

2014

# A Restrained Plea for Judicial Restraint

Lino A. Graglia

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

---

## Recommended Citation

Graglia, Lino A., "A Restrained Plea for Judicial Restraint" (2014). *Constitutional Commentary*. 643.  
<https://scholarship.law.umn.edu/concomm/643>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

## A RESTRAINED PLEA FOR JUDICIAL RESTRAINT

**COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE.** J. Harvie Wilkinson III.<sup>1</sup> New York, N.Y.: Oxford University Press. 2012. Pp. xii + 161. \$21.95 (cloth).

*Lino A. Graglia*<sup>2</sup>

### I. THE PROBLEM: POLITICAL JUDGING

Judge J. Harvie Wilkinson III's slim volume, *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance*, is a heartfelt but somewhat contradictory plea for judicial restraint and protest of judicial supremacy. There can be no doubt there is reason for complaint. It has become routine and unquestioned that the most basic issues of contemporary public policy, such as corporate campaign contributions,<sup>3</sup> gun control,<sup>4</sup> term limits,<sup>5</sup> same-sex marriage,<sup>6</sup> and voting rights,<sup>7</sup> are to be decided not by elected legislators, state or federal, but for the nation as a whole by majority vote of the nine Supreme Court Justices. Given the pronounced four-four liberal-conservative split on the present Court, they are typically decided, as was each of the noted issues, by a single vote, the vote of Justice Kennedy, making him arguably our most important public official in terms of domestic social policy, performing a role similar to that of the Ayatollah in Iran. This is not the "Republican form of Government" promised by the Constitution.<sup>8</sup>

- 
1. United States Court of Appeals for the Fourth Circuit.
  2. A. W. Walker Centennial Chair in Law, University of Texas School of Law.
  3. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).
  4. *District of Columbia v. Heller*, 554 U.S. 570 (2008).
  5. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).
  6. *United States v. Windsor*, 133 S. Ct. 2675 (2013).
  7. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).
  8. U.S. CONST. art. IV, § 4.

It is not “cosmic constitutional theory,” however, that has taken us “down the road to judicial hegemony” (p. 4), as Judge Wilkinson thinks, although he admits that “the justices do not go around citing theorists” (p. 8), and those “inclined to find their own political preferences in the Constitution can accomplish that goal without the assistance of theory” (p. 9). The fact, however, is that the Constitution—and therefore theories of constitutional interpretation—have very little to do with the Court’s constitutional decisions or, at least, its rulings of unconstitutionality. Rarely does a ruling of unconstitutionality turn on an issue of interpretation. The basis of the consistent and predictable liberal-conservative split of the Justices, almost regardless of the issue, is ideological, not semantic, the result of different policy preferences, not different ways of reading the Constitution. No one believes, presumably, that the liberals consistently vote to protect and the conservatives to limit abortion rights,<sup>9</sup> for example, because they find different meanings in “due process,” the ostensible basis of the abortion decisions.

But even if constitutional theory “does not provide the rationale for politicized judging,” Judge Wilkinson argues, “it at least provides the cover, making the expedition into activism appear more respectable or more defensible than it otherwise would” (p. 9). He provides “admittedly an arbitrary and far too abbreviated list” (p. 6) of supposed theories of constitutional interpretation: “the living constitutionalism of William Brennan, the originalism of Robert Bork, the political process theory of John Hart Ely, the textualism of Hugo Black, the minimalism of Cass Sunstein, the cost-benefit pragmatism of Richard Posner, the active liberty of Stephen Breyer [and] the moral readings of Ronald Dworkin” (p. 5). The remainder of the book mercifully consists of discussion of only four of these: living constitutionalism, originalism, political process theory, and pragmatism, devoting a chapter to and analyzing the “vices” and “virtues” of each.

## II. THE SOLUTION: NONPOLITICAL ORIGINALISM

Judge Wilkinson castigates them all in that their “great casualty . . . has been our inalienable right of self-governance” (p. 9). His many so-called theories of interpretation, however,

---

9. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124 (2007).

basically reduce to two: originalism and non-originalism, neither of which is really a theory of interpretation. Originalism, the view that the Constitution should, like any writing, be understood to mean what its authors intended it to mean is less a theory of interpretation than a statement of what, in ordinary usage, interpretation means. The other three “theories” Wilkinson discusses, on the other hand, are less theories of interpretation than arguments for deciding constitutional cases on non-interpretatist, *i.e.*, non-originalist, grounds. The real debate, therefore, is not over how to interpret the Constitution but whether the Constitution should be the only basis for constitutional decisionmaking. The function of so-called theories of interpretation is to claim that constitutional decisions based on some alternative to originalism, such as natural law, tradition, or moral principle, are nonetheless somehow connected to the Constitution and some objective source of values and therefore are not simply products of the judges’ policy preferences.

Because the Constitution became authoritative only when ratified by the states, the ratifiers are in effect its true authors, and it should be understood to mean what it was understood to mean, as best we can tell, by them and the people they represented, that is, the original public understanding. There is no other objective source of constitutional meaning, all others amounting, as a practical matter, to a transference of policymaking power from legislators or other government officials to judges.

Two objections are typically made to this argument by non-originalists. The first is that we may not know the original public understanding as to a contemporary issue, or, most likely, the issue was never considered. Very true, but the purpose of judicial review, at least in theory, is to enforce the Constitution, not authorize judges to substitute their views for the views of legislators. If the Constitution does not clearly prohibit a policy choice, the only conclusion for a judge consistent with representative self-government is that it is not prohibited. The prohibition should be clear because, first, in a democracy, the opinion of legislators should prevail over the opinion of judges in cases of doubt, and second, constitutional restrictions, inherently anti-democratic, should not be favored, new ones should be imposed only for good reasons, and existing ones should not be expanded.

The second objection to having the Constitution mean only what it was originally understood to mean is that the result is

that present-day policy choices are controlled by the “dead hand of the past.”<sup>10</sup> The Constitution wisely precludes few policy choices and even fewer that modern legislators might want to make, but as to those it does preclude (*e.g.*, compelling testimony by the defendant in federal criminal trial),<sup>11</sup> the objection is correct. It is an objection, however, not to originalism, but to judicially enforced constitutionalism, and is a good reason, as just stated, not to favor constitutional restrictions.

Judge Wilkinson does not define the “activism” he protests, but it can most usefully be defined in constitutional law as a court disallowing as unconstitutional a policy choice that the Constitution does not clearly prohibit.<sup>12</sup> Judicially enforced constitutionalism is rule by the dead hand of the past, which should be disfavored; activism is rule by judges, which should, at least, be recognized as such, not obscured by putative theories of constitutional interpretation. If judicial activism is to be prevented or limited and judicial review made consistent with democracy, as Wilkinson urges, it cannot be by pleading with the Justices to ignore supposed constitutional theories of interpretation and exercise self-restraint. It can only be by judicial review being made in practice what it is in theory: the justices refusing to disallow as unconstitutional legislative policy choices that the Constitution doesn’t clearly disallow, with the legislative choice being allowed to prevail in cases of doubt.

This was the insight that Harvard law professor James Bradley Thayer, the leading constitutionalist of his era, famously propounded at the end of the nineteenth century as “the rule of clear mistake.” It is not enough, he insisted, that a court

---

10. See letter from Thomas Jefferson to James Madison (Sept 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958) (“[T]he earth belongs in usufruct to the living: . . . the dead have neither powers nor rights over it.”) *Cf.*, Erwin Chemerinsky, *The Inescapability of Constitutional Theory*, 80 U. CHI. L. REV. 935, 949–50 (2013) (reviewing Wilkinson, *Cosmic Constitutional Theory*). “The Constitution itself is profoundly antidemocratic. No one alive today participated in its drafting or ratification . . . . Even if the majority loathes it, or a part of it, the majority cannot change it unless a supermajority (as reflected in an action of two-thirds of both houses of Congress and three-fourths of the states) agrees.” *Id.* If the Constitution could not be amended, it seems, we would be stuck with a provision we loathe, forever or, at least, until the next revolution.

11. U.S. CONST. amend. V.

12. Examples of the opposite, the Supreme Court allowing as constitutional a policy choice that the Constitution does clearly prohibit, are very rare, not undemocratic, and examples of restraint, whether or not justified, rather than activism. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934), upholding a clearly unconstitutional state debtor-relief law, is perhaps the clearest example.

“conclude[] that upon a just and true construction the law is unconstitutional . . . . It can only disregard the Act when those who have the right to make laws have not only made a mistake, but have made a very clear one,—so clear that it is not open to rational question.”<sup>13</sup> The issue for courts is “not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it.”<sup>14</sup>

This was the rule Chief Justice John Marshall apparently adopted in justifying judicial review in *Marbury v. Madison*,<sup>15</sup> when he gave as an example of an unconstitutional law a law that permitted conviction for treason on the testimony of one witness while the Constitution explicitly requires two.<sup>16</sup> It was also the rule often stated by the Court in early cases,<sup>17</sup> though not the rule always applied when, as in *Marbury*, a law was held unconstitutional.<sup>18</sup> It is certainly not the rule applied by the present Court, which considers itself authorized to remove any issue it chooses from the ordinary political process and assign it to itself for final decision. The rule of clear mistake would result in very few rulings of unconstitutionality, ending the activism and judicial hegemony that Judge Wilkinson protests, but unfortunately, it is not the rule he advocates.

### III. INVALID ALTERNATIVES

#### A. LIVING CONSTITUTIONALISM

Judge Wilkinson begins his critique of alleged theories of constitutional interpretation with a chapter titled “Living Constitutionalism: Activism Unleashed” (p. 10). To the extent that the purpose of a constitution is to impede change, a “living

---

13. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

14. *Id.*

15. 5 U.S. 137 (1803).

16. U.S. CONST. art. III, § 3.

17. See, e.g., *Calder v. Bull*, 3 U.S. 386, 399 (1798) (Iredell, J., concurring) (“If any act of Congress, or of a Legislature of the state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case.”); *Green v. Biddle*, 21 U.S. 1, 38 (1823) (stating “[the Court] will not declare an act, whether of the State or a national legislature, to be void, as being repugnant to the fundamental law, unless in a very clear case”).

18. After finding, questionably, that the 1789 Judiciary Act added to the Court’s original jurisdiction, it held, even more questionably, that that was prohibited by the Constitution, giving judicial review an unpromising start.

constitution” adaptable by judges to their view of changing conditions, is an oxymoron, no constitution at all. Like other alleged theories of constitutional interpretation, its function is to justify non-originalist constitutional rulings as something other than simply a result of the judges’ policy choices. The vice of “living constitutionalism,” Wilkinson points out, is that it “is a complete inversion of democratic primacy and turns the Constitution’s foremost premise of popular governance on its head,” and, quoting Justice Rehnquist, is “genuinely corrosive of the fundamental values of our democratic society” (p. 20). That, one might think, is quite enough to disqualify it as a method of constitutional interpretation. It is not enough for Wilkinson, however, because this vice, incredibly enough, is also its virtue; because it permits judges to exercise policymaking power that he believes, contrary to the supposed point of his book, they should have.

Although living constitutionalism’s “encouragements to free-wheeling judging” may stand the Constitution on its head, it may also, Judge Wilkinson argues, give “the elected branches leeway to craft fruitfully modern definitions of terms like ‘equality’ and ‘commerce’” (p. 16). It is strange to see judicial activism defended as necessary not, as usual, to restrict but to permit the exercise of legislative power, which ordinarily requires only judicial restraint. Congress does not need the Court’s intervention, as Wilkinson argues, to enable it to “eradicat[e] . . . invidious discrimination” or “deal with commercial developments” (p. 16). All it needs, on the contrary, is the Court’s refusal to intervene, a refusal that is almost always consistent with the theory of judicial review.

It is true that Congress is limited to its enumerated powers, but they are so basic (taxation, interstate commerce, war)<sup>19</sup> and so broadly stated and without specific limitations as to be difficult to confine, as history shows, making their scope almost always a policy question. This was the conclusion the Court strongly intimated at the beginning in, most notably, *McCulloch v. Maryland*<sup>20</sup> and *Gibbons v. Ogden*.<sup>21</sup> Congress’s powers to

19. U.S. CONST. art. I, § 8.

20. 17 U.S. 316, 423 (1819) (Congress may do whatever is “necessary,” defined to include “convenient,” for the exercise of its powers, and “the degree of its necessity . . . is to be discussed in another place”).

21. 22 U.S. 1, 197 (1824) (“The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its [the commerce power’s] abuse”).

regulate interstate commerce and enforce the Fourteenth Amendment should be enough to sustain its ability to deal with the issues Wilkinson refers to. There is much to be said for federalism, *i.e.*, decentralized decisionmaking, but also for a national government able to deal with national problems, and it is not clear that the Court should have a strong role in resolving the conflict.<sup>22</sup>

Judge Wilkinson is probably correct that the Court's recent revival of restrictions on Congress' commerce power is unjustified and unhelpful,<sup>23</sup> but the corrective is, as he himself says, "a measure of restraint" (p. 18), which is not the usual mission of living constitutionalism. The Court's invalidation, post Wilkinson's book, of a major portion of the Affordable Care Act,<sup>24</sup> the signature achievement of the President's first term, is a striking example of the kind of power unelected judges probably would not have in a well-functioning democracy.

*Brown v. Board of Education*<sup>25</sup> is the trump card of defenders, including Judge Wilkinson, of judicial activism as "living constitutionalism." As it is not politically, socially, or academically permissible to disagree with *Brown*, it is not possible, it would seem, to oppose activism. Thus originalism is refuted and rule by judges defended. *Brown* and its immediate successors prohibited all official race discrimination, a great achievement, but it did not and could not end school racial segregation, instead in effect giving the South a ten-year grace period for its continuance<sup>26</sup> until Congress ended it with the 1964 Civil Rights Act. As important as *Brown* was for its holding, it was probably more important for the change it worked in the role of judges in our system of government. Although undoubtedly a great moral triumph, it led the Court to some other revolutionary decisions the morality of which is less clear.<sup>27</sup>

---

22. See Lino A. Graglia, *United States v. Lopez: Judicial Review Under the Commerce Clause*, 74 TEX. L. REV. 719 (1996). The essence of American Federalism is less that it limits Congress' power than that it often requires Congress to exercise power by engaging in pretense. Thus, if Great Britain, say, decides to prohibit race discrimination by public accommodations, it prohibits it; Congress must pretend to be regulating interstate commerce. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

23. See *Id.*

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

25. 347 U.S. 483 (1954).

26. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

27. See, *e.g.*, *Roe v. Wade*, 410 U.S. 113 (1973).

The Court that gave us *Brown*, it is well to remember, also gave us *Dred Scott v. Sandford*,<sup>28</sup> which led to the Civil War and should have been enough to conclusively establish that judicial review is not an improvement in the science of government. It also gave us the 1883 *Civil Rights Cases*,<sup>29</sup> which invalidated a congressional prohibition of racial segregation in public accommodations, allowing it to continue for nearly eighty more years. On the issue of race and the schools itself, it led to the failed social experiment of forced busing.<sup>30</sup> Great as it is, *Brown* did not conclusively establish the superiority of judicial over legislative policymaking.

#### B. POLITICAL ORIGINALISM

Judge Wilkinson's next chapter is titled "Originalism: Activism Masquerading as Restraint" (p. 33). Although originalism has many virtues, he concedes, including one that one might consider dispositive, the virtue of "legitimizing judicial review" (p. 44), it is, he finds, "not without real flaws" (p. 39). One of which is that as to "a vast number of controversial constitutional questions, originalism offers only ambiguous historical evidence, if any at all" (p. 46), and even when there is "a wealth of historical evidence concerning the original understanding" of a particular constitutional provision, it may be "varied enough to support any position" (p. 47). The result, in either case, Wilkinson concludes, is that "a judge is free to choose, perhaps at a subconscious level, whatever outcome seems desirable" (p. 47). When the "sources of wisdom conflict," he quotes Prof. Mitchell Berman, "judges may have no choice but to follow their own convictions and moral intuitions" (p. 47). "A sad fact . . . at originalism's heart," Wilkinson further concludes, is that it "has failed to deliver on its promise of restraint," and "[t]he fault lies with the theory itself" (p. 46).

It is not true that judges faced with a constitutional challenge to a policy choice that the Constitution does not clearly prohibit have no choice but to rule on the basis of personal inclinations, and may, therefore, invalidate the choice as "unconstitutional" on a non-constitutional ground. They obviously have the choice of deciding not to intervene and

---

28. 60 U.S. 393 (1851).

29. 109 U.S. 3 (1883).

30. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). See LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* (1976).

letting the result of the ordinary political process stand. The only justification for judicial review, Judge Wilkinson and Professor Berman seem to forget, is that judges are authorized to enforce the prohibitions of a written Constitution. It takes a remarkable degree of confidence in the wisdom, knowledge, and trustworthiness of judges and distrust of popular government to believe that in the absence of a clear constitutional prohibition judges may invalidate laws on the basis of “whatever outcome seems desirable” or their “own convictions and moral intuitions.” It is not a defect of originalism that it would preclude judges from enforcing constitutional prohibitions that do not exist.

If, as Judge Wilkinson states, self-declared “originalist judges have been among the worst offenders” (p. 46) in lack of restraint, the fault is not originalism’s, but the judges’. The gun control cases relied on by Wilkinson illustrate the problem. In *District of Columbia v. Heller*,<sup>31</sup> the Court, with the usual five to four split, invalidated a District gun control measure, holding in an opinion by Justice Scalia, ostensibly on the basis of extensive historical research, that the Second Amendment grants an individual right to possess firearms. A four Justice dissenting opinion by Justice Stevens reached, ostensibly on the basis of equally extensive historical research, the opposite conclusion, and voted to uphold the law. While “[t]here is support” for the majority’s view, Wilkinson concludes, “there is also plenty of clear evidence to the contrary” (p. 58). “What was transparently contestable *Heller* portrayed as indisputable” (p. 58). In an earlier writing, he had argued forcefully in favor of the dissenters’ position.<sup>32</sup> The close division of opinion alone should have been enough to indicate that the Second Amendment did not so clearly settle the issue as to justify the Court in overturning the District’s law. A presumption of constitutionality based on deference to elected legislators and the rationality of letting current problems be solved on the basis of current knowledge and conditions should have been enough to persuade the majority that they were not required to intervene.

In *McDonald v. City of Chicago*,<sup>33</sup> Judge Wilkinson points out, the Court, with the same five to four split, applied the

---

31. 554 U.S. 570 (2008).

32. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009).

33. 130 S. Ct. 3020 (2010).

*Heller* result to the states by holding that the Fourteenth Amendment was meant to “incorporate” the Second. Rather than supporting rejection of originalism, as Wilkinson argues, the result clearly illustrates its misuse to reach an apparently favored result. A restrained originalist would and should have found that it is not clear that the Second Amendment creates an individual right of gun ownership and even less clear, in any event, that the Fourteenth Amendment makes that right applicable to the states.

Judge Wilkinson sees *U.S. Term Limits, Inc. v. Thornton*<sup>34</sup> as a further argument against originalism. The Court, again by a five to four decision, but this time with the four conservatives in dissent and the liberals in the majority by reason of being joined by Justice Kennedy, invalidated a state law that effectively imposed term limits on the state’s federal representatives. Again, both the majority (by Justice Stevens) and minority (Justice Thomas) opinions relied on extensive historical research, only to arrive at opposite conclusions. It turns out, Wilkinson concludes, that, as usual, the “original understanding,” if any, of the issue is “unclear” (p. 48). “Originalism thus offers no guidance on the issue, setting judges adrift . . . in these unchartered waters” where they “may be tempted to latch on to familiar personal preferences for direction” (p. 48).

Judge Wilkinson’s apparent assumption—probably inevitable for judges armed with judicial review—is that all laws require judicial approval for their validity. It is not true that a judge faced with a challenge to a law the Constitution does not clearly prohibit is left “adrift” with the often difficult problem of having to decide whether he approves of it. He should, if he understands and adheres to the basis of judicial review, see that he has no problem at all: a policy choice not clearly prohibited by the Constitution is not unconstitutional.

As already noted, the fact that the Justices divide almost evenly on a constitutional issue should ordinarily be enough, it would seem, at least for a restrained originalist judge, to conclude that the alleged constitutional prohibition is not sufficiently clear to justify overruling the legislative judgment. The additional fact that the division, as on all of the issues noted at the beginning of this review, is typically along clear ideological lines is further reason to suspect that invalidation of the

---

34. 514 U.S. 779 (1995).

legislative policy choice may not have been the inevitable result of a clear constitutional command.

Judge Wilkinson's objection to originalism amounts to little more than that it is not living constitutionalism and would therefore, if followed, preclude some Supreme Court decisions of which he highly approves. It would, in his view, "require . . . overturning a whole host of rights on which citizens now rely," "turn back the clock on matters of personal privacy," and "restore antiquated notions of inequality" (pp. 14–15). This objection leaves very little, however, of his plea for judicial restraint. One cannot effectively complain of judicial activism while lauding some of its results. It is true that originalism would (if *stare decisis* is overcome) remove many Court imposed restrictions on legislators, or at least prevent the Court from imposing new ones, but it would merely return the policy issues involved to the ordinary political process, which should not in a democracy be presumptively suspect. Some rights, such as the right to harass mourners at military funerals<sup>35</sup> may be lost as a result of reinstated state laws, but the corresponding right of mourners not to be harassed would be gained. There is almost always a trade-off.

It is true that an originalist Court would not have been able to find a "right to privacy" in the "penumbras, formed by emanations" from the Bill of Rights, as the Court did in *Griswold v. Connecticut*,<sup>36</sup> but that would not necessarily have been a loss. For one thing, it would have saved the nation from the embarrassment of government by farce. For another, it is not clear that the Court's creation of a near-absolute right to an abortion that the decision led to has proved to be a good policy choice from any point of view. Rather than resolving the abortion issue, the Court's intervention seems to have served to make it more divisive and the right more vulnerable than it would otherwise have been. The Court's abortion decisions have created a four-decade pitiable spectacle of the states devising new means of impeding abortions and then pathetically pleading with the Court not to strike them down.<sup>37</sup>

The nation's enactment of broad civil rights and voting rights laws, honoring Dr. Martin Luther King, Jr., uniquely, with a day of his own, and election and re-election of a black

---

35. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

36. 381 U.S. 479, 484 (1965).

37. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

president should lessen Judge Wilkinson's fear that except for the Court the people might "restore antiquated notions of inequality." They might, it is true, restore some of the laws invalidated by the Court, such as those that gave preference to in-wedlock over out-of-wedlock births.<sup>38</sup> Only the extreme skepticism about democracy and distrust of the American people that is characteristic of liberal constitutional scholars can explain the belief that it is only the Supreme Court that is saving the nation from oppression.<sup>39</sup> Wilkinson's acceptance of that belief to a large extent makes his plea for restraint contradictory and futile.

### C. POLITICAL PROCESS THEORY

Judge Wilkinson's next chapter, "Political Process Theory: A Third Way Down the Rabbit Hole" (p. 60), discusses Professor John Hart Ely's book, *Democracy and Distrust: A Theory of Judicial Review*.<sup>40</sup> Although purportedly rejecting living constitutionalism which he denounced as turning the Court into a "council of legislative revision," Ely also rejected originalism, which he considered "incapable of keeping faith with the evident spirit" of certain allegedly "open-textured" constitutional provisions (p. 62). If the Constitution has "open-textured" provisions, however, it is largely because the Court has made them so by divorcing them from their original meaning, and a warrant to enforce the "spirit" of such provisions cannot be a prescription for restraint.

Following the famous "footnote four" in Justice Stone's *Carolene Products*<sup>41</sup> opinion, Professor Ely would confine the Court's constitutional decisionmaking to enforcing the "specifics" of the Bill of Rights, correcting "malfunctions" of the political "market," and preventing improper discrimination against "discrete and insular minorities" (pp. 63–64). Judges would thus, he argued, need to make only "procedural" decisions, at which they are expert, rather than "substantive" decisions, which are for the legislature. Judge Wilkinson believes that Ely's theory has the merit of rejecting both originalists, who

38. See, e.g., *Levy v. Louisiana* 391 U.S. 68 (1968).

39. It is surely even more true today than it was in 1893 that "we are much too apt to think of the judicial power of revising the acts of the other departments as our only protection against oppression and ruin." Thayer, *supra* note 13, at 137.

40. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

41. *Carolene Products Co. v. United States*, 304 U.S. 144, 155 n.4 (1938).

“lob the hand grenade of democratic accountability,” and living constitutionalists, who “respond by firing back the dead-hand fallacy, contending that it is equally undemocratic to let long-dead individuals make value judgments for us” (p. 67). This attempt at “moral equivalence” is not valid. Democratic accountability is the basis of government legitimacy, while the “dead-hand” objection, as previously noted, is an objection not to originalism but to constitutionalism.

On the “vice” side of the ledger, Judge Wilkinson points out that having the courts police democracy, as Ely recommends, necessarily involves value judgments. Whether *Citizens United v. FEC*,<sup>42</sup> invalidating a federal law restricting corporate campaign contributions, for example, improved the political marketplace by making more speech available or impaired it by permitting wealth to drown out other speech, is highly debatable. Similarly, Ely’s requirement of close judicial scrutiny of “we-they” distinctions to prevent disadvantaging members of groups to which the legislators do not belong involves “the slippery task of discerning who is ‘we’ and who is ‘they,’” “presages a constitutional law of class warfare,” and could “undo almost every legislative classification on the books” (p. 75). Although, “[t]o his credit,” Ely talks the talk of judicial restraint (p. 69), Wilkinson concludes, his theory “is a prescription for an emboldened judicial role unsupported by the Constitution and covered by little more than a fig leaf of restraint (p. 79). The “source” of his theory, after all, was the Warren Court, which was “‘activist’ or ‘interventionist’ by any measure of the term” (p. 63).

#### D. PRAGMATISM

Finally, Judge Wilkinson devotes a chapter titled “Pragmatism: Activism through Antitheory” (p. 80) to Judge Richard Posner’s “pragmatism,” which, far from being a cosmic constitutional theory, “prides itself upon being anything but” (p. 83). Posner, a Holmesian legal realist, would inject a high degree of candor into judicial decisionmaking by recommending that judges openly base their decisions on their likely “effects” rather than the “language of a statute or a case, or more generally on a preexisting rule” (p. 82).

---

42. 130 S. Ct. 876 (2010).

Pragmatism has the virtue, Judge Wilkinson believes, of providing a flexibility that enables judges to escape imposing “eighteenth-century solutions,” or non-solutions, on “twenty-first century problems” (p. 84). “Given the magnitude of the problems we call on the Constitution to solve, pragmatism serves as a safety valve. The Constitution ‘is not a suicide pact’ and pragmatism helps keep it that way” (p. 85). Pragmatic judging is needed, that is, to permit us to escape from unhelpful or harmful constitutional restrictions or requirements. The difficulty with this argument is that although there are some such restrictions or requirements—the president must be a “natural born Citizen,”<sup>43</sup> and Wyoming, as well as California, must have two Senators<sup>44</sup>—they are very rarely the subject of judicial activism, the effect of which is almost always not to escape constitutional restrictions but to create new ones, not to widen, but to limit legislative policy choices. Nor is there any real issue of “the magnitude of the problems we call on the Constitution to solve,” because the Constitution has little to do with most contemporary problems. It cannot often be used to solve, but neither does it often present an impediment to solving, contemporary problems. It is the Court that we call upon to solve our problems, which is what Wilkinson is rightly, though ineffectively, objecting to.

Judge Posner argues that by frankly recognizing judges’ policymaking role, pragmatism may, paradoxically, encourage not activism but restraint. It “may help convince judges of the legislature’s relative superiority,” and that they “likely lack both the relevant data and the democratic responsiveness needed for effective policymaking, not to mention the ability to appropriately process . . . scientific and political inputs” (p. 86). Similarly, the Supreme Court’s frank recognition that it is “inescapably a political court when it is deciding constitutional cases” may “let it at least be restrained in the exercise of its power, recognizing the subjective character, the insecure foundations, of its constitutional jurisprudence” (p. 146 n. 75).

Judge Wilkinson responds that Judge Posner may be “a victim of his own agile and wide-ranging intellect” (p. 102), because pragmatism is “the antithesis of restraint” (p. 94). “Pragmatic judges are ‘forward-looking’ and ‘future-oriented,’

---

43. U.S. CONST. art. II, § 1.

44. U.S. CONST. art. I, § 3.

have a ‘taste for empirical inquiry,’ and lack any sense of duty to the source of legal authority. In a very real sense, these attributes mean pragmatists aren’t really judges after all . . . .” (p. 95).

#### IV. CONCLUSION: ACTIVISM IS BAD EXCEPT WHEN IT’S VERY GOOD

In his concluding chapter, Judge Wilkinson quotes with approval Judge Learned Hand’s well-known statement that he would find it “most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not” (p. 112). Judge Hand took a position that came close to questioning the legitimacy of judicial review.<sup>45</sup> Wilkinson’s position, on the contrary, amounts to objecting to rule by the Supreme Court except when it produces decisions he strongly approves. In addition to *Brown*, these include *Gideon v. Wainwright*,<sup>46</sup> *Reynolds v. Sims*,<sup>47</sup> and *Miranda v. Arizona*.<sup>48</sup> These “[m]ajor activist decisions of the Warren Court,” he believes, “have rightly stood the test of time” (p. 111). He recognizes that this explicit approval of activism “doubtless strengthens the belief of today’s interventionists that tomorrow may smile on their bolder efforts too.” (p. 111) But that belief is unwarranted, he assures us, because “[t]hey are wrong” (p. 111).

His approval of some activist decisions is not inconsistent with his plea for restraint, Judge Wilkinson argues, because those decisions “vindicated foundational principles essential to the functioning of our nation,” and refusal by the Court to intervene would have left the Constitution “bereft of meaning” (p. 111). Judicial review on the basis of unstated “foundational principles,” however, is contradictory of the judicial review justified in *Marbury v. Madison* as simply enforcement of a written Constitution. More importantly, Wilkinson’s justifications are not true: the nation managed to function before the decisions he approves were made—as to some of them, it arguably functioned better. None of them comes close, even discounting for hyperbole, to passing his test of being required to prevent the Constitution from being “bereft of meaning.”

---

45. LEARNED HAND, THE BILL OF RIGHTS 15 (1958) (“[S]ince this power [judicial review] is not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation, it need not be exercised whenever a court sees, or thinks that it sees, an invasion of the Constitution”).

46. 372 U.S. 335 (1963) (criminal defendant’s right to state-supported counsel).

47. 377 U.S. 533 (1964) (one-person, one-vote).

48. 384 U.S. 436 (1966) (warning of Fifth Amendment rights).

“Those who wish to insert the courts into such contestable disputes” as “the precise reach of eminent domain or regulatory takings or the value of same-sex marriage or the utility of firearms regulations,” Judge Wilkinson advises, “would do well to remember that even the near misses of judicial activism expose its true dangers” (p. 111). Unfortunately, they are unlikely to be convinced. There is no reason they cannot contend that strong property and gun ownership rights are at least as much “foundational principles” as some of the rights protected or created by the decisions Wilkinson approves. It is also quite possible to argue that the Court should extend to homosexuals the “equal protection” it extends to some other minority groups.<sup>49</sup>

Judge Wilkinson’s position is essentially that taken by Justice Samuel Chase at the beginning in 1798 in *Calder v. Bull*.<sup>50</sup> Chase was similarly commendably candid in arguing for the power of the Court to restrain legislative power on the basis of “fundamental principle,” even though not “expressly restrained by the Constitution.”<sup>51</sup> Wilkinson’s protest of rule by the Court is vitiated by his refusal to adopt Justice James Iredell’s response that the Court has no power to declare a law void “merely because it is, in their judgment, contrary to the principles of natural justice” which are “regulated by no fixed standard.” The Court would simply be substituting its opinion of “natural justice” for that of the legislature, which has “an equal right of opinion.”<sup>52</sup>

Judge Wilkinson ends as he began with a plea for judicial restraint, the absence of which has “placed the inalienable right of Americans to self-governance at unprecedented risk” (p. 114). The courts should not be, as they are now, “the primary agents of social change. It is the people at the ballot box who should decide, not the people wearing black robes—the many, not the few” (p. 114). The great American achievement of representative self-government in a federalist system with separation of powers has deteriorated into government by majority vote of a committee of nine unelected, life-tenured lawyers, totally undemocratic and totally centralized with judges performing the legislative function.

---

49. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

50. 3 U.S. 386 (1798).

51. *Id.* at 388.

52. *Id.* at 399 (Iredell, J., concurring).

It is not so-called theories of constitutional interpretation, however, that have “left restraint by the wayside” and “made citizens all the more willing to look to the courts to resolve the great social controversies of our time” (p. 114). Citizens are willing to look to the courts to overturn political decisions they disfavor simply because they can, because the courts are available and willing—if not sometimes seemingly eager—to do so. Judicially enforced constitutionalism means that losers in the ordinary political process can become winners with nothing more required than obtaining five favorable votes in the Supreme Court. Nothing, we can be sure, will keep them from trying, as long as this alternative route to political victory is available.

Judge Wilkinson has “been tempted from time to time to develop a theory of [constitutional interpretation of his] own,” he tells us, but resisted it because “the theoretical enterprise is so weighted against restraint that it presages for coming generations democracy’s slow decline” (p. 115). So he concludes by “offer[ing] only a set of worn and ordinary observations that have all been voiced many times before” and which amount to urging judges to believe that “the highest virtues of judging—and of life—are a measure of self-denial and restraint” (p. 116). The problem, as he recognized at the beginning, is that judges are not subject to “the normal constraints on the exercise of power” (p. 7), forcing us to rely on the judges’ self-denial and restraint, which are not characteristic of human beings subject to the corruption of uncontrolled power. Judges are not only human beings but experienced lawyers skilled in the manipulation of language to reach and justify pre-determined results. Sitting in a replica of a Greek temple, dressed in black robes, and addressed as “Your Honor,” it is not surprising that the Justices readily slip from a judicial to a legislative and, indeed, a priestly role.

Our democracy’s decline is probably already too far advanced to expect any move by Congress to re-assert its legislative supremacy and fulfill its constitutional obligation to guarantee the states a republican form of government, unless the Court’s recent dramatic and seemingly accelerating interventions finally prove sufficient to motivate some rethinking of judicial review. Even that remote possibility is more likely to have a restraining effect on the Court, however, than Judge Wilkinson’s reminding them of the virtue of self-denial while applauding the activist decisions he agrees with.