JUDICIAL ENGAGEMENT IN ENFORCING LIMITS ON GOVERNMENT POWER

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Our topic is the role of courts in enforcing limits on government power. The online announcement for this conference states that "courts were meant to play an integral role in keeping legislators and executive branch officials within the proper bounds of their authority, but judges today are often unwilling or feel unable to enforce constitutional limits on government power."[1] A paper written in September 2011 for the Center for Judicial Engagement is tellingly titled *Government Unchecked: The False Problem of "Judicial Activism" and the Need for Judicial Engagement*.[2] It concludes by stating that "[d]ecades of the Supreme Court abdicating its duty to enforce the Constitution have made possible the incredible growth in the size and scope of government we see today. More judicial 'restraint' is not the answer. Judges engaging constitutional claims and the facts behind them is."[3]

I. IS "DISENGAGEMENT" THE REAL ISSUE IN A SUPREME COURT CONSISTING OF NINE ACTIVIST JUDGES?

It is, in many ways, odd to read an analysis that appears to suggest that the contemporary Supreme Court is plagued by an excess of "judicial restraint," considering most political scientists and other observers appear to agree that no member of the current Court comes close to the philosophy of, say, Oliver Wendell Holmes or his epigone Justice Felix Frankfurter in counseling near-complete deference to the "political branches" by the judi-

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[1] *Center for Judicial Engagement Symposium*, INST. FOR JUST., http://www.ij.org/about/4305 (last visited Apr. 4, 2012).

[2] 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.

[3] *Id.* at 11.

ciary.[4] But consider a recently published book by Fourth Circuit Court of Appeals Judge J. Harvie Wilkinson that offers stinging critiques of what he calls "competing schools of liberal and conservative judicial activism."[5] In a highly favorable review of Judge Wilkinson's book, *The New Republic*'s legal analyst Jeffrey Rosen called it "an invaluable reminder of the lost virtues of bipartisan judicial restraint" and went on to say, altogether correctly, that "not a single justice exemplifies this tradition of bipartisan judicial deference today."[6]

Who on the contemporary Court, for example, would blithely echo Holmes's pronouncement in *Lochner v. New York*[7] that even "tyrannical" policies might nevertheless be perfectly constitutional.[8] Frankfurter once described Holmes as "exhibit[ing] the judicial function at its purist" by recognizing that "[i]t was not for him to prescribe for society or to deny it the right of experimentation within very wide limits. That was to be left for contest by the political forces in the state."[9] As Holmes himself wrote in *The Common Law*, "[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, *whether right or wrong*."[10] Or consider part of an introduction he wrote to Montesquieu's *The Spirit of the Laws*, where he defined the "proximate test of excellence" in the law as "correspondence to the actual equilibrium of force in the community—that is, conformity to the wishes of the dominant power."[11] To be sure, "such conformity may lead to destruction" in the case of a dominant power that lacks wisdom.[12] "But wise or not, the proximate test of a good government is that the dominant power has its way."[13] It occasions no surprise, then, that he once wrote to Harold Laski that "if my fellow citizens want to go to Hell I will help them. It's my job."[14]

One might pronounce Holmes's views as enunciating "judicial restraint" with a vengeance, and perhaps it occasions little surprise that judges of all political persuasions, formed by the experience of German and Soviet

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4 *See, e.g.*, FRANK B. CROSS & STEFANIE A. LINDQUIST, MEASURING JUDICIAL ACTIVISM 24-25, 66 (2009).

5 J. HARVIE WILKINSON, III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 4 (2012).

6 Jeffrey Rosen, *Against Interpretation*, N.Y. TIMES BOOK REV., Mar. 18, 2012, at 22.

7 198 U.S. 45 (1905).

8 *See id.* at 75 (Holmes, J., dissenting).

9 FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 22 (2d ed. 1961).

10 OLIVER WENDELL HOLMES, THE COMMON LAW 36 (Mark DeWolfe Howe ed., 1963) (emphasis added).

11 OLIVER WENDELL HOLMES, MONTESQUIEU (1900) (reflecting Holmes's introduction to a reprint of the *Spirit of the Laws*), *reprinted in* THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS 373, 378 (Max Lerner ed., 2d prtg. 2010).

12 *Id.*

13 *Id.*

14 Letter from Oliver Wendell Holmes to Harold Laski (Mar. 4, 1920), *reprinted in* 1 HOLMES-LASKI LETTERS 248, 249 (Mark DeWolfe Howe ed., 1953).

totalitarianism, have rejected such a cavalier notion of the judicial role. *All* members of the current Court can easily be shown to possess philosophies of what might be termed a rightly-ordered constitutional republic, and to be more than happy to instantiate those philosophies into their undoubtedly sincere interpretations of the Constitution. And, as exemplified by the organizers of this particular conference, contemporary political conservatives are eager to have an ever-more-interventionist Court, willing even to emulate the fabled "Old Court" of the New Deal era by striking down the most significant piece of domestic congressional legislation passed in over four decades. For these conservatives, Holmes's opinion in *Lochner* should be treated as part of what Professor Jamal Greene has recently defined as the "anticanon" of constitutional law, replacing Justice Peckham's majority opinion in that category,[15] a standard focus of Frankfurter's and other New Dealers' critiques.

To put it mildly, this brand of contemporary political conservatism is light years away from that of my University of Texas colleague Lino Graglia, who has been unrelenting in criticizing the judiciary for refusing to be properly restrained—a word that, significantly, he does not put in scare quotes.[16] To his tremendous credit, he includes within his sights a host of recent decisions reading the Commerce Clause to restrain congressional power, even though there can be little doubt that Graglia is no fan of the particular statutes in question.[17] Needless to say, Graglia's putative enemies (and critics) for the past forty years have overwhelmingly been political liberals more than happy to defend, say, key decisions of the Warren Court and thereafter. One might also think of the late Raoul Berger in this regard. But Graglia and Berger are increasingly outliers even within conservatism.

Both contemporary liberals and conservatives are more than happy to defend strongly interventionist courts in some areas, even as they unhappily condemn less palatable interventions. Liberals endorse *Lawrence v. Texas*[18] while condemning *Citizens United v. Federal Election Commission*[19] or *District of Columbia v. Heller*,[20] to take only three examples from the last

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15 *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011). On *Lochner*, see the important book by George Mason's own David E. Bernstein, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

16 *See generally* Lino A. Graglia, *"Interpreting" the Constitution: Posner on Bork*, 44 STAN. L. REV. 1019 (1992).

17 *See, e.g.*, Lino A. Graglia, Lopez, Morrison, *and* Raich*: Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL'Y 761, 765-74, 785-87 (2008).

18 539 U.S. 558 (2003). Though *Lawrence* is endorsed at least by libertarian conservatives as well. *See, e.g.*, DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS: HOW A BEDROOM ARREST DECRIMINALIZED GAY AMERICANS (2012) (an illuminating and moving account of the case written by a politically libertarian former law clerk to Fifth Circuit Judge Edith Jones, by any account the most conservative member of that court).

19 130 S. Ct. 876 (2010).

20 554 U.S. 570 (2008).

decade. Most contemporary conservatives reverse the polarity, so to speak. The central point, though, is that one can scarcely construct a picture of the contemporary Court as insufficiently "engaged" with constitutional meaning, in the ways that one might believe Holmes to have been. And it seems unduly tendentious to say that *only* one contemporary, "non-Holmesian" perspective on the Constitution represents genuine "engagement" while the other does not—or, even worse, represents a betrayal of the Constitution.

Perhaps one way of paraphrasing a tract like *Government Unchecked* is that federal courts, particularly the United States Supreme Court, have proved to be only a "hollow hope," in Gerald Rosenberg's words,[21] for those who take fully seriously the mantra that the national government is only a "limited government of assigned [or enumerated] powers."[22] *Federalist 78*, of course, promised that the judiciary would keep government within bounds, especially with regard to what Hamilton and many contemporary conservatives are especially worried about, which is the propensity of political majorities of have-nots (or have-less) to pass redistributive legislation that, by definition, requires taking from the haves (or at least better off).[23] With regard to property rights, one might point not only to the implications of ostensibly limited assigned powers, but also explicit limitations on national power found in the Takings Clause of the Fifth Amendment or the restraint on state power set out in the Contract Clause of Article I, Section 10.[24]

All of this being said, the narrative history of American constitutional development, particularly over the last century, is the steady diminution of any real limits on either state or national governments, except insofar as federal regulation preempts state regulation. One might quibble about the exact date or cases that signify the fall from grace. With regard to national power, the *Lottery Cases*[25] are certain fine candidates; for state power, there are a plethora of New Deal-era cases, though one can also point to such earlier cases as *Muller v. Oregon*,[26] which suggested, among other things, that *Lochner* in fact had an exceedingly short shelf-life.[27] And, of course, this same period that reveals the withdrawal of any genuine enforcement of limits on national regulatory powers or on state regulation of the economy is accompanied by far more vigorous enforcement of what used to be called the "preferred freedoms" linked with the First Amendment or, for a while,

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21 GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (2d ed. 2008).

22 Sanford Levinson, *How Many Times Has the Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change*, *in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 13, 28 (Sanford Levinson ed., 1995).

23 *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

24 *See* U.S. CONST. art. I, § 10; U.S. CONST. amend. V.

25 188 U.S. 321 (1903).

26 208 U.S. 412 (1908).

27 *See id.* at 418-23.

the rights of criminal defendants, not to mention finally beginning to cash the promised "check" of racial justice seemingly endorsed by proponents of the Reconstruction Amendments. More recently, the emphasis has been on the rights to reproductive choice of women or to autonomy and equality for gays and lesbians.[28] This is precisely why most calls for "judicial engagement"—and concomitant denunciations of Holmes and Frankfurter—over the past half-century probably would have come from the left. Given the desire of most political liberals to defend some form of judicial interventionism—Professor Mark Tushnet is very much of an outlier in wanting to abolish judicial review completely in America—it is impossible to mount an effective attack on the notion itself. Instead, one must talk about what one defines as governmental overreaching, as against governmental regulation designed to enhance the "general welfare."

One assumes, incidentally, that the "legislators and executive branch officials" referred to in the web description of this conference are primarily *national* officials.[29] After all, the dominant political theory in 1787 was that states possessed *plenary* powers save for those limitations spelled out in state constitutions' bills of rights or explicitly listed in the Constitution, as in Article I, Section 10, or structurally implied, as in part two of *McCulloch v. Maryland*[30] that disallowed states the power to tax federal instrumentalities.[31] Of course, further limits on state power were certainly established by the Fourteenth Amendment and, more specifically, the incorporation of most of the Bill of Rights, and we can therefore discuss whether courts are adequately willing to enforce constitutional limits on *all* governments.

As already suggested, we could get into extended arguments as to the substantive content of these constitutional limits, especially given my presumption that we do agree that there *are* at least some such limits. I would emphasize, for example, limits on the constitutional power of any government to engage in torture or, indeed, other "enhanced" methods of interrogation as well. I am also inclined to believe that all governments are prevented from enunciating and promoting an official theology, which means that "In God We Trust" should be removed from the currency and "under God" from the Pledge of Allegiance. I would be more than a bit surprised if Professors Doug Kmiec and Stephen Presser agreed with my latter example, but I know that Professor Kmiec, at least, has expressed doubts about the exuberant analysis of unrestrained executive power expressed in Profes-

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28 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Perry v. Brown, Nos. 10-16696, 11-16577, 2012 WL 372713 (9th Cir. Feb. 7, 2012).

29 *See Center for Judicial Engagement Symposium*, *supra* note 1.

30 17 U.S. (4 Wheat.) 316 (1819).

31 *See id.* at 424-37.

sor John Yoo's famous (or notorious) memorandum on the legal propriety of torture.[32]

I confess, though, that even with regard to my views on what the Establishment Clause, properly understood, means, I am more than uncertain that the judiciary should "engage" and stir up what would undoubtedly be a gigantic political hornet's nest by embracing those views. There is something to be said, that is, for the Bickelian "passive virtues," which almost by definition means a prudential and even perhaps unprincipled willingness to let many theoretical sleeping dogs lie.[33] To paraphrase Ecclesiastes, there may be a time for "judicial activism" and a time for "judicial restraint," based on a basically political reading of whether courts have the political capacities to impose their constitutional understandings.[34]

I am sure that each of my colleagues on this panel has his own example of limits on government power that are inadequately enforced by courts, some of which I might agree with, others of which I am sure that I do not.[35] And perhaps we disagree as well on the extent to which courts should pick fights that are likely to provoke significant "backlash." I suspect that we might be most inclined to disagree on the extent to which property rights should be vigorously enforced by courts. Although I share the view that *Home Building & Loan Ass'n v. Blaisdell*[36] is an endlessly interesting case and that it involved rejecting both the "literal meaning" and even historical expectations surrounding the Contract Clause, I am inclined to believe that Chief Justice Hughes's opinion for the Court is persuasive even as I will happily agree that Justice Sutherland's opinion is itself also a great opinion. That is, indeed, why I so love teaching the case, because it may offer the best set of conflicting opinions in the entire corpus.

I also suspect that we might disagree on *Kelo v. City of New London*,[37] which I find a completely easy case under well-established case law that requires deference to any plausible legislative determination that the public

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32 *See* Ina Jaffe, *Torture Memo Author Not Seen as Ideologue*, NPR (Apr. 28, 2009), http://www.npr.org/templates/story/story.php?storyId=103582533 (quoting Kmiec's statement that, "It's a very disturbing memo . . . I don't think there's any member of the American public—let alone the legal profession—who would not be disturbed by what's described there." (internal quotation marks omitted)).

33 *See generally* Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

34 *See, e.g.*, Sanford Levinson, *Compromise and Constitutionalism*, 38 PEPP. L. REV. 821, 841-42 (2011).

35 I want publicly to declare my renewed admiration for Professor Kmiec, who valiantly and, I suspect, unexpectedly defended the constitutionality of the Affordable Care Act in his presentation. It is far easier for a political liberal like myself to come to George Mason and perform my appointed role, as it were, than for Professor Kmiec undoubtedly to disappoint and possibly even upset at least some of his erstwhile ideological and political colleagues.

36 290 U.S. 398 (1934).

37 545 U.S. 469 (2005).

interest will be served by a given taking, whether or not the property taken will ultimately remain in the possession of the state. One of the interesting aspects of *Kelo* is that the failure of the Court to be remarkably "activist" provoked significant backlash, just as might well have been the case with regard to *Heller* and *McDonald* had "judicial restraint" carried the day (which is, frankly, one of the reasons I support the outcomes in those two cases). Still, I hesitate to believe that either Professors Kmiec or Presser believes that courts are entitled to invalidate all exercises of governmental power they personally find appalling, nor do I. But, that only leaves open the basis for invalidation. Even if one is not a full-throated "textualist," one may nonetheless find the presence of relevant constitutional text helpful in making particular arguments.

II. PARTICULAR DILEMMAS OF ENGAGING "FEDERALISM"

This last point might particularly be important with regard to a second issue that I suspect concerns many of you, the protection of state autonomy—i.e., "federalism,"—against overreach by the national government. It should, for any textualist, be an embarrassing feature of the United States Constitution that it contains astonishingly few spelled-out protections of state autonomy. The vaunted theory of "dual federalism" was constructed out of a robust interpretation of the limitations on national power and *not* on citations to the constitutional text that specifically protect state autonomy. Once the Court, as during the New Deal and its aftermath, ratified actions of both Congress and Presidents by offering capacious readings of their authority under the Commerce Clause, there appeared to remain few, if any, effective constitutional checks against national regulation of states themselves. What, after all, entitles states to better treatment, vis-à-vis the national government, than General Motors or Ollie's Barbecue? To be sure, the Rehnquist Court attempted to construct some checks, particularly involving the ability of the national government to "commandeer" state officials to enforce national policies.[38] At the end of the day, though, one can wonder if those cases genuinely offer much in the way of protection against the national government, particularly when the mechanism of influence involves use of the Spending Clause.[39] What is striking is that much of the arguments of those who would cut back on the power of the national government depends on what might fairly be described as the "unenumerated

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38 *See, e.g.*, New York v. United States, 505 U.S. 144 (1992).

39 This, of course, is the issue raised by the attack on the Medicaid funding provisions of the Affordable Care Act. *See* Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d 1235 (11th Cir.), *cert. granted*, 132 S. Ct. 604 (2011) (No. 11-398).

right" of states to be free of certain pressures that might be brought to bear by the national government with regard to the spending of federal funds.[40]

One should remember that Marshall could protect the Bank of the United States against Maryland's tax power only by reference to what he called the "texture," rather than the "text," of the Constitution.[41] After all, he frankly conceded,

> There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds.[42]

Modern devotees of protecting state power against federal regulation must engage in equal feats of structural derring-do inasmuch as the text is wholly lacking in useful guidance.

When Marshall reminds his readers in *Marbury v. Madison*[43] that the importance of written constitutions is to remind readers of limits on government, his examples, not surprisingly, all involve clear text, such as the two-witness rule for treason.[44] One should recall, though, that even ostensibly clear texts—think of the First Amendment or the Contract Clause, both of which invited Justice Black to ask, in effect, "what part of 'no law' do you not understand?"[45]—turn out to be far more complicated that naïve textualists might hope. Still, the importance of modern decisions like the aforementioned *New York v. United States*[46] is that they have almost literally nothing at all to do with text and everything to do with highly amorphous "textures."

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40 *See generally* Brief of State Petitioners on Medicaid, Florida v. U.S. Dep't of Health & Human Servs., *cert. granted*, 132 S. Ct. 604 (2011) (No. 11-400), 2012 WL 105551.

41 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 426 (1819).

42 *Id.*

43 5 U.S. (1 Cranch) 137 (1803).

44 *Id.* at 179-80; *see also* U.S. CONST. art. III, § 3 ("No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.").

45 *See* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 491 (2d prtg. 1997); *see also* SANFORD LEVINSON, IS AMERICA UNGOVERNABLE? 365 (2012) ("Similarly, the greatest defender of civil liberties in the mid-20th century, Justice Hugo Black, always carried a copy of the Constitution in his pocket and asked his colleagues, in effect, to explain what part of "no law" they did not understand when reading the First Amendment.").

46 505 U.S. 144 (1992); *see also* text accompanying note 38.

III. ENGAGING THE *WHOLE* CONSTITUTION: THE IMPORTANCE OF THE PREAMBLE

My reference to such cases as *Blaisdell* and *New York* and the sharp methodological debates, not to say acrimony, found in the majority and dissenting opinions suggest that we could replicate hundreds of other panels by getting into an extended discussion as to whether there is one true method to identify governmental restrains and, therefore, to legitimize judicial invalidation of what may well have gained the support of two legislative houses and the signature of the President or the state's governor. I am more than happy to engage such questions should anyone be interested in my opinions, but I see no particular value to setting them out at any length here.

I do want to make one observation, though, before moving on to what is in some sense my principal argument today. If we *are* to "engage" with the Constitution, then I strongly hope that we, both as legal academics and concerned citizens, pay far more attention than is typical to the single most important words of the Constitution, the Preamble.[47] Why do I say this? The answer is simple: it is the Preamble, and quite literally nothing else in the Constitution, that enunciates the *point* or *purpose* of our experiment in constitutional government. (One might say this, incidentally, of the two parts of the Constitution that contain "preambles" of their own, the "Creativity" Clause[48] and the Second Amendment.[49])

With regard to everything below the Preamble, "engagement" should mean a willingness to ask whether it is instrumentally useful (or, as it may be the case, dysfunctional) to achieving the goals set out above. If, after all, there develop good reasons to believe that the "post-Preamble" Constitution works *against* "establishing justice" or securing "the blessings of liberty," then there is no reason whatsoever to endorse or, even more, to engage in Madisonian "veneration"[50] of the document. This is the case even if, as careful and well-trained lawyers, we agree that the Constitution, correctly interpreted, does indeed require state injustice or prohibit efforts that would make us a more just society. I take quite seriously the accusation by William Lloyd Garrison that the Constitution was a "covenant with death and an agreement with hell,"[51] but that did not lessen the fact that a judge who

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47 U.S. CONST. pmbl.

48 U.S. CONST. art. I, § 8. ("Congress shall have the power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .").

49 U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

50 *See generally* Sanford Levinson, *"Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 TEX. TECH L. REV. 2443 (1990).

51 Levinson, *supra* note 34, at 826 (internal quotation marks omitted) (indicating that Garrison's quotation comes from *Isaiah* 28:18).

had taken an oath to defend the Constitution would require, for example, that Virginia's representation in the House be enhanced by counting all slaves as three-fifths of persons when computing the number of representatives to which that state was entitled (instead of counting slaves as "non-persons" inasmuch as no one could plausibly believe that they would be "virtually represented" by their slavemasters in Congress).

Even if we reject Holmes's near-nihilism, I assume that we all agree that the United States Constitution does not overlap with one's favorite theory of justice or political morality, whether drawn from Thomas Aquinas, John Locke, John Rawls, or Robert Nozick. This means, by definition, that the properly disciplined judge would, at least on occasion, be forced to be complicit with what he or she might regard—perhaps altogether correctly—as rank injustice, unless one's favorite methodology were indeed classical natural law and its assertion that law must *always* be congruent with morality.

IV. CHANGING THE FOCUS

What I want to do, frankly, is to shift the discussion from our almost obsessive concern with judicial methodology, the institutional role of the judiciary, or the existence of a singularly correct description of the nature of the American political system. But, if one does agree that the Constitution, correctly interpreted, generates injustice rather than justice or makes it harder to secure the blessings of liberty, then the proper inquiry should be on changing the Constitution to make it better.

Thus, for those interested in constitutional "engagement," one might move well away from asking what judges should do in favor of asking instead what we as citizens should do to give judges a better Constitution to enforce. Only the most naïve believe that the existing Constitution is a recipe for guaranteed "happy endings" with regard to our own particular theories of the good society. This lack of naïveté can be found, I must emphasize, among many contemporary conservatives, including those at the heart of this very conference. Professor Elizabeth Price Foley and I, for example, recently engaged in a debate about the desirability of adding the so-called "Repeal Amendment" to the Constitution that would allow two-thirds of the states to invalidate any federal law.[52] One can obviously support such a significant change to the Constitution if one believes the present text is inadequate to protect American federalism. Although I think the particular proposal is a terrible idea insofar as it could serve to enhance the already exaggerated power of small states, I am not appalled by the basic idea it-

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[52] *See, e.g.*, Randy Barnett, *The Tea Party, the Constitution, and the Repeal Amendment*, 105 NW. U. L. REV. COLLOQUY 281, 284 (2011), *available at* http://www.law.northwestern.edu/lawreview/colloquy/2011/10/lrcoll2011n10barnett.pdf.

self.[53] If, for example, such "nullification" were allowed by a majoritarian national referendum, or by votes of state legislatures of, say, 60 percent of the states that that would include at least a majority of the national population, then I might well find it an important safety valve against the imperfections of the 1787 Constitution, one of which is the rejection of even an iota of "direct democracy." In this rejection, the national Constitution is a distinct outlier among the fifty-one American constitutions; forty-nine of the fifty state constitutions include at least some aspect of direct decisionmaking by the electorate.[54] Frankly, I would be happier if the Affordable Care Act were subject to a national up-or-down vote than to a potential 5-4 Supreme Court invalidation following the spectacle of six-hour argument in which the contending lawyers, whatever their technical abilities, will basically be talking past one another.

Similarly, although I oppose on substantive grounds those, like Governor Perry of Texas, who support the repeal of the Seventeenth Amendment and the return of senatorial appointment to state legislatures,[55] I think the argument behind that call bespeaks genuine insight into the American political system. After all, the move toward popular election removes any plausible link between the Senate and federalism as such, defined as protection of state institutions and state autonomy. Instead, the Senate becomes only a bizarre affirmative action program for the residents of small states, who get enhanced political power indefensible under any twentieth or twenty-first century sense of "one-person/one-vote."[56] Were we to repeal the Amendment, though, which would make sense only if the nation really did embrace a far more vigorous notion of federalism than we in fact possess at the present time, then I would hope that we would not simply return to the original plan of 1787, but instead might consider allowing state legislatures to recall their senatorial delegates whenever the senators deviated too far from the wishes of their employers, i.e., state government.

The point is that those interested in reining in what they regard as an overreaching national government might well think more of designing a revised Constitution than offering inevitably debatable—and to many of us implausible—"interpretations" of the existing Constitution. It is far too late in the day to have any serious hope that scales will fall from the eyes of various participants in the "interpretation wars" and that they will announce that they see, after all, the knockdown merits of arguments opposite to the

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53 The equal representation of Senators is one example of a constitutional mechanism that creates exaggerated power for small states. U.S. CONST. art. I, § 3.

54 *See* SANFORD LEVINSON, FRAMED: AMERICA'S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE 119-24 (2012).

55 RICK PERRY, FED UP!: OUR FIGHT TO SAVE AMERICA FROM WASHINGTON ch. 3 (2010); *see also* Michael D. Shear, *Rick Perry's Blunt Views in Books Get New Scrutiny as He Joins Race*, N.Y. TIMES (Sept. 2, 2011), http://www.nytimes.com/2011/09/03/us/politics/03perry.html.

56 For the principle of "one person/one vote," see Reynolds v. Sims, 377 U.S. 533, 562-63 (1964).

positions they have taken on such issues as abortion, affirmative action, gun rights, the rights of states to control illegal aliens, presidential authority, or the propriety of the Affordable Care Act. It's not that it *never* happens; it is only that, like snow in October, it is sufficiently unusual to merit attention.

So let me suggest that we might have a profitable conversation by asking how we might *design* courts that would have a greater propensity to "engage" with the Constitution along the lines we envision, whatever they may be. One problem, for example, with the "Footnote Four" approach to constitutional interpretation, whether one emphasizes paragraph one and its insistence on enforcing the text of the Bill of Rights or paragraph three and the protection of "discrete and insular minorities,"[57] is that it has a perhaps fatal difficulty in explaining why the federal judiciary will be populated by judges in fact committed to protecting vulnerable minorities who are unpopular and subject to victimization by political majorities who get positive utility from humiliating or oppressing them. Recent overviews of the history of the Supreme Court by Professor Barry Friedman and my colleague Professor Lucas Powe suggests that the Court operates, more or less, as the agent of the ruling national coalition in going after political outliers (Powe)[58] or reflects the wishes of the median voter in the electorate as to the degree of protection that should be accorded otherwise vulnerable minorities (Friedman).[59] Both of these analyses begin with the simple, though highly important, point that judges are appointed by presidents and must run the gauntlet of confirmation by the Senate.

Perhaps in the "good old days," this was a relatively tranquil process, but we must remember that even George Washington was unsuccessful in gaining assent for all of his choices. The "era of good feeling" that produced a unanimous vote in 1986 for Antonin Scalia may be far more the exception than the rule; the acrimony generated by the Bork nomination and its subsequent hearings the following year, even if perhaps at one end of a spectrum, may be less exceptional than one might believe if one looks over the course of American history. After all, Louis Brandeis, though ultimately confirmed, faced the opposition of five former presidents of the American Bar Association and, as Powe suggests in a recent book review, there is no reason to believe that he could possibly be confirmed in today's political climate, even assuming that a president would be willing to make such a controversial nomination in the first place.[60]

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57 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

58 *See generally* LUCAS A. POWE, JR., THE SUPREME COURT AND THE AMERICAN ELITE: 1789-2008 (2009).

59 *See* BARRY FRIEDMAN, THE WILL OF THE PEOPLE 369-71 (2009).

60 L.A. Powe, Jr., *Icons*, 45 TULSA L. REV. 669, 670 (2010) (reviewing JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA (2009), and MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE (2009)).

One way to get more "engaged judges," however one defines that term, is to elect compatible presidents and make sure that they are complemented by docile Senates. But, as many critics of "activist" models of the judiciary have pointed out, if the political elites in control of such institutions are genuinely committed to protecting one's favorite readings of the Constitution, then courts will play only a relatively marginal role. Congress will not pass, and presidents will not sign, legislation that offends one's own sensibilities. Ironically or not, "activist" judiciaries are important *only* when the general political drift has moved in different directions, so that the dead hand of a past coalition, whether liberal or conservative, attempts to stave off the new political *zeitgeist*. Even if one likes a bit of dead hand in the American constitutional order, one can still ask how long it should last.

No less a staunch conservative than Professor Steven Calabresi has argued, as have Governor Perry and myself, that life tenure on the Supreme Court—and perhaps the federal judiciary more generally—is an idea whose time should have gone, that eighteen years may be literally more than enough for any given Justice.[61] Not only do most countries around the world reject life tenure, but this is also the case in at least forty-eight of the fifty American states, those vaunted "little laboratories of experimentation."[62]

Indeed, if one looks at the states, one quickly discovers that most judges are either elected or subject to retention elections (and, in some states, recalls). If one is genuinely worried about governmental overreaching, perhaps this has something to be said for it, since by definition choice is taken out of the hands of elected officials eager to enhance their own power and placed instead in the hands of popular electorates that might be suspicious of such tendencies. *Government Unchecked* is replete with interesting tables about the (un)willingness of the Supreme Court to monitor ostensibly overreaching legislation.[63] It would be interesting to see if one finds different results on the part of state courts with judges unbeholden for their initial appointment or retention to state officials.

Even if one sticks with an appointive judiciary, perhaps one can imagine other possibilities than selection by presidents and confirmation by the Senate.[64] Some political orders have a more-or-less self-perpetuating judiciary, whereby existing judges basically choose their own successors. That

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61 *See* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006); Jeff Zeleny & Richard A. Oppel, Jr., *Perry Proposes Overhaul of Washington*, N.Y. TIMES (Nov. 15, 2011, 12:53 PM), http://thecaucus.blogs.nytimes.com/2011/11/15/perry-proposes-overhaul-of-washington/#.

62 *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) ("States cannot serve as laboratories for social and economic experiment . . . if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands.").

63 *See generally* NEILY & CARPENTER, *supra* note 2.

64 *See* U.S. CONST. art. II, § 2, cl. 2.

obviously purchases a maximum degree of institutional judicial independence while, at the same time, minimizing the political accountability (and potential for intervention) attached to appointment and confirmation by highly partisan public officials. And, of course, one still has to assume, even with a self-perpetuating judiciary, that it will begin with a group of judges with the "right values" and tendencies toward "judicial activism." How to assure this is certainly beyond the scope of this Essay—and perhaps any essay.

If one is especially worried about federal courts being insufficiently concerned to protect state autonomy, then a relatively simple answer *does* suggest itself, akin to the arguments of those who would repeal the Seventeenth Amendment: have some significant number—all?—of the judges and, especially, Justices of the Supreme Court, appointed by state officials. Consider in this context that for the first time in our entire history, *no* member of the United States Supreme Court has ever served as a state official or member of a state court. David Souter, of course, had been Attorney General of New Hampshire and then a state judge; Sandra Day O'Connor had been in the Arizona legislature before joining the state judiciary there. No such experience is reflected in the careers of any of the current Justices. Neither Presidents Bush nor Obama seemed the least bit interested in seeking out anyone with such experience. Perhaps that is irrelevant; maybe the important thing is (only) to find people with the right ideas—for some of you, I presume, Justice Alito and Chief Justice Roberts—and place them on courts. But that itself could be the topic of an extensive conversation.

In any event, both James Madison and John C. Calhoun, whatever their differences, agreed that it was foolhardy to place faith in the federal judiciary to enforce the terms of what both agreed was a "federal compact."[65] As Madison wrote, "The states, then, being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity that there can be no tribunal, above their authority, to decide, in the last resort, whether the compact made by them, be violated."[66] To allow the Supreme Court to decide such issues would, in effect, allow the national government to be the judge of its own powers. In Calhoun's words it is "hazardous, and, I must add, fatal," to give "to the General Government the sole and final right of interpreting the Constitution."[67] Calhoun had the fantasy of "nullification," by which apparently one state could hold in abeyance any federal law until its validity was confirmed by the agreement of three-quarters of the states that it was indeed within the limited powers as-

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65 John C. Calhoun, On the Relation Which the States and General Government Bear to Each Other (The Fort Hill Address) (July 26, 1831), *reprinted in* THEORIES OF FEDERALISM: A READER 138, 140 (Dimitrios Karmis & Wayne Norman eds., 2005); James Madison, Report on the Virginia Resolutions (1800), *reprinted in* ANTHONY J. BELLIA, JR., FEDERALISM 55-56 (2010).

66 Madison, *supra* note 65, at 55-56.

67 Calhoun, *supra* note 65, at 140.

signed the national government. Madison spoke instead of "interposition," which seemed, however, to be little more than the ability of states to complain to their fellow compactors that the federal bargain was not being kept.

In any event, it is hard to read the constitutional history of the United States without agreeing that the federal judiciary, with some exceptions, has been the faithful agent of the national government. That is, *McCulloch* is almost infinitely more representative (and important) than is *Marbury*, which invalidated an almost totally inconsequential federal law as a means of avoiding a certain-to-lose conflict with the President of the United States and his allies in Congress.[68] This is, to be blunt, quite all right with me, but I am well aware that views differ about the both the constitutional propriety and the wisdom of the nationalization of political power that has proved a constant theme of American constitutional development.

One need not agree with the critics of nationalization in order to be interested in changes in our basic structures that might be necessary if one truly hopes for significant change. James Madison was altogether correct to be skeptical about "parchment barriers" and to emphasize the need for *institutions* that might plausibly be committed to certain values and interests.[69] I have, therefore, offered, quite dispassionately, some suggestions in this regard, whether or not I would personally endorse them. One might well believe that these "proposals" are "academic" in the most pejorative sense; that is, they are totally unlikely to be adopted or, perhaps, even to be proposed by anyone regarded as a "mainstream" political figure or even an academic who wishes to be thought of as "reasonable." But that only underscores the difficulties in the way of those who would attempt to assure a judiciary whose "engagement" would be compatible to one's own goals rather than adverse to them.

In the absence of such radical institutional changes, we should probably accept the fact that *all* appointees to the Supreme Court will appear "constitutionally engaged" to their supporters and unbearably "activist" to their critics. In the contemporary world, all will be able to find organizations and conferences, whether sponsored by the Federalist Society or the American Constitution Society that will reinforce their commitments to particular values and readings. What is unlikely is that the lambs will lie down with the lions any time soon (or, if they do, then, as Woody Allen so memorably suggested, the lambs will get little sleep). As we head into the 2012 election season, the one thing we can be relatively assured of is that the next president will appoint highly engaged judges committed to rebuffing at least *some* kinds of governmental initiatives even as they will prove eager to legitimate other initiatives that their opponents will, perhaps correctly, describe as "overreaching."

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68 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 161-62 (1803).

69 THE FEDERALIST NO. 48 (James Madison).