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The Last Word Debate: How Social and Political Forces Shape Constitutional Values

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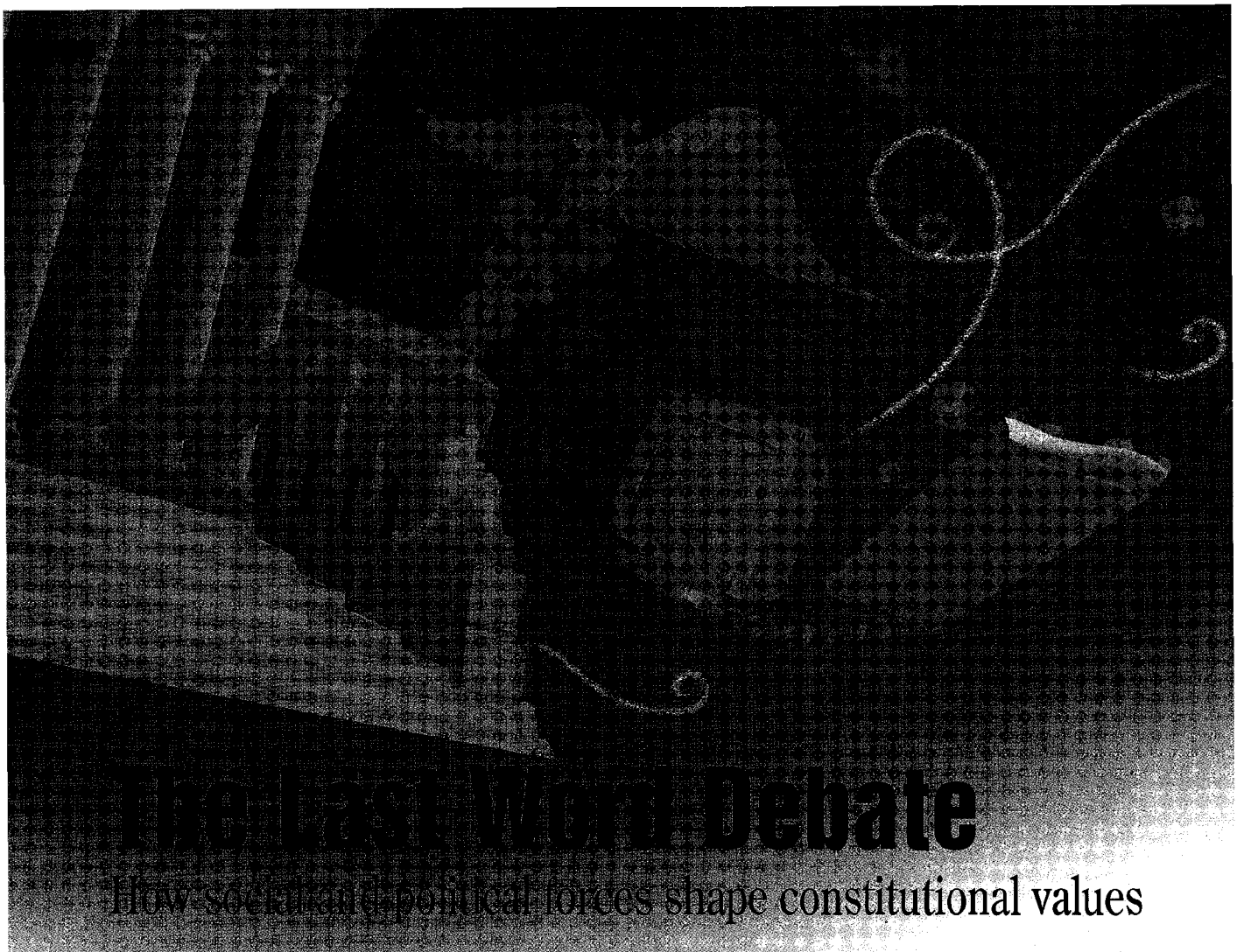

Beyond the Legal Debate

How social and political forces shape constitutional values

BY NEAL DEVINS

Anyone who doubts that the U.S. Supreme Court is a player in national politics need look no further than its decision last term in *City of Boerne v. Flores*.

In striking down the Religious Freedom Restoration Act, the Court reasserted its role as the ultimate interpreter of the Constitution.

Under the Supreme Court's landmark 1803 decision in *Marbury v. Madison*, wrote Justice Anthony M. Kennedy in his opinion for the Court in *City of Boerne*, "The power to interpret the Constitution in a case or controversy remains in the Judiciary."

It was hardly unusual that the Court invoked *Marbury* in *City of Boerne*, 117 S. Ct. 2157 (1997). Throughout its history, the Court has gone to great lengths to remind the American people that it alone delivers the final word on the Constitution's meaning.

This position, that constitutional truth derives solely from a majority vote of the Supreme Court's nine justices, has figured prominently, for instance, in the ongoing national debate over abortion.

In its 1992 decision reaffirming the "central holding" of *Roe v. Wade*, 410 U.S. 113 (1973), in *Planned Parenthood v. Casey*, 505 U.S. 833, the Court claimed authority to resolve the abortion dispute, invoking "the Nation's commitment to the rule of law."

The Court declared that its "interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."

The problem is, no one pays much attention to these pronouncements by the Court until issues arise that have overriding impact on widespread political or social concerns. And then just about everyone has an opinion about what the Constitution means.

As Justice Antonin Scalia has complained, the justices are subject to "carts full of mail from the public, and streets full of demonstrators, urging us—their unelected and life-tenured judges—to follow the popular will."

Justice Scalia, of course, thinks the Court ought to resist such pressures. But the corresponding belief that Supreme Court decisions are the last word in constitutional disputes is parochial, shortsighted and just plain factually inaccurate.

The Court may be the ultimate interpreter in a particular case, but not always in the larger issue of which that case is a part.

Congress, the White House, various government agencies, interest groups, the general public and the states all play critical roles in shaping constitutional values.

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GRAPHIC BY BRENDA GRANNAN

[illegible] The historical record provides overwhelming evidence that the Court is influenced by these challenges as well as the broader social currents that surround it.

The Court sometimes calibrates its decisions to limit political reprisals. Moreover, when the Court declares itself the final word on the meaning of the Constitution, chances are that it feels especially challenged by the other branches.

As Ruth Bader Ginsburg observed before her appointment to the Court in 1993, judges "play an interdependent part in our democracy. They do not alone shape legal doctrine. ... [T]hey participate in a dialogue with other organs of government, and with the people as well."

In the Beginning

Marbury v. Madison, the supposed foundation of judicial supremacy, nicely illustrates how politics and constitutional decision-making are inextricably linked to each other.

When *Marbury* was decided, the Supreme Court and its chief justice, John Marshall, were under attack. Court foe Thomas Jefferson had just been elected president, and at his urging, Secretary of State James Madison openly challenged the judiciary's power to subject the executive branch to court orders.

Specifically, when William Marbury challenged Madison's failure to deliv- [illegible] his judicial commission, Madison refused to present any defense. Further complicating matters —were the Court to rule for Marbury—Marshall believed that his political enemies would push for his impeachment.

Marshall's challenge, therefore, was to craft an opinion that would support judicial power over the elected branches while avoiding a head-to-head confrontation between the judiciary and the executive. The solution was to first acknowledge the merits of Marbury's challenge but then conclude that the Court was without jurisdiction to resolve the dispute.

Along the way, the Court was also able to establish judicial review, holding unconstitutional the statute that granted it jurisdiction in the Marbury dispute.

Marshall's tactics in *Marbury* reveal that Supreme Court decision-making cannot be divorced from its political context.

Indeed, well into the 19th century constitutional decision-making was dominated by the elected branches. Without a body of Supreme Court decisions to look to, Congress and the president had no choice but to engage in definitive constitutional interpretations. And when the courts did speak, elected officials were not inclined to treat those decisions as final.

A dramatic example of how the elected branches controlled constitutional decision-making occurred in 1832, when President Andrew Jackson vetoed legislation rechartering the Bank of the United States.

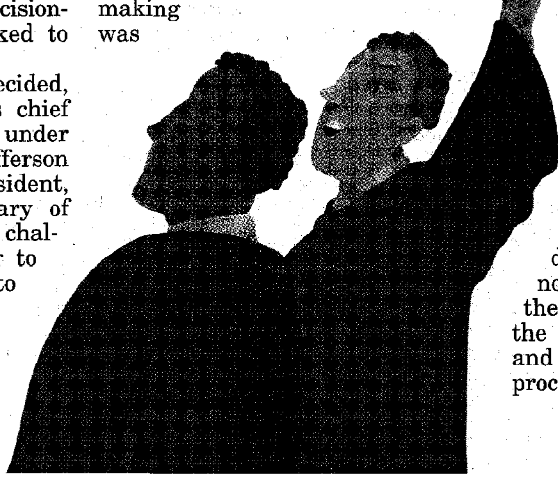
The fact that the Supreme Court had approved the bank's chartering in *McCulloch v. Maryland* was irrelevant to the president: "The opinion of the judges," Jackson proclaimed, "has no more authority over Congress than the opinion of the Congress has over the judges, and on that point the President is independent of both. Each public official who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others."

Another insight into three-branch interpretation comes from the bitter struggle over slavery. Through *Dred Scott v. Sandford*, the Court intended to "definitive[ly]" settle the issue of slavery. By holding that the right to own a slave was "distinctly and expressly affirmed in the Constitution," however, the Court deepened the schism that ultimately led to the Civil War.

Dred Scott's status as the last word on slavery was immediately called into question, most notably by Abraham Lincoln. For Lincoln, Court decisions were necessarily binding on the parties themselves but could not bind elected government to judicially imposed policy-making.

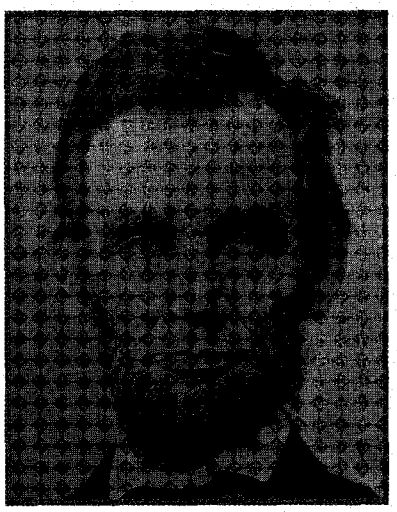
Otherwise, Lincoln said, the "people will have ceased to be their own rulers" if government policies are "to be irrevocably fixed by the decisions of the Supreme Court."

The Court again found itself under sharp attack earlier in this century for striking down about 200 social and economic laws, narrowly construing the authority of both Congress and the states to regulate commerce and broadly construing the due process rights of employers.



In the mid-1930s, after a number of New Deal laws fell victim to the Supreme Court's rulings, President Franklin D. Roosevelt concocted his plan to "pack" the Court with additional justices, presumably ones sympathetic to his New Deal reforms.

The Court-packing plan proved to be a political debacle for Roosevelt, but the Court soon began announcing decisions upholding New Deal programs.



Justice Owen J. Roberts, a member of the Court throughout the 1930s, later said, "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country for what in effect was a unified economy."

While the Supreme Court often has issued decisions in reaction to political or social trends, *Brown v. Board of Education*, 347 U.S. 483 (1954), illustrates what impact the Court can have when it moves out in front of public opinion.

Today, it seems inconceivable that the basic declaration of racial equality in *Brown* tested the limits of judicial authority. When *Brown* was decided, however, segregation was so ingrained in the South that outlawing "separate but equal" school systems promised social turmoil and massive resistance. To minimize opposition in the South, the justices spoke in a single moderate voice.

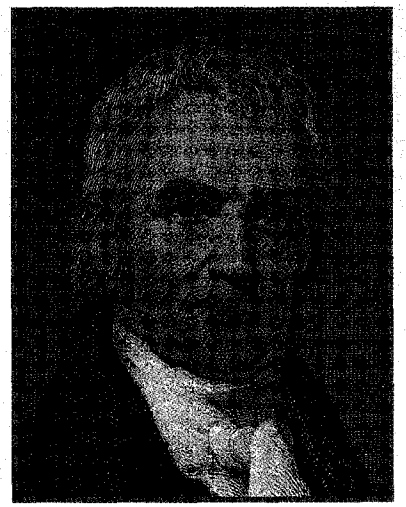
Significantly, after the Court's monumental decision in *Brown*, Congress and the executive have framed most of the debate on racial issues, starting primarily with the Civil Rights Act of 1964.

The saga of abortion rights likewise underscores the interactive nature of constitutional decision-making.

As in *Brown*, the decision of the Supreme Court in *Roe v. Wade* served as a critical political trigger.

When *Roe v. Wade* was decid-

Abraham Lincoln, Justice John Marshall and Franklin D. Roosevelt all had their clashes over whether decisions of the Supreme Court permanently bind elected government officials.

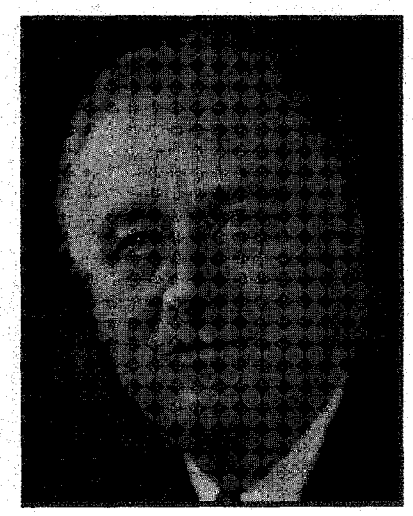


ed in 1973, a vigorous right-to-life movement had successfully blocked pro-choice legislation in a number of states. Consequently, though polls at the time indicated 64 percent of Americans supported the liberalization of abortion laws, *Roe* nonetheless invalidated the laws of 46 states.

Roe also prompted elected government into action. From 1973 to 1989, 306 anti-abortion measures were passed by 48 states.

Congress and the White House also took aim at *Roe*. Through funding and other restrictions, the federal government revealed its opposition to expansive abortion rights. In cases before the Supreme Court, the Reagan and Bush administrations called for *Roe*'s reversal.

After two decades of resistance to *Roe v. Wade* by elected officials and a significant portion of the public (and a changing lineup of justices), the Court eventually returned much of the jurisdiction over this divisive issue to the states. By repudiating the stringent trimester test from *Roe v. Wade* in favor of a more deferential undue burden standard, the Court in *Planned Parenthood v. Casey* signalled its willingness to uphold



state regulation—if not prohibition—of abortion.

Government vs. the Courts

Abortion and school desegregation, like slavery before them, make a mockery of claims that Supreme Court decisions are authoritative and final. A permanent feature of our constitutional landscape is the ongoing tug and pull between elected government and the courts. Indeed, when the Court invokes judicial supremacy, chances are that elected officials are breathing down the justices' necks.

Take *City of Boerne v. Flores*, the Court's most recent invocation of judicial finality.

The Religious Freedom Restoration Act, which *Boerne* invalidated, was a direct challenge to Court efforts to limit First Amendment protections against government conduct that targeted religion. When President Bill Clinton signed the act, he spoke unabashedly of "this act revers[ing] the Supreme Court" and of his conviction that elected government's view of religious liberty "is far more consistent with the intent of the Founders than [is]

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the Supreme Court." Congressional sponsors of the measure condemned the Court's "degradation," "devastation" and "virtual elimination" of religious freedom.

To Supreme Court justices, these are fighting words, and, as such, it is not surprising that the Court decided to fight fire with fire. In its decision in *City of Boerne*, the Court, after proclaiming horror at the prospect that "[s]hifting legislative majorities could change the Constitution," suggests that the role of elected officials in effecting constitutional change is limited to "the difficult and detailed amendment process."

These statements, remarkably, come from a justice, Anthony Kennedy, who had told members of Congress that they "would be fulfilling [their] duty" by limiting the effects of Supreme Court decisions that they think are "wrong under the Constitution."

In fact, several of this past term's decisions underscore the extraordinary role that social and political forces play in shaping constitutional values.

On highly charged decisions that divided the Court, for example, the term was dominated by a five-member coalition of justices either appointed or elevated by presidents Reagan and Bush (Rehnquist, Scalia, O'Connor, Kennedy and Thomas).

The decisions dominated by this group make clear that elected government's most direct link to judicial decision-making is the overtly political process of selecting and approving federal judges.

These decisions, moreover, support the claim that, in critical respects, the Court's constitutional decisions "follow the election returns."

The Court ruling in *Printz v. United States,* 117 S. Ct. 2365 (1997), for instance, which struck down portions of the Brady Act requiring local officials to conduct background checks on prospective handgun purchasers, cannot be disentangled from the fundamental shift toward states' rights that has resulted from the 1994 Republican takeover of Congress and its purported blueprint for legislative action, "The Contract With America."

More striking, in the related 1997 cases of *Washington v. Glucksburg,* 117 S. Ct. 2302, and *Vacco v. Quill,* 117 S. Ct. 2293, a unanimous Supreme Court refused to declare physician-assisted suicide a new constitutional right and held that "the earnest and profound debate" taking place throughout the nation on assisted suicide should not be short-circuited.

At the same time, the Court refused to close the door to the possibility that future state legislation in this area could be upheld.

Glucksburg and *Quill* reflect both calls for judicial restraint that date back to the Reagan administration and an increasing recognition on the part of progressives, most notably Ruth Bader Ginsburg, that the Supreme Court does little more than "prolong divisiveness" when it "ventures too far in the change it orders."

Under this view, "in a democratic society," some basic choices about the identification and elaboration of constitutional values ought to be made by the people, acting through elected lawmakers.

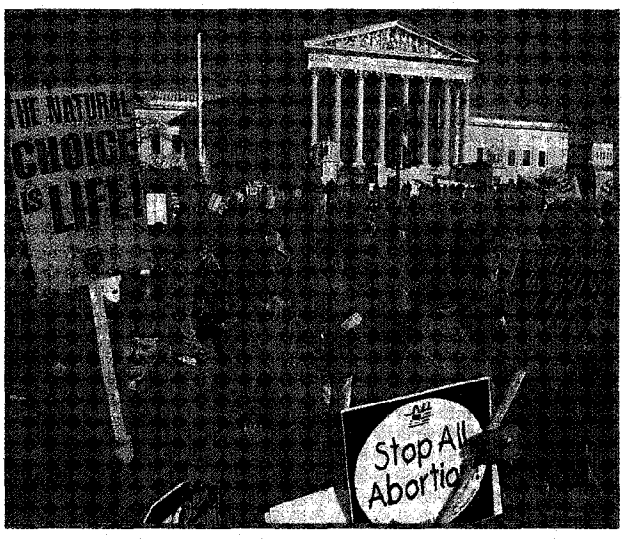
Of course, by passing judgment on the legitimacy of state laws outlawing suicide, *Glucksburg* and *Quill* may well affect the content of this populist constitutional discourse. It is a debate that will be dominated by nonjudicial actors.

Similarly, *Reno v. ACLU,* 117 S. Ct. 2329 (1997), invalidating the Communications Decency Act on "void for vagueness grounds," returned that issue to elected officials.

"There is a magnetic attraction to the notion of an ultimate constitutional interpreter," wrote political scientist Walter Murphy in 1981, "just as there is a magnetic pull to the idea of some passkey to constitutional interpretation that will, if properly turned, always open the door to truth, justice and the American way."

But just as finality is not the language of politics, constitutional decision-making, too, is a never-ending process. Whether the issue is abortion, race or the rights of religious minorities, judges and lawmakers are likely to shape the Constitution together. ■

States' rights entered into *Printz*, striking down portions of the Brady Act on handgun registration.



In *Planned Parenthood*, the Court returned much of the jurisdiction over abortion to the states.

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