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“Judicial Engagement” Is Faux Originalism

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On February 28, 2019, I was honored to speak at the University of Virginia School of Law, at a day-long programsponsored by the UVA student chapter of the Federalist Society, entitled “The Future of Originalism: Conflicts and Controversies.” Congratulations to Jenna Adamson (President of the UVA student chapter), her colleagues, and the participating faculty, speakers, and moderators (including Judges Thomas B. Griffith, Diane S. Sykes, and John K. Bush) for planning and executing a terrific event. At lunch, Clark Neily and I debated the topic “Judicial Engagement v. Judicial Restraint: Equally Compatible with Originalism?” The moderator was UVA Professor Lillian BeVier.

This preface is for readers who are not acquainted with the subject. The Founding Fathers intended a limited but important role for the judiciary. In Federalist No. 78, Alexander Hamilton referred to it as the “least dangerous” branch, because it exercises “neither force nor will but merely judgment.” Article III of the Constitution is silent on the power of judicial review, and the Framers clearly saw the people’s elected representatives as having the greatest power in the unique, dual-sovereign (state and federal) republic they were creating. And so matters stood until the 20th century, when the Warren Court unleashed a torrent of judicial activism. Conservatives properly excoriated that activism, but a new generation of libertarian legal scholars have devised an elaborate rationale to justify an even more grandiose role for the judiciary. They see “natural rights” lurking throughout the Constitution, apparently written with invisible ink. Reminiscent of conspiracy flicks such as The De Vinci Code (2003) or National Treasure (2004), they see encrypted messages in the Ninth Amendment, hidden in plain sight. Not content with the Supreme Court’s activism using the “equal protection” and “due process” clauses, they seek to exhume the moribund “privileges or immunities” clause of the 14th Amendment–thankfully interred in the Slaughter-House Cases (1873)–to facilitate even more judicial mischief. They propose to make unelected judges the ultimate arbiters of all state and federal legislation, which would carry a presumption of unconstitutionality. Legislators would have the burden of justifying every law to life-tenured judges–a post-enactment scheme similar to the Council of Revision role rejected by the Framers. Libertarians call this topsy-turvy theory of constitutional law “judicial engagement,” a clever euphemism for the discredited concept of “substantive due process.” “Judicial engagement” confirms all the worst fears of Anti-Federalist opponents of the Constitution, especially Brutus. I am a critic.

Here were my opening remarks (substantially as given):

I am honored to be here. I was President of the San Diego Lawyers Chapter and now help run the Austin Lawyers Chapter, but have never before spoken at a Fed Soc event. The Society formed after I graduated from law school, but I attended the 1983 national student symposium at the

University of Chicago, which was entitled "A Symposium on Judicial Activism: Problems and Responses." The debate continues, 36 years later.

Clark and I are here today to contrast two different views of the Constitution. This is not a difficult task, since, as my Law & Liberty colleague John McGinnis has noted, "there seem be as many theories of the [Constitution] as there are theorists." Which is to say, there are many different points of view—even, or perhaps especially, on the Right. A veritable Tower of Babel—a constitutional cacophony–at times.

First, I think it is necessary to clarify terminology. "Judicial restraint" is an imprecise term. I explained mydefinition in a National Review article several years ago, "The Quandary of Judicial Review": Judges should not hesitate to strike down laws if they violate the original public meaning of the Constitution, but they should not make up rights that are not actually in the Constitution—what I call "judicial activism." I use "judicial restraint" as the opposite of "judicial activism"; perhaps a better term would be "judicial fidelity." Others use the term "judicial restraint" more broadly, to suggest that judges should rarely, and only in the clearest cases, overrule a statute or executive action. Antonin Scalia, Lino Graglia, Robert Bork, James Bradley Thayer, and Judge J. Harvie Wilkinson (author of Cosmic Constitutional Theory (2012)) have arguably espoused such a position at various times (although their views are not interchangeable).

I am not here to defend that position. While I join Bork and Graglia in condemning specific instances of judicial activism, which unfortunately are quite common, I support a robust judicial role in the enforcement of norms legitimately derived from the Constitution. For example, I applauded the Court's decision in Janus, banning agency fees for government workers, even though some libertarians took a narrower view of compelled speech under the First Amendment (Eugene Volokh). I hope that Janus is extended to invalidate the unified bar if such organizations engage in political activity. I believe that the 14th Amendment mandates color blindness by government actors, and regard decisions permitting race-based preferences (such as Grutter and Fisher) as travesties. All racial preferences by government entities should be declared unconstitutional.

I think Professor Ilya Somin is right about eminent domain; property can properly be condemned pursuant to the Fifth Amendment only for public use. Kelo was wrongly decided. I agree with Professor James Ely that the Court improperly abrogated the Contract Clause (Article I, section 10) in Home Building and Loan Association v. Blaisdell (1934). I have criticized the expansive reading of the Commerce Clause in Wickard v. Filburn (1942) and consider the Court's caselaw regarding administrative agencies to be an abomination. I hope that the Court revives the non-delegation doctrine, as urged by Peter Wallison in his new book, Judicial Fortitude. Unlike Judge Wilkinson, I support the Heller decision. I agreed with the dissenters in Sebelius that Obamacare should have been declared unconstitutional. I could cite other examples.

Before President Trump nominated Neil Gorsuch, I recommended him because of his skepticism regarding Chevron. So I am not a proponent of "judicial passivity" or "judicial deference" or "judicial abdication." The express provisions and structural elements of the Constitutional must be enforced. The same is true for state constitutions. Many other conservatives feel the same way.

No, I am here today as Clark's foil because I disagree with a particular theory of constitutional law advanced by Clark in his 2013 book, Terms of Engagement, and (to varying degrees) by several others in the libertarian camp, which they style "judicial engagement." [1] I have expressed my reservations about this particular theory in National Review, Law & Liberty, American Greatness, City Journal, Modern Age, and the Texas Review of Law & Politics. Others have joined me in criticizing "judicial engagement," in its various iterations, from the Left (Eric Segall, David Strauss), the Right (Ed Whelan, Joel Alicea, Adam White, Jeremy Rabkin, Kevin Gutzman, Barry McDonald), and the Center (Greg Weiner).

We will explore the grounds for our disagreement, but while I have sometimes used strong language to express my disagreement with the theory, I have never questioned the good faith of Clark or his colleagues in advancing it. Indeed, I have called the theory "clever and well-intentioned," and, elsewhere, as "ingenious." I suspect that judicial engagement is motivated in large part by a desire to resuscitate the judicial protection of economic liberties during the so-called Lochner era (1897-1937), which was abandoned in West Coast Hotel Co. v. Parrish (1937). The New Deal Court then salted the earth in Carolene Products (1938), footnote 4 of which relegated economic regulation to the rational basis test. As Clark may point out at some point today, as a young man I was an enthusiastic proponent of the Lochner doctrine, and, inspired by Professor Bernard Siegan's book Economic Liberties and the Constitution (1980), wrote a couple of essays (in Policy Review (1982) and the Wake Forest Law Review(1982)) that Clark likes to quote from when we "debate."

There are many different schools of thought about Lochner, and not all defenses of constitutional protection for economic liberties derive from the theory of "judicial engagement," which is not limited to economic liberties. For many years, I maintained a "straddle" whereby I adopted a "substantive due process" approach in support of economic liberties, but opposed judicial activism in other areas. Most conservatives, including Bork, regarded this straddle as untenable, and after my last appearance with Clark at the Manhattan Institute, I concluded that Bork was right. I subsequently wrote a piece in Law & Liberty disavowing Lochner, entitled "Leaving Lochner Behind." I finally realized that wanting something to be protected by the Constitution doesn't make it so. Wishful thinking is not a sound constitutional philosophy. This can be a difficult truth to accept.

But we are here to discuss "judicial engagement," not Lochner.

I have both originalist and prudential objections to "judicial engagement." It is bad constitutional lawand worse public policy. On top of that, it is unrealistic to think the Supreme Court would ever adopt it, or that the American public would ever abide it.

"Judicial engagement," as articulated by its proponents, seeks to justify the "recognition" of unenumerated (that is, unwritten) rights in the Constitution to invalidate state and federal laws if the reviewing court doesn't think the laws are necessary and appropriate. All laws would be presumptively unconstitutional, and subject to review under a standard approaching "strict scrutiny," with the burden of proof on the government to justify them. Courts would decide which laws passed muster, like a post-enactment Council of Revision–a concept specifically rejected by the Framers. It is a very ambitious theory that goes beyond any liberal argument in favor of a "living Constitution." By relying on "unenumerated rights," judicial engagement does not tether judges to the text of the Constitution; it is essentially open-ended—substantive due process on steroids. Judicial engagement is merely an updated, libertarian version of Justice

Douglas' "penumbras, formed by emanations"—what Ed Whelan calls "a fantasy libertarian constitution."

The theory relies on the Ninth Amendment (a rule of construction meant to be read in parallel with the Tenth Amendment) to eliminate the states' inherent police power and to confer on state residents—individually–a right to all "natural" liberties not expressly assigned to the federal government in the Constitution. The Supreme Court has never interpreted the Ninth Amendment in this manner. Proponents of judicial engagement then assert that the "privileges or immunities" clause of the 14thAmendment makes those rights enforceable (by unelected federal judges) against the states, even though the Supreme Court rendered that clause a dead letter in the Slaughter-House Cases in 1873—nearly 150 years ago. As I said in American Greatness, "in terms of convoluted plot twists, drama, and intrigue, this tale sounds more like an overwrought Dan Brown novel than serious constitutional history."

My prudential objection to "judicial engagement" is that it is far too broad. By presuming all laws to invalid, and applying "strict scrutiny" to review all challenged legislation, it would greatly empower judges, mainly unaccountable federal judges, who have already shown they cannot be trusted to interpret the Constitution fairly and honestly. The result, I have said, would be "a judicially managed state of anarchy." Asking judges to weigh the wisdom, necessity, and possibly even the efficacy of laws in effect makes them de facto legislators—a role for which they are institutionally ill-suited and beyond the Article III judicial power, properly understood. This is not "better judging"; it is lawmaking. The theory also eviscerates the sovereignty of states qua states, making them mere wards of the federal courts. Judicial engagement effectively eliminates federalism. It also denigrates representative self-government, would empower "a bevy of Platonic Guardians" wearing black robes, and represents a radical reversal of doctrine going back to the Founding. Ed Whelan calls it "libertarian judicial activism," and I agree. It will never happen.

Conservatives, who dominate the Republican Party, if not the academy (or even the Federalist Society), will never accept "judicial engagement" as an originalist theory, especially since it would likely leave Roe v. Wade in place. [2] Most conservatives believe that originalism necessarily entails a degree of judicial restraint, imposed by the discipline of interpreting the constitutional text. Abandon the text, and you abandon restraint. Bork famously said that "the judge who looks outside the Constitution always looks inside himself and nowhere else." Unenumerated rights—reading between the lines of the document–is the theoretical equivalent of gazing in the mirror.

Framing the theoretical dialectic as a choice between Thayerian passivity (or "abdication") and "judicial engagement" poses a false dichotomy. [3] The choice is not Reagan Administration-era "restraint" (circa 1985) [4] or, worse, Chief Justice John Roberts' controversial opinions in the Obamacare cases [5] vs. Randy Barnett. Especially in light of 2016's disruptive election, there is a middle ground position to keep government within its constitutional limits. Conservatives, to paraphrase Mark Tushnet [6], are abandoning their "defensive crouch." Libertarians should focus on areas of agreement with conservatives: taming the administrative state, limiting the commerce clause, overruling Grutter, restoring federalism, and protecting religious liberty. [7] The appointments of Neil Gorsuch and Brett Kavanaugh (with perhaps more to come) present a rare opportunity. We must find common cause, grounded in the text of the Constitution, to turn back decades of progressive judicial activism anddereliction. "Judicial engagement" is not the

right vehicle for draining the jurisprudential swamp. [8] But that swamp badly needs to be drained.

The labels are a distraction. I heartily agree with Cato's Ilya Shapiro, who wrote in National Affairs that "So long as we accept that judicial review is constitutional and appropriate in the first place — and it must be if we want a government that stays within its limited powers — then we should be concerned only that the Court 'get it right,' regardless of whether that correct interpretation leads to the challenged law being upheld or overturned." Shapiro continued that "The dividing line…is not between judicial activism and judicial passivism," but between honestly following the law and "illegitimate judicial imperialism." [9]

Postscript: During the debate, Clark referred to his 2013 book, Terms of Engagement, as a "scratch and sniff" synopsis of Randy Barnett's more elaborate body of constitutional scholarship. At the same time, Clark insisted that "judicial engagement" does not require a recognition of unenumerated rights and is simply a critique of the "rational basis" test. However, even a cursory perusal of Terms of Engagementreveals that it is brimming with advocacy of unenumerated rights–a license for activist judges to invent new rights and impose their own policy preferences on the polity. In Terms of Engagement, Clark states that "Constitutions are not meant to be bullet-point lists." (111). He continues: "The idea that judges should strike down only those laws that are unambiguously prohibited by the Constitution represents a particularly stringent form of judicial restraint." (112) "Judicial engagement" is a moving target. It's ever-shifting reliance on natural rights, substantive due process, presumptions of unconstitutionality, and unenumerated rights resembles the arcade game Whack-A-Mole. As soon as critics refute one argument, another one pops up.

[1] In addition to Clark, other libertarians who advocate "judicial engagement" include Roger Pilon, Randy Barnett, Evan Bernick, Ilya Shapiro, William "Chip" Mellor, Timothy Sandefur, and Devin Watkins. The Institute for Justice operates a Center for Judicial Engagement.

[2] "Conservatives will never support a constitutional theory that condones Roe v. Wade, yet most libertarians are, at best, ambivalent about Roe—and actually agree with Obergefell." Mark Pulliam, "Against 'Judicial Engagement,'" City Journal.

[3] This is the dichotomy Clark poses in Terms of Engagement (2013) at 3-4.

[4] Now-Justice Samuel Alito served under Attorney General Ed Meese in the OLC.

[5] NFIB v. Sebelius (2012), King v. Burwell (2015).

[6] Mark Tushnet, "Abandoning Defensive Crouch Liberal Constitutionalism," Balkinization

[7] Ilya Shapiro hinted at this in his National Affairs article, "Against Judicial Restraint": "[T]he Constitution's structural provisions — federalism, the separation and enumeration of powers, checks and balances — aren't just a dry exercise in political theory but a means to protect individual liberty against the concentrated power of popular majorities."

[8] "Judicial engagement" is unrealistic because it falls into an ideological no-man's land. Constitutional theories, in order to take effect, must have political sponsors. Judicial engagement will never find support by a Republican President because of grassroots activists' concern about judicial activism and opposition to Roe. v. Wade. Conversely, judicial engagement will never be adopted by progressives because they are opposed to reviving economic liberties. If a

Democratic candidate is elected President in 2020, we are likely to see Court packing to ensure progressive hegemony.

[9] Chip Mellor, whom Clark credits with coining the term "judicial engagement," was not advocating a theory of unenumerated rights, but merely a rejection of judicial abdication (such as Kelo): "Judicial activism and abdication have read these rights out of the Constitution; it is essential that consistent and principled judicial engagement rehabilitate them." Chip Mellor, "Judicial Activism & Judicial Restraint: Two Paths To Bigger Government," IJ (2005).