

My essay “How a Constitution May Undermine Constitutionalism” was included in Patrick McKinley Brennan, ed., *Civilizing Authority: Society, State, and Church* (Lanham, MD: Lexington Books, 2007). The purpose of this unusual collection is to explore the nature of authority and why it so often either dissolves or becomes distorted, so that society either falls into disarray or succumbs to authoritarianism. The other contributors are Joseph Vining, Michael J. White, Glenn Tinder, John E. Coons, Thomas Kohler, Russell Hittinger, Steven Smith, and the late, distinguished Avery Cardinal Dulles, S.J.

To learn more about the book, click [here](#). To read my contribution, go to the next page.

# How A Constitution May Undermine Constitutionalism

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*L*ex facit Regem. In these three words, Henry de Bracton expressed the essence of constitutionalism. The king is supreme *within* the system of laws but not *over* it; it is law that makes the king, not the king the law. The aphorism, of course, is not just about kings; it endorses “the rule of law” in opposition to “the rule of men.” More precisely, constitutionalism is the principle that the real authority of government, as distinct from its sheer ability to compel, depends not on the personality of the rulers, but on antecedent principles of right. What we commonly call the law—governmental enactments—is not the ultimate ground of right, but an elaboration and specification of these antecedent principles in the light of the circumstances at hand.<sup>1</sup> Because the elaboration and specification of these principles is necessary to the common good, when the enactments that result from them meet certain conditions they “bind the conscience” of the citizens. In other words, they become real obligations. The authority of the government is simply its ability to bind conscience, *subject to these conditions*. Power, then, is justified by authority, not authority by power.

One would think that a written constitution would provide constitutionalism with its highest and most perfect expression. Of course not just any such document would do. It would have to be simply phrased, properly ratified, publicly promulgated, and compatible with the antecedent principles of right that we have been talking about. This would enable it to serve as a “higher law”—not in the sense that it replaced these antecedent principles, but in the sense that it regulated all subsequent attempts to elaborate and specify them. Should some rulers declare lawful

what the constitution forbade, then other rulers, or perhaps citizens, could appeal to the constitution in opposing them.

This was certainly how the American founders expected their constitution to work. As always with big ideas, what actually happened is more complicated. No doubt, having a written constitution does promote constitutionalism in some respects. However, in other respects it actually undermines the concept. Surprisingly, at the time critics anticipated some of the ways in which this can happen, especially Brutus, a pseudonymous Anti-Federalist who was probably the New York judge Robert Yates. Brutus did not propose doing without a written constitution. What he proposed was drafting the document differently, with a greater awareness of the ways in which such an instrument can backfire.

## THE SHAPE OF THE FOREST

As I hope to show, Brutus was an exceptionally acute theorist. However, he was not as talented an expositor and rhetorician as the Federalist writers with whom contemporary Americans are more familiar. James Madison always sets the trees in the context of the forest. Brutus describes the trees, but he leaves his readers to work out the shape of the forest for themselves. It is not that he doesn't see the forest; if he didn't, his pictures of its various localities would not connect up as well as they do. The problem is that he lavishes his powers of portrayal on the localities rather than on the forest as a whole. I hope it will not be presumptuous, then, if I sketch the big picture that all of Brutus's smaller pictures presuppose but which he does not actually paint for us.

Brutus's big picture coincides with Madison's big picture in certain respects, but diverges from it in others. He plainly agrees with Madison that government is both necessary and dangerous. Though indispensable for keeping order, it is also prone to tyranny, because officeholders labor ceaselessly to make themselves more important. Always they seek to expand their spheres of action and enlarge the definitions of their official responsibilities. Human government is always government under the conditions of the Fall.

The disagreement between Brutus and Madison concerns not the identity of this malady, then, but its remedy. Madison had written:

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.<sup>2</sup>

What makes these words interesting is that although the language of “dependence on the people” being the “primary control on the government” conjures up images of direct popular rule, Madison never says that “the people” *as such* are the primary control on the government. No, he says that the government is to “control itself.” What he has in mind is checks and balances. The various parts of the government certainly do depend on the people in various circuitous ways, but the crucial thing is not simply that they do depend on the people, but that they depend on them in such *different fashions*, making it impossible for the government to have a unitary will to oppress them. To put it another way, what makes the government trustworthy is not its similarity to “the people,” but the sharpness of the contrast among its own parts. Although each part may reflect some element in the character of the people, there is no part of the government that reflects the character of the people as a whole.

The Madisonian Senate, for example, depends on the considered judgment of the people as filtered through state legislatures interested in protecting their own authority. The House of Representatives, by contrast, depends on the shifting opinions of the people, or to be more exact, on what is left of these shifting opinions after competing factions have cancelled each other out. The presidency depends on the compromise of the various regions of the people, as filtered through the Electoral College, and, when the college cannot pick a winner, through the House of Representatives. The judiciary depends on the specialized knowledge of those members of the people whose qualities persuade the president to nominate them and the Senate to confirm them. And so on. Direct popular government, had it been instituted, would have been like a mirror that perfectly reflected the people’s image. Republican government, as Madison conceived it, is more like a prism that breaks up the light of that image into a multitude of different hues, coupled with a filter that blocks certain hues from passing through.

Brutus is somewhat more sympathetic to popular government than Madison is, and much less sanguine about the possibility of getting the government to “control itself.” He does not oppose the idea of checks and balances *per se*. He does oppose the Federalist theory of how checks and balances will work. In the traditional theory of checks held by most Anti-Federalists, including Brutus, the parties who are checking each other are social classes, and the place where they are checking each other is a single branch of government—the legislature. In the Federalist theory, by contrast, the main parties checking each other are the branches of government themselves—legislature against executive against judiciary. Note well that for the Federalist innovation of branch-to-branch checking to work, the Federalists must be right about three things: (1) They must be right that just as members of social classes view themselves as vested in

the protection and aggrandizement of these classes, so holders of government offices view themselves as vested in the protection and aggrandizement of these offices; (2) they must also be right that officeholders of different branches view their vested interests in these offices as diametrically opposed, so that the more power and prestige that officeholders in one branch enjoy, the less power and prestige the officeholders in the other branches enjoy; and (3) they must be right about the inherent advantages that each branch of government brings to the competition, because otherwise the strongest checks will not be awarded to the weakest branches, as they ought to be.

Some Anti-Federalists challenged even the first of these three points of confidence. They refused to admit that self-interest is actuated just as strongly by office as by social class. Thus Patrick Henry complains in the Virginia ratifying convention, "Tell me not of checks on paper, but tell me of checks founded on self-love."<sup>3</sup> Brutus's approach is quite different. He readily admits the psychological realism of the first point, but he challenges the realism of the other two.

It may seem that I am straying from the original question of how having a written constitution may undermine constitutionalism. Not so. Brutus recognizes that a written constitution is not merely a statement of political ideals, but a legal instrument. It is all well and good to say that the three branches shall be coequal, but courts normally interpret legal instruments. A differently drafted legal instrument might have distributed the power of interpretation among all three branches. It might have identified particular respects in which the legislature, the executive, and the judiciary are each interpreters of the constitution. What the Constitution actually does, argues Brutus, is just the opposite. Rather than distributing the power of interpretation, it concentrates it in the courts. To make matters worse, he holds, the language by which this is done encourages judges to exercise this concentrated power of interpretation in extravagant ways that bear but a distant relation to what the Constitution actually says.

The Federalists' response to such concerns is that we need not fear the judiciary because the other two branches would immediately check usurping courts. Brutus has a double response, for the Constitution dramatically misjudges not only where checks are most needed, but also where they will actually be used. In the first place it assumes that the judiciary will be the weakest of the three branches, when in fact it will be the strongest. In the second place, it assumes that the other two branches will be jealous of its power, when in fact they will collude with it. The consequence of these two misjudgments is that under the Constitution, the legislature, executive, and judiciary will be coequal in name only, and "the real effect of this system of government, will . . . be brought home to

the feelings of the people, through the medium of the judicial power.”<sup>4</sup> So it is that the very instrument ordained to insure the sober rule of law comes instead to advance the arrogant rule of men—that is, of judges. This is the lie of the forest. Now let us examine the trees.

## JUDICIAL INDEPENDENCE AND FINALITY

Under the Constitution, Brutus argues, the national courts will be unlike the courts of any other republic in history, endowed with both radical independence and interpretive finality.<sup>5</sup>

He does not oppose a moderate judicial independence; in fact, he supports it. Constitutional provisions that prohibit Congress from holding the jobs and salaries of judges for ransom are all to the good. The problem, in his view, is that the Constitution also makes it impossible to remove judges from office for making legal errors. The only grounds mentioned in the Constitution for the impeachment of any official are bribery, treason, and other high crimes and misdemeanors.

Central to his argument is the difference between England and America. Some degree of judicial independence is essential in both settings. However, the reasons that make judicial independence essential to England have less weight on this side of the Atlantic. The important question about judicial independence is always “Independence from whom?” In England, when we speak of the independence of the courts we mean their independence from the king. In America, we mean their independence from the legislature.

To be sure, both kings and legislatures desire to increase the powers and prerogatives of their offices. Independence from the latter may therefore seem just as important as independence from the former. According to Brutus, however, such reasoning is specious. Members of Congress will hold their offices only for fixed terms. By contrast, not only does the king hold his office for life, but he also transmits it to his posterity. This gives him a far stronger motive to draw power to the Crown. For this reason, independence of English courts from the Crown must be very strong indeed, but independence of American courts from the legislature need not be nearly so strong.

Paradoxically, even though the reasons for judicial independence are less weighty under American than English conditions, the Constitution makes the independence of American judges far greater. In the first place, it is obvious that American judges will have the power of judicial review. English judges have no such power; they may declare the meaning of laws passed by Parliament, but they may not set these laws aside on grounds that they are inconsistent with the English constitution. In the

second place, although English judges are accountable for errors in the interpretation of the law to the House of Lords, American judges will not be accountable for errors in the interpretation of law to any tribunal. Consequently, the interpretations they render will be utterly final. The consequence of these differences is that whereas English judges are controlled by Parliament, in America judges will be supreme. Although the Federalists may have thought that they had learned from the English experience, in fact they had gravely misunderstood it.

## INTERPRETIVE MONOPOLY AND EXTRAVAGANCE

In Letter No. 11, Brutus scrutinizes the constitutional language by which the judicial power is characterized. Article III, Section 2 declares without qualification that it extends to all cases arising *both* under the Constitution *and* under the laws of the United States.<sup>6</sup> It is unreasonable to suppose that this language is redundant; therefore, these two provisions—"arising under the Constitution" and "arising under . . . the laws of the United States"—must have distinct meanings.<sup>7</sup> In that case, what does it mean to extend the judicial power to all cases arising under the Constitution? Evidently, that courts will be able to declare what the Constitution *means*. Because the constitutional language is stark and unqualified, we must further assume that this power will be a judicial monopoly, unshared by Congress or the president.

Section 2 also states that the judicial power extends not only to all cases in law, but also to all cases in equity. Quoting Blackstone, Brutus defines equity as "the correction of that, wherein the law, by reason of its universality, is deficient."<sup>8</sup> What he has in mind is the fact that every law is a universal rule; it says, "In all cases that fit into category P, do Q." Unfortunately, because of the infinite variability of circumstances, there will always be some cases in the category P where doing Q would achieve a result opposite to that intended by the legislature. In such cases, a court renders judgment equitably—not according to the words or letter of the law, but according to what the court takes to be the spirit of its reasoning.

If we now put the fact that the judicial power extends to cases "arising under the Constitution" together with the fact that it extends to cases arising both "in law and equity," we conclude that the judiciary will be empowered to interpret not only ordinary laws, but also the Constitution itself, not only according to its letter, but also according to the spirit of its reasoning. If we put this conclusion together with the fact that the decisions of the court will be final, we further conclude that no one will be able to second-guess the speculations of the courts as to what the spirit of the Constitution may be.

This immensely expands the power of the courts. If anything, the structure of the rest of the Constitution encourages the courts to indulge their speculations about the spirit of the document with extravagance rather than restraint. In the first place, the government's powers "are conceived in general and indefinite terms, which are either equivocal, ambiguous, or which require long definitions to unfold the extent of their meaning."<sup>9</sup> In the second place, by suggesting that more power is conveyed than expressed, the Necessary and Proper Clause requires courts to attend not only to the words of the Constitution "in their common acceptance," but also to its "spirit, intent, and design."<sup>10</sup>

Strong as they are, Brutus's arguments seem even stronger today than they did at the time they were written. Historically, references to the spirit of the law in discussions of equity can mean either of two things: the particular intention of the law under examination, or the general intention of fairness that all law is presumed to have. This is why law dictionaries sometimes define "equity" simply as a set of principles of fairness used in interpreting the law. If we view the particular intention of the Constitution, we find that it was not conceived as an instrument for enforcing fairness in general; rather, it picks and chooses among the kinds and aspects of fairness that it guarantees. Today, however, judges treat it as though it really did guarantee all-around fairness, even when this leads to absurd consequences like reading the principle "one man, one vote" into a document that expressly gives the same number of senators to each state.

## CHECKS AND BALANCES: COLLUSION OR COMPETITION?

Brutus's assumptions about the nature of checks and balances directly contradict those of James Madison. To be sure, the Brutusian and Madisonian assumptions do not contradict each other at every point; in particular, both thinkers recognize the deep thirst of officeholders for power and dignity. "It will not be denied," says Madison in *Federalist* No. 48, "that power is of an encroaching nature." Similarly, says Brutus in Letter No. 11, "Every body of men invested with office are tenacious of power; they feel interested, and hence it has become a kind of maxim, to hand down their offices, with all its rights and privileges, unimpaired to their successors; the same principle will influence them to extend their power, and increase their rights." The natural tendency of judges, therefore, is to try to make themselves all-around social umpires, with no limits to the cases and controversies that they can adjudicate.

However, while Madison views the branches as fighting over who gets the biggest slice of a pie of fixed dimensions, Brutus views them as cooperating to get a bigger pie so that all of them may have a bigger slice. To



put this another way, Madison thinks in terms of what we now call a zero-sum game. Each gain in the power of one branch diminishes the power of all the others, making their members natural enemies. By contrast, Brutus thinks in terms of what we now call a positive-sum game. *Certain* ways of increasing the power of one branch can actually increase the power of the other branches too, making their members natural allies. If Brutus is right, then Madison has made a catastrophically serious error, for the name of the game is not competition, but collusion. Instead of “obliging the government to control itself,” inter-branch relations will encourage the government to become ever more powerful.

The pivotal observation in Brutus’s argument is that federal courts can hear cases and controversies that would otherwise be reserved for state courts by allowing Congress to make laws on subjects that would otherwise be reserved for state legislatures. Thus, besides the obvious motive to increase their powers directly, judges have a further, though less obvious, motive to increase them indirectly, simply by expanding the power of legislators. One hand washes the other. “Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts,” Brutus says, “and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise.”<sup>11</sup>

In Letter No. 12, Brutus goes on to explain that the collusion of the judiciary with the legislature in increasing the size of the pie is perfectly compatible with an ever-larger *share* of the pie being given to the courts. He is not convinced that courts will be able to tell Congress *directly* what to do:

Perhaps the judicial power will not be able, by direct and positive decrees, ever to direct the legislature, because it is not easy to conceive how a question can be brought before them in a course of legal discussion, in which they can give a decision, declaring, that the legislature have certain powers which they have not exercised, and which, in consequence of the determination of the judges, they will be bound to exercise.<sup>12</sup>

But he is confident that courts will be able to achieve the *effect* of telling Congress what to do, just because the members of Congress will internalize the principles devised by courts to guide their own decisions:

These principles, whatever they may be, when they become fixed, by a course of decisions, will be adopted by the legislature, and will be the rule by which they will explain their own powers.<sup>13</sup>

What the principles are, which the courts will adopt, it is impossible for us to say; but it is not difficult to see that they may, and probably will, be very liberal ones.

The judiciary becomes therefore the practical, if fitful, sovereign, limited mainly by the fact that it can rule on issues only as, and to the extent that, they arise in particular cases. It might be objected that Congress will *not* internalize the judiciary's explanation of its powers—that this is one of the points at which we should expect Madisonian competition, not Brutusian collusion. However, two centuries of hindsight allow us not only to confirm Brutus's argument, but also to fortify it. First, constitutional separation of the legislature from the executive makes party discipline in our regime much weaker than in parliamentary regimes. This weakness of party discipline, coupled with the vast increase in the range of the government's activities, makes it impossible for the legislature to fully regulate its own agenda. Positive control over the agenda passes largely to the executive, which finds it easier to seize the initiative; negative control passes to the judiciary, which can overturn laws it does not like. Another fact bolstering Brutus's case is that whereas federal legislators periodically face the electorate, federal judges don't. This makes Congress much more risk-averse than courts are. Rather than resenting the judiciary for taking hot-button issues out of its hands, the legislature may be relieved and grateful that someone else has made the decision for them. Finally, although the public perceives the president and members of Congress as politicians, it tends to view the courts, unrealistically, as non-political guardians of the Constitution. This makes it still more difficult for any politicians who might wish to resist the puissance of the courts to stir up the political will to do so.

The upshot of all this is that an ever larger share of the power pie goes to the judiciary—but for a variety of reasons (not least the fact that the pie itself is getting bigger), the other branches acquiesce in the change.

## LEGAL FICTIONS

We have seen that Brutus thinks the courts will expand their powers indirectly, through expansion of the powers of the legislature. It remains to discuss how he thinks that the courts will expand their powers *directly*, through employment of legal fictions. This technique is so effective, he suggests, that courts in England have been able to use it even in actual defiance of Acts of Parliament. How much more effective might it be in America, where no legal barriers stand in the way of its exercise?

His illustrations of the technique are borrowed from William Blackstone.<sup>14</sup> Originally, the Court of Exchequer was intended for suits by debtors of the king who pleaded that the actions of third parties had made them less able to pay their debts; the Court of the King's Bench, in turn, was restricted to suits by parties who had suffered trespasses, or other

injuries, by violence. In passage of time, however, the Court of Exchequer lost interest in whether the party bringing suit really was a debtor of the king, and the Court of the King's Bench lost interest in whether the party really had suffered an injury by violence. Let the plaintiff only say the words—or file the writ—and his suit would be heard by the court.<sup>15</sup> Brutus expects American courts to follow an analogous strategy to overcome their own jurisdictional limits.

In fact, the Constitution only mentions a single exception to the jurisdiction of federal courts in civil cases: They are prohibited from hearing lawsuits between citizens of the same state, unless the parties claim land under grants of different states. Needless to say, if the federal courts could somehow pack this category of case into their jurisdiction too, their civil jurisdiction would be universal. As Brutus explains in Letter No. 12, this would be trivially easy to do. Courts might simply make a routine practice of declaring the parties to be citizens of the same state. If this seems absurd, says Brutus, remember that Article 4, Section 2 guarantees to the citizens of each state all of the “privileges and immunities” of citizens in the several states. If we are entitled to all of the privileges and immunities of citizens in every state, then can we not be regarded as citizens of every state? By this reasoning, the claim of a Virginian to be a citizen of New York would appear perfectly truthful. Even if its falsehood were conceded, if the courts were to allow such a legal fiction who could contradict them?

The bizarre lengths to which this sort of thing could be taken is suggested by the dissenting opinion of Justice Douglas in the 1972 case *Sierra Club v. Morton*,<sup>16</sup> in which an association of environmental activists sought to halt the construction of a resort in a national park. The critical question of “standing” would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. The prospect of vegetables and minerals bringing suit in federal court makes arguments about animal rights seem almost quaint.

## THE TRIUMPH OF VIRTUAL JURISPRUDENCE

Although the members of the *Morton* Court declined to swallow the particular legal fiction suggested by Justice Douglas, it would be a grave mistake to suggest that they are averse to fictitious claims. For example, a fictitious *history* has been employed to conclude that the First Amendment

requires neutrality between religion and irreligion; a fictitious *psychology* has been employed to maintain that the only possible motive for opposing special preferences for homosexuals is animus; a fictitious *embryology* has been employed to insinuate that a child in the womb does not enjoy actual life but only “potential life”<sup>17</sup>; a fictitious *classification* has been employed to characterize anti-reproductive behavior as reproductive behavior; a fictitious *semantics* has been employed to interpret the phrase “exercise of religion” as having no reference to religious acts; and a fictitious *grammar* has been employed to treat categorical prohibitions as implying qualified permissions. The use of fictitious suppositions is so pervasive a feature of constitutional construction that we should no longer speak of actual jurisprudence, but of virtual jurisprudence.

The pivotal moment in the development of virtual jurisprudence was probably *Griswold v. Connecticut*,<sup>18</sup> the 1965 case that established the doctrine of a general right to privacy. Not all of *Griswold*’s methods are still used; the importance of the case lies rather in its demonstration of just how much a determined court could get away with. Writing for the plurality, Justice Douglas set loose not just one legal fiction but an army of them. The argument is most ingenious. Certain clauses of the First, Third, Fourth, and Fifth Amendments provide, respectively, that citizens may peaceably assemble, that soldiers may not be quartered in private houses during peacetime without the consent of the owners, that unreasonable searches and seizures may not be conducted, and that no one may be compelled to give testimony against himself. Appealing to the Ninth Amendment idea of unenumerated rights, Douglas argued (1) that each of the four provisions protests some aspect of privacy; (2) that by doing so they imply a right to privacy *as such*; and (3) that because this right is general, it encompasses the particular behavior which the statute under challenge had prohibited.<sup>19</sup> All three claims are specious; this is virtual jurisprudence at its finest.

As to the first claim, the liberty of peaceable assembly guaranteed by the First Amendment is not a private act but a highly public one, connected with petition for redress of grievances. Moreover, the immunity from self-incrimination in the Fifth Amendment prevents government from eliciting confessions through torture; privacy is not the issue in this clause either. As to the second claim, although the protection against the quartering of soldiers in houses and the protection against unreasonable searches and seizures do have some connection with privacy, neither protection is absolute; the former allows an exception for wartime, the latter an exception for reasonable cause. Moreover, they protect citizens only against certain kinds of intrusions on their homes, bodies, records, and property, not against all intrusions. Plainly, it is unreasonable to suggest that they imply a protection of privacy *as such*. As to the third claim, even

if these provisions did imply a generalized right to privacy, the alleged conclusion would not follow. Privacy concerns what other people may do with my property and what others may know about my affairs. Justice Douglas is not talking about what others may do or know; he is talking about what I may do. What he calls privacy might better be described as self-sovereignty.

## THE COURT BECOMES KING

The idea of self-sovereignty is given its purest expression in the 1992 case *Planned Parenthood v. Casey*.<sup>20</sup> By this time the Court no longer finds it necessary to appeal to the Ninth Amendment or allude to “penumbras, formed by emanations.”<sup>21</sup> It simply composes a confession of faith:

At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>22</sup>

To understand this creedal statement one must recall what occasioned it. What the Court meant by defining one’s own concept of human life was not so much deciding what to think, but deciding what to do: *Because* I have liberty to define my own concept of life, I may kill. In strict logic, it would seem to follow that I may kill anyone. In fact, it would seem to follow that I may do anything whatsoever. For the time being, the Court restricts its universal permission to the taking of life not yet born. This serves as a salutary reminder of what may be called the first principle of judicial usurpation: Formulae of universal permission never really mean universal permission; they are always instruments for the transfer of the power to prohibit from one set of hands to another. That king who says “Everything is permitted” will always add, “But I decide for everyone what ‘everything’ includes.”<sup>23</sup>

The Court seems to recognize the extraordinary nature of what it is doing, for in the very same decision that it assumes such unprecedented power, it goes to unusual lengths to say that doing so is nothing out of the ordinary. Its argument neatly illustrates the *second* principle of judicial usurpation: In an age when candid monarchy has gone out of fashion, kings cannot be expected to call attention to themselves by announcing *l’état c’est nous*. Inevitably, it is in the name of the rule of law that the rule of men is proclaimed. “Our analysis would not be complete,” says the Court, “without explaining why overruling Roe’s central holding would not only reach an unjustifiable result under principles of stare decisis, but

seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation *dedicated to the rule of law*"<sup>24</sup> (emphasis added).

The introductory paragraphs of this essay defined constitutionalism as the principle that the real authority of government depends not on the personality of the rulers, but on antecedent principles of right. Governmental enactments are not the ultimate ground of right, but elaborations and specifications of these antecedent principles in the light of the circumstances at hand. Because necessary to the common good, under certain conditions these elaborations and specifications "bind the conscience" of the citizens; that is, they generate a real obligation to obey.

The Court's argument is a sort of parody of these ideas. It does not deny them; on the contrary, it nominally affirms them. The twist is that by declaring itself uniquely qualified to comment on these antecedent principles, it puts itself, in effect, in their place. By so doing, it arrogates to itself the power to bind the conscience of the citizens. In fact, it claims authority to tell them not only what to do, but also when to shut up—for it regards itself as the umpire of national moral controversies.

The Court puts these claims in loftier language, of course, but their meaning is clear nonetheless. Here is where it proclaims the uniqueness of its qualifications to elaborate and specify the antecedent principles of right from which the authority of governmental arises:

The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States, and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money, and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means, and to declare what it demands.<sup>25</sup>

Here, in turn, is where it declares itself the umpire of national moral controversy, so that, for example, when it tells the proponents of the sanctity of life that the debate is over, they should be quiet and go home:

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.<sup>26</sup>



The Court goes so far as to claim that the measure of the people's fitness to be governed by the rule of law is nothing more than whether the people are willing to agree with what it says:

Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.<sup>32</sup>

Confusing this willingness of the citizens to believe as they are told to believe with its "legitimacy" as an organ of government, the Court concludes with dark warnings that should its "legitimacy" in this sense be undermined, then so would the country be undermined in its "very ability to see itself through its constitutional ideals." Plainly, the members of the Court can no longer distinguish themselves from the nation, their lawlessness from the law, or their arbitrary will from those principles of right that are antecedent to their own authority.

*L'Etat, c'est nous*—such is the unvoiced motto of the monarchs of our day. It was Brutus who saw how such an order of things might come to pass, but it was Bracton who told us how to answer. Against such kings we must say, as he did: *Lex facit Regem*. They may believe that they make the law, but it is not so. Law makes the king.

## NOTES

1. Specification of these principles means more than simply declaring what would have been right even in the absence of enacted law. The enacted law in our country specifies that in the interests of safety, automobiles on two-way roads must drive on the right, not the left. Even apart from law, citizens would have been obligated to drive safely. However, they would not have been obligated to drive on a particular side.

2. James Madison, *The Federalist* 51 (1788).

3. Patrick Henry, "Speeches of Patrick Henry in the Virginia State Ratifying Convention," in *The Anti-Federalist*, ed. Herbert J. Strong (Chicago: University of Chicago Press, 1985), 319:5.16.14.

4. Brutus [Anti-Federalist who was probably the New York judge Robert Yates], *New York Law Journal* 1787-1788, Letter No. 11.

5. Brutus's argument is first sketched in Letter No. 11, and elaborated in Letter No. 15. It may fruitfully be contrasted with the argument of Alexander Hamilton in *The Federalist*, No. 78.

6. U.S. Const. art. III, § 2, cl. 1.

7. *Id.*

7. *Id.*
8. Brutus, Letter No. 11 (quoting Sir William Blackstone, introduction, sec. 2, *Commentaries on the Laws of England* (1765), quoting Grotius, *On the Law of War and Peace*, Bk 2, Chap.16, Sec. 26, which in turn relies on Aristotle, probably either *Nicomachean Ethics*, Bk. 5, Chap. 10, or *Rhetoric*, Bk. 1, Chap. 13).
9. Brutus, Letter No. 11.
10. *Ibid.*
11. *Ibid.*
12. Brutus, Letter No. 12.
13. *Ibid.*
14. The first is discussed in Brutus's Letter No. 11 and the second is discussed in Letter 12.
15. In one medieval case, a plaintiff wroth about having been sold watered wine alleged that the merchant had watered it "with force and arms and against the peace of the King, to wit with swords and bows and arrows." *Rattlesdene v. Gruneston*, Y. B. Pasch. 10 Edw. II pl. 37, 140–41 (1317) (Selden Soc.). For discussion, see Eben Moglen, *Legal Fictions and Common Law Legal Theory: Some Historical Reflections*, 10 *Tel-Aviv University Studies in Law* 10 (1990), 35.
16. *Sierra Club v. Morton*, 405 U.S. 727 (1972).
17. *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).
18. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
19. *Id.*, at 484–86.
20. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
21. *Griswold*, 381 U.S., at 484.
22. *Casey*, 505 U.S., at 851.
23. J. Budziszewski, "The Roots of Law," *Religion & Liberty* 11, no. 5 (2001).
24. *Casey*, 505 U.S., at 851.
25. *Id.*
26. *Id.*, at 867.
27. *Id.*, at 868.