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# The Perils of Judicial Statesmanship

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## COMMENTARY

# THE PERILS OF JUDICIAL STATESMANSHIP

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On a blustery June afternoon in 1616, an angry King James summoned the Judges of Kings Bench to his palace. Furious that the Judges had decided a case on which he had instructed them to withhold judgment, the King denounced the Judges for their unseemly conduct. It was, he exploded, treason. At that, the Judges fell to their knees and begged his forgiveness. As the Judges cowered at his feet, James asked each in turn what he would do if the King ever again told the Court to withhold its judgment. Each replied that he would do as his King commanded. When at last the King fixed his cold eyes on Lord Chief Justice Coke and asked him what he would do, the trembling Chief Justice lifted his head to his King and whispered: "I should do that which would be fit for a judge to do."[1]

The courage of Coke's reply cost him the Chief Justiceship. Its ambiguity saved his head. Time has vindicated Coke's courage. We are justly proved of an independent judiciary which has so recently demonstrated that even the Presi-

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1. C. BOWEN, 3 THE LION AND THE THRONE 370-74 (1956).

dent rules under—and not above—the law. Time has not clarified the ambiguity, however. Precisely what 'tis fit for a judge to do—particularly a Justice of the Supreme Court—remains a perplexing question.

Ours is, afterall, a democratic republic in which power flows from the people to elected representatives who remain answerable to the people. By contrast, the Justices sit for life and answer to no one. The Court is thus a profoundly anti-democratic institution. When and how the Court ought to exercise its anti-democratic authority is the only enduring important question in American constitutional law.

I am not saying that it is the only important question in constitutional law. At any given time, questions about the substantive meaning of specific constitutional provisions may be very important. In the 1920's and 30's, for example, we worried about the meaning of the commerce clause. When—if ever—could Congress protect the welfare of the people through its power to regulate interstate commerce?[2] In the 1940's and 50's, we worried about the meaning of the First Amendment. When—if ever—could the cop tell us to shut up or move on?[3] In the 1960's and 70's, we worried about the meaning of the equal protection clause. When—if ever—could the state treat blacks, women, children, aliens or gays differently?[4] What we will worry about in the 1980's and 90's is not clear to me, for I am no clairvoyant and have no crystal ball in which I read the future. Perhaps a "Reaganized" Court under Chief Justice William Rehnquist will make the meaning of the ninth amendment the most important substantive question in constitutional law.[5]

But whatever substantive question dominates constitutional litigation in the coming decades, a recurring concern will be whether the Court, in answering the substantive question, has acted within its constitutional authority. In the

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2. *See generally* Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645 (1946).

3. *See generally* Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg—And Beyond*, 1969 SUP. CT. REV. 41.

4. *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

5. *E.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976).

1930's, for example, President Roosevelt excoriated the Court for its "horse and buggy" interpretations of the Constitution.[6] The conservative Justices were seen as judicial Neros, content to fiddle Constitutional text and precedent while the country burned. Thirty years later, the Court was excoriated for its progressive interpretations of the Constitution, and impeach EarlWarren billboards dotted the highways.[7] In both instances, critics accused the Court of usurping legislative power. The distinguished Oxford Don H.L.A. Hart has written that "American jurisprudence. . . is marked by a concentration, almost to the point of obsession, on the judicial process, that is, with what courts do and should do, how judges reason and should reason in deciding particular cases."[8]

What is it fit for a judge to do? At the outset, we can identify two popular polar answers to that question. I call these the "impossible dream" and the "recurrent nightmare." According to the first answer, the judge should determine the meaning of the clause in question by reading the language of the clause. That might be possible in "the lawyer's paradise where," according to James Bradley Thayer, "all words have a fixed, precisely ascertained meaning; . . .where a lawyer may sit in his chair, inspect the document referred to him, and answer all questions without raising his eyes."[9] Justice Roberts once described his job as if he lived in that lawyer's paradise: "I lay the statute in question next to the Constitutional provision and see if the former squares with the latter."[10] If Justice Roberts were the only Justice ever to have expressed this view, we might dismiss it as the simple opinion of an unsophisticated Justice who once grumbled to a friend: "It's not my fault I'm not a Holmes or a Brandeis." But the late Justice Black, one of the most influential Justices of this century, agreed with Justice Roberts. In his famous television interview, he was asked how he decided cases. Pulling out his dog-

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6. M. PUSEY, THE SUPREME COURT CRISIS 5 (1937).

7. *See, e.g.*, J. CARTER, THE WARREN COURT AND THE CONSTITUTION (1973).

8. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

9. Quoted in J. Bond & C. Rose, Introduction to Legal Skills 208 (1978) (unpublished materials).

10. United States v. Butler, 297 U.S. 1, 62 (1936).

eared copy of the Constitution, he said: "I look here until I find the answer."[11]

With all due respect to these gentlemen, the view that judges can determine meaning from language alone is self-evident nonsense—an "impossible dream." Admittedly, the meaning of a few Constitutional clauses is apparent from their language. I can't imagine anyone arguing about the meaning of the clause which says that each state shall have two senators. The fact that one of our present senators is dubbed the senator from Boeing is, I assume, political rhetoric and not a serious argument that every major defense contractor is entitled to its own senator. Similarly, the clause which says that the President must be a natural born citizen is clear. Presumably, no one would argue that "natural born" excludes one delivered by Caesarean section.

Cases involving the meaning of such clauses do not crowd the Court docket. Typically, the Court must decide the meaning of clauses whose language is much less specific and clear. The fourth amendment prohibition against unreasonable searches and seizures does not specify the circumstances in which a search or seizure becomes unreasonable. The sixth amendment, which guarantees the accused the assistance of counsel, does not specify the circumstances under which the accused is entitled to that assistance. The due process clauses of the fifth and fourteenth amendments do not specify what process is, in fact, due. The equal protection clause does not specify those classifications which violate its command. The language of these clauses is simply not dispositive of cases arising thereunder.

This very lack of specificity and clarity has caused some to argue that the judge can therefore give any meaning he wishes to the clause in question. In this view, the Constitution is an empty bottle into which the Court may pour whatever meaning it wishes. Bishop Hoadly gave this view its classic statement when he declared: "He who hath the power to interpret the law is truly the lawgiver." While there is much wisdom in the Bishop's dictum, I call this view "the recurrent

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11. *Justice Black and the Bill of Rights*, 9 SW. U.L. REV. 937, 938 (1977) (*reprinted from* a CBS News Special of Dec. 3, 1968).

nightmare." Its implications are frightening. After all, the only justification for the extraordinary discretion which the Court exercises is the belief that its discretion is circumscribed by the law. If that belief be mere myth, then the Justices' discretion is circumscribed only by political realities—and the Justices may decide the meaning of the Constitution on the basis of whim, passion, prejudice—or, if they are in a sporting mood—by the flip of a coin.

Although critics (and dissenting Justices) often berate the Court majority for reading its whims, passions, and prejudices into the Constitution, most Justices do not exercise their authority capriciously. Language is not infinitely malleable. Judges must still give reasons supporting their decisions. The profession may—and does—critique their opinions. Among the modern Justices, I think only Justice Douglas decided cases solely on the basis of his personal predilections. In reviewing his autobiography, I said (perhaps too harshly) that the United States Reports recorded only his enthusiasms for every liberal cause from free speech to free abortion.[12] In fairness to the Justice, he insisted that he worked out decisions like any other judge, and he may well have believed that. Near the end of his life, Justice Douglas articulated yet another basis for deciding cases. A former law clerk, trying to convince the ailing Justice to resign, pointed out that he couldn't even read anymore. "How are you going to know how to vote?" the former law clerk asked. Justice Douglas replied: "I'll listen and see how the Chief votes, and [then I'll] vote the other way. . . ."[13] Spunky—if not principled—to the end.

If the dream is fanciful and the nightmare imagined, what is the real choice? The real choice is between *looking backward* for guidance or *looking forward* for inspiration, between deciding as a *craftsman* or deciding as a *statesman.* The craftsman must necessarily look backward—to the purposes of the framers and to the historical experiences of the American people. His is a search for the values eminent in the text and

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12. Bond, Book Review, ___ DET. C. L. REV, ___ ( ).
*Cf.* Baude, *An Appreciative Note on Mr. Justice Douglas' View of the Court's Role in Environmental Cases*, 51 IND. L. J. 22 (1975).

13. B. WOODWARD & S. ARMSTRONG, THE BRETHREN 391 (1979) [hereinafter cited as B. WOODWARD & S. ARMSTRONG].

our history. He then decides the question before him in light of those purposes and values. Judicial craftsmanship is thus the art of deciding a legal dispute on the basis of a reasoned judgment in which the judge applies legal principles to specific facts. The craftsman cares most about the process, confident that the correct result will follow if he reasons soundly.

By contrast, judicial statesmanship is the process by which the judge wisely and shrewdly manages public affairs through the resolution of legal disputes. The judicial statesman must necessarily look forward for inspiration because he must anticipate the future and fashion a solution for its predicted problems. The judicial statesman thus focuses primarily on the result. Is it wise, just or fair? Process remains important to the statesman. He asks himself: did I seize the right time, and did I move the law as far but no further than the community would tolerate? The bottom line, however, is that any process is acceptable so long as it produces the desired result.

In contemporary writing about the Court, the craftsman is denigrated, the statesman is celebrated. Yale Professor Walter Wade Hamilton contemptuously dismissed Justice Frankfurter, a consummate craftsman, as at his best when knitting legal crochet on the fingers of the case. Alas, the Justice had no instinct, the professor added, for "the moral jugular of the case."[14] By contrast, Chief Justice Earl Warren, we are told, had an unerring instinct for the moral jugular of the case. The most lavishly praised Chief since John Marshall, Warren, according to his biographer, "functioned on the Court much as he had as governor, identifying needed reforms."[15] Warren, the consummate judicial statesman, acted from "his instinct for what was fair, honorable, politically feasible and sensible at the time."[16]

The former Attorney General of the United States, Ramsey Clark, insists that we desperately need judicial statesmen like Warren. "The major question of our times," explains Mr. Clark,

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14. *Id.*
15. G. WHITE, EARL WARREN: A PUBLIC LIFE 369 (1982).
16. *Id.*

> is whether institutions can change to cope with the vast dynamics of mass urban population and burgeoning technology . . . . All institutions must address themselves as their first priority to the science of effective change if we are to meet the challenge of tomorrow. The United States Supreme Court has addressed itself to . . . the future more effectively than any other agent of our society.[17]

In spite of these and similar paeans of praise for judicial statesmanship, I remain skeptical. Indeed, I want to identify four major perils of judicial statesmanship. First, and most obviously, the Court may decide erroneously. Second, the Court may generate rather than resolve controversy. Third, the Court may forsake its special responsibility to protect individual liberty. Finally, fourth, and most important, the Court may undermine the rule of law. Let me explain each of these perils in detail.

*Peril #1*: Error. The court may decide erroneously. The risk of error inheres in all decision-making, of course; but judges who insist on acting as statesmen run a very high risk of making a mistake. The future is, afterall, notoriously difficult to predict. The Court has certainly shown little gift for accurate prediction. Listen to Justice Miller, writing for the Court in the *Slaughterhouse Cases*:[18] "We doubt very much whether any action of a State not directed by way of discrimination against Negroes as a class, or on account of their race, will ever be held to come within the purview of [the fourteenth amendment]."[19] Listen to Justice Bradley, writing for the Court in *Bradwell v. Illinois*,[20] dubbed the "she-lawyer" case by the press because it involved a woman's complaint that Illinois would not license her to practice law: "The natural and proper timidity and delicacy [of] the female sex evidently unfits [her] for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fill the noble and benign offices of wife and mother."[21]

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17. S.Ervin & R. Clark, Role of the Supreme Court: Policymaker or Adjudication26-27 (1970).

18. Slaughter-House Cases 83 U.S. (16 Wall.) 36 (1873).

19. *Id.* at 81.

20. 83 U.S. (16 Wall.) 130 (1873).

21. *Id.* at 141 (Bradley, J. Concurring).

Although Justices Miller and Bradley were probably the two most able judges on the post-Civil War Court, they badly misread the future—as did Holmes fifty years later when he flippantly dismissed an equal protection claim as "the usual last resort of all constitutional arguments."[22]

There are two specific institutional reasons why a Court which attempts to devise a statesmanlike solution will likely err. One, the Court can't get all the facts which it needs. Two, the Court can't balance competing interests sensitively enough. Appellate courts must accept the facts as found below, and the facts thus found are limited to those deemed relevant to the particular dispute at trial. The Supreme Court may not conduct an independent inquiry into the underlying facts. The Justices themselves are not experts. Briefs are not a substitute for legislative hearings, and clerks are not a substitute for professional staffs.

The Court's decision in *Korematsu v. United States*[23] illustrates how both tradition and procedure prevent the court from getting all the facts which it needs. In that case the plaintiff, an American citizen of Japanese ancestry, challenged the government's right to take him from his home and move him inland to a relocation center. The government contended that wartime conditions required relocation. It feared a Japanese invasion of the West Coast. It feared further that American citizens of Japanese ancestry would aid the invaders. Resolving these competing claims required access to facts not easily acquired. How great was the danger of invasion? Were American citizens of Japanese ancestry likely to commit treason? Could those most likely to commit treason be identified through a brief hearing process? If American citizens had to be detained, were their property and other interests at least protected?

The facts, as we know them today, underscore the Court's error in sustaining the relocation plan.[24] Officials within the government disagreed sharply about the probability of invasion and the likelihood of fifth column sabatoge of Japanese-

22. Buck v. Bell, 274 U.S. 200, 208 (1927).

23. 323 U.S. 214 (1944).

24. *See generally* Rostow, *The Japanese American Cases - A Disaster*, 54 YALE L. J. 489 (1945).

Americans. The Court, however, was never apprised of these disagreements. We do know that the British handled the whole problem efficiently and fairly through an expedited hearing process. As a result most British citizens of German, Italian, or Japanese ancestry lived through the war years like all other British citizens.

Even if the Court could find the facts necessary to make an informed decision, it cannot usually shape that decision to the satisfaction of competing interest groups. Compromise, the hallmark of the legislative process, is not the distinguishing characteristic of the judicial process. In a court, one side loses and one side wins. Moreover, the Court is our least representative public institution. Lawyers all, the Justices are old, successful, well-heeled, and, with one exception to date, men. It strains credulity to believe that such persons would tingle with sensitivity to the needs and aspirations of diverse groups. Indeed, the Justices quite properly reject the notion that they represent particular interest groups. Justice Frankfurter, dissenting in the second flag salute case, said:

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should whole heartedly associate myself with the general libertarian views of the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. . . . 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 cherish them or how mischievous I may deem their disregard.[25]

In short, the Supreme Court conference room is not a third house of Congress, despite the common—and I think unfortunate—habit of referring to a Jewish seat, or the woman's seat, or even, God forgive me, the scholar's seat. Moreover, the bench is not a bully pulpit from which the Chief Justice can summon us to a moral crusade.

*Peril #2*: Divisiveness. The Court's attempt to impose a

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25. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 646-47 (1943) (Frankfurter, J., dissenting).

statesmanlike solution may generate rather than resolve controversy. Again, the nature of the judicial process prevents the Court from dictating any final solution. In the first place, the Court cannot impose comprehensive solutions. In the second place, its imposed solutions do not command the acquiescence given those solutions hammered out in the political process.

For strategic reasons, most plaintiffs raise the narrowest claim possible. Even though the plaintiff's claim may be but part of a far larger problem the Court may usually anwer only plaintiff's claim and cannot address the larger problem. *Plyler v. Doe*,[26] the alien schoolchild case decided last term, illustrates my point. Few problems are as complex as the presence of illegal aliens in this country. Unless we wish to build a 2,000 mile long Berlin Wall along our southern border, we cannot seal off the flood of Mexicans into the Southwest. The police could not mount a serious effort to deport those already illegally present without spending a lot of money and using many questionable enforcement tactics. A successful deportation program would disrupt the Mexican economy, which could not support the newly returned workers, and the economy of those states that have come to depend on the illegal alien for cheap labor. At the same time, many specific burdens of dealing with the illegal alien fall disproportionately on particular communities which have neither the resources nor the power to deal with the larger problem. Understandably, the national government has struggled for years to develop a coherent policy.

Whether the children of aliens illegally present in this country are entitled to attend public schools free is but a small part of the larger problem. In *Plyler*, the Court ordered communities to open their schoolhouse doors to alien children illegally present there. It naturally refused to address the question whether these children were entitled to other community welfare services. It also refused to address the question whether their parents were entitled to all services and benefits extended resident aliens or citizens. In trying to answer only one aspect of the larger problem, the Court may nevertheless have opened a Pandora's Box because the appar-

26. 50 U.S.L.W. 4650 (U.S. June 15, 1982) (No. 80-1538).

ent principle upon which it rested its decision that these children had a right to attend our schools is not easily limited. Whether aliens illegally present in this country should be treated like aliens lawfully present or like citizens is for Congress and Congress alone to say. Whatever may ultimately be said for a policy of treating illegally present aliens like resident aliens, it is, at first blush, an astonishing one. To make it a Constitutional command is even more astonishing.

Because the Court can only deal with problems in a piecemeal manner, it must reconsider the basic problem again and again. We can anticipate one alien case after another as litigants force the Courttodefinethelimitsofthe *Plyler*decision. Consequently, the Court keeps controversy boiling. The Court's school integration decisions illustrate my point from yet another perspective. The Court sank into a quagmire once it moved from its principled position that publicly enforced segregation violated the equal protection clause[27] to its pragmatic position that the equal protection clause required integrated schools.[28] Having decided that schools must be racial microcosms of the larger community, the Court assumed responsibility for insuring that result. Quotas and busing—and controversy—followed. Today in many school districts the local federal judge is the de facto superintendant of schools. He may also be the de facto warden of the prison, the de facto chief of police, and the de facto director of welfare services. By seizing the reins of government in the guise of construing the Constitution, judges embroil courts in endless controversy. And the Supreme Court itself must constantly reassess how stringently or flexibly these Renaissance despots must apply its remedial guidelines.

A court, unlike the legislature, cannot easily put a problem behind it and move on to other concerns. In part, of course, that is because the Court has less control over its docket than Congress has over its legislative agenda. More importantly, the legislature can put a problem behind because it can fashion comprehensive solutions. The Court is much praised for its protection of civil rights. In fact, significant

27. Brown v. Board of Education, 347 U.S. 483 (1954).
28. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

progress was made only after Congress passed the Civil Rights Act and, later, other anti-discrimination legislation. In these acts the Congress could deal with the whole range of discrimination practices and regulate them in relation to each other.[29]

Moreover, legislative acts are durable because they emerge from the extended public debate that characterizes the political process. Although we often become impatient with the political process because it works so slowly, its very slowness guarantees public acceptance of its final decision. If we seek a quick fix from the Court, we will find ourselves, just like the addict, needing yet another fix and another to get us through successive crises. James Bradley Thayer counseled against the ready resort to courts to solve our problems for just that reason. He said:

> [T]he exercise of [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way, and correcting their own errors. . . .
>
> The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.[30]

*Peril #3*: Sacrifice. Judicial statesmen may sacrifice the rights of the individual to promote the common good. This is an especially troubling peril because the Supreme Court's one special function is the protection of individual liberty. Justice Jackson explained:

> The very purpose of a Bill of Rights 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 court. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly . . . may not be submitted to vote; they depend on the outcome

29. *E.g.*, Civil Rights Act of 1968, 18 U.S.C. § 245 (1976).
30. J. THAYER, JOHN MARSHALL 106-07 (1901).

of no elections.[31]

Yet statesmen cannot recognize any right whose enforcement will unduly offend the community or impede the implementation of some much desired policy.

The history of the Court is sadly replete with "statesmanlike" sacrifices of the individual. The most egregious is the *Dred Scott* decision.[32] There the Court, in the naive belief that it could forestall civil war, declared that black men had no rights which white men need respect. *Dred Scott* was hardly the first sacrifice. One can read Marshall's famous opinion in *Marbury v. Madison*,[33] for example, as a callous sacrifice of Marbury's right to his commission. Denying Marbury's claim enabled the Court to assert its power of judicial review in a way not easily challenged by the Jeffersonians, and Marshall seized the opportunity. *Dred Scott* was certainly not the last sacrifice. During World War II, judicial statesmen sustained the confinement of American citizens in relocation centers for no reason other than that those citizens had yellow skin and slanted eyes. Even more recently, judicial statesmen sustained investigative witchhunts into the associational rights of those whose left wing political views made them attractive scapegoats. I would not deny that the Court has occasionally shielded some hapless dissenter from persecution. On the whole, however, I think the Court's record in this respect is exaggerated. Fourth of July oratory cannot conceal the fact that judicial statesmen who decide cases on the basis of pragmatic predictions about what the community will tolerate threaten our civil liberties.

*Peril #4*: Subversion. Far more serious than any of the preceding perils is the last peril of judicial statesmanship: that the Court will subvert the rule of law. The founding fathers understood Lord Acton's dictum: power corrupts, and absolute power corrupts absolutely.[34] Consequently, they realized that liberty would flourish only under a government of laws, where people were controlled by certain, constant, and uni-

31. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. at 638.

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

33. 5 U.S. (1 Cranch) 137 (1803).

34. Letter to Bishop Mandel Creighton (Apr. 5, 1887), *reprinted in* L. ACTON, ESSAYS ON FREEDOM AND POWER 328 (1955).

form laws rather than by the arbitrary, uncertain and inconstant wills of public officials. The rule of law ultimately depends at some point, however, on the rule of men. In our country the rule of law depends upon the ability of life-tenured judges to apply those principles of law embodied in the Constitution fairly and objectively.

Judges who look backward for guidance will more likely apply those principles fairly and objectively than will judges who look forward for inspiration. Of course, the judicial craftsman must guard against his biases and prejudices in the selection and interpretation of those legal principles with which he decides the dispute. But their very rootedness in the Constitution and in our subsequent historical experience greatly reduces the risk that his biases and prejudices will distort his reasoning. On the other hand, the biases and prejudices of the judicial statesman must necessarily influence his decision, for his judgment rests on no fixed moorings but rather on evanescent notions of public policy.

*Roe v. Wade*,[35] the abortion decision, is illustrative. In that case the Court held that states could not generally prohibit abortions. Justice Blackmun, who wrote for the Court, conceded at the outset that people differed deeply about the extent to which abortion should be permitted, if at all, that one's view on the question was influenced by her moral values, and that any resolution of the question necessarily involved judgments about many other related issues. In our system such complicated questions are resolved in the political process, and the courts must respect and enforce any legislative resolution that does not violate the Constitution. It thus should not have surprised any of the Justices that the Constitution provided no guidance on the abortion question because it was never intended to provide such guidance. Legislators who daily decide myriad questions of public policy must look to sources other than the Constitution for guidance. They are free to fashion whatever solution commends itself to their collective judgment as long as the solution does not violate the Constitution.

Instead of concluding that the Court should therefore de-

35. 410 U.S. 113 (1973).

fer to the legislative judgment that a woman could not obtain an abortion except in the most unusual circumstances, Justice Powell allegedly concluded that he would have to vote his "gut."[36] Since he thought that the abortion laws were "atrocious," he would vote to invalidate them if he could find rationale. If the Justice meant only that he would insist on some rationale that might reasonably be derived from Constitutional text, precedent, or history, his position might be defensible. Unfortunately, however, he had already concluded that the search for a Constitutional rationale would be futile. He was, then, looking not so much for a rationale as a rationalization. In other words, he wanted to conceal the real ground of decisions—his personal belief that the abortion laws were atrocious—with some clever legal rhetoric.

It is especially troubling that the Justice who is most consistently described as an apostle of judicial restraint should so easily assume the role of statesman. Elsewhere, of course, Justice Powell has assured us that he understands that judges make law and that the belief that the Constitution and laws cabin his discretion is a quaint myth. The Justice learns quickly. He had initially thought otherwise. In the death penalty cases, Powell thought that the soundness of his legal argument would persuade his colleagues that the Constitution did not forbid capital punishment.[37] But justices who cheerfully embrace the role of statesmen care little about the mere soundness of legal argument. They care only about the result. Thus Justice Marshall, ever alert to the problems of the poor, especially the black poor, objected to an early draft of the abortion opinion which did not make viability the determinative criterion because he feared states could "effectively ban abortions in the [second trimester] under the guise of protecting the woman's health."[38] Marshall apparently believed that the viability test would "better protect the rural poor."[39]

Of course the Justice may have been right as a matter of public policy that the poor should be able to obtain abortions as easily as the rich. Additionally, he may have balanced the

36. B. WOODWARD & S. ARMSTRONG, *supra* note 13, at 230.
37. *Id.* at 212-15.
38. *Id.* at 232.
39. *Id.*

equities so sensitively and fairly that he qualifies as a statesman. The rub is that he took an oath to judge cases according to the Constitution, and one searches its text in vain for an indication that viability is the constitutional test for determining when a state may prohibit abortions. As in *Miranda v. Arizona*,[40] where the Court extrapolated from the guarantee against self-incrimination a detailed code regulating police interrogation of criminal suspects, the Court in *Roe v. Wade* extrapolated from the right to privacy a detailed code regulating abortions. Under this constitutionally dictated scheme, the state may not prohibit abortions during the first trimester. It may regulate them during the second trimester only to protect the mother's health. In the last trimester, it may prohibit them. That the right to privacy is nowhere mentioned in the Constitution does not preclude the Court from recognizing it as one of those ninth amendment rights retained by the people, but it does underscore the obvious fact that the Court would have to demonstrate that the right to privacy embraced the right to abortion on demand. Whether Justice Blackmun's review of historical practices in Rome, Greece, and seventeenth century England proves that line of thought is, to say the least, doubtful. Certain it is that he could not have argued that abortion on demand reflected the evolving traditions of the American people, the standard usually invoked when text and history fail. At the time *Roe v. Wade* was decided, all fifty states prohibited abortions. That fact alone might have given craftsmen some pause, but it would not trouble statesmen who thought that the community would nevertheless accept their decision. Indeed, pragmatic prediction of that kind is part of the statesman's art. Justice Stewart, for one, had allegedly concluded that "[t]he public was ready for abortion reform."[41]

Typically, the Judges do not admit that they act as statesmen rather than craftsmen. With a disingenuousness all too characteristic of the Court's recent work product, Justice Blackmun piously began his *Roe v. Wade* opinion:

> Our task, of course, is to resolve the issue by constitu-

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40. 384 U.S. 436 (1966).

41. B. WOODWARD & S. ARMSTRONG, *supra* note 13, at 167.

> tional measurement, free of emotion and of predilection . . . . We bear in mind, too, Mr. Justice Holmes' admonition [that the Constitution] "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[42]

Contrary to his assertion, Justice Blackmun did not decide the case on the basis of constitutional text, tradition, or principle. The first draft of his opinion "did not settle on any analytical framework [and did not] explain on what basis [he] had arrived at the apparent conclusion that women had a right to privacy, and thus a right to abortion."[43] Whatever their personal reasons for favoring the result (Justice Stewart was said to have concluded that abortion was a reasonable solution to the population problem!),[44] the Justices seized almost as an afterthought upon the conveniently vague right to privacy as a justification for their decision. The but-recently-discovered right had apparently been written into the Constitution in invisible ink discernable only to the eye of judicial statesmen like Justice Douglas, who had first reported discovering it in *Griswold v. Connecticut*.[45] Douglas was pleased that "[t]he right to privacy was being given constitutional foundation in a major opinion."[46] One would have thought that the document rather than the Court gave a particular right its constitutional foundation, but that is perhaps a mere technicality that troubles only judges who take too narrow—*i.e.*, unstatesmanlike—a view of their responsibilities.

In truth, facts rather than constitutional principles or tradition proved decisive. Justice Blackmun, having closeted himself in the library of the Mayo Clinic during the Court's summer recess, decided that abortions could be performed safely. Mr. Justice Powell, who also devoted his summer re-

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42. 410 U.S. 113, 116-17 (1973) (quoting from Lochner v. New York, 198 U.S. 45, 67 (1905) (Holmes, J., dissenting)).

43. B. WOODWARD & S. ARMSTRONG, *supra* note 13, at 183.

44. *Id.* at 167.

45. 381 U.S. 479 (1965).

46. B. WOODWARD & S. ARMSTRONG, *supra* note 13,at 235.

cess to a study of the abortion problem, decided that medically performed abortions were better than "unsanitary butchers and coat-hanger abortions."[47] Both conclusions seem eminently reasonable, but the question the Justices never seemed to have asked themselves was whether those facts were constitutionally relevant. While such facts might well convince a legislature to adopt an abortion statute much like the one imposed by the Court, they do not by themselves establish the existence of a constitutional right to abortion. The Court simply cannot assume that its conception of sound social policy is embodied in the Constitution.

That almost all Justices have acted, at least on occasion, as statesmen does not justify the practice, though it may be thought to render any protest against the practice futile, if not naive. If the Justice's perception of his role affects the way in which he decides cases, however, the protest is neither futile nor naive. A Justice who believes that he is obliged to decide cases in conformity with the Constitution will often reach a different result from a Justice who believes that he is free to decide cases in conformity with prevailing notions of sound public policy. A Judge who sees his job as the resolution of the dispute before him will often reach a different result from the Judge who sees his job as the resolution of some broader societal problem.

However much statesmen may be needed in public life, a Justice who faithfully discharges his responsibilities cannot satisfy that need. Courts were designed to serve very important but narrow purposes. The Framers expected the Supreme Court occasionally to apply the brakes to public action. A Court that says "no" to us makes us give our conduct a sober second thought. Such a Court acts as our conscience. The Framers never expected the Court to spur public action. A Court that tells us "you must" leaves us no choice. Such a Court acts as a council of Platonic Guardians.

Like the late Judge Hand, I would not choose to be governed by a bevy of Platonic Guardians even if I knew how to choose them. I certainly would not leave their choice to the likes of Johnson, Nixon, Carter, or Reagan. The present Court

47. *Id.* at 230.

may not consider itself a council of Platonic Guardians. But its Justices do see themselves as statesmen. The prospect is thus not bright that the present Court will help maintain here what has so rarely survived anywhere—a government of laws rather than of men. For they have done what 'tis not fit for any judge to do. They have imposed the statesman's will rather than exercised the craftsman's reason.