NEW YORK LAW SCHOOL

NYLS Law Review

Volume 40
Issue 4 *Volume XL, Number 4, 1996*

Article 12

January 1996

A RETURN TO CONSTITUTIONAL INTERPRETATION FROM JUDICIAL LAW-MAKING

Edwin Meese III

A RETURN TO CONSTITUTIONAL INTERPRETATION FROM JUDICIAL LAW-MAKING

EDWIN MEESE III*

In his book, *The Center Holds*, which he describes as an exposition of "the power struggle inside the Rehnquist Court," James F. Simon gives his sweeping judgment of that Court by describing it as "a conservative judicial revolution that failed."[1] In voicing such a pronouncement, Simon makes a mistake common to many liberal academics and journalists: he views the Supreme Court as simply a political institution and, in doing so, fundamentally misunderstands its true Constitutional role. Viewing every act of the Court, and the deliberations of the justices in formulating their opinions, from his own ideological perspective, Simon engages in an evaluation that is flawed by a series of false assumptions.

Thus he misses the real significance of the Supreme Court's decisions in recent years: after more than a quarter century of judicial activism, in which the text of the Constitution, precedent, and certainty were cast aside in favor of wild flings of judicial fancy, the nation's highest Court has turned in the direction of Constitutional fidelity and devotion to the rule of law. It has been more diligent in adhering to its proper role as a *judicial institution*, rather than acting as a political caucus or a super-legislature.

The first flaw in Simon's analysis is his penchant for describing the Court in political terms. He assumes that each justice has a political agenda which he or she is trying to impose upon the rest of the Court. This constant preoccupation with the *result* of each particular case blinds Simon to the essential task of a true judge: insuring that the *process* of decision-making is consistent with the *interpretive* role of the judiciary, and that the ultimate disposition is based upon the words and meaning of the Constitution or the statute under consideration, rather than individual policy views or political predilections.

His myopic view of the Rehnquist Court is characterized by the chapter[2] in which Simon mournfully discusses two employment cases, *Wards Cove Packing Co. v. Atonio*[3] and *Martin v. Wilkes*.[4] In doing so, he criticizes the Court for insensitivity toward minorities and the civil

---

* Ronald Reagan Chair in Public Policy at The Heritage Foundation, Washington, D.C.

1. JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 11 (1995).

2. *Id.* at 62-81 (referring to Chapter Three, entitled "Fine Phrases").

3. 490 U.S. 642 (1989).

4. 490 U.S. 755 (1989).

rights movement. Simon fails to perceive that this Court is guided by conventional rules of statutory construction and by fairness to all the parties rather than by emotional or philosophical passions going in only one direction. In these cases, the Court interpreted the 1964 Civil Rights Act in determining the procedural burden in certain employment discrimination suits. As it turned out, many in Congress disagreed with the Court's interpretation of the 1964 statute, and Congress subsequently enacted the Civil Rights Act of 1991 in which they exercised their legislative prerogative to change these procedural rulings.[5]

There could not be a better example of the distinction between the *interpretive* versus the *activist* style of a court. Nevertheless, Simon remains perplexed, as he writes:

> For more than three decades, the modern Supreme Court had served as the crucial national institution that had encouraged the civil rights movement by broadly interpreting the Constitution and federal laws to protect racial minorities. . . . With the advent of the conservative Rehnquist Court majority, Congress, not the Court, became the channel for civil rights activism.[6]

Ironically, Simon has inadvertently described the way that the policy process under our Constitution *should* work. The active role in determining public policy should be with Congress and with the Executive, as the elected branches of government. By contrast, an activist federal *judiciary* is inconsistent with the intent of the Constitution and is inherently undemocratic.

When the federal judiciary honors the intent of the Framers and maintains its proper Constitutional role, the Legislative and Executive branches are free to promote civil rights or any other issue as they see fit. This is exactly what happened in the aftermath of the *Wards Cove* and *Martin* cases when Congress enacted the Civil Rights Act of 1991. A Congressional majority at that time disagreed with the Court's interpretation of the statute, and was then free to make the changes to bring the statute into line with the policy views that Congress considered appropriate.

By contrast, when an activist court—such as the Warren Court in the 60s and 70s—"discovers" new Constitutional rights and then invalidates legislation on the basis of such rulings, the legislative and executive branches are helpless to change those decisions. Only through a Constitutional amendment can the law in such cases be overturned.

---

5. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. §§ 1981a, 2000e-2(k), 2000e-2(n) (Supp. V 1993)).

6. SIMON, *supra* note 1, at 81.

Simon, viewing the Court through his own ideological prism, ignores this danger and views the Court in strictly political terms, continually labeling Justices "conservative," "liberal," or "moderate." He fails to perceive that when a Court becomes activist, and thereby promotes a political agenda, that agenda can favor "conservative" as well as "liberal" causes, depending on the personal views of the judges involved. Earlier in the century, a Supreme Court dominated by views favoring business interests routinely invalidated social and economic legislation, such as minimum-wage and child labor laws, which had broad public support in the states in which they were enacted. In cases like *Lochner v. New York*[7] and *Adkins v. Children's Hospital*,[8] the Court ruled that such labor laws violated the due process clause of the Fourteenth Amendment—even though neither the text nor the history of that Amendment addressed such issues. Like the Warren Court decades later, the Court in the *Lochner* era ignored the limitations of the Constitution and blatantly usurped legislative authority.

It should be noted that when Justices carry out their duty to faithfully interpret the Constitution, as opposed to promoting a political agenda, they may well find themselves compelled to produce a result with which they do not agree or may even find abhorrent. Thus Justice Scalia, among others, was bound to join the majority in *Texas v. Johnson*[9] and overturn a statute prohibiting flag-burning, no matter how much he disapproved of the conduct involved.[10]

Similarly, it is highly probable that those Justices that Simon depicts as being at the "center" of the Court would not have voted originally for decisions they now uphold (at least in part) because they feel constrained by precedent and do not wish to emulate the Warren Court by engaging in the wholesale upheaval of existing law. It is this adherence to the principle that even the Supreme Court is part of a "government of laws, not of men,"[11] that is the hallmark of the current Rehnquist Court.

It is therefore ironic that in his Solomon Lecture, entitled "Politics and the Rehnquist Court," Simon makes what to him is a startling observation that the appointees of conservative Republican presidents "have not, in Mr. Dooley's well-worn phrase, 'follow[ed] th[e] iliction

---

7. 198 U.S. 45 (1905).

8. 261 U.S. 525 (1923).

9. 491 U.S. 397 (1989).

10. *Id.*; *see also id.* at 420 (Kennedy, J., concurring) ("The hard fact is that sometimes we must make decisions we do not like.").

11. *See, e.g.*, Patterson v. Shumate, 504 U.S. 753, 766 (1992) (Scalia, J., concurring); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 177 (1951) (Douglas, J., concurring).

returns.'"[12] Although unintentional, Simon could not have given a Constitutionally faithful Court greater praise.

James Simon's second fallacious assumption is that Presidents Ronald Reagan and George Bush, by their Supreme Court appointments, were seeking to achieve a "conservative judicial revolution"[13] in substantive law. To both Chief Executives the activist Court of the *Lochner* era was as illegitimate as the Warren Court. What they did want was a federal judiciary that understood its proper role in a democracy, respected the authority of the legislative and executive branches, and limited their judgments according to the role of the judiciary prescribed in the Constitution. These Presidents' understanding of the proper role of the judiciary—and their rejection of a political agenda for the Court—is explicit in the statements they made surrounding each of their Supreme Court appointments.

Both Presidents Reagan and Bush used the occasion of either the nomination announcement or the ceremony in which the justices were sworn into office—and sometimes both—to clearly enunciate their view of the role of the judiciary. Beginning with his statement on the senate confirmation of Sandra Day O'Connor as an Associate Justice, Ronald Reagan stated that her "judicial philosophy is one of restraint. She believes, as she said in her Senate testimony, that a judge is on the bench to interpret the law, not to make it."[14] The President went on to give his approval of this view when he said, "[t]his philosophy of judicial restraint needs representation in our courtrooms and especially on the highest court in our land."[15]

Five years later, at the swearing-in ceremony for Chief Justice William Rehnquist and Associate Justice Antonin Scalia, President Reagan again expressed his views on the proper role of the judiciary:

> [T]he Founding Fathers gave careful thought to the role of the Supreme Court. . . .

---

12. James F. Simon, *Politics and the Rehnquist Court*, delivered as the Sixth Annual Solomon Lecture at New York Law School (Oct. 31, 1995), *in* 40 N.Y.L. SCH. L. REV. 863, 864 (1996) (quoting MR. DOOLEY ON THE CHOICE OF LAW 52 (Edward J. Bander ed. 1963)).

13. SIMON, *supra* note 1, at 11.

14. President Ronald Reagan, Statement on Senate Confirmation of Sandra Day O'Connor as an Associate Justice of the Supreme Court of the United States, 1981 PUB. PAPERS 819 (1982).

15. *Id.*

> They settled on a judiciary that would be independent and strong, but one whose power would also, they believed, be confined within the boundaries of a written Constitution and laws.
>
> . . . They understood that, in the words of James Madison, if "the sense in which the Constitution was accepted and ratified by the nation is not the guide to expounding it, there can be no security for a faithful exercise of its powers."
>
> The Founding Fathers were clear on this issue. For them, the question involved in judicial restraint was not—as it is not—will we have liberal or conservative courts? They knew that the courts, like the Constitution itself, must not be liberal or conservative. The question was and is, will we have government by the people?[16]

The same theme was repeated again in 1988 when President Reagan spoke at the swearing-in ceremony of Associate Justice Anthony M. Kennedy:

> And so, the role assigned to judges in our system was to interpret the Constitution and lesser laws, not to make them. It was to protect the integrity of the Constitution, not to add to it or subtract from it—certainly not to rewrite it. For as the framers knew, unless judges are bound by the text of the Constitution, we will, in fact, no longer have a government of laws, but of men and women who are judges. And if that happens, the words of the documents that we think govern us will be just masks for the personal and capricious rule of a small elite.[17]

President Bush echoed his predecessor in expressing his view of the proper role of the Court. In his remarks announcing the nomination of David H. Souter to be an Associate Justice of the Supreme Court, Bush said, "Judge Souter [is] committed to interpreting, not making the law—he recognizes the proper role of judges in upholding the democratic choices of the people through their elected representatives with constitutional

---

16. President Ronald Reagan, Remarks at the Swearing-in Ceremony for William H. Rehnquist as Chief Justice and Antonin Scalia as Associate Justice of the Supreme Court of the United States, [1986] 2 PUB. PAPERS 1268, 1270 (1989).

17. President Ronald Reagan, Remarks at the Swearing-in Ceremony for Anthony M. Kennedy as Associate Justice of the Supreme Court of the United States, [1988] 1 PUB. PAPERS 219, 221 (1990).

restraints."[18] Some have suggested that Justice Souter has not always met the high hopes of his appointer,[19] but there is no question what President Bush had in mind as to how a judge should carry out his office.

In commenting on the swearing-in of his last appointment to the Court, Justice Clarence Thomas, President Bush stated that the new Justice "now joins the distinguished ranks of jurists to whom we entrust this sacred task, who, in the stark and simple phrase of Chief Justice Marshall, tells us 'what the law is.'"[20] By this outstanding appointment, Bush gave the Country a Supreme Court Justice who is unsurpassed by any present or prior member of the Court in his understanding of, and fidelity to, the Constitutional role of the judiciary.

Thus when Simon, in his Solomon lecture, says that the Justices appointed by Presidents Reagan and Bush have not "always done the bidding on the Court for the presidents who appointed them,"[21] because "there has not been a wholesale conservative revolution on the Court to match what appears to be happening in the Congress of the United States,"[22] he is absolutely wrong. Both Presidents understood that when there is to be a policy "revolution" it should come from the elected Congress, not the Supreme Court.

Thirdly, in ascertaining where the "center" of the Supreme Court lies, Simon fails to realize the way in which the parameters of debate within that body have changed over the last decade. If one were to construct a spectrum, with judicial activism on one pole and Constitutional fidelity on the other, any objective evaluation would have to recognize how far the Court has moved in the latter direction. Gone are the decades of judicial activism, where precedent, predictability, and consistency in Constitutional law were continually ignored or abandoned, as reasonable interpretation was replaced by "creative" notions of "what [the Constitution] ought to

---

18. President George Bush, Remarks Announcing the Nomination of David H. Souter To Be an Associate Justice of the Supreme Court of the United States and a Question-and-Answer Session With Reporters, [1990] 2 PUB. PAPERS 1046, 1047 (1991).

19. SIMON, *supra* note 1, at 293, 302; *see also* Thomas J. Cunningham, Book Review, 20 J. CONTEMP. L. 307, 310-11 (1994) (reviewing PAUL SIMON, ADVICE & CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES (1992)); Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111, 1128-30 (1994); Richard G. Wilkins et al., *Supreme Court Voting Behavior: 1993 Term*, 22 HASTINGS CONST. L.Q. 269, 270 (1995).

20. President George Bush, Remarks at the Swearing-In Ceremony of Clarence Thomas as an Associate Justice of the Supreme Court, 1991 PUB. PAPERS 1308, 1309 (1992).

21. Simon, *supra* note 13, at 864.

22. *Id.*

mean"[23] in a modern world. Justice Scalia has described this erroneous practice as one in which the Constitution "change[s] its meaning like a chameleon from decade to decade."[24] This was a time in which judicial activists attempted to hide their manipulations and distortions of the Constitution behind such phrases as "a living document"[25] and "the penumbras and emanations"[26] derived from the text of the Bill of Rights.

Under the current Court, obviously there are differences of opinion among the controlling majority, but there is a fundamental agreement dedicated to reasonable construction of the actual meaning of the Constitution. Where they disagree, it is usually over how far and how fast the Court should go in correcting the excesses of the Warren and immediately post-Warren Courts. The conflict is between dedication to precedent and stability on the one hand versus a return to Constitutional authenticity on the other.

Perhaps the most clear-cut indication of where the parameters on the Supreme Court now stand is expressed in the case of *United States v. Lopez*[27] decided in April 1995. For the first time in some sixty years, the Court questioned whether Congress had exceeded its power to legislate under the Commerce Clause when it enacted the Gun-Free School Zone Act of 1990,[28] making it a federal offense for any individual knowingly to possess a firearm within a specified distance from a school.[29] In calling a halt to the illegitimate use of the Commerce Clause to justify virtually any invasion of state authority, the Court expressed its concern about foreclosing the states "from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise,"[30] and doing so "by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term."[31] The Court

---

23. Planned Parenthood of Southeastern Pa. v. Casey, 112 S. Ct. 2791, 2876 (1992) (Scalia, J. dissenting) (citing Dred Scott v. Sandford, 60 U.S. 393, 621 (1857) (Curtis, J. dissenting).

24. *Scalia on Caning: It's Constitutional*, S.F. EXAMINER, May 7, 1994, at A2.

25. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 682 (1952); *see also* Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Constitution] must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

26. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

27. 115 S. Ct. 1624 (1995).

28. *Id.* at 1626 (The Gun-Free School Zone Act of 1990 is located at 18 U.S.C. § 922(q) (1994)).

29. *Id.*

30. *Id.* at 1641.

31. *Id.*

found that Congress' intrusion on state sovereignty, in the absence of adequate connection or identification with commercial concerns that are central to the Commerce Clause, constitutes interference which "contradicts the federal balance the framers designed and that [the] Court is obliged to enforce."[32]

This case also revealed the fact that Justice Clarence Thomas has joined Justice Scalia as a formidable intellectual force on behalf of Constitutional fidelity. In his concurring opinion in *Lopez,* Justice Thomas rightly observed that Constitutional law "has drifted far from the original understanding of the Commerce Clause."[33] He went on to state that "[i]n a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause."[34] Justice Thomas then went on to provide a brilliant analysis of Constitutional history which lays the basis for such future change in the law. He stated that:

> [F]rom the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the Commerce Clause. Moreover, there was no question that activities wholly separated from business, such as gun possession, were beyond the reach of the Commerce power. If anything, the 'wrong turn' was the Court's dramatic departure in the 1930's from a century and a half of precedent.[35]

He concludes by saying that unless the Justices "are willing to repudiate our long-held understanding of the limited nature of federal power,"[36] they must be willing to reconsider the boundaries of the Commerce Clause if the Court wishes "to be true to a Constitution that does not cede a police power to the Federal Government."[37]

James Madison wrote in *The Federalist* that to combine the judicial power with that of executive and legislative authority was "the very definition of tyranny."[38] Limiting the federal judiciary, including the Supreme Court, to its proper Constitutional role thus is a vital liberty

---

32. *Id.* at 1642.

33. *Id.* (Thomas, J., concurring).

34. *Id.*

35. *Id.* at 1649 (footnote omitted).

36. *Id.* at 1650.

37. *Id.*

38. THE FEDERALIST NO. 48, at 303 (James Madison) (Isaac Kramnick ed., 1987).

issue. Significant analysis of the nation's highest Court should not be denigrated to a simplistic argument over whether a non-existent political agenda has been achieved, or whether the imagined political objectives of previous presidents have been advanced or thwarted. Instead, scholarly inquiry should be directed at whether the judicial integrity required by the Constitution has been restored to the Supreme Court and—if it has—how such integrity can be preserved.