ESSAY

CLOSE BUT NO CIGAR: A REPLY TO PROFESSOR GRAGLIA

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Doubtless readers of the recent roundtable discussion on The Revitalization of Democracy from the Nineteenth Annual National Student Federalist Society Symposium appearing in these pages[1] found much to admire, as I did, in the contribution of Professor Lino A. Graglia. In *Revitalizing Democracy*,[2] Professor Graglia makes a number of cogent points in defense of his preference for decentralizing policymaking, his suspicions regarding judicial review, and his cynicism with respect to the supposed "conservatism" of Republican appointees to the United States Supreme Court. I shall not dwell upon the myriad and obvious ways in which the ideas expressed therein are sound. I would, however, like to offer a few thoughts upon certain areas of disagreement concerning matters that are not trivial. Adopting the approach taken by Justice Scalia in his dissent from the Court's decision in *Planned Parenthood v. Casey*,[3] I will preface each critique with a quote from Professor Graglia.

"[D]ual sovereignty is a contradiction in terms."[4]

On this point, Professor Graglia's criticism is clear enough. Ultimately, one sovereign must have the final say.

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1. 24 HARV. J.L. & PUB. POL'Y 149 (2000).

2. Lino A. Graglia, *Revitalizing Democracy*, 24 HARV. J.L. & PUB. POL'Y 165 (2000).

3. 505 U.S. 833 at 981 (1992) ("I must . . . respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered. I shall discuss each of them under a quotation from the Court's opinion to which they pertain.") (Scalia, J., dissenting).

4. Graglia, *supra* note 2, at 166.

Nevertheless, in declaring dual sovereignty to be an impossibility, he overstates his case, in effect saying that there can be no such thing as federalism. While there is a natural and inevitable tension in any political system of separated powers, the question of which entity is truly sovereign only arises when the limits of each power are unclear. Federalism can work if the spheres of national and local power are sufficiently defined, as they are under the United States Constitution. The Tenth Amendment[5] provides a clear delineation of national and local power by declaring the reservation of any and all powers not explicitly delegated. The question of whether the national government has the power to do something or to deny a State the power to do it is answered easily enough; one has but to look to Article I, Sections 8 and 10.[6] If a power is not listed in one of those two places, it is retained. One must then look to the state constitution and statutes to determine whether the people have delegated the power to the state government or reserved it to themselves. The historical failures of dual sovereignty in practice notwithstanding, the theory of the Constitution is, like that of Christianity, sound when actually followed.

Even a cursory reading of the Constitution demonstrates that most of the powers delegated by Article I, Section 8, are perfectly clear. There is very little room for argument over what constitutes levying a tax,[7] or establishing a bankruptcy code, [8] or raising an army.[9] The only provisions that could plausibly support interpretations that would allow federal power to overlap with state power are the interstate commerce and "elastic" clauses, but even these provide clear restraints. The latter is limited by the phrase, "all Laws which shall be

5. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

6. Although several of the Framers believed Article I, Section 8, of the Constitution provided an adequate limitation on national power by exhaustively listing the grants of authority to the federal government, the fear of too much concentration of power in a single centralized authority led to the adoption of the Bill of Rights, which specified—albeit not comprehensively (*see* U.S. CONST. amend. IX)—rights which Congress was not empowered to restrict. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 397 (12th ed. 1991).

7. *See* U.S. CONST. art. I, § 8, cl. 1.

8. *See* U.S. CONST. art. I, § 8, cl. 4.

9. *See* U.S. CONST. art. I, § 8, cl. 12.

necessary and proper *for carrying into Execution the foregoing Powers*,"[10] which makes it a gap-filling provision, not a charter for expansionism.[11] Suppose, for instance, that I have been authorized to drive from Atlanta to Birmingham. Suppose also that this authorization further provides that I might drive anywhere "which shall be necessary and proper for carrying into execution the foregoing authorization." Under this latter clause, I would also be authorized to drive to Douglasville, Bremen, and Anniston, all of which lie between Atlanta and Birmingham along I-20. I could not, however, plausibly interpret that grant of additional power as a warrant for driving to Oxford, Nashville, or Charlotte. As for the interstate commerce clause,[12] if its language is not limitation enough, which it ought to be, despite such patently absurd decisions as *Wickard v. Filburn*,[13] then let the States do what Messrs. Madison, Jefferson, and Calhoun contemplated: nullify acts of Congress which overstep the Constitutional grant of authority. (I shall return to the subject of nullification anon.)

There are, of course, signs that our commerce clause jurisprudence has gotten so far afield that even the federal judiciary is starting to see it. On May 15, 2000, in the consolidated cases of *United States v. Morrison* and *Brzonkala v. Morrison*,[14] the Supreme Court struck down the 1994 Violence Against Women Act[15] on the rather sensible and straightforward ground that allowing battered women and rape victims to pursue federal civil rights claims against their assailants has not the slightest connection to the regulation of commerce "among the several States." The ensuing hue and cry over *Morrison* was ridiculous, but, once one gets past all the leftist disingenuousness and feminist rhetoric, common sense

10. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).

11. *See, e.g.*, THE FEDERALIST NO. 33, at 171 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless."). James Wilson, *Pennsylvania Ratifying Convention, 1, 4 Dec. 1787, in* 3 THE FOUNDERS' CONSTITUTION 241 (Philip B. Kurland and Ralph Lerner eds., 1987), ("Can the words . . . be capable of giving [Congress] general legislative power? . . . On the contrary, I trust it is meant that they shall have the power of carrying into effect the laws which they shall make under the powers vested in them by this Constitution.").

12. U.S. CONST. art. I, § 8, cl. 3.

13. 317 U.S. 111 (1942).

14. 529 U.S. 598 (2000).

15. 42 U.S.C. § 13981 (1994).

counsels that the Court is right on this one. As even Professor Laurence Tribe admits, "if the dissenters [in *Morrison*] are right, then there are no judicially enforceable limits at all on the commerce power, [and] the basic compromise underlying the Constitution has come unglued."[16]

> *"[T]here is much to be said for the notion of a 'living Constitution,' a Constitution adaptable to new circumstances, when the effect of a doctrinal change is not to expand but to loosen constitutional restraints—to relax the grip of the hand of the dead—and the adapting is done not by judges but by elected representatives."*[17]

At best, what Professor Graglia is advocating here is "the ratchet theory",[18] the idea that the Supreme Court, through judicial review, sets the Constitutional minimum, but that Congress, through legislation, may raise the bar (*e.g.*, outlawing sexual discrimination in the Civil Rights Act,[19] which was passed pursuant to amendments which apply to racial discrimination). Underlying this notion is the belief that overly broad interpretations by elected legislators are less pernicious than overly broad interpretations by appointed judges. Legislators who overstep their Constitutional authority, after all, may be replaced at the next election. This distinction, while true as far as it goes, is nevertheless a dubious one in a republic with a national government of limited powers. The Constitution is "adaptable to new circumstances" through Article V,[20] which sets up the mechanisms for amending the document.[21] The phrases "living Constitution" and "relax the grip of the hand of the dead" are loaded with disingenuousness. The amendment process allows for changes in the Constitution to suit the needs of the time. What such phrases mean, of course, is doing an end-run around intellectual integrity by reading into the Constitution what we

16. Stuart Taylor, Jr., *Morrison Decision Hardly Radical: Despite Media Slant, VAWA Ruling Proves Sound*, FULTON COUNTY DAILY REPORT, May 24, 2000, at 8.

17. Graglia, *supra* note 2, at 166-67.

18. *See, e.g.*, Matt Pawa, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us?: An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PENN. L. REV. 1029, 1062-69 (1993).

19. 42 U.S.C. § 2000e-2 (1994)

20. U.S. CONST., art. V.

21. Note that it is "mechanisms", plural, for both Congress and the States can initiate the process.

wish were there but know is not.[22] Our living Constitution was amended twenty-seven times between 1791 and 1992, an average of once every seven years. The ability of the American people to implement doctrinal change at the Constitutional level through the amendment process would appear to be all the mechanism we need if the average thirty-year-old American at any point in our Constitutional history has seen four amendments adopted during his lifetime.

Moreover, the very nature and purpose of our Constitution to *limit* government through *explicit* delegation gives rise to the necessary inference that the Article V amendment process is the sole means by which such Constitutional changes can be implemented. Certainly, any other approach is inconsistent with the rest of the document; for any arm of the national government to aggrandize its own power by changing the Constitution through willful manipulation of its language goes against the very premise of a government of limited and enumerated powers. It is one thing to apply established doctrine in a changing context (*e.g.*, applying the Bill of Rights' prohibition on unreasonable searches and seizures to protect the transmissions I receive in my e-mail account as well as the letters I receive in my post office box). Expanding or loosening Constitutional restraints, however, disrupts the balance of powers carefully created and maintained by our charter of government.[23] An alteration in doctrine that does so without the constitutionally-sanctioned amendment process is an act of violence upon the body politic.

Two final points bear making on the "hand of the dead." First, no one seems to have a problem with being ruled by "the hand of the dead" when the dead in question agreed with them. As Judge Bork has pointed out, no one complains about age-old Constitutional provisions, such as the scheduling of elections, with which we concur, even though the authors of those clauses are just as dead as the men who wrote the parts we wish had been worded differently.[24] If we don't like what was written by "the hand of the dead," we have a mechanism

22. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 167 (1990).

23. *See* ANTONIN M. SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

24. *See* BORK, *supra* note 22, at 170.

for rewriting it, literally through the amendment process rather than disingenuously through creative misinterpretation. The "hand of the dead" rhetoric is no different from the criticism of "dead white European males"; those who use such language aren't really complaining about the physical fate of the thinkers and authors in question. Their real problem is with what those thinkers thought and what those authors wrote. Unable effectively to rebut the dead men's reasons and conclusions, they resort instead to *ad hominem* assaults on the fact of their demise: a particularly underhanded and, ultimately, self-defeating, point of attack.

Secondly, and more importantly, the notion that the "hand of the dead" argument has any persuasive force is rooted in a fundamental misapprehension about our form of government. If the Constitution was truly a legal arrangement between Washington, Madison, Franklin, *et al.*, then, of course, it ought to be of no continuing effect, because the parties to the contract are no longer here to perform their obligations under it. The parties to the Constitution, though, are not the Founding Fathers, and they never were. The parties to the Constitution are Georgia, South Carolina, North Carolina, Virginia, *et al.*,[25] all of whom remain alive, the best efforts of our national government to the contrary.

"It would greatly revitalize and enhance democracy in this country if . . . measures [promoting direct democracy] were adopted by all of the states, if they were made easier to implement in the states that already have them, and perhaps most important, if they were adopted by the national government."[26]

H.L. Mencken was wrong about much, but he evinced a healthy skepticism about the supposed virtues of direct democracy.[27] Simply stated, direct democracy was what our Constitution was designed to prevent,[28] and much of the

25. *See, e.g.*, JOHN C. CALHOUN, *The Fort Hill Address, July 1831*, *in* UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 367, 371 (Ross M. Lence ed., 1992) ("[T]he Constitution of the United States is, in fact, a compact, to which each State is a party.").

26. Graglia, *supra* note 2, at 168.

27. *See, e.g.*, H.L. MENCKEN, A LITTLE BOOK IN C MAJOR 19 (1916) ("Democracy is the theory that the common people know what they want, and deserve to get it good and hard").

28. *See* THE FEDERALIST NO. 10 (James Madison):

problem with the executive and legislative branches at the national level is that direct democracy is now an accomplished fact. Gone are the days when elected officials considered themselves Burkean trustees who were sent to the seat of government to exercise independent judgment.[29] Benjamin Franklin said the Constitution had given us a republic, if we could keep it.[30] We have, without putting too fine a point on the matter, failed to do so. In fact, we have gone to great lengths to destroy it, enslaving the electoral college to the two-party system, popularly electing United States senators,[31] expanding the franchise even to the ignorant and disinterested, abolishing poll taxes[32] and literacy tests,[33] (which were only problematic because of their race-based application; if required across the board and applied uniformly, they would be entirely reasonable and exceedingly beneficial), and placing increasing reliance upon the importance of polling data. Our national government functions poorly because it is too responsive to the popular will,[34] which is frequently ephemeral and inconsistent, *viz.*, we want lower taxes, more government services, a balanced budget, reduced government regulation, more

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> [A] pure democracy . . . can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would at the same time be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

29. *See, e.g.*, EDMUND BURKE, *Speech of November 3, 1774, in* BURKE'S POLITICS: SELECTED WRITINGS AND SPEECHES OF EDMUND BURKE ON REFORM, REVOLUTION AND WAR 114-17 (Ross J.S. Hoffman & Paul Levack, eds., 1949) ("[W]hat sort of reason is that in which the determination precedes the discussion, in which one set of men deliberate and another decide, and where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments?").

30. *Documents – Papers of Dr. James McHenry on the Federal Convention of 1787*, 11 AMERICAN HISTORICAL REVIEW 595, 618 (1906).

31. *See* U.S. CONST. amend. XVII.

32. *See* U.S. CONST. amend. XXIV; Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).

33. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); Voting Rights Amendments of 1970, Pub. L. No. 91-285, § 201, 84 Stat. 314, 315 (1970).

34. *See, e.g.*, GEORGE F. WILL, RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY 107-08 (1992).

efficient governmental administration, and pork-barrel spending in our home district. Our lapdog legislators, panting at the end of the long leash of direct democracy, do their level best to grant us all of these things rather than engaging in reasoned deliberation, exercising informed judgment, and making tough choices regarding proper priorities. California's voter initiatives on tax reform and "entitlement" issues have often been improvements,[35] but electing a more responsible political leadership, as well as reposing less faith in, and ceding less power to, government, would have made such reforms unnecessary. Certainly, there is no cause to believe that nationwide referenda would improve public policy, much less social civility or the behavior of elected officials.

I likewise question whether such initiatives would produce results more conservative than liberal. If we were to make direct democracy truly direct at the national level, the opportunity to cast one's ballot using the internet would doubtless be among the accompanying reforms. The result would be plebiscite by Web site, the town hall meeting at the end of the information superhighway. I am not sanguine about the prospect of removing all institutional barriers and turning direct policymaking responsibilities over to mobs with modems. Even were I convinced by Professor Graglia's argument that the results of direct democracy would be more to my liking, I am nonetheless troubled by his willingness to toss aside representative democracy merely for the sake of ideological expediency. Too much affinity for expeditiousness is what got us into this mess; we were much better off when what we now denounce as "gridlock" was praised as "deliberation" and the cumbersome nature and narrow focus of government were seen as virtues.[36] Like C.S. Lewis, I believe that progress, properly defined, is movement towards a goal; consequently, if a society has turned from its proper course, it cannot move forward and make progress at the same time, for the road ahead would carry the society further from rather than closer to its goal.[37] Likewise, if our own society has turned from its proper course—and I cannot seriously believe that anyone

35. *See* Graglia, *supra* note 2, at 170.
36. *See, e.g.*, JEFFREY K. TULIS, THE RHETORICAL PRESIDENCY (1987).
37. C.S. LEWIS, MERE CHRISTIANITY 22 (1952).

thinks it has not—then the true progressive is not the man who says (as Professor Graglia does), "Let us go even further down this path!" The true progressive is the man who says (as I do), "Let us turn around and go back to where we have been before, so that we might find where we lost our way."

> *"Our very short Constitution wisely contains very few prohibitions, and American legislators are rarely tempted to violate them. The result is that an example of a clearly unconstitutional law is difficult to find."*[38]

This is, to put it mildly, rather an extraordinary statement. In fact, our very short Constitution wisely contains innumerable prohibitions, and it does so precisely because it is so short: the Constitution establishes a government of limited and enumerated powers (pardon me for repeating myself, but this is, after all, the very crux of the Constitution), and thus implicit in its very nature and (more to the point) explicit under the Tenth Amendment is the fact that the government's exercise of *any* power not *expressly* granted to it is by definition prohibited. I could fill pages upon pages with actions prohibited by our Constitution but that American legislators are frequently tempted to take, for they do so all the time. To cite in broad terms but a few of the many areas in which our Constitution prohibits the national government from acting, but in which it acts with regularity and impunity, I need only mention such matters as education, firearms, health care, and housing. Examples of clearly unconstitutional laws have abounded in every age, and never more so than today; what are difficult to find are examples of clearly unconstitutional laws that the courts are willing to strike down. (This may, however, be changing. Between 1995 and 2000, the Supreme Court struck down all or part of some 22 pieces of federal legislation,[39] including the Gun-Free School Zones Act,[40] the Religious Freedom Restoration Act,[41] and the Violence Against Women Act.)[42] All such laws may well embody good policies for state

38. Graglia, *supra* note 2, at 175.

39. Tony Mauro, *High Court's Ruling on VAWA Ends Deference to Congress*, FULTON COUNTY DAILY REP., May 22, 2000, at 8.

40. 18 U.S.C. § 922(q) (2000). *See* United States v. Lopez, 514 U.S. 549 (1995).

41. 42 U.S.C. § 2000bb (2000). *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

42. 42 U.S.C. § 13981 (2000). *See* United States v. Morrison, 529 U.S. 598 (2000).

governments to implement, but none of them lie within the purview of national authority, as anyone with the ability to read the English language ought to know full well.

Here, I cannot help but note that judicial review—which has no grounding in English law and has been applied haphazardly at best ever since (as Professor Graglia rightly notes)[43] John Marshall pulled it out of thin air in 1803[44]—arrived a little late on the scene to be taken seriously as an intellectual concept: Virginia and Kentucky (through the adoption of resolutions authored by the Father of the Constitution[45] and the Sage of Monticello,[46] respectively) had nullified a pair of clearly unconstitutional laws, the Alien and Sedition Acts,[47] as early as 1798, when the ink was scarcely dry on the Bill of Rights. Nullification not only has a longer history and a more honest intellectual pedigree[48] than judicial review,[49]

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43. Graglia, *supra* note 2, at 174 ("Whatever might be said for judicial review, there can be no doubt that it was born in sin."). *See also* Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 63 n.11 (1986); BORK, *supra* note 22, at 22-24.

44. Marbury v. Madison, 5 U.S. (1 Cranch) 137.

45. James Madison, *Virginia Resolutions*, *in* 5 THE FOUNDERS' CONSTITUTION 135-36 (Philip B. Kurland & Ralph Lerner eds., 1987); *see also* 1 Annals of Cong. 500 (Joseph Gales ed., 1834) ("I beg to know, upon what principle it can be contended, that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments?).

46. Thomas Jefferson, *Kentucky Resolutions of 1798 and 1799*, *in* 4 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 540-545 (Ayer Company 1987) (1888).

47. *Id.* at 540-542.

48. *See e.g.*, CALHOUN, *supra* note 25, at 371 ("[I]n case of a deliberate, palpable, and dangerous exercise of power not delegated, [the States] have the right, in the last resort, to use the language of the Virginia Resolutions, 'to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them.' This right of interposition, thus solemnly asserted by the State of Virginia, be it called what it may—State-right, veto, nullification, or by any other name—I conceive to be the fundamental principle of our system, resting on facts historically as certain as our revolution itself, and deductions as simple and demonstrative as that of any political, or moral truth whatever; and I firmly believe that on its recognition depend the stability and safety of our political institutions.").

49. *See, e.g.*, THOMAS JEFFERSON, Letter from Thomas Jefferson to Abigail Adams, *in* 8 THE WRITINGS OF THOMAS JEFFERSON 310, 311 (Ford ed. 1897) ("You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. That instrument meant that its co-ordinate branches should be

it is a constitutional inevitability. The Constitution mentions neither nullification nor judicial review, whether as powers given to the national government or denied to the States. Given that the power of judicial review is not delegated to the national government, it must be prohibited; given that the power of nullification is not prohibited to the States, it must be reserved. Really, this is not a complex business.

The contention has often been raised in opposition to nullification that the Supremacy Clause[50] forecloses the option of interposition. A more careful reading of that provision, however, reveals the fallacy of this argument. "This Constitution," the clause asserts, "and the Laws of the United States *which shall be made in Pursuance thereof*; and all Treaties made, or which shall be made, *under the Authority of the United States*, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[51] In other words, the Constitution (with its express limitations upon the scope of national power and its reservation to the States of all powers not explicitly delegated) is binding, as are any laws passed *pursuant to it* and any treaties ratified *within its authority*. The qualifications contained within the Supremacy Clause are crucial, lest a charter of governance designed strictly to circumscribe the ambit of legislative authority be converted into a warrant for any and all actions under the sun. Only those enactments passed pursuant to the Constitution are law; if a bill is only adopted by one chamber of Congress, for example, or if a statute contravenes a provision of the Bill of Rights, such an action is not pursuant to the Constitution and, therefore, is not law. Likewise, any legislation that goes beyond the outer perimeter of the enumerated powers is, by its very nature, made not "in

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checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature and Executive also, in their spheres, would make the judiciary a despotic branch"); Andrew Jackson, *Veto Message, in* 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576, 581-83 (Richardson ed., 1896); Abraham Lincoln, *First Inaugural Address, in* 6 MESSAGES AND PAPERS OF THE PRESIDENTS 9-10 (Richardson ed., 1896); Franklin D. Roosevelt, *A Frequently Misquoted Letter, in* 4 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 297, 297-98 (1938).

50. U.S. CONST. art. VI, cl. 2.

51. *Id.* (emphasis added).

Pursuance" of the Constitution, but in opposition to it. Such overreaching does not fall within the coverage provided by the Supremacy Clause and, accordingly, it is not law. The reserved power of the States to invalidate these pronunciamentos within their borders is a shining example of dual sovereignty in action.

> *"[The Fourteenth Amendment's] original purpose to prohibit certain discriminations by the states against blacks can and should be expanded into a general prohibition of all racial discrimination by government. That would be a worthy addition to the Constitution in its own right. . ."*[52]

Statements such as this lead one to conclude that Professor Graglia has no major problem with judicial activism as a concept, but rather with the ends to which judicial activism has been put. His generic complaint seems to be, in essence: "I wish we had more right-wing revisionists instead of so many left-wing revisionists." The problem with that theory is that it robs the law, and the process of legal reasoning, of anything approaching legitimacy. If we accept the premise that judges ought to be politically motivated and result-oriented, the law becomes what Columbia's Professor Herbert Wechsler called a "naked power organ."[53] If the law has no independent legitimacy apart from the preferences of the jurist, then it is no more than the outcome of a political struggle in which might makes right and the refined wisdom of thinkers such as Coke, Blackstone, and St. George Tucker must be cast aside in favor of the ideas of such lawless power-mongering monomaniacs as Marx, Mao, and Marshall. If I defend the right-wing activism of the Supreme Court in the first third of the twentieth century against the left-wing activism of the Supreme Court in the latter two-thirds for no better reason than that I prefer the outcomes of the former, I have conceded the revisionists' point that the outcome is all that matters.[54] Revisionism, like racism, is either just plain stone cold flat dead wrong all the time, no matter how benign the motive, or it is acceptable all the time, no matter how malignant the motive. I, for one, am prepared to

52. Graglia, *supra* note 2, at 177 (footnote omitted).

53. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

54. *See, e.g.*, BORK, *supra* note 22.

take a stand against all cases of both revisionism and racism, irrespective of whose ox is getting gored. When Professor Graglia encourages expansion of the Fourteenth Amendment to include "worthy addition[s] to the Constitution," I am left to wonder whether he is interpreting the word "due" or the word "process."[55]

The grand irony, of course, is that our Fourteenth Amendment jurisprudence has become so distorted that what Professor Graglia endorses as acceptable heresy is, in fact, orthodoxy. No expansion of the Fourteenth Amendment's intended meaning is necessary to glean "a general prohibition of all racial discrimination by government"; an adequate knowledge of history is all that is required. Citation of but a single case will suffice: Justice William Strong, writing for the Court in *Strauder v. West Virginia*,[56] overturned the conviction of a black defendant by an all-white jury in a province[57] in which only white men over twenty-one years of age could serve as jurors, explaining the Court's decision thusly:

> [That] the West Virginia statute respecting juries [is] such a [prohibited] discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, [we] apprehend no one would be heard to claim that it would not be a denial to white men of [equal protection]. . . . We do not say [that] a State may not prescribe the qualification of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or

55. *Cf.* Graglia, *supra* note 2, at 176 ("What do you think Harry Blackmun was interpreting in *Roe v. Wade*, for example, the word 'due' or the word 'process'?") (citation omitted).

56. 100 U.S. 303 (1880).

57. I decline to characterize West Virginia as a State in light of the fact that its creation by executive order, without the consent either of Congress or the Virginia legislature, was in clear contravention of our national charter. *See* U.S. CONST., art. IV, § 3, cl. 1.

color.[58]

What the Fourteenth Amendment was intended to mean (as ought to be obvious from its timing and placement between the amendment abolishing slavery[59] and the amendment securing the voting rights of the former slaves[60]) is simple: "Black people are citizens, and government cannot treat black citizens and white citizens differently under the law." That's it. That's all. Nothing about gender,[61] immigrant status,[62] homosexuality,[63] or any other condition John Rocker would not want to encounter on a subway, and certainly nothing about contraception,[64] abortion,[65] legislative apportionment,[66] or welfare payments.[67] Arguably, additional amendments should be ratified for the purpose of extending protection into some or all of these areas as well. Such amendments, however, are not currently in place and cannot plausibly be shoehorned into the language of the Fourteenth Amendment.[68]

In the end, Professor Graglia offers a number of piercing and perceptive critiques of the problems of judicial review, the disingenuousness of modern law, and the general troubles of the intellectual class. Nevertheless, he buys much too much into their rhetoric and (though he seems not to know it) their

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58. *Strauder*, 100 U.S. at 308-10.

59. U.S. CONST. amend. XIII.

60. U.S. CONST. amend. XV.

61. *But see, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); United States v. Virginia, 518 U.S. 515 (1996).

62. *But see, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); Nyquist v. Mauclet, 432 U.S. 1 (1977); Examining Board v. Flores de Otero, 426 U.S. 572 (1976).

63. *But see* Romer v. Evans, 517 U.S. 620 (1996).

64. *But see* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

65. *But see, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

66. *But see* Reynolds v. Sims, 377 U.S. 533 (1964).

67. *But see, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

68. Concurring in the judgment of the Court in *Frontiero v. Richardson*, Justice Lewis Powell argued lucidly that sex should not be regarded as a suspect classification for purposes of equal protection analysis, in part because the then-pending Equal Rights Amendment, "which if adopted [would] resolve the substance of this precise question," counseled caution. "[R]eaching out to pre-empt by judicial action," he argued, "a major political decision which is currently in the process of resolution does not reflect appropriate respect for duly prescribed legislative processes." 411 U.S. 677, at 692 (1973). Justice Powell's admirable sense of restraint reflected the more appropriate way in which the voting franchise was extended through the established amendment process, expanding steadily to include blacks, women, citizens who do not pay poll taxes, and eighteen-year-olds. *See* U.S. CONST., amend. XV, XIX, XXIV, XXVI.

principles. Although he correctly condemns the jurisprudence of Justice O'Connor, he disregards the wisdom of Sinead O'Connor, whose words could apply to large segments of academia and the judiciary:

> Everyone can see what's going on
> They laugh 'cause they know they're untouchable
> Not because what I said was wrong. . . .
> Through their own words
> They will be exposed
> They've got a severe case of
> The emperor's new clothes.[69]

Professor Graglia is as unwilling as those he castigates to follow Jefferson's dictum that no more should be heard of confidence in man, but he should be bound down from mischief by the chains of the Constitution.[70] He echoes the siren song of the liberal intelligentsia when (without saying so explicitly) he also calls for a government of men, not laws; his only quarrel is over the men whose personal predilections and prejudices ought to be accepted in place of a proper reading of the Constitution. Indeed, even that is too great a distinction to draw; Professor Graglia agrees wholeheartedly with the leftist clerisy on the question of who ought to be doing the dirty work of revisionism, for both want revisionists who agree with *them.* Perhaps, as some claim, the last two centuries have proven that our written constitution is a chimera,[71] yet still I reiterate my previously expressed belief that the Constitution's failings spring from the same source as Christianity's: namely, from not having been tried.

No, the Constitution is not Holy Writ, nor anything comparable thereto, and I have no qualms about saying that I would have been among the opponents of ratification in 1788. Nevertheless, we have the Constitution that we have, and we at least ought to be honest about that. If we do not like it, we should replace it. If we are going to keep it, we ought to follow

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69. SINEAD O'CONNOR, *The Emperor's New Clothes, on* I DO NOT WANT WHAT I HAVEN'T GOT (Ensign Records 1990) (variations in spelling altered to conform to standard usage).

70. *Kentucky Resolutions of 1798 and 1799, supra* note 46, at 543 ("In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.").

71. *See, e.g.*, Samuel Francis, *The Constitution, R.I.P.*, CHRONICLES, Dec. 2000, at 35-36.

it. If it needs correcting, we should amend it. In any instance, we ought to think about it, as the Founding Fathers did. Even where they were mistaken, they acted for a reason and they thought it through point by point while writing it. As a rule, where we have deviated from their constitutional design, we have proven right the Founders' fears, and I would certainly defend the historic Constitution against most of its modern alternatives. What we should strive for is a thoughtful and moral republic in which—as Professor Graglia accurately puts it—"we . . . have no more of [government] than necessary and strive to make what we must have as little dangerous as possible."[72] The reforms he proposes, however, are at best only apt to make a bad situation barely tolerable. Perhaps I am just a hopeless romantic, but I believe we are realistically capable of aspiring to something higher than that. I will grant that Professor Graglia comes a good deal closer to the truth than most of his colleagues, and, for that, he is to be commended heartily. Nevertheless, in law, logic, and language (unlike in horseshoes, hand grenades, and casting the female lead in "Fatal Attraction"), close is not close enough.

72. Graglia, *supra* note 2, at 165.