

Thank you, Dean Ammons.

On a personal note, let me say how much I enjoy my relationship with Widener Law School -- with its administration, its faculty, and, particularly, with its students, who are really the focus of our combined efforts.

I would also like to commend the vision of Dean Ammons and Dean Gedid in conceiving the position of jurist in residence and to thank them for according me the honor of being its first occupant. Although the concept of a jurist in residence is not novel, as a number of other law schools nationwide have such a program, it is, to my knowledge, unique among Pennsylvania law schools. In fact, I have received inquiry from the dean of another law school about establishing a similar program. But the jurist in residence at Widener is ideally repositied within its Institute of Law and Government, since the concept stands at the intersection between the purely academic aspects of legal education and their real world application in the actual business of governing.

Now, to the matter at hand, the nature of judging. It occurs to me that in Supreme Court confirmation hearings of late, aspirants, obviously of felt necessity, understate the role of courts in adjudging cases having a constitutional dimension. They seem, at least to me, to suggest that the process is fairly simple;

that all judges need do is lay the text of the Constitution alongside the challenged legislative enactment or executive action and declare where the line is to be drawn.

The true reality, however, is that in the area of constitutional interpretation, where I will focus my remarks, a court makes difficult choices among competing values and, unlike the value choices made by the political branches -- the executive and the legislature -- courts are obliged by tradition, and compelled by institutional necessity, to supply reasons for such choices. It is this work which I will undertake to describe.

And so, what is this thing that we call judging? Socrates said that only four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially. Were it only that simple.

Alexander Hamilton, writing in the Federalist No. 78, said that "there is yet a further and weighty reason for the permanency of the judicial offices; which is deductible from the nature and the qualifications they require. It has been frequently remarked with great propriety, that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict laws and

precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges.” Again, were it that simple.

We all study judging in the sense that we read, analyze and attempt to apply judicial decisions in the course of our legal studies and professional lives. But my goal is to probe more deeply into the intellectual and structural underpinnings of judging.

Members of the legal academy have endeavored over time to explain the nature of the judicial function in a scholarly fashion. The first efforts in this regard are generally credited to Christopher Columbus Langdell, the Dean of Harvard Law School from 1870-1895. Langdell’s model of the case study of law still predominates in our modern law schools, but the work of Langdell’s research and writing was directed towards placing the study of law into a scientific form, much like that of geometry, a series of elementary principles or postulates which could be

discerned by surveying the case law, built upon, and used descriptively and evaluatively to lead to a certain or right result.

Critics very soon attacked this approach, asserting that the law was not, and could never be, a strictly deductive endeavor like geometry. One of the first such critics was Oliver Wendell Holmes, whose writings outlined a view recognizing judicial creativity and insisting that law does not consist of a self-contained set of principles or norms, but rather, constitutes a tool to be used to advance social objectives. This movement, which came to be called legal realism, began at the Columbia Law School in the 1920s and reached full bloom at Yale Law School in the 1930s.

Legal realists opposed the conception of legal science that Langdell had offered. Perhaps the leading critic of the notion of a science of law and judging was Jerome Frank, a New Deal lawyer and legal philosopher who became a judge on the Second Circuit Court of Appeals. As Professor Anthony Kronman has explained, Judge Frank's

argument focuse[d] on the phenomenon of adjudication -- the heart, he believed, of every legal system. [He sought] to show that the activity of judging lacks the very two characteristics that distinguish geometry from

other forms of human creativity. First, Frank argue[d], the decisions of a judge inevitably draw upon his experience in a way that the judgments of a geometer do not. And second, they are always the result of a series of discretionary choices that have no counterpart in the science of geometry. Indeed, for Frank, experience and choice are not only merely compatible with the activity of judging; they are among its essential conditions.

The essence of Frank's writings leads to the conclusion that the causes of judicial behavior are so idiosyncratic as to elude meaningful generalization; in other words, that because judges make choices in deciding cases their behavior cannot be described with scientific rigor.

But this notion led in turn to another school of thought which Professor Kronman has termed "prudential realism." Prudential realism, so called, was the invention of Professor Carl Llewellyn, a contracts professor at Columbia. Since it is Professor Llewellyn's concept of craft-judging which holds the most resonance for me as an intellectual construct, I will attempt to describe some of its salient components. In doing so, I borrow heavily from Professor Kronman's superb book, The Lost Lawyer.

Concerned to show that appellate courts worked in a “reckonable way,” Llewellyn emphasized that, although adjudication is in some sense a creative activity, it is not arbitrary. Rather, there are constraints that guide the adjudicative process and make its exercise understandable. His point, in this regard, was that legal rules alone are not sufficient to supply the necessary discipline, but that judicial creativity is also bound by what he described as traditions and habits, an “ethos” of the jurist’s office, which he viewed as an ideal of judicial craftsmanship, like that of a carpenter who acquires habits and skills over time that are used in his craft, particularly in his selection of tools for different jobs. Llewellyn said of his concept of the craft-tradition:

The existence of a craft means the existence of some significant body of working knowhow centered on the doing of some perceptible kind of job. This working knowhow . . . is in some material degree conscious, it is to some degree articulate in principles and rules of art or thumb A healthy craft, moreover, elicits ideals, pride, and responsibility in its craftsmen. And every live craft has much more to it than any rules describe; the rules not only fail to tell the full tale, taken literally they tell much of it wrong; and while words can set forth such facts and needs as ideals, craft-conscience, and

morale, these things are bodied forth, they live and work, primarily in ways and attitudes which are much more and better felt and done than they are said. Now appellate judging is a distinct and (along with spokesmanship) a central craft of the law side of the great institution of Law-Government. Every aspect of the work and of the man at work is informed and infiltrated by the craft.

The two opposing views were that of Langdell, who sought to define law as a predictable science, and his critics, who thought judges decided cases idiosyncratically. Llewellyn found fault with each side as failing to recognize the limitations on the exercise of judicial will through the craft tradition connected with a body of habits acquired through experience. Such habits develop over time, and hence, to acquire them one must have lived in the law and become accustomed to its routine.

Still, Llewellyn did not believe that the craft tradition meant judicial behavior could be perfectly predicted in advance. But he did believe that the primary aim of appellate judging is “to locate and explore the significant situation-type exemplified by the case at hand, devise a rule to uncover and implement that situation’s immanent law, and fit the rule in question into a larger body of evolving doctrine.”

The true judicial craftsman, according to Llewellyn, therefore knows that his work is constrained even in its creative aspects, that his craft is not a science and cannot be converted into one, and that it must be learned through experience, as it requires a form of practical wisdom that cannot be reduced to a cold set of rules. At the same time, he knows that his craft is not blind habit and that it requires imagination and invention. And so, Professor Kronman concludes:

Confident that his craft provides tolerable guidance and reckonability, and that it does so not because it rests upon a rationally transparent science of law but upon an educated sensibility -- a soundness of judgment that more closely resembles aesthetic taste and style than scientific understanding -- the enlightened judicial craftsman will be neither frightened by the specter of Frank's personalistic nihilism nor tempted by the false ideal of a legal science. The enlightened judge, as Llewellyn portrays him, is a person of prudence, and his philosophy of law, to the extent that he gives it a self-conscious formulation, will be a celebration of the ancient Aristotelian virtue of practical wisdom.

Turning now to the work of constitutional adjudication, what implements do judges have at their disposal in plying their craft? They first have language, that is, the text of the constitutional provision at issue.

They also have history, which is the intent of the framers in placing a certain provision in the Constitution. Sometimes referred to as “original meaning” or “original understanding,” originalism inquires into the meaning that constitutional provisions possessed at the time of their framing and ratification, and if employed in such way in constitutional interpretation, runs something like this: “The whole aim of construction, as applied to a provision of the Constitution, is to discover the meaning, to ascertain and give effect to the intent, of its framers and the people who adopted it. . . . As nearly as possible we should place ourselves in the condition of those who framed and adopted it.”

But if that were the case -- if the ascertainment of the original understanding of the framers were the end and not the beginning of the inquiry -- what kind of constitution would we have, for it is, after all, as Chief Justice Marshall famously said, a constitution which is being interpreted? If the meaning of that Constitution’s provisions were frozen in time -- in the convention summer of 1787 and the ratification year of 1788 -- how could our organic

document have served as a viable framework of government for 220 years without substantial amendment?

Although history informs and elucidates, and thus has weight in constitutional interpretation, as Professor Alexander Bickel cogently wrote: “The original understanding forms the starting link in the chain of continuity which is a source of the Court’s authority. . . . [W]hat is relevant is not alone the origin of constitutional provisions, but also the line of their growth, the further links in the chain of continuity.”

Let me give but a few examples to illustrate this point. The Sixth Amendment guarantees an accused the right to have the assistance of counsel for his defense. It is beyond historical dispute that when the Sixth Amendment was proposed in the First Congress such guarantee was considered merely a right to defend by counsel if you had one, contrary to what was then the English law. But how meaningful would such a right be if it had been forever so confined rather than extended by interpretation to require that court-appointed counsel be provided for an indigent defendant whose life or liberty is at jeopardy?

Even a clause cast in more sweeping terms, like “due process,” might have been confined, as Justice Brandeis urged originally, to a guarantee of fair procedure. But who can regret

that it has been interpreted over time to mean something more? As Professor Herbert Wechsler put the point, “. . . we should prefer to see the other clauses of the Bill of Rights read as an affirmation of the special values they embody rather than as statements of a finite rule of law, its limits fixed by the consensus of a century long passed, with problems very different from our own. To read them in the former way is to leave room for adaptation and adjustment if and when competing values, also having constitutional dimension, enter on the scene.”

And finally, judges have recourse to precedent -- prior decisions regarding the constitutional provision at issue. Precedent is important because, as Holmes once said, “imitation of the past, until we have a clear reason for change, no more needs justification than appetite.”

But of equal importance is the assurance that if constitutional values have been wrongly decreed, or if the circumstances supporting their initial articulation have changed, they will be put aside. Chief Justice Taney, the author of the infamous Dred Scott decision, himself declared his willingness “that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its

judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.”

And so, there you have it. Appellate judging is a craft, not a science. In performing their work, judges bring to bear their experience and practical knowledge, honed by habit and informed by common understanding. Although the precise manner in which they do this is difficult to describe, the end of the endeavor is not. Judges, wrote Justice Frankfurter, are called upon for “allegiance to nothing except the effort, amid tangled words and limited insights, to find the path through precedent, through policy, through history, to the best judgment that fallible creatures can reach in that most difficult of all tasks: the achievement of justice between man and man, between man and state, through reason called law.”