

Restoring Checks and Balances on an Unaccountable Judiciary

Testimony of

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By John C. Eastman

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

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

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

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

The founders recognized that in a system of limited government such as they established, the limits on the power of the legislature or the executive could “be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.”³ They therefore provided for a judiciary that was largely independent of the political branches of government, so that it could withstand the inherently greater power in the other branches—that of the “purse” in the legislature, and that of the “sword” in the executive. Although the two political branches would have a hand in choosing members of the judicial branch—the President nominates, the Senate confirms them⁴—once appointed, judges hold their offices “during good behavior,”⁵ which is to say, for life barring some bad conduct in office. And they cannot have their salaries diminished during their tenure in office.⁶

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

³ *Id.*, at 466.

⁴ U.S. Const. Art. II, § 2, cl. 2.

⁵ U.S. Const. Art. III, § 1.

⁶ *Id.*

⁷ Federalist 78, at 466.

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

Significantly, though, none of the founders believed that the judicial system they established was to be *entirely* independent of either the other branches of government or of the people. Apparently recognizing that placing unlimited power in the hands of any one branch of government—even the weakest one—would likely lead to abuse, the framers provided for a system with checks and balances so that power could not become concentrated in any one branch. Ambition would be made to counteract ambition, as James Madison famously stated in Federalist 51.⁹ This system of checks and balances operates even on the otherwise independent judiciary. By noting in Federalist 78 that the courts “must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments,”¹⁰ for example, Hamilton suggested that the executive branch would have the power to refuse to enforce judicial decrees that were egregiously wrong. And in Federalist 79, he explained that the legislature also had a constitutional means of checking a wayward judiciary. “The precautions for [judges’] responsibility are comprised in the article respecting impeachments,” Hamilton noted. “They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate; and, if convicted, may be dismissed from office, and disqualified for holding any other.”¹¹

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

⁸ Federalist 79, p. 473 (Hamilton).

⁹ Federalist 51 (Madison).

¹⁰ Federalist 78, p. 465.

¹¹ Federalist 79, p. 474.

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

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

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

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

¹² Federalist 81, p. 482 (Hamilton).

¹³ *Id.*, at 484-85.

First, after President Thomas Jefferson’s ill-fated effort in 1804 to have Supreme Court Associate Justice Samuel Chase impeached and removed from office for what most historians believe were largely partisan political reasons, the impeachment pendulum swung too far the other direction and has stayed there for more than two hundred years. Mere “malconduct” in office, or “deliberate usurpations” on the authority of other branches of government—the standard for impeachment described by Hamilton¹⁴—was no longer viewed as sufficient for impeachment; actual criminal conduct of a significant sort was instead deemed necessary. This view even appears to the modern eye to be more consistent with the actual language of the Constitution, which provides that impeachment is only permissible for “Treason, Bribery, or other *high Crimes and Misdemeanors*.”¹⁵ But the notion that the phrase, “high crimes and misdemeanors,” refers to ordinary criminal conduct alone is anachronistic. As Steve Fitschen and many others have pointed out,¹⁶ the historical meaning of that phrase is much different. It encompasses “offences, which are committed by public men in violation of their public trust and duties.”¹⁷ Joseph Story, an Associate Justice on the Supreme Court and the author of one of the leading treatises on the Constitution just a generation after it was ratified, described the meaning of the “high crimes and misdemeanors” phrase this way:

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

¹⁴ Federalist 78, p. 474.

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

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

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

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

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

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

¹⁸ Story, Commentaries § 800 (emphasis added).

¹⁹ *Id.*, § 762.

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

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

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

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

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

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

²⁴ 1 Cranch (5 U.S.) 137 (1803).

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

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

²⁵ *Id.*, at 178.

²⁶ Federalist 78, p. 467.

²⁷ *Id.*, p. 467-68.

²⁸ *Id.*, p. 468.

²⁹ *Marbury*, 1 Cranch, at 177.

Hughes infamously claimed that “We are under a Constitution, but the Constitution is what the judges say it is.”³⁰

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

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

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

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

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

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

Until last month, that is. One of the more extraordinary aspects of the dissenting opinions in the same-sex marriage cases was a less-than-subtle resort to the Lincoln remedy.

Quoting Federalist 78, here is how Justice Scalia concluded his dissent:

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

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

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

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

³⁴ U.S. Const., Amends. XIII, XIV, and XV.

Federal Government were limited in scope.³⁵ Although the adoption of the Civil War Amendments was certainly a salutary development in our nation's history, securing to a much stronger extent than previously the fundamental rights recognized in the Declaration of Independence,³⁶ those Amendments also placed in the hands of the judiciary an expansive power that could easily be abused and that, in a significant way, outpaced the check on a wayward judiciary contemplated by the impeachment power. The Constitution—particularly the Constitution after adoption of the 17th Amendment, which replaced the selection of Senators by State legislatures with direct elections³⁷—does not provide the States with any direct check on the federal judiciary. The impeachment power is available only to Congress, and therefore is designed primarily to allow the national legislature to check the judiciary from encroaching on its legislative prerogatives, not to provide a check on federal encroachment on the States. Indeed, to the extent that the three branches of the federal government share an interest in aggrandizing the power of the federal government at the expense of the States—something that came to fruition once the *federal* Supreme Court began upholding the expansive assertions of power by the President and the Congress during the New Deal—the impeachment power provides no check at all.

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

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

³⁶ See Decl. of Ind., ¶ 2.

³⁷ U.S. Const., Amend. XVII.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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