JULY 22, 2015

WITH PREJUDICE: SUPREME COURT ACTIVISM AND POSSIBLE SOLUTIONS

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ONE HUNDRED FOURTEENTH CONGRESS, FIRST SESSION

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Statement of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee,
Hearing On "With Prejudice: Supreme Court Activism and Possible Solutions"
July 22, 2015

Former Supreme Court Chief Justice William Rehnquist once said, "The Constitution protects judicial independence not to benefit judges, but to promote the rule of law: Judges are expected to administer the law fairly, without regard to public reaction." Our Founders long understood that an independent judiciary was critical to our constitutional system of checks and balances and wisely designed our system to insulate our Federal judiciary from politics. Ignoring our history and Constitution, Senate Republicans have recently presented a series of proposals that would undermine the independence of our Third Branch and politicize the Federal courts.

These measures from the junior Senator from Texas include: (1) a constitutional amendment so that states may discriminate against lawfully married couples; (2) a bill that would strip the Federal courts of jurisdiction from adjudicating the constitutionality of marriage laws; and (3) a constitutional amendment to subject Supreme Court justices to judicial retention elections, injecting politics into this co-equal and independent branch. These proposals are contrary to what the Framers intended when they created the independent Third Branch in the Constitution.

The Court's decision last month in *Obergefell v. Hodges* is a shining example of what an independent judiciary is supposed to do: protect the rights of a minority regardless of public opinion. The Court protected a group that has long been discriminated against and treated unequally under the eyes of the law. Senate Republicans want our Supreme Court justices to face retaliation for prohibiting discrimination against LGBT families. This is wrong.

Nearly five decades ago in *Loving v. Virginia*, the Court ruled that states could not deny their citizens marriage based on the evil of racial discrimination. Should those Supreme Court justices have been subject to retention elections and been voted out of office for that ruling because many in the public at the time opposed the decision? And what about the Court's historic ruling in *Brown v. Board of Education* where the Court held that separate educational facilities for African-American children were inherently unequal. Should the justices of that Supreme Court been subject to retention elections and voted out of office?

After *Brown v. Board of Education* was decided, some Senators proposed court stripping bills to remove the Court's jurisdiction to hear cases involving school integration. There have also been bills to strip the court of its jurisdiction to hear cases involving abortion and school prayer. I, along with Senator Barry Goldwater, fought to defeat these court stripping measures in the 1980s. Senator Goldwater was an Arizona Republican who was once known as "Mr. Conservative." He did not believe in stripping the jurisdiction of our Federal courts to weaken their role and undermine its independence. But that is what the current set of measures that the Texas Senator has proposed would do. Some Senate Republicans appear to want to re-litigate issues that were settled in *Marbury v. Madison*, when Chief Justice Marshall said that it is "emphatically the province and duty of the judicial department to say what the law is."

When the Supreme Court's decisions served Republicans' political interests, I heard nothing about court stripping. For instance, in 2010, the Court departed from principles of judicial

restraint and decided to overturn an act of Congress under the broadest grounds possible, and in so doing, overruled a century of practice and decades of doctrine in *Citizens United v. FEC*. Similarly, in 2013, there were no cries of "judicial activism" or "judicial tyranny" from Senate Republicans when the Court gutted the heart of the Voting Rights Act, and in the process, disregarded an extensive record and an overwhelming Congressional vote for the 2006 reauthorization. In contrast, I do not recall Senate Democrats proposing to strip courts' jurisdiction for campaign finance and race discrimination cases or to subject the Supreme Court justices to judicial retention elections. What the Texas Senator's proposal regarding retention elections would do is to politicize the Court and threaten its independence. It would turn justices into politicians.

In the same remarks that former Chief Justice Rehnquist made about judicial independence, he also said the following: "[O]ur Constitution has struck a balance between judicial independence and accountability, giving individual judges secure tenure but making the Federal Judiciary subject ultimately to the popular will because judges are appointed and confirmed by elected officials. It is not a perfect system – vacancies do not occur on regular schedules, and judges do not always decide cases the way their appointers might have anticipated. But for over 200 years it has served our democracy well and ensured a commitment to the rule of law."

Elected officials and the general public have always criticized and debated the decisions of our Third Branch. It is a natural and healthy aspect of our democracy – and it is what our Framers' intended when they drafted Article III of our Constitution. The solution to disagreement, however, is not to destroy the Third Branch by undermining its role and its independence. And that is what these proposals would do.

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Restoring Checks and Balances on an Unaccountable Judiciary

Testimony of

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United States Senate
Committee on the Judiciary
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts

Hearing on "With Prejudice: Supreme Court Activism and Possible Solutions"

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[1] Institutional affiliations listed for identification purposes only. The views presented by Dr. Eastman are his own, and do not necessarily reflect the views of the Institutions with which he is affiliated.

Restoring Checks and Balances on an Unaccountable Judiciary

By John C. Eastman

Good afternoon, Chairman Cruz, Ranking member Coons, and the other members of the Senate Judiciary Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts. I applaud you for taking up an extremely important structural issue in our constitutional system of government, namely, whether our Founders' efforts to create a judiciary independent enough to do its job but not so independent it would itself become a threat to constitutional government, needs some revision or at least revival.

Alexander Hamilton famously wrote in Federalist 78 that "the judiciary is beyond comparison the weakest of the three departments of power." "The judiciary," he said, "has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever." It has "neither FORCE nor WILL, but merely judgment," he added, "and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." For that reason the drafters of our Constitution took "all possible care . . . to enable it to defend itself against . . . attacks" from the other two branches.[2]

Hamilton's assertion that the judiciary was the "weakest" branch has turned out to be one of the most stunningly erroneous statements made by any of our nation's Founders. Far from being the "weakest" branch, the judiciary has become the most dangerous branch, virtually unchecked in its assertion of power and therefore a serious threat to constitutional government. How could Hamilton and the other Founders have been so wrong? Just what was it they sought to accomplish with the judicial system they established in Article III of the Constitution?

[2] Federalist 78, p. 465 (Hamilton) (C. Rossiter, ed., 1961).

The founders recognized that in a system of limited government such as they established, the limits on the power of the legislature or the executive could "be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void."[3] They therefore provided for a judiciary that was largely independent of the political branches of government, so that it could withstand the inherently greater power in the other branches—that of the "purse" in the legislature, and that of the "sword" in the executive. Although the two political branches would have a hand in choosing members of the judicial branch—the President nominates, the Senate confirms them[4]—once appointed, judges hold their offices "during good behavior,"[5] which is to say, for life barring some bad conduct in office. And they cannot have their salaries diminished during their tenure in office.[6]

These protections ensured that, once appointed, judges were largely independent of the political branches, an independence that the Founders thought necessary if the constitution's limitations on the exercise of power by the political branches were to be viable. "Periodic appointments," Hamilton noted, would "be fatal to their necessary independence," as it would lead either to "an improper complaisance to the branch [of government] which possessed" the appointment power, or to "too great a disposition to consult popularity" rather than only the Constitution and laws, if the people exercised a periodic appointment power directly.[7] Similarly,

[3] *Id.*, at 466.

[4] U.S. Const. Art. II, § 2, cl. 2.

[5] U.S. Const. Art. III, § 1.

[6] *Id.*

[7] Federalist 78, at 466.

the protection against a reduction in salary was necessary so that a judge could "never be deterred from his duty by the apprehension of being placed in a less eligible situation."[8]

Significantly, though, none of the founders believed that the judicial system they established was to be *entirely* independent of either the other branches of government or of the people. Apparently recognizing that placing unlimited power in the hands of any one branch of government—even the weakest one—would likely lead to abuse, the framers provided for a system with checks and balances so that power could not become concentrated in any one branch. Ambition would be made to counteract ambition, as James Madison famously stated in Federalist 51.[9] This system of checks and balances operates even on the otherwise independent judiciary. By noting in Federalist 78 that the courts "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments,"[10] for example, Hamilton suggested that the executive branch would have the power to refuse to enforce judicial decrees that were egregiously wrong. And in Federalist 79, he explained that the legislature also had a constitutional means of checking a wayward judiciary. "The precautions for [judges'] responsibility are comprised in the article respecting impeachments," Hamilton noted. "They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and disqualified for holding any other."[11]

Hamilton repeated this point about impeachment in Federalist 81. The Anti-Federalists had charged that giving the Supreme Court the "power of construing the laws according to the *spirit* of the Constitution, will enable that court to mould them into whatever shape it may think

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[8] Federalist 79, p. 473 (Hamilton).

[9] Federalist 51 (Madison).

[10] Federalist 78, p. 465.

[11] Federalist 79, p. 474.

proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body." This, they contended, would be "as unprecedented as it is dangerous." Unlike in Britain, where the judicial power of last resort was in the House of Lords, or the States, where the state legislatures could "at any time rectify, by law, the exceptionable decisions of their respective courts," "the errors and usurpations of the Supreme Court of the United States will be uncontrollable and remediless."[12] Hamilton rebuffed their concerns:

> It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty, from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. *And the inference is greatly fortified by the consideration of the important constitutional check which the power of instituting impeachments in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security.* There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations. While this ought to remove all apprehensions on the subject, it affords, at the same time, a cogent argument for constituting the Senate a court for the trial of impeachments.[13]

There it is. "The important constitutional check" of impeachment was designed to prevent "deliberate usurpations on the authority of the legislature."

So why have these checks on the judiciary envisioned by the Founders not worked? I believe there are at least three reasons.

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[12] Federalist 81, p. 482 (Hamilton).

[13] *Id.*, at 484-85.

First, after President Thomas Jefferson's ill-fated effort in 1804 to have Supreme Court Associate Justice Samuel Chase impeached and removed from office for what most historians believe were largely partisan political reasons, the impeachment pendulum swung too far the other direction and has stayed there for more than two hundred years. Mere "malconduct" in office, or "deliberate usurpations" on the authority of other branches of government—the standard for impeachment described by Hamilton[14]—was no longer viewed as sufficient for impeachment; actual criminal conduct of a significant sort was instead deemed necessary. This view even appears to the modern eye to be more consistent with the actual language of the Constitution, which provides that impeachment is only permissible for "Treason, Bribery, or other *high Crimes and Misdemeanors*."[15] But the notion that the phrase, "high crimes and misdemeanors," refers to ordinary criminal conduct alone is anachronistic. As Steve Fitschen and many others have pointed out,[16] the historical meaning of that phrase is much different. It encompasses "offences, which are committed by public men in violation of their public trust and duties."[17] Joseph Story, an Associate Justice on the Supreme Court and the author of one of the leading treatises on the Constitution just a generation after it was ratified, described the meaning of the "high crimes and misdemeanors" phrase this way:

> In examining the parliamentary history of impeachments it will be found that many offenses not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanors worthy of this extraordinary remedy. Thus, lord chancellors and judges and other magistrates have not only been impeached for bribery, and acting grossly contrary to the duties of their office, but for *misleading their sovereign by unconstitutional*

[14] Federalist 78, p. 474.

[15] U.S. Const., Art. II, Sec. 4 (emphasis added).

[16] *See, e.g.*, Steven W. Fitschen, "Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny," 10 Regent U. L. Rev. 111, 133-36 (1998).

[17] *Id.*, at 133 (quoting Joseph Story, Commentaries on the Constitution § 762 (1833).

> *opinions and for attempts to subvert the fundamental laws, and introduce arbitrary power.*[18]

And earlier in his treatise, Justice Story explicitly noted that the impeachment power was broader than "crimes of a strictly legal character"; it also "reaches what are aptly termed political offenses, growing out of personal misconduct or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office."[19] Similarly, James Wilson, a signer of the Constitution and one of the five original Justices appointed to the Supreme Court, explained that "Impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments."[20]

Although it has not been used in this fashion for more than two hundred years, even modern jurists have acknowledged that the original meaning of the impeachment clause extended beyond mere criminal conduct to truly bad behavior on the bench, by the willful issuance of unconstitutional decisions. In *Rochin v. California*, for example, Justice Felix Frankfurter noted that "Restraints on [the Court's] jurisdiction are self-imposed only in the sense that there is from [its] decisions no immediate appeal *short of impeachment* or constitutional amendment."[21] West Virginia Supreme Court Chief Justice Richard Neely noted in 1981 that "there is absolutely no recourse from [a] decision [of the Supreme Court] except constitutional amendment *or impeachment of the court and appointment of a new court which will overrule the offending*

[18] Story, Commentaries § 800 (emphasis added).

[19] *Id*., § 762.

[20] Fitschen, *supra*, at 133 (quoting 2 James Wilson, The Works of the Honorable James Wilson 166 (Bird Wilson ed. 1804)).

[21] *Rochin v. California*, 342 U.S. 165, 172 (1952).

decision."[22] And just recently, Justice Scalia hinted that impeachment would be an appropriate remedy for judges who exercise a power not given to them by the Constitution: "We lack the power to repair laws that do not work out in practice," he wrote in his dissent in *King v. Burwell* just last month, "just as the people lack the ability to throw us out of office if they dislike the solutions we concoct."[23] Having just spent the better part of his opinion accusing the Court of exercising the very power that it lacked, Justice Scalia's statement must be seen as a not-too-subtle call for the people to throw them out of office—by the impeachment process set out in the Constitution. If anything, Justice Scalia's suggestion credits a more stingy understanding of the impeachment power than the history recounted above demonstrates to be accurate. Reviving the original understanding of the impeachment power's scope would therefore go a long way toward restoring the checks on the judiciary that the original design of the Constitution envisioned.

A second reason why the Founders' structural checks on the judiciary have not worked out in practice is an erroneous interpretation of the landmark decision issued by Chief Justice John Marshall in *Marbury v. Madison*[24] that has crept into our national psyche. It was a long time in the works, but the modern view of that decision is that any interpretation of the Constitution given by the Supreme Court is itself the supreme law of the land, even if it is contrary to the actual Constitution, and that elected officials high and low, in federal office and in State, are bound by their oaths of office to adhere to the decision of the Supreme Court rather than the Constitution itself. Not only was the actual holding in *Marbury* much more humble than that, but Chief Justice Marshall disavowed that very claim of judicial supremacy. The holding in

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[22] Fitschen, *supra*, at 140-41 (quoting Richard Neely, How the Courts Govern America 5-6 (1981).

[23] *King v. Burwell*, 135 S. Ct. 2480, 2505 (2015) (Scalia, J., dissenting).

[24] 1 Cranch (5 U.S.) 137 (1803).

the case was simply that when, in the exercise of its duty, a court was confronted with a law that conflicted with the Constitution, it was obliged to adhere to the Constitution rather than the law enacted by Congress, because "the constitution is superior to any ordinary act of the legislature."[25]

Marshall's holding tracked quite closely the argument Hamilton set out in Federalist 78 responding to an Anti-Federalist charge that the ability of a court to declare a legislative act void "would imply a superiority of the judiciary to the legislative power."[26] Hamilton strongly rejected the claim, noting that the idea that the Constitution, and not a conflicting law, must be deemed of paramount authority by the courts does not "by any means suppose a superiority of the judicial to the legislative power."[27] Rather, he wrote, "It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in the statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."[28] Thus, although Chief Justice Marshall asserted that "It is emphatically the province and duty of the judicial department to say what the law is,"[29] there was no hint in the opinion that such a duty authorized the Court to substitute its own view of what the Constitution should be for what the Constitution actually was. That erroneous idea would not appear until more than a century later, when future Chief Justice Charles Evans

[25] *Id.*, at 178.

[26] Federalist 78, p. 467.

[27] *Id.*, p. 467-68.

[28] *Id.*, p. 468.

[29] *Marbury*, 1 Cranch, at 177.

Hughes infamously claimed that "We are under a Constitution, but the Constitution is what the judges say it is."[30]

Thomas Jefferson understood the danger to republican (small "r") government that was posed by such claims of judicial supremacy: "To consider the judges as the ultimate arbiters of all constitutional questions is a very dangerous doctrine indeed," he wrote in an 1820 letter, "and one which would place us under the despotism of an oligarchy."[31] Abraham Lincoln, too, spoke of the dangers of that doctrine. In his first inaugural address, he set out in stark terms his opposition to the egregiously erroneous decision of the Supreme Court in *Dred Scot v. Sanford*, which effectively mandated the extension of slavery not just to the territories but to the existing free states as well:

> I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. *At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.*[32]

[30] Charles Evans Hughes, speech at Elmira, New York, May 3, 1907, quoted in Addresses and Papers of Charles Evan Hughes, Governor of New York, 1906-1908, page 139.

[31] Letter from Thomas Jefferson to William C. Jarvis, September 28, 1820.

[32] A. Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101–10, p. 139 (1989).

Lincoln did all that it was within his constitutional power to do to limit the reach of that egregious holding. But his emphatic rejection of the claims of judicial supremacy seemed to have faded from our nation's collective memory.

Until last month, that is. One of the more extraordinary aspects of the dissenting opinions in the same-sex marriage cases was a less-than-subtle resort to the Lincoln remedy. Quoting Federalist 78, here is how Justice Scalia concluded his dissent:

> Hubris is sometimes defined as o'erweening pride; and pride, we know, goeth before a fall. The Judiciary is the "least dangerous" of the federal branches because it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm" and the States, "even for the efficacy of its judgments." With each decision of ours that takes from the People a question properly left to them—with each decision that is unabashedly based not on law, but on the "reasoned judgment" of a bare majority of this Court—*we move one step closer to being reminded of our impotence.*[33]

That is as strong a call for non-compliance with a decision by the high Court as has, to my knowledge, ever graced the pages of the U.S. Reports. It is an invitation to executive officials throughout the land to refuse to give their "aid" to the "efficacy of the" Court's judgment in the case. Perhaps, then, the erroneous interpretation of *Marbury* that has contributed to the phenomenon of an unchecked judiciary is finally on the path toward correction.

The third reason why the Founders' anticipated checks on the judiciary have not worked out in practice is rooted in the adoption of the Civil War Amendments,[34] which transferred a tremendous amount of power from the States to the Federal Government, and in the New Deal revolution of the 1930s, which largely removed any notion that the powers delegated to the

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[33] *Obergefell v. Hodges*, 135 S. Ct. 2584, 2631 (2015) (Scalia, J., dissenting).

[3434] U.S. Const., Amends. XIII, XIV, and XV.

Federal Government were limited in scope.[35] Although the adoption of the Civil War Amendments was certainly a salutary development in our nation's history, securing to a much stronger extent that previously the fundamental rights recognized in the Declaration of Independence,[36] those Amendments also placed in the hands of the judiciary an expansive power that could easily be abused and that, in a significant way, outpaced the check on a wayward judiciary contemplated by the impeachment power. The Constitution—particularly the Constitution after adoption of the 17th Amendment, which replaced the selection of Senators by State legislatures with direct elections[37]—does not provide the States with any direct check on the federal judiciary. The impeachment power is available only to Congress, and therefore is designed primary to allow the national legislature to check the judiciary from encroaching on its legislative prerogatives, not to provide a check on federal encroachment on the States. Indeed, to the extent that the three branches of the federal government share an interest in aggrandizing the power of the federal government at the expense of the States—something that came to fruition once the *federal* Supreme Court began upholding the expansive assertions of power by the President and the Congress during the New Deal—the impeachment power provides no check at all.

That may not have been much of a problem when the powers of the federal government were rightly understood to be few and limited, while the vast residual of governmental power remained with the States, but it is a huge problem today and has been for more than three

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[35] *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that Congress's power to "regulate commerce among the states" was broad enough to allow federal regulation of the amount of wheat a farmer could grow for his own consumption).

[36] *See* Decl. of Ind., ¶ 2.

[37] U.S. Const., Amend. XVII.

quarters of a century. Moreover, because the root of the problem is a different allocation of power between the States and the Federal Government than was contemplated by the Founders, a revival of the checks on the judiciary that they enacted will likely not prove to be an adequate remedy to the problem of federal courts intruding on the legitimate powers of the States. New remedies, new checks, need to be devised to meet that challenge.

Not surprisingly, although they did not anticipate (and therefore did not guard against) this particular problem, the Founders recognized that adjustments to their constitutional plan might need to be made to meet unforeseen challenges. Here again is Alexander Hamilton, quoting from the political theorist David Hume, in Federalist 85, the last of the Federalist Papers:

> To balance a large state or society [says he], whether monarchical or republican, on general laws, is a work of so great difficulty, that no human genius, however comprehensive, is able, by the mere dint of reason and reflection, to effect it. The judgments of many must unite in the work; EXPERIENCE must guide their labor; TIME must bring it to perfection, and the FEELING of inconveniences must correct the mistakes which they inevitably fall into in their first trials and experiments.[38]

In light of the fact that this hearing is even being held, I think it fair to say that there is afoot more than a mere "feeling of inconveniences" crying out for correction. Just last month, the Supreme Court substituted its judgment for the judgment manifested quite recently by the votes of more than fifty million Americans in roughly three quarters of the States (not to mention in every human society throughout history) about the very definition of marriage, the cornerstone of civil society.[39] And our national politics is still infected with the controversy spawned by this Court's decision 42 years ago in *Roe v. Wade,* finding a constitutional "right" to abortion and

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[38] Federalist 85, p. 526-27 (Hamilton).

[39] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (invalidating the long-standing and recently reaffirmed man-woman definition of marriage in Ohio, Michigan, Kentucky, and Tennessee, and by implication in 35 additional States).

thereby removing the intensely contentious matter from the political process.[40] In truth, neither decision is grounded in constitutional mandate; neither conforms to Chief Justice Marshall's maxim that the judiciary is merely to give priority to the Constitution rather than to laws that conflict with it; both are, instead, an exercise of raw will rather than judgment.

Because both of those Supreme Court decisions intrude mightily into areas of policy that our Constitution left entirely, or almost entirely, to the States or to the People of the States, the Constitution's grant of the power of impeachment to the *federal* Congress might well prove to be inadequate even if it were to be revived as a viable option, aimed as it was at forestalling incursions on the legislative branch of the federal government rather than incursions on the States. So something more than mere revival of the original checks and balances must be done, in order to "correct the mistakes" that have become manifest with the passage of time.

I therefore applaud you, Mr. Chairman, for your proposed amendment to adopt a plan of judicial retention elections that could provide "We the People" with a direct check on a wayward judiciary. As the experience with judicial retention elections in the States has demonstrated, such a check on the judiciary has been rarely used, and then only in the most egregious of circumstances. It has therefore not undermined the independence of the judiciary that is so essential to the protection of individual rights and the judiciary's ability to counterbalance usurpations of power by the political branches of government; if anything, it has been successfully used too infrequently to adequately provide the measure of accountability that might prevent that independence from degenerating into judicial supremacy, into judicial tyranny. I hope that your proposal would be more effective at the federal level than retention elections have been in the States.

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[40] *Roe v. Wade*, 410 U.S. 113 (1973).

Allow me to suggest two additional checks for this Committee's consideration. Judicial retention elections would give to the people a direct check on the judiciary, but in our system of federalism, the States are also important players, and they are also in need of an institutional check against usurpations by the federal judiciary. I would therefore like to recommend an Amendment that would allow for a majority of the States to override an erroneous decision of the Supreme Court.[41]

And given the impotence of the impeachment power as a viable check on the judiciary, I'd like to propose a new congressional check that could serve as a corrective for egregiously wrong individual decisions without imposing on any particular judge the "death penalty" of impeachment. An amendment that allows Congress, by a supermajority vote of each House—perhaps 2/3—to override an erroneous decision of the Supreme Court would, I think, serve that intermediate purpose.

I suspect such overrides would rarely (if ever) be exercised, just as I suspect that few federal judges would find themselves thrown out of office by a judicial retention election. (By way of comparison, very few state judges have been removed from office by virtue of state retention elections). Both remedies would therefore be utilized only in the most egregious of cases. But just as the State's experience with retention elections has demonstrated, the very

[41] In an earlier draft of this testimony, I suggested that a supermajority vote might be appropriate, but on reflection, I think that imposes too high a hurdle on the States. To be sure, the Constitution requires a supermajority vote of three-fourths of the States to be amended, but we are here not talking about amending the Constitution, but merely correcting an erroneous interpretation of the Constitution that has been imposed by the Supreme Court. By definition, then, the Constitution has already been effectively amended by a simple majority of the nine unelected justices on the Supreme Court, dramatically changing the default rule that a supermajority of the States is required to *amend*, rather than retain, the existing Constitution. Obtaining the agreement of a majority of the States to overturn a Supreme Court decision will be a difficult enough task, likely utilized only in the most egregious of circumstances. Our proposal should not make the task insurmountable.

existence of such remedies would likely have a very salutary effect, providing an added encouragement to members of the judiciary to stay within the bounds of their judicial office. Alexander Hamilton reminded us in Federalist 78 that the ability of the judiciary to overturn "unjust and impartial laws"—that is, unconstitutional ones—"not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts." We should expect a similar result from judges "who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the" people, by way of retention elections, or the States, by way of possible override, will in like manner be "compelled, by the very motives of the injustice they meditate, to qualify their attempts."

I truly hope this Committee will give serious thought to these proposals, advancing them with your approval, first to the full Senate, then to the other House, and then ultimately to the people for consideration and hopefully ratification. But I encourage you to do that soon, as I sense in the land a strong feeling that our fellow citizens are about out of patience with the "long train of abuses and usurpations" that have emanated from an unchecked judiciary. They have demonstrated for a very long time now that they, in the words of the Declaration of Independence, have been "more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms [of government] to which they are accustomed." We should not expect that the patience of our fellow citizens will last forever. Let us now, therefore, in good faith, advance solid proposals to restore and expand checks and balances on the judiciary before that patience runs out.

PREPARED STATEMENT OF NEIL S. SIEGEL
DAVID W. ICHEL PROFESSOR OF LAW
DUKE LAW SCHOOL

FOR THE

HEARING OF THE SENATE JUDICIARY COMMITTEE, SUBCOMMITTEE ON OVERSIGHT, AGENCY ACTION, FEDERAL RIGHTS AND FEDERAL COURTS –

"WITH PREJUDICE: SUPREME COURT ACTIVISM AND POSSIBLE SOLUTIONS"

JULY 22, 2015

Chairman Cruz, Ranking Member Coons, and Members of the Subcommittee, thank you for inviting me to testify today. I am honored to be here. My name is Neil Siegel. For the past eleven years, I have served as a professor of constitutional law and federal courts at Duke Law School, where I co-direct the Law School's Program in Public Law and direct the Law School's DC Summer Institute on Law and Policy. During the Supreme Court confirmation hearings of Chief Justice John Roberts and Associate Justice Samuel Alito, I was privileged to work for the United States Senate as special counsel to Vice President Joseph Biden when he served on the Senate Judiciary Committee. In the several years before joining the faculty at Duke, I was fortunate to have served as a law clerk to Circuit Judge J. Harvie Wilkinson III of the United States Court of Appeals for the Fourth Circuit, as a Bristow Fellow in the Office of the Solicitor General under the leadership of Solicitor General Theodore Olson and Principal Deputy Solicitor General Paul Clement during the Administration of President George W. Bush, and as a law clerk to Associate Justice Ruth Bader Ginsburg of the Supreme Court of the United States.

I have studied and written about the issue of judicial activism, and I have concluded that the "activism" label, especially as it is used in public debates today, is either over-inclusive or misleading.[1] Consider two possible definitions of the term. First, one might define judicial

[1] *See* Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555 (2010).

activism in the way that Chief Justice William Rehnquist traditionally defined the term—that is, as the *absence of judicial deference* to democratic decision-making.[2] The problem with this definition is that it renders every current and recent Justice on the Supreme Court an activist. Both the so-called liberal Justices and the so-called conservative Justices have exercised the power of judicial review to invalidate democratic decision-making. For example, the so-called liberal Justices joined majority opinions that invalidated democratic decision-making in key cases involving gay rights[3] and the death penalty.[4] And the so-called conservative Justices joined majority opinions that invalidated democratic decision-making in key cases involving voluntary community efforts to integrate public schools,[5] gun rights,[6] campaign finance regulation,[7] health care reform,[8] and the Voting Rights Act.[9] Those who accuse the Court of activism, however, do not mean to indict every Justice or all of the foregoing decisions. Accordingly, Chief Justice Rehnquist's traditional understanding of activism does not capture what critics of the Court have in mind when they condemn how only one group of Justices has been exercising the power of judicial review.

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[2] *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 703, 706 (1976) (rejecting "the notion of a living Constitution" because it potentially empowers individuals to persuade "one or more appointed federal judges to impose on other individuals a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution").

[3] *See* Lawrence v. Texas, 539 U.S. 558 (2003); United States v. Windsor, 570 U.S. __ (2013); Obergefell v. Hodges, 576 U.S. __ (2015).

[4] *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); Kennedy v. Louisiana, 554 U.S. 407 (2008).

[5] *See* Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

[6] *See* District of Columbia v. Heller, 554 U.S. 570 (2008); McDonald v. City of Chicago, 561 U.S. 742 (2010).

[7] *See, e.g.*, Citizen United v. FEC, 558 U.S. 310 (2010).

[8] *See* NFIB v. Sebelius 567 U.S. __ (2012) (holding that the Affordable Care Act's expansion of Medicaid was beyond the scope of Congress's conditional spending power, and also concluding that the law's "individual mandate" was beyond the scope of the Commerce and Necessary and Proper Clauses but within the scope of the Taxing Clause).

[9] *See* Shelby County v. Holder, 570 U.S. __ (2013).

Consider, then, a different definition of activism. One might object that it is incorrect to define activism as the opposite of judicial deference—that activism is not simply the absence of judicial deference to the legislative branch, but rather is the *presence of legal infidelity*. On this definition of activism, a judge can be an activist *both* for not deferring to democratic decision-making when he or she should, *and* for deferring when he or she should not. But under this definition of activism—the one more prevalent in current debates—labeling a decision "activist" is misleading because it ends up being just another way of saying that one disagrees with the decision. A charge of activism seems to be an effort to accuse certain Justices of some kind of serious procedural error apart from the substance of the ruling. But it does not accomplish that purpose, and we would be better off simply debating whether the ruling was right or wrong.

It is entirely appropriate—indeed, vital—for Americans in and out of government to gather to discuss, criticize, and consider proportionate responses to decisions of the Supreme Court with which they disagree. The Justices regularly disagree about questions of statutory and constitutional interpretation, as do the rest of us in responding to cases. Such disagreements are in fact the hallmark of the Court's—and the nation's—history on matters of legal interpretation.

I vigorously disagree with several important decisions of the Roberts Court. *Citizens United* and *Shelby County* come immediately to mind. More generally, the Roberts Court, with the notable exception of gay rights, is a conservative Court. Republican Presidents nominated a majority of its members, and the Court became substantially more conservative in a number of critical areas of law when Justice Samuel Alito replaced Justice Sandra Day O'Connor.

But in the wake of decisions with which I have disagreed, it never crossed my mind to attack judicial independence by advocating a fundamental restructuring of the constitutional relationship between Congress and the Court. It never crossed my mind to advocate jurisdiction

stripping, which is fraught with constitutional difficulties and is likely to prove profoundly shortsighted. It never crossed my mind to call for retention elections for the Justices. On the constitutional Richter scale, retention elections are of a similar magnitude to President Franklin Delano Roosevelt's infamous, failed court-packing plan[10] and may be even more harmful to judicial independence. A packed Court, once packed, may stay packed. But retention elections pose a continuous threat to unpack a Court if it renders unpopular decisions, including decisions that protect the rights of unpopular minorities, whether secular or religious.

Why didn't I advocate these measures? Because the whole point of having a Supreme Court is to enable it to exercise independent judgment, which typically means that it will help one's own causes at certain times and will help the causes of one's opponents at other times. Courts function as a balance wheel, thereby helping to prevent ideological extremism. Our Supreme Court in particular plays a vital role in maintaining our structural systems of separation of powers and federalism, and in protecting individual rights—whether those rights concern speech critical of the government, religious liberty, gun ownership, equal citizenship, procreation, contraception, marriage, or other rights that are important in our democracy.

In addition, for more than a century now, efforts at limiting the authority of the Court have almost always been unsuccessful. And viewed with the benefit of hindsight, they have not been shining moments in our history. Whether it be FDR's attempt to pack the Court or jurisdiction-stripping bills that were introduced in Congress to oppose desegregation in the years following *Brown v. Board of Education*,[11] these episodes have not been ones in which the President or Members of Congress have acquitted themselves well.

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[10] *See* WILLIAM E. LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 82-162 (1995) (chapters 4 and 5).

[11] 347 U.S. 483 (1954).

Given what is at stake in rewriting or potentially violating part of Article III of our Constitution, it is puzzling that any of the Court's recent decisions would elicit a call to severely compromise judicial independence. The targets do not appear to be any of the Court's many conservative rulings in recent years, but rather the Court's decisions in *King v. Burwell*[12] and *Obergefell v. Hodges*.[13] But those rulings make the timing of a proposal for radical institutional reform all the more curious because the Court decided both cases correctly.

In *King*, a cross-ideological super-majority of Justices sensibly read the Patient Protection and Affordable Care Act (ACA)[14] to allow taxpayers to obtain tax credits, which make health insurance affordable for them, regardless of whether they purchase the insurance on a state health insurance exchange or on a federal exchange. A provision in the ACA provides that the amount of the tax credit depends in part on whether the taxpayer has enrolled in a health insurance plan through "an Exchange established by the State."[15]

Writing for the Court, Chief Justice Roberts candidly acknowledged the force of the challengers' argument that, because an exchange established by the federal government is not literally an exchange established by the state, taxpayers buying insurance on federal exchanges are ineligible for tax credits. But the Chief Justice went on to explain that a bedrock principle of statutory interpretation requires courts to read statutes in context and as a whole, and that numerous other provisions of the ACA would not make sense if that one phrase buried in the Internal Revenue Code were given its literal meaning.

[12] 576 U.S. __ (2015).
[13] 576 U.S. __ (2015).
[14] Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered Sections of 21, 25, 26, 29, and 42 U.S.C.).
[15] 26 U.S.C. §§36B(b)–(c).

For example, the ACA requires all exchanges to "make available qualified health plans to qualified individuals,"[16] and defines the term "qualified individual" in part as a person who "resides in the State that established the Exchange."[17] But if that phrase were given its literal meaning, there would be no "qualified individuals" on federal exchanges, even though—as just noted—the ACA plainly anticipates that there will be qualified individuals on federal exchanges. The very point of federal exchanges is to make qualified health plans available to qualified individuals.

In light of this interpretive problem and numerous others, the Court concluded that the statute is ambiguous. The Court then properly looked to the basic purpose of the ACA to improve access to health insurance and enhance the functioning of insurance markets. The Court's conclusion regarding the animating purpose of the ACA is clearly correct. So is the Court's decision to read the statute so as to vindicate its purpose, rather than to undermine that purpose so severely as to threaten grave moral, political, and financial consequences for the nation. As the Chief Justice explained, "[a] fair reading of legislation demands a fair understanding of the legislative plan. Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."[18]

To be clear, I am no apologist for Chief Justice Roberts. I disagree with him much of the time. But his opinion for a six-Justice majority in *King* is carefully constructed, respectful, evenhanded, and persuasively reasoned. What is more, the Court's opinion has the virtue of returning the issue of the size of government in the field of health care—including whether and how to expand access to health insurance—to the political arena where it belongs. The decision

[16] 42 U.S.C. §18031(d)(2)(A).
[17] 42 U.S.C. §18032(f)(1)(A).
[18] *Obergefell*, Slip Op. at 21.

leaves this Congress free, if it disagrees with the Court and has the necessary votes, to amend the relevant statute.

While the Court's decision in *Obergefell* imposed a greater limitation on the democratic process, at least at the state level, the Court was entirely justified in doing so in light of the constitutional rights at issue. By the time of the decision, it had become clear that state bans on same-sex marriage violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment in several ways. First, they discriminate against gay people, a group of Americans that has suffered a long, humiliating history of discrimination based on an immutable characteristic that bears no relation to an individual's ability to contribute to American society. Accordingly, discrimination on the basis of sexual orientation is suspect for many of the same reasons that discrimination on the basis of race or sex is suspect, and so should trigger heightened judicial scrutiny under the Equal Protection Clause.[19]

Second, bans on same-sex marriage facially discriminate on the basis of sex. Such bans allow a man to marry a woman but not to marry a man, and they allow a woman to marry a man but not to marry a woman. Facial sex discrimination triggers heightened judicial scrutiny under the Equal Protection Clause.[20] Moreover, bans on same-sex marriage implicate the very concerns that have caused the Court to police sex classifications since the 1970s: such bans reflect and reinforce traditional gender stereotypes about the inherent "nature" of men and women and the social roles that they are destined to perform.

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[19] Although the Court has yet to hold expressly that discrimination on the basis of sexual orientation triggers heightened scrutiny, its equality reasoning in *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence*, and *Windsor* is incompatible with genuine rational basis review. For a discussion, see, for example, Neil S. Siegel, *Federalism as a Way Station:* Windsor *as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87 (2015).

[20] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996).

Third, bans on same-sex marriage burden the fundamental right to marry, which triggers strict judicial scrutiny under the Due Process and Equal Protection Clauses.[21] The Court has long understood the right to marry as more encompassing than what the institution of marriage historically and traditionally looked like in America. If the Court had limited the right to only those marriages that were deeply rooted in American history and tradition, it would not have been able to hold in *Loving v. Virginia* that bans on inter-racial marriage—which go back to the days of slavery—violate the fundamental right to marry.[22]

The federal government in *Obergefell* argued for the first rationale.[23] Thoughtful commentators and judges have advanced the second.[24] And the Court adopted the third. Writing for the majority, Justice Anthony Kennedy emphasized with admirable clarity that all of the reasons why opposite-sex marriage is constitutionally protected—safeguarding individual autonomy, supporting a two-person union of profound significance to the individuals involved, protecting children and families, and supporting a central institution in American society—apply to same-sex marriage.[25] For example, Justice Kennedy observed that "[t]he States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order," and he concluded that "[t]here is *no difference* between same- and opposite-sex couples with respect to this principle."[26]

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[21] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

[22] *See Loving*, 388 U.S. at 6, 7 (noting that "[p]enalties for miscegenation arose as an incident to slavery, and have been common in Virginia since the colonial period," and reporting that the Supreme Court of Appeals of Virginia upheld Virginia's ban on interracial marriage partly because "marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment").

[23] *See* Brief for the United States as *Amicus Curiae*, Obergefell v. Hodges, 576 U.S. __ (2015).

[24] *See, e.g.*, Latta v. Otter, 771 F.3d 456 (9th Cir. 2014) (Berzon, J., concurring); Brief *Amici Curiae* of Legal Scholars Stephen Clark, Andrew Koppelman, Sanford Levinson, Irina Manta, Erin Sheley, and Ilya Somin, Obergefell v. Hodges, 576 U.S. __ (2015).

[25] *See Obergefell*, Slip Op. at 12-18.

[26] *Id*. at 17 (emphasis added).

What unites these three rationales doctrinally is that they trigger a presumption of unconstitutionality. States that banned same-sex marriage could have overcome this presumption only if they had been able to demonstrate that excluding gay people from the institution of marriage is substantially related to an actual and important state interest. This means an interest that is other than something made up for purposes of litigation, and an interest that is other than an expression of moral opposition to homosexuality.[27] In years of litigation culminating in the Supreme Court, able lawyers for the states that banned same-sex marriage proved unable to make this showing.

For example, it is untenable to argue that states may permissibly exclude same-sex couples from the institution of marriage because states allow opposite-sex couples to marry only in order to solve the policy problem of accidental procreation by heterosexuals. It is also untenable to argue that allowing same-sex couples to marry will harm the institution of marriage or the children of opposite-sex couples by making it less likely that opposite-sex couples will get married or stay married. It is particularly untenable for states that have no-fault divorce to invoke such an interest in litigation. It is therefore unsurprising that the overwhelming majority of courts that have decided same-sex marriage cases in the past few years have invalidated the bans before them.

I recognize that the issue of same-sex marriage is difficult religiously for some Americans. They are constitutionally entitled to their convictions, and no religious organization or leader may constitutionally be required to perform same-sex marriages. But even opponents of same-sex marriage should agree that the Court's decision in *Obergefell* should not be met with threats to the institutional integrity of the Supreme Court any more than other conservative or liberal decisions that have caused some controversy in recent years. At the very least, the Court

[27] *See* Lawrence v. Texas, 539 U.S. 558 (2003).

in *Obergefell* reached a reasonable interpretation of the Constitution within the bounds of its accepted authority.

My own view is that the Court reached the right decision, and that Americans should pay particular attention to the uncommonly poignant and moving language that Justice Kennedy used to describe the stakes and urgency for same-sex couples and their children.[28] The Court's decision vindicates basic constitutional principles of equal citizenship, personal autonomy, and human dignity—and, in doing so, will help bring to an end the pain and humiliation that gay Americans and their families have long endured.

With all due respect to the dissenting opinion of Chief Justice Roberts in *Obergefell*,[29] the Constitution had *everything* to do with it. And it now seems likely that the day will come when the lawfulness and legitimacy of this decision will not be subject to much professional or popular disagreement, but will instead be viewed as one of the finer hours in the Court's history on the long road to equal citizenship stature for all Americans.[30]

[28] *See, e.g.*, *Obergefell*, Slip Op. at 25 ("April DeBoer and Jayne Rowse now ask whether Michigan may continue to deny them the certainty and stability all mothers desire to protect their children, and for them and their children the childhood years will pass all too soon.").

[29] *See Obergefell*, Slip Op. at 29 (Roberts, C.J., dissenting) ("If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.").

[30] *Compare* Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 429-30 (1960).

United States Senate
Committee on the Judiciary
Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts
Hearing on "With Prejudice: Supreme Court Activism and Possible Solutions"
July 22, 2015

Testimony of Edward Whelan

Thank you very much, Chairman Cruz and ranking member Coons, for inviting me to testify before you and your subcommittee on this important topic.

I offer my views in my capacity as president of the Ethics and Public Policy Center and director of EPPC's program on The Constitution, the Courts, and the Culture.[1] In that capacity, I have written and lectured widely on constitutional law and judicial nominations over the past decade, including on the Supreme Court nominations of John Roberts, Samuel Alito, Sonia Sotomayor, and Elena Kagan. I also draw on my additional experience in matters relating to the Supreme Court and constitutional law: During the Court's October 1991 Term, I served as a law clerk to Justice Antonin Scalia. From 1992 to 1995, I worked for the Senate Judiciary Committee as a senior staffer to Senator Orrin Hatch (who was ranking member and then chairman during that period); I worked heavily on judicial nominations, including the Supreme Court nominations of Ruth Bader Ginsburg and Stephen Breyer. From 2001 to 2004, I served as principal deputy assistant attorney general in the Office of Legal Counsel in the U.S. Department of Justice.

Overview and Summary

The Supreme Court's 5-4 ruling last month inventing a supposed federal constitutional right to marry a person of the same sex is brazenly lawless. In the flagrancy and magnitude of its

[1] I am offering only my own views; I am not presenting the views of the Ethics and Public Policy Center as an institution.

errors in overriding, and cutting short, the democratic processes, *Obergefell v. Hodges* is rivaled in Supreme Court history only by *Dred Scott v. Sandford* (1857) and *Roe v. Wade* (1973).

The Court's ruling in *Obergefell* shows, as Justice Alito observes in his dissent, that "decades of attempts to restrain [the] Court's abuse of its authority have failed" and that there is a "deep and perhaps irremediable corruption of our legal culture's conception of constitutional interpretation." For the five justices in the *Obergefell* majority, "the only real limit" on what they or their ideological successors might do in other cases in the future "is their own sense of what those with political power and cultural influence are willing to tolerate."

Some of the ordinary tools are available and necessary to respond to some of the damage that *Obergefell* threatens. In particular, there is an urgent need to protect churches and religious schools and charities from being severely penalized and driven out of operation merely because they adhere to the same understanding of marriage that President Obama professed to hold when he ran for president. It is essential that Congress enact specific religious-liberty protections along the lines of the First Amendment Defense Act that is now pending in both houses of Congress. It is likewise essential that the states enact similar legislation.

Another ordinary avenue that remains available for working to thwart the Court's unconstitutional excesses is the election in 2016 of a president who will aim to appoint sound justices to the Court.

But the Court's extraordinary abuses also call for consideration of extraordinary responses. Possible responses include a range of constitutional amendments—for example, to amend the amendment process itself, to override specific rulings, to provide a means besides impeachment for removing bad justices, or to impose term limits on Supreme Court justices. It's worth emphasizing that voices on the Left have advocated some of these approaches.

None of these constitutional amendments, of course, would be easy to adopt, and careful consideration of their advantages and disadvantages is required. Further, if progress is going to be made, prevailing confusions about constitutional interpretation—especially those embedded in the "living Constitution" approach to judicial decision-making and in the myth of judicial supremacy—need to be dispelled. The challenge is great. But in the present state of affairs, the difficulty of the challenge is a poor excuse for inaction.

Judicial Review and Constitutional Supremacy

Our Constitution reflects two fundamental structural principles for dividing government power: separation of powers among the three branches of the federal government; and federalism, the division of authority between the federal government and the states. An important feature of both separation of powers and federalism is what has come over time to be known as the power of judicial review: the power of the federal courts to determine whether particular laws they are being asked to apply comport with the Constitution and, if they determine in the negative, to decline to give force to such laws.

In Federalist No. 78, Alexander Hamilton famously grounds the power of judicial review—the ability of the federal courts to operate "as the bulwarks of a limited Constitution against legislative encroachments"—in the supremacy of the Constitution as *written law*. As Hamilton explains, the Constitution

> is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be

> preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Further, Hamilton emphasizes repeatedly, the very legitimacy of judicial review is rooted in, and conditional on, the proposition that judges are really doing law:

> *It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.* This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. *The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.*

Thus, judicial review, properly understood, does not "by any means suppose a superiority of the judicial to the legislative power" but rather reflects the supremacy of the Constitution over ordinary statutes. Indeed, Hamilton observes, because the judiciary "may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments," it "is beyond comparison the weakest of the three departments of power."

The "Living Constitution" and the Myth of Judicial Supremacy

As we examine the modern landscape of Supreme Court decisions, it's tempting to laugh or scoff at how wrong Hamilton was. But I would submit that the logic of his argument is rigorous and sound. What he surely didn't foresee is how frequently and pervasively, especially in recent decades, a Supreme Court majority, "on the pretense of a repugnancy" between the

Constitution and a law, would "exercise WILL instead of JUDGMENT" and "substitute [its] own pleasure to the constitutional intentions of the legislature." Nor did he anticipate how cravenly the other federal branches and so many citizens would acquiesce in the judicial usurpations of the realm of representative government.

The rise and widespread (if largely unthinking) acceptance of two deeply unsound concepts of constitutional interpretation explains much about why we are where we are. The first is the so-called "living Constitution" approach to Supreme Court decision-making. Proponents of the "living Constitution" approach (whether using that euphemism or another one) typically contend that, for one reason or another, the judicial task of (in Hamilton's phrase) "ascertain[ing] [the] meaning" of the Constitution is somehow no longer possible or desirable. The Constitution, they argue, in part declares majestic generalities that are of indeterminate meaning and in part sets forth rules and limits that are obsolete. But, as Hamilton recognized, insofar as the meaning of a clause of the Constitution is indeterminate, judges lack the authority to hold that a statute violates that meaning, for how can there be an "irreconcilable variance" between a statute and a constitutional provision of indeterminate meaning? As for supposed obsolescence: It's no business of the courts to determine that the "bulwarks of a limited Constitution" should be ignored.

Proponents of the "living Constitution" also claim that freewheeling judicial authority to invent new constitutional rights is somehow needed to adapt our country to modern circumstances. But that claim ignores the broad play that the Constitution gives to the democratic processes to revise laws in light of changed conditions and perceptions. Even worse, by entrenching in the Constitution whatever rights five justices think important, living-

constitutionalism deprives future generations of Americans of the very flexibility that it falsely claims to advance.

At bottom, the "living Constitution" approach is nothing more than an excuse for five justices to indulge and impose their own policy preferences—"to exercise WILL instead of JUDGMENT"—in the guise of discovering new constitutional rights. As one astute critic has put it, the "living" Constitution is really a "zombie" Constitution, with the corpse of the real Constitution reanimated with the Left's favored positions.[2]

The second deeply unsound concept is the myth of judicial supremacy. According to this myth, the Constitution means whatever five Supreme Court justices claim it means, and all other governmental actors are duty-bound to abide by that supposed meaning. The myth of judicial supremacy pervades our legal culture, even as it is often invoked only selectively to protect and leverage favored rulings.

This mistaken concept of judicial supremacy is often confused with the power of judicial review that Hamilton expounded. But it is one thing for the Supreme Court to decline to apply a law that it deems to be unconstitutional; it is quite another for it to maintain that presidents, members of Congress, and state officials must likewise regard the law as unconstitutional and, further, must accept and follow the rationale of the Court's decision.

Thus, Abraham Lincoln, in his first inaugural address, famously defended his rejection of the *Dred Scott* ruling: "If the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal." Lincoln's actions as president were faithful to his words. In defiance of the dual holdings of *Dred Scott*, he signed into law a bill that outlawed slavery in the

[2] See Steven Menashi, "The Undead Constitution," *Policy Review*, Oct./Nov. 2009.

federal territories, and he instructed the State Department to issue passports to free blacks (thus recognizing them as citizens).

The Court did not propound the myth of judicial supremacy until 1958. But when it did so (in *Cooper v. Aaron*), it tried to concoct a venerable history. It falsely contended that *Marbury v. Madison* — the landmark 1803 ruling that expounded the power of judicial review — "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution." Even more brazenly, without any mention of Lincoln's compelling refutation (or of Thomas Jefferson's and Andrew Jackson's similar contestations), the Court asserted that the concept of judicial supremacy had "ever since [*Marbury*] been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

These two mistaken concepts operate in tandem to reinforce each other. Living-constitutionalists render unsound—indeed, unconstitutional—rulings and then invoke the myth of judicial supremacy to demand acquiescence to those rulings.

The Judicial Assault on Marriage

The judicial assault on marriage that culminated in the Supreme Court's 5-4 decision last month inventing a supposed federal constitutional right to marry a person of the same sex provides a stark illustration of how utterly and recklessly lawless the Supreme Court can be.

For starters, it is important to observe how radically unstable living-constitutionalism is. In 1972, two gay activists filed an appeal in the Supreme Court claiming that a state law defining marriage as a male-female union violated the federal Constitution. In dismissing the appeal "for want of a substantial federal question," a unanimous Supreme Court (in *Baker v. Nelson*) treated the claim as so frivolous, so clearly devoid of merit, that there was no point in bothering with briefing and oral argument. Among the justices who joined in that dismissal were three of the

most aggressive left-wing living-constitutionalists ever — William O. Douglas, William Brennan, and Thurgood Marshall.

That dismissal was no surprise, of course, as the laws of every state had defined marriage as the union of a man and a woman when the Constitution was first adopted and when the 14th Amendment was ratified (as well as every moment between and since).

In 1996, Congress enacted, and President Clinton signed into law, the federal Defense of Marriage Act. DOMA had two substantive provisions. One provision defined marriage, for purposes of provisions of federal law only, as the union of a man and a woman. The other provision declared that no state shall be required to give effect to any public act of another state that treats a relationship between persons of the same sex as a marriage. Both provisions, in short, reflected the judgment of Congress and the president that it is constitutionally permissible to define marriage as the union of a man and a woman. Indeed, DOMA passed overwhelmingly in both Houses of Congress—by a vote of 85–14 in the Senate and a vote of 342–67 in the House. There has of course been a great deal of turnover in Congress over the intervening two decades. But among the House members who voted for DOMA were two individuals who now sit on this subcommittee: Senator Dick Durbin and Senator Charles Schumer. Other current Democratic senators who voted for DOMA, either as senators or as House members, include Senators Benjamin Cardin, Patrick Leahy, Bob Menendez, Barbara Mikulski, Patty Murray, Jack Reed, and Harry Reid. Ditto for then-Senator Joseph Biden.

Barely a decade ago, a living-constitutionalist law professor who supports same-sex marriage — Cass Sunstein, later the regulatory affairs czar in the Obama White House — testified to the Senate Judiciary Committee that it was inconceivable that the Supreme Court, "as

currently constituted," would decide there is a constitutional right to same-sex marriage.[3] To posit the threat of such a ruling, Sunstein asserted, involved a "reckless conception of what is on the horizon and it is indefensible by reference to anything any Supreme Court Justice has said, at least on the bench, and I believe even off the bench."

When Barack Obama ran for president in 2008, he tried to hide his previous support for redefining marriage to include same-sex couples, and he professed his deep belief that marriage is the union of a man and a woman. He thus also clearly espoused the view that it is constitutionally permissible to define marriage as a male-female union. Indeed, even as his public position on marriage policy crumbled—or, rather, "evolved"—President Obama continued to maintain that states had authority to define marriage as a male-female union. It wasn't until last October that President Obama publicly embraced the view that there is a constitutional right to marry a person of the same sex.[4]

How is it that just last month five living-constitutionalist justices would find compelling and meritorious the same claim that their more extreme ideological predecessors regarded as frivolous four decades ago? There's no doubt that the public's position on issues related to homosexuality, like that of many politicians, changed considerably over that period, and those changes would reasonably be expected to be reflected in revised laws and policies. But the 14th Amendment did not change one iota.

What happened, I would submit, is simple: Same-sex marriage rose high on the Left's agenda. Five justices decided that it was a good idea. And they figured they now had ample political cover to impose it on the American people as a supposed constitutional right.

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[3] Transcript, Hearing before the United States Senate, "A Proposed Constitutional Amendment to Preserve Traditional Marriage," S. Hrg. 108-763, 108th Cong. 2nd sess., March 23, 2004, available at http://www.gpo.gov/fdsys/pkg/CHRG-108shrg98156/html/CHRG-108shrg98156.htm.

[4] See Jeffrey Toobin, "The Obama Brief," *New Yorker*, Oct. 27, 2014.

But the *constitutional* question in *Obergefell* was *not* whether it's a good idea to redefine marriage to include same-sex couples. It was instead whether the Court would foreclose the ability of the people in each state to decide that important question for themselves. In denying American citizens their rightful authority over that question, the Court majority acted unconstitutionally and displayed (in the Chief Justice's words) an "extravagant conception of judicial supremacy."

In his majority opinion, Justice Kennedy conceded that all of the Court's precedents recognizing a right to marry "presumed a relationship involving opposite-sex partners." But, to Kennedy, that presumption reflected the blinkered understanding of past ages. It was left to the dissenters to point out the elementary fact that the sexual complementarity embedded in the historical definition of marriage, far from being an incidental feature, is rooted in the unique procreative capacity of heterosexual intercourse. That reality doesn't mean that the people can't redefine marriage through democratic processes. But it does explain why the constitutional right to marry that the Court has recognized doesn't extend to same-sex couples.

The Court's ruling poses severe threats to marriage. The collapse of our marriage culture in recent decades — a collapse for which heterosexuals are responsible — has produced a society in which more than 40 percent of births now occur to unmarried mothers. That collapse has resulted from the weakening of the bond between marriage and procreation — from the widespread rejection of the principle that (as the Chief Justice put it in his dissent) "for the good of children and society, sexual relations that can lead to procreation should occur only between a man and a woman committed to a lasting bond."

The redefinition of marriage — in the guise of the Constitution, no less — to include same-sex couples formally eliminates any connection between marriage and procreation.

Heterosexual marriage will suffer — not because heterosexuals see the guys next door getting married but because the law is now proclaiming that marriage has nothing to do with procreation. Further, candid gay activists acknowledge that non-monogamy is rampant in gay marriages, and they celebrate that the redefinition of marriage will undermine the norm of marital fidelity.[5]

Speaking of non-monogamy: The Chief Justice observed in his dissent that although Justice Kennedy's opinion "randomly inserts the adjective 'two' in various places, it offers no reason at all why the two-person element of the core definition of marriage may be preserved while the man-woman element may not." In the immediate wake of the marriage ruling, more and more advocates of polyamory have come out of the closet to argue that the arguments for same-sex marriage support a right to plural marriage. Indeed, the best argument that we are not sliding fast down the slippery slope is that the polygamist version (one husband, many wives) of polyamory has been historically common and is thus arguably upslope from same-sex marriage.

By misbranding defenders of marriage as opponents of the Constitution, the Court's ruling will also sharply intensify the threats to religious liberty. Perhaps the most revealing moment at oral argument in *Obergefell* came when the Solicitor General candidly admitted that the nonprofit tax status of institutions that oppose same-sex marriage was "certainly going to be an issue." Religious schools that live out their beliefs also will be threatened with discrimination lawsuits and the risk of losing their accreditation. Religious charities face being ineligible for government grants and contracts. And individual Americans who hold the same beliefs about marriage that President Obama professed when he was elected can expect to be penalized, marginalized, and stigmatized.

The Court's ruling also presents a difficult challenge to state officials who understand that they have sworn to uphold the Constitution — not the Supreme Court's mistaken

[5] See, e.g., Scott James, "Many Successful Gay Marriages Share an Open Secret," *New York Times*, Jan. 28, 2010.

interpretations of it — and who recognize that their state laws defining marriage as the union of a man and a woman are valid and enforceable under the real Constitution. It is appalling that the Court has put them to a choice between acquiescence to its own flagrant illegality and obedience to the Constitution.

The Broader Problem

In the larger picture, *Obergefell* is, like *Roe v. Wade*, a particularly egregious example of the broader problem of living-constitutionalist decisions over the past five decades.

What *Obergefell* shows is that there is no rewriting of the Constitution that is beyond the bounds of the possible if something matters to the Left and there are five or more living-constitutionalist justices on the Court. Indeed, Justice Ruth Bader Ginsburg and Justice Stephen Breyer illustrated the point in another case at the end of the Term in which, after more than 20 years each on the Court, they suddenly called into question the constitutionality of the death penalty.

The list of possible living-constitutionalist innovations is endless: Voting rights for illegal aliens; taxpayer funding of abortion and of sex-change operations; mandatory equalized spending for public-school districts; a right to welfare payments above the poverty line; and a right to have multiple spouses.

Other innovations might also severely impair existing rights. Legal academics are enamored of restrictions on so-called "hate speech"— an amorphous category that is already expanding to include criticism of racial preferences or use of male pronouns to refer to a man who thinks he's a woman. The First Amendment, as long construed, would bar the government from imposing such restrictions. But that's no barrier against five willful justices. Ditto for a robust understanding of religious liberty and for Second Amendment rights to firearms.

Possible Solutions

There is no easy solution to the Supreme Court's abuse of the Constitution. Any meaningful solution will take time and will require dispelling pervasive confusions about the Court's proper role—especially those confusions embedded in the "living Constitution" approach and in the myth of judicial supremacy. It's also important to think carefully about the possible unintended consequences of any particular reform proposal.

But this is no time to make the perfect the enemy of the good. Proposed solutions need to be compared to each other and to the status quo, not to some imagined ideal.

At least four types of constitutional amendments deserve attention. The first type, of which there could surely be several versions, would modify Article V of the Constitution to make it easier to amend the Constitution (and thus to formally reject lawless Supreme Court decisions). Article V now provides two means for *proposing* amendments: (1) a two-thirds vote in both houses of Congress; or (2) a convention called by Congress upon request by the legislatures of two-thirds of the states. Article V also gives Congress a choice between two means for *ratifying* proposed amendments: (1) legislatures of three-fourths of the states; or (2) conventions in three-fourths of the states. An amendment to Article V could modify the proposal mechanisms, the ratification mechanisms, or both.

Yale law professor Bruce Ackerman has proposed one such amendment.[6] (Ackerman, I'll note, is no conservative, and his amendment is motivated by what he sees as the threat of a "stealth constitutional revolution" by *conservative* justices.) Under Ackerman's so-called "Popular Sovereignty Initiative," a president who has been elected to a second term would have the authority to propose constitutional amendments. Upon approval by both houses of Congress, the amendments would be placed on the ballot at the time of the next two presidential elections.

[6] See Bruce Ackerman, "We the People Rise Again," *Slate*, June 4, 2012.

A 60% approval of the nation's voters at both elections would be needed in order for the amendments to become part of the Constitution.

Simpler variants are also available. For example, the two-thirds threshold for states to request a convention for proposing amendments could be substantially lowered. In addition or alternatively, the three-fourths threshold of state legislatures needed to ratify amendments could be lowered (or the aggregate effective veto power of less populous states could otherwise be reduced).

A second type of constitutional amendment would enable Congress or the aggregate of state legislatures to directly invalidate a Supreme Court ruling. Again, many variants are possible, but the basic concept is that there would be a mechanism by which a Supreme Court ruling could be immediately teed up for review. Rejection might hinge on the vote of a specified supermajority in each house of Congress or of a supermajority of state legislatures.

A third type of constitutional amendment would provide a means, in addition to impeachment and conviction, for removing bad justices. Chairman Cruz's proposed amendment to establish a system of retention elections for justices is of that type. Under Chairman Cruz's amendment, each justice would face a retention election in the second national election after his or her appointment and every eight years thereafter. A negative vote of both the majority of voters overall and the majorities in at least half the states would be needed to remove the justice from office. (Again, there are obviously plenty of other variants of this approach.)

A fourth type would impose term limits on the justices. This sort of proposal has won support from people on both sides of the political spectrum, from conservative law professor Steven G. Calabresi[7] to liberal commentator Linda Greenhouse.[8] Under the most common

[7] See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 Harv. J. L. & Pub. Pol. 769 (2006).

version of this proposal, each justice would serve an 18-year term, and each of the nine slots would become vacant every two years. This proposal does not directly address the problem of bad justices—it would impose term limits on all justices—and its proponents often have other reasons for supporting it. (Calabresi, for example, regards life tenure—especially now that lifespans have extended so long—as "essentially a relic of pre-democratic times," whereas Greenhouse hopes that regular vacancies, twice for each presidential term, "might lower the temperature surrounding each vacancy.") But some proponents, concerned about the "corrupting influence of life tenure," think that term limits might well have the beneficial effect of making justices more faithful to the Constitution.[9]

Other types of constitutional amendments to rein in the Court's excesses have also been proposed. For example, Harvard law professor Mark Tushnet, coming from the Left, has advocated an amendment that would abolish the power of judicial review altogether.[10]

Other approaches are also worthy of examination. Some argue, for example, that term limits for Supreme Court justices could effectively be achieved via statute.[11] Statutes to strip the jurisdiction of the federal courts over certain classes of cases are another option. A more muscular resort to the existing impeachment option might have beneficial consequences. Further, by some counts, the number of states calling for Congress to call a convention for proposing amendments is just shy of the two-thirds needed.

I emphasize that I am not here endorsing any of these reform proposals. But they are illustrative of the sorts of reforms that urgently deserve careful and considered attention.

Thank you.

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[8] Linda Greenhouse, "The 18-Year Bench," *Slate*, June 7, 2012.
[9] Saikrishna B. Prakash, "America's Aristocracy," 109 Yale L.J. 541, 578-580 (1999).
[10] Mark Tushnet, *Taking the Constitution Away from the Courts* 175 (1999).
[11] See Calabresi & Lindgren, *supra*, at 855-871 (discussing statutory proposals and presenting constitutional objections to them).