crafted book both nicely completes a distinguished author's personal cycle and insightfully raises new questions for historical and constitutional debates.

THE COURT AND THE CONSTITUTION. By Archibald Cox.[1] Boston: Houghton Mifflin. 1987. Pp. 434. $19.95.

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Professor Archibald Cox's latest book is a popular history of constitutional law, from "Miracle at Philadelphia" to the Rehnquist Court. Part One ("Building a Nation") includes chapters on "Judicial Supremacy," "Federal Power and Supremacy," "Opening a National Market," and "One Nation Indivisible." Part Two ("From Laissez-Faire to the Welfare State") contains four chapters that bring the reader from the Civil War to "The Warren Court," which is the title of the introductory chapter in the third and final historical section of the book, covering "The Nonconformists" (religion), "National Security and the First Amendment," "Protection for the Accused," "School Desegregation," "Affirmative Action," "Political Equality," "Invidious Distinctions and Fundamental Rights," and "Abortion." In the last chapter, Professor Cox muses about "The Future of Judicial Review."

Although it does not purport to be very original, *The Court and the Constitution* is a useful addition to the overcrowded shelves of constitutional literature. It's much better written than most history books and would make excellent supplemental reading for law students, not only to supply historical perspective but also to provide a coherent point of view about the great cases and problems, an antidote to the confusion of class discussions and a foil—if that's not too condescending a word—for any contrasting ideas the professor has to offer.

As history, Cox's work can best be judged by historians. Of course, it isn't just history. Cox brings to his task a law professor's characteristic concerns, and the book is a series of didactic essays

(1987); *see esp.* Appleby, *The Heirs and the Disinherited*, 74 J. AM. HIST. 798 (1987), an essay that essentially stands McDonald on his head. *See also* Nash, *Also There at the Creation: Going Beyond Gordon S. Wood*, 44 WM. & MARY Q. 602 (1987).

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on the problem of judicial creativity in various contexts and periods. Cox's ideas about that subject invite comment by scholars who, like Cox himself, have spent more time in casebooks than in archives.

Cox's reflections are of interest, not only because of their intrinsic merits, but also because he exemplifies—as much as anyone—the best qualities of his generation of constitutional lawyers, now fading from the scene: liberal but judicious and pragmatic; academic but lucid, mature, and commonsensical—men who habitually "balance the interests." While often taking sides, Cox tries to state the other side's position fairly, and usually concedes a point or two. He expresses himself with such an air of reasonableness and civility that even when he oversimplifies he sounds scrupulously sensible and fair. Yet Cox's writing also captures the poetry of rights. Even the most jaded reader is likely to derive from these pages a renewed admiration for our constitutional tradition.

The book's weaknesses—of which more in a moment—are largely due to the inevitable superficiality of histories of the Court, and prescriptions for curing its faults. Here again I view Cox as what Strachey would have called a "representative specimen." For all his talent, he is a conventional thinker. His limitations, even more than his strengths, tell us something about the state of constitutional jurisprudence.

I

Cox's purpose in writing this book was to explore the dilemmas of a Court that must somehow be both creative and faithful to the rule of law. The Prologue sets the stage by describing the Watergate tapes case, raising the question whether President Nixon would obey the courts, whether the rule of law would prevail. Against that background, Cox quotes Learned Hand on the judge's task: "He must preserve his authority by cloaking himself in the majesty of an overshadowing past, but he must discover some composition with the dominant needs of his times." This becomes the theme of the work.

As every student of the Court knows, theories about constitutional creativity must come to terms with a good deal of history, and particularly the cases of two periods: the pre-1937 period of sporadic conservative activism, and the postwar period of liberal activism. Shall we approve them both? Disapprove both? Approve one and disapprove the other? Or approve some activist decisions but not others from both eras?

Concerning the conservative era, Cox takes a fairly standard liberal position:

> No one can realistically suppose that those who wrote and adopted the Due Process Clauses ever envisioned the kind of government interference with the free market that is accepted today. On the other hand, there is scant reason to suppose that the Framers intended to bar those developments, given national markets, giant business enterprises, an interdependent national economy, mass production, mass consumption, and all the inequalities of bargaining power that would exist in the absence of government regulation in the modern economic world. That might well be reason enough to read no relevant restriction into the Due Process Clauses, but, as the majority opinion demonstrated in *Minnesota v. Illinois*, there was also an ancient principle permitting government interference with market forces where the bargain affected the public interest. Few situations were seen to fall into that category prior to 1870. The broadening of public regulation in the modern State could at least plausibly be attributed to the much greater number of economic bargains that affect the public interest, rather than to any change of basic principle.
>
> Even more important, the vast changes in law and government involved in the transition from laissez-faire to the welfare state were not primarily the work of judicial hands. . . . The Court can be said to have participated, but only by declining to impose constitutional barriers with scant support in the genius of the original understanding or the earlier ground-breaking interpretations.

Cox is saying three familiar things here, and in similar passages elsewhere in the book. First, that the formal legal foundation for conservative activism—in the constitutional text and the framers' intentions—was rather weak or at any rate not compelling. Second, that post-Civil War industrialization transformed the economy, obliterating the laissez-faire landscape of independent farmers and small businessmen, and creating conditions that justified novel forms of government intervention to protect employees and consumers. And third, that the Court's role, when it sustained such regulations, was in keeping with our democratic traditions. Conversely, decisions like *Lochner* were indefensibly undemocratic.

Few of us could even aspire to write a better brief for judicial restraint in economic regulation cases. I'm inclined, at least tentatively, to agree with its conclusions. But Cox's reasoning in defense of those conclusions is, like that of most constitutional scholars, more glib than profound. It relies too heavily on the tidy New Deal economic history to which constitutional historians almost always subscribe. It also ignores the possibility that democracy has weaknesses in the economic field that are sometimes just as serious, and perhaps just as appropriate for oligarchic correction, as its shortcomings in the realms of civil rights and liberties.

I suspect that many—perhaps most—of the regulations of business that came before the conservative Court were unwise, or at least highly questionable. It's hard to say for sure, of course, but we do know that reforms like the minimum wage and zoning had the effect of protecting vested interests—the man with a job against the less skilled worker who was willing to work for a lower wage, for example, or the family with a spacious house against the family that

might want to put up a cheaper house nearby.[3] Many economists today, even liberals, would at least take seriously the possibility that on the whole conservative activism did more good than harm.[4] Notwithstanding infamous decisions like *Lochner*, the Court may more often have upheld a bad law than invalidated a good one. Professors of constitutional law and history, on the other hand, generally assume the contrary. It's not just that they want courts to defer to legislative judgments about economics; they also believe that in cases involving curtailment of property rights those judgments were usually correct. While economists tend to believe that regulations of business often have shady origins and perverse effects, constitutional lawyers—apart from the relatively small Law and Economics faction—tend to believe that the origins are noble and the effects benign.

Suppose that one dark night a heavenly voice were to inform us that the conservative economists are right. Would we then be content to say that the framers of the fourteenth amendment had no apparent intention to prohibit the minimum wage, or that zoning laws were democratically enacted? Or that industrialization had created new realities? Perhaps, but we certainly would agonize about it much more than Cox and most other constitutional scholars have done. We might stress the myriad difficulties of ascertaining the intentions of the framers, the ambiguities of the text, the strong American tradition of property rights, and the evidence (mentioned by Cox in passing) that "due process" had previously had some substantive connotations. We might cite the historical evidence that political freedom cannot flourish without economic freedom. If this weren't enough, we would surely invoke the ninth amendment.

We probably would add that in matters of economic regulation the democratic process is often seriously flawed, for instance in zoning, where many of the victims of an "exclusionary" regulation live in another city and therefore have no power to vote against the politicians who enacted it, in the unlikely event that they are even aware of the regulation.[5] Frequently the benefits of an economic regulation are palpable to the beneficiaries, while its harmful effects are relatively diffuse, harder to trace, and consequently less visible. The main victims of a regulation that raises prices are unsophisticated people who can more easily be persuaded to vote for a politician

3. For a superb history of the early years of zoning, including its exclusionary purpose, see S. TOLL, ZONED AMERICAN (1969).

4. *See* Foster, Book Review, 4 CONST. COMM. 443 (1987).

5. *See generally* R. BABCOCK, THE ZONING GAME (1966).

who offers them some sort of subsidy, than to vote against one who has created subsidies for others. In such situations, perhaps the "political marketplace" doesn't work very well, just as it doesn't when a dominant majority discriminates on racial or religious grounds, or stifles freedom of speech. Correspondingly, the case for judicial intervention to protect so-called "property rights," though not necessarily persuasive, is stronger than liberal scholars usually acknowledge.

With the sole exception of the NRA, invalidated in the *Schechter Poultry* case, Cox uncritically accepts the traditional, New Deal view of the pre-1937 economic regulation cases: the government represented the little man, while the corporations represented wealth, power, and Spencerian ideology.

Cox's treatment of the minimum wage cases is typical. He begins by describing how social changes created a need for government intervention. With the closing of the frontier in the 1880s, "No longer could a man down on his luck but possessing initiative pull up stakes and start anew on a homestead claim." Not only that, but the worker had no real bargaining power: "He could take the job on the terms offered. If he declined, another [worker] was waiting in line." Therefore, workers needed a guaranteed minimum wage. Although the Supreme Court in *Munn v. Illinois* upheld regulations of public utilities, "All other price or wage regulation was consistently held unconstitutional, even a law guaranteeing women a minimum wage." End of story.

I appreciate the need for concision in a book of this type, but one can summarize a law's vices as easily as its virtues. Even as a summary, Cox's analysis of the minimum wage is too facile. Like most liberal historians, he writes as if inequality of bargaining power suffices to justify government regulation. That, of course, is not strictly true: what justifies a regulation, ultimately, is that it creates a state of affairs that on the whole we prefer to the one that would otherwise exist. Equality of bargaining power is only a means to this end, and not necessarily a reliable one. A measure that appears to be desirable from the point of view of equality of bargaining power may nevertheless do more harm than good; a secretary has no equality of bargaining power with the Pillsbury Corporation, but it does not follow that government intervention to set "a fairer salary" would be in the public interest. Some regulations of business unfairly benefit other businesses, or raise prices, or favor some workers at the expense of others.

It's embarrassing to have to emphasize such an elementary point. Yet nearly all constitutional historians, including Cox, ap-

pear to accept the minimum wage at face value, as a technique for relieving poverty by boosting the income of the lowest-paid workers. Cox simply ignores the voluminous evidence that by raising the price of labor the minimum wage creates unemployment, especially among the most marginal workers such as immigrants in the early twentieth century and teenage blacks today.[6]

Cox glides past another complexity when he says that "even" a minimum wage for women was found invalid, as if it were easier to defend a minimum limited to women than a sex-neutral law. That was the common opinion in Frankfurter's generation, but it's a surprising blooper today. If the minimum wage were simply what it seems to be, Cox would be right, but once the side effects are perceived, a law limited to women may be *less* attractive than a general law—it creates a danger that in some occupations employers will hire fewer women.[7]

As with the minimum wage, so with most of the other economic regulations. Did the Court help farmers by upholding a mortgage moratorium? Or do such moratoria make credit harder to get, and if so was that desirable?[8] Again, I'm not asking for a treatise; just an admission that public policy is more complex than one might infer from FDR's campaign speeches. Was the maximum hour law (for women only) upheld in *Muller v. Oregon* good for "women," as liberal historians usually assume, or did it help native-born women at the expense of immigrants, as the economist Elizabeth Landes claims?[9] Did it deter employers from placing women in traditionally male occupations, where longer hours were customary, as Elizabeth Baker concluded in 1925?[10] In Cox's account, such questions aren't even mentioned in passing: it's the rich against the poor, and the government is on the side of the poor. It was that conviction, more than any purely jurisprudential argument, that made judicial restraint popular in Cox's generation of liberal lawyers. New Deal economics was the sociological foundation of New Deal jurisprudence.

Admittedly, the side effects of economic regulations are usually difficult to calculate exactly, and they may be outweighed by beneficial effects. To say that liberal historians oversimplify is not to say

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6. *See generally* Bryden, *Brandeis's Facts*, 1 CONST. COMM. 281, 303-21 (1984).

7. *See* Peterson, *Employment Effects of State Minimum Wages for Women: Three Historical Cases Re-examined*, 12 INDUS. & LAB. REL. REV. 406 (1958-59).

8. *See generally Farm Foreclosure Moratoria and the Contract Clause: An Economic Analysis*, 3 CONST. COMM. 331 (1986).

9. Landes, *The Effect of State Maximum-Hours Laws on the Employment of Women in 1920*, 88 J. POL. ECON. 476 (1980).

10. Baker, *Protective Labor Legislation*, 116 COLUM. U. STUDIES IN HIST., ECON. & PUB. L. 354, 425-26 (1925).

that their conclusions are wrong. Some people favor the minimum wage, for example, while acknowledging its perverse effects, and most critics of zoning do not want laissez-faire land development. Even on its own terms, conservative activism had serious flaws; the Justices let most controversial regulations stand, and their occasional activism created a hodgepodge of vague opinions and inconsistent holdings. In any event one can favor upholding unwise laws, as Holmes and other judges did. But Holmes was not an activist, and therefore his jurisprudence did not require an accurate appraisal of the effects of regulations of business. Cox's jurisprudence, on the other hand, though not wholly devoid of Holmesian touches, envisions a much larger role for the Supreme Court. His economic oversimplifications cannot so easily be dismissed as irrelevant to his legal conclusions. Without those oversimplifications he would at least have to strain harder to distinguish the Warren Court from its conservative predecessors.

II

If we turn to Cox's discussion of the Warren and Burger Courts, different problems emerge. Abstractly stated, his position is middle-of-the-road: he stresses that the Constitution is often ambiguous, and argues that its meaning must evolve with the times, but adds that nevertheless the Justices are not wholly free to impose their own values; like most constitutional scholars, Cox rejects the extremes of vulgar legal realism and vulgar strict constructionism. And like most of us, he has some difficulty marking the channel between those shoals.

In his discussions of specific cases, Cox almost always comes down on the side of liberal activism. This may be somewhat misleading. Presumably because they are not famous or controversial, Cox rarely mentions cases in which the Warren or Burger Court declined to create new constitutional rights. He is more concerned to defend the Court against the charge that it went too far than to answer those who think it should have gone much farther. In consequence, one cannot tell how often Cox would have disagreed with a Justice like Brennan or Douglas.

Although he equivocates once or twice, Cox rejects only one liberal-activist decision: *Roe v. Wade*. This is his evaluation of the problem in *Roe*:

> Any law requiring a woman who has conceived to carry the unborn to birth denies her equal liberty and opportunity with men. Could conscientious and open-minded judges conclude with equal assurance either that the anti-abortion laws were all too easily enacted, without compelling or even important justification, be-

> cause of indifference to the resulting inequalities of liberty and opportunity? Or did the nearly unanimous acceptance of such laws for many decades rest to an important degree on the belief that they helped to preserve the special sanctity of human life (however broadly or narrowly the word be defined)? If the latter, can we as judges say with assurance that modern science and medicine have undermined the old reasons for confidently believing that the prohibition does help to preserve the special sanctity of a human life? The right answer is far from obvious. My own judgment is that the people's belief in anti-abortion laws rested for the most part on belief in their role in preserving our respect for the special sanctity of human life, and that the people ranked that interest as compelling. And even though science and technology have dispelled much of the mystery of creation and birth, . . . I cannot say that prohibition of abortions can no longer be said to serve the compelling public purpose once underlying the anti-abortion laws.

I'm sympathetic to Cox's position on *Roe*, but I'm troubled by some of the nuances of his analysis. For one thing, I'm not sure exactly what the quoted passage means. Does Cox mean that abortion restrictions should have been upheld because they express a reasonable (even if mistaken) balancing of the interests? If so, what about pregnancies due to rape or incest?

If *Roe* was the only major modern decision that violated Cox's criteria of legality (and then only by a narrow margin), why does he profess such concern about the future of the rule of law? Judging by this book, the Court has been remarkably successful in combining creativity with fidelity to law. The explanation, as we learn in the last chapter, is that Cox fears further politicization of the Court. He believes that the liberal-activist decisions, though nearly always within the zone of legally-justifiable discretion, were often close to its perimeter, and created some understandable concerns. The danger now is that *conservative* activists like Chief Justice Rehnquist, reacting against the liberal decisions, will engage in lawless judging, as they already show signs of doing. So let us rededicate ourselves to the rule of law. Hmmm. . . .

I think that Cox is making an important point, but I would rephrase it slightly. The point, it seems to me, is that an expanded judicial role tends to breed lawlessness *even if the seminal decisions were not themselves lawless*. The more the Court deals with extremely emotional and divisive issues, the more the Justices will be tempted to cut legal corners, if not in the landmark cases then in cases interpreting them, and the more we will encourage them to do so. From this perspective, arguments about the lawfulness of major decisions miss the point.

Cox seems to accept the conventional wisdom that the Court squanders its fund of public trust when its decisions are not lawful. No doubt there's some truth in this idea. If the Court were to become, overnight, entirely and candidly political, some sort of mas-

sive reaction would occur. Even the subtler forms of lawlessness may breed cynicism among lawyers and scholars, who transmit their doubts to wider publics. On the other hand, prophecies that erroneous decisions will undermine the Court's ability to rule have been made before. There's much evidence that judicial lawlessness—however deplorable—is not as such a cause of hostility to the Court. The Warren Court was enormously controversial, yet all of its major decisions were lawful by Cox's standards. *Roe*, decided during the tenure of Chief Justice Burger, created storms of protest, but so did *Brown v. Board*, the school prayer cases, reapportionment, criminal procedure decisions, some pornography decisions, and school busing cases. Although they met Cox's standard of legality, many of them are still not accepted by conservatives.

Among the general public, and even the educated elites, a decision's acceptability appears to be a function of its popularity as public policy rather than its fidelity to law, however one may define that term.[11] Indeed, the media usually do not provide enough information to enable even a thoughtful lawyer to appraise the legal merits without further research. So while I agree that *Roe* contributed more—perhaps much more—than any other decision to politicization of the modern Court, I think that the main culprit has been the Court's expanding role, coupled with its unrepresentative character.

I think Cox would agree with much of this, but he would add that in the long run lawful decisions will be accepted by the people:

> The aspirations voiced by the Court must be those that the community is willing not only to avow but in the end to live by. The legitimacy of the great creative decisions of the past flowed in large measure from the accuracy of the Court's perception of this kind of common will and from the Court's ability, by expressing the perception, to strike a responsive chord equivalent to the consent of the governed. To go further—to impose the Court's own wiser choice—is illegitimate.

I find it difficult to appraise this sort of passage—it's too abstract, too vague, too loaded with unverifiable innuendoes. Cox seems to be saying that, notwithstanding appearances to the contrary, the Court—when it does its job properly—is democratic, because proper decisions are eventually ratified by the people. *Roe*, he implies, will be vindicated if, and only if, the public ceases to be sharply divided about abortion.

Most of us will agree that a decision as divisive as *Roe* carries a heavy burden of justification. We can also agree that some decisions, though initially controversial, are vindicated by history. Be-

11. I think that this is obvious, but in addition a recent study has documented the fact. Haltom & Silverstein, *The Scholarly Tradition Revisited: Alexander Bickel, Herbert Wechsler, and the Legitimacy of Judicial Review*, 4 CONST. COMM. 25 (1987).

yond that, I'm reluctant to attach much significance to the durability of a constitutional doctrine. Polls are the closest substitute for elections, and they cast doubt on Cox's theory of popular ratification. They reveal vast differences between common and elite attitudes toward civil liberties.[12] For example, ordinary folk, many of whom live in crime-infested slums, will never agree with the Court's devotion to the niceties of criminal procedure. They may believe in providing lawyers for the indigent, but in other respects they'll take a rough-and-ready approach to muggers, rapists, and drug dealers. Yet it seems unlikely that the Court will overrule many of its major criminal procedure decisions; police and prosecutors can live with them, while civil libertarians and the media regard them as essential to American liberty. In this sort of context, references to the "common will" of "the community" serve only to obscure the realities of class and politics. It would be better to say frankly that the people are sometimes too brutal and need to be stopped. Whether they've been stopped too often is a different question.

What then is the difference between *Roe* and the other activist decisions? In his last chapter, Cox maintains that, "Each of the major [liberal] decisions except the abortion rulings can . . . be viewed as a projection of fundamental ideals running through our constitutional history, even though not actually reflected in the actual practices of earlier American life." On this ground, he regards *Roe*, but not the other major decisions, as a departure from the rule of law. I find this puzzling. How would Cox respond to someone who justified *Roe* as "a projection of the fundamental ideal of equality," since it liberated career women from the burden of involuntary pregnancy, a severe handicap in their competition with men? To do so, the Court (despite Justice Blackmun's disclaimer) had to decide that fetuses are not people, an unusually momentous decision, but one that was not basically different from, or more difficult than, the tacit (and equally subjective) weighing of interests in other great cases. In *Roe*, the Court tacitly decided that the speculative value of anti-abortion laws as symbols of the sanctity of life was less important than the value of enhancing women's freedom. Why is that different from deciding that the evidence gained by police interrogation of suspects (without a lawyer present) is less important than the values served by a lawyer's presence? Or that the value of suppressing pornographic books like *Fanny Hill* is outweighed by their literary merits? Or that school prayers do more harm than good?

12. H. McCLOSKY & A. BRILL, DIMENSIONS OF TOLERANCE: WHAT AMERICANS BELIEVE ABOUT CIVIL LIBERTIES (1983).

Or that "one man, one vote" is the only correct way to elect a state senate? Undoubtedly, the *Roe* decision sacrificed competing interests and symbols that are important to many Americans, and deserve respect, but that is what the Court does in every close case. In *Roe*, the sacrifice may have been greater than usual, but so—say the feminists—was the achievement. *Roe* was not well-grounded in the constitutional text, but neither were *Pierce, Meyer*, and *Griswold*, decisions that Cox does not criticize. Although the Court may modify or even overrule *Roe*, it seems certain that in the long run the public will accept fairly permissive abortion rules, by statute if not by judicial decree. So why single out *Roe* as a bad decision?

Cox's answer might be that most of the other controversial liberal decisions grew out of a large corpus of law reflecting closely-related constitutional concerns; they were evolutionary rather than revolutionary, and in this sense were more lawful than *Roe*. The difference is one of degree, but it is nonetheless important. Somehow, it seems more arrogant, a greater usurpation, for a court to tell a legislature that it is wrong about when life begins, than to tell the same politicians that they have not afforded sufficient protection to criminal defendants, blacks, atheists, authors, or city voters.

One may grant the validity of this distinction without agreeing that it is the sole, or even the best, criterion for assessing the Court's performance. In particular, some conservatives are likely to reject Cox's definition of constitutional law as "projections of fundamental ideals running through our constitutional history." They will say, accurately enough, that such patently subjective definitions rob law of its distinctive character as a constraint. Cox's standard may be a good one, but as law it is on a par with "equity delights to do justice, and not by halves."

Cox wants to endorse both Warren Court creativity and some sort of principled constraint on creativity, which he calls the rule of law. His situation, it seems to me, is analogous to that of a liberal theologian who has concluded that the God of his fathers doesn't exist and who tries to solve the problem by redefining God as "ultimate concern" or "the life force." The new God, though in some ways more intellectually respectable, doesn't serve the purposes of a god.

III

From the weaknesses of liberal theology, it does not follow that the old-time religion is defensible. Cox's construction of the Constitution is looser than mine. Concerning *Roe*, for example, I would emphasize the silence of the constitutional text much more than he

does. But on the whole I think that Cox usually makes more sense than a strict constructionist, at least if the analysis is kept on a narrowly legal plane. Indeed, the best portions of the book are passages in which he judiciously weighs the legal arguments in *Mapp* and other famous cases.

I think we should try to move beyond the stereotype, according to which conservatives are those who defend an odious status quo with technically sound but exceedingly formal legal arguments, logical to a fault, while liberals want to bend the law in the service of enlightened policies. This stereotype is as prevalent today as it was in the days of William Howard Taft; in modern constitutional arguments, both sides commonly imply that if "law is politics" the activist will have won the argument, while if hard-boiled legalism is justifiable, the restrainist should prevail.

On both counts, the stereotype is only a half-truth, even if we simplify matters by equating liberalism with activism and conservatism with judicial restraint. Activists like Cox often have excellent legal arguments. What could be more lawyerlike than to follow precedents, expanding them to the limits of their rationales, so long as they have not been overruled? That's what the best judges normally do, and in many cases that's what activists have been asking the Supreme Court to do. Sometimes, to be sure, the activist side is stronger as policy than as law; *Brown v. Board* is the classic example. But there are plenty of counter-examples. Does anyone suppose that cross-city school busing is better as policy than as law?[13]

By the conventions of ordinary legal reasoning, judicial restraint is just as likely to be lawless as judicial activism. For example, the holding in *Miranda* that criminal suspects must be offered free legal assistance during custodial interrogation was a logical deduction from the precedents; I for one think that it was the only sound interpretation of *Escobedo* and other cases. (Whether I agree with *Escobedo* is beside the point.) Now some liberals want the Court to hold that *Miranda* rights are not waivable. As public policy that would be a mistake, but I wouldn't mind defending it before a moot court of brilliant, law-trained Martians, devoted to legal symmetry and indifferent to the crime problem.

By framing the issue as law versus creativity, Cox implies that the most powerful objection to judicial governance is that it is un-

13. We have published two excellent book reviews about busing, one pro and one con. It may not be entirely accidental that the pro-busing review was the one by a law professor, while the anti-busing review was by a mother, untutored in law. *Compare* Shoben, Book Review, 2 CONST. COMM. 494 (1985) *with* Feldman, Book Review, 3 CONST. COMM. 644 (1986).

lawful or illegitimate. That notion is as mistaken as it is common. It is true, of course, that critics of Supreme Court decisions usually say that the Court is ignoring the Constitution, or the precedents, and sometimes they are right. But if lawlessness were the main problem, all we would need is a constitutional amendment saying, "It shall be unconstitutional to treat any social problem unwisely; the Supreme Court may enforce this provision on its own motion." That would eliminate every legal issue from standing to the meaning of "due process," making all decisions "legitimate" and mooting nine-tenths of the literature about the role of the Court. But would it solve the basic problem?

As becomes apparent when we contemplate this hypothetical amendment, legal arguments do not adequately express the case against judicial power. Legalism obscures political first principles, and in particular the fact that we pay a price for judicial governance, even when it is lawful. Not always an excessive or even a high price, but a price. First, and most obviously, we pay by sacrificing the substantive interest on the losing side: when your right to libel me is protected, my right to my good name is diminished. Although this trade-off is sometimes obscured by moral feelings—we rarely think of enforcement of contracts as involving a price in freedom—it is the most visible price of a right, and the only price that commentators regularly discuss. In fact, however, there is always at least one additional charge: to expand the Court's role is to diminish the role of self-government. This is so even if the expansion is, on balance, justifiable, indeed even if it liberates a victimized class and thus greatly enhances liberty and self-government in other, more important ways.

When we say that the Court has deprived us of the right to govern ourselves, we are usually expressing the loser's sense of procedural injustice: "Our community wanted school prayers, but the Court prohibited them. It was undemocratic." That sort of complaint, however valid it may be, does not fully describe the effect of judicial intervention on self-government. There is also, as Thayer stressed,[14] a more subtle conflict between judicial activism and democracy. When the Court declares a new constitutional right, even one fairly discoverable in text, traditions, and precedents, it reduces, however slightly, the responsibilities of politicians and reformers from Manhattan to Honolulu. Within the scope of legal expectations aroused by a specific right, they no longer need to participate

14. *See generally* Bryden, *Politics, the Constitution, and the New Formalism*, 3 CONST. COMM. 415, 421-33 (1986). *Cf.* Harlan, *The Bill of Rights and the Constitution*, 50 A.B.A. J. 918 (1964).

in politics. Within the scope of hopes aroused by the Court's general willingness to create rights, they may choose to forego the onerous burden of self-government, waiting instead for an edict from Washington. Even if they lose in the Court, three or four dissents may nourish the hope that new Justices will solve the problem. Life is short, and democratic politics is hard work. To that extent, rights tend to relieve us of the tasks of citizenship: studying the problems, creating reform commissions, drafting statutes, talking to bureaucrats and politicians, bargaining with opponents, and persuading the uncommitted.

Even as a legal issue, open to creative solutions, a constitutional right is a problem that has been removed from the fifty states, with all their judges, to one Supreme Court in the District of Columbia. All other judges, though still free to interpret and suggest, cease to be ultimately responsible.

These hidden prices are often low in individual cases, and even when they are high we should sometimes pay them gladly. The essential point is that we should be trying to judge this process cumulatively—like the federal budget—and as a problem in government, not merely in law. Microanalysis, focusing on the lawfulness of individual decisions, is essential, just as, when analyzing a proposed federal expenditure, we begin by considering its merits in isolation. But it is not enough.

In constitutional jurisprudence, we need to think about the destination, not just the steps of the journey. This doesn't come naturally to lawyers. Legalism makes us indifferent to trends; lawyers ordinarily evaluate decisions as correct or incorrect, not as contributing to a tendency that should be evaluated as such. Indeed, the very word "trend" connotes gradualism, a legal virtue. In politics, on the other hand, a trend—here again one thinks of deficit spending—may be ominous well before the day of reckoning arrives. Cox plainly realizes this, and while celebrating the Warren Court's individual decisions he acknowledges in the last chapter that they may have set harmful forces in motion. But his solution—"the rule of law"—doesn't address the underlying problem.

I'm less alarmed by where we are than by the direction in which we've been moving. Early in 1988, I read two separate newspaper columns about the forthcoming presidential election, in which James Reston and Anthony Lewis listed the composition of the Supreme Court as one of the two or three most significant domestic issues. More recently, the editors of *National Review* identified judicial appointments as *the* issue in the election. And this was before school flag salutes became an issue! I also recall a prediction

in *Newsweek* after the 1984 election that President Reagan's Supreme Court appointments might be the major legacy of his second term. I doubt that similar thoughts were expressed in, say, 1948 or even 1960. We haven't quite reached the point where journalists treat appointment of judges as the main function of the president, but we've been edging closer and closer. Do we want a society in which the Court's role is, or is believed to be, that great? Do we want the Court to decide, case-by-case over the decades, just when and how the government may regulate sex, marriage, and privacy? Do we want national standards for criminal punishment, fashioned case-by-case in the Supreme Court? Do we want the Court to oversee regulation of the economy? Or provision of housing, under the aegis of a "constitutional right to shelter?" Conservatives and liberals alike have been guilty of discussing such questions as if they were discrete and legal. "In our system," you may say, "they are indeed legal—constitutional—questions." Yes, but they are more than that. They are political choices, most of which can be resolved either way in the long run, by the gradual accumulation of precedent, without violating the conventions of legal reasoning and the rule of law. It may sometimes take a more or less lawless decision to get the process started, but every kingdom begins as usurpation.

Powell v. Texas is a good illustration of the difference between legal and political grounds for judicial restraint. In *Powell*, the Court had to decide whether Texas violated the due process clause by punishing a chronic alcoholic for public drunkenness. The trial judge had found that chronic alcoholism is a disease whose symptoms include loss of will power and "a compulsion" to appear drunk in public. This being so, argued Powell's attorney, it would be "cruel and unusual punishment" to treat Powell as a criminal. Send him to a hospital, if you like, but don't convict him of a crime.

The Court rejected this argument. Suppose that the decision had gone the other way. Would this have been improper? If so, why?

A strict constructionist would presumably criticize such a decision on the ground that it did not conform to the original meaning of "cruel and unusual." If we reject the strict constructionist's theory of interpretation, it is difficult to say that a decision in Powell's favor would have been lawless. The leading precedent was *Robinson v. California*, in which the Court had reversed a conviction for the crime of being "addicted to the use of narcotics." The opinion in *Robinson* distinguished between punishing someone for an act and punishing him for a "status," the latter being unconstitutional. Some of the language of the opinion implied that the basic defect of

a "status crime" is that a status—insanity or a disease were the opinion's examples—is or may be involuntary. Arguably, therefore, the rationale of *Robinson* extended beyond status crimes to "involuntary acts" including drunken behavior by an alcoholic. So to hold might have been scientifically unsound or unwise, for a number of reasons, and it might not have been the most persuasive interpretation of *Robinson*, but given *Robinson* it could hardly have been described as a blatantly lawless decision. It would have been the sort of expansive but plausible interpretation of a precedent that courts have been handing down for centuries—hardly a threat to the rule of law. A decision in Powell's favor would also have been consistent with most of the criteria fashioned by academic theorists to distinguish between fields in which judicial activism is legitimate and fields where the Court should accept whatever results the political process produces. It is easy to argue, for example, that criminal law is an area in which the courts have traditionally played a major role, and properly so because of their expertise and the tendency of popular majorities to be insensitive to the need for fairness toward criminals. Criminal defendants can be thought of as the functional equivalent of racial and religious minorities.

While not violative of the rule of law, a broad reading of *Robinson* would have vastly expanded the Court's role in criminal law. For it would have made a potential constitutional case out of every issue of free will—for example, defenses based on drunkenness and insanity. Legalistic arguments for judicial restraint don't give us an adequate handle on this sort of difficult political choice. On one side of the scale are the values of uniformity and rationality (real or imagined). On the other side, there is the Court's caseload as well as the values of federalism: freedom, diversity, and citizen participation in government. Federalism's values are embedded in our constitutional order, but in a case like *Powell* they are not "the law" in the usual sense of an authoritative rule of decision on whose binding force well-trained lawyers would agree. They are political virtues, and in constitutional judging there is no legal wisdom without political wisdom.