JUDICIAL ENGAGEMENT AND CIVIC ENGAGEMENT: FOUR CASE STUDIES

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INTRODUCTION

The Institute for Justice recently launched the Center for Judicial Engagement with a publication: *Government Unchecked: The False Problem of "Judicial Activism" and the Need for Judicial Engagement.*[1] The Center conducted an empirical study of the frequency with which the Supreme Court has ruled state and federal laws unconstitutional or overruled its own precedents.[2] Contrary to popular opinion, this study reported, the Court rarely second-guesses itself and almost never invalidates statutes.[3] From its data, the Center concludes that for decades, the Court has been "abdicating its duty to enforce the Constitution."[4] The Center's study closes by calling on judges to face constitutional issues head-on and challenging them to abandon rational basis review, which the Center considers to "practically ensure" that the government wins constitutional cases.[5]

In this Essay, I hope to offer the Institute and the staff who work on its Center a little constructive criticism. In my opinion, the Center for Judicial Engagement and *Government Unchecked* target some important symptoms in our constitutional culture—but not all the symptoms, and definitely not the disease. Engaged constitutionalist judges will be in no position to enforce constitutional limitations as vigorously as the Institute or Center hope, I suspect, unless they have political support. I have no particular objections to the Center or *Government Unchecked*. That said, I suspect constitutionalists—libertarian or otherwise—will not achieve the goals to which the Institute for Justice aspires unless they all first restore respect for the Constitu-

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[*] Professor of Law, George Mason University. I thank David Bernstein for helpful comments, and I thank Lora Barnhart Driscoll and the other editors of the GEORGE MASON LAW REVIEW for their excellent editing. Many of my observations in this Essay come from my experience teaching George Mason University School of Law's course Constitutional Law: The Founding. I am grateful to four classes of students in that class for helping me think through the themes raised in this Essay.

[1] *See generally* CLARK NEILY & DICK M. CARPENTER II, GOVERNMENT UNCHECKED: THE FALSE PROBLEM OF "JUDICIAL ACTIVISM" AND THE NEED FOR JUDICIAL ENGAGEMENT (2011), *available at* http://www.ij.org/images/pdf_folder/other_pubs/grvnmtunchkd.pdf.

[2] *Id.* at 3-7.

[3] *Id.* at 1.

[4] *Id.* at 11; *see also id.* at 9 ("[E]ven allowing for its limited docket, it is hard to conclude that our biggest problem is the Court doing too much. Indeed, the opposite is likely true.").

[5] *Id.* at 11.

tion in popular culture and among a broader cross section of elite opinion shapers.

I doubt that these suspicions are path-breaking.[6] *The Federalist No. 78* described the federal judiciary as the "least dangerous [branch] to the political rights of the Constitution."[7] Congress has "WILL" and "direction . . . of the wealth of the society," and the President has "FORCE," "dispenses the honors [and] holds the sword of the community," but the courts have "merely judgment."[8] *The Federalist*'s claims resonate in contemporary constitutional scholarship—for example, political science scholarship debating whether and to what extent courts may effectuate social change through litigation.[9] My aim is more modest—to make sure that readers interested in judicial engagement consider arguments and bodies of scholarship they really ought to consider before getting too invested in a litigation program or a research agenda relating to such engagement. I wonder whether resources dedicated toward judicial engagement might be better deployed on *civic* engagement.

I will develop my suspicions in the manner in which they are most likely to be introduced to law students, in connection with several major episodes in American constitutional history.[10] In that spirit, Part I recounts the debate over the Alien and Sedition Acts of 1798. Part II recounts the debate over the Bank of the United States. Part III recounts *Dred Scott v. Sandford*[11] and the debate in the 1850s about extending slavery into the federal territories. Part IV describes two ways of understanding the New Deal transformation in the Court's jurisprudence. As is frequently true, these cases may be interpreted in different ways. In Part V, I offer my interpretations and offer some suggestions for the Center as it begins its efforts.

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6 *See, e.g.*, Mark A. Graber, *Hollow Hopes and Exaggerated Fears: The Canon/Anticanon in Context*, 125 HARV. L. REV. F. 33 (2011).

7 THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

8 *Id.*

9 *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); *see also* JOEL HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM (1978); DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); STUART SCHEINGOLD, THE POLITICS OF RIGHTS (1974).

10 *See, e.g.*, MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 67-83, 114-39, 185 (2010) (recounting debates over the constitutionality of the Bank of the United States, the Alien and Sedition Acts, and the *Dred Scott* decision); *see also* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 27-91, 226-60, 435-56, 549-58 (5th ed. 2006).

11 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

I. THE SEDITION ACT

The Sedition Act of 1798 made it a federal crime (among other things) to "counsel, advise or attempt to procure any insurrection, riot, unlawful assembly, or combination."[12] President John Adams and Federalist partisans supported the Act.[13] They considered it a measure necessary and proper to carry into execution the federal government's powers to wage war against an increasingly belligerent Republic of France.[14] Thomas Jefferson, James Madison, and nascent Republican partisans opposed the Act.[15] They disputed whether France was as threatening to U.S. interests as Federalists maintained, and they contended that the Sedition Act was really designed to suppress Republican criticisms of U.S. policy.[16]

The Adams administration brought prosecutions under the Act, and it was not found to be unconstitutional.[17] Yet even though a Federalist Congress, a Federalist President, and inferior federal judges appointed by Federalists all upheld the Act, Republicans made the 1800 federal elections a referendum on the Act's constitutionality. Republicans maintained that the Act exceeded the scope of the U.S. government's constitutional powers.[18] Jefferson and Madison persuaded friendly Republican state legislatures to adopt resolutions making two constitutional charges.[19] According to one set of resolutions, adopted in Virginia, the Sedition Act "exercise[d] . . . a power not delegated by the Constitution," and it was "expressly and positively forbidden" to the federal government "by one of the amendments thereto"

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12 Act of July 14, 1798, ch. 74, § 1, 1 Stat. 596 (1798) (expired 1801).

13 *See* Kurt T. Lash & Alicia Harrison, *Minority Report: John Marshall and the Defense of the Alien and Sedition Acts*, 68 OHIO ST. L.J. 435, 438 (2007).

14 *See, e.g.*, John Marshall, Report of the Minority on the Virginia Resolutions (Jan. 22, 1799), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 136, 137 (Philip B. Kurland & Ralph Lerner eds., 1987) (arguing that the Necessary and Proper Clause "is admitted to authorize congress to pass any act for the punishment of those who would resist the execution of the laws, because such an act would be incontestably necessary and proper for carrying into execution the powers vested in the government. If it authorizes the punishment of actual resistance, does it not also authorize the punishment of those acts, which are criminal in themselves, and which obviously lead to and prepare resistance?"). This report is sometimes attributed to Henry Lee and other times to John Marshall. I agree with the latter attribution. *See* Lash & Harrison, *supra* note 13, at 437 & n.7.

15 *See* Lash & Harrison, *supra* note 13, at 438.

16 *See, e.g.*, 1 THOMAS V. COOPER & HECTOR T. FENTON, AMERICAN POLITICS (NON-PARTISAN) FROM THE BEGINNING TO DATE 10-11 (Philadelphia, Fireside Pub. Co. 15th rev. ed. 1892); DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 173 (1994).

17 *See, e.g.*, United States v. Cooper, 25 F. Cas. 631 (C.C.D. Pa. 1800) (No. 14,865); Lyon's Case, 15 F. Cas. 1183 (C.C.D. Vt. 1798) (No. 8,646).

18 *See* Republican Platform, Philadelphia (1800), *reprinted in* 2 COOPER & FENTON, *supra* note 16, at 21, 22.

19 *See* Thomas Jefferson, Kentucky Resolutions (Nov. 10, 1798 & Nov. 14, 1799), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 14, at 131-35; James Madison, Virginia Resolutions (Dec. 21, 1798), *reprinted in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 14, at 135-36.

because "it [was] leveled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right."[20] Federalist state legislatures adopted competing resolutions defending the Adams administration.[21]

In 1800, Republicans won the presidency and enough state legislatures to elect a majority in the U.S. Senate in the Sixth Congress.[22] In that Congress, the (still-Federalist) House voted against reenacting the soon-to-sunset Act.[23] President Jefferson instructed a U.S. attorney to quash an ongoing prosecution under the Act, and he pardoned two individuals convicted under the Act.[24] Jefferson defended his actions, writing that "I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image."[25]

Advocates of judicial engagement might cite the controversy over the Sedition Act as further proof that we need an engaged judiciary.[26] The federal courts that presided over prosecutions under the Act could have vindicated free speech and the Necessary and Proper Clause as resoundingly as Jefferson did. They did not. The U.S. Supreme Court certainly interpreted the Sedition Act episode in this spirit in *New York Times Co. v. Sullivan*.[27]

I am more skeptical. This argument has force only if one assumes, as the Court did in *Sullivan*,[28] that it is clear beyond reasonable doubt that the Sedition Act was unconstitutional. In my opinion, that assumption is un-

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20 *See, e.g.*, Madison, *supra* note 19, at 136 (emphases omitted).

21 *See, e.g.*, Resolution of the Senate of the Commonwealth of Massachusetts (Feb. 9, 1799), *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA 533-37 (1787) (Jonathan Elliot ed., Washington, 2d rev. ed., 1836).

22 *See Party Division in the Senate, 1789-Present*, U.S. SENATE, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Apr. 4, 2012); *Thomas Jefferson*, WHITE HOUSE, http://www.whitehouse.gov/about/presidents/thomasjefferson (last visited Apr. 4, 2012).

23 10 ANNALS OF CONG. 1047-50 (1801).

24 DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-29, at 5-6 (2001).

25 Letter from Thomas Jefferson to Mrs. Adams (July 22, 1804), *reprinted in* 4 THE WRITINGS OF THOMAS JEFFERSON 555, 556 (H.A. Washington ed., New York, John C. Riker 1854).

26 *See* NEILY & CARPENTER, *supra* note 1, at 9-10 (calling for "a government of laws that is not ruled by the whim of politicians" and criticizing judges for "judicial abdication" in key constitutional law cases).

27 376 U.S. 254, 276 (1964) (concluding that "the attack upon [the Sedition Act's] validity has carried the day in the court of history").

28 *Id.* (referring to "a broad consensus [among Justices of the Court] that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment").

charitable and anachronistic. When modern readers[29] read the Free Speech Clause, they stress the "no" and "speech": "Congress shall make *no* law . . . abridging the freedom of *speech*."[30] In historical context, however, "freedom" and "abridging" deserve the emphasis: "Congress shall make no law . . . *abridging* the *freedom* of speech."[31] At the founding, freedom of speech was understood to be limited by background natural law principles harmonizing individual natural rights and the public moral order.[32] So not all "speech" in the most literal sense belonged in the "freedom of speech" in the natural law sense. Thus, Blackstone and early American authorities all assumed as a matter of course that public authorities could suppress sedition without encroaching on free speech guarantees.[33] Indeed, in his defense of the Sedition Act, John Marshall understood the freedoms of speech and press to refer to

> a liberty to publish, free from previous restraint, any thing [sic] and every thing [sic] at the discretion of the printer only, but not the liberty of spreading with impunity false and scandalous slanders which may destroy the peace and mangle the reputation of an individual or of a community.[34]

The founding-era interpretation of the term "abridging" reinforces this understanding, for "abridging" was a synonym for "restraining more than necessary to regulate consistent with the public welfare and morals."[35] A government action did not abridge free speech—instead, it "regulated" such speech to keep it within its rightful limits—if it restrained exercise of "the liberty of spreading . . . false and scandalous slanders."[36] This background does not necessarily make the Federalists' constitutional defenses of the Sedition Act right, but it does make the constitutional question close.

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29 *See, e.g.*, Gary Lawson, *The Constitution's Congress*, 89 B.U. L. REV. 399, 406 (2009) (citing the Sedition Act as an example of a flagrantly unconstitutional law without providing any explanation why it was unconstitutional).

30 U.S. CONST. amend. I (emphases added).

31 *Id.* (emphases added).

32 *See* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 922-30 (1993).

33 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *150-53; *see also* Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 325-26 (Pa. 1788).

34 Marshall, *supra* note 14, at 138.

35 *See* Eric R. Claeys, *Blackstone's* Commentaries *and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 SAN DIEGO L. REV. 777, 808-10 (2008).

36 *Id.* at 810.

II. THE NATIONAL BANK

The First Congress enacted an enabling statute authorizing a national bank, over serious objections of James Madison (then a member of Congress), Jefferson (then President Washington's Secretary of State), and Edmund Randolph (Washington's Attorney General).[37] The bank's charter expired in 1811.[38] In 1811, the House of Representatives failed to pass a bill to recharter the Bank by one vote; in the same year, the Senate deadlocked on the matter.[39] In 1815, President Madison vetoed a bill establishing a *second* bank, but after a year's back and forth, Congress passed—and Madison signed—another law chartering a national bank.[40] The Supreme Court upheld the constitutionality of the Second Bank in *McCulloch v. Maryland*[41] in 1819.

In Congress, in *McCulloch*, and in subsequent debates, the dispute over the Banks' constitutionality focused above all else on one question: whether a national bank is a means "necessary and proper for carrying into [e]xecution"[42] Congress's powers over taxation, federal borrowing, commerce, or other enumerated topics.[43] Most contemporary judges,[44] and even many leading conservative judges,[45] construe the Necessary and Proper Clause extremely broadly. When they are construed narrowly, however, the terms "necessary" and "proper" require interpreters to exercise considerable discretion.

In 1832, President Jackson reopened the constitutional debate by vetoing on constitutional grounds a bill that would have reauthorized the Second Bank. Jackson also went to great lengths over the next several years fighting to withdraw the Bank's deposits.[46] More than a decade and a half

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37 *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at 78-80 (1997).

38 CURRIE, *supra* note 24, at 250.

39 *Id.* at 253.

40 *Id.* at 255-57.

41 17 U.S. (4 Wheat.) 316 (1819).

42 U.S. CONST. art. I, § 8, cl. 18; *McCulloch*, 17 U.S. at 330-31; CURRIE, *supra* note 24, at 251-53; *see also* Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the* Legal Tender Cases, 95 GEO. L.J. 119, 130-32 (2006) (providing further discussion of the Necessary and Proper Clause in relation to *McCulloch*).

43 *See* U.S. CONST. art. I, § 8, cls. 1-17.

44 *See, e.g.*, United States v. Comstock, 130 S. Ct. 1949, 1956 (2010) (construing the Necessary and Proper Clause and Supreme Court precedent on it to inquire "whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power").

45 *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 33-42 (2005) (Scalia, J., concurring) (construing the Necessary and Proper Clause to authorize Congress to regulate any local economic activity whose consequences substantially affect interstate commerce).

46 *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-61, at 65-79 (2005).

had passed between Madison's supporting the Second Bank and Jackson's veto. Yet Jackson was not impressed:

> Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress, in 1791, decided in favor of a bank; another, in 1811, decided against it. One Congress, in 1815, decided against a bank; another, in 1816, decided in its favor. . . . If we resort to the States, the expressions of legislative, judicial, and executive opinions against the bank have been probably to those in its favor as 4 to 1.[47]

In addition, by 1832, it was more than a decade after the Supreme Court had spoken in *McCulloch*. Again, Jackson was not impressed:

> Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. . . . The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.[48]

Most important, the *McCulloch* Court had said, "to undertake here to inquire into the degree of [the Second Bank's] necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."[49] Jacksonian Democrats could have taken *McCulloch*'s deference as a cue not to worry about constitutional niceties.[50] Yet Jackson embraced the responsibility *McCulloch* left to the political departments:

> Under the decision of the Supreme Court, therefore, it is the exclusive province of Congress and the President to decide whether the particular features of this act are *necessary* and *proper* in order to enable the bank to perform conveniently and efficiently the public duties assigned to it as a fiscal agent, and therefore constitutional, or *unnecessary* and *improper*, and therefore unconstitutional. . . . It can not be "*necessary*" or "*proper*" for Congress to barter away or divest themselves of any of the powers vested in them by the Constitution to be exercised for the public good. It is not "*necessary*" to the efficiency of the bank, nor is it "*proper*" in relation to themselves and their successors.[51]

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47 Andrew Jackson, Veto Message (July 10, 1832), *reprinted in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1144-45 (James D. Richardson ed., Bureau of Nat'l Literature 1908). For an example of a state resolution, see J. Res., 58th Gen. Assemb., 1st Sess. (N.J. 1834).

48 Jackson, *supra* note 47, at 1145.

49 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

50 *See, e.g.*, Matt Cover, *When Asked Where the Constitution Authorizes Congress to Order Americans to Buy Health Insurance, Pelosi Says: 'Are You Serious?'*, CNSNEWS.COM (Oct. 22, 2009), http://cnsnews.com/node/55971.

51 Jackson, *supra* note 47, at 1146-47.

III. *DRED SCOTT*

A generation after *McCulloch*, political parties and statesmen were even more engaged, this time about the extent to which slavery should be permitted in federal territories. Although political leaders had tried to smooth over the slavery controversy throughout the first half of the nineteenth century, by the 1850s the controversy was virtually impossible to control. Leading statesmen thought they had settled the controversy for a generation with the Compromise of 1850.[52] In 1854, however, congressional Democrats enacted the Kansas-Nebraska Act. This Act repealed the Missouri Compromise[53] and allowed the Kansas and Nebraska Territories to be organized as slave territories.[54] That and other proslavery national measures encouraged antislavery opponents to organize the new Republican Party, which was committed to restricting the expansion of slavery.[55]

In *Dred Scott v. Sandford*, however, Chief Justice Taney wrote the opinion in which the Court declared that the federal government actually *lacked* power to restrict the expansion of slavery.[56] The Court's opinion contained at least three separate holdings. First, black Americans never were, and could never be, "citizens of the United States" eligible to sue in Article III courts.[57] Second, Congress's power to make "needful [r]ules . . . respecting" the federal territories[58] did not include the power to restrict slavery in territories.[59] Third, the Fifth Amendment's Due Process Clause[60] also prevented Congress from so restricting slavery.[61] One contemporary casebook describes the *Dred Scott* Court opinion as "one of the most outrageously, and seemingly deliberately, wrong Supreme Court decisions of all time."[62] That assessment is about right. To take one of several examples: it is hard to reconcile Taney's conclusion about Congress's enumerated powers over the Louisiana Territories with the term "needful" in the Territories Clause—and impossible to square it with Taney's concession that Congress could impose conditions on territorial governance in the exercise of its powers under the Statehood Clause.[63]

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52 *See* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 67-71 (1988).

53 *See* Act of Mar. 6, 1820, § 8, 3 Stat. 545, 548 (1820).

54 *See* An Act to Organize the Territories of Nebraska and Kansas, ch. 59, 10 Stat. 277 (1854).

55 *See Republican Platform of 1856*, USHISTORY.ORG, http://www.ushistory.org/gop/convention_1856republicanplatform.htm (last visited Apr. 4, 2012).

56 60 U.S. (19 How.) 393, 450-52 (1857).

57 *Id.* at 403-27.

58 U.S. CONST. art. IV, § 3, cl. 2.

59 *See Dred Scott*, 60 U.S. at 432-48.

60 U.S. CONST. amend. V.

61 *See Dred Scott*, 60 U.S. at 450-52.

62 PAULSEN ET AL., *supra* note 10, at 893.

63 *Compare* U.S. CONST. art. IV, § 3, cl. 2, *with Dred Scott*, 60 U.S. at 446-49. *See also Dred Scott*, 60 U.S. at 623-24 (Curtis, J., dissenting). For a longer survey of Taney's many errors, see DAVID

It is reasonable to interpret the *Dred Scott* decision as an effort by pro-slavery Southerners to use the Constitution to delegitimize and to deter anti-slavery politicians' efforts to restrict the future spread of slavery.[64] Anti-slavery forces did not take the hint. The Iowa Legislature adopted a joint resolution describing *Dred Scott* as an "extra judicial opinion . . . not binding in law or conscience upon the Government or people of the United States."[65] Abraham Lincoln encouraged citizens to respect the Supreme Court's judgment in relation to Scott and Sandford. Yet (citing President Jackson's treatment of *McCulloch*) Lincoln also declined to respect the Court opinion "as a political rule . . . which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision."[66] When Republicans took the White House and the U.S. House in 1860, Lincoln warned in his first inaugural speech

> that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of [the Court].[67]

And in apparent defiance of *Dred Scott*, a Republican Congress enacted laws (signed by Lincoln) in 1862 outlawing slavery in the District of Columbia and all federal territories.[68]

The United States overturned *Dred Scott* beyond any criticism when the Civil War Amendments were ratified in 1865 and 1868.[69] Yet those Amendments were ratified only because Lincoln and leading Republicans had forged a political coalition in large part by campaigning against *Dred Scott*.

P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 263-76 (1985).

64 *See, e.g.*, DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 305-14 (1978) (discussing President Buchanan's push to ensure that *Dred Scott* addressed Congress's power to prohibit slavery in the territories).

65 Joint Resolution of the Iowa Legislature (1857), *reprinted in* H. W. LATHROP, THE LIFE AND TIMES OF SAMUEL J. KIRKWOOD, IOWA'S WAR GOVERNOR 65-66 (Iowa City, 1893).

66 Sixth Lincoln-Douglas Debate, Quincy, Illinois: Mr. Lincoln's Speech (Oct. 13, 1858), *reprinted in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832-1858, at 730, 741 (Don E. Fehrenbacher ed., 1989).

67 Abraham Lincoln, First Inaugural Address, *reprinted in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 215, 221 (Don E. Fehrenbacher ed., 1989).

68 *See* Act of June 19, 1862, ch. 111, 12 Stat. 432 (1862); Act of Apr. 16, 1862, ch. 59, 12 Stat. 376 (1862).

69 *See* U.S. CONST. amends. XIII, XIV.

IV. THE NEW DEAL

During the New Deal, Congress instituted, and the federal courts acquiesced in, many programs that reflected a substantially new understanding of the federal government's powers and responsibilities. I will refer to this understanding as "New Deal administrative governance." Under this understanding, Congress has power to regulate or spend on many local activities that affect the national economy.[70] Further, to accomplish its regulatory and spending purposes, Congress has power to empower regulatory agencies that operate substantially independent of supervision by the President or federal courts.[71] Although some maintain that New Deal administrative governance is consistent with the Constitution,[72] administrative law scholar, Professor James Landis, said at the time that he was "not too greatly concerned with the extent to which such [administrative] action does violence to the traditional tripartite theory of governmental organization."[73] I find Landis's description more believable, and I assume here that New Deal administrative governance is inconsistent with the Constitution's plain meaning.[74]

The transformation to New Deal administrative governance teaches different lessons depending on which of two accounts of the New Deal one finds more persuasive—externalist and internalist.[75] To keep my observations about both accounts manageable, I will restate each account illustrating with representative cases about the scope of the federal government's power under the Commerce Clause.[76]

"Externalist" accounts explain constitutional law during the New Deal as resulting primarily from a confrontation between the U.S. Supreme Court on one hand and President Franklin Roosevelt and a Democratic Congress on the other.[77] Thus, for example, during Roosevelt's first term as President,

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[70] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 124-25 (1942) (upholding New Deal regulation of intrastate commerce based on its "substantial effects" on interstate commerce); Helvering v. Davis, 301 U.S. 619, 634-36, 640-41 (1937) (upholding the constitutionality of the Social Security Act).

[71] *See, e.g.*, Yakus v. United States, 321 U.S. 414, 425-26 (1944); Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935); Crowell v. Benson, 285 U.S. 22, 53-54 (1932).

[72] *See generally* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

[73] JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 12 (1938).

[74] *See* U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1. *See generally* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (arguing that "[t]he post-New Deal administrative state is unconstitutional").

[75] *See* Laura Kalman, *Law, Politics and the New Deal(s)*, 108 YALE L.J. 2165, 2170-78 (1999); *see also* Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 205-06 (1994).

[76] *See* U.S. CONST. art. I, § 8, cl. 3.

[77] *See generally* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 132-62 (1995). *See also* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 47-50 (1993).

the Supreme Court held that four different New Deal laws exceeded Congress's enumerated powers over interstate commerce.[78] When Roosevelt ran for reelection in 1936, the Democratic Party's platform promised either to enact broad federal laws that would satisfy the Supreme Court's interpretations of the Commerce Clause or to amend the Constitution to allow such legislation.[79] In the 1936 election, Roosevelt took 61 percent of the popular vote and 523 of 531 electoral votes, and Democrats won enough Senate seats that there were seventy-six Democratic senators in 1937.[80]

In early 1937, Roosevelt submitted a bill then called "A Bill to Reorganize the Judicial Branch" now known as the "Court-Packing Plan." The bill proposed to add one extra Justice to the Court for every Justice over the age of 70.[81] Roosevelt defended the plan on the specific ground that from 1933 to 1937, the Court had "been acting not as a judicial body, but as a policy-making body," and he quoted dissenting opinions characterizing the Court's Commerce Clause case law as "plac[ing] 'an unwarranted limitation upon the commerce clause'" or as "tortured construction[s] of the Constitution."[82] In April 1937, the Court held in *NLRB v. Jones & Laughlin Steel Corp.*[83] that Congress's powers over interstate commerce gave it power to institute a federal labor law applicable to local companies.[84]

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78 *See* Carter v. Carter Coal Co., 298 U.S. 238, 289-311 (1936) (holding the Bituminous Coal Conservation Act of 1935 unconstitutional for improperly subjecting "the dissentient minority . . . to the will of the stated majority"); United States v. Butler, 297 U.S. 1, 63-65 (1936) (holding the Agricultural Adjustment Act unconstitutional for improperly attempting to regulate agricultural production, "a purely local activity"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-51 (1935) (holding the National Industrial Recovery Act unconstitutional for not providing specific "rules of conduct" for administrative agencies to follow); R.R. Ret. Bd. v. Alton R.R., 295 U.S. 330, 348-49 (1935) (holding the Railroad Retirement Act unconstitutional for requiring railroads to enact mandatory retirements and pensions at the expense of loyal employees).

79 *Democratic Party Platform of 1936, June 23, 1936*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=29596 (last visited Apr. 4, 2012) ("We have sought and will continue to seek to [solve labor, housing, and economic problems, among others] through legislation within the Constitution. If these problems cannot be effectively solved by legislation within the Constitution, we shall seek such clarifying amendment as will assure to the legislatures of the several States and to the Congress of the United States, each within its proper jurisdiction, the power to enact those laws which the State and Federal legislatures, within their respective spheres, shall find necessary, in order adequately to regulate commerce, protect public health and safety and safeguard economic security.").

80 JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 239 (2010).

81 Cushman, *supra* note 75, at 208 (citing 81 CONG. REC. 877-81 (1937)).

82 Franklin D. Roosevelt, Fireside Chat on the Plan for the Reorganization of the Federal Judiciary (Mar. 9, 1937) (third internal quotation marks omitted), *available at* http://teachingamericanhistory.org/library/index.asp?document=2560.

83 301 U.S. 1 (1937) (5-4 decision).

84 *Id.* at 36-37 ("The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact

To be sure, Roosevelt's Court-Packing Plan stalled later, and it may be too facile to say that one or two swing Justices made "a switch in time that saved Nine."[85] Even so, starting in the spring of 1937, the Court did significantly revise constitutional federalism and other doctrines that precipitated the 1936-1937 showdown, and its new doctrines reduced the potential for conflict with Congress and the President.[86]

By contrast, "internalist" accounts posit that the New Deal transformation was driven primarily by gradual changes in elite legal thought and by contradictions within the Court's own doctrine.[87] In the internalist view, the Supreme Court's pre-1937 decisions gradually incorporated more and more pragmatic accommodations of the necessity of centralized administrative governance (if one believed supporters of the new cases)—or more and more dry rot (if one preferred to believe those cases' critics).[88] In the period between 1935 and 1938, the dissonance between the old-and-narrower and new-and-broader views of national power became intolerable. Starting in that period, the Court threw out or retrofitted the old while it recast the new as the authoritative interpretations of the relevant provisions.

The Court's Commerce Clause supports the internalist interpretation as well as it does the externalist interpretation. In the period between 1895 and 1937, the 1895 decision *United States v. E.C. Knight Co.*[89] framed the general contours of Commerce Clause doctrine.[90] The *E.C. Knight* Court interpreted the Clause to empower Congress to regulate trade and transportation between two or more states, but not to empower, and instead to withhold from, Congress power to regulate trade within a single state, and also local activities that produced goods or services for subsequent trade.[91] In the 1914 *Shreveport Rate Cases*,[92] however, the Interstate Commerce Commission ("ICC") had claimed the power to issue railroad rate regulations preempting state regulations for in-state railroad routes on the same routes as interstate routes.[93] The Court upheld the ICC regulations, arguing that it

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'all appropriate legislation' for its 'protection or advancement'; to adopt measures 'to promote its growth and insure its safety'; 'to foster, protect, control, and restrain.'" (citations omitted)).

85 *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 973-74 & n.9 (2000) (internal quotation marks omitted) (describing the numerous sources to whom various scholars have attributed this phrase).

86 *See* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 234-35 (1993).

87 *See generally* G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000). For an internal account focusing specifically on constitutional federalism, see Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997).

88 *See generally* Cushman, *supra* note 75.

89 156 U.S. 1 (1895).

90 *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 298-301 (1936) (citing *E.C. Knight* as one of three authoritative cases delineating the scope of the commerce power).

91 *See E.C. Knight*, 156 U.S. at 11-16.

92 Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342 (1914).

93 *Id.* at 346-47.

was necessary and proper for Congress (and its delegate, the ICC) to preempt state rates that would otherwise undermine federal rates and diminish the volume of interstate carriage.[94] This decision respected *E.C. Knight*'s general delineations of federal and state regulatory power—but it created an exception for cases in which state price or rate regulations might undermine federal targets.

I believe that the *Shreveport Rate Cases* are neither consistent with the Commerce Clause's (and Necessary and Proper Clause's) original meanings nor rightly decided.[95] Yet assume, as most or all Justices did between 1914 and 1937, that the *Shreveport Rate Cases* were either rightly decided or at least deserving of respect as precedent. Did those cases' holdings state a narrow exception to solve a hard problem or a novel way to understand Commerce Clause regulation? It depends on how much one is willing to rate different regulatory schemes by the extent to which they preserve the Commerce Clause's delineations between state and federal authority. In 1914, federal and state authorities were regulating only railroads and a few exceptional industries as common carriers.[96] The *Shreveport Rate Cases* were legitimately understood to apply only when the U.S. government was regulating interstate common carriers.[97]

By the time of the New Deal, however, state and federal authorities were trying to impose common-carrier regulations on many traditionally private businesses. In a 1934 case, the Supreme Court prevented a state from reclassifying ice-making as being "affected with a public interest."[98] Yet it is more revealing that political and elite opinions had shifted to the point that many Americans assumed that it was perfectly legitimate to use regulation to cartelize ice-making. In *Nebbia v. New York*,[99] a 5-4 majority of the Supreme Court announced it was giving up efforts to sort businesses by whether they were affected with a public interest.[100] Within a decade, that holding had a cascade effect in Commerce Clause doctrine. As Professor Barry Cushman has shown, the pre-New Deal Court had relied on the distinction between common carriers and private businesses to explain

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94 *See id.* at 353-54; *cf.* U.S. CONST. art. I, § 8, cl. 18 (Necessary and Proper Clause).

95 *See* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 54-58 (2006); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1414-19 (1987) [hereinafter Epstein, *Proper Scope*].

96 *See, e.g.*, Epstein, *Proper Scope*, *supra* note 95, at 1418-20 (discussing railroads); *see also Tap Line Cases*, 234 U.S. 1, 26-29 (1914) (holding that logging roads (i.e., tap lines) between lumber mills and railroads were common carriers).

97 *See, e.g.*, Epstein, *Proper Scope*, *supra* note 95, at 1418-20.

98 *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 301 (1932) (Brandeis, J., dissenting) (quoting German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 408 (1914)) (internal quotation marks omitted).

99 291 U.S. 502 (1934) (5-4 decision).

100 *Id.* at 536 ("It is clear that there is no closed class or category of businesses affected with a public interest . . . .").

when the *Shreveport Rate Cases* applied as exceptions to *E.C. Knight*'s general rule.[101] Once the Court had decided the game was no longer worth the candle in due process, it decided quickly to cut the game off in its federalism case law as well.

V. IMPLICATIONS

Different observers may interpret these episodes differently. Before offering my interpretations, let me anticipate a few possible sources of misunderstanding. To begin with, although I suggest here that judicial review can effectuate social change only to a limited extent, I neither claim nor mean to suggest that judicial review is illegitimate. I believe judicial review is grounded in the text of the Constitution.[102] I mean here judicial *review*, not judicial supremacy, for the textual and structural arguments that legitimate judicial review also legitimate constitutional interpretation by Congress, the President, and (with qualifications) Superior officials in states in the course of executing their constitutional responsibilities.[103] I believe that judicial review, in a regime of rough interpretive equality, is desirable on normative grounds.[104] Yet I also wonder whether, in a regime with interpretive equality, judicial review can be sustained in the absence of significant support by political branches that understand the Constitution as the courts do.

Separately, in the following observations, I am going to rely considerably on examples involving the Commerce Clause and economic liberty claims supposedly grounded in the Fourteenth Amendment. I do not mean to suggest that other constitutional issues are unimportant. I focus on these issues in part because they are interesting to readers who share the attachments of the Institute for Justice,[105] and in part because these two fields illustrate important contrasts in the observations I am about to make. In the Center for Judicial Engagement, the term "Engagement" is quite ambiguous. The Commerce Clause and economic liberties help hone in on several of the most important ambiguities.

So, on to my interpretations. First, and most important: in principle, there is no reason why political officials and leaders cannot be as engaged

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101 BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 203-07 (1998).

102 *See, e.g.*, THE FEDERALIST NO. 78, *supra* note 7; Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 894-937 (2003) (book review).

103 *See* Prakash & Yoo, *supra* note 102, at 921-25.

104 *See, e.g.*, Gary Lawson, *Interpretive Equality as a Structural Imperative (or, "Pucker Up and Settle This!")*, 20 CONST. COMMENT. 379 (2003).

105 *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 191-223, 274-334 (2004) (focusing a libertarian theory of constitutional interpretation on the Commerce Clause and the Fourteenth Amendment Privileges or Immunities Clause).

as the Center believes judges should be. Members of Congress took ownership of constitutional questions in all four of the disputes I have recounted. Presidents did so as well, even more prominently. State legislatures did so in all three of the nineteenth-century episodes. In addition, in all four episodes, political parties were extremely engaged. The Jeffersonian Republicans used the debate over the Sedition Act to polarize the 1800 election and to legitimize party politics. The Whigs and Jacksonian Democrats assumed it continued to be fair game to debate the National Bank more than a decade after *McCulloch* pronounced it constitutional. The Republican Party helped make the 1860 election a referendum on *Dred Scott* and slavery in the federal territories, and the Democratic Party helped make the 1936 election a referendum on *E. C. Knight* and other Commerce Clause cases standing in the way of the First New Deal.

These facts do not make it *in*appropriate to encourage courts to be more engaged in enforcing the Constitution's substance. Yet they do suggest a few other questions. Would it not be prudent to expect political parties, states, and the other two departments of the U.S. government to disagree often with the courts? If one supports a particular substantive understanding of liberty, as the Institute for Justice does, why bet most or all of one's legal-political chips on the courts—instead of spreading it across the courts and any political institutions open to securing liberty? And finally, to the extent the Institute aims to make constitutional appeals to the courts, is it making those appeals primarily to set legal precedents—or to educate the public about constitutional issues, and to embolden liberty-loving political officials to engage the Constitution as well?

Second: at least in the most contentious political disputes, when engaged courts go head to head with engaged political actors, the political actors win, hands down. In addition to the warnings offered in *Federalist No. 78*,[106] *Federalist No. 45* also anticipated that states would contest and prevent the worst excesses of the federal government.[107] And *The Federalist* did not foresee how political parties could contribute to political debates over the Constitution.

With qualifications, the events recounted in the last four Parts confirm *The Federalist*'s predictions. In the Sedition Act and Bank controversies, the federal courts did not stand immovably in the ways of political actors who disagreed with them. The Supreme Court did not rule on the Sedition Act. Even when lower federal courts applied the Sedition Act, they left Congress free not to reauthorize the Act and the President free not to enforce it. Similarly, the Supreme Court's opinion in *McCulloch* left future Congresses and Presidents free not to reauthorize the National Bank. By contrast, in the *Dred Scott* episode, the Supreme Court directly opposed a new and rapidly-growing political movement. During and after the Civil

106 *See infra* note 7 and accompanying text.

107 *See* THE FEDERALIST NO. 45 (James Madison).

War, the Supreme Court had extremely little power to confront Republican majorities in Congress. One might object that the Supreme Court was in an unusually precarious position because most of the states who enthusiastically protected the Court immediately after *Dred Scott* seceded in 1860 and 1861. Yet the Court's decision in *Dred Scott* helped bring about that state of relative isolation and exposure. Similarly, it is no wonder that the Democratic Party succeeded while making the 1936 elections in part a referendum on the Supreme Court's decisions from 1933 to 1936. Nor is it any wonder that, when the Republicans gained solid control of the Presidency and Senate during the Civil War and the Democrats did so during the New Deal, both reconstituted the Supreme Court to recast doctrines antithetical to party agendas.

I do not mean to suggest that political actors always tame courts in cases of conflict. Nor do I mean to suggest that there is any crisis looming on the horizon in which one or both political parties will try to tame the courts. The Supreme Court settled the 2000 presidential election without precipitating a constitutional crisis.[108] As this Essay is being written, the Supreme Court is considering challenges to the constitutionality of several provisions of the Patient Protection and Affordable Care Act.[109] Since the Act was enacted by razor-thin margins, and since it continues to be unpopular in opinion polls,[110] it seems extremely unlikely that the Court will precipitate a crisis or showdown if it declares some or all of the Affordable Care Act invalid. I *do* mean to suggest, however, that the Court has not precipitated any crisis comparable to the 1936-1937 crisis recently in part because it has not sought one out. No existing political actors can yet claim they have firm long-term expectations in the constitutionality of the Affordable Care Act. Many constituencies, including in Congress, would retaliate if the Supreme Court reconsidered precedents upholding federal labor regulation,[111] agricultural regulation,[112] or civil rights laws.[113] When the Institute for Justice praises judicial "engagement," it could be understood to mean engagement consistent with a theory of judicial review that unsettles these or other precedents. If the Institute means something different, it would be well-advised to clarify.

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108 *See* Bush v. Gore, 531 U.S. 98 (2000).

109 Pub. L. No. 111-148, 124 Stat. 119 (2010). *See* Florida v. U.S. Dep't Health & Human Servs., 648 F.3d 1235 (11th Cir.), *cert. granted*, 132 S. Ct. 603 (2011).

110 *See, e.g.*, *Health Care Law: New High: 61% See Repeal As Likely*, RASMUSSEN REPS. (Apr. 2, 2012), http://www.rasmussenreports.com/public_content/politics/current_events/healthcare/health_care_law (reporting that, in a survey of 1,000 likely voters conducted March 31-April 1, 2012, 54 percent favored repeal and 40 percent opposed it, and that polling majorities have favored repeal for more than a year).

111 *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

112 *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942).

113 *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

Third: judicial engagement has a downside. The power courts have to enforce the structural Constitution can be abused to hand down a *Dred Scott*. In addition, if federal courts have a responsibility or duty to be engaged, engagement can produce backlash.

Here, it is difficult to forecast how the Supreme Court could have acted differently in many of the cases I have covered. For example, consider the New Deal Court's experience. On one hand, the Court may have forced a confrontation leading to doctrines considerably more deferential and inconsistent with the Commerce Clause's original meaning. On the other hand, even if the Court did not totally stop the New Deal, it did invalidate the New Deal's greatest encroachment on constitutional federalism and separation of powers, the National Industrial Recovery Act.[114] In the course of so doing, the Court at least slowed down the New Deal, by forcing Congress to enact regulatory programs incrementally. In addition, perhaps it was better for the Court to lose in the short term and campaign in the court of history for the long term.

I wholeheartedly agree that the advantages of judicial review outweigh its disadvantages, and I do not mean to suggest that any of these downsides made it inadvisable for the Court to protect the Commerce Clause or other structural constitutional doctrines during the New Deal. Yet our contemporary constitutional case law and culture are messy. Some aspects of contemporary constitutional law continue to follow the Constitution's original meaning and structure fairly closely, while others prefer to follow other sources that legitimate New Deal administrative governance. Before proceeding too far down a path of judicial "engagement," the Institute may want to identify the aspects of New Deal governance it wants to engage. If the Institute chooses not to engage all of the New Deal transformation frontally, it is well-advised to explain how and why "engagement" lets it confront some aspects of that transformation but not others.

Last: judicial "engagement" may sound nice in theory, but it is actually difficult to implement in practice. Realistically, many judges will not be able to resist the temptation to read and apply the Constitution in the spirit of the politics and intellectual context of their times. Chief Justice Taney's *Dred Scott* opinion certainly confirms this problem. When Taney addressed the Territories Clause, his argument seemed to follow and constitutionalize John Calhoun's theory of states' rights.[115] Yet let us set *Dred Scott* aside as an extreme case. It is even easier to see how Jeffersonian-era Federalist judges and Republican politicians each read the Free Speech and Necessary and Proper Clauses as embodying their own political opinions about seditious speech. The same may be said about how Federalist and Whig officials and Jeffersonian-Republican and Jacksonian-Democrat officials con-

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114 *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

115 *Compare* Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 438-42 (1857), *with* CONG. GLOBE, 29th Cong., 2d Sess. 453-55 (1846) (statement of John Calhoun on "The Slavery Question").

strued the Necessary and Proper Clause when they argued about the National Banks.

Although the New Deal presents a more complicated case, I think it provides the most powerful confirmation of this conclusion. New Deal administrative governance is extremely hard to reconcile to the Constitution's textual meaning. Even so, many judges believed then, and many more maintain now, that the two may be reconciled. Judges are dependent on opinions, especially those of intellectuals and others who shape elite opinion. In *The Administrative Process*, Professor Landis invoked his authority as the dean of Harvard Law School and a scholar with expertise in administrative law[116] to pronounce that pre-New Deal constitutionalism was obsolete.[117] Pro-New Deal judges may not have been as overtly hostile to the Constitution as Landis was, but they did manage to find ways to reconcile the Constitution to Landis's blueprint for administrative governance.

These New Deal judges' work makes me especially skeptical that judges can be "engaged" as the Institute hopes—not without substantial support from political movements and intellectuals loyal to the structural Constitution. Let me illustrate with two examples. One consists of the various economic-liberty limitations on states associated with the Fourteenth Amendment.[118] Since the New Deal, conventional wisdom has assumed, first, that the Privileges or Immunities Clause has and deserves a narrow reading and, second, that the Fourteenth Amendment Due Process Clause protects few if any substantive economic liberties.[119] In contemporary academic discourse and politics, supporters of New Deal administrative governance continue to resist vociferously Fourteenth Amendment economic liberties.[120] For such liberties to gain traction in contemporary practice, supporters of such liberties must therefore persuade persuadable academics, judges, and contemporary politicians. Yet many prominent constitutional scholars[121] and judges[122] who might otherwise be sympathetic to economic liberty continue to maintain that the Fourteenth Amendment does not de-

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116 Indeed, Landis served on both the Federal Trade Commission and the Securities and Exchange Commission ("SEC") in the 1930s, including a two-year stint as the SEC's Chair. *See* THOMAS K. MCCRAW, PROPHETS OF REGULATION 176-95 (1984); DONALD A. RITCHIE, JAMES M. LANDIS: DEAN OF THE REGULATORS 2-3 (1980).

117 *See* LANDIS, *supra* note 73, at 7-8.

118 *See, e.g.*, BARNETT, *supra* note 105, at 191-223, 319-34.

119 *See* Eric R. Claeys, *Takings: An Appreciative Retrospective*, 15 WM. & MARY BILL OF RTS. J. 439, 440-47 (2006).

120 *See id.*

121 *See, e.g.*, John Harrison, *The Constitution of Economic Liberty*, 45 SAN DIEGO L. REV. 709 (2008); Gary Lawson, *Due Process Clause*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 337 (David Forte & Matthew Spalding eds., 2005).

122 *See, e.g.*, United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) (calling substantive due process an "oxymoron").

clare or protect such liberty.[123] Even if a few federal courts here and there "engage" economic liberty in a few decisions, in today's intellectual climate, such decisions are certain to be discredited. In the foreground, it will seem as if politicians and appeals judges will do most of the discrediting. In the background, however, their arguments will be influenced by opinions shaped by opinion leaders—scholars and think-tank leaders who support New Deal administrative governance, and originalists skeptical of constitutional economic liberties for originalist reasons.

The Commerce Clause confirms a similar story with an even subtler account. Start with the 1942 decision *Wickard v. Filburn*.[124] *Wickard* completed the New Deal transformation and expansion of the Commerce Clause. The Court's opinion embraced a nationalist perspective, "that the effects of many kinds of intrastate activity upon interstate commerce were such as to make them a proper subject of federal regulation."[125] *Wickard* expanded the Commerce Clause more than any previous case. In *Wickard*, the Court announced it was no longer interested in evaluating on a case-by-case basis whether the activity Congress intended to regulate affected interstate commerce enough to justify federal regulation.[126]

Supporters of the Center for Judicial Engagement probably see *Wickard* as the antithesis of judicial engagement. After all, in *Wickard*, Justice Jackson, writing for the Court, warned "that effective restraints on [the Commerce Clause's] exercise must proceed from political rather than from judicial processes"[127] and that "conflicts of economic interest" among regulated national interests "are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process."[128] To supporters of the Center, these warnings embody judicial abdication. Yet Jackson claimed to deduce these instructions from the original meaning of the Commerce Clause. He read the Supreme Court's first major opinion on the Commerce Clause (the 1824 case *Gibbons v. Ogden*[129]) to "describe[] the [F]ederal commerce power with a breadth never yet exceeded."[130] Jack-

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123 I remain on the fence in these debates. I am skeptical of substantive due process, sympathetic to liberties under the Privileges or Immunities Clause, but suspicious that the Privileges or Immunities Clause is indeterminate enough to be better committed to Congress's enforcement. *See* Claeys, *supra* note 35, at 777-84.

124 317 U.S. 111 (1942).

125 *Id*. at 122.

126 *See id*. at 124-25 ("That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. . . . But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'").

127 *Id*. at 120.

128 *Id*. at 129.

129 22 U.S. (9 Wheat.) 1 (1824).

130 *Wickard*, 317 U.S. at 120 (citing *Gibbons*, 22 U.S. at 194-95).

son's opinion for the Court proceeded to portray *E.C. Knight Co.* and similar cases as aberrations[131] and it praised *The Shreveport Rate Cases*[132] and other similar cases as "destined to supersede the earlier ones, and to bring about a return to the principles first enunciated . . . in *Gibbons*."[133]

With fifty years and more of hindsight, Jackson's claims about the Commerce Clause's original meaning seem extremely unpersuasive.[134] Yet it proves my point that Jackson made originalist claims anyway. Since dominant elite opinion during the New Deal stated unanimously that centralized administrative governance was the wave of the future, many judges would have done as Jackson did and found a way to reconcile such governance to the Constitution. Today, I doubt engaged judges will behave much differently—unless they are taught to see for themselves how fundamentally divided contemporary intellectuals and other opinion leaders are about the law, politics, and economics of centralized regulation.[135]

I realize readers may raise several objections. One may concede that American politicians took the Constitution seriously a century ago but insist that times have changed and politicians today will never do so. I wonder. Politicians will take an interest in the Constitution if they can be persuaded that there is political advantage in the Constitution. The Tea Party's formation seems to suggest the public still reveres and wants to conserve the Constitution. In my view, the Institute for Justice's most prominent successes have been not in court, but in its grassroots efforts to educate citizens and state and local legislators about the abuses that deferential judicial doctrines have encouraged in eminent domain.[136]

Readers may also wonder whether I am suggesting that it is useless or counterproductive for the Institute for Justice to encourage more judicial engagement. Not necessarily. I do not mean to suggest that state or federal courts will provoke a counterreaction like Roosevelt's Court-Packing Plan if they enforce eminent domain, free speech, or structural constitutional

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131 *See id.* at 121-22.

132 *See id.* at 122-24.

133 *Id.* at 122.

134 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring) ("[O]ur case law has drifted far from the original understanding of the Commerce Clause. . . . The Constitution not only uses the word 'commerce' in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that 'substantially affect' interstate commerce."). *See generally* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001) (examining the records of the Constitutional Convention, the ratification debates, the Federalist Papers, and dictionary entries, and concluding that the Commerce Clause should be read narrowly, consistent with Justice Thomas's opinion in *Lopez*); Epstein, *Proper Scope*, *supra* note 95, at 1395-1408 (discussing Chief Justice Marshall's opinion in *Gibbons* and the original meaning of the Commerce Clause).

135 *See* THOMAS SOWELL, A CONFLICT OF VISIONS: IDEOLOGICAL ORIGINS OF POLITICAL STRUGGLES 6-8 (2007).

136 *See Legislation*, INST. FOR JUST., http://www.ij.org/legislation (last visited Apr. 4, 2012).

guarantees more vigorously than they do now. Yet there is *some* outer limit to how far judges may be "engaged" before such a backlash occurs. Precisely because so many political interests have a lot riding on preserving contemporary constitutional doctrines, federal judicial appointments and confirmations are more protracted and politicized now than they have ever been. And as my observations about the New Deal transformation suggest, I strongly doubt judges will change the deferential habits the Center for Judicial Engagement deplores[137] unless they are encouraged by popular culture, protected by sympathetic political leaders, and taught by sympathetic intellectuals and other opinion leaders.

CONCLUSION

I hope my drive-by survey has taught two obvious lessons and one more ambiguous one. First, there was a time in American politics when American legislators, executive officers, and party leaders assumed they had interpretive authority coequal with the authority claimed by the federal judiciary. I encourage readers to reconsider whether it was inevitable that these political actors would defer to the federal judiciary's interpretation of the Constitution. I also encourage the Institute for Justice to consider whether litigation by the Center for Judicial Engagement will be more effective as a way to set precedents or as a teaching and motivating tool for constitutionalists in politics.

Second, in the most divisive conflicts in American constitutional history, when the federal judiciary has used the Constitution to oppose the projects of legislators, executive officers, and party leaders, the latter have put the judiciary in its place. I encourage the Institute to consider which lawsuits might engage political officials to consider doing the same now.

Third, and more ambiguously: judges in the federal judiciary tend to polarize about the judicial aspects of the same basic issues that split political actors politically. This correlation makes me wonder whether it is possible or meaningful to talk about judicial "engagement" in abstraction from the specific government policies that courts should be reviewing or abstaining from considering.

If I am right, a Center for Judicial Engagement may still do a small amount of good. Yet I doubt it will do a huge amount of good. Judicial engagement cannot proceed in a far-reaching way without building on a deeper project of civic engagement.

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137 NEILY & CARPENTER, *supra* note 1, at 9-11.