

3-1970

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Recommended Citation

Bernard Goodwin, *The Supreme Court: Viable Fallibilism or Fatal Infallibility*, 23 *Vanderbilt Law Review* 251 (1970)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol23/iss2/2>

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The Supreme Court: Viable Fallibilism or Fatal Infallibility†

Bernard Goodwin*

The recent growth in the importance and apparent power of the Supreme Court has been one result of our rapidly changing twentieth century society. In the social ferment of the last two decades, the Court, more than Congress, has expressed the conscience and intellectual consensus of American culture. Speaking as a practicing attorney and concerned citizen, the author of this article does not criticize the Court for stepping into this gap in our governmental structure, but he feels that the possibility of increased activism on the part of the Court indicates a serious breakdown in governmental checks and balances and may be leading to the "fatal infallibility" of the judicial branch. After tracing the historical events which have eroded the ideas of the framers of the Constitution, Mr. Goodwin suggests two ways to restore the Court to a position of "viable fallibilism" that retains the confidence of the people and reinstates the original balance. He advocates a permanent panel of judges and citizens to assist in the important process of judicial selection, and he outlines a procedure by which the Constitution may be more easily amended in response to changing social needs and urgent problems.

Much has been written on the Supreme Court.¹ Since it has been and still is the fashion to give vent to jeremiads about the Court or just to review and analyze its decisions and to probe the personalities and policies of Justices, not many writers have been constructive in giving

† "Viable fallibilism," as used herein, refers to effective checks and balances and controls (as planned by the framers of the Constitution) over the potential omnipotence of any office, body, or institution in government.

"Fatal infallibility," as used herein, refers to the omission or gradual destruction of such checks and balances and controls, including the constantly occurring deterioration in the representative form of government so carefully designed by the framers to check the ultimate perils of an uncontrolled mass democracy, especially when influenced and guided by those who tend to make an absurd fetish of democracy in all of its dangerously exaggerated extremes.

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1. It is unnecessary to cite the numerous articles and books on the Supreme Court. Published periodical indexes and library reference cards will furnish a complete list. For 3 recent articles, see Kurland, *Wanted: A Nonpolitical Supreme Court*, 56 NATION'S BUS. 87 (May, 1968); Kurland, *The Court Should Decide Less and Explain More*, N.Y. Times, June 9, 1968, § 6 (Magazine), at 34; Hogan, *The Supreme Court and Natural Law*, 54 A.B.A.J. 570 (1968). See also M. MAYER, *THE LAWYERS* 520-48 (1967).

basic suggestions for preserving and improving the Court as the conscience and fulcrum of our Government. It was Spinoza who said, "It is the part of a wise man not to bewail nor to deride, but to understand."² Or, as it was more colloquially phrased in the aphorism of an unknown Chinese humanist, "It is better to light one candle than to curse the darkness."³ To follow such sound advice, it would be relevant to examine the need for the Court as a political, social, and moral institution in our Society.

1. EROSION OF THE ORIGINAL IDEA

Prior to the pragmatic rationalism and rule of reason of the seventeenth and eighteenth centuries, most peoples during 6,000 years of known history created and maintained their societies⁴ by the inspiration and cement of fear or love of some form of divinity. This may have been a covenant with God (such as the dialogue between God and the Old Testament Hebrews),⁵ or a divine right to rule (e.g., the English Plantagenets, Tudors and Stuarts, and the French pre-revolution monarchs), or a doctrine of apotheosis whereby a sovereign, in tracing his ancestry to the Godhead, himself became a god (as with the Minoan kings, Egyptian pharaohs and Roman caesars), or a reliance on reverence and respect for supreme and sacred oral and traditional law and unwritten customs (natural law) as being in themselves of divine origin and thus superior to state and individual (the ancient Greeks and pre-empire Romans).⁶ However, with the relatively new devotion to a completely secular state, separated from religion, church, divinity, and the Godhead, by seventeenth and eighteenth century political philosophers, it became absolutely essential for the founding fathers (of the United States) to devise a substitute amalgam for the stability of the state. James Madison described the suggested substitute as a political system of checks and balances, and wrote about it in *The Federalist*:

But the great security, against a gradual concentration of the several powers in

2. Elwes, *Introduction to 1 WORKS OF SPINOZA* at xxii (Dover ed. Elwes transl. 1955).

3. B. BOHL, *THE HOME BOOK OF AMERICAN QUOTATIONS* 72 (1967). This quotation was the inspiration for the title of the autobiography, *To Light a Candle*, by the founder of The Christophers, Father James Keller.

4. A.J. Toynbee lists 21 complete civilizations, 1 TOYNBEE, *A STUDY OF HISTORY*, pt. 1 C(ii), at 129 (2d ed. 1935, 4th impr. 1948), as well as a number of abortive civilizations, 2 *id.* pt. 11 D(vii), at 322-60, 369-94, and arrested civilizations, *id.* pt. 111 A, at 1.

5. B. SPINOZA, *A Theologico-Political Treatise*, in 1 *WORKS OF SPINOZA* 47 (Dover ed. Elwes transl. 1955).

6. See Hofstadter & Pesner, *Judges as Legislators*, 19 *RECORD OF N.Y.C.B.A.* 222, 227 nn.8, 9, 10 (1964).

the same department, consists of giving to those who administer each department the necessary Constitutional means and personal motives to resist encroachments of the others. The provision for defence must in this, as well as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the Constitutional rights of the place. It may be a reflection on human nature, that such devices [checks and balances among the different departments of government] should be necessary to control the abuses of government. But what is government itself, but the greatest of all [adverse] reflections on human nature? *If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.*⁷

The concern of the founding fathers that one of the three branches of government would emerge as more powerful than the others led to the system of checks and balances, with constitutional amendment procedures to provide for any impasse among the branches or for any contingencies of the unknown future. The reasoning was simple: the infallibility of the majority (represented by the legislative branch, the Congress), of the few (represented by the judicial branch, the Supreme Court), and of the one (represented by the executive branch, the President) was equally to be feared. Even though the authoritarian absolutism of Jean Jacques Rousseau, with his doctrine of the mystical general will giving birth to a mysterious infallibility of the masses, together with a *mélange* of Montaigne, Voltaire, Montesquieu, Locke, Harrington, the Old and New Testaments, Greek and Roman philosophies, and the Magna Charta, strongly influenced eighteenth century American political thought, the framers of the Constitution were sufficiently wise to temper Utopian theories with realism.

When John Marshall became Chief Justice in 1801, however, this most important contribution of checks and balances to political science began to lose its equilibrium with the development of the Supreme Court as the final force in government. Since then, American political, social, and economic life has been molded and proliferated by the Court's philosophy, which changes chameleon-like with the personalities and policies of the Justices. It would seem that Plato's 2,500-year-old ideal of a permanent government by philosopher kings had finally become a reality, for, with the anointment of appointment, Justices were cloaked with charismatic infallibility. But, inevitably because of this, the Court slowly evolved from its original position as

7. THE FEDERALIST NO. 51, at 356 (B.F. Wright ed. 1961) (J. Madison) (emphasis added).

an equal, well-checked and finely balanced unit, in the harmonious composition of the triptych of the Federal Constitution, to its present sublime status of *primus inter pares*.

This disturbing erosion flows fundamentally from a failure to recognize society's need for a realistic system of checks and balances that strengthens its sinews for survival. Such a system of fallibilism⁸ is the only effective control over philosopher kings (the Supreme Court) who function only if they are respected as having obvious intellectual superiority and unquestioned integrity in the context of the current mores. By contrast, the imposition on peoples of unavoidable or arbitrary infallibility in their institutions has invariably caused governmental systems in this and other civilizations to decline from the Hellenic perfectionism of Platonist philosopher kings to autocratic oligarchy and demagogic democracy, in either order, and lastly to fall to tyranny; and then the holocaust.

One significant result of the turbulent upheavals of the twentieth century, with their concomitant changes in social, political, and economic institutions, has been an accelerated weakening of the system of checks and balances. It was the Warren Court, more than the President or Congress, that tried to cope with the anomie of American culture during the fermentations of the last two decades. The Court will undoubtedly take its place in history as outstandingly courageous in its attempt to fill the gap of guidance in these times of contumacious confusion. At the very least, the Court has been an escape valve for the frequently anemic, and too often selfish or shortsighted, politics of the legislative and executive branches of government, compounded by their dependence for election to office on divisive, and thus enervating, economic, ethnic, geographic, racial, and religious groups. This activity of the Court, as the only agency to serve as the social conscience and to express the intellectual consensus of society, is referred to by one commentator as both proper and necessary for its survival. He goes on to say:

In the Middle Ages the institution that performed this watchdog function was the Church. Post-Reformation confidence in the individual allowed transfer of this function to the individual conscience.

American society is now a secular society. . . . The churches are certainly not strong enough as institutions to reassume the medieval function of passing judgment on the state and standing up against it. The Supreme Court, as a focus of the community's conscience, is the strongest institution available to do the job.⁹

The inevitable concentration in the Court of ultimate control over

8. See Davis, *Toward Justifying Democracy*, 33 THE KEY REPORTER 2, 4 (1967-68).

9. Hogan, *supra* note 1, at 572.

the destiny of society, without operative checks and balances on itself, will become dangerously destructive with the full flowering of fatal infallibility. This becomes more evident with a rapidly moving, activist Supreme Court, such as the Warren Court. It is understandable that, in order to perform its part, the Court must remain flexible in its continuing ability to adjust to new jurisprudence, new justice, and new moral values (in the best traditions of Holmes, Brandeis, Cardozo, and Pound).¹⁰ Nevertheless, even though the Court may be pinpointed by posterity as having from time to time successfully rescued American culture, it will eventually negate its necessary place in society if it fails to retain a viable fallibilism.

Consequently, the burgeoning power of the brilliantly conceived institution of the Supreme Court must be curbed by modernizing the original checks and balances in two ways: first, by wiser, better judicial appointments of Justices resulting from a more immunized method of selection and appointment; and, second, by a more responsive, flexible, and efficient constitutional amendment procedure.

11. IMPROVEMENT OF FEDERAL JUDICIAL SELECTION

When fallible humans in becoming infallible Justices can overnight be transmuted to gods of constitutional law, the quality of each appointment to the Court becomes of great importance. It is not sufficient to rely on replacements due to deaths and resignations or on the startling growth of some Justices either with the first donning of their Supreme Court robes or in the annealing process of continuing service on the Court. Inasmuch as the apocalyptic opinions of the divine nine are necessarily born in subconscious subjectivity, and any appeal from the Court can only be to the written Constitution and the elusive true intent thereof as interpreted from time to time by the Court, each Justice, irrespective of precedent or of other Justices past or present, is always his own arbiter of constitutional law, but within the penumbra of his personal psyche. Justices are usually sufficiently eloquent and learned to write persuasive, even if occasionally *ipse dixit* or sophistical, opinions in support of their convictions, albeit in direct conflict with each other. In effect, a Justice is really enunciating his own social, moral, political, or economic policies, no matter how instinctively or cleverly he cocoons his conclusions with jurisprudential,

10. See Stone, *Law And Society In The Age of Roscoe Pound, A Memorial*, 1 ISRAEL L. REV. 173-221 (1966), for an excellent and well-documented and annotated review of sociological jurisprudence during the "Golden Age of Pound" (as Stone expresses it).

constitutional, or legal logic and principles.¹¹ Chief Justice Charles Evans Hughes put it succinctly when he quoted Chief Justice Taft's definition of a constitutional lawyer as "one who had abandoned the practice of the law and had gone into politics."¹²

Many theories of constitutional interpretation have been expounded: activism or self-restraint; new legality, new jurisprudence, and liberal interpretation differentiated from old legality, old jurisprudence, and strict interpretation; federalism versus states' rights, the latter being defined as the reservation to the people and states of all powers not expressly delegated to the Federal Government nor expressly prohibited to the states; living law and justice as opposed to a search of history for original intention, with abstract rules, technicalities and traditional, mechanical limits on judicial action; supremacy of the Court as a third, superior legislative chamber and as a continuing constitutional convention distinguished from a separation of powers in a federal system of diffusion among the legislative, executive, and judicial branches. And so the controversy continues, with the Justices categorized as conservatives, liberals, or shifting, in-between moderates.¹³ We should also remember that even though we agree today with the attitudes of the Justices, we may disagree tomorrow when either the Justices or we change moral, social, political, or economic, and consequently constitutional, concepts.

It becomes vitally essential, then, in order for the Court to speak ably and wisely, that the best selections possible of Justices be made—really a subtle addition to the system of checks and balances. We have been fortunate in many appointments to the Court, but it is not prudent to continue to gamble on good luck with Presidents and their choices of Justices or on the benevolent objectivity of the Senate in its confirmations. The risks to society are too great. In any event, the quality of a number of such appointments, even if not bad, could have been much improved. This power of the President is ineluctably becoming ossified with party politics, traditions of geography, race and

11. Even so sincere and experienced a Justice as Hugo L. Black can be guilty of camouflaging his reasons when he says, "[I]t is language and history that are the crucial factors which influence me in interpreting the Constitution—not reasonableness or desirability as determined by Justices of the Supreme Court", ignoring that it is really his own convictions of what constitutes reasonableness or desirability which in fact control his conclusions as to the correct interpretation of "language and history." H. BLACK, *A CONSTITUTIONAL FAITH* 8 (1968).

12. 2 M. PUSEY, *CHARLES EVANS HUGHES* 625 (1951).

13. See, e.g., Harlan & Stewart, *Robert H. Jackson's Influence on Federal State Relationships*, 23 *RECORD OF N.Y.C.B.A.* 7 (1968); Mason, *Judicial Restraint and Judicial Duty: An Historic Dichotomy*, 38 *N.Y.S.B.J.* 216 (1966). Both articles contain helpful footnotes.

religion, misguided feelings of loyalty and friendship, and the very quantity of the many thousands of eligibles to cull for the best. The most powerful temporal office in the world has become too busy and burdened for its occupant to devote the necessary time and attention to this task. It would also seem that any President would welcome relief from the political maneuverings constantly cornering him when he is selecting Justices and other federal judges. One helpful fact should be noticed *en passant*; by tacit understanding between the Senate and the President, the custom of "senatorial courtesy" (castigatingly characterized as "senatorial discourtesy" in an editorial of The New York Times)¹⁴ has not been applied to the Supreme Court. So, the wardheeler tactics of political wheeling and dealing do not usually, or at least do not necessarily, becloud the appointment and confirmation of Justices.

The following is a suggested revision of the judicial appointment process. It is made not only for statutory and, where necessary, constitutional solutions, but also to be put into effect by voluntary action of the President.¹⁵

1. A Permanent Judicial Panel (the Panel) for the selection of federal justices and judges should be created with the Chief Justice as chairman (having no vote unless the Panel should be equally divided) and 32 members; the eleven chief judges of the United States Courts of Appeal for the ten circuits and the District of Columbia, five state chief judges or chief justices, and sixteen others.

2. The Chief Justice, the eleven chief judges of the United States Courts of Appeal, and the five state chief justices or chief judges will serve as long as they hold such offices. The other members will serve for six-year seriate periods (four members in each of four periods),

14. N.Y. Times, Jan. 30, 1968, at 40, col. 2.

15. In 1962, The Council of State Governments proposed amendments to the Constitution which would fragmentize the form of Government and turn the clock back to the Articles of Confederation of 1777—a proven failure which was replaced 10 years later by the Federal Constitution. For a critical summary and blunt condemnation of the proposals, see *The Federal Constitution: Reports on Three Amendments proposed by the Council of State Governments*, 35 N.Y.S.B.J. 458-72 (1963).

See also Goldman, *Political Selection of Federal Judges and the Proposal for a Judicial Service Commission*, 52 J. AM. JUD. SOC'Y 94 (1968), which discusses the proposal of Senator Hugh Scott (R-Pa.) for such a Commission, to be relied on voluntarily by the President. Senator Sam J. Ervin, Jr. (D-N.C.) is reportedly proposing a constitutional amendment that would place the selection of Supreme Court Justices in the hands of the Chief Judges from each state and each federal district. This proposed amendment is referred to in an editorial of The N.Y. Daily News, Dec. 2, 1968, at 41.

with the sixteen public members appointed by the President, by and with the advice and consent of the Senate, and with the five state chief justices or chief judges appointed by the Chief Justice, by and with the advice and consent of the Supreme Court. The Panel should be funded by Congress and staffed by researchers and experts, and it should have the right to call on the United States Attorney General and others for investigations and related data.

3. For every vacancy in the federal judiciary, except for Supreme Court Justices, the Panel will designate three persons, and, for each vacancy on the Supreme Court, the Panel will designate five persons; all by a majority vote of the Panel. Persons designated for appointment may include members of the Panel, who will not vote on their own names; no more than one Panel member may be included on a list of three names and no more than two on a list of five names. The President will within ten days appoint one of the designees on a submitted list, by and with the advice and consent of the Senate, with the right to select others on the list during respective additional ten day periods, if the Senate should not confirm within ten days of each respective appointment. If the Senate should refuse to confirm any of the listed designees within ten days of the date of the last appointment, the President's first appointment will become final without confirmation. If the President should choose not to appoint any of the designees in accordance with said procedure, the Chief Justice will have the right and obligation to appoint a designee in like manner, but by and with the advice and consent of the Supreme Court instead of the Senate, within respective ten day periods after each appointment, unless the Court should refuse to confirm any of the listed designees within ten days of the date of the last appointment, in which event the Chief Justice's first appointment will become final without confirmation.

4. As is now provided in the Constitution, federal justices and judges will be appointed for life ("good behavior"). However, removal and disciplinary procedures for the federal judiciary, in addition and as alternatives to the present impeachment process, will be prescribed by the Panel.

III. NEW CONSTITUTIONAL AMENDMENT PROVISION

The second major revision which must be enacted is the modernization of the constitutional amendment procedure. This procedure (article V) has not kept pace with a highly complex,

urbanized, and technological modern society. It was originally drafted to meet the needs of a less complicated, smaller, and slower moving town meeting and agricultural social order, and it implemented the idea that the discriminate Presidential appointment of Justices, by and with the advice and consent of a responsible, intelligent Senate, would be on such a high level as to prevent runaway authority being exercised by the judicial branch. For many reasons, really not the fault of any office or body, bearing in mind the frailties of human nature, this check on the judiciary is difficult to achieve today. As a result, the greatest complaint against an activist Court is that it tends to adopt informal constitutional amendments by judicial fiats reflecting the fluid majority of the Court, without being subject to the controls of any practical system of checks and balances.

The following is a suggested revision of the constitutional amendment procedure.

Broaden article V (amendment provisions) of the Constitution so that two of the Judges of the Supreme Court or one-third of the Panel (in both cases the Chief Justice may also be included) can certify proposed constitutional amendments to the Chief Justice, who will then be required to submit the same within five days to Congress for action and subsequent ratification pursuant to article V. But, if Congress should not act favorably within 60 days of such submission, the Chief Justice must submit the same within five days to a constitutional convention for action and subsequent ratification pursuant to article V. There should be a permanent constitutional convention on call for such submissions by the Chief Justice or for amendments proposed by the states under article V, but the convention should be restricted to consideration and action on such specifically proposed amendments. The convention should be comprised of two members from each state, appointed by the Governor for six-year periods, coinciding with those of the state's two Senators, from a list of names to be submitted by a "Convention Panel" organized and functioning in each state in the same manner as the Panel described herein. The convention's presiding officer should be appointed by the Chief Justice for a period of six years, by and with the advice and consent of the Supreme Court.

The above suggested expansion of article V will help ameliorate the current weaknesses in the checks and balances which the founding fathers so carefully planned to make our Government secure. They were well aware of the dangers of an unbridled democracy, which

history had taught them would probably lead to tyranny.¹⁶ Therefore, the additional protection of a representative form of government, supplementing the checks and balances in the interactions of the three branches (executive, legislative, and judicial), was provided by the designation of an electoral college (article II, § 1(2)) to elect the President and Vice-President and of the state legislatures to elect the Senators (article I, § 3(1)). These devices, the framers thought, would interpose independent, intelligent bodies (the electoral college and state legislatures) in the elective machinery for the federal executive and Senate, with the latter also acting as a check and balance on the popularly and directly elected House of Representatives (article I, § 2(1)). The idea was that this would give us great leaders who would act primarily for the commonweal and not be influenced by or dependent on the selfish need for votes, so often opportunistically, commercially, and ruthlessly obtained.

Unfortunately, this finely balanced plan of government became more and more unbalanced and unchecked, for three good reasons. First, there was the development of the excessive power and position of the Supreme Court, as described herein. Second, political parties (beginning effectively on a broad popular base with the election to the Presidency of Andrew Jackson in 1828), together with the designation of loyal political party functionaries as electors to be elected by popular vote in each state, relegated the electoral college to a rubber stamp anachronism to such an extent that the electoral college will soon be radically changed by constitutional amendment, emphasizing the election of the President and Vice-President by direct popular vote. Finally, the seventeenth amendment (ratification completed April 8, 1913) changed the method of the election of Senators to one of direct popular vote in each state.

To restore a viable government, based on the founding fathers' concept of checks and balances, it now becomes necessary to update this system. The creation of the Panel and the expansion of article V are suggested as means to accomplish this modernization. Present democratic voting and constitutional amendment procedures should be retained. The proposed permanent constitutional convention (with its members to be appointed by state governors in the same manner as appointments are made by the President to the federal judiciary), including the additional methods outlined herein to initiate

16. See, e.g., Schmerl, *Democracy as Aberration*, 5 MICH. Q. REV. 33 (1966), for an interesting and illuminating description of "Our Sacred Traditions, Profane and Faded."

constitutional amendments by Justices and the Panel, are offered as a modernization of checks and balances. The framers of the Constitution really could not be expected to foresee all of the phenomenal and disturbing developments of the twentieth century which can be so potentially disastrous to the government of men by men in this Society. It is pertinent again to repeat what the great James Madison (the reputed philosopher of the Constitution) said so well, "A dependence on the people is, no doubt, the primary control on the government; *but experience has taught mankind the necessity of auxiliary precautions*".¹⁷

IV. CONCLUSION

This article, then, is not a plea to the President alone; it is also a plea to Congress and, if constitutional amendments are required, to the states, for a restoration of viable fallibilism to Government, especially to the Supreme Court. It is most important to meet this serious challenge to society with a response which will assure its survival. If the problem is not resolved, a wonderful way of life may well die under the curse of fatal infallibility—the same dread disease which destroyed so many civilizations. There is still time to control the future, but not if time is dissipated by the endless polemics of politicians compounded by the destructively frustrating and foolish extremes of ethnocentrism. Our need today is for strong statesmen to lead, and not to concensus-follow, with faith, courage, intelligence, and wisdom.

17. See note 7 *supra* and accompanying text. (emphasis added).

