Order in the court: How judges should think

by Thomas C. Berg in the December 27, 2003 issue

Americans are locked in an intense conflict over the role of federal courts. Conservatives are deeply aggrieved by Supreme Court decisions in the past 30 years that have struck down laws against abortion, laws on homosexuality, and certain laws and policies promoting religion in the public square. In a 1996 symposium, "The End of Democracy?," the journal *First Things* protested "an entrenched pattern of government by judges" and raised the possibility that "conscientious citizens can no longer give moral assent to the existing regime."

Another round in the judicial wars began in June with the Supreme Court's decision in *Lawrence v. Texas* invalidating laws in 13 states prohibiting private, consensual adult sodomy. The case involved a gay man having sex with another in his apartment. *Lawrence* contributed, at least to some degree, to the Massachusetts state supreme court's decision in November that the state must recognize same-sex marriages. Simultaneously, a backlash against *Lawrence* added momentum to the proposed Federal Marriage Amendment to the Constitution, which would bar (among other things) court decisions, federal or state, that confer "marital status or the legal incidents thereof" on any relationship other than a male-female couple.

The conflict has also polarized the confirmation process for the judicial nominees of George W. Bush (himself declared president only after an intensely controversial Supreme Court decision). Conservatives, angry that the key Supreme Court votes for abortion and gay rights came from Republican-appointed justices, have vowed to ensure that Bush's nominees will be solid conservatives like Justices Antonin Scalia and Clarence Thomas. On the other side, Senate Democrats have blocked several lower-court nominees, largely (though not solely) because the nominees were viewed as hostile to abortion rights. A Supreme Court vacancy, which is likely within a couple of years, may spark the mother of all confirmation battles.

The critics of the court have some valid points—though I do not endorse their sky-is-falling rhetoric. It's helpful first to define the popular term "judicial activism," which is often used in the debate, though in varying ways.

If "activism" is a bad thing, then the term should not apply simply when a court invalidates a state or federal law. Some laws are unconstitutional and ought to be struck down. An activist decision is one that invalidates a law or executive action without a solid basis for doing so in the text, history or structure of the Constitution.

The power of a court to invalidate unconstitutional laws—"judicial review"—has been a feature of our government from the outset. In *Marbury v*. *Madison* (1803), the great Chief Justice John Marshall laid out the classic rationale. "We the people" of the United States as a whole have power to set rules that constitute and limit our government, superseding ordinary legislation and executive action. Thus, in a lawsuit where a constitutional rule conflicts with a statute or executive policy, the court hearing the case must follow the Constitution and ignore the conflicting act.

This rationale explains why judicial review is consistent with a commitment to representative democracy—that is, a commitment to subjecting government to the consent of the governed—even though federal judges are unelected and hold office for life. In rejecting a law as unconstitutional, the judge is not making her own decision but is simply applying the will of the entire people expressed in the Constitution. Courts are insulated from elections precisely so they can adhere to this "supermajority" will in the face of actions by current majorities.

The problem is that the Constitution is an open-ended document. In arguing that judges must follow the constitutional text, Marshall chose clear examples like the requirement that no one may be convicted of treason without "the testimony of two witnesses to the same overt act." But many of the most important rights-protecting phrases—"due process of law," "equal protection of the laws"—are far more broad and general. If interpreted expansively, they can involve huge areas of life and put numerous public policy decisions in the hands of judges. *Lawrence v*. *Texas* holds that "liberty" in the "due process" clause gives adults the right to have consensual sex in private. Does it also give a right to take illegal drugs in private? To take one's own life? To run a private business free from excessive government regulation (as the court held until the 1930s)? If not, how does sexual activity differ from taking drugs or committing suicide or running a business?

A second problem is that when a court strikes down a law, any error in that ruling is very difficult to correct. The Constitution can be amended; but securing passage by two-thirds of both houses of Congress and three-quarters of the states is (and was meant to be) a high hurdle, as is dramatized by the failure of the popular Equal Rights Amendment. New presidents may appoint new justices, but that project also is long and uncertain: even after 12 years with President Reagan and the first President Bush, both committed to overturning *Roe v. Wade*, the key votes to reaffirm *Roe* in 1992 came from the Republican appointees Sandra Day O'Connor, Anthony Kennedy and David Souter. In contrast, decisions of legislatures and executive officials can be reversed by majority vote—a much easier process, notwithstanding inertia and entrenched political interests.

Finally, a heavy reliance on courts can undermine energy to protect rights through the political process and to convince fellow citizens of the importance of those rights. Members of Congress can argue for a bill without worrying about constitutional concerns: "Leave those to the courts." Social reform movements that turn to lawsuits devote time and money that could be spent on grass-roots activity that might establish their goals more firmly among the people.

The experience of the pro-choice movement is instructive: many pro-choice legislators were elected in the late 1980s when the court was hinting that it would overturn *Roe* and return abortion to the political process. Conversely, the court's reaffirmation of *Roe* in 1992 galvanized the pro-life movement politically.

Judicial review remains crucial to ensuring the status of constitutional rights as supreme over the majority's decisions. But the concerns cited above show why it is important that judicial decisions be disciplined, based on sources of law other than the judge's own view of political morality.

Although the court's strongest critics are often conservatives, the prospect of judicial activism should concern liberals and progressives too. The first two times that the court identified constitutional rights not explicit in the text, it served decidedly unprogressive causes. The notorious *Dred Scott* decision (1857) asserted that because slaves were their masters' property, Congress could not ban slavery anywhere in the United States—a holding that ignored the Framers' compromise of tolerating slavery temporarily but allowing eventual measures against it. *Lochner v. New York* (1905) incensed unions and progressives by reading a laissez-faire theory of economics into the Fourteenth Amendment's guarantee of "liberty," striking down

laws that protected industrial workers and ignoring their lack of effective bargaining power in contracting with employers.

Some decisions by the current court can fairly be characterized as “activist” with politically conservative results. It has severely limited affirmative action as a remedy for past discrimination against minorities, even though the post–Civil War Congress that passed the Fourteenth Amendment also enacted race-targeted benefits for black soldiers, schools and relief agencies. Several decisions have severely restricted the power of Congress to protect Fourteenth Amendment liberties from action by state officials, even though the amendment’s framers saw congressional enforcement of rights as crucial. And the court has given states broad immunity from being sued in any court for money damages—for example, for infringing a patent or discriminating against older or disabled state employees—even though the Constitution limits this immunity only to suits in federal court by a citizen of a different state.

Then there was *Bush v*. *Gore*, in which the court, in halting the Florida recount, announced a novel and potentially far-reaching requirement of equal vote-counting standards across districts, a theory unsupported by the Fourteenth Amendment’s original intent. Although the theory and result can be defended, the court took several highly questionable steps, including staying the recount ahead of time (as the clock ran against Al Gore) and refusing to let the Florida courts remedy the lack of counting standards. Gore immediately deferred to the court’s decision—and liberals thereby reaped the consequence of having established the court as the last word on so many major questions. Unfortunately, the episode seems to have provoked in liberals not a caution about judicial power, but rather an intensified determination to ensure that judges exercise power in liberal ways.

One common answer to the complex question of how to interpret the Constitution is that courts should read each provision, however broad or general, in the light of the principles that those who drafted or ratified it, or the general public at the time, understood it to embody. This explains how a judge gets authority to override democratic bodies—he or she is following the decision of the Constitution’s enacters. And it constrains judges by telling them to look not just at a bare, open-ended phrase like “equal protection,” but rather at the historical record surrounding its enactment.

But there are reasons why the original meaning should not be the sole constitutional touchstone. The breadth of many constitutional phrases implies a potential for growth beyond the precise principles that the framers had in mind. Indeed, there is evidence that the founding generation itself expected later generations to apply provisions through a process of interpretation broader than just reliance on the original understanding.

At the other end of the spectrum, one might treat phrases like “equal protection” and “free speech” as an invitation to judges to fashion whatever rules best serve the general values that the phrases suggest: equality, free expression, and so forth. Legal philosopher Ronald Dworkin, for example, says that to interpret a constitutional phrase, “thoughtful judges” must “decide on their own which conception does most credit to the nation.” This “moral reading” of the Constitution calls on judges to act as moral philosophers: “equal protection of the laws” should mean what best promotes “equal concern and respect” for all humans; “liberty” in the “due process” clause should mean autonomy in matters important to personal development, and so forth. This approach raises the greatest dangers of excessive judicial power and discretion.

Another source of meaning for broad constitutional language is the well-developed traditions of the nation. Phrases such as “due process of law” and “the privileges and immunities of [U.S.] citizens” suggest the protection of rights that were fundamental historically, or that have come to be regarded as fundamental. Tradition as a source allows constitutional rights to expand over time in the light of new circumstances; but the expansion is measured by the widespread views of the people rather than by the moral reasoning of judges. As scholars such as Alexander Bickel and Michael McConnell have remarked, reliance on widespread traditions is also the characteristic method of the common law, the chief form of judicial decision-making for both English and American courts.

What does Christian thought bring to the issue of judicial review? Christians have tended to concentrate on whether the court reached the right result (according to their view) on a particular issue, whether it’s abortion rights or school prayer. But Christians also should think theologically about the overall institution of judicial review, its promises and dangers.

Many Christians of various political and theological stripes will be attracted to the “moral reading” approach. The notion that constitutional-moral ideals, like equality

and liberty, are ones that reason can analyze and apply comports with the notion of a natural law that is accessible to all people of good will ("written on the heart," in Paul's words). But it does not follow that it's good for judges to decide cases based on such ideals without constraints from other sources, such as constitutional history, tradition or widespread public consensus.

Even if a broad principle is obvious, its application to specific cases frequently is not. For example, the principle that all people are created equal does not spell out whether a state university may ever treat minority applicants differently to add diverse viewpoints or redress past discrimination. Individuals should have some zone of privacy and autonomy for important decisions, but that does not logically entail the right of a terminally ill person to get assistance in purposefully ending his life.

If the Supreme Court invalidates laws in such cases, the result is a moral decision for the whole nation made by nine lawyers, drawn from a relatively narrow professional class, who face a crowded docket that limits their ability to reflect seriously on complex moral issues. Christian realism about human nature suggests that legally enforceable determinations of natural law should not be made in this way. Again, the court's errors in such cases are difficult to correct, whereas leaving decisions to various legislatures allows for varying solutions and ongoing debate: states can serve as "laboratories of experiment," in the words of Justice Louis Brandeis.

This relative "openness to revision and correction," as constitutional scholar H. Jefferson Powell calls it, should be appreciated by Christians. Powell, a Christian, points out in *The Moral Tradition of American Constitutionalism* that constitutional rhetoric "is a language of permanence, of settled decision, of absolute political value": it is prone to becoming idolatrous. In contrast, electoral politics—though obviously highly imperfect—at least proclaims "its openness to revisions by the citizens' exercise of the vote" and thus can serve to prevent "elevation to supreme status of a worldly or material interest capable of masquerading as spiritual." The danger of idolatry is sharpest when judges issue rulings based on moral philosophizing about broad ideals without being restrained by history or tradition.

Christians may also be attracted to an approach advanced by former Harvard professor John Hart Ely, who argues that courts should not themselves choose substantive constitutional values, but should issue rulings that keep the processes of political debate and decision-making open to all. This approach—keeping the process open to unpopular groups and viewpoints—explains many of the modern

court’s rulings supporting racial equality, voting rights and free speech. It holds appeal for the wide range of Christians who emphasize the importance of responding to the most vulnerable and despised in society.

But construed broadly, this approach also gives judges tremendous discretion. For example, to assert same-sex marriage as a constitutional right, a court would have to conclude that same-sex couples are denied marriage rights simply because irrational prejudice makes the public devalue their interests. The court would have to dismiss the moral argument that marriage as an ideal should be aimed toward the raising of children with male and female parents. There is an argument that prejudice, rather than real moral and prudential concerns, motivates the bans on same-sex marriage. But that characterization is not obviously true, and for a court to adopt it is an aggressive exercise of judicial power.

Looking to text, history, tradition and widespread consensus does not make judicial review a mechanical process. Sometimes these sources point in different directions—as when a right not recognized in the past becomes widely understood as fundamental—and a court has to make a judgment between the two lines of argument. But constitutional method does constrain judges, and some decisions can be rightly labeled as activist.

For example, the right to abortion recognized in *Roe v*. *Wade* is not well founded in the sources of constitutional reasoning, as even politically pro-choice observers such as the *New Republic* have remarked. The provision on which *Roe* relied—no deprivation of liberty “without due process of law”—seems inapplicable to a law that has been enacted by a valid legislative process. (*Roe’s* theory of “substantive due process,” which was also the basis for *Dred Scott* and *Lochner*, has always landed the court in trouble, because it strikes down properly enacted laws that interfere with whatever the justices conclude is an important “liberty.”)

Even if the due-process provision calls on the court to protect rights recognized by tradition or widespread consensus, there is a problem with *Roe*: it involved neither. Antiabortion laws were decades old, and although a few states had partly decriminalized abortion, *Roe* went much further and struck down laws in virtually every state. One might be concerned that antiabortion laws ignore and devalue women’s interests, but if the unborn are full persons—and the court in *Roe* never really confronted that central claim—they surely are the most voiceless and vulnerable persons of all. Only by adopting a highly debatable moral argument

pitting women's rights against fetal rights could the court give abortion rights constitutional status.

In *Lawrence*, the invalidation of the Texas law is defensible under the traditional sources of constitutional law. The law prohibited sodomy only when committed by a same-sex couple. Only four states had such a law, and in Texas and elsewhere sodomy laws in general were seldom enforced. That does not amount to a long tradition of treating sodomy as a right, but it does suggest a widespread (although not unanimous) consensus that the state should not criminalize such private conduct in the home. And although I have argued that moral reasoning under general concepts like "liberty" is a very uncertain business, we can still note that Texas presented a case of criminalizing only same-sex private behavior. The treatment of sodomy in Texas did not mesh well with any version of traditional or familiar morality. The state essentially allowed any sort of sex—anal sex, adultery, one-night stands—between men and women, but forbade almost any intimate acts between same-sex couples.

But some of *Lawrence's* reasoning cuts much more broadly, suggesting there is a constitutional protection for all noncommercial private sex between consenting adults—a rule that, for example, would seem to declare incest between adult family members a right. And although the court said that *Lawrence* did not involve any question of "formal recognition" of homosexual relationships—thereby distinguishing its ruling from the issue of same-sex marriage—some passages point in the opposite direction.

Ordering states to recognize same-sex marriage would be a dramatically larger, and more activist, step than striking down the criminalizing of private sex in *Lawrence*. Every state limits marriage to male-female couples, and 34 states reaffirmed this definition in the 1990s in stating that they would not recognize same-sex marriages contracted in other states. The analogy between these laws and southern laws against interracial marriage, which were struck down in the 1960s, may or may not be strong as a moral matter, but it is not strong as a constitutional matter: those laws were aimed at maintaining white racial supremacy, a practice that had clearly been identified as a constitutional wrong by virtue of the amendments following the Civil War. Although there certainly are serious moral arguments in favor of same-sex marriage, there are also serious moral and prudential arguments against it. The federal courts should not preempt this developing moral and cultural debate. (A decision for same-sex marriage by a state court, as in the case of Massachusetts,

preempts the debate in that state, but it is less far-reaching because it leaves other states to arrive at a different conclusion—unless, as some same-sex-marriage proponents have claimed, other states are required to recognize such marriages under the Constitution's requirement of giving "full faith and credit" to other states' proceedings.)

In the end, sound constitutional interpretation is ensured not so much by principles on paper as by judges with certain virtues. A judge must have vision to apply the core meaning of a constitutional provision to new circumstances, and courage to apply that meaning when popular will opposes it. But a judge also must have humility to seek his primary insights from outside his own moral reasoning: from the text of a constitutional provision, its historical background, the nation's widely recognized traditions, and the democratic body that passed the law that the judge is reviewing.