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Essay

THE ROLE AND PERFORMANCE OF THE UNITED STATES SUPREME COURT IN PROTECTING CIVIL LIBERTIES*

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I. INTRODUCTION

The American political system is built upon two fundamental ideas. The first is the idea of majority rule through electoral democracy, a principle firmly established in our culture. The second, that even in a democracy the majority must be limited in order to assure individual liberty, is less established, less understood, and much more fragile. It is not exclusively a liberal idea. Conservatives do or should embrace it as well. Thus, the political theorist Friedrich Hayek said in 1944:

> It cannot be said of democracy, as Lord Acton truly said of liberty, that it 'is not a means to a higher political end.' . . . Democracy is essentially a means . . . for safeguarding internal peace and individual freedom.[1]

Law is also a device for achieving the end of freedom. John Locke, whose ideas permeate our Constitution, was well aware that a free society is the

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1. F. HAYEK, THE ROAD TO SERFDOM 70 (1944).

highest purpose of organized government. In his *Two Treatises of Government*, he stated, "the end of law is not to abolish or restrain but to preserve and enlarge freedom."[2]

How is this "end of law" to be achieved? What are the ingredients of our constitutional system? The first ingredient is the bedrock concept: Personal liberty requires strict limits on government power. This concept is woven into the history of the Constitution and Bill of Rights[3] because the Framers knew first-hand that a government not subject to enforceable limits would inevitably encroach on individual rights.[4]

The mere enumeration of certain liberties in the Constitution did not provide the means to defend them. The Constitution never mentions a remedy for people whose rights are violated nor are courts explicitly empowered to declare statutes or executive action unconstitutional. Not until 1803 did the Supreme Court rule, in *Marbury v. Madison*, that the Constitution granted the court the power to nullify laws exceeding congressional authority.[5]

But what exactly is the role of the Supreme Court and the lower federal courts? More particularly, how does one determine what this role is? The most straightforward way to proceed would be to inquire about the intention of those who produced the Constitution and Bill of Rights. However, there is a right way and a wrong way to ascertain that intention.

II. THE ORIGINAL UNDERSTANDING

Former Attorney General Edwin Meese frequently complained about and sought to reverse the direction of the Supreme Court.[6] He told the American Bar Association that "we," that is, the Reagan Administration, "will endeavor to resurrect the original meaning of constitutional provisions and statutes as the *only* reliable guide for judgment."[7] This statement was widely reported and stimulated a barrage of responses, including unprecedented interventions by Supreme Court Justices William J. Brennan and John Paul Stevens.[8]

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2. J. LOCKE, TWO TREATISES OF GOVERNMENT 143 (1690 & photo. reprint 1975).

3. *See* B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971).

4. The Declaration of Independence is premised on this awareness. *See* THE FEDERALIST Nos. 10 (J. Madison), 16 (A. Hamilton), 51 (J. Madison); B. SCHWARTZ, *supra* note 3 (history of fears for personal liberty and the responses of colonial and state governments).

5. 5 U.S. (1 Cranch) 137 (1803).

6. In addition to the speech discussed in the text, *see infra* note 7, the former Attorney General has, for example, "publicly assailed affirmative action preferences in the workplace for women and minority groups as illegal and immoral." N.Y. Times, Mar. 28, 1987, at A1. He has also attacked criminal justice decisions of the Supreme Court, notably Miranda v. Arizona, 384 U.S. 436 (1966), as "wrong," *see* U.S. NEWS & WORLD REP., Oct. 14, 1985, at 67. This position troubled police chiefs who defended the decision. *See* Boston Globe, Feb. 5, 1987, at A25.

Moreover, he delivered a speech at Tulane University on Oct. 21, 1986, in which he denied that a Supreme Court decision interpreting the Constitution establishes a "supreme Law of the Land that is binding on all persons and parts of the Government, henceforth and forevermore." N.Y. Times, Oct. 23, 1986, at A1.

7. E. Meese, Speech Before the American Bar Association (July 9, 1985), *reprinted in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 10 (The Federalist Society 1986) (emphasis added).

8. W. Brennan, Speech at Georgetown University (Oct. 12, 1985), *reprinted in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 11 (The Federalist Society 1986); J. Ste-

In his speech, the Attorney General offered original understanding as the litmus test for Supreme Court decisions. This approach was doomed for two distinct reasons. The first reason is based on the aphorism that "no answer is what the wrong question begets," and it is decidedly the wrong question to ask what constitutes the "only" reliable guide for judicial action. The second reason is Mr. Meese's failure to analyze "original intention" with discernment.

Mr. Meese asked the wrong question because it is not possible to speak coherently of a single source of judicial action; judges cannot avoid using three other interpretive tools employed throughout our constitutional history. As this Essay will show, whether activist or passivist, liberal or conservative, strict or lenient, Supreme Court Justices regularly and inevitably resort to (1) arguments from the structure or purposes of the Constitution, (2) arguments based on judicial precedent, and (3) arguments based on moral, political, and social values. This should not be surprising. How else could they decide the hard questions presented by the "great generalities of the Constitution"[9] such as "due process of law,"[10] "equal protection of the laws,"[11] and "cruel and unusual punishment?"[12]

From the early days, Chief Justice John Marshall relied on structural arguments that reflected constitutional purpose.[13] For example, in *McCulloch v. Maryland*[14] where the Court invalidated a state tax on a federal instrumentality, he stated that "the only security" against abuse of state power to tax "is found in the structure of the government itself."[15]

A more recent example of a structural or purposive argument is found in the decisions addressing whether and, if so, to what degree the first amendment protects commercial speech. To rule sensibly, the Court must consider the purpose of the first amendment. Was it exclusively to protect speech that related to self-government or should other purposes, such as the economic interests of recipients of the speech or the self-expressive needs of the speaker, also be relevant?[16]

Mr. Meese also ignored the importance of judicial precedent as a proper source of constitutional law. Judges habitually look to earlier rulings to be followed, distinguished, or in rare cases overruled. Justice Holmes tersely captured the process in the following passage:

> The provisions of the Constitution are not mathematical formulas. . . .
> They are organic, living institutions. Their significance is to be gath-

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vens, Speech Before the Federal Bar Association (Oct. 23, 1985), *reprinted in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 27 (The Federalist Society 1986).

9. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 17 (1921).

10. U.S. CONST. amends. V, XIV.

11. U.S. CONST. amend. XIV.

12. U.S. CONST. amend. VIII.

13. *See, e.g., Marbury*, 5 U.S. (1 Cranch) 137; McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

14. 17 U.S. (4 Wheat.) 316 (1819).

15. *Id.* at 428.

16. *See* Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976). Professor Tribe's discussion clarifies the inevitably purposive nature of whether commercial speech is protected by the first amendment and, if so, to what degree. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 890-904 (2d ed. 1988).

> ered not simply by taking the words of a dictionary, but by considering their origin *and the line of their growth.*[17]

How can a judge consider what the Constitution means without regard to what his predecessors have done and said? How else can one impart into adjudication a goodly measure of consistency and predictability, two widely accepted criteria of justice?

Perhaps Mr. Meese would answer by saying that he was speaking only about new questions, questions without precedent. But there is hardly such a thing, and if there is it occurs rarely.[18] This is because the rich heritage of constitutional law, accumulated for almost 200 years, is usable not only when succeeding cases are identical, but also in similar cases through judicious and imaginative analogy and through suggestive dicta.[19]

The third type of interpretive tool Mr. Meese ignores is the appeal to moral or social values, a tool employed both by what he might call bad liberals and good conservatives. Among the latter, Justice Frankfurter concluded in *Rochin v. California*[20] that extracting evidence from a defendant's stomach "shocks the conscience" and is thus forbidden by the due process clause.[21] Similarly, Justice Powell, in *Moore v. City of East Cleveland*,[22] invalidated a housing ordinance that restricted the right of extended families to live together because "the institution of the family is deeply rooted in this Nation's history and tradition."[23] Finally, Chief Justice Burger, in one of his last opinions, held that high schools may punish a student for delivering a speech with sexual innuendos because it is the duty of schools to enforce "fundamental values" and may teach "the shared values of a civilized social order."[24]

Mr. Meese not only asked the wrong question in seeking to identify original intention as the "only guide" to judicial decisions. He also ignored the difficulties associated with providing content to the concept. In other words, Mr. Meese gave the wrong answer to the wrong question.

There are scholars who maintain that "[t]he Constitution's framing and ratification . . . is essentially irrelevant to the task of establishing constitutional norms. . . ."[25] One need not embrace this point of view to recognize that in many, if not most, controversies in which constitutional generalities are at issue, it is not possible to ascertain the "original intention." Some issues arising today could not be foreseen by the Framers,[26] others were

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17. Gompers v. United States, 233 U.S. 604, 610 (1914) (emphasis added).

18. *See* H. HART & A. SACKS, THE LEGAL PROCESS, BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 396-97, 469-73 (tent. ed. 1958).

19. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 763-67 (1988).

20. 342 U.S. 165 (1952).

21. *Id.* at 172.

22. 431 U.S. 494 (1977).

23. *Id.* at 503.

24. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 681, 683 (1986).

25. Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885 (1985).

26. For example, does an aerial observation by a police officer in a helicopter hovering 400 feet over a residence, thereby allowing the officer to view the inside of a greenhouse on the property, constitute a "search" under the fourth amendment that requires a warrant? *See* Florida v. Riley, No. 87-764 (U.S. Jan. 23, 1989) (LEXIS 3052) (The Supreme Court, by a 5-4 vote, held "no" to this question.).

never discussed,[27] and still others were the objects of uncertain "intentions."[28] Furthermore, recognizing that the records of the Constitutional Convention debates are incomplete and possibly inaccurate, James Madison deliberately delayed the publication of his notes on the Convention until after his death. He explained that "as a guide to expounding and applying the provisions of the Constitution, the debates . . . of the Convention can have no authoritative character."[29]

In addition to these problems, it is not easy to decipher the eighteenth century mind when it is being brought to bear on twentieth century problems. This is especially so when the intentions of several groups are of concern: the members of the Convention, the First Congress (which proposed the Bill of Rights), and the ratifying conventions of the states that approved the original document and amendments. To this day, "no widely recognized legal convention establishes precisely how the required summing of individual intentions ought to occur."[30]

The upshot of all this is that the Constitution must be interpreted by contemporary judges in the only way they can—as citizens of the late twentieth century. Justice Cardozo expressed this thought almost seventy years ago when he said that the general clauses of the Constitution "have a content and a significance that vary from age to age."[31] Even earlier, the future President Woodrow Wilson captured the idea when he wrote that "the Constitution of the United States is not a mere lawyers' document; it is a vehicle of life, and its spirit is always the spirit of the age."[32]

III. THE SUPREME COURT'S CENTRAL ROLE

If Mr. Meese's resort to original intention is the wrong way to ascertain the proper role of the Supreme Court, what is the right way? The answer lies in determining what function the Framers had in mind for the Court. This process consists of searching text, history, and precedent to determine constitutional purposes and then applying those purposes through the power of judicial review with a goal of harmonizing the day to day actions of federal, state, and local governments with the commands and barriers of the Constitution. This inquiry is very different from using "original intention" as the sole method of deciphering the meaning of a particular clause of the Constitution.

The Preamble states the Constitution's aims: "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common

27. For example, the application of the first amendment to censorship of a student political speaker in a public high school. *See Bethel School Dist.*, 478 U.S. 675.

28. For example, the status of sedition laws under the first amendment. *See* the discussion, including references, in G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 929-30 (1986).

29. Letter from James Madison to Edward Livingston (Apr. 17, 1824), *reprinted in* LETTERS AND OTHER WRITINGS OF JAMES MADISON 53, 54 (1865).

30. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1212 (1987). *See also* Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 471-500 (1981). The literature on "original intent" has become voluminous since Mr. Meese's speech.

31. B. CARDOZO, *supra* note 9, at 17.

32. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 69 (1908).

defense, promote the general welfare, and secure the blessings of liberty" for the Framers and their posterity.[33] Government efficiency, international influence, domestic order, and economic needs are all important, but none exceeds "justice" and "liberty" as the essence of our constitutional commitment to the people of the United States.

This understanding of the Constitution's objectives is confirmed by many reliable indicia of purpose. First, the constitutional structure protects individual liberty through the dispersion of power, adopting Montesquieu's insight that "[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty."[34] With particular reference to judges, Montesquieu added that liberty could not exist "if the judiciary power be not separated from the legislative and executive."[35]

Second, the text of the Constitution protects liberty in many provisions.[36] Moreover, history tells us that, despite these provisions, the Constitution almost surely would not have been ratified without promises from the Federalists that a bill of rights would be added as soon as a government was installed.[37]

The Federalist Papers, which are replete with concern for justice and the interests of minorities, reveal a third indicia of purpose. For example, in *The Federalist No. 10*, Madison spoke of the need for "measures" to be decided "according to the rules of justice and the rights of the minor party," and not by the superior force of "an interested and overbearing majority."[38] Similarly, in *The Federalist No. 51*, he referred to the "preservation of liberty" as the essence of government and to "[j]ustice as the end of government."[39] Later in the same essay he emphasized in several places the importance of safeguarding "the rights of the minority."[40]

Despite references to "the minority" in *The Federalist Papers*, equality was not uppermost in the minds of the Framers. All the delegates to the Convention were men, and women were not mentioned in the debates.[41] Slavery was countenanced in three clauses of the Constitution, although the word itself never appeared.[42] As Justice Thurgood Marshall recently reminded us, "[i]t took a bloody civil war before the thirteenth amendment could be adopted to abolish slavery."[43] Even after the fourteenth amend-

33. U.S. CONST. preamble.

34. BARON DE MONTESQUIEU, SPIRIT OF THE LAWS, vol. 1, bk. XI, at 174 (1873).

35. *Id.*

36. The original Constitution provides that the "privilege" of habeas corpus may not be "suspended" unless in cases of rebellion or invasion. U.S. CONST. art. I, § 9, cl. 2. The ex post facto and bill of attainder clauses require the Congress to act prospectively and by general rule. *Id.* at art. I, § 10, cl. 1. And article III guarantees a jury trial in federal criminal cases, defines treason narrowly, and imposes evidentiary requirements to assure that this most political of crimes will not be lightly charged. *Id.* at art. III, §§ 2, 3.

37. *See* L. TRIBE, *supra* note 16, at 4 n.7.

38. THE FEDERALIST No. 10, at 16 (J. Madison) (R. Fairfield ed. 1981).

39. THE FEDERALIST No. 51, at 158 (J. Madison) (R. Fairfield ed. 1981).

40. *Id.*

41. *See* Law, *The Founders on Families*, 39 U. FLA. L. REV. 583 (1987).

42. *See* U.S. CONST. art. I, § 3, cl. 3; § 9, cl. 1; and § 2, cl. 3.

43. Marshall, *The Bicentennial of the Constitution*, 101 HARV. L. REV. 1, 4 (1987). *But see* Reynolds, *Another View: Our Magnificent Constitution*, 40 VAND. L. REV. 1343 (1987) (replying to

ment guaranteed equal protection of the laws to blacks as well as to whites, it took almost another century before the rights of black Americans to education, housing, and employment, and to have their votes counted, and counted equally, received significant protection.

Whether one admires the handiwork of the Framers without reservation, or regards it as partially flawed, it is clear that a great danger to liberty, perhaps the greatest of all, lies in what James Madison called "the community itself,"[44] that is, the majority. As Judge James Oakes has explained, the Bill of Rights was designed to curb the excesses of the majority and in this sense was "countermajoritarian and undemocratic."[45]

In light of the overarching constitutional goal of advancing justice and liberty—and more recently, equality—the special role of the courts, and particularly the federal courts because of their independence from the electorate, becomes more apparent. In words that cannot be repeated too often, Madison, in urging the First Congress to adopt the Bill of Rights, said:

> If [the rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[46]

Madison's premise, the second basic idea of the American system mentioned at the beginning of this Essay, was that even in a democracy the majority must be subject to limits that assure individual liberty; moreover, the democratic political process requires civil liberties. Such liberties include the right of individuals, including the most despised and obnoxious, to vote, to speak, and to be treated by the law fairly and with equal respect and dignity.

Essential as the courts are, they are not the sole safeguard. The elected branches of the government also play a large role in securing individual liberty. In particular, the nation needs a renaissance of the legislative branch to counteract what Professor Laurence Tribe not long ago called the "almost boundless authority of government over the individual and of the executive over the other branches."[47] If the political branches fail—if the executive is imperial and the legislature supine—courts must intercede pursuant to their responsibility under the Constitution. No matter how wisely they act, there will be cries of "judicial usurpation" and "superlegislature." But if elected and appointed officials, from the President to the cop on the beat, do their jobs and behave according to the law, as the Framers intended, judicial intervention becomes far less necessary to the quest for the "justice" and "liberty" that the Preamble sets as our national goals.

In performing their high function of judicial review, courts are not free

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Justice Marshall). *See generally* Katz, *The Strange Birth and Unlikely History of Constitutional Equality*, 75 J. AM. HIST. 747 (1988).

44. Address by James Madison, House of Representatives (June 8, 1789), *reprinted in* MIND OF THE FOUNDER 224 (M. Meyers ed. 1973) [hereinafter Address].

45. Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. REV. 911, 916 (1979), *reprinted in* THE EVOLVING CONSTITUTION 169 (N. Dorsen ed. 1987).

46. Address, *supra* note 44, at 224.

47. *Quoted in* Lewis, *Hail the State*, N.Y. Times, July 9, 1984, at A19, col. 2.

to roam at large, to "innovate at pleasure" or to "yield to spasmodic sentiment."[48] How can one distinguish "spasmodic sentiment" from rigorous analysis? The process is complex, but one thing is clear—the techniques of constitutional interpretation were not intended to be mere adornments. This is what Judge Learned Hand meant a half century ago when he told his law clerk Archibald Cox that as a judge his responsibility lay not to any person but "to those books about us,"[49] to the "ever-continuing, ever-changing body of law."[50] Our liberties depend upon compliance with law, by each citizen and by the government, including the courts. Law requires the courts to build, in Professor Cox's words, "upon a continuity of principle found in the instrument, its structure and purposes, and in subsequent judicial interpretations, traditional understandings [and] historic practices."[51] The integrity and quality of the judicial opinion is itself critical to the quest for justice.

IV. ENFORCEMENT OF CIVIL LIBERTIES: THE AMERICAN CIVIL LIBERTIES UNION

Having discussed the responsibility of the Supreme Court for protecting civil liberties, I shall briefly comment on the role of the American Civil Liberties Union (ACLU) in our constitutional system before proceeding to a discussion of the Court's performance. A great deal of confusion exists, even in high places, about the organization's role and performance, just as there is about the Supreme Court itself. The context in which the ACLU functions is critical to a better understanding.

As already noted, courts alone, even the Supreme Court, cannot fully assure individual rights. The President and Congress and their agents need no judicial approval before acting; moreover, the courts cannot move on their own initiative to invalidate unconstitutional laws, but must wait until an aggrieved individual or group challenges a particular governmental action before they can intervene. However, few individuals are able to challenge a law single-handedly due to the prohibitive cost involved. Furthermore, government action prejudicing liberty often occurs in legislative and administrative bodies that are inaccessible to most people.

Accordingly, a mechanism must exist by which individuals can join together to defend civil liberties. To be effective, this mechanism must be both politically and financially independent of the government and capable of a sustained effort. In 1920, such a mechanism was established under the name of the American Civil Liberties Union.

In every era of American history, government officials have tried to expand their authority or to achieve their objectives at the expense of personal

48. Cardozo, *The Nature of the Legal Process*, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 107, 164 (M.E. Hall ed. 1947).

49. Cox, *Storm over the Supreme Court*, in THE EVOLVING CONSTITUTION 3, 12 (N. Dorsen ed. 1987).

50. *Id.* at 15.

51. *Id.* at 16.

rights.[52] Further, the ACLU knows from almost seventy years of experience that civil liberties battles never stay won. In the 1980s, the ACLU refought a host of familiar struggles including those to secure the right of women and minorities to equality of opportunity, to protect the right of dissenters to protest without government interference, to assure freedom of religion and separation of church and state, to expand the right of the people to know what the government is doing in their name, to defend their homes and property against invasions of privacy, and to discourage and redress police misconduct.[53] Today, as in previous decades, the ACLU remains faithful to the principle that *any* infraction of liberties weakens all liberties, a principle that is self-evident to some people but elusive to many others. History demonstrates that the same government power that can violate one person's rights can violate anybody's rights.[54] No matter who is the first target of illegitimate power, the exercise of that power threatens everyone.

This idea is difficult for many Americans to grasp. Again and again, the ACLU is asked of a particular case, "why are you defending *that* person?"—often someone unpleasant or worse. The answer is always the same: the ACLU is not defending the person, it is defending the civil liberty that was violated. It is enforcing the libertarian principle against arbitary government power.[55]

V. THE SUPREME COURT'S PERFORMANCE

Let us now turn to an evaluation of the Supreme Court in light of its central purpose of defending the rights of Americans. Until the modern era, which may be defined as beginning in 1953, when Earl Warren became Chief Justice, the Supreme Court's performance was widely regarded as deficient. For instance, Professor Commager wrote in 1943 that "[a]lmost every instance of judicial nullification of congressional acts appears, now, to have been a mistaken one."[56] Similarly, Professor John Frank said in 1954, when he was teaching at Yale, that "the actual overt exercise of judicial review of acts of Congress has . . . probably harmed [civil] liberties more than it has helped them."[57] And Professor Leonard Levy maintained, as recently as 1967, that "[o]ver the course of our history . . . judicial review has worked

52. *See generally* N. DORSEN, P. BENDER, B. NEUBORNE & S.A. LAW, EMERSON, HABER AND DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (4th ed. 1976 & 1979).

53. *See, e.g.*, ACLU Report of Activities (1984-85); *id.* (1986-87).

54. One telling example is the prosecution, during World War II, of the Trotskyite leaders of a small union in Minneapolis for violation of the newly passed Smith Act, which made it a crime to advocate or conspire to advocate the overthrow of the government by force and violence. Treason, Sedition, and Subversive Activities Act, ch. 115, 54 Stat. 670 (1940) (codified as amended at 18 U.S.C. § 2385 (1982)). The Communist Party leaders in the United States did not object because they were enemies of the Trotskyites. Soon thereafter, during the McCarthy era, the Communist leaders themselves were indicted and convicted under the Smith Act, and their convictions were affirmed. Dennis v. United States, 341 U.S. 494 (1951). *See* N. DORSEN & L. FRIEDMAN, DISORDER IN THE COURT 83, 396 n.21 (1973).

55. For a more extensive discussion, see Dorsen, *The American Civil Liberties Union: An Institutional Analysis*, THE TULANE LAWYER 6 (Spring 1984).

56. Commager, *Judicial Review and Democracy*, in JUDICIAL REVIEW AND THE SUPREME COURT 64, 73 (L. Levy ed. 1967).

57. Frank, *Review and Basic Liberties*, in SUPREME COURT AND SUPREME LAW 129 (E. Cahn ed. 1954).

out badly."[58]

Much evidence supports these conclusions. The *Dred Scott* decision,[59] extending slavery and helping to precipitate the Civil War, was only one of many nineteenth century cases that kept blacks in bondage. After the war, the *Civil Rights Cases*[60] and *Plessy v. Ferguson*,[61] to mention only two others, continued this sad tradition. Moreover, many other groups, including women,[62] aliens,[63] and the Japanese-Americans[64] who were removed from their homes and placed in concentration camps during World War II, were denied the equal protection promised by the fourteenth amendment.

Free expression fared little better under Supreme Court decisions. The Court regularly upheld convictions and extensive prison sentences for World War I protests that would seem mild today.[65] And in succeeding decades it affirmed convictions of Communists and other radicals without evidence of unlawful action on their part.[66]

During this period, because of their inapplicability to the states, the procedural protections of the Bill of Rights were almost impotent as a means of assuring fair criminal trials.[67] Rights associated with sexual and family privacy lay in the womb of time.[68] Finally, one should consider the effects of three egregious economic decisions—the ruling that invalidated the federal income tax,[69] *Lochner v. New York*[70] and *Hammer v. Dagenhart*.[71] Until these cases were overruled decades later, in one instance by constitutional amendment,[72] their philosophy enshrined economic laissez faire in the Constitution, often to the detriment of social and economic justice.[73]

Positive decisions should also be recorded, starting with *Marbury v. Madison*[74] itself, which laid the basis for enforcement of constitutional rights through the courts. *Frank v. Mangum*[75] and *Powell v. Alabama*[76] served as starting points for fuller development of due process principles. The gradu-

58. Levy, *Judicial Review, History and Democracy: An Introduction*, in JUDICIAL REVIEW AND THE SUPREME COURT: SELECTED ESSAYS, 36 (L. Levy ed. 1967).

59. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

60. 109 U.S. 3 (1883).

61. 163 U.S. 537 (1896).

62. *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

63. *See, e.g.*, Heim v. McCall, 239 U.S. 175 (1915); Clarke v. Deckebach, 274 U.S. 392 (1927). *But see* Truax v. Raich, 239 U.S. 33 (1915); Oyama v. California, 332 U.S. 633 (1948).

64. *See* Korematsu v. United States, 323 U.S. 214 (1944).

65. *See, e.g.*, Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919).

66. *See* Dennis v. United States, 341 U.S. 494 (1951); Gitlow v. New York, 268 U.S. 652 (1925).

67. *See* Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937).

68. Griswold v. Connecticut, 381 U.S. 479 (1965), opened the Constitution to these issues, although Skinner v. Oklahoma, 316 U.S. 535 (1942), might be viewed as a harbinger.

69. Pollock v. Farmer's Loan and Trust Co., 157 U.S. 429 (1895).

70. 198 U.S. 45 (1905).

71. 247 U.S. 251 (1918).

72. U.S. CONST. amend. XIX.

73. *See, e.g.*, P. MURPHY, THE CONSTITUTION IN CRISIS TIMES (1972); Amidon, *Due Process*, 25 SURVEY-GRAPHIC 412 (1936). *See also* the materials cited in G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 739-41 (1986).

74. 5 U.S. (1 Cranch) 137 (1803).

75. 237 U.S. 309 (1915).

76. 287 U.S. 45 (1932).

ate school segregation cases,[77] and the rulings in *Morgan v. Virginia*[78] and *Shelley v. Kraemer*,[79] inched civil rights law forward.

The first amendment also received its initial application in a series of cases, notably the decision prohibiting states from requiring school children to salute the flag when such enforced fealty violated individual conscience.[80] This ruling deserves special mention because Justice Jackson dramatically highlighted the counter-majoritarian premises of the Bill of Rights. He pointed out that its

> very purpose was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[81]

Turning to the years after 1953, the picture is brighter. It is easy to identify many historic victories for civil liberties, including *Brown v. Board of Education*[82] and other rulings expanding racial justice, the *Reapportionment Cases*,[83] the criminal justice cases,[84] and the cases that protected the interests of young people,[85] expanded free speech,[86] and recognized sexual privacy.[87] During this era, several important rulings rejected civil liberties claims, although they tend to be less well known since the denial of a right is usually less newsworthy than the granting of one. For example, the Supreme Court held that the Constitution does not guarantee equal financial support to public school districts.[88] It also rejected the first amendment claim of anti-war activists who burned their draft cards in violation of a federal statute prohibiting that form of protest.[89] In addition, the Court upheld the constitutionality of capital punishment[90] and of sodomy laws as applied to adults who engaged in consensual homosexual activity in their own homes.[91]

While the totting up of major rulings for or against individual rights is suggestive, it does not adequately depict the constitutional landscape or the performance of the Supreme Court since 1953. To try to achieve a more

77. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).
78. 328 U.S. 373 (1946).
79. 334 U.S. 1 (1948).
80. West Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
81. *Id.* at 638.
82. 347 U.S. 483 (1954).
83. Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).
84. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).
85. Tinker v. Des Moines Ind. School Dist., 393 U.S. 503 (1969); *In re* Gault, 387 U.S. 1 (1967).
86. *See, e.g.*, New York Times Co. v. United States, 403 U.S. 713 (1971).
87. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); *Griswold*, 381 U.S. 479.
88. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).
89. United States v. O'Brien, 391 U.S. 367 (1968).
90. Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).
91. Bowers v. Hardwick, 478 U.S. 186 (1986).

accurate perception, it seems initially appealing to draw a sharp distinction between the Court years under Earl Warren and those under Warren Burger, but the line is not quite as clear as some might assume. It is true that "the Warren [Court's] fidelity to judicial enforcement of a strong Bill of Rights, and particularly to egalitarianism . . . gave a clear signal to judges, officials and the public."[92] However, there are also striking lapses in this record, including the cases that sustained the draft card burning conviction[93] and the convictions of communist leaders,[94] that validated the House Un-American Activities Committee[95] and barred peaceful protests in certain public forums.[96] Moreover, the Warren Court did not accept for argument any of the cases challenging, under separation of powers principles, the legality of the undeclared war in Vietnam.[97]

The Supreme Court under Warren Burger is even harder to characterize. There were more defeats for the Framers' goals of justice and liberty, and many more defeats for equality. In the field of criminal justice, a series of rulings limited *Mapp v. Ohio*'s exclusionary rule[98] and *Miranda v. Arizona*'s warning requirement.[99] Furthermore, welfare rights were narrowed,[100] school desegregation foundered on remedial shoals,[101] and justiciability requirements were used to restrict federal court jurisdiction over civil liberties cases.[102]

On the other hand, there were important victories for civil liberties. For example, the Burger Court went beyond the Warren Court in recognizing the rights of women and aliens under the equal protection clause.[103] It also issued the *Pentagon Papers Case*[104] and many other favorable first amendment rulings. In an important remedial decision, it held that federal officials violating the Constitution are personally liable for resulting damages.[105]

What should be made of all this? Commentators have referred to the Burger Court's "themelessness"[106] and "rootless activism"[107] and I have

92. Dorsen, *The United States Supreme Court: Trends and Prospects*, 21 HARV. C.R.-C.L. L. REV. 1, 14 (1986).

93. *O'Brien*, 391 U.S. 367.

94. *Dennis*, 431 U.S. 494.

95. Barenblatt v. United States, 360 U.S. 109 (1959).

96. *E.g.*, Adderly v. Florida, 385 U.S. 39 (1966).

97. *E.g.*, Massachusetts v. Laird, 400 U.S. 886 (1970) (denying leave to file complaint); Mora v. McNamara, 389 U.S. 934 (1967) (denying cert.).

98. *See, e.g.*, Harris v. New York, 401 U.S. 222 (1971) (statement elicited in violation of *Miranda* requirements admissible for impeachment purposes).

99. Oregon v. Elstad, 470 U.S. 298 (1985) (fifth amendment does not require suppression of otherwise proper confession solely because police had obtained earlier voluntary but improper admission).

100. *E.g.*, Dandridge v. Williams, 397 U.S. 471 (1970) (upholding state ceiling on AFDC payments).

101. Milliken v. Bradley, 418 U.S. 717 (1974).

102. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Laird v. Tatum, 408 U.S. 1 (1972).

103. Reed v. Reed, 404 U.S. 71 (1971) (women); Graham v. Richardson, 403 U.S. 365 (1971) (aliens).

104. *See, e.g.*, *New York Times Co.*, 403 U.S. 713.

105. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

106. Nichol, Book Review, 98 HARV. L. REV. 315, 322 (1984).

characterized the Court as "ambivalent."[108] A probe into the decisions does not alter the verdict. For the most part one finds a see-sawing in which an expression of bold principle in one case is soon qualified, leaving the state of the law unsettled. Three examples must suffice.

The first is abortion. After the Court decided *Roe v. Wade*[109] in 1973, it invalidated a variety of state laws that imposed unreasonable restrictions on the right of women to choose whether or not to bear a child.[110] Then, in 1977, it upheld a state regulation denying Medicaid benefits for abortions that were not "medically necessary"[111] despite the fact that the regulation obviously induced some poor women to bear a child rather than to abort.[112] Three years later, the Court upheld the Hyde Amendment by a five-to-four vote.[113] The Amendment prohibited the use of federal Medicaid funds to perform an abortion, even where the abortion *was* medically necessary, unless performed to save the life of the mother or the pregnancy arose from incest or rape.[114] Since then, the Court has twice reaffirmed the constitutional principle of choice,[115] but the abortion funding decisions surely qualified that principle in the case of very poor women, a large and particularly vulnerable sector of the community.

The second example is from the church-state area, in particular the establishment clause. In *Lemon v. Kurtzman*,[116] Chief Justice Burger followed the theme of the school prayer decisions of the 1960s[117] by invalidating state statutes that impermissibly provided for government aid to church schools. In subsequent cases, the Court began to draw shadowy lines between aid that was consistent with the first amendment and aid that was prohibited.[118] In 1983, the Court relied on what it called "unique history" to permit Nebraska's legislative sessions to be opened with prayers led by a state-employed chaplain.[119] The next year it dramatically departed from precedent and upheld a city-sponsored Christmas display that included a crèche of the Holy Family.[120] The Court concluded that "in context" this merely de-

107. Blasi, *The Rootless Activism of the Burger Court*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198 (V. Blasi ed. 1984).

108. Dorsen, *supra* note 92, at 14.

109. 410 U.S. 113 (1973).

110. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979); Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1975). *But see* H.L. v. Matheson, 450 U.S. 398 (1981).

111. Maher v. Roe, 432 U.S. 464 (1977).

112. *Id.* at 474.

113. The version of the Hyde Amendment that was before the Court was Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979).

114. Harris v. McRae, 448 U.S. 297 (1980).

115. Thornburgh v. American College of Obstretricians and Gynocologists, 476 U.S. 747 (1986); City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983). The Reagan Administration, reflecting a segment of public opinion, sought to persuade the Court to overrule *Roe v. Wade*—most recently in a brief filed on November 10, 1988, in Webster v. Reproductive Health Servs., 851 F.2d 1071 (8th Cir. 1987), *cert. granted*, 57 U.S.L.W. 3451 (U.S. Jan. 9, 1989) (No. 88-605). *See Reagan Administration Renews Assault on 1973 Abortion Ruling*, N.Y. Times, Nov. 11, 1988, at A20, col. 1.

116. 403 U.S. 602 (1971).

117. Engel v. Vitale, 370 U.S. 421 (1962); Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

118. *See* the cases discussed in L. TRIBE, *supra* note 16, at 1216-23.

119. Marsh v. Chambers, 463 U.S. 783 (1983).

120. Lynch v. Donnelly, 465 U.S. 668 (1984).

picted an historical event.[121] To reach this result, however, it strained to distinguish a 1980 ruling that the Ten Commandments could not constitutionally be posted in a public school.[122] The decision placed the law under the establishment clause in considerable uncertainty. This uncertainty has not been dispelled despite the welcome decisions striking down state-encouraged silent prayer[123] and the required teaching in public schools of so-called "creation science" if Darwinian evolution was taught.[124]

A final example is taken from Professor Albert Alschuler, who has pointed out that although President Nixon tried to appoint justices "to redress Warren Court decisions that had favored the 'criminal forces' over the 'peace forces,' the anticipated Burger Court counterrevolution never materialized."[125] Instead of forthrightly overruling the 1960s decisions that expanded protections in criminal cases[126] the Burger Court waged what Alschuler calls "a prolonged and bloody campaign of guerilla warfare," leaving "the facade of Warren Court decisions standing while it attacked these decisions from the sides and underneath."[127] For example, rather than overrule the broad interpretation of the sixth amendment that permitted representation by counsel at police lineups and other identification procedures,[128] the Court sharply limited the doctrine by confining it to lineups conducted after the filing of formal charges.[129] Similarly, the Court did not overrule *Mapp v. Ohio*'s[130] exclusionary rule but instead restricted its reach in important settings.[131]

Depending on one's perspective, the compromises and ambivalences of the Burger Court can be viewed as either or both the inevitable consequence of a tribunal divided in judicial philosophy or as an unfortunate departure from the clarity of principle that lower court judges, officials, lawyers, and the public seeking guidance have a right to expect, irrespective of the content of the principle. From a civil liberties perspective, the harshest criticism can be couched in terms of lost opportunity. As Dean Paul Bender powerfully argued, a Court more single-mindedly dedicated to the protection of individual liberty could have taken major strides in almost every area of constitutional law rather than the more uncertain steps that in fact ensued.[132]

VI. CONCLUSION

This Essay has briefly sketched what the Framers intended for the Supreme Court and how it has performed over the years. To some, no

121. *Id.* at 679.
122. Stone v. Graham, 449 U.S. 39 (1980).
123. Wallace v. Jaffree, 472 U.S. 38 (1985).
124. Edwards v. Aguillard, 107 S. Ct. 2573 (1987).
125. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1441 (1987).
126. Wainwright v. Sykes, 433 U.S. 72 (1977), *overruling in part* Fay v. Noia, 372 U.S. 391 (1963).
127. Alschuler, *supra* note 125, at 1442.
128. United States v. Wade, 388 U.S. 218 (1967).
129. Kirby v. Illinois, 406 U.S. 682 (1972).
130. 367 U.S. 643 (1961).
131. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984); Stone v. Powell, 428 U.S. 465 (1976).
132. Bender, Book Review, 82 MICH. L. REV. 635, 646-49 (1984).

doubt, the degree of protection of justice and liberty has been wholly inadequate compared to the ideal Supreme Court or even to the Warren Court in its heyday. There will be others who conclude that the Court has done quite well considering the pressures of national security, religious sensibilities, government efficiency, the soaring crime rate, and other interests regularly arrayed against civil liberties claims. Still others will view any suggestion that judges be appraised by how well they further liberty and justice as itself misguided; despite the evidence justifying this approach they might instead regard the proper touchstone to be the degree to which courts foster economic growth, enhance international influence or stimulate the moral excellence of the citizenry. Finally, others will be less concerned with substantive outcomes. They would rather concentrate on whether the Supreme Court has functioned with a high degree of judicial competence and professionalism.

If pressed for a verdict, I would say that the performance of the Supreme Court until 1953 was on the whole rather poor. Since 1953, the performance has been good and sometimes better than that, although the Court, especially in recent years, has often been less attentive to the protection of individual liberty than seems required by its unique role under our constitutional system.