

1992

## Saving the Honorable Court: Assessing the Proper Role of the Modern Supreme Court

Michael Allan Wolf  
*University of Richmond*

Follow this and additional works at: <http://scholarship.richmond.edu/lawreview>

 Part of the [Courts Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Michael A. Wolf, *Saving the Honorable Court: Assessing the Proper Role of the Modern Supreme Court*, 26 U. Rich. L. Rev. 499 (1992).  
Available at: <http://scholarship.richmond.edu/lawreview/vol26/iss3/15>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

## AFTERWORD

### SAVING THE HONORABLE COURT: ASSESSING THE PROPER ROLE OF THE MODERN SUPREME COURT

*Michael Allan Wolf\**

A jurisprudence that seeks fidelity to the Constitution — a jurisprudence of original intention — is not a jurisprudence of political results. It is very much concerned with process, and it is a jurisprudence that in our day seeks to depoliticize the law.

— Edwin Meese III<sup>1</sup>

. . . I do not believe that the meaning of the Constitution was forever “fixed” at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, that we hold as fundamental today. When contemporary Americans cite “The Constitution,” they invoke a concept that is vastly different from what the framers barely began to construct two centuries ago.

— Thurgood Marshall<sup>2</sup>

There are few greater delights in legal scholarship than the opportunity to have the last word in a symposium featuring distinguished — and dramatically differing — viewpoints. The thirteen contributions that precede this afterword offer a provocative and representative set of reactions to the ongoing debate over the role of the Supreme Court in the American polity. This debate is by no

---

\* Professor of Law, University of Richmond. B.A., 1974, Emory University; J.D., 1977, Georgetown University Law Center; A.M., 1979, Ph.D., 1991, Harvard University.

1. Edwin Meese III, Address, in 19 U.C. DAVIS L. REV. 22, 29 (1985).  
2. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

means new, or even middle-aged. The struggle over the confirmation of Associate Justice Clarence Thomas is but the latest in a long line of pressure points in American constitutional history — events such as controversial Supreme Court decisions, congressional attempts to limit federal court jurisdiction, court-packing plans, and other heatedly contested judicial nominations — that have brought the issue of the character and function of the Supreme Court to the “front page” of popular discourse.

Some reflection on this diverse collection of ideas and assertions brings to mind three questions: How helpful are the historical sources of Framers’ intent in the ongoing debate over judicial power? Will conservative observers of the Court regret the swing toward judicial restraint? What talents has the Supreme Court lost in the most recent set of resignations and confirmations? By addressing each of these questions, I hope to help set the stage for a continuation of the disputation so capably begun by my fellow contributors.

### *A Framers’ Rendition for Every Position*

The allure of Framers’ intent — a foundation for judicial decision-making championed most prominently of late by former Attorney General Edwin Meese<sup>3</sup> — affects nearly all of those joined in this debate. Of course, one of the more ubiquitous sources for determining the ideas and positions of the Framers is the *Federalist Papers*. Not surprisingly, the authors in this collection employ their share of selections — for a variety of purposes.

Professor Rotunda begins his perceptive foreword by evoking Hamilton’s views on the “duty” of judicial review from *The Federalist* No. 78.<sup>4</sup> Senator Leahy and Mr. Hooks, both fearful of majoritarian excesses, cite Hamilton in support of a strong role for the Senate in the Court appointment process.<sup>5</sup> In contrast, Mr. Jipping opens his plea for judicial restraint by contrasting examples of excess with the sentiment from three Hamiltonian

---

3. See, e.g., Meese, *supra* note 1.

4. Ronald D. Rotunda, *Foreword: The Role of the Modern Supreme Court*, 26 U. RICH. L. REV. 433, 433 (1992).

5. Patrick J. Leahy, *Advice and Consent: Ensuring Judicial Freedom*, 26 U. RICH. L. REV. 447, 447 (1992); Benjamin L. Hooks, *The Supreme Court as a Political Institution*, 26 U. RICH. L. REV. 451, 458 (1992).

chestnuts.<sup>6</sup> Mr. McAteer builds his argument concerning the religiosity of those who constructed the Constitution on *Federalist Papers* passages by Hamilton and James Madison.<sup>7</sup>

Other constitutional Framers (and their nonparticipating contemporaries) whose words supply fodder for argument include George Washington (on justice)<sup>8</sup> and Thomas Jefferson (on fear of the federal judiciary)<sup>9</sup>. Moreover, there are the "generic" assertions, such as McAteer's somewhat anachronistic (and unsubstantiated) description of "[t]he respect for Judeo-Christian moral traditions which permeated the founding generations."<sup>10</sup>

The pervasive use, by parties on opposite sides of key questions like judicial activism and Supreme Court appointments, of Framers' intent "evidence" is neither atypical nor untroubling. Indeed, have we reached the point at which a quotation from a source like the *Federalist Papers* adds little to the substance of the debate? The assertion here is *not* that the intent of the Framers is either irrelevant or inaccessible; even Justice Marshall would refuse to make either of those claims.<sup>11</sup> Instead, the contributions in the pages of this journal comprise one more sign that the debate over the role and the responsibilities of the Supreme Court advances when the participants recognize the negligible advantage to be gained by echoing the phrases of our founding parents.

### *The Hazards of Shifting the Balance*

Now that the latest phase of judicial activism by Court liberals has come to an end, one might expect unqualified rejoicing from those on the political right. As several of the contributions to this symposium demonstrate, the celebration could be quite short-lived, if certain disconcerting trends continue. The problem might well be too much deference; that is, some Justices appear to be carrying judicial restraint just a bit too far.

---

6. Thomas L. Jipping, *Judiciary: Know Thy Place*, U. RICH. L. REV. 481, 481 (1992). Jipping also cites Hamilton on the limited role of the courts.

7. Edward E. McAteer, *In Defense of a Principled Judiciary*, 26 U. RICH. L. REV. 459, 463 (1992).

8. See Strom Thurmond, *The Supreme Court: Final Arbiter of Our Nation's Legal Disputes*, 26 U. RICH. L. REV. 443 (1992).

9. See Beverly LaHaye & Ellen O. Smith, *The Supreme Court: New Hope for the Restoration of Federalism*, 26 U. RICH. L. REV. 479, 479-80 (1992).

10. McAteer, *supra* note 8, at 463.

11. See Marshall *supra* note 2.

The one case that in particular highlights this problem — and that makes for some interesting bedfellows — is *Employment Division v. Smith*,<sup>12</sup> the free exercise case involving peyote use. Two of the contributors, Mr. McAteer on the right and Professor Strossen on the left, criticize Justice Scalia and the other members of the *Smith* majority for their “hands-off posture,”<sup>13</sup> with Mr. McAteer expressing “hope that a *future* Court will demonstrate renewed sensitivity to religious practices.”<sup>14</sup> In contrast, Mr. Jipping and his left-leaning counterpart, Mr. Kropp, cite *Smith* as an example of activist abuse. Mr. Jipping includes the peyote case with two other cases of liberal excess<sup>15</sup> — *Missouri v. Jenkins*<sup>16</sup> (involving the use of judicial taxation to fund desegregated schools) and *Roe v. Wade*<sup>17</sup> (protecting a woman’s right to determine her biological future) — while Mr. Kropp labels *Smith* “conservative activism.”<sup>18</sup>

There is an important lesson to learn from these unexpected alliances. The beauty (and nature) of activism is often in the eye of the beholder. The advocates of judicial restraint in one generation (for example, the New Dealers of the 1930’s) may turn out to be the most vocal champions of activism in the next (the civil libertarians during the Warren Court years). The ease with which such shifts in ideological and jurisprudential rhetoric occur is the kind of political reality that belies the separation of law and politics advocated and described by many critics of the Supreme Court. Contrast, for example, Mr. Hooks’ unabashed endorsement of a politically charged confirmation process<sup>19</sup> with Mr. McAteer’s advocacy of the Court’s role as “even-handed referee, rather than active participant in public policy disputes.”<sup>20</sup>

Both extremes are inadequate. The “law is politics” view, though often a realistic explanation for judicial developments, is a direct challenge to the popular myth of our glorious Constitution. Too

---

12. 494 U.S. 872 (1990).

13. Nadine Strossen, *The Supreme Court’s Role: Guarantor of Individual and Minority Group Rights*, 26 U. RICH. L. REV. 467, 468 (1992).

14. McAteer, *supra* note 8, at 462 (emphasis added).

15. Jipping, *supra* note 7, at 481.

16. 495 U.S. 33 (1990).

17. 410 U.S. 113 (1973).

18. Arthur J. Kropp, *Reagan, Bush and the Supreme Court*, 26 U. RICH. L. REV. 495, 496 (1992).

19. Hooks, *supra* note 6, at 458.

20. McAteer, *supra* note 8, at 464.

many in the audience following the debate over the Supreme Court's role would reject attempts to equate the judiciary's interpretation of that sacred document with the compromise and posturing that takes place in and outside of the legislative chamber.

Still, "law is not politics" is no more satisfying. Advocates of judicial restraint either fail to acknowledge, or find it against their interest to admit, that deference to the popular will (and to the elected branches) is, in fact, the product of a "public policy" choice. If the debate over the Court's role is to advance in a significant way, we need to move beyond the rhetorical thrusts and parries and to focus on the wisdom of the public policy goals advanced and inhibited by judicial action and inaction. We also need a Supreme Court whose members fully appreciate the political and jurisprudential impacts of their decisions.

### *The Talented Trio: What the Court Has Lost*

The last three members to leave the Court — Lewis F. Powell, Jr., William Brennan, Jr., and Thurgood Marshall — brought to their important position special talents, experiences, and expertise that prepared them well for the challenges facing a Supreme Court Justice. Justice Powell was the quintessential lawyer's lawyer. As a partner in one of the South's leading law firms, he led the American Bar Association, the American Bar Foundation, and the American College of Trial Lawyers during the turbulent 1960's.<sup>21</sup> His bar leadership made him keenly aware of the major changes in the practice of law and in the nature of lawyer professionalism that have occurred over the past few decades.

More importantly, Justice Powell was an active participant in efforts to implement the Supreme Court's school desegregation mandates, the central social and political struggle of his day. Oliver W. Hill, one of the legendary figures of the Civil Rights era, has complimented his fellow Virginian for "demonstrat[ing] a strong sense of moral responsibility and great integrity" during the fight against "Massive Resistance" in the Old Dominion.<sup>22</sup> The lessons

---

21. See, e.g., George Clement Freeman, Jr., *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 404, 404-07 (1987).

22. Oliver W. Hill, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 414, 415 (1987).

learned in the trenches were not lost when Justice Powell donned the black robe.<sup>23</sup>

Justice Brennan, a son of Irish immigrants, sharpened his jurisprudential skills as a justice of the New Jersey Supreme Court. As a member of that tribunal, he was an active participant in the political and socioeconomic struggles that dominated the post-war decades. As a state judge, for example, Brennan helped shape New Jersey land-use law, a body of law that would later prove to be the model for other states experiencing the pangs of suburban growth.<sup>24</sup> Moreover, Brennan "remarked on occasion that it was his experience with intricate gerrymandering plans in New Jersey that enabled him to understand and penetrate the intricacies of the Voting Rights Act cases that came to the Court over the years."<sup>25</sup> He came to the federal bench not as an unknown quantity or a safe bet, but as an experienced jurist with an impressive paper trail.

When the third member of this distinguished trio, Thurgood Marshall, was named an Associate Justice he was already an experienced expert on the High Court. Professor Stephen Carter, a former Marshall clerk, describes the Justice as:

[a] man who, as an advocate, won more cases before the Supreme Court than the other Justices argued (even in combination), who served ably as a judge of the Second Circuit and as Solicitor General of the United States, who held together the shifting and often bickering coalition of lawyers that fought and won the legal arm of the battle against mandated segregation.<sup>26</sup>

There are few sitting (and potential) Justices whose resumés contain such significant entries.

What these three Justices from such diverse backgrounds had in common was an acute political sense, acquired in dramatically different arenas, but applied sensitively and skillfully to their challenging work on the Court. Only time will tell whether those who

---

23. See, e.g., Sandra Day O'Connor, *A Tribute to Justice Lewis F. Powell, Jr.*, 101 HARV. L. REV. 395, 396-97 (1987).

24. See CHARLES M. HAAR & JEROLD S. KAYDEN, *LANDMARK JUSTICE: THE INFLUENCE OF WILLIAM J. BRENNAN ON AMERICA'S COMMUNITIES* 19 (1989).

25. Nina Totenberg, *A Tribute to Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 33, 35 (1990).

26. Stephen L. Carter, *Thurgood Marshall*, 26 VAL. L. REV. xxxv, xxxviii (1991).

now sit in their seats (and those to follow) will be able to continue this legacy of informed decision-making.

*A Final Thought: Lincoln's Litmus Test*

Rumors of a litmus test for the confirmation of federal jurists have become pervasive during the Reagan and Bush years. Ms. Bryant, for example, cites two journalistic accounts as "proof" that such a test exists.<sup>27</sup> As with so much else in the history of judicial nomination and confirmation, these allegations are far from novel.

Consider the following excerpt from the Lincoln-Douglas senatorial election debate, held in Springfield, Illinois, on July 17, 1858. Stephen A. Douglas, the Democrat who would emerge victorious (only to lose to Lincoln in the presidential race two years later), was quite prescient in his reaction to Lincoln's harsh criticism of the infamous *Dred Scott*<sup>28</sup> decision:

[I]t is the province and duty of the Supreme Court to pronounce judgment on the validity and constitutionality of an act of Congress. . . . But Mr. Lincoln intimates that there is another mode by which he can reverse the *Dred Scott* decision. How is that? Why, he is going to appeal to the people to elect a President who will appoint judges who will reverse the *Dred Scott* decision. . . . [H]ow are the new judges to be appointed? Why, the Republican President is to call upon the candidates and catechise them, and ask them, "How will you decide this case if I appoint you judge?" Suppose, for example, Mr. Lincoln to be a candidate for a vacancy on the supreme bench to fill Chief Justice Taney's place, and when he applied to [the President], the latter would say, "Mr. Lincoln, I cannot appoint you until I know how you will decide the *Dred Scott* case?" Mr. Lincoln tells him, and then asks him how he will decide Tom Jones's case, and Bill Wilson's case, and thus catechises the judge as to how he will decide any case which may arise before him. Suppose you get a Supreme Court composed of such judges, who have been appointed by a partisan President upon their giving pledges how they would decide a case before it arose, what confidence would you have in such a court?<sup>29</sup>

---

27. Anne Bryant, *Balancing the Federal Judiciary*, 26 U. RICH. L. REV. 485, 490 (1992).

28. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

29. *The Lincoln-Douglas Debates: 1858*, reprinted in *THE DRED SCOTT DECISION: LAW OR POLITICS* 75-6 (Stanley I. Kutler ed., 1967).

Like the years before the Civil War, these are tense times for the Supreme Court. Much political capital has been spent and wasted in the confirmation battles to fill the seats of Justices Powell, Brennan, and Marshall. Pro-choice advocates are waiting for the other shoe to drop, as it already has in the areas of civil rights and criminal procedure. There are signs of popular dissatisfaction with efforts to deconstruct the legal protections erected by the Warren and Burger Courts. Increasingly, activists on the left are turning to Congress for assistance, a trend that should lead to a test of the strength of the Justices' commitment to judicial restraint.

The debate that permeates the pages of this journal will intensify as the Rehnquist Court continues to distance itself from its liberal and moderate predecessors. We can only hope that future participants in the dialogue over the proper role of the honorable Court will, for perhaps the first time, learn from the lessons of the past.