1990

Political Pressure and Judging in Constitutional Cases

Robert F. Nagel
University of Colorado Law School

Follow this and additional works at: http://scholar.law.colorado.edu/articles

Part of the Constitutional Law Commons, Judges Commons, Law and Politics Commons, Law and Society Commons, and the Supreme Court of the United States Commons

Citation Information

Copyright Statement
Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact erik.beck@colorado.edu.
POLITICAL PRESSURE AND JUDGING IN CONSTITUTIONAL CASES

ROBERT F. NAGEL*

I.

Near the beginning of his recent book, The Tempting of America, Robert Bork evokes what for him is a "disturbing" image:

My [judicial] chambers . . . were on the third floor of the United States Courthouse and overlooked Constitution Avenue. Twice a year . . . I watched massive marches come down that wide street, one by anti-abortionists and one by pro-abortionists . . . . [T]he demonstrators march past the Houses of Congress with hardly a glance and go straight to the Supreme Court building to make their moral sentiments known where they perceive those sentiments to be relevant.¹

To Bork these demonstrations are evidence that many Americans are coming to accept what he calls the "major heresy" that judges are not bound by law.²

No matter what you or I may think of the rest of Bork's legal philosophy, this picture of direct political pressure on the Court must cause all of us to pause. At the most elementary and important level, we pause because we believe that, whatever a lawsuit should be, it should not be a plebiscite or a lynching.³ At a more rarified level, we suspect that direct political pressure is inconsistent with judicial review itself, for in one way or another most theories of judicial review turn on the belief that judges have something unique to contribute to public decisionmaking and that the nature of this contribution is

* Rothgerber Professor of Constitutional Law, University of Colorado. This paper was presented as part of the Ira C. Rothgerber, Jr. Constitutional Law Conference at the University of Colorado on April 13, 1990.

2. Id. at 4-11.
3. Perhaps, the idea that a judge may react to political influences is threatening even when the circumstances are benign; the judicial role and function are identifiable precisely by virtue of legal formalities and their limitations, so neither an unconstrained doer-of-good nor a broadly responsive wise-person would be recognizable as a "judge." See J. WHITE, THE LEGAL IMAGINATION 84-89 (1973). Thus, it might be thought that political influence of most kinds is to be resisted because such pressures are usually manifested outside the courtroom and are not properly presented as evidence or in briefs. However, the kinds of influence to be discussed in this paper (including current political events, statutory trends, and positions taken by professional organizations) can be—and are—assimilated into such normal legal forms as amicus briefs, judicial notice, and so on.

685
closely tied to political insulation. These theories emphasize different virtues—the capacity to remain faithful to constitutional text, or to apply law neutrally, or to protect minority participation in the democratic process, or to develop coherent moral precepts—but they all have significant appeal and they are all put at risk by direct political pressure.

If he is right about nothing else, then, Bork is right that it is disturbing to imagine our law being made in response to clamor in the streets. This concern crosses the ideological and jurisprudential spectrum. It is, for example, common ground even for such disparate figures as Justices Blackmun and Scalia.

Recall that Blackmun, the author and staunch defender of Roe v. Wade, started that opinion by writing that the judicial task was “to resolve the issue by constitutional measurement, free of emotion and of predilection.” He assured us, “[W]e seek earnestly to do this . . . .” More recently, in condemning legislative efforts to thwart or limit the right to abortion, Blackmun alluded to the history of massive resistance to desegregation in the South and affirmed that “[a]s judges . . . we are sworn to uphold the law even when its content gives rise to bitter dispute.” In Webster v. Reproductive Health Services, Justice Scalia, who is perhaps the sharpest judicial critic of the right to abortion, lamented the Court’s failure to overrule Roe v. Wade and charged that postponement of an authoritative decision “distorts the public perception of the role of this Court.”

6. Id.
7. Id. It is not entirely clear what Blackmun was including as “emotion and predilection” in contrast to “constitutional measurement.” His two preceding paragraphs seem to suggest that they include virtually all sources of personal beliefs about morality and policy:

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking and conclusions about abortion.

In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

10. Id. at 3065 (Scalia, J., concurring).
We can now look forward to at least another Term with carts full of mail from the public, and streets full of demonstrators, urging us—their unelected and life-tenured judges who have been awarded those extraordinary, undemocratic characteristics precisely in order that we might follow the law despite the popular will—to follow the popular will.¹¹

It is entirely natural that judges, even if they are as different as Blackmun and Scalia, should resent political pressure on the courts. But this common position begins to seem more puzzling when you recognize that, even as they decry demonstrations and resistance, the Justices try to provoke and control political reaction to judicial decisions.

Consider Justice Blackmun. We can take him at his word that his effort is to decide the abortion issue “free of emotion” and independent of “bitter” public disputes. But listen to these extraordinarily impassioned and revealing passages from his dissenting opinion in Webster:

Never in my memory has a plurality announced a judgment . . . that so foments disregard for the law . . .

Nor in my memory has a plurality gone about its business in such a deceptive fashion. At every level of its review . . . the plurality obscures the portent of its analysis . . . The . . . opinion is filled with winks, and nods, and knowing glances to those who would do away with Roe . . .

I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since Roe was decided . . .

It is impossible to read the plurality opinion . . . without recognizing its implicit invitation to every State to enact more and more restrictive abortion laws . . .

Thus, “not with a bang but a whimper,” the plurality discards a landmark case . . . and casts into darkness the hopes and visions of every woman in this country . . . The plurality would clear the way again for the State to conscript a woman’s body.

Of the aspirations and settled understandings of American women, of the inevitable and brutal consequences of what it is doing, the plurality . . . utters not a word. This silence is callous.

¹¹ Id. at 3065-66.
[The plurality invites charges of cowardice and illegitimacy to our door. I cannot say that these would be undeserved.

For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.]

Notice that Blackmun accuses the plurality of inviting the enactment of restrictive abortion laws even though the plurality opinion bears only in very limited and indirect ways on the wisdom or desirability of such legislation. Notice that Blackmun writes as if the plurality had utterly abandoned Roe and had decided to approve even the harshest restrictions on abortion even though the plurality itself expressly rejects both positions. Notice, finally, that Blackmun refers repeatedly to women as a unitary group—"American women" and "the women of this Nation"—and speaks in the most incendiary terms of their liberties, their interests, and their bodies. It is, I submit, impossible to read his opinion in Webster without recognizing that Justice Blackmun is not primarily addressing his colleagues on the bench. He is addressing women in the general public and his intent is to convince them that the plurality opinion should be read in the most ominous possible way. Why would he do this if not to arouse a political reaction to Webster? No wonder Scalia fears those carts of mail.

Now, I do not want to be misunderstood here. I think it is an arresting fact that a highly conscientious judge can—with respect to a single important issue like abortion—bitterly criticize political pressure on the Court and also make transparent efforts to mobilize that pressure. But this fact is not grounds for any special criticism of Justice Blackmun.

Consider Justice Rehnquist's dissenting opinion in Texas v. Johnson, the case that created a first amendment right to burn an Ameri-
can flag. In the past, Rehnquist, like Blackmun, has strongly resisted the notion that constitutional interpretation should be based on public opinion and political influence. But in Johnson Rehnquist protested the majority’s holding by quoting Ralph Waldo Emerson’s “Concord Hymn,” Francis Scott Key’s “Star Spangled Banner” and John Greenleaf Whittier’s poem, “Barbara Frietchie.” He rehearsed bits of American military history with references to the American Revolution, to hand-to-hand combat at Iwo Jima, and to the landing at Inchon. Think what you will of Rehnquist’s dissent, I do not believe it was addressed primarily to lawyers. As is also true of Blackmun’s opinion in Webster, the natural and predictable effect of the kind of rhetoric used by Rehnquist is to foment political opposition to a judicial decision. In the case of flag desecration, that opposition has appeared in the form of outraged editorials, a new federal statute, and talk of a constitutional amendment. In the case of abortion rights, the opposition can be seen in exaggerated newspaper accounts of the meaning of Webster, in an outpouring of political support for organizations and candidates committed to abortion rights, and in a proposed federal statute codifying Roe v. Wade. It is against the background of all this political activity that the Court will soon be reconsidering its position on both flag desecration and abortion.

I doubt that Justices Blackmun and Rehnquist were oblivious to the incendiary qualities in their respective opinions. Whether they specifically intended to provoke marches or to affect the kind of mail delivered to the Justices, of course, no one can say with complete certainty. Normally, however, people are assumed to intend the natural consequences of their actions.

Let us assume that the Justices intended only to influence public opinion generally—that they were simply attempting to be persuasive before the broad audience of the American public. Unless the members of the Court are impervious to the views of American citizens, this attempt is, in effect, also an effort to influence subsequent judicial deliberations. I will return soon to the question whether it makes sense to distinguish between specific forms of pressure, like marches down Constitution Avenue, and diffuse forms of pressure, like general public opinion. But now my point is a limited one: Justices as different as Blackmun and Rehnquist write opinions in a way designed to affect the amount and type of political activity directed at the Court.

even while believing that the Court should not be affected by external pressure.

Opinions that speak of "cast[ing] into darkness the hopes and visions of every woman in this country" or that quote "Barbara Frietchie" may be unusual, but fomenting political pressure on the judiciary is an unavoidable part of judging. Every idea, Holmes said, is an incitement. Every persuasive opinion necessarily helps to shape the political climate, which in turn shapes the Court's deliberations. The fact that Brown v. Board of Education 18 was a unanimous opinion (or that Cooper v. Aaron 19 was individually signed by each Justice) reduced some political pressures and increased others. Even a tightly reasoned, legally powerful dissent—say Justice Brennan's in National League of Cities v. Usery 20—will encourage vehement academic commentary. Law review articles are not marches, but the dominant opinion in academia, like general public opinion, is a form of pressure on the Court and can help to induce the Court to change direction. 21

The issue, then, is not whether the Justices should write in ways that have the effect of altering the constellation of social and political pressures on the Court. They cannot avoid doing so. Nor is the question whether they should intend these pressures to influence judicial deliberations. They can avoid this intent only by convincing themselves—against considerable historical evidence, not to mention an elementary understanding of human nature—that judges are not influenced by such pressures. The issue is whether the kinds of pressures so often condemned (such as marches and bags of mail) are significantly different from the kinds of pressures usually tolerated or approved (say, widespread political consensus or the opinions of the Harvard law faculty).

II.

As a way to begin considering this question, let us return for a moment to Justice Blackmun's opinion in Roe v. Wade. Remember that he began with the statement that the Court was earnestly trying to avoid emotion and predilection, to decide "by constitutional measurement." Those sentences are directly followed, not by any references to constitutional principles or text, but by this statement: "[B]ecause we do [earnestly seek to avoid non-constitutional influ-

21. When the Court repudiated Usery, it relied in part on academic writings that had been critical of that decision. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551 n.11 (1985).
ences], we have inquired into, and . . . place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitude toward the abortion procedure over the centuries." And, indeed, the pages immediately following deal with the beliefs of the Greeks and Romans about abortion, the meaning of the Hippocratic Oath, the history of both English and American positive law, and the positions of the American Medical Association, the American Public Health Association, and the American Bar Association. I count some twenty-three pages of such material before the Constitution is again mentioned (and then only to concede that its text does not mention a right to privacy). Those twenty-three pages are an effort, according to Blackmun's words, to avoid extraneous influences, to find some constitutional measurement.

Now, once again, I am not criticizing Blackmun; he is not unique in his claims about what is relevant to constitutional "measurement." On the contrary, every member of the present Supreme Court subscribes to the view that political and moral traditions are relevant to defining constitutional rights. But this wide consensus presents a perplexing question: no matter how they are derived and defined, why are such traditions more appropriate vehicles for measuring the Constitution than are marches down Constitution Avenue? At first glance, the kinds of sources we are talking about—common law principles, philosophical and religious writings, policy recommendations of professional groups—are simply individual or collective opinions about correct public policy. That is precisely what is carried on the mail cart to the Justices, and it is precisely what is manifested by political demonstrations in the streets. In fact, opinions that we usually dismiss as "political influence" have the advantages of being current and strongly-held. The opinions that we dignify with the word "tradition" are often outdated and faded. At the very least, one would think that if the opinions of the Romans or the early history of state abortion laws are relevant to constitutional measurement, current views should be too.

It is at a point like this that jurists and academics usually start making distinctions, but I find it hard to locate any that are especially

23. Id. at 152 ("The Constitution does not explicitly mention any right of privacy").
24. Even Justice Rehnquist, dissenting in Roe, expressed admiration for the sweep of Blackmun's opinion and countered with his own interpretation of our traditions. 410 U.S. at 171, 174-77. In a more recent case, Justice Scalia presented the most restrictive current view of constitutional authority, and his position is that political and moral traditions are relevant and appropriate to defining the right to privacy if they are conceptualized at their narrowest level of abstraction. Only Justice Rehnquist joined in this proposed limitation. Michael H. v. Gerald D., 109 S. Ct. 2333, 2344 n.6 (1989).
helpful. The most obvious distinction turns on the relevance of the type of opinion expressed.

Substantive relevance: It might be thought that a consensus of respected scholars on a legal question should influence the Court's deliberations but that the chanted slogans of marching feminists or the bottles containing fetuses held out by pro-life demonstrators should not. This kind of distinction seems intuitively strong to many people, but these intuitions depend on implicit and controversial theories about appropriate sources of constitutional meaning. In the days before law faculties turned so much of their attention to Wittgenstein and Habermas, academic opinion might have been thought relevant under a theory holding that the Constitution should be interpreted according to a rigorous application of legal precedents or historical evidence as to the intent of the framers. Since Justice Blackmun's constitutional interpretation in *Roe* relies on the positions of the AMA and the vicissitudes of state regulation, it is clear that he, at least, does not adopt any such restrictive theory of constitutional meaning.

It is difficult to see why the technical knowledge held by the medical profession is relevant to establishing constitutional meaning but not the chants of women who have been patients or the direct observation of a fetus in a bottle. There is reason to think, in fact, that Blackmun does think that information about raw events is relevant; he may well believe, for example, that seeing an individual in a permanent vegetative state is important to deciding the issue whether there is a constitutional right to die.\(^{25}\) If constitutional law is supposed to represent profound public morality, as many now claim, I cannot see any reason why Justice Blackmun is not right if he does believe that emotional reactions to direct observation of the subject matter are relevant. I doubt, for example, that a decision about the morality of the death penalty would be fully informed without seeing an execution carried out. Demonstrations on Constitution Avenue are proxies for direct evidence.

---

\(^{25}\) At the end of the State of Missouri's oral argument in *Cruzan v. Director of the Missouri Department of Health*, 258 U.S.L.W. 4916 (1990), Justice Blackmun initiated the following exchange:

Question: Mr. Presson, before you sit down, I'd like to ask a—an impertinent and perhaps an improper question. Have you ever seen a patient in a persistent vegetative state?

Answer: I have seen Nancy Cruzan herself.

Question: You have seen Nancy?

Answer: Yes.

Question: Any others?

Answer: Yes.

Question: How come?

Answer: I was at the hospital, at Mount Vernon Rehabilitation Center.

observation. The angry, fervent marchers with their bullhorns and their placards are telling the Justices how it felt to them to observe and experience abortion policy in action.

Perhaps it is wrong to think that constitutional law should represent judgments about the morality and wisdom of various public policies, but I know of no one, including Judge Bork, who will argue that such factors should be excluded. It is mysterious to me that there can be such broad agreement on this point and yet we can still find widespread hostility to the idea that judges should note and be duly influenced by street demonstrations.

Pressure and persuasion: Even if it is true that the kinds of experiences communicated by political demonstrations are often relevant to the moral decisionmaking that is now a part of constitutional interpretation, it might be that there is an identifiable type of influence—suggested by the very word “pressure”—that is irrelevant under widely shared assumptions about appropriate sources for constitutional law. There is a difference, one would think, between demonstrations or letters that seek to persuade (even if on the basis of emotion or raw experience or some other unconventional argument) and influence that does not depend on any argument about appropriate legal meaning. Thus, a threat on a judge’s life seems to make no claim of any kind about the proper content of the Constitution; its message is, “Rule my way no matter what the law should require because, otherwise, I will harm you.” As latitudinous as the standards for deriving constitutional meaning have become, there is still a consensus that physical threats are not relevant to interpretation. It might be that this consensus extends to a more general principle: influence that does not depend on persuasive force is inappropriate.26 For example, a street demonstration might be labeled “pressure” to the extent that its message is, “Rule our way because there are many of us” or “Rule our way because we are important people.”

Since most efforts at influencing the Court incorporate at least some form of legal or moral argument—no matter if abbreviated or crude—this distinction between “pressure” and “persuasion” rules out very little. Moreover, even when there is no express argument about law or morality, there can be implicit argumentation. The size of the crowd that masses together on Constitution Avenue is itself an argument unless it is irrelevant to moral decisions how many people share a certain ethical position. (It is hard to see why in due process cases it is thought to be important how widespread a tradition is and how long

26. Although I am not sure I have done justice to his point, I am indebted to Kent Greenawalt for posing this distinction.
it has been entrenched, except on the assumption that the extent of agreement is an appropriate consideration.) The identity of the protestors can also be relevant unless moral advice from a group of liars or criminals should be as weighty as the opinions of right-living citizens. (Perhaps some judgment of this sort lay behind Blackmun’s reliance in Roe on the opinions of professionally respectable groups such as the AMA and the ABA.) Indeed, even physical threats can amount to moral arguments unless a fervently-held position is entitled to no more moral weight than a lukewarm belief. Certainly the willingness of civil rights protestors to break the law during the 1960s attested to the seriousness of their ethical claims. To say that political pressures contain implicit constitutional arguments is not to say that all such pressures ought to be acceded to; sometimes the impolite or garbled or threatening arguments made in the streets ought to be ignored. They should be ignored if they are poor arguments or destructive arguments—but the word “pressure” ought not blind us to whatever persuasive elements do exist.

Formal authority: A third distinction turns on the amount of formal authority represented by those who would pressure the courts. At the high end of this scale would be political influence expressed in constitutional amendments or in the nomination and confirmation of federal judges. In both of these instances a formal governmental mechanism allows for political influence over the courts. Lower on the scale would be the enactment of federal statutes and the exercise of presidential vetoes. Lower yet might be state statutes, the common law and so on. Political influence expressed in these and other ways may or may not be relevant to establishing “correct” constitutional meaning, but such influence is at least authorized in some degree. Hence the Court sometimes defers to congressional judgments on how to enforce the equal protection clause and to state legislative judgments on the justification for various policies that infringe rights; indeed, the Court goes so far as to look to established patterns in state statutory and common law to define individual rights under the due process clause.27 By way of contrast, letters to judges and marches in the streets can be described as the actions of private individuals who have no authority to shape our positive law.

This distinction does not explain either observed behavior or felt intuitions any better than the distinctions based on substantive relevance. In Roe Justice Blackmun, for instance, relied on resolutions and positions of the ABA and the AMA, although those groups are

27. See supra note 24.
not authorized to make law, while in *Thornburgh*\(^2^8\) he bitterly denounced the actions of various state legislatures in establishing restrictive abortion policies. Moreover, even if Blackmun and other judges consistently honored the formal authority of other governmental institutions, it would not follow that they should ignore non-governmental sources of opinion. Although private individuals and informal groups are not authorized to establish legal meaning, this lack of authority does not necessarily disqualify them from influencing the formal mechanisms that do establish the positive law. Public opinion appropriately affects, for instance, the judgment of Senators on whether Bork should sit on the Supreme Court; why should that same opinion, insofar as it relates to issues like judicial enforcement of unenumerated rights, not also be heard by the sitting Justices?

*Informal authority:* A fourth distinction emphasizes informal authority. I am referring to the quality of the decisionmaking process that underlies a particular form of influence. Some theorists have proposed, for instance, that the Court should defer to state legislative enactments when there is evidence of public-spirited deliberation,\(^2^9\) and it may be that public opinion expressed during the Bork hearings should be permitted to affect the Court because those opinions were qualified and transformed in a responsible, thorough public hearing.\(^3^0\)

Informal and formal authority sometimes track one another, but not always. Perhaps in *Roe* Justice Blackmun listened to the positions taken by organizations like the AMA, which have no formal authority, because they are large and provide opportunities for full and informed debate. In contrast, street demonstrations often reflect relatively unorganized and sudden expressions of opinion; letters represent only the views of single individuals who may be writing without careful thought or consultation.

It is even sometimes suggested that informal authority can make up for irregularity and illegality. Thus Professor Ackerman has proposed that the legislative innovations of the New Deal have the force of a constitutional amendment (and thus should greatly influence judicial decisions) even though Roosevelt never proposed any amendments and did not even successfully pack the Court.\(^3^1\) For Ackerman, the massive, mobilized political consensus that developed around the need for affirmative, regulatory government carries its own informal

\(^2^8\) 476 U.S. at 771.
\(^3^0\) Ronald Dworkin, for instance, has praised those hearings as being "often of extremely high quality . . . and . . . sometimes . . . of academic depth and rigor . . . an extended seminar on the Constitution." Dworkin, *From Bork to Kennedy*, N.Y. REV. OF BOOKS, Dec. 17, 1987, at 36, 38.
moral and political authority. Similarly, he argues that the fourteenth amendment should heavily influence judicial interpretations despite the fact that the lawful processes of amendment were significantly abused.\(^\text{32}\) He claims that the legal force of that amendment arises from the extraordinary nature of the public debate, from the transformative power of focused and inspired public opinion.

One problem with the distinction based on informal authority is that it is likely to be wildly inaccurate. Debate in the ABA may be full and thoughtful or it may be posed or even fraudulent; a single letter may reflect a foolish impulse or the most careful internal moral dialogue. Moreover, the same decisionmaking process can be complex enough to justify very different characterizations. Ackerman emphasizes how the Civil War Amendments resulted from deep intellectual and moral deliberations, but they also resulted from (as he acknowledges) brute military and political force. To shift the example a great deal, law review articles might be given low weight because they are typically written by cloistered eccentrics and edited by inexperienced students. But they also can be characterized as the product of a focused, thoughtful collegial discourse. Given the room for error and choice in characterization, emphasis on informal authority is treacherous. To some degree, it inevitably reflects judgments about how correct, not how deliberative, a form of political pressure is. Justice Blackmun, being only human, is inclined to reject the informal authority of state legislatures that oppose his conclusions about abortion; he sees their decisions, like armed resistance to desegregation, as illegitimate expressions of emotion and hostility. On the other hand, I suspect he welcomes massive demonstrations by advocates of freedom of choice.

This inconsistency accurately captures the confused and ambivalent state of our attitudes toward political pressure on the courts today. We have a jurisprudential mythology that is opposed to outside influence and can be trotted out whenever a political message is disagreeable. Pro-choice people flinch at the thought of the Justices being influenced by those bottles holding fetuses and Justice Blackmun rails against state legislative resistance to \textit{Roe}. On the other hand, some pro-life people claim that feminists shouldn’t be marching down Connecticut Avenue and Justice Scalia worries about the mail he will be receiving after \textit{Webster}. But the fact is, I suggest, that despite our selective disclaimers and our occasional genuflections to traditional jurisprudence, just about everyone believes that marches, demonstrations, boycotts, and even armed conflict should affect judicial

\(^{32}\) \textit{Id.} at 500-10.
Political Pressure & Judging

We know that Brown v. Board of Education, Cooper v. Aaron, Shelly v. Kraemer, New York Times v. Sullivan and the other monumental decisions of the Civil Rights era were not decided by judges oblivious to the people in the streets. I think that there is no avoiding the conclusion that under the surface most of us believe that judges should be influenced by political pressures. And, once we admit that some political reactions should at least be noticed and evaluated by judges, there does not seem to be any satisfactory way to define the kinds of pressures that are appropriate and those that are not.

True, judicial review, if predicated on political insulation, is threatened by this admission. But there can still be a distinctively legal function if the processes of adjudication or the acculturation of lawyers can be expected to transform those political influences so that the judiciary produces decisions that are uniquely valuable. Under such a view, however, political pressures ought not to be deprecated on a selective basis. If all such pressures are accepted as legitimate efforts to influence, then the ways that the legal culture improves on those politically-expressed values, if it does improve on them, can be honestly assessed.

III.

Even if you do not agree entirely, assume with me for a moment that political pressures of almost every conceivable variety ought to be regarded as legitimate attempts to influence constitutional decision-making by the courts, at least if the judicial function is to include setting wise and moral public policies. I want now to suggest what follows if this is true. What follows from the propriety of political pressure on the judiciary is that the absence of pressure should also influence the courts. In short, I want to end this talk by suggesting that ordinary behavior has as much claim to constitutional significance as does overt political pressure.

The comparison I want to make now is between what I will call mute behavior and what I will call articulate pressure. Articulate pressures include all the kinds of activities I have been discussing so far—not only marches down Constitution Avenue and mail to the Jus-

---

34. 358 U.S. 1 (1958).
35. 334 U.S. 1 (1948).
37. For one excellent account, see R. Kluger, Simple Justice (1976).
38. For a recent argument for such a possibility, see M. Perry, Morality, Politics, and Law (1988).
tices, but also the great political mobilization that resulted in the New Deal and the small mobilization that occurs when a judge has tea in the Harvard faculty lounge and learns what those professors smirk at and what they take seriously. In each instance, some person or group has considered some issue and attempts to bring an opinion or preference before the judge. Mute behavior is the opposite. It exists when it hasn’t occurred to anyone to articulate an opinion, let alone to bring that opinion to bear on a judge. If, for example, in two hundred years no one has thought to abolish or dramatically alter states as governmental organizations, the resulting institutional patterns are what I mean by mute behavior. If for many generations it never dawns on anyone to use humiliation in the stocks as punishment, the absence of that form of punishment is a mute behavior. If until about 1970 no one imagined that the Constitution protected a right to abortion, that also is a mute behavior.

Although the kinds of political influence that I have been discussing up until now are all articulate pressures, it should be obvious that mute behaviors are a form of political influence as well. When people do not ask for a change, when they remain silent, they are affecting governmental decisionmaking. The issue, then, is whether there is some reason for judges to pay attention when people want something but to ignore people when they take things for granted, are uninterested, or are content.

By their nature, mute behaviors are not announced or even clearly understood. But, like articulate pressures, they reflect human experience. If the consequences of governmental action or inaction are acceptable, especially over a long time, the resulting state of affairs will seem normal and may not even be noticed. Similarly, if the government is urged to undertake some action, the limits established for action may not be consciously understood, for those limits represent an implicit consensus about what is tolerable or even desirable in the existing state of affairs.

Should judges be influenced by mute behaviors? Much of modern constitutional theory says that they should not be. For example, when Ronald Dworkin argues that the equal protection clause should be interpreted to invalidate distinctions based on prejudice—for example, legal discriminations against homosexuality—he is arguing that the reasons given for adopting the fourteenth amendment should count more than the fact that the enactors never imagined that they were changing any laws regarding homosexuality.39 Similarly, when Bruce Ackerman grounds the right to use contraceptives partly in the New

Deal's transformation of our concept of property, he is arguing that affirmative political argument and pressure regarding centralized economic regulation should count more than the fact that those reforms were not precipitated by any concern about restrictions on sexual behavior. Of more direct importance than theories like those of Dworkin and Ackerman is the fact that the normal interpretive practices of our judges systematically ignore or down-play significant mute behaviors. All the innovations that we have become so accustomed to—the discovery in 1972 that sexual privacy is a right that is independent of the institution of marriage or in 1976 that price advertisements are a protected form of expression and so on—involve a decision to disregard the weight of established behaviors and implicit understandings.

One possible justification for crediting affirmative pressures but not mute behaviors is that affirmative pressures represent conscious thought and active decisionmaking rather than reflex. To some degree this contrast is a false one. Individual people can decide not to raise an issue or propose a change on the basis of private reflection. If many people—virtually everyone—had long decided not to push for something (or even to talk about it) so that an issue had not become public, the resulting inactivity would seem to reflect an emphatic kind of collective decision. To some degree, however, the contrast is accurate, since nonaction can sometimes represent lack of thought or concern or imagination. But if conditions or events are not unsatisfactory enough even to inspire thought, the absence of conscious consideration has strong significance because the resulting inactivity might be a powerful endorsement of the way things are.

There is a deeper problem with the claim that affirmative pressures should be preferred because they represent conscious thought and active decisionmaking. When jurists and legal theorists focus on the principle inherent in active politics and ignore what was not considered, they are not privileging conscious thought in any realistic sense. Indeed, the whole effect of their "principles" is to get around the inconvenient fact that, for example, Reconstruction and the New Deal did not involve consideration of homosexuality or contraceptives. Assuming that conscious thought is an advantage, the only way to

40. Ackerman, supra note 30, at 536-45.
41. The generality of this practice is evidenced by the fact that on the present Court only Justices Scalia and Rehnquist argue that traditions used to define constitutional rights should be conceived of as narrowly as possible. See supra note 24 and infra note 41. It could also, I think, be conclusively and tediously demonstrated by a compilation of all the important decisions of the last forty years that invalidated long-ingrained public policies.
42. Cf. M. Perry, supra note 37, at 121-79 (urging "deliberative, transformative politics").
know what was consciously thought about is to pay attention to mute behaviors.\footnote{43}

A second possible justification for crediting affirmative pressures is that, while mute behavior can represent intellectual activity, it cannot (by definition) represent dialogue. Under this view, what has not been talked about is not worthy of the judges' attention. As trendy as this justification is,\footnote{44} it is hard to understand. Mute behaviors do not represent verbal interchange among people or groups, but they do represent other forms of communication and interaction. The prolonged non-repeal statutes, or the subtle coordination of expectations whereby a group senses that they have gone far enough in establishing a new rule, or the implicit message of approval communicated by satisfied inattention to an issue—these are all forms of interaction. They are important even if not verbal. The quiet flow of human conduct is not necessarily less eloquent than the excited noise of public debate.

CONCLUSION

I want to close by anticipating an obvious objection to the drift of

\footnote{43. This leads to Justice Scalia's conclusion that privacy rights should be defined by reference to the narrowest possible conceptualization of the relevant legal/moral tradition. See supra note 24. The issue is not whether to be "generous" as Justice Brennan would have it, but how to be accurate. See R. Bork, supra note 1, at 196, 198.}

\footnote{44. For a brief, useful description and criticism of dialogue theories, see Maltz, The Supreme Court and the Quality of Political Dialogue, 5 CONST. COMM. 375 (1988).}
my discussion. I have been urging that judges should be exposed to and should be influenced by a great variety of political pressures, that indeed, they should be influenced even by political inattention and inactivity. You might be saying that if this is so, judges have an impossibly complicated task; they must pay attention to virtually our whole political and social history. This is true. It is a consequence, not of my argument, but of the ambitious moral and political functions thrust upon and assumed by the modern federal judiciary. I have treated these functions as givens, as in fact they are as a practical matter. If, in enforcing our Constitution, judges are to establish our values by interpreting our political history, then judges should interpret our whole history, not only what has been desired and said but also what has been accepted and left unspoken.

45. For this reason, it does not matter whether I (or anyone else) disapproves of modern interpretive practices or would prefer a different jurisprudence. It is true that I have argued for a much more modest judicial role—but one that still utilizes our political traditions as a major basis for interpretation. See R. Nagel, Constitutional Cultures: The Mentality and Consequences of Judicial Review (1989). But, preferences aside, it is important to consider the full implications of the course on which our judges are currently set.