2001

Judging and Democracy

Diarmuid F. O'Scannlain

*United States Court of Appeals for the Ninth Circuit*

Follow this and additional works at: [https://uknowledge.uky.edu/klj](https://uknowledge.uky.edu/klj)

Part of the [Judges Commons](https://uknowledge.uky.edu/klj)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

**Recommended Citation**


Available at: [https://uknowledge.uky.edu/klj/vol89/iss3/2](https://uknowledge.uky.edu/klj/vol89/iss3/2)

---

This Speech is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
Judging and Democracy*

BY HON. DIARMUID F. O'SCANNLAIN**

I have been thinking about the role of judging in our system of democracy, one of the most successful free governments in world history. Famous quotations in praise of democracy abound. In his Gettysburg Address, Abraham Lincoln spoke of preserving government “of the people, by the people, [and] for the people.”1 Mark Twain proclaimed that “where every man in a State has a vote, brutal laws are impossible.”2 Perhaps most effusive in its praise of democracy is the 1604 declaration of Parliament to James I, which states: “The voice of the people, in the things of their knowledge, is as the voice of God.”3

I do not undertake a normative defense of democracy. The historical evidence suggests to me that democracies are generally more prosperous

---

* Judge Diarmuid F. O'Scannlain, Lecture delivered to the Federalist Society at the University of Kentucky College of Law (Nov. 15, 2000) (transcript available in the University of Kentucky College of Law Library).

** Circuit Judge, U.S. Court of Appeals for the Ninth Circuit.

1 ABRAHAM LINCOLN, Gettysburg Address, in COLLECTED WORKS OF ABRAHAM LINCOLN 7:17, 23 (Roy P. Basler ed., 1953).


than non-democracies. Nonetheless, I will not attempt to convince those of you who are believers in oligarchy, monarchy, anarchy, or any other form of government that you are wrong. Rather, the question I intend to answer is, assuming the existence of a democratic system of government, which, I believe, is essentially the system we have, what is the proper role of the judiciary within that system?

In exploring this subject, we should begin with the question: Why does a democracy need judges? If democracy is government by the populace, then why not have the populace decide the cases? The short answer is that it is simply not feasible to require all electors to vote on every dispute that arises between citizens. Even a republican form of government does not solve this problem. Sitting as a 535-member court, the United States Congress could not decide even a small percentage of the 250,000 cases currently filed in federal court each year.

Because it is impossible for the citizens of a democracy to sit in judgment of every dispute arising within its borders, those citizens delegate to certain individuals, called legislators, the responsibility to establish general rules, or statutes, to govern those disputes, and further delegate to other individuals, called judges, the responsibility to apply those rules to particular controversies. The core function of a judge in a democracy, then, is to apply general rules to concrete controversies involving specific litigants. By specializing in interpreting the rules of the democracy and giving them content in the context of specific disputes, the citizen-judge frees up other members of the democracy to spend more time specializing in other avocations. As a result of this specialization, the democratic body as a whole is made better off.

However, when judges act as anything other than interpreters, they profoundly affect the democratic process. In United States v. Weber,4 a decision I want to discuss at some length, the 1979 Supreme Court did something very instructive. Weber involved a white steelworker's challenge, brought under the Civil Rights Act of 1964, to an affirmative action plan designed to eliminate racial imbalances in a workforce in which only two percent of the skilled craftworkers were black.5 The plan reserved for black employees fifty percent of the openings in a craft training program until the percentage of craftworkers in the plan was commensurate with the percentage of blacks in the local labor force. During the first year of the affirmative action plan, seven blacks and six whites were selected for the program, despite the fact that the most senior black selected had less

5 Id. at 199.
seniority than several whites who were rejected. Brian Weber, a white worker who was not selected, instituted a class action complaint, charging that the training program favored black employees over white employees, thereby violating section 703(a) of the Civil Rights Act, which prohibits "discriminat[ion] against any individual . . . because of . . . race." \( ^6 \)

In an opinion written by Justice Brennan, the Supreme Court, rejecting what it referred to dismissively as a "literal construction of section 703(a)," held that private affirmative action plans are not prohibited by Title VII. \( ^7 \) Relying on snippets of legislative history discussing "the plight of the Negro in our economy," \( ^8 \) the Court concluded that although the Congress of 1964 might have said that it was prohibiting "discrimination . . . on the basis of race," what it actually meant was that it was prohibiting discrimination on the basis of race except where the person discriminated against was white. \( ^9 \)

Writing in dissent, then-Justice Rehnquist attacked what he called the majority's Orwellian reasoning. \( ^{10} \) Justice Rehnquist stated:

The operative sections of Title VII prohibit racial discrimination in employment \textit{simpliciter}. Taken in its normal meaning . . . this language prohibits a covered employer from considering race when making an employment decision, whether the race be black or white.

. . . .

Now we are told that the legislative history of Title VII shows that employers are free to discriminate on the basis of race . . . Our earlier interpretations of Title VII . . . were all wrong. \( ^{11} \)

In a separate dissenting opinion, Chief Justice Burger observed that, were he a member of Congress, he would have voted to amend Title VII to permit affirmative action. However, Chief Justice Burger concluded that he was unable as a judge to join the result reached by the majority in Weber for the simple reason that it was contrary to the plain language of Title VII. \( ^{12} \) On balance, I find myself in agreement with Chief Justice Burger's reasoning. It may very well be in a society's best interest to allow private

---

\( ^6 \) \textit{Id.} at 199-200 n.2.

\( ^7 \) \textit{Id.} at 200-02.

\( ^8 \) \textit{Id.} at 202 (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)).

\( ^9 \) \textit{Id.} at 201-08.

\( ^{10} \) \textit{Id.} at 219 (Rehnquist, J., dissenting).

\( ^{11} \) \textit{Id.} at 220-21.

\( ^{12} \) \textit{Id.} at 216 (Burger, C.J., dissenting).
employers to adopt voluntary affirmative action programs; however, that is a question for voters, and legislators, not judges, to decide.

Many commentators have criticized the majority's reasoning in Weber as result-oriented. Instead of interpreting the law, they maintain, the Court was making law. But the majority in Weber itself said that it was engaging in interpretation. Although the Weber majority virtually ignored the text of the Civil Rights Act, it did focus on the legislative history of the Act. In other words, although the Court overlooked what Congress actually said when it passed the statute, it did set forth at least a plausible version of what Congress may have intended. After examining the legislative history of the Civil Rights Act, the Weber majority concluded that although the letter of the law prohibited reverse discrimination, the spirit of the law allowed it. The Weber majority explained: "It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." In defending the interpretative method used in Weber, Professor Ronald Dworkin has stated:

The law, as Scalia emphasizes, is what Congress has said . . . . Not everyone agrees with that judgment. Some lawyers think that it accords better with democracy if judges defer to reasonable assumptions about what most legislators wanted or would have wanted, even when the language they used does not embody those actual or hypothetical wishes.

With respect, I conclude that the method of interpretation used in Weber and defended by Professor Dworkin is in tension with the concept of democratic government. As I explained earlier, judges are citizens upon whom we delegate the responsibility of interpreting our laws and applying them to concrete disputes. But if interpretation means whatever judges want it to mean, then the purpose behind this delegation of responsibility is defeated. As Justice Scalia has explained:

---


14 Weber, 443 U.S. at 201.

15 Id. (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)).

It is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. That seems to be one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read. Government by unexpressed intent is similarly tyrannical. It is the law that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts constitution: A government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which bind us.¹⁷

A second problem with interpreting laws based on what Congress may have meant notwithstanding what it actually said is that such a method risks the likelihood that the judges’ own values and prejudices might infect their decision making. When judges want to ignore the text of a statute to achieve what they believe is a socially desirable result, it is relatively easy to use the legislative history of that statute as an excuse to accomplish that end. In my career as an appellate court judge, it has been the rare case in which either party could not cite pages of legislative history to support its interpretation of the law at issue. When judges are bound by the text of the law, there is less opportunity to engage in result-oriented adjudication. When I interpret the text of a statute, I attempt to determine the ordinary meaning of the words used in the statute at the time the law was passed. This involves using the definition of the word given in a dictionary published as nearly as possible to the time the law was enacted. Although I do not contend that this method of interpretation removes all discretion from the judging process, it involves considerably less discretion than when a judge simply picks whichever version of the legislative history he believes supports his view of what the law should say. In my view, such a reduction in discretion is an unmitigated good, as it makes it more likely that judges will interpret the law in accordance with how a majority of citizens wants them to interpret the law.

The method of interpretation I have just advocated—interpreting the law according to what the legislature said as opposed to what the legislature may have meant—is known, of course, as textualism. As I have already discussed, textualism has several advantages, not the least of which is that it reduces judges’ discretion to allow their own policy preferences to seep into the judging process. One of the arguments frequently used to criticize

textualism goes something like this: Textualism is a nice theory, but, unfortunately for textualists, it has no basis in the text of the United States Constitution or in any federal statute. However, that argument, as I see it, is flawed. Section I of Article I of the United States Constitution provides: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”

When a court departs from the text of the statute, and thereby effectively rewrites or amends the statute, it seems to me that it impermissibly infringes upon the legislative power of Congress. This is exactly what the Supreme Court did in Weber with respect to Title VII, amending the provision barring discrimination against certain races. In so doing, the Court was acting contrary to Article I, Section I, of the Constitution, which places all legislative power in the hands of Congress. New laws, or amendments to old ones, must be approved by a majority of both Houses of Congress, not merely by a handful of members of the federal judiciary.

By now, many of you are probably thinking: Well, isn’t it the role of the judiciary to protect against the excesses of the majority? Don’t courts have the duty under Marbury v. Madison to strike down statutes that conflict with the United States Constitution, even if those statutes are supported by a majority of the population?

Of course, the answer to both of these questions is “yes.” Does this mean that there is a tension between democracy and the judiciary’s role in our constitutional system? According to many constitutional scholars, it does. One of the foremost expositors of this view was Alexander Bickel. In The Least Dangerous Branch, Professor Bickel stated:

The root difficulty is that judicial review is a counter-majoritarian force in our system . . . . [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens . . . [I]t is the reason the charge can be made that judicial review is undemocratic.

In my view, however, it is not difficult to reconcile the institution of judicial review with democracy. The Constitution is, as Article VI tells us,

---

18 U.S. CONST. art. I, § 1 (emphasis added).
the "supreme Law of the Land." The Constitution is law not because it was divinely inspired, or because its language was drafted by people with high I.Q's, but because it was duly ratified by the people of the United States at thirteen state conventions held between 1787 and 1790. Since Marbury v. Madison, it has been recognized that rules which the people approved when they ratified the Constitution trump rules which are enacted into ordinary federal statutes. As Chief Justice Marshall stated in Marbury: "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected." Marshall continued: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the Constitution is void."

One of the key distinctions between provisions of the Constitution and provisions of federal statutes concerns the relative ease with which each type of provision can be altered. Article V of the Constitution requires that constitutional amendments be proposed by either a Convention called by two-thirds of the state legislatures or by three-fourths of both Houses and ratified by three-fourths of the state legislatures. By contrast, federal statutes can be repealed by a bare majority of the members of the House and the Senate with presidential consent. Therefore, as a general matter, constitution-making requires a substantially higher level of popular support than statute-making does.

Professor Bickel lamented that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now..." Under Bickel's analysis, if three-fourths of the House propose and three-fourths of the state legislatures ratify a constitutional amendment, and the Supreme Court relies on that amendment to strike down an inconsistent statute supported by bare majorities of both Houses of Congress and signed by the President, the Supreme Court's action thwarts the will of the people.

---

21 U.S. Const. art. VI.
23 Id. at 177.
24 BICKEL, supra note 20, at 16-17.
But there is nothing anti-democratic about this. To see why, let us make the assumption that constitutional amendments require the approval of two-thirds, and that federal statutes require the support of fifty-one percent. Bickel apparently thought it problematic that sixty-seven percent can bind future bare majorities which cannot muster the support necessary to pass constitutional amendments. However, binding people who disagree with laws to adhere to those laws is the essence of a civilized government. Bickel’s analysis fails to recognize that, any time an ordinary statute is passed, that statute can only be overturned if over half of the people support its repeal. To use Bickel’s language, the passage of a new statute may thwart the will of up to forty-nine percent of the representatives of the people of the here and now. The only difference between such a statute and a constitutional amendment is that, whereas the statute may thwart the will of up to half of the people, the amendment may thwart the will of nearly two-thirds of the people. This difference is not one of kind but of degree.

Essentially, democracy is rule by the people. If the people can make the rules, the people can also make rules regarding how the rules can be changed. I am unaware of any legal principle that democracy cannot require the support of more than a bare majority of citizens to alter its fundamental law. This is exactly what Americans did do when they ratified Article V of the Constitution. Far from being anti-democratic, the principle that a statute is void when it is repugnant to a provision of the constitution is fundamental to our constitutional democracy.

Many constitutional commentators have stressed the need for an activist federal judiciary to check the excesses of the majority. In the absence of such a check against the majority, they maintain, there is no principled way to prevent the rise of a totalitarian regime.

This argument, which is advanced frequently in constitutional discourse, is a powerful one. It would be terrible indeed for our country ever to fall subject to a totalitarian regime. The question is, whom do we trust to prevent the rise of such a regime? Should we place our trust in an unelected judiciary, or should we place our trust in the people themselves? This is in part an empirical question, and we must look to history to help answer it. The American judiciary has not always stood up against government tyranny; indeed, it has sometimes facilitated it. For example, in the infamous Dred Scott case, the Supreme Court “discovered” in the
Due Process Clause of the Constitution the right to own slaves. Many commentators point to Brown v. Board of Education\(^27\) as evidence that the Supreme Court can help to correct for the occasional failings of the democratic process. However, as Justice Scalia has observed with respect to Brown, even a stopped clock is right twice a day. The Supreme Court is a human institution, after all.

I do not have blind faith in the ability of the people to prevent the rise of a totalitarian regime. Neither do I have blind faith in the power of the judiciary to do so. I do, however, have faith in the Constitution of the United States. In my view, the brilliance of the Constitution lies in its structural provisions. By dividing power between the federal and state governments and then between the various branches within each, the Constitution, to use the words of James Madison in Federalist No. 51, provides a “double security . . . to the rights of the people.”\(^28\) As Madison explained:

\[
\text{Ambition must be made to counteract ambition. The interest of man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary.}\(^29\)
\]

In my view, the primary reason that our Constitution has served us so well for so long is that it has been successful in dividing the powers of government. Regrettably, however, the federal judiciary occasionally steps outside of its constitutionally defined role. The federal judiciary best fulfills its role within the Madisonian framework not when it tries to do it all, but when it acts within its constitutionally prescribed role. This involves leaving the task of legislating to Congress, and leaving the task of constitution-making to the procedures established by Article V.

So far, I have confined my remarks to the role of federal judges, and the relationship between the federal judiciary and the other branches of the federal government. However, also vitally important to the well-being of our constitutional democracy, is the relationship between the federal and state judiciaries. As the Supreme Court has reminded us:


\(^{28}\) The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

\(^{29}\) Id. at 322.
Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front . . . . In the tension between federal and state power lies the promise of liberty.30

The framers did not intend that the federal and state governments were to have equal power. Rather, under the Constitution, most government functions were to remain in the hands of the states. As Madison explained in Federalist No. 45: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."31

As we are all aware, the powers exercised by the federal government are no longer "few" or "defined." The federal government now exercises pervasive regulatory authority over activities that were once exclusively policed by the states. Indeed, there appeared for a time to be a danger that an activist judiciary would transform the narrow constitutional authority that allows the federal government to exercise a few clearly defined powers into a general police power comparable to that retained by the states. Fortunately, the Supreme Court at least temporarily halted this trend in United States v. Lopez32 where the Court struck down a federal law prohibiting gun possession within 1000 feet of schools, holding that Congress may regulate only those activities which truly have a "substantial effect" on interstate commerce.33

As Justice Kennedy pointed out in his concurring opinion in Lopez, the chief source of adjudication regarding federalism has been the Commerce Clause.34 In deciding Commerce Clause questions, courts have traditionally focused on the relationship between Congress and the state legislatures. Less attention, however, has been concentrated on the relationship between the federal and state judiciaries.

In examining the proper relationship between the federal and state judiciaries, we return to Marbury v. Madison,35 which perhaps more than

33 Id. at 559.
34 Id. at 579 (Kennedy, J., concurring).
35 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
any other American case has shaped our understanding of the duties of judges. In what is perhaps his most famous line in *Marbury*, Chief Justice Marshall stated: "It is emphatically the province and duty of the judicial department to say what the law is."

Marshall’s opinion in *Marbury* has often been misinterpreted, but perhaps the most serious interpretive error, one which even some of the most respected constitutional scholars have committed, concerns the nature of the relationship between federal and state judges. According to Harvard Professor Laurence Tribe’s treatise on American Constitutional Law, *Marbury* was “the first case in which the Supreme Court asserted that a federal court has power to refuse to give effect to congressional legislation . . .” However, Chief Justice Marshall’s opinion was not restricted to the duties of federal courts; rather, the opinion applies to all courts. Throughout his opinion, Marshall refers to “courts” and “judges,” never to “federal courts” or “federal judges.” In other words, *Marbury* teaches that the task of interpreting federal statutory and constitutional law is as much the province of the state judiciary as it is the province of the federal judiciary. As the first Justice Harlan stated in *Robb v. Connolly*: "Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . ." Justice Harlan’s statement teaches us that when it comes to the task of interpreting federal law, neither the federal nor the state judiciary stands supreme. Interpreting the Constitution is not a hierarchical task but a cooperative process involving continuous dialogue among judges at all levels of both the state and the federal systems.

State courts have always played a vital role in the protection of federal rights. From the time of the Founding, state courts have exercised exclusive or concurrent jurisdiction over cases involving federal questions. By

---

36 *Id.* at 177.
37 LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (1978).
38 *Id.* at 20 (emphasis added).
40 *Id.*
41 Robb v. Connolly, 111 U.S. 624 (1884).
42 *Id.* at 637.
contrast, it was not until 1875 that Congress granted general federal question jurisdiction to the federal courts.\textsuperscript{45}

In our constitutional system, it is not the federal courts but the state courts that stand as the last line of defense against overreaching by the executive and legislative branches. Article III of the Constitution makes no mention of federal district courts or federal courts of appeals, the so-called "inferior courts." Consequently, the ability of the federal courts to enforce federal constitutional and statutory rights is entirely subject to Congress's willingness to grant them jurisdiction to do so. If Congress wanted to, it could exclude from the jurisdiction of the federal courts any category of claims arising under the Constitution, or even eliminate the lower federal courts altogether.\textsuperscript{46} By contrast, Congress cannot limit the jurisdiction of the state courts so as to foreclose the vindication of federal constitutional rights. Thus, it is not the federal courts but the state courts that serve as the ultimate check against usurpation of constitutional liberties by the executive and legislative branches.

In closing, let me reiterate that our constitutional democracy has served us extremely well for over 200 years. In my view, the greatest threat to that system today stems from the federal judiciary's inflated view of its own role within our constitutional structure. Federal judges must allow state judges to assume their rightful place as the coequal protectors of federal constitutional rights. Federal judges must also resist the temptation to legislate our own policy preferences, instead contenting ourselves with interpreting the law. Only then will the federal judiciary fulfill its proper constitutional role in our integrated democratic system.


\textsuperscript{46} U.S. Const. art. III.