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Book Reviews

Consent and the Roots of Judicial Authority: The Constitutional Writings of Archibald Cox

By Thomas D. Rowe, Jr.*

THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT. By Archibald Cox. New York: Oxford University Press, 1976. Pp. vii, 118. \$6.95.

Archibald Cox had special reason, even beyond what he must have felt because of his central role, for relief at President Nixon's capitulation to public demand for compliance with the court order to produce the first nine White House tapes. In a way that comes only to very few, Cox saw a cornerstone of his work as a scholar put to the severest of tests in the world of affairs—and proven sound. A basic theme in Cox's writings on constitutional adjudication has been the necessity for substantial popular consent to the rule of law and public insistence on its observance. The events that followed President Nixon's dismissal of Cox as Special Prosecutor showed the strength, possibly surprising to many, of this foundation.

I. *The Role of the Supreme Court in American Government*

The aftermath of the "Saturday Night Massacre" is Professor Cox's point of departure in his latest book, *The Role of the Supreme Court in American Government*. In the book, a revised version of lectures delivered at Oxford University in 1975, he proceeds from an account of the tapes impasse¹ to an inquiry into the "American people's attachment to constitutionalism" that broke it.² He begins with a lucid précis of *Marbury v. Madison*.³ Noting the lack of self-evident persuasiveness in the Court's opinion, Cox emphasizes that the likelihood of successful defiance had the Court tried to require the delivery of Marbury's commission makes the case no more than an early seed of the judicial authoritativeness that brought President Nixon's submission.⁴ *Marbury's* mere declaration of the principle of judicial supremacy in matters of constitutional adjudication did not secure the acceptance it needed to be effective. The roots of acceptance took hold, in Cox's view,

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1. A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 3-8 (1976) [hereinafter cited as *ROLE*].

2. *Id.* at 9.

3. 5 U.S. (1 Cranch) 137 (1803).

4. See *ROLE*, *supra* note 1, at 9-16.

mainly through the Court's success in performing the necessary function of "umpire to resolve the conflicts engendered by our extraordinarily complex system of government,"⁵ especially those between federal and state authority.⁶ However central the Court's role as guarantor of human rights may have become, it depended in large part on a halo effect: success as umpire between levels and branches of government legitimated the authority of the Court as constitutional expositor in general.⁷

A court so empowered may, however, find no clear limit to the exercise of its authority, particularly if it believes that there can be constitutional rights enforceable in court without explicit sanction from the Constitution's text. Still, Cox sees this natural-law notion as one that has received considerable acceptance throughout our history⁸ and has been a secondary but important force in the establishment of judicial supremacy.⁹ The conflict between the expanding boundaries of judicial authority and our national commitment to popular sovereignty has caused acute tensions, especially concerning the policymaking authority of elected legislatures. Cox briefly traces the patterns of those tensions through the Court's pre-1937 economic activism, the subsequent phase of judicial deference to the congressional will, and the Warren Court's reemphasis of equality and civil liberties.¹⁰ This lightly sketched history provides an introduction to fuller discussion of recent decisions concerning freedom of expression, the right to privacy, and equal protection, which Cox offers as examples of the Court's changing approach to constitutional adjudication.

Much of this heavily trodden ground is only lightly touched in Cox's book. As he makes explicit in the preface, he has revised only moderately his Oxford lectures, which he intended for a largely nonspecialist audience abroad.¹¹ The book thus mixes occasionally penetrating discussion with elementary, although lucid and graceful, exposition and insightful but sometimes unintegrated observations.¹² For example, the discussion of several

5. *Id.* at 16.

6. *See id.* at 16-23.

7. *See id.* at 29-30.

8. *See id.* at 16, 30-32, 111-13. *See generally* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715-17 (1975).

9. *See* ROLE, *supra* note 1, at 16, 30, 32.

10. *Id.* at 33-36.

11. *Preface to id.* at v-vi.

12. An irregularity of a different sort is the book's rambunctious typography. Inexcusable proofreading errors, some of them fairly serious, abound. Analytically, the mistakes seem to fall into three (not always mutually exclusive) categories:

1) The downright sloppy. *See, e.g., id.* at 69-70 (entire line of type belonging near bottom of page 69 out of place near top of page 70); *id.* at 97 n.2 & 99 n.1 (contents should be exchanged). *Compare, e.g., id.* at vi, *with id.* at 36-37 n.1 (different dates given for publication of same book by Professor Black).

recent first amendment decisions offers a telling, practical criticism of one key underpinning of overbreadth scrutiny:

How many people likely to be involved in this class of cases read the statutes and ordinances closely enough to be deterred from constitutionally protected speech by an over-broad law, and then follow the law reports with such care as to be reassured by a Supreme Court decision declaring the law unconstitutional on its face unless and until it is saved by a narrowing construction by the State's highest tribunal? And how many check for narrowing State court interpretations?¹³

Following this comment, however, Cox "wonders whether the entire doctrine is not built upon pretence [*sic*]"¹⁴—ignoring the support overbreadth analysis draws from a quite practical danger he had just mentioned in connection with prior restraints on demonstrations,¹⁵ the opportunity for discriminatory enforcement of overbroad laws.¹⁶

In Professor Cox's examination of the cases, a recurring theme of inquiry is the appropriateness of the Court's degree of activism. From his discussion emerge several criteria: notably, the effect of the Court's decisions on the workings of the political process, the Court's ability to articulate workable principles, the practicality of decisions requiring complex rem-

2) Those possibly explainable if the proofreading was done in England (although printed in the United States, the book was published by the Oxford University Press) by persons quite unfamiliar with American life, law, history, and institutions. *E.g., id.* at 40, 54, 84, 100-01 (persistent misspelling of Chief Justice's name as "Berger"); *id.* at 16 (reckoning of present time as "almost a century and a quarter later" than *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); *id.* at 96 n.2 (citation to vol. 493 of the *Federal Supplement*, which should not appear until approximately 1980, for a case decided by a United States Court of Appeals).

3) The somewhat amusing. *E.g., id.* at 72 n.4 ("The Supreme Court, 1971 Term: Forward"); *id.* at 71 n.1 ("*Harper v. Board of Electronics*").

13. *Id.* at 45.

14. *Id.*

15. *See id.* at 43-44.

16. *See Note, The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 872 (1970). The cases that Cox discusses "to show how the doctrine of overbreadth can be run into the ground," *ROLE, supra* note 1, at 45, although they may have concerned speech whose suppression few would lament, nonetheless involved laws plainly offering ample room for selective enforcement against protected expression. *See Rosenfeld v. New Jersey*, 408 U.S. 901, 904 (1972) (Powell, J., dissenting) (statute punishing, *inter alia*, "'loud and offensive . . . language in any public . . . place,'" interpreted by state court to include speech "'of such a nature as to be likely . . . to affect the sensibilities of a hearer'"); *Gooding v. Wilson*, 405 U.S. 518, 519 (1972) ("opprobrious words or abusive language").

Moreover, Cox at best exaggerates his further complaint that the Court's overbreadth decisions have not

given any sign that [the Court] has faced the problems of the draughtsmen and has some notion of how to write a law which covers the endless variety of conduct that may disturb public order or decency yet cannot be twisted to reach some constitutionally protected form of expression.

ROLE, supra note 1, at 45. Although with varying degrees of emphasis, the Court has quite consistently tried to strike down statutes only for *substantial* overbreadth. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 & n.14 (1973); *Note, supra*, at 858-60, 918-23.

edies, and the verdict of public opinion on the Court's work. To promote openness in political discourse, activism in the service of free expression is fully warranted: "To apply the philosophy of judicial self-restraint to the area of speech and press would entrust those liberties to the substantially uncontrolled power of the individual States and the Congress."¹⁷ In his view, the Court has generally responded to this concern: "Taken as a whole, the free speech decisions of the past twenty years have expanded liberty and strengthened self-government."¹⁸ Cox's sensitivity to the Court's impact on the political process also contributes to his approval of the reapportionment cases, which he sees as having "removed the chief remaining source of political inequality in the United States and [given] impetus to other correctives."¹⁹

A venturesome Court, however, may intervene in areas in which it is not prepared to articulate durable and workable principles. Such, for Cox, is the case with the abortion decisions²⁰ and several recent equal protection rulings he considers of dubious reconcilability.²¹ By contrast, though Cox does not say so as explicitly as he might have, defense of the reapportionment cases seems strengthened by the coherence and overall workability of the one person, one vote principle the Court articulated.²² Cox's point is not that the Court should invariably avoid making new law that it has difficulty putting in terms of coherent doctrine. Rather, the Court should proceed circumspectly if

17. ROLE, *supra* note 1, at 50.

18. *Id.* at 49. Cox's inclinations in approving or criticizing the Court's recent first amendment decisions are consistent with his emphasis on the relation between expression and the political process. He most strongly endorses the public figure defamation and street demonstration cases, *see id.* at 38-42, 43-44, which involved expression suppressible only by eliminating much from political discourse. For example, Cox mentions the crucially important Watergate investigative reporting, which might well not have appeared under the standards prevailing before *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See* ROLE, *supra* note 1, at 40-41. He questions the first amendment rulings that rejected state efforts to punish the use of vulgarities in political expression. *See id.* at 44-48 (discussing *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972), *Gooding v. Wilson*, 405 U.S. 518 (1972), and *Cohen v. California*, 403 U.S. 15 (1971)). Here, he seems to care little for the effect on liberty and much for "the level at which public discourse is conducted," suggesting that state power "includes the preservation of dignity by barring words spoken to be offensive though not relevant to the issues." ROLE, *supra* note 1, at 47.

19. ROLE, *supra* note 1, at 69.

20. *See id.* at 51-55, 113-14.

21. *See id.* at 73-75.

22. *See id.* at 69, 90-91. Somewhat puzzlingly, Cox is quite uncomfortable with the derivation of the one person, one vote principle, while apparently untroubled by its articulation and operation. He cites the reapportionment cases along with the abortion decisions as "dramatic examples" of reading into the Constitution "notions of wise and fundamental policy which are not even faintly suggested by the words" of the document. *Id.* at 100. One can fairly suggest that the phrase "equal protection of the laws" falls short of dictating the outcome of the reapportionment cases and further contend that the decisions appear to rest in considerable part on the Justices' "notions of wise and fundamental policy." It seems simply wrong, however, given the patent and statutorily sanctioned inequalities of representation that existed in our legislative bodies, to suggest that the policy does not in the slightest follow from the text.

it cannot articulate adequate principles; otherwise, it may undermine and waste the support on which it depends.²³

Highly practical considerations also affect the wisdom of judicial activism. The courts can, quite simply, place themselves in situations they cannot manage, particularly in the framing of remedies. Cox speculates that the anticipation of such problems, although unarticulated, lies behind the Court's refusal to find a deprivation of equal protection in a state's basing school finance on local property taxation.²⁴ In raising such problems of remedies, Cox expands upon a theme of his earlier writing—the increasing tendency of courts not just to protect the individual against governmental action but also to enforce “the affirmative obligations of the government to its citizens.”²⁵ Previously, he had said little of the practical difficulties created by the Court's broadened role; still, as his analysis of the reapportionment cases demonstrates, the difficulties are not always insuperable. Now, however, Cox adds that, although the school segregation cases may initially have seemed to involve merely the overturning of Jim Crow laws, they rapidly came to require the courts “to formulate controversial programmes of affirmative action requiring detailed administration for protracted periods under constant judicial supervision.”²⁶ As complex and controversial as desegregation remedies may have become, nevertheless, the unacceptability of constitutionalizing apartheid required the effort, which quite likely presented the only way to instill the conviction that “the constitutional promise of equality was genuine and capable of realization.”²⁷ Beyond illustrating the problem of affirmative duties and remedies, the book has little to offer here; Cox concludes by observing merely, “Somehow constitutional law must cope with the change. . . . This is the next great challenge of American constitutionalism.”²⁸

23. See *id.* at 75.

24. *Id.* at 93-96 (discussing *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973)); cf. *Robinson v. Cahill*, 70 N.J. 155, 358 A.2d 457 (1976) (ordering closing of New Jersey public schools unless legislature provides full funding to finance education system in manner held mandated by State constitution). See also *ROLE*, *supra* note 1, at 82-83 (mentioning the complex managerial problems involved in the multidistrict desegregation decree reversed in *Milliken v. Bradley*, 418 U.S. 717 (1974)).

25. Cox, *The Role of the Supreme Court in American Society*, 50 *MARQ. L. REV.* 575, 584 (1967) [hereinafter cited as *Marquette Lecture*]; see, e.g., A. COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 35-39, 50 (1968) [hereinafter cited as *WARREN COURT*]; *Marquette Lecture*, *supra* at 584-91; Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 *HARV. L. REV.* 91, 93 (1966) [hereinafter cited as *Foreword*].

26. *ROLE*, *supra* note 1, at 77.

27. *Id.* at 88; see *id.* at 117.

28. In his most recent article, Professor Cox has developed further his concern over sweeping judicial remedies. He compares, for example, the pre-New Deal Court's “veto [of] accommodations worked out through the political process” with the Boston desegregation decrees' imposition “upon millions of people [of] a novel program of legislative character

Cox does note that judicial ventures into the creation of affirmative duties and remedies increase the "degree of judicial dependence upon political support."²⁹ He thus touches upon a fourth consideration in appraising activism: the need for social consensus or at least acquiescence to support the judiciary's efforts. Here again, the reapportionment cases—successful at least in winning public support and in proving workable in their implementation—can serve as a prime example of activism vindicated because the Court "kn[e]w us better than we kn[e]w ourselves."³⁰ In contrast, the effort to enforce the school desegregation decisions, however broad the present acceptance of their basic holding, has subjected constitutional adjudication to "strains never before experienced."³¹ Regard for social consensus may counsel against judicial assertiveness in a different situation—when either possible decision would likely receive acceptance, but the Constitution does not clearly mandate either result. Cox seems to identify reverse discrimination as such a situation;³² he considers at some length the policy and constitutional arguments on both sides and highlights the acute difficulty of the problem for a court or an administrative or legislative policymaker.³³ As matters stand, "[n]o one quite knows all the gains and costs of adopting [reverse discrimination] remedies instead of leaving the obstacles to diminish gradually once further discrimination is stopped."³⁴ The unknown results mandate, in Cox's view, a judicial deference that would not outlaw administrative and legislative experimentation.³⁵

Cox's attention to the Court's dependence on popular consent and his willingness to justify decisions at least in part by their acceptance and effects

without popular representation," wondering whether "the modern Court [is] any less mistaken" than its predecessor. Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791, 815 (1976) [hereinafter cited as *New Dimensions*].

29. ROLE, *supra* note 1, at 88.

30. *Id.* at 117; *New Dimensions*, *supra*, note 28, at 816-17 (courts' "apparent success" at novel judicial task of legislative apportionment). For less favorable views of the reapportionment decisions and their effects, see A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 108-15, 151-61, 165-73 (1970); W. ELLIOTT, *THE RISE OF GUARDIAN DEMOCRACY: THE SUPREME COURT'S ROLE IN VOTING RIGHTS DISPUTES, 1845-1969*, at 213-36 (1974).

31. ROLE, *supra* note 1, at 86; *see id.* at 86-90, 109. The intense reaction to the Court's decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), makes Cox's "never before" phrasing seem an instance of rhetorical excess. *See, e.g.*, C. SWISHER, *THE TANEY PERIOD* 1836-64, at 631-32 (1974).

32. *See generally* DeFunis v. Odegaard, 416 U.S. 312 (1974) (avoiding as moot any decision whether state law school's admissions preference to minority applicants violates equal protection clause); Bakke v. Regents of the Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (state medical school's admissions preference to minority applicants violates federal equal protection clause), *petition for cert. filed*, 45 U.S.L.W. 3437 (U.S. Dec. 14, 1976) (No. 76-811).

33. *See* ROLE, *supra* note 1, at 61-68.

34. *Id.* at 68.

35. *Id.* *See generally* Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975).

demonstrate that he does not consider constitutional adjudication to be strictly confined by legalistic canons, either in practice or in theory. Explicitly articulating this view, he opens his final lecture as follows:

That the Supreme Court plays a partly political role—that it makes public policy under the doctrine of judicial review—is all too obvious. That it is partly bound by law is equally obvious to anyone who understands the self-discipline of the legal method. The hard question is one of degree: how large or small a political role should the Court play?³⁶

He thus positions himself to criticize purist positions on either side. Cox underscores the Court's political role with the slightly overstated observation that certain decisions of the Burger Court, especially its abortion rulings, indicate "that the new Justices will not revert to the philosophy of judicial self-restraint when an existing rule offends their policy preferences."³⁷ Turning to those who would urge the Court "to carry out the policies it deems desirable,"³⁸ Cox states that judicial impartiality and fidelity to law must be more than a myth—"Law professors cannot keep a myth alive if political scientists are able to expose the fiction because of their greater candour or truer perception."³⁹ Moreover, the departure from impartiality entailed by commitment to anything but the search for our society's fundamental constitutional values would carry with it a corrosive "degree of commitment apart from merit."⁴⁰

Cox similarly rejects adherence to rigid legalism, for "law, to command consent, must deserve it."⁴¹ Unwillingness to depart from "constitutional adjudication . . . sanctioned by the strict judicial method," Cox implies, would have left American constitutional law much less deserving of the people's support:

[W]e should still be tolerating a caste system and suffering the inequity of legislative malapportionment. The press would be constrained by fear of suits for libel or prosecutions for contempt of court in publishing discreditable news of public figures; and in some States poor persons charged with crime would still be forced to trial without the assistance of counsel.⁴²

He is, moreover, quite reconciled to judicial reliance on values not explicitly written into the text of the Constitution:

36. *ROLE*, *supra* note 1, at 99.

37. *Id.* at 102.

38. *Id.* at 106.

39. *Id.* at 107.

40. *Id.* See also *New Dimensions*, *supra* note 28, at 821-22 (threat to longrun effectiveness of constitutional adjudication from focus on shortrun benefits of results of Court's decisions).

41. *ROLE*, *supra* note 1, at 110.

42. *Id.* at 115.

All agree that the [due process] clause calls for some measure of judicial review of legislative enactments, and from that point forward all must be done by judicial construct with no real guidance from the document. . . . The Court's persistent resort to notions of substantive due process for almost a century attests the strength of our natural law inheritance in constitutional adjudication, and I think it unwise as well as hopeless to resist it.⁴³

Nevertheless, Cox criticizes an excessive concern solely for policy results, stressing both the need to give "great weight" to a "clear-cut line of precedents"⁴⁴ and the necessity for principled articulation. The result of Cox's criticisms of the political and legalist approaches to constitutional adjudication is a synthesis accepting major elements of both views—and perhaps most notably, recognizing the validity of many conventional rules of judicial restraint while rejecting the most fundamental rule, limitation to values explicitly recognized in the constitutional text.

II. Cox's Theory of Constitutional Adjudication

The Role of the Supreme Court in American Government reflects more than it develops Cox's overall approach to constitutional adjudication, an approach which can be pieced together from his several published lectures and occasional articles on constitutional law over the past fifteen years. Despite his renown and almost unfailing felicity of expression, this significant body of work has gone insufficiently appreciated, no doubt largely because Cox has not yet attempted a single unified presentation.

Countless writers have commented on the judiciary's need for popular assent, but for Professor Cox that need is a central theme affecting nearly all aspects of his outlook.⁴⁵ He specifically finds inadequate, at least standing by

43. *Id.* at 113. Professor Cox would not limit the Court's reference to sources beyond the text to "substantive" adjudication under the due process clauses, for he recognizes the essential similarity of what the courts do under other provisions as well. *See id.* at 72 ("the questions of judicial philosophy which [recent activist equal protection] cases raise are the same as those posed when the Due Process Clause is invoked to protect personal liberties not specifically mentioned in the Bill of Rights"); *id.* at 113 (the Constitution does not "suggest restrained review in some cases and strict review in others"); *cf. id.* at 49 ("balancing opposing values" in recent free speech cases similar to that in pre-1937 economic activism).

Cox acknowledges that the natural-law strain in our constitutional history, legitimating reliance on sources not in or closely related to the text, has appeared in "different intellectual trappings and under other names." *Id.* at 32. He does not identify one intriguing characteristic of his modern version, which in one sense stands the old idea of natural law on its head. Formerly, natural law enforceable in constitutional adjudication would, as some saw it, "impose laws even on the Deity," *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 143 (1810) (Johnson, J., concurring), *see* ROLE, *supra* note 1, at 32, and presumably on a resistant society as well. In Cox's framework, however, principles not accepted by or at least acceptable to society could not properly be part of "natural law" since "[t]he aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by." *Id.* at 117-18.

44. ROLE, *supra* note 1, at 111.

45. Cox has treated this theme time and time again, as in a lecture delivered a decade ago: "It is the capacity to command free assent that makes law a substitute for power. The force of

themselves, other possible foundations for judicial authority—including adherence to a written charter,⁴⁶ judicial craftsmanship,⁴⁷ and, most emphatically, the threat of force on a large scale.⁴⁸ Of course, all democratic institutions rest in large part, and one hopes ultimately, on the consent of the governed; but courts are uniquely dependent on earning and holding popular support since “[t]hey possess neither the purse nor the sword”⁴⁹ and their “decrees draw no authority from the participation of the people.”⁵⁰

Cox’s view of consent holds striking implications for judicial activism. To maintain the assent on which it depends, the judiciary must perform largely in accordance with a complex set of expectations. Prominent among these is the public’s demand for results it believes to be just;⁵¹ adjudication must take account of the “moral sense of civilization” to enable the law to “meet the needs of men and match their ethical sensibilities.”⁵² This approach entails accepting the notion of substantive due process,⁵³ since the limited enumerations of the Constitution obviously will not always incorpo-

legitimacy — and conversely the habit of voluntary compliance—is the foundation of the law’s civilizing and liberalizing influence.” *Marquette Lecture*, *supra* note 25, at 575-76. *See also, e.g.*, *ROLE*, *supra* note 1, at 2, 7, 103-05; *WARREN COURT*, *supra* note 25, at 25-26.

The public assent to which Cox refers appears multifaceted or perhaps even as several different phenomena. Most commonly, he seems to mean the voluntary compliance with court decisions that flows from acceptance of the general legitimacy of the judicial role even when there is disagreement with a particular decision. *See, e.g.*, *ROLE*, *supra* note 1, at 103-04. Second, he seems to have in mind a willingness to accept the main thrust of the Court’s decisions. When acceptance falters, the Court may well, in the long run, change directions. *See text* accompanying notes 127-31, 134-35 *infra*. Finally, there exists the rare instance such as the Watergate tapes “fire storm,” in which the public made clear its insistence on obedience to a judicial mandate, *see, e.g.*, *ROLE*, *supra* note 1, at 8, 104, or presumably when adverse reaction to a court decision becomes strong enough to precipitate a constitutional crisis, *see, e.g.*, note 31 *supra*.

46. *See ROLE*, *supra* note 1, at 2.

47. *See Cox, Chief Justice Earl Warren*, 83 *HARV. L. REV.* 1, 3 (1969) [hereinafter cited as *Chief Justice Earl Warren*].

48. *See, e.g.*, *ROLE*, *supra* note 1, at 7, 103; *Marquette Lecture*, *supra* note 25, at 575-76.

49. *ROLE*, *supra* note 1, at 7.

50. *Foreword*, *supra* note 25, at 98. Cox is not so naive as to postulate a nation of Court-watchers; the Court’s constituency is made up of “many voices, not all carrying equal weight.” *ROLE*, *supra* note 1, at 105. The Court does not require universal support, but it does need acceptance by “the political branches of government, the rest of the legal profession, and enough of the public,” *id.* at 2, that what it is doing “is ‘legitimate,’ and therefore deserves an uncoerced consent.” *New Dimensions*, *supra* note 28, at 822.

51. In responding to this demand, the Court may not always rely on strict adherence to law, *see, e.g.*, *WARREN COURT*, *supra* note 25, at 5, or await reform by the political branches, *see, e.g.*, *id.* at 117-18.

52. *ROLE*, *supra* note 1, at 110; *see Cox, Understanding the Supreme Court*, 2 *NAT. RESOURCES J.* 136, 145 (1962) (higher community valuation justifies greater constitutional and judicial protection) [hereinafter cited as *Understanding the Supreme Court*].

53. *See ROLE*, *supra* note 1, at 113. Cox quite clearly is not driven by sympathy with Warren Court decisions to rationalize a doctrine he rejected in times of less congenial results. Writing during the tenure of Chief Justice Vinson, Cox explicitly called for application of substantive due process standards to bans on strikes shortly after the Court had emphatically rejected the substantive due process approach in an attack on antilabor state legislation in *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 533-37 (1949). *See Cox, Strikes, Picketing and the Constitution*, 4 *VAND. L. REV.* 574, 580-81, 588-89 (1951).

rate the values pressing for judicial recognition; therefore, judicially articulated “principles need not be neutral.”⁵⁴ It justifies preferring rights that society deems especially important⁵⁵ and “inescapably requires the Court to consider the social, economic, and policy consequences of its decisions.”⁵⁶ Consequently, the Court may act as modernizer of the law “to serve the new and newly felt needs of the community,”⁵⁷ possibly even to the point of the judge’s explicitly approaching “constitutional adjudication as an instrument of reform.”⁵⁸ The Court need not merely reflect society’s mores; its relationship with the public is one of mutual influence, involving a role of some leadership for the Court in forming the consensus on which it depends. “It shapes as well as expresses our national ideals.”⁵⁹

The need to consider social values and the effects of the apparent ratification that can flow from judicial inaction⁶⁰ imply that the Court may redress a failure of the other branches to act on matters normally within their competence.⁶¹ In its most extended and perhaps least readily acceptable implication, Cox’s approach not merely tolerates, but mandates “the occasional great leaps forward which lack . . . justification” from “principles referable to accepted sources of law.”⁶² Although a foundation in traditional sources of law is a necessary staple in the diet of constitutional adjudication,⁶³

54. Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 221 (1971) [hereinafter cited as *Role of Congress*].

55. See *Understanding the Supreme Court*, *supra* note 52, at 145; *cf. Role of Congress*, *supra* note 54, at 220 (emphasizing greater fitness of judiciary than of political branches to protect preferred rights).

56. *Marquette Lecture*, *supra* note 25, at 578. *But cf. id.* at 581:

At the same time [the Court’s] constitutional function, defined by history as well as the implications of the document, is to decide whether the exercise of . . . national power [in the Voting Rights Act] disturbs the frame of government erected in 1789 as modified by the Fourteenth and Fifteenth Amendments. . . .

Cox also notes:

The extraordinary character of the questions put before the Court means that the Court cannot ignore the political aspects of its task—the public consequences of its decisions—yet the answer to the question “what substantive result is best for the country?” is often inconsistent with the responses obtained by asking “what is the decision according to law?” The Court may incline to one direction or the other, but no one could wisely and permanently grasp either horn of the dilemma.

WARREN COURT, *supra* note 25, at 4-5.

57. *Foreword*, *supra* note 25, at 98; *cf. Understanding the Supreme Court*, *supra* note 52, at 137.

58. *ROLE*, *supra* note 1, at 112.

59. *Foreword*, *supra* note 25, at 97; see *ROLE*, *supra* note 1, at 117-18; *Role of Congress*, *supra* note 54, at 260-61 (“the Court can assist [the people] in the process of education [from the experience of self-government] by evening out the excessive swings in popular emotion and reminding us all of our better judgment”).

60. See, e.g., WARREN COURT, *supra* note 25, at 119; *Foreword*, *supra* note 25, at 97-98.

61. See, e.g., *ROLE*, *supra* note 1, at 68-69; WARREN COURT, *supra* note 25, at 117-18; *Foreword*, *supra* note 25, at 122.

62. WARREN COURT, *supra* note 25, at 21.

63. *Id.* at 119; see *Chief Justice Earl Warren*, *supra* note 47, at 2.

[i]mportant legal principles, both constitutional and other, have often been created by a judicial *coup de main*. There are times, as all lawyers know, when new legal norms may be made to embody our ideals rather than measure our shortcomings—to project the direction of American life rather than record it.⁶⁴

This enumeration may seem to reduce to the vanishing point the distance between Cox's approach and the views of constitutional adjudication he has criticized as too political and "manipulative."⁶⁵ Certainly, he would often allow the courts greater latitude than would theories holding illegitimate any decisions not demonstrably grounded in constitutional text, history, or precedent. Nevertheless, the need to maintain the links between constitutional decisions and social consensus imposes its own limits. Often grounding his reasoning in the Court's need for public assent, Cox has recognized the validity of a quite comprehensive range of constraints on judicial power arising from the public's confining expectations of judicial behavior as well as doctrinal and practical considerations. We want our courts to act in accordance with some general notions of the appropriate scope of judicial authority; it would become intolerable if a freewheeling judiciary tried on a wide and regular basis to act as policymaker for a people accustomed to the notion that they govern.⁶⁶

One could recognize restraints, of course, and still hold a power-maximizing, manipulative view of the judicial function. Cox, though, is not at all a cynic who believes that courts should exercise all the power they can wield limited only by their appraisal of the real political limits. Instead, he has described the apparent and largely self-imposed outer limits on the Supreme Court: it "is limited in its interpretation of the Constitution only by its own self-restraint in responding to tradition, public pressure, and the claims of conscience in the performance of a judicial office."⁶⁷ He has gone on, within that outer boundary, to formulate an elaborate scheme of appropriate restraints, animated by the general principle that

the power of legitimacy is thought to depend largely upon the realization that the major influence in a decision is not personal fiat, but principles which bind the judges as well as the litigants, and which apply uniformly to all men not only today but yesterday and tomorrow.⁶⁸

64. WARREN COURT, *supra* note 25, at 119; see ROLE, *supra* note 1, at 110:

There have always been occasions when the courts . . . have had to pay the price of revealing that judges sometimes make law to suit the occasion. Nor should we forget that not to pay that price may even defeat the object of obtaining voluntary compliance, because law, to command consent, must deserve it.

65. See ROLE, *supra* note 1, at 106-08.

66. Cf. *Understanding the Supreme Court*, *supra* note 52, at 137-38 (public acceptance of the Court depends upon ideal that it applies the law rather than makes policy).

67. ROLE, *supra* note 1, at 13.

68. *Id.* at 109; see *Understanding the Supreme Court*, *supra* note 52, at 137-38.

The careful reader will already have caught the qualifiers—"thought to depend," "largely," "major influence"; as Cox has said, the Court "is *partly* bound by law."⁶⁹ Perhaps only partly, but bound it is.⁷⁰

Professor Cox proposes three occasionally overlapping types of limits—those of judicial competence, sources from which to derive guides to decision, and articulation of principles. Most are familiar; their importance here lies in how they derive from and relate to the rest of Cox's view. Under the rubric of competence constraints, which function both doctrinally and practically, Cox seems to accept the general outline of the law based upon the article III requirement of a case or controversy⁷¹ and the political question doctrine.⁷² Related to the latter is Cox's emphasis on appropriate deference to the political branches for reasons of both legitimacy and practicality. "A legislative enactment establishing new standards for the promotion of human rights will command more acceptance, once stamped with the judicial imprimatur of constitutionality, than novel doctrine enunciated by the Court," since "[j]udge-made law draws no authority from the participation of the people."⁷³ The representative nature of the legislative branch fits it better than the judiciary to resolve "issues involving the accommodation of the direct interests of large groups of people."⁷⁴ The courts' general lack of the other branches' specialized experience and capacity to make findings of social conditions⁷⁵ provides a different, highly pragmatic reason for deference. Other areas, such as review of Presidential decisions on the use of the armed forces abroad, may pose insuperable difficulties in determining judicially manageable standards.⁷⁶

Cox has, moreover, consistently stressed the importance for public acceptance that the Court's decisions "be rooted in a continuous community of principle found in the words of the constitution, judicial precedents,

69. ROLE, *supra* note 1, at 99 (emphasis added).

70. *See id.* at 107 (impossibility of keeping "the 'myth of the Court' alive without living by it enough of the time to give it some reality").

71. *See id.* at 18, 28; *Understanding the Supreme Court*, *supra* note 52, at 148-50.

72. *See Understanding the Supreme Court*, *supra* note 52, at 150-52. The degree of apparent acceptance of the political question doctrine is qualified by Cox's position that inaction by the other branches can justify judicial intervention. *See* text accompanying notes 60-61 *supra*.

73. WARREN COURT, *supra* note 25, at 67-68.

74. ROLE, *supra* note 1, at 88; *see Role of Congress*, *supra* note 54, at 210-11.

75. *See Role of Congress*, *supra* note 54, at 205, 209-10; *Foreword*, *supra* note 25, at 105 (importance of legislators' knowledge that is not necessarily reflected in formal record); *cf.* WARREN COURT, *supra* note 25, at 90 (acting on insufficient information can inappropriately freeze judicial preconceptions into constitutional law). *But see* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1308 (1976) ("unsuspected advantages" of courts "in gathering and assessing information" in complex public law cases).

76. *See* ROLE, *supra* note 1, at 28; *Role of Congress*, *supra* note 54, at 204. *See also* text accompanying notes 24-28 *supra* (concern for possible complexity of remedies).

constitutional practice and like sources of law.’’⁷⁷ He has apparently never enumerated the accepted sources of law in less vague and open-ended fashion; his discussions of those sources that he has mentioned afford some but not much help. The weight accorded to precedent, for example, “should be so great—I think—as to outweigh the arguments for change unless one is pretty clear that the change is impelled by one of the deeper lasting currents of human thought that give direction to the law.’’⁷⁸ As for the words of the Constitution, “they are binding,” presumably when clear and applicable, yet seldom do they apply so plainly and specifically as to be dispositive.⁷⁹ When reliance on the words fails, Cox’s attachment to the constitutional text seems to amount only to a reluctance “to ignore all constitutional charts’’⁸⁰ and an inclination to connect his reasoning, however tenuously, to a particular provision⁸¹ rather than trying to extrapolate a principle from several clauses at once.⁸²

Perhaps Cox’s most rigorous constraint is that the Court should make manifest the grounding of its decisions in conventional sources of law and articulate the reasons for its rulings in principled generalizations. The articulation constraint looks backward at “accepted sources of law’’⁸³ and ahead towards the quality of the principles articulated. The aim is formulation of “a precept of sufficient abstractness to lift the ruling above the level of a political judgment,’’⁸⁴ a principle at a high enough “level of generality” and “degree of absoluteness.’’⁸⁵ Observing these restraints is not just an academic nicety; referring to “that mysterious process by which decisions meet new needs yet are shown to have the legal roots needed to maintain the rule of law,” Cox writes, “A chief function of the judicial opinion is to preserve this element in the Court’s power to command the consent of the governed.’’⁸⁶

This scheme, juxtaposing the legitimation of sweeping authority against several confining restraints, results in a delicate balance. Despite all the restraints, Professor Cox grants his Court considerable leeway. He plainly approves of the main thrusts of the desegregation, reapportionment, public figure defamation, and right-to-counsel decisions, all of which he neverthe-

77. *Marquette Lecture*, *supra* note 25, at 587; see *ROLE*, *supra* note 1, at 75 (“conventional sources of law”), 109 (“accepted sources of law”); *Foreword*, *supra* note 25, at 98.

78. *ROLE*, *supra* note 1, at 111.

79. *Understanding the Supreme Court*, *supra* note 52, at 137.

80. See *WARREN COURT*, *supra* note 25, at 133.

81. See *ROLE*, *supra* note 1, at 113.

82. See *WARREN COURT*, *supra* note 25, at 132-33.

83. *Foreword*, *supra* note 25, at 98; see *Chief Justice Earl Warren*, *supra* note 47, at 2.

84. *ROLE*, *supra* note 1, at 113.

85. *Role of Congress*, *supra* note 54, at 221.

86. *Foreword*, *supra* note 25, at 98; see *WARREN COURT*, *supra* note 25, at 48-49.

less sees as departures “not sanctioned by the strict judicial method.”⁸⁷ Yet his restraints have bite: in the abortion cases he seems to find the result impossible to reach on his canons and the opinions utterly deficient in the derivation and articulation of their rulings.⁸⁸ Interestingly, he also expresses doubt about *Mapp v. Ohio*,⁸⁹ even though he agrees with the result on policy grounds; he concedes the force of the arguments on both sides and hints that the weight of precedent might have been great enough “to outweigh the arguments for change.”⁹⁰

Finally, Cox’s analysis of the Court’s error in its pre-1937 economic activism is especially illustrative. He could not and does not, consistently with his position on substantive due process,⁹¹ make the usual objection that the Court illegitimately read into the Constitution values not found there.⁹² For Cox, the Court did something arguably appropriate, but did it wrongly. Although the Court may take social values into account, in those decisions it simply misread them by failing “to perceive the changes in American society.”⁹³ Furthermore, it ventured beyond its competence: “[o]ne wonders whether [the Justices] were not also wrong in thinking that issues involving the accommodation of the direct interests of large groups of people are fit for judicial resolution.”⁹⁴ Finally, it violated the canon of principled generalization by approving some justifications for legislative interference with liberty of contract and denying others:

[T]he Court would have stood on more defensible ground . . . if it had consistently maintained the proposition that the constitutional guarantee against deprivation of liberty without due process of law precludes any interference with liberty of contract.⁹⁵

III. Some Observations in Appraisal

Is Cox’s hybrid theory a contradictory jumble or a coherent synthesis of contending approaches to constitutional adjudication? Three observations suggest that at least an overall unity exists in the scheme. First, the restraints Cox advocates do not stand in stony resistance to his justifications for

87. See *ROLE*, *supra* note 1, at 115.

88. See *id.* at 113-14.

89. 367 U.S. 643 (1961) (overruling refusal to apply fourth amendment exclusionary rule to states).

90. See *ROLE*, *supra* note 1, at 111 & n.1.

91. See text accompanying notes 43 & 53 *supra*.

92. See generally, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973). Compare *id.* with *ROLE*, *supra* note 1, at 112-13.

93. *ROLE*, *supra* note 1, at 88.

94. *Id.*

95. *Role of Congress*, *supra* note 54, at 210.

activism. Rather, the restraints themselves often rest on the same underlying considerations that support broad judicial authority. Similarly, the qualifications to the restraints flow from the same sources. Although he would presumably not disagree with them, Professor Cox does not, for example, rehearse the usual arguments for *stare decisis*, such as stability in the law and expectation interests. Instead, he includes precedent among the accepted sources of law upon which the Court must draw to maintain its legitimacy.⁹⁶ And the weight that can tip the scales against precedent is the sort of deeply rooted value that he perceives to be an appropriate influence on the Court's direction.⁹⁷ Second, he often frankly acknowledges major unresolved tensions,⁹⁸ but their persistence does not imply incoherence. Instead, legitimate, competing interests are a part of Cox's framework—for example, the most basic conflict occurs when a Justice concludes that a decision according to strict legality would hurt the country. For Cox, the appropriate resolution to such dilemmas comes through case-by-case decisions and not through the categorical choice of one approach.⁹⁹

Third, Cox's tolerance of principles not neutrally derived or articulated¹⁰⁰ might seem at war with his insistence on judicial impartiality and independence.¹⁰¹ Even if one disagrees with Cox's position on neutral principles, it does not follow that Cox's view cannot logically or practically coexist with principled articulation and impartial application of judicial doctrine. It does not seem unrealistic for a judge to believe, on the one hand, that social values may provide one source for rules of decision and, on the other, both that he should hesitate to go forward if a principled rationalization seems unavailable and that he must not apply the law in any spirit of favoritism. Common-law judges, after all, have worked that way for generations.¹⁰²

In one sense, criticism of contradictions in Cox's outlook would be beside the point. He is pragmatic almost to a fault, and often the most serious charge sustainable against him would be candor in describing judicial reality. He recognizes, for example, the significance of "halo effects"—that public respect for the Court's decisions in one field of law or its general legalistic comportment can foster public acceptance of the Court's venturing into other fields of law or departing from strict canons.¹⁰³ Some of the reasons he gives

96. See text accompanying note 77 *supra*.

97. See text accompanying notes 78, 89-90 *supra*.

98. See, e.g., WARREN COURT, *supra* note 25, at 4-5; *Understanding the Supreme Court*, *supra* note 52, at 137-38.

99. See WARREN COURT, *supra* note 25, at 5.

100. See text accompanying note 54 *supra*.

101. See, e.g., ROLE, *supra* note 1, at 107, 109.

102. See generally, e.g., B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 98-141 (1921).

103. See note 70 & text accompanying notes 5-7, *supra*; WARREN COURT, *supra* note 25, at 21.

for judicial deference to more competent branches are highly practical ones, recognizing the courts' limited experience and fact-finding capacity.¹⁰⁴ He believes the Warren Court's sensitivity to "the best and truest aspirations of the American people" to have been "infinitely more important" than the craftsmanship of its opinions.¹⁰⁵ Further, he explicitly cites the need for pragmatic "play in the joints" in justifying judicial intervention when the other branches have failed to act.¹⁰⁶

Nevertheless, Cox's emphases are strongly moral as well as practical, his approach normative as well as descriptive. For all his pragmatism, he is no cynical advocate of judicial realpolitik.¹⁰⁷ One of the Court's great functions is helping "to make us what we are by telling us what we may be," and "reminding us of our better selves."¹⁰⁸ For the Court to perform this role properly, Cox has repeatedly acknowledged that it must discern accurately those strongly felt and broadly accepted social norms on which it may rely:

The Court must know us better than we know ourselves. . . .
[T]he roots of its decisions must be already in the nation. The aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by. For the power of the great constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will¹⁰⁹

On the vital question of how the Court can hope to perform this essential work properly, Cox's approach seems weakest or, at any rate, least adequately developed. It is plain from the pre-1937 economic activism cases that the Court can misperceive the "common will" for a long time. Even an acceptable theory of how the Court can sense the actual or potential consensus on which it may rely probably cannot escape an unsatisfying level of generality; and even a good theory would afford no certainty against bad practice. Nevertheless, before we accept the legitimacy of so major an addition to "conventional sources of law," should not the means of ascertaining social norms be clear enough to justify hope for accuracy at least most of the time? One can even agree that "the Warren Court did it and the heavens

104. See sources cited notes 75-76 *supra*.

105. Chief Justice Earl Warren, *supra* note 47, at 3.

106. See ROLE, *supra* note 1, at 68-69; WARREN COURT, *supra* note 25, at 117-18.

107. See, e.g., ROLE, *supra* note 1, at 107:

At the core of the Court's strength is [*sic*] impartiality and independence, and the Justices' freedom from every form of commitment or self-interest. I am not speaking only of freedom from the crasser forms of obligation and ambition, but of a cast of mind free so far as humanly possible from the ties of personal and group loyalties and implied commitments.

108. *Id.* at 117.

109. *Id.* at 117-18; see WARREN COURT, *supra* note 25, at 119; *Role of Congress*, *supra* note 54, at 220.

did not fall,"¹¹⁰ but still feel uneasy about chartering the Court to try it on a regular basis.

Having emphasized the importance of the Court's accurately perceiving social values, Cox remains extraordinarily vague about how it can ensure that accuracy. The "great judge," according to Cox, should be able to discover the community's "ulterior values" through "the sensitive reading of history and appreciation of the current condition of the community."¹¹¹ Strong precedent should fall only if "one is pretty clear that the change is impelled by one of the deeper lasting currents of human thought that give direction to the law."¹¹²

But Cox's own vagueness neither means that some greater clarity is impossible nor leaves his structure unable to stand for want of a keystone. An example of a more developed exposition is Dean Kadish's exhaustive article on procedural due process methodology, in which he classified and criticized the sources from which the Court has attempted to discern fundamental principles of justice and proposed others in their place.¹¹³ From Cardozo and Frankfurter down to the present, some Justices have made explicit their effort to ascertain social mores, relying on such sources as patterns in case law development and trends in legislation.¹¹⁴ Although any detailed explication is beyond this review, the examples of others indicate that an approach including judicial reference to social mores can be a viable one.

Even if the Court can discern society's important values accurately enough, there remains a tension between its role as interpreter of a document

110. Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 805 (1971).

111. *Chief Justice Earl Warren*, *supra* note 47, at 3.

112. ROLE, *supra* note 1, at 111. Of course, Cox is not the only writer who has taken refuge in eloquent vagueness when confronted with the difficulty of describing how judges can reliably ascertain social mores. See B. CARDOZO, *supra* note 102, at 113: "If you ask me how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself."

113. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957). Kadish's ultimate conclusion rejects, for procedural due process adjudication, the effort to ascertain established moral judgments, but not on grounds of unfeasibility. He proposes instead an inquiry based on purposes he ascribes to the due process clauses and efforts to determine whether challenged procedures serve those purposes. His article illustrates the possibility of the kind of analysis needed to meet the problem of vagueness discussed in the text. See also Tushnet, *The Newer Property: Suggestion for the Revival of Kadish's Objective Due Process*, 1975 SUP. CT. REV. 261, 279-80, 287-88. For discussion of Kadish's objections to reference to social values, see note 121 & text accompanying notes 117-25 *infra*.

114. See Kadish, *supra* note 113, at 326 (Cardozo & Frankfurter); *Gregg v. Georgia*, 96 S. Ct. 2909, 2928-29 (1976) (plurality opinion by Stewart, Powell & Stevens, JJ.). The Justices in *Gregg* cited the legislative enactments in response to *Furman v. Georgia*, 408 U.S. 238 (1972), a statewide referendum on the death penalty, and the trend in jury verdicts under post-*Furman* statutes. Cf. *Runyon v. McCrary*, 96 S. Ct. 2586, 2604 (1976) (Stevens, J., concurring) ("For the Court now to overrule [a particular statutory interpretation] . . . would be so clearly contrary to my understanding of the mores of today that I think the Court is entirely correct in adhering to [the earlier interpretation]").

guaranteeing basic liberties and our society's commitment to majoritarianism. From this conflict there arise cogent objections to the Court's relying on values from outside the constitutional text. The Court might be either too swayed by public opinion or too independent of it. On the one hand, although Cox ostensibly offers a charter for a degree of activism, a Court seeking to incorporate social mores might confuse strong but transitory feeling with deeply rooted consensus, temporizing too readily even concerning the explicitly recognized rights it should defend from majority onslaught. It might, in addition, yield to a longer-run consensus that fatally undermined constitutional protections. On the other hand, the arguments are several and familiar that allowing courts to reach beyond their written charters is incompatible with democracy. A grant of such latitude engenders several dangers. It exposes judges, who are human and often have backgrounds of significant political activity, to the temptation to reach beyond even the various theories of limited activism. It allows, moreover, the making of policy or even the effective amending of the Constitution by unsanctioned processes extraordinarily difficult to reverse. Finally, one may object, it affords no answer to a challenge to the Court's legitimacy from one who disagrees with its value choices.

Cox would plainly have no patience with a Court inclined to retreat in the face of popular hysteria; he sees the Court as "a check that will preserve continuity and enforce more enduring values" instead of responding to "shortrun pressures."¹¹⁵ His recognition of the appropriate roles of applicable text and the weight of precedent¹¹⁶ reinforces this view and leaves his approach only minimally vulnerable to criticism for susceptibility to momentary passions. More serious is the objection that Dean Kadish posed to any "technique of constitutional due process adjudication that resorts to the preformed moral judgments of others."¹¹⁷ A constitutional rule so derived has lost "any independent integrity as a governing normative principle."¹¹⁸ Anything goes; "all that counts in the end is whether it is accepted."¹¹⁹ Principles are consigned to "complete moral relativity"¹²⁰ because an underlying premise of that approach is "the complete subjectivity of all moral judgments."¹²¹

115. See *Role of Congress*, *supra* note 54, at 220.

116. See text accompanying notes 78-82 *supra*.

117. Kadish, *supra* note 113, at 345.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* This discussion does not imply that Dean Kadish would necessarily subscribe to the generalization of his argument beyond the procedural due process context, nor does the argument in text necessarily dispute his critique of relativist approaches to procedural due process adjudication. Exclusive reliance on "the preformed moral judgments of others" could indeed

Cox's writings do not, however, reveal a moral relativist. He is fond of quoting Lord Radcliffe on the role of the law in vindicating "a sense of right and wrong that is not merely provisional nor just the product of a historical process."¹²² One need not share Cox's somewhat optimistic attitude nor resolve the large and fundamental philosophical issues it raises to conclude that relativism does not fatally flaw his theory. Because he accords the Court a role in shaping as well as reflecting society's value consensus,¹²³ it can hope to prevent the sort of degeneration that would leave it with only impoverished values upon which to draw. Again, the restraints imposed by text, precedent, and history should make decline beyond some minimum levels at least quite difficult and unlikely.¹²⁴ Nevertheless, a more basic response to the threat of declining judicial standards in a society of degenerating values is that deterioration seems inevitable no matter what one's theory of appropriate sources for judicial values and principles if the change in social standards is deep and long-lasting. The political appointment process would eventually yield a Court unsympathetic to the old principles and inclined to erode them. The ultimate determinant, in other words, will be the standards by which the society is willing to live.¹²⁵

Even without such massive social changes, there remains the question whether judges, if empowered to tell society what they perceive its contemporary standards to be, would generally have the humility and perspective to avoid consciously imposing their own values, or unconsciously and too readily finding their values "shared" by society as a whole. For example, would a Mr. Justice Cox have been able to refrain from casting the deciding vote in favor of *Mapp v. Ohio*?¹²⁶ Or could a judge acting on Cox's principles, finding his views wholly at variance with what he had to concede was a broad consensus, be expected to act against his own convictions? No confident

empty *procedural* due process of independent content, making at least theoretically possible the nullification of an explicit constitutional guarantee. If *substantive* due process, by contrast, is to have any role in constitutional adjudication, it can only result from recognition of constitutional protection for rights and interests not specifically mentioned. Basing its content on social mores does not threaten anything already in the Constitution and seems at least preferable by anyone's standard to the only apparent alternative, the individual value preferences of the Justices themselves.

122. See ROLE, *supra* note 1, at 112; *Chief Justice Earl Warren, supra* note 47, at 2-3. Both quote C. RADCLIFFE, *THE LAW AND ITS COMPASS* 78 (1960).

123. See text accompanying note 59 *supra*.

124. Cf. *Gregg v. Georgia*, 96 S. Ct. 2909, 2925 (1976) (plurality opinion by Stewart, Powell & Stevens, JJ.): "[O]ur cases . . . make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty must also accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'"

125. Cf. Hand, *The Contribution of an Independent Judiciary to Civilization*, in *THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 1692-1942*, at 66 (Mass. Bar Ass'n ed. 1942) ("a society so riven that the spirit of moderation is gone, no court *can* save") (emphasis in original).

126. See text accompanying notes 89-90 *supra*.

answer about such mysteries of human nature seems possible, but the tradition of judicial impartiality runs deep. Although some judges would lack the temper necessary to keep them from serious error, the restraints Cox advocates plus the need to muster a majority of a collegial Court should greatly reduce the chance of major abuses.

There may still, of course, occur the momentous mistake, the failure of discernment, articulation, and persuasion, the occasion when somehow the Court goes astray from the criterion that "the roots of its decisions must be already in the nation."¹²⁷ Most would now agree that this happened prior to 1937 in the economic due process cases. Because Cox rests his theory on popular assent to the overall thrust of the Court's work, he can say that such "judgments will surely yield, as they yielded in that instance, to the slow pressures of unfolding history."¹²⁸ Indeed, the Court has recently demonstrated that in the face of strong and clear indications of popular consensus, the judiciary need not greatly delay its response. As the plurality stated in the recent decision upholding the constitutionality of capital punishment:

[D]evelopments during the four years since *Furman* [*v. Georgia*¹²⁹] have undercut substantially the assumptions upon which [the "standards of decency"] argument rested. . . . [I]t is now evident that a large proportion of American society continues to regard [capital punishment] as an appropriate and necessary criminal sanction.¹³⁰

The cruel and unusual punishment clause¹³¹ may be unique in the degree to which it calls for reference to social value judgments, but the recent decisions interpreting it do further demonstrate that the Court can identify and rely upon indications of a public consensus.¹³²

In articulating the role such a consensus can play in constitutional adjudication, Professor Cox has made an important contribution to constitutional theory. He provides an answer to critics who consider antidemocratic a Court that relies on values not tied to the text of the Constitution.¹³³ To point

127. See *ROLE*, *supra* note 1, at 117.

128. *Role of Congress*, *supra* note 54, at 221; see *New Dimensions*, *supra* note 28, at 823. 408 U.S. 238 (1972).

130. *Gregg v. Georgia*, 96 S. Ct. 2909, 2928 (1976) (plurality opinion by Stewart, Powell & Stevens, JJ.).

131. U.S. CONST. amend. VIII.

132. See also note 114 *supra*.

133. See, e.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 6 (1971):

[N]o argument that is both coherent and respectable can be made supporting a Supreme Court that "chooses fundamental values" because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society. The man who understands the issues and nevertheless insists upon the rightness of the Warren Court's performance ought also, if he is candid, to admit that he is prepared to sacrifice democratic process to his own moral views. . . .

in response to Cox's admittedly qualified scheme of restraints would merely suggest that the Court will often refrain from choosing values that the critics find objectionable, not that it always will. In Cox's framework there would undeniably be an extratextual moral ingredient in some of the Court's constitutional decisions, but it would *not* derive from the personal politics or morality of the Justices. Instead, it would result from their considered judgment on what values have deep enough roots in the society to warrant recognition in constitutional adjudication without explicit amendment. A Court operating on such a basis and invoking value premises with which one disagrees may be operating legitimately but mistakenly, just as it may when simply attempting to construe language. One thus disappointed by the Court's constitutional value choices need not see evasion or revolution as his only choices; he may maintain that the Court should realize that his own values are so widely and deeply shared that its decisions should not traverse them. If such a critic's judgment is truly and lastingly correct, the Court will eventually change to adopt it, just as the Court responded to strong indications of social consensus in *Gregg v. Georgia*¹³⁴ and *West Coast Hotel Co. v. Parrish*.¹³⁵

To put it another way, the objection of the critic to injection of extratextual values is not that the adoption of a policy he opposes is necessarily illegitimate. It is that his loss *on novel policy or value grounds* in court is illegitimate because it is antidemocratic. In response, Cox offers an explanation of how in theory and practice the judiciary can legitimately base decisions on such grounds with a foundation for those decisions that is fundamentally democratic. He does not rely on authority backed by force, and he does not try to justify the imposition of individual value preferences through adjudication.¹³⁶ He relies instead on a Court retaining the assent of

Such a man occupies an impossible philosophic position. What can he say, for instance, of a Court that does not share his politics or his morality? I can think of nothing except the assertion that he will ignore the Court whenever he can get away with it and overthrow it if he can.

134. 96 S. Ct. 2909 (1976) (upholding constitutionality of some death penalty statutes after creating serious doubt in *Furman v. Georgia*, 408 U.S. 238 (1972), whether capital punishment was constitutional).

135. 300 U.S. 379 (1937) (overruling "liberty of contract" doctrine, which had invalidated much social legislation).

136. If the Court exercises the leadership role Cox accords it of not merely registering social consensus but of "shap[ing] as well as express[ing] our national ideals," *see* text accompanying note 59 *supra*, it seems fair to ask whether there arises an irreconcilable tension with his democratic justification for judicial recognition of constitutional values from outside the text. If the Court is *not* reflecting a social consensus but seeking instead to create one, where can the Justices find the values upon which they base their decisions, other than within themselves? How are they to choose when to go beyond expressing existing ideals to efforts at reshaping them? If the Court succeeds in its attempts at leadership in such instances, has it not influenced the course of events in ways unsanctioned by conventional sources of law *and* in directions society might well not have chosen by majoritarian processes?

the people because in the long run they accept its ends and means. If they do not, they retain the orderly means in the last analysis to do something about it.

One should not expect a confession of error from the critics of the Court's reliance on values not tied to the text of the Constitution¹³⁷ or a change in the constitutional philosophy of Mr. Justice Rehnquist;¹³⁸ too many serious grounds exist for genuine disagreement about matters as fundamental as those Cox addresses. Nevertheless, even for those who cannot agree with him, his patient development of a constitutional theory insisting on the appropriateness of restrained, principled, and scrupulous reference to social mores should stand as a significant intellectual achievement. Cox has shown us how the judiciary can, on the basis of a coherent theory, act to bring constitutional law into harmony with developing notions of justice. At the same time, he has reminded us that the essential work of building a just and humane democratic society must proceed from the people.

Parenthetically, even an irreconcilable contradiction between such a judicial leadership role and Cox's democratic protestations would not justify rejection of all judicial reference to social values outside the constitutional text. The legitimacy of drawing on extratextual sources is essential to Cox's overall approach, and much of his achievement is in his justification of the practice. Regardless of the importance Cox himself may attach to judicial initiative in shaping national values, such leadership is not at all a necessary corollary of reference to social consensus. A judge who views the judicial function more modestly than Cox could still feel justified in looking to social mores, yet bound to stop short of trying to shape them on his own.

Yet the sort of judicial initiative Cox apparently would legitimate need not always be undemocratic. Candid recognition by the Court that it is venturing onto uncertain ground could lead it to choose carefully the ways in which it provides leadership so as to minimize conflict with democratic theory and with the political branches—even, indeed, to test its value perceptions by allowing for response from the people's representatives. The Court can, for example, construe statutes to avoid constitutional doubts, *see, e.g.,* *Ashwander v. TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring), or invalidate statutes on constitutional grounds that do not foreclose the possibility of redrafted legislation, such as some forms of equal protection deprivations, *see, e.g.,* *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring), or first amendment overbreadth, *see, e.g.,* Note, *supra* note 16, at 845. Moreover, there always remain such important democratic constraints as the political appointment process and society's willingness to accept the Court's initiatives.

137. *See generally* Bork, *supra* note 133.

138. *See generally* Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693 (1976).