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# Book Review: The Constitution in Conflict. by Robert A. Burt.

Michael Stokes Paulsen

high the banner of privacy in *Roth*,[22] a major obscenity decision of the Warren years, and *Chimel v. California*,[23] which narrowed the limits of warrantless searches incident to an arrest. But he resolutely opposed the reapportionment revolution and was the lone dissenter in *Flast v. Cohen*,[24] where the Justices modified standing requirements and broadened the opportunities for taxpayers to contest government programs. He seldom appears to have met a monopolistic business corporation he didn't like.[25]

A lawyer's lawyer, it was appropriate that Harlan filled the seat occupied by Robert Jackson, another first-class advocate, litigator, and process-oriented jurist, whose occasional eloquence on behalf of freedom of speech and liberty was exceeded only by his belief in conspiracies and his passion for order.[26] But from the perspective of 1992 and the present Supreme Court, now packed with political lackeys and intellectual harlots, even Jackson and Harlan have taken on the stature of devoted civil libertarians. One can only hope and pray that the *Casey* five continue to read the Harlan of *Griswold* and not the Harlan of *Flemming*.

## THE CONSTITUTION IN CONFLICT. By Robert A. Burt.[1] Cambridge, Mass.: Harvard University Press. 1992. Pp. 454. $29.95.

*Michael Stokes Paulsen*[2]

### I

*The Constitution in Conflict* is a disappointingly weak book about a powerful and important idea in constitutional law. The

22. *Roth v. United States*, 354 U.S. 476 (1957).

23. 395 U.S. 752 (1969).

24. 392 U.S. 83 (1968).

25. Harlan's principal clients at Root, Clark, Buckner & Howland prior to his judicial appointments had included American Telephone and Telegraph, Western Electric, International Telephone and Telegraph, the Gillette Safety Razor Company, American Optical and DuPont. He represented the latter in their unsuccessful effort to maintain a dominant financial interest in General Motors, and when the Supreme Court finally sustained the government's Clayton Act complaint, he recused himself, but later denounced Justice Brennan's opinion for its "superficial understanding of a really impressive record." The record, of course, had been one he helped to prepare at Root, Clark.

26. Compare Jackson in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), with Jackson in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), or *Kunz v. New York*, 340 U.S. 290 (1951).

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idea is that, contrary to today's conventional wisdom, the Supreme Court is not the sole or even final interpreter of the Constitution. Rather, the power to interpret the Constitution is a shared power of all three branches of the national government—Congress and the President, as well as the courts—and that these branches are co-equal with one another in the exercise of that power. The power of the idea lies in its claim that ours is not a system of *judicial* supremacy, with the Supreme Court having the final word on all constitutional issues, but a system of *constitutional* supremacy accomplished through the structural separation of powers, with each branch exercising independent, coordinate review over the constitutional judgments of the others.

This idea is not new. Indeed, there is a strong argument that this was the original vision of the Framers. This theory has repeatedly emerged at important junctures in our constitutional history as a counterweight to progressively more aggressive assertions of judicial supremacy and power by the federal courts. Historically, the idea that interpretation is a power shared among independent, co-equal branches has been voiced by such prominent figures as Thomas Jefferson, Andrew Jackson, Abraham Lincoln and Franklin Roosevelt. This view was featured prominently in a controversial speech by Attorney General Edwin Meese in 1986 that sparked a new wave of interest in the question of executive branch "nonacquiescence" in Supreme Court precedents, including an issue-length symposium in the *Tulane Law Review*.[3]

The book jacket reviews of *The Constitution in Conflict* lead the reader to expect a defense of the "shared power" view from an unlikely source—Yale Law School Professor Robert Burt, a noted academic liberal known chiefly for his work in the areas of family law, medicine and psychiatry.[4] The inside flap advertises the book as one defending that idea "that the Constitution could be interpreted by any of the three branches of the government" and rehabilitating the idea of "equal interpretive power" as a legitimate, indeed preferred, rival to judicial supremacy. Professor Sanford Levison raves: "*The Constitution in Conflict* presents a well-thought-out attack on the standard notion of judicial supremacy that views the Supreme Court as the 'sole' or even 'ultimate' interpreter of the Constitution."

Such a book might well have been highly interesting. But

3. 61 Tulane L. Rev. 977 (1987).

4. See, e.g., Robert A. Burt, *Taking Care of Strangers: The Rule of Law in Doctor-Patient Relations* (Free Press, 1979); Robert A. Burt, *The Constitution of the Family*, 1979 S. Ct. Rev. 329 (1979).

those who come to this book expecting a thorough and systematic investigation of the idea of coordinate and co-equal interpretive power will be sorely disappointed. In Professor Burt's hands, the idea of shared interpretive authority is a throwaway line that has little to do with Burt's real thesis, which is decidedly less interesting: The Supreme Court, Burt argues, should exercise its authority in a less authoritarian—and, by implication, less authoritative—way, fashioning compromises and intermediate solutions rather than hard-and-fast answers. The Court should be careful not to get too far out in front of public opinion; it must modulate its decisions to take into account public perceptions and the need for its decisions to gain acceptance. It must also help the parties to appreciate the other side's position. The effect of its decisions should be "pacification," not "provocation." The Court should decide cases so that nobody goes away too happy or too unhappy, to the end that nobody goes away and that the contending factions are forced to continue in "dialogue" with each other. Neither party should be able to take a judicial decision and lord it over their litigation opponents, lest the losing party feel too "subjugated" (a too-trendy academic word that Burt hackneys at a rate of once every other page). A typical Burt passage captures the flavor of the entire book: "Though it is obviously preferable that all disputants be equally happy with the outcome and with one another, the equality principle remains viable if everyone is equally unhappy."

This is a tired thesis—warmed over Alexander Bickel but without the grace or sophistication. With Burt, the point is also more social history than law. He labors to develop his view through a long and meandering tour through some of the more interesting events in the Supreme Court's history: *Marbury v. Madison* and the Marshall Court's early conflicts with Presidents Jefferson and Jackson; slavery and the Civil War; economic substantive due process in the late nineteenth and early twentieth centuries; the New Deal realignment; *Brown v. Board of Education*, *Cooper v. Aaron* and the battle over segregation; and today's raging disputes over capital punishment, abortion and affirmative action.

Sometimes Burt becomes so interested in what he is saying about particular cases or epochs in the Court's history that he (and the reader with him) loses track of the main contour of his argument. These lengthy digressions are almost welcome, though, for when Burt seeks to squeeze all the lessons of legal history into his thesis, the book wallows in overwrought sentimentalism:

> In all these instances, the Court not only dismissed the possibility that contending parties on their own might reach a peaceable ac-

> commodation but, more fundamentally, the Court rejected the goal of accommodation and agreed with those among the antagonists who defined their struggle as necessarily requiring the utter subjugation of their opponents.

The theme is constantly repeated, with Burt collating previous issue-discussions as he goes along. By the time we make it to abortion, for example, Burt writes as follows:

> [F]or abortion restrictions, as for race segregation in *Brown*, for economic relations in *Lochner*, for territorial slavery in *Dred Scott*, for federal-state relations in *McCulloch*—a Court may properly overturn the coercive imposition because of its inherent inequality, but only to impose an equal status of stalemate on the adversaries, not to end the conflict, not to seize victory from one and award it to the other.

But the most unfortunate aspect of *The Constitution in Conflict* is not the staleness of the thesis and its presentation, but the fact that Burt's approach seems to have no formal role for the legal correctness of one or the other party's claims. To be sure, Burt has views about who has the politically better position and here he pretty much follows the traditional liberal line. He is pro-New Deal, anti-segregation, pro-abortion, anti-capital punishment. But nowhere does the legal (or moral) correctness of a party's position play a very important part in Burt's theory of how the Supreme Court should resolve disputes. There is nothing remotely approaching traditional *legal* analysis of the issues Burt addresses, and thus no serious discussion of the possibility that one or the other position might be right or wrong as a matter of law. Legal disputes are seen as simple political or social disputes. Everything is an "issue." And when the Supreme Court decides an issue, its goal should be to create dialogue and accommodation. There are no absolutes. All claims not to be subjugated are created equal. Anything and everything can be compromised, even the most important principles of the Constitution.

Thus, Burt treats the right of white Southerners not to be subjugated by the North on a level of moral equivalence with the right of blacks not to be subjugated by their Southern white masters in the institution of slavery. (See p. 198.) The vice of the *Dred Scott* case was not its constitutionalization of a property right in slaves and dehumanization of blacks but in its failure to strike a satisfactory social compromise that preserved dialogue. (See pp. 186-99.) The beauty of the desegregation cases was not *Brown I*'s vindication of the rights of black schoolchildren, but *Brown II*'s moderation of the remedy, so that desegregation created dialogue with,

rather than subjugation of, the competing claims of white southerners to maintain Jim Crow. (See pp. 271-85, 293.)

This is ridiculously obtuse. If the point on which the North seeks to "subjugate" the South is that the South cannot be permitted to insist on slavery for the whole or secession for itself, then we must choose one "subjugation" over another. If desegregation "subjugates" white racist notions of how society should be organized, tough luck Bubba. Certain claims have a higher legal and moral status than others. Some claims and claimants *should* be unqualifiedly rejected. Burt's vision of justice and the Supreme Court's role is an intellectually and morally bankrupt one—splitting the difference between all disputants in the vain hope that they will then reconcile with each other, irrespective of the legal and moral merits of the parties' respective claims or the intransigence of their positions. It is not that Burt is completely agnostic about results—he thinks the Court should push the parties in certain directions—but that he is indifferent to legal principles as the means of determining results. He would prefer to have the Court attempt to manage conflict through a two-steps-forward-one-step-back dance that has more to do with psychology and "dialogue" than with decision according to legal rules. In short, for Burt, constitutional adjudication is group therapy, not law.

Burt embraces this view for "all disputes which are so polarized that one party regards the other's victory as destructive of equal status and therefore intolerably oppressive"—that is, in practical terms, all disputes where the parties strongly assert that they are right and the other side is wrong. Apparently, the best litigation strategy for a party with an indefensible legal position is to stake out the most extreme and unreasonable position imaginable. Burt's Supreme Court will then act as a National Mediation Board that strives to split the difference between a correct legal position and an unreasonable one unreasonably maintained.

Can one imagine what would happen if the Court actually were to behave in such a manner?

## II

The April 1992 publication date of *The Constitution in Conflict* preceded by just a few weeks the announcement of the most significant Supreme Court decision in decades, *Planned Parenthood v. Casey*.[5] The three Justices filing what has come to be known as the "joint opinion" in *Casey*—Justices O'Connor, Kennedy and Sou-

5. 112 S. Ct. 2791 (1992).

ter—doubtless did not read Professor Burt's book as they worked on their sixty-page opus on judicial authority and legitimacy. But their *Casey* opinion provides an interesting example, and test, of Burt's basic themes. For the joint opinion is near pure Burt-ism: In upholding the right to abortion created in *Roe v. Wade* against state laws that "unduly burden" that right, there is only the slightest of nods in the direction of traditional legal analysis. The weight of the discussion concerns the preservation and enhancement of judicial authority, to the end that wise men and women exercising "reasoned judgment"[6] might impose some sort of Grand Compromise (or pseudo-compromise)[7] that does not resolve an issue of constitutional law but instead purports (to borrow Professor Burt's words) to "promote institutional interactions among the combatants that might lead them toward future 'consultation and accommodation.' "

The core of the *Casey* opinion is its reaffirmation of the "central holding" of *Roe v. Wade*—that women have a constitutional right to abortion throughout pregnancy that may be made subject to certain incidental regulations, but that is effectively immune to actual government restriction.[8] The majority opinion does not contend that this result is correct as a matter of constitutional first principles, but merely that it should be adhered to as a matter of precedent, "whether or not mistaken."[9] The ground *Casey* defends is not principle, but the Court's own power: by its own admission, the Court attached unusual importance to the doctrine of *stare decisis* for the sake of preserving its institutional position as chief expositor of the Constitution, accepted by the people as such.[10] That

6. Id. at 2806 ("[A]djudication of substantive due process claims may call upon the Court . . . to exercise that same capacity which by tradition courts have always exercised: reasoned judgment.").

7. Professor Burt correctly recognizes what the Court in *Casey* did not, that its "compromise" over abortion is a lopsided one in favor of the pro-abortion position: "As *Roe v. Wade* was actually decided in 1973, however, the Court awarded total victory to one troop among the combatants." *Casey* tinkers with, but does not meaningfully alter, the terms of *Roe*. See infra n.8.

8. The majority's characterization of its ruling as retaining the essentials of *Roe* is undeniably accurate. The aspects of the Pennsylvania statute upheld by the Court do not actually prevent women from obtaining abortions; they present procedural obstacles only. The Court made clear that it would strike down procedural obstacles that meaningfully restrict access to abortion. Actual substantive prohibitions on some abortions plainly would be struck down under the Court's reasoning. In practical operation, there are only slight differences between the "strict scrutiny" of abortion regulations in *Roe* and the "undue burden" test of *Casey*. Chief Justice Rehnquist's dissent is surely mistaken in its assertion that *Casey* retains but "the outer shell" of *Roe* but "beats a wholesale retreat from the substance of that case." 112 S. Ct. at 2855 (Rehnquist, C.J., dissenting). *Casey* maintains the substance and makes slight alterations in the outer shell.

9. 112 S. Ct. at 2810.

10. Id. at 2814 ("Our analysis would not be complete, however, without explaining why

acceptance, the Court said, would be threatened were it to overrule *Roe v. Wade*, because of the acceptance *Roe* has obtained (at least in some quarters) and because of the possibility that the Court would be *perceived* as succumbing to political pressure —"overrul[ing] under fire"[11]—were it to do so.

One may rightly question (as did Justice Scalia's dissent), the accuracy of the majority's *realpolitik* assessment,[12] and may also question (as did Chief Justice Rehnquist's dissent), whether the Court might not as easily be perceived as succumbing to political pressure in reaffirming *Roe* rather than overruling it.[13] But the truly extraordinary aspect of the majority's discussion is the suggestion that politics or perceptions should play any role *at all* in the Court's decisional calculus, with respect to the doctrine of *stare decisis* or any other matter. The Court's "legitimacy", the majority wrote, is "a product of substance *and perception*."[14] The success of the Court in maintaining real or perceived legitimacy is determined by the "people's acceptance" of the Court's decisions.[15] Accordingly, the Court "must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them. . . ."[16] Those claims should, of course, be "principled," or at least "grounded truly in principle."[17] Thus, the majority concludes,

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overruling *Roe*'s central holding . . . would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so, it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself . . . ."); see also id. at 2816 ("If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals.").

11. Id. at 2815.

12. Id. at 2883 (Scalia, J., dissenting). Opinion polls consistently show that a majority of the public favors significant restrictions on abortion, the size of the majority depending on the nature of the restriction and, often, the way the question is framed. See, e.g., Abortion and Moral Beliefs (Am. Political Network, Mar. 1, 1991). (Gallup Poll commissioned by Americans United for Life but conducted independently shows that substantial majorities of Americans disapprove of abortion in most circumstances under which it is currently performed); Boston Globe, Mar. 31, 1989 at 1, col. 1 (national polls shows large majority (78%) of population opposes abortion in most circumstances, amounting to all but a tiny fraction of reasons cited by women having abortions, but 53% would allow abortions in those exceptional circumstances); The New York Times, Dec. 1, 1987 (New York Times/CBS News poll showing similar results); USA Today, Jan. 2, 1990 at 1, col. 6 (only 37% believe abortions should be left to a woman and her doctor, large majority favoring various degree of restrictions).

13. 112 S. Ct. at 2865 (Rehnquist, C.J., dissenting).

14. Id. at 2814 (emphasis added).

15. Id.

16. Id.

17. Id. The majority's understanding of what constitutes a principled justification for a holding, however, is quite ecumenical: "apposite legal principle" in constitutional cases consists of "the Constitution *and the lesser sources of legal principle on which the Court draws*."

"the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation."[18]

The Court's discussion is dotted with euphonious references to "the rule of law" and "constitutional principle," but the boldness of its claim nonetheless comes through plainly: While social and political pressures do not "as such" dictate how the Court decides cases, they nonetheless bear on how the decisions of the Court will be perceived, and the Court must take those perceptions into account in order to maintain its legitimacy. If the Court's decisions should maintain a principled appearance (under broadly defined criteria), they need not—and cannot—rest on *pure* principle, especially if that principle suggests a politically controversial outcome. Rather, the outcome must be one that readily can be "accepted by the Nation"; its legal justification need only be "sufficiently plausible to be [so] accepted." For the *Casey* majority, the Court's legitimacy depends not on the legal correctness of its decisions, but on some combination of legal plausibility and political acceptability.

*Casey* continues: The Court "would almost certainly fail to receive the benefit of the doubt"[19] when overruling cases in two circumstances. The first is where the Court overrules too frequently: "There is a limit to the amount of error that can plausibly be imputed to prior courts."[20] This proposition is doubtful as an empirical matter; a great deal of error plausibly may be ascribed to earlier decisions. If (as the Court recognizes) courts must be permitted to correct some errors on the theory that "two wrongs do not make a right," how is it that there can be, in principle, too much error correction—on the theory that "too many rights make a wrong"? What the majority probably means is that there is an increasing cost to overruling in terms of the Court's prestige—the currency with which the majority is chiefly concerned. So stated, the point seems sound as a logical matter, but it does not reflect well on the Court. This argument is probably posted as a defensive rear guard against criticism of O'Connor, Kennedy and Souter as being inconsistent for having voted to overrule numerous other cases.

The second situation in which the majority feared losing the benefit of the public's doubt was the overruling of a highly controversial, deeply divisive "watershed" case in which the Court had

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Id. The latter part of this formulation is, of course, circular. Apposite legal principle consists of those sources on which the Court chooses to draw (aside from the Constitution).

18. Id. at 2814.

19. Id. at 2815.

20. Id.

earlier "staked its authority"[21]:

> Where . . . the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and in those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.[22]

In other words, it is precisely because of the controversial, deeply disputed nature of the *Roe* decision and the rare importance it has assumed in contemporary debate over the legitimacy of the Court that the majority felt it could not now back down, "whether or not mistaken" in the first instance.[23] (This aspect of the majority opinion earned Justice Scalia's particular ire as "czarist arrogance."[24]) The *Casey* opinion treats the abortion issue as one on which "[m]en and women of good conscience can disagree"[25] but on which these good people should obligingly put their differences aside once the Court has spoken, and accept the Court's decree. The Court's "promise of constancy" must be kept for the sake of keeping faith with those who have been "tested by following" a controversial decision.[26] The people must accept the will of the Justices because "the character of a Nation of people who aspire to live according to the rule of law" is inseparable from their acceptance of the decisions of "the Court invested with the authority to . . . speak before all others for their constitutional ideals."[27]

Putting aside the Court's pretentious rhetoric, there are at least three fundamental problems with the vision of judicial-political legitimacy reflected in these passages—criticisms equally applicable to Burt's thesis.

First, it is wrong in principle. The legitimacy of the Supreme Court in our constitutional system rests not on its ability to fashion social and political compromises but on its ability to render deci-

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21. Id. at 2815.

22. Id. at 2815.

23. Id. at 2810. See also id. at 2816 ("We conclude that the basic decision in *Roe* was based on a constitutional analysis *which we cannot now repudiate*.") (emphasis added).

24. Id. at 2884 (Scalia, J., dissenting). See also id. at 2883: "I cannot agree with, indeed I am appalled by, the Court's suggestion that the decision whether to stand by an erroneous constitutional decision must be strongly influenced—*against* overruling, no less—by the substantial and continuing public opposition the decision has generated."

25. 112 S. Ct. at 2806. See also id. at 2807 ("As with abortion, reasonable people will have differences of opinion about [contraception].").

26. Id. at 2815.

27. Id. at 2816.

sions that the public readily can recognize as straightforward interpretations of a constitutional or statutory text. The Court's legitimacy rests on its ability to render *non*-political legal judgment in accordance with principles of interpretation that stand outside the judges' personal sense of what is expedient, practical or desirable as a policy matter. That is why *Roe* (and now *Casey*) strikes so deeply at the heart of the Court's legitimacy: it is perceived, rightly, as pure judicial fiat having no basis in constitutional text or history.[28]

True, political opposition to *Roe* flows primarily from its policy result. But unlike other socially explosive decisions (like *Brown v. Board of Education*), opposition to the abortion decisions cannot be met with the rejoinder that the words of the Constitution require such a result, for they plainly do not. (Defenders of *Brown* could properly point straight to the words "equal protection of the laws.") In this respect, *Casey*'s legitimacy (or lack thereof) is completely dependent on *Roe*'s. Adherence to precedent may provide the formal trapping of legitimacy, but not its substance. If the precedent decision is fundamentally illegitimate, no amount of discussion of *stare decisis* can supply the defect; the doctrine of *stare decisis* becomes an excuse for repeating error. And where *stare decisis* is defended solely in terms of the need to preserve the *perception* of legitimacy so that the Court may maintain its institutional power, one may fairly wonder whether the doctrine is empty and circular. *Casey* reveals just how far the Court has strayed from the grounds on which its legitimacy depends.

*Casey's* second fundamental problem is the notion that the Court can successfully defuse controversy in general and the abortion controversy in particular by fashioning astute and expedient "compromises" (all the while denying doing so). This is embarrassingly naive. Historically, as Burt notes, the Court has been more of a provocateur than peacemaker, its supposed "compromises" frequently exacerbating social strife—*Dred Scott*, *Lochner* and *Plessy* leap to mind, along with *Roe*. The problem is not that the Court has done a poor job of peacemaking but that it invariably will perform poorly a task that is not its job and for which it is not particularly well suited. The attempted practice of judicial statesmanship collapses into judicial authoritarianism, as the Court seeks to enforce as law the terms of the "compromise" it has imposed, in the

28. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 935-37 (1973). I have developed this point at length elsewhere. See Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J. Law & Religion 33, 68-72 (1989).

face of resistance by one or both of the parties. Politically sensitive judging does not avoid the need to hand down an Order of the Court; it merely relocates the decree to a position the Justices perceive (often incorrectly) to be more politically acceptable.

Such a relocation is always *away from* principle—away from what an unvarnished legal analysis would produce. The idea that the Court will gain more popular respect by searching for the "sufficiently plausible to be accepted," half-principled-half-political solution than by being principled is highly dubious. Even where the result is politically popular, the very act of judicial compromise compromises the judiciary's authority and legitimacy by rendering its decisions that of a transparently political body. The parties and the public are not fooled, and the Court's decisions become less authoritative in the eyes of the People, not more so. One consequence of *Casey* is likely to be—and should be—the de-legitimation of the present Supreme Court.

The third problem has to do with the nature of *Roe* as being a "watershed" decision. The idea that the more extraordinary the precedent—the more remote its connection to constitutional text, the more severe its departure from tradition and the more wrenching its social and moral consequences—the *less* it should be subject to reconsideration, is strange indeed. It is the Big Lie theory applied to judicial decisionmaking: the bigger and more outrageous the lie, the more likely it is to be believed. If the Court is going to depart from text, history and precedent, it should make a really colossal departure and proclaim it with gusto. (That's what makes it a "watershed," after all.) Future Courts will then feel obliged to "remain steadfast"[29] to the watershed for the sake of preserving the appearance that the judiciary is governed by the rule of law. The logic of the "watershed" argument would suggest that economic substantive due process and the lawfulness of segregation—the *Lochner* and *Plessy* watersheds—should have been preserved.

One would think that the Court's legitimacy might have been *enhanced* by overruling *Roe*, as it was by overruling *Plessy*. Indeed, before *Casey* was handed down, it might have been guessed that there could be as many as seven votes to overrule *Roe*—O'Connor, Kennedy and Souter joining the four dissenters. An opinion written by O'Connor, the first woman Justice and one who had publicly anguished over *Roe*, for a solid majority of seven, and adopting the same high-church tone as *Casey*, might well have been "perceived" as more legitimate than the deeply and bitterly divided *Casey* decision. Moreover, if the result proved contrary to public opinion, that

29. 112 S. Ct. at 2815.

outcome would be susceptible to popular revision, since overruling *Roe* would merely have returned the issue to the democratic process. The Supreme Court would not have been the focus of continued controversy.

Why did not O'Connor, Kennedy and Souter choose this course, which would seem equally as politically astute? There are three possible explanations, none of which is very flattering to those three Justices. The first possibility is that these three now support a broad right to abortion as a matter of substantive constitutional law—a switch of positions by Kennedy and O'Connor—and that their rhetoric about the Court's legitimacy merely provides political and intellectual cover for their present positions. The second possible explanation is more disturbing—that these Justices genuinely view the craft of judging as one of divining that which will prove a balance "accepted by the Nation" and then seeking a "sufficiently plausible" legal justification for that outcome. Professor Burt could not have said it half as well.[30] If this is the explanation, *Casey* is a jurisprudential watershed in its own right, proclaiming an era of Burt-like social-psychological-political constitutional judging.

The third possible explanation is perhaps the most disturbing of all, and probably the most likely. O'Connor, Kennedy and Souter were concerned first and foremost not to be seen as paying off the pro-life political movement for their nominations as Justices, even if they were persuaded that *Roe* was bad law and otherwise would be inclined to overrule it. In an atmosphere poisoned by bitter confirmation disputes centering on the issue of abortion, by

30. Professor Burt's own position on abortion is incoherent: He believes the Court was wrong to impose an answer to the abortion controversy in *Roe*, but only because such intervention was not necessary to insure that the issue would remain "avidly controverted." Nonetheless, the "subjugative impositions" of the abortion controversy (Burt means state regulation of women's rights to abort their unborn children; he does not appear to consider the possible "subjugative imposition" on the child) mean that some sort of substantial abortion right must be protected. The right he would create is plenary but patchwork: states would be free to regulate and prohibit abortions, but only if enough states adopt "free-choice statutes" and women residing in the other states live within reasonable travel distance of those states. Residency restrictions would be unconstitutional and states would be required (apparently as a matter of constitutional law) to provide financial assistance to overcome the financial burdens on women travelling from other states to obtain abortions. (It is not at all clear that Burt's "compromise" is any less abortion-on-demand than *Roe* or *Casey*. It certainly has no firmer basis in the Constitution.)

On the issue of *stare decisis*, however, Burt comes down remarkably close to *Casey*: Even if the Court was wrong in the first instance, it "would [not] be justified in simply overruling *Roe*" twenty years later. "The Court drew the lines of polarized confrontation and cannot now walk away from this subjugative conflict that it, more than any other institution, was instrumental in defining as such." However, Burt held little hope that the Court "might work to redefine the abortion controversy away from this subjugative ethos and toward the equality ideal," predicting instead that *Roe* would soon be reversed "and in its place, so far as this Court is concerned, force will rule."

protestors on both sides besieging the Court's grounds and by hysterical media attention, O'Connor, Kennedy and Souter were concerned that no one have the impression that they had been "bought"—that they had given secret commitments on abortion as the price for a seat on the Supreme Court. They were not so much concerned with the Court's legitimacy but with perceptions of their own individual legitimacy. Whatever views they might have had on abortion and *Roe* were subordinated to this primary, personal concern. There is evidence for this explanation in the opinion itself: the first paragraph's reference to the executive branch's repeated requests over the past decade that the Court reconsider *Roe*;[31] the exalted tone; the extended discussion of *stare decisis* and the Court's legitimacy; yet the unwillingness to embrace *Roe* as correct in principle (and occasional hints that at least some thought it wrong in principle).[32]

The third explanation combines the worst aspects of the other two. Not only is the *Casey* rhetoric a cover for a switch in positions, it is a cover for a switch the Justices do not even believe in themselves. And even if *Casey* was a case-specific personal declaration of independence, the Justices making it will feel the need to adhere to the Burt-like jurisprudential principles stated there. It would be sadly ironic if what Professor Burt has urged out of a naive and misguided sense of judicial statesmanship has become law out of the basest and most personal of motives—the concern of individual Justices for their own prestige, power and public image.

It is doubtful that even those who are cheered by the result in *Casey* respect the Court's reasoning. The concern for image and for the politically expedient, and the lack of concern for principled legal analysis, should be deeply troubling to everyone, regardless of their political views on abortion. The same is true of Burt's thesis. In its acutely self-conscious (and self-important) conception of the judicial role, in its arrogance about its own wisdom and in its naiveté and presumptuousness in purporting permanently to "settle" a divisive political and moral issue by constituting itself as a national abortion-law mediation panel, the Court's *Casey* decision illustrates (far better than Burt's book) the hazards of Professor Burt's method in practical operation. *Casey* shows that the Justices will tend to use that method to fashion Grand Compromises not for lofty purposes of public peace, but for baser motives of seeking to preserve positive public perceptions of the Justices themselves.

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31. 112 S. Ct. at 2803.
32. Id. at 2810, 2816.

## III

There is no necessary connection between Burt's actual theme of judicial mediation and the book's advertised theme of a challenge to the idea of judicial supremacy in constitutional interpretation. One might favor a mediator's role as the appropriate manner in which "supreme" interpretive power should be exercised. But one might also favor such a role out of the perceived need to accommodate other branches that share interpretive power on an equal basis. Burt seems to shade toward the latter view, but his discussion waffles foggily between the two, never clearly coming to rest on either of them.

One wonders what would have been the result had the book seriously and systematically explored the thesis that the Supreme Court is *not* the supreme, or even final, interpreter of the Constitution, but must share that power with other actors in our constitutional system—the President, the Congress, the states. How might such a reading affect our understanding of the Supreme Court's role in our constitutional system? How might it affect our understanding of the power of the Court to "say what the law is" in relation to the other branches? In short, one wonders what might have been the result had Burt written the book advertised by the dust cover.

The raw materials for such a study are present in the same legal history that makes up Burt's discussion in *The Constitution in Conflict*: John Marshall's argument for judicial review in *Marbury v. Madison*; Andrew Jackson's presidential dissent to the Marshall Court's holding in the Bank controversy; Abraham Lincoln's resistance to the Taney Court's ruling in *Dred Scott*; the Court's landmark decision in *Brown v. Board of Education* and state government resistance to the post-*Brown* desegregation decrees, exemplified in the Little Rock situation and culminating in *Cooper v. Aaron*; the Nixon Tapes case; the ongoing dispute over abortion.

Burt begins by noting, accurately, that John Marshall's justification for judicial review in *Marbury* "carefully avoided any claim for judicial supremacy." But the discussion quickly degenerates into the sentimental and speculative as Burt makes the historically unsupportable claim that Marshall was simply trying to engage Jefferson in a constructive dialogue.[33] He never returns to any system-

33. According to Burt, John Marshall was claiming that judges "were an appropriate instrumentality for this protective, conflict-transcending, and therefore unifying purpose for the law" and was "in effect asking Jefferson to transcend the divisive politics of 'the contest of opinion through which we have passed' and to give content to the unifying terms of his inaugural address, that the defeated 'minority possess their equal rights, which equal law must protect.' " It is hard to imagine that anyone familiar with the historical circumstances of the *Marbury* case and the Republican-Federalist acrimony of the era could take seriously

atic discussion of the supremacy versus coordinacy issue.

Suppose, however, that *Marbury* is read—as it fairly can be read—as embracing only a co-equal, coordinate power of judicial interpretation, founded on the ideas of separation-of-powers and the independence of the judge's oath, and not as proclaiming judicial preeminence in legal interpretation. *Marbury*'s separation-of-powers argument is, in a nutshell, that the structure of the Constitution, and the political theory of written constitutions generally, requires that the judges be free to interpret the law independently of the views of Congress. To hold that one branch's (the court's) interpretation is controlled by another's (Congress's) is to bestow a "practical and real omnipotence" on the controlling branch.[34] But this argument suggests not that the judicial branch is the supreme interpreter, but that *each* branch has a power of legal review over the determinations of the others.[35] Similarly, *Marbury*'s argument from the oath requirement of Article VI—that judges would violate their oaths if they were forced to acquiesce in a violation of the Constitution by deferring to the views of another branch[36]—with equal ease can be turned into an argument against judicial supremacy. The President, members of Congress and even the executive, legislative and judicial officers of the states, swear an oath to uphold the Constitution.

Taken seriously, this reading of *Marbury* has rather sweeping and startling implications. Do Congress and the President therefore have the prerogative to disregard (to "overrule"?) Supreme Court decisions with which they disagree when considering legislation? Does the President have the power to refuse to enforce Supreme Court judgments that he believes are legally improper? Is a state governor bound by his oath to resist by every means possible judicial decrees that he conscientiously believes are based on unfaithful interpretations of the Constitution?

Each of these questions corresponds to an actual historical event. Jackson's veto of the Bank bill was premised on the idea that "[e]ach public officer who takes an oath to support the Constitution

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the suggestion that Marshall's *Marbury* opinion was the act of a Great Conciliator intent on engaging Jefferson in dialogue and constructive criticism. See generally James M. O'Fallon, *"Marbury"*, 44 Stan. L. Rev. 219 (1992); William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 Duke L.J. 1 (1969).

34. 5 U.S. (1 Cranch) 137, 178 (1803).

35. See Alexander Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 3-4 (2d ed. 1986); cf. Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 919-22 (1990).

36. The Court characterizes such a requirement of deference, against one's own conscientious judgment as to what the Constitution requires, as "immoral," "worse than solemn mockery" and even "a crime." 5 U.S. (1 Cranch) at 180.

swears that he will support it as he understands it, and not as it is understood by others." Thus, the "opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both."[37] As a Senate candidate in 1858, Lincoln declared his opposition to *Dred Scott* and his refusal to be bound by it as a legislator; the decision was not binding "as a political rule" preventing Congress or the President from "resisting it" by passing legislation inconsistent with it. As President, Lincoln defied Chief Justice Taney's order declaring unconstitutional Lincoln's suspension of the writ of habeas corpus at the outbreak of civil insurrection in Baltimore in April 1861. Lincoln directed subordinate executive officers to ignore Taney's order in *Ex Parte Merryman*, either because Lincoln believed that Taney was wrong on the merits of the precise constitutional issue presented or because Lincoln interpreted the Constitution to justify otherwise unconstitutional actions when necessary to suppress insurrection threatening the maintenance of the constitutional union.[38]

Modern constitutional conflicts raise many of the same issues. Richard Nixon complied with the Court's decision in *United States v. Nixon*, but he had made noises about refusing to do so. Had he been convinced of the legal correctness of his claim of executive privilege, should he not have refused to produce the tapes? Would Arkansas Governor Faubus have been within his constitutional prerogative (if still morally and legally wrong) in resisting desegregation in Little Rock if he conscientiously believed that the *Brown* decision was unlawful? Could an anti-abortion President legitimately announce that *Roe v. Wade* and *Planned Parenthood v. Casey* were wrongly decided, and that the executive branch would take no action to enforce any injunction issued by a federal court against state abortion legislation?

Are there principled distinctions among these various situations, or must we choose between judicial supremacy and radical decentralization? If so, is it so clear which alternative is to be preferred? Which one is more consistent with the original understanding and design of the Constitution? Burt asks none of these

37. Veto Message, July 10, 1832 3 *Messages and Papers of the Presidents* 1139, 1145 (Bureau of Nat'l Literature, 1897).

38. *Ex Parte Merryman*, 17 Fed. Cas. 144 (D. Md. 1861) (Taney, C.J., Circuit Justice). See James M. McPherson, *Battle Cry of Freedom* 261-62, 286-87 (Oxford U. Press, 1988). Curiously, Burt says nothing about this singular and jurisprudentially very important incident of a President's refusal to honor a judicial decree directed against him personally. For a discussion of *Merryman* and its implications, see Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, — Cardozo L. Rev. — (1993) (symposium issue) (forthcoming).

questions, the discussion of which would have made a far more interesting book—and one better suited to its title—than *The Constitution in Conflict* turned out to be. Asking these questions might also have shed light on the question with which Burt is most concerned: *how* is the judiciary's interpretive power to be exercised? The shared power view offers at least two limited insights on this question.

First, if the power of constitutional interpretation is viewed as shared, rather than the Court's exclusive prerogative, there would seem less warrant for the Court taking itself and perceptions of its institutional integrity quite so seriously, (as it did in *Casey*, for example). If those in other branches are not, in fact, required to acquiesce in the Court's constitutional judgments, then there is no need to adhere to precedents out of an overwrought sense of obligation—a "promise of constancy,"[39] a commitment "to remain steadfast, lest in the end a price be paid for nothing"[40]—to those in other branches who will be "tested by following" the Court.[41] Nor must precedents be followed on the ground that the Nation's "very ability to see itself through its constitutional ideals" is bound up in devotion to a Court "invested with the authority to . . . speak before all others for their constitutional ideals."[42] Perhaps the legitimacy of the Court depends on a fairly high doctrine of judicial inerrancy *if* the underlying premise is one of judicial supremacy. But if the premise is one of co-equal authority and interpretive tension among the branches with the political branches regarded as playing an equal role, the legitimacy of the system is not dependent on whether the Nation accepts as indisputably correct the views of any one institution within that system.[43]

Second, at the same time that a shared power model might suggest that the Court take itself less seriously, it might suggest that the Court not act so politically. That role—the tempering of principle with pragmatism—can be expected to be performed all too aggressively by the political branches. It does not follow from the premise of shared power that the Court should modulate its decisions to take into account political realities, either to effect compromise or

39. 112 S. Ct. at 2815.
40. Id.
41. Id.
42. Id. at 2816. See also id. at 2814 ("The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court.").
43. Again, contrast the (inconsistent) words of *Casey*: "[T]he justification claimed must be *beyond dispute*. . . . [T]he Court's legitimacy depends on making legally principled decisions . . . *sufficiently plausible* to be accepted by the Nation." 112 S. Ct. at 2814 (emphasis added).

to avoid rendering decisions that will likely bring the Court into conflict with the President, the Congress, the states or the people. On the contrary, to do so would be to compromise away in advance the one contribution it can best make to government: the integrity of its judgments. The actual "final" constitutional resolution of an issue will be determined by the extent to which the executive, the Congress, the states and the people agree or disagree with the Court's interpretation and translate that constitutional judgment into limitations on or refinements of the Court's ruling. But that resolution is a matter properly out of the Court's control and, strictly speaking, should be none of its concern. The Justices should—indeed, because of their oaths, *must*—state what they believe is a proper interpretation of the law, irrespective of political consequences, public perceptions or concern for their own power.

*The Constitution in Conflict* implicitly rejects such a view of the Court's role in favor of a more self-consciously political role. That Professor Burt has taken this position is not of enormous moment. That the Supreme Court has made considerations of power and politics the centerpiece of its new jurisprudence of "reasoned judgment" is of far greater cause for concern.

## THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS. By James W. Ely, Jr.[1] New York: Oxford University Press. 1992. Pp. x, 193. Cloth, $32.50; paper $10.95.

*Carol M. Rose*[2]

In this small volume James Ely puts forth a careful, wide-ranging and blessedly terse survey of the constitutional treatment of property rights over the course of American history. This is not a book of constitutional theory, nor is it a book on the theory of property rights; and although the author makes a number of interesting and informed judgments about the legal events he describes, he does not give the reader many explicit clues about the theoretical stance from which these comments emerge. Extrapolating from the text itself, Ely seems to be working from the perspective of ordinary language or ordinary understanding. That is, he appears to be asking what most people mean by "property," and then describing the

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