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Abstract

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on nothing more than governmental whims.**

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.

40. Graglia, supra note 1, at 66.

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LINO GRAGLIA: I will try to respond briefly to some of the points Professors Rohr and Joseph made. 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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1. 5 U.S. (1 Cranch) 137 (1803).
finance turned over to the national government.

In response to my assertion that Marbury was a set-up power grab, Professor Rohr makes the surprising point that all the Court actually held was that it did not have the power to do something. But, again, almost all commentators have seen that as a typical tricky Marshall ploy. Of course he held for the Jefferson administration, modestly declining to order Secretary of State James Madison to deliver the commissions. He knew very well that he had better not issue any such order, because Jefferson would have simply ignored it, with great damage to the prestige of Chief Justice John Marshall and his Supreme Court. The whole point of this clever exercise was to establish judicial review in a context where there was essentially no response to it. The beauty of the maneuver was that Jefferson won the case and so was not in a position to defy Marshall.

Professor Joseph, citing a current work by Professor Burris, said that judicial review did not create great surprise at the time of Marbury. It did not strike people as a bombshell; it seemed to be anticipated or expected. I do not question that. I do want to point out, however, that given how unprecedented it was and how extraordinary was its potential, one would expect to find a very clear provision for it if it was, in fact, intended by the Framers and knowingly granted by the Ratifiers. The most famous mention of judicial review before Marbury was in The Federalist No. 78 by Hamilton. There is now a lively debate about how many people read or knew about the Federalist Papers in general, and No. 78 in particular. But it is clear that Marshall did not invent the notion of judicial review.

Jefferson was severely angry at Marshall for asserting in Marbury that the Jefferson administration behaved illegally, and denied Marbury his legal rights, only to conclude that the Court had no jurisdiction over this case. It is as if my wife wanted a divorce but went to the wrong court, say to the probate court instead of the family court, and over the case, but if no good-nic were here I would really put it to him for you." This is essentially what Marshall did to Jefferson. Jefferson was understandably enraged, but he did not make a fuss about judicial review.

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Madison’s notes were not published until after his death. There was certainly no agreement on judicial review at the convention, no clear understanding that courts were to have such a power. There should be no doubt that if the Framers had decided to provide for judicial review, they would have made some explicit and detailed provision for it, including some provision giving Congress the last word, as they did in the somewhat analogous matter of the presidential veto. Article III gives Congress control over the Supreme Court’s jurisdiction, but it is not at all clear that this was directed toward controlling judicial review, and it is not an effective or appropriate means of doing so.

In any event, the whole issue of judicial review, whether it was usurped or is legitimate, is not really important as a practical matter, and I do not want to emphasize it. If judicial review were in fact what it is represented to be—the power to disallow laws that violate the Constitution—it would be a power of very limited importance, because laws that violate the Constitution rarely occur. I can easily imagine laws that would violate the Constitution, but congressmen and state legislators live in this country and share our values, and they generally have no interest in enacting what the Constitution forbids, especially considering that the Constitution actually forbids very little. In Marbury, Marshall gave as an example of an unconstitutional law, an act of Congress permitting conviction for treason on the basis of the testimony of one witness, despite the fact that the Constitution clearly requires two. But such laws, of course, never occur; Congress has never passed and will never pass a one-witness treason law.

I was debating judicial review on television once when the moderator, a well-known commentator on legal affairs, said, “But Professor Graglia, according to you nothing is unconstitutional.” The moderator asked if I could give an example of a state law I would hold unconstitutional if I—“God forbid,” she thought, but was too gracious to say—were on the Supreme Court. “Sure,” I said, “No problem. An example would be a state law saying that women are not permitted to vote. I said that I would not want to take a position on its merits (I knew she would enjoy that), but such a law would clearly be unconstitutional. The nineteenth amendment prohibits denying the right to vote on grounds of sex.” Instead of being pleased and reassured, she acted as if I had somehow cheated her. “But,” she sputtered, “no state would enact such a law.” “Of course,” I said, “that’s exactly my point:
legislators can read, and unconstitutional laws do not get enacted." It is almost as if she felt that judicial review has no point unless courts can invalidate laws that are not prohibited by the Constitution.

The most important statement made by Professor Rohr, because it reflects a very common basic misconception, is that nearly all of the Supreme Court's controversial constitutional decisions have at least some "identifiable basis" in the Constitution. He recognizes an exception only for what he calls the decisions on "family privacy," by which he means the abortion decisions. For example, the Court has held that the Constitution prohibits state laws providing for prayer and Bible reading in the schools. While the Constitution admittedly says nothing about abortion, it does mention religion; so, you see, according to Rohr, the Court's prayer decisions at least have some constitutional basis. It seems to me that there could hardly be a less accurate or less sophisticated analysis of the situation.

It must be noted, first of all, that the first word of the first amendment is "Congress;" it says that "Congress shall make no law," and obviously has nothing to do with the states. But, Professor Joseph says, Justice Black has told us that the first amendment is "incorporated" in the fourteenth and is thus applicable to the states after all. Justice Black used to delight in claiming that he was just a simple, Alabama country boy, and I, for one, always believed him. But to Professor Joseph, Black is a reliable legal historian and impartial scholarly authority. Some people are prepared to believe anything! Even would-be lawyers should know that there is such a thing as truth, and that it is different from fiction.

We do not really know the meaning of the fourteenth amendment, according to Joseph; it is all a big mystery. In fact, however, we know the meaning of the fourteenth amendment as well as can be expected. It is perfectly clear that its purpose was to constitutionalize the 1866 Committee on Reconstruction. Thaddeus Stevens, a clear thinker, but John Bingham, to whom clarity was offensive, wanted to throw in reason, probably to avoid giving blacks the right to vote, the committee language at the last minute. This was indeed unfor-borbut it does not change the fact that the amendment was sold to the, granting basic civil rights to blacks. It is not credible that the ratifying states meant to impose upon themselves the sometimes pointless restrictions of the first eight amendments.

In any event, and this is of crucial importance to constitutional law, if we do not know what a constitutional provision means, it is of no use as a provision of law and cannot be a basis for a court to invalidate legislation. A meaningless constitutional provision is a judicial nullity, not a warrant for the exercise of unlimited judicial power. A constitutional provision with knowable meaning is, after all, the only justification ever suggested for allowing judges—lawyers in robes, unelected and holding office for life—to overturn the results of the democratic political process. The Constitution does not authorize judges, as Professor Joseph and Justice Brennan seem to think, to simply enforce their ideas of justice, natural law, or the laws of God. Such an authorization would, of course, amount to a simple transference of policymaking power to judges. There would be nothing to interpret, and the Constitution would have nothing more to do with constitutional law. This, of course, accurately describes the situation we now have reached as a result of the activism of Justices like Brennan and Douglas, with the aid and encouragement of Professors Joseph and Rohr.

It is possible, of course, to make an argument for government by philosopher kings, as Plato did. But not even Plato could defend government by lawyer kings, which is the present meaning of constitutional law. If we wanted rule by philosophers, we would choose philosophers—not, for example, Harry Blackmun. Professor Joseph likes the present arrangement, however, because Blackmun almost always votes to enact Joseph's liberal policy preferences. The first thing to know about constitutional law is that it has nothing to do with the Constitution; the second thing is that for the past thirty-five years it has simply been a cover for the Court's enactment of the liberal agenda. Every single one of the Court's controversial so-called constitutional decisions adopts and advances a position favored by the A.C.L.U.—and by Joseph, a representative of the A.C.L.U.—positions which are rejected by the vast majority of the people of this country and which, therefore, could never be adopted in any other way.

But who appointed Blackmun, Joseph asks. Nixon did! Does that not prove I am wrong about Blackmun being merely a tool of the A.C.L.U.? No, nothing could prove that I am wrong about that, because the undeniable fact is that for the last fifteen years he has voted consistently with Brennan and Marshall to enact the A.C.L.U.'s agenda. All it proves is that uncontrolled power is not good for the
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human personality, that it makes people forget the limits of their authority and competence and makes them think they are entitled to decrep tong notions of good policy.

Joseph could also point out that not only Blackmun, but the last seven (now eight) appointments to the Court have been by Republican presidents. Indeed, Brennan himself, the greatest abuser of judicial power at least since Douglas, was appointed by Republican President Eisenhower way back in 1956. It is odd that nearly all of these people should turn out to be liberal judicial activists. There is, I think, a potential embarrassment for me in that fact. I could say that the lack of opponents of government by judges has been very bad—who could have expected that Blackmun would become another Brennan or that then-President Ford, who tried to impeach Douglas, would then replace him with Stevens, who is little better than another Douglas? But when luck is consistently bad, something is probably operating other than luck. This is a big subject and to fully understand it—for me to be able to undo Joseph's work of spreading misinformation—you will have to come to Texas and take my full course.

In a word, what is probably operating is that it is irresistibly tempting to be important and have things your own way; it is much more fun to run the country than to merely to be a faithful judge doing your best to apply the law. Being a judge can be a very boring job, and, as my friend John Noonan can attest, it certainly does not pay very well. So why not enhance your office by taking advantage of your practical power to do great things? If you are a liberal like Brennan and Marshall and disapprove of capital punishment, why not abolish it? Would that not show that you are on the side of the forces of enlightenment and goodness? Would not Joseph and all the other really good people applaud? Only basically mean, nasty people like Graglia—Reaganites—would complain that you are not authorized to do these wonderful things and even that maybe they are not so wonderful.

Professor Rohr's argument that there is an "identifiable basis" in the Constitution for such Supreme Court decisions as its decision on prayer in the schools lacks, in my opinion, minimal intellectual integrity. It is an argument congenial only to lawyers and law professors, people whose professional training and practice have caused them to view inconvenient truths as obstacles to be overcome by clever or, at least, confusing argument. Rohr agrees that Roe v. Wade does not have anything to do with the Constitution, but the Court's other wonderful decisions do, he thinks. That is pure nonsense, sheer arrant nonsense. Do any of you really think—any of you, even if you are first-year students or if you started law school yesterday—that the states lost the power to provide for prayer in the schools in 1962, when the Supreme Court decided Engel v. Vitale, because the Supreme Court Justices suddenly noticed something in the Constitution that had not been noticed before? It should be perfectly clear to all of you, even if it is not to your law professors, that that is not true. States can no longer provide for prayer in the schools only because a majority of Supreme Court Justices had a different preference in the matter and were willing to impose their preference on the nation regardless of the fact that they were not authorized to do so, and regardless of the injury they inflicted on the process of self-government and on the idea of federalism. It is true that there is something about religion in the Constitution (in the first amendment) and nothing about abortion. But the first word of the first amendment is "Congress;" it is Congress that "shall make no law respecting an establishment of religion," and it says nothing about the states. The whole point of this provision in the first amendment was to make perfectly clear that the national government would have nothing to do on matters of religion, that it was not to interfere in any way in such matters. Religion was to be left entirely to the states, and some states had established churches up until the middle of the nineteenth century. For the Supreme Court, an arm of the national government, to then come along and say that the first amendment—supposedly "incorporated" in the fourteenth—deprives the states of authority to make policy regarding prayer and Bible reading in public schools is to pervert the first amendment, to stand it on its head. The truth is that the states lost the power to make policy on


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Professor Rohr's argument that there is an "identifiable basis" in the Constitution for such Supreme Court decisions as its decision on prayer in the schools lacks, in my opinion, minimal intellectual integrity. It is an argument congenial only to lawyers and law professors, people whose professional training and practice have caused them to view inconvenient truths as obstacles to be overcome by clever or, at least, confusing argument. Rohr agrees that Roe v. Wade does not have anything to do with the Constitution, but the Court's other wonderful decisions do, he thinks. That is pure nonsense, sheer arrant nonsense. Do any of you really think—any of you, even if you are first-year students or if you started law school yesterday—that the states lost the power to provide for prayer in the schools in 1962, when the Supreme Court decided Engel v. Vitale,* because the Supreme Court Justices suddenly noticed something in the Constitution that had not been noticed before? It should be perfectly clear to all of you, even if it is not to your law professors, that that is not true. States can no longer provide for prayer in the schools only because a majority of Supreme Court Justices had a different preference in the matter and were willing to impose their preference on the nation regardless of the fact that they were not authorized to do so, and regardless of the injury they inflicted on the process of self-government and on the idea of federalism. It is true that there is something about religion in the Constitution (in the first amendment) and nothing about abortion. But the first word of the first amendment is "Congress," it is Congress that "shall make no law respecting an establishment of religion," and it says nothing about the states. The whole point of this provision in the first amendment was to make perfectly clear that the national government would have nothing to do on matters of religion, that it was not to interfere in any way in such matters. Religion was to be left entirely to the states, and some states had established churches up until the middle of the nineteenth century. For the Supreme Court, an arm of the national government, to then come along and say that the first amendment—supposedly "incorporated" in the fourteenth—deprives the states of authority to make policy regarding prayer and Bible reading in public schools is to pervert the first amendment, to stand it on its head. The truth is that the states lost the power to make policy on

prayer in the schools in 1962 not because of, but despite the first amendment. For Rohr to then tell you that there is some identifiable basis in the Constitution for the prayer decisions is little more than a joke. He is one hundred percent, one hundred and eighty degrees wrong.

In the 1890s, some people favored some form of federal control of state power in matters of religion, and something called the Blaine Amendment was proposed. That amendment was proposed and it was defeated, but no one suggested that a constitutional amendment was not necessary if there was to be a federal constitutional limitation on state regulation of religion. However, according to the Supreme Court in 1962 and Professor Rohr today, the amendment was unnecessary because the first amendment, through the fourteenth, already limited the states. I am not arguing for prayer in the schools or against prayer in the schools. I am arguing for minimum intellectual integrity. To say that there is a basis in the Constitution for the Court's prayer and Bible-reading decisions is to take an intellectually in defensible position, and you students should insist that your professors not do that.

I could demonstrate the same thing as to each of the Supreme Court's other controversial so-called constitutional decisions, nearly all of which purport to be based not only on a single constitutional provision, but on no more than four words: "due process" and "equal protection." No one here believes, I assume, that the Court decides difficult questions of social policy by studying these four words. Law professors speak misleadingly of the Court interpreting the Constitution, but very rarely is any question of interpretation involved.

The school segregation cases nicely illustrate how little the constitutional provisions supposedly relied on by the Court actually have to do with the result reached. Why was school segregation held unconstitutional in *Brown*, what constitutional provision was violated? The Equal Protection Clause of the fourteenth amendment was violated, of course; that is what the court said. So, if there were no Equal Protection Clause, the result would be different, right? No, wrong. It is almost as if the Court meant to provide us with a scientific experiment to test the hypothesis that constitutional provisions are the basis of constitutional decisions. If we wanted to know whether a certain chemical caused a liquid to turn blue, we would compound the liquid without the chemical, and if it still turned blue we would know that the chemical in question was not the cause.

On the same day that the Court decided *Brown*, it also decided

*Boiling* v. *Sharpe*, which involved school segregation in the District of Columbia. The Equal Protection Clause of the fourteenth amendment, which applies only to the states, was, of course, inapplicable. So we had the *Brown* case without the Equal Protection Clause, the supposed basis of the *Brown* decision. Did this make any difference in the result the Court reached? Of course not. School segregation, the Court told us, is unconstitutional in the District of Columbia, too, only now because it is prohibited by the Due Process Clause of the fifth amendment, which does apply to the federal government. Imagine that; the fifth amendment, adopted in 1791 as part of a Constitution providing for and protecting slavery, prohibits assigning blacks and whites to separate schools! If you are capable of believing that, you are qualified to be not only a lawyer but a law professor. If there were no fifth amendment Due Process Clause, the Court would simply have "relied on" some other constitutional provision, perhaps the provision prohibiting the federal government from discriminating among seaports. But your law professors persist in telling you, nonetheless, that the Court is interpreting the Constitution, and they do it with a straight face, as if they were not kidding you. Worse than that, I am afraid that some of them—like Joseph and Rohr—actually half believe it themselves, so important is it to them that they have some means of justifying the Court's advancement of their liberal political views.

Finally, in my talk, I made the point that every time the Supreme Court holds a law unconstitutional that is not in fact prohibited by the Constitution—and very rarely is an enacted law prohibited—the Court violates not only the constitutional principle of representative self-govern ment, but also the principle of federalism or local autonomy, of keeping most policy decisions close to the people at the state level. But, Professor Rohr responds, Congress has done more than the Court to violate federalism and centralize nearly all policymaking at the national level. Professor Rohr is correct; Congress has indeed acted to centralize power in Washington, but that hardly justifies the Court in further centralizing it. Further, and most important, if Congress takes over matters that were formerly left to the states, it at least does so subject to the approval of the people at the polls. Franklin Roosevelt's New Deal was a massive centralization of power in Washington, but that is apparently what the people wanted. They kept re-electing Roosevelt, and self-government means that what the people want, they

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I could demonstrate the same thing as to each of the Supreme Court's other controversial so-called constitutional decisions, nearly all of which purport to be based not only on a single constitutional provision, but on no more than four words: "due process" and "equal protection." No one here believes, I assume, that the Court decides difficult questions of social policy by studying these four words. Law professors speak misleadingly of the Court interpreting the Constitution, but very rarely is any question of interpretation involved.

The school segregation cases nicely illustrate how little the constitutional provisions supposedly relied on by the Court actually have to do with the result reached. Why was school segregation held unconstitutional in Brown? What constitutional provision was violated? The Equal Protection Clause of the fourteenth amendment was violated, of course; that is what the court said. So, if there were no Equal Protection Clause, the result would be different, right? No, wrong. It is almost as if the Court meant to provide us with a scientific experiment to test the hypothesis that constitutional provisions are the basis of constitutional decisions. If we wanted to know whether a certain chemical caused a liquid to turn blue, we would compound the liquid without the chemical, and if it still turned blue we would know that the chemical in question was not the cause.

On the same day that the Court decided Brown, it also decided Bolling v. Sharpe,7 which involved school segregation in the District of Columbia. The Equal Protection Clause of the fourteenth amendment, which applies only to the states, was, of course, inapplicable. So we had the Brown case without the Equal Protection Clause, the supposed basis of the Brown decision. Did this make any difference in the result the Court reached? Of course not. School segregation, the Court told us, is unconstitutional in the District of Columbia, too, only now because it is prohibited by the Due Process Clause of the fifth amendment, which does apply to the federal government. Imagine that; the fifth amendment, adopted in 1791 as part of a Constitution providing for and protecting slavery, prohibits assigning blacks and whites to separate schools! If you are capable of believing that, you are qualified to be not only a lawyer but a law professor. If there were no fifth amendment Due Process Clause, the Court would simply have "relied on" some other constitutional provision, perhaps the provision prohibiting the federal government from discriminating among seaports. But your law professors persist in telling you, nonetheless, that the Court is interpreting the Constitution, and they do it with a straight face, as if they were not kidding you. Worse than that, I am afraid that some of them—like Joseph and Rohr—actually half believe it themselves, so important is it to them that they have some means of justifying the Court's advancement of their liberal political views.

Finally, in my talk, I made the point that every time the Supreme Court holds a law unconstitutional that is not in fact prohibited by the Constitution—and very rarely is an enacted law prohibited—the Court violates not only the constitutional principle of representative self-government, but also the principle of federalism or local autonomy, of keeping most policy decisions close to the people at the state level. But, Professor Rohr responds, Congress has done more than the Court to violate federalism and centralize nearly all policymaking at the national level. Professor Rohr is correct; Congress has indeed acted to centralize power in Washington, but that hardly justifies the Court in further centralizing it. Further, and most important, if Congress takes over matters that were formerly left to the states, it at least does so subject to the approval of the people at the polls. Franklin Roosevelt's New Deal was a massive centralization of power in Washington, but that is apparently what the people wanted. They kept re-electing Roosevelt, and self-government means that what the people want, they

should be able to get. Constitutionalism means that the people cannot always get what they want unless they want it enough to change the Constitution, but Congress must have great leeway in interpreting the Constitution if it is not to be a straitjacket. The Court, on the other hand, should disallow the results of the political process only when it has a clear constitutional basis for doing so, otherwise it would not be making the Constitution more flexible, but more of a straitjacket.

Constitutional law on federalism has come to mean that Congress can do whatever it wants—it can legislate on anything—but it must do so in a sneaky, underhanded manner. If France wants to have a national law on kidnapping, it passes one making kidnapping a national crime. If Congress wants a national law on kidnapping, it can have one too, but it must pretend to be regulating interstate commerce. So Congress passes a law prohibiting not kidnapping, but the transportation of kidnapped persons across state lines, and after someone is missing for three days, the law assumes that a state line has been crossed, and the F.B.I. gets officially involved in the case. This is all shameless trickery, of course, which is one reason why this country needs so many lawyers. This is very unfortunate; it teaches bad habits to young and impressionable law students, and explains in part the bad reputation of lawyers. I think that local autonomy is a very good thing, our best protection against tyrannical government, but the people apparently want the national government to do many things. If your child is kidnapped, you want the F.B.I. on the case as soon as possible, regardless of what Madison might have thought of it; you do not care about federalism, you want your child back. It is too bad federalism always loses, but people should have the right of self-government. When the Supreme Court makes national policy, however, by invalidating state laws not prohibited by the Constitution, it destroys both local autonomy and self-government.

GEORGETTE DOUGLAS: Professor Graglia, in both the speech that you gave us today and your 1987 Texas Law Review article, Constitutional Theory, you describe the Supreme Court as made up of lawyers who have a right to be heard, serving for life, and not accountable to the people. What do you propose that we could do to bring them into line with this system of checks and balances?

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GEORGETTE DOUGLAS: Professor Graglia, in both the speech that you gave us today and your 1987 Texas Law Review article, Constitutional Theory, you describe the Supreme Court as made up of lawyers in robes, unelected, serving for life, and not accountable to the people. What do you propose that we could do to bring them into line with this system of checks and balances?


PROFESSOR GRAGLIA: That is a good question. There are a lot of things that can be done in theory, and Professor Joseph mentioned some of them. For example, we could overturn a Court decision by constitutional amendment, Congress could pass laws denying the Court jurisdiction over certain matters, or Congress could impeach Supreme Court Justices or change the number of Justices, as has been done and as Franklin Roosevelt tried to do. Our experience of the last three and one-half decades indicates, however, that for various reasons none of these possibilities is available as a realistic practical matter. The reality is that the Court is very remote indeed from the possibility of popular control, and the Justices know it. The Justices have been able to perpetrate such outrages as denying children the right to attend their neighborhood schools because of their race without anything being done to stop them. I have testified before Congress in favor of constitutional amendments and for jurisdiction-limiting proposals, none of which have been adopted.

We could, by constitutional amendments, give the justices limited terms rather than lifetime terms, and I would favor doing that. Or we could require that decisions holding a law unconstitutional be decided by at least a two-thirds vote, and I would favor that, too. I favor anything that weakens the power of the Court. Indeed, I would favor simply abolishing judicial review, which has become the most serious defect in the American system of government. Many things could be done with or without constitutional amendments, but none of them will be: I am afraid that we may be doomed to destruction by an irrational constitutional religion.

One might think that the only realistic way to change the Court's self-appointed role as the enacting arm of the A.C.L.U. is by care in selecting replacements on those increasingly rare occasions when death finally creates an opportunity. Many of the Warren Court's most objectionable innovations, such as Miranda and Mapp v. Ohio (the exclusionary rule), were very close, five to four or six to three. Everyone remembered the New Deal era and how all Roosevelt needed was one or two appointments to permanently turn the Court around. Professor Felix Frankfurter correctly advised Roosevelt that the source of his problem was not the Constitution but the Justices, and that if he could get some of his people on the Court, the Constitution would never give him a bit of trouble again. That, of course, proved to be the case; with
Black and Douglas on the Court, the New Deal and all state economic regulations became perfectly constitutional. The Constitution, as I said, has nothing to do with constitutional law. Rohr suggested that I might be overstating my case, but I am not; I can prove virtually by scientific demonstration that I am telling you the plain, literal, unvarnished truth.

Surely, therefore, it was thought, Nixon would need only one appointment to the Court to overturn the unbelievable five to four Miranda decision that a murderer-rapist may go free if the police should dare to question him without first offering to call in a lawyer to guarantee that he refuse to confess. Only people who did not believe that criminal law has a purpose could have thought of that one—Douglas and other revolutionary ideologues of the 1960s committed to such notions as that society is the criminal and it is the criminal who is the victim. These are notions that occur to Joseph, other A.C.L.U. people, Supreme Court justices, and other intellectuals, never to policemen and truckdrivers. The American people elected Nixon overwhelmingly with the expectation he would turn the Court around on this and many other issues. By an incredible stroke of luck, Nixon got not one, but four appointments in his first term, but what had worked for Roosevelt somehow did not work for him and the people who had elected him.

Nixon appointed as Chief Justice, Warren Burger, who had made a reputation on the District of Columbia Circuit dissenting from the opinions of Judge Bazelon. Bazelon, like Chief Justice Rose Bird of the California Supreme Court, never met a criminal he did not like or, at least, a criminal conviction he was not willing to overturn. Bazelon was so far on the left that he made Burger look like a tower of strength for the forces of law and order, but Burger proved to be a tower of putty, who took the position that Miranda should not be overturned, and who voted for Roe v. Wade. Four more appointments have been made by Republican presidents, but Miranda still has not been overturned. We must face the possibility that there may be no way to turn the Court around, that judicial review may prove to be a fatal defect.

But does not the failure of Congress to propose a constitutional amendment or enact jurisdiction-limiting legislation to stop the Court show that the Court has political support? Yes, it does, but even the most tyrannical of governments require some political support, something other than total resistance by the governed. There have at all times been enough supporters of the Court's political agenda in Congress to defeat measures to overturn its decisions, but that does not necessarily take many people. It is a lot easier to defeat legislation than
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