HOW AMERICAN JUDGES INTERPRET THE BILL OF RIGHTS*

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I

American courts have considerable power to affect government by exercising the power to invalidate, and thus render inoperative, federal and state statutes or the executive acts of federal and state officials (including the President himself) which they consider to be in conflict with a provision of the United States Constitution. All federal and state judges have the authority in appropriate cases to wield this power of judicial review, but the stakes are highest in the United States Supreme Court.

Americans take the subject of judicial review very seriously. The recent Senate hearings into the confirmation of President Clinton's nominee to the Supreme Court, Judge Ruth Bader Ginsburg, were tranquil by comparison to those that preceded them. From 1987 to 1991 Robert Bork, Anthony Kennedy, David Souter, and Clarence Thomas each underwent exhaustive and exhausting public grilling on their philosophies of law, their philosophies of life, and indeed their lives themselves. All but Bork eventually were confirmed by the Senate, but Thomas barely made it, by a vote of 52-48. The reason for the intense hearings was, of course, the recognition that the stakes are enormous when each of the nine Supreme Court Justices represents one-fifth of the votes needed to determine the direction of the country on all sorts of basic matters.

Judicial review in the United States is not a paper tiger. To take some early examples, the Supreme Court in 1857 held that African-American slaves had no rights under the Constitution,

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and never could have such rights.[1] It thereby thwarted a congressional attempt to fashion a compromise on the slavery issue and avert a bloody Civil War. In the 1870's, following the war, the Supreme Court voided congressional efforts to legislate full citizenship for former slaves.[2]

In the early twentieth century the Supreme Court regularly struck down federal and state social legislation that provided for minimum wages, maximum hours, the protection of labor unions, and the outlawing of child labor.[3] In mid-century, the Court operated with a more liberal philosophy but no less vigorously. For example, from 1954 to 1973 it declared unconstitutional the American version of racial apartheid, organized prayer in state schools, and laws prohibiting or restricting abortion.[4] And it told President Harry Truman that he could not lawfully take over and run privately-owned steel mills when a labor dispute threatened the production of steel for the armed services during the Korean War.[5]

How does one justify, or even explain, the Supreme Court's pattern of decision in constitutional cases so as to explain and perhaps justify judicial review, probably the greatest contribution that the United States has made to political theory and civil liberty? In order to address this question, I shall begin by identifying six pairs of Supreme Court rulings, in each of which the later decision was a radical change of direction from the earlier one. I shall then discuss five key factors which I believe affect judges when they are interpreting the Constitution, especially the Bill of Rights. I shall conclude by venturing some explanations, based on these five factors, for the changes in direction in each of the pairs of decisions that I have identified.

Three of the six pairs concern equality issues under the constitutional provision that prohibits government from "denying to any person . . . the equal protection of the laws." The other three deal with free expression under the constitutional provision that prohibits government from "abridging the freedom of speech or of the press."

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1. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

2. *The Civil Rights Cases*, 109 U.S. 3 (1883).

3. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Lochner v. New York*, 198 U.S. 45 (1905); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

4. *Brown v. Board of Educ. of Topeka*, 347 U.S. 483 (1954); *Engel v. Vitale*, 370 U.S. 421 (1962); *Roe v. Wade*, 410 U.S. 113 (1973).

5. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Turning first to the three equality pairs, what explains the change from 1896, when the Supreme Court upheld the forced segregation of black people into "separate but equal" schools and other public accommodations,[6] to 1954, when in *Brown v. Board of Education* it declared "separate but equal" facilities to be unconstitutional? Second, what explains the change from earlier judicial decisions that permitted government discrimination on the basis of gender[7] to recent cases in which the Court has struck down almost all such inequalities?[8] And third, in light of the acknowledged constitutional protection for sexual privacy, what explains the Court's approval in 1986 of laws that criminalize consensual homosexual sodomy?[9]

As to the three "free expression" pairs, why did the Supreme Court uphold the convictions of Communist leaders in 1951 for conspiracy to advocate the overthrow of the government by force and violence but reverse the convictions of other top Communists in 1957 under the same charge?[10] Can one reconcile the Court's willingness to sustain the conviction of a man for burning his draft registration card in protest against the Vietnam war[11] with its more recent declaration that burning the American flag as a political protest is constitutionally protected expression?[12] Finally, why did the Court in 1952 permit Illinois to send a man to jail under a criminal libel law for defamation of Jews and blacks,[13] but twelve years later strike down a huge libel judgment against the *New York Times* for printing an advertisement which falsely alleged that an Alabama official harrassed and arrested civil rights workers without cause?[14]

There are scores of similar pairings, including cases from other areas of constitutional litigation such as criminal justice, religion and the state, the rights of private property, and the separation of powers among the branches of government. But the examples I have selected should suffice for present purposes.

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6. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

7. See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948).

8. E.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971). But see *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981).

9. Compare *Roe v. Wade*, 410 U.S. 113, with *Bowers v. Hardwick*, 478 U.S. 186 (1986).

10. Compare *Dennis v. United States*, 341 U.S. 494 (1951), with *Yates v. United States*, 354 U.S. 298 (1957).

11. *United States v. O'Brien*, 391 U.S. 367 (1968).

12. *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

13. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

14. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Accordingly, I turn now to five factors that largely determine how courts interpret the Bill of Rights.

II

The first factor is the degree to which individual judges are in fact committed to the principle of judicial review. This may seem strange in light of the fact that the Supreme Court asserted the reviewing power as long ago as 1803 and its authority is now thoroughly established.

But throughout American history there have been those who denied the validity of judicial review. Not two decades after *Marbury* a state court contended that "the foundation of every argument in favor of the right of the judiciary, is found, at last, to be an assumption of the whole ground in dispute."[15] As recently as 1938 a well-known scholar maintained, in rather overheated prose, that Marshall's reasoning in *Marbury* was "baseless," and that the arguments supporting the restriction of "the will of a democratic majority by the judgment of a few elderly gentlemen" (that is, the judges) were "precisely those which the adherents of Hitler and Mussolini use against the frailty of democratically representative or elective government."[16] More recently, a leading federal judge, Learned Hand, lent his voice to those who doubted the general grant of judicial review in the Constitution, although he conceded at the end that it was "essential to prevent the defeat" of the government established in 1789 for the Supreme Court to assume at least some of this power.[17]

The approach of Judge Hand and the other critics is consistent with a long tradition that cautions the Supreme Court not to exercise its prerogative whenever it "sees, or thinks that it sees, an invasion of the Constitution."[18] In this view a court can invalidate a statute only when those "who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question."[19] Judge Hand, in short, by grudgingly recognizing a right of judicial review, implicitly cautioned judges to exercise the power with extreme reluctance.

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15. *Eakin v. Raub*, 12 Serg. & Rawle 330, 353 (Pa. 1825) (Gibson, J., dissenting).

16. Morris R. Cohen, *The Faith of a Liberal* 182-185, 192 (Henry Holt and Co., 1946).

17. Learned Hand, *The Bill of Rights* 10-15 (Harv. U. Press, 1958).

18. Id. at 14.

19. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 144 (1893).

This is not the occasion, nor is it necessary, to recount in detail the many reasons that judicial review has survived these assaults for almost two centuries. The arguments derive from the text of the Constitution and its contemporary history. They also stem from a perception of democratic theory which validates a role for a judicial body that acts both as umpire of our federal system and as protector of minorities and unpopular segments of society.

The key point is that the freedom with which a judge approaches the question whether to nullify a statute or executive act turns in part on how solid a footing the judge believes judicial review has under the Constitution and in a democracy. In particular, if a judge believes it is inherently undemocratic to overrule the actions of the elected branches of government he or she will tend to be diffident and cautious. On the other hand, if a judge believes that the judiciary is an authorized ingredient of a properly functioning democracy, the judge will feel far freer in exercising judicial review under the Constitution and Bill of Rights.

III

A second element determining how judicial review is exercised concerns the appropriate technique or techniques for interpreting the Constitution. This factor was brought dramatically to the attention of Americans in 1985 by Edwin Meese, then the Attorney General to President Ronald Reagan.

In a speech to the American Bar Association Mr. Meese said that the Reagan Justice Department "will endeavor to resurrect the original meaning of constitutional provisions and statutes as the *only* reliable guide for judgment."[20] This statement was widely reported and sparked an unusual popular interest in the hitherto specialized subject of constitutional interpretation. It also stimulated a barrage of responses, including unprecedented reactions from two sitting Supreme Court Justices, William J. Brennan, Jr. and John Paul Stevens.[21]

In limiting judges solely to "original meaning," that is to the text and the history behind the text, Mr. Meese ignored the fact that the Supreme Court regularly has resorted to at least four

20. Edwin Meese III, Speech before the American Bar Association, July 9, 1985, printed in *The Great Debate: Interpreting Our Written Constitution* 1, 10 (The Federalist Society, 1986) (emphasis added). See also Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 Harv. J.L. & Pub. Pol'y 5, 10 (1988).

21. William J. Brennan, Jr., *Construing the Constitution*, 19 U.C. Davis L. Rev. 2 (1985); John Paul Stevens, *Construing the Constitution*, 19 U.C. Davis L. Rev. 15 (1985).

other types of justification for its decisions—arguments from the purposes or theory of the Constitution, arguments from the Constitution's structure, arguments based on judicial precedent, and arguments based on moral, political, and social values. It is not my intention now to discuss whether the justices have employed these arguments well or badly, or too much or too little. It is rather to point out the obvious—that they have been, must be, and should be part of the legal intellectual capital on which the Court draws in deciding hard questions presented by the "great generalities of the Constitution," such as "due process of law," "equal protection of the laws," and "private property."

The appeal to moral or social values is, of course, the most controversial criterion I have mentioned and the one that Mr. Meese would no doubt find most objectionable. But such values have long been employed by conservatives as well as liberals. For example, Justice Lewis Powell invalidated a housing ordinance that restricted the right of extended families (grandparents and cousins as well as the nuclear family) to live together because "the institution of the family is deeply rooted in this Nation's history and tradition."[22] Chief Justice Warren Burger in a leading case concluded that obscenity could be banned in the interests of a "decent society."[23] And in one of his last opinions, Burger held that high schools may punish an off-color speech by a student because it is the duty of schools to enforce "fundamental values," including "habits and manners of civility" essential to a democratic society."[24]

One need not embrace a jurisprudence of social values to recognize that in many, if not most, constitutional controversies it is simply not possible to ascertain the "original intention" of the authors of the document. Some issues arising today could not have been foreseen in the eighteenth century, others were never discussed, and still others were the objects of conflicting "intentions" both at the Constitutional Convention in 1787 that proposed the Constitution and at the state conventions that ratified it. Furthermore, the records of the debates at the Convention are incomplete and possibly inaccurate. That is why James Madison deliberately delayed the publication of his notes on the Convention until after his death, asserting that as a guide to ex-

22. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

23. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973) (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting)).

24. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986), quoting Charles Beard and Mary Beard, *New Basic History of the United States* 228 (Doubleday, 1968).

pounding and applying the provisions of the Constitution, the debates lacked any authoritative character.[25]

The upshot of all this is that we can't stop the world and get off. The Constitution must be interpreted by contemporary judges in the only way they can—as citizens of the late twentieth century. Among others, Justice Benjamin Cardozo expressed this thought when he said that the "great generalities of the constitution have a content and a significance that vary from age to age."[26] Earlier, Chief Justice Marshall recognized the principle, in words no less true for being familiar, when he described the Constitution as an instrument "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[27] Almost a century later the Supreme Court said, "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions."[28] There are many such authoritative statements.

Finally, it is important to observe that Mr. Meese—unlike some other textualists—had a political agenda. Justice Brennan perceived this clearly. In replying to Meese he said that "while proponents of this facile historicism justify it as a depoliticization of the judiciary, the political underpinnings of such a choice should not escape notice."[29] The nature of Mr. Meese's political agenda is apparent, namely, to resolve the Constitution's textual ambiguities against claims of individual right. By skewing all inquiry toward a spurious "original intention," Mr. Meese would require the rejection of any civil liberties claim that could not be supported by hard evidence from the late eighteenth century. Such evidence is very difficult to come by, not only because of the problems associated with ascertaining "original intention," but also because concepts concerning the individual's relation to the state differed drastically at that time. There is no warrant for such a crabbed view of constitutional interpretation.

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25. See Paul D. Carrington, *Meaning and Professionalism in American Law*, 10 Const. Comm. 297, 298-99 (1993).

26. Benjamin N. Cardozo, *The Nature of the Judicial Process* 17 (Yale U. Press, 1921).

27. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

28. *Weems v. United States*, 217 U.S. 349, 373 (1910).

29. See Brennan, 19 U.C. Davis L. Rev. at 5 (cited in note 21).

IV

A third factor relates to the strength of a judge's commitment to the values underlying particular sections of the Bill of Rights. To illustrate, no Justice of the Supreme Court would belittle the institution of private property as a bedrock of the capitalist free enterprise economy or as an important basis for individual security and independence. Yet the Justices vary considerably in their willingness to tolerate government regulations of business and other forms of property. These decisions reflect, at least in part, different levels of attachment to the property principle.

Another example concerns free expression. In the course of many years of academic discourse and courtroom combat relating to free speech, I rarely have found a person who openly deprecates its worth. To the contrary, everyone professes to support free speech, much as everyone claims to have a good sense of humor, and to be open-minded. Why, then, the sharp differences among judges in their protection of free speech under the First Amendment? The difference turns not merely on whether a judge supports free speech, but rather on the *degree* to which he or she does so. Intensity of this sort cannot be measured, but it is palpable in some judicial opinions and not in others—as it is in the books and articles of some scholars and not others. It stems from a deep source within each person, where basic values reside. As the late Supreme Court Justice Potter Stewart observed about hard-core pornography, one knows it when one sees it.

A final example of this point focuses on a prominent Supreme Court Justice, Felix Frankfurter, who served from 1939 to 1962. When Frankfurter was appointed to the Court from a professorship at Harvard Law School, the liberal community rejoiced. For instance, the editor of a leading liberal magazine, *The Nation*, said, "I must record my profound gratitude to President Roosevelt for the appointment of Felix Frankfurter. . . . I do not believe that in my lifetime anyone has been appointed to the bench who was better qualified or more truly liberal."[30]

Yet Frankfurter confounded the liberals (and nearly everyone else) by becoming the leading exponent of judicial restraint of his era. Again and again he led the Court in conservative rulings relating to free speech, criminal justice, and equal protection, or he dissented from liberal decisions in these and other areas. But there were three principal exceptions to his restrained

30. Oswald Garrison Villard, *Issues and Men*, 148 Nation 94 (1939).

approach—separation of church and state under the Establishment Clause was one, academic freedom was a second, and the protection against unreasonable searches and seizures under the Fourth Amendment was the third. In those areas Frankfurter was an aggressive liberal, consistently upholding individual claims against the government. This inconsistency is explained by Frankfurter's special commitment to the values underlying these constitutional guarantees. The commitment arose in the first instance because of personal experience as a member of a minority religion, in the second because of his decades as a professor, and in the third in his capacity as intellectual heir to his mentor Justice Louis Brandeis's devotion to the right to privacy, the "right to be let alone."[31]

V

A fourth thread in the judges' tapestry is possibly even more imponderable than the intensity factor. Justice Oliver Wendell Holmes stated the idea, in his characteristically Olympian way, when he said that the "felt necessities of the time"[32] were critical determinants in the development of law. It has been put more defensively by others such as Professor Alexander Bickel, who said that "a court that decided the equivalent of five cases such as *Brown v. Board of Educ.* in a single year would have seen the end of the institution, I am sure."[33] The common element in these remarks is that public opinion has a powerful effect on judges, including Supreme Court Justices, even though lifetime tenure insulates them from crass retribution for their decisions. Public opinion may be transitory or may reflect a more general cultural context in which a decision is rendered.

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31. Justice Brandeis's devotion to privacy norms was manifested early. See Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890) ("[N]ow the right to life has come to mean the right to enjoy life,—the right to be let alone"). See also *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting). In contexts other than the Fourth Amendment, Justice Frankfurter had a more limited attachment to privacy values. See, e.g., *Barenblatt v. United States*, 360 U.S. 109 (1959) (freedom of association) and *Lerner v. Casey*, 357 U.S. 468 (1958) (privilege against self-incrimination).

32. Oliver Wendell Holmes, Jr., *The Common Law* 1 (Little, Brown and Co., 1881). The full sentence from which this phrase is taken is central to the thesis of this paper: "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." Id.

33. *Arthur Garfield Hays Conference: The Proper Role of the United States Supreme Court in Civil Liberties Cases*, 10 Wayne L. Rev. 457, 476 (Norman Dorsen ed., 1964).

A perceptive formulation of this point was rendered by James L. Oakes, a judge of the same court of which Learned Hand was a member. Judge Oakes wrote:

> It is also a bit of a myth to think that lifetime tenure operates to create irresponsibility. Lives are short; reputations are meaningful. There is, I venture to suggest, hardly an institution that operates with so many built-in checks and balances capable of instant criticism: one's fellow judges, higher courts, lower courts, law professors, law reviews, law writers, law clerks, lawyers' associations, families, and, yes, to an ever greater and more professional extent, the press. All or almost all of our actions are matters of public record; most of the reasons for taking them are openly and publicly stated for all to see and to criticize.[34]

Judge Oakes concluded that "the legitimacy of judicial solution to many of the most perplexing problems of the day must be, and is, ultimately supported by the accountability of the judiciary to the people."[35]

Put another way, judges (especially Justices of the United States Supreme Court) do not live in a disembodied vacuum, but exist as part of the hard real world where their decisions will be closely reviewed by every segment of society and ultimately redound to each judge's enhanced or impaired reputation. This is bound to influence decision-making.

VI

The fifth and final consideration is the degree to which judges are sensitive to the core purpose of the Constitution. This is very different from deciphering the meaning of a particular clause or word. Rather it is a question of commitment to the Constitution's *general* purposes. These purposes are stated movingly in its Preamble: "to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty" for all posterity. In human terms, the desire to "establish justice" and "secure the blessings of liberty" is the ultimate goal of the Constitution. Government efficiency, international influence, domestic order and economic needs are all important, but none exceeds justice and liberty as the heart of the constitutional commitment to the people of the United States.

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34. James L. Oakes, *The Proper Role of the Federal Courts in Enforcing the Bill of Rights*, 54 N.Y.U. L. Rev. 911, 948-49 (1979).

35. Id. at 949.

This conclusion is confirmed by many reliable indicia of constitutional purpose. The first is the structure of the Constitution, which protects individual liberty through the dispersion of power among the branches of government, thereby adopting Montesquieu's insight that liberty cannot exist if the judiciary is not separated from the legislative and executive.[36]

The second is the text of the Constitution, which as originally ratified and promptly amended by the Bill of Rights protects liberty in numerous provisions. In this connection, it is of prime importance that without promises from the Federalists—the majority party at the time—that a bill of rights would be added as soon as a government was installed, the Constitution almost surely would not have been ratified by the states.

Third, the Federalist Papers, which provide the best contemporary discussion of the theory of the Constitution, are replete with concern for individual justice and the interests of minorities. For example, in one issue Madison referred to the "preservation of liberty" as the essence of government. In another, he spoke of the need for "measures" to be decided "according to the rules of justice and the rights of the minor party," and not "by the superior force of an interested and overbearing majority."[37]

Despite several references to "the minority" in the Federalist Papers, we should appreciate that "equality" was not uppermost in the minds of the Framers of the Constitution. All the delegates to the Constitutional Convention were men, and women hardly were mentioned in the debates. Slavery was countenanced in three clauses of the Constitution, although the word itself never appeared. As the late Justice Thurgood Marshall wrote when the bicentennial of the Constitution was celebrated in 1987, even after the Fourteenth Amendment in 1868 guaranteed equal protection of the laws to blacks as well as to whites, "almost another century would pass before any significant recognition was obtained of the rights of black Americans to share equally even in such basic opportunities as education, housing, and employment, and to have their votes counted, and counted equally."[38]

Whether one admires the handiwork of the Framers of the Constitution without reservation, or regards it as partially flawed

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36. See generally Charles Montesquieu, *The Spirit of the Laws* (Thomas Nugent trans., Hafner, 1949).

37. The Federalist No. 51 at 321 (James Madison) (Clinton Rossiter ed., New American Library, 1961); The Federalist No. 10, id. at 77 (James Madison).

38. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harv. L. Rev. 1, 4 (1987).

or incomplete, it is plain that a great danger to liberty—perhaps the greatest danger—lies in what Madison called "the community," that is, the majority. The conservative English writer Edmund Burke concurred with this sentiment at almost the same time, saying that in a "democracy the majority of citizens is capable of exercising the most cruel oppressions upon the minority."[39] Madison's essential premise was that even in a democracy the majority must be subject to limits that assure individual liberty, and that the democratic political process requires a check through a politically insulated body in order to guarantee the right of individuals, including the most obnoxious, to vote, to speak, and to be treated fairly and with equal respect and dignity.

A judge's attachment, or lack thereof, to these general purposes and principles will powerfully affect his or her rulings in particular cases.

VII

While recognizing that a far more extensive analysis would be required to do full justice to the six pairs of rulings that introduced the discussion, it is nevertheless time to apply my general observations about how judges approach the Bill of Rights to these concrete settings.

The first pair comprised two segregation cases. In 1896, when the Supreme Court legitimized apartheid, judicial review on behalf of individual rights was still undeveloped, meaning that few of the Justices saw their role as protector of the Bill of Rights. Further, it is unlikely that any one of the Justices but the dissenting John Marshall Harlan accepted the extensive governmental intervention that would be necessary to bring the freed slaves fully into American life. Finally, by that time the white backlash to the Civil War and its egalitarian impulses had become settled public policy, making it easy for the Court to ignore the central purpose of the Fourteenth Amendment's Equal Protection Clause (let alone the general purpose of the Constitution to protect individual rights).

In contrast, by 1954 when *Brown v. Board of Education* was decided, there was a much firmer sense in American society of the Equal Protection Clause's general principle, and there were many members of the Court committed to racial equality. The Second World War and its aftermath contributed greatly to change and—also in the category of the "felt necessities of the

39. Edmund Burke, *Reflections on the Revolution in France* 139 (Doubleday, 1989).

times"—the Cold War competition with the Soviet Union and China rendered the system of racial stratification highly embarrassing to American interests abroad. This was pointed out in the Eisenhower Administration's *amicus curiae* brief to the Supreme Court.

The second pair involved decisions in relation to women's rights. The enhanced constitutional protection of women's rights beginning in 1971[40] was also heavily influenced by the times, in particular the rise of the women's movement at the end of the 1960's. This factor was of critical importance because it could not be claimed that the Equal Protection Clause of the Fourteenth Amendment (ratified in 1868) was intended to provide special protection for women. Furthermore, at least three Justices—William O. Douglas, William J. Brennan, and Thurgood Marshall—were thoroughly committed both to the general liberty purposes of the Constitution as well as to the specific agenda of female equality. Most of the other Justices recognized that the idea's time had come.

Turning to our third pair of cases, it is hard to understand why the Court upheld the sodomy conviction of a homosexual, albeit by a narrow 5-4 vote.[41] After all, the gay rights movement was fully organized by 1986, when the decision was rendered, and there were several strong civil libertarians on the Court.

The explanation for *Bowers v. Hardwick* has several strands. Initially, the case was pressed on the same sexual privacy theory that had been used successfully in the abortion rights cases; by the mid-1980's four Justices rejected the abortion decisions and were unwilling to extend them further in any direction. Second, there has always been in American culture a deep antipathy towards homosexuals. This antipathy surfaced most recently in the bitter and largely unsuccessful legislative struggle to accord lesbians and gay men equal rights in the military. Finally, the frightening AIDS epidemic that was relatively new in 1986 cast a harsh light on homosexual lifestyles and severely prejudiced their claims for equal treatment. Despite these rationales, the case apparently was decided by a hair because one of the five member majority, Justice Lewis Powell, said soon after his retirement that he had long agonized over *Bowers v. Hardwick* and concluded later that he had made a mistake.[42]

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40. See *Reed*, 404 U.S. 71.

41. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

42. See Anand Agneshwar, *Ex-Justice Says He May Have Been Wrong*, Nat'l. L.J. Nov. 5, 1990 at 3.

The first pair of "free expression" cases was the two prosecutions of Communist leaders. In 1951, at the heart of the Cold War, a large majority of the Supreme Court expressly doubted their capacity, as judges, to second guess the Congress on matters of national security.[43] In other words, the justices lacked confidence in the authority of judicial review in these circumstances. Six years later, with a waning of McCarthyism at home (including the eclipse and death of Senator Joe McCarthy) and a softening of international tension after the death of Joseph Stalin, the Court eased its stance and imposed heavy restrictions on conspiracy prosecutions of Communists that effectively ended such prosecutions.[44] By that time, too, Earl Warren was Chief Justice and there were four strong civil libertarians on the Court; the shift to a generally more protective view of individual rights was well on the way.

The next pair comprised the draft-card and flagburning decisions, which are so similar doctrinally. Like the Communist cases, they are partly explicable by national security concerns or, more precisely, the public's emotional reaction to war. In 1969, when the Supreme Court upheld the law prohibiting public destruction of a draft card,[45] most members of the Court were dedicated to principles of civil liberty and to freedom of expression, and none of them would have agreed with Edwin Meese's narrow approach to the Constitution. Thus, their unwillingness to protect a pyrotechnic protest, unlike the liberal decision invalidating the flag-burning statute two decades later, was rooted elsewhere. In my opinion, that root was the Court's belief in 1969 that public opinion was offended by the widespread and vigorous opposition to the Vietnam war and, more generally, by the flamboyant 1960's counterculture. Consequently, it feared erosion of the Court's standing with the public on a matter which was highly emotional but relatively minor, certainly in comparison with the Warren Court's broader agenda.

By contrast, in our final pairing public opinion was far less of a factor. In 1952, when the Supreme Court upheld the Illinois statute that proscribed group defamation of Jews and blacks,[46] few people were aroused by the controversy. In 1964, when the Court reversed the Alabama libel judgment against the New

43. *Dennis v. United States*, 341 U.S. 494 (1951).

44. *Yates v. United States*, 354 U.S. 298 (1957). See also *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

45. See *O'Brien*, 391 U.S. 367.

46. See *Beauharnais*, 343 U.S. 250.

York Times,[47] the public was divided over the civil rights movement which had precipitated the incident leading to the inaccurate advertisement. The different results in the two cases seem to turn on the far greater commitment of the later Supreme Court to the principle of free speech, even when the words insult individuals or vulnerable groups. This is an illustration of the intensity factor: the 1964 Court was willing to subordinate the competing values of personal reputation and possible civic strife to the freedom of expression protected by the First Amendment.

VIII

The variety and complexity of the issues that arise under the Bill of Rights defy easy categorization or synthesis. In presenting a series of considerations that seem to me important to judges, I am acutely conscious of the incompleteness of the analysis. The cases discussed represent only a portion of constitutional problems. Moreover, I have not alluded to the complexities introduced by precedent (including *stare decisis*) or by issues of statutory construction and administrative law that are intertwined with constitutional law. I have eschewed these topics because discussion of precedent as well as statutory and administrative issues would take us far afield. Despite these omissions I hope that I illuminated in some small way the awesome power of judicial review.

47. See *Sullivan*, 376 U.S. 254.