

1992

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Recommended Citation

Edward E. McAteer, *In Defense of a Principled Judiciary*, 26 U. Rich. L. Rev. 459 (1992).

Available at: <http://scholarship.richmond.edu/lawreview/vol26/iss3/7>

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IN DEFENSE OF A PRINCIPLED JUDICIARY

*Is there not a cause?*¹

*Edward E. McAteer**

The Supreme Court has a unique function in the American democratic Republic. In a column written near the end of the Court's 1990-91 term, judicial analyst Patrick B. McGuigan observed,

Constitutional law should be orderly, largely predictable. For years, analyses of Supreme Court rulings were recitations of liberal academic theories fused into constitutional litigation. Creeping conservative success in the federal judiciary is undoing the decades-long successes of academics and litigators in getting the U.S. Supreme Court to mandate policies liberals could never attain through legislative majorities.²

For decades, the justices themselves undermined the honor which ought to be afforded the third branch of the federal government as they regularly exceeded the proper, limited but vitally important role they ought to play. October term after October term, the justices acted as a permanent constitutional convention, disrupting legislative accommodations and settled precedent with regularity.

McGuigan, the author and editor of several books on judicial controversies who now serves as chief editorial writer at *The Daily Oklahoman*, noted that

Judicial activists, for decades, seemed to assert that "law" is whatever a majority of the Supreme Court says it is. . . . So long as William Brennan — perhaps, as Pat Buchanan remarked . . . , the most powerful man in the last 30 years of American history — dominated the Supreme Court, this was comfortable for the liberals.³

1. I *Samuel* 17:29.

* President, The Religious Roundtable; Former National Director, Christian Freedom Foundation; Former National Director, The Conservative Caucus.

2. Patrick B. McGuigan, *The Court, The Judges, The Law*, DAILY OKLAHOMAN, June 6, 1991, at 12.

3. *Id.*

The particulars of those excesses are too numerous to record in this offering from a part-time preacher and part-time participant in the debate on judicial policy. However, a brief recital of some notable judicial excesses of decades past and present might encourage readers to at least consider the legitimacy of the views expressed here — views shared by millions of Americans which contributed to conservative electoral majorities in the last three presidential elections.

In recent decades, procedures mandated by judges resulted in the acquittal or release of countless thousands of real — not theoretical — criminals who had impacted the lives of actual — not fictional — victims. Willie Horton, after all, is a criminal whose story first rose to national prominence in the campaign of Democrat United States Senator Al Gore of Tennessee when he sought his party's presidential nomination in 1988.⁴ Defenders of the activist judiciary can decry and distort the part Horton later played in George Bush's presidential campaign as often as they want. The fact is Horton symbolized the reality of America's cities and suburbs — where the law-abiding citizens have often seemed to have fewer rights than the criminals.

To the relief of millions the new functioning majority of "interpretivists" on the United States Supreme Court seems on the verge of recognizing and reaffirming a common sense understanding of criminal procedure which the founding generation shared. As Thomas Jefferson put it, "[I]t frequently happens that wicked and dissolute men resigning themselves to the domination of inordinate passions, commit violations on the lives, liberties and property of others."⁵ Jefferson believed "that the secure enjoyment of these having principally induced men to enter into society, government would be defective in its purpose were it not to restrain such criminal acts, by inflicting due punishments on those who perpetrate them."⁶

4. While popular lore suggests that President Bush was the first to use the "Willie Horton" television advertisement, Senator Al Gore (D-Tennessee) actually used the advertisement in the fight for the Democratic nomination. See R. Emmett Tyrell, Jr., *Horton's Climb to Celebrity*, WASH. TIMES, Nov. 3, 1991, at B1.

5. Thomas Jefferson, A Bill for Apportioning Crimes & Punishments, in cases heretofore Capital, in 1 THE WRITINGS OF THOMAS JEFFERSON 218 (The Thomas Jefferson Memorial Assoc., 1903).

6. *Id.*

As the High Court moves to streamline appeals procedures in capital cases, as it firms up a "good faith" exception to the exclusionary rule fashioned by its predecessors, and as it generally acts with prudence and common sense in most criminal justice cases brought before it, millions of Americans are applauding the results.

Perhaps the most befuddled area of modern Supreme Court jurisprudence — a labyrinth incomprehensible to even the most skilled litigators Left and Right — is that surrounding the First Amendment's religion clauses: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."⁷

Beginning slowly in the late 1940's and accelerating in the 1960's, the Court gave constitutional authority to a turn of phrase Thomas Jefferson used in a letter to the Danbury Baptists. The Court's gradual adoption of Justice Hugo Black's use of Jefferson's "wall of separation between church and state"⁸ — a phrase found nowhere in the nation's founding documents — led to quirky results in substantive law.

Justices of the past have declared unconstitutional a variety of historic and utterly reasonable partnerships between government and religious entities in the provision of education. The justices have said nativity scenes on public property were alright so long as Santa Claus was nearby. In *Lemon v. Kurtzman*,⁹ the justices adopted a three-part test which is universally regarded as beyond interpretation, with the result that even private devotional practices by individual students and teachers are regarded by some as unconstitutional.

A more recent and more conservative Court allowed to stand a laudable public program to promote teen-age chastity, even when those involved in the program were religious persons.¹⁰ So, in the area of church-state cooperation (as opposed to establishment of a

7. U.S. CONST. amend. I.

8. *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947) (citing *Reynolds v. United States*, 98 U.S. 145 (1878)); *Illinois v. Board of Educ.*, 333 U.S. 203, 211 (1948); *Torcaso v. Watkins*, 367 U.S. 488, 493 (1961); *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

9. 411 U.S. 192 (1973).

10. *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding that the Adolescent Family Life Act did not violate the Establishment Clause where the Act expressly included religious groups as potential participants in carrying out the Act's mission). In *Bowen*, the Court concluded that the Adolescent Family Life Act, on its face, had "a valid secular purpose, [did] not have the primary effect of advancing religion, and [did] not create an excessive entanglement of church and state." *Id.* at 617.

state-approved religion), the Court seems headed in the right direction.

However, even the new, improved Supreme Court demonstrates confusion in the First Amendment arena. One of the best justices of all is not without sin in this area, so let me cast a stone. In the controversial peyote case involving Native American religious practices, Justice Antonin Scalia opined that the use of peyote was not a protected, individual religious activity. That strikes many as correct, but Scalia's broad language is widely interpreted as threatening to practices traditionally afforded vigorous judicial protection. Justice Sandra Day O'Connor's critique of Scalia's analysis gives some hope that a future Court will demonstrate renewed sensitivity to religious practices which might strike some as odd, but which nonetheless deserve strong protection in a free society.

In the Court term under way as this essay is written, the justices — who begin each session with a prayer — are considering whether non-sectarian prayers at public high school functions amount to a violation of the First Amendment.¹¹ I am optimistic believers will find something to applaud in the Court's eventual ruling on this case.

Given the use past Supreme Court justices made of one Thomas Jefferson letter to the Danbury Baptists, there might be reason to hope that a future Court will turn, if not to constitutional text, then perhaps to Jefferson's generous letter to the Ursuline Sisters of New Orleans (written while he was actually President of the United States), in which he went to great lengths to assure the sisters he believed his government should afford great protection to them in their works of charity. As lawyer Mark Chopko has noted, in this and other actions as President, Jefferson demonstrated he "did not intend for the government to be an enemy of religion, but rather to be benevolently supportive of the many works that religious institutions undertook for the common good. Timeworn ideas about Jefferson must yield to better evidence."¹²

11. *Weisman v. Lee*, 728 F. Supp. 68, *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991).

12. Mark Chopko, General Counsel, United States Catholic Conference, Remarks Before a Red Mass Luncheon in Norwich, Connecticut (Sept. 8, 1991). An Article about Mr. Chopko's speech appears in *Has U.S. Society Become Anti-Religious?* 21 ORIGINS (CNS Documentary Service) 306 (1991).

There is no naive confidence in this corner that the present Rehnquist Court will perform perfectly in this area, but there are reasonable grounds to believe that the Court will act with greater sensitivity to American traditions than either the Warren or Burger Courts.

After all, the American Constitution was formed by a generation which presupposed the existence and dominion of God and his laws. The Declaration of Independence is full of calls to universal standards of morality, but Jefferson's allusions to God's eternal laws were not limited to the Declaration. James Madison, in *The Federalist* No. 43, referred to "the transcendent law of nature and of nature's God. . . ."¹³ Alexander Hamilton in *The Federalist* No. 31 referenced "first principles", an explicit reference to the Bible.¹⁴ The great Justice Joseph Story, whom many believe was second only to John Marshall in early constitutional interpretation, held that Natural Law was "at the foundation of all other laws."¹⁵

The respect for Judeo-Christian moral traditions which permeated the founding generations is not necessarily dispositive in every judicial controversy, where intervening precedents and traditions play important roles. It does yield, however, an understanding of First Amendment jurisprudence somewhat at odds with Hugo Black's expansive reading of Jefferson's "wall of separation" phrase.

The quintessential example of judicial excess, of course, was the controversial *Roe v. Wade*¹⁶ decision of 1973. Justice Byron White — an appointee of a Democrat president — aptly described that edict as an exercise "in raw judicial power."¹⁷ It has taken nearly twenty years for a broad coalition of Americans — those who be-

13. THE FEDERALIST No. 43 (James Madison).

14. See *Hebrews* 5:12.

15. JAMES McCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 65 (1971) (citing Joseph Story, *The Value and Importance of Legal Studies, A Discourse Pronounced at the Inauguration of the Author as Dane Professor of Law in Harvard University* (Aug. 25, 1829) in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 533 (William W. Story ed., 1852)).

16. 410 U.S. 113, 222 (1973). Justice White was one of the two dissenters in *Roe*, and remains on the Court as of this writing. He has continued to criticize the decision. In one case, he expressed fears the case invariably results in the Court engaging "in the unrestrained imposition of its own, extraconstitutional value preferences. . . ." *Thornburg v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting). Chief Justice Rehnquist aptly declared that *Roe* "partakes more of judicial legislation than it does of a determination of the intent of the drafts of the Fourteenth Amendment." *Roe*, 410 U.S. at 174 (Rehnquist, J., dissenting).

17. *The End of Roe; Supreme Court and Abortion*, NAT. REV., Mar. 24, 1989, at 12.

lieve in the sanctity of innocent, unborn human life, in concert with legal theorists concerned with the decision's impact on separation of powers and federalism — to bring about the political climate which might, in the next few years, lead to an explicit reversal of *Roe*.

Conservatives wonder why in the world the argument of the last two decades was even necessary. *Roe* had little to do with constitutional law, as even Professor John Hart Ely observed at the time,¹⁸ and made little pretense of being a constitutional decision in the traditional sense. It was an unprincipled edict driven by the outer fringe of modern activist jurisprudence, an edict which will soon be reversed to the nation's benefit.

Unhappily, two decades of a moral public policy may result, temporarily, in a moral blind spot among many Americans, with the result that it will require Herculean efforts to restore full protection to unborn members of the human family. But with the debate returned to state legislatures and to the people, at least some protections can be enacted in the short-term, with more comprehensive protections the focus of long term political action. Conservatives do not fear the debate, so long as there can finally be a debate.

Americans never voted for the drastic policy changes which federal judges mandated in the Warren and Burger Court eras. A few of those changes — as in the race-related judicial mandates — were constitutionally justifiable. In other public policy areas, most of the sweeping liberal precedents were unjustified. Conservatives believe that none of the changes in abortion policy were merited from the standpoint of either constitutional law or good public policy. Therefore, the re-empowerment of elected representatives which is now occurring is welcomed among conservatives and Bible-believing Americans.

To sum up, there is rejoicing in the land that we now have a Supreme Court which comes much closer to playing the role of even-handed referee, rather than active participant in public policy disputes. The determination of Presidents Ronald Reagan and George Bush to appoint to the judiciary women and men who hold traditional values, including judicial restraint, is resulting in a third branch of government usually content to leave tough political

18. See RONALD W. REAGAN, ABORTION AND THE CONSCIENCE OF THE NATION 16 (1984).

questions in the two branches of government where they belong — the executive and the legislative.

This is likely to yield an ironic political equation in the next few years. Look for liberals to denigrate the justices as they exercise a proper, limited role, and for conservatives to emerge as sometimes uncomfortable defenders of a principled judiciary.

The clearest sign that the justices are edging steadily back to restrained jurisprudence is paradoxical coverage of the Court in the liberal-oriented national media. On the one hand, Americans are asked to believe that a Court that might allow state legislatures again to deal with abortion policy is a fundamental threat to our liberties. On the other hand, the most widely read liberal analysts bemoan how allegedly boring recent terms of the Court have been, as the justices deal with a reduced volume of cases and write majority opinions that focus on narrow questions rather than sweeping categories of national policy.

It is not my contention that the justices are now playing their role perfectly. As noted above, a majority of the justices afford less protection to religious beliefs than those beliefs deserve, although Justice Scalia's sweeping pronouncements might yet be restrained by his colleagues, or by himself in some future case.

Nonetheless, a healthy process of long overdue reconsideration of short term (ten to thirty years) liberal precedent is underway, and it will happily yield precedents more in tune with American traditions.

Pat McGuigan outlined the broad outlines of this new era in his article last year: "Conservatives assert judicial construction of law must seek neutral principles, objectively applied in given cases or controversies. Now, as time goes on, American will find of increasing significance the subtle differences between William Rehnquist's majoritarianism, Anthony Kennedy's precedent-consciousness and Antonin Scalia's brand of libertarianism."¹⁹

It's true. Conservatives are dominating the judicial debate at the Supreme Court for the first time since I was a child. There will continue to be heart-breaking disappointments, but it seems certain a search for neutral principles is under way, one which will yield a judiciary close to the ideal of "original intent" or "original understanding", as the good Judge Robert Bork has defined it:

19. McGuigan, *supra* note 2, at 12.

“The judge’s authority derives entirely from the fact that he is applying law and not his own personal values. . . How should a judge go about finding the law? The only legitimate way is by attempting to discern what those who made the law intended.”²⁰

I speak for millions of Bible-believing Americans when I say:
Amen, Judge Bork!

20. *Id.*