

THE INEVITABILITY OF JUDGMENT

One of the puzzles of unenumerated rights has been how judges usually regarded as conservative came to support them. Justice O'Connor and Kennedy had famously joined in a critical opinion in *Planned Parenthood v. Casey*, upholding the principle of Roe. Two terms ago, Justice Kennedy wrote the decision in the Texas sodomy case, and Justice O'Connor concurred in a separate opinion. When President Reagan appointed these two justices to the Court, he was pursuing a conservative agenda. After all, he also nominated Justice Scalia and proposed Robert Bork. These justices have been very deferential towards the states – joining Chief Justice Rehnquist in support of the new federalism, and upholding the state in criminal procedure cases. Their decisions in most areas have been marked with caution, not bold new directions – centrist and not radical. Thus, many people were surprised when both O'Connor and Kennedy supported recognition of a constitutional right to choose to have an abortion, but explained their decision by pointing to the justices' discussion of respect for precedent. But if their opinion in the abortion cases was based on respect for precedent, that can hardly be said for their decision to overturn *Bowers v. Hardwick* and strike down the Texas sodomy law.

A variety of explanations may be offered for their views – from Justice O'Connor's respect and affection for Justice Powell to the exposure of these justices to international influences and personal experiences with minorities and gays. Any decision is the product of great many different influences, and it is unlikely that one alone was decisive. This short essay merely suggests that one element overlooked in most discussions is judicial modesty.

Justices Kennedy and O'Connor went to law school in the 50's, a time when the Court was wrestling with *Brown* and its immediate aftermath. Academic faculties, however, came out of the generation of the 30's. In the 30's, the Court was castigated for its "hubris," an arrogance that led it to invalidate economic legislation under the due process clause and brought forth President Roosevelt's court packing plan. By the 1950's, the critics of the old court had prevailed both on the Court and in academy. The values of neutral principles and judicial deference dominated law schools. Justice Holmes was the heroic model – willing to invalidate legislation that was contrary to his understanding of the command of the Constitution on freedom of speech, but otherwise deferential to "progressive" legislation. The Court's intellectual leader on the left was Justice Black, a proponent of a liberal interpretation of enumerated individual rights, but deferential to the legislature where there was no textual anchor to stand in the way. The judge saw himself as a passive vessel for implementing the values of the document, intervening where the Constitution directed intervention and otherwise upholding the state.

The language of the Constitution rarely commands the result in any case that winds up at the level of the Supreme Court. It gets there because a plausible argument can be made for an interpretation either way. For the Court to strike down a statute without an imperative constitutional command, justices must find they are better guardians of constitutional principle than the legislatures. Thus, a powerful argument has long been made that the undemocratic nature of the court should make judges reluctant to exercise their acknowledged power to invalidate legislation. Modesty is critical. Even Justice Black's activism in voting and civil rights decisions was based in his perception

that the guarantee of equal protection like the guaranty of freedom of speech was a sweeping and explicit command of the constitution, and he insisted on deference to the legislature if rights were to be implied.

Deference in some fashion enables judges to disclaim the responsibility of judging – “I didn’t impose this law.” Thus from Justice Black in *Griswold* to Justice Thomas in *Lawrence*, we find judges voting to uphold laws they call silly, which they would have opposed as legislators, but which they claim they lack power to interfere with because of their role. What seems striking about the decision in *Lawrence* is that the decisive votes are from judges who were trained in a tradition of judicial restraint and inculcated with the values of deference adhering to express language.

Why should the right of “privacy,” a right to engage in abortion and homosexual relations, be a protected right when the constitution makes no specific reference to either behavior? Both behaviors had been subject to both legal and moral disapproval for centuries before the Court suddenly proclaimed them to be constitutional rights.

One critical factor is that the decision of the Court upholding state regulations is a statement that this decision is not one for individuals, but for the state. The court must make a decision in every case – it may decide not to decide (e.g. refusing to accept certiorari, finding no jurisdiction for either prudential or constitutional reasons), but that itself is a decision with consequences. There are always at least two parties before it, one of whom will be disappointed with the result. Notions of an “imperial judiciary” are largely criticism aimed at the criteria for decision and the willingness of the court to order other institutions of government to act or to itself create standards that supplant the standards established by other institutions.

Both Justices Kennedy and O'Connor have joined Chief Justice Rehnquist on his quest for a new federalism that limits federal orders against the state. From one perspective, the limits imposed on the federal government are part of the imperial judiciary – putting itself on a higher plane than the legislature. But refusal to enforce the federal law enables Courts to evade a confrontation with the state government. The federalism cases show that upholding legislative action can bring the Court into conflict with other governmental institutions, so that the Court is ordering a state government to pay specific amounts of money. A court order against state government itself may be seen as arrogant, and the refusal of the Court through the new federalism to participate in controlling the states as a show of deference. At least the sovereign immunity decisions of the Court then may be characterized as anti-imperial, because they allow states to retain decision-making autonomy.

It is in that sense that the decision in *Lawrence* shows modesty rather than hubris. The issue posed by the dissenters is whether the court can place its judgment against that of the legislature, but the issue for the majority is whether the court can appropriately find that choices with respect to intimate relations are for society rather than the individual. The Court is part of society, and it is deference to individual decisionmaking that marks the core of the decision.

The New Deal deference to the legislature nominally restricted private choices – to work for less money, longer hours and without unions – but those choices were constrained by social conditions. The worker did not want the term, but wanted work more. It was possible to argue that the elimination of the terms for everyone did not discourage employment (many argued it provided purchasing power that increased it), so

that it was removing an economic weight in the calculus of the agreement. By eliminating a potential pressure, it equalized bargaining abilities. Thus, judges could believe that deference to the legislature served to increase rather than decrease individual choice. But legislation on intimate matters is neither intended to nor does it increase individual choice. It forces the judge to confront whether society should make the choice for the individual. To think that society knows what choice is best for the individual in these core matters is not so deferential – and where the choice is to defer to the legislature or to the individual choice, deferral takes on an air of moral superiority rather than humility.

Of course there is a sense in which *Lawrence* is an assertion that the justice knows better than the legislator what the law is, but the “imperial” judiciary here is not arrogant in its assumptions but humble. The good Catholic, be they politician or judge, may follow the teachings of the church to believe that abortion is immoral and wrong, and yet believe that they do not have the right to impose that view on others. At least in this area, it may be that uncertainty and modesty support the activist Court.

Whether “we” know best is even visible in *Grutter*, where the amicus briefs from departments of the federal government and from business on the crucial importance of diversity had an impact on the Court’s decision. There, of course, the court deferred to the governmental institutions decision, finding that it should not overturn the decision of the school to give weight to diversity even though it led to a racial classification and implicated the equal protection clause.

In conclusion, at least from a particular perspective, the actions of the Court in the radical new lines of decision in federalism and due process flow from a desire to avoid

confrontation and modesty in believing itself better able to make decisions than other bodies.