What Am I? A Potted Plant?

Richard A. Posner

Since the 1960s, there has been a continuing political debate over the appropriate amount of discretion that appeals court judges and Supreme Court justices should exercise in interpreting the Constitution. Liberals have generally argued for substantial leeway, noting that the framers could not have anticipated many key contemporary policy debates, such as those about abortion or the regulation of nuclear plants. By and large, conservatives have made a case for less discretion and a more literal interpretation of the Constitution. Nevertheless, some liberals, such as the late Supreme Court justice Hugo Black, have adopted a literalist position, while some conservatives, such as Court of Appeals judge Richard Posner, have taken a more discretionary approach.

Here, Posner reacts to the strict constructionist or "legal formalist" view, labeling it virtually impossible to carry out. "Judges," he notes, "have been entrusted with making policy from the start." Posner endorses this notion in large part because of his tendency to approach legal reasoning from an economic perspective—one that has little, if any, grounding in the Constitution or the ideas of the framers. What is clear from his point of view is that all judges make policy and that both liberals and conservatives can benefit from expanded judicial discretion.

Many people, not all of conservative bent, believe that modern American courts are too aggressive, too "activist," too prone to substitute their own policy preferences for those of the elected branches of government. This may well be true. But some who complain of judicial activism espouse a view of law that is too narrow. And a good cause will not hallow a bad argument.

This point of view often is called "strict constructionism." A more precise term would be "legal formalism." A forceful polemic by Walter Berns in the June 1987 issue of Commentary—"Government by Lawyers and Judges"—summarizes the formalist view well. Issues of the "public good" can "be decided legitimately only with the consent of the governed." Judges have no legitimate say about these issues. Their business is to address issues of private rights, that is, "to decide

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whether the right exists—in the Constitution or in a statute—and, if so, what it is; but at that point inquiry ceases.” The judge may not use “discretion and the weighing of consequences” to arrive at his decisions and he may not create new rights. The Constitution is a source of rights, but only to the extent that it embodies “fundamental and clearly articulated principles of government.” There must be no judicial creativity or “policy-making.”

In short, there is a political sphere, where the people rule, and there is a domain of fixed rights, administered but not created or altered by judges. The first is the sphere of discretion, the second of application. Legislators make the law; judges find and apply it.

There has never been a time when the courts of the United States, state or federal, behaved consistently in accordance with this idea. Nor could they, for reasons rooted in the nature of law and legal institutions, in the limitations of human knowledge, and in the character of a political system.

“Questions about the public good” and “questions about private rights” are inseparable. The private right is conferred in order to promote the public good. So in deciding how broadly the right shall be interpreted, the court must consider the implications of its interpretation for the public good. For example, should an heir who murders his benefactor have a right to inherit from his victim? The answer depends, in part anyway, on the public good that results from discouraging murders. Almost the whole of so-called private law, such as property, contract, and tort law, is instrumental to the public end of obtaining the social advantages of free markets. Furthermore, most private law is common law—that is, law made by judges rather than by legislators or by constitutionframers. Judges have been entrusted with making policy from the start.

Often when deciding difficult questions of private rights courts have to weigh policy considerations. If a locomotive spews sparks that set a farmer’s crops afire, has the railroad invaded the farmer’s property right or does the railroad’s ownership of its right of way implicitly include the right to emit sparks? If the railroad has such a right, shall it be conditioned on the railroad’s taking reasonable precautions to minimize the danger of fire? If, instead, the farmer has the right, shall it be conditioned on his taking reasonable precautions? Such questions cannot be answered sensibly without considering the social consequences of alternative answers.

A second problem is that when a constitutional convention, a legislature, or a court promulgates a rule of law, it necessarily does so without full knowledge of the circumstances in which the rule might be invoked in the future. When the unforeseen circumstance arises—it might be the advent of the motor vehicle or of electronic surveillance, or a change in attitudes toward religion, race, and sexual propriety—a court asked to apply the rule must decide, in light of information not available to the promulgators of the rule, what the rule should mean in its new setting. That is a creative decision, involving discretion, the weighing of consequences, and, in short, a kind of legislative judgment—though, properly, one more confined than if the decision were being made by a real legislature. A
court that decides, say, that copyright protection extends to the coloring of old black-and-white movies is making a creative decision, because the copyright laws do not mention colorization. It is not being lawless or usurpatory merely because it is weighing consequences and exercising discretion.

Or if a court decides (as the Supreme Court has done in one of its less controversial modern rulings) that the Fourth Amendment’s prohibition against unreasonable searches and seizures shall apply to wiretapping, even though no trespass is committed by wiretapping and hence no property right is invaded, the court is creating a new right and making policy. But in a situation not foreseen and expressly provided for by the Framers of the Constitution, a simple reading out of a policy judgment made by the Framers is impossible.

Even the most carefully drafted legislation has gaps. The Constitution, for example, does not say that the federal government has sovereign immunity—the right, traditionally enjoyed by all sovereign governments, not to be sued without its consent. Nevertheless the Supreme Court held that the federal government has sovereign immunity. Is this interpolation usurpatory? The Federal Tort Claims Act, a law waiving sovereign immunity so citizens can sue the government, makes no exception for suits by members of the armed services who are injured through the negligence of their superiors. Nevertheless the Supreme Court has held that the act was not intended to provide soldiers with a remedy. The decision may be right or wrong, but it is not wrong just because it is creative. The 11th Amendment to the Constitution forbids a citizen of one state to sue “another” state in federal court without the consent of the defendant state. Does this mean that you can sue your own state in federal court without the state’s consent? That’s what the words seem to imply, but the Supreme Court has held that the 11th Amendment was intended to preserve the sovereign immunity of the states more broadly. The Court thought this was implied by the federalist system that the Constitution created. Again the Court may have been right or wrong, but it was not wrong just because it was creative.

Opposite the unrealistic picture of judges who apply law but never make it, Walter Berns hangs an unrealistic picture of a populist legislature that acts only “with the consent of the governed.” Speaking for myself, I find that many of the political candidates whom I have voted for have failed to be elected and that those who have been elected have then proceeded to enact much legislation that did not have my consent. Given the effectiveness of interest groups in the political process, much of this legislation probably didn’t have the consent of a majority of citizens. Politically, I feel more governed than self-governing. In considering whether to reduce constitutional safeguards to slight dimensions, we should be sure to have a realistic, not an idealized, picture of the legislative and executive branches of government, which would thereby be made more powerful than they are today.

To banish all discretion from the judicial process would indeed reduce the scope of constitutional rights. The framers of a constitution who want to make it a charter of liberties and not just a set of constitutive rules face a difficult choice.
They can write specific provisions, and thereby doom their work to rapid obsolescence or irrelevance; or they can write general provisions, thereby delegating substantial discretion to the authoritative interpreters, who in our system are the judges. The U.S. Constitution is a mixture of specific and general provisions. Many of the specific provisions have stood the test of time amazingly well or have been amended without any great fuss. This is especially true of the rules establishing the structure and procedures of Congress. Most of the specific provisions creating rights, however, have fared poorly. Some have proved hopelessly anachronistic—for example, the right to a jury trial in federal court in all cases at law if the stakes exceed $20. Others have become dangerously anachronistic, such as the right to bear arms. Some have even turned topsy-turvy, such as the provision for indictment by grand jury. The grand jury has become an instrument of prosecutorial investigation rather than a protection for the criminal suspect. If the Bill of Rights had consisted entirely of specific provisions, it would have aged very rapidly and would no longer be a significant constraint on the behavior of government officials.

Many provisions of the Constitution, however, are drafted in general terms. This creates flexibility in the face of unforeseen changes, but it also creates the possibility of multiple interpretations, and this possibility is an embarrassment for a theory of judicial legitimacy that denies that judges have any right to exercise discretion. A choice among semantically plausible interpretations of a text, in circumstances remote from those contemplated by its drafters, requires the exercise of discretion and the weighing of consequences. Reading is not a form of deduction; understanding requires a consideration of consequences. If I say, "I'll eat my hat," one reason that my listeners will "decode" this in non-literal fashion is that I couldn't eat a hat if I tried. The broader principle, which applies to the Constitution as much as to a spoken utterance, is that if one possible interpretation of an ambiguous statement would entail absurd or terrible results, that is a good reason to adopt an alternative interpretation.

Even the decision to read the Constitution narrowly, and thereby "restrain" judicial interpretation, is not a decision that can be read directly from the text. The Constitution does not say, "Read me broadly," or, "Read me narrowly." That decision must be made as a matter of political theory, and will depend on such things as one's view of the springs of judicial legitimacy and of the relative competence of courts and legislatures in dealing with particular types of issues.

Consider the provision in the Sixth Amendment that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Read narrowly, this just means that the defendant can't be forbidden to retain counsel; if he can't afford counsel, or competent counsel, he is out of luck. Read broadly, it guarantees even the indigent the effective assistance of counsel; it becomes not just a negative right to be allowed to hire a lawyer but a positive right to demand the help of the government in financing one's defense. Either reading is compatible with the semantics of the provision, but the first better captures the specific intent of the Framers. At the time the Sixth Amend-
ment was written, English law forbade a criminal defendant to have the assistance of counsel unless abstruse questions of law arose in his case. The Framers wanted to do away with this prohibition. But, more broadly, they wanted to give criminal defendants protection against being railroaded. When they wrote, government could not afford, or at least did not think it could afford, to hire lawyers for indigent criminal defendants. Moreover, criminal trials were short and simple, so it was not ridiculous to expect a person to defend himself without a lawyer if he couldn't afford to hire one. Today the situation is different. Not only can the society easily afford to supply lawyers to poor people charged with crimes, but modern criminal law and procedure are so complicated that an unrepresented defendant will usually be at a great disadvantage.

I do not know whether Professor Berns thinks the Supreme Court was usurping legislative power when it held in the Gideon case [selection 3.5] that a poor person has a right to the assistance of counsel at the state's expense. But his article does make clear his view that the Supreme Court should not have invalidated racial segregation in public schools. Reading the words of the 14th Amendment in the narrowest possible manner in order to minimize judicial discretion, and noting the absence of evidence that the Framers wanted to eliminate segregation, Berns argues that "equal protection of the laws" just means non-discriminatory enforcement of whatever laws are enacted, even if the laws themselves are discriminatory. He calls the plausible empirical proposition that "separate educational facilities are inherently unequal" "a logical absurdity."

On Berns's reading, the promulgation of the equal protection clause was a trivial gesture at giving the recently freed slaves (and other blacks, whose status at the time was little better than that of serfs) political equality with whites, since the clause in his view forbids the denial of that equality only by executive officers. The state may not withdraw police protection from blacks (unless by legislation?) but it may forbid them to sit next to whites on buses. This is a possible reading of the 14th Amendment but not an inevitable one, unless judges must always interpret the Constitution as denying them the power to exercise judgment.

No one really believes this. Everyone professionally connected with law knows that, in Oliver Wendell Holmes's famous expression, judges legislate "interstitially," which is to say they make law, only more cautiously, more slowly, and in more principled, less partisan, fashion than legislators.* The attempt to deny this truism entangles "strict constructionists" in contradictions. Berns says both that judges can enforce only "clearly articulated principles" and that they may invalidate unconstitutional laws. But the power to do this is not "articulated" in the Constitution; it is merely implicit in it. He believes that the courts have been wrong to interpret the First Amendment as protecting the publication of foul

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* Oliver Wendell Holmes (1841–1935) served first on the Massachusetts Supreme Court and then on the U.S. Supreme Court between 1882 and 1932. He was labeled "the Great Dissenter," and many of Holmes's minority opinions become the ladder for subsequent Court majority reasoning.
language in school newspapers, yet the words “freedom of speech, or of the press” do not appear to exclude foul language in school newspapers. Berns says he deduces his conclusion from the principle that expression, to be within the scope of the First Amendment, must be related to representative government. Where did he get that principle from? He didn’t read it in the Constitution.

The First Amendment also forbids Congress to make laws “respecting an establishment of religion.” Berns says this doesn’t mean that Congress “must be neutral between religion and irreligion.” But the words will bear that meaning, so how does he decide they should be given a different meaning? By appealing to Tocqueville’s opinion of the importance of religion in a democratic society. In short, the correct basis for decision is the consequence of the decision for democracy. Yet consequences are not—in the strict constructionist view—a fit thing for courts to consider. Berns even expresses regret that the modern Supreme Court is oblivious to Tocqueville’s opinion “of the importance of the woman . . . whose chastity as a young girl is protected not only by religion but by an education that limits her ‘imagination.’” A court that took such opinions into account would be engaged in aggressively consequentialist thinking rather than in strict construction.

The liberal judicial activists may be imprudent and misguided in their efforts to enact the liberal political agenda into constitutional law, but it is no use pretending that what they are doing is not interpretation but “deconstruction,” not law but politics, because it involves the exercise of discretion and a concern with consequences and because it reaches results not foreseen 200 years ago. It may be bad law because it lacks firm moorings in constitutional text, or structure, or history, or consensus, or other legitimate sources of constitutional law, or because it is reckless of consequences, or because it oversimplifies difficult moral and political questions. But it is not bad law, or no law, just because it violates the tenets of strict construction.

Questions for Discussion

1. Can the notion of “original intent” be defended as a serious legal doctrine according to Posner? Why not?
2. Do all judges make policy at least part of the time?
3. Posner has frequently been mentioned as a prospective Supreme Court nominee. Do you think the sentiments articulated in this article make his nomination and confirmation more or less likely? Why?