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Suppose Joseph Story Had Been Right and Brutus Had Been Wrong

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Abstract

Brutus, one of the loose-knit group of Anti-Federalists who opposed the adoption of the Constitution, was convinced that the new government would prove to be a national, not a federal, government; that the several states would cease to exist as sovereign entities; and that the judiciary would be instrumental in causing that result. Joseph Story, a proponent of a strong judicial branch, believed that "the worst, that could happen from a wrong decision of the judicial department, would be, that it might require the interposition of congress, or, in the last resort, of the amendatory power of the states, to redress the grievance." Judge Alice Batchelder examines several key areas and concludes that Brutus, regrettably, was right and Story was wrong.

This paper, in its entirety, can be found at **http://report.heritage.org/hl1215**

The Joseph Story Lectures

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I am honored to have been asked to deliver this year's Joseph Story Lecture here at Heritage, but I confess that it is more than a bit daunting. When my former law clerk, Robert Alt, called and invited me to give this lecture, I explained to him that this is out of my league. After all, Judge Bork gave the first Joseph Story Lecture. I'm not a scholar—I'm just a judge. But Robert slyly advised that Ed Meese wanted me to do this. As Robert well knows, Ed Meese is one of the very few "but fors" in my life, so here I am.

Actually, Ed Meese is one of the few "but fors" for all Americans who believe in limited government and individual liberty. But for Ed Meese—his courage, his leadership, his vision, and his tireless crusading across this country in the name of those virtues—the proponents of big government would have made far greater inroads on individual liberty in the last 30 years than they have.

But I must preface this talk with two caveats. First, I'm *not* a scholar. I'm a judge, and although I've been one for longer than I like to think about—I spoke at a law school the other day and discovered that I had been billed as having "decades" of experience on the bench. Really? It is true, but "decades"?—as a judge, I

Key Points

- Justice Joseph Story assumed that the judiciary, given the power to declare the meaning of the Constitution and the constitutionality of laws, would stick to the language of the Constitution and to its meaning as understood by those who voted to ratify it.
- Wickard v. Filburn and other cases, however, while reiterating the principle that the powers of the federal government are limited and that those limits must not be exceeded, incrementally removed nearly all limits on Congress's power to regulate under the Commerce Clause.
- The same pattern holds true in other areas of American life, leading to "penumbras," "zones of privacy," and what Justice Antonin Scalia has called "an inflated notion of judicial supremacy."

am a generalist. My late father-in-law, who was the best trial lawyer I ever saw, used to describe himself as having a "bathtub mind"; he filled it up with whatever he needed for the case at hand, and when the case was over, he pulled the plug so he could refill for the next case. That applies to me as well.

My second caveat is that, as a sitting judge, I have to be pretty careful about the topics I talk about and the opinions I express publicly, lest I find myself in a situation in which a litigant or his lawyer demand that I recuse because I have taken a public position on an issue in his case.

I'm not just *a* judge, though. I'm a *Reagan* judge. Ronald Reagan had a strong commitment to the idea that the third branch of the federal government was not another legislative branch, but was intended by the Framers to be confined by the Constitution as it was written, not as individual judges might have wished it had been written. And he made it clear from the outset of his campaigning for the presidency that he would appoint to the courts individuals who shared that view of a judiciary constrained by the Constitution and laws and restrained in their interpretation of them.

Parenthetically, I should say that I am one of those individuals, but how President Reagan happened upon me is still something I shake my head over. Suffice it to say that when I discovered that my husband, Bill, who had been a movement conservative since he was old enough to spell the word, was floating that particular balloon, I was horrified. "That," I told him, "is the dumbest idea you have ever had." His position was that Ronald Reagan had made it clear that he intended to appoint to the federal bench young conservatives—that is, people who believed, as he did, that it was the function of the legislative branch, not the judges, to make law—and that President Reagan was looking for, among other things, some young women of that ilk. So, with a lot of help from Ed Meese and some others, I was struck by lightning and here I am.

I might add, though, that it was a bumpy road. The first time I went through the "judicial selection process"—a euphemism if ever there was one—I was the runner-up. I well remember the night I got the call from one of Ohio's Congressmen telling me that I would not be getting the nomination. Bill and I had been watching "Monday Night Football," and I got off the phone just in time to hear Frank Gifford say about a nearly blocked punt, "If that guy had been where that ball would have gone, he might have gotten it!" I said to Bill, "That describes *me*!"

The second time around had a more successful ending. And I can't resist saying that although I was later appointed by President George H. W. Bush to the Sixth Circuit—struck by lightning again—if you come to my office in Medina, Ohio, and you look carefully at my commissions on the wall behind my desk, you will see that the one on the right, signed by Ronald Reagan, hangs slightly higher.

The Anti-Federalist View of the Federal Judiciary

One of the things I enjoy talking about is how right the Anti-Federalists were in their view of the federal judiciary, something about which I am reasonably sure that Ronald Reagan and I would have agreed. The Anti-Federalists were a loose-knit group who opposed the adoption of the Constitution. They found a particularly effective voice in Brutus, who was probably Robert Yates, a former justice on the New York Supreme Court.

Brutus wrote a series of essays that were published in the *New York Journal* during the same period of time that the *Federalist* essays were appearing in several papers in New York, New England, and Virginia. Central to Brutus's opposition to the proposed Constitution was his conviction that this new government would prove to be a national, not a federal, government; that the several states would cease to exist as sovereign entities; and that the judiciary would be instrumental in causing that result.

"THE JUDICIAL POWER WILL OPERATE TO EFFECT, IN THE MOST CERTAIN, BUT YET SILENT AND IMPERCEPTIBLE MANNER…AN ENTIRE SUBVERSION OF THE LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS OF THE INDIVIDUAL STATES."

I have often thought that had I been alive at that time, I probably would have been an Anti-Federalist, but I'm not sure that it would have been because I was prescient, as Brutus surely was, or because by nature I am one who subscribes to the Eleventh Beatitude: Blessed is he who expects the worst, for he shall not be disappointed.

In Essay XI,[1] Brutus began his attack on the "nature and extent of the judicial power, proposed to

1. The Essential Antifederalist 185–190 (W.B. Allen & Gordon Lloyd eds., 2d ed., Rowman & Littlefield Pub., Inc. 2002) (1985).

be granted by this constitution," warning:

> This part of the plan is so modelled, as to authorise the courts, not only to carry into execution the powers expressly given, but where these are wanting or ambiguously expressed, to supply what is wanting by their own decisions.
>
> ...The judicial are not only to decide questions arising upon the meaning of the constitution in law but in equity. By this they are empowered to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter.... And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution that can correct their errors or control their adjudications. From this court there is no appeal.
>
> ...The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution;—I mean, an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted.

"The Least Dangerous Branch"

Alexander Hamilton, writing as Publius in the *Federalist Papers*, countered Brutus's concerns in *Federalist* No. 78,[2] describing the judiciary as "the least dangerous branch" of the new government, declaring:

> [T]he judiciary...has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This, Hamilton explained, "proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power...." Continuing, Hamilton gave the nod to what would become judicial review, noting that the power to ascertain the meaning of the Constitution as well as the meaning of any laws enacted by the legislature belonged to the judiciary and that "whenever a particulare statute contravenes the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former." "It can be of no weight to say," Hamilton continued,

> that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.... The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation if it proved anything, would prove that there ought to be no judges distinct from that body.

(Interestingly, there are currently some legal scholars who, at least in the commerce power arena, have come to the view that the Court ought not be engaging in judicial review of the laws Congress passes under the guise of its commerce power and that review—in the sense of undoing or permitting the continuance of those laws—ought to be left to the political process.) To permit the courts to fulfill their function as a bulwark against the encroachments of the legislative branch and the whims of politicians of the day, Hamilton argued, the judges must be made independent, and the best way to do that is to grant them permanent tenure on the court.

Brutus had a very different view of the independence of the judiciary as established by the new Constitution. In Essay XV,[3] he warned:

> ...They have made the judges independent, in the fullest sense of the word. There is no power above them to control any of their decisions. There is no authority that can remove them, and they cannot be controled by the laws of the legislature. In short, they are independent of

2. THE FEDERALIST No. 78, at 402 (Alexander Hamilton) (George W. Carey and James McClellan eds. 2001).
3. THE ESSENTIAL ANTIFEDERALIST at 197–200.

> the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.
>
> ...The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every power of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature.

Brutus warned as well that "Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted; one adjudication will form a precedent to the next, and this to a following one."

"IF...THE LEGISLATURE PASS ANY LAWS, INCONSISTENT WITH THE SENSE THE JUDGES PUT UPON THE CONSTITUTION, THEY WILL DECLARE IT VOID; AND THEREFORE IN THIS RESPECT THEIR POWER IS SUPERIOR TO THAT OF THE LEGISLATURE."

Responding in *Federalist* No. 81,[4] Hamilton said this concern that the errors and usurpations of the Supreme Court could not be remedied was "altogether made up of false reasoning upon misconceived fact." "There is not a syllable in the plan," Hamilton proclaimed, "which *directly* empowers the national courts to construe the laws according to the spirit of the constitution...." Brutus probably would have responded, "My point, exactly."

Because this is the Joseph Story Lecture, and because I promised Robert Alt and Todd Gaziano that I would not just talk about the Anti-Federalists, I spent some time with Justice Story's *Commentaries on the Constitution of the United States,* which I should probably admit I had not looked at since I was in law school. My recollection was that Justice Story was not a fan of the Anti-Federalist view of the judiciary, and my reading has persuaded me that my recollection was pretty good.

"Who Is Final Judge?"

Chapter 4 of Book III of the *Commentaries*, entitled "Who Is Final Judge or Interpreter in Constitutional Controversies," makes it clear that Justice Story was a proponent of a strong judicial branch and that he did not put any stock in Brutus's prediction that the justices of the Supreme Court would "not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution." And he viewed as a positive the fact that the decisions of that court were final and unreviewable:

> Ours is emphatically a government of laws and not of men; and judicial decisions of the highest tribunal, by the known course of the common law, are considered, as establishing the true construction of the laws which are brought into controversy before it. The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our ancestors brought it with them, when they first emigrated to this country; and it is, and always has been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice, or will of particular judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.[5]

And a little further on in that chapter, Justice Story opined that "the worst, that could happen from a wrong decision of the judicial department, would be, that it might require the interposition of congress, or, in the last resort, of the amendatory power of the states, to redress the grievance."

I'm guessing that Justice Story probably was not concerned by the Anti-Federalists' warning that a republican form of government such as that embodied in the new Constitution could not be spread out over a large geographic area or a large number of states. And I'm also guessing that he would not, in his wildest imaginings, have anticipated

4. The Federalist No. 81, at 418 (Alexander Hamilton).
5. 3 Joseph Story, Commentaries on the Constitution of the United States § 377 at 349 (Fred B. Rothman & Co. 1991, Boston, Hilliard, Gray & Co.) (1833).

Franklin Roosevelt or the New Deal when—to prove his point that the extent of the power of the judiciary was just right—he said that the Constitution had been in full operation more than 40 years, during which the Supreme Court had constantly exercised its power of final interpretation, not only in relation to the Constitution itself and the laws of the United States, but in relation to the acts of the states and the state laws and constitutions, and no one had even attempted to repudiate or resist the execution of any of the Court's decisions.

So the Anti-Federalists warned that the judiciary would destroy the system that the Constitution purported to establish. Justice Story, at least in the *Commentaries*, didn't say that it wouldn't. But he did say that it hadn't done so to that point. And he certainly assumed that the judiciary, to which the power of declaring the meaning of the Constitution and the constitutionality of laws must of necessity have been granted if the system were to have any stability and predictability, would stick to the language of the Constitution and to its meaning as understood by those who voted to ratify it.

President Reagan, who was stuck with 175 years of a judiciary that had, so far as he was concerned, to a significant degree vindicated the prophecies of the Anti-Federalists, wanted to stop the wayward train of constitutional jurisprudence. He was hoping to appoint judges and justices who would alter the by-then-common perception that, as a member of the Congress told the captive audience of judges at the Judicial Conference a couple of weeks ago, "You say that you don't, but we know that you make the law." (And this Congressman was clearly OK with that.)

PRESIDENT REAGAN, WHO WAS STUCK WITH 175 YEARS OF A JUDICIARY THAT HAD, SO FAR AS HE WAS CONCERNED, TO A SIGNIFICANT DEGREE VINDICATED THE PROPHECIES OF THE ANTI-FEDERALISTS, WANTED TO STOP THE WAYWARD TRAIN OF CONSTITUTIONAL JURISPRUDENCE.

I can only imagine how discouraged President Reagan would have been to hear one of the members of the Supreme Court—who will be nameless here, but whose words I am repeating entirely accurately—tell an audience that every judge, regardless of the level of the court or the kind of issue before him, must start with the "Square One questions: Is it fair, is it decent, is it just, is it right, does it comply with the law and the Constitution?" I wrote that down on the spot so that I would not misquote it; and I wrote it on the only paper I had with me at the time, which was the receipt from the gas pump I had stopped at earlier in the day. Fortunately, when I got back home, I found that it just fit into a tiny little frame I had in my desk drawer in which was a picture of the Mad Hatter and Alice in Wonderland. That just seemed right—so I left Alice and the Mad Hatter in the frame and slid the Justice's words in over them. It sits on my desk as a constant reminder and irritant.

It's not that the Justice got those questions backwards, which was my first thought. It is that even when they are reversed, only the first two have any relevance to what judges are supposed to be doing. If the action or the law under review does not comply with the Constitution, then, of course, that is the end of the matter. And if the action at issue does comply with the Constitution, but it doesn't comply with the law, then *that* is the end of the matter. And if it *does* comply, then that, too, is the end of the matter. The policy questions—"Is it fair, is it decent, is it just, is it right"—are immaterial. Policymaking is not the realm of the courts. Could this Justice more succinctly have proved Brutus right? Or Justice Story wrong?

Which brings me to the heart of my ruminations this afternoon. Suppose Brutus had been wrong? And Justice Story right? At least with regard to how the federal judiciary would operate?

Congress and the Commerce Clause

Let's start with Congress's power under the Commerce Clause. In 1824, Chief Justice John Marshall—after having 20 years earlier, in *Marbury v. Madison*,[6] made explicit the power of judicial review—tackled the commerce power in a case called *Gibbons v. Ogden*.[7] There, he defined the terms of the Commerce Clause, but at the outset of his opinion, he said:

> [The Constitution] contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there

6. 5 U.S. (1 Cranch) 137 (1803).
7. 22 U.S. 1 (1824).

> one sentence in the constitution which gives countenance to this rule?[8]

(Remember Alexander Hamilton? "There is not a syllable in the plan which *directly* empowers the national courts to construe the laws according to the spirit of the constitution.")

I recently read an article published in the Winter 2005 *Tulsa Law Review* in which the author, Steven K. Balman, started from the intriguing premise that the Supreme Court had, in most of the cases expanding the reach of the Commerce Clause, utilized one or more of what he called three "paradoxes."[9] He defined that term, as used in his analysis, as "a statement that is seemingly contradictory or opposed to common sense." According to Mr. Balman, those three paradoxes are, first, that "interstate" means "intrastate"; second, that the "commerce power" is not about commerce but about power; and third, "substantial" means "trivial."

So, for example, he looked at the 1942 case of *Wickard v. Filburn*[10] and concluded that, in upholding the constitutionality of the Agriculture Adjustment Act (AAA) as it was applied to an Ohio farmer, the Court had utilized at least the first and third of these paradoxes—that is, the wheat that Farmer Filburn was growing that exceeded his allotment under the Act but was not intended to ever hit the market was involved in interstate commerce even though not a single grain of it would ever cross a state line or even leave his farm; and this trivial amount of wheat was substantial because, when aggregated with the wheat grown by other similarly situated farmers, it would amount to a lot of wheat.

Engaging in what I like to call "stick, stick, beat dog"[11]—or, perhaps, "if we had some ham we could have a ham sandwich if we had some bread"—reasoning, the Court reached its result thus:

> [E]ven 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."[12]

(Maybe this reasoning is really better described as "building upstairs over a vacant lot.")

Wickard, of course, was only one of a whole line of cases that, while reiterating the principle that the powers of the federal government are limited and that those limits must not be exceeded, incrementally removed nearly all limits on Congress's power to regulate under the Commerce Clause. And *Wickard* certainly illustrates Brutus's warnings that "in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution" and that "one adjudication will form a precedent to the next, and this to a following one."

WICKARD V. FILBURN **CERTAINLY ILLUSTRATES BRUTUS'S WARNINGS THAT "IN THEIR DECISIONS THEY WILL NOT CONFINE THEMSELVES TO ANY FIXED OR ESTABLISHED RULES, BUT WILL DETERMINE, ACCORDING TO WHAT APPEARS TO THEM, THE REASON AND SPIRIT OF THE CONSTITUTION."**

Jonathan Swift made this point some 50 years earlier in *Gulliver's Travels* in his rather nasty explanation to the Houhynynms of how the English legal system worked:

> It is a maxim among lawyers that whatever has been done before, may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice, and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions; and the judges never fail of directing accordingly.[13]

8. *Id.* at 187. (The casual reader might wonder how page 187 could be the "outset" of an opinion reported beginning at page 1. The answer, of course, is that in the early days of the Supreme Court's reporting system, the arguments of counsel appeared at the beginning and as part of the Court's opinion.)
9. Steven K. Balman, *Constitutional Irony:* Gonzales v. Raich, *Federalism and Congressional Regulation of Intrastate Activities Under the Commerce Clause*, 41 Tulsa L. Rev. 125, 126 (2005).
10. 317 U.S. 111 (1942).
11. *See The Old Woman and Her Pig*, *in* The Tall Book of Nursery Tales (Harper Collins Publishers 1972).
12. *Filburn*, 317 U.S. at 125.
13. Jonathan Swift, Gulliver's Travels and Other Writings 203 (Richard Quintana ed. 1958).

(Swift didn't like judges. He didn't like lawyers either. He said lawyers were that body of men "bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black, and black is white, according as they are paid."[14])

But what if, instead of finding that the AAA applied to this Ohio farmer and his *de minimis* wheat crop, the *Wickard* Court had looked at the language of the Commerce Clause, which provides that Congress has the power "to regulate commerce among the Several states," and had said:

- "*Commerce*." Well, Chief Justice Marshall cleared that right up for us in *Gibbons v. Ogden* when he said, "Commerce...is intercourse. It describes the commercial intercourse between nations, and parts of nations...."

- And "*among the several states*." Well, that requires more than just one. Chief Justice Marshall explained that pretty well too in *Gibbons*. He said "It is *not* intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same State, and which does not extend to or affect other States." And he said that "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one.... The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State."

- Finally, "*states*." Well, there are only 48 of those, and none of them is named Filburn. And none of them is cattle, Filburn's or otherwise. So, Mr. Filburn, grow your wheat for your family and your animals. Congress has no authority under the Commerce Clause to stop you.

The downside of the Court's holding that Congress's commerce power did not stretch to the control of activity both *de minimis* and wholly intrastate would have been that members of the Constitutional Law Drafting Committee of the Multi-State Bar Exam—of which I have been one for some 30 years—would have found it much harder to come up with Commerce Clause questions, because we really do get a lot of mileage out of the "in the aggregate" line of cases. For example, we couldn't make up questions designed to test whether the test-takers understand that, even though there is ostensibly no general federal police power, if the wax used on the lanes in the bowling alley came from a neighboring state, torching that bowling alley is a federal crime.

Another consequence might be that it would not have been necessary for one member of the court on which I sit to observe, in his concurring opinion in a case challenging the Patient Protection and Affordable Care Act, "the Court either should stop saying that a meaningful limit on Congress's commerce powers exists or prove that it is so."[15] Indeed, it is likely that we would not even be having a national debate today over whether Congress has the power under the Commerce Clause to require individual Americans to enter into and participate in the health insurance market.

It is likely that legal scholars would not be debating whether the Supreme Court's decisions in *United States v. Lopez*,[16] in which the Court struck down the Gun Free School Zones Act as exceeding Congress's commerce power, and *United States v. Morrison*,[17] in which the Supreme Court found that the Violence Against Women Act exceeded Congress's commerce power, were simply anomalies—i.e., blips on the screen of the jurisprudence of an ever-expanding commerce power—or were portents of some reining in of that power. That debate, of course, encompasses such things as whether the *Lopez* majority's refusal to sign on to the "costs of crime" and "national productivity" reasoning advocated by the government in that case—i.e., the piling of inference on inference of economic activity, no matter how tenuously related to interstate commerce, in order to arrive at a substantial effect—could eventually lead the Court to hold that federal regulation in such areas as the Endangered Species Act or the Clean Water Act is not within Congress's commerce power.

I would not want anyone to think that I harbor any animosity toward the kangaroo rat, but is its home on some farmer's range

14. *Id.* at 202.
15. Thomas More Law Center v. Obama, 651 F.3d 529, 555 (6th Cir. 2011) (Sutton, J. concurring).
16. 514 U.S. 549 (1995).
17. 529 U.S. 598 (2000).

really something that even "affects," let alone "constitutes," commerce among the several states? If Justice Story had known about kangaroo rats, would he have thought so?

Religion and Civil Government

The Commerce Clause is not the only area worth reviewing. Brutus, you will recall, predicted that because the judges "are empowered to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter...in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution." Not so, Justice Story declared: "Our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice, or will of particular judges."[18]

But Justice Story was not contemplating, for example, the Supreme Court's incorporating the Bill of Rights into the Fourteenth Amendment and the succession of cases through which the First Amendment's "Congress shall make no law respecting an establishment of religion" would become essentially that no governmental entity on any level may do or say anything which might be viewed by an outside observer as endorsing religion.

Justice Story would not have subscribed to this result. In 1833, Jasper Adams, the president of the College of Charleston, sent to Justice Story (as well as to James Madison and John Marshall) a copy of the sermon he had preached to the South Carolina Convention of the Protestant Episcopal Church. That sermon, entitled "The Relation of Christianity to Civil Government in the United States,"[19] reviewed the history of the relationship between Christianity and Western civilization and the role of Christianity in the history of this country, including its recognition in the constitutions of the then-24 states of the Union and the references—albeit, he acknowledged, "slight"—to Christianity in the United States Constitution. (These include, for example, Article I, Section 7's requirement that if a bill sent to the President is not signed within 10 days *excluding Sundays*, it becomes law without his signature. The exception of Sundays, Adams asserted, demonstrated the Framers' recognition that the President would not employ himself in public business on a Sunday.[20])

The sermon then turned to Adams's thesis; namely, that in founding this nation and adopting the Constitution, the American people had clearly intended to establish a link between, as Adams put it, "the Christian religion and their political institutions." He carefully built the case for his belief that the Christian religion was "entitled to the sustaining aid of the civil constitutions and law of the country" and detailed the consequences that would follow should that aid not be part of our governmental structure, explaining:

> [T]he Constitution of the United States contemplates, and is fitted for such a state of society as Christianity alone can form. It contemplates a state of society, in which strict integrity, simplicity and purity of manners, wide diffusion of knowledge, well disciplined passions, and wise moderation, are the general characteristics of the people. These virtues, in our nation, are the offspring of Christianity, and without the continued general belief of its doctrines, and practice of its precepts, they will gradually decline and eventually perish.[21]

Story responded by letter to Jasper Adams,[22] commending him on the "tone & spirit" of the sermon and observing that "My own private judgement has long been, (& every day's experience more & more confirms me in it,) that government can not long exist without an alliance with religion *to some extent*; & that Christianity is indispensable to the true interests & solid foundations of all free governments." Recognizing and agreeing with Adams's distinction between the establishment of a particular sect and the establishment of Christianity itself, he went on to say, "I know not, indeed, how any deep sense of moral obligation or accountableness can be expected to prevail in the community without a firm persuasion of the great Christian Truths promulgated in your South Carolina constitution of 1778."

18. 3 Story, *supra* note 5, § 377, at 349–50.
19. Religion and Politics in the Early Republic: Jasper Adams and the Church-State Debate 39–58 (Daniel L. Dreisbach ed. 1996).
20. *Id.* at 63–64, n. C to Adams's Sermon entitled "The Relation of Christianity to Civil Government in the United States."
21. *Id.* at 47, n. 21.
22. *Id.* at 115.

Condemning Thomas Jefferson's denial that Christianity is part of the common law—recall that in the *Commentaries*, Story had emphasized that in this constitutional system, judicial decisions "of the highest tribunal, by the known course of the common law, are considered, as establishing the true construction of the laws, which are brought into controversy before it"—Story said, "I am persuaded that a more egregious error never was uttered by able men." He concluded his letter: "These are times in which the friends of Christianity are required to sound the alarm & to inculcate sound principles. I fear that infidelity is mak[ing] rapid progress under the delusive guise of the freedom of religious opinion & liberty of conscience."

More specifically, in Book III of the *Commentaries*, Story explained that the Establishment Clause was adopted at a time when:

> [The] general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.[23]

"The real object of the amendment," he continued, "was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment." He concluded that "the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions."

CONDEMNING THOMAS JEFFERSON'S DENIAL THAT CHRISTIANITY IS PART OF THE COMMON LAW, STORY SAID, "I AM PERSUADED THAT A MORE EGREGIOUS ERROR NEVER WAS UTTERED BY ABLE MEN."

The First Amendment says: "Congress shall make no law respecting the establishment of religion." Even assuming that Justice Story had foreseen and accepted the doctrine of incorporation such that "Congress" would mean "any governmental entity," it is hard to believe that he would have anticipated the development of the precedents under the Establishment Clause that have led to the *Lemon* test as the governing law—that is, "whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion."[24] And it's hard to believe that this does not prove Brutus correct.

But what if Justice Story had been right? What if, contrary to Brutus's predictions, the Supreme Court through the years had simply looked at the language of the Establishment Clause in the context of its adoption as part of the Bill of Rights?

I'm thinking that we would not have had to remove Christmas carols from the "Winter Holiday" concerts in many public schools; I'm thinking we would not even *have* "Winter Holiday" concerts rather than Christmas concerts. We probably wouldn't have spent huge amounts of time and money litigating whether the inclusion of a crèche scene in a holiday display on some public property constituted an establishment of religion by whatever governmental entity owned or controlled that property, or exactly how many secular and diverse figures—Santa Claus, elves, Rudolphs, menorahs, and gaily wrapped presents—must accompany a crèche scene before it is sufficiently diluted that it is not unconstitutional.

We would not have expended huge amounts of time and money litigating whether a judge could display in his courtroom or a county government could erect on its courthouse grounds any depiction of the Ten Commandments.

We might have avoided fostering a belief that any mention of God in the public schools by anyone, including students, breaches that "Wall of Separation" between church and state that, as everyone knows, is right there in the First Amendment. We might have been able in our public schools to teach enough of a basis for morality that our children would not fear for their safety in simply going to school.

Indirectly addressing the Ninth Amendment in the *Commentaries*, Justice Story observed:

> In regard to another suggestion, that the affirmance of certain

23. 3 Story, *supra* note 5, § 1868, at 726.

24. Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).

> rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say, that such a course of reasoning could never be sustained upon any solid basis; and it could never furnish any just ground of objection, that ingenuity might pervert, or usurpation overleap, the true sense. That objection will equally lie against all powers, whether large or limited, whether national or state, whether in a bill of rights, or in a frame of government. But a conclusive answer is, that such an attempt may be interdicted, (as it has been,) by a positive declaration in such a bill of rights, that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people.[25]

Penumbras and "Zones of Privacy"

Would Justice Story have thought that either the Ninth Amendment or his explanation of it would be interpreted to mean that rights not enumerated in the Constitution would be subject to the Supreme Court's pronouncement that they are nonetheless fundamental and protected by the Constitution and therefore not retained by the people, at least in the sense that the people could *not* decide for themselves whether they wanted their elected representatives to regulate with regard to them? See Justices Douglas and Goldberg, in *Griswold v. Connecticut*,[26] in which the Court decided that "specific guarantees of the Bill of Rights have penumbras"—not even penumbrae?!—"formed by emanations from those guarantees, that give them life and substance. Various guarantees create zones of privacy," and the federal courts can declare these unenumerated penumbral rights both fundamental and immune from regulation.

THERE STILL EXIST SKEPTICS WHO ARE CONCERNED THAT A CONSTITUTIONAL RIGHT WHICH MUST BE DIVINED FROM MARGINAL REGIONS OR BORDERLANDS OF PARTIAL OBSCURITY FORMED BY EFFLUVIUM MAY REFLECT THE PLEASURES OF THE INDIVIDUAL MEMBERS OF THE COURT RATHER THAN THE SUBSTANCE OF THE CONSTITUTION ITSELF.

I've always been a bit skeptical about the penumbras. "Penumbras" are defined as "marginal regions or borderlands of partial obscurity," and "emanations" are defined as "something impalpable (as light, odor or effluvium) that arises from a material source." It seems to me unremarkable that there still exist those skeptics who are concerned that a constitutional right which must be divined from marginal regions or borderlands of partial obscurity formed by effluvium may reflect the pleasures of the individual members of the Court rather than the substance of the Constitution itself. Some of us might even wonder how a marginal region or borderland of partial obscurity could, under any stretch of the imagination, give "life and substance" to anything and, indeed, why it would not be the case instead that the life and substance must be there first in order for the penumbra to exist at all.

But if those Justices had not discovered those penumbras, perhaps we would not have evolved to the decision in *Lawrence v. Texas*,[27] in which the Court struck down a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct. The Court held that its decision a mere 14 years earlier in *Bowers v. Hardwick*,[28] holding that a similar statute in Georgia was constitutional, had been wrong at the time and must be overturned. There is no long-standing history in this country of law directed at homosexual conduct, the majority opinion said, and to the extent that those laws did exist, they were out of step with the views of other nations on the subject and were premised on notions of morality.

Quoting from the Court's opinion in *Planned Parenthood of Southeastern Pa. v. Casey*,[29] one of the line of cases after *Griswold* holding that the fundamental right of privacy includes a woman's right to abortion, the majority opinion said, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of

25. 3 Story, *supra* note 5, § 1861, at 720–21.
26. 381 U.S. 479 (1965).
27. 539 U.S. 558 (2003).
28. 478 U.S. 186 (1986).
29. 505 U.S. 833 (1992).

personhood were they formed under compulsion of the State."

The opinion went on to hold that morality cannot be the basis for law. Justice Stevens had gotten it right in his dissent in *Bowers,* the Court held: "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." (Some might find that particularly interesting in light of the fact that one of the explicit justifications used by the Supreme Court for the expansion of the Article I, Section 8 power to regulate commerce among the states was to prevent the use of commerce for immoral purposes.[30]) The opinion concluded:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

I'm pretty sure Brutus is somewhere shouting "I told you so," and I suspect that Joseph Story is wondering why he was so sure that the Court would not consider itself "at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles."

"An Inflated Notion of Judicial Supremacy"

There are so many areas in which it would be entertaining to engage in speculation about where we would be had Joseph Story been correct in his view of the judiciary and its role in our republican constitutional government, but it would also be entertaining to wander off to the cocktail hour. So I want to look at one final belief expressed by Justice Story and the very current proof that the system just wasn't likely to work the way he wanted it to.

Near the end of Book III, Chapter 4 of the *Commentaries,* Story addressed the potential for misconstruction of the Constitution by any part of the government. "[T]he worst that could happen from a wrong decision of the judicial department, would be, that it might require the interposition of congress, or, in the last resort, of the amendatory power of the states, to redress the grievance."[31] Later in the chapter, he said, "[I]f the usurpation should be by the judiciary, and arise from corrupt motives, the power of impeachment would remove the offenders; and in most other cases the legislative and executive authorities could interpose an efficient barrier. A declaratory or prohibitory law would, in many cases, be a complete remedy."

But would it really? Well, in some cases, it would. For example, I doubt the Supreme Court was prepared for the outrage that greeted its decision in *Kelo v. City of New London,*[32] in which the Court held that a state actor could take private property and turn it over to a *private* actor because the Fifth Amendment's requirement that private property shall not be taken for "public *use*" without just compensation does not mean that after the taking, the property must be put to public *use* at all; it simply means that some economic benefit to the public might result from the taking.

The response of the states has been remarkable: Before *Kelo,* eight states restricted the power of eminent domain in some substantial way. Post-*Kelo,* 43 states have laws on the books restricting to varying degrees the exercise of that power. President Bush issued an executive order restricting the federal use of eminent domain, and one bunch of citizens even advocated seizing Justice Souter's house by eminent domain, although that may not have been the kind of response Justice Story had in mind.

But it certainly has not worked in other cases. In 2004, the Supreme Court held in *Rasul v. Bush*[33] that aliens being held at Guantanamo Bay have a right to file petitions for habeas corpus under 28 U.S.C. Section 2241. Congress responded by passing the Detainee Treatment Act, which amended Section 2241 so that:

- No court, justice, or judge shall have jurisdiction to hear or consider

30. *See, e.g.,* Cleveland v. United States, 329 U.S. 14, 16 (1946) (holding that "[t]he power of Congress over the instrumentalities of interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices.").

31. 3 Story, *supra* note 5, § 384, at 358.

32. 545 U.S. 469 (2005).

33. 542 U.S. 466 (2004).

- (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

- (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense or an alien at Guantanamo Bay, Cuba, who —

- (A) is currently in military custody; or

- (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.

The Detainee Treatment Act established that the D.C. Circuit is the exclusive court for this review.

The Supreme Court responded in *Hamdan v. Rumsfeld*[34] by holding that, despite the text of the Detainee Treatment Act, it could still entertain pending habeas petitions. Further, it held that the Military Commissions—before one of which Hamdan was slated to be tried—exceeded the President's authority under the Authorization for Use of Military Force and the Uniform Code of Military Justice, because the President had not shown in the record that it was not practicable to follow normal courts-martial rules and because the procedures violate the Geneva Conventions. Four of the justices in the majority opined that Congress could have, but had not, created military commissions of the kind at issue in the case, and if the President wanted that authority, he could ask for it. A fifth justice essentially invited the Congress to do that—"in conformance with the Constitution and other laws," of course.

So Congress did just that. In the Military Commissions Act of 2006, Congress made it crystal clear that all jurisdiction to hear habeas cases was stripped immediately. The new law, Congress said, "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." And the new law explicitly gave the President the power that the *Hamdan* court had said was lacking: It authorized the commissions, stating that they complied with the Geneva Conventions and forbidding challenges under the Geneva Conventions.

In *Boumediene v. Bush*,[35] the Supreme Court, having just spent some quality time with Justice Story's *Commentaries*, said, "OK, then. Congress cleared that right up." The Court said:

> We acknowledge, moreover, the litigation history that prompted Congress to enact the M[ilitary] C[ommissions] A[ct].... If this ongoing dialogue between and among the branches of Government is to be respected, we cannot ignore that the MCA was a direct response to *Hamdan*'s holding that the D[etainee] T[reatment] A[ct]'s jurisdiction-stripping provision had no application to pending cases.

But wait. They did not read far enough in Justice Story's *Commentaries*. Or, as Justice Scalia said in his dissent, "Turns out they were just kidding."[36] Because the Court went on to explain that by enacting the MCA, Congress had suspended the Writ of Habeas Corpus, and the suspension was unconstitutional because the habeas right enjoyed by alien detainees at Guantanamo Bay is not only the statutory right, as was at issue in *Rasul*, but a constitutional right that cannot be suspended in the absence of a valid substitute for habeas review, and these review tribunals and limited judicial review by the D.C. Circuit do not measure up.

In his vigorous—maybe even stinging—dissent, Justice Scalia pointed out that the constitutional right to habeas corpus "could not possibly extend farther than the common law provided when that Clause was written." It did not then, nor has it until this very case ever been thought to, extend to aliens who are not and never have been on American soil or within the sovereign territorial jurisdiction of the United States; and no one was arguing that Guantanamo Bay was within United States sovereign territory. Further, he said, where the writ does not run, the limitations of the Suspension Clause have no application. What was really going on in *Boumediene*,

34. 548 U.S. 557 (2006).

35. 553 U.S. 723 (2008).

36. *Id.* at 831 (Scalia, J. dissenting).

he opined, was "an inflated notion of judicial supremacy."

If Justice Story had been right, the Court would have followed the established precedent of *Johnson v. Eisentrager*,[37] a case decided more than half a century earlier, which flatly established that aliens located outside United States sovereign territory have no constitutional right to habeas corpus. The Court would have looked to the common law and the habeas protection extended by the common law at the time the Suspension Clause was written. And because the common law did not extend the right of habeas relief to aliens outside the sovereign territorial jurisdiction of the United States when the Constitution was written, the actions of both of the other branches of the federal government—Congress's adopting and the President's signing of the Military Commissions Act—would have sufficed to remedy the wrong decision (or usurpation, depending on how strongly you feel on the subject) in *Hamdan*.

If Justice Story had been right. And Brutus had been wrong.

***—The Honorable Alice M. Batchelder** is Chief Judge of the U.S. Court of Appeals for the Sixth Circuit.*

37. 339 U.S. 763 (1950).