THE VARIETIES OF ACTIVIST JUDGES

The Warren Court

Ever since the 1950s conservatives have railed against “activist judges”. They mean the Warren Court. because it took a broader view of the Equal Protection Clause of the 14th Amendment than the Reconstruction-Era Supreme Court did in cases like *The Civil Rights Cases*.

The Warren Court said in *Brown v. Board* that Black kids must get the same education that White kids get, and the way to insure that was to put all the kids together in the same schools.

In *Gideon v. Wainwright*, the Warren Court said that the right to counsel in criminal cases was meaningless for all of the people who didn’t have enough money to pay a lawyer. It forced states to provide counsel for every defendant who couldn’t pay for one.

The Warren Court established a zone of personal privacy in *Griswold v. Connecticut*. It established a right to abortion in *Roe v. Wade*.

These and many other Warren Court cases have a common thread. They all improve our democracy by making sure that more and more people share in the rights and benefits of being an American citizen. Some of them increase our ability to participate in our democracy, as in *Baker v.Carr.* Some increase our personal freedom. Some insure that everyone receives a greater level of protection from government prosecution or interference. All of them take the Reconstruction Amendments seriously, and try to implement them, as Congress expressly intended.

The Warren Court’s broad reading of the Constitution horrified conservatives because it upset a century of Constitutional decisions and laws designed to insure the suppression of Black people and women and insure White male

supremacy.

A very brief discussion of the theory of Constitutional and Statutory interpretation

Over the centuries the Common Law and US jurisprudence worked out a number of theories of interpretation of the Constitution. In 2021, the Congressional Research Service issued nine very short essays under the heading The Modes of Constitutional Analysis. Here's an index.

1. The Modes of Constitutional Analysis: An Introduction (Part 1)

2. Textualism

3. Original Meaning

4. Judicial Precedent

5. Pragmatism

6. Moral Reasoning and the National Ethos

7. Structuralism

8. Historical Practices

9, The Constitutional Avoidance Doctrine

These essays provide an introduction to the basic concepts with examples, and describe some of the pros and cons of each mode.

In general, SCOTUS decisions and dissents rely on a combination of these modes of analysis. *Griswold v. Connecticut,* with its concurring and dissenting opinions is a good example of the application of most of these modes of analysis.

Warren Court Jurisprudence

The Warren Court's decisions follow a tradition laid down in the English Common Law and imported to the US as part of tour legal system. Courts hear hundreds of cases, and they write down the facts, the decisions and the rationale for their rulings. These accumulate over time, and gradually the courts build up principles which they follow in current cases. These rules are gathered into books and taught to lawyers who

can use them to advise clients of likely outcomes. This is what is meant by the terms stability and predictability used in the CRS essays.

Griswold is a good example. The majority held that the Constitution protected a zone of privacy for Americans. The words do not appear in the Constitution. William Douglas, writing for the majority, examined a number of cases construing different parts of the Bill of Rights, and synthesized them into the proposition that state and federal governments are not allowed to invade people's personal lives or interfere with their private decisions. Marriage is one of those areas. As Douglas said:

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

Conservatives mock the use of the terms penumbra and emanation used by Douglas, but they have-no acceptable answer for this question. Each of the modes of analysis (other than originalism) support this outcome. That didn't stop conservatives from attacking the Warran Court, and it didn't stop them from pushing government into our private lives either.

Conservative Activism

In the 1970s rich conservatives began to fund efforts to reverse the Warren Court decisions. They set up organizations like the Federalist Society and others led by Leonard Leo to push conservative ideas through law professors and legal think tanks.

These academics produced motivated scholarship aimed at getting rid of any mode of constitutional analysis that could be used to expand rights. Conservatives argued that only textualism and originalism, and perhaps judicial precedents from the 19th and early 20th

Centuries, are legitimate forms of Constitutional analysis. Everything else is activist. These conservative academics produced a cadre of movement lawyers who now staff groups funded by rich right-wingers. like Americans Defending Freedom. They generated a roster of potential judges committed to the conservative legal project.

Here's an explanation from Nelson Lund, a professor at the Antonin Scalia Law School at George Mason University, writing in the New York Times.

> The goal of the conservative legal movement has been to replace the result-oriented adventurism of the Warren court during the 1950s and 1960s with respect for the original meaning of the Constitution, including its allocation to Congress of the sole authority to enact and amend statutes. If the government wins either of these cases, let alone both, that movement should recognize that its project has not succeeded.

The two cases Lund is talking about are *US v. Rahimi* and *Garland v. Cargill*. Rahimi is the subject of a domestic abuse order under which he may not possess guns. Cargill sells bump stocks which are barred by a federal rule. Lund seems to think it would be "activist" to uphold democratically enacted laws, rules, and court orders restricting violent domestic abusers, and stop the sale of attachments that, as he puts it, "facilitate mass murder."

Lund's statement that conservatives want to protect the Congressional power as the sole authority to enact and amend statutes is laughable. His interpretation of the Constitution bars Congress from regulating firearms at all, and from empowering federal agencies to act under statutory limitations.

Lund and the Roberts Court refuse to consider

the real-world results of their ideology. It’s nothing to them if women suffer and die, or if not-white votes are suppressed or if domestic violence deaths rise, or mass murders plague churches, schools, concerts, and shopping malls.

The judicial activists on the Roberts Court demonstrate the damage an ideologically-driven and unconstrained SCOTUS can do to democracy.