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The American Constitution: A Double Life*

Lawrence M. Friedman**

As everybody knows, 1987 was the year of the bicentennial of the American Constitution; celebrations went on all over the country with (alas) the usual vulgarity, commercial exploitation, empty posturing, and hype. Similar parties took place in other anniversary years—1876, 1887, 1976; and the recent centennial of the Statue of Liberty was perhaps the worst of all. It may all be innocent fun. While the parties go on, some commentators and academics have assumed the role of shrill old nannies, spoiling the good times with their nagging and scolding. The message of these critics is bound to be unpopular: it is essentially a message about complexity and ambiguity, while the point of the parties, to the contrary, is eulogy and self-intoxication. In fact, close study of historical reality tends to support the critics; it turns up warts, bumps, puzzles, and embarrassments like slavery. The nagging and the doubts have great value, of course, when offered in the spirit of genuine inquiry, and not merely to spoil the party. I feel close to the critics in spirit. Yet, in this talk, my message in the end is one of celebration—not so much for the Constitution as written, as for the justices who made it what it is.

In an important sense, there are at least two separate constitutions, which stand in a kind of paradoxical opposition to each other.

* From an address delivered for the Ben J. Altheimer Lecture Series at the University of Arkansas at Little Rock School of Law on October 1, 1987.
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The first, which we might call the Constitution of stability, is found in the document itself. It is the system of government which the framers set up in the late eighteenth century. This Constitution has shown remarkable powers of endurance. It is, apparently, the oldest Constitution still in force. The framers' plan, to be sure, has been altered in a number of details. Some of these changes are fairly important—the direct election of Senators, for example. Still, if the framers came back to life, they would recognize a good deal of their handiwork. There still is a President and a Vice-President, a Senate and a House, a Supreme Court and separate states. The framers would be surprised to see the ethnic diversity of Congress, and the women and blacks on the floor; but the institution itself, like the others mentioned, would not surprise them, at least not on the surface. (Beneath the surface, to be sure, would be an executive branch whose power and size would amaze them totally.)

What they would recognize is the work of the first Constitution. But there is, in fact, another constitution, the constitution which the Supreme Court has made, working over the course of two centuries. The labor of creating this constitution has proceeded with special speed and force in the last forty years. This is not a constitution of stability or endurance; it is, rather, a constitution of expanding rights and continuous evolution. What we call constitutional law, as it is studied in law school, is really the work of the Supreme Court, creating this second constitution. In particular, it is the extravagant designs which the Court has woven out of a pitiful handful of phrases, mostly from the post-Civil War amendments, and from the fourteenth amendment most of all. It is very doubtful that the framers would recognize anything much in this second constitution. It would be utterly foreign to them—as foreign as the world of jet airplanes, computers, and heart transplants, which is foreign indeed. It would be almost as foreign to the men who drafted the fourteenth amendment, some eighty years after the adoption of the original Constitution.

It is paradoxical that what we celebrate is the endurance of the first Constitution. This Constitution, but only this one, is two hundred years old. The second constitution is almost entirely modern. Yet the passion and the pride, the argument and the debate, the thrust and parry, the explosions of controversy, the fallout and backlash, all revolve around the second constitution, the constitution the Supreme Court has made.

Indeed, practically everything we think of as "constitutional law" is part of the second constitution. There is some litigation, to be
sure, about the framework of government—about the separation of powers. But in the main it is the open, lapidary, ambiguous clauses and phrases which have swollen in importance and scope. The second constitution has some elements that can be traced as far back as Chief Justice John Marshall. On the whole, however, it came into its own only in the late nineteenth century. The Supreme Court spun a whole web of doctrines out of the due process clause—doctrines powerful enough to strike down state laws fixing wages and hours, or setting railroad rates, or restricting child labor. Doctrines of substantive due process came out of the second constitution. In the 1930s, the Court used its private constitution to make war on the New Deal. The Justices scuttled some of Roosevelt's key measures, and brought a storm down on their heads. In the last two generations, in a stunning reversal, the Court has turned meek and deferential toward economic regulation; it filled the void with a magnificent structure of rules, in aid of minorities and underdogs in general. This is the constitution of *Brown v. Board of Education*,\(^1\) the constitution of one-person one-vote, of *Gideon v. Wainwright*,\(^2\) the death penalty cases, of the right of privacy, and of *Roe v. Wade*.\(^3\) It goes without saying that not all of these cases won universal acclaim. An explosion of outrage greeted some of them.

The subject of this talk is the second constitution and the Justices who make it. The subject is very much in the public eye. The anniversary year makes it prominent; the battle to confirm Robert Bork increased the sound and the fury. My aim is to clear away certain layers of rubbish and myth that surround the second constitution. I want to explore, above all, one fundamental question: What gives the Justices the right to create a constitution? Do they follow some coherent body of principle? Is there some privileged source of legitimacy for what they are doing? And what controls, if any, have been placed on their power? Are they judicial outlaws, usurpers, imperialists—doing what they please, without a shred of proper authority? Of course, in theory, the whole cascade of doctrine is derived from the Constitution; it is all "interpretation" of the text. Some Justices even say so. But few scholars are so naive as to think this is what constitutional law is about. There is no point in fudging the facts: the Justices have, basically, made it up by themselves. Of course, they believe in what they are doing. They believe the Constitution was

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meant to be flexible, meant to evolve, meant to move with the times. They may well be right. But what does “flexible” mean, or “evolution?” What does it mean to change with the times? However one twists and turns, these phrases assert that the Court was *intended* to exercise vast power; those who wrote the words expected the Court to innovate, free from true textual constraints.

In scholarship and politics, there has been an endless search for some source of legitimacy—some way to justify what the Court has done or is doing; some way to decide which parts of constitutional law are valid, and which are usurpations. It is an ancient puzzle. There are literally dozens of theories. It would be a waste of time to spell them out here. Every well-known constitutional scholar has his own. Professors battle it out in the law reviews, in the columns of the press; during the Bork hearings, theories were aired on TV.

In my view, all of these theories, at bottom, are rationalizations. Each theory, at its core, is result-oriented. Now “result-oriented” is a dirty word in this field. When one professor calls another professor “result-oriented,” it is almost as bad as calling him a horsethief or a communist. A “result-oriented” person is one who does not care about “the law,” or principles of law; she cares only about the results of the cases, and never mind how one gets there. Result-orientation is thus a deeply subversive approach; a kind of heresy against constitutional law, if not against the rule of law itself; it warrants burning at the stake, or worse.

Nonetheless, in my view, the whole fraternity of scholars is result-oriented, whether they know it or not, whether they admit it or not, whether they like it or not. By this I mean that theorists start out, not with theories, but with ideas in mind about results: which ones they like and which ones they do not like. They are for or against desegregation, or prayer in the schools, or the death penalty, and so on. They then try to construct some theory to justify good results and condemn bad ones—a theory that will be, in addition, powerful enough and logical enough to persuade other people, or bring them around; a theory that will prove the “good” results to be based on sound morals and sound law. Results in fact are the *test* of theory. If a professor constructs a theory, and then finds to her horror that, logically, the theory makes *Brown* 4 or the cases on sex discrimination wrong, then the theory will be thrown out the window, and a new one crafted forthwith.

Result-orientation is an accusation leveled mostly at liberals.

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This is, in part, because a few of them admit the crime openly. But the charge is equally true, I am convinced, for conservatives. Many conservatives claim allegiance to the old-time religion of strict construction. Strict construction, they claim, is politically neutral; let the chips fall where they may. But in truth their passion for strict construction comes from distaste for the Warren Court results; this leads them to attack loose construction, which underpins these decisions. Strict constructionists want to dismantle these doctrines, lock, stock and barrel; strict construction is the theory that allows them to go from there to here.

Many conservatives will, of course, deny these propositions. On the contrary, they will say, strict construction is the only valid and coherent theory. It is the only one that is simple to operate—any child could assemble it from a do-it-yourself kit—and it is the only one, in a babel of theories, with a built-in principle of legitimacy. The only safe course is to stick to the original intention; to ferret out what the framers said and meant. Nothing further or extraneous should enter constitutional law. If some rule, doctrine, or principle is not literally expressed in the Constitution, and if the framers did not or could not mean to put it there, then the Justices have no right to embrace that rule, doctrine, or principle.

There is a strong argument that this strategy is not only wrong, but downright impossible; nobody can tell what the framers really meant, if indeed this is a meaningful question. But for the sake of argument, I will concede that it is a workable strategy. The real problem is that the Court itself has never been content to follow this strategy. Therefore, the strategy can be adopted only at the price of throwing away ninety-five percent of current constitutional law, including much of the law of race and sex discrimination, the cases on reforming the political process, protecting the rights of criminal defendants, and increasing autonomy in matters of personal life-style. Do we really want to discard fifty years of higher law? Some of us no doubt do—those who do not like the results. But the public, I am convinced, is not so inclined—not root and branch. That is one message of the Bork hearings. And I for one agree. The destruction of constitutional law as we know it is far too high a price to pay for a simple, orderly theory.

In short, theories of constitutional law, and constitutional interpretation, whether right, left, or center, are normative, that is, they are searches for some ethical or doctrinal principle which will tell the court what it ought to do, when it ought to do it, and above all how it
should decide its tough cases. And the theories all suffer from the same basic vice. That is, they are normative theories; but they are in essence result-oriented, that is, driven by principles outside the law and the Constitution itself. What moves and motivates them is the desire to reach certain concrete ends. There is no way around this. Results are also the way we judge other people’s theories. If I do not agree with you about results and policies, why should I accept your theory about how the Court should behave? If your theory makes my favorite case wrong, I will reject it. I can always find some theory more to my liking—a theory under which the results I want turn out to be “principled” and just.

Most constitutional theorists are concerned with ideas and principles, and the logic that ties them together. Results and values are what makes the wheels turn, inside their minds and hearts; but for the outside world, these preferences are dressed up as constitutional theory. Those who play this game are, on the whole, neither historians nor sociologists, by training or inclination. Their bent is toward political or legal philosophy. They like system, rationality, logic. They cannot see any middle ground between two polar situations. The first, which they prefer, is the heaven of coherent principle. They would like the Justices to give allegiance to some beautiful, consistent normative theory, an elegant network of philosophical principle; this is to act as the touchstone of decision. The only alternative they see is anarchy—total inconsistency; or what is worse, a regime of personal whim, in which Justices simply do as they please, and to hell with the Constitution and the will of the majority. But is this really the choice? Is there nothing between these two poles? If a regime of perfect principle is neither possible nor desirable, are the Justices then truly outlaws on the bench?

Explaining Judicial Behavior

Constitutional scholars often pin the dreadful label, “countermajoritarian,” on the work of the Supreme Court. Nobody elects the Justices, and they are appointed for life. Frequently, a Justice disappoints the President who put him on the bench. The Justice almost always outlasts the President in office. Theodore Roosevelt appointed Justice Oliver Wendell Holmes, Jr., and was later annoyed at Holmes’ holdings. Eisenhower put Chief Justice Earl Warren on the bench, and rued the day. The Court, with life tenure and vast power, seems out of place in a democratic society, where the people
are supposed to be sovereign, and express their sovereignty through elections.

There is something almost endearingly naive about this line of criticism. The concept of "democracy" it implies comes straight out of high school civics. It does not have a drop of subtlety or sophistication. Of course, our system is democratic to a significant degree; but, it is also a very complicated, delicately balanced, subtle working system. No doubt the Court often thwarts the popular will, assuming we understand what that means (I will return to this subject). But it is childish to pin that label on them as if they did nothing else. Moreover, the label strikes me as crudely applied. In some cases, for example, the Court overturns—on due process or other grounds—decisions of officials who may be three tiers down from the top at the Pentagon, or in the lower depths of the Social Security administration. These officials are supposed to represent democracy or the popular will, because they were appointed by somebody who was appointed by somebody who was appointed by somebody actually elected. I am not prepared to say that the Court, if it goes against these bureaucrats, is less in tune with democracy or the will of the people than they are. Indeed, the courts are sometimes the only way to control the bureaucracy democratically. I pass over a second point, so obvious as to be banal, that the Court is often supposed to thwart the majority; otherwise, the Bill of Rights would have little meaning.

"Countermajoritarian" is a word which, as far as I can tell, is mainly used in discussions of the Supreme Court. No doubt much of what the President does, between elections, is equally "countermajoritarian;" and, certainly, so is the behavior of Congress and the civil service, at least some of the time. But it is only the Court that gets insulted this way. Another buzz word is "usurp." This is hardly a common verb in the English language; these days, the judges seem to be prominent usurpers, in the view of their critics. They have greedily aggregated to themselves far more power than the framers ever dreamed of; and in so doing, they have stepped over the line that separates honest decision-making from outright legislation, which is not their job at all. So the argument goes.

Now part of this charge is absolutely true. The Justices do exercise vast power—power that would make Jefferson's hair stand on end; or even Hamilton's hair, or George Washington's. But these men would be equally shocked at the power of the President, and of the bureaucracy, and of the governors of all fifty states. The scope and sweep of government, the complexity of government, the tasks
and problems of government, have all increased to a degree that nobody in 1787, or even in 1887, could have dreamt of in their wildest fantasies. And small wonder: the world has changed, socially, technologically, and in every other way. Government has at its fingertips billions of dollars in resources, vast armies of soldiers and civil servants; it commands every technical tool of the computer age, with the hydrogen bomb thrown in for good measure. Its capacity for good is great; its capacity for harm quite frightening. If there ever was a time for mighty checks and balances, it is now. The Court's power, to a great extent, is countervailing power; power erected and exerted to defend against executive or legislative power. If so, then the dreaded word "usurp" is distinctly out of place.

There is a strong case—I would say an overwhelming case—that judicial power is needed in the United States. A system of checks and balances has grown, evolved, and developed, which depends upon this power. Still, everyone would agree that judicial power, like power in general, cannot be unlimited; it must have some end-point; it must have its own checks and balances. As I said before, constitutional theorists worry themselves to death over this problem. They seem to think that the power of the Justices is in fact totally unlimited, unless they can find and impose a coherent theory of judging. Without such a theory, the Court is a panel of dictators, whose naked whims are foisted on a helpless society.

The truth is that the Supreme Court operates within relatively narrow limits. It is simply not correct to say that without the idea of judicial restraint or strict construction the Justices are let loose, like imps out of their bottle. It is a wild caricature to think of the Justices as power-mad warlords, looting and pillaging, destroying legal traditions and ripping the fabric of society. The alternative to strict construction is not unbridled whim. The Court, after all, has no power to invent cases or frame issues on its own; it is strictly a reactive body. It decides those cases that come knocking at its door. The Court, in an important sense, is totally dependent on its litigants. Moreover, although it has no power to fabricate issues, it has a great deal of power to avoid them. In fact, the Court has more often dodged issues than sought them out needlessly. It never ruled, for example, on whether the war in Vietnam was legal. Litigants begged and pleaded; the Court's ears were deaf.

A second limit is imposed by collegiality. This is a nine-Justice court. It takes five to make a majority; a Justice may have to bargain and wheedle and compromise and persuade to weld together a work-
ing majority. This puts a powerful brake on any Justice too far out of line with his associates.

There are also limits which derive from the Court’s long and emphatic tradition. The Supreme Court, like all common-law courts, deals with issues within a structure whose boundaries are set, and whose dialogue is established, by the logic and language of recent cases on point. The Justices cannot be forced to follow precedent, and often they do not. But they never ignore case law completely. They read past decisions, they argue them, they consider what these cases imply. Prior cases form an agenda, and mark off an area. Inside of this, to be sure, the Court is free to shift and maneuver; but it rarely strays out of the bounds.

Moreover, the Justices are lawyers. They have all gone to law school; most of them have practiced law and served on the bench before appointment. The internal legal culture is their intellectual and emotional home. The legal world has its own powerful symbols, its own language and etiquette. Judges and lawyers frame issues within that language, and operate within the boundaries of that etiquette, which are as ceremonial and fixed as, say, the habits of the Japanese Imperial Household. These cultural factors tend to smooth away a Justice’s rough edges; they incline judges toward moderation and incrementalism.

Last, and strongest of all, are the limits imposed by context, by the simple fact that Justices live in this society, are part of this society, and share the general social norms of society—including norms about the proper role of judges. Of course, there is no mystical consensus about goals and values in American society, which the Justices automatically inhale. “Society” is not a monolith; it is fragmented and split into dozens of quarreling factions and fractions, rich and poor, North and South, white and black, and a hundred other ways. Some of the Court’s recent cases have been tremendously controversial: the abortion cases; the death penalty cases; cases on affirmative action. The Court itself is sharply split on many issues. Nevertheless, there are certain broad commonalities. No Justice would dare write an overtly racist opinion. No Justice would dare question Brown v. Board of Education. All Justices hold certain general but potent norms and values. Their minds and feelings are locked onto certain fundamental ideas, just like the rest of us.

But what makes context so compelling is more than shared norms. Context is the very source of the norms. Our attitudes and
ideas reflect training, and traditions; they also reflect what is happening in the world today. A Justice who lives in a world of computers, the hydrogen bomb, surrogate motherhood, and gene splicing, is not the same as a Justice who lived in horse and buggy days, or a judge from the world of knights, castles, and serfs. And if context is the source of changing norms, it is also the very mother of normative limits.

All the factors mentioned guide and limit the Justices—one might almost say they determine what the Justices do. Understanding the power of context, how much it confines and limits ideas and actions, should go a long way toward alleviating fears of judicial dictatorship. I am not saying that the Justices are infallible, that an invisible hand is guiding them. Nothing of the sort. Context is no excuse for any particular decision. Some decisions are obviously, disastrously wrong. The Dred Scott 6 case comes immediately to mind. To be sure, even a Dred Scott 7 case is bounded by context. Chief Justice Taney was a slave-owner, and his views were by no means extreme, for slave owners of his time, if that is any comfort.

Nonetheless, the importance of context cannot be overstated. The Court evolves over time. It changes its collective mind. At any given moment, there are conservatives and liberals on the Court. At least it is conventional to analyze Justices in this way; and for many purposes the analysis is useful. But the questions on which conservatives and liberals split, and the ways they split, vary tremendously from generation to generation. So does the definition of what is liberal, and what is conservative. It is hard to squeeze nineteenth century Justices into twentieth century categories, and vice versa.

The range of opinion on the court forms a kind of normal distribution, a little bell-shaped curve, with liberals at one end and conservatives at the other, and moderates bulging in between. The curve maintains its shape as it moves through social space, but its absolute position depends on the period. At the moment, Chief Justice Rehnquist is probably the most conservative Justice on the Court, on many issues, probably including race. Yet, on race, Chief Justice Rehnquist stands far to the left of every single Justice who sat on the Court in the 1890s. The most radical Justice, on race issues, in that period, was the first Justice Harlan. Justice Harlan's passionate and eloquent dissent, in Plessy v. Ferguson, 8 is one of the great constitutional docu-

7. Id.
8. 163 U.S. 537 (1896).
ments. It is full of courage and humanity; but by the standards of the 1980s, it is racist to the core.

I say this not to denigrate Justice Harlan. He was a wise, caring, and far-sighted person. But he was also a white man of his time and place, and he could not totally escape the pervasive theories of race, which poisoned the very atmosphere. The Court moves with the times—as a whole; but its center point travels through space; its opinions always reflect society, as well as the views of particular Justices, but society changes, and the Court changes too. How could it be otherwise? The Justices of today live in our world, read our newspapers, go to our movies, walk on our streets. The culture of 1987, not 1787, suffuses the air they breathe; and their minds are bent accordingly.

Legitimacy

Among the panjandrums of constitutional theory there is a good deal of talk about the legitimacy of the Supreme Court. The argument runs something like this: if the Court goes too far, takes too active a role, departs too much from original intention, it damages itself, it abandons its proper function, it loses legitimacy. Sometimes the argument stresses the craft and manner of judging. Weak logic, badly written opinions, inconsistency from case to case, are said to be dangerous; they too rob the Court of legitimacy. Exactly what happens after loss of legitimacy is not entirely clear, but it seems to be a fatal disease.

These arguments give off the faint smell of red herring. To begin with, there is a question of definition. What is this "legitimacy" that everybody talks about? What does the word actually mean? There seem to be two general senses, much muddled together. One sense is strictly normative or theoretical. An institution is legitimate if it is proper or ethical or right in some theoretical or philosophical sense, regardless of what people actually think about it. We can, I think, safely disregard this meaning. Loss of legitimacy in this purely theoretical sense would have no practical consequences, except for theoreticians.

There is a second meaning, however, which is much more significant. Here legitimacy refers to a public attitude, a state of public opinion. A legitimate institution is one that people accept as right and proper; it has been properly established, it has its proper role, and it fills it properly. The hypothesis is that people love, honor, and obey legitimate institutions; they do not respect illegitimate institutions,
and they are less inclined to obey them. In extreme cases, when a whole government loses legitimacy, the result may be armed rebellion.

There is no doubt that legitimacy in this sense is vitally important for the Supreme Court, and for any institution for that matter. But this is only the beginning of our inquiry. We must go on to ask: what is the source of legitimacy? Or, to put it another way, where does the Court's strength (or weakness) with the public come from? Is it the quality, craft, and style of the written opinions? Hardly. After all, nobody reads them, not even lawyers. The public is only dimly aware of what the Court does, except for a few very notable, splashy or momentous decisions. Most people get their information about the Court from the six o'clock news, in twenty second spots, if they get it at all. No recent decision of the Court has been debated and discussed as much as the abortion case, *Roe v. Wade*.9 Thousands of people have demonstrated for or against it, bombs have been thrown, elections won and lost. Yet I would wager that the number of people who have actually read the opinion—besides law professors and students who see edited versions in class—could fit comfortably in one small room. The legitimacy of the Court, for most people, even for most lawyers, comes from what the Court does, not the reasons it gives, and certainly not from the craftsmanship, legal logic, or doctrinal purity of its opinions.

Some opponents of *Roe v. Wade*,10 to be sure, are aware that a number of legal scholars have savagely criticized the case. Pro-choice people, for their part, know that other scholars praise it. Both sides use scholarly opinions as arguing points; and nothing more. Whether, in the final analysis, the written opinions of the court were well done, or poorly done, or neither, is of no consequence whatsoever.

*Brown v. Board of Education*11 makes this point too. Chief Justice Earl Warren's opinion, in my view, is not only laudable in result, but a respectable piece of legal craftsmanship. Many experts, however, feel otherwise. Almost all of them praise the result; they declare it justified on constitutional grounds. But an undertow of grumbling persists over the quality of the written opinion. It rests (it is said) on shakier foundations than it might have. A better legal scholar, a more thoughtful or philosophical judge, could have crafted a better opinion.

But does anyone seriously imagine that a better opinion would have made any difference? Those who opposed the decision with

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10. Id.
vigor, passion, desperation, the segregationists with “Impeach Earl Warren” bumper stickers, Ku Klux Klan members, even moderates who thought the case “went too far”—would they have changed their minds, if Chief Justice Warren and the Court had put together a more convincing opinion? The question answers itself. How many of these people had ever read it? For that matter, how many civil rights workers and black activists had ever read it? I repeat: legitimacy is no doubt a vital element in sustaining the power of the Court. But we are far from understanding what makes legitimacy work; and what is usually said about the subject is superficial, or downright wrong. In particular, constitutional theorists, I am convinced, are far from the mark. The roots of legitimacy are in results, not in craftsmanship; in what the court does, not what it says.

Indeed, far from endangering the legitimacy of the Court, Brown\textsuperscript{12} enhanced it beyond all measure, at least with one important part of the population; and perhaps, by now, with almost everybody. No doubt, it is dangerous for the Court to act boldly on issues that divide opinion very sharply. But these issues are also the Court’s greatest opportunity—to advance the general welfare, and to bolster its own legitimacy and prestige in the process. The Court ranks high with the public. People feel the Court stands for justice, for humanity, for the citizen’s rights. These attitudes are based on decisions, actions, results. The public knows little or nothing about the paths the Court takes to reach these results. In the battle over Robert Bork, the Senate rooms became a gigantic classroom. A debate over constitutional theory so concentrated and public has not been heard, perhaps, since the Philadelphia Convention. But, with all due respect, it was basically a sham—on both sides. The real battle was over concrete interests, concrete rights, concrete results. The rest was window-dressing.

\textit{The Court and Public Opinion}

The argument up to this point suggests what seems a paradox. On the one hand, the Court depends on social context; it cannot wander too far from limits set by context. It is a tiger, but a tiger in a cage. Yet on the other hand, the Court seems free to thwart the majority will. The paradox is only apparent. The Court is not a random sample of the population chosen scientifically; it is a panel of nine senior judges. Everything it does must have a basis in social norms, to be sure. Public opinion shapes the issues that come before the Court,

\footnote{12. \textit{Id.}}
and affects the Court’s reactions to those issues. But this statement conceals a great deal of complexity.

To begin with, to quote the famous line from Mr. Dooley, the Supreme Court follows the election returns. This was true ninety years ago, and it is true today. Of course, unlike Congressmen and state legislators, the Justices do not worry about losing their seats. Justices can rebuke the regime—or the electorate—without taking much of a risk. In some countries, we must remember, judges who defy the government lose their posts, or even their freedom or their lives. Yet on the other hand, the Supreme Court always knows which way the winds are blowing. The Court is (politically) independent, but it is not (politically) autonomous. The administration cannot order the Justices about, but the Court is part of the world in which the administration functions; the Court is not divorced from currents of opinion; and it, too, worries about its legitimacy in the event that it goes too much against the grain.

The precise relationship, however, between the Court and “public opinion” is complex. To begin with, what does “public opinion” mean? The concept is elusive. It cannot be blandly equated with, say, public opinion polls. The numbers that pollsters scrape together are not meaningless; but they require delicate interpretation, which they rarely get.

Polls are unreliable, to begin with, because they omit intensity or salience. A person may say, yes, I favor the death penalty; but it is crucial to know whether he favors it mildly or intensely; and whether he puts his money and influence where his mouth is. In politics, intensity is everything. A small group, passionately in favor of some bill or proposal, can have a powerful effect. The group may well defeat a majority, if the majority, despite its numbers, never mobilizes, never shows intensity. One committed partisan outweighs ten passive citizens. In elections, there is only one vote to a customer; but in the rest of our on-going political life, people can cumulate their influence; they can put their weight behind issues they believe in, or which touch their vital interests. “Single-issue” people are dangerous and powerful for that reason. And in the real world of politics, money and power talk in ways that do not count inside the polling booths. The voice of a major contributor rings louder than the voice of mere voters.

The Supreme Court is not, and cannot be, blind to attitudes, thoughts, trends, and problems of contemporary life. Sometimes, the Court is a prisoner of those trends. At times, the Court drifts aim-
lessly. In the first decade of the Cold War, the Court seemed caught up in the general hysteria. It is a rarer situation, though an exceedingly important one, where the Court stakes out a position in defiance of majority opinion. The Court does this, on the whole, reluctantly, hoping that the public’s views will pass on like summer squalls. And of course, the Court never stands completely alone; there are always some on the Justices’ sides; otherwise, there would be no case. On race and sex discrimination, the Court moved more rapidly than majority opinion; later, the public caught up. The jury is still out, so to speak, on expanded rights of privacy.

Of course, the Court sees its duty as one that transcends public opinion. The Court must decide on the basis of principles and rights; and those principles and rights, though products of their times, are by no means identical with the way they reverberate in public opinion. The Bill of Rights would be meaningless if the Court felt the need to defer to majorities, simply because they reflected public opinion. If the Court’s principles represent public opinion at all, it is a rather special version, which we might call enlightened public opinion.

Hardly anything is better calculated to make cynics snicker than this phrase. What is the difference between plain public opinion, and enlightened public opinion? Simple: my opinions are enlightened; yours, if you disagree, are unenlightened. For the Court, then, “enlightened” is a fig leaf for elite judicial views.

This point is in the main well taken. Yet there is a sense in which “enlightened public opinion” means something more than prejudice or elitism. Survey research, despite its limitations, points toward such a meaning. Surveys consistently show that lawyers are far more liberal than the general population on issues of civil rights and civil liberties. In reaction to a question whether the law should “legally protect” the right of atheists to “make fun of God and religion . . . no matter who might be offended,” only a small minority of the general public (one out of four) said yes. But fifty-three percent of community leaders did so; and an amazing seventy-five percent of a sample of “legal elites” said yes, too. A similar split appeared on the question of pornography. The general public wants to suppress it or ban it; legal elites do not. Only thirty-eight percent of the general public agreed with a statement that people should be allowed to see any movie they want to, “no matter how ‘filthy’ it is.” Forty-three percent disagreed; the rest were undecided. “Community leaders” split almost evenly on this question. But fifty-six percent of a sample of legal elites favored a permissive, let-them-see-it attitude; only twenty-nine percent dis-
agreed.\textsuperscript{13} Compared to the general population, the lawyers sampled were close to the line of the American Civil Liberties Union all across the board.

Yet lawyers are hardly on the whole flaming radicals. They are an educated elite; they enjoy an income much greater than the mass of the population. On economic issues, they are perhaps a shade more conservative than the general population; it is hard to tell. In general, they are stout defenders of the established order. Why then do they appear so liberal in these polls?

To begin with, they know more about the subject. In particular, they know how difficult these issues are and that easy solutions do not work. Another way of putting it is to point out that lawyers are trained to think about legal structures. They approach these questions concretely. Their minds focus on the practical problems of putting doctrine into practice.

Take the question of pornography. If we ask lawyers what they think about pornography, their answers draw on their legal experience and training. Perhaps they detest pornography. Still, they ask themselves: what are the structural consequences of outlawing dirty books? Who is going to define pornography and how? How will we avoid book-burning? How can we draw lines between the permissible and the impermissible? Lawyers see problems that the general public does not know about, has not thought about. The same is true of the rights of atheists. Who will decide on the limits of religious argument? Where will the line be drawn?

The issue of prayer in the schools strikingly illustrates the point. Enormous majorities disagree with the Supreme Court. Lawyers are less convinced. Lawyers may be both conservative and religious and still remain in doubt. Lawyers, in the first place, are acutely aware of the first amendment, the issues, and the case-law under this amendment. In the second place, once again, the lawyers are aware of structural difficulties, the public is not. It is all very well to say, schoolchildren should pray; but what prayer, whose prayer? Who drafts or chooses the prayer? What about people who object to the prayer? It is not that there are no answers to these questions; but the general public has never even thought of the questions, let alone the answers. The lawyer has.

In short, it is not nonsense to say that the opinion of lawyers is enlightened, compared to the opinion of ordinary folks. This is not

elitism, but simple fact: the lawyer knows what she is talking about; her opinions are based on experience and knowledge, on thought and on training, and not on chance speculation. Of course, lawyers differ among themselves on these issues. But the lines of debate are fairly sophisticated, compared to discussions among members of the general public.

A fortiori, the same holds true as to the United States Supreme Court. At least in the present generation, the Justices have a firm, sensitive grasp of the great issues of civil rights and civil liberties—as sensitive and finely-tuned, perhaps, as any group in the country. In a real sense, they are experts on the subject. Their job forces them to think long and hard about the issues. I am not saying that they think correctly or consistently, or that their thinking is always intelligent. It is and it isn't. There are gaps in the thinking of the Justices—even the best of them. The Court is relatively weak in thinking about impact—about the consequences of decisions. It has no mechanism for following up its cases, and at times shows little understanding on the subject. Nonetheless, it is clear why even the most conservative Justice is "ahead" of the public on some issues—issues of race, of church and state, of privacy so-called.

I do not want to exaggerate this point. The historical record suggests the need for caution in praising the Court; the Supreme Court decided _Dred Scott_14 and _Plessy v. Ferguson_,15 as well as _Brown v. Board of Education_.16 Perhaps the Supreme Court is not inherently more sensitive to rights issues than anybody else; but it seems clear that at any rate, under present day circumstances, it is more sensitive than the general public, and partly at least because of the factors mentioned.

It is possible, of course, to change the complexion of the Court through strategic appointments. The struggle over Robert Bork in 1987 made it clear, if it was not clear before, that the Supreme Court is a powerful symbol, as well as a powerful force. It has developed a constituency for itself; when this constituency feels threatened, it reacts with volcanic force. This is a distinctly American situation. English or French judges are appointed without fanfare and without overt controversy. French judges then slide into grey obscurity, into an anonymity from which they never emerge. They exercise power, to be sure, but strictly in camouflage, and from behind the scenes.

15. 163 U.S. 537 (1896).
In a small but vital group of cases, the United States Supreme Court works in a wild blaze of publicity. This is despite the fact that ninety-nine percent of the public has not a clue about the legal issues. How many people understand the incorporation doctrine, or can talk intelligently about levels of scrutiny? (Can anybody?) Yet millions feel that the Court is on their side; that it is a bulwark of justice, as they understand it. The Court has built for them a house of justice and understanding. They are only dimly aware of the textual sticks and stones. But the Court, and its constitution, are engrained in political and social life; and this the people know.

Ultimately, the second constitution rests on intuition, faith, unspoken norms—principles deeply felt and passionately experienced by the Justices, eight men and one woman. Tradition and logic play a part; other ideas float like plankton in the sea of legal culture. The Justices take their responsibilities seriously. Collectively they have, it is true, created this second constitution. It is linked to the text with the most silky and invisible of threads. Yet this does not mean a government of judges, as my argument, I hope, has made clear; for any particular problem, for any concrete issue, there are powerful constraints on the Justices. The second constitution is part of our legal system, our legal culture, whatever the source of its norms. By now, it is rooted in the very structure of the country. Those roots—political, legal, social, and ethical—run deep. The first Constitution gave a framework of stability; the second constitution grew up under its sheltering wing. This constitution will, one hopes, continue to move, and to grow, in the coming centuries of American life.