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by VIKRAM DAVID AMAR*

Like the other presenters, I remember pretty vividly my first conversation with Mr. Justice Blackmun when he interviewed me in his office in February of 1989. He proceeded through his standard list of questions in that self-effacing way that *is* Harry Blackmun, and then he got to the question: how would I feel about working for the man who authored the *Roe v. Wade*[1] decision? I answered, quite reflexively and tritely, that I would of course "be honored" to work for such a man. It was not until much later, as I began to teach and write about constitutional law issues, that I really thought carefully and critically about *Roe* as constitutional creed. The conclusion I have reached is that *Roe* likely arrives at the right and glorious answer, but that the precise question the Court asked, whether a fundamental due process right to engage in certain activity exists, may have been the wrong one. Instead, I would ask, following the ideas of people like Ruth Bader Ginsburg, do anti-abortion laws treat women and men equally within the meaning of the Constitution, and is a political process that generates laws that uniquely burden women problematic? The answer to this question yields a result similar to that reached by the Court in *Roe*, but the equal protection question, focusing as it does on the way political processes work and how women are represented in them, is entirely different.

When Bill Dodge[2] asked me a few months ago whether I would be willing to contribute a short piece on Justice Blackmun's federalism and separation of powers decisions to be included in this symposium, I

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1. 410 U.S. 113 (1973).

2. Professor of Law, University of California, Hastings College of Law, and co-organizer of the symposium.

gave the same answer I gave nine years ago: "I would be honored." Just like my answer in 1989, my answer to Bill was genuine but reflexive in that I had not at the time really given any systematic thought to the Justice's overall contribution in the federalism and separation of powers areas. Having now spent a few months thinking about that topic, I have a reaction that in some ways is the converse of my sense of *Roe*. In many important federalism and separation of powers cases, Justice Blackmun was impressive and thoughtful *in asking the right kinds of questions about the way the political process functions*, but sometimes gave answers that are open to serious question.

I. Federalism

Let us begin with federalism and Justice Blackmun's most famous and important contribution in that area - his authorship of the majority decision in the 5-4 *Garcia v. San Antonio Metropolitan Transit Authority*[3] case, decided in 1985. In *Garcia*, the Court held that federalism imposed no bar to the application of the federal Fair Labor Standards Act ("FLSA")—which regulated minimum and overtime wages—to state and local mass transit employees.[4] In so doing, the Court formally overruled a case decided a decade earlier, *National League of Cities v. Usury*.[5] In that decision, the Court had said, with Justice Blackmun concurring in the majority opinion, that federalism (in particular, limitations inherent in the Commerce Clause) prevents the national government from enforcing the FLSA against states and their subdivisions "in areas of traditional governmental functions."[6]

The meaning of this phrase, of course, proved illusive and indeterminate in the lower courts during the almost 10-year reign of *National League of Cities*. Indeed, in jettisoning the "traditional governmental functions" test, Justice Blackmun's opinion in *Garcia* characterized the *National League of Cities* approach as "unworkable in practice."[7] But Justice Blackmun went on to find the *National League of Cities* framework "unsound in principle" as well.[8] This is so, he said, because while the Framers of Constitution admittedly gave high priority to protecting the states from federal overreaching, they did so by building into the Constitution political process safeguards

3. 469 U.S. 528 (1985).
4. *Id.* at 555-56.
5. 426 U.S. 833 (1976).
6. *Id.* at 852.
7. *Garcia*, 469 U.S. at 546-47.
8. *Id.*

sufficient to protect the sovereignty states were to retain.[9] As the Justice emphasized:

> [T]he Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete [judicially enforceable] limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.[10]

I think a political process model may very well be a helpful one, although by no means the exclusive one, for evaluating federalism issues posed by cases like *Garcia*. In other words, I believe Justice Blackmun hit on something when he asked: do state governments enjoy structural protections that enable them to take care of themselves and their own interests in the federal legislative process such that a "searching judicial inquiry" (a *Carolene Products*[11] term) is unwarranted?[12] What gives me pause, then, is not so much the question *Garcia* asks, but the way the Court answers that question, relying as it does on the role states play in the selection of both the Legislative and Executive Branches of the federal government.[13] In particular, I think of the four most important structural safeguards Justice Blackmun cited,[14] one is pretty trivial, one never existed, and two have ceased to meaningfully exist by 1985.

First, Justice Blackmun points to the "indirect influence" enjoyed by the state legislatures over the House because Article I, section 2 provides that "Electors [for the House] shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[15] This does not move me very much. To begin with, prescribing voter qualifications even in 1787 did not give state legislatures that much power to control those persons whom the qualified voters elected. In any event, as Pam Karlan[16] could tell us better than I, 1985 is a little late to talk about broad state powers to determine voter qualifications, after *Harper v. Virginia State Board of Elections*[17] held

9. *See id.* at 550-51.
10. *Id.*
11. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).
12. *Garcia*, 469 U.S. at 550-55.
13. *See id.*
14. *See id.*
15. U.S. CONST. art. I, § 2(1); *see also Garcia*, 469 U.S. at 551.
16. Professor of Law, Stanford Law School, and symposium participant.
17. 383 U.S. 663, 666 (1966).

that voting is a fundamental right under the Equal Protection Clause of the Fourteenth Amendment.

Second, the Court points to the fact that each state is entitled to equal representation in the Senate, and that such equal representation cannot be deprived, even by constitutional amendment, without the consent of the State.[18] This *is* an important structural provision of the Constitution; however, it is not one that protects state governments from any federal incursions, but rather one that gives special protection to the people of smaller states. Indeed, equal representation in the Senate does not protect states *qua* states in any significant way;[19] it protects people of some states from the people of others.

Third, Justice Blackmun's opinion points to the power states have to select the individuals who make up the electoral college in the presidential election setting.[20] This was an important state power back in 1787. The Framers explicitly rejected a parliamentarian model of government in which the legislature, or its dominant party, selects the Chief Executive.[21] Instead, the President ordinarily was to be selected by a body independent of Congress, the electoral collegians.[22] Being able to pick the people who actually get to pick the President is a big deal. Or at least it *was* a big deal. Beginning in the 1820s, states began holding general elections for the presidency.[23] Over time, most states enacted laws purporting to legally bind their electoral collegians to vote for the candidates selected by the state voters in the general election.[24] And while it is not entirely clear that a state could not reverse course today and pick electoral collegians who would follow the instructions of the state legislature rather than those of the people of the state, I think such a reversal would be difficult as a constitutional matter, and certainly impossible as a political matter. The scheme we have today, with electoral collegians bound by the results of states' general elections, is a basic feature of today's "unwritten"

18. *See Garcia,* 469 U.S. at 551.

19. It might be argued that state equality in the Senate does remind people that the Constitution thinks in terms of states, suggesting that the people should as well. In this way, equal respect (in the Senate) for states translates into some respect for every state. I am indebted to Bill Wang for this point, which is more psychological than legal.

20. *See Garcia,* 469 U.S. at 551.

21. *See generally* Akhil R. Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 124-25 (1995).

22. *See id.*

23. *See* Akhil Reed Amar & Vik Amar, *President Quayle?*, 78 VA. L. REV. 913, 919 (1992) (citing JAMES W. CEASER, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT, 103 n.22 (1979)).

24. *See id.* (citing, e.g., Cal. Elec. Code § 25105 (West 1989) (requiring electors to vote for candidates of the political party that they represent)).

Constitution, and appears to have the approval of both the country and the Supreme Court.[25] So even if state control over electoral collegians was once a meaningful protection from federal incursion, it no longer is.

The same is true of state legislative election of United States Senators, the fourth structural mechanism relied on by the *Garcia* Court.[26] State legislative election of Senators was, in 1787, thought to be the most important device by which state government could protect itself from federal domination.[27] Of course, the device of legislative selection of U.S. Senators did not survive the Progressive era, and was formally abandoned by the adoption of the Seventeenth Amendment in 1913.[28] Thus, it could not count for anything in 1985, when the Court decided *Garcia.*

To his credit, Justice Blackmun does acknowledge that time has brought about change, and he even mentions one change in particular, the Seventeenth Amendment.[29] But the opinion never goes on to really grapple with the effect of these changes on its political process theory. Instead, the Court simply says: "Nonetheless, against this background, we are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result."[30] I generally have trouble with sentences—and happily Justice Blackmun has written only a few over the years—where the word "nonetheless" does the bulk of the work.

One may have argued that the Seventeenth Amendment, the decline of the Electoral College, and cases like *Harper* all reflect a changed national attitude about whether states *qua* states *ought* to be protected from federal domination. If indirect election was the states' greatest protection in 1787, and we have made a conscious decision to eliminate that device, perhaps that reveals how little we value protec-

25. *See id.*

26. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551 (1985).

27. *See generally,* Vik D. Amar, Note, *The Senate and the Constitution,* 97 YALE L.J. 1111, 1128 (1988).

28. As I have written elsewhere, the Seventeenth Amendment formalized what states were already doing through devices such as requirements that state legislators to take a pledge to elect the peoples' choice for U.S. Senate after taking state legislative office. For more discussion on this device—the so-called "Oregon Plan"—and legislative election more generally, see Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment,* 49 VAND. L. REV. 1347, 1354 (1996).

29. Unfortunately, he does not mention the other big changes, such as those in the operation of the so-called electoral college.

30. *Garcia,* 469 U.S. at 554.

tion. So too, with the Electoral College and state control over voter qualifications. The Court never made such arguments, and I am glad it did not. In fact, the Seventeenth Amendment was enacted for reasons largely unrelated to federalism.[31] The weakening effect it had on state government *vis à vis* the federal government went relatively unnoticed, and certainly was not a desired and intended effect.[32] So too, I think development like *Harper* and the decline of the electoral college are more about populism than federalism, but the story there is more complicated.

If I were to defend the Court's application of a political process approach in *Garcia*, I would stress something that Justice Blackmun mentioned, but did not emphasize. At the end of his theoretical and historical discussion, Justice Blackmun pointed out that under the FLSA, the state respondent "faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet."[33] In other words, the FLSA did not on its face single out states for any special and inferior treatment. Nor did the FLSA have any disproportionately onerous effect on states relative to similarly-situated private employers. In equal protection political process theory, there is safety in generality. Perhaps Justice Blackmun could have made more of that in this context as well.

If he had, however, he may not have been able to vote the way he did in another important federalism case decided seven years later, *New York v. United States*.[34] The majority in that case, over the dissents of Justices White, Blackmun and Stevens, held that Congress had violated federalism principles by "commandeering" state legislatures, when it required them either to legislate to accomplish federal waste storage objectives, or be forced to "take title" to radioactive waste generated by private sources within the state.[35] As Justice O'Connor's majority opinion repeatedly pointed out, the Low-Level Radioactive Waste Act of 1985 imposed obligations on states that were not imposed on any private or other public entities.[36] Thus, unlike the FLSA at issue in *Garcia*, the statute in question in *New York* singled out states and forced upon them obligations unknown to private entities.

31. *See* Amar, *supra* note 28, at 1352-55.
32. *See id.*
33. *Garcia*, 469 U.S. at 554.
34. 505 U.S. 144 (1992).
35. *Id.* at 176.
36. *See id.* at 160.

I am not sure why this lack of generality did not give Justice Blackmun much pause. Justice White's dissent, which Justice Blackmun joined, is certainly not unconcerned with issues of political process. In fact, the dissent spends considerable time describing its vision of "how the legislation at issue . . . came to be enacted," and how it was state governments who lobbied the federal government to help them solve a quintessential NIMBY ("Not In My Back Yard") collective action problem.[37] Had Justice White's dissent stopped there, and simply explained why the lack of generality in the federal statute was unproblematic once the statute was viewed in proper context, I may very well have agreed. But, Justice White, with Justice Blackmun in tow, did not stop there; he attacked Justice O'Connor's theory on its face, and not just as applied. Justice White called the distinction drawn by O'Connor between general and nongeneral laws in this context "illogical" and observed that:

> [T]he Court's attempt to carve out a doctrinal distinction for statutes that purport solely to regulate state activities is especially unpersuasive after *Garcia*. . . .[In subsequent cases we have characterized *Garcia* as leaving] primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers.[38]

I suppose this is where Justices White and Blackmun have failed to completely convince me. When political process theory is invoked in the equal protection setting, the Court uses lack of generality to explain why deference to the political process is *not* owed in a given setting. When a law on its face targets noncitizens, for example, a *Carolene Products* footnote 4 theory proponent would wonder whether the concerns of those noncitizens were properly respected in the legislature.[39] At least that is what Justice Blackmun's fine opinion in the seminal alienage case of *Graham v. Richardson*[40] says. And just like non-citizens, states *qua* states cannot—after the Seventeenth Amendment—really vote for federal legislators. It is not clear to me why a law singling out states *qua* states for distinct regulatory treatment should not raise our suspicions, assuming, of course, that we think robust state governments are worth preserving as an effective counterbalance to federal authority. This is not to say that nothing could allay our suspicions, but it seems to me at least that more of an explanation is required. I am not saying that I realistically fear that

37. *Id.* at 189-94 (White, J., dissenting).
38. *Id.* at 205 (quoting Gregory v. Ashcroft, 501 U.S. 452, 464 (1991)).
39. United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).
40. 403 U.S. 365 (1971).

Congress is going to conscript state governments so that they will not have time to tend to their own business or that citizens will not know whom to blame when federal programs go bad. Rather, it might be argued that cases like *New York v. United States* and *United States v. Printz*[41] provide good stopping points down any slippery slope.

II. Separation of Powers

Moving from federalism to another great theme of the Constitution's design, separation of powers, I see a similar pattern in Justice Blackmun's jurisprudence. The opinions he writes and joins keenly and insightfully pose important and interesting questions regarding political processes, but he answers these questions in ways that have not yet entirely persuaded me. *Mistretta v. United States*,[42] perhaps his most well-known majority opinion in this area, gives us some insight into his approach.

In the 1988 *Mistretta* case, a criminal defendant challenged on nondelegation and more general separation of powers grounds the composition of the Federal Sentencing Commission, a group of officials charged with promulgating the federal sentencing guidelines since 1984.[43] For my purposes today, the precise nature of the separation of powers challenge made by the defendant and rejected by the Court is less important than the way Justice Blackmun set out the essential nature of the separation of powers inquiry.

He describes the analysis in terms of the political process - not the process leading to the enactment of the 1984 Sentencing Reform Act that created the Commission, but rather the interactive process between the branches that takes place after the law has gone into effect. Drawing from earlier cases, he quotes Justice Jackson to remind us that "[w]hile the Constitution diffuses power . . . it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[44] Moving beyond these generalities, Justice Blackmun goes on to pose specific questions about how the Sentencing Commission would affect the way the branches interrelate. He focuses the Court's inquiry on "the extent to

41. Printz v. United States, 521 U.S. 98, 106 (1997) (extending *New York* to hold that Brady Handgun Prevention Act's background check requirement on prospective handgun buyers imposed unconstitutional obligation on state officers to execute federal laws).

42. 488 U.S. 361 (1989).

43. *See id.* at 371.

44. *Id.* at 381 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

which [a provision of law] prevents the Executive Branch from accomplishing its constitutionally assigned functions."[45] and cautions against a law that "impermissibly threatens the institutional integrity of the Judicial Branch."[46]

Some would call this approach "functionalist," as distinguished from a "formalist" take on separation of powers. While helpful to a point, labels like these mean different things to different people, and can sometimes confuse as much as clarify. In any event, I think the kind of functionalist questions Justice Blackmun poses, such as how a particular challenged law will affect the real-life ability of each branch to discharge its assigned role in the political and judicial processes, have much practical value. At the very least, we ought not to get so caught up in asking formalist questions that we lose sight of this reality.

I think, by the way, that the Court did lose sight of this reality in last Term's line-item veto case.[47] I know Malcolm Stewart's[48] name was on the Solicitor General's brief and that he understands the case better than I, but my sense is that Justice Scalia got it right in his dissent when he suggested that Justice Stevens' Court majority had been "faked out" by the title of the Line Item Veto Act itself.[49] Stevens' sometimes formalistic opinion pointed out that the text of the Constitution mentions only one kind of Presidential disapproval of Congressional bills in Article I, section 7, and the words "line item" are not attached to this disapproval power.[50] What Justice Stevens never explained is why presidential exercise of so-called "cancellation" authority under the statute, which Stevens says allows the President to unconstitutionally rewrite bills, is any different from a President deciding to spend no money on a program where Congress has permissibly delegated to him the discretion to spend between zero and X dollars on that program. Indeed, the Act required more by way of presidential explanation before he could exercise cancellation authority than would an act that simply gives the President authority not to spend. So asking formalistic questions about the meaning of words like "veto" and "cancellation" makes less sense to me than posing questions about how a law affects real relationships between the

45. *Id.* at 383 (quoting United States v. Nixon, 418 U.S. 683, 711-12 (1974)).

46. *Id.* (quoting Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 851 (1986)).

47. *See* Clinton v. New York, 118 S. Ct. 2091 (1998).

48. Assistant solicitor general and participant in this symposium.

49. *See Clinton*, 118 S. Ct. at 2118.

50. *See id.* at 2102-08; *see also* U.S. CONST. art. I, § 7.

branches. As was true in the federalism context, of course, asking the right political process questions does not always yield the right answers.

For me, the case that most clearly illustrates the dangers of giving the wrong answers to functional separation of powers questions is not *Mistretta*, where the stakes do not appear big. Instead, we should look to the infamous blockbuster the year before, *Morrison v. Olson*,[51] in which Justice Blackmun did not write, but joined the majority opinion. *Morrison*, which was quoted extensively by *Mistretta* a year later, rejected a challenge to the Independent Counsel Act (the "Act").[52] Recall two of the important questions Justice Blackmun's opinion in *Mistretta* asked: (1) whether a law threatens the institutional integrity of the Judicial Branch, and (2) whether a legal provision would prevent the Executive Branch from accomplishing its constitutionally assigned functions. Keep those questions in mind when you think about the Act as it has been applied: you have *judicial* branch officers picking an Independent Counsel with a limitless budget who wields quintessential *executive* branch powers, yet reports to the *Legislative* Branch. You think perhaps this has the potential to throw a monkey wrench in the ability of the three branches to do their jobs effectively?

You did not need to be a fortune teller in 1988 (the year *Morrison* was decided) to see that. Structural features of the Act create the problems we have observed, all too painfully, over the past few years. Focus first on how Judge Starr was appointed. After lunching with Republican senators, a panel of Republican judges crafted by a Republican Chief Justice picks a Republican Independent Counsel from a previous Republican administration. Does that, to use words from *Mistretta*, threaten "the institutional integrity" of the Judicial Branch?[53] Of course it does. But not because the Chief Justice or the other judges involved are evil or excessively partisan; they merely did what the act contemplates they would do. Is it surprising that the Chief Justice turned to judges in whom he has built up confidence after years of reviewing their decisions? Is it surprising that this panel of judges, not accustomed to the political task of appointing prosecutors, would turn to politicians for guidance? What did we expect?[54]

51. 487 U.S. 654 (1988).

52. *Id.* at 659-60.

53. Mistretta v. United States, 488 U.S. 361, 383 (1989).

54. *See* Akhil Reed Amar, *Too Much Independence*, THE S.F. DAILY J., October 7, 1998, at 4.

Turn now to the mistakes and poor prosecutorial judgment Judge Starr may have exhibited in the course of his investigation. Again, is this unexpected? The Act tells *judges* to pick *prosecutors*. Is it that surprising that judges might pick a fellow judge with no prosecutorial experience? Is it surprising that someone with this background might make some rookie mistakes? Moreover, because the Independent Counsel is independent, his mistakes do not reflect on those who selected him in the same way that mistakes by an Attorney General's underlings would reflect upon her. Because there is no accountability, the appointing court does not have the incentives to think through its decision as carefully.[55]

Finally, consider the zeal and determination with which Judge Starr has pursued his presidential target, lurching from one supposed scandal to another. Is that surprising? After all, the Act effectively designates Starr as President Clinton's personal prosecutor. Unlike regular prosecutors, who are informed of a crime and then try to find and prosecute a perpetrator, Judge Starr was told, "Here is the man, now go find his crime, no matter how large or small. And by the way, money is no object." Combine this with a press and a public that measures prosecutorial success by the number of indictments and convictions rather than exonerations, and you have a heck of a set of incentives. Do you think that this constitutional monstrosity might be preventing the Executive Branch from "accomplishing its constitutionally assigned functions?"[56]

So even though in *Morrison* and *Mistretta* the Court may have asked some of the important questions about how the laws in question affect the political interaction of the branches, I have my doubts about whether the Court (including Justice Blackmun) thought carefully enough about the answers.[57]

55. For further developments of these points, see *id.*

56. *Mistretta*, 488 U.S. at 383; *Morrison*, 487 U.S. at 658.

57. I have similar views about another important separation of powers case decided after Justice Blackmun's retirement, *Clinton v. Jones*, 117 S.Ct. 1636 (1997). There too, it seems, the Court misread the way a real-world process—this time litigation—works when the President is a party.

In particular, as former Solicitor General Walter Dellinger succinctly pointed out to me in a conversation, ordinarily one can expect the market "value" of a case to place an upper limit on how many resources a plaintiff is willing to expend investigating. But when non-parties gain a great deal by bringing a President defendant to his knees, this market-based limitation dissolves, and civil litigation can become boundless.

III. Conclusion

At the end of the day, when I reflect back on Justice Blackmun's voice and his votes in these important federalism and separation of powers cases, I am not sure that he answered the important and interesting questions he posed in the same way I would. But I am also not entirely sure that he would answer all of them the same way today as he did when he decided them. For one hallmark of Justice Blackmun's jurisprudence, here and elsewhere, is an intellectual open-mindedness and a willingness to reconsider questions in light of experience and new information. I am not at all suggesting that Justice Blackmun's jurisprudence lacked stability; in many areas, such as the free speech cases Bill Dodge is going to talk about, there was very little movement.[58] But stability should not be mistaken for rigidity. Justice Blackmun, while a habitual man, is also an open-minded man. He showed that in the *Garcia* case, for it was he who moved away from his earlier support of the *National League of Cities* approach to create the *Garcia* majority. And he showed it again in the capital punishment line of cases on which Malcolm Stewart is going to comment.[59] (By the way, I think it is noteworthy that his ultimate conclusion that capital punishment in America today is unconstitutional was based on a discomfort not so much with the penalty itself, but rather the process by which the penalty is decided upon.) In any event, Justice Blackmun's intellectual honesty and open-mindedness are two reasons why I could not be more sincere when I say it was the biggest honor of my life to be able to work for him, and it is an honor to be able to celebrate his wonderful contributions today.

58. William S. Dodge, *Weighing the Listener's Interests: Justice Blackmun's Commercial Speech and Public Forum Opinions*, 26 HASTINGS CONST. L.Q. 265 (1998).

59. Malcolm L. Stewart, *Justice Blackmun's Capital Punishment Jurisprudence*, 26 HASTINGS CONST. L.Q. 271 (1998).