Libertarians want us to place an unwarranted faith in judges to protect "unenumerated rights." This is a utopian recipe for disaster.

The Libertarian Constitutional Fantasy

Mark Pulliam

Debates regarding the role of the courts used to be waged primarily between conservatives, who were opposed to "judicial activism," and liberals, who contended that the U.S. Constitution was a "living" document susceptible of a flexible interpretation. In recent years, however, libertarian scholars such as Georgetown Law professor Randy Barnett have altered the course of the debate by arguing—with some ingenuity—that the Constitution contains both enumerated and unenumerated (i.e., unwritten) rights, which federal courts have the obligation to enforce against both the federal and state governments. Barnett, and like-minded libertarians, claim that laws should enjoy no presumption of constitutionality, and the government should have the burden of justifying all challenged laws as necessary and appropriate.

This notion of "judicial engagement" purports to be an originalist theory, meaning that it is supposedly consistent with the original public meaning of the Constitution. I strongly disagree. The theory of judicial engagement is unsound as a matter of history and contrary to the original understanding of the framers. Moreover, it is flawed in theory and practically unworkable. Critics have accused judicial

Mark Pulliam is a contributing editor at the *Library of Law and Liberty*. He writes from Austin, Texas.

engagement of being an invitation for libertarian judicial activism, but given the overwhelmingly liberal orientation of the legal academy, the organized bar, and the federal courts, the theory will likely just encourage more mischief by progressive judges seeking to impose their personal predilections on the polity—continuing (or accelerating) a trend that began in the 1960s with the activism of the Warren Court.

The libertarian theory of constitutional law is clever and undoubtedly well-intentioned. The theory of judicial engagement posits that all nonharmful conduct is a protected liberty, and these individual "rights" are safeguarded from "majoritarian" interference. The real problem with the courts, proponents insist, has been judicial passivity, even abdication, especially since the New Deal. The government has grown, they believe, because courts have not held the Congress and state legislatures in check. All we need to tame the Leviathan is "better judging." Enter "judicial engagement," which sounds innocuous but actually reorders the way our government would operate in fundamental—even radical—ways.

By severely constraining the states' police power, and presuming all laws to be unconstitutional, the libertarian theory both centralizes decision-making in the national government (i.e., the federal courts) at the expense of the states and confers enormous power on the least democratically accountable branch (life-tenured, unelected judges). Conservative legal scholar Ed Whelan has called this theory "a fantasy libertarian constitution," and it is. But worse than that, it is a dangerous, utopian fantasy—based on a theoretical sleight-of-hand—that ignores the premises of the Constitution, dramatically weakens the states as political entities, and disregards human nature by presuming wisdom and honesty on the part of judges.

Premises

Owing in large part to the tenacity of the late Justice Antonin Scalia, originalism has become the dominant force in constitutional theory on the right. Originalism requires that the Constitution be interpreted according to its original public meaning. The Constitution is a text. Judges should try to ascertain the meaning of that text, which is binding on succeeding generations as a social compact. Judges serve a role different from that of legislators. This is why the framers created a Constitution with separate powers for the legislative (Article I), executive (Article II), and judicial (Article III) branches. All legislative powers were vested in Congress, the executive powers were vested in the president, and—in the shortest of the three articles—the judicial power of the United States was vested in a supreme court (details unspecified) and "in such inferior courts as the Congress *may* from time to time ordain and establish."

Some fundamental conclusions are apparent from reading the Constitution and its accompanying commentary, the *Federalist Papers*—for example, none of the branches is "in charge" of the other branches. This is because the framers deliberately separated the powers of each branch and created checks and balances among them. The president can veto laws passed by the Congress. The "advice and consent" of the Senate is required for certain presidential actions. Federal judges serve for life and cannot have their compensation reduced. And so forth. The framers did not create, in any of the branches, a Monarch, a Philosopher-King, Platonic Guardians, or Delphic Oracles.

That is because the framers viewed the best protection of liberty to be a republican form of government—filtered self-rule in which the power of "faction" and passions of unbridled democracy would be tempered by a bicameral legislature with different terms,


We the People
of the Un
insure domestic Tranquility, provide for the common defence, prom
and our Posterity, do ordain and establish this Constitution for the
Article. 1.
Section. 1. All legislative Powers herein granted shall be vested in
of Representatives.
Section. 2. The House of Representatives shall be composed of Mem
in each State shall have Qualifications requisite for Electors of the most numer
No Person shall be a Representative who shall not have attained

The Constitution created a federal government with limited and enumerated powers for a reason

equal representation of states in the Senate (whose members were originally selected by the state legislatures), and limited federal powers delegated by the sovereign states. In *Federalist* No. 10, James Madison explained that the republican form of government is the best antidote to the "dangerous vice" of faction: "In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government."

The Constitution created a federal government with limited and enumerated powers, but it did not diminish the power of the states. Indeed, Article IV, section 4 of the Constitution guarantees "to every state in this union a republican form of government." The Bill of Rights was added to the Constitution expressly to assuage fears that the federal government would have too much power over the states.

The framers did not disdain self-government; they insisted on it. They feared the power of "faction" but mitigated the dangers of democracy by diffusing it, not eliminating it. The framers were not opposed to popular government; they regarded accountability to the voters as essential to the maintenance of freedom and the avoidance of tyranny. The "consent of the governed" was a familiar theme in *The Federalist Papers.* Madison talks about the importance of "republican principles" in *Federalist* No. 39: no other form of government, he stated, "would be reconcilable with the genius of the people of America; [or] with the fundamental principles of the Revolution." What did the framers believe to be the "distinctive characters of the republican form"? In *Federalist* No. 39, Madison cites several "essential" features: the government must derive "all its powers directly or indirectly from the great body of the people"; and government officials must be accountable to the voters by holding their offices "for a limited period."

The framers were not libertarians; they were realists about human nature and deeply distrustful of it. What they feared most was the concentration of power in a single government official or branch of government. In *Federalist* No. 51, Madison explained the importance of, and rationale for, the republican form of government:

> It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? *If men were angels, no government would*

> *be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.* A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions [emphasis added].

Modern-day libertarians who disdain "majoritarianism" must accept that the framers felt otherwise. In *Federalist* No. 51, Madison states that "it is not possible to give each department [of government] an equal power of self-defense. In republican government, *the legislative authority necessarily predominates*" [emphasis added]. Thus, it is not surprising that the most critical federal powers—to tax, to declare war, to impeach, to create "inferior" federal courts, to regulate the jurisdiction of the judicial branch, and to select the president in the event of an Electoral College deadlock—were assigned to Congress.

The framers were realistic enough to recognize that the political consensus of their era might change and that circumstances in the future might require that the Constitution, as written, be modified. To deal with this, they provided a mechanism for the people, through their elected representatives, to amend the Constitution. Article V was their version of "the living Constitution," not inventive judges.

Natural law

"Unenumerated rights" are the Holy Grail of libertarian constitutional theory. Without them, the Constitution is just another text, and is reduced to the status of "positive law" defined by its written terms. Libertarians sometimes view this as "amoral," "relativistic," or "nihilistic," but texts are agnostic. Justice Antonin Scalia described the Constitution as "a practical and pragmatic charter of government." Libertarian theorists discover the "unenumerated rights" thought to inhabit the Constitution in the notion of "natural law" or "natural rights" that was a common thread in eighteenth-century political philosophy and jurisprudence.

To libertarians, "natural law" serves the same role as the open-ended "penumbras, formed by emanations" that Justice William O. Douglas used to recognize a constitutional right to "marital privacy" in *Griswold v. Connecticut* and the "mystery passage" Justice Anthony Kennedy used in *Planned Parenthood v. Casey* to extend the holding of *Roe v. Wade* to ban any restrictions that placed an "undue burden" on abortion access. In short, it is an artifice to allow activist judges to ignore the text of the Constitution and make rulings based on their personal policy preferences. Most originalists scoff at the search for "penumbras" and Justice Kennedy's navel-gazing that masquerades as constitutional law, but resort to "natural law" is just as subjective, and therefore equally prone to abuse.

True, the Declaration of Independence explicitly refers to natural rights. But the Declaration is not the same as the Constitution. The Declaration was a proclamation justifying secession, not a social compact or a governing document. The Declaration was never ratified by the states. And even the Declaration acknowledges that men institute governments "to secure these rights"—and the Founding Fathers did. The legitimacy of such governments derives from the "consent of the governed." The colonies declared themselves independent from Great Britain because of the tyrannical abuses of King George III, not just "taxation

without representation" but also denying the colonists the ability to pass laws they desired. To the colonists, a fundamental aspect of their grievances lay in the denial of popular sovereignty—the right of self-rule: what libertarians sometimes disparage as "majoritarianism."

So, following the Declaration of Independence, the colonies, now organized as sovereign states, with separate state constitutions, entered into the ineffective Articles of Confederation, approved by the Continental Congress in 1777 and ratified in 1781. And when the Articles failed as a national charter, the states went back to the drawing board and—more than a decade after the Declaration—adopted the Constitution at the convention held in Philadelphia in 1787. (It is often overlooked that the Articles of Confederation lacked a judicial branch altogether.) The Constitution—loaded with compromises—was eventually ratified by the states in 1788, along with a Bill of Rights in 1791. With subsequent amendments, the same Constitution governs us today. It begins with the words "We the people" and contains not a single reference to natural law or to the Declaration of Independence.

In response to arguments that the Constitution must be interpreted in accordance with the terms of the Declaration, Justice Scalia properly dismissed the lofty sentiments expressed in the Declaration as mere "aspirations." Scalia also rejected the notion that the Declaration lurks, invisibly, in the Constitution: "There is no such philosophizing in our Constitution, which, unlike the Declaration of Independence and the Declaration of the Rights of Man, is a practical and pragmatic charter of government." How can there be a legally enforceable "natural law"? Where is it written down? Who ratified it? What makes it binding on succeeding generations? If the meaning of "natural law" is in the eye of the beholder, why is one person's interpretation more valid than another? And why should courts be in charge of deciding that? If natural law connotes moral reasoning, judges are no better equipped than ordinary citizens (or legislators) to determine what is "just" or "fair." Robert Bork concluded that "the prospect of 'correct' natural law judging is a chimera."

Libertarians place a great deal of stock in the Ninth and Tenth Amendments, which they contend preserve for individuals, and not just the states, all rights not specifically granted to the federal government, including the undefined and unenumerated "natural rights" libertarians want federal judges to enforce against state and federal elected officials. In the 227 years since the Bill of Rights was ratified, however, the Supreme Court has never embraced such an interpretation. Nor should it. The Tenth Amendment is fairly straightforward: any powers not specifically delegated to the national government are retained by the respective states (and, to the extent that the state constitution protects certain rights, to the people). The Ninth Amendment, which almost certainly was intended to be read as a companion to the Tenth Amendment, is more enigmatic: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Note that the Ninth Amendment is a rule of construction, not a conferral of rights. Recent scholarship (by Kurt Lash and others) has confirmed that the Ninth Amendment was a companion to the Tenth Amendment to protect the retained powers and rights of the states. This is consistent with popular concern over the Constitution as granting too much power to the national government, at the expense of the states. Alleviating that concern was the primary purpose of the Bill of Rights. In the context of the two amendments read together, as they were intended to be, "people" meant nothing more than the retained right of local self-government—the "representative form of government"

so important to the framers. "People" and "states" were interchangeable. Some scholars dispute this, but if the framers had intended to import open-ended unenumerated rights into the Constitution—with momentous implications—surely they would have said so explicitly.

Not until *Griswold v. Connecticut* in 1965—the precursor to *Roe v. Wade*—did any justice on the Supreme Court suggest that the Ninth Amendment was a source of unenumerated rights. Such dubious revelations coming 174 years after the Ninth Amendment was ratified, at the hands of one of the court's most notorious activists (Justice William O. Douglas, along with the concurring opinion of Justice Arthur Goldberg), smacks of revisionism.

"Better judging" is a form of legislation

Judicial engagement is ultimately based on the premise that judges are better suited than legislators to judge the wisdom or necessity of laws. This egregiously misconceives the role of judges. What proponents refer to as "better judging" is more accurately a form of legislation.

At the most basic level, the three branches of government play separate but complementary roles: the legislature makes the law, the executive applies (or implements) the law, and the judiciary interprets the law. It gets a bit more complicated because "the law" includes both legislative enactments (statutes, ordinances, etc.) and "fundamental" law that overrides legislation—i.e., state and federal constitutions. Pursuant to Article VI, the Constitution is "the supreme law of the land," paramount to conflicting federal and state laws. So one of the things courts do is "judicial review"—determining whether legislation conflicts with a constitution. As Chief Justice John Marshall famously declared in *Marbury v. Madison* (1803), "It is emphatically the province and duty of the judicial department to say what the law is."

When a statute is challenged as being contrary to the Constitution, the judicial branch is best equipped to determine if there is a conflict. Marshall's rationale for judicial review in *Marbury v. Madison* presupposes that the "laws" in question are texts capable of discernment: "If two laws conflict with each other, the courts must decide on the operation of each." In general, courts are not supposed (and are ill-equipped) to evaluate the necessity, wisdom, or efficacy of legislation. Legislators are elected by the people, expected to weigh competing social and political interests, to be receptive to public input, in theory to investigate facts before acting, and ultimately to strike the "correct" compromise since all laws will burden some people and benefit others. Legislation is policymaking, usually involving compromises and trade-offs—the stuff of politics.

What courts are supposed to do is quite different. Judges are ordinarily not elected; they weigh the arguments of the parties before them, generally not the interests of the public at large; they are not permitted to entertain "ex parte" communications; and they only decide the actual dispute presented to them. When judges interpret laws, they typically strive to reach *the* correct answer, not to "split the baby" in Solomonic fashion by fashioning an expedient compromise. Judges who make policy (by deciding cases based on their own subjective opinion of what is preferable as a policy matter) are correctly accused of "legislating from the bench." When judges do this, they overstep their role and usurp the authority of the other branches.

In *Federalist* No. 78, Alexander Hamilton (citing Montesquieu) said that "incontestably . . . the judiciary is beyond comparison the weakest of the three departments of power." Hamilton explained that this is because the judiciary exercises "neither force

nor will but merely judgment." In the course of this discussion, Hamilton contrasts the judiciary with the role of the legislature, which "not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated." In contrast to the legislative branch, the judiciary is essentially passive.

If we stopped there, we would be left with the firm impression that the framers did not conceive of a judicial role that would permit—let alone obligate—courts to second-guess the wisdom or efficacy of legislation, as contemplated by judicial engagement. But Hamilton went on to warn against the dangers of blurring the lines between the branches: in *Federalist* No. 78, again citing Montesquieu, Hamilton was emphatic that "there is no liberty if the power of judging be not separated from the legislative and executive powers . . . as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments."

Given the framers' devotion to the separation of powers and checks and balances, Hamilton was as concerned with legislative encroachment on the judiciary as he was with judicial encroachment on the legislature. The separate branches of government were three silos of government power. This is why Article III of the Constitution adopted life tenure for federal judges and prohibited the reduction in compensation for sitting judges. But the framers were very clear about the role of judges, granting them the power of judicial review (defended in *Federalist* No. 78) but explicitly denying them an expanded role in lawmaking. In particular, at the Constitutional Convention the framers specifically rejected the example of New York's Council of Revision, which made New York State courts part of the lawmaking process. In New York, all bills passed by the legislature were reviewed by the council (a majority of whose members were judges) "for their revisal and consideration" before they took effect. Madison's Virginia Plan contained this feature, which the convention ultimately rejected in lieu of presidential veto power over legislation. Judicial engagement would blur the lines between the legislature and the judiciary, constituting a modern-day Council of Revision and creating the very danger Hamilton warned against in *Federalist* No. 78.

The myth of the perfect constitution

Many constitutional theorists have fallen prey to the temptation of imagining that the Constitution, properly understood, creates an ideal society—and that judges are authorized to intervene as necessary to produce such ideal outcomes. Invariably, the "ideal" results dictated by the Constitution comport with the theorists' (or judges') own policy preferences. Professor Henry Monaghan termed this form of wishful thinking the pursuit of "our perfect Constitution." Judicial engagement is a manifestation of this well-intentioned delusion.

Proponents of judicial engagement frequently invoke certain past judicial decisions now seen as wrongly decided—such as *Plessy v. Ferguson*, *Buck v. Bell*, or *Korematsu v. United States*—and argue that those mistakes could have been prevented had courts employed "judicial engagement" instead of the standard of review used in those cases. This is a fallacious argument. Reasoning backward from *Buck v. Bell* or other decisions proves nothing beyond the benefits of hindsight. Humans are imperfect. History is rife with injustice and tragedy. All branches of government have been culpable at some point. The parade of historical mistakes and injustices in America includes the treatment of Native Americans, slavery, secession, the Civil War, the treatment of Chinese immigrants, the denial of suffrage to women, child

labor, Prohibition, American imperialism, eugenics, lynchings, Jim Crow, the internment of Japanese Americans, and the list goes on. As a nation, we have made mistakes, eventually realized our mistakes, and generally corrected those mistakes, sometimes by amending the Constitution. Progress—not perfection—is the hallmark of a civilized society.

In *Buck v. Bell*, the court upheld a compulsory sterilization law for the "feeble-minded." In his decision, Justice Holmes pungently declared that "three generations of imbeciles are enough." Eugenics was wrong, but in 1927 it didn't seem so. Only one justice (Pierce Butler, a Catholic) failed to join in Justice Holmes's memorable decision, and Butler wrote no dissenting opinion. Even liberal Justice Louis Brandeis, the first Jewish justice to serve on the court and—ironically—a pioneer in developing the right to privacy, joined Holmes's 8-1 opinion. The ACLU and the founder of Planned Parenthood supported eugenics. There was an overwhelming intellectual consensus in favor of the practice at the time. It is absurd to imagine that the result would have been different if only the justices had been more "engaged." And the mistake of eugenics was corrected democratically, via a change in the law, an outcome that would have been made difficult or impossible if the original decision had been carved in constitutional stone.

Historic injustices prove nothing, other than that mistakes were made. Hindsight is always 20-20. And if one wants to play this game, one can blame *Dred Scott v. Sandford*—and the Civil War it arguably caused—on Chief Justice Roger Taney's use of substantive due process to recognize a slave owner's constitutional right to own human chattel, declaring the Missouri Compromise unconstitutional in the process. Taney was an "engaged" jurist who got it wrong.

It is a fantasy to imagine that enlightened judges will always be on the right side of history. Judges are human, just like legislators and other government officials. The legislators and judges alike from prior eras sometimes made bad decisions reflecting the ethos and mores of the times. Waving a wand called "judicial engagement" does not make mortal judges omniscient. It is precisely because of human foibles and the inevitability of error that the framers carefully distributed federal government power among the different branches with a system of checks and balances. The states are a critical safeguard. Concentrating power in the hands of one branch merely increases the likelihood of error and reduces the chance of its being recognized and corrected.

It is simplistic to assume that the Constitution will, if correctly applied, always produce a just result. The Constitution is not a utopian document. Not all social problems are addressed, let alone solved, by it, and it does not invariably compel the "best" or philosophically or morally "correct" result. The institution of slavery took the Civil War and several constitutional amendments to abolish.

The competing interests in complex societies often lead to compromises that are unsatisfactory to many people. Disappointment is an inevitable feature of democracy. Judges applying laws enacted by the political branches—including the Constitution itself—must accept the possibility of an unsatisfactory result. As Justice Scalia once said, "If you are going to be a good and faithful judge, you have to resign yourself to the fact that you're not always going to like the conclusions you reach. If you like them all the time, you're probably doing something wrong."

Why should we trust judges?

The most risible element of judicial engagement is the belief that unelected judges are more likely than the political branches to

reach intellectually honest decisions. The activist legacy of the Warren Court, beginning in the 1960s and continuing today, suggests otherwise. Proponents of judicial engagement apparently believe that elective politics is hopelessly corrupted by rent-seeking, but they fail to recognize that judges are also subject to bias and influenced by an equally powerful group of special interests: for example, trial lawyers, civil rights groups, legal academia, the organized bar, labor unions, and the liberal media.

When bona fide constitutional rights are at stake, judicial review is sometimes necessary to protect them from legislative infringement, in accordance with *Federalist* No. 78. But that doesn't alter the fact that judges are just government officials wearing robes, not High Priests whose rulings are divinely inspired. Judges can and do make mistakes, sometimes intentionally. After all, judges are drawn from the most highly politicized and lopsidedly partisan spheres of our society: primarily from left-leaning law faculties and the increasingly monolithic ranks of elite law firms. Even in the progressive environs of higher education, the legal academy stands out as overwhelmingly—even shockingly—unbalanced in favor of the left. According to a 2015 study reported in the *Harvard Crimson*, an astounding 98 percent of political contributions from members of the Harvard Law School faculty during the period 2011 through 2014 went to Democrats.

What values does the progressive "legal establishment" embrace? Here are just a few examples: California has adopted a code of judicial ethics that forbids state judges to serve as adult leaders in the Boy Scouts of America owing to BSA's disapproval of homosexuality; the Wyoming Commission on Judicial Conduct unsuccessfully sought to remove Judge Ruth Neely, a twenty-one-year veteran, from the bench for merely expressing religious objections to same-sex marriage, even though she never refused to perform one; and a prominent Harvard Law School professor advocates that the U.S. Supreme Court, upon attaining a liberal majority, immediately approve race-based affirmative action, campaign finance restrictions, and abortion on demand, while eliminating any religious objections to "LGBT rights," easing class action litigation, and expanding the so-called disparate impact doctrine (which treats statistical imbalances the same as intentional discrimination). None of these policy positions could ever gain popular approval in elective politics, yet they are fairly typical of beliefs held by members of the elite legal culture.

Libertarians believe that judicial engagement will only result in the protection of individuals' "negative rights"—the right to be "left alone." However, activist judges can, and often do, invent "positive rights" that require the expenditure of taxpayer funds. For example, in 2015 federal district court judge Jon Tigar (appointed by President Barack Obama), based in San Francisco, ruled that Jeffrey Norsworthy, a convicted murderer serving a life sentence in a California state prison, was entitled to a sex-change operation *at taxpayer expense* because Norsworthy was diagnosed with "gender dysphoria." Tigar concluded that forcing the "transsexual" Norsworthy to retain his male genitalia while behind bars violated the Eighth Amendment's prohibition of "cruel and unusual punishment" and necessitated a medical procedure estimated to cost the taxpayers $100,000.

Unfortunately, in cases involving public education, government employee pensions, and the administration of state prisons, judges frequently impose obligations—sometimes quite onerous—on taxpayers. Writing in *City Journal*, Steven Malanga has warned that "liberal judges and legal scholars are calling for state courts to push the positive-rights agenda even further by guaranteeing minimum welfare payments

and government subsidies for food, clothing, housing, and medical care to every citizen."

Libertarians apparently believe that the judges who will exercise the sweeping powers contemplated by the theory of judicial engagement will share their values. Proponents fervently hope to turn back the constitutional clock to pre–New Deal jurisprudence, overruling the libertarian bête noire decision in *United States v. Carolene Products Co.* and restoring the *Lochner* line of cases. Perhaps proponents subconsciously believe that Randy Barnett (or someone like him) will be playing the role of Ronald Dworkin's Judge Hercules (from his 1986 book *Law's Empire*). Alas, libertarians are in short supply in legal academia, and in the legal establishment generally. And the left will never allow economic liberties to be resurrected; *Carolene Products* buried them on purpose.

Long ago, the famed jurist Learned Hand lamented that 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." Realistically, the unaccountable judges that would rule us under judicial engagement are not going to be libertarians, or even a cross-section of the community, but a cadre of secular left-wing intellectuals resembling Massachusetts senator Elizabeth Warren—who was, fittingly, a Harvard Law professor prior to her election.

Conclusion

The libertarian theory of constitutional law is unsound from an originalist standpoint. It is historically untenable. It requires doctrinal leaps of Olympic caliber. Instead of increasing individual liberty, it would destroy the republican form of government by concentrating power in one branch of government—and the least democratically accountable branch of government at that. In addition to all its other defects, an independently fatal flaw of judicial engagement is that it assumes judges—drawn from the overwhelmingly leftist ranks of the legal academy and organized bar—will behave neutrally, honestly, and responsibly.

In other words, judicial engagement ignores reality and assumes that the same federal judges who have hamstrung law enforcement, wrested control of many prison systems, micromanaged school districts, meddled in the administration of the death penalty, compelled tax increases to fund education, redefined marriage, created a right to abortion, and generally acted as the enforcement arm of the ACLU will, if entrusted with sweeping powers of judicial review over the political branches, make us more free. I'll take my chances with the republican form of government.