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Edited by Christopher Wolfe: That Eminent Tribunal

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Introduction

Christopher Wolfe

> 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.
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> —Abraham Lincoln, First Inaugural Address

In the past generation, an abundance of scholarship has clearly described the profound transformation in the role of the Supreme Court (and the judiciary in general) in American public life. While the Court has always played a significant role in our political system, it has not always wielded the broad policymaking power it regularly exercises today.[1]

The scope and character of judicial power today is fundamentally inconsistent with the separation of powers embodied by the American founders in our Constitution. Current judicial excesses are not merely an aberration from our ordinary political arrangements, but raise the specter of establishing a new form of government. Even many of those who are opposed to judicial usurpation today are under the impression that it is merely a particular group of unusually "extreme" judges that account for this phenomenon. They fail to understand that extreme notions of judicial power have become entrenched in our legal and political system. And, as Lincoln argued, in regard to the *Dred Scott* case—with all the respect properly owed to the judiciary as a coordinate branch of government—to treat the Supreme Court as the *final* or *ultimate* authority on constitutional issues is to resign our self-government into the hands of "that eminent tribunal."

At times in the past thirty years Court watchers have predicted a fundamental shift in the Court, a retrenchment of judicial power, due largely to the appointments by Republican presidents who have stated their desire to appoint judges who will interpret the law rather than make it. But,

typically, those terms in which the Burger Court or Rehnquist Court handed down decisions that seemed to portend a withdrawal from judicial pretensions have been followed by other terms in which such pretensions have been reasserted. The current composition of the Court (and, even more so, the lower courts) gives little hope for fundamental change.

In particular, there is something quite distinctive about the Court's continuing injection of its power into so-called culture war issues (symbolized by cases such as *Roe v. Wade* and *Planned Parenthood v. Casey*) that have become so prominent a part of American political and social life since the 1960s—matters regarding life and death, family and sexuality, church and state. According to many of its critics, the Court's "privacy" decisions (regarding, for example, abortion and homosexuality) have, in the name of individual autonomy, undermined the moral framework of society by depriving state and local governments of their legitimate power to provide social supports for traditional morality. Similarly, in their view, the Court has barred state and federal efforts to provide for a reasonable accommodation of religion, pursuing instead a conception of church-state relations that radically privatizes religion and creates a "naked public square." Even liberals who approve of many of the policy outcomes that have been generated by the courts in these and other areas sometimes question the constitutional and moral legitimacy of achieving these outcomes by judicial fiat.[2]

The debate is not merely about how the Supreme Court should use its authority to resolve authoritatively our great constitutional questions, and whether it has used this power well or ill. The question is *whether* the Supreme Court has such authority, especially in light of the fact that the Constitution for at least the first century was generally understood to give *no one branch* such final authority. Phrased more positively, the legislative and executive branches and state governments have legitimate constitutional authority to participate in the resolution of our great constitutional questions, rather than simply waiting to receive answers from the Supreme Court. In this respect, it could be said that the central question about judicial power today is how to limit it effectively in order to reestablish a full measure of republican government in the United States.

It should not be surprising that this will be no easy task. First, elite intellectual opinion is strongly behind the courts—as one should expect it to be, given that courts are often an effective vehicle for giving elite intellectual opinions the political power that they cannot win through elections. Second, the legal profession as a whole has been educated by a corps of legal intellectuals and scholars, the vast majority of whom are committed to modern notions of judicial power that are quite incompatible with the traditional American separation of powers. And, third, the "new class" professionals—such as journalists, those working in the en-

tertainment media, and writers and artists—whose power and influence turn on the ability to manipulate information, and who typically tend to support liberal intellectuals, also tend to weigh in against any efforts to restore a proper balance between judges and the political branches.

Even recent "conservative" judicial activism in some areas of the law has led to only limited reconsideration of the scope of judicial power. Certainly we do not hear many scholars calling for a wholesale reconsideration of the Court's liberal precedents from the last generation or two. More often, there is criticism of particular decisions, and, in some cases, a call to recognize a broader power in other branches to qualify or limit what the recent, more conservative Court has done, in order to undermine those decisions (but usually in ways that protect the earlier and more academically popular fruits of judicial activism). If this qualified reconsideration of judicial supremacy is welcome, it does not go nearly far enough.

This book, drawing on scholars with divergent political views, lays out the problem of judicial imperialism today—what it is, what its sources are, some of the key arguments made on its behalf, and the appropriate responses to those contentions.

Gerard V. Bradley opens the volume with an analysis of the claims made by defenders of the Court, and by the Court itself, in the landmark joint opinion in *Planned Parenthood v. Casey*. He describes the way in which the Court has identified its own authority with that of the Constitution, after having detached the Constitution from any concrete content and arrogated to itself the power of defining its alleged majestic generalities. The Court effectively tells Americans, "We will be your Court and you will be our people." To those who object to this arrogation of power, there is a twofold response. The power of the Court to strike down laws on the basis of something other than the Constitution is said to have been popularly ratified (in some unspecified manner), but popular opposition to controversial Court decisions is downplayed on the basis of the Court's superiority to the people in elaborating our national principles: "the Court has constructed around its rulings a seemingly impregnable rhetorical fortress, pouring the hot oil of principle on the heads of rabble ascending the walls, cutting off the legs of highbrow critics with the whipsaw of popular ratification." But, then, how is it possible to know what the law is, until the "winners" have written their histories?

Robert F. Nagel locates the source of *Casey*'s claims for the Court in the fear that the nation lacks a sufficient ground for unity without judicial supremacy. What explains *Casey*'s concern about a "jurisprudence of doubt" is something deeper than precedent: "the authoritativeness and supremacy of the judiciary's interpretive function, not respect for prece-

dent, is the operative concern." The Court is the vehicle by which the nation can "see itself through its constitutional ideals," and the capacity for this kind of collective self-perception is nothing less than the capacity for a national identity. What is at issue is not just the operational integrity of our constitutional system but the existence of the political culture upon which that system rests. This fear of disintegration appears regularly among scholars and Court watchers, and has been particularly salient in cases involving race, such as *Cooper v. Aaron*, and the culture war, such as *Casey*. The shadow argument of *Casey* "is that the Court's interpretation must be accepted, not because it is right, but because dissensus on an issue deemed crucial and unresolvable will tear the country apart." But there is a terrible irony in all this: our devotion to judicial supremacy, exemplified in the centralized imposition of questionable policy by *Roe v. Wade*, may stimulate further opposition that makes nationhood seem more precarious than it is, thus inducing ever more nervous reliance on national judicial power.

Michael Zuckert takes another swing at *Casey*, arguing for a more limited understanding of it. Despite the apparent magnitude of its surface claims (for example, in its famous "mystery passage"), *Casey* should be understood more narrowly—as an example not of "Nietzschean autonomy" but of "hermeneutic Socratism"—not radical autonomy on fundamental issues, but a sort of openness to competing answers. But in the end hermeneutic Socratism is inadequate: first, as a judicial and political action, it failed in its goal of eliminating a "jurisprudence of doubt," since it only stimulated further controversy; second, it is inadequate as a general constitutional theory, because it is has too open-ended a theory of rights, and too little appreciation for the role of government in protecting rights; and third, it is ill equipped to resolve the abortion controversy, providing inadequate resources to address the two fundamental questions that are decisive of the issue: whether the rights of the fetus counterbalance the woman's generalized liberty right, and whether there are other considerations of the public good that counterbalance the woman's generalized liberty right.

Hadley Arkes contends that judges seem willing to snatch questions such as marriage, sexuality, nature, life, death, and the very definition of a human being out of the political arena and reserve it to their own hands, "removing from the arena of public deliberation questions that were once thought to be at the center of our public lives." Their holdings on abortion—especially recent lower-court decisions on prohibitions of partial-birth abortion, at a point where the act is indistinguishable from infanticide—have cast doubt on human beings' natural rights, making such questions a matter for political authority. We are no longer as certain as we used to be about what constitutes "nature" and human beings,

or perhaps (even if we think we understand what a human being is) "we think that our judgment here may be a matter of opinion or convention—or even a certain tribal preference for our own species—and so we are content to leave to the decision of the community, or the political process, the authority to determine just who is a human being." That is to say, we assume that there is no intrinsic meaning or dignity that attaches to the notion of a human being: this judgment is a matter dependent wholly on the positive law. Judges are thereby at war with jurisprudence itself, for the law is no longer committed, as part of its central mission, to the protection of human life, it being no longer clear that there is a body of natural rights that forms the grounds of our rights, and our jurisprudence. This new jurisprudence can therefore be characterized as "antijural jurisprudence," since it detaches itself from the premises necessary to the notion of lawfulness, leaving us with the forms but without the substance of law.

George W. Liebmann discusses the effect of judicial interference on subordinate and mediating institutions, and what should be done about it. He describes the deleterious effect of judicial interference in state and local governments, various professions (law, medicine, social work, schools, the mass media), economic units (especially by perverse statutory construction), and the family (with the extolling of the individual rights of family members above interests of family solidarity). These unfortunate judicial interventions have been tolerated because of the fixation on the economic by both the Right and the Left, and have been hastened by their association with the pursuit of racial equality (aspects of which have only helped to make slum inhabitants wards of the state, due to a fostering of extreme individualism). Government should start by obeying the admonition to "do no harm." Its contribution to equality should come in the form of a fair tax policy applied to income above subsistence. Other efforts of egalitarianism generally end in tyranny and partiality. "The road away from our present discontents," he argues, "is found not in invention of new 'rights' but in respect for what was once thought to be a distinctive American value, what Justice Black called 'the right of each man to participate in the self government of his society.'" Repudiation of various judicial doctrines is necessary to help prevent the United States from falling into the error of France described by Tocqueville: a prejudice against local discretion (characteristic of both the Left and the Right, the Jacobins and Economists) leading to a capricious and arbitrary central administration that undermined respect for law.

Steven D. Smith inquires into the capacity of the legal academy to shape the law. The first category of the more obvious ways of influencing the Supreme Court—for example, scholarly publications and supplying "the courts with law clerks freshly trained to see the law the way the pro-

fessor sees it"—are very limited, Smith believes. Even the capacity to bestow praise and blame on judges, which is likely to have a greater impact, at least on some judges, is still limited and somewhat haphazard. A second, and much more important, form of influence on the courts is more indirect: the legal academy's inculcation of a "culture of rationalism." This rationalism has three principal components: a discourse of instrumental rationality; a perpetual roving commission to ferret out decisions based on tradition, faith, and emotion; and deference to the opinions prevalent among an educated class. This culture has various unfortunate consequences, and finally results in a kind of arrogance that disparages tradition, faith, and intuition as sources of decision, or as modes of living. This culture and its consequences help to explain an otherwise puzzling phenomenon: how it is that personally modest judges become aggressive intermeddlers in the social order.

Jack Wade Nowlin rejects an argument, put forward by advocates of a "moral" reading of the Constitution, that judges have special powers of moral insight, concluding that it has insuperable theoretical and practical difficulties. The obvious and familiar arguments in favor of a special judicial power of moral insight in fact paint a skewed and idealized portrait of judges and courts. On the one hand, the inference of moral "expertise" from a tendency to reach the "right" answers as defined from a particular "thick" or substantive moral standpoint—liberal judges are moral "experts" from a liberal standpoint—is indistinguishable from special pleading and therefore cannot serve as a general argument for expansive judicial power. But, on the other hand, one cannot draw a clear connection between the ability to engage in "thin" sophisticated moral reasoning and the discovery of right answers to difficult moral questions. Moreover, other aspects of the judicial process—such as the primacy of legal interpretation and the practical political constraints on judicial power—suggest that judges typically do not, and indeed cannot, openly engage in sophisticated moral reasoning or develop sophisticated, critical, reflective, reasoned, and coherent moral theories. Judicial moral analysis is inexorably understated, incompletely theorized, and distorted by legal materials (*Roe* and *Casey* providing notable examples).

Michael W. McConnell is not surprised by the fact that justices (and lawyers and law professors) take a "generous" view of judicial power, but he puzzles over why "the People," whose democratic authority has been wrested away by nine lawyers wearing robes, put up with it. His answer is that the Court is the beneficiary—in high schools, colleges, and even law schools—of a "celebratory history" of the Court as a defender of the Constitution and the agent of beneficent social reform. After summarizing this history, McConnell sketches a (more accurate) counterhistory, in which most political actors, including the Supreme Court itself,

have *not* viewed the Court as the body with exclusive authority to tell us what the Constitution dictates. Moreover, this counterhistory would recognize that the Court has made mistakes, not just on peripheral questions, but on some of the most important moral, political, and constitutional questions that our society has had to face. *Dred Scott*, decisions dramatically narrowing the proper scope of the Fourteenth Amendment and helping to usher in Jim Crow, and the oft-cited laissez-faire cases of the early twentieth century are only some examples of such decisions. The Warren Court engaged in activism that was legitimate, activism that was politically desirable but illegitimate, and much that was neither wise nor legitimate. The Burger Court "exacerbated the worst tendencies of the Warren Court," and the Rehnquist Court, while pulling back, has not reconsidered precedents and carries on "the vision of the Justices as the high priests of our constitutional religion." Especially given that bad judicial decisions are much more difficult to change than legislative ones, a "more balanced" understanding of constitutional history calls for "greater humility in the exercise of judicial review."

Jeremy Waldron asks how republican government can be squared with a political system in which important issues of public principle are decided finally by majority voting in panels of professional judges, appointed for life, whose decisions are made after, and whose decisions prevail over, decisions made in legislative assemblies by the accountable representatives of the people. He considers arguments that judicial review is compatible with republicanism inasmuch as it represents the view of the people as to how their self-government should be conducted, that it promotes republican values by improving the quality of public debate on matters of principle, and that it is necessary as a means of safeguarding a republican framework. Each of these arguments, he argues, betrays the idea of republican government in the light of something that seems to the proponent more important—popular sovereignty, scholarly culture, or procedural respectability. Republican government is a demanding ideal, requiring risks based on faith in a people's ability to govern themselves. The worst form of republican apostasy is to worry that important social issues may not be settled according to one's own views, and therefore to refuse to submit to social decisions with which one disagrees. Such a stance fails to respect the elementary condition of *being with others*, which is both the essence of republican politics and the principle of mutual recognition that lies at the heart of the idea of citizenship.

Keith E. Whittington writes in response to the increasing academic criticism of an "activist" Rehnquist Court—not because of decisions like *Planned Parenthood v. Casey* (which largely garners the approval of the legal professoriate)—but because of its federalism cases. The recent Supreme Court has increased judicial review of national, as opposed to

state, action, and has shifted from a focus on individual rights to matters of constitutional structure. What Whittington particularly puts his finger on is a key difference in the nature of recent judicial activism: unlike *Casey*, which had the effect of "stopping political debate and legislative action," recent decisions such as *Lopez* "are about redirecting political activism into different channels," that is, from national to state channels. The result of this difference is that the policy consequences of federalism-oriented judicial activism are rather modest, and do not involve the much more substantial threats of judicial supremacy inherent in earlier forms of activism(à la *Casey*). Whittington is careful to note that we might still want to criticize recent activism qua activism, but he says that we should at least understand the magnitude of its implications for "judicial imperialism."

In the final chapter, I discuss the academic charges of "conservative judicial activism" leveled against the Rehnquist Court. I begin by detailing a specific understanding of what constitutes judicial activism, focusing especially on the transformation of judicial review from an interpretive to a legislative power, and by offering a few observations on just who constitutes "the Rehnquist Court," since various combinations of justices on that Court can produce quite different sorts of opinions. After reviewing some significant cases from the Burger Court (which help to identify the jurisprudential approach of key Rehnquist Court members), I then examine the Rehnquist Court's takings clause jurisprudence (contrasting *Lucas v. South Carolina Coastal Commission*'s search for an "intelligible standard" favorably with *Dolan v. City of Tigard*'s balancing), its free exercise jurisprudence (defending *Smith*, but arguing that *Boerne* is only accidentally right in this particular case and that its broader argument is unsound), and *U.S. v. Lopez* (suggesting that, despite the importance of constitutional standards for federalism, the judiciary lacks manageable standards for the exercise of judicial review). On the whole, I conclude, the critics have substantial grounds for their accusations of judicial activism, and it appears that the Rehnquist Court has not, unfortunately, marked a significant retreat from the activism inherent in modern forms of judicial review.

What practical measures can be taken to rein in judicial imperialism, and whether and when political conditions will exist to make them a reality is unclear. It is vital, however, for those who value republican government to recognize the necessity of achieving that aim. A lack of awareness about the scope of contemporary judicial power will make it impossible to mobilize the necessary political support even to consider significant limits on court power. And a fatalistic acceptance of extraordinarily broad policymaking power in the hands of unelected and virtually unac-

countable judges is not consistent with the profound attachment to self-government that is embedded in the very foundation of our nation's political principles. A dedication to those principles should impel us to persevere in efforts to restore "that eminent tribunal" to its proper and limited role in our system of government.

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Notes

1. See Robert Bork, *The Tempting of America* (New York: Free Press, 1990); Raoul Berger, *Government by Judiciary* (Cambridge: Harvard University Press, 1977); Christopher Wolfe, *The Rise of Modern Judicial Review* (New York: Basic Books, 1986).

2. See, for example, Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999); and Gerald Rosenberg, *The Hollow Hope* (Chicago: University of Chicago Press, 1991); as well as Jeremy Waldron's contribution to this volume.