JUDICIAL ACTIVISM RECONSIDERED

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JUDICIAL ACTIVISM RECONSIDERED

Like many catchwords, "judicial activism" has acquired so many different meanings as to obscure more than it reveals. Yet it is not a term that can simply be ignored as intellectually "void for vagueness," for at the heart of it are concerns about the very meaning and survival of law. Abandonment of the term not being a viable option, clarification becomes imperative.

"Judicial activism" and "judicial restraint" raise logically obvious but often ignored questions: Activism toward *what*? Restraint toward *what*? Are judges deemed to be activist or restrained toward (1) the current popular majority, (2) the legislature representing the current popular majority, (3) the statutes passed by present or past legislatures, (4) the acts of current of past executive or administrative agencies, (5) the meaning of the words in the Constitution, (6) the principles or purposes of those who wrote the Constitution, or (7) the legal precedents established by previous judicial interpretations of the Constitution?

Activism or restraint toward one of these does not imply the same toward all the others, and may in some instances imply the opposite toward some other or others. For example, a "restrained" jurist, attempting to hold fast to the "original intentions" of constitutional provisions, must actively strike down statutes passed by a legislature which repeatedly oversteps the bounds of those provisions. Conversely, an "activist" jurist may passively accept expansive legislative action of a sort deemed consistent with general constitutional "values," even if lacking specific constitutional authorization or entering a "gray area" of constitutional prohibitions. One

of the more striking examples of the latter was Justice William O. Douglas' repeated deference to the legislature in economic and social legislation, using language dear to the heart of those who believe in judicial restraint,[1] though Douglas was a classic judicial activist.

In the analysis that follows, the first priority will be to operationally distinguish judicial activism from judicial restraint, which involves focusing on the concept of "original intent." Only then is it possible to move on to the substantive issues dividing them. Finally, the prevailing image of "liberal, activist judges" will be questioned, the argument being that judicial activists have historically come in various political varieties.

MEANING VERSUS "INTENT"

At the heart of the concern over judicial activism is the fear that the judge will impose his own personal preferences in his decisions, to such an extent as to ultimately negate the very meaning of law as a body of known rules to guide individual and social conduct. Formally, at least, both supporters and opponents of judicial activism deplore any such result, the former denying that this happens and the latter asserting that it does.

Supporters of judges and justices labelled as judicial activists often assert that these jurists are restrained by the Constitution and are therefore necessarily active against individuals, groups, institutions, and policies in violation of constitutional provisions or principles. The empirical validity of this assertion is not an issue, at this point. Such assertions provide an area of common ground between critics and supporters of particular judicial practices, thus aiding in the definition of judicial activism. It is not mere activity or passivity that is at issue, but the basis of that activity or passivity. In a constitutional government, a jurist is said to be activist—in the sense objected to—to the extent that he settles cases on grounds *extrinsic to the Constitution.* It is ultimately the Constitution toward which the jurist is "activist" or "restrained," though similar principles apply to the construing of statutes. The controversies which rage over judicial activism are controversies as to the extent to which jurists decide cases on grounds extrinsic to the Constitution, and in particular on grounds counter to the Constitution. That such decisions may also violate the popular will in some of its various meanings, or in its various man'f t t' h h d'ff

cide cases on grounds intrinsic to the Constitution, however easy or difficult this may prove to be in practice, from (2) attempts to use extrinsic considerations deemed to be of equal (or superior) value to the Constitution.

Intrinsic Considerations

One of the most obvious obstacles to following what the Constitution says is the difficulty of knowing what it says. The magnitude of this difficulty is crucial. No one believes that all cases can be disposed of, each with a unique solution, predetermined by "black letter law." Even the strongest advocates of "judicial restraint" present rules of interpretation which are implicit recognitions that obvious, all-encompassing, and uniquely predetermined solutions cannot be presupposed. However, it does not require a precise mathematical formula, specifying the location of a series of points, in order to know whether those points lie within certain boundaries. The real question is whether the jurist is searching for such boundaries or for escape from such boundaries—whether what is involved in the interpretive process is a genuine dilemma or tactical agnosticism.

In this context, the question as to what *exactly* the Constitution means by such phrases as "due process" or "privileges and immunities" would be relevant to specifying an infinite series of unique points, but not necessarily relevant to establishing boundaries, nor would lack of exactness preclude uniquely defined decisions in particular instances. It would be necessary to know *exactly* what constitutional provisions mean in all possible applications if the court were issuing comprehensive advisory opinions (defining an infinite series of unique points) but not when deciding each case *seriatim* (determining whether its particular conditions fall inside or outside relevant boundaries).

The problem is not one of finding pinpoint meanings, universally applicable and uniquely determining the outcome of each case, but rather of finding boundaries of meaning for the issue at hand. The question is not what "cruel and unusual punishment" meant *exactly*, but whether the death penalty fell inside or outside its boundaries. Similarly, if a contract calls for an employment agency to supply an employer with "tall" men, clearly there is no exact meaning to this term, but if the agency consistently supplies men less than 5 feet high, there is no difficulty in determining that it has failed to live up to the contract. The question is not whether a term is comprehensively definitive but whether it is sufficient to dispose of the issue in the case at hand. Perhaps there are pigmy societies in which a man 4 feet 11 inches high is considered "tall." But that is no reason to abandon the meaning of the term in American society and to

seek extrinsic meanings or to declare that it has no possible meaning in any case.

Ultimately, exactness is humanly unattainable, even in the simplest physical sense. No one knows exactly how far it is from the Washington Monument to the Tower of London. If the distance is given as an integer in miles, it can be rejected as inexact because it is not accurate to the inch, and if exact to the inch, then it can be rejected as not exact to the millimeter. If it is given fractionally rather than integrally, the exactness of the measuring instrument itself can be challenged as necessarily less than perfect. But notwithstanding all these difficulties in theory, in practice someone who did not know even the distance in miles would not hesitate to dismiss any claim that the Washington Monument was 10 miles from the Tower of London—or 10 million miles. Though few could specify the exact distance, all could dispose of these estimates as being outside the boundaries.

The degree of difficulty in interpreting the Constitution or a statute depends upon what that task is conceived to consist of. Some of the interpretive rules suggested by those who urge judicial restraint provide clues to the interpretive process they envision—and, more important, shed light on what meaning to give to the phrase, "original intent." The point here is not to assess the merits of these rules but to consider what these rules imply as to the task being undertaken.

Blackstone, for example, provided an explicitly numbered serial order of steps toward carrying out those "intentions at the time when the law was made." First, the words were "to be understood in their usual and most known signification." Simple as this may seem, it is a significant limitation—a narrowing of the boundaries. It meant that the words of the law were *not* to be construed according to whatever meaning could with "propriety of grammar" be given to them, but rather according to "their general and popular use." Where "terms of art" or "technical terms" were involved, they were to be construed according to the meaning prevalent in the particular fields to which they pertained.[2] In short, the judge was not to interpret the words *de novo* in whatever way grammar and the dictionary would permit, much less according to later beliefs or usage.

Only when "words happen to be still dubious" was it permissible, according to Blackstone, to go on to the second step and try to "establish their meaning from the context." The context or "spirit" could not supersede the cognitive meaning. For Blackstone—and, as we will see, for others—it was the original cognitive *meaning*, not intent in the sense of psychological motivation or philosophical values, which was being sought.

Even when Blackstone moved on to the third step in the interpretive

process, determining what was "in the eye of the legislator," he used this only as a guide to the cognitive meaning of words still undetermined by the first two steps. Only where words still had no significance or "a very absurd signification" did Blackstone proceed to the fourth step in which "we must a little deviate from the received sense," so that a law, for example, against shedding blood in the street should not apply to a surgeon treating an injured man.[3]

It was only "lastly" in the process of "discovering the true meaning of a law, when the words are dubious" that the judge was justified in "considering the reason and spirit of it" or "the cause which moved the legislator to enact it."[4] In all these steps, singly and collectively, the judge's role was *the carrying out of instructions, with a meaning already given*, whether given clearly or in a manner requiring further steps of discovery. It did not involve conceiving new meanings, whether based on later insights, judicial conscience, or the philosophical values presumed to motivate the original law.

To Oliver Wendell Holmes, as to Blackstone, the cognitive meaning of laws as instructions took precedence over the psychological motivations or philosophical values of the writers of laws—or of contracts, for that matter, for "parties may be bound by a contract to things which neither of them intended."[5] Legal interpretation of what someone said did not mean, for Holmes, trying to "get into his mind."[6] When a legal document "does not disclose one meaning conclusively according to the rules of the language," Holmes said, the question was "not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."[7] He said: "We do not inquire what the legislature meant; we ask only what the statute means."[8]

Since it is flesh-and-blood people who have "values" and motivations, while statements may have logic and meaning, Holmes clearly was searching for cognitive meaning rather than philosophical, psychological, or other antecedents, much less the later values and insights of others. "I do not expect or think it desirable that judges should undertake to renovate the law," he said. "That is not their province."[9] Like Blackstone, Holmes would, as a last resort, try to "read what the writer meant into what he tried but failed to say"—as for example, when a contract was made in which each party designated a different ship by the same name.[10] But, in general, when judges "interpret and apply the words of a statute, their function is merely academic to begin with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meanings of the words used is open to reasonable doubt."[11] Once again, this is

a sequential process of interpretation, with the sequence stopping whenever the original meaning is found, other considerations—whether philosophical or psychological antecedents or subsequent results—becoming moot at that point. When interpreting the Sixteenth Amendment, Holmes expressed the belief that its words should be read in "a sense most obvious to the common understanding at the time of its adoption."[12] Similarly, he refused to declare unconstitutional under the Fourteenth Amendment "methods of taxation which were well known when that Amendment was adopted."[13] Here as elsewhere, what was being sought was original cognitive meaning. Like Blackstone, Holmes declared that meaning "is to be gathered not simply by taking the words and a dictionary," but by observing their historical, contextual meaning.[14]

It may seem inconsistent for Holmes to have been an advocate of judicial restraint, given his oft-quoted comments on "the legislative function of the courts"[15] in his classic, *The Common Law.* However, Holmes' own words must be read in context, as he urged in the reading of others' words. To write of the common law—by definition, judge-made law—as having been made by judges is by no means to take a controversial position, much less an activist one. Nor was there even a change of mind on this point involved between this and Holmes' later views. In the very same paragraph in which he argued that it was not the province of judges to "renovate the law," Holmes also declared that "judges are called on to exercise the sovereign prerogative of choice"—in "doubtful" cases.[16] He continued over the years to speak of judges' making "some profound interstitial change in the very tissue of the law."[17] He said: "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[18] This was not advocacy of even "a little" judicial activism, as that term is used here. Judges acted in interstices left vacant by explicit legislation and constitutional provisions. At no point were they authorized to supersede either by extrinsic sources of judicial decisions.[19] While judges were to take the public interest into account when making their interstitial choices, such considerations had no place when weighing explicit legislation:

> I think the proper course is to recognize that a State legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain.[20]

In short, judges were not to expand their interstices. Nor was this merely a pious generality. In practice, Holmes repeatedly dissented from expansive readings of the Fourteenth Amendment,[21] deprecating "the use of the Fourteenth Amendment beyond the absolute compulsion of its words."[22] In statutory construction, Holmes likewise declared that he saw "no reason for reading into the Sherman Act more than we find there."[23] In his first dissent on the U.S. Supreme Court, Holmes read the Sherman Act so narrowly as to deny that it protected competition in the marketplace.[24] Holmes' most famous rejection of extrinsic sources of law was of course his declaration: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*."[25] This was not a rejection of Spencer's economic or social philosophy, to which Holmes' own views bore considerable resemblance.[26] The point was simply that Holmes practiced what he so often preached, that his own personal opinions and philosophy were irrelevant to the legal issues at hand.[27] He sometimes made devastating dismissals of the views of people whose cases he supported with his vote.[28]

The themes elaborated by Blackstone and Holmes continue to be echoed by contemporary advocates of judicial restraint. For example, the self-disciplined judge, according to Richard Posner "is the honest agent of others until the will of the principals can no longer be discerned."[29] In short, the jurist is carrying out instructions, not synthesizing decisions from the raw material of "values." In Raoul Berger, the "original intentions" of the framers of the Constitution is given a cognitive rather than a psychological—or philosophical—motivation definition as "the meaning attached by the framers to the words they employed in the Constitution and its Amendments."[30] Judge Robert H. Bork has likewise argued that judges should render decisions "according to the historical Constitution."[31]

In summary, judicial activism and judicial restraint are defined here in terms of activism or restraint toward the written law—constitutional or statutory—in the cognitive meaning it had when enacted. That meaning need not be pinpointed. In practice, the question is whether issues raised in a given case fall inside or outside the boundaries of that cognitive meaning. To advocates of judicial restraint, the phrase "original intent" is simply a convenient label for that cognitive meaning as enacted into law. The psychology or philosophy of the writers has no weight, as against that of the cognitive meaning, and is resorted to only in aid of an elusive meaning. Because "original intent" is a shorthand label for the views of the advocates of judicial restraint, its meaning is taken from them rather than

from their adversaries. *Arguments* from their adversaries are of course relevant and will be considered in due course, but the *definition* of what is being advocated must be that of the advocates.

Extrinsic Considerations

Extrinsic considerations enter the interpretation of law because (1) some jurists do not choose to interpret within the confines of intrinsic meanings and because (2) there are gaps in law and language which must be filled in from extrinsic sources (Holmes' "interstitial" judicial legislation). Inasmuch as the second reason applies to even the most judicially restrained jurist, only the first is judicial activism in the sense that is controversial, the sense defined above.

Advocates of judicial activism urge that extrinsic meanings be used, even if intrinsic meanings are known. Ronald Dworkin, for example, rejects a "strict interpretation" of the constitutional text because it limits constitutional rights "to those recognized by a limited group of people at a fixed date of history."[32] It would be wrong, according to Dworkin, in interpreting the constitutional phrase, "cruel and unusual punishment" for the Supreme Court "to be much influenced by the fact that when the clause was adopted capital punishment was standard and unquestioned."[33] Dworkin argued:

> That would be decisive if the framers of the clause had meant to lay down a particular conception of cruelty, because it would show that the conception did not extend so far. But it is not decisive of the different question the Court now faces, which is this: Can the Court, responding to the framers' appeal to the concept of cruelty, now defend a conception that does not make death cruel?[34]

In this view, "the Court can enforce what the Constitution says only by making up its own mind about what is cruel."[35] More generally, "rights may vary in strength and character from case to case, and from point to point in history."[36] Dworkin called for "a fusion of constitutional law and moral theory."[37]

Morality, as such, is not inherently extrinsic to the Constitution, even on Holmes' view. "The law is the witness and external deposit of our moral life," he said.[38] It is the *judge's* morality (or the judge's conception of society's morality) which is extrinsic to the Constitution. The case for recognizing that there is morality in law is not a case for judges' *introducing* morality into law. When Holmes defined law as essentially a "prediction of the incidence of the public force,"[39] he also denied that this was "the lan-

guage of cynicism,"[40] for when he emphasized "the difference between law and morals," he did so "with reference to a single end, that of learning and understanding the law."[41] Law was not to be *interpreted* by moral criteria, but as a set of instructions whose cognitive meaning was pre-emptive.

By contrast, those who argue for a larger interpretive role for judges seek to go *behind* the cognitive meaning. To them, "original intent" encompasses the psychological state of mind of those who wrote the Constitution—the fact that Madison "approached the Convention in the grip of a great intellectual passion,"[42] that he had "fear" of certain policies regarding property and religion,[43] or that he "privately described" constitutional amendments in a particular way.[44] Professor Dworkin argues at considerable length against original intent on grounds that the "mental events" in the minds of legislators or writers of the Constitution are difficult or impossible to discern,[45] that "it seems even plainer that we have no fixed concept of a group intention," nor any way of deciding "which aspects of individual mental states are relevant to a group intention."[46] In a similar vein, others point out that "public statements often do not reflect actual intentions."[47] In contrast to Holmes, this is indeed trying to get inside people's minds.

Given the expansive nature of the task conceived, the great difficulties and ambiguities—not to say utter impossibility—of discerning "original intent" are indeed what the advocates of judicial activism claim. But it is not this kind of original intent which has been proposed. It is only when going *behind* cognitive meaning that original intent would require modern interpreters to "discern exactly what the Framers thought," as Justice William J. Brennan claims. Within his framework, it is relevant to point out that "the Framers themselves did not agree" on all provisions of "a jointly drafted document," and its enactment involved not only "the drafters" but also "the congressional disputants" and "the ratifiers in the states."[48] But the relevance of such considerations depends entirely on the framework adopted and the task it implies—a framework *not* adopted and a task not undertaken by advocates of "original intent" or judicial restraint.

These great—if not insuperable—interpretive difficulties do not derive from the Constitution itself or from deficiencies of the historical record, and would apply even to an ordinary commercial contract or employment agreement made today. If a judge were to seek out the "aspirations" behind a decision to embark on a particular career or the "substantive values" embodied in establishing one corporate structure rather than another, his interpretive task would be equally formidable. Instead of determining the cognitive meaning of the terms and conditions set forth in a contract, he

would have to consider the subjective intentions and motivations, not only of the attorneys who drew up the relevant documents, but also of the executives who directed them, the stockholders (vocal and passive), investment bankers with a stake in the company, labor union officials, and others whose influence was felt one way or another in the emergence of the document in question. It is only by focusing on cognitive meaning that the interpretive task becomes manageable for the judge—or so manageable that it need not come before a judge.

A specific and real case may illustrate concretely the distinction between seeking the cognitive meaning of instructions and going beyond cognitive meaning to extrinsic considerations. The *Weber* case[49] provides such an illustration. Section 703(a) of the Civil Rights Act of 1964 made it illegal for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race" or various other characteristics. Section 703(d) more specifically forbade such discrimination in "any program established to provide apprenticeship or other training." A white employee, Brian F. Weber, was denied admission to a training program where places were awarded on the basis of seniority, even though black employees with less seniority were admitted, because racially separate seniority lists were used and racial quotas were established. That this was counter to the plain cognitive meaning of the Act was not explicitly denied in the U.S. Supreme Court opinion written by Justice William J. Brennan. But Justice Brennan rejected "a literal interpretation" of the Civil Rights Act, preferring instead to seek the "spirit" of the Act in Congress' "primary concern" for "the plight of the Negro in our economy."[50] In short, he went behind the cognitive meaning of the law's provisions to the presumed purposes and values motivating the enactment of the law. Because that presumed purpose was not to protect whites from racial discrimination, the Act was deemed not to protect Brian F. Weber, who lost the case. The emergence of this decision from the clear language of the Act to the contrary was likened to the great escapes of Houdini, in the dissenting opinion of Justice William H. Rehnquist.[51]

The *Weber* case illustrates the difference between seeking intrinsic cognitive meaning and going beyond that meaning to extrinsic considerations because (1) there was no serious question as to the cognitive meaning of the words, so that (2) the kinds of interpretive steps suggested by Holmes and Blackstone, among others, were unnecessary for the purpose of advancing toward the cognitive meaning—and were, on the contrary, used to advance *beyond* cognitive meanings, in the manner suggested by Ronald Dworkin.

Professor Dworkin in fact endorsed the *Weber* decision. Citing "the background of centuries of malign racial discrimination,"[52] Dworkin referred to the Civil Rights Act as "a decision by Congress to advance racial equality," so that this "underlying policy" made Brennan's decision the right one.[53] According to Dworkin, "the question of how Title VII should be interpreted cannot be answered simply by staring at the words Congress used."[54] Yet he did not claim that the specific words actually used were unclear as to cognitive meaning, though he proceeded to discuss a *hypothetical* case of what to do when statutory language was in fact "unclear."[55] Tactical agnosticism can of course make any words unclear, and hypothetical cases are a very effective way of doing so. But in the actual case under discussion, there was no claim that Congress had exempted affirmative action plans from the Act or (as in the case of the surgeon shedding blood in the streets) simply not contemplated the particular situation referred to when writing the statute.[56] Such questions are relevant to attempts to advance toward the cognitive meaning given by the legislators, but they are not relevant to the interpretive process proposed by Dworkin:

> One justification for a statute is better than another, and provides the direction for coherent development of the statute, if it provides a more accurate or more sensitive or sounder analysis of the underlying moral principles. So judges must decide which of the two competing justifications is superior as a matter of political morality, and apply the statute so as to further that justification.[57]

All this was said in exploring a hypothetical case, but the results of the reasoning were then referred back to the *Weber* case, whose decision Dworkin then approved as "another step in the Court's efforts to develop a new conception of what equality requires in the search for racial justice."[58]

The tactical ingenuity of Professor Dworkin's discussion of the *Weber* case with reference to a hypothetical case of unclear meaning cannot be fully appreciated without knowing that (1) far from being a situation not contemplated by the legislators (like the surgeon shedding blood), the possibility of racial quotas and reverse discrimination against white individuals was raised often and insistently by congressional critics of the Civil Rights Act in the debates leading up to its passage, and (2) were equally often and emphatically rejected by the Act's supporters as being neither the purpose of the Act nor even permitted by the Act.[59] Had Dworkin discussed the *Weber* case specifically throughout his considera-

tion of it, and had he made the explicit claim that the language of the Act was cognitively unclear in its application to the case at hand, that would have opened up a search for cognitive clarification, which would have turned up these embarrassing results.

Tactical agnosticism and an escape into the hypothetical are by no means peculiar to Professor Dworkin, or even to analyses of particular cases. A general argument has often been made that times and circumstances have changed, thereby necessarily changing the meanings of constitutional provisions. This is almost never said in the context of a particular, concrete case at hand, requiring a particular provision to be superseded as manifestly inapplicable to the circumstances of the litigants. More commonly, hypothetical cases are posited, involving technological or other changes unforseeable by the framers of the Constitution, thereby arguing for a *general* difficulty of following original meanings. Ironically, this general argument from hypothetical cases has virtually no applicability to the most controversial Supreme Court cases of the past generation, which dealt with things well known at the time the Constitution was adopted—abortion,[60] prayer in school,[61] the arrest of criminals,[62] the segregation of the races,[63] differential weighting of votes,[64] and executions.[65] To be dissatisfied with the substantive position of the law or the social conditions in the nation is not to assert that the law is unclear, unless one's proclaimed agnosticism is in fact purely tactical. When Justice Brennan said "ambiguity of course calls forth interpretation,"[66] he ignored the more fundamental question, whether it was interpretation which called forth ambiguity.

The case for extrinsic considerations in interpretation of law can be made independently of claims of cognitive ambiguity, though it seldom is. More commonly, there are protestations of the great difficulties of determining what the writers of the Constitution meant—followed by assertions that such meanings are now obsolete anyway. But if the case for extrinsic meanings is valid, the difficulties of finding intrinsic meanings are irrelevant. The whole argument thus reduces to one of the substantive merits of the case for going beyond cognitive meanings in the law.

SUBSTANTIVE ISSUES

Among the reasons advanced for going beyond the "original intent" (cognitive meaning) of those who enacted legislation or constitutional provisions is that (1) there have been significant social changes since the enactment, (2) there are moral questions involved, only imperfectly

addressed or cryptically suggested by the explicit language of the enactment and, more generally, the enactment—especially the Constitution—is not to be read as a set of rules but as an expression of values, to be given specific content in the particular case by the jurist. Those on the other side, who propose remaining within the original cognitive meaning, often raise another issue as to (3) the right of a democratic majority to govern through its representatives. These arguments will be considered in turn.

"Change"

Advocates of judicial activism often refer to changes which have taken place, and others deemed desirable, as reasons for going beyond the original cognitive meanings of laws, including the Constitution. According to Justice William J. Brennan:

> Those who would restrict claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstances.[67]

According to Justice Brennan, "the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."[68] Similar views can be found throughout a vast literature, inside and outside the legal profession, at both scholarly and popular levels.

The repeated and insistent emphasis on the fact of "change"—surely one of the most common and uncontroverted features of human history—is difficult to understand, except as a prelude to the non sequitur that judges are the special, authorized agencies of particular changes favored by the particular advocates. Generic "change" is simply not a controversial issue. Even individuals commonly identified as "conservative" often have a breath-taking range of changes which they would like to see introduced—differing in specifics, more so than in number or magnitude, from the changes advocated by those considered "liberal" or "radical."

Technological or other changes which literally render it impossible to meaningfully apply constitutional provisions in their original senses—electronic listening devices or aerial surveillance, for example—have seldom been involved in the constitutional cases which have produced firestorms of controversy. Nor have the objective "social changes" which have occurred usually been such as to make existing laws impossible to apply—

as massive miscegenation might have rendered racial segregation laws *administratively* untenable, for example. What has more commonly happened is that changes in subjective attitudes and beliefs—among judges, intellectuals, or the public at large—have weakened or displaced faith in the *desirability* of various laws and social conditions. Whatever the merits and validity of these subjective changes, they are not objective compulsions which judges "cannot avoid" which compel them, against all their misgivings, to try to "penetrate to the full meaning of the Constitution's provisions," as Justice Brennan depicts it.[69]

In short, whatever hypothetical tyranny "change" might exercise over reluctant judges in hypothetical cases—in the real world, the real cases which have caused concern and controversy over judicial activism have seldom been of this nature. Social change created no cognitive difficulties in determining Brian Weber's race or that of his fellow employees, or made the language of Sections 703(a) or 703(d) of the Civil Rights Act shrouded in ambiguity defying all attempts to discern what Congress could possibly have meant. The changing technology of abortions raised neither administrative nor other barriers to the feasibility of its being either legal or illegal. Nor were any of the eighteenth-century methods of execution, which escaped the "cruel and unusual" prohibition of the Constitution at the time, lost as options through "change" in the intervening generations. In short, *feasibility* is not the central issue. What has changed most profoundly is what people, including judges, wish to do.

Once the argument is disencumbered of tactical agnosticism, feasibility, and generic "change," the issue can be faced as to how to institute such specific changes as seem desirable. There is nothing in the Constitution of the United States to prevent this, despite many laments as to the "difficulty" of amending the Constitution. Difficulty must be distinguished from frequency. It is not difficult to put on one red shoe and one green shoe each morning, but it happens infrequently—because people do not wish to do so. The statistical frequency with which the Constitution is amended is relevant only when compared to the frequency with which the public wishes it to be amended. The fact that it is considered a damning charge against judges that they are *de facto* amending the Constitution—and that judges feel called upon to deny it—suggests that the public is more anxious to *prevent* the Constitution from being changed than to change it. If this evidence is insufficient, it nevertheless exceeds evidence to the contrary. Indeed, the hallmark of the opposite view is that evidence is neither asked nor given as to the *differential* between desired and actual amendment—i.e., the "difficulty" of the amending process.

Discussions of how rarely the amending process has been "successful"[70] implicitly define success as the adding of an amendment rather than the

carrying out of the public's will. By this standard, the electoral process must also be considered an abysmal failure, because far more candidates are defeated than elected, especially if primary elections are counted. But in both the electoral and the amending process, defeat of what the public wants defeated is just as much a success as the victory of what the public wants victorious. Even where a majority – but not a sufficient majority, or not a majority so distributed as to produce victory – wishes to have an amendment (or the over-riding of a presidential veto of legislation), but is thwarted from doing so, the absence of any serious effort to change the constitutional rules suggests that the public does not regard the whole process as a failure – that is, they accept the verdict of the enduring majorities who have sanctioned this procedure as a brake against their own transitory majority.

Social changes – even changes of a profound and far-reaching nature – do not of course necessarily require changes in the U.S. Constitution. Many statutes and state constitutions serve as instruments of change, as do an ever-increasing number of administrative agencies at all levels of government, and an ever-expanding galaxy of private individual and corporate arrangements. The proposition that publicly desired changes are thwarted for lack of institutional instruments, so that judges are the public's last resort, not only flies in the face of this evidence but is also inconsistent with the courts' plummeting prestige as they putatively carried out the public's otherwise thwarted desires for change. Not all advocates of judicial activism take on the formidable task of claiming that the public wants the changes imposed by judges. Some admit to speaking for a much narrower constituency among their contemporaries, however much they may anticipate vindication from later and presumably more enlightened generations. Justice Thurgood Marshall has made the test what the public *would* believe if properly informed.[71]

In principle, the fundamental justification for judicial activism is that what is imposed is morally preferable to what exists – or what the public wants. In Ronald Dworkin's words, "a more equal society is a better society even if its citizens prefer inequality."[72] This puts the issue at its clearest. What remains is to determine why judges are the proper instruments of changes counter to public desires and unauthorized by the source of their authority. The pragmatic answer is that they are appointed rather than elected and, with federal judges, appointed for life. Even so, different kinds of institutions have their own advantages and disadvantages,[73] so that even intellectually or morally superior individuals in a particular kind of institution need not make more socially beneficial decisions when over-riding the decisions of other institutions which have social advantages in the particular matters within their respective purviews.

Dworkin's dictum is instructive in another sense as well. To him, and to

many other advocates of judicial activism, the issue is *what to do*—not *who* is to decide what to do. To this latter question, as to many others, the mere fact of "change" has little relevance.

The oft-repeated dichotomy between judicial activism and perpetuating the social and political world of the Framers of the Constitution defies history as well as logic. Some of the most dramatic changes—indeed, drastic transformations of the whole social and political landscape of the United States—occurred in the first century under the Constitution, which is to say, before Earl Warren was born. Few of these transformations were caused by judicial decisions, and the most historic social transformation of all—the freeing of the black population from slavery—went counter to the most prominent judicial opinion of that era on race, the *Dred Scott* decision. The choice between judicial activism and perpetuating the eighteenth century represents either incredible naiveté as a belief or incredible cynicism as an argument.

Morality

Although some argue as if the moral issue in judicial interpretation is whether, or to what degree, morality is to influence the law—as if it were a controversy between "moral skeptics" who believe that "morality may be ignored"[74] and those who wish the law to be applied with moral sensitivity—the more fundamental question is not *what* to decide but *who* is to decide. Emphatic reiteration of the theme of morality, like emphatic reiteration of the theme of "change," is not a substitute for determining *whose* morality—or, analogously, whose change, whose meaning, whose purposes, whose intent. The question is not whether rights should be "taken seriously"[75] but *whose* conception of rights—there being some conceptions of rights which are the very negation of rights as conceived by others.[76]

The morality of the law as enacted must be distinguished from the morality of the judge interpreting it. Justice Holmes was as insistent on the central and legitimate role of the former as he was on the irrelevance and illegitimacy of the latter. Whether or not one agrees with Holmes' substantive conclusion, the point here is simply that he demonstrated a viable distinction. Holmes was not "for" or "against" the generic principle of morality in the law. When discussing the development of law from a philosophical perspective, Holmes called it "the witness and external deposit of our moral life" and described its history as "the history of the moral development of the race."[77] He also referred to "high idealizing" in general as "the best thing in man."[78] But, as a member of the Supreme Court, he often said to his fellow jurists: "I hate justice"—as an argument

to be weighed by them in the context in which they were working.[79] One of his dissenting opinions ended: "I am not at liberty to consider the justice of the Act."[80] Similarly, when writing to a foreign jurist, Holmes said: "I always should be sorry if I could not get any reason more definite than in consonance with our sense of justice." The real question, according to Holmes, is "does this decision represent what the law-making power must be taken to want?"[81] Similarly, in a dissenting opinion, Holmes declared: "When we know what the source of the law has said that it shall be, our authority is at an end."[82] In his later years, Holmes contemplated writing a book on the law, "getting rid of all talk of duties and rights—beginning with the definition of law in the lawyer's sense as a statement of circumstances in which the public force will be brought to bear on a man through the Courts . . ."[83]

In this context, Holmes cannot be depicted as a judicial defender of the "substantive value" of free speech, or any other moral value. He was a defender of the Constitution, as the ultimate source of the power he wielded, and the Constitution was the defender of free speech. On the Supreme Court bench, Holmes did not deem himself the agent of any moral values transcending the Constitution. Rather, he saw his judicial role as being "to see that the game is played according to the rules whether I like them or not."[84] When he said that the Constitution did not enact Herbert Spencer's philosophy, that was not a rejection of Spencer's philosophy. Unlike some other critics of judicial activism, Holmes rejected activism, even when based on his own philosophy. The Constitution, he said, "is not intended to embody a particular economic theory." More generally: "It is made for people of fundamentally differing views."[85]

What is at issue between those who urge judicial restraint and those who urge judicial activism is not whether there is, or should be, morality in the law. What is at issue is the institutional source of that morality. A contemporary exponent of judicial restraint, Judge Robert H. Bork, has summarized the argument in terms very similar to those of Holmes: "In a constitutional democracy, the moral content of the law must be given by the morality of the framer or the legislator, never by the morality of the judge."[86] Once again, it is necessary to state the position of the advocates of judicial restraint at some length because the opposing views of the judicial activists do not simply disagree with their premises, reasoning, or conclusions, but often debate an entirely different range of issues—whether or to what extent there should be morality in the law, what kind of morality it should be (utilitarian, contractarian, etc.), and the moral bases of disobedience of the law, for example.[87] It is difficult to get the issues between them joined, much less resolved.

It has been argued by Ronald Dworkin, for example, that those with a "rule book" conception of law "do not care about the content of the rules in the rule book"[88]—as if the issue were one of relative caring rather than the institutional locus of discretion. While conceding the value of prospective rules, Dworkin says, "compliance with the rule book is plainly not sufficient for justice; full compliance will achieve very great injustice if the rules are unjust."[89] No one can doubt that; one need only conceive of being a judge in South Africa, Nazi Germany, or the Soviet Union. The real question is whether that is the issue.

Such societies are condemned precisely because their laws and policies are considered unjust, and those who in conscience resign from positions which require them to act as agents of such laws and policies are applauded. The moral problem is with the nature of such regimes, not with the nature of agency. The larger question—and the real point of contention—is not how individuals should respond to institutionalized injustice already in place, but how institutions can function to better the human condition. It is moral preening to suggest that those who favor one method of institutional decision-making "care" more about justice (or other "substantive values") than those who think another method of institutional decision-making will prove more effective. What must be analyzed and debated are the *reasons* for believing that one institutional pattern will advance justice—or any other goal—more effectively than another.

It can be, and has been, debated for centuries whether specialized roles, strictly observed, contribute more to human well-being than more expansive responsibility for the common good being directly assumed by each individual. Arguments for "social responsibility" by businessmen are, in this sense, parallel to arguments for judicial activism, liberation theology, or advocacy journalism.[90] These are all questions about the scope, mode, and locus of institutional discretion—not about who cares more about justice or any other moral precept. Oliver Wendell Holmes, born during the era of slavery, was an abolitionist who left college to volunteer to fight in the Civil War, where he was severely wounded in two battles. This was hardly moral agnosticism. Even when serving, years later, on the U.S. Supreme Court Holmes publicly voiced strong opinions on the political ideologies of his day[91]—though his votes on the Court often went in favor of those whose ideas he repudiated and anathematized.[92] Moral neutrality has nothing to do with defining the limits of a judge's institutional role.

Judicial activists like Ronald Dworkin and Laurence H. Tribe recognize limits on what judges can and should do when interpreting the Con-

make no law . . . " rather than "Congress should weigh the following," much less "Judges should weigh the following . . . "?

In any document (or situation, philosophy, institution, population, equation) involving many factors, nothing is easier than to abstract from factors *A* through *Y* and then declare that *Z* is the truly crucial variable to consider. Because the Constitution has a moral dimension, this procedure can make plausible the non sequitur that it must be read and interpreted as a moral statement. But because Beethoven wore clothes, it does not follow that his significance must be assessed sartorially—or that those who consider his apparel irrelevant are claiming that he was a nudist. Establishing a particular fact is not establishing its salience for a particular purpose. Establishing that the Constitution was not morally nude does not make the judge's role that of its fashion designer. Judicial activists who depict the Constitution as a morally groping document, crying out plaintively for the aid of judges,[99] have nothing on which to base this vision, other than their own self-serving assumptions. Although a junkyard owner may choose to regard General Motors as his raw material supplier, that in no way justifies imputing to General Motors an "original intent" to play such a role.

The call for "constitutional choices"[100] likewise evades or pre-empts a crucial issue: Are there in fact choices to be made, in the sense suggested? Judges can certainly assess *processes*, as the advocates of judicial restraint urge, but can they choose *results* in the manner suggested by Professor Tribe? The difference can be illustrated with the best-known (and most traumatic) episode of the twentieth century: World War II. Central to Adolf Hitler's ambitions, which led to this war, were (1) the desire for a territorially more expanded Germany, including the Germanic peoples of Austria and of the Sudeten region of Czechoslovakia, as the centerpiece of an international empire, and (2) the disappearance of the Jews as a people. The net results of Hitler's endeavors, however, were (1) a reduction of Germany's territory to a smaller size than when he took power in 1933, with this smaller Germany then being further split in two between Eastern and Western political blocs, and (2) creation of the state of Israel. During the prewar era, Neville Chamberlain's *choice* was "peace in our time," but the processes he followed have often been blamed for producing—unnecessarily—the greatest carnage in history. These examples are meant to be illustrative as to a distinction, rather than conclusive as to history.[101]

Contrasts between intentions and results are not confined to the twentieth century. There are ancient and fundamental differences of beliefs as to the extent to which man's intentions are realized or

realizable—differences manifest in controversies involving some of the leading intellectual figures of the Western world over the past two centuries, at least.[102] Yet Professor Tribe pre-empts this whole issue with his doctrine that judges make choices among results.[103] But it is by no means clear from the empirical record that judicial activism in the area of ethnic minority issues, for example, has improved these groups' over-all economic position vis-a-vis the society as a whole, and substantial evidence that poorer minorities have fallen further behind as judges have bent the law to advance them.[104] It is not necessary to regard such evidence as conclusive proof of counter-productive results in this case or in general. It is sufficient to indicate that whether judges can in fact make choices of results is an *issue*, rather than a foregone conclusion. Both Dworkin and Tribe repeatedly treat the assumptions and the results of the courts' racial and ethnic decisions as foregone conclusions.[105] Their reiterated insistence that judges *should* choose results based on moral principles contrasts sharply with their gliding silently over the prior question of whether judges *can* choose social results, whether on moral or any other bases.

Once the analysis recognizes the distinction between choosing processes and choosing results—that is, once it takes account of the fact that people are profoundly mistaken a significant part of the time—then the question of institutional locus of discretion involves not simply the relative prescience of the various people but also, and more importantly, the ability of differing institutions to correct initially mistaken beliefs in the light of subsequent experience. Courts are among the institutions least able to monitor continuously the ramifications of their decisions and least subject to incentives to admit being wrong, much less to violate their own precedents and change.

Majorities

Institutionally, majorities are important as the source of power in a democracy, a portion of which power is wielded by judges, at the sufferance of those majorities. There are moral choices to be confronted by any individual before agreeing to act as the agent of any constituency or organization, unless he accepts the role in the spirit of a guerrilla operating behind enemy lines, but that is very different from saying that he is an agent of abstract moral principles, set above the source of his power. As an individual, he may indeed view some moral principles as representing a higher level of morality than the principles embodied in the law he is authorized to enforce. But the distinction between unfettered individual freedom of conscience in belief and the very real moral constraints of duty

The larger question is for the whole society to consider: How just are the specifics of the law, and how secure are the legal rights granted? The presumed tenuousness of majority-based rights ignores the majority's own recognition, in a constitutional democracy, of moral principles superior to its own current inclinations—even if it refuses to grant such superiority *a priori* to the current inclinations of others. Free speech is politically important as part of the process of changing the majority's mind. Rights granted by a majority may, of course, be revoked by a majority—but so ultimately may rights created and granted by judges. Constitutional rights have a protective legitimacy which has sustained them for two centuries, despite numerous popular disagreements with particular judicial decisions. Surreptitiously created rights, lacking that politically protective legitimacy, invite circumvention and stake their endurance on popular reluctance to impeach judges or disrespect laws, or to dismantle parts of the constitutional structure. That is, they *raise the stakes*, in hopes of forcing the opposition to fold their hand. It is a dangerous and unnecessary gamble with the future of constitutional government. Moreover, judges who act like guerrillas behind enemy lines have no moral claim to exemption from the fate of guerrillas discovered behind enemy lines. At a minimum, guerrillas have no moral claim to tenure.

Those who argue for a judicial fusion of moral and legal principles once again confuse the question of *what* to decide with the prior question of *who* is to decide. Issues of justifying a particular institutional locus of discretion, which are so often glided over in the arguments of judicial activists, are central to the arguments of those advocating judicial restraint. Legal rights and moral rights cannot be fused in the latter vision, for they relate to entirely different processes—hence Holmes' distress that they were described by the same word. According to Holmes:

> . . . for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those said to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space. One phrase adds no more than the other to what we know without it. No doubt behind these legal rights is the fighting will of the subject to maintain them, and the spread of his emotions to the general rules by which they are maintained, but that does not seem to me the same thing as the supposed *a priori* discernment of a duty or the assertion of a preexisting right. A dog will fight for his bone.[109]

In short, to Holmes rights are the creation of governments, and the emotional attachment felt toward these rights indicate nothing to the

contrary, nor even anything specifically human. The opposite view of Professor Dworkin is that "citizens have moral rights against their governments."[110] These moral rights are "made into legal rights by the Constitution."[111] Thus "we must treat the First Amendment as an attempt to protect a moral right."[112] Behind all these rights is "the vague but powerful idea of human dignity," that "there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community," which "holds that such treatment is profoundly unjust."[113]

The concept of "government" is used here by Dworkin in the same timeless and inconsistent way "majority" is used in other contexts by judicial activists. Government in the form of a particular administration at a given point in history prohibited all future administrations from doing certain things—and subsequent administrations have been unwilling or unable to get these prohibitions repealed. Far from being abstract rights of individuals against government, based on nebulous moral presumptions, these prohibitions are products of government and rights of the government itself, as an enduring institution, against its transient agents, whose violations of these prohibitions may lead not only to having their orders countermanded, but also to impeachment, removal from office, and punishment by civil and criminal penalties. The fact that the transient agents of government usually have the prudence to change course, once a violation of constitutional principles has been detected, means that this scenario is seldom played out in full, but nevertheless it remains the powerful threat behind the scenario that is actually played out, under the guise of some aggrieved "individual citizen" versus "the government." It was precisely the threat of "the government" which forced its highest official to resign in 1974. It is the threat of "the government" which forces its other agents to respect the rights of "the individual."

While democratically elected administrations are bound by the cognitive meanings of prior government, judges are somehow assumed to be exempt, and to be authorized to re-open the whole range of constitutional issues and reasons—not all of them purely questions of morality—settled long ago. Even if all constitutional provisions could be shown to be based solely on moral essences of the sort discussed by Professor Dworkin, the question of locus of discretion would remain: Why are today's judges authorized—and by whom?—to re-open these questions? Is mere use of the magic incantations "unclear" and "ambiguous" sufficient to open the doors to the enormous power of remaking government? As the *Weber* case demonstrated, *anything* can be made "unclear."

The idea that rights have their origin in the "dignity" of the individual

as a member of the human community treats "membership" as a one-way, free, and irrevocable grant—contrary to what membership means in almost any other context, where those who fail to carry out the duties of a member forfeit their membership. It is commonplace that those who refuse to pay their dues or obey the rules cease to be members. At one time the law distinguished between those within its protection and "outlaws" who had been placed—or placed themselves—beyond its protection. If rules are more than arbitrary enactments and serve some social purpose, to limit the retaliatory consequences of disobeying them while the direct consequences to society remain unlimited means giving some individuals the ability to impose high costs on others at low costs to themselves. Concepts of "dignity" and "respect," as free goods available to all, empty them of meaning as differential rankings of people in response to their own respective behavior. Again, the net effect is to enable some to impose costs on others without corresponding costs being imposed on themselves. Granting differential privileges to persons conceived separately as "individuals" than when they are conceived collectively as "the majority" seems arbitrary at best—and worse than arbitrary when the basis of selecting such beneficiaries is that they violated rules.

Much of the moral force for favoring "the individual" over "society" or "the majority" comes from contemplating the fate of disadvantaged racial or ethnic minorities—which is to say, minorities defined by characteristics beyond the individual's control, as distinguished from minorities defined by the individual's own behavior (homosexuals, alcoholics, or—in principle—pilots or doctors). Moral condemnation of racial discrimination, however richly deserved in many lands around the world, is not the same as an argument that legal rights must be created by judges to stand between all minorities—behaviorally as well as genetically defined—and the will of the majority. To say that a moral right exists is not to say that a legal right exists, or that judges are authorized to create one not already in the Constitution.

Generalization from the history of racial minorities is often false as history as well. Historically, the ending of the enslavement of blacks in the United States was not the work of courts but of a democratically elected president (who was subsequently re-elected) and of majorities sufficient to pass a series of constitutional amendments in a few years, granting both freedom and equality before the law. The implementation of this legal equality was retarded for decades by the courts' restrictive reading of the Fourteenth Amendment in racial cases, while they read the Amendment ever more expansively in areas remote from the "original intent" of the

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enactment. Depiction of courts as the last bastion of morality against the immoralities of the democratic process requires highly selective samples of history.

The history of racial minorities is instructive in yet another way related to controversies over the institutional locus of discretion. Much of the controversy proceeds as if the important decisions—and the important changes—are due to collective decisions, centered in political institutions, with the issue then being where in such institutions the controversies should be decided. In reality, many of the most profound advances of racial and ethnic minorities around the world have occurred independently of political or legal changes—and often precisely to the extent that collective controls were inoperative or inefficient.

Racial residential integration, for example, was far greater in many American cities half a century before racially restrictive covenants were abolished by *Shelley v. Kramer*[114] than at any time since.[115] The increase of blacks in high-level occupations was greater in the decade *preceding* the Civil Rights Act of 1964 than in the decade following its enactment.[116] Many groups have prospered far more when ignored by the authorities than when made the subject of their attention—the Jews, the Chinese, the Indians, and the Japanese being classic examples in countries around the world. More than selective historical examples are involved. Economic analysis has demonstrated logical reasons why the systemic actions of the marketplace are often more favorable to disadvantaged minorities then are the actions of government, and a growing body of empirical evidence supports that theoretical analysis.[117] Whether or not the economic theory or the factual evidence is accepted as conclusive, at the very least they seriously undermine the foregone conclusion that the decisions which matter most—and most beneficially—are the collective decisions, made through political or legal processes. If judicial activists wish to maintain this essential underlying premise, then it must be supported by evidence rather than by presumption and reiteration.

Political Varieties of Activism

Much current discussion pits "liberal judicial activism" against "conservative judicial restraint." As loose labels, these are not entirely without foundation. Indeed, it is worth exploring what that foundation is. But it is at least equally important to recognize that neither logic nor history inevitably ties the issue of judicial activism to a particular political or social creed. This is especially so when discussing a particular constitutional system

already in place, as distinguished from deciding what kind of legal structure to have, as the framers of the Constitution did in 1787.

When Chief Justice Taney said, in the *Dred Scott* case, that a black man "had no rights which the white man was bound to respect,"[118] he was ruling on the basis of substantive values, not process—and so must be classed with the judicial activists, however much modern liberals might resent the company. When courts of the "substantive due process" era struck down much government regulation, they were making "constitutional choices" in the manner urged by Professor Tribe—though not with the same social philosophy as Professor Tribe. Already there are fears being expressed that judges will in future be appointed on the basis of substantive values which include prayer in school and outlawing abortions—fears not only as to the particular policy issues involved, but fears as to an immoral corruption of the judicial process, often expressed by people who have long supported and applauded liberal judicial activism.

In short, judicial activism can cut many ways ideologically, though many who have argued for it proceed as if it is their own kind of "substantive values," "constitutional choices," and "change" which it entails. Once it is recognized that these phrases can have radically different content ideologically, they no longer represent goals—whether good, bad, or indifferent in themselves—but rather a process which can amount to a judicial war of each against all. Whoever might win ideologically, if anyone does, the law and the society lose. A dependable framework of legal expectations, achieved after centuries of painful and bloody struggles, would be sacrificed, while a whole society retrogressed toward a world where edicts are simply issued by whoever has the power at the moment. This is, of course, not the goal of anyone on either side of the controversy—only the logic of allowing a degree of judicial freedom for some purposes which is just as readily usable for opposite purposes.

While judicial activism is in principle adaptable to any ideological program—and in practice likely to be adopted by its current ideological enemies if it proves to be politically unstoppable—it is nevertheless "no accident" that the principled argument for judicial activism has been made largely by those with a particular social vision. The assumptions of that vision make judicial activism both feasible and desirable, in a way in which it is not desirable to those with different assumptions about the nature of man and of social causation. While people with all sorts of philosophies may *practice* judicial activism surreptitiously, an explicit advocacy or justification for judicial activism is not compatible with all assumptions or social visions.

The kind of man conceived by those who have historically advocated judicial restraint is a very different creature from the kind of man envisioned by those who urge judicial activism. The kinds of societies and institutions appropriate to these two kinds of creatures, called by the same name, necessarily differ—just as an ideal society for whales would differ from an ideal society for ants or eagles.

Those with a highly constrained vision of man's capabilities—both mental and moral—seek institutions and institutional roles which confine the discretion of each individual to a small circle, within which he may be competent, rather than let his decisions roam over vast reaches, where all are certain to be incompetent. Blackstone's vision of man was that "his reason is corrupt, and his understanding full of ignorance and error." Given "the frailty, the imperfection, and the blindness of human reason,"[119] Blackstone's desire to keep judges on a short leash was understandable. All institutional roles are confined in this vision, the boundaries of specialties (morality and law, for example) respected, and the specialist deferred to within his realm. "I revere men in the functions which belong to them," Burke said.[120] He too had a very constrained vision of human capabilities.[121] So did Oliver Wendell Holmes,[122] who said, "We need specialists even more than we do civilized men"[123]—these "civilized men" being defined in this context as elite generalists who "are a little apt to think that they cannot breathe the American atmosphere."[124] Specialization was also central to the economic theories of Adam Smith[125]—another social thinker with a very constrained vision of man.[126] Specialization has in general been the hallmark of the constrained vision, whether in law, economics, politics, or philosophy.

In short, man's competence does not extend far enough for him to be trusted with other than limited responsibilities, according to the constrained vision. Judicial restraint is only a special application of this general principle. The businessman is likewise *not* to attempt to exercise "social responsibility," according to this view,[127] but to run his own particular business as efficiently as he can. The broad authority necessarily given to political and legal institutions was acceptable to those with this vision insofar as it consisted essentially of defining the boundaries of others' discretion—not second-guessing them within those boundaries.[128] This meant defining the rules of a process, within which others would exercise substantive discretion, according to their more competent specific knowledge and varying individual values.

This whole vision of law, and of social processes in general, becomes very different when the key assumptions of the constrained vision are dropped. Then it becomes possible to conceive of a wider scope for the

discretion of those who control social processes, judges being just one example. Specialization of knowledge and of social function can become far less important than the general moral and intellectual stature of those making social decisions. When Ronald Dworkin wrote of "a fusion of moral and legal theory,"[129] he echoed a long tradition in which, for example, Thorstein Veblen lamented the (to him) needless boundaries between the social sciences,[130] and in which numerous other social thinkers considered the running of a business to be something to be readily done by political authorities or their appointees, or by others with no great specialized training or experience.[131] This melding of different disciplines and roles is quite different from Holmes' urging of legal practitioners to learn economics,[132] which did not imply any "interdisciplinary" blurring of lines between the two fields.

The issue between the two social visions is not whether most people have broad or narrow abilities. The issue is whether *man as such* has inherently very limited moral and intellectual potential—the "brightest and best" as well as the masses. Where the constrained vision of human nature is fundamental to the analysis, then the systemic coordination of experience is essential—and tapping the brilliance or moral dedication of an elite is incidental.[133] In this vision, maintaining diffused loci of discretion is more important that the intellectual principles or moral commitment of any individual or institution, judicial or otherwise. The constrained vision is concerned primarily with processes—with institutional incentives and restrictions—and its watchwords are cast in process terms: "free enterprise," "judicial restraint," or "property rights." This contrasts with visions cast in terms of goals, such as "liberty, equality and fraternity," or "social justice," for example.

It is unnecessary here to attempt to resolve this conflict of visions. That would be a relevant task if we were back in 1787 trying to create a Constitution. But now that a Constitution has endured for two hundred years, the issue is not whether it should have been constructed according to a constrained or an unconstrained vision. However it was constructed then, it is a fact of life today, and the question for today is whether it is to be changed—by whom, and through what process? Consideration of the differing visions simply suggests reasons why those who want an expansive role for judges—on principle—often share a set of moral and societal goals (summarized as "social justice"[134]) quite different from those who favor judicial restraint. That is not saying that it is all just a question of one's ultimate presuppositions. That would have been true in 1787. It is not true today. The question for today is whether one chooses to continue to live under the existing constitutional government, which includes the

right to urge changes, or to usurp the power to make changes unilaterally.

The distinction between *ad hoc* judicial activism, according to the individual judge's own subjective inclinations, and "principled" judicial activism, according to some general moral theory, has been advanced to suggest that the latter is more moral. But ultimately this difference is one between retail and wholesale judicial activism—the "principled" version being as much extrinsic to the Constitution as the *ad hoc* version, and no less a surreptitious usurpation.

The case for judicial restraint is not that it will give unique "right answers" in each legal case. No such claim has ever been made for constitutional government in general, much less for one of its parts. The argument for judicial restraint in specific cases is that the inevitable variance from the ideal can be better kept within limits when the whole process is conceived as one of seeking boundaries of cognitive meaning for each concrete case as it arises, rather than weighing values derived from a multiplicity of ever-changing sources. The more general argument for judicial restraint is that, even when imperfectly observed, it has maintained a political legitimacy and public support which have enabled constitutional democracy to survive for two hundred years, while more ambitious forms of government have come and gone—or have been able to survive only by draconian methods.

Within the camp of those urging judicial restraint, there will of course be differences of opinion on specific cases and specific constitutional provisions. Some would read the "takings" clause of the Constitution, for example, to require compensation for implicit or partial takings of the *value* of property, even if the physical thing possessed remains with the original owner.[135] Rent control laws, which can take more than 100 percent of the value of a building—in the sense that it becomes an unsaleable liability rather than an asset[136]—are a classic example, though stringent zoning laws, confiscatory public utility rate-setting, and other governmental action can also destroy vast amounts of property values without changing legal title to physical things. Professor Richard Epstein's argument that these kinds of "takings" should be compensated from the public treasury, while based economically on efficiency and morally on considerations of justice, are based legally on an explicit provision already part of the Constitution, not on these "substantive values." Reading the same Constitution, Justice Holmes repeatedly—though not invariably—upheld such government actions,[137] while not denying that they were indeed partial "takings."[138] According to Holmes, "The constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme" for government must function and "some play must be

allowed in the joints if the machine is to work."[139] The idea of a need for "play in the joints" appeared in Holmes' discussion of legal interpretation in general, as well as in specific cases.[140]

The point here is not to weigh the relative merits of alternative readings of the "takings" clause. Rather, the point is simply that there may be alternative readings without recourse to arguments for "change," for judicially imposed morality, claims of textual ambiguity, or other principles or tactics of judicial activism. Moreover, Professor Epstein's reading would call for a court far more *active* in striking down legislative actions, without being any more "activist" than Holmes as far as constitutional interpretation was concerned. On the contrary, Holmes' "play in the joints" argument, whatever its merits legally or socially, is extrinsic to the constitutional text in a way in which Epstein's argument is not. Attempts to deny, ignore, or dismiss Professor Epstein's economic reasoning are not arguments over "black letter law" in the Constitution. Holmes in fact saw similar acts as "takings" in his day but often refused to strike them down, saying "property rights may be taken for public purposes if you do not take too much."[141] Like many legal issues, he saw it as a question of degree—and when "the extent of the taking is great,"[142] he struck it down.

Questions of degree, and of conflicting rights, ensure that legal controversies will not come to an end, regardless of what interpretive principles or practices are chosen. That does not mean that the nature, magnitude, and dangers of these controversies are predestined. Judicial restraint is not meant to predetermine every decision but to safeguard constitutional government. Disagreements with particular judgments or judges do not imply disaffection toward the whole judicial process or with the political system in general. But a long span of "principled" judicial activism does raise that specter, for it means that judges have repudiated the very document which they demand that the rest of us respect—and which is the ultimate source of our deference, or even toleration, toward them.

SUMMARY AND CONCLUSIONS

The degree of difficulty of constitutional interpretation is not independent of what specifically it is that is being attempted. Discerning (1) the cognitive meaning of instructions is fundamentally different from weighing (2) what past and present values will produce the morally best social results, and both are very different from determining (3) the psychological state of those who wrote the law—this last being so patently impossible on the face of it that elaborate arguments as to its difficulty[143] are absurd by

their redundancy. When concrete cases are decided *seriatim*, it is sufficient in each case to determine if the specifics of that case fall inside or outside the boundaries of possible cognitive meanings of the instructions. Those who have set themselves the very different task of weighing values from various constitutional, statutory, and other sources, have taken on a much heavier responsibility, a more vaguely defined goal, and a quest without legal authorization.

The ultimate issue between judicial activism and judicial restraint is the institutional locus of discretion, and no amount of insistence on the desirability of change or morality answers the question as to *who* is to decide what specific changes or what specific morality is needed. The institutional security of federal judges, appointed for life, may provide temptations for assuming this prerogative, without providing either moral or pragmatic justification. If no authorization is needed for judges to introduce "change," neither is it needed for generals and admirals to do the same—as in fact happens in a number of countries. Judges can conduct limited *coups d'état* surreptitiously, while a military coup is usually overt and sweeping. Nevertheless, the dangers to constitutional government are no less real in the long run from judicial activism—both because of the cumulative effect of small usurpations and because small usurpations both generate pressures and provide the precedents for larger usurpations by others with different social visions.

The claim that judicial activism is necessary to rescue us from bondage to the past—from having the writers of the Constitution "rule us from the grave"—defies both logic and history. There is no contest between the living and the dead. The contest is between those living individuals who wish to see control of change in judicial hands and those who wish to see it in other hands. There has been no argument that either statutory or constitutional laws are not to change. The only meaningful question is: *Who* is to change them? The reiterated emphasis on change, like the reiterated emphasis on morality, argues what is not at issue and glides over what is crucially at issue: Why are *judges* the authorized instrument? The original cognitive meaning of laws—constitutional or statutory—is important, not out of deference to the dead, but because that is the agreed-upon meaning among the living, until they choose to make an open and explicit change—not have one foisted on them by the verbal sleight-of-hand of judges.

Existing social philosophies and political alignments cannot be presupposed in discussions of long-run questions, such as constitutional interpretation. Even within the judiciary, differences in "substantive values" have been drastic over time, and by no means negligible even at a

19. Holmes repeatedly noted in his decisions that the common law was superseded even by state statutes. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, at 222; *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518; *Panama Railroad Co. v. Rock*, 266 U.S. 209, at 216; *Noble State Bank v. Haskell*, 219 U.S. 104, at 113. *A fortiori*, it was superseded by the federal Constitution.
20. *Tryson & Brother v. Blanton*, 273 U.S. 418, at 445–46.
21. *Lochner v. New York*, 198 U.S. 45, at 74-76; *Truax v. Corrigan*, 257 U.S. 312, at 342–44; *Muhlker v. Harlem Railroad Co..*, 197 U.S. 544, at 576; *Weaver v. Palmer Bros. Co.*, 270 U.S. 402, at 415–16; *Schlesinger v. Wisconsin*, 270 U.S. 230, at 241–42; *Baldwin, et al. v. Missouri*, 281 U.S. 586, at 595.
22. *Truax v. Corrigan*, 257 U.S. 312, at 344.
23. *Nash v. United States*, 229, U.S. 373, at 378.
24. *Northern Securities Co. v. U.S.*, 193 U.S. 197, at 405–6.
25. *Lochner v. New York*, 198 U.S. 45, at 75.
26. Holmes, *supra*, note 5, at 279–82, 292–94. The agreement was not perfect, however. Holmes, *The Mind and Faith of Justice Holmes*, ed., Max Lerner, at 50.
27. Holmes *supra*, note 5, at 239, 295, 307. *Lochner v. New York*, 198 U.S. 45, at 75; *Adair v. United States*, 208 U.S. 161, at 191–92; *Adkins v. Children's Hospital*, 261 U.S. 525, at 570–71; *Abrams et al v. United States*, 250 U.S. 616, at 630; *Tryson & Brother v. Banton*, 273 U.S. 418, at 446–47; *Kuhn v. Fairmont Coal Co.*, 215 U.S., 349, at 372; *Schlesinger v. Wisconsin*, 270 U.S. 230, at 241; *Untermeyer v. Anderson*, 276 U.S. 440; *Quong Wing v. Kirkendall*, 223 U.S. 59, at 62; *William W. Bierce, Ltd., v. Hutchins*, 205 U.S. 340, at 347–48.
28. In *Abrams v. United States*, for example, Holmes dissented in favor of appellants whose views he characterized as "a creed which I believe to be the creed of ignorance and immaturity." 250 U.S. 616, at 629.
29. Posner, *The Federal Courts: Crisis and Reform*, at 221.
30. Berger, *Government by Judiciary*, at 363.
31. Bork, *Tradition and Morality in Constitutional Law*, 7.
32. Dworkin, *Taking Rights Seriously*, 134.
33. *id.*, at 135.
34. *id.*, at 134–35.
35. *id.*, at 136.
36. *id.*, at 139.
37. *id.*, at 149.
38. Holmes, *supra*, note 5, at 170.
39. *id.*, at 167.
40. *id.*, at 170.

41. *id.*, at 170.
42. Rakove, "Mr. Meese, Meet Mr. Madison," *The Atlantic Monthly*, December 1986, 81.
43. *id.*, at 82.
44. *id.*, at 84.
45. Dworkin, *A Matter of Principle*, 40, 43, 44.
46. *id.*, at 42.
47. Macedo, *The New Right v. the Constitution*, 10.
48. Brennan, "The Constitution of the United States: Contemporary Ratification," speech at Georgetown University, October 12, 1985, 4.
49. *United Steelworkers of America v. Brian F. Weber*, 443 U.S. 193 (1979).
50. *id.*, at 207, note 7.
51. *id.*, at 222.
52. Dworkin, *supra*, note 45, at 318.
53. *id.*, at 319.
54. *id.*, at 318.
55. *id.*, at 320ff.
56. This claim was advanced in the preceding year's *Bakke* case, but was then devastated in the *Weber* case by one of those who initially made that claim—Justice William H. Rehnquist.
57. Dworkin, *supra*, note 32, at 328–29.
58. *id.*, at 331.
59. See, for example, U.S. Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of Civil Rights Act of 1964, at 3005, 3006, 3013, 3015, 3134, 3160, 3187–90.
60. *Roe v. Wade*, 410 U.S. 113 (1973).
61. *Engel v. Vitale*, 370 U.S. 421 (1962).
62. *Miranda v. Arizona*, 384 U.S. 436 (1966).
63. *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954).
64. *Baker v. Carr*, 369 U.S. 186 (1962).
65. *Furman v. Georgia*, 408 U.S. 238 (1972).
66. Brennan, *supra*, note 48, at 1.
67. *id.*, at 5.
68. *id.*, at 8.
69. *id.*, at 2.
70. Tribe, *Constitutional Choices*, 22.
71. *Furman v. Georgia*, 408 U.S. 238, at 361–62.
72. Dworkin, *supra*, note 32, at 239.

73. Sowell, *Knowledge and Decisions*, 21-44.
74. Macedo, *supra*, note 47, at 35.
75. Dworkin, *supra*, note 32, at 184–205.
76. Sowell, *A Conflict of Visions*, 185–90.
77. Holmes, *supra*, note 5, at 170.
78. Holmes, *supra*, note 26, at 441.
79. *id.*, at 435.
80. *Untermeyer v. Anderson*, 276 U.S. 440.
81. Holmes, *supra*, note 26, at 432.
82. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, at 372.
83. Holmes, *supra*, note 26, at 449. Nor was this a new conception for him; he considered it to be among "some of my old chestnuts" (*id.*)—this conception of the law having appeared in his public writings decades earlier. In a speech in 1897, Holmes said, "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this way or that by the judgment of the court; and so of a legal right." Holmes, *supra*, note 5, at 169. See also *id.*, at 175; Holmes, *supra*, note 15, at 79.
84. Holmes, *supra*, note 5, at 307.
85. *Lochner v. New York*, 198 U.S. 45, at 76.
86. Bork, *supra*, note 31, at 11.
87. Dworkin, *supra*, note 21, *passim*.
88. *id.*, at 11.
89. Dworkin, *supra*, note 45, at 12.
90. Sowell, *supra*, note 76, at 56–57.
91. Holmes, *supra*, note 5, at 279–82, 291–97; Holmes *supra*, note 26, at 399–401.
92. For example, *supra*, note 28.
93. Tribe, *supra*, note 70, at 3–4, 268; Dworkin, *supra*, at 140.
94. Tribe, *supra*, note 70, at 3–4.
95. *id.*, at 268.
96. *id.*, at 26.
97. *id.*, at 13.
98. *id.*, at 11.
99. Bickel, *The Least Dangerous Branch*, 103–4.
100. Tribe, *supra*, note 70.
101. A suitable fable from Aesop might serve the same purpose. In reality, the view that World War II was unnecessary was held by, among others, Winston Churchill. "There was never a war in history easier to prevent by timely action than the one which has just desolated such great areas of the globe."

Speech by Winston Churchill, March 5, 1946. Churchill, *Churchill Speaks*, ed., R.R. James, 884.

102. Sowell, *supra*, note 76, at 23, 27–28, 36, 57–59, 68–75, 85, 86–87, 106, 156, 201.
103. Tribe, *supra*, note 70, *passim*.
104. Sowell, *Civil Rights: Rhetoric or Reality*, 48–52.
105. Dworkin, *supra*, note 32, at 225, 228, 237; Tribe, *supra*, note 70, at 232, 233.
106. Socrates refused a pre-arranged escape and deliberately stayed in prison to drink the prescribed poison, on grounds that to do otherwise would be to undermine the law. Plato, "Crito," *The Works of Plato*, ed., Irving Edman, 91–106.
107. If there were democratic world government, its constitution would supersede that of the United States for the same reason – not because morality in the rest of the world is presumptively higher than in the United States.
108. Dworkin, *supra*, note 45, at 60.
109. Holmes, *supra*, note 5, at 313.
110. Dworkin, *supra*, note 32, at 184.
111. *id.*, at 190.
112. *id.*, at 197.
113. *id.*, at 198.
114. *Shelley v. Kramer*, 334 U.S. 1.
115. Sowell, *Markets and Minorities*, 69–73.
116. Sowell, *supra*, note 104, at 49–50.
117. See, for example, Sowell, *supra*, note 115, at 34–82, 103–24; Williams, *The State Against Blacks*, *passim*; Tipton, *Capitalism and Apartheid*, *passim*; Roback, "The Political Economy of Segregation: The Case of Segregated Streetcars," *Journal of Economic History*, December 1986, 893–917.
118. *Dred Scott v. Sanford*, 60 U.S. 393 (1857), at 407. Taney attempted at length to show that this view represented the "original intent" of those who wrote the Constitution, *id.*, at 407–18. However, Taney also argued on substantive due process grounds against deprivation of property, *id.*, at 450.
119. Blackstone, *supra*, note 2, at 41.
120. Burke, *Reflections on the Revolution in France*, 42.
121. Sowell, *supra*, note 76, at 21, 42.
122. *id.*, at 175–77.
123. Holmes, *supra*, note 5, at 47.
124. *id.*, at 47.
125. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, 3-21.
126. Sowell, *supra*, note 76, at 19–21, 32, 85.
127. *id.*, at 57, 102.

128. *id.*, at 185–87. Holmes said: "It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of a real doubt a law must be sustained." *Interstate Railway Co. v. Massachusetts*. 207 U.S. 79, at 88.
129. Dworkin, *supra*, note 32, at 144.
130. Veblen, *Essays in Our Changing Order*, 7–8.
131. Shaw, *Fabian Essays in Socialism*, 223; Veblen, *The Engineers and the Price System*, 70–71, 159; Bellamy, *Looking Backward*: 2000–1887, 58, 104, 141.
132. Holmes, *supra*, note 5, at 187, 301.
133. Sowell, *supra*, note 76, at 40-66.
134. *id.*, at 190–198.
135. Epstein, *Takings: Private Property and the Power of Eminent Domain*, 57–62.
136. Sowell, *supra*, note 73, at 193–194.
137. Holmes' opinions favoring particular "takings" include *Tryson & Brother v. Banton*, 273 U.S. 418, at 445–47; *Muhlker v. New York & Harlem Railroad Co.*, 197 U.S. 544, at 571–77; *Denver v. Denver Water Co.*, 246 U.S. 178, at 195–98; *Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, at 600–602; *Interstate Railway Co. v. Massachusetts*, 207 U.S. 79 (1907), at 83–88; *Noble State Bank v. Haskell*, 219 U.S. 104 (1911), at 109–13; *Block v. Hirsh*, 256 U.S. 135 (1921), at 153–58; *Cedar Rapids Gas Light Co. v. City of Cedar Rapids*, 223 U.S. 655, at 666–70. His opinions opposing "takings" include *Chanler v. Kelsey*, 205 U.S. 466, at 479–82; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), at 412–16.
138. *Interstate Railway Co. v. Massachusetts*, 207 U.S. 79, at 86–87; *Noble State Bank v. Haskell*, 219 U.S. 104 (1911), at 110; *Block v. Hirsh*, 256 U.S. 135, at 155–56.
139. *Tryson & Brother v. Banton*, 273 U.S. 418, at 446.
140. Holmes *supra*, note 5, at 204; *Missouri, Kansas & Texas Railway Co. v. May*, 194 U.S. 267, at 270; *Bain Peanut Co. v. Pinson*, 282 U.S. 499. The same idea, without this specific terminology, appears in *Interstate Railway Co. v. Massachusetts*, 207 U.S. 79, at 87.
141. *Tryson & Brother v. Banton*, 273 U.S. 418, at 446.
142. Holmes, *supra*, note 26, at 188.
143. Dworkin, *supra*, note 45, at 319–24.