



The law: if it has honoured us, may we honour it.
I would invoke those who fill seats of justice... that they execute the
wholesome and necessary severity of the law.

DANIEL WEBSTER

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The First Amendment — Second To None In The Constitution

Speech presented to the Idaho Newspaper Association on January 15, 1988

By Justice Robert E. Bakes

The subject about which I would like to speak to you today came to my attention as the result of the casual reading of routine articles which cross my desk. In the November, 1987 issue of *The Advocate*, there appeared a Bicentennial commemorative article entitled "The Fourth Amendment: Second to None in the Bill of Rights."¹ The thought expressed in this article intrigued me. Is the Fourth Amendment really the most important of those first ten amendments that constitute the Bill of Rights? The author argued that, indeed, the Fourth Amendment was

the most important, quoting former Solicitor General Dean Irwin Griswold, that the protections of the Fourth Amendment largely determine "the kind of society in which we live."² The author concluded, quoting from Justice Felix Frankfurter's opinion in *Harris v. United States*, the Fourth Amendment occupies "a place second to none in the Bill of Rights."³

The Fourth Amendment, which protects the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures,

is certainly important in our free society. But is it really the most important? How does it compare to the other amendments in the Bill of Rights?

The Fifth Amendment immediately came to mind with its protection against twice being put in jeopardy for the same offense, and from being compelled in a criminal case to be a witness against oneself, and from being deprived of life, liberty or property without due process of law.

Then there's the Sixth Amendment — the right, in criminal

proceedings, to a speedy public trial by an impartial jury; the right to be informed of the nature of charges, to confront witnesses, to have compulsory process for obtaining witnesses, and, most importantly, the right to counsel.

The Eighth Amendment prohibits excessive bail and cruel and unusual punishments. Surely those rights are important in a civilized society. The Tenth Amendment addresses the balance of power between the national government and the state governments, an important political concept in our republic.

“I know no safe depository of the ultimate powers of the society but the people themselves.”

Comparing the Fourth Amendment to some of the other amendments, I thought to myself, how does one decide which is the most important? They all protect substantial rights we have come to take for granted. Trying to decide that question raised another, more fundamental, question. What is the core value the founders tried to establish by the Constitution of the United States?

A review of the Constitutional Proceedings suggests the core value the founding fathers were attempting to establish was democracy. Above all else, they wanted to establish a democratic form of government in which the people choose the laws and officials under which they are governed. They wanted the power of government to be dispersed among several governmental bodies so that no one individual, or small group of individuals, could control the power of government and impede the right of the people to govern themselves.

Yet, they were well aware that too much dispersion of power, as in the Articles of Confederation, is detrimental to good governance. Those delegates to the Constitutional Convention wanted to provide a national government which could act decisively, but would also be responsive to the citizenry through the democratic process.

As Thomas Jefferson wrote to William Jarvis, “I know no safe depository of the ultimate powers of the society but the people themselves.”⁴

With that purpose in mind, I returned to the question — what is the most important amendment contained in the Bill of Rights? The answer came back very clear — none of those I had previously been considering. The most important amendment has to be the First Amendment.

If democracy, *i.e.*, the right of the people to make the laws and choose the officials under which they are governed, is the core value, then the right of the people to know what their government is doing, and to speak, write, assemble and protest, is most basic. As Jefferson continued in his letter to William Jarvis, “If we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion,”⁴ *i.e.*, to educate and enlighten the public.

Without the right of freedom of speech, press, assembly and protest, the people would never know when a despotic government had infringed upon any of the other rights guaranteed in the Bill of Rights. Without the ability to gain knowledge of what elected representatives and officials are doing and the ability to use that knowledge to organize and effect change, democracy becomes meaningless.

As George Washington stated in his farewell address, “The basis of our political system is the right of

the people to make and to alter their constitutions of government.”⁵ A quarter of a century later, Chief justice John Marshall stated, “The people made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will.”⁶ The founding fathers believed that an informed electorate would correct any abuses of power by removing those officials who were responsible, and choosing others who would follow the will of the majority.

Accordingly, while each of the other amendments in the Bill of Rights is important to secure life, liberty and property, the First Amendment is appropriately numbered. It is first among all of the others in importance in preserving democracy. Without free speech and a free press, the popular conscience could not be aroused to sear the conscience of the people’s representatives into action. Governmental abuses, would go unreported, unnoticed, and unrectified. With no popular conscience, constitutional guarantees could easily be ignored or interpreted away, as they often are in totalitarian countries today.

For these reasons, the First Amendment is pre-eminent in the rights guaranteed by the Constitution. If the core value of the Constitution is democracy, *i.e.*, the right of the people to choose and to repeal the laws under which they live, then this certainly has serious implications for judges as they decide cases.

In one sense, judges have always made law.

This past year has brought us judicial vacancies and nominations which have raised in the minds of the public, more than ever before, the question of the propriety of judges making law.

In one sense, judges have always made law. The common law of England, the historical framework for the American legal system, was, for the most part, judge-made law. Judges operated in earlier centuries without the benefit of the volumes of statutes and regulations we have today. Cases were usually decided based on a doctrine of *stare decisis*, *i.e.*, following the decisions in earlier cases.

The law made by judges in earlier cases became the law applied by judges in later cases. Cases were never quite the same, and new rules or variations of rules had to be made to cope with different situations. Also, society changed, and rules from earlier times had less application in later years. Judges, who were compelled to act without the benefit of extensive legislation, revised the rules of law as they decided issues, case by case.

With the coming of the twentieth century, the legislative process has produced comprehensive and detailed legislation, setting the standards for the resolution of many, if not most, conflicts in our society. The basic constitutional doctrine of separation of powers provides that legislatures may, within constitutional limits, change the substantive common law made by judges.

The degree of acceptance by the courts of legislative change of judge-made law provides much of the

battle ground between those who debate the merits of judicial activism versus judicial restraint. Judicial activists believe that courts, relying on developments in politics and socio-economic thought, can, through their judicial decisions, influence the social and political direction of our society. Those practicing judicial restraint would leave the formulation of new social policies to the legislative and executive branches of government elected directly by the people for that purpose.

Judicial activists believe that courts can . . . influence the direction of society.

If the core value of the Constitution is democracy, then this core value is best preserved and enhanced by judges practicing judicial restraint.

Judicial lawmaking is essentially undemocratic. Judges are not elected by the popular majority based upon their platforms and promises. In fact, the nature of the office precludes judicial candidates from making promises on how they would decide future cases. Thus, when judges engage in lawmaking they are ordinarily not carrying out the will of

the majority, expressed through the democratic process, but are expressing their own judgment on what the law should be.

A judge exercising judicial restraint tries to base that judgment upon the will of the majority as expressed through their legislative and constitutional pronouncements, even though he or she may disagree strongly with the result. The judicial activist is less concerned with the views expressed by the other democratically elected branches of government than with his or her own views on how society should develop, socially or economically. "Judicial activism draws power away from the branch most sensitive to the popular will, repositing it in the least sensitive branch."⁶

Not all judicial activism, is the result of judges knowingly imposing their will irrespective of the will expressed in the more democratically elected branches of government. Often the courts are left with little choice.

. . . judges and courts should recognize they have a limited function in the lawmaking process . . .

When the two elected branches of government disagree, inaction is often the result. Citizens turn to the courts to resolve disputes the political branches of government have either refused or seemingly are incapable of resolving. Courts then move (or are pushed) into the vacuum and assume powers and make decisions that should have been made by the elected political branches of government.

However, except in unusual circumstances, courts should reject the invitation to enter the power vacuum and resolve issues which are more appropriately the responsibility of the other political branches of government.

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The founding fathers studied history's successes and failures in government. They established a democratic form of government they thought could act sufficiently decisively to preserve the Union. They set up checks and balances to prevent too much consolidation of power in one body, particularly a non-elected body such as the courts. They realized that some inertia was a necessary byproduct of a stable government. Accordingly, judges and courts should recognize they have a limited function in the lawmaking process in a democratic society. They should not be too quick to assume society cannot solve its social problems without the intervention of judicial lawmaking.

At the same time, courts must protect the few from the acts of the majority. Whenever a court acts to protect the few from the actions of

the majority, the democratic process is impaired. But other values secured by the Bill of Rights are enhanced. Balancing the tension between the will of the majority as expressed in the democratic process, and the rights of the minority preserved by the Bill of Rights is the difficult task of the judiciary.

However, recognizing that the core value of the Constitution is democracy, and indulging the presumption which the Supreme Court did in *Vance v. Bradley* that "even improvident decisions will eventually be rectified by the political process,"⁸ judges should practice judicial restraint. As one author stated, "It is judicial self restraint that makes tolerable the necessarily anti-democratic nature of judicial review."

In conclusion, the First Amendment holds great significance

for both journalists and judges. It preserves the core value of our constitutional form of government, which is democracy. To both judge and journalist, the First Amendment is "second to none." □

QUOTATION SOURCES

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2. E. Griswold, "Search & Seizure: A Dilemma of the Supreme Court," p. 39 (1975).
3. *Harris v. United States*, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting).
4. Thomas Jefferson, On Constitutional Issues, compiled by Virginia Commission on Constitutional Government. Quote is from a letter to William Charles Jarvis, September 28, 1820.
5. George Washington's Farewell Address, September 17, 1776.
6. Chief Justice John Marshall, in *Cohens v. Virginia*, 6 Wheaton (19 U.S.) 264, 389 (1821).
7. Burnett, "Should Judges Make Law," *Remand*, Vol. 3 (1987).
8. *Vance v. Bradley*, 440 U.S. 93 (1979).

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