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Commenting on the Views of Roger Pilon

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Thank you, Mr. Hull. I want to thank the Federalist Society and our distinguished guest, Mr. Pilon, of the Cato Institute, for his graciousness in allowing me to comment. He understands that a commentator's role is to raise questions, to take a different point of view, and to encourage us all to reflect upon the main speaker's positions, however coherent, sound, and even obvious, they initially appear to be.

Mr. Pilon emphasizes the Declaration of Independence, infusing our Constitution with a human rights and dignity, the creation of a government of limited powers, the keys of the 9th, amendment with its notice of unmentioned rights and 10th Amendments, well as the Privileges or immunities clause of the 14th Amendment, and the dependent nature of the Article I General Welfare Clause. He finds no constitutional basis for the modern regulatory state, and the redistribution of property, since it interferes with liberty and property rights. He challenges Carolene Products bifurcation of rights.

Federal entitlement programs like Social Security* to him are bad policies but they are unconstitutional, since beyond the enumerated powers, properly understood. He would have Madison on his side and some other founders, but not Hamilton, and Story, or Cardozo. We'll get to that. Indeed, it would seem that it is unconstitutional, for Pilon, for the federal or state governments to provide even free public education. Tho the Cato Institute is clearly supportive of a voucher plan for parents. 15 Regents U L Rev. 41, 59 (2002-3. "Notice that no 'welfare rights' are included in those categories [in Bushrod Washington's list of Privileges and Immunities under Article IV in the 1823 decision of Corfield v. Coryell]—'rights' to education, health care, subsidies, import restraints, and the like. Not only are such 'entitlements' no part of the rights the Constitution protects, but as a corollary, when they are created by statute, they conflict with constitutional rights, rights to liberty and property. Thus , such statutes, if federal, are unconstitutional because unauthorized under the doctrine of enumerated powers; but they are also unconstitutional, whether federal or state, because they trample constitutional rights, much as a statue restricting speech would be unconstitutional, and for the same reason."

The 1964 Civil Rights Act, in prohibiting private race discrimination, runs afoul of a citizen's right not to associate under privileges and immunities clause (45 Am. U..Rev. 567, 576 (1996). "It is unconstitutional because it requires individuals to forfeit rights they have as citizens of the Untied States that are guaranteed under the Privileges and Immunities Clause.") . His view would be news to John Marshall Harlan, of course, evidenced by Harlan's dissent in the 1883 Civil Rights Cases, and all the members of the Court for the past 40 years.

Mr. Pilon searches to discover, in the text, right answers to resolve constitutional disputes. Judges who do not try to do so, or who ought to know they are getting it wrong, infusing their own subjective values, are lawless.

I search for reasonable positions. I believe there is some lawless judging, but far less than he would contend.
Pilon, I think would agree that constitutional interpretation is complex, at least at times, and requires the justice to attempt objectivity, notwithstanding his personal views and the influence of his own culture, and calls at times for practical decision-making.

My position: Complexity, the justice's own culture, and practicalities, are much more important in arriving at sound constitutional decision-making, than, I believe, Pilon or Federalist Society members would acknowledge. First, Complexity. There is great complexity in sound constitutional decision-making, and not just made-up complexity. Gaps to be filled and leaps and assumptions to be made. With complexity comes reasonable choice. Second, Culture. It is inevitable, try as he or she may, and he or she should try, that the justice, however unknowingly, will be affected by his or her own culture and subcultures. Third Practicality. It is important as well. These factors are not simply minor irritants, easily dealt with, but substantial challenges, which lead not to discovery of the correct answer, but only to reasonable alternatives, based in the constitutional text. This is the case, though a justice may well prefer some of the positions over others. I do not suggest of course that we give up the enterprise, merely understand the challenges of that enterprise. I mean it as no excuse. If the misdirected constitutional ship of state needs to be turned around, better to begin now. That may be, but at least let us understand the challenge.

Let's consider complexity facing the justice in 1789, 1868, and in 2006.
*What lesson from the Declaration of Independence? Who is left out of the people, like slaves, and Native Americans, and in a measurably sense, women?
*What lesson from Locke? The common law privilege of life, liberty, and estate, or the common law, subject to the preeminence of Parliamentary statute?
*No instruction booklet, for the framers in interpreting their duty.
*No American dictionary until 1828 though an English one by Samuel Johnson in 1755, which admittedly the framers were well aware of.
. *Broad language, commerce, general welfare, freedom of speech, due process. "Necessary and Proper," included the usage of "convenient," said Marshall, presumably in the sense that we understand it, but maybe not.
*A Court at the beginning, interpreting a document different from a contract or statute, meant, as Marshall said to endure for three weeks and two days, oh, I mean, for the ages, to deal with unknown crises.
*A Court in 1868, after the passage of the 14th Amendment, following a catylismic Civil War,
*A Court in 2006, after 200 years of court case precedent.
*Inevitable silence in context in every case, whether in constitutional clause, statute at issue, or case precedent: No mention of the power of judicial review, no mention of immunity of a federal instrument, no mention of executive privilege, no mention of the removal power of the Senate, no mention of the Senate's Treaty abrogation power.
*Given that silence, how is it to be interpreted, and how narrow or broad should our focus be? Was it a national bank even though 80% of the stock and directors were private? Do we look at one plant and see 10 men about to be fired for union activities or look broadly

to find a catastrophic potential of unrest throughout the steel industry? Parade of Horrors or anti parade of horrors.?

Justices who are not trained historians, faced with a limited time period and limited question to answer.
*Choice: Which clauses are relevant? Which sources of evidence? Convention vote? Convention notes? Why didn't Madison not share his notes until a half-century after the Convention? Ratifier votes? Reports of primary proponents of an amendment? Subsequent votes, after passage of the 14th Amendment?
*Federalist Papers, Are they the most important philosophical assessment of our Constitution, or partisan advocacy to convince NY Convention participants to vote for the Constitution, or a combination?
*How important are early government actions? Early Court decisions following adoption of the Constitution? Following adoption of the 14th Amendment?
Marshall emphasized the importance of the first Congress, in establishing a national bank, yet did not emphasize it all in Marbury. Nor did Marshall consider a readily apparent plausible alternative to his construction of the statute, one which would have avoided the constitutional question?

*. Pilon strongly objects to interpreting the General Welfare Clause as independent, that is, as its own basis for justifying taxing and spending. He emphasizes the position of Madison, the principal drafter of the Constitution, and some other founders. And certainly the power comes first in a long list of enumerated powers in Article I section 8. Is that the only reasonable position? I don't think so. None other than Alexander Hamilton disagreed with Madison, as did Joseph Story, the respected Constitutional authority, immediately after the founding period, and of course, Benjamin Cardozo, some respected a jurist that President Hoover was prevailed upon to nominate him to the Court, although, there were already two other New Yorkers on the Court, he would make the second Jewish justice. In addition, the text has no condition clause, no "but" clause. The framers knew how to write "but," They did so 15 other times. Today, no greater complexity exists than in determining the sound balance today in our War Against Terrorism.

Which first principles? Do we emphasize the limited nature of our federal government or the broad power of that government, notwithstanding their limits?
What are the dimensions of "privileges and immunities"? To Pilon, the Court in Slaughterhouse got them wrong. Certainly we should consider Bushrod Washington's opinion on circuit in Corfield v. Coryell. 6 f.cas 546. But since it is not even an opinion of the Supreme Court, how much weight should we give it?

Today, we are in another of our crisis moments, like the Civil War and its aftermath, the Great Depression. We are fighting three wars. Constitutional decision-making can't get any more complex. We must recognize the President's broad military and foreign policy power, Congress's key enumerated rights, the Prohibition on ordinary suspension of the writ of habeas corpus (is this suspension or non-applicability given the status of the

detainee?), and the rights, given the Bill of rights, of citizens, and even non-citizens, being held outside the war zone, absent emergency need for action, in the United States or perhaps in areas under permanent control of the United States, the applicability of the Geneva Convention? The Combatant Status Review Tribunal, CIA and treatment short of serious physical injury.

Not just complexity, but Culture bathing of a justice is inevitable. You can fight it, but it is insidious, try as you may to be objective, and you should try. But let's be frank. It is there.

Culture has always driven one's perceptions.
Witness slave-holder Jefferson, declaring to the world that all men being created equal.

*Present culture has driven Court decision-making, for the good, in two major areas: toward expanded African-American rights to non-segregated public education and to expanded rights for women.

We have the same language today in the 14th Amendment as we had in 1868. Granted there is very broad language of privileges and immunities and equal protection for persons. How is it to be interpreted?

*No justice before the 1950s, not John Marshall Harlan, not Oliver Wendell Holmes, not Brandeis, read the amendment as expansive in either area. And perhaps only a rare judge, state or federal did. Respected constitutional scholar Alexander Bickel had to come up with the concept of "language capable of growth," to justify Brown. Judge Bork had to examine the reality over time, to conclude that that racial segregation has never in fact produced equality. Justice Jackson before Brown, according to then clerk Rehnquist, expressed his view that he wanted to vote to strike down racial segregation, but he wondered whether that would be Lochnerizing (perhaps the equivalent of "lawless judging" based upon the subjective values of the Justice). Michael McConnell presents important evidence of a strong Congressional position against race segregation in the schools of the time. But of course, not quite the 2/3 required in Congress or the ¾ of the state legislatures.

*What justice, today, though, across the ideological spectrum, given today's culture, would take the position that racially segregated schools are constitutional? None. What changed? Not the text? Not the history. But the culture. Conservatives find a way to get there. Bork by looking at the state of racial segregation over time, a kind of cultural perception, and McConnell by an exhaustive study of Congress and the states at the time, that does not quite prove its originalist case.

*As to women's rights, women remained second-class citizens, despite the 14th Amendment equal protection and privileges and immunities clauses, until at least 1971, when Chief Justice Burger, in Reed v. Reed, declared that the Court would begin to look more closely at laws that restricted women's opportunities. It was not Court decision-making under the 14th Amendment that slowly enlarged women's rights to property and

full opportunity to enter the business and political world. It was no accident, but evidence of culture's influence at the time of the passage of the 14th Amendment, that 3 justices in Bradwell in 1873, including Justice Field, who was so enraptured about men's privileges and immunities. To Bradley, with Field concurring, "The paramount destiny and mission of women are to fulfill the noble and benighn officies of wife and mother. This is the law of the Creator. During the next period, the culture, controlled by men, dictated that women were in need of protection, including protection from jobs and equal wages. It was culture that led Felix Frankfurter to turn down Ruth Bator Ginsburg as his clerk. It was culture that led Truman to ask Chief Justice Vinson how his colleagues would react if Truman were to nominate Ohio's Frances Allen as a justice, and Vinson reported back that the boys wouldn't like it. They feared they wouldn't be able to use their spittoons. I do not suggest that inclusion of excluded classes will necessarily result in different class-based interpretations, but only that particular individuals, like Florence Allen, will not have the chance to show, that perhaps she might have been a libertarian justice.

It will be culture that may one day find a men-only draft unconstitutional, once an unheard of proposition.

Culture and Brandeis and women's suffrage, Holmes and Buck v. Bell's sterilization in 1927, Frankfurter in Korematsu and we're all doing are duty, Warren apologizing for urging confinement of ethnic Japanese extraction
Holmes and Roberts, Mass v. Davis, 1897 v. Hague v. CIO 1937.
Holmes and Radice in 1924 by Sutherland, waitress.Burger in Reed v. Reed.

Complexity, Culture, and Practicality.

Practicality.
*The instructions of the framers, including Madison, were to amend the Articles, and get Congressional approval, and then have it submitted to the states, for adoption, which needed unanimity as required by the Articles. Instead, they scrapped the Articles, and didn't call for Congressional approval, and called for adoption if 9 out of 13 states ratified.
*Practicality, in accepting the 14th Amendment as adopted, even though, the Southern states, needed for the three-fourths approval, understood that they would only be readmitted to the Congress if they agreed to the amendment.
*As a practical matter, the post-Civil War Court understood that it had better not consider the constitutionality of the Reconstruction Acts, and readily found ways to avoid reaching it, or even speaking about the question in dicta.
*Practicality is clearly represented by Madison. While deeming the national bank beyond Congress's power, he "waived" his objection after 25 years of action endorsing the bank by the three federal branches. Apparently he thought the Hamilton view on its legitimacy had been reasonable and come to prevail. Sullivan Gunther, 15th Ed. 104: In his January 1815 veto message he said that "while disapproving the details of the bill, he had 'waive[d]the question of congressional power to incorporate a bank, 'as being precluded in my judgment by repeated recognitions under varied circumstances of the validity of

such an institution in acts of the legislative, executive, and judicial branches of the Government.' In 1816, Congress established a Second Bank acceptable to Madison."

*Practicality is reflected by the dual nature of the Supreme Court. It is the authoritative judicial interpreter of the Constitution, yet it is a court too and must act like a court.

*It must be active in reaching a decision that needs to be reached, yet since it is unelected it must seek to avoid policy making. It must decide, yet not lose the support of the people. It will not ordinarily use the sledge hammer of too-ready overruling precedent to avoid the accusation that they are not judges but activist policy makers. . At times the Court will choose not to hear a case. At other times, perhaps read a statute narrowly. At still others find the posture of the case inadequate for review on the merits. At other times distinguish. Members of the institution, and especially the Chief Justice, see an obligation to protect the institution itself. Chief Justice Rehnquist, in Dickerson, came to the aid of the Miranda finding it "has been embedded in routine police practices to the point where warnings have become part of our national culture," though as associate justice he had long opposed it.

Complexity, and choice. Ever-present Culture, and Practicality. These factors, in my view, overwhelm efforts at easy coherence. Skepticism requires a caustious look at first principles, and discovery of the definitive truth by examining documents 200 and 100 years old. I shall look forward to Mr. Pilon's thoughts on the subject, and again it is an honor to present these comments for his consideration.