Through The Looking Glass With Lino Graglia

Paul R. Joseph∗

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Abstract

After stepping through the looking glass of Lino Graglia’s interesting paper one finds oneself in a world strangely different from that in which most of us dwell.
the late Justice Potter Stewart, among others. But I suppose one is entitled, if one wishes, to call these jurists dupes of the American Left.

Speaking of radicals, the ACLU comes in for some sharp criticism at Professor Graglia's hands, and I think that part of his presentation really detracts from his argument, and needlessly so. The 1988 presidential election was hardly a referendum—and certainly not an informed one—on the policy positions of the ACLU, despite Mr. Bush's regrettable attempt to get political mileage out of his attacks on that organization. Indeed, I would argue that the Bork nomination came closer to providing a referendum on the Supreme Court's work-product in the realm of civil liberties—and I will admit to being surprised at the outcome.

Having said all that, I happen to agree with Professor Graglia that the Supreme Court has at times found much more in the Constitution than many of us would have suspected was there. It has done so, typically, not by looking to the "original intent" of the Framers, but by ignoring any such evidence. I am inclined to agree that the Court has put some heavy weight on the words "due process" and "equal protection." Perhaps the most questionable bit of interpretation in which the Court has engaged—and perhaps the most important—is its gradual determination that almost all of the provisions of the Bill of Rights are "incorporated" in the Due Process Clause of the fourteenth amendment. Think about the import of that doctrine. The debate rages, but I am not convinced that the Framers of the fourteenth amendment had any such understanding. Then again, perhaps the natural reading of the discarded Privileges and Immunities Clause of the fourteenth amendment is, as some have argued, a reference to those "privileges" embodied in the Bill of Rights. Perhaps the Court reached the right result with the wrong reasoning.

In sum, I think Professor Graglia has an important message that deserves to be considered and taken seriously. All it needs is a little editing.
3. Although the judiciary is not elected, it has significant restraints upon it.

4. The Civil War and the subsequent events radically altered the political relationship between the states and federal government.

5. The Graglia view is one which exalts majority rule over individual dignity and rights, undervalues the meaning and importance of the Bill of Rights, and ignores political changes which have altered the nature of the American nation and government.

I. Constitutional Purposes and Content

Professor Graglia’s paper tells us that the men really behind the drafting of the Constitution were “ardent nationalists” seeking to destroy state power, and that they largely accomplished their goal. We are also told, however, that the “purpose” of the Constitution was narrow and limited primarily to matters of commerce and finance. Is this not contradictory? Surely the “ardent nationalists” did not have such a narrow purpose in mind. Nor is it clear that all those ratifying did.

Yes, the Constitutional Convention did exceed its instructions but its actions were adopted when the Constitution was ratified.

Throughout the paper the same troubling problem reemerges. The fourteenth amendment, for example, is presented as having only one purpose—to help freed Blacks—and although the motivations, purposes, and effects of that amendment were debated at the time, and continue to be so today, section one of the fourteenth amendment at the time it was adopted, some voices suggested that the effect of the states. The point is not that this view was or is clearly right, but that it can be fairly debated. The paper, by contrast, appears to take the view that there is one and only one clear meaning which can be definitively and conclusively determined. If reasonable minds can differ about what a document meant when adopted, reasonable interpretation must be allowed. Only if absolute clarity and singularity of purpose are alleged can interpretation really be faulted. This assertion of singular and obvious clarity is the basis of the entire thesis presented by Professor Graglia. Unfortunately for his position, it is, finally, unconvincing.

The Bill of Rights is presented solely as a protection of states although many of its provisions are clearly aimed at protecting individuals. Professor Graglia’s paper seems to deny the importance of the Bill of Rights. Amendments which protect the most fundamental freedoms of people such as speech, press, religion, the right to bear arms, and the right to petition the government for redress of grievances, are dismissed in the paper as dealing “primarily with criminal procedure.”

II. Judicial Review

It is likely that people will be debating the legitimacy, source, and scope of judicial review long after all of us are gone from this earth. While conceding that the question was debated even at the time of the ratification of the Constitution, the paper still seems to suggest that the doctrine came as a complete surprise. Professor Johnny Burris, of our faculty, in his recent article on the legitimacy of judicial review, however, reviewed the evidence, including references to judicial review during the Constitutional Convention, by both federalists and anti-federalists during the ratification debates, and to the fact that a number of state cases appear to claim the judicial review power. Professor Burris concluded, “the framers’ generation, both those favoring and opposing the ratification of the Constitution, perceived the power of judicial review as possibly within the scope of authority granted in the term ‘judi-

2. Id. at 53.
3. Id. at 54.
4. Graglia, supra note 1, at 62.
5. U.S. CONST. amend. XIV, section 1 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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6. See generally by Representative Brigham and Senator Howard, in particular
3. Although the judiciary is not elected, it has significant restraints upon it.
4. The Civil War and the subsequent events radically altered the political relationship between the states and federal government.
5. The Graglia view is one which exalts majority rule over individual dignity and rights, undervalues the meaning and importance of the Bill of Rights, and ignores political changes which have altered the nature of the American nation and government.

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Throughout the paper the same troubling problem reemerges. The purpose—to help freed Blacks—and although the motivations, purposes, and effects of that amendment were debated at the time, and never uses the word "Black" and is written in the broadest terms. Even amendment would be to make the Bill of Rights applicable against the states. The point is not that this view was or is clearly right, but that it can be fairly debated. The paper, by contrast, appears to take the view that there is one and only one clear meaning which can be definitively and conclusively determined. If reasonable minds can differ about what a document meant when adopted, reasonable interpretation must be allowed. Only if absolute clarity and singularity of purpose are alleged can interpretation really be faulted. This assertion of singular and obvious clarity is the basis of the entire thesis presented by Professor Graglia. Unfortunately for his position, it is, finally, unconvincing.

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7. See e.g., U.S. Const. amendments I, III, IV, V, VI, VII, VIII, IX.
8. Graglia, supra note 1, at 62.
9. See generally Graglia, supra note 1.
cial power' in article III of the Constitution." To say that the Constitution does not explicitly include it is certainly true. To claim that it is clear that the doctrine is illegitimate goes too far.

What is the alternative to judicial review? Professor Graglia's paper suggests that the federal Congress should be the final arbiter of the meaning of the Constitution. Since one of the paper's main points is that the Constitution itself is an improper power grab by the national government, it seems strange to make that national government the final arbiter of the scope of its own power. In regard to the Bill of Rights, which directly limits federal legislative power, this seems particularly curious and inappropriate. The proposal suggests a level of trust of the federal congressional power unshared by those of the ratification era. For an excellent discussion of this, one can consult the dissenting opinion written by Justice Sandra Day O'Connor in Illinois v. Krull. Justice O'Connor writes that "Statutes [passed by Parliament] authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment."13

III. Politics and History

Graglia's paper appears to continue to view America as a confederation of sovereign states. To some extent that is true, but a number of political events have severely undercut and modified this reality.

The importance of the Civil War cannot be overemphasized. Arguably, the war forever negated the theory that the nation was a mere compact of sovereign states and replaced it, through force of arms, with the reality that the nation is a union in which states, while important, are finally subordinate to the national power. Although the paper argues that the war was caused by judicial review (the Dred Scott decision), surely this is only one part of a complex and multi-caused event. Federal power was strengthened again when the post-war amendments specifically limited state power and gave Congress broad legislative power to enforce their provisions.18 Later, in 1913, the Constitution was amended to eliminate election of Senators by state legislatures. Thus, the states lost their direct representation in the national government. This further altered the state/federal balance in favor of the national government. Other expansions of federal power came from legislation under the Commerce Clause. The modern story of that clause is the unwillingness of the Supreme Court to challenge federal legislative authority. The disruption of the balance between the federal government and the states is not primarily the product of judicial review. For good or ill, it is the result of the political history of our country.

IV. Individual Liberty and Majority Rule

Professor Graglia's paper extols liberty (arguing that for liberty power must be kept to close as those governed as possible) but seems to equate liberty solely with the principle of majority rule, ignoring the fact that powerful majorities can and have used their power to destroy the freedom of less powerful minorities within the community. While one important part of American liberty is majority rule, another is the principle of individual liberty—that each individual has some fundamental rights which the majority (and so no government in its name) may contravene. The Bill of Rights and fourteenth amendment limit government from doing things even if the majority desires and approves it. It is the combination of these principles—democracy, but limited by individual rights—that produces the American conception of freedom. Individual, as opposed to collective, freedom seems lacking from Professor Graglia's conception.

Although Professor Graglia appears to be no fan of judicial review, his paper also opposes federal as opposed to state legislative power. One would expect, then, that even if judicial review is opposed, those occasions where it has been used to strike down federal legislation and uphold state power would be viewed, by Professor Graglia, as the doctrine at its best. Not so. Some of the cases he alludes to in order to attack judicial review are cases in which local autonomy

17. Graglia, supra note 1, at 60.
19. Id. at 362.
21. See generally Graglia, supra note 1.
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11. *Graglia, supra note 1*, at 60.
13. Id. at 362.
15. U.S. Const. amends. XIII, XIV, XV.
16. U.S. Const. amend. XVII.
19. *Graglia, supra note 1*, at 53.
21. See generally *Graglia, supra note 1*. 
was upheld by the Supreme Court and federal power was restrained.

For example, there was a time in the history of our nation when some States wanted to give children the "freedom" to work long hours for low pay. The federal government wanted to stop child labor. The Supreme Court sided with the states and struck down the federal laws (Hammer v. Dagenhart\(^{22}\) and Bailey v. Drexel Furniture\(^{23}\)), and thereby caused a victory for local autonomy and a defeat for federal attempts to expand its power. Yet, Professor Graglia uses such cases to attack judicial review.

Can Professor Graglia have it both ways? If the prime evil is judicial review, then Congress will be the ultimate defender of its own powers. History shows that Congress will define its powers broadly, will regulate and limit states, and will exercise even broader power, and the result may be local autonomy will die. If, on the other hand, the growth of federal power is the prime evil, then exercises of judicial review which limit this power ought to be applauded. When push comes to shove, local control may not be possible without at least some exercise of judicial review.

The more fundamental flaw in Professor Graglia's analysis is his belief that individual liberty equals local majority control. Without restraints on the majority, this leads to tyranny of the majority and subjugation of the minority.

In the Civil Rights Cases\(^{24}\), the Court struck down federal legislation that would have ended racial segregation in public accommodations on the ground that the federal legislation was infringing upon local sovereignty—that is, on the states.\(^{25}\) Professor Graglia ought to love this decision. In fact, however, it demonstrates that Professor Graglia is wrong when he assumes that local control is more likely to lead to freedom than national control. When dealing with minorities within the local community, exactly the opposite is likely to be true.

Brown v. Board of Education\(^{26}\), a case which increased the legitimization of the use of federal power, also set the stage for congressional action. Once again, a national government, by an exercise of national power, pushed the local governments (states) into granting its mi-

V. Constraints on the Court

Professor Graglia presents the view that unelected federal judges are the real rulers of the land\(^{27}\) and are not restrained as the other two branches are.\(^{28}\) Yet Congress retains the power to abolish all federal courts except the Supreme Court.\(^{29}\) To make at least some modifications in its jurisdiction (Ex Parte McCardle\(^{30}\)), and to determine the size of the Court.\(^{31}\) Constitutional amendments can be used when necessary,\(^{32}\) as the eleventh amendment demonstrates.\(^{33}\) No federal judge appears magically at his or her bench. Each has been proposed by the executive branch and confirmed by the Senate.\(^{34}\) Each can be removed for abuse of power.\(^{35}\) Federal judges do not serve for life, they serve "during good behavior."\(^{36}\) If courts have not been sufficiently controlled for the liking of Professor Graglia, the problem is a lack of political will in the other two (elected) branches.

VI. The Triumph of the ACLU

I wish, at times, that I lived in Professor Graglia's world, where the ACLU never loses and the Supreme Court Justices (although appointed by the likes of Presidents Eisenhower, Nixon, and Reagan) nevertheless exist to advance a liberal agenda. It may be that his focus is on a very few years of constitutional history or on a few Justices with whom he disagrees. It is not reality in the world as I know it. I think about a court that invents seizures on "reasonable suspicion,"\(^{37}\) that creates "administrative warrants"\(^{38}\) by mangling the probable cause standard, and that would uphold roadblock seizures based, for example,

\(^{22}\) 247 U.S. 251 (1918).
\(^{23}\) 259 U.S. 20 (1922).
\(^{24}\) 109 U.S. 3 (1883).
\(^{25}\) Id. at 25.
\(^{26}\) 347 U.S. 545 (1954).
\(^{27}\) Graglia, supra note 1, at 60.
\(^{28}\) Id.
\(^{29}\) U.S. Const. art. III, §§ 1 and § 8.
\(^{30}\) 74 U.S. (7 Wall.) 506 (1869).
\(^{31}\) See Judiciary Act of 1789, § 1, 1 Stat. 73.
\(^{32}\) U.S. Const. art. V.
\(^{33}\) U.S. Const. amend. XI.
\(^{34}\) U.S. Const. art. II, § 2, cl. 2.
\(^{35}\) U.S. Const. art. I, §§ 2 and 3, art. III, § 1.
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32. U.S. Const. art. V.
33. U.S. Const. amend. XI.
34. U.S. Const. art. II, § 2, cl. 2.
on nothing more than governmental whim.  

It is true that Mr. Bush made significant political capital out of the ACLU, largely by distorting a very few of its positions and ignoring the rest. To argue, however, that there is a "political ideology uniformly advanced by the Supreme Court" when the people involved include such a diverse cast of characters as Justice Brennan and Chief Justice Rehnquist, strains credulity past the breaking point.

VII. Conclusion 

It is not my purpose to argue here that the Court has always done good things; it has not. But neither has Congress and neither have the state legislatures. It is my purpose to argue that eliminating judicial review and allowing Congress to be the final arbiter of its own powers is not the way to preserve liberty, especially in those areas (such as the Bill of Rights) which place direct constraints on Congressional power. I argue, further, that a vision of freedom which embraces majority rule without any limit, check, or notion of individual liberty is fundamentally flawed. Finally, I suggest that the Court is enmeshed in a delicate and complex balance of powers with the other two branches which is unrecognized in the paper. Lastly, and something which might surprise Professor Graglia, the Supreme Court often does things I do not like. Yet, I am not willing to jettison judicial review because I think it plays an important part in maintaining liberty in both its aspects.

Professor Graglia's world, as he presents it in his paper, is a provocative personal vision. You may find it an interesting place to visit, but you would not want to live there.

Response by Lino Graglia*

LINO GRAGLIA: I will try to respond briefly to some of the points Professors Rohr and Joseph make. Professor Rohr began by arguing that federal courts are necessary to provide protection from local pressures. Federal district court judges, however, are residents of the state and place in which they serve, and in my experience they have been as much subject to local pressures as other judges. Much more interesting is Rohr's statement that he finds Marshall's justification of judicial review in *Marbury v. Madison* to be convincing. That must put him in a minority of about one among people who have written on this question. No one has found Marshall convincing, and the writings on *Marbury* are voluminous. Marshall's primary—almost his only—justification for judicial review was that it is inherent in a written constitution, and that plainly is not so. Many nations had and have written constitutions with limitations on government without judicial review. *Marbury* has been compared to the Cheshire cat: it has all been made to disappear—that is, Marshall's reasoning has been shown to be fallacious—but somehow judicial review, like the cat's smile, remains, even though the cat is gone.

Rohr questions my statement that decentralized power is one of the two major principles, along with self-government, of the Constitution. By decentralized power, I mean federalism, and both Supreme Court opinions and scholarly commentary throughout our history support the view that the genius of the American system was the idea of federalism. The primary argument made against adoption of the Constitution was that we could not have a democracy or a republic in a nation of continental extent or potential continental extent. Madison's answer was that we could with federalism, with a system of divided sovereignty. Divided sovereignty has not worked and cannot work—the states have no sovereignty today—but the idea of federalism was certainly crucial to the Constitution's adoption. The Constitution was sold to the people in each state on the representation that the states would remain independent sovereigns as to the vast majority of matters of public policy, with basically only matters of commerce, defense, and

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40 *Graglia, supra note 39*.

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1. 5 U.S. (1 Cranch) 137 (1803).