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Keeping a Republic: Overcoming the Corrupted Judiciary

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Abstract: *America, beginning about 50 years ago, has steadily become less of a republic, and there will always be those who prefer the victory of their interests to republican processes. The problem is both political and intellectual, and so must be the solution. Almost regardless of the outcome of the intellectual struggle, however, there remains the political battle to nominate and confirm justices and judges who spurn activism as illegitimate and will be guided instead by the original understanding of the principles of the Constitution. This may be the more difficult task. Many politicians, and the activist groups of the Left which they serve in these matters, have no interest in the legitimacy of constitutional interpretation; they care only about results. The appointment of new justices who hold an originalist philosophy is therefore necessary for the preservation of a republican form of government.*

It is a signal honor to be invited to give the first annual Joseph Story Lecture. That is especially so because today is the public unveiling of a 10-year campaign, launched by Ed Meese and his team at The Heritage Foundation, to restore the courts and the law to their proper roles in American government and culture.

There are many aspects to this endeavor, but I will speak primarily about the law of the Constitution, which has become so badly deformed that Joseph Story and his colleagues would find today's Constitution, and especially the Bill of Rights, unrecognizable. That is a serious problem for the republican form of

Talking Points

- America today is only partially a republic and, beginning about 50 years ago, has steadily become less of one.
- Only the originalist approach to the law is compatible with republican government. Activism means lawlessness, and it is rife among many judges and most professors of constitutional law.
- Many politicians, and the activist groups of the Left which they serve in these matters, have no interest in the legitimacy of constitutional interpretation; they care only about results.
- Nominating and confirming justices and judges who will be guided by the originalist understanding of the principles of the Constitution is therefore essential for the preservation of republican government.

This paper, in its entirety, can be found at: *www.heritage.org/Research/LegalIssues/hl1147.cfm*

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government that the United States was intended to embody.

Judicial Supremacy

It may help to remember that uncertainty about America's prospects is not new. As Benjamin Franklin exited the Constitutional Convention in Philadelphia for the last time, a woman asked him, "What have you given us?" He answered, "A republic, if you can keep it."

A republican form of government is about legitimate processes rather than results, except in those few instances in which the nation has adopted self-denying ordinances, such as our Bill of Rights, that rule out certain results. Obviously, those ordinances must be carefully construed so that they are effective but do not encroach on the legitimate powers of majorities. A corollary is adherence to the rule of law, for only such adherence can ensure that the will of the majority is not altered or subverted in its application to particular cases so that the power to govern is effectively denied to the majority.

Perhaps something like this is what Franklin had in mind. If so, he may have been worried about the displacement of majorities by oligarchies. Franklin was right to suggest that the success of the Republic was contingent—so it was, and so it is, and so it will always remain. There will always be people, often in well-funded organizations, who prefer the victory of their interests to republican processes. The danger becomes acute when the citizenry no longer appreciates the virtues and vulnerabilities of a republic. As Walter Bagehot put it, "The characteristic danger of great nations, like the Romans and the English, which have a long history of continuous creation, is that they may at last fail from not comprehending the great institutions which they have created."

The great institution we have created and may be failing to comprehend is judicial supremacy: the power we have accorded courts to correct, and do so with finality, the other branches of the federal government and all branches of state governments.

In America's case, the great institution we have created and may be failing to comprehend is judicial supremacy: the power we have accorded courts to correct, and do so with finality, the other branches of the federal government and all branches of state governments. The judges need only announce that these other branches and governments have strayed from the principles contained in our written Constitution. Never mind that the power of judicial review is nowhere mentioned in that Constitution or that that power was established in very dubious fashion in *Marbury v. Madison* (1803).

The nation ultimately acquiesced, and a great institution was born—great in its capacity to do much good but also dangerous when it employs its powers to accomplish ends outside the law. After all, after *Marbury* came *Dred Scott* (1856), which denied the federal government the power to prevent slavery in any state or territory or to permit a state to bar slavery within its borders. Perhaps it should have been seen as ominous that these two cases, one greatly admired, the other now universally despised, were both instances of what today we call judicial activism.

The Olympians and the Judiciary

My thesis is uncomfortable, but I think it is undeniable: America today is only partially a republic and, beginning about 50 years ago, has steadily become less of one. It would be vainglorious to claim that judges have accomplished this all by themselves. Congress has repeatedly overstepped constitutional limits to its authority, as has the President.

Though America does not lack for external threats, it is certainly arguable that our greatest long-term threat comes from within. I refer to our self-identified intellectual elites whom Kenneth Minogue calls the Olympians.

Olympianism is a secular religion which does not recognize itself as a religion. Its acolytes, until recently concentrated in the universities and the mainstream media, claim superior knowledge which they will share with, and if necessary impose upon, the rest of us. The bad news is that this class is growing and taking root in the general population, both here and in all the industrial democracies of the West. The reasons for that growth are well

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beyond my topic today. For the moment, I merely cite that growth as an obvious fact.

The most powerful educational and political weapon in the Olympian's arsenal is the United States Supreme Court and the inferior federal and state judiciaries. Over time, the courts tend to adopt the values of the dominant culture, and that culture today, and for the foreseeable future, belongs to the Olympians.

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The reason the judiciary is such a valuable ally to any class or political movement is that the courts, when purporting to speak in the name of the Constitution, even if they speak falsely, are the only institution in America that claims absolute finality for its decisions and is accorded that superior status by all other bodies. The Constitution provides no check upon the courts other than the highly uncertain authority to appoint new judges when vacancies occur. A series of unpleasant surprises in the behavior of new judges suggests that the appointment power is not much of a safeguard.

It is noteworthy that the same phenomenon of judicial supremacy is being taken up by other nations of the West, with results similar to ours: an unjustified diminution of democracy, the erosion of national sovereignty, and a judicially imposed movement of the culture to the left. Those results seem to be in the nature of the beast because of the alliance everywhere of the intellectual class and the judiciary.

We must ask ourselves whether we continue to understand courts with the power of judicial review. Some inkling of answer may be found by comparing the views of two prominent men, one of the founding generation and the other a contemporary of ours. I refer to Alexander Hamilton and Justice Anthony Kennedy.

Hamilton expressed the original view of the Framers. Downplaying the danger the anti-Federalists saw in a powerful national judiciary, he wrote in Federalist 78 that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution" because it does not command the sword and the purse and has "neither FORCE nor WILL, but merely judgment." He quoted Montesquieu: "of the three powers [legislative, executive, and judicial]…the judiciary is next to nothing."

That was then. Contrast Justice Kennedy's view. In an interview, he stated his understanding of the role of a justice on the Supreme Court: "You have the opportunity to shape the destiny of this country. The Framers wanted you to shape the destiny of the country. They did not want to frame it for you." Why men who did not want to frame anything should be called the Framers was not explained. At the Philadelphia Convention, they argued long and hard, drafted and redrafted, almost as if they thought they were framing a government to last, but apparently they were simply handing the United States over to a small clutch of judges who would take the nation in unanticipated directions without regard to either the Constitution or the desires of the people.

Justice Kennedy's remarks were no slip of the tongue, as shown by his further statement. "You know," he said, "in any given year, we may make more important decisions than the legislative branch does—precluding foreign affairs, perhaps. Important in the sense that it will control the direction of society."[1] That "perhaps" had an ominous ring and, as will be seen, was soon dropped as a barrier to judicial interference with both foreign policy and defense strategy.

Kennedy's view of judicial power is not markedly different from those of the four other justices in the Court's liberal bloc. He merely

1. In fairness, it should be said that in the ordinary run of litigation—antitrust, taxation, and the like—Justice Kennedy has shown himself to be a solid judicial craftsman. In constitutional matters, however, he sometimes verges on the grandiose.

has the candor to articulate what is implicit in their decisions.

The Court's performance strikes at the heart of the concept of a republic. Without any warrant in law, nine lawyers split five to four, and the judgments of Congress, the President, state legislatures, governors, other federal judges, and the judges of all 50 states all are made instantly irrelevant. Whatever else it is, that is not democracy or a republican form of government. It is a robed oligarchy. So far, all attempts to tame it, to bring it back to democratic legitimacy, have failed.

The Supreme Court's performance strikes at the heart of the concept of a republic.

So contemptuous of the electorate has the Court majority become that it routinely publishes opinions notable for their incoherence and remains unperturbed by the most devastating criticisms. The best known, but hardly unique, example is *Roe v. Wade*, which invented a wholly fictitious right to abortion. Though they have tried desperately, nobody, not the most ingenious academic lawyers nor judges, in the 36 years since it was decided has ever managed to construct a plausible legal rationale for *Roe*, and it is safe to say nobody ever will.

Roe is the premier example of what we now call judicial activism. You will hear it argued that to apply the term "activism" means no more than that you don't like a case's outcome. That is not true, and people who talk that way are, whether they realize it or not, implicitly saying that there are no criteria for judging the goodness or badness of a case other than personal or political sympathy.

"Activism" has a real meaning, and it is an indispensable term in our debates. A judge is an activist when he reaches results or announces principles that cannot plausibly be derived from the actual historic Constitution. The historic Constitution is the set of principles that the ratifiers, who made the Constitution law, understood themselves to be enacting—the original understanding. That approach is now called "originalism," and under no other approach can we have any semblance of the rule of law, which means in turn that no other approach is compatible with a republican form of government. Activism means lawlessness, and it is rife among many judges and most professors of constitutional law.

The rule of law requires that the principles announced and relied upon by judges be neutral in their application. Neutrality requires that a principle, once chosen, be applied according to its terms to all relevant cases without regard to the judge's personal views of the parties or issues before him.

That is a powerful discipline, for in deciding Case A he must realize that he has committed himself to decisions in future cases that fall within the principle but whose particulars are at the moment unknown to him. That counsels great care in choosing and articulating the principle which he advances as dispositive in Case A. Should the principle prove unsatisfactory in Case B, the judge's only recourse is to reformulate it with a full explanation of his reasons.

It is not sufficient, of course, that a principle be neutrally applied. That requirement would be met if the judge chose the principle that a labor union always loses and applied it neutrally, no matter the merits of a particular case. The principle chosen must also be neutrally derived, chosen without regard to the judge's individual preferences. The only source for principles that minimize or eliminate the judge's biases is the Framers' original understanding of the principles they were making into law. The morality and the policy enforced come from outside the judge. The judge who looks outside the historic Constitution looks inside himself and nowhere else.

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No judge can possibly avoid seeing a case without his own worldview coloring his vision. But there is a chasm between a judge who knows that and consciously strives for objectivity and a judge who

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knowingly undertakes to impose his vision of justice upon the parties before him and upon the society.

Professor Lino Graglia of the University of Texas Law School summarizes what the Court has done in recent years to domestic policy, moving the nation to the cultural left:

> Virtually every one of the Court's rulings of unconstitutionality over the past 50 years—on abortion, capital punishment, criminal procedure, [school busing], prayer in the schools,…public display of religious symbols, pornography,…discrimination on the basis of sex, illegitimacy, alien status,…flag burning…have reflected the views of the elite. In every case, the Court has invalidated the policy choice made in the ordinary political process, substituting a choice further to the political Left….

Graglia observes that the thought that the making of policy should fall into the hands of the American people is the intellectual's nightmare. Maintaining a liberal activist judiciary is the only means of preventing that.

Even more egregiously, the Court has forced itself into the conduct of our war against Islamic terrorists. Professor Gregory Maggs, of George Washington University Law School, points out that our current Supreme Court has overruled every precedent established in World War II, and it has done so in defiance of the foreign affairs powers the Constitution entrusts to Congress and the President, as well as the President's role as commander in chief of the armed forces.

The Court's incursions into areas best governed by the political branches are unprecedented as well as far beyond its competence. Detained enemy combatants, even those held abroad, are now for the first time in our history entitled to challenge their detention by claiming due process rights formerly available only to American citizens and lawful residents. The alternative system of justice, trial by military commissions, which goes back at least to George Washington and was ratified as recently as World War II by Franklin Roosevelt, has been made subject to new rules that seriously impair the effectiveness of the commissions. Judges have interfered with the collection of intelligence about terrorists by electronic means even where there is no conceivable threat to any citizen's privacy.

The threat to American lives and war aims by the American judiciary is real and serious. Professor Jack Goldsmith warns that our capacity to wage war "has been strangled by law"—the war has been "judicialized."

The threat to American lives and war aims by the American judiciary is real and serious.

So accustomed are Americans becoming to control by judges and legal processes that we are introducing law into areas where it is incapable of performing well and instead debilitates other vital national functions. Lawyers now oversee the conduct of war, often down to tactical levels.

It is reported that an Army general, given the opportunity to fire a missile at an automobile in which Osama bin Laden was thought to be riding, was deterred by his legal adviser. It seems certain that introducing lawyers into combat situations will usually lead to undue caution that is inconsistent with the aggressiveness and risk taking necessary to the successful conduct of war. Both the lawyer and the commander, mindful of the second guessing that could damage their careers, will be tempted to play it safe by not firing at a car in which it is only *probable* that bin Laden is riding.

As this quick and necessarily truncated survey demonstrates, policymaking in crucial areas of domestic and foreign affairs has shifted dramatically from the elected representatives of the political branches to unelected judges, who cannot be voted out of office and whose views cannot be adequately known before they take office. The result is, as Justice Antonin Scalia put it, "Day by day, case by case, this Court is busy designing a constitution for a country I do not recognize."

The Confirmation Circus

How can the branch that Hamilton called the least dangerous to the political rights of the Constitution have become in the last 50 years arguably the

most dangerous? That takes us to the subject of the corruption of the process for confirming a President's nominees.

Prior to Felix Frankfurter, a Supreme Court nominee did not even appear before the Judiciary Committee. Byron White was asked perhaps a dozen innocuous questions. William O. Douglas waited outside the hearing room until he learned he would not be called and then went home.

Now the nominee may be grilled intensively for days about how he would vote on every major issue, asked in effect to make campaign promises. His character and honesty may be impugned. He may resort to the standard reply that he cannot venture an opinion because the issue raised may come before him as a justice, but that answer is not available if he has written or spoken on the issue in the past. Which is why nominees who have taken no strong positions on major issues are now chosen.

The responsibility for this circus-like atmosphere lies immediately with the Senators, but behind them is an array of activist left-wing groups that, when the target seems promising, will wage a national political campaign which has the same quotient of lies and half-truths as may be found in a typical presidential campaign. These groups and the Senators who respond to them want justices who will go outside the Constitution to legislate politically correct results.

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In recent years, the Senators most active in confirmation debates have tended to be Democrats. Republicans have shown no similar willingness to do battle. They docilely confirm nominees whose activist records should make them anathema to those who believe the original Constitution should be the judge's guide. Compounding this are the influences of the mainstream media and the law schools, both consistently far more liberal than either the American public or the actual Constitution.

So long as a majority of the justices persist in their present behavior, so long will confirmation hearings be unedifying power struggles played out on national television.

It must be said, however, that the ultimate responsibility for this state of affairs lies with the Court itself. Half a century ago, the Court served notice that it was open to claims that have no basis in the Constitution, thus inviting litigation which, since no law was available, could only be decided on grounds of political philosophy or social sympathy. But the Court is a unique political branch because its decisions are accorded finality. The Founders, having no idea what a court could become and believing, as did Hamilton, that the judiciary's powers would be limited to enforcing the policies of the legislative and executive, did not provide the checks and balances they devised for the political branches.

Thus, today's judiciary, claiming both omni-competence and finality, has made control of the Court the ultimate political prize and its decisions the most potent weapons in our ongoing political and cultural struggles. So long as a majority of the justices persist in their present behavior, so long will confirmation hearings be unedifying power struggles played out on national television.

Preparing the Next Generation

What can be done to remedy the situation? The problem being political and intellectual, so must be the solution. There is some reason for very modest optimism on both fronts.

Thirty-five to 40 years ago, there was almost no intellectual support for originalism in the academic world, where that philosophy was commonly regarded as at best passé and at worst reactionary. Today, a sizeable body, though by no means the majority, of constitutional law professors, explicitly or implicitly, adhere to that view of constitutional interpretation. That is having an effect on those students who will comprise the next generation of scholars and, through them, on the judges of the future.

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This is a daunting task, and its difficulty may be so great as to seem impossible, but the history of the reform of antitrust law by scholars and then judges may provide some reason for hope. Antitrust jurisprudence once seemed so politicized—its irrationalities so fiercely defended by the enforcement agencies, plaintiffs' lawyers, professors, judges, and Congress—that reform seemed impossible. Yet, largely through intellectual critique, reform has been achieved. There are, to be sure, very real differences between antitrust reform and the return of rationality to constitutional law, but there are enough similarities to suggest that hope need not be abandoned for the return of legitimacy to the institution of judicial review.

Almost regardless of the outcome of the intellectual struggle, however, there remains the political battle to nominate and confirm justices and judges who spurn activism as an illegitimate creed and will be guided in their deliberations by the original understanding of the principles of the Constitution. This may be the more difficult task. Many politicians, and the activist groups of the Left which they serve in these matters, simply have no interest in the legitimacy of constitutional interpretation; they care only about results.

Our hope, if there is to be hope, must be in the appointment of new justices holding an originalist philosophy. That is necessary if not sufficient for the preservation of a republican form of government.

—The Honorable Robert H. Bork is a Distinguished Fellow at the Hudson Institute and has served as U.S. Solicitor General, acting U.S. Attorney General, and Circuit Judge of the U.S. Court of Appeals for the District of Columbia Circuit. After some years in private practice, he became a professor at the Yale Law School. This speech was delivered as the inaugural Joseph Story Lecture at The Heritage Foundation.