

“THE FIRST THING WE DO, LET’S KILL ALL THE LAWYERS.”¹
A Constitutional Analysis

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Lawyers, being lawyers, have argued that the title of this article, a line from Shakespeare’s *Henry VI, Part II*, was somehow meant by Shakespeare “as a compliment to attorneys and judges who instill justice in society.”³ Indeed, at least one United States Supreme Court justice has expressed this “complimentary point of view.” Justice John Paul Stevens, in his dissent in *Walters v. National Ass’n of Radiation Survivors*,⁴ complained about the majority’s “apparent unawareness of the function of the independent lawyer as a guardian of our freedom.”⁵ Referencing Shakespeare’s famous line, he wrote: “That function was, however, well understood by Jack Cade and his followers, characters who are often forgotten and whose most famous line is often misunderstood.”⁶ This statement about killing lawyers “was spoken by a rebel, not a friend of liberty.”⁷ Announcing his judicial assessment, Stevens wrote, “as a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government.”⁸

¹ William Shakespeare, *Henry VI*, ed. Sylvan Barnet, Parts I, II and III edition (New York: Signet, 2005), Part II, Act IV, Scene II, Line 73.

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³ Debbie Vogel, “‘Kill the Lawyers,’ A Line Misinterpreted,” *The New York Times*, June 17, 1990, sec. N.Y. / Region, <http://www.nytimes.com/1990/06/17/nyregion/1-kill-the-lawyers-a-line-misinterpreted-599990.html>.

⁴ *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 371 (1985) (J. Stevens dissenting).

⁵ *Ibid.*

⁶ *Ibid.*, n. 24

⁷ *Ibid.*

⁸ *Ibid.*

Notwithstanding his status as a justice on the United States Supreme Court, Justice Steven's judicial analysis of Shakespeare's line has been described as:

the way one might expect all thin-skinned, oversensitive, defensive lawyers to react to it. They bridle at the criticism in the line spoken by Dick the Butcher. They believe that the line "was not intended as a slur" because "analysis . . . shows *conclusively* that the legal profession . . . was regarded as a stabilizing force in society, complimentary to say the least.' To such readers, it is "*clear* that Shakespeare never intended the line mouthed by Dick the Butcher as the fountainhead for the proposition that eliminating lawyers would be best for society's welfare."⁹

Of course, the plain meaning of the line in context undercuts Justice Steven's reading, and non-lawyers and lawyers alike may point out that only a lawyer would take an otherwise disparaging remark and remake the meaning in an attempt to convert it into a complement. In the United States today, reasonable people may agree with Justice Steven's suggestion that lawyers should act as guardians of our freedom, but given recent events, question his observation "that disposing of lawyers is a step in the direction of a totalitarian form of government." Indeed, reasonable people could argue that the opposite may be true. The sentiments giving rise to the utterance of this line within Shakespeare's play are arguably present today, over four centuries later, in a nation with a different political structure and governance. Due to many lawyers' actions, particularly over the last few years, not only does Shakespeare's joke resonate with the public, Shakespeare's initial and intended meaning could very well be expressed through clenched teeth by a substantial portion of the electorate.

Houston: We Have A Problem

Although there has always been some anti-lawyer feeling here in the United States, this sentiment historically reflected "society's impatience with legalistic delays, injustices, and long

⁹ Daniel J. Kornstein, *Kill All the Lawyers? Shakespeare's Legal Appeal*, First edition (Princeton, N.J: Princeton Univ Pr, 1994), p. 28 (quoting Lester Forest, "Let's (Not) kill all the Lawyers," *New York Law Journal*, 19 (July 1988): 2 (emphasis added)).

windedness, with the oppression often associated with what the lawyer does for a living.”¹⁰ In other words, the meaning of Shakespeare’s “kill the lawyers” line, without consideration of how it was originally intended, came to be “emblematic of a widespread antilawyer attitude that views attorneys as parasites and enemies of productivity and economic well-being.”¹¹ Lawyers have been blamed for a Pandora’s box of social ills such as the endless proliferation of governmental rules and regulations, an epidemic of litigiousness, but mainly because it is perceived that “while law is supposed to be a device to serve society, a civilized way of helping the wheels go round without too much friction, it is pretty hard to find a group less concerned with serving society and more concerned with serving themselves.”¹² On the other hand, lawyers historically have retained some respect, particularly individually as opposed to as a group, and one-on-one with their clients. Even as a group, lawyers have been appreciated as “the standard-bearers of the Constitution” viewing their work as a “sacred trust.”¹³ But, over the course of the last fifty years, there has been a marked change in the role of lawyers as it relates to being “standard-bearers of the Constitution,” the idea of self-governance, and service to our democratic system of government. This change is something that “modern” lawyers sought, and has certainly placed all of us in the political limelight and made lawyers even more the subject of praise or derision.

¹⁰ Kornstein, *Kill All the Lawyers?*, p. 33; In 1994, the *Eagles* released the song “Get Over It,” written by Don Henley and Glenn Frey which echoed Shakespeare’s Henry VI Part II: “Old Billy was right: let’s kill all the lawyers – kill-em tonight.” “Get Over It (Eagles Song),” *Wikipedia, the Free Encyclopedia*, January 15, 2015, [http://en.wikipedia.org/w/index.php?title=Get_Over_It_\(Eagles_song\)&oldid=642585691](http://en.wikipedia.org/w/index.php?title=Get_Over_It_(Eagles_song)&oldid=642585691).

¹¹ *Ibid.*

¹² *Ibid.*, p. 27 (quoting Fred Rodell, “Goodbye to Law Reviews,” *Faculty Scholarship Series*, January 1, (1936): 38, 42.) The new AMC television show “Better Call Saul” is an example of this perception that lawyers only care about themselves. See [amctv.com](http://www.amctv.com), “Better Call Saul,” www.amctv.com, accessed March 24, 2015, <http://www.amctv.com/shows/better-call-saul>.

¹³ Kornstein, *Kill All the Lawyers?*, p. 34.

In recent times, lawyers, and lawyer-judges, have not limited their historic lawyerly role of helping resolve civil or criminal disputes to the parties involved in individual cases. Rather, lawyers have also taken up the mantle of “social justice,” as they perceive it, seeking to use the legal system and our foundational governing document, the United States Constitution, to impact and fashion cultural and social policy for the whole nation. As opposed to pursuing outcomes for litigants in individual cases, lawyers have instead, through litigation and judicial rulings, sought to broaden the application of an individual case through “constitutional” decisions seeking to dictate undemocratic outcomes for us all. There are now a plethora of law firms seeking political, social and cultural change based upon alleged, but unenumerated, constitutional “rights,” and they do not hesitate, at the drop of a hat, to haul individuals or entities into court to answer for perceived or alleged “constitutional” wrongs.¹⁴ Indeed, it could be argued that lawyers, through the use of the litigation process, are now political and legal bullies, attempting to not only silence any opponent to their new social order, but also impose their constitutionally decreed will on all by judicial mandate. Due to receptive lawyer-judges, this effort to invoke change through “constitutional protection” and judicial decree has had great success, at the expense of democracy and our right of self-governance.

¹⁴ Scott L. Cummings and Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, February 6, 2009), <http://papers.ssrn.com/abstract=1338342>; Bernard Koteen Office of Public Interest Advising at Harvard Law School and Center for Public Interest Law at Columbia Law School, “Private Public Interest and Plaintiffs’ Firm Guide” (President and Fellows of Harvard College, 2013), <https://www.google.com/search?q=Private+Public+Interest+and+Plaintiffs%E2%80%99+Firm+Guide&ie=utf-8&oe=utf-8>. As an example: “The Southern Poverty Law Center is dedicated to fighting hate and bigotry and to seeking justice for the most vulnerable members of our society. Using litigation, education, and other forms of advocacy, the Center works toward the day when ideas of equal justice and equal opportunity will be reality.” “Who We Are | Southern Poverty Law Center,” accessed March 25, 2015, <http://www.splcenter.org/who-we-are>.

Lawyers, of all people, recognize that democracy and republicanism are messy and take time. Lawyers' willingness to argue for a constitutional right to social and cultural change, and lawyer-judges' willingness to enter the political fray and adopt this approach, has been the antecedent to the creation of all sorts of new constitutional rights for the democratically disgruntled or challenged. This effort arguably has had greater impact on our society and culture over the past fifty years than the actions of any other branch of government. Of course, in each case, this change is ordered by lawyers without the consent of the governed, and sometimes in blatant contradiction to the will of the governed, who are simply told by lawyers to abide by the new court made rule as a good citizen of a "nation of laws." Is there any doubt that the victory handed to one side over the other by judicial fiat has led to the continued fracturing of our republic through the removal of important governance issues from public debate?

The whole idea of law is to define what is good or bad, what conduct is to be encouraged or discouraged by society. In advocating for new constitutional rights, lawyers have repudiated the democratic will of the majority, our country's foundational principles of natural law, and any common or historic understanding of morality as expressed by society in law. This course has been pursued even though ultimately the constitutional principles upon which such judgments are based, such as due process or equal protection, are in-and-of-themselves a moral judgment. At this point in our democratic history, it is clear that "judicial review," or more pointedly, lawyers having assumed the absolute and final right to say what the Constitution means, "has elevated judicial hubris over humility, boldness over modesty, and intervention over restraint."¹⁵

¹⁵ J. Harvie Wilkinson, *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance*, 1 edition (Oxford UK ; New York: Oxford University Press, 2012), p. 19 (discussing "living constitutionalism").

And it has been our nation’s highest lawyer-judges on the United States Supreme Court, who have led us all:

deep into the thickets of abortion, capital punishment, and habeas corpus. They endowed trial courts with broad authority over local school administration, extended the realm of constitutional tort at the expense of state and local governance, and . . . [have in the past been] poised to confer broad constitutional protections on economic entitlements as well.¹⁶

As recently noted by one Supreme Court justice, the lengths to which some lawyer-judges will go in extending the power to govern by decree through constitutional interpretation is only limited by “what [the Court thinks it] can get away with.”¹⁷

Although this expansion of lawyer power has been occurring for decades now, the most recent example of this effort to impose the judicial will on all citizens, notwithstanding public sentiment, is the “constitutional” redefinition of marriage, or the “constitutional” idea of “marriage equality,” as it is phrased with an ambiguous and all-encompassing meaning. Same-sex marriage, which term to some may be an oxymoron,¹⁸ is an idea of recent vintage.¹⁹ Nevertheless, without much critical thought as to the implications of its legal adoption, it is

¹⁶ Ibid., pp. 11-12.

¹⁷ As pungently phrased in a recent dissent predicting future activism by the U.S. Supreme Court:

It takes real cheek for today’s majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here – when what has preceded that assurance is a lecture on how superior the majority moral judgment in favor of same-sex marriage is to the Congress’s hateful moral judgment against it. I promise you this: the only thing that will “confine” the Court’s holding is its sense of what it can get away with.

United States v. Windsor, 133 S. Ct. 2675, 2709, (2013) (Dissent by J. Scalia, and J. Thomas).

¹⁸ Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What Is Marriage?: Man and Woman: A Defense* (Encounter Books, 2012).

¹⁹ “In this country, no State permitted same-sex marriage until the Massachusetts Supreme Judicial Court held in 2003 that limiting marriage to opposite-sex couples violated the State Constitution.” *Windsor*, 133 S. Ct. at 2715. (J. Alito, dissenting).

overwhelmingly supported by academia, the media, entertainers, and others who would generally consider themselves to be part of the cultural elite. Lawyers, and lawyer-judges, have been at the forefront of the fight to redefine marriage to include same-sex unions. Notwithstanding the massive propaganda campaign for “marriage equality” over the past twenty years, a substantial portion of the American people remain unconvinced of the merits of this proposed revision to their traditional understanding of marriage.²⁰ Indeed, federal legislation passed overwhelmingly by Congress and signed by President Clinton supported the traditional concept of marriage. In the forty-four states where self-governance has been employed, the people voted either directly on ballot measures, or indirectly through their legislatures, for the traditional or conjugal view of marriage.²¹ Although a few states have approved same-sex marriage through legislation or referendum, the media now reports thirty-seven “states” as having legalized same-sex marriage. It conveniently omits that the overwhelming majority of the activity in favor of same-sex marriage has been by lawyers and lawyer-judges through “unconstitutional” judicial decree.²²

And now, here we are at the apex of this history, where five lawyers on the U.S. Supreme Court may well decide marriage policy for the nation, drawing the debate of this deeply-divisive issue to an undemocratically abrupt close.

As everyone now knows, the struggle over constitutional rights these days is, in the end, a battle over political power.²³ Who among us is not plainly and clearly aware of the political

²⁰ Girgis, Anderson, and George, *What Is Marriage?*, p. 5.

²¹ Ibid.

²² Ryan Phillips, “Alabama’s Same-Sex Marriage Fight Draws Scrutiny,” *Birmingham Business Journal* 23, no. 7 (February 13, 2015): 6. See “Same-Sex Marriage in the United States,” *Wikipedia, the Free Encyclopedia*, March 24, 2015, http://en.wikipedia.org/w/index.php?title=Same-sex_marriage_in_the_United_States&oldid=653325740; “Should Gay Marriage Be Legal,” <http://gaymarriage.procon.org>; Girgis, Anderson, and George, *What Is Marriage?*, p. 5

²³ Wilkinson, *Cosmic Constitutional Theory*, p. 4.

issues at stake in “gaining theoretical supremacy” in the application of “constitutional theory?”²⁴ Judicial restraint has given way to a judicial activism at a level not envisioned even fifty years ago, with “little more than lip service to the notion that judges should refrain from promoting their personal views of what is right and good.”²⁵ The result is that no informed citizen believes that judges do not have a political agenda or that courts are above the political fray, and indeed, all now recognize that judges, the courts, and constitutional interpretation have become an integral part of it.²⁶ Can it be seriously suggested that the personal views of the individual judges play no role in the outcome of these cases or that constitutional theory is not simply used as cover for a raw political agenda? Democratic liberty has become the victim of a select few lawyers with a broadened view of the mandates of the Constitution, placing our supposed inalienable right to self-governance at unprecedented risk. The eagerness of lawyers to look to the lawyer-judge to resolve the great social controversies of our time has cast our justice system in a decidedly political light, and the question remains whether people are willing to accept what is in essence a form of dictatorship by decree. Unfortunately, the advocacy of lawyers in support of “constitutional” social and cultural reform has not only been accepted by the Bar, it is enthusiastically endorsed,²⁷ to the detriment of our justice system and democracy, with a resulting loss of confidence by the electorate.

²⁴ *Ibid.*, p. 5.

²⁵ *Ibid.*, p. 6.

²⁶ *Ibid.*, p. 7.

²⁷ The American Bar Association has been at the forefront of many political issues including marriage equality for homosexuals. In 2010, the ABA passed a resolution endorsing marriage equality for gays and lesbians with then incoming president Stephen Zach asking, “Why would anyone in this country not want two people who love each other to enjoy the blessings of marriage and the protections of law?” Former ABA President Tommy Wells told the House that “our citizens of the same sex who are being denied the right to a civil marriage are only seeking to participate in an equal basis in a foundational institution of our civil life.” A.B.A. Journal, “ABA Backs Marriage Equality for Gays and Lesbians,” *ABA Journal*, accessed March

Cosmic Constitutional Theory

As we all know, the authors of the Constitution, and the states in adopting it, sought to create a limited federal government with checks and balances on each branch – the executive, legislative, and judicial – so that no one branch could have complete authority over the other. To some degree, our system of self governance was designed to be messy and take time, so it could be deliberative. However, through the efforts of lawyers with an expansive and impatient view of the mandates of the Constitution, the judicial branch has sought to involve itself in the minute and endless facets of our everyday lives without any check by the legislative or executive branches, or the states for that matter, on this assumed authority.²⁸

Many have praised the 1803 United States Supreme Court decision in *Marbury v. Madison*²⁹ which assumed for lawyers the right to say what the Constitution means.³⁰ But, the

25, 2015, http://www.abajournal.com/news/article/aba_backs_marriage_equality_for_gays_and_lesbians/. ABA Backs Marriage Equality for Gays and Lesbians, (Aug. 10, 2010). For a reasoned response setting forth the state’s interest in marriage and any constitutional issues implicated, see *Ex parte State ex rel. Ala. Policy Inst.*, 2015 Ala. LEXIS 33 (Ala. Mar. 3, 2015) (“provision of Alabama law contemplating the issuance of marriage licenses only to opposite-sex couples does not violate the United States Constitution”).

²⁸ *Windsor*, 133 S. Ct. 2675, 2709, (Federal Defense of Marriage Act unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (state laws regulating use and distribution of contraceptives unconstitutional); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (struck Mass. Law forbidding the sale and distribution of contraceptives to unmarried persons); *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977) (extends right to purchase contraceptives to unmarried minors); *Roe v. Wade*, 410 U.S. 113 (1973) (unborn child is not a person and thus not sheltered by Due Process or Equal Protection clauses); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (reaffirmed abortion rights); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (contraceptives to minors); *Lawrence v. Texas*, 539 U.S. 558 (2003) (Court declared a constitutional right to homosexual sodomy); *Stenberg v. Carhart*, 530 U.S. 914 (2000) (Neb. Law criminalizing partial-birth abortions unconstitutional).

²⁹ *Marbury v. Madison*, 5 U.S. 137 (1803). “Judicial review has really been three different sorts of power, during three distinct eras of American judicial history. The first or ‘traditional’ period, from the birth of the Constitution until the end of the 19th century, embraced a notion of interpretation based on the “fair reading” of the document and a moderate form of judicial review. The second or ‘transitional’ period, from the end of the 19th century until 1937, maintained the theory of the traditional era while in practice giving birth to a more activist form

decision has also been criticized for altering and expanding judicial authority and, without the exercise of restraint, expanding lawyer power to create a judicial oligarchy with few institutional limits.³¹ Indeed, any limits that exist are completely self-imposed.³²

At the time of this enlargement of power by lawyers, Thomas Jefferson, a lawyer, a founder of our republic, and the principal author of the Declaration of Independence, was critical of this assumption of raw political power:

The Constitution . . . meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional and what not, not only for themselves in their own sphere of action but for the Legislative and Executive also in their spheres, would make the judiciary a despotic branch.³³

Jefferson later said:

of judicial review. The third or ‘modern’ period, from 1937 until the present, developed new activist theories of constitutional interpretation and judicial review.” “From Constitutional Interpretation to Judicial Activism: The Transformation of Judicial Review in America,” *The Heritage Foundation*, accessed March 26, 2015, <http://www.heritage.org/research/reports/2006/03/from-constitutional-interpretation-to-judicial-activism>.

³⁰ See Saikrishna B. Prakash and John C. Yoo, “The Origins of Judicial Review,” 70 U. Chi. L. Rev. 887 (2003); “Symposium: The Constitutional Origins of Judicial Review: Questions for the Critics of Judicial Review,” 72 Geo. Wash. L. Rev. 354, 354-355 (2003); Richard H. Fallon, Jr., “The Core of An Uneasy Case for Judicial Review,” 121 Harv. L. Rev. 1693, 1700 (May 2008).

³¹ Mark R. Levin, *The Liberty Amendments: Restoring the American Republic* (Threshold Editions, 2013), p. 55. Jeremy Waldron, “The Core of the Case Against Judicial Review,” 115 Yale L.J. 1346 (2006); Frank B. Cross and Herbert D. Kelleher, “Shattering the Fragile Case of Judicial Review of Rulemaking” 85 Va. L. Rev. 1243, 1333 (1999); Eugenie M. Van Loam, III, “Judicial Review And Its Limits Part I (Legitimacy),” 47 N.H.B.J. 52, 63 (2006); Larry D. Kramer, “The Supreme Court Term 2000-Foreword: We the Court,” 115 Harv. L. Rev. 4 (2001); “Putting the Politics Back into the Political Safeguards of Federalism,” 100 Colum. L. Rev. 215 (2000); “When Lawyers Do History,” 72 Geo. Wash. L. Rev. 387 (2003).

³² Ibid.

³³ Levin, *The Liberty Amendments*, p. 56, quoting Thomas Jefferson, “Letter to Abigail Adams, September 11, 1804,” in Andrew A. Lipscomb & Albert Ellery Bergh, Editors Thomas Jefferson, *The Writings of Thomas Jefferson - Vol XI*, Library Edition (Thomas Jefferson Memorial Association, 1903), pp. 50-51.

[T]o consider judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men and not more so. They have with others the same passions for party, for power, and the privilege of their corps . . . and their power the more dangerous as they are in office for life and not responsible, as other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves.³⁴

In his first inaugural speech of March 4, 1861, Abraham Lincoln, a lawyer who saw the Court's "constitutional" *Dred Scott*³⁵ decision as one provocation for the Civil War, said:

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

³⁴ Levin, *The Liberty Amendments*, pp. 56-57, quoting Thomas Jefferson, "Letter to William Charles Jarvis, September 28, 1820," in Albert Ellery Bergh, Editor, *The Writings of Thomas Jefferson; Vol. XV-XVI*, Definitive Edition (The Thomas Jefferson Memorial Association, 1907), p. 277.

³⁵ *Scott v. Sandford*, 60 U.S. 393 (1857). "By denying Congress's power to prohibit slavery in the territories, Taney's decision struck at the heart of the Republican Party's position on the issue, the *raison d'être* of the party, which was built on the notion that slavery violated the nation's most fundamental principles contained in the Declaration of Independence. Lincoln adopted a carefully nuanced position in dealing with the case. First, he noted that the decision itself was binding, but that there was a distinction between the decision and its weight as a precedent or as an authority for the actions of other branches of government. Second, he acknowledged that the Court's interpretation 'when fully settled' controlled not only the immediate case, but the 'general policy of the country' as well. But, third, he asserted that under some circumstances, the Court's interpretation could not be considered settled or authoritative.

He then spelled out some of the grounds which might undercut the authority of the Court's interpretation: lack of unanimity on the Court, the use of clearly incorrect historical facts as premises, apparent partisanship, and conflict between the decision and legal public expectation and the steady practice of different branches throughout history." "From Constitutional Interpretation to Judicial Activism."

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.³⁶

Consistent with the words of Jefferson and Lincoln, why would lawyer-judges, once they have taken the power to say what the Constitution means, restrain themselves from exercising the great power they have assumed? When given the power to govern, without input or review by the people and with no review by any other branch of government, the temptation over time is just too great for mere mortals to resist. To count on lawyers and lawyer-judges to exercise restraint bets against eons of human experience that power corrupts and absolute power corrupts absolutely.³⁷ Unfortunately, in recent years, rather than encouraging their fellow brethren in restraint, lawyers have initiated and abetted this usurpation of power.³⁸

Judge Harvey Wilkinson of the United States Court of Appeals for the Fourth Circuit, in his book *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance*, expressed his concern regarding the apparent willingness of lawyers and judges to abandon democratic processes in favor of judicial activism and edict. Although constitutional theory has been with us in some form since the Federalist Papers, “its explosion is a relatively recent phenomenon.”³⁹

³⁶ Levin, *The Liberty Amendments*, quoting Carl Sandburg, *Abraham Lincoln, the War Years Volume 1* (Harcourt, Brace & Company, 1939), p. 132.

³⁷ Wilkinson, *Cosmic Constitutional Theory*, p. 7.

³⁸ *Ibid.*, pp. 7-8.

³⁹ *Ibid.*, p. 3. Judge Wilkinson addresses each constitutional theory fashionable today beginning with living constitutionalism described as activism unleashed, originalism described as activism masquerading as restraint, political process theory, described as a third way down the rabbit hole, and finally, pragmatism, described as activism through anti-theory. Judge Wilkinson’s insight into the strengths and weaknesses of each of these theories is excellent.

Today, “constitutional” law is simply used as a theoretical cover for purely partisan results in the culture war.⁴⁰ Judge Wilkinson laments modern constitutional theory appears to have “done real damage to the rule of law, the role of courts in our society, and the ideas of restraint that the greatest judges in our country once embraced. But the worst damage of all has been to democracy itself, which theory has emboldened judges to displace.”⁴¹

Remarking on this assumed role of governance, Judge Wilkinson asks:

If judges are to be the living Constitution’s modernizers, we ought at least to ask whether they will be any good at it. After all, the virtue of restraint lies in the recognition of one’s own limitations. And the limitations of the judiciary are considerable. Legislators—at least those who hope to be re-elected—must actually meet their constituents, understand their concerns, and press for their interest in the legislature. Federal appellate judges—whose job security surpasses even that of the most ensconced incumbent—spend the vast majority of their time in the monastic environment of chambers with only a miniscule staff. Sustained contact with the public is difficult, and discussion with members of the public most interested in a judge’s ruling can be a grave breach of ethics. Most judges are sociable enough, but compared to legislative service, ours is an introverted calling. With regard to the capacity for comprehending “the nation’s best understanding of its fundamental values,” the comparison between legislator and judge is, in the vast majority of cases, no comparison at all.

It is not only what the legislator does, but who the legislator is that makes the legislature the superior updater. The fact that a value is ‘fundamental’ or claimed to stem from a vague and cryptic constitutional provision does not somehow render it unfathomable to representative government. The multitude and relative diversity of representative institutions makes them more likely than courts to accurately assess the content of the fundamental values of America as a whole. Indeed, Congress was structured precisely to ensure the broad representation of the American people. This representation is not only broad—it is constantly updated by the elections that take place, for example, every two years in the House of Representatives. “Courts,” however “are not representative bodies. They are not designed to be a good reflex of a democratic society. Nothing in the Constitution suggests that councils composed exclusively of lawyers were meant to be America’s reigning class.”⁴²

⁴⁰ Ibid., p. 4.

⁴¹ Ibid.

⁴² Ibid., p. 23 (footnotes omitted).

Lawyers, being human, are obviously drawn to this siren call of legal activism with exhortations about ‘human dignity,’ ‘decency,’ and the perceived demands of justice and needs of society. Who does not want to create a better world molded, of course, after one’s own idea of what that should look like? However, to answer this call is to abandon the very ideas that make our legal system work and the system acceptable in a democratic republic.⁴³ Lawyers’ pursuit of “social justice” through Constitutional interpretation generally reflects the views of elite segments of the electorate predominated by “an urban and coastal intelligentsia whose influence upon the intellectual processes of the judiciary appears to leave many ordinary Americans in the cold [even if these] narrow opinions of elites often seem broad minded to those who hold them.”⁴⁴

In recognizing that the Constitution frames judicial power passively, Judge Wilkinson notes that “it would thus take an extreme blindness not to discern that judicial restraint is a bedrock principle of America’s founding and that the faith of the framers lay at the end of the day with the organs of government more proximate to the people.”⁴⁵ Lawyers and for the most part, lawyer-judges are not elected, and hence, are not accountable to the people. Lawyer-judges are drawn from the elite rungs of an elite profession. When lawyers and lawyer-judges impose their will through “constitutional interpretation,” it simply defeats the purpose of a democracy of diverse viewpoints, including those from a variety of trades and occupations, whose values and opinions are entitled to equal weight. If lawyers and lawyer-judges have the right to say what the

⁴³ Ibid., p. 20.

⁴⁴ Ibid., pp. 30-31.

⁴⁵ Ibid., p. 105.

Constitution means, to the exclusion of all other voices, then they in effect become the ruling class of this new social order.⁴⁶

One may subscribe fully to the need and necessity of judicial review and yet recognize that the club of unconstitutionality is a weapon of last resort, precisely because it so often knocks every other player out of the ring. The declaration of rights so essential to liberty can ironically pose the greatest challenge to liberty when power is removed from Congress, the executive, the states, and ultimately the people by the thinnest of judicial margins. Whether five-to-four disablements of democratic majorities are more suspect than unanimous rulings may be open to debate, but surely the power to invoke the awesome majesty of the constitution in the cause of far-flung yet uncertain consequences calls for a spirit of utmost sobriety in courts—“the spirit which is not too sure that it is right.” For while legislative majorities and states and even agencies can monitor their actions and revisit their mistakes, constitutional “[r]evisions cannot be made in the light of further experience” unless and until the courts themselves come to concede or recognize their errors, something that human nature does not always find the wherewithal to do. So to supplant the diverse voices of an infinitely pluralistic people with one true and only word is an act whose enormity should never fail to register.⁴⁷

The Founding Principle Of The Constitution: Self-Governance

“[N]o one can now plausibly make the claim that judging is impersonal, that constitutional rulings are dispassionate, or that decisions exhibit a respect for the bedrock principles of constitutional restraint even close to what the framers envisioned or what the spirit of self-governance requires.”⁴⁸ “[T]hat judges should be cautious in disturbing legislative value judgments is not merely an academic belief, but rather the Constitution’s unyielding command.”⁴⁹ What lawyers and lawyer-judges are doing “is a complete inversion of democratic primacy and turns the Constitution’s foremost premise of popular governance on its head.”⁵⁰ “In a democracy, courts protect individual rights and personal liberties, but they are not, and should

⁴⁶ Ibid., p. 106.

⁴⁷ Ibid., pp. 106-107 (footnote omitted).

⁴⁸ Ibid., p. 114.

⁴⁹ Ibid., p. 69.

⁵⁰ Ibid., p. 20.

not be, the primary agents of social change. It is the people at the ballot box who should decide, not the people wearing black robes—the many, not the few.”⁵¹

Some lawyers plainly do not like unconstrained, vulgar democracy, which in their view, has many more flaws than virtues, and they welcome “judicial oversight” as a means of tempering or checking the views of the majority. But “[t]he imperfections of democracy are the imperfections of the human condition, which, by the way, have not passed the judicial branch by. And the messiness of democracy is often little more than government in action, with all its attendant disputatiousness and untidy compromises.”⁵² Questions of morality and decency and fairness many times are “in the eye of the beholder, and the very reason we have a democracy is that on many sensitive questions, views of fairness, morality, and justice might legitimately diverge.”⁵³

Of course, the path down this course of expanded lawyer power did not begin with homosexual marriage, nor will it end there:

As unfortunate as cosmic theory’s contribution to the activism of the past has been, by far the greater danger lies ahead. For the ingredients of cosmic theories are so stacked against self-governance that the temptations for judicial misadventures will only increase in years to come. And the admirable intellect and upmost sincerity displayed by leading theorists of all hues and stripes should only increase our consternation of the common danger they pose to democracy.⁵⁴

For example, the Supreme Court has considered constitutional rights in the context of social welfare administration.⁵⁵ Some justices were willing “to craft constitutional entitlements

⁵¹ *Ibid.*, p. 114.

⁵² *Ibid.*, p. 21.

⁵³ *Ibid.*, p. 30.

⁵⁴ *Ibid.*, p. 9.

⁵⁵ *Dandridge v. Williams*, 397 U.S. 471 (1970) (aid to families and children); *Lindsey v. Normet*, 405 U.S. 56 (U.S. 1972) (landlord tenant law); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (education of the poor).

to housing and public education, respectively.”⁵⁶ Lawyers and lawyer-judges would have then become partners with the legislative and executive branches in large areas of domestic policy.⁵⁷ Lawyers and judges using the Constitution as their authority would serve as a national police for ensuring the adequacy of appropriations for welfare payments and education under whatever constitutional criteria they deemed best. Although rejected at the time by a majority of the court, this example serves as a precursor of what is to come.

Likewise, lawyers have argued that the Constitution’s Fourteenth Amendment should be broadly construed to incorporate a so-called Second Bill of Rights, to ensure:

“[t]he right to a useful and remunerative job in industries or shops or farms or mines of the Nation; to earn enough to provide adequate food and clothing and recreation; of every farmer to raise and sell his products at a return which will give him and his family a decent living; of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home and abroad; of every family to a decent home; to adequate medical care and the opportunity to achieve and enjoy good health; to adequate protection from the economic fears of old age, sickness, accident, and unemployment; to a good education.”⁵⁸

Under this expansive view of constitutional theory, what then would be off limits from constitutional consideration? Lawyers’ tendency to use the Constitution as a sword rather than a shield overlooks that “the basic nature of the Constitution [is] to operate as a negative prohibition upon certain government intrusions and not as a fountain of positive rights.”⁵⁹ But, today, under contemporary “constitutional theory,” there appears to be no hesitancy to adopt through judicial fiat controversial constitutional “rights” in direct contradiction of representative government,

⁵⁶ Wilkinson, *Cosmic Constitutional Theory*, p. 29.

⁵⁷ *Ibid.*

⁵⁸ Levin, *The Liberty Amendments*, pp. 60-64, (referring to Yale law professor Bruce Ackerman’s campaign to “interpret” the Fourteenth Amendment to implement President Franklin D. Roosevelt’s so called “Second Bill of Rights”).

⁵⁹ Wilkinson, *Cosmic Constitutional Theory*, p. 29.

including the direct vote of the people. This path of lawyer transformation of our governmental charter is a present and real threat to our republic.

As we all know, much of our Constitutional language is broad enough to encompass an almost infinitely wide range of positions, which is why lawyer restraint is absolutely essential so that the preeminent principle of self-governance reigns supreme. This is not to say that from time to time, lawyers and lawyer-judges have not gotten it right and promoted ideas and policies with which many agree, or offered Constitutional decisions which might be considered just or even exceptional. But even monarchs and dictators have been occasionally benevolent and wise.⁶⁰ However, if the mandate of the Constitution is self-governance, even these occasions of wise judicial activism arise from perverted law.

Lawyers should restrain their impulse to make the Constitution the be-all and end-all for every perceived injustice created or caused in a democratic society. Self-governance means that the people decide how to accommodate conflicting moral and communal values to be embodied in law, not lawyers.⁶¹ As Judge Wilkinson aptly puts it:

In leaving questions to democratic processes, courts convey the impression that Americans are in this together, that our destinies are interwoven, that our civic participation, however small, retains something of meaning and will not in the end be upstaged by the judicial will.⁶²

He warns:

By contrast, when *judges* take it upon themselves to update the Constitution in the name of the popular will, they deprive “all participants, even the losers, the satisfaction of fair hearing and an honest fight.” When a court declares certain rights or powers beyond the legislative capacity, Americans can no longer attempt to persuade their fellow citizens on these issues in the legislative arena and can no

⁶⁰ Levin, *The Liberty Amendments*, pp. 61-64

⁶¹ Wilkinson, *Cosmic Constitutional Theory*, p. 108

⁶² *Ibid.*, pp. 112.

longer enjoy the intellectual and psychic satisfaction of reasoned republican self-rule.⁶³

In a democracy, losers today can hope and work to be winners tomorrow by persuading their neighbor of the rightness of their cause. But even if their hopes fail, at least their voices have been heard, their values considered, and the loss more acceptable because it comes from the many not the few.⁶⁴ The Constitution is a document of governance and it is not just owned by lawyers and judges. An insistence that all constitutional discourse be surrendered to lawyers under the false premise that they are endowed with the “special knowledge” needed to determine its meaning in matters of governance is a perversion of the Constitution.

Shakespeare’s Legal Appeal

Some may disagree with the ideas expressed herein or consider them political. Some may look positively on judicial review and its current expression in the form of a continuing constitutional convention of lawyers to reinterpret the Constitution anew for each generation. Public debate is certainly welcome on these important issues, but to pretend that “judicial review” in its most recent incarnation is “Constitutional” self-governance is a lie.

In Shakespeare’s line, the killing of lawyers is not the second or third step on the revolutionists’ agenda. It is first. The primacy of that task makes the line resonate and suggest a reason for its predominance.⁶⁵ What was it in Shakespeare’s play that made lawyers “the very symbols of the inequities and oppression that provoke a revolution?”⁶⁶ In context, can it be that the line is not a criticism “of all lawyers but only of those who pervert and distort law”?⁶⁷

⁶³ Ibid., p. 26 (footnote omitted).

⁶⁴ Ibid., p. 66.

⁶⁵ Kornstein, *Kill All the Lawyers?*, pp. 26-27

⁶⁶ Ibid., p. 26.

⁶⁷ Ibid., p. 25.

The most important—and often overlooked—point about law in *Henry VI, Part 2* is the crucial role of another character in the play, Humphrey, duke of Gloucester. One simply cannot understand Dick the Butcher’s controversial line without seeing how it relates to Gloucester.

* * *

As lord protector, Gloucester in effect rules England during Henry’s minority. A “virtuous prince” (2.2.74), Gloucester symbolizes the rule of law, its fair execution and administration, as well as the need—reminiscent of Socrates—to submit to it when it wrongly turns on him. In Gloucester, one finds the humane impulses that should animate the law. Other advisers to the king, ambitious for themselves and jealous of Gloucester’s sway, unjustly accuse him, and while holding him for trial, kill him. All the time, everyone around the king—scrupulous or not—pays lip service to the law, its integrity and symbolism.

* * *

Perhaps the sequence of events culminating in Gloucester’s death means the death of law and the triumph of chaos and disorder. It is at this point, and not before, that the commons rise up in anger. By fairly administering the law, by acting as a tribune of the people, Gloucester had “won the commons’ hearts.” (3.1.28). When he, their lord protector, became imperiled by what passed for law, “the commons haply rise to save his life.” (3.1.240).

* * *

Most important, Cade’s mob emerges only at the moment of Gloucester’s death. They did not criticize the law before then. The people are compelled, through lack of a law giver, through the total breakdown of the constitutional rule of order, to take the law into their own hands. They do not protest all law, but only perverted and false law, such as accused and killed the good duke of Gloucester. As symbols of the evil legal system, lawyers became the object of hatred.⁶⁸

The law is an honorable profession. It is filled with honorable people—many who want to do good, at least, as they see it. But there are clearly those lawyers who question democracy, who have an agenda to shape our society and culture as they see best, without the inconvenience of persuading their neighbors to their view. Although paying lip service to the Constitution, they seek to use the Constitution as a sword to enforce their political will, damaging the integrity and

⁶⁸ Ibid., pp. 32-33.

symbolism of the Constitution. Over the last fifty years, lawyers have been at the fore front of radical change using “constitutional theory” to attack self-governance. We have ignored our oath to preserve, support, and defend the Constitution.⁶⁹ We have abused the sacred trust of the people as standard bearers of the Constitution by making them the victim of perverted law for our own ends. Rather than acting as a stabilizing force, working to see that our system of governance dispenses justice and creates social cohesiveness, we have worked at cross purposes, and the product of our work is evident in our country’s divisiveness. Reasonable people today see our “interpretive” constitutional approach to law as evil, and chafe against lawyer imposed judicial authoritarianism. As in Shakespeare’s play, lawyers have become the object of “reasonable” hatred because we have assumed for ourselves a power to govern which is not ours.

Conclusion

Lawyers have, since its inception, played an important and leading role in our nation’s governance. Historically, lawyers have been advocates for the principles of self-governance, and we have enjoyed the fruits of our unique and exceptional American experience. However, in recent years, lawyers have been willing to abandon the principles of self-governance, pay lip service to the law, its integrity and symbolism, and substitute the rule of lawyers for the rule of law.

As in any human endeavor, good leadership can lead to success and bad leadership can lead to failure. This is particularly true in our experiment with self-governance. Lawyers, as

⁶⁹ “By the 1950s, it was possible for the Court to say, in *Cooper v. Aaron*, that *Marbury* stood for the proposition that ‘the federal judiciary is supreme in the exposition of the law of the Constitution’ and to imply that the oaths of state officials to uphold the Constitution were oaths to uphold the Court’s interpretation of it. That view lay behind critical responses to legislative efforts to modify or restrict major controversial decisions of the modern Court, such as *Roe v. Wade*. A particularly striking version appeared in the argument of the plurality opinion in *Planned Parenthood v. Casey* that the Court’s very legitimacy is undermined by overturning highly controversial precedents.” “From Constitutional Interpretation to Judicial Activism.”

leaders, need to reassert their role as standard-bearers of the Constitution in service to the ideals of republican self-governance. Leaders in our Bar and our judicial system need to publically stand in favor of self-governance regardless of their own personal, political, or social views in order to continue to allow the words in our Constitution of “We the People” to have effect. All of us should encourage restraint when it comes to constitutional interpretation, and for those of us incapable of restraint, rather than praise, the condemnation of the Bar should follow. If we do not now take a stand in favor of constitutional self-governance, we face not only the damnation of our forefathers and of history, but ultimately the real censure of the people.

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