Judging in the Constitutional Workshop

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I have been asked to speak to you about how a judge works with the Constitution. I received the impression that, much like an Egyptian priest of Isis and Osiris, I might reveal to you some of the mysteries that are otherwise reserved for our exotic and hidden priestly revels.

Egypt in the days of the Pharaohs was ruled by images and hidden levers. Mystery as to the source and authority of law was essential. For us, a society based on the premise that what citizens think and want will in the long run determine our fate, mystery and deification of the basic principles and institutions of our governance are out of place.

So I begin with some demystification. Now I don't want to go too far. I am not sure that I would follow the late droll humorist and parliamentarian reformer, A.P. Herbert. In a mock judicial opinion entitled, "Is Magna Carta Law?" he reported a cynical Mr. Justice Lugg as saying:

> [I]f we examine the Great Charter, as I did for the first time in bed this morning, we are led towards the conclusion that, if this is the foundation of the liberties of the subject, then these liberties are not so numerous as is commonly supported; for out of the thirty-seven chapters of Magna Carta at least twenty-three have become obsolete, or have been abolished by later legislation, while among the fourteen which are not definitely extinguished there are at least as many for the benefit of the Crown as for the benefit of the subject, and the remainder have only a precarious existence, if any.[1]

Chapter after chapter of that great document he ruthlessly surveyed, finding it obsolete, overruled, or irrelevant until he came to the seminal portion, Chapter 29, the spiritual ancestor of our Fifth and Fourteenth Amendments' rights to due process of law: "Nor will we proceed against a freeman, nor condemn him, but by lawful judgment of his peers or by the law of the land." Id. at 57.

After reflection, Mr. Justice Lugg felt that the evidence in the case required him to read the noble clause thusly:

> 'Nor will we proceed against a freeman, nor condemn him, but by lawful judgment of his peers or by the law of the land, or Government Departments, or Marketing Boards, or Impregnable Monopolies, or Trade Unions, or fussy Societies, or Licensing Magistrates, or officious policemen, or foolish regulations by a Clerk in the Home Office made and provided.'

Id.

Speaking for myself, I shall leave Magna Carta where it is. Where it is in England is a bit problematic. For, since we have a record of its reception into the British Constitution by no fewer than 32 parliamentary enactments, we have to conclude that it was dropped from that Constitution 31 times. Since, unlike Britain, we have a written constitution, we don't have that problem. But we have others.

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[1] A.P. Herbert, Uncommon Law, London: Bibliophile Books, 1986, p. 54.

Having a written constitution has tempted and will continue to tempt scholars of jurisprudence to try to discern the single proper philosophic way to interpret that document. We therefore have seen a plethora of schools of thought arise: the "original intent" school; the structuralists; the legal realists; the legal process school; "liberals" and "conservatives;" activists and apostles of restraint; strict and loose constructionists.

My message to you is, that for you as undergraduates to approach the Constitution with these labels as your guides is to miss the reality of most of the work of most judges and justices most of the time. Perhaps there is value in searching for the One True Way of interpreting the Constitution; if so, this Holy Grail must be sought by others for the judges are too busy deciding cases. In the meantime the public, the press, and the Senate waste acres of space and aeons of time debating abstract principles. I think it is vital for citizens to have a closer, more realistic look at how judges work with the Constitution. And college is a perfect place to develop this look.

The Constitutional workshop is not high-tech, modern, automated, robot-operated. As I have indicated, it doesn't -- for most -- possess the all-purpose machinery of dispositive philosophic principles. Instead, it is a fuddy-duddy workplace, crammed with old jigs, clamps, and tools from the past, with a few new gouges and drills -- and hanging overhead, a spirit level, an old set of grocer's scales, and a plumb bob to remind the craftsperson of the ultimate objective.

The first key to the workshop is that anyone who wishes to understand, even generally, what our Constitution is must know the kind of activity that goes on. What the judges do is a kind of mirror image of what moved the Founders at Philadelphia. Professor Freund has written:

> The key, of course, is accommodation. The Constitution is no country for inflexible absolutes or single-premised logic. The genius of James Madison as constitution maker and expositor lay in his capacity for contrapuntal, instead of linear thinking . . . .[2]

This reference is illuminating, for "counterpoint" connotes the combining of two melodic lines to establish a harmonious relationship. This kind of accommodation, harmonizing or balancing, is the function of the nation's state and federal judges as they labor in the constitutional workshop. All this is a preview to what happens actually when judges get down to business.

Unlocking the Door

But, before they even open the workshop door, there is much busy work to do. To begin, judges do not simply seize upon a case as a vehicle for announcing their views about the Constitution. They must take whatever case comes along. Even when a case looks to be sprouting a red hot constitutional issue, all judges, whether liberal or conservative, "activists" or "restraintists," disciples of realism or legal process, strict or loose constructionists, invoke the discipline of their craft and subject the case before them to this rigorous catechism: Is there jurisdiction? Has a claim been stated? Is this a real case or controversy or is it moot or premature? Is there "standing" for this particular plaintiff to sue? Was the issue presented and preserved in the lower court? Has another case foreclosed consideration of this through the doctrines of stare decisis or claim or issue preclusion? Should we abstain out of interests of

[2] "What They Said, What They Read," book review of "The Founders' Constitution," New York Times Book Review, March 15, 1987, p. 3.

federal-state comity? Has the plaintiff exhausted his administrative and judicial remedies?

In addition, when the lawyers claim to raise a constitutional issue, we push a few more buttons. We ask whether it is necessary that we reach it. It may be that the statute, as construed by the state court, avoids constitutional attack. If a federal court is not confident of the proper interpretation of state law, it will certify the question to the state court. Or, if the functioning of state government may be deeply affected by the case, the federal court may simply abstain and send the parties to the state courts.

My own sense is that, in this limited area of deciding whether to enter the constitutional workshop, technical knowledge rules. There is relatively little division between liberals and conservatives, activists and restraintists, loose and strict constructionists.

Selecting the Raw Material -- the Facts

If litigants succeed in surmounting these obstacles, and the court is persuaded that it should indeed decide the case, the next question is: what are the facts? To pursue our workshop analogy, these are the raw materials. It makes a big difference whether the craftsman is working with slender strips of balsa wood or massive timbers. "What are the facts?" seems a simple enough question, but it includes several subquestions.

In the first place, we appellate courts take the facts as the trial court found them; if the judge believed certain witnesses, for example, the law enforcement officers, not the accused, so do we. And, so long as a jury verdict can reasonably be supported, we take the facts and inferences therefrom that support the verdict, even though we might have come out the other way.

A more subtle problem lies in the scale of the facts presented. Is the court asked to look at the events affecting one person under all the specific circumstances surrounding him, or should the court treat the particular person as representative of an entire class? One of the most common experiences of any appellate judge is to read the briefs of appellant and appellee in a case and wind up feeling that two entirely different cases have been described. There are two dangers. One is that a decision based on the first approach will be so fact specific that it offers no guidance for future cases. The opposite danger, when a problem is addressed at a very high level of generality, is that the facts sufficient to decide at this level will not have been gathered or analyzed, and that a far-reaching rule will be announced far beyond the needs of the case. The goal is to have enough facts assembled to enable a sound decision of some generality to be made.

The danger, in constitutional decision making, is, to use our workshop metaphor, that we construct a top heavy table on flimsy legs. Let me give an example, a recent Supreme Court case involving the warrantless search of the desk of a doctor employed by a state hospital. O'Connor v. Ortega, 107 S. Ct. 1492 (1987). The Court's factual base was its simple observation about what it called "workplace realities," namely, that employers had a legitimate need to enter offices and desks to get files or reports or to chase down missing property. Standing on this premise, without distinguishing the professor's study from the guard table at a prison, the Court swept away the requirements of a warrant and probable cause for all public employees, 3,021,000 federal, and 13,669,000 local and state -- blue collar, white collar, and no collar.

Another example is a case decided three weeks ago by the Court. Florida v. Riley, No. 87-764, Jan. 23, 1989. A Florida sheriff, unable to confirm a tip that marijuana was being grown in defendant's greenhouse, flew a helicopter at 400 feet over the property and saw the plants through openings in the roof. The whole case turned on the factual question: does one reasonably expect police snooping at 400 feet? The majority, through Justice White, said yes because,

although fixed wing planes cannot legally, under F.A.A. regulations, fly below 500 feet, helicopters can. Justice O'Connor thought that the case should not turn on safety regulations, assumed there was considerable public flying at 400 feet, and in any event faulted defendant for not showing the contrary. Justice Brennan derided the majority for saying, in effect, that the search was valid if the sheriff was in a helicopter, but not if he was in a fixed wing aircraft. And Justice Blackmun, citing Coffin on Judicial Balancing, said, "I am not convinced that we should establish a per se rule for the entire nation based on judicial suspicion alone."

I suspect that even on this mundane level of facts there is room for value-laden, ideological tension. Depending on the case, judges may feel a pull to a narrow or broad factual basis. This magnetic "pull" may run in any direction: a "liberal" judge may wish to generalize in favor of the individual, a "conservative" judge may wish to do the same for the state or its law enforcement officials.

Single Step Decisions

Once over the threshold, when we have satisfied ourselves that we really have a constitutional case on our hands, we have to decide whether this is a case to be decided by a precise formula or standard, or by resorts to balancing interests of the individual and the state. These are the two broad categories of constitutional decision making. The former is a process involving but a single step; the latter involves several steps. To use our workshop figure, the former operation requires only one tool; the latter, several.

The first category requires judges to answer a simple question: do the facts fit the formula? For example, if the issue is obscenity, does the book or film contravene the local public sense of what is either fitting or outrageous? If the latter, it must be banned. There is no fine tuning. No weighing. If the issue is church versus state, is the benefit allowed the church such as to communicate a state endorsement of religion or does it involve an "entanglement" of church-state monitoring so as to broach the fine, if inchoate, line between state and church? Subsidies to teachers in parochial schools, even though their courses are secular, cross the line; a Christmas crèche on the city park does not. Wherever the line is found to lie, the decision is one in line-drawing; it is not in balancing. So also are constitutional decisions as to what constitutes a "taking" of land, an ex post facto law, or a violation of the principle of separation of powers.

A case our courts heard argued last week involved a city's billboard ordinance. All billboards, other than those owned by the owner of the premises were banned if over 65 square feet in size unless for the previous year they had been solely used for non-commercial messages. The critical question is: Does the ordinance reflect a content-based distinction? If so, it will be upheld only if the city can point to a compelling need -- something exceedingly difficult to establish. If not, a much less weighty interest will justify it.

Of course, the values and philosophic preferences or "tilts" of judges enter into this line drawing. One judge's obscenity is another's protected speech with some redeeming value.

Judicial Balancing -- Decision in Several Steps

Most of the constitutional decision making I have done involves resort to a number of tools or steps in resolving contests between an individual or group and government officials or subdivisions. The operation can be crudely described as assessing the interests of both sides to see which "outweighs" the other. Its label is "balancing" and it is, I think, the dominant judicial style of this era.

a. Threshold Decisions

The first step is to determine whether there will be any balancing at all. One such example is Rankin v. McPherson.[3] where an employee in a constable's office was discharged for remarking to a co-worker, after hearing of an attempt on the President's life, "[I]f they go for him again, I hope they get him."[4] If this statement, in its context, was speech "on a matter of public concern,"[5] then the Court would have to determine whether the employee's right to utter it was outweighed because it threatened the efficient operation of the office. In the end there was balancing, because five Justices felt this was speech "on a matter of public concern." But the dissent devoted all of its efforts to showing that the words were not such speech or, if they were, were unprotected.

Other such threshold questions are: Does the individual have any recognized liberty or property interest at all? If not, there is no further concern over due process. Has there been a search or a seizure? Was there a reasonable expectation of privacy? If not, we shall not inquire into the reasonableness of the officers' conduct.

Again, the contrasting values of judges will often enter this deciding at the threshold -- as the McPherson case revealed. The "liberals" saw the words as speech on a matter of public concern; the "law and order" conservatives did not.

b. Identifying the Issue

I have referred summarily to balancing as the effort to weigh the right of an individual against the interest of society. This is the way most courts and judges express the basic choice. But such a characterization conceals an implicit utilitarian bias. To the extent that a conflict is seen as one between the interest of a lone individual and that of all the rest of us, the result is pretty well foreshadowed. Justice Brennan sounded the same note in his dissent in a noteworthy fourth amendment case decided in the October 1984 Term, New Jersey v. T.L.O.:[6]

> I speak of the "government's side" only because it is the terminology used by the Court. In my view, this terminology itself is seriously misleading. The government is charged with protecting the privacy and security of the citizen, just as it is charged with apprehending those who violate the criminal law. Consequently, the government has no legitimate interest in conducting a search that unduly intrudes on the privacy and security of the citizen. The balance is not between the rights of the government and the rights of the citizen, but between opposing concepts of the constitutionally legitimate means of carrying out the government's varied responsibilities.[7]

What a court is always trying to achieve in the kind of cases we are discussing is as close as possible an approximation to the balance struck by the Constitution. The particular case is always, by definition, a case involving public interests on both sides. And society has as much interest in the vindication of any right that the Constitution has given (or reserved) to the individual as it has in the proper (not merely efficient) functioning of government. A judicial balancing that includes this thought in identifying the issue starts on the right track, avoids tilting the scales before the weighing begins, and increases the chances for sensitive discourse and perhaps even a narrowing of the differences.

In addition to this general observation, applicable to all of the cases we are dealing with,

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[3] 107 S. Ct. 2891 (1987).
[4] Id. at 2895.
[5] Connick v. Myers. 461 U.S. 138, 146 (1983).
[6] 469 U.S. 325 (1985) (Brennan, J., dissenting).
[7] Id. at 363 n.5 (Brennan, J., dissenting).

there are particular instances where the majority and minority of the Court see the issue quite differently and, accordingly, march off in opposite directions without acknowledging the other position. A classic example is a case decided at the end of the October 1985 Term, Bowers v. Hardwick.[8] In that case a homosexual challenged the constitutionality of the Georgia sodomy statute. The majority framed the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many states that still make such conduct illegal and have done so for a very long time."[9] The dissent sharply criticized that formulation and countered: "[T]his case is about 'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'"[10]

It is obvious that the underlying values of the two groups of Justices were revealed in their descriptions of how they perceived the question to be resolved.

c. Interest Analysis

The next step, interest analysis, really involves several sub-steps: determining the existence of the individual's interest and its centrality or importance, the likely extent of its infringement, and the interests of the government.

A judge will first identify whether any constitutionally protected right of the individual or groups is at stake and, if so, what it is. Sometimes the question will turn to whether state law has given one a liberty or property interest that the Constitution then will protect. This in turn leads to questions about the definiteness and expectancy creating nature of the state-created right, whether by law or custom. Sometimes the major issue is whether a right exists at all. Such rights as those concerning the rearing and educating of children, the preserving of family relationships, marriage, procreation, abortion have all been recognized and delineated by the Supreme Court even in the absence of any supporting text in the Constitution, a statute, or ordinance. So also with interstate travel, desegregation, and "one person, one vote." The declaration of such rights -- what lawyers and judges call substantive due process -- is perhaps the most difficult balancing task; indeed, the weight of current mores, scientific knowledge, technical advances, and state legislation, separately or all together, must be formidable to overcome the "great resistance" to expand the Due Process Clause.[11] So far the right of an individual not to be executed by the state has not commanded sufficient votes of the justices.

Once an individual's right or interest has been identified, the task of balancing really begins. A large portion of constitutional litigation concerns itself with whether a citizen has been given procedural due process, such as advance notice and a hearing. The starting point is to decide whether the citizen possesses an interest sufficient to merit any due process. Not only does the interest or right have to be identified, but the likely extent of its infringement has to be assessed. This is one of the real battle lines: is the prospect of infringement a realistic one or merely a remote possibility? Judges differ not only in their gauging of remoteness, but in the weight they assign to it. For some judges the chance that some law or policy will infringe on even a few persons' rights is enough to trigger due process protection. For others, there must be a likelihood of a more substantial impact before their due process nerve is flicked. I really can't say what, except for everything that has made the judge the kind of person he is, triggers either

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[8] 106 S. Ct. 2841 (1986).

[9] Id. at 2843.

[10] Bowers, 106 S. Ct. at 2848 (Blackmun, J., dissenting) (quoting Olmstead v. United States. 277 U.S. at 438, 478 (1928) (Brandeis, J., dissenting)).

[11] Bowers, 106 S. Ct. 2841, 2846 (1986).

reaction. But what I can say is that a greater effort to justify and explain assumptions at this point would be a healthy development in opinion writing. To the extent that the basis for the judge's or the court's view of the likelihood and significance of infringement invites criticism, the continuing sound development of the law is advanced. To the extent that the reasoning commands respect, the law achieves justified stability.

If the judge finds a protectable interest, the next step is to survey the interests of government. This means both the range of interests and their importance. Again, one judge may come away from his survey feeling that there would be very little burden if government were required to comply with additional due process requirements. Another judge might imagine formidable complications and demands. Yet here, too, there is generally no effort made to buttress, from experience or logic, the prophesies of little or great burden. Sometimes the ultimate value judgment comes down to whether or not the judge trusts or views with suspicion prosecutors, prison authorities, the police, administrative agencies. Indeed, in a number of recent Supreme Court cases dealing with probation officers, government supervisors, educators, and corrections officials, the final decisions were markedly influenced by the deference given them. To the extent that deference means the acceptance of all official justifications except the outrageous, there is little room for serious balancing.

A coequal competitor for constitutional decision making, in addition to due process -- substantive and procedural, is equal protection litigation. This comes about when a person complains that government (federal or state) is treating him differently from someone else similarly situated. In this kind of situation, judges have a fairly complicated balancing job to do. They first must ascertain if the plaintiff is indeed "similarly situated" to others who are better treated. If so, they must ask if the plaintiff is part of a "suspect" group -- defined in terms of race, national origin, or alienage -- or if the right involved is "fundamental." Even these threshold questions are not easy.

If this threshold question is answered "yes," the judge will then engage in what is called "strict" scrutiny; this means that the state will have to advance a very strong ("compelling interest") justification for its law or policy. Not only this, but government must demonstrate that there is no way "less restrictive" to plaintiff to serve its interests. If these questions are asked, the state seldom wins. If the plaintiff is not in that position but nevertheless has an issue based on gender or legitimacy, the scrutiny employed is "heightened." There must be a pretty good justification, a "substantial" connection between the law and the policy aim. But if a litigant complains of mere socio-economic discrimination, all that a judge asks is whether there is a "rational" relation.[12] If this question is asked, the state nearly always wins.

In this equal protection calculus, a judge obtains his ideas of state interests not only from the briefs and arguments of counsel, but from his own experience and general reading . . . and imagination. The judge's idea of "less restrictive" alternatives are also to some extent intuitive. This observation applies to both judges favoring the citizen-plaintiff and those inclined toward the government-defendant. The latter are likely to inflate the government's interests; the former may too cavalierly conjure up less restrictive alternatives. There is room for improvement at this level of analysis in being clearer about what and how weighty (and why) are the government's interests.

d. The Remedy

The task of balancing is not yet done. There remains the complicated question of remedy for a constitutional violation. This could range from a simple declaration of rights, to an

[12] Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985).

injunction commanding future action, to back pay and punitive damages, even to affirmative action with hiring quotas or the reorganization of a prison, a mental hospital, or a school system under the supervision of a master or receiver. Sensing what one or combination of several of these remedies is justified by the facts, the law, and common sense poses quite a different balancing task for the constitutional judge.

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So this is the thicket of the questions judges ask as they face constitutional issues raised by criminal defendants, prisoners, teachers, students, tenants, sexuals -- homo and hetero, welfare recipients, public employees, pamphleteers, pornographers, bishops, politicians, and editors. As we emerge, I suspect that the question deemed of overarching importance by some -- whether judges should confine themselves to discerning the original intent of the Founders -- has dwindled into insignificance. Few judges are bothered by the failure of the Constitution to mention, in addition to the army and navy, the air force. I know of none who would deny due process of law to a corporation because it is not a "person." Somehow the questions we have brought into the open about constitutional balancing seem more relevant to the rock bottom accommodation approach of the Founders.

I suggest also that trying to pronounce on the wisdom of being judicial activists or judicial restraintists does not advance us very far. For I think the truth is that the real differences between judges lie in their answers to the specific questions we have outlined as the guts of constitutional interest analysis. Here judges will not always be predictable. Some will be "liberal" in some situations and "conservative" in others -- just as has been the case with most Supreme Court Justices. But at bottom, as judges identify interests, give weight to them, and estimate the likelihood, frequency, and seriousness of infringements of these interests, I suspect that a frequent division will be between those who tilt in favor of the individual and those who tilt in favor of the established order -- with the saving vote cast by those who shift from one side to the other, depending upon the area of life involved, the facts, legal precedents and their sense of policy.