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Lino A. Graglia

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RETHINKING JUDICIAL SUPREMACY

*Lino A. Graglia**

The Supreme Court's recent decision in *Obergefell v. Hodges*¹ provides a particularly impressive demonstration of both the power of the Supreme Court and of the fact that it is based entirely on a ruse. Even for Americans unfortunately grown used to having radical cultural changes decreed by the Court, it should be impressive that the Court could by a margin of one vote decree that "marriage" no longer means the union of one man and one woman and deprive fifty state legislatures and Congress of the power to have it retain that meaning. At the same time, it could hardly be clearer that the decision, as Chief Justice Roberts pointed out in dissent, has nothing to do with the Constitution.² It is an egregious example of the Court's usurpation of legislative authority. To accept it without protest is in effect to accept a change in our form of government, from the system of representative self-government in a federalism with separation of powers created by the Constitution to government, to a large extent, by the Supreme Court. If leaving the final decision on basic issues of domestic social policy to the Court is seen as an improvement on the constitutional system, it should at least be openly identified and justified as such, not put forth as required by the Constitution. *Obergefell* presents an apt and timely occasion to reconsider the basis of the Court's current role in our system of government, the power of constitutional judicial review.

Constitutional judicial review is the extraordinary power of judges to invalidate policy choices made by other officials of government on the ground that they are prohibited by the Constitution. Evaluation of the power should begin with recognition that all constitutional restrictions on policy choices by government are problematic in a democracy in that their effect is

* A. W. Walker Centennial Chair in Law, University of Texas School of Law

1. 135 S. Ct. 2584 (2015).

2. *Id.* at 2626

to substitute policy choices made by people in the past for the different choices preferred by people of today. It is not rational to decide a current issue of public policy, for example gun control, by seeking to determine the views of people from a time when many of the relevant considerations, including the nature of guns, were very different. Further, many constitutional restrictions, such as the “natural born Citizen” requirement for the presidency,³ often serve only to needlessly create problems. If the norm is self-government, constitutional restrictions should be disfavored, not expanded or multiplied.

The principal problem with the power of judicial review, however, is not judicially enforced constitutionalism, which raises the problem of rule by the dead, but judges abusing the power by holding unconstitutional policy choices that the Constitution does not clearly forbid, which raises the problem of rule by judges. The Constitution, a very short document, was wisely meant to preclude very few policy choices.⁴ Most constitutional cases involve state, not federal, law and nearly all of them purport to be based, like *Obergefell*, on a single sentence of the Fourteenth Amendment, which the Court has wrongfully converted from a guarantee of basic civil rights to blacks to a grant of virtually

3. U.S. CONST. art II, § 1.

4. The original Constitution prohibited both the federal government and the states from passing bills of attainder or ex post facto laws or granting any Title of Nobility, which prohibitions have raised few policy issues. The most important restriction on state policymaking was the prohibition of impairing the obligation of contracts, i.e., enacting debtor relief laws, which the Court effectively read out of the Constitution in *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398 (1934), so that Minnesota could help farmers during the Great Depression—an excellent illustration that constitutional restrictions may be bad ideas. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), provides a more recent example of the Court reading out of the Constitution a provision found to be inconvenient; (Art. I, §4, ch. 1, requiring that redistricting be done by the state legislature). In addition, the Bill of Rights prohibits confiscation of property by the federal government and grants a qualified right to “keep and bear arms.”

The Constitution provides very little to interpret and has very little to do with the Court’s making of constitutional law. This does not prevent constitutional theorist and Yale law professor Jack M. Balkin from asserting that if the Court would just adopt his “theory of constitutional interpretation and construction,” its rulings of unconstitutionality would have “fidelity to the original meaning of the constitution” and be “faithful to the principles that underlie the text,” JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011). These rulings, he would boldly have us believe, would then no longer be simply expressions to the Justices’ political preferences. The study of constitutional law enables one, apparently, to believe three impossible things before breakfast.

unlimited policymaking power.⁵ The Court thereby gave itself the power to remove from the ordinary political process any policy issue (libel law, term limits, abortion) it chose and assign it to itself for final decision. The result is to make the Court the most powerful institution of American government in terms of domestic social policy, thereby depriving the states of the “Republican Form of Government” guaranteed them by the Constitution⁶ and undermining representative self-government by giving citizens less and less reason to participate in the political process.

The effect, as Judge Learned Hand famously protested, is to create a system of government similar to Plato’s government by philosopher kings⁷ except with the philosophers replaced (unfortunately) by lawyers to maintain the fiction that the decisions are based on the Constitution. The decisions are necessarily based on only the Justices’ policy preferences, however, when, as is almost always the case, they undertake to invalidate as unconstitutional a policy choice that the Constitution does not clearly forbid or, typically, even refer to. That these decisions are based on ideology, not law, should also be clear enough simply from observation of the current Justices’ highly predictable voting patterns, with one group of four⁸ consistently voting for the “liberal” result and another group of four⁹ voting almost as consistently for the “conservative” result, almost regardless of the issue. Although presumably equally competent

5. The Court has done this primarily by converting the Due Process Clause of the Fourteenth Amendment (prohibiting a state from “depriv[ing] any person of life, liberty, or property without due process of law”) from a guarantee of procedural regularity to a grant of authority to the Court to invalidate any limitation of liberty (*i.e.*, any law) it considers “unreasonable.” *See, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905) (maximum ten-hour workday); *Roe v. Wade*, 410 U.S. 113 (1973) (restrictions on abortion). *See* EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT* (1948). Similarly, it converted the amendment’s Equal Protection Clause (prohibiting a state from “deny[ing] to any person within its jurisdiction the equal protection of the laws”) from a guarantee to blacks of police protection equal to that of whites to a grant of authority to the Court to invalidate any legal discrimination or classification (*i.e.*, any law) it considers “unreasonable.” *See, e.g.*, *Levy v. Louisiana*, 391 U.S. 68 (1968) (illegitimacy); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage). *See* DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT*, 347–49 (1985).

6. U.S. CONST. art. IV, § 4.

7. LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958).

8. Justices Ruth Bader Ginsberg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor.

9. Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito.

to read the Constitution, the two groups consistently reach directly opposite conclusions as to its meaning, and their conclusions, even more remarkably, are almost invariably consistent with their apparent political preferences.¹⁰

The result of this situation is, of course, to make the vote of the ninth Justice, Justice Kennedy, decisive. Thus, the “Constitution” gives us an individual right to own a gun,¹¹ prohibits Congress from restricting corporate campaign contributions,¹² and prohibits public school districts from considering race to increase integration in assigning students to schools,¹³ because in each of those cases Justice Kennedy chose to vote with the four conservatives instead of the four liberals who took the opposite position. On the other hand, the Constitution prohibits the states from imposing term limits on their federal representatives¹⁴ and, as we have just learned, restricting marriage to one man and one woman,¹⁵ because in those cases he voted with the liberals, with the four conservatives left to dissent. The result is that in a nation of over 300 million people, the most basic and controversial issues of domestic social policy are ultimately decided by the vote of one unelected government official, leaving the rest of us diminished, the ultimate in rule by an elite that the Framers sought to abolish.

Judicial review, unknown to British law where Parliament is supreme, is not specifically provided for in the Constitution. It was defended by Alexander Hamilton¹⁶ and established by Chief Justice Marshall¹⁷ with the expectation, no doubt, that it would be a conservative force, as it proved to be for most of its history, serving primarily to protect property and contract rights. Its legitimacy was therefore severely questioned by liberals.¹⁸ The ultimate success of the 1954 *Brown* decision,¹⁹ prohibiting racial

10. See, e.g., Richard A. Posner, *The Supreme Court 2004 Term, Foreword: A Political Court*, 119 HARV. L. REV. 32 (2005).

11. *McDonald v. City of Chi.*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

12. *Citizens United v. FEC*, 598 U.S. 310 (2010).

13. *Parents Involved in Community Schs. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007).

14. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1999).

15. *Obergefell*, *supra* note 1.

16. THE FEDERALIST NO. 78.

17. *Marbury v. Madison*, 5 U.S. 137 (1803).

18. See, e.g., LOUIS B. BOUDIN, *GOVERNMENT BY JUDICIARY* (1932); HENRY STEEL COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* (1943).

19. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

segregation, however, followed by a series of other society-changing decisions uniformly moving social policy to the left by the Warren Court (*e.g.*, criminal procedure,²⁰ prayer in the schools,²¹ pornography,²² libel²³) and the Burger Court (*e.g.*, abortion,²⁴ busing,²⁵ capital punishment²⁶) convinced many liberal constitutional law scholars and others of the superiority of policymaking by the Court to policymaking by elected representatives. Some of the Court's more recent decisions, however, such as *Bush v. Gore*,²⁷ seemingly settling the year 2000 presidential election controversy in favor of the Republican candidate, and *Citizens United*,²⁸ removing restrictions on corporate campaign contributions, plus the near death of the Affordable Care Act²⁹ and the Court's hostility to affirmative action,³⁰ have caused some prominent academic supporters of judicial review to have second thoughts,³¹ perhaps making consideration of a means of limiting the Court's power a realistic possibility.

Alexander Hamilton's defense of judicial review on the ground that the Supreme Court, having, he argued, "merely judgement," not will, and "no influence over either the sword or the purse,"³² was the "least dangerous" branch of the federal government,³³ has proved to be entirely mistaken. Alexis de

20. See, *e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

21. *Engel v. Vitale*, 370 U.S. 421 (1962).

22. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

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

24. *Roe v. Wade*, 410 U.S. 113 (1973).

25. *Swan v. Charlotte-Mecklenburg Board Of Educ.*, 402 U.S. 1 (1971).

26. *Furman v. Georgia*, 408 U.S. 238 (1972).

27. 531 U.S. 98 (2000).

28. *Citizens United v. FEC*, 558 U.S. 310 (2010).

29. *Nat'l Fed'n of Indep. Bus's. v. Sebelius*, 132 S. Ct. 2566 (2012).

30. *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013); *Ricci v. De Stefano*, 129 S. Ct. 2658 (2009).

31. See, *e.g.*, LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

32. See JOSHUA M. DUNN, *COMPLEX JUSTICE: THE CASE OF MISSOURI V. JENKINS* (2008). *But see* *Missouri v. Jenkins*, 495 U.S. 33 (1990) (authorizing a federal district judge to order state officials to raise taxes and, in one of the most impressive demonstrations of the Court's power, approving orders by the judge requiring the expenditure of over \$1,000,000,000 in a futile attempt to induce suburban parents to send their children to Kansas City public schools).

33. THE FEDERALIST NO. 78.

Tocqueville's insight that the Court was, on the contrary, potentially the most dangerous³⁴ proved to be prescient when the Court's *Dred Scott* decision,³⁵ invalidating a congressional compromise on the slavery issue, confirmed his warning that an imprudent decision could lead the country to civil war. That one decision should have been enough, one might think—as perhaps should also the Court's more recent decisions on abortion, forced busing, and same-sex marriage—to establish that judicial review is not an improvement on democracy.

Obergefell shows, Justice Alito stated in dissent, that “decades of attempts to restrain this Court's abuse of authority have failed.”³⁶ That was and is no doubt inevitable given the current understanding of judicial review as effectively authorizing the Justices to substitute their policy preferences for policies they strongly disapprove that are adopted in the ordinary political process. The Justices' effective lifetime tenure makes them more, not less, susceptible than other government officials to the corrupting effect of unrestrained power. The availability of impeachment and the Court's dependence on Congress for enforcement of its decisions have not provided the complete assurance against the Court's abuse of power that Hamilton expected.³⁷ The Justices know that they have no reason to fear impeachment or that their decisions will not be enforced. Seeking Supreme Court nominees willing to assert their commitment to judicial restraint—our only present method of addressing the problem—is clearly not effective.

Judicial review could be eliminated, as it has been in, for example, the Netherlands, by constitutional amendment.³⁸ Because judicial review, much less judicial supremacy, is not explicitly provided for in the Constitution, however, an amendment should not be necessary. In theory at least, Congress

34. “The President, who exercises a limited power, may err without causing great mischief in the state. Congress may decide amiss without destroying the Union, because the electoral body in which Congress originated may cause it to retract its decision by changing its members. But if the Supreme Court is ever composed of imprudent or bad men, the Union may be plunged into anarchy or civil war.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 192 (Francis Bowen ed., 1862).

35. *Dred Scott v. Sandford*, 69 U.S. 393 (1896).

36. *Obergefell*, *supra* note 1, at 2642.

37. THE FEDERALIST NO. 81.

38. Gw. art. 120.

could announce the view, contrary to the view of the Court,³⁹ but in agreement with Thomas Jefferson,⁴⁰ and James Madison,⁴¹ that the Court's interpretation of the Constitution is not superior to that of Congress. Congress could then officially express the view that the Constitution does not prohibit the states from refusing to recognize same sex unions as marriage and that Congress, therefore, will not act to enforce such a prohibition. As radical and drastic as this may sound, an assertion of legislative over judicial supremacy should not be shocking—should be seen as essential—in a republic. The immediate effect will be that the decisive vote on national policy and the policy of each of the states on this issue will no longer be in the hands of a single unelected government official.

The question presented by judicial review is not the question endlessly and misleadingly debated by constitutional law scholars: How should the Court interpret the Constitution? Very few, if any, rulings of unconstitutionality turn—any more than in *Obergefell*—on an issue of interpretation. The issue is simply who should decide issues of basic public policy, a question of the proper form of government. Should they be decided by the process of representative self-government, usually on a state-by-state basis, created by the Constitution or by majority vote of a committee of nine unelected, life-tenured lawyers pretending to interpret the Constitution in Washington, D.C.? The effect of abolishing judicial review would be not to lessen the importance of the Constitution, but to reestablish it as the basis of our system government.

39. *Cooper v. Aaron*, 358 U.S. 1 (1958).

40. Thomas Jefferson, 10 *The Writings of Thomas Jefferson* 142 (“[E]ach of the three departments has equally the right to decide for itself what is its duty under the constitution.”).

41. *THE FEDERALIST NO. 48* (“[N]one of [the three departments] ought to possess, directly or indirectly, an overruling influence over the others.”).