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THE BILL OF RIGHTS: THE NEXT 200 YEARS

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In addressing the future of the Bill of Rights, I would like to begin with some observations about the doctrine of original intent. I do so for two reasons. First, a great deal of attention has been paid this doctrine in recent years, and I would like to explain why, in my view, it is a bankrupt theory of constitutional interpretation. Second, as will become clear later, our stance towards the doctrine of original intent will have much to do with the meaning of the Bill of Rights in the future.

We live in an era during which high officials of the United States Government have strongly endorsed the theory of original intent. The proponents of this doctrine maintain that the United States Supreme Court should limit itself to enforcing the "original intentions" of the framers of the United States Constitution. They claim that in much of its constitutional jurisprudence the Court has exceeded the appropriate bounds of its authority and has substituted its own conception of what the Constitution should mean for the framers' conception of what the Constitution does mean. The proponents of original intent assert that such "judicial activism" pervades constitutional law and violates the essential tenets of majority rule and democratic theory.

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Understanding the debate over original intent requires that we go back to basics. What is the role of the Supreme Court in our constitutional system? What is the role of the Bill of Rights? Why do we grant the Supreme Court the power of judicial review?

The framers of the United States Constitution confronted a difficult task. On the one hand, they sought to establish a democratic society in which government would act in response to the will of the majority. But the framers also knew that there are dangers as well as strengths in majoritarian rule. Individuals, they knew, often act out of self interest rather than out of a more general conception of the public good. And they knew that, human nature being what it is, majorities often would act out of feelings of intolerance, anger, short sightedness, panic, greed, and fear in ways that would not serve the public good and that often would be deeply regretted when viewed from the perspective of clear-eyed, objective hindsight.

To protect against these concerns and to preserve the benefits of democratic government, the framers adopted two institutional arrangements to brake the effects of such distortions of the majoritarian process. First, by adopting a system of checks and balances, staggered terms of office, separate houses of Congress, and the legislative-executive distinction, the framers devised a set of procedures to disperse power and reduce the potential that considerations of intolerance, greed, self-interest, faction, and short sightedness would dominate and distort the law-making process.

Second, the framers adopted, in the Constitution itself and in the Bill of Rights in particular, explicit guarantees of right designed to limit the legitimate scope of governmental power. These rights are, of course, familiar: the freedom of religion, the freedom of speech, the freedom from unreasonable searches and seizures, the right to due process of law, the privilege against compelled self incrimination, the right to counsel in criminal cases, the prohibition against cruel and unusual punishments, and so on.

Why did the framers select these rights in particular for express guarantee in the Constitution? These rights have two essential features in common. First, they may be seen as central to the dignity and integrity of the individual in a self-governing society. Citizens in a system of self governance constantly must understand that they are not in a subordinate position to government, but that government is instead subordinate to them. By recognizing certain rights that protect from

governmental intrusion into areas of life central to the autonomy and dignity of the individual, the Bill of Rights reinforces the appropriate relation between citizen and government in a self-governing society. Second, the framers knew well that these rights historically had been subject to abuse and that, because of their very nature, they are the rights that an intolerant or frightened majority most likely would sacrifice. It was therefore these rights in particular that required explicit protection against majoritarian abuse.

But what good is all this? If the majority is inclined to sacrifice these rights, what purpose does writing them into the Constitution serve? If they are to serve merely a hortatory purpose, then they surely will be overridden by precisely those factors that ordinarily tend to distort the democratic process. Here judicial review enters the picture. The Constitution provides life tenure for federal judges. We do not elect them, and they are not dependent on the majority for their continued tenure in office. This is a central fact of our constitutional structure. Indeed, in my view, it may well be the most central fact of our constitutional structure, for by divorcing judges from direct responsibility to the majority and granting them the power of judicial review, the framers created an institution designed to put a check on the democratic process. They established an institution that could, more dispassionately and with a greater sense of history and commitment to principle, enforce the guarantees of the Bill of Rights largely free from the considerations that often would lead to abuse and distortion of the majoritarian process. And by measuring government action against the fundamental guarantees of the Constitution, and exercising the power to invalidate government action that violates those guarantees, the Supreme Court effectively could police majoritarian abuse and ensure respect for the rights and liberties of the people.

Now, the proponents of the doctrine of original intent would, I expect, agree with much of what I have said to this point. They challenge, not the theory or power of judicial review as such, but the way in which the Supreme Court has exercised it. In their view, the Court should limit itself to the original intentions of the framers and invalidate only those laws that the framers themselves believed violated the Constitution. Beyond that, say the proponents of original intent, the Justices simply make up the Constitution on their own, and no one authorized them to do that.

In my view, this conception of original intent is both unwise and dangerous. I offer three reasons for this conclusion. First, this doctrine re-

flects an illogical and unduly rigid view of interpretation. It is incompatible with the basic tenets of legal analysis and with the essential premises of analogical reasoning. Let me offer two simple illustrations.

First, consider the issue of wiretapping. The Fourth Amendment provides that the right of the people to be secure in their houses, persons, papers, and effects against unreasonable searches and seizures shall not be violated. Is a wiretap of a telephone conversation a "search" within the meaning of the Fourth Amendment? It might seem evident that it is, but for the proponents of original intent, the opposite result must prevail. The framers, of course, did not intend the Fourth Amendment to restrict the practice of wiretapping. They knew nothing at all of wiretapping, or telephones, or even of electricity, and they therefore could not have had any intent with respect to this issue one way or the other. The framers of the Fourth Amendment had no original intent to restrict wiretapping. Of course, the framers knew about the practice of mail opening, and they certainly regarded mail opening as a "search" within the meaning of the Fourth Amendment. And it would seem sensible to reason that if a mail opening is a "search," then a wiretapping is a "search" as well. After all, they both invade privacy in much the same way. Nonetheless, the proponents of original intent reject precisely this sort of analogical reasoning. If the framers did not affirmatively intend to restrict wiretapping, it is not for the Court to bring the Fourth Amendment up to date. The appropriate response to the gap is not interpretation, but constitutional amendment. Lest you think that I over simplify, I should point out that the Supreme Court once held, over the dissents of Justices Holmes and Brandeis, that a wiretap was not a search within the meaning of the Fourth Amendment, for reasons quite similar to those underlying the doctrine of original intent.[1] Moreover, this remained the law for some forty years, until it was finally reversed by the Warren Court in 1967.[2]

For another example of this phenomenon, consider movies, television, and radio. These means of communication did not exist when the framers enacted the First Amendment, which guarantees the freedom of speech and of the press. The framers therefore did not intend the freedom of speech or of the press to govern these new media. They did, of course, intend the First Amendment to cover newspapers and leafleting, for these means of communication were well known to them. And

1. Olmstead v. United States, 277 U.S. 438 (1928).
2. Katz v. United States, 389 U.S. 347 (1967).

although any sensible form of reasoning by analogy would compel the conclusion that movies, television, and radio also should be within the protection of the First Amendment, this step involves a leap of logic that reaches beyond the bounds of original intent. Moreover, again to dispel any concern that I am playing fast and loose with my examples, you should know that the courts initially held that movies were not within the protection of the First Amendment, and that the Supreme Court to this day accords the broadcast media a lower degree of protection under the First Amendment than more traditional means of written communication.

Thus, my first objection to the doctrine of original intent is that it leads to illogical and unduly rigid results that are incompatible with any meaningful form of analogical reasoning, a process of interpretation deeply embedded in our legal culture.

My second objection to the theory of original intent focuses on the difficulty of ascertaining the actual intent of the framers themselves with respect to virtually any issue of constitutional significance. To dramatize the point, suppose that we are the members of Congress who have proposed for ratification to the states the Equal Rights Amendment, which prohibits any state to deny any person the equal protection of the laws on account of sex. Let us also suppose that at some point down the road the Court is called upon to decide whether this guarantee prohibits the existence of separate men's and women's bathrooms in public buildings or the exclusion of women from combat or the exemption of women from the draft.

How would that future Court ascertain our intentions with respect to those questions? The language of the Equal Rights Amendment itself would of course provide no answer, for the language is vague in the extreme, as is the language of virtually every provision of the Constitution that guarantees individual liberties. Presumably, the Court, attempting to implement the theory of original intent, would look to our subjective intent. But how would that intent have been manifested? It is, of course, possible that some members of this body would have stated their views on one or another of those issues, but it is unlikely that we would have reached any explicit agreement with respect to those specific questions. Indeed, one of the reasons we would have drafted the constitutional provision so broadly would be precisely to avoid the need to reach agreement on all of the many specific implications the provision might have. Without such fudging, enactment of the provision might well prove im-

possible. Moreover, even if the Court believed it could ascertain the collective intent of this body, there still would remain the question of the intent of each of the state conventions or state legislatures that ratified the provision.

In effect, then, any inquiry into the actual subjective intent of the framers with respect to virtually any important question of constitutional interpretation will produce no clear answer. What it will produce is very bad history. Indeed, what almost invariably will happen is that the Justice attempting to ascertain the intent of the framers will simply attribute to the framers his or her own preferences. How do I know what the framers of the United States Constitution intended? Simple. I merely ask myself what I would have intended had I been a framer, and there it is. In that way, the proponents of original intent succeed in smuggling their own constitutional preferences into constitutional interpretation through the back door. If any clear example of this is needed, it is in the twin conclusions that advocates of original intent generally reach with respect to the Equal Protection Clause. On the one hand, the proponents of original intent maintain that the Equal Protection Clause does not protect women, because the framers of the clause did not explicitly intend to bring women within the protection of the clause. Fair enough. But on the other hand, the proponents of original intent also put forth the view that the Equal Protection Clause prohibits affirmative action in favor of minorities. They cannot have it both ways. It is just as true that the framers of the Fourteenth Amendment did not intend to prohibit affirmative action as it is that they did not intend to prohibit discrimination against women. What we see here, as in so many other examples of the purported use of original intent, is the attribution of the "originalists' " own views to the framers themselves.

My third objection to the doctrine of original intent is that it profoundly misunderstands the original intent of the framers themselves. To illustrate the point, let us again suppose that we have voted to enact the Equal Rights Amendment. And let us suppose further that we have explicitly addressed such issues as whether the Equal Rights Amendment should prohibit separate men's and women's bathrooms in public buildings, or should prohibit the exclusion of women from combat, or should prohibit the exemption of women from the draft, and that we have reached some clear, general consensus on those issues. Suppose I then asked you, however, whether the conclusions you reached with respect to those issues should control the meaning of the Equal Rights Amend-

ment, not in the year 1992 or 1997, but in the year 2041, or 2091, or even 2191.

I am confident that, as thoughtful, sensible individuals, you would respond that whatever intent you might have with respect to the resolution of those issues in the near future, you would not want to control strictly the meaning of the Equal Rights Amendment with respect to such issues 50 or 100 or 200 years from now. You would say: "How can we possibly know what the Equal Rights Amendment should mean with respect to those questions in a world that we cannot even begin to imagine?" And if I asked you what relevance you would want the Equal Rights Amendment to have to the resolution of those questions in 2041 or 2141, you would state that you want the Amendment to be viewed as an aspiration, as a principle, as a value. You would say that you want its meaning to evolve and shift with changes in society that you know you today cannot foresee. In short, you would want, as a matter of your own original intent, a relatively open-textured interpretation, not the sort of crabbed construction those who espouse the doctrine of original intent put forth. The framers, of course, as similarly thoughtful and sensible individuals, fully understood this problem. They too did not intend their immediate expectations of the effects of the provisions they were adding to the Constitution to control into the indefinite future. Their decision to employ vague and open-ended language testifies to their understanding that the meaning of those provisions would necessarily evolve if they were to retain their vitality and relevance in an ever-changing society. As Alexander Hamilton observed, "Constitutions should consist only of general provisions; the reason is that they must necessarily be permanent, and that they cannot calculate for the possible change of things."

My point is not that constitutional interpretation should be unleashed from the core intentions and understandings of the framers. It is, rather, that those core intentions provide only a starting point for analysis. Such an approach, which grants considerable responsibility to the Court to employ analogical reasoning to make constitutional provisions effective and meaningful in an ever-evolving society, will not always produce "right" constitutional conclusions. Once freed from the narrow constraints of a rigid and artificial originalism, constitutional interpretation must involve a process of judgment. There will be unwise as well as wise exercises of this judgment. But no institution of government is always "right." The Supreme Court, of course, must be especially careful in the exercise of the power of judicial review, for when it invokes that power it

acts in a nondemocratic fashion. But the power of judicial review, and the responsibility aggressively to enforce the rights and liberties enshrined in the Constitution, provide essential checks on the majoritarian process. The framers intentionally built these checks into the central fabric of our constitutional structure, and an abdication of this responsibility would, in my view, be as bad, or worse, than its occasional overuse.

Perhaps the best test of any institution of government is whether it has made this a better, more decent, and more civilized society. If for the past forty years we had had Justices who subscribed to the theory of original intent, we still would have state-sanctioned prayer; state-mandated racial segregation in our schools; no constitutional protection of equality for women; no constitutional protection against even gross malapportionment of our legislatures; no disclosure of the Pentagon Papers during the Vietnam War; no federal constitutional protection of freedom of speech, freedom of press, freedom of religion, or other fundamental rights against *state* infringement; no effective restraint against government abuse in the interrogation process; no effective protection against government lawlessness in search and seizure; and no effective right to counsel for persons accused of crime. If I am right that the ultimate question in evaluating an institution of government is whether it has made this a better or worse society, then for me the answer is clear: the judicial activism of the past that the proponents of original intent have subjected to such abuse in recent years has, on balance, made this a more sane, a more decent, and a more civilized society.

Now, what does all this have to do with Bill of Rights in the next 200 years? Well, if we embraced a rigid doctrine of original intent as the core of our constitutional interpretation, the meaning of the Bill of Rights in 2191 would look very much as it would in 2091, or 1991, or 1891, or 1791. That is, in the absence of amendments to the Constitution itself, the Bill of Rights would prohibit essentially the same practices in 2191 that it prohibited in 1791, and little, if anything, else. The enormous changes in society, culture, and technology in the interim would be of no constitutional consequence. Constitutional interpretation would be static, and I surely would not have been invited to offer my thoughts on this subject.

Fortunately, that is not the case. Original intent is not and never has been the predominant mode of constitutional interpretation. We have a dynamic, not an ossified Constitution. This is not, however, all good news. For the corollary is that, once freed from the constraints of origi-

nal intent, it becomes largely impossible to predict what constitutional interpretation of the Bill of Rights will look like as we move into an always changing and uncertain future. Freed from the binds of original intent, it is no more meaningful for me to attempt to *predict* the meaning of the free speech guarantee in the year 2191 than it would be for you, as framers of the Equal Rights Amendment, to attempt to *control* the meaning of that guarantee 200 years from now.

In short, and in all candor, I have little, if anything, useful to tell you about what the Bill of Rights will mean in the next 200 years. Consider, for example, a similar conference in 1891 designed to forecast the interpretation of the Bill of Rights in the next century. If we were today to review the predictions proffered at that conference, I am certain we would find that the prognosticators of the time failed dismally. Indeed, one prediction I will make today, though I am not sure hindsight qualifies as prediction, is that, unlike the present, in which we are inundated with celebrations of the Bicentennial of the Bill of Rights, few, if any, conferences, panel discussions, debates, or symposia were held 100 years ago to mark the Centennial of the Bill of Rights.

This, in itself, is significant. The plain fact is that in 1891 the Bill of Rights really did not seem all that important. This was so because the single most important development in the history of the Bill of Rights, and in the importance of the Bill of Rights to our Nation, occurred after 1891, was largely unanticipated in 1891, and did not even involve an interpretation of the Bill of Rights itself.

This development was the doctrine of incorporation, which did not emerge in full form until the 1930s. Let me take a moment to explain. The Constitution is a charter of government. The rights set forth in that document are not rights in the general sense. They are, rather, limitations on government. Thus, try as hard as I might, I cannot violate your right to free speech, or freedom of religion, or your freedom from unreasonable searches and seizures. I may impair your *ability* to speak freely, for example, by assaulting you for advocating communism, but this would not violate your constitutional *right* to freedom of speech. Only the government can do that.

Similarly, the Constitution of the United States and its Bill of Rights originally were designed and understood as limiting only the national government. Thus, your "right" to freedom of speech guaranteed by the First Amendment limited the federal government, but not the State of Missouri or the City of St. Louis. The State and the City, like private

individuals, were legally incapable of violating the Bill of Rights, for those rights were designed to limit only the government of the United States.

After the Civil War, however, the Nation adopted the Fourteenth Amendment. Through a process of constitutional interpretation that evolved over many decades, the Supreme Court gradually held that that Amendment, which prohibited any state from denying any person "due process of law," "incorporated" within its protections most of the rights guaranteed in the original Bill of Rights against the national government. As a consequence of the doctrine of incorporation, the United States Constitution now prohibits the State of Missouri and the City of St. Louis, like the government of the United States, from denying your freedom of speech, your freedom of religion, and your freedom from unreasonable searches and seizures.

This doctrine has had an enormous effect on the importance of the Bill of Rights and of the Supreme Court, for it brought to the Court's attention a broad range of laws and governmental practices that previously would not have been within the purview of the Constitution, and because it established a nation wide, uniform protection for our most fundamental rights and liberties against *all* governmental interference. As a practical matter, the Bill of Rights we celebrate today is as much the product of the doctrine of incorporation as it is of the drafters of the first eight amendments themselves. Thus, even if a conference on the Centennial of the Bill of Rights had been held in 1891, the speakers would not have had any idea of the extraordinary developments to come. Incorporation was the key.

The prediction problem goes even further, however, for even if a Centennial Conference had been held in 1891, and even if some speaker had presciently predicted incorporation, it is doubtful that the participants would have anticipated the other critical developments of the next 100 years. The Supreme Court of 1891 was notoriously conservative. Indeed, that Court only a few years later held in *Plessy v. Ferguson* [3] that racial segregation was constitutional so long as it met the principle of "separate but equal," and that Court only a few years later laid the groundwork for the doctrine of economic substantive due process, which invalidated a broad range of reform legislation designed to protect consumers and workers from the abuses of an unregulated market.

3. 163 U.S. 537 (1896).

It was through the filter of such experience that the participants in our hypothetical 1891 Conference would have looked forward, and through that filter, the speakers could not possibly have foreseen that the Supreme Court of the future would outlaw school prayer, require the police to give *Miranda*[4] warnings, protect the right to advocate violent overthrow of the government, or recognize a constitutional right to abortion. No one in 1891 would have predicted all, or any, of that.

Why is prediction so difficult? After all, even if we reject the static concept of original intent, constitutional interpretation is "law," and "law" should have some element of constancy, certainty, and predictability. What, then, is the problem?

The problem is time. In fact, law, even constitutional law, is generally quite constant, certain, and predictable—if we look at it in relatively short time-bites. But over decades, to say nothing of centuries, law, and especially constitutional law, is unpredictable in the extreme. This is so for several reasons. But before I turn to those reasons, I would like to say just a word about why, over the short run, constitutional law is law and not "politics," why it should not be understood as the product of mere judicial whim, preference, or partisan ideology.

Like all judge-made law, the doctrine of precedent governs constitutional law. Judges, even Justices of the Supreme Court, are steeped in our tradition of *stare decisis*. They do not see themselves as free to reexamine every issue every time it arises. Even our most radical Justices, of the left or the right, have felt themselves constrained by the body of law with which they must work. They are not free simply to jettison the past and call a "do over." Each decision must build upon, address, and confront the past. The process is cautious, incremental, and tentative. It is remarkably patient.

Here is an image for you to consider. Imagine an enormous gelatinous mass large enough to fill a football field. The mass moves slowly forward. Now imagine nine individuals in black robes, each carrying a bucket. They are at the front of the mass, and it dwarfs them. As the mass oozes forward, these individuals use their buckets to try to direct its flow. Sometimes they all, or most of them, try to move the mass in the same direction. More often, they all, or most of them, try to move the mass in different directions. Sometimes they can shepherd the mass, but it is slow going and it takes time.

4. Miranda v. Arizona, 384 U.S. 436 (1966).

The mass, of course, is the body of law with which the Justices must work. It has a powerful effect on what they can do, but changes of direction—usually small, occasionally large—are possible, particularly if the Justices have a common vision and lots of time in which to do their work. It is the mass that makes law, especially in the short run, predictable.

What, then, makes constitutional law so unpredictable in the long run? Put differently, what determines the direction the mass will take? There are several factors. First and most obviously, there is the nature, background, and ideology of the Justices themselves. Different individuals bring to the Court different values, experiences, and visions of the role and responsibility of the Court in our constitutional system. Those values, experiences, and visions profoundly affect the way in which they approach—and decide—constitutional questions. William Rehnquist has a vastly different vision of constitutional law than Thurgood Marshall. A Court of nine Rehnquists will move the mass much differently than would a Court of nine Marshalls. This is neither a bad thing nor a good thing. It merely is. Justices, like all of us, are human. They see the world—including the legal world—through their own eyes. Law, and especially constitutional law, cannot be divorced from these differing perspectives. Law, and especially constitutional law, is not bloodless, formulaic, or mechanical. We should not pretend that it is. Constitutional law is unpredictable over the long run, not because individual Justices have differing views and perspectives as such, but because Justices are appointed by Presidents who do not make random choices and whose elections over the long run are impossible to predict. Who would have guessed in 1964, for example, when it looked as if we had seen the demise of the Republican Party, that Republicans would win six of the next seven Presidential elections? In 1964, we would have confidently predicted that Democrats would dominate the next quarter century and that the Warren Court, in spirit if not in person, would still be firmly entrenched today. Of course, as we now know, we could not have been more wrong.

Second, constitutional law is the product, not only of partisan presidential politics, but also of long-term social, economic, cultural, and political change in the Nation. The Depression of the 1930s produced an extraordinary centralization of authority in the national government to address a national problem. This mind set—looking towards a uniform, federal law—contributed significantly to the development of the incorpo-

ration doctrine, which produced a similar, uniform constitutional law at the federal level with respect to individual rights. Similarly, the movement of blacks to the North, the process of urbanization, and the civil rights movement together created the conditions that led to the criminal procedure revolution of the 1960s, in which the Court adopted the exclusionary rule, required *Miranda* warnings, and expanded the right to counsel in criminal prosecutions, all of which were designed to address evils that nonlegal social and economic change had produced.

Third, constitutional law is the product of technological change, much of which is difficult, if not impossible, to predict. The advent of electronic bugging devices and parabolic microphones posed new and difficult issues for the meaning of the Fourth Amendment. What is a "search"? What is a "seizure"? Similarly, the development of new means of communication has had profound effects on society in general and on the political process in particular—effects that have generated complex efforts to regulate the media and the political process in ways that could not have been foreseen in 1891.

Finally, constitutional law is the product of changes in world politics and economics. Developments in the Soviet Union led to the era of McCarthyism and the extraordinary strains that era placed on the First Amendment; developments in Nazi Germany had an important effect on American constitutional law, including the recognition in the 1940s of a constitutional right not to be sterilized, a decision that was a precursor of *Roe v. Wade*;[5] and the Vietnam War produced the *Pentagon Papers* decision,[6] which significantly strengthened our commitment to freedom of political expression.

What, then, of the next 200 years? Your guess, frankly, is as good as mine. Who will win the next ten elections—the Democrats or the Republicans? Will there even be Democrats in 2041? What will happen socially, economically, and culturally in the United States over the next 200 years? Will crime fulfill our worst nightmares? What will happen to the urban underclass? Will we suffer a depression, or two, or five? Will the population explode, or dwindle? What will we do with issues of gun control, sexual orientation, the changing concept of the family, and, perhaps, compulsory sterilization? What of technological change? What will happen with genetic engineering? With our ability to prolong life?

5. 410 U.S. 113 (1973).

6. New York Times v. United States, 403 U.S. 713 (1971).

With the increasing concentration of media and efforts to regulate the political process? With the ever-expanding capacity of government to gather, store, and process all sorts of information about our private lives? More speculatively, perhaps in 100 or 200 years we will have interplanetary or even interstellar travel. What, then, of the right to travel? We even may be forced to confront the awkward reality of extra-planetary aliens. Is a Uranian a "person" within the meaning of the Constitution? And what of world change? Will we, in 2091, merge with Canada? With the European Community? With the Commonwealth of Independent States? What will that do to our Bill of Rights? And what of the effects of religious fundamentalism? Will that movement take hold in the United States? Next year? In 2041? 2091? 2191? Can we even begin to guess at the answers to such questions?

Where, then, does this leave us? Certainly, I can offer some predictions and, not to disappoint you completely, I will. I can, for example, predict some of what will happen in the next decade. Given the current make-up of the Supreme Court, and its likely make-up into the next century, I predict the following concerning the Bill of Rights: *Roe v. Wade*[7] will be overruled. The Court will severely limit the protection of sexually oriented speech under the First Amendment. The Court will expand significantly the power of government to condition the receipt of government funding and other privileges on the waiver of constitutional rights. This shift, presaged by last year's decision on abortion counselling,[8] will vastly enlarge the power of government indirectly to suppress the exercise of constitutional rights. The protection accorded religious freedom will be sharply curtailed. In the area of free exercise, the Court already has taken an important step in this direction in its decision two years ago denying the right of Native Americans to use peyote in their religious services.[9] In the area of establishment, we can expect a similar reorientation, perhaps as early as this year. Within a very short time, it will again be constitutional for public schools to display a creche on school grounds. The protections accorded those suspected of crime, reflected in such decisions as *Miranda v. Arizona*,[10] *Mapp v. Ohio*,[11] and other cases

7. *See supra* note 6.

8. Rust v. Sullivan, 111 S. Ct. 1759 (1991).

9. Employment Div. v. Smith, 494 U.S. 872 (1990).

10. *See supra* note 4.

11. 367 U.S. 643 (1961).

guaranteeing procedural fairness, will be significantly eviscerated in the years to come. The exclusionary rule, in particular, will meet its demise.

We might think of all this in terms of the mass. From 1954, when the Court decided *Brown v. Board of Education*,[12] until 1968, when the Warren Court drew to a close, the mass flowed in a very definite direction. The Court in this era used its energy, its resources, and its moral authority aggressively to interpret the Constitution in general and the Bill of Rights in particular to protect the fundamental rights of the Court's natural and intended constituency—the underrepresented, the despised, and the oppressed—those groups and individuals—Communists, Blacks, Jehovah's Witnesses, and members of other political, racial, religious, and ethnic minorities—whose interests were persistently unprotected in the majoritarian political process. In so doing, the Court, in my view, performed its *intended* function in the best and most responsible manner.

From 1968 to about 1988, the Court stopped the movement of the mass. With but a few exceptions, prior developments in the protection of individual liberties were brought to a halt, though they were only occasionally directly reversed.

We are now in an era in which the mass is flowing back on itself, in new swirls and patterns that protect states' rights and federalism, the democratic principle, and executive authority. The rights of the unrepresented, the oppressed, and the disadvantaged are a nuisance, rather than a mission. In the coming years, the Bill of Rights will be in remission. The Court increasingly will focus on issues of federalism and separation of powers, and potential civil rights litigants will grow ever more reluctant to bring their causes to the Court. We will, in an important sense, be a nation *without* a Supreme Court in terms of its most important function. This is, in my view, a severe failure of our constitutional system.

How did this happen? Is it our fault, if fault it be? If, as I suggest, we cannot predict the future, can we at least control it? We cannot control most of the forces I identified earlier that shape the evolution of constitutional law. Social, economic, cultural, political, and technological changes provide the backdrop against which the Court operates. They are, for these purposes, a given.

We do, however, have some control over what in the end is the most important factor—the character, the ability, and the vision of our Justices. It is, in the end, the individuals who wield the judicial power of the

12. 347 U.S. 483 (1954).

Supreme Court of the United States who must face the challenges of the future, and the best way to face those challenges well is to appoint the right men and women to the task.

This is both easier and more complex than it sounds. On the one hand, it is unlikely in the extreme that a political majority will elect a President on a platform that calls explicitly for the appointment of Justices who will aggressively construe the Constitution to protect the rights and interests of racial, religious, and other minorities. The Court, at its best, is counter majoritarian. That is the deepest irony of our constitutional structure, and political majorities rarely will be galvanized to elect a President so that he or she can restrict the majority's own power. It is thus not surprising that appeals to the electorate concerning the Court are most successful when they appeal to those who believe that "the Court has gone too far."

We do, however, have every right to expect that our Presidents will appoint only truly distinguished individuals to the Court; that in making their nominations our Presidents will take into account not only partisan political advantage, but also the special and unique role the Court plays in our complex constitutional system; and that our Senate will confirm only those nominees who meet the highest standards of excellence and whose appointment will serve the best interests of the Nation.

In this, our Presidents in the last quarter-century have let us down, for they too often have placed partisan political advantage over their responsibility to preserve and protect the essential role of the Court, and our Senate has let us down because of its failure to assert its authority and its constitutional prerogative to insist on nominees who serve what they, too, believe to be the best interests of the Nation.

According to popular myth, the Senate must exercise its advise and consent power to confirm a Presidential nominee unless the Senate finds that the nominee is intellectually unqualified or lacking in character. This seriously misconceives the appropriate role of the Senate and confuses the Senate's role in considering a Presidential nominee for the position of Attorney General or Secretary of State with its role in considering a Presidential nominee for appointment to the Supreme Court of the United States. In the former situation, it is appropriate for the Senate to defer to Presidential prerogative, because the Attorney General or Secretary of State is a personal adviser to the President whose term of office ends with the term of the President. A Justice of the Supreme Court, however, is not a personal adviser to the President, but the holder of one

ninth of the power of the third branch of government, and a Justice's tenure is, of course, for life.

No reason in political theory, national tradition, constitutional history, or common sense exists for the prevailing myth that the Senate must defer. Indeed, as originally drafted, the Constitution assigned the power to appoint Justices to the Senate. The power to nominate was reassigned to the President on virtually the last day of the Constitutional Convention when it occurred to one of the framers that multi-member bodies are not very good at making appointments. The decision to give the President the power of nomination was thus in no sense intended to give the president the final say.[13]

Of course, throughout most of our history, the Senate has deferred. But this is so because, through most of our history, the Presidency and the Senate have, at any point in time, been controlled by the same political party. In such circumstances, one would of course expect the Senate to defer. But when the Senate and the Presidency have been in different political hands, the Senate frequently has denied confirmation.

The awkwardness of the current state of affairs is evident in the fact Republicans have controlled the Presidency for nineteen of the past twenty-three years, while Democrats have controlled the Senate for twenty-one of those years. There has been no national consensus in favor of one party or the other. Yet in those twenty-three years, we have had ten consecutive Republican appointments of conservative—often extremely conservative—Justices.

This might be acceptable if there were, in fact, a true national consensus reflected in one party's dominance of the national government. But in an era of divided government, the Senate's failure to exercise its constitutional authority and responsibility—in the face of highly ideological Presidential nominations—has produced a serious constitutional failure. It is a failure that we, and our children, and perhaps even our children's children will have to live with well into the twenty-first century.

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13. *See* David Strauss & Cass Sunstein, *The Need for Senate Independence in the Confirmation Process*, 101 YALE L.J. (forthcoming 1992); James E. Gauch, Comment, *The Intended Role of the Senate in Supreme Court Appointments*, 56 U. CHI. L. REV. 337 (1989).