The Limits of Majority Rule

George F. Will

In Central Illinois, where men are men and I am from, people develop, or at least in the 1940s and 1950s they did develop, what I consider an admirable Midwestern reticence about themselves. Although I left Champaign-Urbana to go to college in 1958, four months after my 17th birthday, I have never stopped thinking of myself as a Midwesterner. I am, in words that are the title of Hamlin Garland’s once-famous book published 99 years ago, a son of the middle border. As such, I still adhere to what I consider a Midwestern reserve in talking about myself. I retain a Midwestern inclination to not share my feelings with others, and to thank others for not sharing their feelings with me.

This is why there hangs on my office door in Washington’s Georgetown section a framed New Yorker cartoon that is my personal proclamation against today’s confessional culture. The cartoon depicts a man dressed in a suit and tie and reclining, rather stiffly, on a psychiatrist’s couch, with the psychiatrist sitting behind him, pen and notebook in hand. In the caption, the man on the couch says, “Look, call it denial if you like, but I think that what goes on in my personal life is none of my own damn business.”

And yet, sometimes what you learn about yourself can illuminate a larger subject. And sometimes it is only when looking back upon years of work and thought that you recognize a telling pattern, or an implicit preoccupation, with a lesson to offer. I have spent my adult life reflecting on the public life of my country, and one clear pattern that emerges from those reflections is a preoccupation with the proper bounds of majoritarianism, and with the grave costs of failing to observe those bounds.

That preoccupation has pointed me toward different questions at different times, and in recent years it has led me to revise, or at least

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sharpen, some prior views about the role of the judiciary and its relation to the elected branches of our government. But it is important to see, as just a bit of biographical reflection will help me to show, how the views I have come to on the question of the judiciary’s proper role are related to the abiding question of majoritarianism—and therefore to a host of other vital questions about the character of our republic.

**The Reach of Majorities**

The largest influence on my life’s work was, and still is, Abraham Lincoln. And one of the most important events in my life, one that continues to shape my thinking about the most fundamental problems of this nation’s public life, is an event that happened 87 years before I was born. The event was the work of another man from Illinois, Senator Stephen Douglas. It was the 1854 enactment of the Kansas-Nebraska Act. It is not too much to say that a great question posed by that Act continues to reverberate in the nation’s life and in my professional life.

It reverberates in the nation’s life not just because the Civil War is the hinge of American history, and the Kansas-Nebraska Act, which repealed the Missouri Compromise of 1820, was the spark that lit the fuse that led to war. If the Civil War was not, in William Seward’s famous phrase, an “irrepressible conflict” before 1854, it certainly was after that.

The Missouri Compromise had been the work of Henry Clay, whom Lincoln, in the first of his seven 1858 debates with Senator Douglas, called “my beau-ideal of a statesman.” The Compromise somewhat defused the slavery issue and sectional animosity for three decades. It did so by forbidding slavery in the Louisiana Territory north of a line that included the Kansas and Nebraska territories. The Kansas-Nebraska Act, introduced by Senator Douglas, empowered the residents of those two territories to decide whether or not to permit slavery there.

The Act’s premise was that the distilled essence of the American project is democracy. And that the distilled essence of democracy is majority rule. And that, therefore, it was right that there should be popular sovereignty in the territories regarding the great matter of slavery. People should have the right to vote it up or vote it down.

Lincoln disagreed. He responded to the Act with a controlled, canny, patient, but implacable vehemence. So, the most morally luminous career in the history of American democracy took its bearings from the
principle that there is more to America’s purpose, more to justice, than majorities having their way.

Considering my origins in the Land of Lincoln, there is a personally satisfying symmetry—which I did not recognize at the time—in the fact that 50 years ago I submitted to the Politics Department of Princeton University a doctoral dissertation titled “Beyond the Reach of Majorities: Closed Questions in the Open Society.” The title came from the Supreme Court’s 1943 opinion in *West Virginia State Board of Education v. Barnette*, the second of the flag-salute cases involving public-school children who were Jehovah’s Witnesses.

As told by Professor Noah Feldman of New York University Law School, in his splendid history, *Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices*, the two cases, which culminated in one of the most striking reversals by the Court in its history, began on an October morning in 1935 in Minersville, Pennsylvania, when William Gobitis, a 10-year-old fifth grader, refused to salute the flag during the Pledge of Allegiance. “The teacher,” Feldman writes, “tried to force his arm up, but William held on to his pocket and successfully resisted.” The next day his sister, Lillian, 12, a seventh grader, also refused to salute the flag, explaining to her teacher, “The Bible says at Exodus chapter 20 that we can’t have any other gods before Jehovah God.”

At that time, Feldman explains, the flag salute “closely resembled the straight-arm Nazi salute, except that the palm was to be turned upward, not down.” A national leader of the Jehovah’s Witnesses had recently given a speech denouncing the Nazi salute, and some Witnesses around the country had come to the conclusion that Lillian explained to her teacher: Saluting the flag was idolatry. Lillian and William were shunned at school, the Gobitis family grocery store was threatened with violence and boycotted, the school district changed saluting the flag from a custom to a legal duty, and the Gobitis children were expelled from school.

Their case wended its way to the Supreme Court as war clouds lowered over the world—a context, Feldman notes, that was not favorable to the Witnesses. They were pacifists; they had opposed U.S. participation in World War I and were opposing any U.S. involvement in any war in Europe. In June 1940, just days before Nazi troops marched into Paris, the Court ruled 8-1 that the school district had the power to make saluting the flag mandatory.
The opinion for the Court was written by Justice Felix Frankfurter, a founder of the American Civil Liberties Union. He was Jewish and had been born in Austria, which the Nazis had occupied in 1938. As a Jew, he was anxious to avoid practices that allowed school children to be treated differently because of their religion. The case, *Minersville School District v. Gobitis*, dealt, he said, “with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security.” He said his personal opinion was that the school board should allow the Witnesses’ children their dissent. He was, however, as most political progressives had been for many decades, an advocate of judicial restraint, and he thought the Court should acknowledge that the elected school board had made a defensible, meaning reasonable, choice expressing the will of a majority of its constituents.

Five members of the majority had been appointed to the Court by President Franklin Roosevelt, whose anger with the Court’s refusal to be deferential toward Congress’s enactment of New Deal legislation led to his ill-fated attempt to “pack” the Court. The lone dissenter in *Gobitis* was Harlan Fiske Stone, who had been appointed by President Calvin Coolidge.

Minersville’s flag-salute law, wrote Stone, was “unique in the history of Anglo-American legislation” because it forced students “to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions.” So, deference to the school board’s legislative judgment amounted to “the surrender of the constitutional protection of the liberty of small minorities to the popular will.”

As Feldman says, “In 1940, the idea that the Court should protect minorities from the majority was not the commonplace it would later become. Stone had first introduced it in 1937, burying it in a footnote.” Indeed, this became the most famous and consequential footnote in the Court’s history.

Taking their cue from the Court, many communities made flag saluting mandatory. There was an upsurge of violence against Witnesses, including a riot by a mob of 2,500 who burned down the Witnesses’ Kingdom Hall in Kennebunk, Maine.

Then in 1943, with a world war raging, the Court ruled on another flag-salute case concerning Jehovah’s Witnesses, for the purpose of overturning the decision it had reached just 36 months earlier. Writing for the majority in a 6-3 decision, Justice Robert Jackson, who had not been on the Court when *Gobitis* was decided, said:
The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. Fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

This was Lincoln's principle articulated as a constitutional and even judicial philosophy.

**THE COUNTER-MAJORITARIAN DIFFICULTY**

First as a graduate student, then briefly as a professor of political philosophy, and now for more than four decades as a Washington observer of American politics and governance, I have been thinking about the many vexing issues implicated in these two flag-salute cases. The issues include the source of American rights, the nature of the Constitution and the role of the Supreme Court in construing it, and what fidelity to democracy requires regarding the rights of majorities.

This is why I say that the Kansas-Nebraska Act reverberates in my professional life: It forced the nation and, decades later, me, to confront a question that constantly takes new forms but never goes away. It is the question of the limits of our commitment to majority rule. It is the question of how majoritarian we should be in our public life.

The question concerns two daunting quandaries that are, I hope and assume, at the center of American legal thought, education, and scholarship. The first is the nature and purpose of a written constitution. The second is the legitimacy of judicial review, and particularly whether judicial review really does involve what has been called a “counter-majoritarian difficulty.”

There are those, and they might be an American majority, who believe that majority rule is the sovereign American value that trumps all others. They believe that the degree of America’s goodness is defined by the extent to which majorities are able to have their way. Such people are bound to believe that it is the job of the judicial branch of government to facilitate this by adopting a modest, deferential stance regarding what legislatures do.

Many also implicitly believe that such an attitude should shape the attitude of courts toward what executive branch officials and agencies
do. Here, judicial deference is said to be dictated by the plebiscitary nature of the modern presidency. This began with the presidency of Andrew Jackson, but did not fully flower until modern communications technologies—especially radio and then television—changed the nature of the American regime by changing the nature of political campaigns and of governance. Many have argued that, because presidents alone are elected by a national constituency, they are unique embodiments of the national will, and hence should enjoy the maximum feasible untrammeled latitude to translate that will into policies.

The two-fold problem with such an attitude of deference, however, is that majorities can be abusive, and that some questions are not properly submitted to disposition by majority rule because there are some—actually, there are many—closed questions even in an open society. So, we must ask: How aberrant, or how frequent, are abusive majorities? A related but different question is: When legislatures, which are majoritarian bodies, act, how often are they actually acting on behalf of majorities? My belief, based on almost half a century observing Washington, the beating heart of American governance, is that as government becomes bigger and more hyperactive, as the regulatory, administrative state becomes more promiscuously intrusive in the dynamics of society and the lives of individuals, only a steadily shrinking portion of what the government does is even remotely responsive to the will of a majority.

Rather, the more that government decides that there are no legal or practical limits to its proper scope and actual competence, the more time and energy it devotes to serving the interests of minority—often very small minority—factions. So, paradoxically, as government becomes bigger, its actions become smaller; as it becomes more grandiose in its pretensions, its preoccupations become more minute.

THE RENT-SEEKING STATE

Let me offer a few examples drawn from government below the federal level.

Ali Bokhari emigrated from Pakistan in 2000, settled in Nashville, became a taxi driver, and got a very American idea: He started a business to serve an unmet need. He bought a black Lincoln sedan and began offering cut-rate rides to and from the airport, around downtown, and in neighborhoods not well served by taxis. After one year he had 12 cars.
Soon he had 20, and 15 independent contractors with their own cars. And he had a website and lots of customers.

Unfortunately, he also had some powerful enemies. The cartel of taxi companies had not been able to raise their rates since Bokhari came to town. Those companies, in collaboration with limo companies that resented Bokhari’s competition, got the city government’s regulators to require him to raise his prices and to impose many crippling regulations.

Sandy Meadows was an African-American widow in Baton Rouge. She had little education and no resources, besides her talent for making lovely flower arrangements, which a local grocery store hired her to do. Then Louisiana’s Horticulture Commission — there is such a body, for rent-seeking reasons — pounced. It threatened to close the store in order to punish it for hiring an unlicensed flower arranger. Meadows tried but failed to get a license, which required her to take a written test and to make four arrangements in four hours. The adequacy of the arrangements was judged by licensed florists who were acting as gatekeepers to their own profession, restricting the entry of competitors. Meadows, denied re-entry into the profession from which the government had expelled her, died in poverty. But the people of Louisiana were protected by their government from the menace of unlicensed flower arrangers.

Elsewhere in Louisiana, the monks of St. Joseph Abbey also attracted government’s disapproving squint. In 2005, Hurricane Katrina damaged the trees that for many years the monks had harvested to finance their religious life. Seeking a new source of revenue, they decided to make and market the kind of simple wooden caskets in which the Abbey has long buried its dead. But the monks were unwittingly about to embark on a career in crime.

Louisiana has a State Board of Embalmers and Funeral Directors. Its supposed purpose when created in 1914 was to combat diseases. It has, however, long since succumbed to what is called “regulatory capture.” That is, it has been taken over by the funeral industry that it ostensibly regulates. At the time the monks began making and selling caskets, nine of the board’s 10 members were funeral directors, one of whose principal sources of income is selling caskets.

In the 1960s, Louisiana had made it a crime to sell “funeral merchandise” without a funeral director’s license. The monks would have had to earn 30 hours of college credits, and to apprentice one year at a licensed funeral home to acquire skills they had no intention of using. And their
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abbey would have been required to become a “funeral establishment” with a parlor able to accommodate 30 mourners. And they would have had to install an embalming facility, even though they only wanted to make rectangular boxes, not handle cadavers. In other words, the monks would have had to stop being monks.

The law requiring all this rigmarole served no health or sanitary purpose: Louisiana does not stipulate casket standards, or even require that burials be done in caskets. Furthermore, Louisianans can buy caskets from out of state—even from Amazon.com, which, after all, sells everything. Obviously, the law that was brought to bear against the monks is an instrument of unadulterated rent-seeking by the funeral directors to protect their casket-selling cartel. Rent-seeking occurs when private interests bend public power to their advantage in order to confer favors on themselves, often by imposing impediments on actual or potential competitors.

**Economic Liberty**

Now, you may be thinking that I have wandered far from the Kansas-Nebraska Act, Abraham Lincoln, and the work of a political commentator. But the question raised by these examples of abject rent-seeking is a question about the proper limits of the power granted to majoritarian institutions.

The government action used to prevent a Pakistani immigrant from entering into his chosen profession of operating a transportation company, and the government action that blocked an aspiring flower arranger from exercising her skill and consigned her to die in poverty, and the government action that blocked the monks from supporting themselves by making and selling wooden boxes were violations of a basic right. All three actions, and thousands like them from coast to coast, should be, but usually are not, considered unconstitutional. They should be struck down even though they have issued from majoritarian processes— from elected officials or from regulatory agencies created by elected officials.

They should be struck down as violations of a natural right, the right that Lincoln understood as the right to free labor, the right that was, of course, at the core of the slavery crisis. It is the unenumerated, but surely implied, constitutional right to economic liberty. But laws abridging that right survive and proliferate because courts at least since the New
Deal have stopped doing their duty to defend this economic liberty against its rent-seeking enemies.

In a sense, the problem began in Louisiana 16 years before the monks’ monastery was founded in 1889. It began across Lake Pontchartrain from the monastery, in New Orleans. That city had awarded some rent-seeking butchers a lucrative benefit. The city had created a cartel for them by requiring that all slaughtering be done in their slaughter houses. Some excluded butchers went all the way to the U.S. Supreme Court to challenge this law. They lost when, in the 1873 Slaughterhouse Cases, the Court, in a 5-4 decision, upheld the law that created the cartel. In doing so, the Court effectively expunged a clause from the 14th Amendment. The clause says: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” The court construed the phrase “privileges or immunities” very narrowly. It construed that phrase so narrowly, in fact, that the phrase essentially disappeared from constitutional law. A melancholy fate for a phrase that was intended as shorthand for the full panoply of rights of national citizenship.

Intermittently since then, and steadily since the New Deal, courts have abandoned the protection of economic rights, including the fundamental right to earn a living without arbitrary and irrational government hindrances. Instead, courts have adopted the extremely permissive “rational basis” test for judging whether government actions are permissible. Courts almost invariably hold that if a government stipulates a reason — any reason — for a law or regulation that burdens economic activity, or if the court itself can even imagine a reason for the law, even if the law reeks of rent-seeking, then the court should defer to the elected legislature, elected city council, or other majoritarian institution that is the ultimate source of the law or regulation.

Indeed, in 2004, the 10th Circuit Court of Appeals upheld a notably ludicrous Oklahoma law requiring online casket retailers to have funeral licenses. To obtain such licenses, applicants are required to take several years of course work, serve a one-year apprenticeship, embalm 25 bodies, and take two exams. Upholding this travesty, the court wrote, with breezy complacency, that “while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.”
The court did not say, but it might as well have said, that majority rule requires that courts only reluctantly and rarely engage in the judicial supervision of democracy, because majority rule is the essence of the American project. There are, however, two things wrong with this formulation.

First, it is utterly unrealistic and simpleminded to think that there is majority support for, or majority interest in, or even majority awareness of, even a tiny fraction of what governments do in “dishing out” advantages to economic factions. Does anyone really think that, when the Nashville city government dispenses favors for the taxi and limo cartel, it is acting on the will of a majority of the city’s residents? Can anyone actually believe that a majority of Louisianans give a tinker’s dam about who sells caskets or arranges flowers?

The second fallacy behind a passive judiciary deferring to majoritarian institutions is more fundamental. It is rooted in the fact that we know, because he said so, clearly and often, that Lincoln took his political bearings from the Declaration of Independence. We know that Lincoln believed, because the Declaration says so, that governments are instituted to secure our natural rights. These rights therefore preexist government. And they include the unenumerated ones affirmed in the Constitution’s Ninth Amendment: “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

JUDICIAL ENGAGEMENT

Which brings me, by an admittedly circuitous route, back to 1854, to the Kansas-Nebraska Act, and to Lincoln’s noble recoil from “popular sovereignty in the territories.” That recoil propelled Lincoln out of semi-retirement from politics and into a debate that still reverberates.

For many years and for several reasons, many of my fellow conservatives have unreflectively and imprudently celebrated “judicial restraint.” For many years, I, too, was guilty of this. The reasons for that celebration of restraint include an understandable disapproval of some of the more freewheeling constitutional improvisations of the Warren Court, and the reasonable belief that the law schools that train future judges, and the law reviews that influence current judges, are, on balance, not balanced—that they give short shrift to conservatism. It is, however, high time for conservatives to rethink what they should believe about the role of courts in the American regime.
Another reason many conservatives favor judicial deference and restraint is what can be called the conservative populist temptation. Conservatives are hardly immune to the temptation to pander—to preach that majorities are presumptively virtuous and that the things legislatures do are necessarily right because they reflect the will of the majority.

But the essential drama of democracy derives from the inherent tension between the natural rights of the individual and the constructed right of the community to make such laws as the majority deems necessary and proper. Natural rights are affirmed by the Declaration of Independence; majority rule, circumscribed and modulated, is constructed by the Constitution. Timothy Sandefur of the Goldwater Institute in Phoenix, in his book *The Conscience of the Constitution*, rightly emphasizes that the Declaration is not just chronologically prior to the Constitution, it is logically prior. Because it “sets the framework for reading” the Constitution, it is the Constitution’s “conscience”: By the terms with which the Declaration articulates the Constitution’s purpose—the purpose is to “secure” unalienable rights—the Declaration intimates the standards by which to distinguish the proper from the improper exercises of majority rule. “Freedom,” writes Sandefur, “is the starting point of politics; government’s powers are secondary and derivative, and therefore limited….Liberty is the goal at which democracy aims, not the other way around.”

The progressive project, now entering its second century, has been to reverse this by giving majority rule priority over liberty when the two conflict, as they inevitably and frequently do. This reflects the progressive belief that rights are the result of government; they are “spaces of privacy” that government “has chosen to carve out and protect.”

If the sole, or overriding, goal of the Constitution can be reduced to establishing democracy, and if the distilled essence of democracy is that majorities shall rule in whatever sphere of life where majorities wish to rule, then the Court is indeed a “deviant institution.” But such a reductionist understanding of American constitutionalism is passing strange. It is excessive to say, as often has been said, that the Constitution is “undemocratic” or “anti-democratic” or “anti-majoritarian.” It is not, however, too much to say that the Constitution regards majority rule as but one component of a system of liberty.

The principle of judicial restraint, distilled to its essence, frequently is the principle that an act of the government should be presumed
constitutional and that the party disputing the act’s constitutionality bears the heavy burden of demonstrating the act’s unconstitutionality beyond a reasonable doubt. The contrary principle of judicial engagement is that the judiciary’s principal duty is the defense of liberty, and that the government, when challenged, bears the burden of demonstrating that its action is in conformity with the Constitution’s architecture, the purpose of which is to protect liberty. The federal government can dispatch this burden by demonstrating that its action is both necessary and proper for the exercise of an enumerated power. A state or local government can dispatch the burden by demonstrating that its act is within the constitutionally proscribed limits of its police power.

Justice Don Willett of the Texas Supreme Court has cogently addressed, and largely dissolved, the supposed counter-majoritarian difficulty. There are, he says, two different but not equal majorities involved. He begins, as judicial review began, in 1803, with *Marbury v. Madison*, in which Chief Justice John Marshall wrote: “The powers of the Legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written.” In distinguishing between proper judicial deference to legislative majorities and the dereliction of the judicial duty to police majoritarian excesses, Willett says that in our democracy the legislature’s policymaking power, “though unrivaled, is not unlimited.” The Constitution is supreme. And “desirable” is not a synonym for “constitutional.”

Although “[t]he political branches decide if laws pass,” it is for courts to decide “if laws pass muster,” he continues. So, “[i]f judicial review means anything, it is that judicial restraint does not allow everything.” To avoid a “constitutional tipping point” where “adjudication more resembles abdication,” courts must not “extinguish constitutional liberties with nonchalance.” This requires fidelity to the supermajority against which other majorities must be measured—the supermajority of those who wrote and ratified the Constitution.

“There must,” Justice Willett writes in a Texas case, “remain judicially enforceable constraints on legislative actions that are irreconcilable with constitutional commands.” Why “must”? Because, says Willett, the Texas constitution, like the U.S. Constitution, is “irrefutably framed in proscription.” It “declares an emphatic ‘no’ to myriad government undertakings,” even if majorities desire them. Judicial review means preventing any contemporary majority from overturning yesterday’s
supermajority, the one that ratified the Constitution. Federal judges are accountable to no *current constituency*. But when construing the Constitution, they are duty-bound to be faithful to the constituency of those who framed and ratified it.

This, says Willett, is the profound difference between an (improperly) activist judge and a properly engaged judge. The former creates rights that are neither specified in nor implied by the Constitution. The latter defends rights the framers actually placed there and prevents the elected branches from usurping the judiciary’s duty to “declare what the Constitution means.”

It is not true that, as Dr. Stockman declares in Henrik Ibsen’s play *An Enemy of the People*, “the majority is always wrong.” It is true that the majority often is wrong, and that the majority, even when wrong, often has a right to work its will anyway. Often, but not always. The challenge is to determine the borders of the majority’s right to have its way, and to have those borders policed by a non-majoritarian institution — the judiciary.

And here, naturally, we return once more to Lincoln. By his noble rejection of the Kansas-Nebraska Act and the idea of popular sovereignty as the way to decide the question of slavery in the territories, Lincoln concentrated our minds on two timeless truths. One is that majority rule is inevitable, but not inevitably reasonable. The other is that moral reasoning properly done, and the Constitution properly construed, both affirm that many things should be beyond the reach of majorities.