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## Reflections About The United States Supreme Court

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## **Abstract**

The widely publicized book *The Brethren*<sup>1</sup> has not, in any substantive sense, contributed to an understanding of the role of the Supreme Court.

**KEYWORDS:** brethren, court, gossip

## Reflections About The United States Supreme Court

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The widely publicized book *The Brethren*<sup>1</sup> has not, in any substantive sense, contributed to an understanding of the role of the Supreme Court. *The Brethren*, after all, is essentially a gossip book about the Justices. Of course, we all like gossip and engage in it. But gossip does not answer basic questions about the Supreme Court.

Indeed it may be that *The Brethren's* single contribution to an understanding of the Supreme Court is its emphasis that the Justices are human. If this is the case one may well comment, "So What's New?"

I propose to discuss what is myth and what is reality about the Court's decision making process.

The very first myth which apparently must be laid to rest in every generation is that the Court has usurped the function of passing upon the constitutionality of state and federal laws and action. This myth, always revived during times of storm over the Court, has no solid basis in history. Chief Justice John Marshall did not write on a clean slate in asserting in *Marbury v. Madison*<sup>2</sup> the right and duty of the Court to declare void an act of Congress contravening the Constitution. His action was forecast in the debates in the Constitutional Convention and urged by proponents as one of the solid reasons for the Constitution's adoption. Professor Charles L. Black, Jr., in his excellent book, *The People and the Court*,<sup>3</sup> has summarized the historical evidence. It supports his conclusion that "It seems very clear that the preponderance of the evidence lies on the side of judicial review."<sup>4</sup> And the very first Congress, composed of men whose memories of the making of the Con-

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1. B. WOODWARD & S. ARMSTRONG, *THE BRETHERN* (1979).
2. 5 U.S. (1 Cranch) 137 (1803).
3. C.L. BLACK, *THE PEOPLE AND THE COURT* (1960).
4. *Id.* at 23.

stitution were fresh, enacted the Judiciary Act of 1789,<sup>5</sup> which, from that date to this, has expressly authorized the Court to review the constitutionality of state legislation. This enactment was shortly followed by a succession of laws providing for the Court's ultimate review of judgments of the lower federal courts.<sup>6</sup>

Thus the reality rather than the myth about the Court is that it exercises judicial review as a consequence of intent as well as tradition. Judicial review is not a usurped power, but a part of the grand design to ensure the supremacy of the Constitution as law, supreme law to which all branches of government — executive, legislative and judicial, state and federal — are subject. This is what the Constitution clearly imports.

The next great myth is that, even though judicial review was intended and is sanctioned, it is nevertheless undemocratic and that therefore it is to be regarded with alert suspicion and its exercise to be dimly viewed. The argument has an obvious, albeit superficial, appeal. The Justices are appointed for life<sup>7</sup> and not elected by the people for limited terms, as the President and Congress are. The latter, so the argument goes, being representative of the popular will, should have their way; otherwise, democracy will be forsaken; a guardianship, however benevolent, negates popular government.

This reasoning, however, overlooks the first facts about our Constitution: that its source is the people. It is the people who mandated that the individual be protected and safeguarded in his constitutional rights even against the popular will of the moment, as voiced by the legislature, the executive, or even public opinion polls. In large part, our courts were entrusted with the responsibility of judicial review to protect individuals and minorities in their fundamental rights against abridgment by both government and majorities.

It is not a denial, therefore, but rather a supreme manifestation of democracy that the fundamental rights of the least among us are protected from government or transient majorities by the Constitution and safeguarded by an independent judiciary. History teaches that democ-

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5. Judiciary Act of 1789, Ch. 20, 1 Stat. 73 (1789).

6. Circuit Court Act of 1801, Ch. 4, 2 Stat. 89 (1801) (repealed 1802); Act of March 3, 1803, Ch. 40, 2 Stat. 244 (1803).

7. U.S. CONST. art. II, § 2, cl. 2 read in conjunction with U.S. CONST. art. III, § 1.

racy and an independent judiciary are one and inseparable. A country where judges are faithful to the popular will, to the executive, or to the legislature, rather than to the rule of law, will not be a democratic country worthy of the name.

Another myth disseminated about the Court is that the Court reaches out and determines troublesome cases that would be best avoided. It enters, so it has been said at times, into thickets of controversy. The reality is that the cases which the Court decides are pressed upon it. It does not seek out cases or invite their filing. Under our Constitution it issues no advisory opinions<sup>8</sup> — it decides only actual cases and controversies.<sup>9</sup> These must be genuine and current; otherwise, jurisdiction will be summarily declined.

But what of cases seeking protection of political rights — should not the Court have shunned them? The answer to this is that most of the cases before the Court deal with public issues of the first moment in our society — issues like reapportionment — commonly called political. As de Tocqueville said, “scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”<sup>10</sup>

My former colleague Justice Brennan accurately observed in *Baker v. Carr* — the germinal decision of the reapportionment cases — that “the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection is little more than a play upon words.”<sup>11</sup> If a claim is justiciable, there is no escaping the responsibility of decision just because the constitutional right asserted is a political one.

Whatever the justification in another age or time for seeking out ways of avoiding decisions on the merits of a case, the temper of the modern world demands that judges, like men in all walks of public and private life, avoid escapism, and squarely and frankly confront even the most controversial and troublesome justiciable problems.

And surely it should be agreed by all supporters and critics of the Court alike that the least possible justification for the Court to avoid

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8. See, e.g., *Flast v. Cohen*, 392 U.S. 83 (1968).

9. U.S. CONST. art. III, § 2, cl. 1.

10. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290 (P. Bradley ed. 1954).

11. 369 U.S. 186, 209 (1962).

adjudicating a claim of constitutional right is that the Court may injure *itself* if it decides the case. Is this not another way of saying that the Court should avoid unpopular decisions? I have always conceived it to be the first duty of any judge worthy of the name and office to abjure popularity in decision making. Lord Mansfield long ago stated the creed of any worthy judge:

I will not do that which my conscience tells me is wrong upon this occasion to gain the huzzas of thousands, or the daily praise of the papers which come from the press. I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. . . . Once for all, let it be understood, "that no endeavors of this kind will influence any man who at present sits here."<sup>12</sup>

The Court should — the Court must — decide the cases and controversies properly coming before it, however difficult and controversial they may be, by doing what the justices are appointed and sworn to do. They must faithfully and impartially discharge and perform all the duties of their office and "administer justice . . . according to the best of [their] . . . abilities and understanding, agreeably to the Constitution and laws of the United States."<sup>13</sup> Judicial timidity is far more likely to be the undoing of the Court as an institution than the faithful exercise of judicial responsibility.

There is a myth that the Court coddles criminals. In fact, what the Court is doing can be justified on strict constitutional and stare decisis grounds.

But the Court's criminal law decisions are fundamental because they reinforce an old principle that where there is a right, that right will not remain unenforceable because of the defendant's poverty, ignorance or lack of remedy. These decisions lie close to the essence of our great constitutional liberties. The controversial criminal law decisions are designed to give practical effect to the protections afforded by the Bill of Rights,<sup>14</sup> and to deal with the realities of the varying situations confronting the Court in the area of criminal justice.

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12. *Rex v. Wilkes*, 4 Burr. 2527, 2562, 98 Eng. Rep. 327, 347 (1770).

13. 28 U.S.C. § 453 (1970).

14. U.S. CONST. amends. I-X.

If I am right that the Court's criminal law decisions have increased the effectiveness of our cherished constitutional protections without significantly affecting the crime rate, then one must recognize their significance in a democratic society.

As Winston Churchill, then Britain's Home Secretary, said in the House of Commons on July 20, 1910:

The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal, against the State — a constant heart-searching by all charged with the duty of punishment — a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment: tireless efforts towards the discovery of curative and regenerative processes: unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols, which, in the treatment of crime and criminal, mark and measure the stored up strength of a nation and are sign and proof of the living virtue within it.<sup>15</sup>

There is a myth that the Court is against states' rights, oblivious of the great interests of federalism — interests which reflect not only our history and traditions but which require constant and vigilant attention if we are to avoid over-centralism of our national government and if we are to preserve viable local government.

There was considerable substance to this myth during three decades early in this century when the Court, in the name of due process, invalidated social and economic legislation of the states as well as the nation. But, as current decisions demonstrate, the Court does not strike down state or federal legislation because it deems laws of this type unwise or unsound. The nation and the states are free to experiment, and never have their interests in federalism been better safeguarded than they are now by the Court.

But it is asserted that the Court intervenes far more frequently than in the past to protect individuals in their constitutional rights against state action. Particularly is this true, so the argument goes, in connection with criminal prosecutions. The Court, critics charge, is fol-

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15. 19 PARL. DEB., H.C. (5th ser.) 1354 (1910).

lowing a double standard: it denies the application of the due process clause to economic cases; it applies the clause energetically to cases involving impairment of personal liberties.

There is a simple answer to this charge. There is no evidence that the framers intended the fifth and fourteenth amendments to deny to the nation and the states their right of economic experimentation.<sup>16</sup> There is every evidence that they intended the Bill of Rights and the fourteenth amendment to safeguard the fundamental personal rights and liberties of all persons against governmental impairment or denial.<sup>17</sup>

There is a myth, very popular these days, that the Court is divided into "liberal" and "conservative" wings, or, as some would put it, into "activists" and those who practice "judicial restraint." Labels of this kind are convenient but not accurate. Members of the Court, applying general constitutional provisions, understandably differ on occasion as to their meaning and application. This is inevitable in the interpretation of a document that is both brief and general by a human institution composed of strong-minded and independent members charged with a grave and difficult responsibility. But the inappropriateness of these labels becomes apparent upon even the most perfunctory analysis.

A judge may believe, as I did during my tenure on the Court, that under the Constitution a court without a jury may not adjudge guilty a defendant charged with serious criminal contempt.<sup>18</sup> Is he a liberal or a conservative, particularly where the defendant is a governor resisting integration of a state university? Is he an activist or a believer in judicial restraint? Or a judge may refuse to hold a litigant or newspaper in contempt for biting comment on the guilt or innocence of a criminal

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16. See *Munn v. Illinois*, 94 U.S. 113 (1877); *Nebbia v. New York*, 291 U.S. 502 (1934); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Olsen v. Nebraska*, 313 U.S. 236 (1941); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

17. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

18. *United States v. Barnett*, 376 U.S. 681, 728 (1964) (Goldberg, J., dissenting).

defendant.<sup>19</sup> Is he an activist or a follower of judicial restraint? Is he a liberal or a conservative? May not the denial of a claim of constitutional right be more activist in its effects upon our constitutional structure than the allowance of the claim?

Examples could be multiplied, but inevitably the classification of the justices as liberal or conservative, or activist or believer in judicial restraint, will depend upon the outlook of, or the criteria employed by, the classifier.

I could continue this recital of myths about the Court, but I shall conclude with one that emanates from those who seek to support rather than condemn the Court. It is the myth that the Supreme Court is infallible. A simple and correct answer to this myth is the oft-quoted bon mot of Justice Jackson: "We are not final because we are infallible; we are infallible because we are final."<sup>20</sup>

The reality is that, as a human institution, the Court is bound to err. It is a tribute to its awareness of human frailty, and the extent to which the Court seeks to avoid mistakes, that so few really serious ones have been made in the Court's history. And, of course, it is only proper to note that reserved to the people is the right to change the course of the Court's opinions — right or wrong — through the process of constitutional amendment<sup>21</sup>

There are more sophisticated mythologists who would seek to preserve the illusion of infallibility by banning dissenting opinions. The Court, by their lights, would then speak with a single authoritative voice not to be gainsaid. Some courts in other lands function in this fashion, burying their differences in a single opinion and judgment. But I, for one, would not have it this way, for I profoundly believe that in the long run the Court benefits, and certainly the people do, by the free expression of dissenting views. They educate and sometimes eventually prevail, and they always demonstrate that our judicial air, like all of the air of American life, is — and, God willing, will remain — free.

So long as the Supreme Court sits, myths about it will exist. Myths are not necessarily all or entirely bad as the literature of mythology proves. But because we must live in this world and not in a

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19. *United States v. Barnett*, 376 U.S. 681 (1964).

20. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

21. U.S. CONST. art. V.

**make-believe world, myths about the Court or any other human institution must yield to reality. Otherwise our society will be the victim of our fantasies rather than the servant of our purposes.**