

Appellate Issues



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Please Stop Strangling the Constitution

By David J. Perlman

“The world does not expect logic and precision in poetry or inspirational pop-philosophy. It demands them in the law.”¹ So Justice Scalia belittled Justice Kennedy’s majority opinion in the gay marriage case, *Obergefell v. Hodges*. Although this wasn’t the dissent’s most caustic critique, it’s the most interesting. For interpreting the Constitution may indeed have more in common with inter-

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Preserving the Judiciary’s Legitimacy in an Increasingly Polarized America¹

By Nolan B. Tully and Vishal H. Shah

Introduction

Today’s state of American politics represents more polarization than any other time in its history. Indeed, a 2014 Pew Research study found that the share of Americans who express consistently conservative or consistently liberal opinions more than doubled, from 10% to 21% between 1994 and 2014.² Of the three co-equal branches of government, the legislative branch is most clearly directly

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Editor’s Note

Members of the Constitutional Convention met in Philadelphia in May of 1787 under great uncertainty. The Articles of Confederation had failed. They gathered at the State House to try again.

Their objective was to construct a government unlike any the world had seen, a political system embodying the

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preting poetry or seeking guidance from inspirational pop-philosophy than in applying deductive logic.

Generally, we're reluctant to acknowledge the true character of legal interpretation. Both legal professionals and the general public prefer to view legal decision making, and hence legal argument, as objective and neutral in a manner modelled on science; if you simply plug the data of each case into the legal rule or formula, you'll get the correct result. We fear that by admitting that legal interpretation entails value judgments that we're conceding that decision-making boils down to nothing more than a judge imposing a personal preference. And from that concession, a host of evils are thought to flow—bias, arbitrariness, and ultimately, the erosion of judicial legitimacy.

Countering this fear, we succumb to a compulsion to prop things up with false accounts of decision making, comparing judges to umpires, for example (and thus law to baseball), or worse, to distort legal decisions and argument, dressing them in the phony guise of a preferred paradigm of neutrality and objectivity. It's in the area of Constitutional law, particularly the Constitution's recognition of individual rights, that the complex character of legal interpretation is most evident.

Interpreting all the way down

That the paradigm of a scientific type of objectivity, what Ronald Dworkin referred to as "scientism," is not an accurate or workable model is by no means a new idea.² Interesting-

ly, the two sentences from Justice Scalia's dissent quoted above resonate in direct counterpoint to a famous sentence: "The life of the law has not been logic: it has been experience." The author, of course, was Oliver Wendall Holmes, Jr., in 1881 in *The Common Law*.³ Sixteen years later, in his influential essay "The Path of the Law," Holmes considered "... the notion that the only force at work in the development of the law is logic" to be a "fallacy."⁴ On both occasions, he noted that the law cannot be worked out from "axioms" in the manner of "mathematics."⁵

As these sentences suggest, Justices Scalia and Holmes held different conceptions of legal interpretation. One might say that Justice Scalia's demands replicable uniformity. This is different from treating like cases alike. It means every mind arguing or deciding a legal issue according to a shared, authoritative method, as if a legal problem were indeed akin to a math problem. It manifests itself as textualism, and in the Constitutional realm, originalism, but it needn't take those forms alone. It's an idea that extends beyond Justice Scalia's and Justice Thomas' literalist approach to text and their reliance on Eighteenth Century practices as an indicator of Constitutional intent. More universally, it is rooted in an underlying belief that legal rules and conclusions—and ultimately, truth itself—must be fixed across time and circumstance.

Justice Holmes, viewing the law through the prism of pragmatism, was particularly concerned with how, and whether, legal rules worked. The results of legal decisions count;

they can, in turn, influence the rules. Put another way, the impact of decisions is one factor that will determine how future decisions are made. Legal principle is not static; it must discover a continuing justification and meaning in changing fact. The fixity of a rule is insufficient ground for its validity. As Holmes dramatically put it, “It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV.”⁶

The contrasting sentences from Justices Scalia and Holmes suggest another point: it is impossible to practice law, whether as attorney or judge, particularly Constitutional law, without subscribing, whether explicitly or implicitly, consciously or unconsciously, to a theory of law – of what law is and ought to be. For the decisional process must begin and end somewhere, making its way from here to there by some intellectual means.

More generally, when we engage in some discipline or endeavor, we can’t help but interpret the endeavor itself. As Ronald Dworkin wrote: “When we interpret any particular object or event, ... we are also interpreting the practice of interpretation in the genre we take ourselves to have joined....”⁷ In our case, the genre is law. In a continuation of the same sentence, Dworkin explained **how** practice in any genre, whether it be law or science or literature, also constitutes an interpretation of the genre itself: “we interpret that genre by attributing to it what we take to be its proper purpose – the value that it does and ought to provide.”⁸ In other words, in interpreting the law in any particular case, we are also positing some underlying values or objectives for law itself.

Clear text and context

In its guaranty of rights, the Constitution is clear. It is neither ambiguous nor “vague,” the descriptive term Justice’s Scalia applied in *Obergefell*.⁹ For the Constitution – like a poem – cannot be expected to relinquish all of its potential meanings instantaneously in the absence of interpretive contexts yet unrealized. The First Amendment clearly restrains Congress’ hand in areas of religion, speech, assembly, and petition. By carving out swaths of freedom, it implicates political values and ideals. Other passages are even more open-ended, such as the Fifth Amendment’s prohibition against deprivation of “life, liberty, or property, without due process of law” or the Fourteenth’s guarantee of “equal protection of the laws,” but they are all clear in what they proclaim. Likewise, the Ninth Amendment’s statement that “the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people,” preserving a region of unarticulated – and yet unrealized – individual rights.

The document needn’t specify how any of these rights or political values will influence any particular case. It needn’t specify how conflicts between them should be resolved. The Constitution’s guarantee of rights is not “vague” any more than a poem is “vague” because its meaning can’t be encapsulated in prose. In the words of Chief Justice Marshall, “...we must never forget it is a *constitution* we are expounding.”¹⁰ Within the genre of law, the Constitution is a sub-genre; intended to guide the future life of a nation, its text requires semantic breadth and a mode of interpretation befitting its task.

The Constitution is not a static collection of words but — again, not unlike a poem — it opens into a reality beyond the text itself. Put another way, it references our continually evolving experience, influences this experience, and, perhaps most importantly, can be read and interpreted only from the vantage point and context of this experience. It cannot stand apart from the ever-changing flow of experience from which we perceive it and to which we apply it.

Despite the Founder's genius, their foresight was limited. Not only were they unable to foresee the physical and technological components of our world — electricity, automobiles, aircraft, the internet, devastatingly destructive weapons — but our mental landscape, our new modes of understanding both our setting and ourselves. But there's even more to the unforeseeability inherent to constitution-making. The document, as the Founders well knew, set in motion a dynamic system — a set of moving pieces of government — and there was no telling how the dynamic system would play out, how the elements of democratic government and the opposing forces of checks and balances would work. There was no predicting what the government would look like, what forms of action the branches of government might take in relation to each other or in relation to its citizens. What is more, this dynamic system, in turn, was embedded in larger dynamic social, cultural, and natural systems. **Everything** was, and remains, subject to complex, unpredictable change.

Certainly, a Constitutional guarantee of rights could never be interpreted in the same manner as legal pronouncements, or, to use the lan-

guage of positivist legal theory, a “command of the sovereign,” such as a statute or rule. Secondly, it's obvious that the Constitution's creation of individual rights that trump the majority will entails political and moral values — freedom of speech and religion, for example, or equality under the law and in relation to the government. — Finally, being the originating blueprint for a dynamic system — which itself functions in a dynamically changing world — it can be interpreted only by assessing and re-assessing those implicated values in newly arising contexts. The contexts aren't “new” simply by virtue of changing factual scenarios but “new” by virtue of a changing social and cultural environment, changing human knowledge, and a changing legal structure. The metaphor of a “living Constitution” never lost its relevance.

The possibility of *becoming* cruel and unusual

It seems obvious that, while underlying Constitutional values in their broadest conception are identifiable, a particular Constitutional rule or holding is subject to change since the context that influences a holding is subject to change, indeed, unforeseeable change. Thus, it makes perfect sense that, while the death penalty may have been held to be Constitutional, it may, at a later time, run afoul of the Eighth Amendment's prohibition against cruel and unusual punishment.

As Justice Breyer, joined by Justice Ginsburg, argued in his dissent in *Glossip v. Gross*, circumstances may arise that require re-evaluation of the death penalty.¹¹ Justice Breyer's argument for re-evaluation has four parts. First, innocent

people are sentenced to death more frequently and more certainly than we realized. Secondly, the death penalty is arbitrarily imposed and therefore cruel. Thirdly, the delay in death penalty cases renders it cruel. Fourth, it's unusual since its use is declining.

Justice Breyer made the point in connection with the first argument – although it could support all the arguments – that the taking of a life by the state is of a different order from other punishment due to its “finality.”¹² “Qualitative difference” is the phrase he quotes from *Woodson v. North Carolina*.¹³ It's for this reason that we should be less tolerant of error when the sentence is death. In his rebuttal, Justice Scalia ignored Justice Breyer's point that death is another order of punishment, claiming that Justice Breyer misses the mark because the errors stem from the process of conviction, not the sentence. Importantly, the Breyer dissent reviews the changed factual context justifying re-evaluation due to errors. For example, the advent of DNA analysis has made us more certain than ever before of the number and identity of innocent people sentenced to death.

Justice Scalia's rebuttal, joined by Justice Thomas, is notable for its contrasting approach in which a Constitutional rule tends to be frozen in time. It begins by comparing the scenario of re-considering capital punishment to “Groundhog Day” – the movie in which the protagonist finds himself reliving Groundhog Day until he gets his human interactions empathetically right. In Justice Scalia's view, analysis should be brought to a close once and for all because of the words of the Constitution itself: “It is impossible to hold unconstitutional that which the

Constitution explicitly *contemplates*.” The dissent continues: “The Fifth Amendment provides that ‘[n]o person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury,’ and that no person shall be ‘deprived of life . . . without due process of law.’”¹⁴

Yet it's not impossible that capital punishment, even though practiced in Eighteenth Century America and mentioned in the Constitutional text, could **become** unconstitutional, since the protection against cruel and unusual punishment must be realized, can only be realized, in a world subject to dynamic change. The inquiry doesn't end – because it's a **constitution** that we're interpreting – with the inability of Constitutional draftsmen to foresee that in another, future context capital punishment might conflict with the prohibition against cruel and unusual punishment. (In the passages Justice Scalia quoted, capital punishment is mentioned in relation to other protections afforded the accused – the right not to be held without presentment or indictment of a grand jury, for example – and capital punishment's unconstitutionality wouldn't run counter to honoring those rights.)

It doesn't matter that the delay in carrying out the death sentence, which Justice Breyer cited as a reason for abolishing capital punishment, is, as Justice Scalia observed, caused by the criminal process itself. Due process in capital cases demands time, and the delay caused by the imperatives of due process can reach a point that strains other Constitutional imperatives. There is nothing shocking about being caught between the demands of two Constitutional ideals or standards. It's entirely possible that we cannot

— and that it's taken generations for us to discover that we cannot — implement the death penalty while satisfying the mandates of Constitutional guaranties. This idea seems anomalous only if one assumes from the outset that the death penalty **must** be Constitutional.

The majority opinion by Justice Alito follows just this line of thought. The issue the majority confronted was whether use of the available formula for lethal injection was cruel and unusual because it created a risk of a painful death. A crux of Justice Alito's majority opinion reads:

If States cannot return to any of the "more primitive" methods used in the past [such as the electric chair] and if no drug that meets with the principal dissent's approval is available for use in carrying out a death sentence, the logical conclusion is clear. But we have time and again reaffirmed that capital punishment is not *per se* unconstitutional. [Citations omitted.] We decline to effectively overrule these decisions.¹⁵

In other words, since capital punishment is Constitutional (because we decline to overrule decisions saying so), there must be a means of implementing it.

Freedoms Unimagined

The attitude that Constitutional rights are frozen in time and impervious to a changing world is evident in Justice Scalia's repudiation of the statement, from *Trop v. Dulles* (1958), that the cruel and unusual clause "must draw its mean-

ing from the evolving standards of decency that mark the progress of a maturing society." To this principle Justice Scalia attributed "the proliferation of labyrinthine restrictions on capital punishment," delays in execution, and the abandonment of capital punishment in some jurisdictions.¹⁶

Justice Scalia's rejects the *Trop* approach with a refrain commonly invoked to rationalize the denial of rights. In his words, interpreting "cruel and unusual" in light of "the evolving standards ... that mark the progress of a maturing society" is "a task for which we are eminently ill suited."¹⁷ The protest of modesty is echoed by Chief Justice Roberts in *Obergefell*: "Just who do we think we are?"¹⁸ The answer is self-evident. You know — or should: The Supreme Court, of course.

It's the judiciary's responsibility to interpret the Constitution, and interpretation can only be accomplished, and is only relevant, in the ever evolving present. Judges abdicate responsibility when they back away from interpretation because it seems difficult or open-ended or entails competing values. Rights are affirmed only as they find expression in entirely new contexts, taking on new forms, maybe even becoming "new rights" — depending on how one chooses to parse the word "right" — or, put another way, becoming personal freedoms previously unimagined.

As his profession of modesty suggests, Chief Justice Robert's principal gay marriage dissent fails to accept the judiciary's role of ensuring that new manifestations of freedom become a reality — although it pays rhetorical lip service

to the idea. “I agree with the majority that the ‘nature of injustice is that we may not always see it in our own times.’ [Citation omitted.] “As petitioner’s put it, ‘times can be blind.’ [Citation omitted.] But to blind yourself to history is both prideful and unwise.”¹⁹ The shift here, founded on an aversion to pride and an appeal to wisdom – with their religious and philosophic connotations – is incongruous in a dissent that faults the majority for veering from law into morality and philosophy. Chief Justice Roberts’ proclaimed agreement that injustice unrecognized in one era may become apparent in another is contradicted by a passage just a few pages earlier; there, he mocks the majority, by quoting it, for relying on “its own ‘reasoned judgment,’ informed by its ‘new insight’ into the ‘nature of injustice,’ which was invisible to all who came before but has become clear as ‘we learn [the] meaning’ of liberty.”²⁰ Ultimately, in Chief Justice Robert’s due process analysis, the fact that gay marriage hasn’t been historically recognized as a right becomes the basis for continuing not to recognize it.

The dissent is aided in reaching this point by remaining closed to the current plight of the petitioners and of others denied marriage as a matter of law. It considers the issue to be whether gays suing for the rights and privileges of marriage can dictate to a state legislature the “definition” of “marriage” and not an issue concerning the impact on people of the government’s disparate treatment of people. Blind to the unfairness imposed on gays, it says nothing about the majority’s observation – discussed in Judge Posner’s notable Seventh Circuit opinion, and brought to both courts’ attention by an

amicus brief on behalf of the American Psychological and American Psychiatric Associations, among others – that sexual orientation is immutable, an insight realized in our times, not many years after homosexuality had been pathologized as a “disorder.”

The dissent buttresses its position by labelling gay marriage as a “policy” issue, and, of course, “policy” is for the legislature, not the courts. Sadly, it devolves into small-minded turf when it portrays the opponents of gay marriage as victims, taking offense at perceived slights inflicted by the rhetoric of the gay marriage debate; it laments the “... apparent assaults on the character of fairminded people...” opposing gay marriage.²¹ Certainly, the experience of gays denied marriage – paying inheritance taxes that heterosexual couples don’t pay, their children deprived a guardian upon a partner’s death, apart from the issue of stigma – is of a different order from the experience of gay marriage opponents participating in debate.

Unlike the dissents, Justice Kennedy’s opinion recognizes that new rights will come into existence over time. “... New dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas and protests and then are considered in the political sphere and the judicial process.”²² Following his sentence about injustice being potentially invisible, he recognizes that Constitutional guarantees find their meaning in the context of the once unforeseeable, ever changing present:

The generations that wrote and ratified the Bill of Rights and Fourteenth Amendment did not

presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.²³

The majority accurately implies that Constitutional interpretation **requires** judicial enforcement of new rights – or, put another way, of new manifestations of rights – for the alternative is paralysis in both interpretation and the enforcement of rights: “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”²⁴ Rights are derived not just from source documents but from our evolving understanding of political principles and present circumstances: “They rise, too, from a better informed understanding of how Constitutional imperatives define a liberty that remains urgent in our era.”²⁵

Judge Posner's opinion, though very different from Justice Kennedy's, agrees that rights must be newly conceived under changing circumstances. It observes that sexual orientation is believed to be not simply immutable but innate in the sense of beyond choice.²⁶ It even offers current hypotheses on how homosexuality is consistent with natural selection.²⁷ Because sexual orientation isn't voluntary, it observes, discrimination based on it is, like racial discrimina-

tion, especially stigmatizing.²⁸ It notes the change in litigation concerning the issue since 1972, when the Supreme Court dismissed, for want of a federal question, an appeal from a state supreme court holding that limiting marriage to opposite sex couples did not violate the Constitution; *Baker v. Nelson* was the “dark ages” for such litigation.²⁹ With statistical specifics, it describes adoption by gay couples in today's society, countering the argument that reserving marriage for heterosexuals is justified by the necessity of nurturing children.³⁰

A beginning

Not unlike a poem, the Constitution renews its meaning in time. Like inspirational, pop-philosophy, it articulates communal aspirations, which, in turn, can only be realized under the circumstances of any given moment.

As Erwin Chemerinsky observes, “... all Justices – liberals and conservatives – are making value choices.”³¹ But the fact that decisions implicate values does not render them extra-legal or the personal preference of a judge. It does not justify retracting into a shell of modesty for fear of venturing into restricted domains. Only by accepting that values are in play and that we're called to actualize them in the world today can we even begin to interpret a constitution.

- ¹ *Obergefell v. Hodges*, ___ U.S. ___ (2015) slip op., Scalia dissent, 9.
- ² Ronald Dworkin, "Law from the Inside Out," *New York Review of Books*, November 7, 2013, <http://www.nybooks.com/articles/2013/11/07/law-inside-out/>.
- ³ Oliver Wendell Holmes, Jr., *The Common Law* (1881) in *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, ed. Sheldon M. Novick (Chicago: University of Chicago Press, 1995) Vol. 3, 115.
- ⁴ Oliver Wendell Holmes, Jr., "The Path of the Law," *Harvard Law Review* 10:457 (1897) in *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, ed. Sheldon M. Novick (1995) Vol. 3, 396.
- ⁵ Oliver Wendell Holmes, Jr., *The Common Law*, 115; "The Path of the Law," 396.
- ⁶ Oliver Wendell Holmes, Jr., "The Path of the Law," 399.
- ⁷ Ronald Dworkin, *Justice for Hedgehogs*, (Cambridge: Harvard University Press, 2011), 131.
- ⁸ *Ibid.*
- ⁹ *Obergefell*, Scalia dissent, 4.
- ¹⁰ *M'coulough v. Maryland*, 17 U. S. 316, 407 (1819)
- ¹¹ *Glossip v. Gross*, ___ U. S. ___ (2015).
- ¹² One could argue that "finality," and hence irrevocability, is only one aspect of this "qualitative difference."
- ¹³ *Glossip v. Gross*, Breyer dissent, 52-53, quoting *Woodson v. North Carolina*, 428 U. S. 280, 325 (1976).
- ¹⁴ *Glossip v. Gross*, Scalia concurrence, 25.
- ¹⁵ *Glossip v. Gross*, majority opinion, 20.
- ¹⁶ *Glossip v. Gross*, Scalia concurrence, 39.
- ¹⁷ *Ibid.*
- ¹⁸ *Obergefell*, Roberts dissent, 3.
- ¹⁹ *Ibid*, 22.
- ²⁰ *Ibid*, 19.
- ²¹ *Ibid*, 28-29.
- ²² *Glossip v. Gross*, majority opinion, 7.
- ²³ *Ibid*, 11.
- ²⁴ *Ibid*, 18.
- ²⁵ *Ibid*, 19.
- ²⁶ *Baskin v. Bogan*, 766 F. 3d 648, 657 (7th Cir. 2014).
- ²⁷ *Ibid.*
- ²⁸ *Ibid*, 658.
- ²⁹ *Ibid*, 660.
- ³⁰ *Ibid*, 662-664.
- ³¹ Erwin Chemerinsky, *The Case Against The Supreme Court*, (New York, Viking, 2014), 340.

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impacted by a more partisan body politic. Similarly, though the executive branch accomplishes much of its function through a large, unelected bureaucracy, it is headed by the President and Vice President, who are elected in a partisan election. The federal judiciary, however, is a step removed from this process—purposely designed by the Framers of the Constitution to be independent and impartial, with judges appointed by the Chief Executive with the advice and consent of the Senate.

Since the founding of the Republic, it has been widely acknowledged that an impartial judiciary is integral to the function of our federal government. In fact, commentators often analogize the judiciary to a baseball umpire, dutifully calling balls and strikes and enforcing the rules of the game without expressing a preference for either of the teams competing on the field. Indeed, Chief Justice John Roberts referred to this analogy during his confirmation hearing, stating to the Senate “it’s my job to call balls and strikes, and not to pitch or bat.”³ But recently, the federal judiciary as a whole, and the Supreme Court in particular, has faced criticism for acting in a partisan manner and using the law as a mechanism to reach a judge’s desired outcome, otherwise called results-oriented jurisprudence. This has led to increased cynicism about bias in the court system, both among the public at large and legal practitioners.

Recent events have done little to assuage that cynicism. High profile 5-4 decisions by the Supreme Court prior to Justice Scalia’s death have supported the perception that the Court has pre-

-ordained blocks of liberal and conservative justices who will interpret the law as necessary to achieve their desired political outcomes.⁴ The Senate has only furthered this perception by refusing to give Supreme Court nominee Merrick Garland a confirmation hearing, causing the shorthanded Court to split evenly on a number of crucial cases involving immigration,⁵ labor unions,⁶ tribal jurisdiction,⁷ and the Affordable Care Act.⁸

Beyond the Court’s decisions, Donald Trump, the Republican nominee for President, has questioned the impartiality of United States District Judge Gonzalo P. Curiel based on Judge Curiel’s Mexican heritage and Mr. Trump’s avowed policies concerning the United States’ southern border. And most recently, Justice Ruth Bader Ginsburg encountered significant backlash for her comments regarding Mr. Trump, where she stated, “I can’t imagine what this place would be – I can’t imagine what the country would be – with Donald Trump as our president. . . . For the country, it could be four years. For the court, it could be – I don’t even want to contemplate that.”⁹ Given that many citizens now perceive the judiciary as politically partial, what is the impact of that perception on the legitimacy of the courts? How has the perception of judicial partiality mirrored the polarization of the American public? Has partisanship impacted the process by which the government selects and appoints judges to the federal courts? And what does this mean for the legitimacy of the judiciary as a co-equal branch of government, premised on its independence and impartiality?

The Polarization of the American Public

It has become nearly axiomatic to cite the polarization of the American public as a reason for a whole host of problems, from the perceived inadequacy or overzealousness of certain rules and regulations to the failure of elected officials to pass meaningful legislative solutions to problems. As referenced above, this complaint has impacted the judicial branch, as those who disagree with judicial decisions attribute their discontent to results-oriented jurisprudence or, sometimes, to judicial activism. But how has the public become more polarized? And how has that impacted the court system?

The Pew Research study cited above found more than just that a significant portion of the American public has become more staunchly conservative or liberal over the past two decades. It also found that the movement of people to the left or the right was accompanied by a rise in animosity towards those in the opposite party. For instance, the study found that Republicans who have “very unfavorable opinions of the Democratic Party” rose from 17% to 43% over the last two decades. Similarly, Democrats harboring very negative opinions of the Republican Party have risen from 16% to 38% in the same time frame. People are not only becoming more fervent in their political beliefs, but they are also potentially becoming less tolerant of the other party’s policies and beliefs and more likely to ascribe negative intentions or aims to their political opponents.¹⁰ The polarization is self-reinforcing; about 63% of consistent conservatives and 49% of consistent liberals stated that their friends generally shared their political views.¹¹

Not so long ago, the judiciary was made up almost exclusively of white men from a similar background. The “whiteness” and “maleness” has changed, but the background for the most part has not. Many applauded the diversification of the judiciary because they thought that having people from different backgrounds brought different insight. But when Justice Sotomayor made her “wise Latina woman” comment (“I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life”¹²), it raised the question whether the insight that surfaced was results-oriented jurisprudence (*i.e.*, political polarization) or a wealth of experience. The more people, and in particular the press, view the application of one’s individual experience to judging as politically polar, the more suspect decisions will be, even if the decision-making is not.

As the American population has become more polarized, perceptions of the judicial system have changed. While it is possible that judges have become more polarized (and certainly probable for elected state court judges), the perception of politicization impacts the judiciary’s legitimacy the most. Now, as more Americans find themselves on the extremes of the political spectrum and associate more strictly with those individuals that share their viewpoints narratives about the judiciary change. Dissenters focus more on the political impact of a court’s decision and less on the legal process that was required to reach that decision. Once the process is marginalized, and the sources of law that were used to reach a decision—statutes, regula-

tions, precedential decisions – are ignored, then it is very easy for those on the wrong end of a decision to point the finger at a jurist’s perceived political leanings. At this point, the perception of the judiciary changes from that of an independent body calling “balls and strikes” based on a deep knowledge of the rules of the game to a partisan entity with each individual member of the judiciary reaching decisions based on their own particular political biases and experiences. The truth likely lies in between those two perceptions, and the question then becomes whether the pendulum has swung too far in the direction of a polarized body politic perceiving the judiciary as a partisan branch of government.

The Importance of Impartiality

The idea that judges should be independent and impartial emerged well before the formal birth of America. As scholar Charles Geyh noted, “[t]he dependence of colonial courts on the English monarch was among the flashpoints that sparked the Declaration of Independence.”¹³ While English judges had been granted tenure during “good behavior,” colonial judges were made to serve at the pleasure of the King, causing colonialists concern that judges were independent of the people but dependent on the crown.¹⁴ The Framers reflected these concerns in the Declaration of Independence, noting that the King “has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”¹⁵

Alexander Hamilton further opined on the importance of impartiality in the Federalist Papers. In Numbers 78 and 79, Hamilton reaffirmed the

idea that the judiciary should be structurally independent from Congress and the President so as to protect the legitimacy of the judiciary. In defense of lifetime tenure, Hamilton stated:

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.¹⁶

Similarly, Hamilton defended the fixed salary of judges:

Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . *A power over a man’s subsistence amounts to a power over his will.* And we can never hope to see realized in practice, the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.¹⁷

The Framers ultimately manifested these concerns in the Constitution’s separation of powers principle. As part of that system, the founding

fathers viewed impartiality as the only way to preserve the courts' legitimacy, which was institutionalized in both decisional and branch independence.

Decisional independence concerns the impartiality of judges—the capacity of individual judges to decide specific cases on the merits without “fear of favor.” Lifetime tenure, fixed salaries, and insulation from politics all support and promote decisional independence.

Likewise, the Framers pursued branch independence, also called institutional independence. This concept concerns the general, non-case-specific separation of the judicial branch—the capacity of the judiciary to remain autonomous, so that it might serve as an effective check against the excesses of the political branches. Separation and independence are synonyms; the separation of the judicial branch functionally entails some form of independence so as to facilitate its autonomous capability. This autonomy is key for impartiality and, through the process of judicial review, allows the judiciary to protect the institutional integrity of the government against unconstitutional political encroachments by the executive and legislative branches.

Partisanship in the Confirmation Process

The polarization of the body politic is further reflected in the evolution of the confirmation process of federal judges. The Appointments Clause empowers the President to appoint federal judges, among other public officials, with the “*advice and consent*” of the U.S. Senate.¹⁸ *While the core evaluative criteria remain the same*

(*e.g.*, merit as a legal professional, ideology, and political relationships), the confirmation process has become longer and, as a result, more intense, especially since the 1980s.

By the sheer numbers, confirmation hearings have become more extensive over the last 30 years. Before 1981, the confirmation process of justices was usually rapid. For example, George Sutherland was nominated by President Harding and confirmed on the same day in 1922. From the Truman through Nixon administrations, justices were typically confirmed within one month. Since the Ford administration, however, the process has taken longer. In fact, a Congressional Research Service study found that, since 1975, the average number of days from nomination to final Senate vote is 67 days (2.2 months), while the median is 71 days (or 2.3 months).¹⁹

Indeed, the Senate Judiciary Committee never questioned nominees until the 1925 confirmation hearings of Harlan Fiske Stone. Ironically, Stone actually proposed appearing before the Committee to answer questions after some senators voiced concerns about his relationships with Wall Street players. His testimony helped secure a confirmation vote with very little opposition.²⁰ However, the nature of the confirmation hearings has changed since that time. After 1955, every nominee has been required to appear before the Committee to answer questions from politicians. The hours spent before the Committee have lengthened from single digits before 1980 to double digits today.²¹

The increasing intensity of confirmation hearings can be attributed to the judiciary's role

within the government, and more specifically, the public's and press's awareness of the Court's resolution of landmark cases that affect public policy. The Committee first questioned nominees on their judicial views in 1955 with John Marshall Harlan II, whose confirmation hearing occurred shortly after the Court's landmark decision in *Brown v. Board of Education*.²² Moreover, politicians are careful to not repeat the mistakes of President Dwight D. Eisenhower or President George H.W. Bush. Both presidents nominated justices (Chief Justice Earl Warren and Justice David Souter, respectively), who were believed to be conservative, but turned out to be liberal justices. President Eisenhower famously called the Warren appointment "the biggest damn fool mistake I ever made."²³ It may be that the intensity of the confirmation process represents an attempt to gain some decisional certainty in the way a judge will rule to prevent further surprises.

The Legitimacy of the Court System - Are We in Crisis?

As set forth above, the American system of government requires the judiciary to serve as a check against the other two branches of government and to balance power coequally with those two branches. To serve that purpose, the Framers devised an independent judiciary, appointed by the Chief Executive with the advice and consent of the Senate, serving a lifetime term insulated from the political fray. As such, an independent judiciary is and always has been fundamentally important to the basic rights of the American citizenry. The Fifth Amendment to the Constitution states, in part, "[N]or shall any person . . . be deprived of life,

liberty, or property, without due process of law. . . ." ²⁴ "The fundamental requisite of due process of law is the opportunity to be heard."²⁵ In addition to an opportunity to be heard, the due process requirement guarantees that a citizen facing deprivation of life, liberty or property will be afforded notice of their opportunity to be heard.²⁶ However, behind the assurance of due process is a high degree of confidence that the arbiter will be impartial. In countries where the judiciary is perceived to be biased, a right to a hearing is not seen as providing a right to justice.

Accordingly, if the public and those seeking justice and redress from our judicial system no longer perceive the judiciary as impartial, it would shake our system to its very core. Citizens expect that their elected officials will look out for their constituents first, in a partisan manner, because that is exactly how those individuals got elected. Courts must be different. The judiciary, in combination with citizen juries, must sit in judgment of all manner of disputes in the public realm, from civil disputes over small amounts of money to the most serious criminal matters where the verdict may deprive someone of their life. If the judiciary is infected by the notion that the decisions it renders are based on political expediency rather than striving for a dispassionate interpretation and application of the law, then everyone appearing before the judiciary has a ready-made reason to delegitimize any judicial decision that comes down against them.

That is not to say that judges are purely apolitical, which would be tantamount to painting every judge as a robot in a black robe. Judges,

of course, are humans and therefore have individual political viewpoints. The recognition of that among the populace is perhaps a good thing—it evinces a more realistic view of the judiciary, and serves as a more accurate description of how a judge comes to his or her decision. Specifically, most judges come to each case trying their best to faithfully construe and apply the law as it was written by the legislature or articulated in prior precedent. They approach this task, however, shaped by their own experience and guided by their own set of principles and morals which have been developed over their entire life. It would be impossible to ask any judge to divorce themselves from those prior experiences and their own personal principles. Recognizing that the members of the judiciary are influenced at some level by those things is likely a more accurate articulation of how judicial decisions are ultimately made.

But that does not mean that jurists stalwartly decide cases along party lines. If that were the case, how can one explain decisions that are unanimous or not divided conveniently along party lines? In reality, an acceptance of some inherent political bias in the judicial system is probably nothing more than the realization of an enlightened body politic. Where the United States may stand now, however, is at the precipice of moving from that truthful acceptance to a more cynical and destructive viewpoint—specifically, that each judge is governed primarily or solely by their own personal biases and political preferences. If this viewpoint becomes widely accepted, then the legitimacy of every judicial decision is undercut; each one can be dismissed as merely the rogue opinion of a bi-

ased judge and the decision can justly be ignored.

The obligation to prevent political polarization from delegitimizing the delivery of justice falls to all of us. It falls, of course, to the judiciary and those responsible for appointing judges to faithfully adhere to the Framers' vision of an independent, impartial judiciary. It falls to the lawyers and their clients appearing before the courts to try to objectively evaluate their own cases and not simply dismiss adverse outcomes as "wrong" decisions handed down by "biased" judges. And it falls to the public as a whole, including the press, particularly with respect to decisions of great public importance (principally rendered by the Supreme Court), to disagree with decisions on the merits and based on thoughtful considerations of the arguments made by both sides rather than simply dismissing decisions as nothing more than "liberal" or "conservative" judges reaching a decision that was politically expedient.

Conclusion

It seems apparent that the perception of the judiciary—as well as the process for appointing judges within the federal court system—have become more politicized in recent years. The question then becomes, what is the impact on the delivery of justice? Certainly, if the court system is delegitimized to the point where every decision can be characterized by the losing party as simply a results-oriented decision by a jurist who espouses a different political viewpoint than the losing party, both the authority of the courts and their legitimacy as a third, coequal branch of government will be severely and

negatively impacted. If, however, lawyers and the press are more careful and thorough in their analysis so as to convey the rationale behind a decision rather than labeling it just “liberal” or “conservative,” we will all be better off. Of course, judges are people that have backgrounds and viewpoints, some of which are political. Recognizing that fact, rather than ignoring it, should strengthen the American court

system, as it reflects a more realistic view of how judges operate. But going further and characterizing every decision as reflective of political bias disservices the judiciary—and ultimately all of us.

¹ We greatly appreciate the efforts of our colleague, Alicia Hickok, whose support and insight made this publication possible.

² Carroll Doherty, *7 Things to Know about Polarization in America*, PEW RESEARCH CENTER (June 12, 2014), <http://www.pewresearch.org/fact-tank/2014/06/12/7-things-to-know-about-polarization-in-america/>.

³ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., nominee to be Chief Justice of the United States).

⁴ See, e.g., *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015) (concerning same-sex marriage); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751 (2014) (concerning the Religious Freedom Restoration Act); *Michigan v. EPA*, 576 U.S. ___, 135 S. Ct. 2699 (2015) (concerning whether costs must be considered before pollution may be regulated); *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010) (concerning the regulation of campaign spending by corporations).

⁵ *United States v. Texas*, 579 U.S. ___ (2016) (per curium) (upholding a preliminary injunction on the Deferred Action for Parents of Americans program without addressing the merits).

⁶ *Friedrichs v. Cal. Teachers Ass’n*, 578 U.S. ___, 136 S. Ct. 1083 (2016) (per curium) (affirming the Ninth Circuit ruling allowing union agency fees to be levied on non-union teachers in California but failing to address the legal issues).

⁷ *Dollar Gen. Stores v. Miss. Band of Choctaw Indians*, 579 U.S. ___ (2016) (per curium) (affirming the Fifth Circuit ruling that Dollar General consented to tribal jurisdiction but avoiding questions of tribal judicial or legislative authority and constitutional due process in tribal courts).

⁸ *Zubik v. Burwell*, 578 U.S. ___, 136 S. Ct. 1557 (2016) (per curium) (vacating and remanding to the Third Circuit to allow the parties to suggest solutions for accommodating religious freedom while ensuring women receive full and equal health coverage under the Affordable Care Act).

⁹ Adam Liptak, “Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term,” N.Y. TIMES, July 10, 2016, available at <http://www.nytimes.com/2016/07/11/us/politics/ruth-bader-ginsburg-no-fan-of-donald-trump-critiques-latest-term.html>.

¹⁰ Doherty, *supra* note 1.

¹¹ *Id.*

¹² Sonia Sotomayor, “A Latina Judge’s Voice” [Judge Mario G. Olmos Memorial Lecture, University of California, Berkeley, School of Law, 2001]. Reprinted, N.Y. TIMES, May 15, 2009, available at <http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html>.

¹³ Charles G. Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI. KENT L. REV. 31, 35 (1998).

- ¹⁴ *Id.*
- ¹⁵ *Id.*
- ¹⁶ THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
- ¹⁷ THE FEDERALIST NO. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
- ¹⁸ U.S. Const. art. II, § 2, cl. 2.
- ¹⁹ Barry J. McMillion, Cong. Research Serv., Supreme Court Appointment Process: Senate Debate and Confirmation Vote 13 (2015), available at <https://www.fas.org/sgp/crs/misc/R44234.pdf>.
- ²⁰ Steve Padilla, *Sotomayor Hearings: The Grilling of Supreme Court Nominees is a Relatively New Invention*, L.A. TIMES: L.A. TIMES BLOGS (July 15, 2009, 6:02 PM), <http://latimesblogs.latimes.com/washington/2009/07/sotomayor-hearings-the-grilling-of-supreme-court-nominees-is-a-relatively-new-invention.html> (“Harlan Stone became the first Supreme Court nominee to appear and testify before the Judiciary Committee in 1925”; “Every nominee to the high court since President Eisenhower’s 1955 nomination of John Harlan has testified before the committee.”).
- ²¹ COURT IN TRANSITION; *Republicans Speak of Respect of Roberts’s Peers, and Democrats Issue Warnings*, N.Y. TIMES, Sept. 16, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9C02E5D91E31F935A2575AC0A9639C8B63&pagewanted=all>.
- ²² 347 U.S. 483, 74 S. Ct. 686 (1954).
- ²³ Todd S. Purdum, *Presidents, Picking Justices, Can Have Backfires*, N.Y. TIMES (July 5, 2005), <http://www.nytimes.com/2005/07/05/politics/politicsspecial1/presidents-picking-justices-can-have-backfires.html>.
- ²⁴ U.S. CONST. amend. V. A nearly identical clause also appears in the Fourteenth Amendment to the Constitution. U.S. CONST. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law...”).
- ²⁵ *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783 (1914).
- ²⁶ *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950) (“This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.”).

...Continued from page 1: **Editor's Note**

ideals set forth in the Declaration that had been signed in the same State House in the summer of 1776 and that was the opening salvo to a war. It was to be a representative government — a democracy — honoring equality and an individual's rights against it. When they completed the blueprint in September, there was reason for optimism.

While it was being signed, the elder statesman, 81-year-old Benjamin Franklin, noted that the armchair used by the Convention's President, George Washington, had a sun carved on its back. "I have often in the course of the session," he said, "... looked at that [sun] behind the President without being able to tell whether it is rising or setting. But now at length have the happiness to know that it is a rising and not a setting sun."

"It was a new nation," Lincoln later said, "conceived in liberty and dedicated to the proposition that all men are created equal."

But, of course, uncertainty still loomed. For this new government had never been tried. As Franklin emerged from the building, a Mrs. Powel of Philadelphia asked, "Well, Doctor, what have we got, a republic or a monarchy?"

"A republic," Franklin replied, "if you can keep it."

Ever since, the republic has been put to the test. At the moment, the power of the President to appoint Supreme Court Justices has been tested as never before and the consequences will resonate long into the future. There's a great parti-

san divide over Constitutional rights and interpretation. Judicial legitimacy is in doubt. New issues continue to arise, and history casts its ever new illuminations on the present.

Year after year, one after another, individually and cumulatively, the tests, implicate the ultimate test — in Lincoln's words, "whether that nation, or any nation so conceived and so dedicated, can long endure."

Can we, indeed, keep it?

Both anticipating and reflecting on the November 2016 Appellate Judges Education Institute to be held a short walk from the State House, today known as Independence Hall, the theme of this *Appellate Issues* is: "The Constitution: Experiment at Work."

I thank the contributors for meeting the challenge of writing on our political work in progress.

David J. Perlman

Editor

Judge Garland, the Rule of Law, and the Elephant in the Room

By *Conor Dugan*

The Constitution states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.” That is the entirety of what the Constitution says about Supreme Court nominations, confirmations, and appointments. With the death of Justice Scalia in an election year and the President’s nomination of Judge Merrick Garland to replace Justice Scalia, the meaning and import of those words have taken on an immediate and concrete significance.

What are the consequences of the Senate not even considering Judge Garland’s nomination? What does this do to the Constitution and the institutions of government it establishes? What does a proper interpretation of the Constitution require? These previously abstract questions are very much live and real for us today. Ultimately, the answers are elusive—or perhaps unsatisfying—for when one peels back the layers of argument, the Constitution has very little to say about these questions. The Constitution leaves judicial nominations to the intrigues of the political process. Ultimately, what the battle over this and every other nomination tells us is that there are larger issues lurking in the background of nomination fights that remain unaddressed. It is on these larger issues that we as lawyers may be able to offer dispassionate and reasoned thinking that helps to tamp down the heat in our political culture.

A Vacancy Arises

Only an hour after Justice Scalia’s death was confirmed, Senate Majority Leader\ Mitch McConnell, Republican from Kentucky, announced that the “American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president.” Leaders across the aisle were quick to push back on McConnell’s statement. Senate Minority Leader, Harry Reid called McConnell’s suggested approach “unprecedented” and stated that a failure to “fill this vacancy would be a shameful abdication” of responsibility. Former Secretary of State, Hillary Clinton said that “[e]lections have consequences” and declared that the “president has a responsibility to nominate a new justice and the Senate has a responsibility to vote.” Announcing his nomination of Garland, President Obama said that “Presidents do not stop working in the final year of their term; neither should a senator.”

Since Judge Garland’s nomination there has been no crack in the stalemate. Most Republican Senators have refused even to meet with Garland during the nominee’s traditional senate courtesy calls. After Garland’s nomination, McConnell doubled-down and said that the “next president may also nominate someone very different. Either way, our view is this: Give the people a voice in filling the seat.” Barring an unforeseen miracle, Judge Garland’s nomination will go no further, and the next president will nominate Justice Scalia’s successor.

What Does the Constitution Require?

Scholars and pundits have been divided on what the Constitution requires in these circumstances. One important contribution is a lengthy article by Professors Robin Bradley Kar and Jason Mazzone examining historical practice to glean a potential constitutional rule. See Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say about President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. Rev. Online 53 (2016). They write that the "historical rule that best accounts for senatorial practices" throughout United States history is the following:

While the Senate has the constitutional power to provide advice and consent with respect to particular Supreme Court nominees and reject (or resist) particular candidates on a broad range of grounds, the Senate may only use this power to deliberately transfer a sitting President's Supreme Court appointment powers to a successor in the highly unusual circumstance where the President's status as the most recently elected President is in doubt. [*Id.* at 53-54.]

In other words, the Senate has used its power to advise to examine a nominee and then reject him or her, but, according to Kar and Mazzone, it has never completely refused to consider a nominee (except in highly unusual circumstances not present today). Kar and Mazzone believe

that the refusal to consider a nominee has the effect of taking away the President's appointment power and transferring it to his successor.

But Professor Kar and Mazzone go further. They write that norms of conduct can mature into constitutional rules. Thus, Kar and Mazzone raise a further question whether the historical practice they have discovered has "ripened into a constitutional rule that should inform the best interpretation of constitutional text and structure." *Id.* at 54; see also *id.* at 100. In short, what the Republican Senate is doing may be more than break from senatorial tradition (which itself should not be rejected lightly). It might violate the Constitution.

Kar and Mazzone's article has garnered much attention. *The New York Times* highlighted the study in a June 13, 2016 article. See Adam Liptak, *Study Calls Snub of Obama's Supreme Court Pick Unprecedented*, N.Y. Times, June 13, 2016, available at www.nytimes.com/2016/06/14/us/politics/obama-supreme-court-merrick-garland.html?_r=0. Many scholars have been quick to praise the article. Others have been critical. Their thesis is worth considering. Do the actions of the Senate Republicans with respect to Judge Garland violate the Constitution? And, if so, what then? If not, is the behavior of Senate Republicans still problematic? And what is to be done about this behavior if it is problematic?

Examining the thesis

Kar and Mazzone are right, of course, to suggest that practices and traditions can and do inform us as to the meaning of the Constitution. They

are also right that practices and understandings can ripen into norms. They seem generally right in their analysis of the historical data. As Josh Zeitz has written, “there is no modern precedent for the Senate’s refusal to take any action.” Josh Zeitz, *Republicans, Beware the Abe Fortas Precedent*, Politico Magazine, Feb. 15, 2016, available at www.politico.com/magazine/story/2016/02/scalia-republicans-abe-fortas-precedent-beware-213640. The deepest problem with Kar and Mazzone’s thesis, however, may be the plain text of the Constitution—what the Constitution says and does not say.

As Professor Michael Ramsey of the University of San Diego has written, the appointments clause “does not place any duty on the Senate to act nor describe how it should proceed in its decision-making process. . . . [T]he Senate’s core role in appointments is as a check on the president, which it exercises by not giving consent—a choice it can make simply by not acting.” Michael D. Ramsey, *Why the Senate Doesn’t Have to Act on Merrick Garland’s Nomination*, The Atlantic, May 15, 2016, available at www.theatlantic.com/politics/archive/2016/05/senate-obama-merrick-garland-supreme-court-nominee/482733/. Ramsey argues that this is buttressed by Article I, Section 5 of the Constitution which allows the Senate establish its own rules and, by implication, “decide how to respond to presidential nominations.” *Id.* Further, “[n]o one doubts that the Senate can refuse consent to Garland’s appointment.” *Id.* Thus, how the Senate refuses to consent to Judge Garland’s nomination, may not matter, in terms of the Constitutional question.

On the other hand, the practice uncovered by Kar and Mazzone may show that the proper *original* understanding of the Constitution requires that the Senate do *something* in response to a nomination. In other words, what advice and consent means—and how it has always been understood—is that the Senate must take some action on a nomination. Advice and consent means that the Senate must engage in *some* process even if it does not mean an eventual confirmation of a nominee. The Senate, by choosing repeatedly to exercise its “advice and consent” power in the way, may have established a Constitutional rule that binds its future actions. There is some force to these arguments especially for those inclined towards originalism.

There are larger doubts however. How can practice bind future generations if that practice is not consonant with the text? Indeed, if as Professor Noah Feldman has written the Constitution says absolutely “nothing” “about filling Supreme Court vacancies,” extra-textual practice can have no binding force. Noah Feldman, *Obama and Republicans Are Both Wrong About Constitution*, Bloomberg.com, Feb. 17, 2016, available at www.bloomberg.com/view/articles/2016-02-17/obama-and-senate-are-both-wrong-about-the-constitution. Moreover, while there are certainly Constitutional provisions that are unenforceable, the lack of any enforcement mechanism here is particularly glaring. Moreover, as Feldman notes the Constitution says nothing about the size of the Supreme Court and the size has fluctuated over time. Refusing to consider a nominee whose presence on the Court is not even constitutionally mandated

seems hardly to be a sanctionable offense.

The other weakness in the Kar and Mazzone thesis is that the Senate itself seems not to have understood its role as requiring an up or down vote on a nominee. While one may not be able to point to other examples where the Senate has failed to hold hearings and vote on nominations in a presidential election year, senators have indicated a willingness to do just that. They have acted to bar a vote on nominees in the past. For instance, President Obama joined other senators in a failed attempt to filibuster (another pesky senatorial process not set out in the Constitution) Justice Samuel Alito's nomination. Obviously, had the filibuster been successful, Justice Alito never would have gotten his up or down vote. This indicates that senators themselves do not see themselves as being constitutionally required to give a nominee a vote.

At the end of the day, the simplest answer seems to be that the Constitution simply does not bar the actions taken by the Republicans with respect to Judge Garland. Their actions may be foolish (see below), unnerving, nasty, or discourteous. But they are not unconstitutional. As Professor Feldman notes:

The upshot is that the Constitution really doesn't answer the question of what the president or the Senate must do after the death of Justice Scalia. It sets the ground rules for a political battle—and the politicians can fight it out. That's OK. Our Constitution has its good points—and one of them is that it doesn't solve

every political question. Nor should it. [Feldman, *Obama and Republicans Are Both Wrong About Constitution*, Bloomberg.com, Feb. 17, 2016.]

Because the text leaves open what "advice and consent" means, the Senate may choose a variety of means through which to give that advice and consent. And, we, the people, can duke it out telling our senators our opinions and voting at the ballot box.

Constitutional but Foolish?

But that's not the end of the matter. Even if failing to hold hearings and a vote on a nominee does not violate the Constitution, one can certainly ask whether it is wise. The Senate's current unwillingness even to vote on the Garland nomination seems to be the logical next step in the mutually assured destruction on judicial nominations towards which Republicans and Democrats have been hurtling since the Robert Bork nomination. Democrats refused to confirm President Bush's judicial nominees to lower courts. Republicans have done the same with respect to President Obama's nominees. Each side cries foul. The rhetoric has become increasingly more poisonous, the posturing more pronounced, the accusations more shrill.

It is here that institutional concerns embodied in the Constitution may come into play. Any governing document assumes a certain amount of good faith and fair play among its actors. The Constitution is no different. In order to function properly, one can argue that American democracy requires a certain level of cooperation on

the part of its coordinate branches of government. Thus, the appointments clause of the Constitution assumes, at some level, a somewhat functional, cooperative process by which a president and the senate work together to fill vacancies. Without such good faith, we may have more than Supreme Court vacancies to worry about.

Furthermore, on a purely pragmatic level, the Republicans argument that they are attempting to allow the people to have a voice in their next Supreme Court justice has flaws. If elections have consequences, then President Obama's reelection in 2012 means something. By the time President Obama ran for reelection in 2012, it was clear what sorts of justices he would nominate. The American people had an opportunity to voice their displeasure with the sort of judicial philosophy that the President embraces in his nominees. They, instead, chose to reelect him.

On the other hand, Republicans can counter that the people have a political recourse now. They can punish Republicans for their unwillingness to consider Judge Garland. The people can also elect a president who will nominate justices similar to those President Obama has appointed. The argument can go on ad infinitum—and ad nauseam. The inability to resolve these arguments points to a larger issue lurking in the background.

The Elephant in the Room

The preceding discussion points to larger questions that few seem willing to entertain. The refusal to hold hearings and vote on Judge Gar-

land's nomination is ultimately a battle about the meaning of the courts and the Supreme Court, in particular. Ed Whelan, President of the Ethics and Public Policy Center, was right when he wrote that the "immediate question before Senate Republicans upon Justice Scalia's death was how to deal with (a) a nomination by an opposite-party president, (b) in an election year, (c) that threatens to dramatically alter the ideological composition of the Court." Ed Whelan, *Law Profs Kar/Mazzone on Senate Duty on Supreme Court Vacancies – Part 4*, Bench Memos Blog, June 7, 2016, available at <http://www.nationalreview.com/bench-memos/436302/kar-mazzone-senate-duty>. Everyone knows that Justice Scalia's replacement could dramatically shape the law for decades to come. Replace him with a clone of Justice Brennan and the law will jerk in a particular direction. Replace him with the second-coming of Justice Scalia and Justice Kennedy will remain the swing vote until the next nomination fight comes down the pike.

What few seem to be asking is why one vacancy should matter *this* much. If the rule of law is to mean anything, one person should not hold the power to maintain or reshape the law so significantly. This problem points to larger foundational and systemic questions that have remained unanswered for too long: What are courts for? What is the role of the judge in a constitutional democracy? How should a judge approach the text of the Constitution? How can the Supreme Court and courts in general maintain their institutional authority and legitimacy if it's the identity of the judge that makes all the difference? Perhaps this is ultimately where we

as lawyers can provide value to society. If we explain the law, the role of judges and lawyers within the law, the legal bases for decisions and arguments, and the contested claims to those on the left and right, we can shed light and reduce the heat in this area of our political discourse.

Voted Most Likely to be the Subject of Proposed Constitutional Amendments: The Electoral College

By Nancy M. Olson

With this *Appellate Issues* dedicated to our Constitution and published during an election season, I thought it appropriate to write about the electoral college, first provided for in the Constitution and later revised by the Twelfth Amendment. We are all familiar with the electoral map shaded red, blue, and sometimes interim-purple, on election night. But how many of us are aware of the origins of the electoral college system and how it has been refined to its present form? Relatedly, did those refinements fix identified issues? If not, what arguments have been made for transforming or abolishing the system? This article travels back in time to the founding of our country, specifically, to the Constitutional Convention that set the stage for the selection of a national executive, then on to the passage of the Twelfth Amendment, and finally to the present.

At the Constitutional Convention in 1787, the delegates discussed forming a national legislature and selecting a national executive. The delegates debated options for selecting the executive, including selection by the legislature, selection by the people, selection by the states' governors, electoral selection, and lottery. According to Roger Sherman of Connecticut, the "sense of the nation would be better expressed by the

legislature, than by the people at large" because the people would "never be sufficiently informed of characters [or] give a majority of votes to any one man." James Madison, *Notes of Debates in the Federal Convention of 1787*, at 306 (Ohio University Press 1966). Query whether Sherman would have held a different view had he known of the information and media age on the distant horizon. In any event, rather than adopting a system crediting Sherman's view of voter ignorance, the delegates agreed upon a compromise whereby electors (initially selected by the state legislature) would select the president.

Under the compromise between small and large states, each state would have a number of electors based on the total number of its elected members in the Senate and House of Representatives. Each elector would cast two votes. Commentators have suggested that this indirect-election method was preferable in 1787 due to a variety of factors, including widespread illiteracy, poor means of communication, and a home-state advantage for large states. Under the new system, the electors were supposed to be "the wise men" of the community. The original system provided for two votes per elector, with the candidate receiving the highest number of votes winning the presidency (assuming the candidate also received a majority of votes). The sec-

ond-place candidate won the vice presidency. If no candidate received a majority, the House of Representatives would select a president from the top five candidates, with each state's delegation receiving one vote. If no vice presidential candidate received a majority of votes, the Senate would select a vice president from among the top three candidates.

The two-votes-per-electror method created unintended consequences — the possibility of a president and vice president from different parties or an unintended tie between candidates from the same party. If party electors cast their votes intending to seat their party's top-two candidates as president/vice president, by calculatedly casting slightly fewer votes for the intended number two candidate, it was possible that one party's leading candidate would be elected president, with another party's leading candidate elected as vice president (e.g., John Adams and Thomas Jefferson in 1796). Similarly, if a majority of electors used all of their votes to vote for one party's presidential and vice presidential candidates, an unintended tie for president could result and would need to be resolved by the House of Representatives (e.g., Thomas Jefferson and Aaron Burr in 1800). The infamous 36 ballots required to break the deadlock following the 1800 election between Jefferson and Burr paved the way for revising the system.

As a result of these unintended consequences, in 1803-04, Congress passed and the states ratified the Twelfth Amendment. Significantly, it changed the electoral college system adopted in the Constitution by requiring electors to cast one vote for president and one vote for vice president. The amendment provides that electors shall "vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted

for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States . . ." U.S. Const. Amend. XII. As with the original system, the person receiving the most votes for the position (assuming he/she wins a majority) wins the election, with the distinction that votes are now cast for a specific office (president or vice president). If no majority vote emerges, then the House of Representatives will pick the president from the top three (rather than five) candidates, with each state receiving one vote; similarly, absent a majority, the Senate will pick the vice president from among the top two (rather than three) candidates, with each senator receiving one vote. Since the passage of the Twelfth Amendment the House of Representatives has picked a president under the runoff rules only one time (the Andrew Jackson/John Quincy Adams election of 1824). The Senate has picked a vice president only once (Richard Johnson in 1837).

Post-Twelfth Amendment, the electoral college has been revised in other ways. For example, the Twentieth Amendment, along with the Presidential Succession Act of 1947, changed the expiration dates of the presidential and congressional terms from March 4th to January 20th and January 3rd, respectively. The purpose of this change was to prevent a lame duck Congress from holding a runoff election in the event that no candidate secured a majority of electoral votes. It also shortened the period between such an election and the inauguration. In 1961, the Twenty Third Amendment granted residents of Washington D.C. the right to vote for president, and it also granted three electoral votes to Washington D.C. This change, however, does not allow Washington D.C. to partici-

pate in a run-off election if the president or vice president must be selected by Congress. For a presidential candidate to win by a vote of the House of Representatives, he/she must receive 26/50 votes among the states, with no vote granted for Washington D.C.

The electoral college has been criticized over the years for a number of reasons, including: the fact that “faithless electors” may vote for a candidate different than the one to whom they are pledged; the system does not allow voters to directly elect their president; and, it can result in the winner of the popular vote losing the election. Electors are now guided largely by the popular vote in each state, yet the winner of the popular vote has lost the election on four occasions, three of which occurred in the 1800s, and the most recent of which occurred following the race between George W. Bush and Al Gore in 2000. In addition, although the election has only gone to the House of Representatives twice, it came within 30,000 votes on four other occasions. Lastly, a faithless elector has cast a rogue (but non-influential) vote in a total of seven elections.

Since the passage of the Twelfth Amendment, over 700 proposals to further amend the process have been introduced in Congress and failed. The most successful effort occurred in 1969 when the House of Representatives passed a bill providing for direct election of the president and vice president. After passing in the House, the bill failed in the Senate, and thus was never sent to the states for ratification. Proposals to modify or replace the electoral college have included, but are not limited to, ideas such as proportional division of each state’s electoral votes based on the state’s popular vote, division of each state’s electoral votes by congressional-district popular vote, abolition of the electoral college in favor of direct election by popular vote, and direct election by popular vote requir-

ing a majority with a built-in runoff provision. With the exception of proposals that call for abolition of the electoral college, many changes could be effected on a state-by-state level, such as a change in the way electoral votes are awarded.

Notwithstanding the fact that states control the rules for pledging their electors (although electors are not “bound” in about half of the states), 48 out of 50 states award all of their electors, i.e., winner-take-all, to the winner of the state’s popular vote. Only Maine and Nebraska allow for a system whereby the elector for each Congressional district votes for the winner of the popular vote in that district, with the two Senate-seat electors casting their votes for the overall popular vote winner in the state. Such a system more closely represents what a direct-election would look like, yet it has not gained popularity among the states. Most recently in 2004, Colorado voters rejected switching to a proportional system that would have replaced the winner-take-all award method with a proportional method.

With 700 proposed alterations (and no sign of the debate subsiding any time soon), the electoral college holds the record for being the constitutional topic subject to the most proposed amendments. Over time, popular opinion has generally overwhelmingly been in favor of abolishing this system. If history is any guide, however, the system is here to stay and the most accessible means for influencing the way it works in the near term is by making changes to the electoral process at the state level. Future elections wherein the loser of the popular vote is elected president and/or the election must be decided by the House of Representatives would likely be necessary to force any significant changes.

The Riddle of Judicial Review

By Travis Ramey

At some point, all (or nearly all) American children take a civics class. Presumably, the goal of requiring students to learn about the structure and function of government is to create an informed electorate. As part of informing the future electorate, civics classes teach students about the three branches of government and their respective spheres of power. The legislative branch makes the law. The executive branch enforces the law. The role of the judicial branch, however, is a little fuzzier. It “applies” the law. It “interprets” the law. It “states what the law is.”

The point of having three independent branches of government is for the branches to “check and balance” each other. In terms of the federal Constitution, the judicial branch’s power to “check and balance” the other branches boils down to a two-word phrase: judicial review. The ultimate origin of judicial review is questionable, but the courts functionally gave the power of judicial review to themselves. The effect has been to make the federal courts the absolute and final arbiter of the Constitution. They are the authoritative interpreters. They state what the Constitution is and is not.

The courts’ self-conferred power of judicial review has not gone unchallenged. In fact, the history of the American constitutional experiment is, in many ways, wrapped up in contests over who gets to decide what the Constitution means. With that in mind, it is somewhat puzzling that the judiciary has been able to retain

the power of judicial review and create an environment where the legitimacy of its power to decide what the Constitution means is nearly unquestioned.

Popular culture may provide an explanation, however, in the form of a riddle posed in the phenomenally successful HBO television series *Game of Thrones*. What that riddle may teach is that although the issue of judicial review appears now to be a settled question, the ultimate authority to interpret the Constitution could have vested elsewhere. And there is no guarantee it could not vest elsewhere at some point in the future.

A brief look at the origins of judicial review

Ask a question about judicial review, and some of the first responses are likely to include *Marbury v. Madison* and *Martin v. Hunter’s Lessee*. Many scholars have written about the origins of judicial review. Although they do not always agree on its origins, they do agree that those origins predate the *Marbury* decision.

Even a cursory review of pre-*Marbury* authorities reveals this to be true. Although the concept of federal judicial review found no berth before the Constitutional Convention of 1787, that should come as no surprise as the Articles of Confederation provided for no federal court system. The issue of judicial review was, however, one of significant concern when debating the ratification of the Constitution. Alexander Hamilton famously defended the practice in *The Federalist Papers*. And the power of the Supreme

Court to invalidate legislative actions was heavily criticized by the Anti-Federalists.

The earliest Supreme Court Justices apparently considered the power of judicial review to be a matter of little debate. Justice James Iredell, who joined the Court in 1790, had been writing about the concept of judicial review since 1783. By 1800, even Justice Samuel Chase, who had previously been noncommittal as to the Court's power of judicial review, took judicial review as something of a given:

It is, indeed, a general opinion, it is expressly admitted by all this bar, and some of the Judges have, individually, in the Circuits, decided, that the Supreme Court can declare an act of congress to be unconstitutional, and, therefore, invalid; but there is no adjudication of the Supreme Court itself upon the point.

Thus, by the time it decided *Marbury* and *Martin*, the Court's claim to power as final arbiter of the Constitution was mere recognition of an existing legal theory.

Challenges to the power of judicial review

The courts' claim to the role as final arbiter of the Constitution has not gone unchallenged. The States and the two coordinate branches of the federal government have challenged the judiciary's power. They have done so through defiance. They have done so through structural attacks. And they have done so by claiming the power for themselves.

The earliest presidents claimed the power to decide whether congressional action was constitutional, and the veto was the early presidents' tool for exercising that power. As of 1824 more than half of all vetoes were for constitutional reasons. That practice altered with President Jackson, who exercised the veto more than the first six presidents combined and did so for both constitutional and policy reasons.

As early as 1798, states began claiming that they had the authority to determine when the federal government had exceeded its constitutional bounds. In the Virginia and Kentucky Resolutions, which were written by James Madison and Thomas Jefferson, two states took the position that they had power to nullify unconstitutional federal laws, at least within their own territory. Eventually bowing to political pressure, Virginia and Kentucky repealed the resolutions.

The early 1830s saw a significant challenge to the Supreme Court, coming after its decision in *Worcester v. Georgia*. In that case, the Court struck down a Georgia law that regulated Cherokee territory and the occupants of that territory. The Court concluded that the Georgia law was unconstitutional because it usurped the federal government's exclusive power to regulate intercourse with Native Americans. The Cherokee apparently believed the Court's decision would require Georgia to return the territory taken from them and would require the Georgians who had moved onto Cherokee lands to leave. Georgia, however, defied the Court's ruling and apparently threatened to hang anyone who came to Georgia to enforce it. Despite political pressure, President Andrew Jackson refused to intervene to enforce the Supreme

Court's decision. Although the quote may be apocryphal, President Jackson is purported to have said "John Marshall, the Chief Justice, has made his decision; now let him enforce it."

The same period also saw the resurrection of the theory of state nullification, leading to the Nullification Crisis of 1832. That crisis arose after Congress enacted the so-called "Tariff of Abominations." In response, Vice President John C. Calhoun anonymously wrote *South Carolina Exposition and Protest*, which adopted and expanded on the nullification theories in the Kentucky and Virginia Resolutions. The crisis reached its peak in 1832, when South Carolina held a special convention and "nullified" the 1828 tariff and its 1832 modification. Although President Jackson asserted federal supremacy and Congress authorized Jackson to use the military, Congress also reduced the tariffs. South Carolina rescinded its nullification of the tariff, but it maintained its stance regarding nullification. Although the Nullification Crisis arose as a challenge to federal supremacy, not judicial review, the nullifiers' position was that states had judicial-review-like authority.

Since the 1830s, attacks on the federal judiciary's power of judicial review from the other branches of the federal government have tended to be structural in nature. These attacks have come in the form of attempts to manipulate the size of the Supreme Court. The most famous of them is President Franklin Roosevelt's proposed "court packing" plan, which was designed to overcome the Supreme Court's constitutional opposition to New Deal programs. The ongoing political dispute regarding Judge Merrick Garland's nomination to the Supreme Court is

something of an inverted echo of that plan. These attacks have also come in the form of jurisdiction stripping, with mixed success.

States, however, have continued to try to assert their own power of judicial review and have acted to defy the federal courts. For example, President Eisenhower famously used the National Guard to compel school desegregation in Arkansas. In response, Arkansas asserted nullification theories in *Cooper v. Aaron*, but the Court rejected them and refused to allow Arkansas to avoid desegregating its schools. More recently, in expressing resistance to the Supreme Court's decision in *Obergefell v. Hodges*, some members of the Alabama judiciary have questioned whether state judges are bound to follow Supreme Court decisions and have advocated refusing to follow the *Obergefell* decision.

The riddle of judicial review and judicial independence

In light of those many challenges, it is interesting that the courts have been able to retain their position as final arbiters of the meaning of the document vesting fundamental powers in the government. It is particularly interesting (at least at the federal level) in light of the Constitution's silence regarding judicial review.

The courts' retention of this power calls to mind a scene from the HBO series *Game of Thrones* in which a character named Varys poses a riddle to another named Tyrion Lannister about the nature of power:

Varys: Three great men sit in a room. A king, a priest and a rich man. Between them stands a com-

mon sellsword. Each great man bids the sellsword kill the other two. Who lives, who dies?

Tyrion: Depends on the sellsword.

Varys: Does it? He has neither crown nor gold nor favor with the Gods.

Tyrion: He has a sword, the power of life and death.

Varys: But if it's swordsmen who rule, why do we pretend Kings hold all the power? . . .

Tyrion: I've decided I don't like riddles.

Varys: Power resides where men believe it resides. It's a trick, a shadow on the wall. And a very small man can cast a very large shadow.

The idea that power is an illusion based on belief is hardly a revolutionary concept. But the riddle's application to the power of judicial review is nearly perfect—the power of judicial review resides where men believe it resides. The judiciary has that power because other political entities and the American public accept and believe that it has that power.

Justice Breyer has commented on the remarkable nature of that acceptance, which he ascribes to the American public's respect for the rule of law:

Abortion? School prayer? *Bush v. Gore*? Almost everyone in the United States has strong views on such matters. And when the Court decides cases involving those issues, half of the people think not just that it was wrong, but that it was terrible. And yet, what I think is the most remarkable fact about those cases is a fact that is rarely remarked. There are no paratroopers. There is no army. There are no people in the streets saying they will not follow the law, even those who think it is terrible. It is accepted that even in the most controversial matters the public will abide by the rule of law.

In light of that public respect for the role of the courts, it has become nearly unthinkable that the President, the Congress, or a state would successfully defy the courts in the way Georgia did after *Worcester*.

Yet, this system depends heavily on maintaining public belief that the courts are more than just another political institution. As one commentator has noted: "If the public should ever become convinced that the Court is merely another legislature, that judicial review is only a euphemism for an additional layer in the legislative process, the Court's future as a constitutional tribunal would be cast in grave doubt." In other words, if a power is built on public confidence, a lack of confidence can destroy it.

With that in mind, if bench and bar wish to preserve the courts' independent power of judicial

review, they must seek to foster public confidence in the courts' independence and apolitical nature. Courts should work to maintain public confidence by (to the extent possible) depoliticizing their decisions and even the process of their decision making. When courts promote at least the appearance of being apolitical, and not some sort of super-legislature, they encourage and bolster the public's confidence in the legitimacy of their role as final arbiters of the Constitution.

In addition, both bench and bar should recognize that both vitriol-filled statements that accuse members of the judiciary of acting for political reasons and direct political comments by (or about) members of the judiciary may damage public confidence in the courts. That is not to say that dissent has no role; it can be an important part of the constitutional dialogue and provide the foundation for later changes to the law. Nevertheless, when members of the judici-

ary, the bar, and even the political branches (perhaps in an effort to "rein in" judicial activity they view as illegitimate) foster the public opinion that courts act for political reasons they risk throwing the baby out with the bathwater. They may very well be doing more harm than good.

Indeed, when bench and bar act contrary to these principles, they risk destabilizing the system of judicial review. They embolden political actors to criticize and defy the courts. They embolden states to resurrect theories of nullification and state judicial review. They damage the very foundation—made of smoke, mirrors, and belief—of the courts' position as the final arbiter of the Constitution. If maintaining that position is desirable, both bench and bar must protect its tenuous foundation and work to foster public confidence in independent and apolitical courts.

¹ 5 U.S. (1 Cranch) 137 (1803).

² 14 U.S. (1 Wheat) 304 (1816).

³ See, e.g., G. Edward White, *The Lost Origins of American Judicial Review*, 78 GEO. WASH. L. REV. 1145 (2010); Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L.J. 502 (2006); Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI-KENT L. REV. 825 (2006); Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH & LEE L. REV. 787 (1999); John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333 (1998); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031 (1997).

⁴ See generally THE FEDERALIST Nos. 78, 81 (Alexander Hamilton)

⁵ See, e.g., Brutus, "The Power of the Judiciary" (pt. 1) (Mar. 20, 1788), reprinted in THE ANTIFEDERALIST PAPERS 222, 223–24 (Morton Borden ed. 1965).

⁶ See William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329, 339 (1995).

⁷ See *id.* at 331–32.

⁸ See *Calder v. Bull*, 3 U.S. (3 Dall.) 387, 392 (1798); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1976).

- ⁹ See John T. Pierpont, Jr., *Checking Executive Disregard*, 84 ST. JOHN'S L. REV. 329, 342 (2010); J. Richard Broughton, *Rethinking the Presidential Veto*, 42 HARV. J. ON LEGIS. 91, 119 (2005).
- ¹⁰ See Broughton, *supra* note 9.
- ¹¹ See *id.*
- ¹² See Austin Raynor, *The New State Sovereignty Movement*, 90 IND. L.J. 613, 620–22 (2015).
- ¹³ See *id.*
- ¹⁴ 31 U.S. (6 Pet.) 515 (1832).
- ¹⁵ See *id.* at 535, 562.
- ¹⁶ Rennard Strickland & William M. Strickland, *A Tale of Two Marshalls: Reflection on Indian Law and Policy, the Cherokee Cases, and the Cruel Irony of Supreme Court Victories*, 47 OKLA. L. REV. 111, 113 (1994).
- ¹⁷ See Raynor, *supra* note 12, at 622.
- ¹⁸ See Michael T. Morley, *Reverse Nullification and Executive Discretion*, 17 U. PA. J. CONST. L. 1283, 1300 (2015); James W. Ducayet, *Publius and Federalism: On the Use and Abuse of the Federalist in Constitutional Interpretation*, 68 N.Y.U. L. REV. 821, 826 (1993).
- ¹⁹ See Raynor, *supra* note 12, at 622.
- ²⁰ See *id.*
- ²¹ See *id.*; see also Morley, *supra* note 18, at 1301.
- ²² See *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding a jurisdiction-stripping statute unconstitutional); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) (same).
- ²³ 358 U.S. 1 (1958).
- ²⁴ 135 S. Ct. 2584 (2015).
- ²⁵ See *Ex parte State ex rel. Ala. Policy Inst.*, No. 1140460, 2016 WL 589009, at *26–31, 33–34, 37 (Ala. Mar. 4, 2016) (Moore, C.J., concurring); *id.* at 48–51 (Parker, J., concurring). *But see id.* at *46 (Bolin, J., concurring); *id.* at *55–59 (Shaw, J., concurring).
- ²⁶ *Game of Thrones: What is Dead May Never Die* (HBO television broadcast Apr. 15, 2012).
- ²⁷ See JIMMY BRESLIN, *HOW THE GOOD GUYS FINALLY WON: NOTES FROM AN IMPEACHMENT SUMMER* 33–34 (1975) (“All political power is an illusion . . .”).
- ²⁸ The Honorable Stephen G. Breyer, *Reflections of A Junior Justice*, 54 DRAKE L. REV. 7, 10–11 (2005) (footnote omitted).
- ²⁹ See *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court's authority – possessed of neither the purse nor the sword – ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.”).
- ³⁰ Robert G. McCloskey, *Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54, 67 (1962).
- ³¹ See *Baker*, 369 U.S. at 267; see also Brian Christopher Jones, *Disparaging the Supreme Court: Is SCOTUS in Serious Trouble*, 2015 WIS. L. REV. FORWARD 53, 55–56 (2015) (discussing the need for the Court to depoliticize itself);
- ³² See *Baker*, 369 U.S. at 267; see also McCloskey, *supra* note 30.
- ³³ See generally, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2626–31 (2015); see also *id.* at 2627 (“Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.”); *id.* at 2629 (“This is a naked judicial claim to legislative – indeed, super-legislative – power; a claim fundamentally at odds with our system of government.”).

³⁴ Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, N.Y. TIMES, July 10, 2016, at A1.

³⁵ See Jones, *supra* note 31, at 60–61 (discussing the effects of the Court’s disparagement of itself).

³⁶ See, e.g., Brent Kendall, *Election 2016: Trump Keeps Heat on Judge*, WALL ST. J., June 3, 2016, at A5; Adam Liptak, *A Rare Rebuke, in Front of a Nation*, N.Y. TIMES, Jan 28, 2010, at A12; see also Eric Hamilton, Note, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35, 36 (2012).

³⁷ See *supra* note 25.

To Change for the Better: a Primer

By Wendy McGuire Coates

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

What follows the Constitution’s Preamble is an outline of power and restrictions on that power: the legislative branch (Article I), the executive branch (Article II), the judicial branch (Article III), and relation of the states to each other (Article IV).

With this framework of divided power in place, the Founders both contemplated future changes and provided the mechanism for amending in Article V:

The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two thirds of the sever-

al states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

Amending the Constitution was intended to be hard but not too hard. In conjunction with the 1787 Constitutional Convention, James Madison, in Federalist No. 43, wrote about the amendment process:

It guards equally against that extreme facility which would render

the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the General and the State Governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other.

The Constitution contains 4,543 words, including the signatures and has four sheets, 28-3/4 inches by 23-5/8 inches each. It contains 7,591 words including the 27 amendments.

The Clarion Call for Amendment

To a large degree, modern jurisprudence and legal education focuses on the amendments in place and not on attempts to modify, add, or repeal amendments. Maybe it is the tenor of the current election cycle or the deepening divide between the major political parties' platforms, but movements to amend the Constitution are quickening and finding acceptance at the center of presidential politics.

Both Hillary Clinton and Bernie Sanders advocated for a constitutional amendment striking down the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*, 588 U.S. 310 (2010).

Ted Cruz touted his proposed constitutional amendment to give state legislatures the authority to define marriage between a man and a woman and a proposed amendment that would require the justices of the Supreme Court to stand for periodic judicial-retention elections.

One of Donald Trump's centerpiece issues is a promise to end birthright citizenship in the United States by amending the Fourteenth Amendment, which provides "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

With the loud positions and bold promises pronounced during the current presidential election cycle, some will be surprised to learn that the President is noticeably absent from the constitutional amendment ratification process.

Instead, pursuant to 1 U.S.C. § 106b, the Archivist of the United States is responsible for administering the amendment process. With no vote, no veto power, and no signature requirement, the President plays no role in approving or preventing the people from amending the Constitution. See *Hollingsworth v. Virginia*, 3 U.S. 378 (1798).

An Amendment's Paths to Ratification

Since 2000, members of Congress have proposed constitutional amendments calling for a federal balanced budget, a change to allow a naturalized citizen with twenty years of citizenship to become president, a ban of same-sex marriage, a repeal of the 22nd amendment, and a denial of U.S. citizenship to anyone born in the United States unless at least one parent was a U.S. citizen, a permanent resident, or in the armed forces. Pragmatically, the onerous pathway to an amendment provides significant roadblocks to ratification.

Congress is authorized to propose a Constitutional amendment when two-thirds of both houses vote to find an amendment appropriate, thereby implying that the amendment is necessary, assuming a sufficient quorum exists. If Congress proposes and approves an amendment by joint resolution, the proposed amendment then has two paths to ratification. The first path sends the amendment to the states for ratification by the state legislatures. The second path provides for a ratification convention. Only once has Congress used the state convention option, the Twenty-first Amendment.

An alternative path to a congressional joint resolution is available. Congress could skip passing language in both houses and call for a ratifying convention when two-thirds of the states' legislatures apply for it. While this option is available, the states have never successfully called for an Article V Convention to amend the Constitution.

Out of About 11,623 Proposed, Only 27 Adopted and Ratified

Since 1789, Congress has sent only 33 amendments to the states for ratification. The first ten amendments, the Bill of Rights, were simultaneously adopted and ratified. Of those 33 proposed amendments, six were sent to the states but never have been ratified:

1. *Congressional Apportionment Amendment*: Regulating the size of the House of Representatives (1789)
2. *Titles of Nobility Amendment*: Stripping U.S. citizenship from anyone who accepted a title of nobility or honor from a foreign power (1810)

3. *Corwin Amendment*: Restricting any amendment and any Congressional power to "abolish or interfere" with any State's "domestic institutions" which included "persons held to labor or service by the laws of said State" (1861)
4. *Child Labor Amendment*: Giving Congress the exclusive power to "limit, regulate, and prohibit the labor of person under 18 years of age" (1924)
5. *Equal Rights Amendment*: Providing "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." (1972)
6. *District of Columbia Voting Rights Amendment*: Granting statehood to the District of Columbia (1978)

After an amendment is sent to the states for ratification, the Constitution does not place a deadline on the states. But Congress typically puts a seven year time limit within which the states must ratify the proposed amendment. Needless to say, Congress' power to impose a deadline on the ratification of a proposed amendment was challenged and subsequently affirmed.

See United States Supreme Court in Coleman v. Miller, 307 U.S. 433 (1939).

No amendments were added between 1804 to 1865 until the end of the Civil War when the Thirteenth amendment abolished slavery. This was the longest period in American history in which there were no changes to our Constitution.

The Woman Card

August 18, 2016 saw the 96th anniversary of the Nineteenth Amendment, which guaranteed all American women the right to vote. What would eventually become the Nineteenth Amendment was first introduced in Congress in 1878 and rejected. For the next 41 years, the amendment was reintroduced. The status of women's suffrage varied quite dramatically across the states. Wyoming is still known as "the equality state" because the territory granted women the right to vote in 1869. When Wyoming applied for statehood, Congress threatened to deny the request unless it revoked the female vote. Wyoming's legislature stood its ground with the rebuke to Congress that Wyoming "will remain out of the union [for] 100 years rather than come in without the women." In 1890, Wyoming became the 44th state and brought with her a voting population of women.

On the national level, U.S. Representative James R. Mann (Illinois) proposed the House approve the Susan B. Anthony Amendment with the measure passing 304-89. The Senate followed and on June 4, 1919, it passed what would become the 19th Amendment by just two votes. The amendment was sent to the state and in a quick six days Illinois, Michigan, and Wisconsin had ratified it. Within the month, Kansas, New York, and Ohio joined. And by March 1919 35 of the needed 36 states had ratified. Years later, Sara Roosevelt became the first mother eligible to vote for her son, FDR, who won the presidency.

With Tennessee's ratification on August 18, 1919, it provided the required three-fourth's majority. But, Tennessee almost did not become the 36th state to ratify the amendment. Voting mothers need rejoice after a mother's letter broke the 48-48 tie in the state's House of Representatives. As the story goes, on the day of the vote a 24-year-old politician, who opposed women's suffrage received a letter from his mother encouraging him to vote in favor of the amendment. In voting yes, Tennessee's House of Representatives ratified the 19th amendment 49-47, which had already passed the state's senate.

By the time the right to vote was granted nationally through the 19th Amendment, 21 states had already granted women the right to vote locally.

However, not all states got on board. Maryland's constitution granted the vote only to men and challenged the constitutionality of the 19th amendment as an infringement on state's rights. The Supreme Court unanimously rejected the challenge in *Leser v. Garnett*, 258 U.S. 130 (1922). Louisiana and North Carolina did not ratify the amendment until the early 1970s. And it was not until 1984 that Mississippi became the very last state to ratify the amendment.

Akhil Reed Amar, described the effect of the 19th Amendment as "the single biggest democratizing event in American history." Following the 19th Amendment's ratification, over 8 million women voted in the national November 2, 1919 election for the first time.

The Last One So Far

We have not had a new amendment to the Constitution since 1992's 27th Amendment, which prohibits any law increasing or decreasing the salary for members of Congress until the start of the next term of office for Representatives. The amendment's text was first proposed by James Madison on June 8, 1789 and was included among 12 proposals, 10 of which became the Bill of Rights. But what would become the 27th amendment languished.

Between 1789 and 1873, eight states ratified the amendment and then nothing. No movement occurred until a Texas college student, Gregory

Watson, wrote a paper in 1982 and received a C because his professor was left unconvinced that the proposed amendment was still pending. Watson started a letter writing campaign that led to Maine's ratification of the amendment in 1983 followed by Colorado in 1984. Other state legislatures followed and the Archivist certified the amendment's ratification without honoring the tradition (not requirement) of seeking Congressional approve before certification.

It took 202 years but on May 20, 1992, Congress passed a joint resolution agreeing that the 27th Amendment was valid and had been ratified.

Resources

Neale, Thomas H. (March 29, 2016). "The Article V Convention to Propose Constitutional Amendments: Contemporary Issues for Congress" (PDF). Congressional Research Service. Retrieved June 24, 2016, available at: <https://fas.org/sgp/crs/misc/R42589.pdf>

"Measures Proposed to Amend the Constitution" Statistics & Lists. United States Senate. Last visited on June 24, 2016, available at: http://www.senate.gov/pagelayout/reference/three_column_table/measures_proposed_to_amend_constitution.htm

"Constitutional Amendment Process" National Archives. Last visited June 26, 2016, available at: <https://www.archives.gov/federal-register/constitution/>

"Bernie Sanders on Political & Electoral Reform" Last visited June 29, 2016, available at: <http://feelthebern.org/bernie-sanders-on-political-and-electoral-reform/>

"Campaign finance reform" Our democracy should work for everyone not the just the wealthy and well-connected. Last visited on June 29, 2016, available at: <https://www.hillaryclinton.com/issues/campaign-finance-reform/>

Donald Trump Immigration Report That Will Make American Great Again, Last visited on June 29, 2016, available at: <https://www.donaldjtrump.com/positions/immigration-reform>

National Constitution Center, Constitutional Spotlight Series: Birth Rights: Citizenship and the Constitution by Lind R. Monk, J.D. Last visited on June 29, 2016, available at: http://constitutioncenter.org/media/files/Monograph_BirthRights.pdf

"Constitutional Remedies to a Lawless Supreme Court" Ted Cruz June 26, 2015 National Review, Last visited: June 29, 2016, available at: <http://www.nationalreview.com/article/420409/ted-cruz-supreme-court-constitutional-amendment>

Bernstein, Richard B. (1992). "The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment". *Ford-*

ham Law Review, Last visited July 5, 2016, available at: <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3017&context=flr>

"27: Congressional pay raises". *Pittsburgh Post-Gazette*. November 27, 2002. Last visited on July 5, 2016, available at: http://old.post-gazette.com/nation/20021127amendment_27p9.asp

"19 Facts About the 19th Amendment" by Mark Mancini. Last visited on August 20, 2016, available at: <http://mentalfloss.com/article/67422/19-facts-about-19th-amendment>

Does the First Amendment Protect Elected Officials When They Speak in Connection with their Official Duties?

By *Ellie Neiberger*

The First Amendment was built on the theory that "debate on public issues should be uninhibited, robust, and wide-open." But freedom of speech is not absolute. Over the years, the Supreme Court has defined certain types of speech as outright unprotected. And, for speech that is protected, it has developed a series of complex rules for determining whether different forms of government regulation are permissible, which vary depending on the type of speech, type of regulation, and context.

One area in which the Court has developed a special framework is speech by public employees. This framework is rooted in the idea that the government's interests when acting as an employer are different from its interests when acting as a sovereign. The government, like any other employer, has a need to control what its employees do and say so that it can operate efficiently and convey its own messages consistently. Therefore, while a citizen does not give up all First Amendment rights by becoming a public employee, "[w]hen a citizen enters govern-

ment service, the citizen by necessity must accept certain limitations on his or her freedom."

For decades, a two-step test has governed First Amendment claims based on a public employer's discipline of an employee for his or her speech. This test, known as the *Pickering-Connick* test, was designed to strike a balance between a public employer's need to control its workforce and a public employee's right to speak as a citizen on public issues.

The first step under the *Pickering-Connick* test is to determine if the employee spoke on a matter of public concern. If the answer is no, the employee's speech is unprotected by the First Amendment, and the analysis ends. If the answer is yes, the possibility of a First Amendment arises and the analysis continues to step two. In step two, the court must determine whether the employer's interest in efficient operations and a disruption-free workplace outweigh the employee's interest in the speech. Speech on a matter of public concern could only be the basis for discipline if the employer's interests outweighed the employee's interests.

The Court's 2006 decision in *Garcetti v. Caballos* narrowed public employees' First Amendment rights by adding a new threshold inquiry to the *Pickering-Connick* test. Under *Garcetti*, even where a public employee speaks on a matter of public concern, the speech has no First Amendment protection if it is made pursuant to the employee's official job duties.

The plaintiff in *Garcetti* was a deputy district attorney. He wrote a memorandum to the district attorney recommending that a case be dismissed after he discovered serious misrepresentations in the affidavit used to obtain a search warrant. The plaintiff met with his supervisors to discuss the memo's allegations of wrongdoing in connection with the affidavit. The discussion at the meeting became "heated," and the supervisors decided not to dismiss the case. The plaintiff claimed that he was transferred and subjected to other retaliatory employment actions based on the memo, in violation of his First Amendment rights.

The Court concluded that the plaintiff's memo was not protected speech, and, therefore, retaliation based on the memo did not violate the First Amendment. The controlling factor was that the plaintiff wrote the memo pursuant to his duties as a deputy district attorney. The Court held that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." This is because "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee

might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."

One unsettled question is whether *Garcetti* applies to elected public officials. In other words, does the First Amendment protect speech made by elected officials in performing their official duties?

The most recent case addressing the issue is the Third Circuit's 2015 decision in *Werkheiser v. Pocono Township*. There, the plaintiff was an elected official who sat on a township's three-member governing board. Early in the plaintiff's term as a board member, the board appointed him as the director of its public works department, which was an employment position.

A dispute later arose between the plaintiff and the two other board members about the township's spending activities. The plaintiff criticized the two other board members for excessive spending at public board meetings. In the following months, the two other board members decided they no longer wanted the plaintiff to be the public works director. When the appointment for public works director for the next year was brought before the board for a vote, the two other board members voted not to reappoint the plaintiff. The plaintiff sued the two other board members, claiming they violated his First Amendment rights by voting not to reappoint him in retaliation for the criticism he voiced in his capacity as a board member at public board meetings.

The question before Third Circuit was whether the defendant board members had qualified immunity from suit. Qualified immunity protects government officials from liability for their official acts unless they violate clearly established constitutional rights. Based on the mixed authority on whether *Garcetti* applies to elected officials' speech, the Third Circuit concluded the plaintiff's First Amendment rights as an elected official were not clearly established at the time of defendants' conduct in question. The court did not actually decide whether *Garcetti* applies to elected officials—it only concluded the law on the issue was not clear enough to deny the defendants qualified immunity.

However, in analyzing whether the plaintiff's First Amendment rights were clearly established, the Third Circuit comprehensively discussed the arguments for and against applying *Garcetti* to elected officials, and the case law on both sides.

First, the Third Circuit explained that “many of the reasons for restrictions on employee speech appear to apply with much less force in the context of elected officials.” In *Garcetti*, the Supreme Court reiterated that public employers may regulate employee speech where it is justified by the need for efficient government operations and workplace harmony. Part of the reason restrictions on public employee speech are “less problematic” than restrictions on speech by regular citizens is because “[e]mployers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity.” And employers must

ensure that ““their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission.”” In other words, restrictions on employee speech ““simply reflect[] the exercise of employer control over what the employer itself has commissioned or created.””

Werkheiser also acknowledged that the Supreme Court’s pre-*Garcetti* decision in *Bond v. Floyd* suggests that elected officials’ speech may be entitled to First Amendment protection. There, the plaintiff was elected to the state legislature. After he was elected, but before he took the office, the plaintiff made public comments criticizing the Vietnam War. Based on those comments, the legislature refused to seat him. The Court held that this violated the plaintiff’s First Amendment rights. In doing so, the Court explained that the “manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views of policy” and “debate on public issues should be uninhibited, robust, and wide-open.” The Court also said it is part of a legislator’s official duties “to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them.”

Werkheiser noted that “the Supreme Court did not deem it necessary to address or revisit *Bond* in deciding *Garcetti*.” This may suggest that the Supreme Court stands by the statements it made in *Bond* and that *Garcetti* is limited to public employees’ speech. However, because the

speech at issue in *Bond* was made before the plaintiff officially took office, *Bond* did not actually deal with speech made pursuant to an elected official's official duties, and there was no need for *Garcetti* to address it.

On the side of applying *Garcetti* to elected officials, the *Werkheiser* court said it "t[ook] seriously the [Garcetti] Court's explicit pronouncements that the 'controlling factor' in that case was that the expressions at issue 'were made pursuant to [the plaintiff's] duties as a calendar deputy' and that the 'significant point is that the memo was written pursuant to [the plaintiff's] official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.'" It is arguable that, under *Garcetti*, speech that "owes its existence" to a government position has no First Amendment protection.

The Third Circuit then discussed the "unsettled" case law on the issue. In *Rangra v. Brown*, a panel of the Fifth Circuit "grappled with" whether *Garcetti* applies to elected officials, although outside the retaliation context. There, city council members brought a First Amendment claim against the state attorney general after they were charged with criminal violations of the state's open government statute for communicating with each other about official business outside public meetings. The Fifth Circuit panel squarely considered "whether speech of elected state and local government officials made pursuant to their official duties, like speech of non-elected public employees, is less protected by the First Amend-

ment than other speech." Based on *Garcetti*, the district court held the "First Amendment affords absolutely no protection to speech by elected officials made pursuant to their official duties."

The Fifth Circuit panel disagreed, stating: "The First Amendment's protection of elected officials' speech is full, robust, and analogous to that afforded citizens in general." It explained that "an elected official's relationship with the state differs from that of an ordinary state employee...[o]ur 'employee' is an elected official, about whom the public is obliged to inform itself, and the 'employer' is the public itself, at least in the practical sense, with the power to hire and fire." While the government has a need to supervise, discipline, and control what its employees say in the employment context, the very foundation of representative government would be undermined by government control over elected officials' speech. The panel concluded that elected officials' speech pursuant to their official duties is protected political speech.

However, as *Werkheiser* recognized, the continuing viability of the panel's analysis on this issue is unclear. On rehearing *en banc*, the Fifth Circuit dismissed the case as moot in a one-sentence opinion without any analysis. The only other circuit court opinion to touch on the issue is a 2007 Eighth Circuit decision, which "expressed skepticism that elected officials' speech is entitled to any protection whatsoever." The Eighth Circuit stated in dicta, without further elaboration, that "under *Garcetti* [the elected official's] speech would not be protected under the First Amendment if it was made in

the course of her official duties.” After noting the “substantial disagreement among the district courts” on the issue, the *Werkheiser* court found the law on whether elected officials have First Amendment rights when speaking in their official capacities was too unclear to deny qualified immunity.”

Werkheiser also concluded that, even assuming the First Amendment rights of elected officials were clearly established, “the law was not clearly established that the kind of retaliation [the defendant board members] engaged in against [the plaintiff] violated his First Amendment rights.” The retaliatory conduct—the defendants board members’ vote not to reappoint the plaintiff as public works director—was a “politically motivated act[] undertaken by a majority of his fellow elected board [members], pursuant to their proper authority.”

On this issue, *Werkheiser* again discussed the Supreme Court’s decision in *Bond*, which the district court heavily relied on in concluding that the First Amendment rights at issue were clearly established. The Third Circuit explained that *Bond* dealt with “one kind of very serious retaliation by elected officials” against another elected official: the exclusion from office. The Third Circuit said “nothing in *Bond*...suggests the Court intended for the First Amendment to guard against every form of political backlash that might arise out of the everyday squabbles of hardball politics.” Therefore, it is possible that the First Amendment only protects elected officials from retaliation for speech made pursuant to their official duties when the retaliation deprives them of the ability to perform an official duty. As another example, the Third Circuit

cited its earlier decision in *Monteiro v. City of Elizabeth*, where it held that a city council member’s First Amendment rights were violated when he was ejected from a public council meeting for expressing a certain viewpoint. “*Monteiro*, like *Bond*, focused on an elected representative whose ability to fulfill his elected obligations was purposefully impaired.”

Werkheiser went on to explain that there are special considerations when the retaliation against an elected official is by his or her fellow elected officials. The court said it is doubtful the First Amendment prohibits “elected officials from voting against candidates whose speech or views they don’t embrace.” Indeed, in casting such votes, the fellow board members may be “exercising a competing First Amendment right to make a political statement.”

Based on the fact that the retaliation at issue in *Werkheiser* did not interfere with his elected duties and was by his fellow board member exercising their rights to vote on matters before the board, it was not clearly established that this type of retaliation that would violate the plaintiff’s First Amendment rights. Therefore, the defendant board members were protected by qualified immunity.

Interestingly, *Werkheiser* did not address the Supreme Court’s 2011 decision in *Nevada Commission on Ethics v. Carrigan*, which held that a legislator has no right to a legislative vote under the Free Speech Clause of the First Amendment. In that case, the Court considered a state statute requiring legislators to abstain from voting on matters in which they have a conflict of interest. A member of the state legislator claimed that his

First Amendment right to freedom of speech was violated when he was censured for failing to abstain from a measure on which he had a potential conflict of interest, as the statute required. The Court held that his First Amendment rights were not violated because the legislator did not have a First Amendment right to vote.

In *Carrigan*, the Court first stated our country's universal and long-established tradition of conflict of interest recusal rules created a strong presumption they do not violate a legislator's freedom of speech. A conflict of interest recusal rule was put in place in Congress shortly after the Constitution was ratified, and, although members of Congress were subject to the recusal rule at the time Congress voted to ratify the First Amendment, no one objected based on an inconsistency between them. Recusal rules have been commonplace at the federal and state levels for over 200 years. The Court concluded this was "overwhelming evidence of constitutional acceptability."

Next, the Court rejected the argument that the act of casting a legislative vote is speech or symbolic conduct. The Court explained: "[T]he act of voting symbolizes nothing. It *discloses*, to be sure, that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, just as a physical assault discloses that the attacker dislikes the victim. But neither the one nor the other is an act of communication." Even if a vote itself could express the depth of a legislator's belief, the Court "rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message."

The third key factor in the Court's decision was the challenged recusal statute was not "viewpoint discriminatory." The Court explained it has "applied heightened scrutiny to laws that are view point discriminatory even as to speech *not* protected by the First Amendment." However, the recusal statute was "content-neutral and applie[d] equally to all legislators regardless of party or position."

The Court also explained restrictions on legislators' voting are not restrictions on their protected speech because legislative votes "belong to the people." A "legislator casts his vote 'as trustee for his constituents, not as a prerogative of personal power.'" However, the Court expressly acknowledged that the recusal statute was not challenged on the basis that it impermissibly burdened the free speech rights of "legislators and constituents apart from an asserted right to engage in the act of voting." Additionally, the Court did not address First Amendment associational rights because the right to association was not raised.

Despite the Court's conclusion that a legislator's vote is not protected speech, an elected official's vote may still be protected by the First Amendment in other contexts. As discussed above, the Court did not consider the free speech fights of the constituents, for whom the legislator speaks, or associational rights between legislators and their constituents. The Court only addressed whether a viewpoint-neutral restriction, of the type that has been around since our country's founding, violated a legislator's own right to a vote.

Retaliation against a legislator based on the way he or she votes, or a regulation compelling a legislator to vote a certain way, would probably be treated differently. Both situations would discriminate based on viewpoint and raise special concerns about the rights citizens have in a representative democracy. Citizens' rights to elect the officials who will represent them necessarily requires legislators to be able to vote freely on issues as they arise. It is the right to vote freely which enables legislators to speak the will of those who elect them and thus "consummate their duty to their constituents."

The role elected officials play in representative government makes it difficult to apply a bright-

line rule that the First Amendment does not protect speech made by elected officials pursuant to their official duties. It remains to be seen whether these difficulties stem from First Amendment rights other than the free speech rights of elected officials, such as the right of association between elected officials and their constituents and constituents' own rights to free speech. Future case law will likely focus on defining the nature of the rights that are implicated and protecting against retaliation that interferes with rights of citizens to be represented by those they elect, and the rights and duties elected officials have to represent those who elect them.

¹ *N.Y. Times Co. v. Sullivan* 376 U.S. 254, 270 (1964).

² *Waters v. Churchill*, 511 U.S. 661, 671 (1994).

³ *Id.* at 675; *Garcetti v. Caballos*, 547 U.S. 410, 418 (2006).

⁴ *E.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967) ("the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."); *Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964, 970 (7th Cir. 2001) ("a public employee does not shed his First Amendment rights at the steps of the government building.").

⁵ *Garcetti*, 547 U.S. at 418 (citing *Waters*, 511 U.S. at 671 ("[T]he government as employer indeed has far broader powers than does the government as sovereign").

⁶ *Pickering v. Board of Ed. of Township High Sch. Dist.*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

⁷ *Garcetti*, 547 U.S. at 418 (citing *Connick*, 461 U.S. at 147).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* (citing *Pickering*, 391 U.S. at 568).

¹¹ *Id.*

¹² 547 U.S. 410.

¹³ *Id.* at 421-22.

¹⁴ *Id.* at 414-15.

¹⁵ *Id.* at 421.

- ¹⁶ *Id.*
- ¹⁷ *Id.*
- ¹⁸ *Id.* at 422.
- ¹⁹ 780 F.3d 172 (3d Cir. 2015), *cert. denied*, 135 S. Ct. 404 (Nov. 2, 2015).
- ²⁰ *Id.* at 177-78 (quoting *Garcetti*, 547 U.S. at 417).
- ²¹ *Id.* at 178 (quoting *Garcetti*, 547 U.S. at 422-23).
- ²² *Id.* (quoting *Garcetti*, 547 U.S. at 422).
- ²³ *Bond v. Floyd*, 385 U.S. 116 (1966).
- ²⁴ *Id.* at 135-36.
- ²⁵ *Id.* at 136-37.
- ²⁶ *Id.* at 179 (quoting *Garcetti*, 547 U.S. at 421-22).
- ²⁷ 566 F.3d 515, 518 (5th Cir. 2009), *on reh'g en banc*, 584 F.3d 206 (5th Cir. 2009).
- ²⁸ *Id.* at 517.
- ²⁹ *Id.*
- ³⁰ *Id.* at 526 (internal citations omitted).
- ³¹ *Id.* The panel concluded that the statute at issue was a content-based regulation which failed strict scrutiny. The Fifth Circuit later upheld the constitutionality of the same statute in *Asgeirsson v. Abbott*, 696 F.3d 454, 462 (5th Cir. 2012). But in that case, the court did not consider whether the elected officials' speech was unprotected under *Garcetti*. There, the elected officials challenged the district court's conclusion that the statute was a content-neutral time, place, or manner regulation and, therefore, subject to intermediate scrutiny. They argued the statute was a content-based restriction that should have been analyzed under strict scrutiny. The Fifth Circuit affirmed the district's application of intermediate scrutiny. The issue of whether the speech was unprotected was not before the court.
- ³² *Werkheiser*, 780 F.3d at 180 (citing *Rangra v. Brown*, 584 F.3d 206, 207 (5th Cir.2009) (en banc)).
- ³³ *Parks v. City of Horseshoe Bend, Arkansas*, 480 F.3d 837, 840 n.4 (8th Cir. 2007).
- ³⁴ *Werkheiser*, 780 F.3d at 180-81 (citing cases).
- ³⁵ *Id.* at 181.
- ³⁶ *Id.*
- ³⁷ *Id.*
- ³⁸ *Id.*
- ³⁹ *Id.*
- ⁴⁰ *Id.* at 181-82.
- ⁴¹ *Id.* (quoting *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 545 (9th Cir. 2010)).
- ⁴² *Id.* at 178 (citing *Blair*, 608 F.3d at 545 (noting that "almost all retaliatory actions can be expressive" and that, while an elected official may have the right to criticize other officials for their votes, the elected officials he is criticizing "had the corresponding right to replace [him] with someone who, in their view, represented the majority view."))).

⁴³ 564 U.S. 117 (2011).

⁴⁴ *Id.* at 122.

⁴⁵ *Id.* at 122-25.

⁴⁶ *Id.* at 125.

⁴⁷ *Id.* at 126-27.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* (citing *R.A.V. v. St. Paul*, 505 U.S. 377 (1992)) (emphasis original).

⁵¹ *Id.*

⁵² *Id.* at 126.

⁵³ *Id.*

⁵⁴ *Id.* at 129 (Kennedy, J., concurring).

⁵⁵ *Mihos v. Swift*, 358 F.3d 91, 109 (1st Cir. 2004) (elected official has a right to vote on a matter of public concern properly before his agency without suffering retaliation from the appointing authority for reasons unrelated to legitimate governmental interests).

⁵⁶ *Wrzeski v. City of Madison*, 558 F. Supp. 664, 667 (W.D. Wis. 1983) (entering preliminary injunction against city ordinance which compelled council members to vote “aye” or “no” based on improper infringement of members first amendment right to refrain from voting).

⁵⁷ See *Clarke v. United States*, 705 F. Supp. 605, 612 (D.D.C. 1988).

⁵⁸ *Id.*; *Miller v. Town of Hull, Mass.*, 878 F.2d 523, 532-33 (1st Cir. 1989).

Judicial Review and Five Million Acres: an Appellate Tale

By Steve Emmert

Late on a sunny morning in early June 2019, Justice Elena Kagan gazes out the window of her chambers, lost in thought. Her mind has been drifting for a few moments in the self-hypnosis that she finds mentally refreshing from time to time.

Her conscious mind returns to the fore; she snaps out of her reverie. She reaches across her desk, grabs her cell phone, and hits a preset number. A male voice answers:

“Elena! How are you?”

“Great, Barack; I’m doing fine. How was Malia’s second year at Harvard?”

“Dean’s List, I’m happy to say.”

“I expected no less. Even if you didn’t set such a high bar, I know The Boss would never tolerate anything less.”

“True; Michelle would be all over her if her grades dropped. So, what’s up?”

“I’m working on the Court’s majority opinion in this Term’s huge First Amendment case, *Fox News v. Gaga*, and I’d like your advice on how best to shape some of the primary holdings. I checked with Elizabeth Warren and got some great ideas from her, but I’ll be grateful for your insight, too ...”

* * *

The above is fantasy, of course. Supreme Court justices would never consult ex-presidents or politicians for input on how to decide an appeal; they keep their deliberations strictly in-house. It’s always been that way in American jurisprudence.

Mostly.

* * *

In 1649, King Charles II seethed over the execution, earlier that year, of his father, Charles I. During the course of his scheming to regain the throne that Oliver Cromwell and the English Commonwealth withheld from him, the new nominal monarch had time to sign a land grant for five million acres in the Virginia colony across the Atlantic.

It took eleven years – until the English Restoration in 1660, when Charles formally took the throne – before that grant took effect. When it did, the several recipients of the grant became at least potentially wealthy, as they owned mostly raw land that comprised much of Northern Virginia, including property that would eventually hold the Pentagon, Arlington Cemetery, Washington’s birthplace and his home at Mount Vernon, and much, much more. The property

stretched from the Chesapeake Bay into what is now West Virginia.

By 1719, the land’s ownership had been consolidated in a single man – Thomas, Lord Fairfax, the only English peer to make his permanent home in America in the late Colonial period. Lord Fairfax sold or leased parts of the tract until his death in 1781, seven weeks after the surrender at Yorktown. In his will, he left his immense holdings to a clergyman – his nephew, Denny Martin Fairfax.

The now-wealthy vicar eventually found himself on the business end of a bill in ejectment in a Virginia court. The new Commonwealth of Virginia, acting pursuant to one of its statutes enacted during the Revolution, had confiscated the property, since it was held by a foreigner – and a British Loyalist, at that. Several men who had purchased parts of the tract from the Commonwealth were trying to kick the vicar out.

Denny Fairfax defended the suit by relying on two treaties between the British Crown and the new nation, validating Colonial-era land grants. Those treaties, he argued, trumped Virginia law. A Virginia trial court agreed, and ruled in favor of Fairfax. The Court of Appeals [now Supreme Court] of Virginia reversed, holding that the treaty didn’t apply to the Fairfax grant. *Hunter v. Fairfax’s Devisee*, 1 Munf. (15 Va.) 218 (1810). The Virginia appeal was argued twice, 13 years apart with no intervening decision. (Remember that, the next time you find yourself waiting impatiently for a ruling in *your* appeal.) Denny Fairfax had died in 1800, still waiting for a ruling.

The Supreme Court of the United States took the case and reversed, finding that the treaty really did apply, so Fairfax's heir, Philip Martin, got to keep his lands; the Virginia purchasers were out of luck. *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813). The Clerk of what we now know as SCOTUS issued a suitably dignified mandate, politely commanding the Court of Appeals in Virginia to regard its considered judgment as having been reversed. An order like that in the 21st Century would be newsworthy but hardly controversial in its own right.

But in 1813, the issue of SCOTUS review of state-court rulings was anything but settled. The Virginia judges looked at the mandate and wondered what to do. They eventually called for oral arguments from the parties on whether the court had to obey such an audacious directive. They requested input from the Virginia bar as a whole, not just from the counsel employed by the litigants. Lawyers named Leigh and Wirt appeared for Fairfax's devisee, Martin. A lawyer named Williams argued on behalf of Hunter, and he was joined by two volunteer attorneys who came in response to the public invitation – Nicholas and Hay, two veterans of the Virginia bar.

The Virginia court entertained oral argument for six days – from Thursday, March 31 to Wednesday, April 6, 1814¹ This despite the fact that the merits of the case were no longer in issue; the sole question to be adjudicated was whether, in a new, untested society of dual sovereigns, SCOTUS had the power to tell a state court what to do.

The Virginia court took its time with the case under advisement. The judges pondered the matter for a year and a half. (Let's be fair to them: British Army, Marines, and Royal Navy forces had invaded Virginia in the interim, on their way to burn Washington, DC. What we know as Real Life did not come to a halt merely because the judges had a momentous decision on their hands.)

During this time, the most influential member of the Virginia court was its presiding judge, Spencer Roane. Reports have occasionally surfaced that Thomas Jefferson had favored appointing Roane as Chief Justice of the United States, though there's no written evidence to back that up. In any event, he never got the chance; the retirement of Chief Justice Oliver Ellsworth in 1800 allowed a very lame-duck John Adams to nominate John Marshall for the position, depriving Jefferson of his choice and changing the course of American law.

Roane badly wanted to thumb his nose at SCOTUS in the litigation, but he was sensible enough to get a reality check first. He placed the Nineteenth Century equivalent of cell-phone calls to Jefferson – who had left the White House six years earlier – and James Monroe, then serving as Secretary of War and effectively as Secretary of State at the same time. Only after getting their input did he release his opinion in *Hunter v. Martin, Devisee*, 18 Va. (4 Munf.) 1 (1815), a full 20 months after oral argument.

The Virginia judges issued seriatim opinions – four judges, four opinions – each refusing to recognize the mandate's legitimacy. Roane's opinion alone spans almost 30 pages of what

would eventually become Virginia Reports. It contains the flowery judicial rhetoric that we attorneys have become accustomed to seeing in early opinions. For example, here's his response to an argument by counsel for the appellee, who had warned of the political consequences of a reversal in the context of the War of 1812:

They should also have recollected, that there is a Charybdis to be avoided, as well as a Scylla; that a centripetal, as well as a centrifugal principle, exists in government; and that no calamity would be more to be deplored by the American people, than a vortex in the general government, which should ingulph and sweep away, every vestige of the state constitutions.

18 Va. at 26. (They don't write 'em like that anymore, folks.)

Roane turned to sources from the English common law to The Federalist Papers to Aesop's Fables in order to reach the conclusion that SCOTUS had no authority under the U.S. Constitution to review the decision of a state court. This, of course, was one of the important questions surrounding federalism in the early days of the Republic, when its citizens – including jurists – were feeling around in the dark to figure out how this new form of government worked.

Anyone who attended law school knows how this dispute came out: SCOTUS handed down *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304

(1816), ruling that the Supreme Court does, after all, have the power to review decisions by state courts of last resort, at least where those decisions turn on issues of federal law. Along with *Marbury v. Madison*, *Martin* is one of the pillars of American judicial review; a decision we now take for granted.

There's one last anecdote in this tale. Marshall was Chief Justice when *Martin v. Hunter's Lessee* came down. But Justice Joseph Story wrote the opinion, joined by the other five associate justices. Marshall took no part in the decision. You see, back in the 1790s, he and his brother had contracted with Denny Martin to buy much of the Fairfax tract. So he stepped away from the case, and watched while his colleagues unanimously voted to make him a wealthy man.

* * *

Most law students never pause to learn this elaborate backstory, with its fascinating twists and turns. But the real lesson of this tale is the extent to which appellate practice has changed since *Martin* came down, 200 years ago this year.

For example, few modern readers would ever imagine Justice Kagan's repeating Judge Roane's act of "judicial expediency" in asking his friends Tom and Jim how *they* thought he should rule. Modern appellate advocates might not know what to do with an essentially unlimited oral argument – six days! – or the ability to appear off the street and contribute argument to someone else's case of great public import. The idea of a judicial turf war might not be quite so foreign, but the Virginia court's utter rejection

of SCOTUS authority would be unthinkable today.

Of course, it would be a mistake to assume that even our modern, evolved appellate system will

remain intact indefinitely. Early in the 23rd Century, our appellate descendants may well look back on today's appellate practice and wonder, "How could they *ever* abide by such crude procedures ...?"

¹ April 6 was coincidentally the date on which the Emperor Napoleon abdicated, accepting (temporary) exile to Elba. This enabled England to send its crack troops to America late in the War of 1812.

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