IN DEFENSE OF JUDICIAL ACTIVISM*

by
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I wish to begin this lecture in the spirit of its sponsor, with a return to fundamental precepts. Each year as it has done for over fifty years, I am told, the Senior Honor Society reviews every member of the junior class. It asks of each, not what has he achieved, but what has he contributed to the university? The question tests not popularity but traits of character that resist the wear of time. Goodrich White met the test and imbued this community with the basic principles he represented and believed in. In 1946, with those principles in mind, he called upon the university to value "those things that make us stronger, wiser, more courageous, and thus better able to do and to serve." Goodrich White was not concerned with novelty, but with truth. In that spirit, I come not to break new ground but to share my perspective in surveying ground familiar to us all. Like good moral philosophy, good legal thinking is not discovery; it is emphasis.

What bears reexamination is the legacy of the Warren Court. What bears reemphasis is that judicial activism in the defense of constitutional liberty is no threat.

Now, as in the earliest days of the Republic, critics claim that federal judges have usurped the authority of Congress and the states, have ignored precedent and predictability in the law, and have used vague phrases in the Constitution to impose their own sense of justice on society. In 1819, the issue was the Bank of the United States; the Chief Justice was John Marshall; the catchword was "arbitrary power." Spenser Roane in his "Hampden" essays attacked the Supreme Court as "assum[ing] legislative powers." "It

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Footnotes have been provided to facilitate reference to the cases discussed by Judge Johnson.

claims the right," he argued, "to change the government."[1] In 1861, the issue was habeas corpus; the Chief Justice was Roger Taney; and the catchword was "tyranny." The *New York Tribune* labelled the power of the judiciary "the most insidious, the most intolerable, the most dangerous" affecting mankind. Twenty years ago, the issue was race and the epithet was "Impeach Earl Warren." Today there are new issues and new faces on the Court. But the new catchword conveys the old message. Beware, critics now say, the "Imperial Judiciary."

This chorus of criticism may be a valuable check on the federal courts. But it is a check without constitutional warrant or logical coherence. The point I wish to emphasize anew is that judicial activism should not be equated with judicial abuse of authority.

The framers perceived that, for the Republic to survive, the Constitution must be supreme. They also realized that the supremacy of the Constitution depends upon an independent judiciary—one with power to resolve disputes between the states, between a state and the national government, and, most importantly, between individuals and government. The architects of the Constitution designed this power into the framework of Article III, Section 2 and Article VI, Section 2.

The power to decide constitutional cases—the power recognized in *Marbury v. Madison*[2]—is not, of course, absolute. It is circumscribed by two basic doctrines. The first, the doctrine of separation of powers, reflects the belief that one arm of government should not wield all authority. The second doctrine, "Our Federalism," restricts the power of the federal courts to intervene in state affairs. Yet these doctrines serve only to limit, not to bar, the exercise of judicial power. Of course, any legal system contains, intellectually, the means of frustrating itself, of bringing its most solemnly enunciated commands to nothing. The political question doctrine and "Our Federalism" can be put to that purpose, and upon occasion

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[1] Roane, *Hampden Essays*, Richmond Enquirer, June 11-22, 1819, *reprinted in* G. GUNTHER, JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 106-54 (1969).

[2] 5 U.S. (1 Cranch) 137 (1803). In *Marbury* the Supreme Court first established its power of "judicial review" by declaring a section of the Judiciary Act of 1789 unconstitutional.

they have been. But neither doctrine reserves to Congress or the states the right or the power to violate the Constitution. Were that not so, as Alexander Hamilton recognized, the Bill of Rights "would amount to nothing."

In defense of judicial activism, it has sometimes been deemed sufficient to declare with all due gravity: when presented with a true case or controversy, the court must not "shirk" its responsibility to uphold the Constitution. Those who press this argument make quick repair to Chief Justice Marshall's eloquent words in *Cohens v. Virginia*:[3]

> It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us.[4]

But this defense begs the question being raised tonight. The challenge we hear being raised is not to *which* cases the courts consider, but to *how* they decide the cases they do consider. The charge is that the federal courts are not interpreting the Constitution but making social policy.

That challenge is infected with three fallacies. First is the "watershed" fallacy. It assumes that judicial activism is a recent phenomenon and that it is alarming, in part because of its novelty. Second is the "elitist" fallacy. It misunderstands the process by which judges decide hard cases. It assumes that the Constitution is but a sounding board for the personal philosophy of the judge. Third is the fallacy of omnipotence. It dramatically overstates the power of the federal courts. Let me discuss each fallacy in turn.

I

Some say the Warren Court marked a watershed in American

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[3] 19 U.S. (6 Wheat.) 264 (1821). In this decision the Supreme Court recognized the State of Virginia's right to prosecute the interstate sale of lottery tickets. Nevertheless, the Court simultaneously established its authority to review and overturn state laws determined to be unconstitutional.

[4] *Id.* at 404.

judicial history—since then, the theory goes, the judiciary has been "ever-more-activist." History may well designate the period from 1953 to 1969 as a watershed—but not because of a quantum leap in activism.

Professor Charles Black claims that the Warren Court is the only Court so far in American history that has so much as a chance of being thought as great as the Marshall Court, because it is the only Court to make an assertion as large and as bold as that made by the Marshall Court. I believe we will all agree that in the decisions of both Courts there is a touch of that "sublime audacity" which gives vision to constitutional theory. Marshall's vision was of one people and one nation. He took disconnected texts and read them together in light of that vision of nationhood. The achievement of the Warren Court was to read the constitutional guarantees, not separately and narrowly, but as interrelated and forming "a total scheme of citizenship." The Warren Court grasped the idea of citizenship and saved it from becoming a conceptual relic of the Enlightenment. The Court gave "citizenship" positive content.

All this may be claimed for the Warren Court. But if its vision was new, its activism was not. Consider the benchmark of judicial greatness—the standard by which the Warren Court or any other is judged. That standard is the Marshall Court. The question since *Marbury v. Madison* has only been which direction judicial activism will take. For a century, activism favored finance capitalism; now it safeguards civil rights and civil liberties. Marshall used the contracts clause to cut back state regulation of business. The Warren Court used the Fourteenth Amendment to curb state abuse of individual rights. The Court in the 1930s was no more wedded to the "passive virtues" and no less activist. Then, conservatives welcomed activism as a bulwark against popular reform.

Activism, then, is an old and persistent theme. Over time, the courts may have changed the key and worked variations on the tune, but none have forgotten the melody of *Marbury*.

We can reach this same conclusion along a different path. We can ask, did earlier courts interpret various constitutional texts any differently? Was their method more restrained? When Richard

Nixon ran for President, he promised he would appoint to the Supreme Court what he called "strict constructionists." If men of such a mind are to be distinguished from judicial activists, it is the strict constructionists who represent a new breed. By the nature of its language, the Constitution must be read actively. Its broad and general terms do not lend themselves to a single, strict construction. When the framers prohibited "unreasonable searches and seizures,"[5] they inevitably required the courts to decide what was "unreasonable." The Eighth Amendment[6] inevitably required the courts to decide what was "cruel." And while everyone is entitled to due process of law,[7] the courts must decide how much process each person is due. With all respect to Justice Black,[8] it must even be admitted that the decisive language of the First Amendment, "shall make no law,"[9] does not mean and could not possibly mean "shall make *no* law." Of necessity these texts must be read flexibly.

This is not a recent revelation. It was not the Warren Court which held that flying a red flag was protected "speech." It was the Supreme Court of Charles Evans Hughes in 1931.[10] In those days, the Court also held that "Commerce among the several states" included the movement of one indigent person across state lines.[11] Motion pictures were deemed "writings" or "discoveries." The Air Force was part of the "land and naval" forces. Making noise was "taking property."[12] Clearly, the school and voting and mental health cases of this era have not experimented with some new method of constitutional interpretation. They reflect the same reasoning the courts have used all along in reading the rest of the Constitution. As Charles Black has put it, all we needed in legal

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[5] U.S. CONST. amend. IV.

[6] *Id.* amend. VIII. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[7] *Id.* amends. V & XIV.

[8] *See* Black, "The Bill of Rights," 35 N.Y.U. L. REV. 865, 874 (1960); Cahn, "Justice Black and First Amendment 'Absolutes': A Public Interview," 37 N.Y.U. L. REV. 549, 552-54 (1962).

[9] U.S. CONST. amend. I, which provides in part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

[10] Stromberg v. California, 283 U.S. 359 (1931).

[11] Edwards v. California, 314 U.S. 160, 174 (1941).

[12] United States v. Cansby, 328 U.S. 256, 262 (1946).

method, to get all we needed in the field of racial equality, was that the Thirteenth, Fourteenth, and Fifteenth Amendments be read in the same spirit as the admiralty clause.

I would add one more perspective. Judicial activism has not been confined to constitutional decision-making. Every first-year law student learns that courts must refuse to enforce contracts that are "contrary to public policy." What that is, scholars have not told us and legislatures have not said. But all accept this principle of activism with equanimity. Consider, second, the creation of strict products liability. State courts overturned the established rule of negligence almost overnight, and upon grounds of social policy. Ironically, this revolution in the law goes unmentioned by critics of judicial activism.

To be sure, there is a difference between activism in the private and public sectors. But that difference does not explain all. One must ask with some skepticism why a broad reading of the equal protection clause causes grave concern, while radical enlargement of congressional commerce clause powers earns praise.

Thus if the federal courts have been activist, that is as it has always been and as it should be. Of course, this is not to say that nothing has changed in recent years. There have been two developments—one substantive and one procedural—which have accented the role of the federal judiciary. I have already mentioned the substantive change: the shift in focus from economic issues to issues of individual right and personal style—from issues of dollars and cents to issues freighted with symbolic meaning. With these new issues have come new litigants. But these issues and litigants are, in part, the product of a change in rules and procedures. That is the second development. The traditional model of litigation no longer fully explains what the Federal Rules permit. The traditional model tells us that litigation is *bipolar:* that it takes place between two diametrically opposed interests which initiate the lawsuit and define the issues. It tells us that litigation is *retrospective*—that it is about identified events in the past—and that it is *self-contained*—that the impact is confined to the parties. Liberal rules of joinder and intervention, combined with a broad view of standing and culminating in the class action, have brought about

the "demise of the bipolar structure." A new model of litigation must account for the following:

— the subject matter often is not a private dispute but public policy;
— the party structure is not rigidly bilateral but multilateral;
— the factual inquiry is not retrospective but predictive; and
— the relief is not compensatory but ameliorative.

If federal judges appear more activist, it is not because they have appointed themselves roving commissioners to do good. Rather it is because new procedures have opened the doors of the federal courthouse to new interests. In the last twenty-five years, racial and economic minorities have turned to the lawsuit as an instrument of reform. To criticize this phenomenon in terms of judicial activism reflects a lack of perspective. The courthouse door has always been open to the powerful, and the lawsuit has always been a ready instrument of the affluent. I suggest to you, as Professor Arthur Miller has suggested to me, that activist judges may be the true conservatives. As Edmund Burke recognized: "People, crushed by law, have no hopes but from power. If laws are their enemies, they will be enemies to laws . . . ."[13]

II

A second and more misleading fallacy is that judicial decision-making is elitist—reflecting no more than the judge's personal view of right and wrong. I reject that contention, whether stated in its simple or sophisticated form. In an earlier age Blackstone's classic statement held sway—that the function of the judge is merely "to find the law and pronounce it." A more skeptical age gave us legal realism. That, in turn, produced its own Thermidor. The progressive realists argued that legal issues are no different from other policy issues. They said that what distinguishes judges from legislators is not the nature of the choice, but the way the choice is made. "Reasoned" decision-making defines the proper judicial role.

[13] Letter from Edmund Burke to Charles James Fox (Oct. 8, 1777).

Legislators, it was argued, are not incapable of reasoned decision-making. They are just inconsistent. When emotions ride high and the pressure for immediate results is strong, legislatures generally prefer to act on expediency rather than principle. Only the courts, said the realists, could generate a coherent body of principled rules.

The test set for the courts was to base their constitutional choices on "neutral principles." A neutral principle is one capable of uncompromising application, not one contrived to produce a favorable immediate result. Critics charge that activism is fundamentally at odds with adjudication by neutral principles. For if it is not neutral principles that control, it must be the personal morality of the judges.

In my view, the doctrine of neutral principles robs the Constitution of its vitality. It freezes constitutional thinking in the interests of theoretical purity. The framers were pragmatic men and the Constitution is a practical blueprint. Its genius lies in its generality. Perfect logical consistency has always given way to practical distinction, as well it should.

It is not my purpose to rebut those who advocate strict neutrality. That has been ably done by others, including Judge Skelly Wright. But I would make two points on my way to distinguishing judicial activism from elitism. First, if the law should beware unprincipled distinctions, it should also beware insufficient inconsistency. Religious differences, race differences, sex differences, age differences, and political differences are not the same. It is no mark of intellectual soundness to treat them as if they were. Moreover, if the life of the law has been experience, then the law should be realistic enough to treat certain issues as special, as racism is special in American history. A judiciary that cannot declare that is of little value. Second, what happens after the court has generated neutral principles of decision? How does the court choose among available neutral principles? Obviously, it can do so only by the kind of activist decision-making that neutral principles are meant to avoid in the first place.

How, then, does the judge decide, if not by personal inclination?

Since no methodology can guarantee uniformity of results, variance alone is not proof that personal whim governs judicial decision-making. Consider the First Amendment: there shall be no law abridging the freedom of speech. Congress passes a law prohibiting commercial advertising on billboards along the interstate highways. How does the judge decide whether this statute violates the First Amendment? The literal language of the First Amendment provides no ready answer. Certainly the intent of the framers does not. But this does not leave it up to the judge's personal tastes. I say that what the judge must do is construct a constitutional theory of the First Amendment. Taking into account the language of the amendment, the intent of the framers, and the logic of prior cases, the judge must attempt to state the essence of the constitutional guaranty. There will always be several possible formulations.

Faced with equally plausible theories, the judge must decide which provides the smoother fit with the Constitution as a whole. No conclusion will be indisputable. Nor will the conclusion drawn necessarily decide the case. If the First Amendment protects self-expression, what are the limits of self-expression? At this point the issue becomes one of philosophy. The judge must elaborate a conception of free expression. Otherwise, the case cannot be decided.

You may object that these choices will be made differently by different judges. Indeed. But it is one thing for a judge to adopt a theory of political morality *because it is his own*; it is another for him to exercise his judgment about what the political morality implied by the Constitution is.

This is the inevitable process by which judges interpret the Constitution. The process that brought forth the desegregation opinions is the same one that gave us *McCulloch v. Maryland*.[14] This process may be labelled judicial activism, but it is not personal preference run rampant.

If you are troubled by this model of judicial activism, consider

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[14] 17 U.S. (4 Wheat.) 316 (1819). *McCulloch* involved the constitutional ability of Congress to establish a national bank. In upholding Congress' authority to charter such a bank, the Supreme Court extended the legitimate function of the federal sector in addressing national concerns.

what judicial restraint means. The only method of constitutional interpretation that precludes judicial discretion is one that strictly limits the judge to the expressed intent of the framers. Such constitutional interpretation is more appropriate to an indenture bond than to an enduring charter of government, and advocates of restraint confess as much. Their enthusiasm for strict construction generally runs to the Fourteenth Amendment and not to the commerce clause. But the general language of the Constitution, of the Bill of Rights, and of the Civil War amendments has a common purpose: it appeals not to a particular *conception* of necessity or reason or equality but to the *concepts* themselves. In making its appeal to concepts, the Constitution presents questions, not answers. But these questions are posed within a framework that guides our tentative answers. The important value choices have been made by the framers already.

Therefore, I submit to you that to equate judicial activism with moral elitism is a fallacy. Justice Douglas was right when he said that constitutional questions are "always open." Judicial license does not make it so; the Constitution, by its nature, makes it so.

III

The courts decide cases; they must then devise relief. This brings us to the fallacy of omnipotence—the claim made by former Solicitor General Robert Bork that "democratic government gets pushed back and back, as judicial government takes over." Increasingly, it is true, trial judges have become creators and managers of complex forms of ongoing relief. The prisoner in fear of his life and the mental patient without a program of treatment will not have their rights protected by an award of damages for past injury. And if we, as judges, have learned anything from *Brown v. Board of Education*,[15] it is that prohibitory relief alone affords but hollow protection from continuing abuse by recalcitrant governments. Facing this situation, judges have the option of either declaring that litigants have rights without remedies, or fashioning relief to fit the case.

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[15] 347 U.S. 483 (1954). In this landmark decision, the Court held that racially segregated school systems violated the Fourteenth Amendment's equal protection clause.

That choice is no choice. The Constitution does not say "no state shall in perpetuity" or "no law shall for an inordinately long time" deny certain rights. The Constitution sets presently effective limits on governmental power. Nor does it say that minorities must trade away certain interests to secure their fundamental rights. The Constitution does not put a price on rights.

If the state abdicates its responsibilities, the federal courts are not powerless to act. The courts can set standards and goals, and if they meet defiance, unyielding defendants can be held in contempt, receivers can be appointed, and, if worse comes to worst, institutions can be closed. The courts may even require certain mandatory financing measures. These are indeed potent tools. But the federal courts are far from omnipotent. It is still true that the judiciary is "the least dangerous branch."

Before you rate the power of the federal courts, place them on a continuum with Congress, the President, the executive bureaucracy, "big business," and "big labor." Judges can state norms and frame decrees; compliance requires a reservoir of public acceptance. Without it, judicial power is empty. The decrees of the courts with regard to the schools, the prisons, the mental hospitals, and voting district reapportionment have enjoyed that acceptance.

I believe our recent history reflects that the courts have intruded only so far as the states have retreated. Let me refer to the Alabama mental health case. The evidence at trial showed that over five thousand patients were crowded into a single hospital for the mentally ill, built in the 1850s. Of those five thousand, sixteen hundred were not mentally ill at all, but were geriatrics for whom the state had no facility. Another thousand were mentally retarded rather than mentally ill. To care for these five thousand, there were only five staff members with psychiatric or psychological training. The state spent less than fifty cents per patient per day for food. *Time* magazine may wonder why the court order dictated minimum requirements in such detail; the public, however, recognized the order as a response to total default by the state.

The other side of this coin is that state responsibility limits judicial activism. One year ago, I could state that in over two decades

on the bench I had never appointed a master or receiver, though requested to do so several times. I can no longer say that. In January, 1979, I appointed a receiver for the Alabama prison system. But that step will work not to diminish state responsibility but to increase it, because, as many of you know, the receiver I appointed is the new Governor of Alabama. In his petition to be appointed receiver, the Governor declared his "intense concern" in the "proper operation of a corrections system in the State of Alabama in accord with, and not in contravention of, the guarantees of the Constitution . . . ." As I said at the time, comprehensive "orders result in the loss of some of the autonomy and flexibility the state might have exercised in the control of its public institutions had it chosen to accept the responsibility for their management before it was too late. That responsibility is one the Court will gladly relinquish to those who are elected to do it, if they are willing to undertake it."[16]

I submit that the surest curb on judicial activism, for those that fear it, is executive and legislative activism in defense of constitutional liberties. The courts possess only so much power as the other branches relinquish.

I have drawn your attention to three fallacies about judicial activism. I would add one point for the skeptical. Judges will make mistakes. But when they do, we should not shift from debating the merits of those particular decisions to narrowing the institutional function of the courts. "There are many cases the law decides—there are a few cases that decide the law." The viability of a legal system may depend upon, and the mark of high greatness only touches, the recognition of such cases. That, in essence, is the role of judicial activism and the basis for its defense.

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[16] Newman v. State, No. 3501-N, at 13 (N.D. Ala. Feb. 12, 1979).