1973

Book Review of Equal Justice: The Warren Era of the Supreme Court

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Book Review

EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT,† by Arthur J. Goldberg. Evanston, Illinois: Northwestern University Press, 1971. Pp. 117. *Reviewed by W. Taylor Reveley, III**

Emblazoned on the portals of the great edifice that houses the Supreme Court of the United States are the words "Equal Justice under Law."

Equal justice was an unrealized goal when the "marble palace" was erected in the 1930's; it is still unrealized.

It is the thesis of this book that great progress was made toward the realization of equal justice during the years in which Earl Warren served as Chief Justice of the United States.[1]

In a book of slightly more than one hundred pages, former Justice Arthur Goldberg presents his apologia for the Warren era, of which he was a stalwart during his three years on the Court. His objectives are threefold: "to explain the advances made, to justify the overrulings necessary to these advances, and to demonstrate why the Warren Court's decisions should stand."[2] The three chapters of this book—"A Court of Relevant Justice," "Judicial Activism and Strict Constructionism," and "Constitutional Stare Decisis"—are devoted successively to these ends. This review, in turn, will move from a précis of Mr. Goldberg's principal arguments to comment on certain of them.

I. PRÉCIS

A. A Court of Relevant Justice

Goldberg observes that we live in a time of rapid social change occasioned by revolutionary advances in education, communication, and technology. "Litigating organizations" have confronted the Court "with cases raising every facet of every important social problem" and the press of events denies the Justices an opportunity "gingerly to enter upon a problem, then to wait for a generation until [their] handiwork had been tested in experience."[3] Nonetheless, the author insists, the Court must attempt to redress social ills as they are

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1. A. GOLDBERG, EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT vii (1971) [hereinafter cited as GOLDBERG].
2. *Id.* at 7.
3. *Id.* at 5.

laid before it. He places overriding importance on "the need to make our declared principles, our constitutional protections, into a workable and working reality for those to whom they must often seem to be the sheerest of illusion and promissory deception."[4] To bridge the gap between principle and practice, the Court must consider "the reality from which the claims spring and in which the claimants live."[5] If the Justices shrink from the facts of life, they "increase the distance between declared law and reality and . . . heighten the mistrust of the legal system already felt by too many who are subject to its domain."[6]

For Goldberg, relevance was one of the great virtues of the Warren court: "[I]t brought to constitutional adjudication a commonsense willingness to deal with the hard and often unpleasant facts of contemporary life."[7] Focusing on race, reapportionment, and the rights of the accused, Goldberg traces what he believes were the major achievements of the Warren era.

He celebrates *Brown v. Board of Education*[8] and its progeny as primal indicia of the Court's willingness to grapple with the world as it is—"to measure the actual impact of official conduct," "to look through formalistic devices to substance and to strike down or remedy evasive doctrines."[9] *Baker v. Carr*[10] and its progeny are similarly, if somewhat less euphorically, cited for their recognition of voting realities. Primary attention, however, is devoted to criminal justice, because the decisions in this area are most vulnerable to challenge.[11] Here the Warren court contributed to relevant justice by taking account of the circumstances in which the poor, ignorant, and otherwise remediless defendants operate, and "introduced an entirely new prin-

4. *Id.* at 26.
5. *Id.* at 31.
6. *Id.* at 29-30.
7. *Id.* at 31.

> [I]t appeared that the Warren Court was manifesting a growing and possibly more general impatience with legalisms, with dry and sterile dogma, and with virtually unfounded assumptions which served to insulate the law and the Constitution it serves from the hard world it is intended to affect. If still not articulated, there was discernible a general groping for what might be called a "new realism" in the Court's approach, a retreat from abstraction and an increased willingness to attach broader significance to the realized human impact in the events that gave rise to legal disputes and court cases. That movement was both healthy and necessary; it responded to an increasingly apparent fact of modern life—the gap, too often a chasm, between the sometimes pietistic pronouncements of our system and its performance in fact.

Id. at 25-26.

8. 347 U.S. 483 (1954).
9. GOLDBERG 22.
10. 369 U.S. 186 (1962).
11. "The rights of the criminal defendant do not share the majoritarian popularity of the reapportionment cases, the compelling morality of the civil rights cases, or the emerging popular appeal of the free speech, press, and privacy cases." GOLDBERG 8.

ciple—a new promise—that where there is a right, that right will not remain unenforceable because of the defendant's poverty, ignorance or lack of remedy."[12]

Goldberg divides the criminal justice decisions into four groups: (1) cases eliminating the effects of an accused's poverty;[13] (2) decisions giving effect to already established rights, whether to ensure that they can be meaningfully exercised[14] or that a remedy exists for their violation;[15] (3) cases defining the bounds of recognized rights;[16] and (4) decisions applying federal constitutional safeguards to the states.[17] Indicative of the mild paranoia that afflicts defenders of these decisions is Goldberg's citation of *Warden v. Hayden*[18] among the category-three cases, and his observation that *Warden's* elimination of the "mere evidence" rule "tends to rebut the argument that the Warren Court *always* redefined constitutional rights in order to expand them in favor of the accused."[19]

B. Judicial Activism and Strict Constructionism

Having argued that the Warren court took notable strides down the road of relevant justice, Goldberg turns to justification of the overrulings necessary en route. He first states that the "basic attitude with which the Court [approaches] claims that fundamental personal liberties are infringed" is "one of the most important questions to ask about any court, past, present, or future."[20] In his definition of the appropriate attitude lies much of Goldberg's justification of the Warren court's reversal of prior dogma. Investigation of attitude involves him in consideration of strict construction, judicial restraint, and the tempering of judicial "protection of basic personal liberties for fear of the reactions of others."[21]

Goldberg deals with strict construction principally to dismiss it as a useful concept. He contends that the notion does little to separate the sheep from the goats, as "nearly every justice considers himself a strict constructionist in the sense that he tries to apply the Constitution

12. *Id.* at 20.
13. *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (assistance of counsel for the indigent); Griffin v. Illinois, 351 U.S. 12 (1956) (free transcript on appeal for the indigent).
14. *E.g.*, Escobedo v. Illinois, 378 U.S. 478 (1964) (right to counsel at the accusatory stage).
15. *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment exclusionary rule applied to states).
16. *E.g.*, Chimel v. California, 395 U.S. 752 (1969) (search incident to arrest only of the arrestee's person and the area "within his immediate control").
17. *E.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).
18. 387 U.S. 294 (1967).
19. GOLDBERG 17.
20. *Id.* at 35, 36.
21. *Id.* at 36.

in accordance with the intent of the framers."[22] But that intent, says Goldberg, "is not always easy to ascertain; historical materials rarely point unambiguously to a single, particular disposition for an individual case."[23] Further, strict construction cannot be equated with judicial quiescence, as some of the Warren court's critics seem to think: "[S]trict constructionists, conservative or liberal, have tended to be judicial activists. They have exercised their power of judicial review to the full."[24]

Though Goldberg does not find strict construction an operationally useful concept, he does accord functional significance to judicial restraint—"the basic attitude that makes a court most reluctant to overturn legislative judgments."[25] That restraint, he believes, is what the critics of the Warren court really have in mind, even when they talk of strict construction. But while conceding that judicial restraint is a sound philosophy as regards laws regulating economic matters, Goldberg argues that it "has only limited applicability when the treatment of minorities, the fundamental liberties of individuals, or the health of the legislative process are at issue."[26] He notes that this differentiation between the protection given economic and civil liberties has led some critics of the Warren court to accuse its members of having "simply followed their personal predilections rather than consistently applied principles of law."[27]

Goldberg turns for justification to the fourteenth amendment and to the philosophical underpinnings of judicial restraint. He finds "every evidence that the Fourteenth Amendment was intended to protect the slaves newly freed . . . and . . . personal rights in general" but "not a scintilla of evidence . . . that the Amendment was intended to abridge or curtail the police power of the state in any other way."[28] Further, he finds "four . . . sets of circumstances in which strict judicial scrutiny of governmental action is . . . perfectly consistent with that respect for democracy inherent in the notion of judicial restraint."[29]

22. *Id.* at 37.

23. *Id.* Goldberg identifies a type of ambiguity that provides unusual interpretative freedom to those who glimpse it:

> Historical materials are sometimes ambiguous on the question of whether the framers intended a particular constitutional provision to be interpreted "statically" or "dynamically." That is to say, the framers may have believed that a given factual situation lay outside the scope of protection in 1789 or 1868, and yet they may have been fully aware of the likelihood that, as circumstances change, the same factual situation will later fall within the scope of protection. They may have fully intended for the Constitution to apply in this fashion.

Id. at 38.

24. *Id.* at 41.

25. *Id.*

26. *Id.* at 61.

27. *Id.* at 43.

28. *Id.* at 44.

29. *Id.* at 46.

These circumstances exist when (1) legislation adversely affects persons unrepresented in the legislature; (2) the integrity of the legislative process itself is threatened through restrictions on the opportunity of those in the minority to persuade others of their views; (3) protection is needed for "an easily identifiable group, . . . that has difficulty forming political alliances and, as a result, finds itself in the minority on many, if not most, important legislative issues";[30] and (4) protection is needed for "particularly feared or hated individuals, such as political dissenters or criminal suspects."[31] Goldberg concludes that judicial restraint in these circumstances could undermine the Bill of Rights.

But restraint, in his judgment, is appropriate when judges review legislative regulation of property rights:

> It is merely stating a fact of life to say that economic interests have political influence. They are ordinarily capable of organizing, forming coalitions, and finding access to the legislative process. They are, in other words, able to protect their interests in the political forum in ways that are often unavailable to those injured when personal liberties are infringed.[32]

Accordingly, for Goldberg, the Warren court's overrulings in defense of personal liberties are constitutionally and philosophically secure against criticism as unwarranted judicial lawmaking.

Judicial activism, however, risks public opprobrium and legislative retaliation from those offended by the nature of the Court's holdings. Goldberg's response to such backlash is essentially one of "Damn the torpedoes," though he recognizes that occasionally the Court may have "to trim its sails."[33] He stresses the strength of the Court and the acceptability of its decisions, and argues that when the Court has made decisions for political reasons, it more often than not has inflicted a "shameful wound upon itself."[34] Goldberg feels that the particularly trying times in which we live make even more essential judicial activism uninfluenced by fear of backlash.

C. Constitutional Stare Decisis

In his concluding chapter, Goldberg's primary concern is to defend Warren court decisions against would-be overrulers, though these decisions themselves often reversed the work of prior courts. In the process, he further elaborates his contentions that Chief Justice Warren and his colleagues decided cases by consistent application of le-

30. *Id.* at 49.
31. *Id.* at 50-51.
32. *Id.* at 52.
33. *Id.* at 54.
34. *Id.* at 54-55.

gal principle, not pursuant to personal prediliction, and that their overrulings were justified.

Goldberg gives the Warren court high marks for principled adjudication: "I honestly believe that never in the past history of the Court have its members been better trained, worked harder, or availed themselves of better research facilities. And never has a Court applied these resources more consistently or diligently in the service of principle."[35] He implicitly recognizes, however, that to ward off would-be overrulers, it is not enough that Warren court activism was devoted to good ends in a craftsmanlike and principled manner. Thus, he falls back upon stare decisis. But to so defend Warren era decisions, many of them striking departures from precedent, presents Goldberg with a credibility problem of the first order.

He acknowledges the duality in his argument that the Warren court's civil libertarian decisions were reached "without affront to the doctrine of stare decisis and that those decisions cannot now be rejected without such affront."[36] Goldberg finds justification in his reading of the "uneven" impact of precedent on constitutional adjudication, a reading that eases the way for the expansion of civil liberties while making more difficult their contraction. He cites

> . . . a general and neutral principle that has long been observed, although, as far as I am aware, it has never before been fully articulated. The principle . . . is that stare decisis applies with an uneven force—that when the Supreme Court seeks to overrule in order to cut back the individual's fundamental, constitutional protections against governmental interference, the commands of stare decisis are all but absolute; yet when a court overrules to expand personal liberties, the doctrine interposes a markedly less restrictive caution.[37]

Accordingly, to the extent that Warren court decisions expanded individual rights, they gave no affront to precedent.

Goldberg devotes the balance of his book to the reasons he finds persuasive for an "uneven" reading of constitutional stare decisis. He identifies five considerations. The first, the "most pervasive and persuasive," is "that the constitutional safeguards of our fundamental personal liberties were instilled with an innate capacity for growth to enable them to meet new evils."[38] Second is the mandate of the Bill of Rights to guard against the tyranny of the majority, a tyranny that may influence justices "not always . . . insensitive to political pressure or contemporary fears."[39] Third are the reliance interests central to the concept of stare decisis, especially in criminal justice.

35. *Id.* at 72.
36. *Id.* at 75.
37. *Id.* at 74-75.
38. *Id.* at 82.
39. *Id.* at 87.

Fourth, Goldberg turns to the symbolic significance of the Court's decisions. He argues that during our two centuries of judicial experience, "once fundamental rights have been recognized, there has never been a general reversal of direction by the Court, a going back against the trend of history."[40] Accordingly, the public has come to expect continued growth of constitutional liberties. Hence the impact of their contraction would "heavily outweigh the corresponding reactions to an equal step forward."[41] The "multiplier effect" would be increased even further because the Court "plays a most important role in expressing the essential morality inherent in the Constitution."[42] Worse, Goldberg argues, contraction would undermine the credibility of all that the Court has previously termed, and would have remain, "fundamental."

Fifth, Goldberg deals with "practicalities of power," which, though they do not actively favor expansion, do affirmatively militate against contraction. He speaks of the Warren court's overriding of state sensibilities to protect individuals' rights and observes that, after the states have been denied certain powers and become accustomed to their denial, "common sense reinforces the command of stare decisis not to give back to the states any of their previously asserted power to curtail fundamental liberties . . . . Nothing is to be gained by overruling those cases which caused wounds to state sensibilities that have already healed."[43] Similar practicalities apply, in Goldberg's view, when the focus shifts from state to public sensibilities: "Once the advance in constitutional rights has been made and the 'newness of the standard wears off,' the tough part with respect to public opinion is past; and again stare decisis and common sense preclude retreat."[44]

In sum,

> The impact of stare decisis on our constitutional safeguards . . . results in a ratchet-like effect. Under its dictates, the Court can readily move to expand those liberties . . . but contraction meets stiffer resistance. And . . . this concept of stare decisis both justifies the overruling involved in the expansion of human liberties during the Warren years and counsels against the future overruling of the Warren Court libertarian decisions.[45]

Thus, it is on adherence to precedent that Mr. Justice Goldberg ultimately, and somewhat ironically, relies to shelter the constitutional advances of the Warren era.

40. *Id.* at 90.
41. *Id.* at 93.
42. *Id.*
43. *Id.* at 95.
44. *Id.* at 96.
45. *Id.*

II. COMMENT

The accomplishments of Chief Justice Warren and his colleagues merit Mr. Goldberg's enthusiasm. He presents these accomplishments in terms that are well ordered, always clear, and occasionally eloquent. The book, however, suffers from a weakness characteristic of its genre. It is another in the procession of writings by public figures based on lecture notes warm off the lectum, which tend in a few pages to cover a broad range of subjects. Superficiality results, breeding arguments that would be more credible if offered in less simplistic and unqualified fashion. The following comments focus on certain aspects of Goldberg's apologia that might be enhanced by futher elaboration.

A. A Court of Relevant Justice

Goldberg captures an obvious but often unrecognized reality regarding the Warren court when he traces the theme of relevant justice through its work. One of that Court's salient characteristics was its unusual willingness to recognize the existence of social ills and attempt to remedy them. Goldberg also appropriately sets as a goal for future Courts continued bridging of the gap between principle and practice through law shaped to deal with life as it actually is.

But Goldberg's injunction to the Court to bridge the gap between principle and practice cannot be taken as an absolute. The quest for relevant justice must itself be tempered by the reality that the Court has limited authority and resources to remedy social ills. There are many hard and often unpleasant facts of contemporary life that constitute denials of equal justice, most of which, as Goldberg points out, will be laid before the Court by one claimant or another. The Court lacks the decisionmaking capacity to deal with all of them. It lacks the requisite lawmaking mandate or enforcement power to remedy certain social ills. It may conclude that the time is not ripe to confront yet others, perhaps because society itself lacks the will or resources to bring practice meaningfully into accord with principle. Thus, claimants will present to the Court some gaps between principle and practice whose hard and unpleasant facts the Justices may properly recognize but fail nonetheless to treat.

In such instances, the Court can simply ignore the claimant by declining to hear his case. Or it may take the case and remedy it in part, ignoring the balance of the claim. Occasionally a place exists even for unsupported judicial assumptions or sterile legalisms to keep alive principles pending the time that the Court feels that it or society can act to bring practice into line with principle. To cite a criminal justice example: It seems better for the Court to maintain the fiction that most defendants who plea bargain have voluntarily admitted their guilt than judicially to admit that most plea bargainers have been co-

erced into confession by the prospect of more severe penalties were they to go to trial and be found guilty. Since our system of criminal justice rests inextricably upon guilty pleas from the vast majority of those accused, the Court cannot go far toward recognition and elimination of plea bargaining coercion without wrecking the system. By maintaining the fiction that most of those who plea bargain have voluntarily admitted their guilt, the Court retains voluntary confession as the principle and thus exerts constant, if limited, pressure on the system to bring practice into line with principle.[46]

In short, relevance requires the Court to confront both the hard facts of claims presented to it and also the hard facts of its limited influence over many of the wrongs so presented. The harsh realities of the latter may properly lead the Justices upon occasion to stay their hand.

B. Judicial Activism and Strict Constructionism

While there are limits on the Court's ability to realize equal justice for all claimants before it, its reach remains broad. Goldberg's definition of that reach, however, seems to skirt several important broadening considerations.

He begins his treatment of strict construction by reciting, in accord with public piety, that "nearly every Justice" hews religiously to the intent of the framers. He then extricates himself from the cramped, mechanistic constitutional interpretation inherent in such a claim by noting that it is difficult to tell what the framers meant on most issues and that sometimes they may have intended a dynamic interpretation. Conveniently, Goldberg finds that the fourteenth amendment is among the constitutional provisions to be given an evolutionary interpretation—one that "encompasses our greater awareness of equality."[47]

Goldberg's analysis seems unduly facile. He states as an eternal verity the necessity for adherence to the framers' intent, without consideration that their intent may compel practices that are no longer viable. He then seeks to give the Court the interpretative freedom it needs by sidestepping compelling intent, on the ground that it is ambiguous, and thus susceptible to a dynamic reading.

It would have been more credible had Goldberg stated that adherence to the intent of the framers is an important but not decisive consideration in constitutional interpretation—that strict construction is not the alpha and omega of constitutional law, even when the intent of the framers is clear but static. The judge-made evolution in the in-

46. The Court could, however, go further than it has gone toward giving effect to the principle. *See, e.g.*, Mr. Justice Brennan's dissenting opinions in North Carolina v. Alford, 400 U.S. 25, 39-40 (1970); McMann v. Richardson, 397 U.S. 759, 775-89 (1970); and Parker v. North Carolina, 397 U.S. 790, 799-816 (1970).

47. GOLDBERG 39.

terpretation of the Constitution strongly suggests that most justices have not, in fact, felt themselves bound to follow lockstep the framers' intent. Rather they have recognized that if the Constitution is to remain functional, its interpretation has to move in pace with the changing needs and values of the country. Myres McDougal has stated the situation in an apt, though dated, manner:

> [I]t is utterly fantastic to suppose that a document framed 150 years ago "to start a governmental experiment for an agricultural, sectional, seaboard folk of some three millions" could be interpreted today . . . in terms of the "true meaning" of its original Framers for the purpose of controlling the "government of a nation, a hundred and thirty millions strong, whose population and advanced industrial civilization have spread across a continent." Each generation of citizens must in a very real sense interpret the words of the Framers to create its own constitution. The more conscious the interpreters are that this is what they are doing the more likely it is that their interpretations will embody the best long-term interests of the nation. In truth, our very survival as a nation has been made possible only because the ultimate interpreters of the Constitution—presidents and congressional leaders, as well as judges—have repeatedly transcended the restrictive interpretations of their predecessors.[48]

This is not to say that the drafters' intent is unimportant. The Founding Fathers may have ordained a practice that remains viable. If their design is workable, there is no functional reason to abandon it; and there is always a long-term national interest in adherence to the design of the framers, lest its disregard undermine public confidence in the rule of law. The Court, one of whose major objectives is the creation and maintenance of the rule of law, cannot ignore or seem to ignore the drafters with impunity. Thus, absent necessity to abandon old constitutional patterns because of changed national circumstances, a contemporary Court does better to follow them. In short, the intent of the framers is an important element in constitutional interpretation, but one that historically has been ignored when necessary to ensure government practice that serves the changing needs and values of the country.

While Goldberg's treatment of judicial activism is more satisfying than his discussion of strict construction, it also seems unnecessarily circumscribed. There should have been some recognition that a part of wisdom about the judical activism of the Supreme Court is that this body is unique among American tribunals. It is the cutting edge of the third branch of the federal government, on a plane with Congress and the President. Thus the Court has a political character and powers

48. M. McDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 446-47 (1960) (footnotes omitted).

lacking in other American courts. Further, the work of the Supreme Court centers on constitutional interpretation, the facet of government in which the judiciary as opposed to the legislature or the executive is preeminent and in which the Court, unlike any other American tribunal, has ultimate authority. Other courts are far more concerned with judicial development of the common law and with statutory interpretation, areas of governance in which the views of the legislature and the executive are of controlling importance.

Accordingly, when talking of judicial activism, it is important to distinguish between the Supreme Court and all other American tribunals. Much that is said about the impropriety of judicial activism applies with far more vigor to the latter than to the former. The Supreme Court, by virtue of its parity with Congress and the President and by virtue of its final authority in constitutional interpretation, has a far greater mandate to define society's objectives and governmental patterns than do other courts. Thus to justify activism by the Supreme Court, one need not justify activism by judges in general.

An activist Court confronts the dilemma of where to cut short its activism. Goldberg to the contrary, this line-drawing problem is not one readily susceptible to Wechslerian precision,[49] because it depends in good part on the Court's assessment of the gravity of the social ills before it and on its assessment of its own capacity to deal with them. Thus the Warren court broke through several self-imposed judicial restraints of earlier eras to remedy certain cancerous injustices that seemed beyond the ministrations of other branches of government. But, as indicated, neither that Court nor any other can remedy all of the injustices that claimants put before it. Where to draw the line is a mixed question of politics and law that the Court in its discretion must answer.

As Goldberg points out at some length, the Warren court generally chose to distinguish between economic and civil liberties cases in setting the limits of its activism. The Court's reluctance to apply substantive due process and equal protection to economic questions is explicable in light of the harsh political reaction to their application to New Deal legislation by an earlier Court. The Warren era's reluctance in this regard may also reflect the judgment of its Justices that they could be effectively activist in only so many areas at once.

Realistically, however, certain economic cases in which the Warren court stayed its hand may well have involved injustice no less intense than much of the wrong that the Court boldly sought to remedy in the civil liberties area.[50] Many economic claimants do not have

49. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

50. *E.g.*, Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); *cf.* Goldblatt v. Hempstead, 369 U.S. 590 (1962). The Warren

the power to redress their grievances politically. And it is probable that most people regard protection of their basic economic interests as more important than protection of many of the civil liberties so diligently guarded by the Warren court. For the average man, the opportunity to earn a living in his chosen manner without unreasonable interference is very likely more precious than access to an unrestricted range of media. Thus the Warren court's decision to stay its hand in economic cases may have been less an application of neutral principles of law, as Goldberg suggests, and more a discretionary decision in favor of restraint, pending a more propitious time for action.

It follows that Goldberg's injunction to future Courts to strike boldly forward in decisionmaking without fear of political consequences is more attractive as inspiration than as a realistic guideline. The Court is far more a political institution than any other American tribunal, and its activist decisions often go beyond mechanistic application of preexisting law to given facts. The Supreme Court does make constitutional law. Its rulings can lead, or fall behind, the existing values of the country to only a limited extent without harmfully disrupting the body politic. Thus the Court, like every other governmental institution, must operate within the constraints of its times, and not pursuant to a quixotic insistence on vindicating its view of the law irrespective of the political consequences. As Goldberg tacitly recognizes by his reference to judicial sail trimming in 1937, there are occasions when the Court properly takes politics into account.

C. Constitutional Stare Decisis

The most significant part of Goldberg's analysis is his theory of constitutional stare decisis. The argument for an uneven adherence to precedent provides persuasive support for those who favor overruling to expand civil liberties while opposing overruling to contract them. Goldberg's work in this regard effectively precludes a simple-minded application to Warren court overrulings of the maxim that those who live by the sword properly die by it: Supporters of the Warren era are not estopped from arguing stare decisis to oppose overrulings of that Court's decisions simply because those decisions themselves often reversed precedent. A distinction does exist in our constitutional tradition between ignoring precedent to expand personal freedom and ignoring precedent to contract it.

It is well to note, however, that Goldberg paints an unduly grim picture of the effects of contraction so far as Warren court decisions

court, admittedly, had ample contemporary precedent for its frigid approach to economic claimants. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464 (1948); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947).

are concerned. The criminal justice decisions risk the most significant erosion. Popular understanding of, and support for, this aspect of the Warren court's work has always been minimal, however. And it need hardly be said that the accused or convicted do not form an effective pressure group, whose "cries of repression . . . [in response to overrulings] may induce in others the belief that the Court is sanctioning repression—inviting it and condoning it."[51] Nor, for these reasons, is it probable that for any contraction by overruling in the sphere of criminal justice "the Court must pay a huge premium in lost force of those decisions that it wishes to retain as 'good constitutional law.' "[52]

Although *Equal Justice: The Warren Era of the Supreme Court* occasionally partakes more of the rhetoric of the public speaker than the analysis of the scholar, the book merits attention. It provides an explanation and defense of the Warren court by a man who was among its members for a time and thus has historical value for its insight into Mr. Justice Goldberg's jurisprudence. Further, the book usefully captures that Court's unusual willingness to confront reality in its decisionmaking. Finally, Mr. Goldberg offers a theory of stare decisis to resolve the dilemma of those who wish to overrule precedent to advance civil liberties without, at the same time, undermining the protection that stare decisis gives those advances.

51. GOLDBERG 93.
52. *Id.* at 94.