JUDICIAL RECANTATION

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I. JUDICIAL RECANTATION

Civil libertarians frequently sigh when retired Justice Lewis F. Powell, Jr. speaks. Three years after leaving the bench, Powell admitted to a New York University Law School audience that he probably made a mistake in *Bowers v. Hardwick*¹ by providing the crucial fifth vote that sustained state bans on homosexual sodomy. "When I had the opportunity to reread the opinions in that case," Powell acknowledged, "I thought the dissent had the better of the arguments." More recently, Powell revealed to his biographer that he regrets having written the majority opinion in *McCleskey v. Kemp*. Given a second chance, Powell would now join the four dissenters in that case and reverse the vast majority of death sentences in the United States. Indeed, Powell advocates "that capital punishment should be abolished."

Powell's recent confessions support claims that prominent developments in American constitutional law are contingent;⁵ the Supreme Court might have decided major cases differently than it did. Had Justice Powell seen the light while on the bench, the Supreme Court would have dealt a crippling blow to the death penalty in *McCleskey*, and, in *Bowers*, barred states from criminalizing private homosexual conduct. Indeed, Powell had provided the fifth vote in

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^{1. 478} U.S. 186 (1986).

^{2.} JOHN C. JEFFRIES JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 530 (1994).

^{3. 481} U.S. 279 (1987).

^{4.} JEFFRIES, supra note 3, at 451; see John C. Jeffries, A Change of Mind That Came Too Late, N.Y. TIMES, June 23, 1994, at A23.

^{5.} See, i.e., Robert W. Gordon, Critical Legal Histories, 36 STAN. L. REV. 57 81-87; SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 160 (1994)("[T]he outcome of the long history of the First Amendment was not inevitable: American law and policy could have gone in a very different direction.").

conference to declare Georgia's ban on sodomy unconstitutional. His eventual change of heart seemingly resulted from the fortuitous coincidence of his having an articulate Mormon clerk, who vigorously disputed Powell's initial choice, and an equally bright gay clerk, who elected not to reveal his sexual orientation to the Justice.⁶

More significantly, Powell's second thoughts apparently bolster claims that an independent federal judiciary is capable of making counter-majoritarian decisions. Gay rights and the abolition of capital punishment were not popular causes during the mid-1980's. Appeals to traditional family values and demands that courts get tough on crime were staples of President Reagan's domestic policy agenda. Nevertheless, Powell's ambivalence suggests that only bad luck and bad timing prevented the Supreme Court from handing down rulings in *Bowers* and *McCleskey* that would have declared unconstitutional two policies that popular and electoral majorities strongly favored. Civil libertarians have reason to believe that a tribunal, sufficiently independent of political pressure, to come within a whisker of protecting gay rights and abolishing capital punishment during the Reagan years, might prove willing in the near future to defend constitutional liberties against sustained legislative and executive attack.

Before civil libertarians wistfully think about what might have been, however, they should consider the pattern of past recantations by former Supreme Court Justices. At least two other retired Justices have publicly regretted their votes in influential Supreme Court decisions. Justice William O. Douglas, in his posthumously published autobiography, disavowed his support in *Korematsu v. United States*, the decision permitting the military to evacuate Japanese-Americans from the west coast during World War II. After leaving the bench, Justice Homer Billings Brown criticized crucial features of his opinion in *Plessy v. Ferguson*. 8

Justices Powell, Douglas and Brown all renounced earlier votes that sustained popular, but constitutionally dubious, governmental policies. This judicial tendency to become more sympathetic to racial minorities and individual liberties after leaving the bench⁹ suggests a more

^{6.} JEFFRIES, supra note 3, at 516-29.

^{7. 323} U.S. 214 (1944).

^{8. 163} U.S. 537 (1896).

^{9.} This sympathy also arises after the political pressure has abated. Justice Douglas completed the bulk of his autobiography before he left the Court. WILLIAM O. DOUGLAS, THE COURT YEARS 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS ix-x (1980)

pessimistic interpretation of judicial recantation. The political pressures on sitting Justices may affect their judgment in constitutional cases, leading them to reject claims of constitutional rights that in more relaxed circumstances those Justices might come to recognize as valid.

II. SECOND THOUGHTS

Most Supreme Court Justices have little or no opportunity to reflect on their judicial careers. The vast majority of Justices leave the bench upon death or mental incapacitation. Thirty-four of the forty-eight Supreme Court Justices who served during the nineteenth century died in office. Contemporary Justices are more likely to resign before dying. Still, only six Justices who sat on the Supreme Court for at least ten years during the twentieth century lived for more than five years after retiring. For this reason, former Justices rarely recant opinions.

Nevertheless, although recantations by former Justices are rare, their limited occurrence does suggest that retired Justices are more likely to regret their votes in favor of state policies than their votes in favor of constitutional rights. The three Justices who confessed error after leaving the bench, Justices Powell, Brown and Douglas, all acknowledged that they had failed in important cases to protect the rights of racial minorities or individual liberties. No retired Justice has criticized his previous vote declaring a law unconstitutional. In particular, no twentieth century Justice has, following retirement, expressed second thoughts about past support for judicial decisions that expanded the rights of women, persons of color, political dissenters, or criminal suspects.

Justice Homer Brown's critical reappraisal of his majority opinion in *Plessy v. Ferguson*¹⁰ was the first and, perhaps, most significant judicial recantation in American history. Six years after leaving the bench, Brown expressed reservations about the Court's decision to sustain Jim Crow policies. In a tribute to the recently deceased Justice John Marshall Harlan, Brown declared that, although "twenty-eight years have elapsed since *Plessy v. Ferguson* was rendered . . . there is still a lingering doubt whether the spirit of the amendments was not sacrificed to the letter, and whether the Constitution was not intended to secure the equality of the two races in all places affected

with a public interest." Brown's essay in the American Law Review acknowledged that Harlan's dissent in Plessy had correctly characterized the racist motives underlying the Louisiana Coach law. Brown argued that Harlan had "assumed what is probably the fact, that the statute had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied or assigned to white persons." ¹²

Brown did not explicitly affirm or recant his vote in *Plessy*. Still, his comments after leaving the bench were inconsistent with crucial passages in his *Plessy* opinion. In *Plessy*, Brown wrote that separate but equal laws were "enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." However, Brown's 1912 article acknowledged that Louisiana had not acted to preserve "the public peace and good order," which was his original justification for finding that state mandated segregation was not "unreasonable." Sixteen years too late, Brown conceded that the Louisiana Legislature was promoting white supremacy. No longer did he believe *Plessy*'s infamous claim that if "the enforced separation of the two races stamps the colored race with a badge of inferiority, . . . it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it." ¹⁵

Justice Douglas was more willing to openly confess error. His autobiography bluntly criticized his tendency in the 1940's to side with proponents of limited judicial power when adjudicating controversial claims of constitutional wrong. "In retrospect," Douglas wrote, "I realize I made more mistakes in not following [Justice Frank] Murphy than in not following [Justice Felix] Frankfurter." Douglas particularly rued his failure to endorse Murphy's libertarian stance during World War II. Three decades after hostilities had ceased, Douglas publicly announced that he had "always regretted" his decision not to publish a concurring opinion in *Korematsu v. United States*, "agreeing to the evacuation but not to evacuation via concentration camps" of

^{11.} H.B. Brown, The Dissenting Opinions of Mr. Justice Harlan, 46 Am. L. Rev. 321 (1912).

^{12.} Id. at 336, 338.

^{13.} Plessy, 163 U.S. at 550.

^{14.} Id.

^{15.} Id. at 551.

^{16.} DOUGLAS, supra note 10, at 26.

^{17. 323} U.S. 214 (1945).

Japanese-American citizens.¹⁸ Indeed, Douglas came to regard the entire evacuation policy as unconstitutional. He noted in his autobiography that "[g]rave injustices had been committed," and "fine American citizens had been robbed of their properties . . ." Looking back from a critical distance at the Court's decision to support government policy in *Korematsu* and *Hirabayashi v. United States*, Douglas acknowledged that "Murphy and Rutledge, dissenting, had been right."

Sitting Justices have also occasionally recanted past opinions that upheld controversial policies. Two years after *Minersville School District v. Gobitis*,²² Justices Hugo Black, Douglas and Murphy publicly declared that they were wrong to sustain West Virginia's required flag salute exercise.²³ Justice Harry Blackmun has recently recanted his past votes in favor of capital punishment.²⁴ In private conversation, Justice Louis Brandeis told Justice Felix Frankfurter that he regretted endorsing judicial opinions immediately after World War I that narrowly defined First Amendment rights. Brandeis still maintained that the Espionage Act of 1917 was constitutional, but he would have "placed the *Debs* case on the war power." Had he done so, Brandeis maintained, "the scope of espionage legislation would have been confined to war."²⁵

Chief Justice Warren Burger, in his last term on the bench, asked the Court to "reexamine" whether abortion was a constitutional right. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 785 (1986) (Burger, C.J., dissenting). Burger, however, explicitly reaffirmed his original concurrence in *Doe v. Bolton*, 410 U.S. 179 (1973), the companion case to *Roe v. Wade*, 410 U.S. 113 (1973). Indeed, the Chief Justice only regretted the failure of other Justices, in subsequent cases, to follow the principles he had laid down in that opinion. *Thornburgh*, 476 U.S. at 782-85 (Burger, C.J., dissenting).

^{18.} DOUGLAS, supra note 10, at 280.

^{19.} Id.

^{20. 320} U.S. 81 (1943).

^{21.} DOUGLAS, supra note 10, at 280; see id. at 38-39, 44 ("[M]y vote to affirm was one of my mistakes.").

^{22. 310} U.S. 586 (1940).

^{23.} Jones v. City Opelika, 316 U.S. 584, 623-24 (1942) (Black, Murphy and Douglas, JJ., dissenting).

^{24.} Callins v. Collins, 114 S. Ct. 1127 (1994) (Blackmun, J., dissenting).

^{25.} The Brandeis-Frankfurter Conversations, in SUPREME COURT REVIEW 1985, at 324 (Melvin I. Urofsky ed., 1986).

III. THE MEANING OF SECOND THOUGHTS

Four (or seven) cases is hardly a sufficient basis on which to offer a comprehensive theory of judicial decisionmaking. Moreover, judicial second thoughts may be interpreted in various ways. From one perspective, the confessions of Justices Brown and Douglas support what Professor Gerald Rosenberg refers to as the "dynamic court view." Had these Justices been swifter (or better progressive advocates), American constitutional law in the late nineteenth and twentieth centuries might have been far more protective of racial minorities and individual rights.²⁶

From a second perspective, however, the judicial tendency to recant decisions that sustain controversial laws may provide more support for claims that sitting justices are unlikely to issue decisions that members of the dominant national coalition uniformly oppose.²⁷ In *Bowers*, ²⁸ *McCleskey*, ²⁹ *Korematsu*³⁰ and *Plessy*, ³¹ the Supreme Court upheld laws that were strongly supported by most elected officials and the general public. Constitutional attacks on race segregation, capital punishment and bans on homosexuality eventually proved persuasive to crucial Justices, but only after they had retired from the Court or their opinions became moot.³² At the actual moment of decision, when their constitutional choice had political ramifications, Justices Powell, Brown and Douglas convinced themselves that the popular policies before the court did not violate fundamental constitutional rights.

This judicial capacity to rationalize controversial votes in favor of state power suggests that, when faced with strong political pressures to sustain state policies, some Justices may subconsciously adopt decisionmaking rules that privilege government power. Justices Powell, Douglas and Brown did not explicitly adopt James Bradley Thayer's

^{26.} GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 21-30 (1991).

^{27.} The Supreme Court frequently declares laws unconstitutional when members of the dominant national coalition cannot agree on a common policy. See Mark A. Graber, The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary, 7 STUD. AM. POL. DEV. 35, 36 (1993).

^{28. 478} U.S. 186 (1986).

^{29. 481} U.S. 279 (1987).

^{30. 323} U.S. 214 (1945).

^{31. 163} U.S. 537 (1896).

^{32.} See JEFFRIES, supra note 3, at 451, 530; DOUGLAS, supra note 10; BROWN, supra note 12.

principle that courts should sustain any law that is "not unconstitutional beyond a reasonable doubt." Still, something similar to the rule of reasonable doubt seems to have affected their judicial deliberations in important cases. At the very least, *Bowers*, *McCleskey*, *Plessy* and *Korematsu* indicate that Justices sometimes need a much higher degree of confidence in their judgment to strike down a popular law than they do to sustain constitutionally dubious governmental policies.

This sub silentio double standard may provide another limit on the capacity of courts to protect racial minorities and individual rights. Commentators have previously pointed out that the appointment and confirmation process ensures that members of the federal bench will normally support whatever policies are preferred by the dominant national coalition. It is "unrealistic," Robert Dahl points out, "to suppose that a Court whose members are recruited in the fashion of Supreme Court Justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite."34 Moreover, when faced with hostile political forces, Justices have been unwilling to publicly articulate their notion of constitutional right.³⁵ For example, the Marshall Court ducked several opportunities to issue orders that the Jefferson administration would have ignored.³⁶ Bowers, McCleskey, Korematsu and Plessy suggest that the political pressures which make justices unwilling to express their constitutional convictions may also influence the very formation of those convictions. When faced with the possibility of issuing a concurrence or dissent that will provoke a political firestorm, Justices may convince themselves that the policy under constitutional attack is right, or at least, not unconstitutional. Confronted with substantial political and institutional pressures to sustain constitutionally dubious practices, Justices Powell, Brown, and Douglas repressed or discounted doubts as to the constitutional validity

^{33.} James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 129, 151 (1893).

^{34.} Robert A. Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 6 J. Pub. L. 279, 291 (1957).

^{35.} See generally WALTER F. MURPHY, CONGRESS AND THE COURT (1962); Stuart S. Nagel, Court-Curbing Proposals in American History, 18 VAND. L. REV. 925 (1965); Gerald N. Rosenberg, Judicial Independence and the Reality of Political Power, 54 REV. Pol. 369 (1992).

^{36.} See Marbury v. Madison, 5 U.S. 137 (1803); United States v. More, 7 U.S. 159 (1805). For good political histories of Marbury and More, see James M. O'Fallon, The Case of Benjamin More: A Lost Episode in the Struggle Over Repeal of the 1801 Judiciary Act, 11 LAW AND HIST. REV. 43 (1983); James M. O'Fallon, Marbury, 44 STAN. L. REV. 219 (1992).

of their votes. Only when they were off the Court and removed from political demands for conformity did those doubts return and eventually prove decisive.

The admittedly slim pickings of recantations by retired Supreme Court Justices place an ironic twist on Alexander Bickel's assertion that "judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government," that life tenured Justices "have certain capacities for dealing with matters of principle that legislatures and executives do not possess." When Justices Powell, Douglas and Brown had the "leisure... and the insulation" necessary "to follow the ways of the scholar in pursuing the ends of government," they recognized that popular governmental policies violated fundamental constitutional rights. Unfortunately, Bowers, McCleskey, Korematsu and Plessy suggest that sometimes justices only have "the leisure" and the "insulation" necessary to "deal with matters of principle" when they are no longer justices.

^{37.} ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 25-26 (1962).