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The Constitutional Scholar

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Owen Fiss is one of the great constitutional scholars and teachers of his generation. His writings have had a profound impact on the work of thousands of students, scholars, practitioners, and judges, and on the law itself. His view of family and friendship, broad and all encompassing, including, of course, students and colleagues alike, has made him an even more important and varied role model than any scholarship would suggest.

In this symposium, we celebrate his many contributions to legal scholarship, but not only because of the high quality of his work. We celebrate his contributions because of the powerful moral force he brings to that scholarship and because the personal and professional integrity and the intellectual rigor with which he approaches his tasks are beyond reproach. These attributes are especially significant today, when much of the population, particularly members of the bar and academic lawyers, feels so alienated from the historic function played by the federal courts in perpetuating a highly moral body of learning known as constitutional law.

Lawyers who came of age in previous generations, such as Owen, saw the Supreme Court of the United States, as well as the federal circuit and district courts, and even some state courts, as institutions worthy of their highest respect, admiration, and support. Presently, however, fed-

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eral courts are often seen as hostile and uncommitted to our most prized national ideals of equality and justice under the law.[1] They are frequently seen as institutions dedicated to protecting the status quo and increasing the power of those who serve it, such as officials of the Executive Branch.[2]

It is, therefore, not an exaggeration to say that Owen Fiss is an important scholar who possesses qualities that have long since gone out of style, but which are integrally related to the fragile art of constitutional adjudication and to the pursuit of substantive justice. He represents the best ideals of the legal institutions that created the impetus for the most significant changes in the history of the republic, including, not least of all, the quest for racial equality. Being entirely cynical, even hostile, about the positive role that courts may play in assuring justice in our society — a view I have certainly held and I suspect some of the participants in this symposium issue may also hold — jeopardizes the significant achievements of constitutional scholars and of federal courts in profound ways. Owen Fiss is so important both as a scholar and as a moral force because he constantly confronts that cynicism and attacks it in ways that are difficult to ignore. His work forces us to "stand within the law and test the government's actions by the law."[3]

It is perhaps easier to understand my views about the importance of Owen Fiss's work if I set the context for my conclusions. On many significant levels — intellectual, political, and social — Owen Fiss came of age in his conceptions of the role the judiciary should play in our society in the 1960s and early to mid-1970s. This was, of course, during the heyday of the Warren Court, a remarkable era of Supreme Court history that can be said to have started with *Brown v. Board of Education*[4] in the mid-1950s, and to have reached its most dazzling heights during the early to mid-1960s when the progressive wing of the Court achieved a strong majority. This was the *golden age* of American law, the era of Justices Warren, Black, Brennan, Douglas, Fortas, Goldberg, and Marshall, among others. Although Chief Justice Earl Warren retired in 1969, the extraordinary phase of legal history that bears his name continued into the early 1970s. Owen Fiss played an important role in this *golden age*. His timing for being involved in great events was — and still is — impeccable. In 1964, he clerked for Judge Thurgood Marshall on the United States Court of Appeals for the Second Circuit. During the 1965 term, he served as Justice William J. Bren-

1. Many would cite *Bush v. Gore*, 531 U.S. 98 (2000), as the most recent example.

2. The litigation over the terrorism cases is a prime example. *See* Owen Fiss, *In the Shadow of War*, 58 U. MIAMI L. REV. 449 (2003).

3. *Id.* at 470.

4. 347 U.S. 483 (1954).

nan's clerk on the Supreme Court. He then spent two years in the Civil Rights Division of the Justice Department. He lived and participated directly in these amazing times and events.

The foundation of the Warren Court jurisprudence had its antecedents in earlier Supreme Court periods. Most particularly, these foundations are reflected in some of the decisions of the Supreme Court in the 1930s. During the Warren Court period, for example, the Court took the dissents written by Justices Holmes and Brandeis and turned them into majority positions, thus elevating the principle of freedom of speech into a significant set of values of American society.[5] Simultaneously, the Court began to intervene in criminal proceedings to assure a minimum level of procedural fairness.

Even with these roots as background, however, the Warren Court represented an almost completely new experiment in judicial decision-making. There was clearly something unique, indeed special, about that Court. *Brown*, for example, undertook the most daunting of all constitutional jobs: making America's historic promise of racial equality in all aspects of political and social life a reality. But *Brown* stood for even more than this incredible challenge. It stood for an entirely new vision of constitutional law that grew into a set of cases that resulted in significant constitutional reform of the entire institutional structure of our state and federal governments. In pursuit of this vision, the Warren Court used the Civil War Amendments, particularly the Fourteenth Amendment, and the Bill of Rights as the basis for evaluating the then-accepted order. By so doing, the Court changed the entire range of relationships between the citizen and the state and federal governments.

The Warren Court nationalized a set of rights reflected in these amendments. For example, no longer could a man charged with a crime in State A be given virtually no procedural protections or be treated with fewer procedural protections than one charged with the same crime in State B. Both would now have to be treated with an equivalent minimum of procedural protections. Convictions would no longer be based on evidence seized in violation of the Fourth Amendment or on statements physically or psychologically coerced from the accused in violation of the Fifth Amendment. Trials would no longer be allowed without the right to counsel or the right to a jury of the accused's peers. In addition, the Warren Court placed legal barriers on the death penalty, made sure the welfare system was not administered in an arbitrary and

5. It was not until this period that the Supreme Court began to create and take seriously the tradition of protecting citizens from prosecution for seditious libel. The idea that democracy demands a right to criticize government became the central meaning of the First Amendment. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

capricious manner, stopped the state governments from imposing poll taxes, protected *radical* speech, and allowed the dissemination of information concerning contraception. Indeed, many government practices of the 1950s and early 1960s disproportionately affected the poor and otherwise disadvantaged. The Warren Court attacked this invidious discrimination with vigor.

These were only some of the extremely difficult challenges faced by the Warren Court. The Court not only spoke to these issues, but attacked them systematically and, by and large, successfully. In dealing with these matters, the Supreme Court acted with the strong support of many sectors of society, such as the civil rights and welfare rights movements. It did not, and could not, act without such political and social support. Law reflects and is reflected in social movements. Indeed, the federal courts often looked to the executive and legislative branches for support during the most critical times of change.

But, in my opinion, it was the Warren Court and the lower federal courts of that era that acted as a catalyst for these bold reforms. The federal courts inspired and protected the people who sought to implement those changes. To put it another way, constitutional and statutory law became both an object as well as a subject. Employing that law, the federal judiciary created a centrifugal force for change, and was itself inspired and empowered by those political and social changes. Owen Fiss's scholarship can surely be seen as deriving from many of the Warren Court's decisions, and especially from the vision of judicial decision-making created by that Court.

A constitutional program that was so revolutionary is certain to face powerful opposition. The assault began in the early 1960s. By 1980, the Warren Court's jurisprudence was essentially gutted. As only one example, the Burger and Rehnquist Courts attacked *Brown* and its progeny. Although the Court did not expressly overrule *Brown*, it ruled, for example, that it is constitutional in some circumstances for a school system to contain a large number of all-black and all-white schools.[6] The Rehnquist Court has shifted the emphasis of *Brown,* indeed turned it topsy-turvy, and, in so doing, severely limited the nature of the remedy. As a result, *Brown* has lost much of its strength, energy, and moral power.

In other areas, such as freedom of speech, the Rehnquist Court created new power for the state and certain private interests. The Court's strong commitment to what Justice Brennan called "uninhibited, robust,

6. *See, e.g.*, Pasadena City Bd. of Ed. v. Spangler, 427 U.S. 424 (1976); Milliken v. Bradley, 418 U.S. 717 (1974).

and wide-open"[7] debate, for example, has been severely cut back, and even gutted.

In the criminal context, the Warren Court precedents have fared no better. The Rehnquist Court has shifted the balance of advantage in the criminal process strongly to the state. For example, restrictions on the investigatory power of the police have been almost totally removed. Fourth Amendment protections against unreasonable searches and seizures and Fifth Amendment bars against self-incrimination have been narrowly construed. The Sixth Amendment right to counsel has also been severely compromised. The ban on the death penalty has essentially been removed. Moreover, Rehnquist, both as Chief Justice and as head of the Judicial Conference of the United States, has attempted to institute a series of *procedural reforms* that speed up that process. To a large extent, he has succeeded. Nine hundred convicted persons have been executed from 1976 through March 3, 2004.[8]

These changes, of course, are only a sample of the success that the Rehnquist Court has had in destroying the vision and jurisprudence of the Warren Court. To many, it is almost inconceivable that the judiciary can continue to be a positive force in giving concrete meaning to our constitutional values through reasoned analysis. For many members of the profession, both in practice and in the academy, disaffection from the federal judiciary runs deep. Under such conditions, therefore, it is very difficult to pay respect to and admire the present body of constitutional law. It is difficult to see how the courts, particularly the federal courts, can continue to speak authoritatively to the burning issues that divide us, and to attempt to ameliorate the great tensions in our society when many feel so alienated from the courts. Yet, for the most optimistic of us, it is always possible to believe that the federal courts will once again become a source of moral authority and hope. Can we create a new vision of what might be by looking at what was and what is?

In thinking about this predicament, I cannot help but think about Owen Fiss. While he means many things to many of the participants in this symposium, one of the most important aspects of his public life, which touches us deeply and pushes the cynicism away, is his loyalty to the federal courts both as an institution of justice and as an institution of limited power. As a constitutional scholar, he resists these cynical views of constitutional law tenaciously; he always remains faithful to the prospect of achieving justice even within the confines of this dilemma.

His scholarship is an attempt to convince those who now reject law

7. *Sullivan*, 376 U.S. at 270.

8. *See* American Civil Liberties Union, *Death Penalty*, *at* http://www.aclu.org/DeathPenalty/DeathPenaltyMain.cfm (last visited Mar. 7, 2004).

that once again judges can and will perform their most important function — giving meaning to our public values through reason. By so doing, his scholarship confronts more modern jurisprudential movements, such as the Critical Legal Studies Movement, Critical Race Theorists, Civic–Republicans, and the Law and Economics Movement, the proponents of which, for various reasons, reject altogether Owen Fiss's vision of law. For the past twenty-five years, he has analyzed the place of adjudication in American life and defended the role of the judge as the main instrument of public reason.[9] His achievements speak for the correctness of his views. His faith is the torch that helps sustain us during these dark times.

There are, of course, other qualities of heart and mind that Owen possesses, and that inspire me to use law both as an end in itself and as an instrument for achieving justice. Owen Fiss's contributions to constitutional law, to federal courts, and to the search for substantive justice have many levels. His writings span a broad range of issues — free speech, equality and desegregation, Supreme Court history, and various strands of jurisprudence. He believes passionately in the values we identify with freedom, liberty, and autonomy — equality, procedural fairness, freedom of speech and the like — and he has attempted to protect and perpetuate these values by writing and teaching about them and acting on them whenever the opportunity presents itself.

Moreover, Owen is thoroughly devoted to the federal courts as a co-equal branch of government. His articles and books reflect a set of skills that attest to the details that constitute the law in a manner that is meant to strengthen the courts in the eyes of the public and the profession alike. To Owen, this is significant both constitutively and instrumentally. He believes that opinions should be written in a technically correct manner by employing the craft of law as an end in itself, and so that opinions will enhance a court's capacity to do its socially important work.

Perhaps even more significantly, Owen Fiss is, in the best sense of the phrase, a constitutional law diplomat. He is a person who is capable of grasping a multiplicity of conflicting principles, including some of which are concerned with the health of our system of constitutional law and the courts' role in protecting and perpetuating that system. At the same time, he pushes the vision that a judge's duty is not merely to speak to the law, but also to act on it. In his scholarship, Owen Fiss always takes the high road and lives his life through principled judgment and action. In his writings, Owen always selects his words in a way that will minimize the confrontation with other branches of government. He

9. For a collection of his work, see OWEN FISS, THE LAW AS IT COULD BE (2003).

clearly understands that major reforms require a coordination of government powers. He also respects the traditions of law, and thus follows the principle of stare decisis — but not in a wooden way. Justice always remains the overriding goal.

Owen Fiss is as much a great lawyer as he is a constitutional law diplomat. The mastery of the craft of law requires a mixture of the theoretical and the technical. Owen Fiss is a master of both sets of skills. He knows the cases, the statutes, and the theories behind them, and how they interact. He also understands how the legal system works, how it ought to work, and how to make it better. In his distinguished public career as a constitutional scholar of the first order, Owen Fiss constantly blends all of these remarkable skills.

I first met Owen Fiss in the early 1970s when I was a first-year student at the University of Chicago Law School in what was inappropriately labeled a property class. What I soon discovered, however, was that it was not a course in the technical aspects of property law but rather a course in constitutional and moral theory. When I think about that course and other classes I took from him, and when I think about his scholarship, I am often reminded of a platonic dialogue — *Gorgias* — which I teach in my jurisprudence course. To me, and I suspect many others, the theory of that dialogue is another reason to celebrate Owen Fiss's work.

Gorgias himself is a professor of oratory, and the dialogue opens with a discussion between Socrates and Gorgias on the nature of his art. It soon becomes clear, however, that the true concern of *Gorgias* is with ethics, and its scope cannot be better indicated than by a quotation from Socrates's concluding words.

> All the other theories put forward in our long conversation have been refuted, and this conclusion alone stands firm, that one should avoid doing wrong with more care than being wronged, and that the supreme object of [an individual's] efforts, in public and in private life, must be the reality rather than the appearance of goodness.[10]

The dialogue is in fact a passionate defense by Socrates of the ideals for which he gave his life: that man's business on Earth is to discover and do what is right. To Socrates, therefore, it is better to suffer wrong than to do wrong. If we ask what this ideal has to do with oratory, the answer is that in Socrates's view it stands in direct opposition to the ends that the oratorical training of the day was adapted to serve. Indeed, to Socrates, a person will not be justified in embarking on a public career unless she possesses a knowledge of moral values and a vision that will enable her to improve the character of the community.

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10. PLATO, GORGIAS 148 (W. Hamilton ed., 1960).

Owen Fiss is one of the few people I have ever known who actually attempts to live his life in harmony with the stringent moral and ethical requirements envisioned by Socrates. As his scholarship and teaching attest, Owen Fiss believes passionately in the importance of doing what is right and in treating each person he encounters with respect and dignity. He lives the Socratic ideal in all aspects of his public and private life. He is a role model for his students and colleagues alike.

Perhaps his most outstanding characteristic is that he cares so intensely. He cares about people, institutions, and ideas. Moreover, he values people not for what they can give him but for their individual, intrinsic worth. His loyalty to his friends is uncompromising and enduring. This is so not out of habit, but because of the intensity and depth of his feelings. He values ideas because they are good and important and affect human beings, not simply because of the intellectual puzzles they produce.

All of these positive attributes are reflected in his scholarship and even in the critical comments of the symposium participants. To Owen, constitutional law and adjudication is more than an object of scholarly pursuit; it is an ideal of behavior between the state and the individual. The adjudicative process is a method of giving meaning and content to our social values. This symposium issue honors Owen Fiss for all of his remarkable qualities.