



Reflections on the Judicial Oath

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EVERY JUSTICE AND JUDGE of the United States begins service in office by making a public commitment, expressed simply and elegantly in the statutory oath of office:

I ... will administer justice without respect to persons, and do equal right to the poor and to the rich, and ... I will faithfully and impartially discharge and perform all duties incumbent upon me¹

Implicit in these words are critical assumptions about the judiciary as an institution, the role of judges, and law itself as something distinct from those who implement it or interpret it. What does it mean to administer justice “without respect to person”? How far does the obligation to “do equal right” go? How can we be sure a judge is being “faithful” to a general constitutional text that speaks only of “due process” or of “the establishment” of a religion?

There has never been a time in the history of the United States that people have *not* debated questions about the role of judges in a democratic society. Sometimes those debates have been relatively low-key and academic; other times they have touched national nerves closely and discussions have grown passionate.

It will hardly be news to readers of the *Green Bag* that we are experiencing the latter sort of period. For example, in the three cases arising out of the detentions of “enemy combatants,” the Bush Administration argued to the Supreme Court that the judiciary had no business poking its nose into the legality of executive detentions undertaken for national security purposes. As we now know, the Court rejected this absolute and uncompromising position in its decisions in *Rasul v. Bush*² and *Rumsfeld v. Padilla*.³ I happened to have been in London at the time those decisions were handed down. Both

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¹ 28 U.S.C. § 453.

² 124 S. Ct. 2686 (2004).

³ 124 S. Ct. 2633 (2004).

the British press and the Continental press rejoiced in the Supreme Court's affirmation of the rule of law. Since that time, however, the Administration's response has made it clear that much is still up in the air. What kinds of hearings will the detainees receive? Before what kind of tribunal? What level of legal representation, if any, will they have? On the domestic front, we see controversy every day of the week. Take, for example, the U.S. Supreme Court's decision in *Lawrence v. Texas*,⁴ or the Supreme Judicial Court of Massachusetts's decision in *Goodridge v. Department of Public Health*,⁵ each of which affected the individual rights of homosexuals. Both – but particularly the Massachusetts decision, which is the famous or infamous “gay marriage” ruling – have ignited a national debate not just about homosexuality, but also about the appropriate roles for judges, legislatures, and executive officers as agents of change in this area.

In a recent book entitled *Coercing Virtue: The Worldwide Rule of Judges*,⁶ former judge and Solicitor General Robert Bork has charged that judges not only in the United States but throughout what he calls the “West” have been in the vanguard of a cultural war. They have become “activist” and “imperialistic,” he asserts, by interpreting laws and constitutions in a manner radically different from the way the drafters of those instruments would have intended.⁷ They do so principally by using the vocabulary of “rights” and the power of judicial review.⁸ Consider one statement made in the introductory

chapter of the book: “When, in the name of a ‘right,’ a court strikes down the desire of the majority, expressed through laws, freedom is transferred from a larger to a smaller group, from a majority to a minority.”⁹ In the final analysis, Bork concludes, the untrammelled power of judges that he perceives threatens to replace the “rule of law” with the “rule of judges.”¹⁰ His principal objection to this “judiciary” is that it “elevates the objectives of a dominant minority above the democratic process.”¹¹ He charges, with despair, that many judges “view their mission as preserving civilization from a barbarian majority motivated by bigotry, racism, sexism, xenophobia, irrational sexual morality, and the like.”¹² Indeed.

I would like to offer some thoughts about whether, and if so, why, judges are doing anything that might even remotely meet this description. This inquiry takes us quickly to questions like whether it is acceptable or necessary to have a fully independent judiciary in a democracy, why the early decision in *Marbury v. Madison* claiming the power of ultimate judicial review even over constitutional questions has endured, and why it is both predictable and desirable that anti-majoritarian outcomes occur from time to time in judicial decisions.

Far from revealing the grim picture painted by Bork, this survey shows that the judiciary is playing both a legitimate role and the role contemplated for it by the Framers of our Constitution and Bill of Rights. Our democracy has been stable for 215 years, even

4 539 U.S. 558 (2003).

5 798 N.E.2d 941 (Mass. 2003).

6 Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press 2003).

7 *Id.* at 8.

8 *Id.* at 11–12.

9 *Id.* at 12.

10 *Id.* at 135.

11 *Id.*

12 *Id.* at 137.

weathering a civil war, in no small part because the Framers made sure that tyrannies of the majority could not override individual rights; because judges could make even highly unpopular decisions without fear of retribution, either financially or through loss of position; and because over and over again the people of the United States have seen through open and public court proceedings that no one is above the law. Think, for example, of *United States v. Nixon*,¹³ unanimously upholding the Watergate Special Prosecutor's subpoenas to President Nixon, or *Clinton v. Jones*,¹⁴ unanimously enforcing civil discovery requests directed at President Clinton. Judges do this not by forcing society as a whole to adopt a particular abstract moral vision; they do so by ensuring, through the power of judicial review, that our long-standing constitutional guarantees continue to have vigor today.



Let's recall why this country, and all others that value the rule of law, have taken precautions to assure the independence of their judiciaries. It is *not* because there are no other ways to structure a government. In the People's Republic of China, for example, the judiciary is under the control of the National People's Congress. In the former Soviet Union it was under the domination not only of the Supreme and area Soviets, but also of the Communist Party. But these are hardly models that would recommend themselves to any free society. In the United Kingdom, the highest court is at present technically a part of the House of Lords, which in turn is

part of Parliament. Nonetheless, it has been a long time since the Law Lords had anything but *de facto* independence, particularly in their applications of Britain's unwritten Constitution. And it is interesting to note that at this very time there is pending before Parliament a Constitutional Reform Bill that would create a Supreme Court of the United Kingdom to replace the current Law Lords.¹⁵ Two critical provisions of that bill look quite familiar to Americans: section 24, which provides that judges of the Supreme Court will hold office during good behavior; and section 25(4), which assures that salaries may be increased but not reduced during the judge's time in office. These provisions are there for the same reason that the Framers of the United States Constitution put their analogs in Article III: to assure the independence of the court.

Alexander Hamilton squarely addressed the importance of judicial independence in Federalist No. 78. Commenting on the desirability of a tenure of office measured only by "good behavior," he said:

In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachment and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.¹⁶

Complete independence of the judiciary also assured, in Hamilton's view, that the legislative branch would stay within the boundaries set forth by the Constitution. Referring

13 418 U.S. 683 (1974).

14 520 U.S. 681 (1997).

15 For the text of the bill, see www.publications.parliament.uk/pa/ld200304/ldbills/030/2004030.pdf. Further information is available through the website of the House of Lords, www.parliament.uk/about_lords.

16 Federalist No. 78 at 503 (Modern Library ed.).

to the example of the prohibitions against bills of attainder and *ex post facto* laws found in Article I, he wrote:

Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.¹⁷

But ensuring that constitutional violations will be redressed is not the only reason Hamilton gave for the importance of judicial independence. He also suggested that “the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society,” reflected in “unjust and partial laws.”¹⁸ Finally, he argued (in terms that could have been written today) that tenure and salary protections were needed to attract properly qualified people to the judiciary.

Time and again, the wisdom of assuring this kind of independence for the judiciary has been confirmed in the decisions of the Supreme Court – decisions that may have been unpopular at the time they were rendered, but decisions that have stood the test of time. This is not to say that some of them do not still excite debate, or that none has been refined by the Court over the years. But that should neither surprise us nor shake our confidence in the integrity of the Court’s constitutional decision-making. These are hard questions, after all, and reasonable people can disagree even – or maybe especially – on something like the content of the fundamental law under which we live.

While it would be impossible in this lim-

ited space to consider every case, or even every area, in which the Court has taken decisions that would have failed either national or regional popularity tests, it is worth recalling some of them. It may be appropriate, given the times in which we are living, to begin with several decisions that touch on displays of patriotism: *West Virginia State Board of Education v. Barnette*,¹⁹ *Texas v. Johnson*,²⁰ and *Elk Grove Unified School District v. Newdow*,²¹ the “Pledge of Allegiance” case that washed out on standing grounds.

In one way or the other, these cases all involve the American flag. *Barnette* raised the question whether a state rule requiring students to salute the flag every day, on pain of expulsion for insubordination if they refused, violated the First Amendment rights of certain Jehovah’s Witnesses. The Court answered “yes” in an opinion by Justice Robert Jackson still admired for its eloquent rejection of compulsion as a means of reaching national unity, and its statement that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”²² The presence and toleration of unorthodox or dissenting views, in short, are precisely what distinguish democracies from more totalitarian forms of government.

Johnson, decided in 1989, invalidated a man’s conviction for flag desecration. He had publicly burned an American flag as a means of political protest during the Republican National Convention in Dallas. The Court

17 *Id.* at 505.

18 *Id.* at 509.

19 319 U.S. 624 (1943).

20 491 U.S. 397 (1989).

21 124 S. Ct. 2301 (2004).

22 319 U.S. at 642.

held that his act of flag-burning was expressive conduct, and as such, was entitled to protection under the First Amendment. This was a highly unpopular decision in many quarters. For some time after *Johnson*, proposals to amend the Constitution to overturn its result were regularly introduced in Congress. Thus far, however, none has gone anywhere; the Republic has not crumbled because of occasional acts of disrespect toward the flag, and the First Amendment has remained secure.

Last is *Newdow*, in which Mr. Newdow tried unsuccessfully to raise the question whether the words "under God" in the Pledge of Allegiance to the flag violate the Establishment Clause of the Constitution. The Court ducked the issue. Ordinarily, that would be the end of the matter for now. And perhaps it will be here too, assuming that the Congress does not pass the legislation that has cleared the House that would strip the Supreme Court of jurisdiction to hear any case involving the Pledge.²³ No matter what happens, however, it seems clear that no amount of pressure will cause the Court to announce that the United States is a nation that has adopted monotheism as its official state dogma.

Religion has been one of the most sensitive areas of constitutional decision-making, and it is the one about which Bork expresses the greatest dissatisfaction. He sees the Court as uniformly hostile to religion, but the actual record is far more nuanced. The Court has instead been striving to maintain the constitutionally compelled balance between the commands of the Free Exercise Clause and the Establishment Clause. Re-

cently, for example, in *Locke v. Davey* the Court held that a Washington State educational scholarship program that excluded devotional studies from its scope did not violate the Free Exercise rights of a student who wished to pursue a devotional religious degree, even though the State also would not have violated the Establishment Clause had it chosen to include these studies in its funding program.²⁴

Other decisions draw similarly fine lines. The older case of *School District of Abington Township v. Schempp*,²⁵ for instance, banned Bible reading as a standard part of the public school program, and the later case of *Lee v. Weisman*²⁶ held that even a nonsectarian prayer at graduation ceremonies was constitutionally impermissible, given the *de facto* mandatory nature of the program and the age of the students. Each one of these was greeted with dismay in many parts of the country where the great majority of the population consists of observant Christians. Yet this is precisely where the rights of the minority are most important, whether that minority is composed of adherents of other religions such as Islam, Hinduism, or Buddhism, or it includes atheists and agnostics. Thanks in large part to the Establishment Clause, the United States has never suffered the fate of Northern Ireland, where religion has led to open warfare and religious affiliation has been a proxy for countless other forms of discrimination.

And in many cases, especially in recent years, the Court has made it clear that the State neither can nor should treat religious organizations *less* favorably than others. In *Good News Club v. Milford Central School*,²⁷

23 See H.R. 2028, 108th Cong., 2d Sess. (Sept. 23, 2004).

24 540 U.S. 712 (2004).

25 374 U.S. 203 (1963).

26 505 U.S. 577 (1992).

27 533 U.S. 98 (2001).

it upheld the rights of a private Christian group to hold weekly after-school meetings that included Bible lessons and prayer on school premises. Given the availability of the schoolrooms for other kinds of clubs, the Court ruled that it would have violated this Club's free speech rights if it had been excluded solely on the basis of the religious content of its speech. Roughly the same rationale lies behind the Court's result in *Rosenberger v. Rector & Visitors of the University of Virginia*,²⁸ which upheld the right of a student organization that published a religiously-oriented magazine to receive university financial support, again on free speech grounds. Finally, in *Zelman v. Simmons-Harris*,²⁹ the Court sustained a state school-voucher program that allowed voucher recipients to pay for private education in either a secular or sectarian school with state funds. The program had been challenged on Establishment Clause grounds, but the Court rejected that argument because the program itself was neutral and left the choice of institution (religious or otherwise) to the individual beneficiaries. These are hardly the actions of an out-of-control institution biased at its core against religion.

Criminal procedure is another field characterized by constitutional protections written in general terms that must be applied to a myriad of specific situations. One of the most famous of these protections is the Fifth Amendment right against compulsory self-incrimination. In *Miranda v. Arizona*,³⁰ the Court held that the coercion inherent in custodial interrogation is so great that concrete constitutional guidelines – the famous *Miranda* warnings – had to be given

to suspects before their statements would be admissible in evidence. Over time, questions arose over whether *Miranda* merely outlined one way of implementing the Fifth Amendment privilege, and thus was subject to statutory modification, or if the rule of the case rested directly on the Constitution. The Court answered in favor of the latter alternative in *Dickerson v. United States*,³¹ noting among other things that it had consistently applied *Miranda* to prosecutions arising in state courts (an action that would not have been possible if the ruling rested only on its power to devise prophylactic rules for the federal courts). The *Miranda* rule, like the Fourth Amendment standards that restrain police searches and seizures, can be frustrating and unpopular at times. But the Court has recognized that the rights of the many can be protected only if the rights of the unattractive few are preserved.

This point is most clear when we consider the Court's capital punishment jurisprudence. Once again, a picture emerges of an institution attempting to give meaning to broad constitutional commands in light of contemporary realities. While some have criticized the pivotal decision of the Supreme Court to apply the Eighth Amendment in the light of evolving standards of decency,³² it is hard to imagine that the authors of the Bill of Rights, who were well conversant with English usage, meant to embalm 18th century mores in the words "cruel and unusual." And if they did not, there is no alternative to taking an evolutionary approach to this Amendment. Even the strictest of constructionists surely cannot think that the death penalty would be anything but "cruel and unusual" today for

28 515 U.S. 819 (1995).

29 536 U.S. 639 (2002).

30 384 U.S. 436 (1966).

31 530 U.S. 428 (2000).

32 See *Trop v. Dulles*, 356 U.S. 586, 598 (1958) (plurality opinion); *Hudson v. McMillian*, 503 U.S. 1 (1992), among many others.

the host of lesser crimes to which it applied in 1791, or that housing someone in prison conditions that met only late 18th century sanitation, medical, heating, and nutritional standards would suffice.

Even with this commitment to evolving standards, however, the Court can hardly be accused of recklessly disregarding U.S. history or traditions relating to capital punishment. With the brief exception of the four-year period between *Furman v. Georgia*³³ and *Gregg v. Georgia*,³⁴ it has consistently upheld the constitutionality of the core of the death penalty: capital punishment for competent adults who have taken another life. It has had much to say about the procedures that are required to reach that end; it has ruled out the death penalty for crimes that do not result in a death³⁵; and it has held that capital punishment would be cruel and unusual if administered against a person with severe mental impairments.³⁶ It is now considering whether the death penalty is constitutional as applied to individuals who were below the age of 18 at the time of the crime.³⁷ These decisions reflect an effort to give meaning to the constitutional text, which itself was designed to limit legislative discretion over penalties. If the Framers had meant to confer unlimited power on legislatures over punishments, they would have dispensed with the Eighth Amendment altogether.

Yet another area in which the Court's independence has enabled it to render constitutional decisions in spite of widespread popular hostility is that of race discrimination. We should not forget how recently this

country shook off *de jure* race discrimination, or how difficult that task was. When *Brown v. Board of Education*³⁸ was decided, the Court well knew what a bombshell it would be – that is one reason why it postponed its decision on remedy for a full year after the decision on the merits. Even so, it took a long time for this firestorm to abate. To its credit, the Court persevered through years of cases challenging racial discrimination in all its guises. We can only hope that the worst of those days are behind us.

Finally, there is the controversial area usually known as “privacy.” Many decisions of the Court rest on the idea that there are some areas of life so intimate that government of any kind – federal, state, local – may not intrude into them. While this concept is often seen as “code” for the abortion cases, it goes far beyond abortion. What about *Meyer v. Nebraska*,³⁹ which, in the name of the “liberty” protected by the Fourteenth Amendment, reversed the state-law conviction of a teacher who had committed the crime of teaching the German language to one of his pupils.⁴⁰ Lest one think that the right to speak a particular language is trivial, let us recall the experiences in the former Communist countries, where the State forbade ethnic minorities to use their own languages and in doing so tried to break their spirits and trample on their family lives, religious practices, and cultures.

Other rights have also been found to be within that zone of personal liberty. How aggressively, for example, may the State define who is and is not included within the

33 408 U.S. 238 (1972).

34 428 U.S. 153 (1976).

35 See *Coker v. Georgia*, 433 U.S. 584 (1977).

36 *Atkins v. Virginia*, 536 U.S. 304 (2002).

37 No. 03–633, argued Oct. 13, 2004.

38 347 U.S. 483 (1954).

39 262 U.S. 390 (1923).

40 *Id.* at 399.



family? The Court confronted that question in *Moore v. City of East Cleveland*,⁴¹ where a town ordinance stipulated that only members of a family could live together and then had such a parsimonious definition of “family” that a grandmother with two grandsons who were cousins, not brothers, in the home was in violation of the ordinance. No single opinion commanded a majority of the Court, but the outcome was to strike down the ordinance. *Loving v. Virginia*⁴² also belongs in this group. Although there is no clause in the Constitution forbidding anti-miscegenation laws, the Justices sensibly held that there is no need for such specificity. The right not to have the State prescribe a set of acceptable spouses, in the absence of the kind of powerful reason it would have for incest laws or laws designed to protect children, is implicit in the concept of liberty.

These examples, which could be multiplied many times over, demonstrate that service on the Supreme Court is not for the thin-skinned or the timid. The Constitution guarantees certain individual rights, such as the right to free speech, to free exercise of religion, to equal protection of the laws, to non-abusive police procedures, and to liberty in the most personal aspects of private life. Sometimes society stands up and applauds when those rights are protected; sometimes there is a loud “boo.” Someone needs to make those calls, however, because often not-to-decide has exactly the same effect as an affirmative decision. When individual rights are concerned, legislatures are institutionally incapable of playing that role. It must be the courts. They are free to decide on the merits, because they are assured under the Constitution of the independence they need to do so.

Popularity of outcome is a singularly unhelpful way to assess what the Court is doing, or should be doing. The heart of the debate on the Court’s function ought instead to focus on its approach to constitutional adjudication. How literally should the document be read? Should anything beyond the text be consulted? If something else, then what? The Federalist Papers? Madison’s notes from the Convention? The common law background to the legal concepts expressed in the document? The cultural milieu in which the drafters lived? Beyond that, what are we to make of the broad terms that permeate the original Constitution and the amendments? The phrase “due process of law” is hardly self-defining; nor is “equal protection,” nor is the word “liberty.”

As I recently explained at length in New York, when I delivered this year’s Madison Lecture at New York University Law School,⁴³ I find it impossible to believe that the people who wrote the Constitution thought that its meaning would be frozen, like an insect in amber, in the last decade of the 18th century. Indeed, there is every indication in the Federalist Papers that they had no such expectation. Even traditionalists agree that the Constitution applies to new methods of accomplishing old goals: electronic wiretaps and thermal imaging are covered by the Fourth Amendment; use of electric cattle prods would be covered by the Eighth Amendment; free speech on the Internet is protected, aside from whatever complications are added by the commercial speech doctrine or the need to protect users from frauds, scams, and abusive materials. Even

41 431 U.S. 494 (1977).

42 388 U.S. 1 (1967).

43 Wood, “Our 18th Century Constitution in the 21st Century World,” James Madison Lecture, delivered at New York University Law School on October 18, 2004, publication forthcoming in the *N.Y.U. Law Review*.

though it is fairly clear that the Civil War amendments were passed with the newly freed African slaves in mind, it is well established that the guarantee of equal protection extends to sex discrimination as well as race discrimination. Indeed, the equal protection guarantee covers topics such as discrimination based on mental disability too; the Court simply reviews some distinctions with a more lenient eye than it uses for race or sex discrimination.

The only question worth asking is therefore one of degree: how much elaboration of the foundational clauses in the Constitution is legitimate, and how much is not? Attempts to answer this question have filled countless books and articles, and I cannot hope to do it justice in just a few pages. But in general, the answer depends on the constitutional text that is being interpreted and the place it holds in the document as a whole. The authority to create a system of Post Offices and Post Roads is quite specific and clear, and it predictably has not given rise to very many problems of constitutional interpretation. At the other extreme are the provisions that speak broadly of liberty, equal protection, and due process. Sometimes language that seems rather narrow and tailored to a particular problem has been used as a launch-pad for a far more ambitious constitutional doctrine. That has been the fate of the Eleventh Amendment in recent years, which nominally withdraws one head of jurisdiction from federal courts that had been conferred by the original version of Article III, section 2, but which is now seen as a reflection of a broad structural doctrine of State sovereignty and a corollary doctrine of close to absolute State sovereign immunity.

I have expressed doubt elsewhere that the theory of state sovereignty now espoused by

the Court requires such a seemingly inflexible version of sovereign immunity,⁴⁴ but there is no need now to embark on that debate. From a methodological standpoint, I have no quarrel with what the Court is doing. It has done the same thing throughout its history, as it has confronted new problems. And one does not need to be an Alvin Toffler *Future Shock* fan to recognize that the pace of change does nothing but accelerate. At the time the Constitution and the various amendments were adopted, no one could have dreamed of the depth of intrusion into private life that is now possible using modern techniques. The state was not regulating many aspects of private life; the church was instead. The federal government had not legislated in so many areas, and there were far fewer occasions upon which private citizens might have tried to sue states in federal or state courts relying on federal law. As new problems came up, the Court found new answers in the Constitution.

The fact that these specific answers have emerged from the process of judicial interpretation of broad constitutional language does not make them illegitimate, nor does it make them “policy” instead of “law.” Someone must decide these questions, and there is simply no way simultaneously to rule with the majority all of the time and to protect minority rights all of the time. The Court is the institution best suited to decide *who* should decide, and then, when the job properly belongs to the Court itself, to make the call. The problem described as the tyranny of the majority is not one that we left behind us two centuries ago. Our record has been one of protecting the rights of each and every individual, no matter how popular that person’s viewpoints, and no matter what demographic characteristics that person has.

44 Wood, “The Structure of Sovereignty,” 80th Annual Meeting, The American Law Institute: Proceedings 2003 at 7–14 (ALI 2004) (Opening Remarks, May 12, 2003).

This takes me back to the judicial oath. The term “all persons” in that oath means exactly what it says: all human beings, regardless of race, sex, citizenship, age, disability, belief system, or wealth. All these persons are entitled to an impartial, dignified consideration of their cases before the courts. And they are entitled to certain rights even if their ideas, or religion, or personal decisions would be unpopular with a majority. As the international law of human rights also makes

clear, some rights are not subject to the veto of the majority. This is not a principle that judges are forcing down the throats of societies around the world. It is a principle that has animated the United States Constitution since its formative days. The role we have chosen for the judiciary, and in particular for the Supreme Court, has allowed us to give life to the promises on the pages of the Constitution. It is a system of which we can all be proud. *GP*