LOUIS FISHER

Constitutional Dialogues

Interpretation as Political Process

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Constitutional Dialogues

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Interpretation as Political Process

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To Herman C. Pritchett,
for enriching and gracing
the lives of students and friends

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Constitutional Dialogues

Introduction

The purpose of this book is to show that constitutional law is not a monopoly of the judiciary. It is a process in which all three branches converge and interact with their separate interpretations. Important contributions also come from the states and the general public.

The theme itself is not new. In *The Least Dangerous Branch* (1962), Alexander Bickel said that the courts find themselves engaged in a "continuing colloquy" with political institutions and society at large, a process in which constitutional principle is "evolved conversationally not perfected unilaterally." Recent studies by John Agresto, Sotirios Barber, and Walter Murphy emphasize the contributions by institutions outside the courts.[1] In previous works, I have explored this larger framework of constitutional law.[2]

This book demonstrates, with very concrete examples, the kind of colloquy Bickel had in mind. Constitutional law is a complicated, subtle process—far removed from the simple and beguiling model of the Supreme Court issuing the "final word." Most of my illustrations come directly from the judiciary, either from caselaw or the outside writings of judges. In its more candid moments, if the reader will take the time to tease out the underlying message, the Court readily acknowledges that it is not the sole agency in deciding constitutional questions.

Unfortunately, most of the major textbooks on constitutional law promote the idea of judicial supremacy. The subject is treated as the discipline of interpreting the text of a document and the gloss placed

[1]John Agresto, The Supreme Court and Constitutional Democracy (1984); Sotirios Barber, On What the Constitution Means (1984); Walter F Murphy, "Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter," 48 Rev. Pol. 401 (1986).

[2]Constitutional Conflicts between Congress and the President (1985); "Constitutional Interpretation by Members of Congress," 63 N.C. L. Rev. 707 (1985); "Congress and the Fourth Amendment," 21 Ga. L. Rev. 107 (1986); "Social Influences on Constitutional Law," 15 J. Pol. Sci. 7 (1987).

upon it by judicial rulings. In a provocative comment, Professor Michael Reisman recently described the method used in law schools:

> Constitutional law in American law schools is identified as the work of the Supreme Court in supervising the discharge of what is decided are the "constitutional functions" performed by all other authorized agencies in the national community. But the Constitution is not a document; it is an institution, as Llewellyn put it. As such, it involves a process in which many other formal and informal, authoritative and functional actors participate. These, alas, are never studied under the rubric of constitutional law. In this respect, there is no comprehensive course on constitutional law in any meaningful sense in American law schools.[3]

The intersections between law and politics are given inadequate attention for a number of reasons. In part we want to believe that law is unsullied by politics, despite rather abundant information that comes to us year after year demonstrating beyond doubt various linkages and interactions. We remain of two minds. As Robert Dahl noted three decades ago, Americans are not quite willing to accept the fact that the Supreme Court "*is* a political institution and not quite capable of denying it; so that frequently we take both positions at once. This is confusing to foreigners, amusing to logicians, and rewarding to ordinary Americans who thus manage to retain the best of both worlds."[4]

A purely technical approach to the law misses the constant, creative interplay between the judiciary and the political system. Adjudication is one of many methods in government for resolving politi-

[3]W. Michael Reisman, "International Incidents: Introduction to a New Genre in the Study of International Law," 10 Yale J. Int'l L. 1, 8 n.13 (1984). A few legal textbooks include sections on congressional and presidential participation: Paul Brest, Processes of Constitutional Decisionmaking 15–31 (1975), and Gerald Gunther, Constitutional Law 21–29 (11th ed. 1985). The section in Brest is omitted from his second edition, coauthored in 1983 with Sanford Levinson, but the second edition devotes an entire chapter to the allocation of constitutional decisionmaking authority between Congress and the judiciary (pp. 903–1015). See also Laurence H. Tribe, American Constitutional Law (1978). Tribe does not regard the rulings of the Supreme Court "as synonymous with constitutional truth" (p. iv) and he recognizes a process "which on various occasions gives the Supreme Court, Congress, the President, or the states, the last word in constitutional debate."

[4]Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," 6 J. Pub. L. 279 (1957). Emphasis in original.

cal conflict. Private individuals and public agencies, joined by a growing number of interest groups, come before the courts to settle their disputes. These cases may begin as a personal grievance, but they contain issues of broad sociopolitical dimensions. Basic questions of political philosophy and individual rights are at stake, requiring a dialogue not just among jurists but among all sectors of society.

The customary identification of the Supreme Court as the exclusive source of constitutional law is far too limiting. The Supreme Court is not the sole or even dominant agency in deciding constitutional questions. Congress and the President have an obligation to decide constitutional questions. For members of Congress to shy away from these issues, claiming that the Court must make the ultimate determination, is tempting but irresponsible. Constitutional issues generally turn not so much on technical legal analysis of particular provisions but rather on a choice between competing sections that contain conflicting political and social values. The Court needs the conscientious guidance and participation of the legislative and executive branches. Equally important are the judgments of state courts and the general public.

The Constitution undergoes constant interpretation and reinterpretation by legislators and executive officials. Constitutional questions are considered when Congress debates legislation and when Presidents decide to sign or veto bills presented to them. The Attorney General and the Comptroller General analyze (and resolve) many constitutional questions, as do general counsels in the agencies. Actions by the political branches, over the course of years, help determine the direction and result of a Supreme Court decision. Often constitutional issues are hammered out without the need for litigation.

Charles Evans Hughes, in a widely quoted epigram, said that "We are under the Constitution, but the Constitution is what the judges say it is."[5] The Supreme Court nevertheless recognizes that each branch of government, in the performance of its duties, must initially interpret the Constitution.[6] Those interpretations are given great weight by the Court; sometimes they are the controlling factor.[7] When courts

[5]Charles Evans Hughes, Addresses and Papers 139 (1908).

[6]United States v. Nixon, 418 U.S. 683, 703 (1974).

[7]Rostker v. Goldberg, 453 U.S. 57 (1981), concerning male-only registration for military service.

decide to duck a case by using threshold devices of standing and other techniques, the political branches have the first and last word on constitutional issues. Indeed, they have the only word.

To explain the process that shapes our fundamental law, this book is divided into seven chapters. The contributions of Congress and the President must be placed within a broad setting, for all three branches are constantly buffeted by political, historical, and social forces. Just as it is a mistake to study constitutional law solely from the standpoint of court decisions, so would it be misleading to treat constitutional interpretation as simply the interactions between the judiciary and the other branches. Government operates within a political culture that presses its own brand of constitutional law.

Chapter One lays the groundwork for this broad context. It covers litigation as a political process, the intervention of interest groups, the Executive's role in court, congressional duties, and the judge as lawmaker and administrator. A number of institutional questions are addressed. To what extent does the Solicitor General divide his duties between the President and the judiciary? How are the House and the Senate organized to protect the interests of Congress? How do Congress and the President fit into the complex picture of institutional and interest-group pressures?

Chapter Two examines the doctrine of judicial review. Unless we understand the unsettled nature of the Court's authority to review actions by other branches, we are unable to see why the door is deliberately left open for congressional and executive participation. It is one thing to concede the Supreme Court's duty to review state actions but quite another to accept judicial review of coordinate bodies, Congress and the President. Important constraints operate on the second type of judicial review; this reality allows the executive and legislative branches to authoritatively advance their own doctrines of constitutional law.

Because of the shaky foundation of judicial review, the Court consciously circumscribes its activities and invites other branches to participate. Chapter Three analyzes the threshold requirements used by the Court to restrain its power: the case-or-controversy test, standing, mootness, ripeness, and political questions. The courts employ these thresholds to minimize collisions with the other branches of government. A number of issues never reach the courts because of these self-limiting conditions imposed by judges. This spirit of give-

and-take and mutual respect allows an unelected Court to function and survive in a democratic society.

Thresholds raise important questions. How much can Congress determine who has standing to sue without encroaching on the judiciary's right to decide what is a case or controversy? How do courts issue "advisory opinions" that telegraph helpful hints to legislatures? How did Congress, by authorizing declaratory judgments, supply the Court with a middle ground between the previous rule on case or controversy and the forbidden advisory opinion? When does the Court invoke issues of ripeness because Congress is unwilling to challenge presidential actions?

To appreciate other connections between the judiciary and the political branches, Chapter Four examines questions of judicial organization: how Congress set up the court system, how Congress created "legislative courts" that in time became full-fledged constitutional courts, and how the Senate and the House are involved in appointments to the courts. In addition to appointments, Congress also handles the sensitive matter of removing or disciplining federal judges by working through the judicial councils, which are themselves creatures of Congress. Other aspects of organization concern congressional determinations of judicial compensation and how the courts lobby Congress.

Constitutional dialogues include the decisionmaking process within the courts. Chapter Five covers the mechanics of how the judiciary reaches a decision, the boundaries of jurisdiction for courts, and the choice between striving for unanimity or allowing concurrences and dissents. Unanimity is often important to assure compliance with controversial rulings, as in the desegregation case of 1954 and the Watergate tapes case of 1974. Concurrences and dissents permit the courts to ventilate disagreements and prepare the way for future adjustments of judicial doctrines. Chapter Five concludes with a discussion on the role of the lower courts.

Chapter Six analyzes the methods used by Congress and the President to curb the judiciary when it overreaches or is out of step with political sentiments. By using the amendment process to reverse judicial decisions, overturning decisions that concern statutory construction, resorting to court packing, and threatening to withdraw jurisdiction, the political branches are able to keep the judiciary within bounds. Moreover, when the Supreme Court decides a question, its

ruling must be translated into action by lower courts, executive agencies, Congress, and local government. Those bodies can avoid compliance through a variety of more or less subtle means. Compliance is often made difficult because of ambiguities in the Court's decision, producing broad choices of interpretation and implementation.

The final chapter on coordinate construction examines specific instances in which the three branches shape constitutional law. In some cases Congress and the President take the initiative in determining the meaning of a constitutional provision. Congressional and executive practices over a number of years can be instrumental in fixing the meaning of the Constitution. If their actions are challenged in the judicial arena, courts may affirm or invalidate, but even in the latter case the colloquy between the branches continues. Congress can rewrite the statute, preparing it for another round of litigation, or may decide to present essentially the same statute in later years to a court with a changed composition. At times the judiciary invites Congress to pass legislation that challenges previous decisions. Judicial rulings rest undisturbed only to the extent that Congress, the President, and the general public find the decisions convincing, reasonable, and acceptable. Otherwise, the debate goes on.

Preoccupation with the Supreme Court as the principal and final arbiter of constitutional questions fosters a misleading impression. A dominant business of the Court is statutory construction, and through that function it interacts with other branches of government in a process that refines the meaning of the Constitution. Judges share with the Legislature and the Executive the duty of defining political values, resolving political conflict, and protecting the integrity and effectiveness of the political process. Constitutional law is a process that operates both inside and outside the judicial arena, challenging the judgment and conscience of all three political branches at the national level, the state governments, and the public at large.

1. Public Law and Politics

For those who teach constitutional law, the relationship between the judiciary and politics remains an awkward topic. Technical details of a decision have a way of driving out the political events that generate a case and influence its disposition. To infuse law with dignity, majesty, and perhaps a touch of mystery, it is tempting to separate the courts from the rest of government and make unrealistic claims of judicial independence.

Legal scholars who explored this relationship early in the twentieth century were discouraged by traditional leaders of the legal profession. To speak the truth, or even search for it, threatened judicial symbols and concepts of long standing. In 1914, when Morris Raphael Cohen began describing how judges make law, he encountered strong objections from his colleagues. The deans of major law schools advised him that his findings, although unquestionably correct, might invite even greater recourse to "judicial legislation."

Undeterred by these warnings, Cohen had "an abiding conviction that to recognize the truth and adjust oneself to it is in the end the easiest and most advisable course." He denied that the law is a "closed, independent system having nothing to do with economic, political, social, or philosophical science." If courts were in fact constantly making and remaking the law, it became "of the utmost social importance that the law should be made in accordance with the best available information, which it is the object of science to supply."[1]

For more than a century, the legal profession claimed that judges "found" the law rather than made it. This doctrine of mechanical jurisprudence, joined with the supposed nonpolitical nature of the judiciary, provided convenient reasons for separating courts from the rest of government. In a perceptive essay, C. Herman Pritchett noted that the disciplines of law and political science drifted apart for semantic, philosophical, and practical reasons: "Law is a presti-

[1]Morris R. Cohen, Law and the Social Order 380–81 n.86 (1933).

gious symbol, whereas politics tends to be a dirty word. Law is stability; politics is chaos. Law is impersonal; politics is personal. Law is given; politics is free choice. Law is reason; politics is prejudice and self-interest. Law is justice; politics is who gets there first with the most."[2]

Chief Justice Warren believed that law could be distinguished from politics. Progress in politics "could be made and most often was made by compromising and taking half a loaf where a whole loaf could not be obtained." He insisted that the "opposite is true so far as the judicial process was concerned." Through the judicial process, "and particularly in the Supreme Court, the basic ingredient of decision is principle, and it should not be compromised and parceled out a little in one case, a little more in another, until eventually someone receives the full benefit."[3]

Yet the piecemeal approach fits the judicial process quite well. The Supreme Court prefers to avoid general rules that exceed the necessities of a particular case. Especially in the realm of constitutional law it recognizes the "embarrassment which is likely to result from an alleged attempt to formulate rules or decide questions beyond the necessities of the immediate issue." The Court prefers to follow a "gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted."[4]

Compromise, expediency, and ad hoc action are no less a part of the process by which a multimember court gropes incrementally toward a consensus and decision. The desegregation case of 1954 was preceded by two decades of halting progress toward the eventual abandonment of the "separate but equal" doctrine enunciated in 1896. After he left the Court, Potter Stewart reflected on the decision to exclude from the courtroom evidence that had been illegally seized: "Looking back, the exclusionary rule seems a bit jerry-built—like a roller coaster track constructed while the roller coaster sped along. Each new piece of track was attached hastily and imperfectly to the one before it, just in time to prevent the roller coaster from crashing,

[2]C. Herman Pritchett, "The Development of Judicial Research," in Joel B. Grossman and Joseph Tanenhaus, eds., Frontiers of Judicial Research 31 (1969).

[3]Earl Warren, The Memoirs of Earl Warren 6 (1977).

[4]Euclid v. Ambler Co., 272 U.S. 365, 397 (1926).

but without an opportunity to measure the curves and dips preceding it or to contemplate the twists and turns that inevitably lay ahead."[5]

The desegregation case plunged the Court into a political maelstrom that pitted blacks against whites, the North against the South, and states righters against advocates of national action. Justice Jackson, viewing the briefs as sociology rather than law, was reluctant to rule segregation as unconstitutional. When he finally decided to join the majority, he said that the case was basically a question of politics: "I don't know how to justify the abolition of segregation as a judicial act. Our problem is to make a judicial decision out of a political conclusion. . . ."[6]

The Social Environment

Constitutions do not govern by text alone, even as interpreted by a supreme body of judges. Constitutions draw their life from forces outside the law: from ideas, customs, society, and the constant dialogue among political institutions. In *South Carolina* v. *United States* (1905), the Supreme Court stated that the Constitution "is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now." Having announced the conventional formula, the Court immediately noted: "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."[7]

Just as the Supreme Court leaves its mark on American society, so do social forces influence constitutional law. The Court, regarded as a nonpolitical and independent branch of government, is very much a product of its times. Justice Cardozo remarked that the "great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by."[8] Courts are obviously buffeted by social pressures. To what extent is difficult to say. We see the final

[5]Potter Stewart, "The Road to Mapp v. Ohio and Beyond. The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases," 83 Colum. L. Rev. 1366 (1983).

[6]Bernard Schwartz, Super Chief 89 (1983).

[7]199 U.S. 437, 448 (1905).

[8]Benjamin N. Cardozo, The Nature of the Judicial Process 168 (1921).

result in a decision but must speculate how the court got there. The link between social cause and judicial effect cannot be measured with scientific accuracy, or anything approaching it, but we can make reasonable and informed judgments about social influences on constitutional law.

For their own institutional protection, courts must take account of social movements and public opinion. It is too flippant to accept Mr. Dooley's pronouncement that the Supreme Court follows the election returns, but careful studies by Robert Dahl, David Adamany, and Richard Funston show that the Court generally stays within the political boundaries of its times.[9] When it strays outside and opposes the policy of elected leaders, it does so at substantial risk to its legitimacy and effectiveness. The Court maintains its strength by steering a course that fits within the permissible limits of public opinion. This reality does not make it a political body in the same sense as Congress and the President, but pragmatism and statesmanship must temper abstract legal analysis. De Tocqueville noted in the 1840s that the power of the Supreme Court "is enormous, but it is the power of public opinion. They are all-powerful as long as the people respect the law; but they would be impotent against popular neglect or contempt of the law." Federal judges, he said, "must be statesmen, wise to discern the signs of the times, not afraid to brave the obstacles that can be subdued, nor slow to turn away from the current when it threatens to sweep them off. . . ."[10]

The responsiveness of courts to the social community is even more immediate at the local level. District courts reflect public opinion on such matters as civil rights, labor relations, and sentencing of Vietnam resisters.[11] A conference of federal judges in 1961 agreed that public opinion "should not materially affect sentences" and that the judiciary "must stand firm against undue public opinion." Note that the courts are to resist only *undue* public opinion. The judges cau-

[9]Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-maker," 6 J. Pub. L. 279 (1957); David Adamany, "Legitimacy, Realigning Elections, and the Supreme Court," 1973 Wisc. L. Rev. 790 (1973); Richard Funston, "The Supreme Court and Critical Elections," 69 Am. Pol. Sci. Rev. 795 (1975).

[10]Alexis de Tocqueville, Democracy in America (Bradley ed.) Vol. 1, pp. 151–52.

[11]E.g., Dianne Bennett Graebner, "Judicial Activity and Public Attitude: A Quantitative Study of Selective Service Sentencing in the Vietnam War Period," 23 Buff. L. Rev. 465 (1974); Beverly B. Cook, "Public Opinion and Federal Judicial Policy," 21 Am J. Pol. Sci. 567 (1977); Herbert M. Kritzer, "Federal Judges and Their Political Environments: The Influence of Public Opinion," 23 Am J. Pol. Sci. 194 (1979); Beverly B. Cook, "Judicial Policy: Change Over Time," 23 Am. J. Pol. Sci. 208 (1979).

tioned that resistance to public opinion "should not mean that the community's attitude must be completely ignored in sentencing; although judges should be leaders of public opinion, they must never get so far out in front that the public loses sight of them."[12]

Social forces affect the process by which the courts function. In such areas as civil rights, sex discrimination, church and state, and criminal procedure, the Supreme Court moves with a series of half steps, disposing of the particular issue at hand while preparing for the next case. Through installments it lays the groundwork for a more comprehensive solution, always sensitive to the response of society and the institutions of government that must enforce judicial rulings. This social and political framework sets the boundaries for judicial activity and helps influence the substance of specific decisions—if not immediately, then within a few years.

By recognizing the force of social movements and public opinion, do we reduce the judiciary to just another political body responding to majoritarian pressures? Not necessarily. If the Court succumbs to social needs in such areas as economic regulation, so are there examples—school prayer, school busing, abortion—where the Court can be steadfast in the teeth of intense opposition. In one of the most majestic paragraphs in Supreme Court history, Justice Jackson in 1943 struck down a mandatory flag salute and declared that 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 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."[13]

Nonetheless, constitutional rights depend to a substantial extent on contemporary standards and majority opinion. Jackson could write what he did in 1943 partly because Frankfurter's decision in 1940, upholding a mandatory flag salute, had aroused almost uniform opposition throughout the country.[14] Frankfurter, writing for an 8-to-1 Court, concluded that states could force children of Jehovah's Wit-

[12]35 F.R.D. 398 (1964).

[13]West Virginia Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

[14]For reference to critical responses to Minersville School District v. Gobitis, 310 U.S. 586 (1940), see West Virginia Board of Education v. Barnette, 319 U.S. at 635 n.15.

nesses to salute the flag in grade school exercises. The Witnesses claimed that saluting a secular symbol violated their religious beliefs. In examining the response to the 1940 decision, one study was unable "to locate a single clearly approving statement in any of the accessible law reviews."[15] Newspapers and weeklies were virtually unanimous in denouncing the decision.[16] This same study explains the 1940 decision as a reaction to the war hysteria that developed after the German army raced across northern France and fears mounted of a "Fifth Column" developing within the United States. After these fears subsided and the country regained respect for religious freedom, the changed climate allowed the Court to reverse itself in 1943.

On such subjects as obscenity, law enforcement, and the death penalty, the Supreme Court attempts to determine "contemporary standards" and "evolving standards of decency."[17] Justice Frankfurter, in a death penalty case, felt obliged to follow "that consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution."[18] When legislatures passed death sentences for certain crimes, jurors often refused to return guilty verdicts. This response forced legislatures to permit discretionary jury sentencing.[19]

To say that constitutional rights merely reflect contemporary values would be misleading. If that were the case, we could dispense with the Constitution and simply legislate all constitutional questions. The Constitution is revered because it represents enduring values and a consensus of broad moral and political ideas. The fundamental principle that people cannot be governed without their consent created an inherent conflict between the Declaration of Independence and the Constitution, which sanctioned, at least for a time, the institution of slavery. This basic incompatibility between natural rights and the Constitution had to be redressed, if not by the courts and Congress then by civil war.

[15]Francis H. Heller, "A Turning Point for Religious Liberty," 29 Va. L Rev. 440, 451 (1943).

[16]Id. at 452–53.

[17]Woodson v. North Carolina, 428 U.S. 280, 288, 293 (1976) (death penalty). See also Miller v. California, 413 U.S. 15, 30 (1973) (obscenity) and Rochin v. California, 342 U.S. 165, 169, 173 (1952) (law enforcement).

[18]Francis v. Resweber, 329 U.S. 459, 471 (1947).

[19]McGautha v. California, 402 U.S. 183, 198–203 (1971).

Two cases in 1986 illustrate the Court's sensitivity to social attitudes. *California* v. *Ciraolo* concerned flights by police officers over a backyard to discover marijuana plants. The Court claimed that the grower's "expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor."[20] How the Court divined society's judgment it declined to say. In *Bowers* v. *Hardwick,* the Court by a 5-to-4 margin upheld a state law that made consensual sodomy among homosexuals a criminal offense. The Court rejected the argument that the law should be struck down because it merely reflects the "presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable." The Court noted that the law "is constantly based on notions of morality."[21] Justice Stevens, dissenting, pointed out that the fact the majority in Georgia views sodomy as immoral "is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."[22]

Constitutional law is constantly shaped by people operating through the executive and legislative branches. Through this rich and dynamic political process, the Constitution is regularly adapted to seek a harmony between legal principles and the needs of a changing society.

Litigation as a Political Process

The decision of many political scientists in recent decades to ignore the substance of Supreme Court opinions came at a most peculiar time. The Supreme Court had moved from narrow nineteenth-century questions of private law (estates, trusts, admiralty, real property, contracts, and commercial law) to contemporary issues of public law (federal regulation, criminal law, immigration, equal protection, and federal taxation).[23] The period after World War II is generally considered a high-water mark in judicial policymaking. Decisions with

[20]106 S.Ct. 1809, 1813 (1986).

[21]Id. at 2841, 2846.

[22]Id. at 2857.

[23]Felix Frankfurter, "The Supreme Court in the Mirror of Justices," 105 U. Pa. L. Rev. 781, 792–93 (1957).

nationwide impact were handed down, affecting desegregation in 1954, reapportionment and school prayers in 1962, criminal justice in the 1960s, and abortion in 1973.

Although members of Congress complain about "judicial activism," they do their part to encourage judicial policymaking. Congress passes statutes that give standing to litigants, provides fees for attorneys, and establishes separate agencies (such as the Legal Services Corporation) to bring suit on broad public issues. Class-action suits open the doors of the courts even wider. Instead of merely resolving private disputes between private individuals, courts develop and articulate public values on major social, economic, and political questions. Their decisions are increasingly prospective rather than retrospective. Judges become active participants in negotiating a resolution and maintain their involvement after issuing an initial decree.[24] This activist role by the courts has been criticized by those who believe that federal judges lack both the legitimacy and the capacity to decide questions of broad social policy.[25]

Justices of the Supreme Court have encouraged the belief that a gulf does indeed separate law from politics. Chief Justice John Marshall, in *Marbury* v. *Madison* (1803), insisted that "Questions in their nature political . . . can never be made in this court."[26] In that very same decision, however, he established a precedent of far-reaching political importance: the right of the judiciary to review and overturn the actions of Congress and the Executive. As noted by one scholar, Marshall "more closely associated the art of judging with the positive qualities of impartiality and disinterestedness, and yet he had made his office a vehicle for the expression of his views about the proper foundations of American government."[27]

During his days as law school professor, Felix Frankfurter referred to constitutional law as "applied politics."[28] "The simple truth of the matter," he said, "is that decisions of the Court denying or sanctioning the exercise of federal power, as in the first child labor case, largely involve a judgment about practical matters, and not at all any

[24]Abram Chaves, "Public Law Litigation and the Burger Court," 96 Harv. L. Rev. 4 (1982).

[25]Donald L. Horowitz, The Courts and Social Policy (1977).

[26]5 U.S. (1 Cr.) 137, 170.

[27]G. Edward White, The American Judicial Tradition 35 (1976).

[28]Felix Frankfurter, "The Zeitgeist and the Judiciary," a 1912 address reprinted in Archibald MacLeish and E. F. Prichard, eds., Law and Politics 6 (1962).

esoteric knowledge of the Constitution."[29] He regarded courts as "less than ever technical expounders of technical provisions of the Constitution. They are arbiters of the economic and social life of vast regions and at times of the whole country."[30]

Once on the bench, however, he did his part to perpetuate the law–politics dichotomy. Refusing to take a reapportionment case in 1946, he said it was "hostile to a democratic system to involve the judiciary in the politics of the people."[31] In 1962 the Supreme Court liberated itself from this narrow holding[32] and has demonstrated throughout its history a keen sense of the political system in which it operates daily. Writing in 1921, Justice Cardozo dismissed the idea that judges "stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do."[33] Although the Supreme Court is an independent branch, it is subject to the same social winds that press upon the executive and legislative branches, even if it does not respond in precisely the same way. It does not, and cannot, operate in a vacuum.

From the late nineteenth century to the 1930s, the courts struck down a number of federal and state efforts to ameliorate industrial conditions. Laws that established maximum hours or minimum wages were declared an unconstitutional interference with the "liberty of contract." Lawyers from the corporate sector helped translate the philosophy of laissez-faire into legal terms and constitutional doctrine.[34] These judicial rulings were so spiced with conservative business attitudes that Justice Holmes in *Lochner* (1904) protested that the case was "decided upon an economic theory which a large part of the country does not entertain." He chided his brethren: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[35] When it was evident that the country would no longer tolerate interference by the courts, the judiciary backed off. After retiring from the Court, Justice Roberts commented on the expansion of national power over economic conditions: "Looking back, it

[29]Id. at 12 (1924 unsigned editorial on "The Red Terror of Judicial Reform").

[30]Felix Frankfurter and James M. Landis, The Business of the Supreme Court 173 (1928). Footnote omitted.

[31]Colegrove v. Green, 328 U.S. 549, 553–54 (1946).

[32]Baker v. Carr, 369 U.S. 186 (1962).

[33]Cardozo, The Nature of the Judicial Process 168.

[34]Benjamin R. Twiss, Lawyers and the Constitution (1942).

[35]Lochner v. New York, 198 U.S. 45, 75 (1904).

is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy."[36]

In *Buck* v. *Bell* (1927), the Supreme Court upheld Virginia's compulsory sterilization law.[37] The decision was handed down in the midst of the eugenics movement, which sanctioned efforts to prevent reproduction of the "unfit." In the hands of reformers and progressives, eugenics became a respected argument for opposing miscegenation and excluding "lower stock" immigrants from the Mediterranean countries, Eastern Europe, and Russia.[38] After odious efforts in Nazi Germany to conduct biological experiments and exterminate millions of Jews, Poles, gypsies, and other groups to produce a "master race," the eugenics movement had run its course.

A combination of racism in totalitarian countries and the emergence of the United States as a world leader after World War II helped set the stage for the desegregation decision of 1954. America could not fight world communism and appeal to dark-skinned peoples in foreign lands if it maintained racial segregation in its own school system. The executive branch made the Court mindful of these realities. The federal government prepared an amicus brief that explained in great detail the harmful effects of American segregation on the foreign policy of the executive branch. Racial discrimination within the District of Columbia, the nation's capital, operated in full view of foreign officials, who were often mistaken for American blacks and refused food, lodging, and entertainment. The problem of racial discrimination, said the brief, had to be viewed within the context of the world struggle between freedom and tyranny: "Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith."[39]

On the foundation of court cases that established rights for black Americans, the feminist movement pressed for fundamental changes

[36]Owen J. Roberts, The Court and the Constitution 61 (1951).

[37]274 U.S. 200 (1927).

[38]Louis Fisher, "Social Influences on Constitutional Law," 15 J. Pol Sci 7, 11–15 (1987); Clement E. Vose, Constitutional Change: Amendment Politics and Supreme Court Litigation Since 1900 5–20 (1972). *Buck* was substantially weakened by Skinner v. Oklahoma, 316 U.S. 535 (1942).

[39]49 P. Kurland and G. Casper, eds., Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 121 (1975).

in women's rights. From the stereotype in *Bradwell* v. *State* (1873), which viewed women as too timid and delicate for work outside the home,[40] women made important gains in occupations and professions. Statutory protections came in the form of the Equal Pay Act of 1963 and the Civil Rights Act of 1964, which prohibited discrimination based on sex and created the Equal Employment Opportunity Commission to investigate cases of discrimination. The Equal Rights Amendment passed Congress by overwhelming margins, but the Supreme Court's abortion decision in 1973 split the women's movement and polarized the country, making ratification of the amendment impossible. Throughout the 1970s, however, it appeared that most of the goals of the amendment could be accomplished by legislative action and judicial decisions.[41]

To associate litigation with social forces is not meant to demean the courts or reduce adjudication to just another form of politics. Judges make policy, but not in the same manner as legislators and executives. Unlike the elected branches, the judiciary is not expected to satisfy the needs of the majority or respond to electoral pressures; instead, it has a special responsibility to protect minority interests and constitutional rights. Although judges have an opportunity to engage in their own form of lobbying, they are not supposed to debate a pending issue publicly or participate in *ex parte* meetings that are open to only one party—privileges routinely exercised by legislators and administrators. Most lobbying by the executive and legislative branches is open and direct; lobbying by the judiciary is filtered through legal briefs, professional meetings, and law review articles.

The executive and legislative branches have elaborate mechanisms for handling public relations, self-promotion, and contacts with the press. For the most part, judges release their opinions and remain silent. If executive officials and legislators are criticized in the press, they can respond in kind. Judges, with rare exceptions, take their lumps without retaliation.

Judges must wait for a case to present itself. They cannot initiate policy with the same ease as members of the political branches. As Judge David Bazelon once remarked, a federal judge "can't wake up one morning and simply decide to give a helpful little push to a

[40]Bradwell v. State, 16 Wall. (83 U.S.) 130 (1873).

[41]Gilbert Y. Steiner, Constitutional Inequality: The Political Fortunes of the Equal Rights Amendment (1985); Jane J. Mansbridge, Why We Lost the ERA (1986).

school system, a mental hospital, or the local housing agency."[42] Furthermore, judges cannot be as willful as legislators and executives. They are expected to base their decisions on reason and precedent. Courts may overrule themselves, and frequently do, but they must explain (or attempt to explain) why it is necessary to break with a prior holding.

Even so, the operations of the judiciary are often difficult to distinguish from Congress and the Executive. In reviewing the work of federal courts in tax matters, Judge Charles E. Wyzanski witnessed the constant interaction between the judiciary and Congress. The disputes generally were "not about a fundamental value but about the choice of insistent interests or pressing policies to be preferred. In short, here again we have an emphasis on those aspects of the law which relate to bargain and compromise, not to 'absolutes' and not even to principles or 'standards.' "[43]

The operations of the political branches can resemble those of the courts. Although responsive to majoritarian pressures, Congress and the President are sensitive to minority rights. Since the days of President Franklin D. Roosevelt, executive orders and congressional statutes have advanced the cause of civil rights. Although the political branches are more at liberty to engage in ad hoc actions, they usually follow general principles and precedents of their own and feel an obligation to present a reasoned explanation for their decisions.

Lobbying the Courts

Private organizations do not hesitate to treat litigation as a political process. They regularly conclude that their interests will be better served through court action than through the legislative and executive branches. Many of the major labor-management struggles were fought out in the courts, with unions and employers hiring counsel to represent their interests. In 1963 Justice Brennan called litigation "a form of political expression." Groups unable to achieve their objectives through the electoral process often turn to the judiciary: "under the conditions of modern government, litigation may well be the

[42]David L. Bazelon, "The Impact of the Courts on Public Administration," 52 Ind. L. J. 101, 103 (1976).

[43]Charles E. Wyzanski, Jr., "History and Law," 26 U. Chi. L. Rev. 237, 242 (1959).

sole practicable avenue open to a minority to petition for redress of grievances."[44] For groups such as the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU), litigation is not merely a technique for resolving private differences. It is a form of political expression and association.[45]

The use of litigation in the 1940s and 1950s to shape social policy led to broader public participation and produced fundamental changes in the amicus curiae (friend of the court) brief. Originally such briefs permitted third parties, without any direct interest in the case, to bring certain facts to the attention of the court to avoid judicial error. Over the years it lost this innocent quality and became an instrument used by private groups to advance their cause. The amicus curiae brief moved "from neutrality to partisanship, from friendship to advocacy."[46] The briefs are now regularly used as part of the interest-group struggle in the courts.

The number of amicus briefs increased so rapidly that the Supreme Court adopted a rule in November 1949 to discourage their filing. With the exception of government units, all parties must consent to the filing of an amicus brief. If a party objects, the applicant must submit to the Court a motion for leave to file.[47] The value of an amicus brief is sometimes sharply questioned by Justices. In a 1947 case, Justice Jackson noted that an amicus brief filed by the American Newspaper Publishers Association failed to cite "a single authority that was not available to counsel for the publisher involved, and does not tell us a single new fact" except the large number of publishers who belonged to the association. Objecting to this kind of lobbying, Jackson thought that the case "might be a good occasion to demonstrate the fortitude of the judiciary."[48]

The political nature of litigation is underscored by many familiar

[44]NAACP v. Button, 371 U.S. 415, 429–30 (1963). See also United Transportation Union v. Michigan Bar, 401 U.S. 576, 585–86 (1971).

[45]In re Primus, 436 U.S. 412, 428 (1978).

[46]Samuel Krislov, "The Amicus Curiae Brief: From Friendship to Advocacy," 72 Yale L. J. 694 (1963). See Lucius J. Barker, "Third Parties in Litigation: A Systemic View of the Judicial Function," 29 J. Pol. 41 (1967).

[47]Fowler V. Harper and Edwin D. Etherington, "Lobbyists Before the Court," 101 U. Pa. L. Rev. 1172, 1173–74 (1953). The procedures are currently governed by Rule 36 of the U.S. Supreme Court.

[48]Craig v. Harney, 331 U.S. 367, 397 (1947) (Jackson, J., dissenting).