

CURIA REGIS: SOME COMMENTS ON THE DIVINE RIGHT OF KINGS AND COURTS "TO SAY WHAT THE LAW IS"*

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Sir William Holdsworth, in his monumental History of English Law, tells us:

As Mr. Turner remarks, "from the time of the Conqueror there must always have been a *curia coram rege* of some sort. We cannot imagine a time when cases were not reserved to the king and judicial advisers at his side, cases which concerned the king himself and his peace; nor can we imagine a time when other cases were not referred to him for special consideration. Such reservation and reference were part of the burden of kingship. . . . In ordinary matters, whether civil or criminal, ample justice could have been done by the local courts. . . ."¹

Sir William, later in his book, added:

It is quite clear that the jurisdiction exercised by the undifferentiated Curia Regis of the twelfth century was marked by two of the chief characteristics which we associate with a court of equity. Proceedings were begun by petition to the king for his interference; and that interference might result in remedies which, by reason both of their character and their method of enforcement, were, as Professor Adams has said, "outside of, and in violation of, the ordinary system of justice which prevailed throughout the Anglo-Norman state. . . ."²

This description of the procedure and powers of the Curia Regis

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1. I W. HOLDSWORTH, HISTORY OF ENGLISH LAW 30 (7th ed. 1955).

2. *Id.* at 446-47.

surely has a familiar ring to those concerned with the Supreme Court of the United States and how it goes about its business. But it should be remembered that the Curia's business, as Holdsworth said, was "undifferentiated." The royal court was not confined to judicial business. There was, then, no distinction between the exercise of executive, legislative, and judicial powers. Not even the imagination of a Montesquieu could extract a principle of separation of powers from the operation of the king's government of that time.³ "*L'Etat, c'est moi*," as Louis XIV put it.⁴ The Curia Regis was the Crown, and it operated without the constraints of constitution, of legislation, or of judicial precedents. Its judgments were ad hoc and based primarily on notions of what the royal court thought to be best for the interests of the king, including the preservation of the King's Peace.

In theory, our government, unlike that of our English forebears, derives not from the divine right of kings which found in God's will the source of its lawmaking function, but from the mandate of the people, expressed primarily in written constitutions. It was intended to be what John Adams, in the Massachusetts Declaration of Rights, called "a government of laws and not of men."⁵ And, however ready we may be to recognize the weakness of the Adams conception because we know that laws are but the tools of men,⁶ we generally accede to the proposition that we are all to be governed by the same preestablished rules and not by the whim of those charged with executing those rules. In his phrase, Adams epitomized what has come to be known in the Anglo-American world as "the rule of law."⁷ The difference between rule by law and rule by fiat or discretion is largely what distinguishes the democracies of the West from the governments of most of the rest of the world.

The American Constitution purports to provide for the distribution of government power as well as its containment. And, whether originally intended or not, the Supreme Court from the beginning as-

3. See MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1750).

4. According to the OXFORD DICTIONARY OF QUOTATIONS, the remark was made to the Parlement de Paris, 13 April 1655. It cites DULAURE, *HISTOIRE DE PARIS* as its source.

5. H. COMMAGER, *DOCUMENTS OF AMERICAN HISTORY* 110 (8th ed. 1968).

6. The conception of a government by laws dominated the thoughts of those who founded this Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men, who were to be the depositaries of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be 'as free, impartial, and independent as the lot of humanity will admit.' So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige.

United States v. United Mine Workers, 330 U.S. 258, 308 (1947) (Frankfurter, J., concurring).

7. See G. MARSHALL, *CONSTITUTIONAL THEORY* 137-39 (1971).

sumed the role, not of keeper of the King's conscience, but of keeper of the rule of law as embodied in the Constitution. It has been suggested that this function of the Supreme Court—the function of judicial review—derives from necessity rather than plan:⁸ the necessity to confine the other two branches of the government to their respective spheres, the necessity to make the Constitution meaningful and not a mere “piece of paper.” But it should also be remembered, as John Marshall told us in *Marbury*, that “courts, as well as other departments, are bound by that instrument.”⁹

That we must all be grateful to the Court for performing its duty as guardian of the Constitution from the origins of our Nation down to the present, none should gainsay. I venture that no governmental body in history has maintained so unblemished an escutcheon, free of venality, and personal vindictiveness, as the Supreme Court of the United States. This, of course, is not to say that the Court has been free of self-aggrandizement or of partisanship, but its partisanship has been for causes and not for persons. Neither can it be denied, however, that the love of power is no less fearsome than “the love of money.”¹⁰ And, if we must applaud the Court, we need not abstain from critical examination of its behavior. Professional criticism affords the only form of judicial accountability. The Constitution is the “supreme law of the land,” and the Supreme Court is an institution of government, but the Justices, as Lord Bryce told us some years ago, “are only men.”¹¹

Being men and not Platonic Guardians or “aristocrats,”¹² the Justices, who have the special duty of expounding the Constitution, have no special capacities, training, or experience in doing so that is not shared by most, if not all, lawyers, whose craft they purport to express. For in the performance of its functions, the pretense, at least, is that the

8. L. HAND, *THE BILL OF RIGHTS* (1958).

9. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

10. 1 *Timothy* 6:10.

11. 1 J. BRYCE, *THE AMERICAN COMMONWEALTH* 274 (1917 ed.).

12. Chief Justice Bird of the Supreme Court of California has suggested that courts are “the last aristocratic part of a democratic system.” D. BRODER, *CHANGING OF THE GUARD* 248 (1980). In this she follows de Tocqueville: “If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar.” 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 278 (P. Bradley ed. 1945). Tocqueville established his meaning of aristocracy in the context of his statement; Bird did not. It would be interesting to learn which, if any, of the following descriptions would most closely fit her idea of “aristocratic”: 1. “Aristocracy is that form of government in which education and discipline are qualifications for suffrage or office holding.” ARISTOTLE, *RHETORIC*, bk. I, at 2. “There is a natural aristocracy among men. The grounds for this are virtue and talents.” 2 *THE ADAMS-JEFFERSON LETTERS* (Cappon ed. 1959). 3. “An aristocracy is a combination of many powerful men, for the purpose of maintaining and advancing their own particular interests.” J. COOPER, *THE AMERICAN DEMOCRAT* ch. X (1838). 4. “The aristocrat is the democrat ripe and gone to seed.” R. EMERSON, *REPRESENTATIVE MEN* ch. VI (1850).

Court, like the other two branches of government, has but two sources for its judgments: the Constitution and congressional legislation.

Small, indeed, is the number of Justices who are or will be marked by history as great jurists. Most of those who have served could have said, with at least as much reason, what Mr. Justice Roberts wrote upon his resignation from the Court: "I have no illusions about my judicial career. But one can only do what he can. Who am I to revile the good God that he did not make me a Marshall, a Taney, a Bradley, a Holmes, a Brandeis or a Cardozo?"¹³ Others may choose a slightly different list of judicial greats, but few would expand the list beyond a half-dozen. The strength of the Court must derive from its collegial powers rather than from those of individual Justices. Historically, the Supreme Court has never collectively risen to the heights of its most brilliant Justices; nor has it ever been collectively reduced to the level of its weakest ones. The Court is a collegial body and its product has usually reflected the mean of its collective talent. For only to the degree that its opinions are the consequence of deliberation and truly represent a consensus of the Court can it adequately perform its functions of definition and guidance.

It is the Court's lawmaking function by "construction" and "deconstruction" of the Constitution that I purport to address here. By "construction" of the Constitution, I mean the Court's derivation of a rule of law from the text, context, and structure of the Constitution itself. By "deconstruction," a word I have borrowed from academic literary critics¹⁴ and probably have misshaped to my own ends, I mean not what the Court takes from the Constitution but what it puts into it. Deconstruction may be analogized to "salting" a mine: the only gold to be gotten from it is that which has been put into it. (I do not propose to examine here the Court's role as expounder of the meaning of congressional legislation rather than the Constitution except to say that the *Weber* opinion¹⁵ is more than adequate demonstration that where there is a wilfulness, there is a waywardness.)

Not long ago, Geoffrey Marshall wrote in *The Times Literary Supplement*: "English constitutional conventions are, as G.H.L. LeMay says in *The Victorian Constitution* ('like the procreation of eels'), vague, slippery and mysterious. Precisely how they are generated is somewhat unclear; how they are recognized excites differences of opin-

13. Quoted in FELIX FRANKFURTER ON THE SUPREME COURT 517 (P. Kurland ed. 1970) (hereinafter Kurland).

14. See H. BLOOM, P. DEMAN, J. DERRIDA, G. HARTMAN, & J. MILLER, *DECONSTRUCTION AND CRITICISM passim* (1980).

15. *United Steelworkers v. Weber*, 443 U.S. 193 (1979). See generally Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423 (1980).

ion and how they change and disappear is a matter of dispute."¹⁶ American constitutional conventions are equally vague, slippery, and mysterious. But there are no longer questions as to how they are generated, how they are recognized, how they change, or how they disappear. The Supreme Court of the United States generates them, recognizes them, changes them, and abolishes them. We have been told by no less an authority than Charles Evans Hughes that the Constitution is whatever the Justices of the Supreme Court say it is.¹⁷ Nevertheless, there is now a heated debate among academic lawyers over whether constitutional adjudication must depend upon the meaning to be given the text of the document in the context of history, structure, and prior judicial construction, or whether there are other sources from which our constitutional law may as well be derived.¹⁸

In his preeminent textbook on constitutional law, which is disguised as a casebook, Professor Gerald Gunther has put the issues this way:

To what extent must the Court confine itself to the text and history of the relevant constitutional provision? To what extent may it rely on inferences from the structures and relationships established by the basic document? . . . To what extent is the Court authorized to implement values derived from sources outside the written document—e.g., the society's political and moral values, or the Justices' personal ones?¹⁹

Gunther continues:

Typically, that debate is now couched as a battle between "interpretivism" and "noninterpretivism"—between the view that judges can only enforce norms stated or clearly implicit in the Constitution and the position that courts can legitimately go beyond those sources. Examples of "noninterpretivist" positions include the claim that the Supreme Court has the obligation to articulate the changing content of the nation's fundamental values and that it is charged with evolv-

16. THE TIMES LITERARY SUPPLEMENT, Jan. 18, 1980, at 67, col. 1.

17. "We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution." ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES 185-86 (2d ed. 1916).

18. A representative, but far from exhaustive list, includes: R. BERGER, GOVERNMENT BY JUDICIARY (1977); A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); R. DWORIN, TAKING RIGHTS SERIOUSLY (1977); J. Ely, DEMOCRACY AND DISTRUST (1980); L. LUSKY, BY WHAT RIGHT? (1975); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Levinson, *"The Constitution" and American Civil Religion*, 1979 SUP. C. REV. 123; Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

19. G. GUNTHER, CONSTITUTIONAL LAW, CASES AND MATERIALS 24 (10th ed. 1980).

ing and applying the society's fundamental principles.²⁰

(You will pardon me, I trust, if I frequently prefer to use the word "construction" where my colleagues refer to "interpretivism" and the word "deconstruction" where they speak of "noninterpretivism." My tongue ties too readily over the more pedantic expressions.)

The debate, I should say, is not over what the Supreme Court does in its constitutional adjudication but over what it should do. The question is not whether the Court engages in deconstruction—everyone seems to recognize that it does, at least from time to time—but rather whether it ought to do so.

If we look to John Marshall's classic justification for judicial review as expressed in *Marbury v. Madison*,²¹ or Hamilton's 78th *Federalist*, there should be no doubt about the validity of the "interpretivist" position. But to resort to so basic a judicial precedent, or so authoritative a contemporary text on the original meaning of the Constitution, is itself an act of interpretivism and, therefore, begs the question rather than answers it. My own view is that deconstruction makes nonsense of the concept of a written constitution. But as to deconstruction, I am in the position of Thomas Reed Powell's Vermont farmer who, when asked whether he believed in Baptism, replied, "Believe in it hell; I've seen it done."

Of course, to say that I believe that the Constitution must be the source for constitutional adjudication is not to suggest that the duties of the Court are mechanical or that an examination of its origins, its words, and its structure will afford unequivocal answers to every problem that comes to the Court for resolution. Mr. Justice Frankfurter's admonition about statutory construction is equally appropriate to constitutional construction: "The notion that because the words . . . are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine of rather recent vintage . . . to which lip service has on occasion been given here, but which since the days of John Marshall, this Court has rejected, especially in practice."²² The language, history, and clausal relationships give adequate play for judgment on the part of the Justices. Constitutional opinions, as Mr. Justice Brandeis so often told us, are not chiseled in stone.²³ But neither is the Constitution a ball of clay to be molded to the desires of the judges. The Constitution and its history impose boundaries—what the current jargon terms "parameters"—not only on the legislative and

20. *Id.*

21. 5 U.S. (1 Cranch) 137 (1803).

22. *United States v. Monia*, 317 U.S. 424, 431 (1943).

23. *E.g.*, *Olmstead v. United States*, 277 U.S. 438, 472 (1928); *United States v. Moreland*, 258 U.S. 433, 451 (1922).

executive branches but on the judicial branch as well. But it is not my purpose here to explicate my own views on the proper mode of constitutional adjudication.

I would point out, however, that while the fervor of the present debate suggests that the jurisprudential question of interpretivism versus noninterpretivism is comparatively new, it is in fact a contest that has been waged from the beginning of the Court's history and before; only the labels have changed from time to time. What we have in the recent literature is old wine in new bottles. The central question is even hoarier than the anecdote about the Vermont farmer and may be recognized by some of you under the old rubrics of "higher law," "natural law," "substantive due process," "realism," and "preferred positions," to mention just a few.

Thus in 1798, in the classic case of *Calder v. Bull*,²⁴ Justices Chase and Iredell—in dicta to be sure—argued about whether there was a "natural law" superior to the Constitution.²⁵ And Mr. Justice William

24. 3 U.S. (3 Dall.) 386 (1798).

25. Mr. Justice Chase stated:

There are certain *vital* principles in our *free Republican governments*, which will determine and overrule an *apparent and flagrant* abuse of *legislative power*; as to authorize *manifest injustice by positive law*; or to take away that security for *personal liberty, or private property*, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the *great first principles of the social compact*, cannot be considered a *rightful exercise* of legislative authority. The obligation of a law in governments established on *express compact, and on republican principles*, must be determined in the nature of the power, on which it is founded.

Id. at 388 (emphasis in original).

Mr. Justice Iredell argued:

If any act of Congress, or of the legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. There are then but two lights, in which the subject can be viewed: 1st. If the Legislature pursue the authority delegated to them, their acts are valid. 2d. If they transgress the boundaries of that authority, their acts are invalid. In the former case, they exercise the discretion vested in them by the people, to whom alone they are responsible for the faithful discharge of their trust: but, in the latter case, they violate a fundamental law, which must be our guide, whenever we are called upon, as judges, to determine the validity of a legislative act.

Id. at 399.

It might be added that Mr. Justice Chase's notion of the superiority of his own judgment over that of the Constitution and the Congress was, in part, what earned him his place in history as the only Supreme Court Justice ever to have been impeached, although he was not convicted. See R. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC passim* (1971).

Johnson, in *Fletcher v. Peck*²⁶ and *Mills v. Duryee*,²⁷ adumbrated the supremacy of natural law.

When Professor Gunther, almost five hundred pages after his notes on noninterpretivism from which I have already quoted, comes to deal with the problem of "substantive due process," he makes it very clear that the issues are the same:

These substantive due process cases, old and new, raise common issues: Are these decisions from *Lochner v. New York* [198 U.S. 45 (1905)] to *Griswold v. Connecticut* [381 U.S. 479 (1965)] and *Roe v. Wade* [410 U.S. 113 (1973)], justifiable as interpretations of the Constitution? Are the fundamental values identified in such cases plausible extrapolations from constitutional text, history, or structure? Or are they ultimately extraconstitutional, noninterpretive judicial infusions? . . . Are there basic values—moral, social, or economic—that truly reflect a national consensus? Even if there are such values, does the existence of a consensus justify reading them into the Constitution? Do the Court's fundamental value adjudications in fact rest on an adequately widespread consensus? . . . Or do they ultimately reflect nothing more than the beliefs of a majority of the Justices at a particular time? Are fundamental value adjudications unacceptable if the Court cannot demonstrate an adequate link to constitutional text, history, or structure? Is it possible to state a principled, disciplined "fundamental values" approach that safeguards adequately against merely subjective judicial lawmaking?²⁸

For me, these questions are rhetorical. But these are the questions addressed in the fast-growing legal literature on the subject. It will be recalled that it was in *Lochner* that Mr. Justice Holmes remarked in dissent, "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics."²⁹ Of today's decisions, it might be said that the fourteenth amendment does not enact Professor John Rawls's *Theory of Justice*. Both statements are equally right or equally wrong, and I think that Holmes was probably wrong. Spencer encapsulated the judicial zeitgeist of the early twentieth century as Rawls has encapsulated that of the latter part of this century: for Spencerians, liberty, even at cost of gross inequity; for Rawlsians, or at least for his epigone, equality, even at the cost of almost any liberty.

26. 10 U.S. (6 Cranch) 87 (1810). Johnson suggested that a statute revoking a grant was unconstitutional, not because it violated the contract clause, but "[on a general] principle which would impose laws even on the Deity." *Id.* at 143.

27. 11 U.S. (7 Cranch) 481 (1813). Here Johnson retreated a little, suggesting that legislative power was greater than that of divine law. "There are certain eternal principles of justice which never ought to be dispensed with, and which courts of justice never can dispense with but when compelled by positive statute." *Id.* at 486.

28. G. GUNTHER, *supra* note 19, at 502-03.

29. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

There is, however, no showing that the judiciary's notion of fundamental values originating outside the Constitution bears any resemblance to the values preferred by the majority of the people. In any event, the expression of society's notion of fundamental values would more readily be reflected in the behavior of the legislative and executive branches—the democratic branches of government—and thus make the invocation of such a judicial power redundant. Indeed, it has been proposed that the Supreme Court's primary function is to protect individuals and minorities from legislatively imposed values of the society at large.

Somehow, and perhaps because I received my legal education when legal realism was at its apex, the language of legal realism seems more compelling to me than that of our contemporary jurists. The realists told me that each of the three branches of government exerts political power and that the realists chose to support the branch that came to the conclusions most satisfying to themselves.³⁰ For them, personal predilections guided both the Justices and their critics.

I suspect that the words "interpretivism" and "noninterpretivism" are used in the current literature because "substantive due process" and "natural law" have been so thoroughly discredited. If the phoenix is to rise again it must be in the disguise of a new bird; perhaps a turkey would do.

Two questions within the current debate are far more interesting to me than whether the Court does or should indulge in constitutional deconstruction. The first, which I propose to examine, is if the Court engages in noninterpretivism, as it surely does, why does it not do so candidly and openly? The second, which I propose to bypass, is if not

30. Cf. Roche, *The Expatriation Cases: "Breathes There the Man, with Soul so Dead . . . ?"*, 1963 SUP. C. REV. 325, 326, n.4, saying:

In the forlorn hope of quashing in advance charges of inconsistency, let me set out my position on judicial review in constitutional cases: (1) On the theoretical plane I do not consider Supreme Court review of policy matters to be democratic in character. See Roche, *Courts and Rights* 93-105 (1961). (2) As a participant in American society in 1963—somewhat removed from the abstract world of democratic political theory—I am delighted when the Supreme Court takes action against "bad" policy on whatever constitutional basis it can establish or invent. In short, I accept Aristotle's dictum that the essence of political tragedy is for the good to be opposed in the name of the perfect. Thus, while I wish with Professors Wechsler and Kurland, *inter alios*, that Supreme Court Justices would proceed on the same principles as British judges, it does not unsettle or irritate me when they behave like Americans. Had I been a member of the Court in 1954, I would unhesitatingly have supported the constitutional death-sentence on racial segregation, even though it seems to me that in a properly ordered democratic society this should be a task for the legislature. To paraphrase St. Augustine, in this world one must take his breaks where he finds them. (3) Finally, I insist that the task of the historian (Professors Black and Cahn to the contrary notwithstanding) is not to fortify useful myths, but to attempt to plumb the realities of the past.

For an examination of American realist jurisprudence, see G. CASPER, *JURISTISCHER REALISMUS UND POLITISCHE THEORIE IM AMERIKANISCHEN RECHTSDENKEN* (1967).

from constitutional text, its history, its structure, or prior judicial pronouncements, where are the appropriate principles for guidance to be found? On the second question, suffice it here to quote from Lord Pollock in a letter to Holmes: "In the Middle Ages natural law was regarded as the senior branch of divine law and therefore had to be treated as infallible (but there was no infallible way of knowing what it was)."³¹

The demand on the Court for frank recognition of its deconstructive methods is not new. For example, Professor Felix Frankfurter, as he then was, wrote in 1923:

Granted that the power of judicial review in this widest field of social policy is to be retained, its true nature should be frankly recognized. Since the nine Justices are molders of policy instead of impersonal vehicles of revealed truth, the security of the power which they exercise demands that, in this realm of law, the most sensitive field of social policy and legal control, the judicial process should become a *conscious* process. The Justices will then recognize that the "Constitution" which they "interpret" is to a large measure the interpretation of *their own experience*, their "judgment about practical matters," their ideal picture of the social order.³²

Judge Learned Hand put the same point more pithily, as was almost always the case, when he said, "If we do need a third chamber it should appear for what it is, and not as the interpreter of inscrutable principles."³³ Note that both these eminent jurists not only suggested the desirability of candor but recognized that the bases for judgment were personal evaluations by the Justices of what they thought to be the best solutions to the social, economic, and political issues that came before them. Note, too, that these are the words of the two most eminent judicial representatives of the school of judicial restraint.

Both of the quoted remarks, however, were extrajudicial utterances. Neither in their own judicial opinions nor in those of the Supreme Court generally have I found any equally candid expression of the view that it is not the Constitution, its history, its structure, or prior judicial construction, but a personal evaluation in the light of their own experience that should lead Justices to their constitutional judgments.³⁴ This failure may be mine, attributable either to my igno-

31. 1 HOLMES-POLLOCK LETTERS 275 (M. Howe ed. 1941).

32. Quoted in Kurland, *supra* note 13, at 119-20.

33. L. HAND, *supra* note 8, at 70.

34. Cf. *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (Frankfurter, J., dissenting): As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. . . . It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench.

rance of what in fact exists or my unwillingness to see what has been plainly written. But I think it cannot be denied that the Court has rarely been candid about its deconstructionist behavior.

It is true, nevertheless, that the Court frequently signals its deconstruction without openly avowing it. Thus, whenever an opinion quotes Marshall's dictum in *M'Culloch v. Maryland*³⁵—"[w]e must never forget that it is a *constitution* we are expounding"³⁶—you can be sure that the Court will be throwing the constitutional text, its history, and its structure to the winds in reaching its conclusion. Witness, for example, *Home Bldg. & Loan Ass'n v. Blaisdell*,³⁷ which buried the contract clause until only a term or two ago, or Mr. Justice Blackmun's opinion in *Bakke v. Board of Regents*,³⁸ which would suspend the Constitution until things got better.

Another signal of deconstruction is the citation of the renowned Holmes dictum in *Missouri v. Holland*:³⁹

[w]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . .

The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.⁴⁰

Once more this means that the Constitution is out the window. History has not changed the principles of the Constitution, although it has changed the subjects to which the constitutional principles are applicable.⁴¹ The one historical change necessarily reflected in constitutional adjudication is the change in the role of government from that of a policeman to that of a prime mover in the affairs of men. Because of the great expansion of government, there is a vastly wider field for the

Id. at 647.

35. 17 U.S. (4 Wheat) 316 (1819).

36. *Id.* at 407.

37. 290 U.S. 398 (1934).

38. 438 U.S. 265, 407 (1978) ("In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.")

39. 252 U.S. 416 (1920).

40. *Id.* at 433.

41. See Mr. Justice Brewer's opinion in *South Carolina v. United States*, 199 U.S. 437 (1905): The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded.

Id. at 448-49.

play of constitutional adjudications under the service state of today than there was in the time of the Federalists and Jeffersonians. But the principles of allocation of power and the restraints on its exercise have not been altered by history.

A third signal of the Court's indulgence in noninterpretivism is its invocation of phrases that are no part of the Constitution as if they were to be found there. I call this deconstruction by label. You know the phrases: "the right to contract,"⁴² "freedom of association,"⁴³ "the right to travel,"⁴⁴ "the right of privacy,"⁴⁵ are some of them. Generations of laws students have grown up believing that some or all of these words were among those framed by the Founding Fathers in 1787.

Perhaps the most candid of these subterfuges for replacing the words of the Constitution by the will of the Justices is that which purports to resort to original intent even as it rejects it. It is that construction which says that a particular term or phrase was intended to be without substantive content—that the Court was given a blank check to be filled in however it wished. The only restraint on this discretion is that there must be sufficient political capital in the Court's account so that it is not returned by the people marked "N.S.F." As the King told Alice, "If there is no meaning in it, that saves a world of trouble, you know, as we needn't try to find any."⁴⁶ This, you will recall, was the Court's reading of history in relation to school desegregation in *Brown v. Board of Education*,⁴⁷ to which it was led by no less a scholar than the late Professor Alexander M. Bickel.⁴⁸

The foremost proponent of this "empty vessel" school—to change the metaphor—was Mr. Justice Frankfurter, who often voiced the view that the commerce clause, the due process clause, and the equal protection clause were among those whose content was left to be created by the Justices. For example, he once said, "Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."⁴⁹ Judges, "whose preoccupation is with [constitutional

42. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

43. *E.g.*, *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

44. *E.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

45. *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

46. *See* L. CARROLL, *ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS* 115 (Schocken ed. 1978).

47. 347 U.S. 483, 489 (1954).

48. *See* Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

49. *Quoted in* Kurland, *supra* note 13, at 336-37.

clauses like these] should be compounded of the faculties that are demanded of the historian and the philosopher and the prophet . . . [with] poetic sensibilities. . . ."⁵⁰ (Perhaps Frankfurter thought this was a self-portrait; surely he did not believe that any of his brethren met the standard he bespoke. And, aside from thee and me, what lawyer does?) It has always come as a surprise to my students that it was Frankfurter who was the deconstructionist and Black the interpretivist,⁵¹ although both claimed to eschew personal values as a guide to judgment.

The question remains, if the Court indulges in deconstruction, as everyone seems to agree that it does, why will it not reveal the manner by which it reaches its conclusions rather than concealing it by purporting to find its answers in the Constitution? There are many hypotheses offered to explain this phenomenon, but there is little other than speculation to support any of them.

One explanation is to be found in an anecdote related by Ronald Steel in his new and excellent book *Walter Lippmann and the American Century*. Speaking of Walter Lippmann's new bride, who had come to Washington with him to reside in the House of Truth, which was stocked with the bright young men—mostly from Harvard—who came to Washington in World War I to help preserve the world for democracy, Steel writes:

One of her greatest admirers was Justice Holmes, who used to come from the Court chambers in the late afternoon to play double solitaire with her. Once during a game she gently pointed out to him that he was cheating. 'But it's such a small thing, my dear,' he sighed through his great drooping mustache, 'and no one will suffer from it but me.'⁵²

The argument may well be that the Court believes that its exercise of deconstruction is "a small thing" from which none will suffer but those who indulge in it. As Frankfurter once wrote for the Court, in a different context, "Fictions have played an important and sometimes fruitful part in the development of the law; and the Equal Protection Clause is not a command of candor."⁵³ Nor, it may be added, does any other part of the Constitution contain such a command except by deconstruction. This approach, however, was inconsistent with Frankfurter's more frequent admonitions that democracy requires that the governors keep the governed accurately informed of their behavior so

50. *Id.* at 504.

51. See the respective opinions of Justices Frankfurter and Black in *Adamson v. California*, 332 U.S. 46, 59, 68 (1947); H. BLACK, *A CONSTITUTIONAL FAITH* (1968).

52. R. STEEL, *WALTER LIPPMANN AND THE AMERICAN CENTURY* 121 (1980).

53. *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940).

that the people might exercise their ultimate authority over their government.⁵⁴ Much governmental authority, however, is based on fictions, and that of the Supreme Court would seem to be no exception. It is a pretense that presidential nominees are chosen by the people and elected by the Electoral College. It is a pretense that the President is in control of the executive branch, including the bureaucracy. It is a pretense that legislation represents the will of the majority of the electorate, or even the will of the majority of senators and congressmen. It is a pretense that independent agencies are responsible to the legislature and not the administration, or that administrative law judges are independent of their agencies. The ideals of our democratic state are reconciled with the facts of life through these fictions. Why should the Court be an exception to these pretensions? We have long since learned that democratic principles need play no role in judicial review.⁵⁵ The Court, like the other branches, may justify its behavior in terms of the Platonic lie.⁵⁶ Or, as Moliere suggests: "If you're still troubled, think of things this way: No one shall know our joys, save us alone, And there's no evil till the act is known; It is scandal, Madam, which makes it an offense, And it's no sin to sin in confidence."⁵⁷

A more cynical and popular explanation of the Court's coverup of its sins is that the Court conceals the truth about its behavior because its revelation would adversely affect public confidence in the role of the Court. It is the Constitution and not the Court that is revered by the people. So long as the Court purports to speak as the voice of the Constitution, its decisions will be respected by those who are governed by them. If the mantle of the Constitution is removed and the ordinary men concealed behind the black robes are revealed as the framers of the rules, the Court's authority might be substantially diminished. Again the argument was well put by Moliere: "In certain cases it would be uncouth And most absurd to speak the naked truth With all respect for your exalted notions It is often best to veil one's true emotions Wouldn't the social fabric come undone If we were wholly frank

54. Democracy demands, as does no other form of society, that its citizens understand their institutions and their problems. Indeed, democracy is dependent upon the pervasiveness of such understanding among its citizens. . . . Democratic government may indeed be defined as the government which accepts in the fullest sense the responsibility to explain itself. It can operate successfully only when statesmen know not merely that they will be held to account for what they do, but that those who hold them to account can weigh facts and reflect upon their meaning.

Frankfurter, *There Is No Middle Way*, SATURDAY REV., Oct. 26, 1946, at 21.

55. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH passim* (1962); E. ROSTOW, *THE SOVEREIGN PREROGATIVE* 33 (1962).

56. Cf. Kurland, *Magna Carta and the Constitution of the United States: "The Noble Lie,"* in S. THORNE, W. DUNHAM, P. KURLAND, & I. JENNINGS, *THE GREAT CHARTER* 48 (1965).

57. MOLIERE, *THE MISANTHROPE*, Act 5 (Wilbur trans. 1965).

with everyone?"⁵⁸ Thus, the Court conceals its noninterpretivist behavior to preserve the social fabric. It has been said, "Our kind of society cannot endure if the controlling authority of the Law as derived from the Constitution is not to be the tribunal specially charged with the duty of ascertaining and declaring what is 'the supreme Law of the Land.'"⁵⁹ On the other hand, the aristocratic Rochefoucauld pointed out that "[h]ypocrisy is the homage which vice renders to virtue."⁶⁰

Obviously, speculation can provide many answers for the Court's silence about its processes of constitutional deconstruction. Let me offer just one more, the one I find most persuasive, although there are no more proofs here than are available for the other hypotheses. The position that attracts me is not that the Court will not reveal its noninterpretive processes but that it cannot reveal them. This is premised on the notion that constitutional deconstruction proceeds as one literary critic has described the procedure of other hermeneutics. E.D. Hirsch in his small, but cogent, book *The Aims of Interpretation* wrote:

The words of the text alone do not "contain" the meaning to be communicated; they institute a spiritual process which, beginning with the words, ultimately transcends the linguistic medium. Canons of philological evidence and rules of procedure do not constrain this intersubjective communion, because understanding is not entirely a mediated process, but is also a direct speaking of a spirit to a spirit. The authority of this communion is determined less by philological investigation than by the vigor of inward conviction, the spiritual certainty of communion. The process is intuitive, because even though it is mediated at first by words, it is not constrained, in the end, by their form.

Intuitionism has a venerable tradition. It is probably the oldest principle of hermeneutics, being associated from the start with sacred interpretation. The letter killeth, but the spirit giveth life. But since sometimes only chosen souls have direct access to the spirit behind the letter, interpretation must be left to the priests who interpret for other men with instituted authority. . . .

It is obvious that any interpretive disagreements based on intuitive premises can be resolved only by arbitrary fiat. But such a fiat could compel our assent only if the spiritual authority of the interpreter-priest were widely accepted. . . .⁶¹

Is not this what the Court seems to be telling us in cases like *United States v. Nixon*,⁶² where it repeated a formula that it had used before:

58. MOLIERE, *TARUFFE*, Act 4, sc. 5 (Wilbur trans. 1965).

59. *Cooper v. Aaron*, 358 U.S. 1, 24 (1958) (Frankfurter, J., separate opinion).

60. LA ROCHEFOUCAULD, *MAXIMS*, No. 218 (1665).

61. E. HIRSCH, *THE AIMS OF INTERPRETATION* 20 (1976).

62. 418 U.S. 683 (1974).

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. . . . Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137 (1803), that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Id.* at 177. . . . Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to be derived from enumerated powers . . . the “judicial power of the United States” vested in the federal courts by Art. III, § 1, of the Constitution can[not] be shared. . . . We therefore reaffirm that it is the province and duty of this Court “to say what the law is.”⁶³

If the Court is made up of the anointed—by reason of their presidential commissions—and it is given to them to “say what the law is,” we are brought back to Hirsch’s proposition that “any interpretive disagreements based on intuitive premises can be resolved only by arbitrary fiat. But such a fiat could compel our assent only if the spiritual authority of the interpreter-priest were widely accepted. . . .”⁶⁴ The Court, therefore, does not reveal its noninterpretive processes simply because, being intuitive, they are not amenable to rational explanation. (“Intuitivism” may also explain the untoward length and the floundering language of many opinions seeking to explain not the Justices’ reasons but their feelings.)

In 1896, Mr. Justice Holmes said as much in his dissent in the Massachusetts case of *Vegeahn v. Gunther*.⁶⁵

The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable any one even to form an intelligent opinion about them. *In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas for which a rational defence is ready.*⁶⁶

He repeated the proposition in *Lochner*: “The decision will depend on a judgment of intuition more subtle than any articulate major prem-

63. *Id.* at 703-05. *Cf.*, *Glidden v. Zdanok*, 370 U.S. 530, 542-43 (1962) (“the ultimate expositor of the Constitution”); Powell, *What Really Goes on at the Supreme Court*, 66 A.B.A.J. 721 (1980) (“to say what the law is”).

64. See text & note 61 *supra*.

65. 167 Mass. 92 (1896).

66. *Id.* at 106 (emphasis added).

ise.”⁶⁷ In sum, to satirize another of Holmes’s “apercus,” the life of constitutional law has not been reason, but it has been judicial intuition.⁶⁸

For myself, I am no more satisfied by instinctual or intuitional constitutional construction than by the many theories of fundamental values that my academic colleagues have recently come up with in defense of constitutional deconstruction. I am still of the belief that a written constitution must be more than a declaration of faith to be explicated by the ordained according to their unexplainable insights.

Let me conclude, then, by reminding you that the question of deconstruction is an old one. To a degree, the recent contributions to the subject are no more than an attempted reinvention of the wheel—a square wheel at that. In large measure, the deconstructionists are simply supplying excuses rather than justifications for a *fait accompli*, the expansion of the judicial power. And, like much of the work of the Court itself, the arguments appeal more to the heart than to the mind. Many of these recent commentators appear to be the children of the Age of Aquarius. A Constitution that was the child of the Age of Reason will necessarily be alien to them. In essence, their claim—perhaps like mine—rests on the divine right of academic lawyers “to say what the law is.” I end then with a couplet from *The Dunciad*:⁶⁹ “May you, may Cam and Isis preach it long, The RIGHT DIVINE of kings to govern wrong.”

67. *Lochner v. New York*, 198 U.S. 45, 76 (1905).

68. “The life of the law has not been logic, it has been experience.” O. HOLMES, *THE COMMON LAW* 1 (1881).

69. A. POPE, *THE DUNCIAD*, bk. III, at 187-88 (1743).

