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CONSTITUTIONAL LAW, MORAL JUDGMENT, AND THE SUPREME COURT AS SUPER-LEGISLATURE

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to be presented as the 24th Mathew O. Tobriner Memorial Lecture in Constitutional Law at the University of California, Hastings College of the Law, San Francisco, January 12, 2015

I propose to defend and explore three claims in this lecture. First, there is very little actual “law” in federal constitutional law in the United States, especially with respect to cases that end up at the U.S. Supreme Court: there, the Court operates as a kind of super-legislature, albeit one with a limited jurisdiction, essentially making decisions based on the moral and political values of the justices, and not on the basis of legally binding standards. This is, in part, a jurisprudential thesis about what counts as “legally binding standards,” one that I shall defend by reference to the most plausible account of the nature of law, the legal positivist theory developed by H.L.A. Hart and Joseph Raz. Second, the absence of law in so many parts of federal constitutional law means that the quality of moral and political judgment exercised by judges is of decisive importance in how they fulfill their role and thus should be the overriding factor in the appointment of federal appellate judges, especially Supreme Court Justices. That brings me to my third claim, namely, that all political actors know that the U.S. Supreme Court often operates as a super-legislature, and thus that the moral and political views of the Justices are decisive criteria for their appointment. This almost banal truth is, however, rarely discussed in the public confirmation process, but is common knowledge among political and legal insiders. To be sure there is media speculation about the political predilections of the nominees, but their actual moral and political views are treated as off limits in the real confirmation process. This anti-democratic secrecy is,

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in my view, deeply wrong and must be replaced with a realistic acknowledgment of the role of the Supreme Court as a political actor of limited jurisdiction. I will illustrate these claims by discussing a number of important public law cases, recent and not-so-recent.

What does it mean to say there is very little “law” in American constitutional law? That requires us to have some view about what it means to say law exists, and so I must begin with some discussion of basic jurisprudential questions. I will here follow the most promising theory about the nature of law, the legal positivism of H.L.A. Hart and his student Joseph Raz.¹ Let us start with some terminology. Human societies are awash in norms, by which I mean demands of the form, “You ought to do X” or “You ought not do Y.”² Some norms are merely norms of etiquette: for example, “You ought not talk on your cell phone during the lecture” or “You ought not talk with your mouth full at the table.” Others are norms of prudence or self-interest: “You ought to attend class, lest you fail the exam!” Some are moral norms: “You ought to consider how your actions will affect the well-being of others.” And some are *norms of the legal system*, for example, “You ought not go faster than 55 mph on the highway.” The categories are not mutually exclusive: sometimes moral norms (e.g., “You ought not murder innocents”) are also legal norms, and sometimes norms of prudence are too (e.g., “You must wear a seatbelt while driving”). Norms of etiquette are rarely legal norms, many moral norms are not legal ones, and many legal norms are not ones we think of as representing moral or ethical obligations (we don’t think the English are immoral for driving on the left rather than the right, but we recognize they have a legal obligation to do so). The jurisprudential question is: how do we mark the difference? And the legal positivist answer is: norms are *legally valid*—that is, norms of the legal system—in virtue of satisfying criteria in that system’s “rule of recognition” as Hart called it. A rule of recognition specifies the criteria

¹On legal positivism, see Brian Leiter, *The Case for Legal Positivism as an Account of the Artefact Law*, in [TITLE OF BOOK IN LARGE AND SMALL CAPS] [page number at which your article begins, if available] (L. Barazin & K. Himma eds., forthcoming).

²There are many other kinds of norms, for example permissions: “You may do X.” I use deontic norms as the central case.

in virtue of which particular norms are taken to be norms of the legal system. Such criteria can include legislative enactment, executive orders, judicial decisions, and so on.

Rules of recognition in modern legal systems are, admittedly, complex. Consider: a norm is a valid norm of the California legal system if it has been enacted by the California legislature and signed by the Governor, and has not been deemed unconstitutional as a matter of state or federal law by a state or federal court and has not been preempted by a constitutional federal law; a norm can also be a valid norm in the California system if it has been enacted by the U.S. Congress and signed by the President, and has not been deemed unconstitutional by the U.S. Court of Appeals for the 9th Circuit or by the U.S. Supreme Court; a norm can also be a legally valid norm in the California legal system if it figures in the holding of a California court that has not been reversed by a higher California or federal court; and so on. This omits executive orders and administrative rulings, also subject to various kinds of judicial review.

A good part of legal education is education in the rule of recognition of one's legal system, although it is rarely denominated as such in the law school classroom. But what makes it the case that California's rule of recognition is what it is? H.L.A. Hart's great insight was that, at bottom, legal systems rest upon nothing more than a conventional practice of officials, notably judges. The California Constitution is a binding norm of the California legal system *only because* judges in California treat it as binding on their decisions; so too with the Federal Constitution, and so too with legislative enactments, administrative decisions and the like. That a rule of recognition exists, and that it has the particular content it does, depends entirely on officials converging on certain criteria of legal validity and on their treating such criteria as obligatory or binding—accepting them from an “internal point of view” as Hart famously said. That they converge on certain criteria is an empirical question, manifest in their decisions and sometimes the reasons given for them; that they treat such criteria as obligatory is manifest in their

language and their behavior: for example, in their willingness to criticize other judges who depart from those criteria, and in the language they use to justify their own conduct.

A wonderful example of Hart's point comes from the case of Chief Judge Roy Moore of the Alabama Supreme Court, who in 2003 refused to abide by a decision of the U.S. Court of Appeals for the 11th Circuit that the presence of a statue of the Ten Commandments in the Alabama Supreme Court building violated the Establishment Clause of the U.S. Constitution.³ There was no doubt that under the applicable rule of recognition, the 11th Circuit had authority over Judge Moore with regard to the constitutionality of the placement of that statue. And when Judge Moore defied the 11th Circuit's decision, the officials of the Alabama legal system made manifest their acceptance of this aspect of the rule of recognition from an internal point of view: they not only criticized Judge Moore's refusal to comply with the order, they convened the necessary procedures to remove him from office. (Moore was subsequently reelected, which, alas, says more about the Alabama electorate, than about the officials of the legal system, who acted appropriately.)

We may imagine a more fanciful example to illustrate Hart's view that where a rule of recognition exists, officials of the system accept that rule from an internal point of view, that is, they treat it as obligatory. Suppose Chief Justice Roberts comes to Hastings, and a student asks, "Justice Roberts, why are you and the other Justices always worried about whether laws are constitutional? I mean, who cares? Why not just make a sensible decision?" Once he gets past being surprised, the Chief Justice, we can be sure, would *not* give the following answer: "I'll tell you why we're always talking about the Constitution: being Chief Justice is a great job, it's got prestige, lifetime tenure, a great pension too. If I didn't treat the Constitution as a constraint on what we do, I'm worried I'd get impeached and have to give up this wonderful sinecure I have." Instead of averting to crass self-interested reasons like these for taking the Constitution seriously, the Chief Justice is far more likely to

³*Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003).

appeal to the professional oath of office he took as a Justice to uphold the Constitution, as well as to the moral and political virtues of our Constitutional system as he understands them. I want to be clear: I am quite sure those are the *actual* reasons the Chief Justice, like other justices and judges, take the constitutionality of statutes seriously. Where legal systems exist, officials of the system, including the judges, really do accept the criteria of legal validity, such as constitutionality, from an internal point of view.

But this now brings us back to the problem with which we started. Constitutionality is only a criterion of legal validity in the rule of recognition of the American legal system if judges generally treat it as such and accept it from an internal point of view. The difficulty is that, while all judges treat the constitutional document as legally binding, they differ wildly on how to ascertain the meaning of its provisions. Justice Scalia thinks the original public meaning of the provisions of the Constitution determines its requirements; Justice Thomas sometimes agrees with him, but no one else does.⁴ As a matter of the rule of recognition of American constitutional law, it is obviously false that the original public meaning of the Constitution is what is legally binding on the courts⁵: some judges treat the plain meaning as binding, some appeal to the structure of the Constitution, and almost all defer to past judicial interpretations of constitutional provisions (whether based on original meaning or not) as binding, an example of what my colleague David Strauss calls our “constitutional common law.”⁶ Since federal judges do not converge on a single way of fixing constitutional meaning, it follows, on the

⁴Other judges will avert to originalist considerations, but do not regard them as decisive the way Justice Scalia purports to do.

⁵*Cf.* Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107 (2008).

⁶See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). In the lower federal courts, something like the “common law constitutionalism” approach dominates, due to convergence among officials on the binding force of Supreme Court decisions. But even there there remains plenty of room for the exercise of quasi-legislative powers.

positivist view, that in large parts of so-called “constitutional law” there really is no law because there are no criteria of legal validity generally accepted and applied by judges.⁷

Not all areas of what we call constitutional law are so unsettled—unanimous decisions by the Supreme Court on many constitutional issues are rather good evidence in support of that point. But even divided decisions can turn out to be. Let us recall the 1989 case *Texas v. Johnson*,⁸ in which the U.S. Supreme Court decided that a law prohibiting desecration of the flag violated the First Amendment, a decision in which Justices Scalia and Kennedy joined the majority opinion by Justice Brennan. Twenty-five years later, the case stands as good law: the government cannot, constitutionally, punish burning the American flag. Lower court judges understand that a Supreme Court decision like *Texas v. Johnson* binds them to invalidate any blanket ban on flag-burning, and thus the issue has hardly arisen since.

Then, however, we have an issue like whether the Second Amendment protects an individual right to own guns. For most of the twentieth-century, it was settled law that it does not; after all the Amendment reads, “A well-regulated militia being necessary to the security of a free State, the right of the People to keep and bear arms shall not be infringed.” One natural reading, one that dominated for most of our constitutional history, was that this protected the right of states to arm their militias. That the Amendment really protects an individual right to bear arms was famously deemed a “fraud on the American public” by the late Chief Justice Warren Burger, a Republican appointee.⁹ The “fraud” is now the law of the land, thanks to the decision in 2008 by the super-legislature in *District of Columbia v. Heller*, which bypassed precedent and received wisdom in favor of the original public meaning as read by Justice Scalia in the majority and disputed at length by Justice Stevens in the dissent.¹⁰ The historical

⁷This extends beyond constitutional law in some measure in the U.S. See the discussion in Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1224–32 (2009).

⁸*Texas v. Johnson*, 491 U.S. 397 (1989).

⁹*The MacNeil/Lehrer NewsHour: First Freedoms* (PBS television broadcast Dec. 16, 1991).

¹⁰*District of Columbia v. Heller*, 554 U.S. 570 (2008).

evidence is obviously mixed, and my colleague Judge Richard Posner's verdict on the decision, in a well-known *New Republic* article at the time,¹¹ still seems apt:

Lawyers are advocates for their clients, and judges are advocates for whichever side of the case they have decided to vote for. The judge sends his law clerks scurrying to the library and to the Web for bits and pieces of historical documentation. When the clerks are the numerous and able clerks of Supreme Court justices, enjoying the assistance of the capable staffs of the Supreme Court library and the Library of Congress, and when dozens and sometimes hundreds of amicus curiae briefs have been filed, many bulked out with the fruits of their authors' own law-office historiography, it is a simple matter, especially for a skillful rhetorician such as Scalia, to write a plausible historical defense of his position.

But it was not so simple in *Heller*, and Scalia and his staff labored mightily to produce a long opinion (the majority opinion is almost 25,000 words long) that would convince, or perhaps just overwhelm, the doubters. The range of historical references in the majority opinion is breathtaking, but it is not evidence of disinterested historical inquiry. It is evidence of the ability of well-staffed courts to produce snow jobs.

....

... For more than two centuries, the "right" to private possession of guns, supposedly created by the Second Amendment, had lain dormant. Constitutional rights often lie dormant, spectral subjects of theoretical speculation, until some change in the social environment creates a demand for their vivification and enforcement. But nothing has changed in the social environment to justify giving the Second Amendment a new life discontinuous with its old one: a

¹¹Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC (Aug. 27, 2008), <http://www.newrepublic.com/article/books/defense-looseness>.

new wine in a decidedly old wineskin. There is no greater urgency about allowing people to possess guns for self-defense or defense of property today than there was thirty years ago, when the prevalence of violent crime was greater, or for that matter one hundred years ago. Only the membership of the Supreme Court has changed.

If constitutional decisions are to be determined by the balance between liberals and conservatives on the Supreme Court, the fig-leaving that we find in *Heller*--the historicizing glaze on personal values and policy preferences--will continue to be irresistibly tempting to the justices, with their large and tireless staffs and their commitment to a mystique of "objective" interpretation. There is no way to purge political principles from constitutional decision-making, but they do not have to be liberal or conservative principles. A preference for judicial modesty--for less interference by the Supreme Court with the other branches of government--cannot be derived by some logical process from constitutional text or history. It would have to be imposed. It would be a discretionary choice by the justices. But judging from *Heller*, it would be a wise choice. It would go some distance toward de-politicizing the Supreme Court. It would lower the temperature of judicial confirmation hearings, widen the field of selection of justices, and enable the Supreme Court to attend to the many important non-constitutional issues that it is inclined to neglect.

A preference for judicial modesty is, however, also a political choice,¹² as Judge Posner recognizes, one that will serve to immunize from judicial review whatever the prevailing ideology of the other branches of the government is at that time. So the real question is why, when we confirm Justices to the super-

¹²There is ambiguity in the notion of a "political" choice, though the basic idea is that it is a choice motivated by adherence to a norm that has no legal status but instead reflects commitments for how the polity as a whole should be organized—such norms may run the gamut from partisanship for the narrow agenda of a particular party to a vision of the just society.

legislature, why do we not have a public discussion of their political principles? That is the question Judge Posner’s apt critique raises.

The Supreme Court’s role as super-legislature emerges in the recent voting rights case, *Shelby County v. Holder* (2013).¹³ Here a bare majority of the super-legislature invalidated Section 4 of the Voting Rights Act that the actual legislature, that is, the United States Congress, had evaluated and extended in 2006.¹⁴ The *Shelby* decision did so based on the finding of five members of the super-legislature that Section 4—which specified the formula for determining which states with a history of voting discrimination required federal pre-approval for election law changes—is no longer necessary, contrary to the view, apparently, of the actual legislature seven years earlier. In an opinion by Chief Justice Roberts, the five super-legislators explained that while, “Congress compiled thousands of pages of evidence before reauthorizing the Voting Rights Act,” these did not justify the original 1965 formula for pre-clearance.¹⁵ Why not? According to Chief Justice Roberts, there was “no logical relation” to the Section 4 requirements, that these requirements are “irrational” given the record, indeed, “played no role” in the pre-clearance formulas.¹⁶ This is all just rhetorical flourish, of course, for a different legislative judgment: it is obviously not irrational to rectify a wrong with a possibly overinclusive measure when the wrong is sufficiently serious that one wants to secure its elimination. As Justice Ginsburg, for the dissenters, observed:

Congress determined, based on a voluminous record, that the scourge of discrimination was not yet extirpated. The question this case presents is who decides whether, as currently operative, [pre-clearance in accordance with the Section 4 formula] remains justifiable, this Court, or a Congress charged with the obligation to enforce the post-Civil War Amendments “by

¹³*Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013).

¹⁴Note that the fundamental question in *Shelby County* was a constitutional, not statutory one: namely, was Section 4 a constitutional (i.e., rational) exercise of Congressional power to enforce the Reconstruction Amendments, i.e., the 14th and 15th Amendments, to the U.S. Constitution?

¹⁵*Shelby County*, 133 S. Ct. at 2629.

¹⁶*Id.* at 2629, 2630–31.

appropriate legislation.” With overwhelming support in both Houses, Congress concluded that, for two prime reasons, [the preclearance formula] should continue in force, unabated. First, continuance would facilitate completion of the impressive gains thus far made; and second, continuance would guard against backsliding. Those assessments were well within Congress’ province to make and should elicit this Court’s unstinting approbation.¹⁷

Alas, a majority of the super-legislature did not offer approbation to the actual legislature’s assessment, instead substituting its judgment on the policy merits for Congress’s. If *Shelby County* were anomalous, this might not be notable, but the point is that it is fairly typical of what happens in the public law domain.

The problem is exacerbated, of course, because the U.S. Supreme Court *selects* its docket—it picks the cases it wants to hear, and unsurprisingly it picks the cases where the federal circuits conflict or where the law is up for grabs, up for grabs in precisely the sense that the rule of recognition does not clearly settle what should be done. Of course, the Supreme Court, having claimed for itself—without any basis in the constitutional text—final authority to adjudicate constitutional questions two centuries ago in *Marbury*¹⁸ (one of the more successful revisions of the American rule of recognition in our history) sometimes takes cases that might appear to be settled, a clear indication that the Court intends to exercise its super-legislative authority. Recall *New York v. United States* from 1992,¹⁹ one of the early cases²⁰ that signalled the intent of some members of the super-legislature to redraw the boundaries of federal power after an earlier super-legislature appointed by President Franklin Roosevelt redrew them in the late 1930s and early 1940s to make the New Deal possible. *New York* concerned the Low-Level Radioactive Waste Policy Amendments Act of 1985, which the State of New York now challenged as

¹⁷*Id.* at 2632–33.

¹⁸*Marbury v. Madison*, 5 U.S. 137 (1803). [Note on scholarly controversy about this—cf. Hamilton, Federalist 78, see also articles by Maiva Marcus, David Currie]

¹⁹*New York v. United States*, 505 U.S. 144 (1992).

²⁰Earlier, see *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

betraying federalism values by violating state autonomy. Under what one might have thought the controlling precedent, *Garcia v. San Antonio Metropolitan Transportation Authority*²¹ just seven years earlier, this should have been an “easy” case, i.e., one in which the law clearly dictated that New York lose. *Garcia*, which concerned federal regulations about wages and working hours, held (or so it seemed at the time!) that the only protection for federalism values, like state autonomy, came from the political process itself, that is, from the fact that the states were all represented in Congress; only if there were a breakdown in the political process, so the *Garcia* court suggested, would the U.S. Supreme Court intervene. *New York v. United States* was a clear case from the standpoint of *Garcia*: the Federal Radioactive Waste Management Act had been enacted by Congress *after being drafted by the various states*: the states, in effect, wanted Congress to bind them to the agreement they had reached among themselves. This would seem to be a paradigmatic case of federalism values in action: autonomous states strike a bargain about how to dispose of their radioactive waste, and then ask Congress to enforce the bargain.

Once the super-legislature known as the Supreme Court granted cert in the matter everyone was on notice, of course, that the super-legislature planned to act. And act it did: in its majority opinion, Justice O’Connor took a page from the great American Legal Realist Karl Llewellyn’s explanation of the malleability of precedent from his 1930 book *The Bramble Bush*.²² In Llewellyn’s famous rendering, appellate courts approach precedents in one of two ways: they read “unwelcome” precedents strictly, that is, they characterize their holding in a way that is highly specific to the facts of the earlier case in order to distinguish it from the case currently before the court. In Llewellyn’s obviously facetious example, a strict reading of an earlier court’s holding might be, “This rule holds only of redheaded Walpoles in pale magenta Buick cars.”²³ By contrast, a “loose” reading of a precedent abstracts away

²¹*Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

²²KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 68–71 (11th prt. 2008).

²³*Id.* at 68.

from the particular facts of the case in favor of a generic rule of law that the court would like to treat as binding in the present instance. Not every “strict” or “loose” reading is going to be plausible, but Llewellyn, as the smart and experienced lawyer he was, is plainly correct that the doctrine of precedent affords courts enough latitude in construing the holdings of earlier cases to make precedent a feeble constraint on present decision in many cases. And that is precisely what happened in *New York v. United States*.

Justice O’Connor, in the majority opinion, faced an obvious problem as I mentioned: under *Garcia*, the Federal Radioactive Waste Act looked like a clear case of the political process operating to protect the interests of the states—after all, the states had drafted the Act in negotiations with each other, and then asked Congress to enact it. Presumably O’Connor lacked the votes to overrule *Garcia*—a move that would have been unseemly, in any case, given that *Garcia* had overruled another case, *National League of Cities*,²⁴ from less than a decade before!—and so, taking a page from Llewellyn, she set out to *distinguish Garcia* by reading it strictly. According to Justice O’Connor’s majority opinion,²⁵ the rule in *Garcia*—the rule that the only protection for federalism values comes from the political process itself—applies *only* in cases where the federal regulation applies to *both* public and private entities, as was true of the wage and hour regulations at issue in *Garcia*. *Garcia* itself did not make an issue out of this, but now, seven years later in *New York*, Justice O’Connor did: for the Federal Radioactive Waste Management Act applied only to public entities, namely states, and so according to Justice O’Connor presented a different issue than in *Garcia*. With *Garcia* distinguished, Justice O’Connor proceeded into an historical analysis and ultimately invalidated a portion of the Act. Those details do not matter for our purposes.

²⁴*Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976).

²⁵*New York v. United States*, 505 U.S. 144, 149–88 (1992).

The dissenting opinion by Justice White²⁶ also took a page from Llewellyn: he effectively accused the majority of distinguishing *Garcia* on the basis of factual differences that did not make a difference—in effect, Justice White complained, the majority opinion said the rule in *Garcia* applies only to “redheaded Walpoles in pale magenta Buick cars.”²⁷ From Justice White’s perspective, the difference between a federal regulation that reached public and private entities as opposed to only public ones was irrelevant, *New York v. United States* was an easy case, and *Garcia* should have controlled the result.

I want to be clear that I do not think either majority or dissent was right “as a matter of law” in this case. Justice O’Connor did a poor job, to be sure, of explaining why the factual difference between *Garcia* and *New York* actually mattered, but an explanation is not hard to come by: surely it is not crazy to think state autonomy might be more at risk when a federal regulation *only applies to the states*, as opposed to regulating public and private actors equally. At the same time, Justice White’s view was equally plausible as a matter of law: the *Garcia* rule emphasized the importance of the political process as a safeguard for state autonomy, and the underlying facts in *New York* seemed to indicate a political process functioning well, indeed, driven by the states themselves, until the state of New York had some buyer’s remorse.

If the preceding is correct, then we should ask what really happened in *New York v. United States*? *New York*, as students of federalism know, was near the beginning of a series of Supreme Court cases in which, for the first time since the triumph of the New Deal, the Court began placing some limits on the exercise of federal power. President Reagan, who appointed Justice O’Connor a decade earlier, ran partly on this issue, the issue of state autonomy from federal overreach. And so for Justice O’Connor, a new-fangled conservative in the Reagan mold, *New York* presented an opportunity to state loud and clear that there really are limits on federal power. By contrast, for Justice White, an old-

²⁶*Id.* at 188–211.

²⁷LLEWELLYN, *supra* note 22, at 68.

fangled conservative, appointed by President Kennedy in the early 1960s, the New Deal revolution had settled all the questions about the scope of federal power; Justice White was a law-and-order conservative, skeptical of the expanding rights of criminal defendants, as well as of abortion rights, but he was fully accepting of the transformation of the constitutional system effected by the New Deal. The federal legislature voted to bind the states to a proposal for disposing radioactive waste that they themselves had drafted; in *New York v. United States*, the super-legislature known as the Supreme Court voted to overturn part of that plan. In doing so, they did not act as the law requires: only a naif could believe that. Instead, they exercised moral and political judgment and acted accordingly.

Let us now fast forward to the present, last term's decision in *Burwell v. Hobby Lobby* (2014).²⁸ In *Hobby Lobby*, the Supreme Court upheld a challenge by closely held corporations to a requirement of the Affordable Care Act—more precisely, the mandate imposed by the Department of Health & Human Services under that Act—that employers (of a certain size) pay for employee health insurance that covers, among other things, four kinds of (allegedly) post-conception contraceptive drugs and devices. The challenge was based on the Religious Freedom Restoration Act (RFRA), a 1993 law which attempted to restore the constitutional protections for “free exercise” of religion that had existed prior to Justice Scalia's majority opinion in *Employment Division v. Smith*.²⁹ That 1990 decision held that the state need not grant religious exemptions for neutral laws of general applicability—neutral in the sense that their purpose was not (facially or otherwise) to substantially burden a particular religious faith. Thus, under *Smith*, the federal government did not need to find a less burdensome alternative to a law that imposed incidental but substantial burdens on free exercise of religion.

The *Hobby Lobby* decision found, plausibly, that the owners of the closely held corporations challenging the mandate genuinely believed that life begins at conception, so that they genuinely

²⁸*Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

²⁹*Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990). [BL add discussion of RFRA history, now applies only to feds]

believed that post-conception contraception was akin to murder.³⁰ I want to emphasize that three aspects of the *Hobby Lobby* decision seem to me fairly banal, given the existence of RFRA: first, that the free exercise of religion of a closely held corporation is not meaningfully distinguishable from the free exercise of religion by the individuals who closely own the corporation (in other words, closely held corporations are “persons” for purposes of RFRA); second, that since the federal government had already provided an opt-out provision from the mandate for non-profit entities with religious objections (like the University of Notre Dame), one that did not shift costs to the employees seeking contraceptive coverage, then it was clear that there were regulatory alternatives available to the federal government to insure that contraception was available to female employees that did not impose a substantial burden on religious belief; and third, that under our constitutional regime of religious liberty, courts must take seriously someone’s religious belief that life begins at conception. I, myself, disagree with this latter aspect of our constitutional system, just as I also think RFRA is a bad law,³¹ but that is not at issue in my doubts about *Hobby Lobby*. My doubts lie elsewhere.

The crucial legal question presented in *Hobby Lobby*, granting the points I have just conceded, is whether requiring a closely held corporation to pay for health insurance that an employee *might* use to access medical services of which her employer disapproves constitutes a “substantial burden” on the free exercise of the employer’s religion in a society which is not a theocracy, that is, in a society in which, for example, employees need not subscribe to the religion of their employers. The idea that it would constitute a substantial burden ought to have seemed preposterous on its face. Yet in the majority opinion of the super-legislature by Justice Alito, we are told that the belief of the owners of the closely held corporations that their paying for insurance which their employees could use to secure contraceptive services of which their employers disapprove “implicates a difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a

³⁰*Hobby Lobby*, 134 S. Ct. at 2764–65, 2766, 2775.

³¹See BRIAN LEITER, WHY TOLERATE RELIGION? (2013).

person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.”³² It is not for the courts, Justice Alito asserts, to tell “the plaintiffs that their beliefs are flawed.”³³ The job of the courts is only to determine whether the beliefs are sincere religious beliefs, which everyone, including me, grants that they are.

This sounds reasonable until one considers a scenario in which the religious plaintiffs profess the following putatively religious belief: “This law substantially burdens our free exercise of religion.” That looks rather like a legal conclusion masquerading as a religious belief, but now we need to ask how such a scenario is any different from the position of the challengers in *Hobby Lobby*? If you believe that paying for medical insurance that can be used by your employees to access medical procedures of which you disapprove violates your free exercise rights, that’s a legal question for the courts: the courts can grant that *you really believe this*, indeed, that you hold a particular philosophical or religious view about “the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another.” But calling it a “philosophical” or religious view does not change the fact that it states a legal conclusion, namely, that the law requiring you to pay for the medical insurance substantially burdens your religion.

In short, we can agree with Justice Alito that the Supreme Court has long held that it will not adjudicate whether religious beliefs are sensible, only whether they are *religious* and *sincerely held*. But that does not mean that the courts must defer to the religious person’s beliefs about whether the law substantially burdens their religion: that has to be a legal question for the courts, or the courts are out of business. The super-legislature should have acted like an actual court and found there was no “substantial burden” on *Hobby Lobby*.³⁴

³²*Hobby Lobby*, 134 S. Ct. at 2778.

³³*Id.*

³⁴Justice Ginsburg makes this point in dissent. *Id.* at 2798.

It is important to notice that the mistake in Justice Alito’s reasoning was, in fact, a *legal* mistake, not in the sense that he failed to recognize the relevant sources of law but in the sense that he failed to understand the conceptual or logical entailments from those sources. More precisely, Justice Alito failed to correctly distinguish the *legal* question whether a particular law actually imposes a “substantial burden” on religious exercise from the non-legal question that courts are not supposed to adjudicate, namely, whether claimant’s religious beliefs are reasonable. If it were really the case that courts must defer to claimant’s allegedly *religious beliefs about substantial burdens—that is, about whether their legal rights are violated*—then there is nothing for the courts to do. Since that is absurd, Justice Alito obviously made a serious mistake in his legal reasoning.

Even if the super-legislature’s mistake in *Hobby Lobby* was a *legal* mistake, it still calls attention again to the importance of moral and political judgment by the members of this super-legislature, since their moral and political values may explain their propensity to make certain kinds of mistakes. Remember that the Supreme Court, two hundred years ago in *Marbury v. Madison*, successfully claimed for itself the power to settle *constitutional* questions, meaning that the actual legislature cannot easily undo the mistakes that are motivated by the moral and political beliefs of the Justices—in this case, the desire of the conservative majority of the super-legislature to signal their fundamental sympathy with religious conservatives. To be sure, *Hobby Lobby* concerns RFRA, not the First Amendment, though RFRA was, in part, purporting to re-establish an earlier constitutional regime.³⁵ But it is a reasonable prediction that Congress will not revisit RFRA to undo the *Hobby Lobby* decision. Thus, even the plain legal mistakes of the super-legislature give us further reason to want to know the moral and political views of the Justices before they are appointed, since those views will illuminate precisely the domains in which they are likely to make errors.

³⁵[as *Hobby Lobby* court notes, RFRA perhaps go beyond it as well]

Alas, the only people who are led to believe that Supreme Court Justices are appointed based simply on their legal skill and knowledge are the American people, i.e., the electorate.³⁶ Every American President, from at least Roosevelt to Reagan to the present, understands that the U.S. Supreme Court often acts as a super-legislature, and therefore one had better try to appoint legislators, that is Justices, who share the moral and political views of the appointing President. Let me share an amusing, but revealing, story my colleague, Judge Richard Posner, told me, and which he has shared with many others so I am not betraying any secrets here. Posner was appointed to the U.S. Court of Appeals for the Seventh Circuit in 1981 when, as he has said to my jurisprudence class one year, people didn't realize Reagan was "stacking" the courts with "right-wingers like me." Those are Judge Posner's words, though as all lawyers know, he has proven to be far less of a right-winger than the current Republican Party might have hoped. In any case, Judge Posner's point was that the media did not pay much attention to Senate confirmation hearings then. Posner's hearing was presided over by Senator Strom Thurmond of South Carolina, even then (in the early 1980s) a nearly octogenarian segregationist trying to pass as a member of the modern world. Senator Thurmond, reading from his prepared script, asked, "Mr. Posner, if appointed to the Court, will you regard it as your obligation to apply the law as written rather than make new law?" Posner, being a smart lawyer and scholar, explained that the choice was a false one: appellate courts are repeatedly asked to decide cases in which the law is not settled—that is one reason the cases are litigated through the stage of appellate review, after all—and in those cases, the courts must provide authoritative resolution, essential to a civilized society. So, of course, appellate judges must sometimes make new law, since no legislature—as H.L.A. Hart observed a half-century ago—could

³⁶The public is not wholly ignorant, to be sure. A CBS News poll in 2012 found that three quarters of Americans believe that Supreme Court justices "sometimes let their personal or political views influence their decisions." See <http://www.pollingreport.com/court.htm>. The Public Religion Institute in 2013 found that 55% of those surveyed thought Supreme Court Justices were influenced by their own political views "a lot, while 32% thought they were influenced only "a little," and 8% "not at all." Despite these suspicions, when Supreme Court Justices are confirmed in public by the Senate, inquiry into their personal or political views is treated as off-limits. (Thanks to Mike Seidman for help on this topic.)

possibly anticipate all the problems that will arise. In other words, appellate judges must exercise moral and political judgment, an unavoidable part of their job. Senator Thurmond, already well into his dotage, did not respond to the actual answer, but moved on to the next question in his script. Now we come to the punchline of this curious story: when Judge Posner received the transcript of his confirmation hearing several weeks later, Senator Thurmond's initial question was correctly recorded, namely, "Mr. Posner, if appointed to the Court, will you regard it as your obligation to apply the law as written rather than make new law?" But instead of Posner's actual answer, the transcript read that Posner simply replied, "Yes."

Now this is America in 1981, not Stalinist Russia, yet a federal judicial nominee's *actual* answer to a silly question by a political hack was *erased* from the historical record in order to comport with the political agenda of a President—Ronald Reagan—who liked to claim that he only wanted to appoint judges who apply the law, rather than make the law. But Reagan and his advisors knew this was nonsense, just like Judge Posner: they knew that appellate judges must inevitably exercise moral and political judgment beyond the issues settled by the law in order to resolve the actual disputes that come before the appellate courts. How, in a democratic society, can such secrecy be justified?

In my view, it cannot. We should tell the truth to the electorate: law makers cannot anticipate all problems that will arise, but in a civilized society, we need courts to provide authoritative resolutions of disputes which are left unsettled by the existing sources of law. Courts play that role, and the "higher" the court, the more likely it is that court will be asked to exercise circumscribed moral and political judgment, akin to what we expect from honest legislators, assuming that term is not an oxymoron in America these days. Therefore, when such judges are to be appointed, the nominal representatives of the people should evaluate the quality of moral and political judgment the nominee would exercise. Will the nominee reflexively side with markets against state regulation, with majorities against minorities, with the religious against the non-religious, with color-blindness against sensitivity to

the pernicious role of race in society, with the police against criminal defendants, with the current ideological fixations of the Republican Party against the current ideological fixations of the Democratic Party? Is the nominee sensitive to injustice, to the powerless, to the losers in the political process, or does he or she side reflexively with those in power, with the status quo? These questions should be central to the confirmation process of members of the super-legislature—or rather, they should be central *in public* to that process, since they are obviously central to the actual nominators. They are also, to be sure, the subject of speculation, rumors and gossip, but that is not the same as making them central to the actual proceedings in which the Senate confirms a nominee. There are, certainly, many issues in which legal expertise is essential, but there is no shortage of candidates with the requisite expertise to parse technical points of law and it is rare indeed that a President puts forward a candidate for the super-legislature lacking that competence. What is not rare, unfortunately, is for Presidents to put forward candidates for the super-legislature whom they choose based on their moral and political views, but then fail to acknowledge that fact to the rest of the polity, indeed, to object when the Senate even asks about those views.

There is, one must acknowledge, a genuine worry about encouraging candor on these matters. The worry, simply put, is that it will embolden judges to overreach the legal limits *even more* than they already do. Perhaps so, but the status quo is that elected officials appoint super-legislators because of their moral and political views, but no one is permitted to discuss that fact in public. If, in fact, we had a public discussion of what all the insiders know—namely, that appellate judges at the highest levels *must* exercise moral and political judgment—then perhaps those judges who actually survive the process will be those whose moral and political judgments comport more closely with those of the polity at large?³⁷ A polity that might welcome a liberal one decade might not welcome her a decade later, and so that is

³⁷I assume, for the sake of argument here, that majority approval suffices to “legitimate” the moral and political views of the judges. For independent reasons, this strikes me as dubious, but that would require a separate argument.

yet another reason to abolish lifetime tenure for federal judges in favor of fixed term appointments, as other scholars have proposed.³⁸ But even before that happens, I do not see how in a democratic society where transparency in the exercise of public power (outside a select realm of areas, such as national security) is a fundamental value we can continue to tolerate the current charade of nominating lawyers to the United States Supreme Court without vetting, fully and in public, their moral and political views which will determine their decisions in a range of momentous constitutional matters, and sometimes not only there.

³⁸*See, e.g.*, REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006); Letter from Paul Carrington, Professor, Duke Univ. Sch. of Law, et al. to Vice President Joseph Biden et al. (Feb. 2009) (available at <http://www.scotusblog.com/2009/02/groups-proposals-for-supreme-court-reform>).

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