

JUDICIAL ACTIVISM AND THE RULE OF LAW

Toward a theory of  
Selective Intervention

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PART ONE

As the Supreme Court goes about its work, distracting brawls break out among the spectators. The pattern is familiar. When the court is seen as "liberal," its liberal rooters urge it to continue its "activism," to continue to reshape the law in a liberal political direction; while its conservative critics urge it to remember that it is a "court" and is only to announce the Law and not to reshape it to the demands of a political agenda. Liberal theorists develop and defend a theory of Judicial Activism; conservatives counter with a Rule of Law theory that denies the legitimacy of judicial policy-making. The one encourages what the other condemns as a dereliction of duty.

When the composition of the court changes and it is thought to have become politically conservative, the confusion among the spectators may seem comical. Conservatives can be heard to mutter that their enthusiasm for judicial self-restraint and a policy-indifferent rule of law may have been excessive and that, at the very least, a period of "corrective activism" to undo recent distortions is needed. While liberals, struggling vainly to reconcile themselves to the election returns, try to rediscover the virtues of the argument for a Court "above politics," a court that diligently refrains from reading its preferred social policy into the law, and even try to remember how to pronounce "stare decisis" as they attempt to draw its protective mantle over the recently hailed but now precarious innovations of the last few

decades. A quick change of costume for new roles, an attempt to learn to articulate the strange lines of the once rejected creed.

The perennial conflict between a Rule of Law position and an Activist position can become very bitter when an important judicial appointment is at stake. Conservatives may want a conservative judge, liberals a liberal judge, but something about the situation keeps them from simply saying so. They want, they may say, almost must say, a good judge, a neutral master of the judicial art, who happens, more or less irrelevantly, as a small bonus perhaps, to be a liberal or a conservative, conceding that there may something like a good judge quite apart from political leanings. The argument, as we can remember, is full of fury and, in its course, may not significantly clarify the conception of a good judge or free it from its political entanglements.

A crude liberal-conservative dispute may be displaced by an argument between two conceptions of the judicial function: the orthodox "non-political" view, and the challenging "activist" view. Some argue that judges should simply "declare" the law, others that the judge should remake or reshape it closer to the demands of justice or utility. The judge is thought to have a choice as to which kind of judge to be. But this is a misleading way of putting the problem. The significant question is not whether it is better to be an Activist than a Rule of Law judge. It is whether it is possible, even if you want to, to carry out the orthodox Rule of Law program. It is one a thing to say that judges, if they wish, can slip into an activist or "policy

making" mode; it is drastically different to hold that they can not help doing so for reasons built into the very structure of any legal order.

This is, I believe, a deeply significant issue about the very nature of the legal order, and it is not always easy to understand. So I am going to try to provide a guide to the battle. I will begin by sketching a simplified but essentially correct version of the orthodox Rule of Law view. I will then show, with considerable reluctance, and to my deep regret, that it does not really work, and that this failure has serious consequences. I will then see what can be saved from the wreck, and try to end, all passion spent, on a reasonably constructive and even cheerful note. It is a bit like trying to continue to be religious after you have been cured of fundamentalism. Less zeal, perhaps, but more understanding.

I am not writing this primarily for lawyers, who generally think they know all about it but who seem unwilling or unable to explain the mystery to the uninitiated, and who, if pressed, fall into their familiar habit of referring cryptically to this or that case or murmuring something about the common law. Lawyers can be an aggravating problem, but I worry here about us plain citizens baffled by legal mysteries. So I will try to explain what it is all about without mentioning *Marbury v Madison* or *Roe v Wade* or any other real "case." I will make up examples if I think I need them, and I will use plain English throughout, in

the belief that if the problem cannot be explained that way it cannot be explained at all.

First, a word about the "Rule of Law," a reminder about why that seems important. It is not that we really want a world in which every contingency is covered by a rule or a law, in which we are overpowered, hemmed in, governed by a mass of imperatives, left with no anxiety-producing discretion in a world in which an incorruptible Judge always has the last word. But experience has taught us that it is usually better to have laws than to live subject to the discretionary judgments of others. In the end, we want to have traffic laws rather than to leave it all to police instructed simply to stop and punish, as they think best, anyone they think is driving improperly. The real point is the insistence that, where we grant political authority over aspects of our lives, such authority be exercised within the constraints of laws that limit and guide it. When I apply for a permit I want to have to show that I satisfy the conditions in the law; I do not want to have to convince an official with unguided discretion that granting it is a good idea. We are, on the whole, beyond regarding lawmaking itself as a necessarily malign intrusion of the mischievous human will (infected with unintended consequences) into an otherwise benign nature.

To insist that the rule of law be protected by an independent judiciary is to seek something more than the dutiful self-restraint of officialdom. We want courts to settle the question of whether someone has exceeded the limits set by the

law. And we want Judges to be free of essential dependence upon the wielders of power so that they can do what they are supposed to do without being intimidated.

Such a view of the rule of law and an independent judiciary is something that every American drinks in with his mother's milk. It is an essential feature of our religio-secular "constitutionalism":

The Constitution, solemnly sired at a creative Sinai-like moment in history, expresses the covenant, the social compact, the agreement, the consent of the governed, that lies at the foundation of our legitimate political life. In a world weary of the sway of arbitrary rule it tames raw power into authority, subdues ruling into office-holding, creating a system of individual rights and of legitimate but limited governmental power. It provides for a legislative, an executive, and a judicial branch, each of which is to perform only its own distinctive function (oddly echoing Plato's definition of justice in the Republic). The legislative and executive branches are to shape politics into law and policy. But the judicial branch, removed from politics, is the guardian of limits, of legitimacy, of "constitutionality." It stirs into operation only when there is a claim that a law has been violated. Does Smith ignore the "Stop" sign? Does the legislature pass a law about school prayer? Does the President issue an order about travel to a foreign country? The Court may be called on to decide whether Smith violated the traffic law, whether the legislature violated

the law--the constitutional rule--about religion, about whether the President exceeded his authority over foreign travel. No one, no person, public or private, is immune to the demand that they act within the law. And this is the basis for the special place of the Court in our scheme of things. It is the guardian of the system, not a partisan within it. In a gaming culture like ours it is natural that we think of the court as a glorified umpire or referee. It is on the field, but it is not a player. It knows the law and enforces it impartially, calling it as it sees it, unconcerned about particular outcomes, about who wins or loses, essentially, we think or expect or hope, above the transient struggles and quarrels that it adjudicates.

This, or something very much like it, is what is wanted when the cry goes out--reaching us now from behind the rusted iron curtain--for the rule of law protected by an independent judiciary. Without this as a background the very shape of "judicial activism" cannot even be seen, for it is essentially a challenge to the conception of the court built into our legitimizing constitutional myth. Judicial Activism is an iconoclastic position, shaped, like all such positions, by its particular icon. While I have given a brief sketch of the familiar myth--if it can be called that--I must here emphasize the feature most subject to attack, the point of greatest vulnerability--the "separation of powers."

The phrase "separation of powers" does not appear in the Constitution itself, but it is taken for granted as part of its

theoretical context. There is nothing terribly mysterious about it. In its pure form, each branch of government is to exercise only the kind of power that has been given to it, not the kind that has been given to another branch. So, we say, the legislature makes policy judgments and embodies them in laws; the judiciary is not to judge the wisdom or value of the laws but is only to say if they are violated or if they themselves violate higher laws. That division of labor seems clear enough. Ends, goals, policies, values, and the means of pursuing them--these are the concern of the legislative and executive, the "political" branches. It is not for the judicial branch to decide whether abortion or capital punishment or affirmative action are good or bad things and should be prohibited or permitted or required; it is only to say whether they are constitutional. It is not, in short, supposed to make policy or decide policy questions.

If this is the crucial point of the traditional or ceremonial view of the Rule of Law, the view of Judicial Activism is that judges make policy all the time. And not just because judges don't want to do what they are supposed to do but because it is impossible to do only what they are supposed to do in the mythic role. The serious argument about Judicial Activism is an argument about the necessity, the legitimacy, and the scope of policy-making by judges. Activism thus involves, as we shall see, a rejection of the theory or practice of "separation of powers."

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Let me begin by simplifying the traditional view into a few essential propositions:

First, there is a special class of "judicial" questions to which the court is limited.

Second, there are "correct" answers to such questions.

Third, it is possible to find judges capable of performing the function of providing correct answers to the proper questions "objectively" or "properly" (not infallibly).

Taken together, these constitute a view of deceptive simplicity, but they go to the heart of the matter. If there is no distinctive class of judicial questions--like, has a law been broken?--the court will indeed come close to being "a Kadi sitting under a tree" dispensing its wisdom about a variety of matters, not simply upholding a rule of law. If there is indeed no "correct" answer, the "rule of law" simply serves as a cover for unconstrained judicial policy-making, the search for good or moral or wise answers by those not elected to try to find them. And if judges, because they are human and socialized and all that, are necessarily conscious or unconscious partisans, why cling to forlorn hopes of judicial objectivity or neutrality? So, if it can be shown that the court cannot confine itself to rule-conformity questions or that there are no "correct" answers to such questions, or to many of them, or that Judges cannot be seen as tolerably good correct-answer-seeking animals--the case

for activism seems to triumph without further ado. The first stage of my argument will consider these matters.

### I. Proper Judicial Questions

The argument goes: There is a limited range of questions appropriate for a court. They are all of the form "Is X in conformity with the Law?" The distinction is between questions of rule-conformity and questions of "utility" or "value"--between "Is X in conformity with the law" and "Is it better to do A than B?" Thus, the question of whether it is a good idea to keep students off the basketball squad if they fail a single academic course is a question of policy for the school board. If a student takes the school board to court, the question for the court is not whether it agrees with the Board about its policy but whether the Board's decision is in conformity with some relevant and over-riding law. Or, if a State adopts capital punishment for murder in the belief that it will improve the general quality of life, the court is to decide only if the State's action violates some law by which the State is bound, not to overrule the State if it has a different view about the value of capital punishment. The judicial question is one of rule-conformity not of wisdom.

These are not just different questions, they are different kinds of questions. And they evoke two different kinds or modes of argument--the casuistic (or Talmudic), and, what might be

called loosely, the pragmatic or utilitarian. These are the two great and significantly distinct kinds of argument that we are all constantly involved with, and it is necessary to distinguish them because, as you can guess, the Court is supposed to stick to one of them. Casuistry is the art of applying general rules to particular cases and, in the process, where necessary, resolving, by interpretation, apparent contradictions. The argument that a fetus is a "person," that abortion is the killing of a person and thus a violation of an overriding law against killing persons is, without aspersion, a casuistic argument. (Pascal's attack on "rule twisting" Jesuits in the 17th Century gave "casuistry" a bad name.) The argument that each person is sovereign over his or her own body and that an abortion decision is an exercise of that sovereignty is also a casuistic argument. The argument that abortion is an effective means of population control and tends to increase--or decrease--happiness is, by contrast, a pragmatic or utilitarian argument. It is obvious that if courts are to consider only questions of rule conformity, the mode of argument appropriate for it is casuistic, and long policy arguments in briefs or in opinions ought, at least, to raise eyebrows.

I pause for a passing nod at a natural and significant question: Even if we can distinguish these two kinds of question, why should courts or judges confine themselves to one kind, and the least interesting and important kind at that? Why should they limit themselves to finding that something is in accord with the law or "legal" when it is clear that it is a stupid or

harmful law that can, with the available techniques, be effectively nullified? Why not simply act on the familiar principle that you are always to do what you think will promote the greatest happiness? The answer--that it is not your job to impose your wisdom on the situation, that that is precisely what the separation of powers means, that you are just to deal with legality and let others, usually elected and answerable, deal with the more important matters--this answer may seem a pedantic, crabbed response entailing a sheer waste of wisdom. If that's what "separation of power" means, why respect such a peculiar principle...? The reply would have to be a long one, aimed, among other things, at reaffirming the significance of fairly-adjudicated law-abidingness and at curbing the judicial desire to do more good than the job calls for. A reminder, as someone said, that while Judges are to be lions they are to be lions under the throne.

Let us now examine the conventional assertion that the court's task is to deal only with rule-conformity questions. I will try to show how the proper judicial question, "is X in accord with the law?" seems inevitably to turn into or be displaced by the naughty question "Is A better than B?" (demanding a "policy" response), to show, presumably, that the rule of law program cannot be carried out.

That the court cannot simply apply the law because the laws are contradictory.

The argument is that if laws "contradict" each other, give conflicting instructions, you cannot simply apply the law but must decide which it is better to follow, which is the more important, which weighs more heavily in the scales as you "balance" the conflicting values.

Suppose that the constitution or the laws authorize the government to do such things as regulate commerce or wage war or run a public school system. Suppose also that the government is, by the constitution, forbidden to abridge the freedom of speech. Imagine that the government, as authorized, enacts laws that punish deception in advertising, or the revealing of defence secrets, or that require pupils to read assigned books and submit to recitation and examination. Do not such laws abridge the freedom to speak as, and only as, one pleases? And is not the government forbidden to do that?

Confronted by apparently conflicting rules--and we are confronted by them everywhere--what are we to do? We cannot simply "follow the rules" since what we do in obedience to one is a violation of the other. A law punishing deceptive advertising is authorized by the grant of authority to regulate commerce; it is prohibited by the law about not abridging free speech. Obvious simple principles may not help--for example, that a grant of power extends only to the edge of a prohibition as, "You may...but only so far as it can be done without...." You might

accept that as it subordinates the power over commerce to the protection of free speech. But would you also hold that government may try to win the war provided it can do so without abridging speech to keep the invasion date secret? Or try to educate children but only if it can be done without making them read or answer questions on exams (self-incrimination too!)?

"Prohibitions mark the limits of powers" is a plausible principle, but you cannot ride it like a bull into life's china shop. On the other hand, if a prohibition doesn't limit a power, what does it limit? And when? And how are we to decide that?

In this common situation, faced with apparently conflicting rules we find ourselves torn between two paths--the path of casuistry or "trying to make sense" and the path of utility or value maximization or, to use a familiar judicial term, "balancing." The casuistic instinct is to try to show that what seems like a contradiction is really not one, that a proper reading of the law will remove the apparent conflict and restore the situation to one in which it can be decided whether or not something is in accord with the law, properly read. Thus, it might be discovered that "freedom of speech" in the First Amendment is properly read as meaning the freedom of "political speech" and that the regulation of "commercial speech," advertising, is not barred by the amendment. Or that the First Amendment applies only to adults and, therefore, not to minors in school. Or that the War Power enjoys exemption from peacetime

constraints. These are oversimplified quasi-hypothetical examples and I don't want to agree with or argue them.

The other path tends to take the apparent conflict as an example or symptom of human and social incoherence illustrating once again that a yearning for consistency is a petty obsession, that the law is a charming patchwork, not a coherent scheme, that it makes no sense to try to make sense out of a situation that makes no sense, and that the thing to do when confronted with these "contradictions" is simply to decide what the best thing to do is, forego the hairsplitting, and "balance" the competing values on whatever scales you happen to have. As, for example: curbing advertisers is more important than letting them speak freely; or, perhaps, protecting free speech is more important than punishing commercial deception, winning the war is more important than free speech; educating children is more important than letting them take the First Amendment with them through the schoolhouse gate...making, in each case, a "balancing" or policy decision.

We don't need real "legal" examples to get the point. We could just as well consider a "Thou shalt not kill" sign at a church barbecue. You might explain to an alert bewildered child that the commandment really means "Thou shalt not murder a human being" and doesn't, therefore, apply to the animal whose ribs we are about to gnaw--starting her down the primrose path of casuistry. Or if you want your child to eschew a life of quibbling you can start her down the path of pragmatic balancing

by pointing out that there are no "absolutes," that "Don't kill" is a fine idea but so is "Man does not live on bread alone" and you have to balance respect for animals against our need for protein and it's O.K. to have a barbecue if you don't eat too much or waste anything--having her complain to her analyst years later, that you taught her to be a calculating compromiser.

Confronted by apparently conflicting instructions we can try to unpuzzle the matter by making distinctions, resolving (or creating) ambiguities, clarifying meanings so that we can ask, in the end, "does the regulation of advertising violate the rule that says, or really means, you cannot abridge freedom of political speech..." and look for a correct answer, in this case "No!," even from a judge who believes in the free market. That is, if there is a respectable art of figuring out, or discovering, what the rule "really means."

What something really means! What it means as "properly interpreted," as having been put through the interpretive mill. There is an interpretive art, not always regarded as respectable. I remember an exasperated Divisional Commander driven to including in an order a stern "This is to be carried out and not interpreted." It is an art or exercise that has a fascination of its own, a deep pleasure in fitting pieces together so that everything suddenly makes sense. "Makes sense" or, alas, gets you out of it, or lets you do it in spite of what it seems to say. Is it an art of cognitive discovery, capable of going wrong, of falling into misinterpretation, subject to heavy



constraints of objectivity? Or is it, through and through, a partisan art, more or less clever or smooth or strained or ingenious, but never able to claim, beyond enabling or disabling, being really right or objectively correct. Is it like deciphering a coded message, so that you know when you've got it right, or is it more like a reading of a musical score? And who says "speech" in the First Amendment means "political speech" and what makes you think that's the right interpretation? Or that there is a "right" interpretation? Do you applaud it because you want to restrict advertising but not the criticism of government...?

It is a part of the burden of the conventional rule of law view that, where interpretation is needed, as it usually is (and I pass over the question of whether all reading, even when you think the meaning is plain or clear, is "interpreting"), there are correct and incorrect interpretations. This is a terrible hurdle in its path since it seems to be widely held that where two interpretations are possible neither can claim to be correct--at least not in this democratic age in which one person's interpretation can be no better than another's. I defer the pursuit of this problem, noting only that the attempt to resolve apparently conflicting orders into an unambiguous rule plunges us at once into an interpretive quagmire, forced, if we wish to maintain the traditional view, into a defence of interpretive "correctness." Not, perhaps, hopeless, but difficult enough to tempt one into skipping a difficult journey with an uncertain

destination and settling for the simpler--and possibly unavoidable--life of "balancing" competing values. If, in the end, the test of an interpretation itself is how well it serves your purpose, not whether it is "correct," why insist on being dragged kicking and quibbling into the world of subjectivity and partisanship, clinging to vain hopes of an objectivity or correctness that went out of style when it was announced that "God is dead!"?

So one great difficulty with the first item in the rule of law creed is that, to resolve apparent contradictions, "Is X in accord with the law" will become "is X in accord with the law as properly interpreted," in which the propriety of the interpretation itself may be thought to rest on whether the interpretation supports a valued result. To the extent that the question becomes "is interpretation A better than interpretation B?" instead of "is X in accord with the rules?" the round goes to activism. To avoid that result it must be shown that the "correctness" of an interpretation is grounded in something other than its policy consequences. Not hopeless, but difficult.

I should point out that while casuistry or interpretation has its problems, "balancing," frequently invoked in judicial opinions to deal with contradictory or incompatible rules, while suggesting scales and weights and objective measurement is something like a conjurer's operation. "We now must balance the value of A against the value of B," says the court with a hurried glance at its invisible scales, "and A is clearly weightier than

B!" Whenever the court says it has a balancing problem you know that the rule-correspondence question, the question of whether something squares with the law, has, at that point, given way to a pronouncement of policy or value-priority. If you look for it, you will be surprised at how frequently this happens. "Balancing" is easier than following a twisting path in search of the correct interpretation.

So: In any large set of rules there will always seem to be contradictory or conflicting orders. In some cases the conflict can be resolved, casuistically, in a way that strikes almost everyone but the most rabid partisan as obvious. It is not necessary to rush from the mere appearance of contradiction into the balancing act (although if you want to, there is always a pretext). Having said that, it must be granted that not all contradictions or conflicts can be made to vanish by the exercise of casuistry. In such cases some policy decision about priority or importance or value needs to be made, and that is not a rule-conformity decision. For the Rule of Law "fundamentalists" this is something of a scandal, and I will return to the problem in due course. I note here only that if or where the rules are in conflict it is not possible to simply follow the rules or stick to rule-conformity questions without first resolving the conflict, and that process is a very slippery one and seems to make it impossible for the court to stick to its own "proper" question.

"Reasonable" and other weasel words

Another problem: There is a class of "soft" words whose appearance in a law is said to introduce or even force policy considerations.

"Reasonable" is a familiar troublemaker. It appears frequently in laws--as when someone is given the authority to make reasonable regulations about something. Even when it is not explicit, it is sometimes held that all authority is granted with the implicit proviso that it be exercised reasonably, or even that a "due process" clause expresses that demand. So it is not uncommon that a court will find itself considering whether a government agency or agent has violated the law by exercising its authority "unreasonably." The reason I call this troublesome is that, as we know all too well, "reasonable" is confused with "wise," and when that is done a policy question has been substituted for a rule-conformity question.

For example, a school board enacts a rule (a reasonable rule, it thinks) that a student cannot play basketball if he is failing a single required course. We can imagine the argument that had taken place--the need to emphasize academic work, to improve classroom performance, to come down strongly or not so strongly, etc. There are harder and softer options, but in the end, the advocates of the one-course rule prevail. A student fails, is kept off the team, goes to court. "Has the Board acted reasonably" is the question. The judge may well think it too

severe a rule, as likely to increase the drop-out rate, as ruinous to the hopes of the fans, and he may even be right in supposing that on the whole it would be better if the Board were to adopt a more lenient rule. Had he been on the board he would have voted against the one-course rule. Nevertheless, it would be ludicrous, if, as a judge, he ruled against the board.

"Did the board act reasonably" is the question. Not, "Did the board do what I think it should have done." Not, "Did the board act wisely." The Supreme Court has repeated to the edge of weariness that the court is not to substitute its wisdom for the judgment of the responsible agency, but the temptation seems irresistible. On questions about which reasonable people can disagree some will be wiser than others, but the court is not to declare that the reasonable view it may think unwise or less wise should, therefore, be declared unreasonable. We are, I assume, beyond the familiar urchin view that "reasonable is what I think should be done."

Besides "reasonable," there are words like "proper" or "due" or "appropriate" or "fair" whose appearance in a law seems to be an invitation to a judge to take a hand in the making or correcting of policy. In all such cases it is to be remembered that the court is not being asked to decide what to do about a problem but to judge whether someone with primary responsibility for the matter--a legislature or an administrator--has exceeded the limits loosely suggested by these troublesome words that signal a delegation of responsibility more than clearly defined

guidance. So, one can acknowledge that the board has acted reasonably even though one would have acted differently. But admittedly, there is a very hazy zone that cannot be conjured away, and I do not intend to try to conjure it away. "Is this reasonable enough?" can seem close to "Is this good enough?" and to the extent that this is so it will trouble anti-activists that words like reasonable are scattered throughout the law and constitute a standing invitation to judicial policy-making.

The attempt to eliminate such words, to tighten things up, to get rid of ambiguities is understandable but generally misguided. Ambiguity has important functions. It is not always a vice, just as clarity is not always a virtue. The point about these expressions is that they are ways of postponing decisions that probably should be postponed, of delegating decision-making scope to others more likely to make informed judgments. To say "make reasonable rules..." relieves you of the hopeless task of trying to spell it all out here and now. We may have to abandon the view that since we now know it all we had better make sure that everything is clear and nailed down tight because from this high point it's all downhill. But it is wiser, I am sure, to continue to make use of ambiguity, even though it may create some problems for rule-of-law fundamentalists.

The problem of new instances

But the difficulties created for the strict opponents of judicial policy-making by apparent contradictions and by words like "reasonable" are nothing compared to the disasters that open unexpectedly at their feet in the most ordinary of situations, unmarked by paradox or contradiction, undistinguished by the use of mushy language or by flaws in expression. In the normal course of events it is necessary to decide whether or not something falls under a rule. A law governs the taxation of religion; is that a religion? Is a skateboard a "vehicle?" Is delivering a message engaging in transportation? Is a live-in same-sex lover a "spouse?" Is a fetus a "person?" There is no need to multiply examples. In a changing world we are always being faced with the question of whether something falls under a rule, is another one of "those," to be treated as other things of the same sort. (The morning news reports that the Court is going to have to decide if a "cordless" phone is a telephone. With no wires to tap is it O.K to tune in? ) We may think we know what a "spouse" is and have provided, by law, that an employee's spouse is covered by the medical plan. But is Smith's live-in homosexual lover, Jones, a spouse?

I will linger over this example. The common sense, the naive view, would be that a court is to discover the meaning of "spouse" and then see if Jones is one of them. The same common sense would consider it a scandal if the court were first to

decide whether Jones should receive the benefits and then adjust the meaning of "spouse" to get the desired policy-result, the very model of the crime of activism. So we will, in a quick search for the meaning of "spouse," round up the usual suspects. We want to see if the court can succeed in doing what, on the common sense view, it is supposed to do.

#### Definition

A handy definition would seem to settle the matter, except that, as in most cases, the word is not given an authoritative definition. Or if it is, it might still leave the matter unsettled--as might a dictionary. The one on my desk says "a marriage partner; a husband or wife." But what is "marriage," or "wife," for that matter? We are unlikely to have a definitive specification of "spouse" (or religion, or commerce, or telephone, or speech...)--neither an exhaustive list of the instances of "spouse" nor a specification of the properties that, possessed by anything, determines its membership in the class in question. We may regret this and resolve that all terms in the law should be carefully defined, but it will turn out that for a variety of reasons this cannot always be done, and, in spite of the plausibility of that familiar battle-cry "Define your terms!", should not be seriously attempted. For much the same reasons as I mentioned regarding the desire to get rid of ambiguous words like "reasonable." We would be foolishly forcing



ourselves to make decisions we are not prepared to make, are better off not making.

#### Usage or precedent

Let us suppose that no dispute-settling definition is at hand so we turn for help to customary legal usage. For example, consider "religion," protected in the Constitution, and not defined. Some time ago it was held to cover religions A and B and C. Then something else raised its head. "No need to define "religion," says the Court, "we can tell that this is another one"--adding D. So now we come to this new candidate, E. No definition of religion; not on the list. But is this another religion? Is E like A,B,C,D? How much like? Essentially like? Sufficiently like? How like and in what respects it has to be like in order to be another one is a question that presents difficulties. Does E "belong" with A,B,C,D? and therefore...or "should we treat E the way we treat A,B,C,D?" Are these the same question? Are we to discover whether or not E "belongs" with A,B,C,D, is really another one? Or are we to decide whether or not to treat E as we have treated A,B,C,D?

"Spouse." Some time ago the law provided benefits for the wife of a public employee. Then, as more women took jobs, and after a big fight (What! Benefits for idle husbands!) "wife" was changed to "spouse," so that both husbands and wives were covered. And now? Same-sex live-in lovers? It is, of course,

somewhat unprecedented, but the current range of precedents does not settle whether the rule extends to this situation since, as we know, the reach of a general term is not limited to already acknowledged instances. So, we are to consider whether the live-in same-sex lover is a "spouse."

We compare homosexual couples with heterosexual married couples and discover that they are similar in a number of respects. They differ, in this case, in not being of different sexes. But is that difference crucial? Is it essential to being a "spouse" that you be one of a heterosexual pair? The answer, oddly enough, is not altogether obvious, any more than the question of whether a belief in a universe-creating God is a necessary or defining trait of "religion." Is it really a spouse, really a religion are questions that take you into the thickets of "classification"--real, conventional, merely convenient for this or that purpose or as somehow carving the world at the right joints. Can you discover as a fact about the world, that the homosexual lover is not really a spouse? Or, in the end, must you decide whether to treat him or her as one for reasons that are not discoveries about meaning but considerations of policy.

In some cases there is something I call "intuitive strain." If we navigate more or less easily from Catholic to Protestant to Jew to Mormon (not a religion but a criminal conspiracy a Supreme Court judge once said) to Unitarian and Humanist, including them, in turn, under "religion" whose freedom is protected by the

First Amendment, we might feel that proposing Communism as a "religion" is a strain on one's hospitality. Or : You are in the "delivery" business if you deliver furniture. If you deliver books? Yes. Letters? Well, ok. Letters by Fax? Messages? By telephone? Speeches, by television? No, wait, don't be silly. "Delivery" just means... So, "spouse" may grow from wife, to husband or wife, to common law partners ("unmarried" but with three children) ... to same-sex partners? Admittedly, some strain, although we may feel the strain at different points.

"Intuitive strain" ( or "stretch" ) is a sloppy but not insignificant notion, full of difficulties that may prevent its being taken seriously. Its appearance here--how much "stretch" is tolerable?--is an occasion for taking up the question of "strict" construction and the contrast between strict and liberal (or lax or broad) construction or interpretation. In deciding whether to admit a new candidate to the class in question, we do so on the basis of "similarity." How similar? and similar in what respects? "Strictness" is the tendency to be grudging about new admissions, to insist on greater similarity, especially with respect to any characteristic that, if dropped, generates intuitive strain. Thus, the strict constructionist might insist that heterosexuality is an indispensable condition of spousehood. A liberal or broad constructionist might say that the couple is committed, caring, economically intertwined, etc--in many respects like ordinary married couples and that a spouse is really like a partner or a friend and need not be one of a

heterosexual pair, that "sexual orientation" is not a necessary, definitive trait of "spousehood." What is at stake here is inclusive generosity. A strict constructionist would be against stretching "spouse" to include Jones; a broad or lax constructionist might not be. Put crudely, "strict" demands more similarity ; "liberal" is satisfied with less. The latter is more tolerant of "stretch." (Put otherwise, "strict" tends to increase the number of necessary or defining conditions, "broad" or "liberal" to decrease them.)

The question is, are we to consider strict construction correct and, therefore, required by the Rule of Law? Alas! It is not that simple. Strict and broad are merely two modes of interpretation and neither can claim "correctness" across the board. My liberal friend is a broad constructionist when it comes to interpreting "freedom of speech" in the First Amendment to include not only "speaking", but picketing, or marching, or sitting down in the middle of the street, or burning the flag--almost anything as long as it is a way of "saying" something. On the other hand, suggest that "treason" should be stretched a bit to include not only giving aid and comfort to the enemy in time of war but to include sticking up for the potential enemy in a period of cold war--and he will rush to embrace some rule about how criminal laws should be strictly construed, not stretched. We really need three notions. Broad, strict, and correct; and unfortunately, neither of the first two is always correct. So, although some opponents of activism seem to think "strict" is

always right, it is only a mode of reading, and a commitment to a particular mode of reading is neither inherent in the idea of the rule of law nor explicitly mandated by the constitution. If, however, you don't want to accept the idea that there is a "correct interpretation" you are left with merely competing modes of interpretation. And either you choose the one that gives you the result you want ("strict" if you want to exclude Jones, "broad" if you want to include him)--the activist scandal--or you apply some general theory about use of modes of interpretation regardless of results. That might seem a rather pedantic, and even questionable, gamble. In the end, instead of an across-the-board commitment to a single mode of interpretation we will find ourselves mapping the conditions under which the use of one or another interpretive mode is called for--a policy-driven venture in political theory.

The upshot is that the determination of the crucial defining character (of telephone or religion or spouse ...) is not a simple matter of cognitive inspection. The problem arises over the question of subsuming a candidate-instance under a rule. Grudgingness or strictness is not always correct, and the temptation is to substitute the question "should we decide that Jones is a spouse?," clearly a policy question, for the subtly different question, "Is Jones really a spouse?" This temptation is almost irresistible in view of the complexity of the latter alternative, and we can see why what I have called the commonsense or naive expectation--that first we find out what

"spouse" means and then we decide whether Jones is one of them-- is likely to be deeply disappointed. Sooner or later, the lurking policy question pounces and "is X in accord with the rule" gives way to "Is alternative A better than alternative B". This situation arises with different degrees of difficulty whenever the candidate at the door seeks admission to the club.

### Intent

But you must be impatient for me to get to this point. Surely, what "spouse" means, whether it includes the live-in same-sex lover, is a question of what the law-maker had in mind. Behind the law lies the intent of the lawmaker, and if there is some ambiguity about what the law means are we not to try to find out what was intended? Is not the correct interpretation the one that expresses the intent of the law-maker? This seems so plausible, so obvious, so undeniable, that it will not come as a surprise that the search for legislative intent has been a major legal industry. Our question here is with whether we can find in intent or in "original intent" an alternative to judicial policy-making as when, avoiding questions of strict or liberal construction, we can correctly answer the question "Is Jones a spouse" by looking for the intent of the lawmaker or legislature or Board of supervisors.

The answer is "no," or at least "not entirely." I put aside some very intriguing arguments to the effect that "intent" is, in

principle, altogether irrelevant, that the law should be taken as a public artifact severed from any special connection with its maker, that it should make sense on its own, standing on its own feet, unmarked by the traumas of its creation. However it was created you are not to try to seek out the (often elusive) creator and demand elucidation as if the creator meant more than it said. You have the words; make what you can of them; and if in doubt, don't look back but interpret them so as to further the good as you see it. "It is what is said that counts, not what is intended," said a well-known Judge. (Unfortunately, the same Judge can be found to say "What he had in mind is what counts, not what he said." Legal maxims often come in pairs; pick the one you need!)

I will not pursue this line, although it is powerful enough to merit more than casual dismissal. And, of course, it lends support to the activist view that consequences are what count. It may be a tempting short-cut, and I do not really dismiss it. But I am going to try to show that even if we consider that we should eke out the law with the intent of the lawmaker there are discouraging complications that will keep the anti-activist from finding happiness or salvation in "intent" or even "original intent."

1) The mystery of multi-person statements.

It is one thing, when we think of law as the command of the Sovereign, to think of James or Charles or Napoleon whose command we are to take as law. "What did he intend?" if it is not clear, is at least an intelligible question. But the law in a polity like ours is not the will or command of a single natural person. What a legislature intended or had in mind is not the same thing as what I may have had in mind when I voted for it, nor what a canny draughtsman may have had in mind, nor what the most zealous advocate or the most grudging supporter may have had in mind. The "intent of the legislature" cannot be identified with what a particular legislator or even a group of legislators may have been thinking. (I seem to remember that a member of Parliament is not permitted to testify as to what Parliament may have intended by a law that he participated in passing.)

While some will hold that only a particular individual or single person can be said to intend or mean something or have something in mind or be said to have a mind at all, I am inclined to flirt a bit with the un-individualistic notion of collective intention. That is, I feel no need to apologize, or to hasten to explain away or banish ghosts from "we think" or "they thought" or "the committee intended" or "we decided." I find no terrible sin in saying "the legislature intended" or "the Court meant"--even though no one, including a member, is authorized to speak for the court in explaining what the court really meant beyond what it said.



But even if one accepts the idea of legislative intent, how you would discover it is something of a mystery, and its complexity keeps the appeal to it from being an easy solution to discovering what the lawmaker or enactor of the First amendment may have intended by "religion" or "an establishment of religion" or the enactor of the Fourteenth by "person." When the meaning seems clear, it is not because of "intent"; when you are driven to look for the collective intent you are not likely to find a conclusive answer. Not even a letter from Jefferson establishes that "they," whose action is what matters, intended what he may have intended about "a wall of separation between church and state."

## 2) Historical vicissitudes and "Original" intent.

The original intent, if I may use that expression, of those who enacted the First Amendment was clearly not that no government should abridge the freedom of speech, but rather that the newly formed Federal government was not to interfere with the States, which retained the power to regulate speech as they thought best. There is really no serious dispute about this; it even says "Congress shall make no law..." Then, after the civil war, came the Fourteenth amendment, which restricts the power of the States in some respects, although it does not mention the Bill of Rights or the First Amendment. Some have argued, rather creatively, that the Fourteenth somehow "transmits" the Bill of Rights, or rather "transmutes" it into limitations on State as well as Federal powers. In addition to the overwhelming

difficulty of finding out what was "intended" by the adopters of the Fourteenth, it is almost impossible to say how such transmission nullifies or modifies the "original intent" of a Bill of Rights that certainly cannot be held to mean the same thing when it denies powers to the Federal government only, leaving those powers to the States, and when it is to be read suddenly, years later, without explicit reference, as denying power to all government. You may be able to make sense out of the situation, but it won't be by looking for "original intent," either of the 1st or of the 14th Amendments. The operative "intent" of a long-lived law is not always (to say the least) the same as the "original" intent, and the answer to what a law is now properly taken to mean is not always discovered by historical research.

"Original Intent" seems either a redundant way of saying "intent" or, if it is a recognition that what a law means is subject to some historical battering, it is a way of reminding us that we do not always--a century or a decade later--interpret a law in the light of the original intention. To say that we should always stick to--or return to--the original intent is not merely to utter a conservative dogma. It is a radical proposal of questionable merit. Long established usage may be discovered to be a departure from original intent, but it is not at all clear that a return to the original intent should follow that discovery. For example, the current interpretation of the "establishment of religion" clause is a wild departure from the

"original intent." It is also probably the case that the adopters of the Fourteenth did not intend to include "corporation" under "person." But it would take not an activist court but a hyper-active court to announce a return to the original intent in such cases. At some point, established usage, on almost any theory, displaces original intent--just as current linguistic usage displaces and need not blush before the archaic.

Historical questions about fundamental laws should remind us about how difficult questions about the intent of the "amending power" are. Research on these matters is usually inconclusive and policy-driven in the bargain. On less ancient or fundamental laws, "original intent" really shrinks to "intent" and on the "intent" question, as I have suggested, the mystery of multi-person utterances will keep us from finding in "intent" the infallible cure for legislative ambiguity.

### 3) Intending the instance and intending a class

The context in which the 14th Amendment decrees that no "person" shall be denied the equal protection of the laws clearly suggests the intention to cover black persons. But "person" covers more than "black person" and let us even suppose that the Amenders "intended" more. But what more? How much more? They intended "person," including black person. Did they intend "persons of Japanese ancestry?" Female persons? Minor persons? Artificial persons? Fetal-stage persons? Illegal alien persons? While it is clear that more than "blacks" was intended, the

attempt to settle the scope of "person" by finding out what the Amenders "had in mind" or "intended," is a hopeless enterprise. The law says "person," presumably the class of persons; the class of "persons" includes black persons; it includes more than black persons; we don't know how much more; and we cannot find out how much more was intended by that amorphous mass by whose action the Amendment was passed.

Consider how you would try to discover whether "person" in the 14th Amendment was intended to include "fetus" and you will probably discover that you will assess every argument about "intent" in terms of whether it is compatible with your policy view about abortion. You will not know how to decide about the defining characteristics of "spouse" without knowing how it squares with your view about whether a same-sex lover should be treated as a wife or husband. Such a simple thought-experiment conducted in diligent privacy will reveal the force of the activist insistence on the determinative power--and the unavoidability--of the policy question.

This is a very short brush with problems plaguing the attempt to apply an existing law or set of laws to a changing world. They are, as anyone who has grappled with them knows, fascinating problems, and I do not pretend to do full justice to them here. I am trying to show how the first item of the Rule of Law Creed--that the question for the court is always of the form "is X in accord with the law"--seems to turn into a policy instead of a rule-conformity question at a surprising number of

points, so that a court--even without policy-making ambitions-- finds itself always confronted with questions of policy. Contradictory rules, soft words like "reasonable, claims to the status of new instances (a fetus is a "Person"; a live-in same-sex lover is a "spouse...") present questions not simply answered by the "discovery" of what the law requires untarnished by "decisions" about what the law should be taken to mean. Not even "strict construction" and "original intent" can steer us away from the rocks of policy to the tranquil waters of "what the law really requires." So that the very foundation of the Rule of Law creed--that judicial questions are all simply rule-conformity questions--seems, at the very least, to be very shaky, if not absurd. We begin by asking "Is X in accord with the law?" and soon, at a number of different points, we find ourselves deciding, having to decide, whether A is better than B.

I pause here to mention two general points. First, this is a highly simplified account of a generally complicated legal reality. If I had been able to successfully defend the fundamentalist Rule of Law view in these artificially simple terms, I would invite the charge that in the more complex "real" world it would be a different story and that the simple account is misleading. But if even in a simplified form the story doesn't hold up there is no point to considering complexities that would make the outcome even more obvious.

Second, there is the question of whether all these ambiguities or difficulties are marginal, whether they exist only

at the fringes of the system or are, on the other hand, pervasive features of the legal order. The answer is that it is not some local flaw or accident that creates these opportunities for judicial policy-making. It is, rather, the focussing of attention at a particular point for some political or social reason that makes that point seem subject to unexpected ambiguity, in need of interpretation and all the rest. It could happen anywhere in the system, not merely at some unguarded weak spot. And this precludes a possibly attractive easy way out. That is, we cannot really say that most of the law is unambiguous and that activism is a merely marginal option.

## II. Correct Answers

The second item in the simple rule of law creed--that to the proper rule-conformity questions there are correct answers--might seem so obvious that it is puzzling that I bother to list it. You either exceeded the legal speed limit or you did not, and the court is supposed try to come up with the correct answer. Sometimes it does, sometimes it doesn't. The justification of procedure is that it helps, the objection to procedure is that it impedes, the discovery of the correct answer. In principle, in an unKafkaesque legal order, the statement that you have violated the law is true or false. A law may be wise or foolish, fair or oppressive, morally worthy or unworthy of obedience, but, unless it is so flawed that it does not count as a law, there is a

correct answer to the question of whether it has been violated. Common sense, at whose touch so many complexities vanish, will insist on it. Rule of Law fundamentalism insists on it. Nevertheless, even this simple clarity will become clouded.

The force of this position is seen most easily when we consider a single rule or law disentangled from its context. Did you break a law--did you fail to stop at that red light, did you limit someone's speech, did you not give timely notice...someone adduces a rule or a law you have broken. You either did or didn't. The answer that you did is either true or false. There is a correct answer.

But now things get confusing. In spite of all the work that goes into formulating a simple "question" for the court out of the complexities of an actual dispute or conflict, we will find that the question may become "Did you violate the law," not a law. The distinction is between a single rule and the system of rules of which it is a part. A student may violate a school rule about not wearing armbands in class. But that rule has to accommodate itself to other rules--the First Amendment, for example--and by the time we take into account the impact of the whole system of rules brought to bear on the application of the simple rule we began with, we, or a court, may find that the student did not step outside the bounds of the legal order, is not in violation of the law after all. He broke the rule about armbands; he did not break "the law," taken as the system of

relevant rules and operative principles, properly interpreted and reconciled.

The question now is this: There seems to be a correct answer to whether what the student wore violated the dress code. But is there also a correct answer to whether, taking everything into account, the student violated the law? I do not mean a "wise" or "liberal" or "conflict reducing" answer; I mean simply a correct answer, an answer that interprets all ambiguities correctly, that resolves all interpretive conflicts correctly, that does everything right from beginning to end so that we can be as confident of the answer about the law as about the prima facie violation of the rule that starts the process.

It seems quite natural to say that the judge was correct in ruling that I was speeding. It is not as obvious that the judge was simply "correct" in ruling that I was properly stopped by the police at a road-block check on illegal aliens. "Hard-line" or "liberal" are not only something we might say in addition to correct or incorrect; they seem to squeeze "correct" out of the picture, to preempt the field of comment. Awareness of the complexity involved in judging conformity to a system of rules, something like calling an act "unconstitutional," makes us hesitate to call such a judgment correct or true or false.

Consider our familiar example: suppose a court rules that our old friend Jones is indeed Smith's spouse, entitled to medical coverage. You might rejoice that it came out that way and that you can now tell others that their live-in same-sex



companions are covered. And it is true that they are now covered. But would you really say that it is, in some serious sense, true that Jones is Smith's spouse and that fortunately the Judge discovered it and correctly told the truth? As it is true that I did not stop at the stop sign?

I have raised the question of the possibility that "correctness" may not apply to complex situations when it is a question of being in conformity with a "system" of laws or being "constitutional." My professional legal friends are always reluctant to characterize a constitutional decision as simply correct or incorrect. Is it true that there was a right to privacy guaranteed by the Federal Constitution before the court said there was, and the court was simply correct in saying so? Or was it really "there is from now on!"--a good example of "judicial activism" or judicial policy-making filling in for the absence of a "correct answer"?

Apart from the question of whether the complexity of a system and the necessity of interpretation weakens the sense that a judicial decision is simply correct or incorrect, there is the familiar situation, discussed earlier, in which a rule-conformity question has been displaced by a balancing problem, a problem of deciding whether one alternative is better than another.

Is there, in the end, a correct answer to a balancing question or to questions like whether capital punishment or abortion or the exclusion of religion from public education are

good things? We enter into the hazardous domain of "value," a domain in which, we are told, it is archaically elitist to suggest that anyone is really right or really wrong, or more right or wrong than anyone else, in which the claim that your view is the correct one is dismissed as an expression of dogmatic intolerance. I am not going to argue the matter here. I will only point out that if you think there are indeed correct answers to such "value" or "moral" questions you will want judges who are properly attuned to them and you might see "moral correctness" as a qualification for appointment, displacing "moral neutrality." And if you do not think there is an objective value or moral "rightness," and if you think that judges must necessarily deal with such matters, you may consider it important that judges are appointed who at least share your own views.

It is here, baffled in the search for the clearly "correct" answer and disenchanted with judicial answers that seem thinly disguised partisan political pronouncements, that we sometimes encounter the well-merited and oddly comforting characterization of judges or decisions as "statesmanlike" or "judicious" or even "wise". Such characterizations are hard to analyse, but they suggest neither narrow or legalistic correctness nor mere political partisanship. "Judicial statesmanship" must certainly be compatible with the conception of the Rule of Law. But it seems to offer us "wise" answers instead of "correct" answers. It may be difficult to object to that substitution, but the hope

for, the dependence upon, judicial wisdom is not without its threat to the mundane conception of the Rule of Law.

### Proper Judges

I now come to the third item of the simple Rule of Law creed: It is possible to find judges competent to give the correct answers to the proper questions.

What is required is a practitioner who is not swamped by the partisanship that is built into the conception of the lawyer as a hired gun in an adversary system. I hold rather doggedly to the conviction that, in spite of protestations, our law schools are better at training lawyers than preparing judges for their functions. But in any case it is clear that a judge is not supposed to be an advocate for a client, preparing briefs and arguments--"opinions"--for a partisan position. He is supposed to be--and here we have trouble describing it--neutral or non-partisan or impartial, or unbiased, or objective, or whatever we settle on as fitting for the agent of the rule of law in the midst of a distracting gaggle of partisan advocacy.

So we can expect to hear, and will not be disappointed in the expectation, the annually rediscovered shocking insight that all men and women are human, prone to error, to bias, to subjectivity, to neurosis, and therefore, that to be a Judge is impossible. In its more pretentious form this insight is decked out with tattered philosophical and sociological fragments--the

mind forever shut out from the world of things-in-themselves, warped into merely human categories, culture-conditioned, linguistically blinkered, sex and class distorted, ego-centric. In the ordinary world we occasionally hear the cry "kill the umpire!" but in that world we are seldom told that, since we are human, baseball is impossible or that umpires should be home-team activists--or are, in fact, if they would only admit it. But in the more richly imaginative academic world ...Judges? Objective? Who? Whom? We are all partisans... the familiar half-baked academic enlightenment that, in students, we call sophomoric. I am not going to take this position seriously. Whatever we are--including human and ego-centric and all that--we are capable of being scientists and doctors and referees and umpires and even judges. The Rule of Law is the kind of game that can be played with the kind of people we are--properly selected, properly educated, properly encouraged. If we fail here it is not because we are asking humans to behave like angels.

The real difficulty is with the theory of judicial obligation, with the delineation of the judicial task, with the mastery of the interpretive art from the point of view not of the lawyer but of the judge. There is a radical difference between the perspective of the lawyer and the perspective of the judge. The lawyer is someone with a client; the judge is someone with a problem. But I remember a newspaper account of an interview with a newly appointed appellate court Judge. "I've been a civil liberties lawyer," he said, "and I will go on being a civil

liberties lawyer." No one seemed to notice the moral and intellectual absurdity of that remark.

There may be judges who have an inadequate understanding of their function. There may be an occasional rogue judge who indulges himself in the arbitrary exercise of his discretion. But more common, more troublesome I think, is the judge who shares a pervasive utilitarian bent, who believes that one is always to do, in any particular case, whatever he thinks will promote the greatest good and that, in the end, one is to bend even the apparent requirements of the law to the advancement of the "good" as one--who else?--sees it. So that even if there is what I have called a "correct" answer, the judge, as a moral activist, should, it is said, provide a better answer. He should be "result oriented," not neurotically fixed on mere correctness.

The "proper judge" called for by the simple rule of law creed is not an impossible dream. But everything does turn on his education (Law School education is not a cheering spectacle) and on the judicial theory with which he approaches the inevitable discretion that any complex system of rules imposes upon its administrator or guardian.

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I began with a delineation of the basic Rule of Law creed, according to which the court deals only with questions of rule-conformity, pronouncing correctly on the legality or constitutionality or legitimacy of actions, speaking through a special class of persons trained and competent to practice the interpretive arts that serve the administration of the rule of law, restrained by self-discipline from the temptations of policy making, leaving that to those whose proper political function it is.

In short order the painful inadequacy of the creed became apparent, essentially because of the irrepressible ubiquity of the policy or balancing question. The naive "rule of law" image of the judicial umpire gives way to the more realistic one of a rhetorically constrained political agent making policy decisions.

But if, in this conflict, the activist view seems to carry the day, it does so at a price.

First, by dissolving a rule-conformity into a policy question it strips the mantle of "legitimacy" from the political process. "Constitutionality" itself is the concept of rule-conformity writ large and it lies at the basis of American governmental legitimacy. The President was able to say, as he reluctantly prepared to enforce a school desegregation order upon a recalcitrant southern state, that "constitutionality" over-rode judgments of policy and that he was pledged to defend a constitution that was something more than the mere policy views of nine non-elected judges. As a society we are disposed to play

by the rules even if it means we may lose a game. But not if we think the umpire is making policy decisions in the guise of calling strikes. Respect for the Court and acknowledgment of the need to abide by its decisions--a social habit of immense utility--rests on the naive view of its function as the guarantor of legitimacy, as the enforcer of the Rule of Law.

Second, the displacement of rule-conformity by policy questions strips judicial review of its compatibility with democracy. There is nothing undemocratic about a court, even an unelected court, enforcing the rules of the constitution against violations by elected legislatures and presidents--any more than it is undemocratic for police to enforce traffic laws against citizen-drivers. It is a different story if judicial review permits the court to have the last word not on rule-conformity but on policy questions. If the activist view is right, the acceptance of judicial review by a democratic polity rests upon ignorance of what the court is really doing. Even some activist judges, aware of this difficulty, go to a lot of trouble to maintain publicly that they are not making policy. The plea for judicial "independence," on the activist view, is a disguised plea for "undemocratic" judicial supremacy.

Third, the activist view strips away the notion that judges are to be chosen--and respected--for some "professional" judicial character, for their objectivity or neutrality, regardless of their underlying political inclination. We are, perhaps, increasingly open in our concern about a judge's politics, but

there is still a feeling that we really shouldn't be, that it is important to have a disinterested referee, not a committed liberal or conservative warrior. On the activist view good politics may outweigh mere technical competence. But it is a testimony to the strength of the Rule of Law position that we are deeply reluctant to strip the court of the aura of objectivity and policy neutrality upon which its unique position depends.

Fourth, the argument that we should submit to the jurisdiction and judgment of International Tribunals or World Courts loses, on the activist view, whatever force it might enjoy under the fundamentalist view. Why put ourselves at the mercy of political judgment by foreign judges whose political balancing comes pompously disguised as objective pronouncements about what "The Law," or International Law, or a Bill of Human Rights requires?

The difficulty is that respect for the Rule of Law, for the pronouncements of Courts, seems to rest upon popular misconception about the whole business. What I have called the fundamentalist or the naive view is, more or less, the general view. Insiders generally may not share that view, but may well think it a good thing that the public has the standard illusions. Lawyers are, after all, the clergy, the beneficiaries, of this particular religion, and hesitate to de-mythologize aloud on their own territory. I have even heard lawyers who can explain with great zest how judges in their solemn robes are really "politicians in drag" declare publicly, without blushing, that



the glory of our system is our non-political Rule of Law presided over by a Judiciary whose independence must be protected against the intrusion of politics.

De-mythologizing may be great fun, but it is not without cost. An unabashed Activism must eventually pay the full price for the abandonment of the fundamentalist Rule of Law conception. It would, if understood, undermine the respect upon which the constitutional system and the Rule of Law depend. That respect can be protected or restored only as Activism retreats from its own fundamentalist or unrestrained policy-making view. And that is why the story cannot end here but must move, as I will now suggest, towards a theory of selective intervention.

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## PART TWO

The Fundamentalist view of the Rule of Law cannot survive the activist challenge; its basic propositions are vulnerable to skeptical attack; but rejecting the view exacts a price we are reluctant to pay. In this situation, unwilling to continue to argue for the truth of the fundamentalist view and unwilling to accept the price of abandoning the traditional ceremonial empowerment of the judicial order, we may take a clue from what happens in the life of religion. We discover that the fate of religion does not depend on the fate of fundamentalism. It does

not depend on the truth of the assertion that Mrs. Lot was turned into a pillar of salt. It may be better served by a non-fundamentalist reading that if you insist on looking back in longing to the pleasures of your dubious past you may become, like Mrs. Lot, monumentally bitter--a more profound insight and, no doubt, what the inspired creator of the parable really intended. So I will now turn from the hopeless defence of the fundamentalist position to the delineation of a more complex conception of the Rule of Law.

"Why bother?" you may well ask. Why not, since I am treating this as a "religious" problem, go directly from a refutation of the fundamentalist position to an acceptance of an honest atheism, an unabashed and eager activism? Because, I suppose, I consider an atheism based on a refutation of fundamentalism as just another case of fundamentalism, as the same error in another direction, as the same missing of the point that, clumsily served by fundamentalism, is worthy of being better served and defended. And besides, I was bitten by Dostoyevsky when I was young, and I still worry about the Smerdyakov syndrome. You will remember that his highly cultured half brother, Ivan, went around saying "If there is no God, everything is permitted." Ivan concluded that everything was permitted, but having been raised a gentleman, continued to act more or less like a gentleman. But Smerdyakov was not raised a gentleman, and having heard on Ivan's authority that everything was permitted proceeded to do what no gentleman would do. He

killed his father. There may be some Smerdyakovs around who, having heard that the Rule of Law is a fairy tale, may conclude that all judicial bets are off and seek judicial appointment.

To put the matter in less Dostoyevskian terms, the rejection of Rule of Law fundamentalism seems to unleash a kind of naive or crude fundamentalist Activism. It seems to convert the discovery of the existence of policy-discretion in administering the law into a license to indulge in unabashed policy-making, to become substantially "result oriented," restrained only by the need to avoid giving too much scandal. It is sad that one should escape one form of fundamentalism or naivete only to fall into the embrace of another. So I will try to sketch a defence of a tenable, non-fundamentalist Rule of Law position. My hope is to rob fundamentalist Activism of some of the fruits of its victory over its fundamentalist opponent by suggesting the constraints that a more sophisticated version of the Rule of Law position can oppose to, can defend against, an unrestrained Activism. And, by so doing, to lessen the great price we must otherwise pay for the weakening of the conception of the Rule of Law in its Fundamentalist form.

The Rule of Law view, as I have said, rests heavily on the theory of separation of powers. This is seen as pre-supposing functional differentiation. Each tribunal or branch of government is to limit itself to its own kind of task, not to intrude on the function of another. The prohibition against a Bill of Attainder, for example, is an explicit ban against the

performance by a legislature of a function reserved for the judicial branch--finding someone guilty of a crime. We worry about the President's possible invasion of the war-declaring function of Congress, as we might worry about legislative meddling in the professional conduct of the war properly under the direction of the President as commander-in-chief. It is the function of the Regents, not of the legislature, to govern the University, and the legislature may find, to its frustration, that it cannot hire or fire a professor. This is all very familiar, and I need not parade examples.

The justification for the separation of powers is not only the wisdom of avoiding undue concentration of power but also the fact that different kinds of tasks take different skills and are best carried out by institutions adapted to those tasks. We may think laws best made by gregarious types who like to run for office and please constituents, not by cerebral law school graduates who are good at long written arguments and who end up in or around courts. Different characters for different roles, different procedures, different recruitment, different training, different discipline, differently cultured--characters who will be content to play their own parts, for which they are specially or even uniquely suited, in a great division of labor. It is in such a context that a violation of the separation of powers, of functional differentiation, is seen as a major sin, an insult to the dignity of human interdependence, and not merely a case of jurisdictional imperialism. So, just as a legislature is not to

try someone for breaking a law, a court is not to make, modify, amend, or improve a law.

But merely to state this is to make us aware of how much the purity of this functional differentiation scheme has become sullied--Legislatures conducting foreign policy, staging quasi-judicial trials or investigations, Courts administering schools, prisons, employment policy, Administrative agencies making masses of rules indistinguishable from laws and conducting trials almost as if they were courts. We may still classify tribunals in traditional ways, but functional purity has long been lost. Messy, perhaps, and even sad; but too late to weep over.

However, there is a sibling notion, very American, and very much alive--our familiar "checks and balances." It shares with "separation of powers" a hostility to the concentration of political power and to its untrammelled exercise. But it has no commitment to functional distinctiveness. In this respect it is like "distribution of powers," referring to the allocation or parcelling out of power among a myriad of jurisdictions--federal, state, local--without functional concern. "Checks and balances" seems, in fact, to suggest a general overlapping or duplication of function. The same demand is made over and over again in different contexts, before different tribunals. Everyone seeks the most accessible or sympathetic forum, altering the argument as required but pushing the same point. If the school board doesn't give you what you want, you try to get it from a court or

a legislature. Social policy is what emerges gradually and cumulatively from a gauntlet of decision-making tribunals, each modifying the other, none completely dominating the scene. The courts are said to be part of this complex system, concerned, as is every part, with "policy," required by tradition and some special circumstances to put its arguments in a judicial rhetorical form. It works under special institutional constraints, but it is part of the political process, not apart from it, part of the process by which tribunals check and balance and offset each other.

It might have seemed strange, not too long ago, to include courts in the political hurly-burly. But things have changed. Readers of classical detective stories will remember lawyers as stodgy conservative types, bright enough to read wills to crestfallen family gatherings, honest, upright, seldom inclined to take liberties with tradition. They did not go into the practice of law in order to reform the world by an imaginative employment of judicial tactics, did not see the court as an instrument of change or as a battlefield in a war against the established order. But now! Hordes of lawyers debouch from the portals of law-schools, flooding the country, dedicated to causes, to change. They are not heading to courts in order to be referees, above the struggle over policy. They are going where the action is, where you can make a political difference without being elected or climbing a long bureaucratic ladder. They are heading for one of the places where the law, if not made, is at

least changed or reshaped, to where the benighted legislature (also lawyer-infested) can be checked and the obdurate executive balanced--to one of our more accessible powerful political institutions in a system of checks and balances.

The upshot is that "checks and balances" may capture the spirit of our situation more accurately than does "separation of powers." To the extent that it does, "functional distinctness," the conception of a unique judicial function tied to a special class of judicial questions, fades into the background. But it does not altogether bow out of the picture. It still has a significant role to play.

We should remember that we are, after all, talking about courts and that courts are rooted in the great traditional task of deciding whether someone has broken a law or committed a crime, that the trial that looms so large in the popular mind is still something that courts are engaged with, day in day out, and that, in that storied world, functional uniqueness is most clearly demonstrated. Here, the fundamentalist Rule of Law view is not to be dismissed simply because of complications that may arise at the more problematic appellate level.

The persistent strength of the fundamentalist model is rooted in its simple appropriateness at this working level. And it is because of this appropriateness that the court gets, almost uniquely among political institutions, the great moral authority, the moral capital, it carries with it and spends when it starts to play more complex games. We start with the image of the

impartial judge or referee and continue to respect and defer to him as a referee even after he has become, without changing uniform, a player on the field. But before that, we expect from the court or judge reliable predictability, an absence of judicial surprises; policy novelty, originality, is out of place; imagination an intruder. In this world we should expect that the claim that the law requires that a same-sex lover be treated as a "spouse" would be received with "Quit your kidding. If you want that, get the city council to change the law."

It is beyond this level that the temptations of policy-making flaunt themselves. We move into the world in which the functional differentiation of "separation of powers" yields place to checks and balances. Without distinctive functions, the injunction "Do not overstep your function!" loses its point. In the world of check and balance what is there to do but check and balance? What is left of the old sense of limited role?

To sum this up in terms that I have used earlier, within the separation of powers framework, the unique function of the court is to confine itself to questions of the form "Is X in accord with the Law?." In the check and balance framework, questions are normally of the "Is A better than B" form, that is, questions of "policy." The necessary involvement of the court with policy questions means, as I have argued, the defeat of the fundamentalist Rule of Law unique-function view and the movement into judicial "balancing" in a world of checks and balances. And



the question now is about how the courts should behave in that world.

At this point we encounter the familiar notion of "judicial self-restraint." It is frequently coupled with "strict construction" and "original intent" in the anti-activist litany, but it introduces an interesting new note. We move from language-centered notions (meaning, intent, construction, interpretation...) to concern with the attitude--psychological or political-theoretical--of the judge toward his function, and it is precisely here that the serious non-fundamentalist Rule of Law position must establish itself. In the end, and I stress this point, the Rule of Law must be based not on the theory of language but on political theory.

We begin with "self-restraint," a notion that is almost gratuitous when the court is acting within the "separation of powers" framework. There, it is a reminder to stick to the proper question, to its own non-policy function. And also, perhaps, a warning against foolish zeal, against losing a sense of "de minimis," against pushing things to absurdity. As when a court finds that the equal protection clause of the Fourteenth Amendment prevents the holding of a father-son or father-daughter banquet, or that the First Amendment prohibits a moment of silence at the start of the school day. Absurdity always lurks in the vicinity of a foolish consistency, and we are not required to be absurd. Urging self-restraint against that might, if it is sadly necessary, make sense.

But we cannot seriously accept that in a "balancing" world the court is to take "self-restraint" as meaning that the court is to turn a deaf ear to the pervasive invitation to join in the game of policy-formation. Such judicial minimalism would reduce the court, as an institution, to triviality, and no one, I think, who has any conception of the relation of our courts to our other political institutions would seriously defend such a position. Self-restraint remains an important notion but it needs to be supplemented or even supplanted. What we need is a guide to the exercise of restraint, a consideration of the circumstances that require or justify judicial policy-making. What we need, in short, is a well-considered Theory of Selective Intervention. I will not try to develop such a theory here but I will present a small sample of the sort of things it should deal with:

1. The court is about the only institution in a position to deal with jurisdictional conflicts between state and federal and between administrative and legislative tribunals or agencies. Can a president or governor refuse to spend what a legislature has appropriated? Can anyone order a legislature to raise taxes? Can the department of labor order a university to hire someone? Should a court extend spousal coverage to a same-sex lover? Questions of this sort come up all the time; they are policy questions. The court is appealed to. Can it refuse to decide who should decide what?

2. The court is expected to exercise more policy-responsibility in matters closely related to the justice system--

adequacy of process, trials, evidence, punishment, jails, etc,-- than in other areas. Should it not?

3. Should the court try to remedy what might seem to be a structural failure? Redistricting is called for, but legislatures are supposed to do it themselves, or to themselves. Naturally, they don't. The court finally decides, on policy grounds, to find a way to put an end to a sort of scandal that no one else could deal with. Improper activism? Wise intervention? I distinguish such structural difficulties from situations in which the "barbaric" state of public opinion is deemed to be an obstacle to enlightened social policy. If the people are too backward to abolish capital punishment, should the court do it? I do not consider public opinion a structural obstacle, but some might. Should the court?

4. Should the court do the country a service by taking on questions that seem to be too difficult for elected politicians to handle? Sometimes the whole country seems to turn, as with a single neck, to the court, imploring it to handle matters like abortion or affirmative action that no one else wants to get burned by. Is there a "hot potato" function?

5. More respectable perhaps is the assumption by the court of the role of the Roman Tribune, the special guardian of the weak, the oppressed, the minority, the group unable to work the political process to its own salvation. Is it to act as an additional check against the powerful, to tip the balance, sometimes, in favor of helpless virtue?

6. The court is sometimes thought to have a policy role in bringing the law and constitution "up to date." The constitution is several centuries old and, it is said, if it is to be a living document and not an irrelevant antiquated charter it must be reinterpreted, adjusted to modern times. This point bears chiefly on "constitutional" provisions that can only be formally changed by the cumbersome process of amendment, and since that is really impractical it may be said to be up to the court to effectively modernize the constitution by interpretation. This sounds reasonable, but it is not without problems. A new situation does not always require changing old rules. The ancient "Do not lie!" can be held, without change, to cover "Do not lie on the telephone!" "Do not Xerox without permission" does not put a strain on "Don't steal." Our ancient "freedom of speech" seems still elastic enough to cover lots of modern ground. Deciding whether a rule covers a new instance, as discussed earlier, goes on all the time. But beyond this sort of thing, is the court, acting on its sense of what modern America requires, to bring the constitution up to date by deciding that we can no longer afford freedom of the press, that we should ignore the right to bear arms, that we should curb abortions by proclaiming that a fetus is a person, that "color-blind" should be replaced by "proportional?" Do we want the court to be a surrogate constitutional convention?

7. Finally, I list among these random items a position that even conservative anti-activism warriors might approve of. I

call it "corrective activism." Whenever the court has been living through a period in which it has been accused of blatant activism, and another President succeeds in re-coloring the court with judges of a different political complexion, we may not be treated immediately to the demonstration of a non-activist court at work. First, it may be thought necessary to undo the activism of the previous court. Should the new court accept and protect the policy excesses of the late liberal or conservative court? Of course not! So first, a brief period of "corrective activism" to get everything back to where it was supposed to be before they messed it up. But the agenda of corrective activism, even if you agree with it, is a program for a long haul, and a court so engaged will look like just another activist court.

I list these familiar problems to suggest a range of questions to which "judicial self-restraint"--if that means more than "be careful"--is hardly an acceptable answer. It is not an answer required explicitly or even implicitly by the constitution itself. It is not required by linguistic or legal or political or moral theory. In the world of checks and balances, out from under the limits of "separation of powers" what is needed by the court is some practical and theoretical wisdom about "selective intervention." A confident sweeping "activism" would be fun, but irresponsible. A dogmatic identification of the "rule of law" with a fundamentalist or even puritanical eschewing of all judicial decision making beyond "rule-conformity" would be an unjustified form of self-denial, a form of irresponsibility. If

we really want to explain it all to those who yearn for "the rule of law and an independent judiciary," we need to go through the traditional myth, through the demythologizing process, to end finally with an understanding of checks and balances and the theory of selective intervention. Such a theory should appreciate the relative merits of legislative, administrative and judicial institutions in terms of the intelligence and sensitivity that, in their contemporary form, they bring to the varied tasks of government. Our judicial institutions, culminating in the Supreme Court, may well be our best hope for injecting some reflective wisdom into our public life, and there is really no canonical theory above partisanship that stands as a bar to "selective intervention."

"Judicial activism," as a reproach, might re-emerge as the tendency to overstep the limits of a reasonable theory of selective intervention. Lest this appear too bloodless an outcome, I suggest that it really preserves the point that generates the greatest indignation among critics of activism. They are likely to be more outraged that a court would presume to extend spousal rights to same-sex lovers than over that result enacted by the city council. A legislative decision moving from non-discrimination toward "racial balance" might, even if opposed, be accepted with relative equanimity compared to the fury evoked by a court moving in that direction by a supposedly non-political exegesis of "equal protection." Similarly with questions like capital punishment and abortion. We may be, in

short, prepared to accept at the hand of the familiar political process what we are unwilling to accept from an activist court taking the matter out of our hands. So the cry "a court shouldn't be doing that!" can still arise with undiminished fervor, but we can focus more clearly on "why" or "why not" rather than on questionable abstract views of the process of construction or interpretation. An "activist", it is worth repeating, is not simply a judge who is, unavoidably, involve in the policy world, but rather, a judge who oversteps the limits of a reasonable theory of selective intervention. The development or delineation of such a theory is, under present circumstances, among the more urgent tasks of legal or constitutional theory.

Any legal system is at least two-layered. There is a set of positive rules or laws--written laws and written constitutions, and there is a set of rules and principles about those rules, and they are usually neither explicitly nor formally enacted. They are, nevertheless, a fundamental part of the legal order, and they are not to be waved aside as if their intrusion into the world of positive law is a result of judicial misconduct.

The power of the court to declare a law unconstitutional is merely implicit; "separation of powers" is not mentioned in the constitution; "strict construction" and "original intent" as proposed guides to the court are not mentioned in the constitution; that the court, in interpreting a law, should try to carry out the intent of the lawmaker, is not mentioned; that the court has a special role in protecting the "federal system"

is not explicit...these are examples, a small part of the context within which the constitution and the positive law exist and make sense.

The strongly urged view of some opponents of "activism" that the court should stick to what is explicit and avoid all dependence on the what is implicit in the "spirit" of the constitution or the "Higher Law"--that view is itself an argument about an implicit part of judicial theory and does not enjoy a "preferred position" in the field. What is implicit is often crucial. For example, the constitution speaks of the "legislative power." It does not define it or tell you what it means. It does not say that Congress has the power to "investigate," but it certainly makes sense to say that the power to make laws implies the power to investigate the need for laws, even though not explicit.

Again, the legislative power is, presumably, the power to make laws. Is a "law" anything the legislature chooses to enact? Or does a "law" have certain characteristics so that only what has those characteristics--enacted or not--is a law? Suppose there is a long tradition that a law is a reasonable act of the lawmaker aimed at the public good. Would not a court sometimes have to say "this is arbitrary and unreasonable and therefore not a valid law?"

Readers of Paradise Lost will remember that Eve, confronted with a divine command, was led to think about it and concluded that a command to avoid knowledge of good and evil simply made no



sense, was unreasonable. "Such prohibitions bind not!" she declared, firing an opening shot in the eternal battle between the sovereign Will and the demands of Reason. It is no longer a very original sin when a court today rejects a governmental law or act as unreasonable, even though an enemy of judicial activism might condemn the frustrating of the sovereign's will by such an appeal to the higher law. Eve may not be celebrated as the patron saint of judicial review, but the Rule of Law must include implicit elements of the Higher Law that the Court is to incorporate in the legal order, not by a rebellious bit of "activism" but by a necessary act of judicial piety. "The Higher Law," implicit in any system, is a reminder that even the Sovereign Will cannot altogether escape the demands of Reason, although even as we seek to restrain the governing will within a tight structure of rules, we come to realize, even if we are devoted to the Rule of Law, that we cannot write it all down and do just what it says.

The defence of the Rule of Law against Judicial Activism is fought in two lines of trenches. The outer line is what I have presented as the fundamentalist position. I have tried to show that, in the end, that position cannot be successfully defended. The battle, however, does not end there. The fall-back position is "judicial self-restraint." But as functional distinctness and the separation of powers give way to "checks and balances," I have suggested that "self restraint" must be displaced by doctrines of "selective intervention." Conflict between the moods

of activism and restraint will continue, but the argument should focus on the appropriateness of intervention in different kinds of cases rather than on positions--like "strict construction" or "original intent"--involved in the old fundamentalist view.

I confess to being rather fond of the old fundamentalist Rule of Law view and even find myself wishing it were all true. It is not my fault that it is not and that we must be satisfied with the consolations of thoughtful selective intervention. But there is also something satisfying in the realization that Judicial Activism is not merely or necessarily a form of willful misbehaviour but that it grows out of a shared realization of the inadequacy of Rule of Law Fundamentalism and that its proponents, if they do not succumb to the temptations of their own Fundamentalism, can join in a common development of the theory and practice of Selective Intervention. For that is the task that faces us after we stagger out of the trenches of yesterday's battle.

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