"TODAY'S SENATE CONFIRMATION BATTLES AND THE ROLE OF THE FEDERAL JUDICIARY"

Commencement Address
to the
Class of 2003

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of Lewis & Clark College
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By

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President Mooney, Dean Huffman, distinguished faculty and guests, graduates of the Class of 2003, your families and friends, it is an honor for me to be here today.

Honored though I am, it is nevertheless hard for me to believe, as I stand before you on this most joyous occasion, that it has been forty years since I sat where you are now sitting. While some of you may be able to visualize yourselves forty years hence, you must believe me when I tell you that, on my graduation day, I had no inkling that I would be where I am now. And, having just attended my fortieth law school reunion, I can assure you that some of my classmates were only too eager to remind me that they couldn't believe that I had become a federal judge, either.

Perhaps, among your graduating class there is a future federal judge or two. Serving the nation in such a capacity is a worthy ambition, to be sure. I fear, however, that many lawyers who would otherwise welcome such an opportunity may feel compelled to decline it when faced with the prospect of enduring what has become – at least at the appellate level – an increasingly acrimonious Senate confirmation process.

My own nomination was blessedly free of partisan strife. Early on the morning of August 8, 1986, the telephone rang at my home and my wife Maura answered. "It's for you," she shouted upstairs, where I was in the shower, adding, "I think it's the press." "Tell them I'll call back," I said. But the caller persisted, "the Pres-i-dent of

the United States is calling." Needless to say, I threw a towel around myself and picked up the bedroom phone to hear President Ronald Reagan himself graciously ask if *he* had *my* permission to sign some papers on his desk. Three days later, my nomination arrived in the Senate, which held a hearing less than a month after that, on September 10. The hearing lasted all of twenty minutes and two weeks later, on September 25, Senator Mark Hatfield called me at home to tell me that I had been unanimously confirmed.

My confirmation experience – all six weeks of it – contrasts sharply with that of my Ninth Circuit colleagues, Judges Richard Paez, Willy Fletcher, and Marsha Berzon, who endured protracted, years-long confirmation battles.[1] Similar confirmation ordeals are playing out as I speak.

[1/] Judge Paez was nominated in January 1996 and confirmed in March 2000. Judge Fletcher was nominated in April 1995 and confirmed in October 1998. Judge Berzon was nominated in January 1998 and confirmed in March 2000.

One wonders what the Founders would have thought of the increasing intensity with which both parties have waged their respective confirmation fights. After all, it was Alexander Hamilton who famously wrote, more than two centuries ago, in Federalist No. 78, that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."[2] If, as Hamilton believed, the courts were the "least dangerous" branch, then why the pitched battles over nominations to the supposedly un-dangerous courts?

The easy answer, of course, is that, while the federal courts may lack the power to "annoy or injure" "the political rights of the Constitution," they nevertheless have come to possess an uncanny knack for annoying large portions of the population. A recent example of this curious judicial tendency is my own court's controversial decision in *Newdow v. United States Congress*,[3] in which a bare majority of a three-judge panel declared unconstitutional the practice of reciting the Pledge of Allegiance in public schools.

Insulated as we are from direct popular influence – the Founders saw to that by

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[2/] The Federalist No. 78, at 465 (Clinton Rossiter ed., 1961).

[3/] 312 F.3d 772 (9th Cir. 2003).

bestowing life tenure and by preventing Congress from reducing judicial salaries – the people and their elected representatives have sought to exert what influence they can. The results have ranged from the symbolic – the "Impeach Earl Warren" bumper stickers of the 1960s come to mind – to the legislative: in the wake of the *Newdow* decision, for example, at least one congressman has threatened to introduce a bill to strip federal courts of jurisdiction over cases involving the Pledge.

But the primary means by which the political branches exert control over an otherwise insulated federal judiciary – especially during the last decade and a half – has been the confirmation process. Thus, the disputes over this or that nominee are not an end in themselves but rather a reflection of a larger trend: The seemingly ever-increasing centrality of federal courts in our divided system of government. Indeed, on issues such as abortion, assisted suicide, affirmative action, and church-state relations, the courts have become a focal point – perhaps *the* focal point – in the loosely defined national debate that goes by the now-tired label of "the culture wars."

The courts, to judge from the heated language in the hearing rooms of the Senate Judiciary Committee and in the pages of the nation's newspapers and magazines, are no longer the "least dangerous branch," but perhaps the most dangerous. As is often the case in such debates, the language, while overheated, nevertheless contains an element of truth. The federal courts *do* decide cases of great

social, political, and even moral significance. That this is so is an unavoidable byproduct of our tripartite system of governance. It is critical to note, however, that the power wielded by judges was meant, by its very nature, to be impersonal and strictly circumscribed. The federal judiciary, Hamilton noted in Federalist No. 78, "has no influence over 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 may truly be said to have neither FORCE nor WILL, but merely judgment."[4] That this original conception remained the norm for some time after the founding is evident in the writings of that most astute observer of America, Alexis de Tocqueville, who in the mid-1800s observed that "[t]he federal judges feel the relative weakness of the power in whose name they act, and they are more ready to give up a right to jurisdiction in cases where the law has given it to them than to claim one illegitimately."[5]

This emphasis on judgment and reserve, as opposed to force or will, is telling. For, the creation of the judicial branch, it is important to remember, was by no means a foregone conclusion. Indeed, the Framers vigorously debated the issue of where to locate the judicial power, with a not insignificant number of them advocating the

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[4/] The Federalist No. 78, at 469 (Alexander Hamilton (Clinton Rossiter ed., 1961) (emphasis in original).

[5/] Alexis de Tocqueville, Democracy in America 143 (J.P. Mayer ed. 1988)

British model, wherein the judicial power resides in Parliament – ultimately, in the House of Lords – rather than in an independent judiciary. The wisdom of reposing the judicial power in an independent judiciary here, of course, is manifest, especially in the context of a Founding generation that was deeply suspicious of political factions and the dangers they posed – mob rule foremost among them. As Hamilton noted:

> [T]here is still greater absurdity in subjecting the decisions of men, selected for their knowledge of the laws . . . to the revision and control of men who, for want of the same advantage, cannot but be deficient in that knowledge. The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and . . . so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice.[6]

The Constitution's erection of a third, independent judicial branch, then, presupposed – and indeed counted as a positive virtue – the insulation of that branch from "the pestilential breath of faction."

Try as they might, however, the Founders could not ensure total insulation of the judiciary from politics. That the confirmation process has always been shot through with political intrigue of one form or another cannot be gainsaid. An example from Oregon's own history proves the point.

The death of Chief Justice Salmon P. Chase in 1873 led President Ulysses S.

[6/] The Federalist No. 81, at 483-84 (Hamilton) (Clinton Rossiter ed. 1961).

Grant to nominate Roscoe Conkling of New York, who promptly turned the nomination down – historians tell us he had grander ambitions than to be Chief Justice of the United States. Grant's second option was his attorney general, George H. Williams, an Oregonian, indeed the only Oregonian ever nominated to the Supreme Court. Williams' nomination, however, ran into stiff political opposition.[7]

[7/] Paul A. Freund, *The Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1149-50 (1988)

As it turned out, Williams had fired a United States' Attorney for Oregon for no other reason, it seemed, than the prosecutor's zealous investigation of political fraud back here. This blot on Williams' nomination was followed soon after by the revelation that the Attorney General had used public funds to purchase for personal use a horse-drawn carriage, two horses, and the services of a footman. These were, as one commentator noted, "perquisites not enjoyed by senators."[8] The fate of Williams' nomination in the Senate was little aided by the fact that his wife apparently had been informing the wives of several senators that soon, as the wife of the Chief Justice, she would outrank them socially. Faced with imminent defeat, Williams withdrew his name from consideration. As a side note, I will tell you that, while George Williams largely has disappeared from the history books, he remains quite present to me – not because of any special affinity I feel for the man, mind you, but rather because his official portrait hangs in my chambers, on loan from the Oregon Historical Society.

While Williams' failed nomination does illustrate the influence of politics upon the courts, it is also a dramatic contrast to the confirmation battles of today. Williams, I think all can agree, was rejected on the basis of quite legitimate concerns about his character and judgment. My colleagues Judges Richard Paez, Willy Fletcher, and

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[8/] *Id.*

Marsha Berzon, however, were above reproach in the conduct of their personal and professional affairs, as are current nominees such as Miguel Estrada, Priscilla Owen, and Carolyn Kuhl. And yet, their nominations have languished for months and even years. On what basis?

The short answer, the one that leaps to the lips of partisans on both sides, is "politics." You will note, however, that I have taken pains to cite examples of nominees of both Democratic and Republican Presidents. Whatever one's political orientation, all sides agree on one point: that it is the other side that is "playing politics" with judicial nominations in an effort to exert control over the federal courts. But the politics that stand in the way of these would-be judges is, to my mind, qualitatively different from that which thwarted the nomination of Judge Williams in 1873 – and it is different in a way that threatens to undermine the design of our federal government envisioned by the framers and enshrined in the Constitution.

For, the politics that has come to dominate today's nomination process is a politics which aims, before the fact, to ascertain how a given nominee will decide a particular case – or to be more precise, a series of hot-button cases. In addition to presenting nominees with the Hobson's choice of defying a Senate committee or violating his or her duty not to decide a case until it is actually before him or her, I suggest this form of politics threatens to erode the delicate balance of power that

insulates federal judges from the political branches.

By demanding to know, in advance, how a particular nominee will rule in a given case, the political branches are exerting precisely the sort of direct control over the judiciary that Hamilton and the other Framers sought to avoid with the creation of a separate and distinct third branch. Indeed, there can be no better example of the "pestilential breath of faction" infecting the judiciary than the contemporary confirmation hearing. It is just this sort of questioning of judicial nominees that led Abraham Lincoln to declare: "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it."[9]

Indeed, the very notion of a public – let alone nationally televised – confirmation hearing is of fairly recent vintage. When fulfilling its constitutional duty to provide its advice and consent on presidential nominations, the Senate traditionally sat in closed executive session. Indeed, until 1929, the Senate's practice was to consider all nominees in closed sessions unless the debate was ordered opened by a two-thirds vote. Only in exceptional cases – as with the controversial nomination of Louis Brandeis in 1916 – was the required two-thirds majority achieved and the closed

[9/] *See* G. Boutwell, Reminiscences of Sixty Years 29 (1902), *as quoted in id.* at 1162.

session opened.

As for the appearance before the Senate of judicial nominees, the practice was unheard of until 1925, when Harlan Fiske Stone, a nominee to the *Supreme Court* – to say nothing of the court of appeals or the district court – voluntarily appeared before the Senate. Stone's appearance, one commentator noted, took place as a result of unusual procedural circumstances within the Senate: His nomination had been voted out of committee to the floor of the Senate only to be sent back to the Judiciary Committee after a vociferous objection was raised on the floor.[10]

The practice of *compelling* the personal appearance of a judicial nominee did not begin in earnest until 1939. This increased openness, Professor Paul Freund has noted, was accompanied by an increasing concern with "politics in the larger, Aristotelian sense – a perception that an individual's identity is conditioned by his or her associations, inclinations, and sympathies, concomitant with a heightened awareness of the Supreme Court's role in the social, economic, and political life of the

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[10/] Ronald D. Rotunda, *The Confirmation Process for Supreme Court Justices in the Modern Era*, 37 EMORY L.J. 559, 559-60 (1988).

nation."[11]

11/ *Freund* supra note 7 at 1157.

I cannot help but notice that the historical moment identified by Professor Freund as the genesis of the more intense, and more politicized public scrutiny of court nominees coincides roughly with the so-called *Lochner* Era, beginning in 1905 and continuing throughout the period when the Supreme Court invalidated several popular statutes at the core of President Franklin Roosevelt's New Deal. The Supreme Court of the 1930s earned the increased scrutiny it received – along with FDR's threat to pack the Court with jurists more sympathetic to his legislation – not solely because its decisions were "unpopular." Unpopular though they were, the Justices' holdings were principally criticized for being little more than the thinly veiled and bluntly expressed policy preferences of a group of "Angry Old Men." They were, in short, grounded in nothing the public or the political branches recognized as the customary reasoned basis for opinions of the nation's highest court: The most noteworthy constitutional basis the Justices provided for their actions was the vague notion of "substantive due process," a concept conspicuously applied in the now-infamous case of *Dred Scott v. Sandford*,[12] which pronounced the constitutional right of one human being to hold another as property.

Today, we once again find ourselves polarized by a series of decisions that have

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12/ 19 How. 393 (1857).

sprung forth from the revivified substantive due process jurisprudence bequeathed to us by the Warren and Burger Courts. "The central problem with this jurisprudence," the constitutional scholar and recently confirmed Tenth Circuit Judge Michael McConnell has written

> is that [it] cast[s] aside all of the traditional constraints on constitutional decision making. This approach place[s] into the hands of judges the power to turn their own views of good social policy into law without any credible basis in constitutional text, history, precedent, constitutional tradition, or contemporary democratic warrant."[13]

The willingness of some judges to locate new and hitherto unidentified constitutional rights has raised the stakes of the nomination game. While no President in recent memory has been so bold as to propose an outright court-packing scheme along the lines of Roosevelt's plan, the two parties have by turns attempted to carry out a piecemeal version of such a plan when the political stars of Senate and White House control have aligned. On the one side are those who feel that the judiciary has overstepped its bounds and is encroaching upon the traditional province of the political branches. On the other are those who, perhaps recognizing that they have achieved in the courts what may not have been so readily accomplished through political action,

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13/ *Symposium: Remembering and Advancing the Constitutional Vision of Justice William J. Brennan, Jr.*, 43 N.Y.L. SCH. L. REV. 41, 58 (1999) (Remarks of Michael McConnell).

want to ensure that their gains are not reversed. Regardless of one's party allegiances, let us recognize the basic assumption that underlies much of the debate: That is, that the courts are a proper place for what is essentially a political struggle.

I recognize that many of my colleagues on the bench firmly believe that, in adapting the Constitution to fit changing circumstances, they are accomplishing the true aim of that great charter. But, by endeavoring to adapt the Constitution, even those doing the adapting must admit that they do so according to some not-so-hard-and-fast criteria. In describing the judicial approach of Justice William Brennan, that greatest of the "living constitutionalists," one of my colleagues approvingly noted that this mode of judging requires one to "examine the nature of human life and the nature of human liberty and recognize that society evolves and changes."[14] There would be nothing wrong with this statement were it offered to describe the tasks facing, say, political philosophers or even legislators. But judges? I cannot help but wonder what makes me, or any of my life-appointed colleagues for that matter, better equipped to determine "the nature of human life" or "the nature of human liberty" than the elected representatives of the people or, indeed, the people themselves.

Again, I do not question the motives of those who adhere to the belief in a

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14/ *Id.* at 67 (Remarks of Judge Stephen Reinhardt).

"living" and ever changeable Constitution – their belief in the rectitude of such an approach is genuine. Indeed, as a judge, I must say that I find their view damnably enticing. My job would be infinitely easier if the Constitution actually contained all the things I thought – or rather, wished – it ought to contain; I would never have to render a decision with whose result I did not personally agree. Nevertheless, I am not persuaded that it is sound judicial practice to go about creating new constitutional rights—even if one's intentions in doing so are perfectly pure.

As no less a figure than Judge Learned Hand once observed, "[f]or myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs."[15] In short, the federal judiciary best fulfills its role within the American constitutional framework not when it tries to do it all, but when it acts within the confines of its prescribed role. This involves leaving the task of legislating to Congress and State and local legislatures, and leaving the task of constitution-making to the amending procedures established by Article V.

Of course, while I believe in my approach to judging – tethered as it is to the

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[15/] Learned Hand, The Bill of Rights 73 (The Oliver Wendell Holmes Lectures, 1958)

text of the Constitution and the history and tradition that informed its drafting and ratification – I am quite sure that those of my colleagues who profess a belief in the "living constitution" are every bit as convinced of the error of my ways as I am of theirs. I am equally confident, however, that their approach raises two problems that a more limited conception of judging does not: One near-term, the other long-term.

First, as I have suggested here today, the judicial branch as a whole pays a price in the near-term for this kind of judging – and that price is paid out from the store of institutional independence and credibility that the judiciary builds up over the years, but can squander only too quickly. For, as a recent and warmly received visitor to this campus, Justice Antonin Scalia, has so forcefully put it:

> As long as [the Supreme Court] thought (and the people thought) that we justices were doing essentially lawyers' work up here – reading text and discerning our society's traditional understanding of that text – the public pretty much left us alone. . . . But if in reality our process of constitutional adjudication consists primarily of making *value judgments* . . . [and] [i]f, indeed, the "liberties protected by the Constitution are . . . undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*.[16]

16/ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 1000-01 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis in original).

There is, of course, nothing wrong with the people voicing their discontent with or approval of this or that decision of the Supreme Court or any other federal court. It is their sacred right protected by the First Amendment. My point is that, once they are convinced that the Supreme Court and other federal courts are deciding cases in a fashion more akin to policymaking than strictly legal decision-making, the people will demand the right not just to protest, but also the right to influence and even to control those making the decisions: the judges themselves. The people, in short, will allow a judge to be independent only for as long as they perceive him or her as truly neutral—forsaking decisions based upon one's own view of what the constitution *ought* to be.

So it is, that we now have the sort of confirmation battles we do, in which each Senator seems not so much to be offering his or her "advice and consent," but rather ensuring that the nominee will support or at least not oppose a particular slate of rights. Senators seem no longer to value impartiality, judgment, and lawyerly acumen above all else – no, the touchstone has become whether a particular nominee shares the senator's view as to how the constitution ought to evolve (or not evolve) over time.

Some may say that "the confirmation mess," as Prof. Stephen Carter of Yale has called it, is a small price to pay for the expansion of constitutional rights we have witnessed over the last four decades. If preserving these new constitutional safeguards and inventing still newer ones comes at the expense of some partisan bickering in the

Senate, the argument goes, then so be it. But such an argument overlooks the second, and more long-term consequence of "living constitutionalism" – one that, over time, will inevitably grow out of the first. For, if the Constitution truly is an ever-changing document, none of the rights we judges manage to locate within its textual core or its more ethereal penumbras today can ever truly be said to be free from encroachment or indeed, even eradication tomorrow. This is so regardless of how fundamental a prior Supreme Court decision may have deemed that right to be. By contending that the Constitution can and should be adapted as circumstances require, living constitutionalists cannot ensure that it always will be adapted in ways they find salutary. The mere fact that the living constitutionalists of recent memory devoted themselves to an *expansion* of rights offers no guarantee that the next generation of living constitutionalists – similarly unconstrained by the inconveniences of constitutional text and history – will be favorably disposed to maintaining such an expansion of rights. And while the doctrine of stare decisis – which requires courts to adhere to their earlier holdings, or at least not overrule them lightly – may serve to check judicial overzealousness, history has shown that where courts consider themselves free to adapt the Constitution, they often consider themselves similarly freed from the constraints of their earlier holdings.

In short, to contend that the Constitution is an eminently mutable document is, in effect, to concede at least the possibility that the judges of tomorrow may adapt the living Constitution in a manner contrary to the very principles exalted by the judges of today. Such a possibility, it seems to me, renders the central fact of our nation's founding – namely, the promulgation of a *written* document designed to bind the will of future majorities – a mere afterthought, if not a nullity. In so doing, it threatens to undermine the long-term health of the unique polity established by that great charter.

I began this address by noting the increasingly acrimonious confirmation process faced by nominees to the federal bench. And while it is normally incumbent upon those who point out problems to offer solutions, I am afraid that – when it comes to this problem – I am ill-suited to propose much beyond an adherence to the principles of judicial restraint I have advocated here today. And while I am not so naive as to believe that I can persuade all my colleagues on the federal bench of the correctness of my views concerning the proper role of the federal judge, I nevertheless hope that I have demonstrated that the ongoing debate over that role is vital to our well-being as a country.

I also hope that, in so doing, I have shown that this debate has implications for you, the graduating class of 2003, not just as practicing lawyers but also as citizens.

You will quickly learn, if you have not done so already, that – having attended and now graduated from law school – others will look to you to explain to them the often inscrutable and even frustrating workings of our legal system. It is a structure that has stood the test of time, in part because – at least at the federal level – the Founding generation saw to it that power would be dispersed and certain enumerated rights protected against encroachment forever. When you pass the bar exam – and you *will* pass the bar exam – you will eventually be asked to raise your right hand and to swear an oath to uphold the Constitution and laws of the United States and the state in which you practice. I urge you to take that oath seriously. For while I have made clear this morning my belief that the Constitution is not a "living" and mutable document, that does not mean that I do not think it an *enduring* one. For it is surely that. But, the Constitution will continue to endure only if you – the next generation of lawyers and, yes, judges – live up to the oath you will soon take.

Congratulations on your graduation.