
HARVARD LAW REVIEW

© 2010 by The Harvard Law Review Association

ADDRESS

HARVARD UNIVERSITY'S
359TH COMMENCEMENT ADDRESS

*Justice David H. Souter**

When I was younger I used to hear Harvard stories from a member of the class of 1885. Back then, old graduates of the College who could get to Cambridge on Commencement Day didn't wait for reunion years to come back to the Yard. They'd just turn up, see old friends, look over the new crop, and have a cup of Commencement punch under the elms. The old man remembered one of those summer days when he was heading for the Square after lunch and crossed paths with a newly graduated senior, who had enjoyed quite a few cups of that punch. As the two men approached each other the younger one thrust out his new diploma and shouted, "Educated, by God."

Even with an honorary Harvard doctorate in my hands I know enough not to shout that across the Yard, but the University's generosity does make me bold enough to say that over the course of nineteen years on the Supreme Court, I learned some lessons about the Constitution of the United States, and about what judges do when they apply it in deciding cases with constitutional issues. I'm going to draw on that experience in the course of the next few minutes, for it is as a judge that I have been given the honor to speak before you.

The occasion for our coming together like this aligns with the approach of two separate events on the judicial side of the national public life: the end of the Supreme Court's Term, with its quickened pace of decisions, and a confirmation proceeding for the latest nominee to fill a seat on the Court. We will as a consequence be hearing and discussing a particular sort of criticism that is frequently aimed at the

* Associate Justice, United States Supreme Court. Justice Souter delivered this Address at the Harvard University commencement ceremony on May 27, 2010. He received an honorary doctor of laws degree preceding the address.

more controversial Supreme Court decisions: criticism that the Court is making up the law, that the Court is announcing constitutional rules that cannot be found in the Constitution, and that the Court is engaging in activism to extend civil liberties. A good many of us, I'm sure a good many of us here, intuitively react that this sort of commentary tends to miss the mark. But we don't often pause to consider in any detail the conceptions of the Constitution and of constitutional judging that underlie the critical rhetoric, or to compare them with the notions that lie behind our own intuitive responses. I'm going to try to make some of those comparisons this afternoon.

The charges of lawmaking and constitutional novelty seem to be based on an impression of the Constitution and on a template for deciding constitutional claims that go together something like this. A claim is made in court that the government is entitled to exercise a power, or an individual is entitled to claim the benefit of a right, that is set out in the terms of some particular provision of the Constitution. The claimant quotes the provision and provides evidence of facts that are said to prove the entitlement that is claimed. The facts on their face either do or do not support the claim. If they do, the court gives judgment for the claimant; if they don't, judgment goes to the party contesting the claim. On this view, deciding constitutional cases should be a straightforward exercise of reading fairly and viewing facts objectively.

There are, of course, constitutional claims that would be decided just about the way this fair reading model would have it. If one of today's twenty-year-old college graduates claimed a place on the ballot for one of the United States Senate seats open this year, the claim could be disposed of simply by showing the person's age, quoting the constitutional provision that a Senator must be at least thirty years old, and interpreting that requirement to forbid access to the ballot to someone who could not qualify to serve if elected. No one would be apt to claim that lawmaking was going on, or object that the age requirement did not say anything about ballot access. The fair reading model would describe pretty much what happened. But cases like this do not usually come to court, or at least the Supreme Court, and for the ones that do get there, for the cases that tend to raise the national blood pressure, the fair reading model has only a tenuous connection to reality.

Even a moment's thought is enough to show why it is so unrealistic. The Constitution has a good share of deliberately open-ended guarantees, like rights to due process of law, equal protection of the law, and freedom from unreasonable searches. These provisions cannot be applied like the requirement for thirty-year-old senators; they require more elaborate reasoning to show why very general language applies in some specific cases but not in others, and over time the various examples turn into rules that the Constitution does not mention.

But this explanation hardly scratches the surface. The reasons that constitutional judging is not a mere combination of fair reading and simple facts extend way beyond the recognition that constitutions have to have a lot of general language in order to be useful over long stretches of time. Another reason is that the Constitution contains values that may well exist in tension with each other, not in harmony. Yet another reason is that the facts that determine whether a constitutional provision applies may be very different from facts like a person's age or the amount of the grocery bill; constitutional facts may require judges to understand the meaning that the facts may bear before the judges can figure out what to make of them. And this can be tricky. To show you what I'm getting at I've picked two examples of what can really happen, two stories of two great cases. The two stories won't, of course, give anything like a complete description either of the Constitution or of judging, but I think they will show how unrealistic the fair reading model can be.

The first story is about what the Constitution is like. It's going to show that the Constitution is no simple contract, not because it uses a certain amount of open-ended language, but because its language grants and guarantees many good things, and good things that compete with each other and can never all be realized, altogether, all at once.

The story is about a case that many of us here remember. It was argued before the Supreme Court of the United States on June 26, 1971, and is known as the *Pentagon Papers*.¹ The *New York Times* and the *Washington Post* had each obtained copies of classified documents prepared and compiled by government officials responsible for conducting the Vietnam War. The newspapers intended to publish some of those documents, and the government sought a court order forbidding the publication.

The issue had arisen in great haste, and had traveled from trial courts to the Supreme Court, not over the course of months, but in a matter of days. The time was one of high passion, and the claim made by the United States was the most extreme claim known to the constitutional doctrines of freedom to speak and publish. The Government said it was entitled to a prior restraint, an order forbidding publication in the first place, not merely one imposing a penalty for unlawful publication after the words were out. The argument included an exchange between a great lawyer appearing for the Government and a great judge, and the colloquy between them was one of those instances of a grain of sand that reveals a universe.

¹ N.Y. Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713 (1971) (per curiam).

The great lawyer for the United States was a man who had spent many Commencement mornings in this Yard. He was Erwin Griswold, Dean of the Law School for twenty-one years, who was serving a stint as Solicitor General of the United States. The great judge who questioned the Dean that day was Justice Black, the first of the New Deal Justices, whom Justice Cardozo described as having one of the most brilliant legal minds he had ever met with. The constitutional provision on which their exchange centered was the First Amendment, which includes the familiar words that "Congress shall make no law . . . abridging the freedom of speech, or of the press."² Although that language by its literal terms forbade Congress from legislating to abridge free expression, the guarantees were understood to bind the whole government, and to limit what the President could ask a court to do. As for the remainder of the provision, though, Justice Black professed to read it literally. When it said there shall be no law allowed, it left no room for any exception; the prohibition against abridging freedom of speech and press was absolute. And in fairness to him, one must say that on their face the First Amendment clauses seem as clear as the requirement for thirty-year-old senators, and that no guarantee of the Bill of Rights is more absolute in form.

But that was not the end of the matter for Dean Griswold. Notwithstanding the language, he urged the Court to say that a restraint would be constitutional when publication threatened irreparable harm to the security of the United States, and he contended there was enough in the record to show just that; he argued that the intended publications would threaten lives, and jeopardize the process of trying to end the war and recover prisoners, and erode the government's capacity to negotiate with foreign governments and through foreign governments in the future.

Justice Black responded that if a court could suppress publication when the risk to the national interest was great enough, the judges would be turned into censors. Dean Griswold said he did not know of any alternative. Justice Black shot back that respecting the First Amendment might be the alternative, and to that, Dean Griswold replied in words I cannot resist quoting: "The problem in this case," he said,

is the construction of the First Amendment.

Now Mr. Justice, your construction of that is well-known, and I certainly respect it. You say that no law means no law, and that should be obvious. I can only say, Mr. Justice, that to me it is equally obvious that "no law" does not mean "no law," and I would seek to persuade the Court that that is true.

² U.S. CONST. amend. I.

As Chief Justice Marshall said, so long ago, it is a Constitution we are interpreting³

The Government lost the case and the newspapers published, but Dean Griswold won his argument with Justice Black. To show, as he put it, that “no law” did not mean “no law,” Dean Griswold had pointed out that the First Amendment was not the whole Constitution. The Constitution also granted authority to the government to provide for the security of the nation, and authority to the President to manage foreign policy and command the military.

And although he failed to convince the Court that the capacity to exercise these powers would be seriously affected by publication of the papers, the Court did recognize that at some point the authority to govern that Dean Griswold invoked could limit the right to publish. The Court did not decide the case on the ground that the words “no law” allowed of no exception and meant that the rights of expression were absolute. The Court’s majority decided only that the Government had not met a high burden of showing facts that could justify a prior restraint, and particular members of the Court spoke of examples that might have turned the case to go the other way. Threatened publication of something like the D-Day invasion plans could have been enjoined; Justice Brennan mentioned a publication that would risk a nuclear holocaust in peacetime.

Even the First Amendment, then, expressing the value of speech and publication in the terms of a right as paramount as any fundamental right can be, does not quite get to the point of an absolute guarantee. It fails because the Constitution has to be read as a whole, and when it is, other values crop up in potential conflict with an unfettered right to publish, the value of security for the nation and the value of the President’s authority in matters foreign and military. The explicit terms of the Constitution, in other words, can create a conflict of approved values, and the explicit terms of the Constitution do not resolve that conflict when it arises. The guarantee of the right to publish is unconditional in its terms, and in its terms the power of the government to govern is plenary. A choice may have to be made, not because language is vague but because the Constitution embodies the desire of the American people, like most people, to have things both ways. We want order and security, and we want liberty. And we want not only liberty but equality as well. These paired desires of ours can clash, and when they do a court is forced to choose between them, between one constitutional good and another one. The court has to decide which of our approved desires has the better claim, right here, right now, and a court has to do more than read fairly when it makes

³ Transcript of Oral Argument at 76, *Pentagon Papers*, 403 U.S. 713 (No. 1873).

this kind of choice. Choices like the ones the Justices envisioned in the *Papers* case make up much of what we call law.

Should the choice and its explanation be called illegitimate law-making? Can it be an act beyond the judicial power when a choice must be made and the Constitution has not made it in advance in so many words? So much for the notion that all of constitutional law lies there in the Constitution waiting for a judge to read it fairly.

Now let me tell a second story, not one illustrating the tensions within constitutional law, but one showing the subtlety of constitutional facts. Again the story is about a famous case, and a good many of us here remember this one, too: *Brown v. Board of Education*⁴ from 1954, in which the Supreme Court unanimously held that racial segregation in public schools imposed by law was unconstitutional, as violating the guarantee of equal protection of the law.

Brown ended the era of separate-but-equal, whose paradigm was the decision in 1896 of the case called *Plessy v. Ferguson*,⁵ where the Supreme Court had held it was no violation of the equal protection guarantee to require black people to ride in a separate railroad car that was physically equal to the car for whites. One argument offered in *Plessy* was that the separate black car was a badge of inferiority, to which the Court majority responded that if black people viewed it that way, the implication was merely a product of their own minds. Sixty years later, *Brown* held that a segregated school required for black children was inherently unequal.

For those whose exclusive norm for constitutional judging is merely fair reading of language applied to facts objectively viewed, *Brown* must either be flat-out wrong or a very mystifying decision. Those who look to that model are unlikely to think that a federal court back in 1896 should have declared legally mandated racial segregation unconstitutional. But if *Plessy* was not wrong, how is it that *Brown* came out so differently? The language of the Constitution's guarantee of equal protection of the laws did not change between 1896 and 1954, and it would be hard to say that the obvious facts on which *Plessy* was based had changed, either. While *Plessy* was about railroad cars and *Brown* was about schools, that distinction was no great difference. Actually, the best clue to the difference between the cases is the dates they were decided, which I think point to the explanation for their divergent results.

As I've said elsewhere, the members of the Court in *Plessy* remembered the day when human slavery was the law in much of the land. To that generation, the formal equality of an identical railroad car

⁴ 347 U.S. 483 (1954).

⁵ 163 U.S. 537 (1896).

meant progress. But the generation in power in 1954 looked at enforced separation without the more revolting background of slavery to make it look unexceptional by contrast. As a consequence, the judges of 1954 found a meaning in segregating the races by law that the majority of their predecessors in 1896 did not see. That meaning is not captured by descriptions of physically identical schools or physically identical railroad cars. The meaning of facts arises elsewhere and its judicial perception turns on the experience of the judges, and on their ability to think from a point of view different from their own. Meaning comes from the capacity to see what is not in some simple, objective sense there on the printed page. And when the judges in 1954 read the record of enforced segregation it carried only one possible meaning: it expressed a judgment of inherent inferiority on the part of the minority race. The judges who understood the meaning that was apparent in 1954 would have violated their oaths to uphold the Constitution if they had not held the segregation mandate unconstitutional.

Did the judges of 1954 cross some line of legitimacy into lawmaking, stating a conclusion that you will not find written in the Constitution? Was it activism to act based on the current meaning of facts that at a purely objective level were about the same as *Plessy*'s facts sixty years before? So much for the assumption that facts just lie there waiting for an objective judge to view them.

Let me, like the lawyer that I am, sum up the case I've tried to present this afternoon. The fair reading model fails to account for what the Constitution actually says and fails just as badly to understand what judges have no choice but to do. The Constitution is a pantheon of values, and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another. Not even its most uncompromising and unconditional language can resolve the potential tension of one provision with another, tension the Constitution's Framers left to be resolved another day; and another day after that, for our cases can give no answers that fit all conflicts, and no resolutions immune to rethinking when the significance of old facts may have changed in the changing world. These are reasons enough to show how egregiously it misses the point to think of judges in constitutional cases as just sitting there reading constitutional phrases fairly and looking at reported facts objectively to produce their judgments.

The fair reading model has all that to answer for, but more than just that. For the tensions that are the stuff of judging in so many hard constitutional cases are, after all, the products of our aspirations to value liberty as well as order, and fairness and equality as well as liberty. And the very opportunity for conflict between the good and the good reflects our confidence that a way may be found to resolve it when a conflict arises. That is why the simplistic view of the Constitution devalues those aspirations, and attacks that confidence, and di-

minishes us. It is a model of judging that means to discourage our tenacity (our sometimes reluctant tenacity) to keep the constitutional promises the Nation has made.

So, it is tempting to dismiss the critical rhetoric of lawmaking and activism as simply a rejection of at least some of the hopes we profess to share as the American people. But there is one thing more. I have to believe that something deeper is involved, and that behind most dreams of a simpler Constitution lies a basic human hunger for the certainty and control that the fair reading model seems to promise. And who has not felt that same hunger? Is there any one of us who has not lived through moments, if not years, of longing for a world without ambiguity, and for the stability of something unchangeable in human institutions? I don't forget my own longings which heartily resisted the pronouncement of Justice Holmes that I read as an undergraduate, that certainty generally is illusion and repose is not our destiny.⁶

But I have come to understand that he was right, and by the same token I understand that I differ from the critics I've described not merely in seeing the patent wisdom of the *Brown* decision, or in espousing the rule excluding unlawfully seized evidence, or in understanding the scope of habeas corpus. Where I suspect we differ most fundamentally is in my belief that in an indeterminate world I cannot control it is possible to live fully in the trust that a way will be found leading through the uncertain future. And to me, the future of the Constitution as the Framers wrote it can be staked only upon that same trust. If we cannot share every intellectual assumption that formed the minds of those who framed the charter, we can still address the constitutional uncertainties the way they must have envisioned, by relying on reason that respects the words the Framers wrote, by facing facts, and by seeking to understand their meaning for the living.

That is how a judge lives in a state of trust, and I know of no other way to make good on the aspirations that tell us who we are, and who we mean to be, as the people of the United States.

⁶ See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).