

McCain's Bench Press

By Robert Bastian

Republican candidate John McCain's position on the judiciary, presented in a May speech in North Carolina should not, in James Boswell's phrase, pass without "due animadversion."

It's the same old snake oil. McCain tars his opponents as favoring "judicial activism" while he seeks — if not quite uttering the actual phrase — "strict constructionists." Discredited, toxic and corrupt, this idea — judicial activists are bad, strict constructionists are good — has long since been exposed as a combination of intellectual fraud and poison for the polity. Yet, McCain flogs the hobbyhorse as if it were ever, much less, presently alive.

The first step toward clarity on the subject is recognition that the idea bundled in the phrases "strict construction" and "judicial activism" is essentially a political, not a legal one. It is not embraced by any prominent judge. Even the judges McCain expressly approves, such as Supreme Court Chief Justice John Roberts and Justice Samuel Alito, shy away from the term. So did the judges outgoing President Bush cited as his favorite strict constructionists, Antonin Scalia and Clarence Thomas. There may be those who call themselves, originalists, textualists or literalists, but few identify themselves as strict constructionists.

Moreover, strict construction is incoherent. It is as illusive as the trivial metaphysical dispute William James famously described in a lecture introducing Pragmatism. While camping, his friends were engaged in a "ferocious dispute." A squirrel clung on one side of a tree, a human stood on the other. As the human tried to get a view of the squirrel, the squirrel circled the trunk. No matter how fast the human, the squirrel was quicker. Now, the disputants asked, does the human go round the squirrel?

How, likewise, does one strictly construe the equal protection or due process clauses in instances where their language, intent and purpose demand broad applicability and liberal interpretation? If a judge is striking down popular legislation on constitutional grounds, is the judge an activist injudiciously imposing his or her will on an otherwise popularly elected legislature? What if a strict reading of the constitutional provision commands the result?

Which party to the dispute is correct, James explained, "depends on what you practically mean by 'going round' the squirrel." If one means having occupied positions to the north, south, west and

east of the squirrel, one has gone around. If, alternatively, one means being to the front, left, right and back of the squirrel, one hasn't. In short, nothing is resolved.

Why, then, does a bankrupt doctrine that is so patently incoherent and lacking in adherents remain subject to debate? The strict construction/judicial activism axis is, rather than jurisprudence, a profoundly political idea promulgated by politicians. It's small surprise that the idea is political, rather than legal, because it was essentially popularized and defined by a politician, former President Richard Nixon. Nor, given its source, is it astonishing that Nixon employed the idea for essentially corrupt political ends.

In 1968 primaries, Nixon ran against the Warren Court as much as the incumbent Johnson administration, playing into the fears aroused by crime, political protest and desegregation. He promised to appoint strict constructionists. After he came to office, Nixon elaborated, in an audiotaped conversation with his attorney general, John Mitchell, that a "Frankfurter type" would be fine. "I really want to be goddamn sure though," he added, "on the criminal side and the busing issue, housing, education, I [just don't want to put] a liberal on that court, I can't handle that."

Nixon's public rhetoric on the subject is exemplified in a 1971 speech to the nation, when he announced the nominations of William Brennan and William Rehnquist to the high court. Nixon noted that 21 years earlier, Walter Lippman had written that, "the balance of power within our society has turned dangerously against the peace forces, against governors, mayors, legislatures, against the police and the courts."

The two he was nominating, Nixon explained, "believe as I do ... The peace forces must not be denied the legal tools they need to protect innocent people from criminal forces. As great constitutional lawyers, they are dedicated to the lawyers, at the same time, to the lawyer's most precious principle, that the rights of innocent men must always receive the fullest protection of the law."

The administration's private rhetoric was more pointed, honest and edifying. While he was an assistant attorney general, Rehnquist summarized Nixon's judicial philosophy in a memo: "A judge who is a 'strict constructionist' in constitutional matters will generally not be favorably inclined toward claims of either criminal defendants or civil rights plaintiffs — the latter two groups having been the principal beneficiaries of the Supreme Court's

'broad constructionist' reading of the Constitution."

Plainly stated, strict constructionists favor prosecutors over criminal defendants, civil rights defendants over plaintiffs.

This "war on crime" and Nixon's "Southern strategy" interlocked. The latter was Nixon's effort to turn the backlash against desegregation into a Republican conversion of the otherwise solidly democratic South. The "Southern Manifesto," was the defiant shot on Fort Sumter in this cultural war. Signed in 1956 by 101 prominent Southern politicians, it attacked *Brown v. Board of Education* and its progeny in Biblical terms, warning that it was "bearing the fruit always produced when men substitute naked power for established law." According to its signatories, the court overturning separate but equal "climaxes a trend in the federal judiciary ... to encroach upon the reserved rights of the States and the people."

Nixon seriously considered and courted for the high court one of the two Republican signatories, Rep. Richard Poff. When Poff became unavailable, one of the two empty seats ultimately was directed to Rehnquist. Rehnquist, himself, had staked essentially the same claim as Poff when he clerked for Justice Robert Jackson.

In an infamous memorandum defending the separate but equal doctrine of *Plessy v. Ferguson*, Rehnquist contended that Thurgood Marshall's argument in *Brown* that the majority may not deprive a minority of a constitutional right "might be fine in theory." Yet, he continued, "150 years of attempts on the part of this Court to protect minority rights of any kind — whether those of business, slaveholders, or Jehovah's Witnesses — have all met the same fate."

"I realize," Rehnquist concluded, "that is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues but I think Plessy [] was right and should be reaffirmed."

In his nomination hearings, Rehnquist claimed that he was merely mirroring, in his role as law clerk, Jackson's view. Others consider Rehnquist's effort at plausible deniability a slander against Jackson's memory.

The Nixon/Rehnquist "activist" agenda, then, was to support the prosecution and the civil rights defendant. The trajectory of constitutional law since then has been precisely that — the steady erosion of criminal defendants' rights and of individuals' constitutional rights and remedies. It so clearly is the most accurate description



that any attempt to justify the trend can appear, itself, to be a dishonest effort at creating plausible deniability.

When one acknowledges that, since the 1970s, the thumb has been repetitively on the scale in favor of "our" peace forces valiantly fighting against the "other" criminals and assertive minorities, one is finally looking at the belly of the squirrel. It explains why some judges can go their entire careers warning about horrible slippery slopes that will result in explosive litigation and the imminent destruction of the Republic if their conservative principles remain unheeded, but never once imagine, much less articulate, a slippery slope regarding the underdeterrence of individual rights leading to injustice, uncompensated personal tragedy, incipient authoritarianism, and, above all, the destruction of the liberty.

One decade ago, a *reductio ad absurdum* argument asserted what then was a prognostication of unthinkable horrors to come — pre-emptive war; torture; extraordinary rendition; emasculation of habeas rights; devaluation of Fourth, Fifth and Eighth Amendment rights; disregard for the Geneva Conventions; lawless cooperation between government and corporations; and deplorable prisons that incarcerate an unprecedented number of people. Now these fears are fact.

The sole remaining political effectiveness of the judicial activism tag is that the candidate can still discretely wink at voter prejudices with plausible deniability. If the voter doesn't like assertive racial minorities, the balm is strict construction. If the voter subtly resents women, the activist decision of *Roe v. Wade* (in significant ways, the cultural war over desegregation sublimated), it's those judicial activists. If the voter is afraid of criminals, it is those America-hating, ACLU-types who are to blame. Don't like gays? Look what that California Supreme Court is imposing on you. It lets the mongrels into the political tent while permitting true believers to showcase the purity of their political poodles, all the while, denying that their dogs have fleas.

In a moment of "straight talk," Senate Judiciary Chairman Arlen Specter confided to a reporter after the North Carolina speech that McCain "has never really been interested in judges." It is difficult determining whether Specter meant to be assuring or unsettling. Still, it suggests, that McCain's current position is only so much red meat for his red base. More precisely, it is a rabid, tired squirrel.

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Mediation 'Magic' Happens When Neutrals Revitalize Justice Issues

By Victoria Pynchon

There comes a point in every mediation when the attorneys need help in understanding their clients and the clients need to be reminded of the limitations the legal process imposes on everyone's efforts to resolve the conflict at hand. A mediator knows this time has come when the parties begin to complain that their counsel is "forgetting" to

emphasize their most important losses; "editing" their stories or refusing to let them speak their minds. Sometimes it's the attorneys who alert the settlement officer to the lawyer-client communication cap. "My client's expectations of success are unrealistic," they'll say, or, throwing up their hands, they'll exclaim, "She just doesn't understand. No matter how carefully I try to explain the law's limitations, she just won't accept them."

As litigators, we *do* forget that what we're doing for our clients — transforming their narratives of injustice into actionable claims — is as mysterious to the parties as quantum physics is to most of us.

On those occasions when it becomes clear that the parties need to re-visit their justice issues along with the limitations of the legal system, this is what I usually say:

"The dispute you're having exists in the world of injustice.

"Picture the earth.
"Now picture a grain of rice somewhere on the earth.

"The grain of rice represents the injustices the law will remedy. The earth represents the injustices the law will not."

Then I sketch a round green "earth" surrounding a small yellow square.

"It feels as if your attorney is 'editing' or 'shaping' or 'spinning' your story of injustice," I continue, "because she is. This tiny yellow area represents the facts necessary to obtain relief in court (damages or an injunction, for instance) or to defeat your opponent's claim (failure to satisfy a condition precedent; inability to state a claim the law will recognize and the like).

"The entire dispute — everything that happened inside the green circle — is what you, the client, want to resolve. Unfortunately, what you want would often require the disclosure of facts that would be harmful to your case. That's why your attorney doesn't let you talk in the presence of the 'other side' and asks you not to discuss the dispute with your opponent again. She's protecting you from revealing something in the green area that's bad for proving your case in the yellow square."

"Here's the good news. Mediators work in the green area — where injustices the law will not remedy reside. That's why we're here today in this conference room negotiating a 'deal.' As my friend the mediator Richard Millen says, 'People don't have legal problems. Only lawyers have legal problems. People have people problems.' But people don't

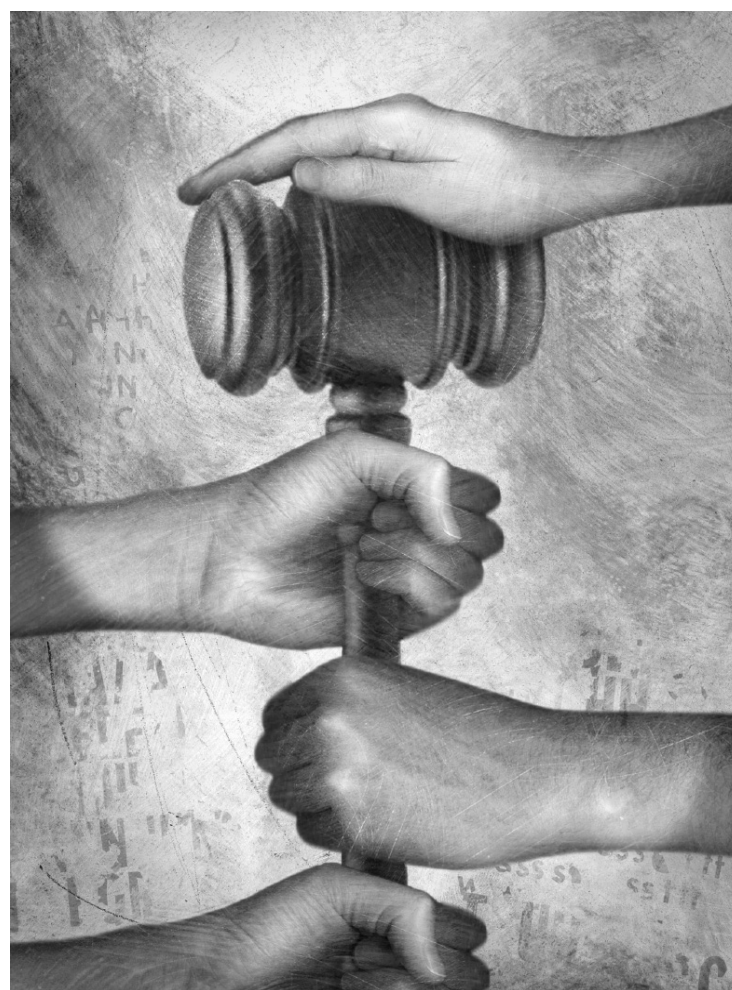
seek out lawyers to help them resolve those problems unless they're accompanied by a justice issue.

"If you were only seeking money — as your opponent believes — you'd buy a lottery ticket or borrow the sums you need to open that restaurant you told me about. When you sought legal advice, you were asking your lawyer to "monetize" injustice. And that's what he's done. He calculated the value of your injuries and called them remedies. He assessed the worth of your injuries or traced the transfer of your monies by your opponent to restore the benefit of their investment to you. He'll even ask the jury to punish the opposition by asking them to look at its net worth and then award enough damages to make it "hurt."

On those rare occasions when mediation feels like "magic," its almost always because the mediator has helped the parties and their counsel re-vivify the justice issues that the legal dispute has flattened for the purpose of precedent, consistency and predictability. We're successful in this task when we allow the parties to restore to the conflict the life, texture, nuance and gray tones that "the law" has removed from it.

Rarely are we able to break through the injustice impasse when money is all we have to work with. But barriers to settlement slowly begin to evaporate when we couple money with fairness, apology, unexplored business opportunities, narratives with the ring of truth or empathy and compassion. Anyone who has suffered harm as the result of a social interaction cannot and should not be asked to "get over" the injustice that comes with giving in, compromising or splitting the baby in half. This is particularly true when the parties are told they must give up their rights because the justice system works too slowly, is too uncertain or costs too much money.

Compromise alone is not our mutual goal. Accommodation of one another's interests coupled with a rough sense of justice is what



clients want from lawyers and mediators want for both counsel and the parties.

Vendors who line beach boardwalks or the sidewalks of tourist towns often include the guy who will write your name on a grain of rice. Sometimes I feel as if my entire career as a litigator was written on one of those grains of rice. That's how small the legal zone sometimes looks from here.

There's nothing I value more than that legal zone. In the absence of the rule of law, we're all vulnerable to the strong arm or the snake oil's charm. Legal process is an exquisitely balanced clockwork necessary to our liberty. Absent the *opportunity* for justice, we fall prey to tyranny. But long before there was a rule of law, there were people

sitting down with one another, telling their stories, reconciling their differences and accommodating one another's idiosyncratic needs and desires. That's what we do in the mediation zone.

Can we actually deliver on mediation's promise to send people away with less money and more justice? I think so. Choose a mediator who not only honors the sacred trust between you and your client but who is also willing to dig under the "legal conflict" to address the justice issue your client sought you out to resolve in the first instance.

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