WHAT WILL DETERMINE THE ROLE OF THE JUDICIARY IN THE TWENTY-FIRST CENTURY?

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INTRODUCTION

Good afternoon. I am delighted to have been able to accept Dean O’Rourke’s invitation to be here with you today. Returning to my alma mater is always an occasion that I look forward to. It is, of course, an added bonus, and indeed an honor, to have the opportunity to address such a distinguished audience on a subject as consequential as the role of the judiciary in the twenty-first century.

After considerable reflection about this topic, I have concluded that if there is any contribution I can make to this gathering, it is in attempting to provide you with a macro view of some of the factors or forces that are likely to determine the role of judges in the twenty-first century, rather than trying to predict what that role actually will be.

Let me candidly state that much of what I am going to say concerns matters already in the public arena, involving circumstances or events of general knowledge. Thus, I will be mostly a collator or reporter of issues rather than a resolver of them. Many of these factors are concerns not usually directly associated with the subject of this conference. I will try to connect them to our role as judges, but I beg your indulgence; my self-imposed assignment is elusive, and you will be getting a wide angle rather than a myopic perspective of the future.

The judiciary is but one of several institutions that make up an organized society, albeit an important one. As you may very well agree, the role played

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by the judiciary is largely determined not by the internal workings or dynamics of that branch of government, but by the general constraints and forces that influence the society of which it is a part. I shall refer to those outside forces and constraints collectively as our “extra-judicial environment.”

Identifying and analyzing the major factors that make up and affect the extra-judicial environment is, in my opinion, decisive in determining what the role of the American judiciary will be in this century. I suggest that what we would like this role to be, or even what it has been in the past, may be less than conclusive of what that role will actually be in the future. Furthermore, our judicial role in this century will be strongly driven by an extra-judicial environment beyond our control. In fact, much of it is even beyond our nation’s control, for a principal segment of those extra-judicial factors is also extra-national, although some overlap and become internal extra-judicial factors as well.

I. DEMOGRAPHIC CHANGE

While one can posit a number of extra-judicial factors, I believe the single most important factor in terms of overall long-range impact is worldwide demographics and the apparently uncontrollable explosion in the world’s population. This is a galvanic force underlying the entire extra-judicial environment, serving as a propellant to several of the other factors I will briefly discuss. The demographic explosion, combined with reduced resources, may be the greatest problem facing the developed countries, of which the United States is the linchpin.

I believe that impending global demographic changes will affect our role as judges in several important ways. First, our caseloads will change radically. Particularly in the areas of immigration and civil rights, we will see global trends reflected in our courtrooms and we will need to be prepared for their effects. Already our southern border courts are being overwhelmed by trans-border issues. Second, our interpretative methodology must develop to meet the needs of a judicial landscape impacted more and more by international issues. It will become increasingly important to look outside our borders for guidance and information as we seek to apply and interpret our own Constitution and laws in an ever-shrinking world. Similarly, our courts will be further internationalized by a growing number of disputes related to the global economy, terrorism, the environment, and the global energy crisis. Third, the composition of the judicial establishment will change radically to reflect demographic changes in our population.

A few statistics are in order:¹

¹ Unless otherwise specified, the statistics that follow can be found in Paul Kennedy, Preparing for the Twenty-First Century (1993). Kennedy provides an excellent in-depth treatment of the challenges facing our country in the twenty-first century as a result of demographic change.
In 1825, when Malthus was completing his sixth and final edition of *An Essay on the Principle of Population*, the total world population was approximately one billion people. By 1925, it had doubled to nearly two billion, a figure that again doubled to four billion by 1976, and reached 5.3 billion by 1990. It has been estimated that the world population will climb to 8.5 billion by 2025 and reach 14.5 billion by the second half of this century.

These numbers, which are alarming enough, become even more critical when demographic distribution is factored in. In the developed countries, the population has remained stable at about one billion since 1950. It is expected that this number will increase to only about 1.2 billion by 2025. By contrast, in the underdeveloped countries, the population will soar from 2.8 billion to 9.5 billion during that same period. Thus, between the present and the year 2025, 95% of the global population growth will take place in the underdeveloped countries. For example, in 1985, Africa’s population was about the same as Europe’s. Yet by 2025, Africa’s population will be three times larger than Europe’s, reaching 1.58 billion to Europe’s 512 million, while its resources will remain constant.

Other key developing countries of the world will similarly have significant population growth. In China, the population will “only” increase from the present 1.13 billion to 1.5 billion by 2025. By contrast, India’s population could reach the two billion mark by that date, surpassing China and becoming the world’s most populous nation. Meanwhile, closer to home, Brazil will have 245 million inhabitants and Mexico 150 million by 2025. Latin America will become the most urbanized area in the world, with nearly 85% of its people living in cities by 2025. Mexico City alone will have almost twenty-one million inhabitants by 2015.

As a basis of comparison, while the population of the United States is forecast to increase by 25% from its present 281 million by the year 2025, during that same period the population of Mexico could go up by 88%, and Guatemala, on Mexico’s southern border, may see a population increase of as much as 225%.

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4 See *id.* at 23 chart 1 (citing *World Population: Squeezing in the Next Five Billion*, ECONOMIST, Jan. 20, 1990, at 19, 19).

5 *Id.* at 24 (citing *WORLD RES. INST. ET AL., WORLD RESOURCES 1990-91*, at 254-55 (1990)).

To put continental demographics in geographical perspective in this hemisphere, in 1960 the combined population of the United States and Canada was about equal to the population of Latin America. It is expected that by 2025 Latin America will have a total population of almost double that of the United States and Canada combined.

II. EXTRA-NATIONAL EXTRA-JUDICIAL FACTORS

The most obvious ramification of the momentous tilt in the world’s demographic balance is the tsunami-force waves of migration that are moving throughout the world. These will continue to tremendously impact the developed countries, as the excess populations in the underdeveloped countries seek better lives in the less populated, developed ones. The labor force in the developing countries, which is around 1.76 billion, will reach 3.1 billion by 2025. This means that thirty-eight to forty million new jobs will need to be created each year to maintain the present levels of employment in just the developing countries.

Although our principal concern is with migration involving our own borders, which are being penetrated by a steady stream of over one million illegal immigrants each year, adding to the estimated ten to twelve million undocumented aliens already here, there remain millions more potential immigrants throughout the world. We can no longer ignore what is taking place elsewhere, particularly as regards Europe, for what is happening there will have trans-Atlantic downstream effects with a direct impact on the United States.

Apart from the direct and immediate impact on the resources of the nations to which the waves of immigrants are arriving, perhaps the most compelling circumstance raised by the world’s demographic explosion will be the eventual decline in the geopolitical influence of the industrial democracies, including the United States. Industrial democracies represented about 15% of the global population in 1985, a figure expected to drop to 10% by 2025. By that time, the only democracies represented among the twenty most populous


8 See id. (projecting that in 2025 the United States and Canada will have a combined population of roughly 388 million, while Latin America and the Caribbean will have a combined population of 690 million).

9 See Rachel L. Swarns, Split over Immigration Reflects Nation’s Struggle, N.Y. TIMES, Mar. 29, 2006, at A17.


11 See id. at 128.
countries in the world will be the United States and Japan (and probably also India). 12

This situation will present two possible alternative scenarios, neither of which is promising. If the major developing countries on that list raise their productive output and standards of living sufficiently, the West’s proportion of economic output, global power, and political influence will decline steadily, simply because of the force of numbers in these developing nations. This decline in the number of countries promoting “Western values” (i.e., freedom of speech, human rights, religious tolerance, democracy, and market forces) means that they will be fighting a defensive, possibly losing battle against a world in which these values are not paramount. 13 Alternatively, if the developing countries are unable to raise their outputs and their standards of living, the developed countries will be overwhelmed by the tens of millions of migrants and refugees from the developing countries. In seeking a new life among prosperous democracies, these migrants are likely to strip those countries’ resources, causing social disruption and instability.

The rapid growth of poor societies along with increased imbalances between the richer and poorer societies will have other serious ramifications. A full discussion of these issues is far beyond the time and scope of this presentation, but I should briefly mention the most salient ones, which will influence our nation, and thus our courts.

- The spread and escalation of terrorism in all its forms is a phenomenon whose emergence is at least partially traceable to demographic pressures. Although other factors enter into the picture, social unrest and political instability have often been driven by instances of uncontrolled population growth and overcrowded social conditions. In Central America, Afghanistan/Kashmir, the Middle East, and Northern Ireland, there exist fast-growing, youthful populations, largely unemployed, with pent-up social and economic expectations in societies not well equipped to meet those demands. Add to this ideological rivalries, and racial and religious hatreds, and terrorism becomes a foregone conclusion.

- The progressive degradation of the environment is unquestionably a by-product of overpopulation. The globe is under a two-fold attack brought about on the one hand by the excessive demands and wasteful habits of affluent populations in developed countries, and on the other by the billions of new individuals in the developing world, who naturally aspire to what is enjoyed in developed countries. National and international environmental issues will become even more important questions as this century progresses.

12 Id.

13 See id. at 129 (“The population and economic-growth trends described could create an international environment even more menacing to the security prospects of the Western alliance than was the Cold War for the past generation.”).
The continuing energy crisis is directly affected by demography. By 2050, world energy usage is projected to double present needs and will more than triple by the end of the twenty-first century.\textsuperscript{14} The looming specter of uncontrollable world health issues will be exacerbated by growing population density and may be the source of a future pandemic. An unusually unstable geopolitical scenario will result in continuous military confrontations with massive military expenditures, which presently represent about 19% of our national budget.\textsuperscript{15} Even in normal times, the judiciary’s competition for scarce resources is not news to most of you. As you may be aware, as a basis of comparison, the entire annual budget for the judicial branch is only 0.2% of the total national budget.\textsuperscript{16} It is self evident that this budgetary drought, if it continues, will have a deleterious systemic impact on the long-term role of the judiciary.

### III. How Demographics Translate into Domestic Extra-Judicial Factors Affecting the Role of the Judiciary

Demographic changes in the United States, promoted in part by the world population explosion and the immigration flow into the United States, will have a major impact on the ethnic composition of our nation’s population. This will have, first, a resounding impact on the resources of the various governments of the states and on the federal establishment. Second, it is likely to promote a major restructuring of American society and its institutions, including its judicial branches.

These changes will be brought about both by further large-scale immigration\textsuperscript{17} – legal and illegal, principally from Latin America and Asia – and by the higher birth rates of the non-white ethnic groups within the United States.\textsuperscript{18} Thus, demographers predict that Caucasians will be in the minority by 2050.\textsuperscript{19}

Particularly important is the impact that this demographic transformation will have on the voting population of the United States, and as a consequence, on its political processes. The regional electoral balances that affect the composition of the House of Representatives, and to a lesser extent the Senate,

\begin{footnotes}
\item[16] See id.
\item[19] See id. at 28.
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reflect population changes. As a result, there is likely to be a further shift in voting power from the north and east of the country to the west and south, from white to non-white districts, and from Eurocentric issues to Hispanic American and Asian American concerns. Equally important is the fact that the political empowerment of these groups will undoubtedly serve as a direct catalyst in changing the composition not just of Congress, but also of the many state and local governments, as well as of the federal executive and judicial branches, including the Supreme Court.

**IV. THE JUDICIARY’S ROLE**

How we will deal with the effect of the global demographic flow on us as a nation is a question of current events yet to be solved. What can be said for present purposes is that the question of demographics will have a momentous impact on our country: socially, culturally, politically, and legally.

I believe it is fairly clear that the extra-judicial environment, of which demographics is the most important underlying force, will have a definite impact on the twenty-first century’s judiciary. The question, then, is how the judiciary will deal with the impact of demographic changes. Will these matters, particularly those dealing with immigration, be channeled to specific courts, as has recently been suggested by proposed legislation in Congress? Will the problem degenerate to the point that segments of the population are concentrated in certain geographic areas, as happened during World War II, although in a different context? Will we go down the path of internal passports? Will it reach the point of mass arrests and deportations? How will international law and treaties come into the picture?

Of course, these and other similar questions also arise with respect to the by-products of demographic tensions such as terrorism and transnational health issues. For example, what role will the courts play in the event of a credible threat or actual terrorist attack with a weapon of mass destruction, or in the event of a pandemic? Recently, we have had several previews, including the controversies surrounding the Guantanamo Bay detentions and the related issues raised by the creation of military commissions, restrictions on the use of the writ of habeas corpus and related jurisdictional matters (both with regard to the so-called “war on terrorism” and immigration), electronic surveillance by presidential directive and related Fourth Amendment controversies, the scope of the President’s war powers, and others that I am certain are well known to this audience.

**A. Checks and Balances**

Six years into the twenty-first century, it is apparent that our nation is entering one of the most crucial periods in its history. The volatility of the world makes it more difficult every day to control our destiny, notwithstanding our preeminence as the globe’s only superpower. It is true that our nation has faced dangerous epochs in the past, in which our national resolve was sorely tested, such as during the Civil War, World War II, and the Cold War period
that followed. Yet the present milieu seems highly precarious, if for no other reason than the apparently amorphous nature of the problems that face us, and the lack of clarity as to their solutions.

Unfortunately, it is within the framework of this black hole that I look upon the subject with which this conference grapples. Frankly, in doing so I am left with a considerable amount of uneasiness as to the role the judiciary will play in the maelstrom that faces us, for the role of the judiciary as an institution has thus far been sketchy at best, particularly when facing serious transgressions by the executive branch.\textsuperscript{20} This, regrettably, is in keeping with our posture during similar times of crisis in our history.

It is in such instances of national crisis that it is most tempting to infringe on fundamental constitutional rights, with the motivation or excuse of pursuing competing but plausibly noble interests.\textsuperscript{21} If you need be reminded of similar moments in our past, let me just refer to the notorious Espionage Act prosecutions that took place during World War I under President Woodrow Wilson’s administration,\textsuperscript{22} or to the Japanese American internment cases during the World War II period,\textsuperscript{23} not to mention more recent examples like that of citizen Padilla.\textsuperscript{24}

The bedrocks of our constitutional system are the separation of powers between the three branches, the balance of power among them, and the ability of each branch to check overreaching by another branch. The judiciary as an unelected body is only indirectly accountable to the people, and thus, it is not for the judiciary to second-guess the other branches. However, the judiciary must not shirk its duty to uphold the Constitution and prevent overreaching by the other branches. I cannot say that the judiciary’s performance to date has been stellar in facing up to what by all lights has been executive overreaching.

B. Legal Pluralism

Xenophobia, whether in considering the general subjects I have mentioned, or in our judicial answers to resolving the issues they spawn, is not a response that should make us proud, nor, for that matter, one that makes objective sense. I suggest that in the same way the United States has chosen to become an

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\item \textsuperscript{20} See, e.g., Rumsfeld v. Padilla, 542 U.S. 426, 442, 451 (2004) (denying the habeas corpus petition of a U.S. citizen detained as an “enemy combatant”). However, in the months after this speech was delivered, the Court issued a decision that gives cause for hope. See Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2759 (2006) (holding that a military commission convened by the President to try a Yemeni national could not proceed “because its structure and procedures violate both the [Uniform Code of Military Justice] and the Geneva Conventions”).
\item \textsuperscript{21} See generally Geoffrey R. Stone, Perilous Times (2004) (discussing the United States’ long history of “overreacting to perceived dangers during wartime”).
\item \textsuperscript{22} See id. at 146.
\item \textsuperscript{23} See Korematsu v. United States, 323 U.S. 214, 219-20 (1944).
\item \textsuperscript{24} See supra note 20.
\end{itemize}
international player and has sought to influence the course of other nations – friends and foes alike – its judiciary cannot afford to become legal isolationists. Are we not surrounded by successful examples to the contrary in every other discipline or profession? Where would we be, or what would the United States be like, if we only looked within our borders for scientific or technical knowledge, or for our cultural expansion in music or literature? Granted, many of us believe that our legal and constitutional systems are the world’s best, and in large part they probably are. But to assume that they are, without even comparing or searching to see what others have done in solving problems that may be similar to those facing our society, strikes me as a rather peculiar way to run a railroad.

C. Constitutional Interpretation

Last, and in a related vein, is the question of the appropriate interpretative methodology for resolving the issues that will be produced by the dynamic extra-judicial environment to which I have referred. Some of these issues may resemble matters previously considered by the courts, and thus may properly be subjected to old techniques and approaches. There will be many other issues, however, requiring innovative consideration, because they are new to the courts or because the changing times require it. In attempting to resolve these issues, flexibility, not recourse to “originalism,” is the answer.

In fact, this is not a novel approach to judicial interpretation. Rather, it is as old as the republic. It is at least as old as Marbury v. Madison, a seminal case in our constitutional constellation. Marbury established what was then a new concept, needed by the nascent republic to tackle new problems, and which a progressive judiciary, not far removed from the Founding Fathers, did not hesitate to create, notwithstanding the absence of any authorizing language in the still-wet ink of the Constitution. Perhaps the role of the judiciary in the twenty-first century should take this old revolutionary spirit as its guiding light.

CONCLUSION

There is much more that can be said of the broad subject that I have chosen to address today, but as is clearly apparent, I have bitten off more than I can chew in the bite of time that this luncheon allows me. Luckily for me, this is an audience that can easily fill in the many gaps I have left unattended, and one that is more than able to discard my comments altogether if that is your wish. Even luckier is the fact that I am appointed practically for life and that I am leaving town immediately after this wonderful gathering. In any event, I thank you for your patience and for the pleasure of your company.

25 5 U.S. (1 Cranch) 137 (1803).