THE PRESUMPTION OF CONSTITUTIONALITY

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Justice Bolick and I have agreed to disagree as much as possible, so I'm going to do my best to live up to our agreement. Let me jump right into my core thesis.

A Justice may deem a statute to be unconstitutional only when, after careful analysis, the Justice determines that the statute clearly conflicts with the Constitution. A Justice may not deem a statute to be unconstitutional if the relevant constitutional provision, at the end of the analysis, has two or more plausible meanings and the statute is consistent with one of those plausible meanings. It's not enough, in other words, that the statute is inconsistent with what the Justice regards as the best reading of the constitutional provision. If there remains a plausible alternative reading that can be reconciled with the statute, the Justice must apply the statute.

This concept might fairly be labeled a "presumption of constitutionality." A statute, that is, is presumptively constitutional. That presumption may be rebutted, but only by showing that the statute clearly conflicts with the Constitution.

This principle has deep roots. Indeed, it inheres in the very foundation of what we call judicial review: the power or, perhaps better, the duty of federal courts to decline to apply statutes that violate the Constitution. In his justification of judicial review in Federalist 78, Alexander Hamilton explains that the Constitution is a "fundamental law" that, like any other law, judges must interpret in order to "ascertain its meaning."[1] In the event of what Hamilton calls an "irreconcilable variance" between the Constitution and an ordinary statute, judges need to apply the Constitution, the law of, as he puts it, "superior

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1. *See* THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (Jacob E. E. Cooke, ed. 2010).

obligation and validity," in preference to the statute.[2] Chief Justice Marshall's exposition of judicial review in *Marbury v. Madison*[3] closely tracks Hamilton's reasoning.

Hamilton explains that the exercise of determining whether a statute clashes with the Constitution is akin to the ordinary judicial function of deciding which of two competing statutes trumps the other. As he puts it, "[s]o far as [those statutes] can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done."[4] Likewise, it is the obligation of judges to attempt, by any fair construction, to reconcile the Constitution with a statute that is alleged to violate it, and to decline to enforce the statute only when such reconciliation is not possible.

In perhaps his most famous passage, Hamilton again emphasizes that the exercise of judicial review to decline to apply a statute must involve a genuine repugnancy between the Constitution and the statute. "It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. . . . [I]f they should be disposed to exercise WILL instead of JUDGMENT," by, for example, positing repugnancies that can in fact be reconciled, "the consequence would equally be the substitution of their pleasure to that of the legislative body."[5] "The observation," he continues, "if it proved any thing, would prove that there ought to be no judges distinct from that body."[6]

So, again, the presumption of constitutionality is built into the very justification for judicial review. As Chief Justice Marshall writes in *Fletcher v. Peck*,[7] in order for a judge to deem a statute void, "[t]he opposition between the constitution and the

2. *Id.*

3. 5 U.S. (1 Cranch) 137 (1803).

4. THE FEDERALIST NO. 78, at 525–26 (Alexander Hamilton) (Jacob E. E. Cooke, ed. 2010).

5. *Id.* at 526.

6. *Id.*

7. 10 U.S. (6 Cranch) 87 (1810).

law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."[8]

Let me emphasize that under a proper understanding of the exercise of judicial review, judges do not *invalidate* or *strike down* laws; they merely *decline to apply* them. Judges do not have the authority to remove laws from the statute books. There is, as law professor Jonathan Mitchell points out, no "writ of erasure" that judges can issue to erase a law.[9] If you look at various laws that were "struck down," you will find that most of them are still on the books. Very rarely has the legislature actually repealed them. When the Supreme Court first ruled that paper money was unconstitutional and then reversed itself a couple years later, there was no new statute enacted in the meantime. But if the first statute was erased (in material part) after the court's first ruling, how could the court have resuscitated it later?

The whole notion of judges striking down laws is part of the myth of judicial supremacy—a myth that goes well beyond the sound understanding of judicial review and holds that we are all obligated to accept as binding in all respects whatever the Supreme Court rules on the constitutionality of statutes. This is a myth that was never voiced by the Supreme Court until *Cooper v. Aaron*[10] in 1958. When the Court voiced it then, it made up a constitutional history that was entirely unsound, claiming that this myth had always been accepted. Never mind that Andrew Jackson, Abraham Lincoln, and Thomas Jefferson had clearly rejected it.[11] If we can avoid saying that the Court strikes down statutes, it will lead to an improved understanding of the role of the Court.

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8. *Id.* at 128. This standard of clear conflict is less deferential than the standard that James Bradley Thayer advocated and, unlike Thayerian deference, it applies to federal laws as well as state laws. *See* Ed Whelan, *John McGinnis on the Originalist Case for Judicial Restraint*, NAT'L REV.: BENCH MEMOS (March 27, 2015, 3:51 PM), https://www.nationalreview.com/bench-memos/john-mcginnis-originalist-case-judicial-restraint-ed-whelan/ [https://perma.cc/85MM-7W4X].

9. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018).

10. 358 U.S. 1 (1958).

11. *See* Ed Whelan, *A New Book Revitalizes Our Understanding of the Constitution*, NAT'L REV. (May 20, 2015, 8:00 AM), https://www.nationalreview.com/2015/05/new-book-takes-myth-judicial-supremacy-ed-whelan/ [https://perma.cc/5VWJ-926W].

Having laid this foundation, I would now like to defend "judicial activism"—the term and epithet, that is, not the practice. There is a cottage industry of academics who alternate between maligning the term judicial activism and trying to co-opt it.

I will first address the common claim that the term judicial activism should simply be avoided. The relevant question is not whether the term is often used poorly. That is surely the case. But that is also the case with many terms that no one seeks to banish from public discourse. Terms like "conservative," "liberal," and "moderate" are highly contested and are often used poorly. The relevant question is whether the term is capable of being used well. The answer to that question is, plainly, "yes." Indeed, the term judicial activism best captures succinctly the wrongful judicial invasion of the realm of representative government. The core of judicial activism, as I use the term, consists of the wrongful overriding by judges of democratic enactments, typically through the invention of new constitutional rights. *Roe v. Wade*[12] is a classic example. The central concern that the term signals is over the proper limits on the role of the courts in our system of separation of powers and representative government. The term also usefully triggers the deeper question of what interpretive method or methods are legitimate.

I emphasize that judicial activism is just one category of judicial error. I use the term "judicial passivism" to identify another category of error: a court's wrongful failure to enforce constitutional rights and limits on governmental power. Judicial restraint is the sound mean between the two extremes of judicial activism and judicial passivism. Judicial restraint means that judges do not wrongly decline to apply democratic enactments. At the same time, it is entirely consistent with judicial restraint, and it is part of the judicial duty, for judges to deem unconstitutional those statutes that do clearly conflict with the Constitution.

Some critics aim to destigmatize the term judicial activism. Judicial activism actually began as a non-pejorative term, advanced in its first public use by Arthur Schlesinger back in the

12. 410 U.S. 113 (1973).

late 1940s.[13] But over time, especially as liberal judicial activism prevailed in many ways, the term fully earned its stigma. Now, we see a legal system rife with liberal judicial activism on questions like abortion, marriage, the death penalty, criminal procedure, obscenity and pornography, gender issues, the place of religion in the public square, and so much more, along with the resort to foreign law to justify some of these results.

One effort to destigmatize judicial activism is to redefine it to mean any exercise of judicial review, whether right or wrong, that declines to apply a statute. I am reminded of William F. Buckley's response to the leftist charge during the Cold War that the CIA and the KGB were engaged in morally equivalent acts of spycraft. As Buckley put it, that's like saying "that the man who pushes an old lady into the path of a hurtling bus is not to be distinguished from the man who pushes an old lady out of the path of a hurtling bus: on the grounds that, after all, in both cases someone is pushing old ladies around."[14] To lump sound exercises of judicial review with unsound ones is likewise obtuse.

Another effort is to equate judicial activism with the overturning of precedent. Under this verbal wordplay, overturning an activist precedent would itself somehow be activist. That is another unsound use of the term. Of course, reasonable minds can differ regarding the proper way to address precedent. For example, there was a significant division between Justice Scalia and Justice Thomas on their willingness to revisit precedent.[15] Justice Scalia was certainly willing to do it. But in some instances, he would say, "look, that's settled." There is reasonable ground for criticism about the notion that a ruling that gets

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13. Keenan D. Kmiec, *The Origin and Current Meanings of Judicial Activism*, 92 CAL. L. REV. 1441, 1445–46 (2004).

14. *See* LINDA BRIDGES & JOHN R. COYNE JR., STRICTLY RIGHT: WILLIAM F. BUCKLEY JR. AND THE AMERICAN CONSERVATIVE MOVEMENT 182 (2007).

15. *See* Randy Barnett, *Celebrating Justice Thomas's 25 Years on the Supreme Court*, NAT'L REV. (July 1, 2016, 8:00 AM), https://www.nationalreview.com/2016/07/clarence-thomas-supreme-court-celebrating-25-years/ [https://perma.cc/W5U3-PRLK] ("Justice Thomas is far more willing than any other justice on the Court to reverse . . . precedents that have expanded the powers of Congress beyond the original meaning of the text. This judicial stance has distinguished Justice Thomas from originalism's most vocal defender on the Court, the late Justice Antonin Scalia.").

the Constitution wrong could ever be deemed settled. If the Court were inclined to be a little bit creative—not one millionth as creative as it is in inventing rights, but just in using its equitable power—it might come up with a way to overturn precedents on which there has been great reliance, but in a way that is not disruptive. Say that the Court were to decide that paper money is unconstitutional. It surely would seem pretty disruptive to have a ruling like that come down tomorrow. But what if the Court said, "We believe this is the best reading of the Constitution. We recognize that it will be disruptive, and we're going to give the political branches X years to work through an amendment to address this if they see fit"? Such an amendment would likely go through quickly; and if it needed a little more time, the Court could give it more time. In other words, there is plenty of ability to overturn precedents while respecting reliance interests.

I suspect that many of those who want to destigmatize or redefine judicial activism do so for the same reason that arsonists would be happy to have the word "arson" disappear or be redefined. If "arson" were simply referred to as "fire-building," or if all legitimate fire-building would henceforth be called "arson," the term "arson" would lose the stigma that it has earned, and life would be much easier for arsonists. I do not think that is something we should encourage.