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Playing the Judicial Long Game: How Long Is Enough?

The Honorable Edith Hollan Jones

KEY TAKEAWAYS

Constitutional indeterminacy ultimately puts at risk the rule of law and very palpably undercuts the notion that ours is a government of laws, not men.

Compared to the watershed eras, the long game for a return to originalism and textualism is becoming very long—and many innings remain.

Clarity is not served by decisions that nod to originalist reasoning and then veer into judgments based on newly minted, seemingly ad hoc grounds.

Heartfelt thanks are due to many friends responsible for my being here this evening to deliver the Story Lecture. It is an honor to follow in the path of judicial heroes like Judge [Robert] Bork and nine eminent judges and now-Justices. I owe the greatest debt to my long-suffering husband, Woody, the true intellectual of our family, and to my son and daughter-in-law, Andrew and Miranda Jones, and three granddaughters. I am also indebted to teachers (in chronological order) including Charles Alan Wright, James McClellan, Gary McDowell, Stephen Presser, Ralph Rossum, Frank Buckley, Raoul Berger, Walter Berns, Philip Hamburger, Hadley Arkes, and Antonin Scalia.[1]

Teachers have the greatest responsibility in passing on our Constitutional history and tradition to succeeding generations, and each of these gentlemen has contributed to the enlightenment and understanding

of hundreds of grateful students like me. And although I could name even more mentors, I will stop here, with a global thanks to over 100 former law clerks, my friends in the audience tonight, and my judicial assistants, including, now for over 10 years, Pam Wood.

Finally, it is a great honor to commend General [Edwin] Meese only a week after he was awarded the Presidential Medal of Freedom. Without his vision, leadership, and persistence, I would surely not be here, nor, in all probability, would the originalist revolution have been waged. My remarks this evening are directed to the legacy of that revolution.

The "Long Game"

Next May, I celebrate my 35th year on the Fifth Circuit Court of Appeals. This, plus slowly advancing age, have inspired contemplation about what I, and the judiciary of which I have been a part, have accomplished. In other words, has my tenure been the product of a misspent youth?

One can contemplate from many different perspectives, of course. But as an avowed, even notorious, judicial conservative and a younger appointee to the bench during the Reagan Administration, my retrospective turned to the aspirations that the President and General Meese had for their judicial appointments. To make it quite clear at the outset, "aspirations" are not to be confused with "outcomes": We were not nominated with an agenda to obtain particular results in particular types of cases. Instead, General Meese's and the President's aspirations were simple: a return to textualism and its tools in basic legal reasoning and to faithfully upholding the original meaning of the Constitution.[2]

I have tried to steer by those twin polestars. As President Reagan said, however, there are simple answers, but there are no easy answers.[3] A few prevailing opinions I've written in contentious cases, tucked into a significant body of dissents, confirm his aphorism. It can be hard to mold aspiration to actual decision making.[4]

Tonight, I will try to assess the extent to which the aspirations of the Reagan Administration are on the way to being fulfilled. An explanation for certain important decisions in recent years is that the Supreme Court is playing "the long game."[5] How long is the "long game"? To figure that, it is useful to compare three previous watershed periods in American constitutional law. This sophisticated audience is well acquainted with these periods, which include the Marshall Court, the transition to the Progressive Court, and the Warren Court. Sketching the evolution of legal reasoning and Supreme Court decisions during those periods, along with the political

backdrop, facilitates comparing these periods with the Supreme Court during my tenure thus far. And I venture to show what these preceding eras can teach judicial originalists.

The Marshall Court, 1801–1836, and Justice Story's Contribution

Chief Justice [John] Marshall was appointed in December 1801, one of the final acts of [President] John Adams. Marshall accepted the nomination by default after John Jay declined, deeming the Supreme Court not a significant body. Chief Justice Marshall showed the shortsightedness of Jay's view. Although today Justice Marshall's decisions seem cloaked with inevitability, it is easy to forget that he and his Court faced strong political headwinds. At the time of his appointment, Marshall's five colleagues on the Supreme Court were all Federalists. Within six years, however, death, resignations, and a bill expanding the Supreme Court had allowed President Jefferson to appoint four Republican Justices, placing Marshall nominally in the minority. So it would remain for the duration of his career.

Republicans mistrusted the federal judiciary, owing to the anti-Federalist fear of overweening judicial power, the courts' vigorous enforcement of the Sedition Act, and unresolved constitutional conflicts over the respective spheres of federal and state power. After his inauguration, Jefferson expressed in a private letter his hope that Congress would "[lop]... off the parasitical plant engrafted at the last session."[6] The Republicans accommodatingly passed the Judiciary Act of 1802, which eliminated the Federalist-appointed "midnight judges'" positions.

In an additional petty blow, Congress statutorily canceled the Supreme Court's summer session, thus delaying any challenge to that controversial law until at least February 1803. Privately, Marshall and his colleagues feared that for Congress to eliminate judgeships was an affront to Article III's life-tenure protection. But the challenge to the 1802 Judiciary Act eventually failed on procedural grounds.

Not so the challenge to a provision of the 1789 Judiciary Act, from which *Marbury v. Madison*[7] evolved in 1803. Chief Justice Marshall's unanimous opinion presaged a unified judicial approach that would be the norm for years to come. The Court's power of constitutional judicial review had clearly been envisioned in documents like Hamilton's *Federalist* 78, but *Marbury* explained why the Supreme Court had the duty to declare void acts of legislation in conflict with the Constitution. Courts may not enforce laws that derogate from or clash with the fundamental law, and this result follows

inexorably from the fact the Constitution is the permanent expression of the government's structure chosen by the people.

Marbury initiated a series of decisions that filled in details integral to preserving the constitutional and federalist structure. As my friend Mike Uhlmann, God rest his soul, summarized, "[d]elineating the constitutional topography of federalism was only one of [Marshall's] signal accomplishments. The achievement of that goal necessarily entailed careful explication of...the Commerce Clause, the Contracts Clause, the Supremacy Clause, and the constitutional bargain that created the Bill of Rights."[8] You all know the cases: *McCulloch*, *Dartmouth College*, *Gibbons*, *Fletcher*, *Cohens*, and others.

Throughout his tenure, Marshall enjoyed unwavering support and admiration from Justice Joseph Story. Story contributed his incomparable intellect and encyclopedic mastery of law to further defend the principles adopted by the Marshall Court. Story's *Commentaries on the Constitution of the United States* is dedicated to Marshall. The work was intentionally designed to counteract the ascendance of the compact theory and the nullification movement. Story's Preface to the *Commentaries* contained this memorable passage:

> The reader must not expect to find in these pages any novel views, and novel constructions of the Constitution. I have not the ambition to be the author of any new plan of interpreting the theory of the Constitution, or of enlarging or narrowing its powers by ingenious subtleties and learned doubts.... Upon subjects of government it has always appeared to me, that metaphysical refinements are out of place. A constitution of government is addressed to the common sense of the people; and never was designed for trials of logical skill, or visionary speculation.[9]

During the era of the Marshall Court, the nation was beset by political turmoil, war, and philosophical divisions. Marshall and Jefferson were political and personal enemies. The Jeffersonians had attempted to impeach and remove the Federalist-appointed Justice [Samuel] Chase on largely political grounds. Marshall thwarted Aaron Burr's prosecution for treason despite Jefferson's public advocacy for conviction. Marshall's Federalist Party became extinct following its opposition to the War of 1812. Marshall himself remained a minority among overwhelmingly Republican fellow Virginians, some of them his implacable opponents.

So reviled were several of the seminal decisions [of the Marshall Court] that Senator Richard Johnson of Kentucky denounced the Court on the floor of the Senate in 1822 and proposed a series of constitutional

amendments that would have restricted federal court jurisdiction, made federal judges removable by votes of Congress, appointed the Senate the court of last resort over state court decisions, and even expanded the Court to 10 Justices.[10] Finally, President Andrew Jackson's tenure brought new Justices and judicial philosophies antithetical to those of Marshall and, after Marshall's death, to Story. Both men, toward the end of their careers, believed they might have failed and the nation was doomed.

Much is made by some scholars about Marshall's cleverness, his technique of making broad statements of law in cases otherwise narrowly decided. I would make a different point. Marshall acted on the courage of conviction. He served in combat in the Revolutionary War and spent the winter at Valley Forge. He had been a witness to the "original meaning" of the Constitution as a delegate to the Virginia ratifying convention. He idolized Washington, he knew the importance of persistence, and he was an incomparable diplomat. His principles did not waiver; they were grounded in the Constitution and objective legal standards. As Justice Story says, Marshall's "maturer years were devoted to the task of unfolding [the Constitution's] powers, and illustrating its principles."[11] Whether the opinions ultimately satisfy contemporary legal technicians' post hoc evaluation trivializes the Marshall Court's systematic application of textualism and originalism.

In the end, the Marshall Court's legacy essentially endured and prevailed throughout the 19th century and speaks to us today. The Taney Court undermined some of its predecessor's impairment of contracts decisions and expanded states' regulatory power notwithstanding the Commerce Clause, but it never reversed the Marshall Court's holdings concerning the constitutional structure. The Marshall Court, in sum, designed the structure most harmonious with the original meaning of the Constitution and showed how to interpret it.

The Progressive Era, 1905–1940

The period from 1905, when *Lochner*[12] issued, until about 1940 is an era of momentous change in the Supreme Court. Politically, the Progressive movement was well underway by 1905. Intellectually, Progressivism had been developing for a couple of decades. The Progressive movement was rooted in historicism, Darwinism, and German theories about the organic nature of the State (with a capital S). These ideas were challenging Enlightenment rationalism and religion as foundations of American government.

In law, the Progressives euphemistically called their movements "realism" or "sociological jurisprudence." Progressives in the legal academy sought to abandon ossified doctrinal notions that, they claimed, were getting in the way of social progress. In regard to the Constitution, Progressives adopted Professor Woodrow Wilson's academic writings, which advocated abandoning as outmoded the limitations on government engrafted in the Constitution.[13] Wilson wrote that, "all that progressives ask or desire is permission—in an era when 'development,' 'evolution,' is the scientific word—to interpret the Constitution according to the Darwinian principle."[14] Professor Edward Corwin preached the doctrine of the living Constitution to students and judges and urged them to disregard the intent of the Framers. Writing in 1925, he said that "[f]or many practical purposes, the *constitution* is the judicial version of it—*constitutional law*."[15]

Just a few of the eminent legal Progressives included scholars and judges like Jerome Frank, Roscoe Pound, Learned Hand, and Felix Frankfurter. Clever and opinionated, they exerted immense influence on future generations of lawyers, and their writings were often designed to appeal to a wide audience.

But Progressivism took awhile to achieve dominance in the Supreme Court. Justices [Oliver Wendell] Holmes and [Louis] Brandeis remained in the minority through the 1920s and became famous for pithy dissents from decisions involving First Amendment rights and labor legislation. The "conservative" Court, however, saw itself as guarding the traditional, Marshall Court approach to constitutional interpretation. Contrary to the Progressives' views, Justice [Josiah] Brewer wrote that "[c]onstitutional questions...are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking."[16] Less appreciated is that the conservative-dominated Court that issued decisions like *Lochner*[17] and *Adkins v. Children's Hospital*[18] actually upheld many pieces of social legislation under the police power, prompting Felix Frankfurter to characterize *Lochner* in 1916 as an "activist island in a sea of judicial restraint."[19]

One may agree or disagree with the "conservative" Court's interpretation of liberty of contract, but do not forget that the "conservative" Court interpreted the Due Process Clause of the Fourteenth Amendment as early as 1908 to incorporate some provisions of the Bill of Rights, holding that those rights "are of such a nature that they are included in the conception of due process of law."[20] "Conservative" Courts issued

the *Meyer*[21] and *Pierce*[22] decisions and grounded them in "liberty" under the Due Process Clause in two senses: liberty of teachers to pursue the profession of language teaching and the business of private schooling, and liberty for parents to control their children's educations. And the "conservative" Court that had decided *Schenck*[23] announced in the *Gitlow* case only a few years later that "freedom of speech and of the press...are among the fundamental personal rights and 'liberties' protected by the Due Process Clause of the Fourteenth Amendment from impairment by the states."[24]

Many in the legal establishment apart from members of the Supreme Court understood the challenge posed by Progressives to constitutionalism and traditional legal reasoning. Campaigning for [Warren G.] Harding in 1920, William Howard Taft wrote that "there is no greater domestic issue in this election than the maintenance of the Supreme Court as the bulwark to enforce the guarantee that no man shall be deprived of his property without due process of law."[25] He added that the sociological school of constitutional jurisprudence, represented by Justice Brandeis, threatened to "greatly impair our fundamental law."[26] Two successive American Bar Association Presidents lamented the growth of government power and the failure of the courts to limit such growth.[27] And President Calvin Coolidge supported some progressive reforms and regulation that he thought would protect individual liberty. But regarding the law, he said, "Men do not make laws. They do but discover them. Laws must be justified by something more than the will of the majority."[28]

By the end of the 1930s, however, Progressives controlled the Court. Where Court-packing had failed, new appointees of Presidents [Herbert] Hoover and [Franklin] Roosevelt were devoted New Dealers. The Constitution began to be interpreted flexibly as Woodrow Wilson could only have dreamed. The limitations intended by the Contracts Clause were neutered, and vast new federal economic regulation was largely rubber-stamped as the reach of the Commerce Clause became almost unlimited. The delegation doctrine was interred,[29] and *Lochner*-era precedents protecting "liberty of contract" under the Due Process Clause were rapidly repudiated.[30] The *coup de grace* was administered by Justice [Harlan] Stone in footnote 4 of the 1938 *Carolene Products* decision.[31] Here, the Court foreswore serious judicial scrutiny of laws affecting economic interests, while signaling that closer attention would be paid to alleged invasions of interests protected by the Bill of Rights through the Fourteenth Amendment, and there would be "more searching judicial inquiry" of governmental actions affecting discrete and insular minorities.[32]

This era, approximately 1905–1940, experienced political crisis and scandals, wars, labor strife, fears of monopolistic big business, challenges from immigration, the rise of the Ku Klux Klan, the civil rights and women's suffrage movements, Prohibition, anarchists, Marxists, and Fascists. As noted, the Progressive constitutional challenge was attacked politically and by the organized bar, but the Great Depression finally overwhelmed supporters of limited government and traditional constitutionalism.

An epitaph for constitutional limits was written by Justice Sutherland in a 1937 dissent: "[T]o say ...that the words of the Constitution mean today what they did not mean when written—that is, that they do not apply to a situation now to which they would have applied then—is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise."[33]

The Progressives persisted, their judicial opinions rarely temporized. They made their case in academia, in the courts, and in the public square. And the changes the Progressive Supreme Court effected in our constitutional structure following that era have gone largely unchallenged for three quarters of a century.

The Warren–Brennan Court, 1953–1973

Watershed eras can develop in far less than three decades. Whereas the Progressive Court practiced judicial self-restraint in the face of dramatic federal government expansion, the Court led by [Chief Justice] Earl Warren and then deeply influenced by [Justice] William Brennan, abandoned restraint, aggrandizing the federal judiciary at the expense of federalism and self-government. The Court's steady rush of decisions affected nearly every corner of American life. Time permits only a partial enumeration of the areas affected by the new constitutional law.

Consider that the Court constitutionalized over two dozen aspects of criminal procedure, prescribed *Miranda* warnings and the exclusionary rule with no textual constitutional support, and transformed federal collateral review of state court convictions into an unwieldy and unpredictable weapon against finality. The Court banned Bible reading in public schools. With its invocation of the extra-constitutional metaphor "wall of separation"[34] and the creation of taxpayer standing, the Court unleashed a flood of Establishment Clause litigation. But at the same time, the Court placed the imperatives of the Free Exercise Clause, through its novel interpretations, in conflict with the Establishment Clause.

The Court enlarged the Free Speech Clause as a protection of free expression, and thereby unbridled pornography and undid centuries of libel and defamation law. The Court embroiled federal courts in the "political thicket" of legislative redistricting. It approved forced bussing of school children in districts throughout the country, along with managerial oversight of those schools by federal courts. The Court declared that the Eighth Amendment's prohibition on cruel and unusual punishments must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[35] The Court reformulated the Civil Rights Act of 1871 to allow federal court damage claims over the constitutionality of actions by individual local and state officers.[36] And of course, in *Griswold*, the Court endorsed "substantive due process," cloaked as the "right to privacy,"[37] followed by *Eisenstadt*[38] and, crowning the era three years after Chief Justice [Earl] Warren stepped down, *Roe v. Wade*.[39]

What distinguished this era was its freewheeling abandonment of recent precedents in favor of the Justices' hubristic assertion of the power to apply "vague generalities" in the Bill of Rights to satisfy "today's" needs. The Court embraced the penumbras and emanations from the Constitution rather than its permanent expression in the text and structure of the fundamental law. The Court's continual excess turned Justices Frankfurter and [Hugo] Black into "strict constructionists," as their dissents sought to impose minimal fixed limits on the increasing scope of the Court's judicial activism.

Outside the courts, other jurists and scholars, although themselves schooled in the Progressive tradition, began to criticize the Court's plain overreach and cast about for limitations. Professor [Herbert] Wechsler was one of the first,[40] seeking neutral principles for constitutional adjudication. Even before the full flowering of Warren Court innovations, Learned Hand's sustained critique concluded, "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."[41]

Professor Alexander Bickel delivered some of the most insightful criticisms of the Court's legislative-like decisions. Along the way, he described how law professors easily found flaws in the Court's reasoning, its use and abuse of history, and its failure to answer unavoidable questions about the decisions' consequences. However, many either "welcome[ed] [the Court's] results or profess[ed] detachment from them."[42]

This era was punctuated domestically by the civil rights movement, and the intentions behind the Court's integration decisions cannot be faulted despite their legal flaws. But more than in other watershed eras, the Court's own decisions inspired special public hostility. Those included banning

school prayer, promoting forced school bussing to achieve integration, and crafting criminal procedure rights that were associated with a significant rise in crime. As a result, political candidates like Richard Nixon capitalized on cracking down on crime and appointing strict constructionists to the Court.

The Warren Court did not flinch in the face of public, political, or professional criticism. *Roe v. Wade*[43] was the jurisprudential culmination of the Court's ad hoc, result-oriented process. Right, wrong, or egregiously wrong, the precedents of that Court have remained largely intact.

The Present Era

If each of the three noted eras was a long game in which a distinctive constitutional approach matured, what can we conclude about the Supreme Court's activity in the most recent 35-year period? In candor, I must rate this as a period of indecision, vacillation, and uncertainty about the principles governing the Court's awesome power.

To be sure, originalist reasoning has generated some achievements. Justice [William] Rehnquist was no longer a solo voice for federalism when he authored decisions that began to cabin excesses in federal habeas law that were later codified in the Anti-Terrorism and Effective Death Penalty Act of 1996. Establishment Clause barriers to neutral secular aid to students in private schools were gradually removed. Some, albeit small, limits were placed on federal power under the Commerce Clause, and the federal government was denied the power to commandeer the states in service of its functions. By fits and starts, some religious liberty claims have received the Court's endorsement, and the possibility of interminable litigation over public monuments with religious connotations has been removed.

That the Second Amendment protects an individual right to keep arms was affirmed[44] and then, although pursuant to Progressive principles, incorporated against the states.[45] And recently, the Court strengthened the Fifth and Fourteenth Amendment Takings Clause by overruling the *Williamson County* exhaustion rule.[46]

Offsetting such decisions are others that no originalist can endorse. The Court has approved affirmative action in college admissions[47] and disparate impact claims under the Fair Housing Act.[48] The Court's Establishment Clause jurisprudence as a whole remains nearly impossible to follow. Death penalty case law has meandered far from the text of the Eighth Amendment, severely burdening capital litigation and leaving victims' families in decades-long limbo. The Court rejected separation of powers challenges

to the U.S. Sentencing Commission[49] and a challenge to the independent counsel law that infringed the President's executive authority.[50]

One dramatic example of the Court's internal division appeared in *United States v. Booker*,[51] where one bare majority held that the mandatory United States Sentencing Guidelines violate the Sixth Amendment, while another bare majority in the same case saved the guidelines by blatantly refashioning the statute's appellate review standard. Another such example is the split decision upholding the Affordable Care Act.[52]

Most disturbing, the Court reframed *Roe v. Wade* and has issued mixed messages about regulating abortion facilities and practices. No Justice defends the original Court decision as it was written. But *Roe* stands—and the Court used its radical libertarianism to justify both *Lawrence*[53] and *Obergefell*.[54]

As of 1997, I had thought *Glucksberg*[55] would cabin substantive due process rights to those deeply rooted in our history and traditions. But *Obergefell*'s majority declared that history and traditions no longer set outer boundaries on the identification and protection of constitutional rights the Court deems fundamental. Moreover, such newly discovered rights may demand the Court's intervention "notwithstanding the more general value of democratic decisionmaking."[56]

Obergefell's right of dignity remains, to paraphrase Justice [Robert] Jackson, a loaded weapon lying around awaiting its next use.[57]

The absence of consensus in the Court's approach to constitutional adjudication got to the point that one astute litigator said it had become necessary to appeal to nine separate decision makers when writing briefs to the Court. It has often been frustrating to sit as a lower court judge throughout this period, not being sure of the baseline tests for our constitutional cases. Two examples are illustrative.

The Fifth Circuit went *en banc* twice to decide whether, after the *Lopez* decision, Hobbs Act prosecutions for robbery of small local businesses had such an insubstantial connection with interstate commerce as to be outside the federal Commerce Clause power. The court split 8–7 in each case.

Another *en banc* decision in our court yielded multiple opinions on the question whether an elementary school teacher violated a student's free exercise rights by forbidding the student to give out Christmas candy canes with a tag stating, "Jesus is the reason for the season."

These should not have been difficult cases, but the Court's indecisive split holdings rendered them debatable. Yet our intellectual discomfort is as nothing compared with the public's inability to comprehend the law and appreciate constitutional boundaries. Constitutional indeterminacy

ultimately puts at risk the rule of law, and very palpably undercuts the notion that ours is a government of laws, not men. But despite this period's disappointments, to despair would be premature.

Ideas have consequences, and after all, the return to originalism and textualism announced and so persistently supported by General Meese and others in this room challenged nearly a century of misguided interpretive theories. At the Supreme Court, the seat of final constitutional interpretation, Justices [Antonin] Scalia's and [Clarence] Thomas's opinions have proven the modern-day feasibility and persuasiveness of originalism. Other Justices are molding their own originalist legacies. Of incalculable importance also is Justice Scalia's co-authored book, *Reading Law*, for a definitive explanation of the canons of textual construction. The canons, long derided in the legal academy, do indeed furnish objective criteria for resolving legal disputes, whether contractual or statutory or constitutional in nature. *Reading Law* is becoming a ubiquitous judicial resource.

Would that the waves had parted when the 1980s debate over originalism began. Formidable opposition arose immediately and is unabated. Politicians recognized the threat originalism poses to obtaining their preferred results on the cheap, outside the conflict and compromises required in the political process. Interest groups worked overtime to fundraise and manufacture controversy out of similar fears. The Supreme Court confirmation process has become a blood sport. Overt threats to the Court's membership and composition are being made. Opponents have cleverly used slogans like the "living Constitution" and the "wall of separation," which are glibly attractive but deeply misleading.

In my estimation, however, opponents of originalism have relinquished the intellectual high ground. Constitutional scholarship after the Warren Court has become a Tower of Babel. Frankfurter's Progressive democratic realism, which accommodated the political branches and sought neutral principles, was interred by the Warren Court itself. Traditional scholars confronted with Warren Court decisions developed numerous and nuanced theories on subjects like tiers of scrutiny, suspect classes, and speech classifications. Unfortunately, real life, as presented in legal cases, rarely conforms to theories, and the Court's decisions have reflected this deficiency. More ambitious scholars, emulating the Warren Court's activism, fabricated critical legal studies, feminist jurisprudence, environmental justice, and post-modern theories that have been useful for awarding tenure but had little influence outside academia. As my friend Professor Lino Graglia consistently maintained, these scholars are not following the Constitution but making it up as they go. The goal of other scholars and commentators has

been to dismiss originalist decisions as politically motivated, while refusing to engage them substantively.

A telling indicator of originalism's importance is found in Justice [Elena] Kagan's rhetoric. Dissenting in *Rucho v. Common Cause*,[58] where the Court held that legislative gerrymandering presents nonjusticiable political questions, she quoted the Declaration of Independence, Madison in the *Federalist Papers*, and the Constitution at the beginning and *Marbury v. Madison* at the end. (One may question how apt the references were.) In eulogizing Justice Scalia, she declared, "we are all textualists now."[59]

Lessons

Compared to the watershed eras, the long game for a return to originalism and textualism is becoming very long, and many innings remain. Those eras nevertheless hold several important lessons for the next phase of the long game.

First, personnel is critical. Judge Bork concluded the first Story Lecture with his "hope" for the appointment of new originalist judges as a "necessary if not sufficient" prerequisite for preserving a republican form of government. What was true for the Progressive and Warren Courts remains true today. We are blessed that the President and a majority of U.S. Senators have selected originalist judges for the Supreme Court and, importantly, for lower courts.

Other lessons I glean from the watershed eras may be denoted by three terms: clarity, persistence, and fortitude.

Clarity. The opinions that characterize these preceding eras are clear about their principles, whether defending the Marshallian Constitutional structure, "adapting" its "rigid" constraints in the Progressive era, or simply using the "vague generalities" of the Bill of Rights as a frame for judicial embroidery.

Going forward, originalists must continue to speak with clarity about why the Constitution's framework of government is necessary to preserve liberty—and why judges may not alter it. Precedent is important, in fact, overriding for us on the lower courts. But precedents can be abrogated, as they were by the Progressive and Warren Courts and recently in *Knick*,[60] where compelling originalist grounds meet with prudence.

Clarity is not served by decisions that nod to originalist reasoning and then veer into judgments based on newly minted, seemingly ad hoc grounds. Such temporizing undercuts originalism and makes decisions appear pragmatic rather than principled. And, cautiously, I suggest that clarity may be

disserved by the filing of a multiplicity of originalist opinions. The Marshall Court demonstrated the power of unanimity or near-unanimity in logic and legal exposition.

Persistence. Persistence is a quality obviously derived from the three watershed eras. With few aberrations, the Marshall Court, Progressive judges, and the Warren Court majority stuck to their guns (if I may be excused for using militaristic imagery). Justices Marshall and Story persisted even after they believed they were on the losing side of constitutional development. Justice Thomas's career of almost 30 years on the Supreme Court has demonstrated persistence at its finest.

Justice Scalia persisted until his insistence on textualism has nearly overcome the use of legislative history and the discretion-loaded competing theories of textual interpretation. Even that achievement, however, requires persistent reinforcement. Justice Kagan, writing for the majority in *Gundy*[61] (the SORNA [Sex Offender Registration and Notification Act] delegation case), applied Scalia's *Reading Law* in her statutory exegesis, but she pivoted into legislative history with a quip: "Justice Scalia's dissent thought that legislative history was gilding the lily.... He had a point, but we can't resist."[62] Purposivist interpretive theories are dormant, not yet done for.

Going forward, my hope is that the Court that rendered decisions supporting religious liberty, defending the constitutional freedom to associate—or not—according to one's political beliefs, and protecting the individual right to keep arms will persist. Persistence, I believe, strongly suggests the Court should hear more cases to cement these originalist rulings and, frankly, prevent lower courts from "underruling" them. The Court has greater resources than ever before and should be fully capable of increasing its annual workload. In the early 1970s, for instance, with only two law clerks each—and typewriters—the Court was deciding well over 100 cases per term. Persistence is required more than ever in our litigious era, with thousands more lower court decisions than in the watershed eras, to maintain uniform federal and constitutional law.

Fortitude. Fortitude means strength of mind that enables a person to encounter danger or bear adversity with courage. Its synonyms include backbone and grit. The past 35 years have not been the first period in which fortitude has been essential to weather pressure against Article III judges. The careers of Justices Marshall, Story, and Frankfurter, and the judges who integrated the South following Warren Court decisions exemplify fortitude. Surely those who adhere to constitutional originalism are obliged to have strength of mind when facing the inevitable criticism, even defamation, they will encounter.

For instance, Chief Justice [John] Roberts memorably stated in the *Seattle Schools* case that the "best way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[63] Writing additional opinions to undergird this originalist conclusion will require fortitude. Among many other subjects in which the authorship of originalist opinions will require fortitude are those involving voting rights and districting, the separation of powers and administrative state, and religious liberty. But in the end, what is life tenure about, if not to secure judicial fortitude?

Conclusion

The principles of originalism are in place; personnel have joined the Article III courts at all levels who are brilliant and claim to be originalists. What remains in this long game is to demonstrate clarity, persistence, and fortitude. I conclude with two quotations:

Justice Story taught that the Constitution should have "a fixed, uniform permanent construction. It should be…not dependent on the passions or parties of particular times, but the same, yesterday, today, and forever."[64] And my friend Professor Gary McDowell writes in *The Language of Law and the Foundations of the American Constitution*:

> Time has shown that originalism as a theory of constitutional interpretation remains very much alive; Bork was defeated, but his central idea was not. That theory of interpretation and its implicit belief in restrained judging continues to guide those who believe that the inherent arbitrariness of government by judiciary is not the same thing as the rule of law.[65]

God bless the United States and these Honorable Courts.

The Honorable Edith Hollan Jones is a United States Circuit Judge and the former Chief Judge of the United States Court of Appeals for the Fifth Circuit. These remarks were presented on October 16, 2019, as the annual Joseph Story Lecture at The Heritage Foundation in Washington, DC.

Endnotes

1. Although I was only casually acquainted with Judge Bork, his book, *The Antitrust Paradox*, and article, "Neutral Principles and Some First Amendment Problems," were both formative in my thinking.
2. *See* Edwin Meese III, Attorney General, Address at American Bar Association (July 9, 1985).
3. *See* Ronald Reagan, A Time for Choosing (Oct. 27, 1964).
4. *See* Antonin Scalia & Bryan A. Garner, Reading Law xxx (2012): "Your judicial author knows that there are some, and fears that there may be many, opinions that he has joined or written over the past 30 years that contradict what is written here—whether because of the demands of stare decisis or because wisdom has come late. Worse still, your judicial author does not swear that the opinions that he joins or writes in the future will comply with what is written here—whether because of stare decisis, because wisdom continues to come late, or because a judge must remain open to persuasion by counsel."
5. Interestingly, that term, according to a Wikipedia source, means not only a game that lasts a long time. In Britain, the term refers to a long-term confidence trick or swindle. https://www.urbandictionary.com/define.php?term=long%20game (accessed Aug. 9, 2019).
6. Richard Brookhiser, John Marshall: The Man Who Made the Supreme Court 83 (2018).
7. 5 U.S. 137 (1803).
8. Michael M. Uhlmann, *The Last of the Founders*, Claremont Rev. Books 66–67 (2018–19) (reviewing Richard Brookhiser, John Marshall: The Man Who Made the Supreme Court (2018)).
9. 1 Joseph L. Story, Commentaries on the Constitution of the United States viii (Thomas M. Cooley ed., Little, Brown & Co. 4th ed. 1873) (1833).
10. Brookhiser, *supra* note 6, at 177–78.
11. Story, *supra* note 9, at iii.
12. Prof. Bernstein writes that using the term "*Lochner* Court" as ubiquitously negative is of recent vintage (early 1970s). David E. Bernstein, Rehabilitating Lochner: Defending Individual Rights against Progressive Reform 116–17 (2011). I refer to the case here as a convenient temporal point.
13. Woodrow Wilson, *What is Progress?*, *in* The U.S. Constitution: A Reader 641 (Hillsdale Coll. Politics Faculty ed., 2012).
14. Bernstein, *supra* note 12, at 47 n.53.
15. Edward S. Corwin, *Constitution v. Constitutional Theory: The Question of the States v. the Nation*, 19 Am. Pol. Sci. Rev. 290, 303 (1925).
16. *Muller v. Oregon*, 208 U.S. 412, 420 (1908).
17. *Lochner v. New York*, 198 U.S. 45 (1905).
18. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).
19. Bernstein, *supra* note 12, at 49 n.76.
20. *Twining v. New Jersey*, 211 U.S. 78, 99 (1908).
21. *Meyer v. Nebraska*, 262 U.S. 390 (1923).
22. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
23. *Schenck v. United States*, 249 U.S. 47 (1919). Justice Holmes wrote, and Justice Brandeis joined, the Court's unanimous opinion in *Schenck*.
24. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). In fact, the Progressives' attitude toward the Due Process Clauses was ambivalent and ambiguous. Prof. Charles Warren, for instance, lamented after *Gitlow* that carried to its logical conclusion, the decision foreshadowed that all of the provisions of the Bill of Rights must be included within the Due Process Clause. Bernstein, *supra* note 12, at 101 n.96. Both Frankfurter and Learned Hand had written unsigned editorial pieces in favor of abolishing Fourteenth Amendment due process because it was getting in the way of activist legislation. *Id.* at 44 n.35.
25. William H. Taft, *Mr. Wilson and the Campaign*, 10 Yale L. Rev. 1, 19–20 (1920).
26. *Id*., at 19.
27. Bernstein, *supra* note 12, at 155 n. 86.
28. Calvin Coolidge, Senate President, Massachusetts, Faith in Massachusetts: Massachusetts Senate President Acceptance Speech (Jan. 7, 1914).
29. *Compare Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), *and A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), *with Yakus v. United States*, 321 U.S. 414 (1944).
30. Bernstein, *supra* note 12, at 50–51.
31. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).
32. *Id.*

33. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 403 (1937) (Sutherland, J., dissenting).
34. *Engel v. Vitale*, 370 U.S. 421, 425 (1962); *see Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963).
35. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).
36. *Monroe v. Pape*, 365 U.S. 167 (1961).
37. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).
38. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
39. *Roe v. Wade*, 410 U.S. 113 (1973).
40. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).
41. LEARNED HAND, THE BILL OF RIGHTS 73 (1958). This statement was quoted by Justice Black in *Powell v. Texas*, 392 U.S. 514, 548 (Black, J., concurring).
42. ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 11 (1978).
43. 410 U.S. 113 (1973).
44. *District of Columbia v. Heller*, 554 U.S. 570 (2008).
45. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).
46. *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162 (2019).
47. *Fisher v. Texas II*, 136 S. Ct. 2198 (2016).
48. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).
49. *Mistretta v. United States*, 488 U.S. 361 (1989).
50. *Morrison v. Olson*, 487 U.S. 654 (1988).
51. *United States v. Booker*, 543 U.S. 220 (2005).
52. *Nat'l Fed'n of Indep. Bus. (NFIB) v. Sebelius*, 567 U.S. 519 (2012).
53. *Lawrence v. Texas*, 539 U.S. 558 (2003).
54. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
55. *Washington v. Glucksberg*, 521 U.S. 702 (1997).
56. *Obergefell*, *supra* note 54, at 2605 (internal quotation marks and citations omitted).
57. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).
58. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (Kagan, J., dissenting).
59. Elena Kagan, Associate Justice, Supreme Court of the United States, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:28 (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation [http://perma.cc/3BCF-FEFR].
60. *Knick*, *supra* note 46.
61. *Gundy v. United States*, 139 S. Ct. 2116 (2019).
62. *Id.* at 2127.
63. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747 (2007).
64. STORY, *supra* note 9, at § 426, 315.
65. GARY L. MCDOWELL, THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 7 (2010).