BRENNAN CENTER FOR JUSTICE

SUPREME COURT ADJUDICATION AND THE QUALIFICATIONS OF SUPREME COURT NOMINEES

Sidney S. Rosdeitcher

Brennan Center for Justice *at New York University School of Law*

ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at NYU School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Our work ranges from voting rights to redistricting reform, from access to the courts to presidential power in the fight against terrorism. A singular institution — part think tank, part public interest law firm, part advocacy group — the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

ABOUT THE AUTHOR

Sidney S. Rosdeitcher is Senior Policy Advisor to the Brennan Center for Justice and is also of counsel to Paul, Weiss, Rifkind, Wharton & Garrison LLP where he was a litigation partner until his retirement at the end of 2004. He previously served as a lawyer in the Office of Legal Counsel at the Department of Justice and as an assistant to Commissioner Philip Elman of the Federal Trade Commission. He is currently Chair of the Task Force on National Security and the Rule of Law of the New York City Bar Association and a member of the Board of Directors of the Lawyers Committee for Civil Rights Under Law. He teaches a seminar in Constitutional Law at Columbia College. He received his LL.B. from Harvard Law School (1961) where he was Articles Editor of the Harvard Law Review, and his A.B. from Columbia College (1958).

ACKNOWLEDGEMENTS

I thank my Brennan Center colleagues Eric Lane, Susan Liss, Burt Neuborne, Fritz Schwarz and David Udell for their invaluable comments and advice. Special thanks are due to my Paul Weiss colleagues Gillian Sinnott and summer associate Jerome Mayer-Cantú for their excellent comments, advice and research assistance.

Generous grants from the Carnegie Corporation of New York, the Joyce Foundation, the Open Society Institute, the Wallace Global Fund and the Democracy Alliance Partners supported the development and publication of this report.

All opinions and errors are attributable solely to the author.

TABLE OF CONTENTS

The Senate will soon commence its constitutional Advice and Consent duties with respect to Judge Sonia Sotomayor, President Obama's nominee to replace Justice Souter. This process should focus on the nominee's relevant qualifications to perform the job of Supreme Court Justice. The evaluation of the nominee should be based on the recognition that Supreme Court adjudication inevitably requires choice and discretion but that the exercise of such choice or discretion must be cabined by the constraints traditionally imposed by the judicial process. This paper examines these realities and how they bear on the evaluation process, and challenges the myths and slogans that have all too often served to confuse that process and mislead the American public.

EXECUTIVE SUMMARY

The distracting effect of the resort to such myths and slogans is exemplified by much of the discussion about President Obama's identification of "empathy" and an understanding of how our laws affect daily lives as among the qualities relevant to the choice of a Supreme Court Justice and statements by the nominee about how her experiences as a Latina may contribute to the quality of her decision making. Some have suggested that these statements indicate that the nominee is a "judicial activist" who will "make" rather than "interpret" law and decide cases according to her own personal preferences or based on the identities of the litigants. Studies of her 17-year record as a trial and appellate judge so far have repudiated those claims.[1] But the criticisms also reflect a mistaken view of the process of constitutional and statutory interpretation as a mechanical one which excludes choice and discretion and in which good judgment and experience have no role.

The reality is that choice and discretion are unavoidable features of Supreme Court adjudication and the Court frequently "makes law," subject to the constraints of the judicial process. In this process, empathy and life experience are valuable assets in making the judgments that Supreme Court adjudication requires, provided they are made within the limits of these constraints. In this paper I hope to clarify both the creative and constrained nature of judging.

---

1 *E.g.*, Charlie Savage, *Uncertain Evidence for 'Activist' Label on Sotomayor*, N.Y. Times, June 20, 2009, at A10; David Brooks, *Cautious at Heart*, N.Y. Times, June 9, 2009, at A27.

As this paper shows, none of the competing interpretive philosophies can exclude the exercise of judgment, choice and discretion that is required to answer the most difficult questions of constitutional and statutory interpretation which frequently confront and sometimes divide the Court. Notwithstanding the claims for originalist and textualist theories of interpretation, many of these questions cannot satisfactorily be answered by resort to the Constitution's text, which employs many open-ended indeterminate terms like due process or equal protection, or to its "original meaning," which is frequently unknowable or debatable. Nor may *stare decisis* – adherence to judicial precedent – always eliminate choice and judgment because the guidance precedent provides for cases of first impression is subject to reasonable debate and even where there is directly controlling precedent, the Supreme Court may occasionally choose to overrule it based on factors requiring the exercise of judgment. Moreover, Supreme Court constitutional and statutory interpretation does not take place in a vacuum of abstract law, but involves the application of a rule, and more typically an open-ended standard, to facts, and requires judgments about which of those facts are most significant and what weight they should be given. The issues posed in recent cases are illustrative: Was a public school's strip search of a teenage girl to determine if she possessed a drug an "unreasonable" search within the meaning of the Fourth Amendment, under the specific circumstances? Were the educational value of diversity and the alleviation of racial isolation "compelling interests" warranting a city's efforts to maintain a modicum of racial balance in its public schools and were those efforts "narrowly tailored," within the requirements of equal protection clause jurisprudence? Did a federal statute prohibiting a late-term abortion procedure without making an exception for protecting the health of the mother place an "undue burden" on the mother's right to choose? Each of these cases required the Justices to exercise judgments about the significance and weight of the facts that were necessarily informed by their experience and by an understanding of the impact of the conduct at issue on the lives of the affected litigants. And it would beggar belief that they each did or could view those facts in exactly the same light.

In sum, judgment, choice and discretion are unavoidable and in exercising that judgment, discretion and choice, judges do in a special sense "make law." That is the view of our greatest jurists – Holmes, Brandeis, Cardozo – and one of the most eminent conservative

appellate judges of our time, Richard Posner.[2] The grandeur of our constitutional history is not based on mechanical or syllogistic theories of interpretation. The meaning of due process, equal protection, and freedom of speech are not products of textual semantics or "original meaning," but have evolved through an incremental process of judicial reasoning much like the common law process on which our judicial system is based, and which reflects precedent, experience, history, and contemporary circumstances. Neither text nor "original meaning" produced the Supreme Court's decisions banning public school segregation, protecting the right of married couples to use contraceptives, protecting the privacy of telephone conversations from warrantless wiretapping, or establishing the principle of one person, one vote.

These decisions and many other landmarks of constitutional law establishing our most cherished rights and freedoms "made law." Similarly, the process of interpreting ambiguous or open-ended statutory text, whether employing textualist methods or more mainstream pragmatic and purposive methods, also involves choice and discretion that amounts to "lawmaking." But crucially, unlike the legislative process, such lawmaking is subject to the well-established constraints imposed by the judicial process. In evaluating the nominee the Senate, therefore, should recognize that, because some exercise of discretion and "lawmaking" is both inevitable and proper, it is all the more important to determine whether the nominee has a firm understanding and respect for those constraints.

Text is the first of these constraints even where it is ambiguous and open-ended. It limits the range of plausible meanings and precludes interpretations that the words will not bear. Respect for precedent – *stare decisis* – is a critical restraint especially in interpreting open-ended or indeterminate terms of the Constitution. *Stare decisis* furnishes the predictability and stability vital to the rule of law. Unlike lower courts, however, the Supreme Court has the power to overrule its precedents. But unless the exercise of that power is limited to compelling circumstances and takes account of the injustice it may entail for those who relied on these precedents, it may undermine the rule of law and respect for the Court. The Senate therefore should also carefully examine the nominee's standards for overruling precedent.

---

2 *See* Richard A. Posner, *How Judges Think* 78-92, 256-60 (2008) [hereinafter Posner, *How Judges Think*].

Respect for our system of Separation of Powers and Federalism and the democratic values underlying our constitutional system of government impose constraints which require the nominee to respect the limits of judicial power and the roles of the elected branches and the allocation of power between the National government and the States. But while the nominee must show the deference these limits impose on the judiciary, she also must be equally conscious of the role assigned by the Constitution to the Court to impose checks on the elected branches and States.

Finally and fundamentally, the nominee must be impartial and self-consciously aware that she may not decide cases based on personal ideological or partisan political preferences or based on favoritism to any individual or group of litigants. The nominee must have the strength of character to draw the line between the positive use of empathy and experience to identify the significance of facts bearing on the proper interpretation of the constitutional or statutory text, and deciding cases based on biases for or against particular individuals or groups. This line is not always easy to identify, but it surely is crossed where a decision cannot be reasonably explained within the limits imposed by the judicial process – for example, where a decision is based on a reading of precedent or on principles extrapolated from precedent that is implausible or based on a reading of a statute that cannot reasonably be made to fit within the range of plausible meanings to which even an ambiguous text is limited.

Thus, the true picture of the worthy nominee is one with the superior legal knowledge and good judgment to exercise the choice and discretion required by the difficult issues before the Court and the character and commitment to do so within the constraints of the judicial process.

Meanwhile, slogans like "judicial activist" are unhelpful and distracting. As Judge Frank Easterbrook noted: "When liberals are ascendant on the Supreme Court, conservatives praise restraint and denounce activism . . . . When conservatives are ascendant on the Court, liberals praise restraint . . . and denounce 'conservative activism.'"[3] A recently published

---

[3] *See* Frank Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. Colo. L. Rev. 1401, 1402 (2002).

and quite sophisticated empirical study attempted to measure "judicial activism" by focusing on such factors as the Justice's votes to invalidate federal and state laws, grant access to the federal courts, overrule precedent, and vote ideologically. Applying such criteria to 22 Justices sitting on the Court between 1953 and 2004, the study concludes that the most "activist" Justices were Justices Douglas, Black, Warren, Brennan and Marshall, but that the most "activist" Justice on the current Court is Justice Thomas, with Justice Scalia not far behind.[4] But, as this study also recognizes, its criteria cannot distinguish between good and bad "activist" decisions. As the study observes, some of the decisions considered "activist" when issued are among the most widely accepted by the American people, while some exercises of "judicial restraint," such as *Korematsu* v. *United States*,[5] deferring to the Executive on the internment of Japanese Americans, are among the "most lamented."[6]

The best advice recently was given by noted conservative legal scholar Richard Epstein of the University of Chicago:

> "'Judicial activism'" tells you nothing. The term ought to be scrapped. In today's world it's just a synonym for bad decisions. O.K., I'm against bad decisions, too. But you always have to explain why, and there's no short cut for doing that."[7]

I. MYTHS AND REALITIES OF CONSTITUTIONAL AND STATUTORY INTERPRETATION

Even before President Obama's nominee to replace Justice Souter was known, some political activists were already preparing to attack any nominee he chose as a "judicial activist" who would make, rather than interpret the law, and do so according to his or her personal,

---

4 *See* Frank B. Cross & Stefanie A. Lindquist, *Measuring Judicial Activism* 54-56, 59, 76-77, 138 (2009).

5 323 U.S. 214 (1944).

6 Cross & Lindquist, *supra* note 4, at 146-48.

7 Savage, *supra* note 1.

subjective preferences.[8] Such attacks were then launched simultaneously with the announcement of Judge Sotomayor's nomination.[9]

It is not activists alone, however, who use sound bites in the judicial nomination process. President George W. Bush announced his intention to appoint "strict constructionists" to the Court.[10] And Chief Justice Roberts during his confirmation process described the job of the Justice as merely that of an "umpire calling balls and strikes."[11]

The activists' slogans obviously reflect a political agenda that has nothing to do with the true qualifications of the nominee. Justice Scalia has denounced "strict constructionism" as "a degraded form of textualism," and long ago, "strict construction" was famously criticized by Chief Justice John Marshall.[12] Renowned appellate judges affirm that where text and

---

8 Charlie Savage, *Conservatives Map Strategies on Court Fight*, N.Y. Times, May 16, 2009, at A1.

9 *See* Jeff Zeleny, *Obama Chooses Sotomayor for Supreme Court Nominee*, N.Y. Times, May 26, 2009, http://thecaucus.blogs.nytimes.com/2009/05/26/obama-makes-decision-on-supreme-court-nominee/ ("Conservative groups reacted with sharp criticism on Tuesday morning. 'Judge Sotomayor is a liberal judicial activist of the first order who thinks her own personal political agenda is more important than the law as written,' said Wendy E. Long, counsel to the Judicial Confirmation Network. 'She thinks that judges should dictate policy, and that one's sex, race, and ethnicity ought to affect the decisions one renders from the bench.'").

10 Jeffrey Rosen, *Can Bush Deliver a Conservative Court?*, N.Y. Times, Nov. 14, 2004, http://www.nytimes.com/2004/11/14/weekinreview/14jeff.html ("At a press conference two days after his re-election, President Bush was asked about what sort of Supreme Court Justice he might nominate if and when the ailing Chief Justice William H. Rehnquist retires. Mr. Bush repeated the pledge he made in the presidential debates: 'I would pick people who would be strict constructionists.'").

11 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States*, *Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee, United States Supreme Court).

12 Antonin Scalia, *A Matter of Interpretation* 23 (1997) [hereinafter Scalia, *A Matter of Interpretation*]. In *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 187-88 (1824), Chief Justice Marshall, responding to the assertion that the enumerated powers of the federal government should be strictly construed, said: "But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? . . . . What do gentlemen mean by a 'strict construction?' . . . . If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government and render it unequal to the object for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we

precedent are unclear, judges do – and must – in fact "make law." Judge (later Justice) Benjamin Cardozo explained:

> "Obscurity of statute or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retroactively in the exercise of a power frankly legislative in function.[13]

In doing so, of course, they are subject to the constraints of the judicial process. As Justice Holmes emphasized:

> "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.[14]

As noted above, both conservatives and liberals misuse the term "judicial activism" for partisan ends.[15] But even Chief Justice Robert's characterization of the job of a Justice as merely that of "an umpire calling balls and strikes" casts a misleading light on the reality of the Court's constitutional and statutory interpretation that has been heavily criticized.[16]

Like some of the activists' slogans, the Chief Justice's metaphor implies that the process of interpretation is a mechanical one in which a pre-existing rule (the physical boundaries of the strike zone) is simply applied to a set of facts (the location of the ball against those

---

cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded."

13 Benjamin Cardozo, *The Nature of the Judicial Process* 128 (1921).

14 *S. Pac. Co.* v. *Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). *See also* Posner, *How Judges Think*, *supra* note 2, at 78-92, 256-60.

15 *Supra* pp. 4-5.

16 Posner, *How Judges Think*, *supra* note 2, at 78-79 (2008).

boundaries) to produce a value-free, objective decision unaffected by the policy preferences of the Justice. On this view the law pre-exists in some platonic reality, just waiting to be "found" by the judge applying the correct tools. Such claims have in fact been made for certain conservative philosophies of constitutional and statutory interpretation, whose chief advocates on the Court are Justice Scalia and Justice Thomas. These philosophies, labeled "originalism" and "textualism," insist that by looking only to the Constitution's text and original meaning and a statute's text and semantic aids like context, rules of construction, and dictionaries, and aided by resort to precedent ("*stare decisis*") – what Judge Posner collectively labels "legalisms"[17] – questions of interpretation of open-ended or ambiguous constitutional and statutory texts can be resolved without the exercise of any discretion or judgment or resort to policy. At the same time, advocates for these philosophies claim that competing interpretive approaches which read open-ended constitutional terms like due process or equal protection in light of constitutional history and tradition, experience and current circumstances and which read ambiguous statutory texts in light of legislative purpose, allow judges to import their own political or policy preferences and subjective biases into the process of interpretation, with the result that these judges make law, rather than interpret it.[18]

Close examination shows that this dichotomy is unwarranted. Legalist philosophies, like those advocated by Justice Scalia, do not, in fact, preclude choice or discretion and leave as much room as competing philosophies for the importation of policy preferences in interpreting open-ended constitutional provisions or ambiguous statutory texts. Meanwhile, competing philosophies interpreting the open-ended provisions of the Constitution in light of current circumstances, and ambiguous statutory terms in light of statutory purposes, are no less subject to the constraints of the judicial process: the limits imposed by text, precedent, history, tradition, impartiality, and the obligation to explain decisions through reasoned opinions that come within those limits.

---

17 *Id.* at 7-9.

18 Scalia, *A Matter of Interpretation*, *supra* note 12, at 37-47. *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989) [hereinafter Scalia, *Originalism: The Lesser Evil*]; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

A. Interpreting the Constitution

No responsible jurists would disagree that where the text of the Constitution lays down an unambiguous rule, the Court must faithfully follow its command. Thus, the Constitution's requirements that the President be at least 35 years of age or that treason be proven by at least two witnesses mean exactly what they say. These provisions leave no room for dispute.

But cases involving the interpretation of such provisions will not reach the Court – or even likely be brought at all. The constitutional issues that do reach the Court typically require interpretation of phrases like "due process," "equal protection of the laws," "freedom of speech," or "cruel and unusual punishment," which have no determinate meaning on their face. The Court is also called upon to interpret the scope of broad grants of power to Congress, such as the power to "regulate Commerce with foreign Nations and among the several States" or to enact "appropriate legislation" to enforce the Fourteenth and Fifteenth Amendments, or giving the President authority to exercise "the Executive Power" or to act as "Commander in Chief of the Army and Navy." The meaning and scope of these terms have been the subject of intense controversy in Separation of Powers or Federalism disputes that have divided even conservative Justices.[19]

1. Originalism

There is little debate that "original meaning" may be useful in interpreting such constitutional provisions. But contrary to claims made for it, original meaning neither eliminates discretion nor satisfactorily resolves all questions of constitutional interpretation. As Justice Jackson observed:

> "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result, but only

---

19 *See, e.g.*, *Boumediene* v. *Bush*, 128 S. Ct. 2229 (2008); *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004); *Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721 (2003).

> supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other."[20]

Indeed, even "originalists" disagree as to the meaning of "original meaning." Some contend for the intent of the Framers of the Constitution and its Amendments; others for the intent of the ratifiers. Justice Scalia contends for the "public meaning" of the term, as may be found, for example, in dictionaries or public documents and writings at the time of ratification.[21] There also are disputes about the historical evidence for a particular "original meaning." For example, in *Heller* v. *District of Columbia*, the Court's recent interpretation of the Second Amendment's right to bear arms, both Justice Scalia's majority opinion and Justice Stevens' dissent advanced voluminous but competing versions of the historical evidence for the Amendment's original meaning.[22] Judge Posner observed that Justice Scalia's version reflected a highly selective, and therefore misleading, version of the historical record, which Judge Posner labeled "law office history."[23] Judge Harvie Wilkinson III, the eminent Fourth Circuit conservative judge, also criticized Justice Scalia's use of history in *Heller*.[24] Judge Wilkinson observed that "originalism, though important, is not determinate enough to constrain judges' discretion to decide cases based on outcomes they prefer"[25] and that in his selective use of founding-era sources in *Heller,* Justice Scalia was guilty of "look[ing] over the heads of the crowd and pick[ing] out [his] friends,"[26] in the same way Justice Scalia

---

20 *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring).

21 Scalia, *A Matter of Interpretation*, *supra* note 12, at 38; Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. Rev. 1, 9-15 (2009).

22 *See generally District of Columbia* v. *Heller*, 128 S. Ct. 2783 (2008).

23 Richard A. Posner, *In Defense of Looseness*, The New Republic, Aug. 27, 2008, at 35 [hereinafter Posner, *In Defense of Looseness*].

24 Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253 (2009).

25 *Id.* at 256-57.

26 *Id.* at 271.

accused the majority in *Roper* v. *Simmons*[27] of doing in relying on sociological evidence to find the juvenile death penalty unconstitutional.[28]

Most fundamentally, there is a dispute about whether the Framers, in using open-ended terms like "equal protection," intended that their meaning be fixed as understood at the time or whether they sought to sketch out certain principles which, to remain vital, would have to be adapted to unforeseeable circumstances in a distant future. Thus, Judge Posner notes that true originalism would recognize that the reigning interpretive theory in the legal culture of the 18th century was "loose (or flexible, non-literal) construction" and that it is unlikely that the Framers "intended to freeze American government two centuries hence at their eighteenth-century level of understanding."[29]

2. Mainstream Interpretation

The assertion that the meaning of these terms be fixed as understood in 1789 or 1868 is at odds with the mainstream of our constitutional jurisprudence. In the earliest days of our Republic, Chief Justice Marshall famously laid down the principle that "it is a Constitution we are expounding"[30] and that its provisions are part of "a constitution, intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs."[31]

---

27 543 U.S. 551 (2005).

28 *Id.* at 617 (Scalia, J., dissenting).

29 Posner, *In Defense of Looseness*, *supra* note 23, at 33. As Justice Breyer observed: "The Framers did not say specifically what factors judges should take into account when they interpret statutes or the Constitution . . . . Why would Framers, who disagreed even about the necessity of *including* a Bill of Rights in the Constitution, who disagreed about the *content* of that Bill of Rights, nonetheless have agreed about *what school of interpretive thought* should prove dominant in interpreting that Bill of Rights in the centuries to come?" Justice Stephen Breyer, Our Democratic Constitution, Harvard University Tanner Lectures on Human Values, Nov. 17-19, 2004, *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_11-17-04.html.

30 *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

31 *Id.* at 415. *See also* Posner, *In Defense of Looseness*, *supra* note 23, at 33 (describing Chief Justice Marshall as a loose constructionist and noting that "[b]ecause of the difficulty of amending the Constitution, it has from the beginning been loosely construed so as not to become a straitjacket or suicide pact.").

Justice Brandeis elaborated on this principle in his 1928 dissent in *Olmstead* v. *United States*,[32] a case presenting the question of whether the Fourth Amendment's protection of the right to be "secure in one's houses, papers, persons and effects" protected the privacy of telephone conversations from wiretapping. The majority held that the text could not bear that meaning. In his dissent, which ultimately was vindicated by the Court in 1967,[33] Justice Brandeis explained:

> "'We must never forget,' said Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 407, 'that it is a constitution we are expounding.' Since then this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the fathers could not have dreamed. We have likewise held that general limitations on the powers of government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the states from meeting modern conditions by regulations which, 'a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.' Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world."[34]

Justice Brandeis endorsed the approach to constitutional interpretation set out in the Court's earlier decision in *Weems* v. *United States*, from which he quoted the following:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had

---

32 277 U.S. 438 (1928).

33 *See Katz* v. *United States*, 389 U.S. 347 (1967).

34 277 U.S. at 472 (citations omitted).

> theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of Constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a Constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule, a Constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality."[35]

This is not to suggest that Justices are free to simply read open-ended constitutional provisions as they wish, based on personal preferences. One of the most thoughtful descriptions of the need to balance the exercise of discretion with the constraints of the judicial process in interpreting the Due Process Clause of the Fourteenth Amendment is Justice Harlan's influential and prophetic dissent in *Poe* v. *Ullman*.[36] There, in an opinion that forms the basis for the right of privacy today, Justice Harlan argued that a Connecticut law prohibiting the use of contraceptives by married couples violated the liberty component of the Due Process Clause.[37] Before reaching that conclusion he laid out the principles of interpretation as follows:

---

35 277 U.S. at 472-73 (quoting *Weems* v. *United States*, 217 U.S. 349, 373 (1910)).

36 367 U.S. 497 (1961).

37 *Id.* at 553-54.

> "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint."[38]

As Justice Harlan further explained this process of creation and constraint:

> "Each new claim to constitutional protection must be considered against a background of constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no 'mechanical yard-stick,' no 'mechanical answer.' The decision of an apparently novel claim must depend on grounds which follow closely on well accepted principles and criteria. The new decision must take 'its place in relation to what went before and further [cut] a channel for what is to come.' *Irvine* v. *California*, 347 U.S. 128, 347 U.S. 147 (dissenting opinion). The matter was well put in *Rochin* v. *California*, 342 U.S. 165, 342 U.S. 170-171: 'The vague contours of the Due Process Clause do not leave judges at large.

---

[38] *Id.* at 542.

> We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession.'"[39]

Justice Harlan's characterization of the interpretive process as one of both "judgment and restraint" and one that is limited by and yet builds upon our constitutional tradition is the mainstream approach to constitutional interpretation.

3. The Contributions of Mainstream Interpretation

Even Justice Scalia acknowledges that originalism does not have all the answers. Thus, he concedes that flogging would violate the Eighth Amendment's prohibition on cruel and unusual punishment, even if it would not have been so considered in late 18th century America.[40] Indeed, aspects of Justice Scalia's opinion in *Heller* acknowledged the limitations of originalism. Thus he accepted the need to interpret the Second Amendment in terms of current social conditions, reasoning that the right to bear arms extended beyond the muskets and other arms used by 18th century militias and included their 21st century analogues;[41] at the same time he recognized an exception for the prohibition of "dangerous and unusual weapons" used by our modern day "militias."[42]

A prime example of the limitations of the legalist approach to constitutional interpretation is the iconic precedent of *Brown* v. *Board of Education*.[43] No responsible conservative jurist

---

39 *Id.* at 544-45.

40 Scalia, *Originalism: The Lesser Evil*, *supra* note 18, at 861.

41 128 S. Ct. at 2792.

42 *Id.* at 2817.

43 347 U.S. 483 (1954).

questions its holding that state-ordered segregation of public school education violates the equal protection clause. But the Supreme Court found inconclusive the evidence of whether the original meaning of "equal protection" forbid public school segregation:[44] Subsequent legal scholarship asserts that it did not.[45] Moreover, the term "equal protection" as a textual matter could be read to encompass "separate but equal," the meaning that would have been compelled under *stare decisis* by the 1896 precedent of *Plessy* v. *Ferguson*.[46] In reaching its conclusion that nevertheless "separate but equal educational facilities are inherently unequal," the Court instead turned to experience:

> "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."[47]

This approach to constitutional adjudication has produced constitutional principles which most Americans now take for granted and consider fundamental but which at the time they were first established required the Court to "make law".

In addition to the prohibition and dissolution of state-sponsored racial segregation of schools and other public facilities, a small sample of cases "making law" includes the validity of federal and state wage and hour laws;[48] the principle of one person, one vote;[49] protections

---

44 *Id.* at 483, 489-90.

45 *See* Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and Racial Equality* 26, 447 (2004).

46 *Plessy* v. *Ferguson*, 163 U.S. 537 (1896).

47 *Brown*, 347 U.S. at 492-93.

48 *W. Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937); *United States* v. *Darby Lumber Co.*, 312 U.S. 100 (1941).

for minority voting rights;[50] gender equality;[51] a right to privacy and autonomy in individuals' most intimate personal relationships;[52] the right to criticize public officials without fear of libel damages so long as the criticisms when made were not known to be false or made in reckless indifference to their falsity;[53] protection against wiretapping of one's private telephone conversations;[54] the right of indigent defendants to the appointment of counsel;[55] and the right of persons in police custody to be warned of their right to remain silent and to assistance of counsel.[56]

All of these landmarks "made law," extending the principles of earlier cases to meet new circumstances or overruling earlier cases which were no longer viable in light of experience and current conditions. Those jurists who follow this approach are employing our Nation's most cherished jurisprudential traditions.

B. Interpretation of Statutes

Textualism has had a considerable influence on the process of statutory interpretation. Certain tenets of textualism are accepted by most jurists. It is now axiomatic that interpretation begins with the language of the statute and where its text is clear and unambiguous that is the end of the process.[57] Where the text is ambiguous there is also

---

49 *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Gray* v. *Sanders*, 372 U.S. 368 (1963).

50 *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

51 *United States* v. *Virginia*, 518 U.S. 515 (1996); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

52 *Lawrence* v. *Texas*, 539 U.S. 558 (2003); *Planned Parenthood* v. *Casey*, 505 U.S. 833 (1992); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

53 *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

54 *Katz* v. *United States*, 389 U.S. 347 (1967).

55 *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

56 *Miranda* v. *Arizona*, 384 U.S. 436 (1966). *See also Dickerson* v. *United States*, 530 U.S. 428 (2000).

57 "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). Most jurists except the situation where a literal reading produces an absurd result, but textualists like Justice Scalia have a very narrow definition of "absurd" limiting it to situations of

consensus that resort should be had to context, dictionaries, statutory structure, rules of construction, rules for deference to administrative agencies and other semantic or legalist devices. Differences arise, however, as to the use of legislative history and efforts to reconstruct Congress' purpose to determine the meaning of an ambiguous phrase and the relative weight to be given purpose and semantic or legalist devices in reaching an interpretation.

1. Textualism

Strict textualists like Justice Scalia claim that their approach, which largely excludes consideration of Congress' purpose from the process of interpreting ambiguous text, produces more objective results that preclude preferences of individual Justices. They also maintain that it is more faithful to the Constitution and democracy. They base their position on a reading of the legislative process reflected in Article I, section 7 of the Constitution – bicameralism, presentment to the President for signature or veto, and the process for overriding a veto by a supermajority – and various procedural rules of the House and the Senate. They maintain that these features, together with the reality of bargaining among competing interests, are designed to produce compromise and make it impossible to accurately determine a collective legislative purpose. They insist that the only way to remain faithful to the constitutional process and exclude "judicial lawmaking" is to rely on the text and where ambiguous, context and semantic or legalist devices. They maintain that resort to legislative history allows judges to select their "friends" from among the many differing statements to support their personal preferences and upsets the legislative compromises reflected by ambiguous text. They also maintain that resort to legislative history ignores the President's role in the legislative process under the presentment clause.[58]

"scrivener's error," obvious errors in transcription. *See Pub. Citizen* v. *Dep't of Justice*, 491 U.S. 440, 454 (1989); *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 454, 509 (1989); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1982); Scalia, *A Matter of Interpretation*, *supra* note 12, at 20.

[58] Scalia, *A Matter of Interpretation*, *supra* note 12, at 25; John F. Manning, *What Divides Textualists from Purposivists?*, 106 Colum. L. Rev. 70, 73, 103 (2006); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1, 32 (2006). Some textualists will look at legislative history to determine the evil at which the legislation was directed. Justice Scalia will do so where he believes it confirms his semantic interpretation. Manning, *supra*, at 83; Molot, *supra*, at 45-48.

2. Critiques of Textualism

Interpretive pragmatists reject this approach on several grounds.[59] They reject the strict textualist resort to solely semantic devices as unrealistic, because it seems unlikely that Congress in passing, or the President in signing, legislation had those devices, such as particular canons of construction, in mind or were even aware of their existence; in one case Justice Scalia relied on an obscure, ancient text to establish the meaning of an ambiguous phrase with which neither Congress nor the President could conceivably have been familiar.[60] Pragmatists maintain that judges' constitutional obligation and democratic principles require the courts to do their best to give effect to Congress' purpose provided that doing so is consistent with a plausible meaning of ambiguous or indeterminate statutory language. While they recognize the need to treat statements in the legislative process warily, they reject the notion that determining purpose is not feasible. They also maintain that Congress, like the Framers of the Constitution, uses indeterminate language because it cannot foresee all the circumstances to which its legislation may apply and expects the courts to assist it by determining how its language should apply to carry out its purpose in those unforeseen circumstances.[61] They see textualism as an attempt to carry out an anti-government, anti-democratic agenda and maintain the status quo by forcing Congress to legislate in code-like detail, thus slowing the legislative process and making it harder to enact legislation. Finally, they reject the claim that textualism imposes greater limits on individual Justices' personal or political preferences, noting that the variety of semantic and legalist devices available makes it at least equally possible for textualist Justices to find "friends" to support their personal or political preferences.[62]

---

59 Molot, *supra* note 58, at 25. "Pragmatists" is used here as a loose shorthand to encompass those like Judge Posner who focus on the consequences of choosing among plausible interpretations of ambiguous text, as well as purposivists, including those following the Legal Process approach of the late Harvard Law School Professors Henry Hart and Albert Sacks, which seeks to establish the purpose likely held by an objectively reasonable legislator. *See* Posner, *How Judges Think*, *supra* note 2, at 230-69.

60 Manning, *supra* note 58, at 83.

61 Molot, *supra* note 58, at 53-54.

62 *Id.* at 48-49.

The interpretive selectivity that textualism permits is nicely illustrated by Justice Scalia's dissenting opinion in *Massachusetts* v. *E.P.A.*[63] That case involved the politically controversial issue of whether the Environmental Protection Agency (EPA) was required by the Clean Air Act to regulate the global warming effects of carbon dioxide and other greenhouse gas emissions from automobiles. The EPA claimed the Act did not authorize it to do so.

The Clean Air Act requires the EPA to regulate "emissions of *any* air pollutant" from new automobiles and automobile engines contributing to "air pollution which may reasonably be anticipated to endanger public health or welfare."[64] "Air pollution" was defined by the Act as "*any* air pollution agent or combination of such agents, including *any* physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air."[65] There was no dispute that carbon dioxide and other greenhouse gas emissions were physical, chemical substances "emitted into or otherwise enter[ing] the ambient air." Justice Stevens, writing for the majority, therefore concluded that the language of the statute unambiguously covered greenhouse gases. In doing so, he added that Congress repeated use of the word "any" made clear that the statutory definition "embraces all airborne compounds of whatever stripe."[66] In effect, he was invoking the "plain meaning" canon, in which the statutory text alone provides the basis for interpretation.[67]

In his dissent, Justice Scalia conceded that Justice Stevens' interpretation was a possible one, but under a different canon – one under which words following "including" are treated as an

---

63 549 U.S. 497 (2007).

64 *Id.* at 506.

65 *See id.* (emphasis added).

66 *Id.* at 529.

67 "[I]n interpreting a statute a court should always turn to one cardinal canon before all others….[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. at 253-54 (1992). Indeed, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (quoting *Rubin* v. *U.S.*, 449 U.S. 424, 430 (1981)).

illustrative sampling of the general category that precedes the word "including."[68] But Justice Scalia chose instead to accept a government argument that there were also cases in which the examples following the word "including" were limited by the general category preceding it, as indicated in the following hypothetical: *American* vehicles including *any* cars, trucks, or minivans. In that hypothetical, the illustrative list would be limited by the general category to "American" cars, etc.[69] On its face, "air pollution agent" contains no limitation analogous to "American" in the hypothetical. Justice Scalia nevertheless reasoned that there was an ambiguity as to whether the general category "any air pollution agent" did impose a similar limitation, because *Chevron* deference[70] required him to defer to the EPA's position that it did. Further applying *Chevron* deference, Justice Scalia then deferred to the EPA's definition of "air pollution agent" as applying only to pollutants of the lower atmosphere and excluding greenhouse gases which purportedly only affected the upper atmosphere.[71] Justice Scalia found this reading consistent with "common sense"[72] and with the second of three definitions of "air" in the 1949 edition of *Webster's Dictionary*, which defines "air" as "[t]he body of the earth's atmosphere; esp. the part of it near the earth, as distinguished from the upper rarified part."[73] Neither of the other definitions make this distinction.

Thus, by choosing among different canons of construction, twice invoking *Chevron* deference, and selectively choosing from among the dictionary definitions, Justice Scalia managed to convert what, on any fair reading of the statute, reflected Congress' unambiguous, sweeping command to include within "air pollution agent" "any" automobile emission containing "physical, chemical . . . substances entering . . . the ambient air" to an ambiguous statute requiring deference to EPA's narrow reading which would have prevented

---

68 "[The majority's reading] is certainly one possible interpretation of the statutory definition. The word 'including' can indeed indicate that what follows will be an 'illustrative' sampling of the general category that precedes the word." 549 U.S. at 556 (Scalia, J., dissenting).

69 *Id.* at 557.

70 *See Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

71 549 U.S. at 557-59.

72 *Id.* at 558 n.2.

73 *Id.* at 559.

regulation protecting "the public health and welfare" from the anticipated dangers of global warming caused by auto emissions.[74]

* * *

Textualists have made important contributions to statutory interpretation. Pragmatic jurists who employ all available methods – text, semantics, legislative purpose and assessment of the consequences of particular interpretations – are, however, more faithful agents of the legislative process prescribed by the Constitution and democratic principles. But whichever approach is taken, it is plain that the exercise of judicial discretion and choice among plausible meanings is unavoidable.

II. CONSTRAINED JUDGMENT AND THE RELEVANT CRITERIA FOR EVALUATING THE NOMINEE

The Senate may wish to explore which of the competing interpretive philosophies the nominee employs. Her extensive record as a trial and appellate judge provides an extensive basis for such an inquiry. But assuming they are not employed in some aberrational way, her qualifications to serve on the Court should not depend on which of these philosophies she employs. Rather, the more relevant inquiry is whether, given the constrained exercise of discretion which is inevitable in constitutional adjudication under any of these approaches, the nominee has the qualities of knowledge, judgment and maturity necessary to exercise her discretion and whether she understands and will be faithful to the constraints of the judicial process which must limit the exercise of that discretion. The qualities for the exercise of this constrained judgment are inseparable from one another. This section begins, however, with the qualities which the exercise of discretion and judgment requires and then discusses those required by the constraints imposed by the judicial process.

---

74 *See also* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 Vand. L. Rev. 395 (1950) (listing twenty-eight pairs of canons that directly contradicted each other and arguing that canons of construction were therefore a fundamentally indeterminate method of interpretation). *See also* Abner J. Mikva & Eric Lane, *Legislative Process* 116-17 (2d ed. 2002).

A. Judgment

As Judge Posner notes, recognition of the important role played by discretion and choice in the work of appellate judges means that they need not only superior legal knowledge, intelligence and analytic ability, but qualities of "good judgment," which he defines as "a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of limitations, sanity, prudence, a sense of reality and common sense."[75] Judge Posner also emphasizes the role that experience and intuition play in appellate judging.[76]

A recognition of the importance of these qualities to judging should enable the Judiciary Committee and the Senate to better appreciate President Obama's statement that among the qualities he seeks in a nominee for the Court is someone for whom justice is "also about how our laws affect the daily realities of people's lives – whether they can make a living and care for their families; whether they feel safe in their homes and welcome in their own nation . . . . [T]hat quality of empathy, of understanding and identifying with people's hopes and struggles [is] an essential ingredient for arriving [at] just decisions and outcomes."[77] Some have seized on the reference to "empathy," claiming it is a code word for judicial activism – ignoring the rest of the President's statement that he seeks someone who is "dedicated to the rule of law, . . . honors our constitutional traditions, . . . respects the integrity of the judicial process and the appropriate limits of the judicial role."[78] Empathy is by no means inconsistent with these latter values. To the contrary, President Obama correctly included it as an important qualification. The same can be said about the nominee's references to her own experiences as an asset in judging. The ability to understand how the choices that must be made in interpreting open ended terms of the Constitution or statutes affect real people in the real world is in many cases essential to a fair and just outcome that is faithful to the written text.

---

75 Posner, *How Judges Think*, *supra* note 2, at 117, 258-60.

76 *Id.* at 94-117.

77 Barack H. Obama, President of the United States, The President's Remarks on Justice Souter (May 1, 2009), http://www.whitehouse.gov/blog/09/05/01/The-Presidents-Remarks-on-Justice-Souter/ .

78 *Id.*

Constitutional and statutory interpretation do not occur in a vacuum. They arise in particular factual contexts and require the Court to decide whether that factual context comes within the constitutional or statutory rule or standard it is being asked to apply. Whether a statute abridges freedom of speech or religion, or imposes an "undue burden" on a mother's right to choose to terminate a pregnancy, or whether a government search is "unreasonable," each require an understanding of the facts and a selection of those facts most pertinent to the application of the rule or standard. David Brooks, the conservative New York Times columnist, although not a lawyer, gave one of the best descriptions of the role of empathy and experience in this process:

> "Supreme Court Justices, like all of us, are emotional intuitionists. They begin their decision-making processes with certain models in their heads. These are models of how the world works and should work, which have been idiosyncratically ingrained by genes, culture, education, parents and events. These models shape the way judges perceive the world. As Dan Kahan of Yale Law School has pointed out, many disputes come about because two judges look at the same situation and they have different perceptions about what the most consequential facts are. One judge, with one set of internal models, may look at a case and perceive that the humiliation suffered by a 13-year old girl during a strip search in a school or airport is the most consequential fact of the case. Another judge, with another set of internal models, may perceive that the security of the school or airport is the most consequential fact. People elevate and savor facts that conform to their pre-existing sensitivities."[79]

Two recent examples illustrate the point.

The first is the case of *Safford Unified School District* v. *Redding*, alluded to by Mr. Brooks, raising the question whether a public school official's strip search of a 13-year-old student to

---

79 David Brooks, *The Empathy Issue*, N.Y. Times, May 29, 2009, at A25.

determine if she possessed ibuprofen was an "unreasonable search and seizure" within the meaning of the Fourth Amendment.[80] Part of the mix of facts potentially bearing on the reasonableness of the search was its intrusiveness, given the sensitivities of a 13-year old girl. The importance of experience in the perception of the facts of the case was apparent at oral argument. Justice Breyer seemed to dismiss the teenager's sensitivities, referring to his own boyhood memories of stripping in the locker room.[81] Justice Ginsburg had to point out to him that what the record actually showed was a search of a 13-year old girl's bra.[82] As Justice Ginsburg later observed in an interview: "They have never been a 13-year-old girl. It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood."[83] Ultimately, however, Justice Ginsburg's viewpoint did seem to have an impact on her colleagues, as a majority of the Justices did come to understand the humiliation that Savana Redding experienced and found, 8-1, that such an intrusive search was unreasonable under the Fourth Amendment in the absence either of any indication that the drugs Redding was suspected of concealing posed a danger to other students or of any reason to suspect that drugs were in fact concealed in her underwear.[84] Justice Souter, who wrote the opinion of the Court, noted that Redding had found the search "embarrassing, frightening and humiliating"[85] and he found that a "search exposing the body" as a result of "an accusation reserved for suspected wrongdoers" had an "obviously different meaning" from students taking off their clothes in other circumstances, such as changing for gym class.[86]

---

80 No. 08-479, slip op. (U.S. July 25, 2009).

81 Transcript of Oral Argument at 58, *Safford* (U.S. Apr. 21, 2009).

82 *Id.* at 45-46. *See also* Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA Today, May 5, 2009, at 1A.

83 Biskupic, *supra* note 82.

84 *Safford*, No. 08-479, slip op. at 10.

85 *Id.* at 8.

86 *Id.* at 9.

A second example involves the issue of statutory interpretation in the recent gender pay discrimination case of *Ledbetter* v. *Goodyear Tire & Rubber Co.*[87] That case required an interpretation of a 180-day statute of limitations on discrimination claims under Title VII of the 1964 Civil Rights Act. The statute was ambiguous as to when the limitations period began to run, but there were two lines of cases interpreting the statute that potentially bore on the issue. Justice Alito's opinion for the majority relied on a line of cases which involved single, discrete, immediately identifiable acts such as a firing or a denial of tenure, in which the statute began running immediately upon the firing or tenure-denial.[88] He therefore concluded that the limitations period began running with the first alleged pay discrimination. The other line involved repetitive, cumulative acts of discriminatory harassment allegedly creating a racially or sexually hostile atmosphere. Those cases held that the statute ran from the time such a hostile atmosphere was created, rather than from the earliest of the series of acts that were the components of the atmosphere. Justice Ginsburg brought to bear her awareness of how pay discrimination actually operates in the real world – *e.g.*, where the employer (as did Goodyear) forbids employees from disclosing their pay to one another and in any event, where the pay difference may not appear significant enough to imply discrimination or justify a lawsuit until it accumulates over time. She therefore analogized the pay discrimination claim to the hostile environment cases.[89] Moreover, Justice Ginsburg noted that given the real world characteristics of pay discrimination, Justice Alito's conclusion that the 180-day limitations period began to run from the first discriminatory paycheck, would render nugatory Title VII's purpose to eliminate gender-biased pay discrimination.[90]

Justice Alito looked at the interpretation issue solely from the viewpoint of the employer possibly facing stale claims, while Justice Ginsburg – who spent much of her career before joining the Court as a lawyer challenging gender discrimination in the workplace – focused

---

87 550 U.S. 618 (2007).

88 *Id.* at 625-28.

89 *Id.* at 645-50.

90 *Id.* at 660.

on the way pay discrimination operated in the real world.[91] Indeed, one could examine almost any of the Court's 5-4 decisions of the last several terms to see how the individual Justices' different values and perspectives brought to bear on the facts and their significance shaped their different conclusions.[92]

In sum, empathy, experience and understanding of how the real world works are frequently decisive factors in constitutional and statutory interpretation. The examples above also show the desirability of having a Court composed of Justices with a diversity of experiences. As Judge Posner notes, such diversity protects individual Justices against being "blind sided" – overlooking the significance of facts because of the particular preconceptions, intuitions, and attitudes shaped by the individual experiences that they bring to bear on the cases before them.[93] A Justice Thurgood Marshall can enrich the experience of a colleague like Justice Sandra Day O'Connor,[94] just as a Justice Ginsburg can enrich the experience of a Justice Breyer or Justice Alito, enabling them to challenge their own preconceptions or intuitions.

B. Constraints

At the same time, these personal qualities that enter into Supreme Court adjudication make it all the more necessary to determine whether the nominee has the character and commitment to exercise her discretion and judgment within the constraints imposed by the judicial process. These constraints include: A self-conscious awareness that her own personal emotions, biases in favor or against particular individual persons or groups, and personal ideologies or partisan political views must be excluded from her decisions; respect for the

---

91 Earlier this year, Congress in effect agreed with Justice Ginsburg, enacting the Lily Ledbetter Fair Pay Act to overturn the *Ledbetter* decision. *See* Sheryl Gay Stolberg, *Obama Signs Equal-Pay Legislation*, N.Y. Times, Jan. 29, 2009, http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html.

92 *See, e.g.*, *Gonzales* v. *Carhart*, 550 U.S. 124 (2007); *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1.*, 551 U.S. 701 (2007).

93 Posner, *How Judges Think*, *supra* note 2, at 115-16.

94 Linda Greenhouse, *Every Justice Creates a New Court*, N.Y. Times, May 26, 2009, at A27 ("After Justice Thurgood Marshall retired in 1991, Justice O'Connor published a tribute describing him as the embodiment of 'moral truth' and recounting the experience of listening to his stories during the decade that they served together, stories that 'would, by and by, perhaps change the way I see the world.'").

limits imposed by text; respect for precedent and fidelity to our constitutional tradition; a recognition of the limits of the Court's role imposed by Article III's limitation of the exercise of judicial power to "cases and controversies"; the limits on its role vis-à-vis the elected branches and the states imposed by Separation of Powers, Federalism, and our democratic system of government; and the obligation to explain her decisions in reasoned opinions that meet the requirements of our legal and judicial traditions.

Thus, while qualities such as personal experience and empathy are assets contributing to an understanding of the facts pertinent to assessing their significance for the interpretation of a constitutional or statutory provision, the nominee must be capable of resisting and factoring out the emotions, personal sympathy or identification with particular litigants that those qualities may arouse. The extensive record of written trial court and appellate decisions compiled by Judge Sotomayor should enable the Senate to determine whether she has that capacity.

Even an ambiguous text imposes limits on the range of plausible meanings that can be ascribed to it; the words cannot be given a meaning they will not bear.

The importance of *stare decisis* or precedent to constitutional adjudication is critical. In significant part, constitutional law is not about the Constitution's text, but about the Court's precedents. Interpretive issues relating to due process, equal protection, cruel and unusual punishment, freedom of speech, establishment and free exercise of religion, and the scope of Congress' or the President's powers cannot be resolved by simply looking at the Constitution's text. The starting point for analysis will necessarily be the great body of accumulated precedent already interpreting these constitutional provisions. Adherence to precedent – *stare decisis* – provides the stability and predictability which is vital to the rule of law. As explained by Justices O'Connor, Kennedy and Souter:

> "The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. *See* B. Cardozo, *The Nature of the Judicial Process* 149 (1921). Indeed, the very

> concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. *See* Powell, Stare Decisis and Judicial Restraint, 1991 *Journal of Supreme Court History* 13, 16."[95]

This is not to suggest that the Court should never overrule precedent, but it should do so only in those rare instances where it satisfies appropriate limiting criteria. The most thoughtful exposition of those criteria is the opinion of Justices O'Connor, Kennedy and Souter in *Planned Parenthood* v. *Casey*. They include:

> "whether the rule has proven to be intolerable simply in defying practical workability, . . . whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, . . . whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, . . . or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[96]

This is a prudential and pragmatic analysis, which in some special cases, even asks whether the cost of overruling would be to undermine the Court's legitimacy.[97] The willingness of the nominee to adhere to these principles limiting departures from *stare decisis* is, therefore, an important part of the inquiry into her qualifications.

Another constraint deserving comment is "judicial restraint." Article III of the Constitution limits the judicial power to the resolution of "cases and controversies," which has been read

---

95 *Planned Parenthood* v. *Casey*, 505 U.S. 833, 854 (1992).

96 *Id.* at 854-55 (citations omitted).

97 *Id.* at 864-65.

to include a number of doctrines – such as standing, mootness and ripeness – that limit the judiciary's power to decide claims brought to it by litigants.

Other doctrines such as deference to the elected branches are commanded both by Separation of Powers and our democratic system, and deference to the States is required, by Federalism as well as democratic principles. But care must be taken to assure that nominees also respect the role contemplated by the Framers in creating the judiciary as a third and co-equal branch. They created the judiciary to act as a check on unconstitutional and unlawful acts infringing on the rights of individuals. They expected the judiciary to "guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves . . . ."[98] In presenting the Bill of Rights to Congress James Madison emphasized that "independent tribunals of justice will consider themselves the guardians . . . of those rights; they will be an impenetrable bulwark against every assumption of power of the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."[99] The respect for – and the commitment to – this obligation of the Justices is as important as their recognition of the limits of judicial power. Similarly, while deference is due to the States, equal respect is due to the Supremacy Clause which, among other things, requires the Court to enforce limits on the States imposed by the Constitution and by Congress' legitimate exercise of its powers.

CONCLUSION

Too frequently during recent debates about Supreme Court nominations myths and slogans have dominated public discourse. The investigation of the nominee and her qualifications should be conducted with an awareness of the realities of Supreme Court adjudication. Supreme Court Justices must have the learning, intelligence and good judgment to exercise the discretion and choice they will inevitably be required to exercise in those hard cases of constitutional and statutory interpretation that confront the Court and the outcomes of which

98 *The Federalist* No. 78, at 440 (Alexander Hamilton) (Isaac Kramnick ed. 1987).

99 1 Annals of Cong. 439 (Joseph Gales ed., 1834).

profoundly affect the lives of individual persons. Part of that good judgment are qualities of empathy and the benefits of experience which enable the Justices to recognize those features of the cases before them that are especially relevant to the sound interpretation and application of the Constitution's and statutes' commands, principles and protections. The diverse experiences that a nominee may bring to the Court is a valuable asset which helps the other Justices challenge their own personal preconceptions, intuitions, unconscious biases, and blind spots which inevitably affect their perspective and their best judgment. At the same time, the nominee must have the character, integrity and commitment to the rule of law to act within the constraints of the judicial process. The Judiciary Committee's investigation and hearings should explore these qualities by examining the nominee's full record as reflected in her seventeen years as a trial and appellate judge, as well as her experience in law enforcement, private law practice, and communal activities. Such a process would best fulfill the Senate's Advice and Consent function, and at the same time educate the American people about the role of the Court in our democracy.

SELECTED BRENNAN CENTER PUBLICATIONS

Language Access in State Courts
LAURA ABEL

Expanding Democracy: Voter Registration Around the World
JENNIFER S. ROSENBERG WITH MARGARET CHEN

Electoral Competition and Low Contribution Limits
CIARA TORRES-SPELLISCY, KAHLIL WILLIAMS AND DR. THOMAS STRATMANN

Executive Privilege: A Legislative Remedy
EMILY BERMAN

Maryland's Parole Supervision Fee: A Barrier to Reentry
REBEKAH DILLER, JUDITH GREENE, AND MICHELLE JACOBS

Improving Judicial Diversity
CIARA TORRES-SPELLISCY, MONIQUE CHASE AND EMMA GREENMAN

Voter Registration Modernization
WENDY R. WEISER, MICHAEL WALDMAN AND RENÉE PARADIS

Is America Ready to Vote?
LAWRENCE NORDEN, ET AL.

Voter Purges
MYRNA PÉREZ

Eligible for Justice: Guidelines for Appointing Defense Counsel
THE ACCESS TO JUSTICE PROGRAM

Better Ballots
LAWRENCE NORDEN, ET AL.

Access to Justice: Opening the Courthouse Door
DAVID UDELL AND REBEKAH DILLER

Fair Courts: Setting Recusal Standards
JAMES SAMPLE, DAVID POZEN AND MICHAEL YOUNG

Restoring the Right to Vote
ERIKA WOOD

A Return to Common Sense: Seven Bold Ways to Revitalize Democracy
MICHAEL WALDMAN
(Sourcebooks)

For more information, please visit www.brennancenter.org.

BRENNAN
CENTER
FOR JUSTICE

At New York University School of Law

161 Avenue of the Americas
12th Floor
New York, NY 10013
www.brennancenter.org