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The Betrayal of Judgment

Cover Page Footnote

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THE BETRAYAL OF JUDGMENT

Lawrence Sager*

I. FIDELITY

A. *Fidelity to Role, or Fidelity as Role*

CONCERNED as we are with fidelity in constitutional practice, we have to distinguish at the outset between the fidelity of judges and other constitutional interpreters to their appropriate roles and fidelity as the content of the role that judges and other constitutional interpreters are meant to play. To dissent from the proposition that judges should be faithful to their proper role is to dissent from a tautology: of course it is right for judges to do what is right for judges to do. *All* the work is left to be done in deciding what it is that is right for constitutional judges to do. I assume we are talking about fidelity as constitutive of what it is that is right for judges to do, that we are talking about fidelity *as* role, not fidelity to role.

B. *Fidelity as Instruction-Taking*

So the proper role of judges is to be faithful to something, and our concern is both what it is they are to be faithful to and what it means to be faithful to that thing. These are the broad questions that are meant to provide the thread for our conversation. But to speak of fidelity as role is to agree on more than just that justices are meant to be faithful to something. For example, if I said that judges are meant to be faithful to their best judgment about securing the just outcome in the case before them, without reference to anything but their philosophical reflections, I would have missed the point about fidelity.

There may be different views about what fidelity requires judges to be faithful to and what it means to be faithful to that thing, but there is some common ground implicit in the idea of fidelity as role. Roughly, the idea of fidelity as the role of a constitutional judge requires us to distinguish between a judge following instructions from our constitutional past as to the proper outcome of a case before her, and a judge forming her own judgment as to the proper outcome of a case on the other. At the heart of fidelity is the notion that a judge should follow instructions, not act on her own judgment.

More precisely, the notion at the heart of fidelity is that *courts* should follow instructions rather than act on their independent judgment. I restate the point this way because those who worry that constitutional judges are acting on their independent judgment and thereby being unfaithful to the Constitution will not be consoled by the assurance that the judges in question are conscientiously following

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the protocol of adjudication and reaching outcomes substantially shaped by prior judicial decisions and shaded by the contemporary workings of collegiality. They worry about the independence of the constitutional judiciary as an institutional whole, not only about rogue judges.¹

C. *How Fidelity Is Like Chaos*

There is an irony here. Discourse about fidelity in constitutional practice is like the preoccupation of some mathematicians and scientists with chaos. The nominal study of chaos turns out not to be about chaos at all, but rather about the order that underlies what we regard as chaotic. So too, discourse about fidelity in constitutional practice turns out to be importantly concerned not merely with the obligation of the judge to follow instructions, but with the concomitant license/obligation of a judge to act on her own judgment.

A common and important theme in the conversation about fidelity in constitutional practice is this: a conscientious judge, setting out to be as faithful as possible to the instructions of the Constitution (and/or whatever other instructions are taken to be binding upon her) will discover that the instructions cannot simply be followed; such a judge will discover that *in order* to follow the instructions she must exercise her own normative judgment. What we might call pure or simple fidelity is impossible: paradoxically, fidelity requires the judge to step outside the frame of instructions.

II. RELUCTANT JUDGMENT THEORISTS

A. *Two Examples*

I want to give two examples of this paradoxical turn in thought about fidelity to the Constitution. These two examples have interesting features in common which qualify them as members of a distinct school of constitutional theory which I am going to call reluctant judgment theory.

My two examples are represented in the symposium of which this paper is a part. The first is the idea of fidelity as *translation*, championed by Larry Lessig;² the second is the idea of fidelity as *synthesis*, championed by Bruce Ackerman³ (though not the focus of his prepared remarks for this Symposium). Because I plan to be somewhat critical of these two ideas, I should say at the outset that I hold Professors Lessig and Ackerman in high regard, in no small measure be-

1. In the discussion that follows, I will refer to the independent judgment of judges because of an expositional preference for the human rather than the institutional; but I mean to include the idea of the independence of courts as an alternate reading in all such references.

2. See Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165 (1993).

3. See Bruce Ackerman, *We the People: Foundations* 142-62 (1991).

cause they have offered original and arresting ideas about constitutional practice, ideas worth arguing about.

Let me give nutshell accounts of their positions. I am sure to fail to do justice to the nuance and force of their claims, but for the moment I mean only to get enough on the table to explain what these ideas have in common and where they run into difficulty. Roughly, then, the point of Lessig's work on constitutional translation is this: to be faithful to the instructions of the Constitution we have the conceptual burden of translating from one language to another, and then some. To paraphrase the waggish remark that the English and Americans are two peoples divided by a common language: we share with the framing generations a common language, but we are divided by profoundly different cultures. Translation involves sensitivity to both the context of writing and the context of application, and many elements in the two contexts may diverge, including (perhaps especially) firm presuppositions in the prevailing world views of these political generations so separated by time and circumstance. Translation inevitably involves a wide range of choice and judgment; it implicates a constitutional court in a practice that seems at times far removed from following instructions.

Ackerman's project centers on the claim—which really *is* about fidelity—that the Constitution can be and has been importantly amended by broad and sustained political consensus even though that consensus was not manifest in the way stipulated by Article V.⁴ In certain times political concerns become superheated and politics are transformed from ordinary to constitutional; if an appropriate consensus forms in the crucible of constitutional politics, the distillate is an amendment to the Constitution, notwithstanding the absence of an Article V provenance. The job of a constitutional judge is to enforce the whole of the Constitution, including these informal amendments.

I find much to disagree with in this picture, and will at least gesture towards my concerns below. For the moment though, I want to focus on how Ackerman's provocative view of fidelity gives license to judges to step outside their instructions and exercise their own normative judgment. The rough idea is this: while in principle judges are exclusively responsible to the Constitution's instructions, the Constitution includes important informal amendments like that which emerged from the New Deal. The effective Constitution is thus somewhat cluttered with overlapping and even contradictory instructions and judges are obliged to effectuate a synthesis among them. Thus, meaning has to be assigned to informal constitutional amendments like the one that emerged in the midst of the New Deal, and then that meaning has to be reconciled with the Constitution as it was before. It is in the course of this reading of the unwritten and synthesis of the

4. U.S. Const. art. V.

dense that the normative judgment of judges is engaged and overflows the role of simply following instructions.

B. *Reluctant Judgment Theories (And How Fidelity Differs from Chaos)*

What the models or metaphors of translation and synthesis have in common is a basal, unmitigated commitment to fidelity in principle, coupled with the discovery that pure or complete fidelity is impossible. For Lessig or Ackerman, the good judge aspires to take instructions, and is the best instruction-taker she can be. Were a stance of pure instruction-taking possible for the constitutional judge, she would maintain such a stance. But it is not possible: the instructions of the historical Constitution have to be translated or reconciled and the enterprise of translation or reconciliation inevitably engages independent normative judgment to some extent. It would be self-defeating to try to exclude these judgmental ingredients of adjudication, because we would ultimately have a product that was less rather than more faithful to the instructions of the past. Fidelity for such theorists thus begins with the instruction-taking imperative but is tempered by the necessary intrusion of normative independence. We can call accounts of fidelity in our constitutional practice which assume this general form *reluctant judgment theories*, because judgment enters the story as an afterthought, as an inevitable but unfortunate limit on the instruction-taking impulse.

Fidelity in these accounts is still in the grip of the norm of instruction-taking. The job of the conscientious judge is to be as much of an instruction-taker as possible and to allow her own normative judgment to enter the picture only as required by the enterprise of taking instruction. Fidelity, so understood, is ultimately different than chaos theory, which replaces apparent chaos with the revelation of order. Reluctant judgment fidelity never forsakes its allegiance to instruction-taking; its accommodation of contemporary normative judgment is in the name of, and governed by, that allegiance.

III. A CRITIQUE OF RELUCTANT JUDGMENT THEORY

A. *Two Models of Constitutional Adjudication*

We can better understand reluctant judgment theory and its shortcomings if we consider two quite different general models of the role of constitutional judges. The first is the model of agency, the second of partnership. In the agency model the popular constitutional decision-maker—"The People" at the appropriate time and in the appropriate way, whenever and however that might be thought to be—is the principal, and constitutional judges are the agents. The job of judges is to be the best *instruction-takers* they can be, and their warrant to act in the name of the Constitution is tightly bounded to that role. The

desired end of constitutional adjudication is the discovery, decoding, and execution of the instructions of the popular constitutional decision-maker; independent judgment by judges is only the consequence or by-product of their agency, and an unfortunate by-product at that.

In the partnership model, in contrast, the popular constitutional decision-maker and constitutional judges are *collaborators*, and the independent judgment of judges is expected and welcomed as a central part of their responsibility in the partnership. The partnership model, it should be emphasized, need not exclude hierarchy (and concomitantly, instruction-giving, and taking) or concede unlimited judgmental authority to judges. On any plausible understanding of our constitutional practice, the popular constitutional decision-maker has the final say when it chooses to speak in terms that quash or restrain reflection from its junior, judicial partner. But the partnership model does require that, at the end of the day, constitutional judges be invited to exercise a substantial modicum of independent judgment, and are valued precisely because of their judgmental role.

The distinction between the agency and partnership models is meant to call attention to different ways we can think about the responsibilities of constitutional judges on an ongoing basis. It does not invoke or depend upon the provenance of those responsibilities. Were we to conclude for example, that the popular constitutional decisionmaker had in effect invited the collaboration of constitutional judges in giving content to the broad liberty-bearing provisions of the Constitution, that would be fully consistent with choosing partnership as the best understanding of the resulting constitutional role.

B. *Problem with the Agency Model of Our Constitutional Practice*

Reluctant judgment theories have an advantage over more extreme versions of the agency model. Accounts of our constitutional practice which portray the role of judges as exclusively that of taking instructions from the Constitution and the generations that framed its terms ("historicist" or "originalist" accounts) are transparently implausible. The broad generalities with which most of the liberty-bearing provisions of the Constitution are framed demand wide-bodied interpretation; they read as normative ideals, not as instructions for the resolution of specific cases or the fashioning of a systematic jurisprudence. The actual practice of constitutional adjudication, in turn, engages the ongoing normative judgment of the judiciary at every interesting point. Free speech, freedom of religion, and equality (equal protection)—all these important calls of the liberty-bearing Constitution demand and get the rich normative mediation of the judiciary for their implementation. Historicist judges and commentators themselves are routinely and rather notoriously embarrassed by the fact that they too have had to generate and defend accounts or theo-

ries of the abstract values named in the Constitution.⁵ Reluctant judgment theories can survive the force of these unduckable observations, because they agree—indeed, insist—that instruction-taking, unenlightened by appropriately pointed contemporary normative judgment, is an impossible judicial protocol.

But if reluctant judgment theories are more plausible than more extreme versions of the agency model of constitutional practice, their advantage is only a matter of degree, and ultimately, they are vulnerable to many of the same objections as those that greet their more extreme conceptual cousins. While reluctant judgment theories concede that conscientious constitutional instruction-takers must engage in independent normative judgment, they miss the point that the liberty-bearing provisions of the Constitution and our actual experience under them are starkly inconsistent with the idea that instruction-taking is the appropriate starting point for understanding our constitutional practice. The enterprise of bringing meaning to the Constitution involves at its core a collaboration between the framing generations who fixed the text of that document and those who undertake to apply the precepts named in the text to concrete issues that arise in the maintenance of our political community; both sides of that collaboration have to engage their faculties of normative judgment.

Were this not otherwise obvious, the Ninth Amendment⁶ would make it so. The Ninth Amendment puts the instruction-taking view of constitutional practice in conceptual gridlock. If the Constitution's text is understood to be the primary source of instruction for the judge, what is the conscientious instruction-taker supposed to do when the text itself tells her not to limit the scope of constitutional liberty to the rights stipulated in the Constitution? The instruction-taking judge: "I am bound to take my instructions from the Constitution; if the Constitution is silent, then I am bound to do nothing, that is, to leave the status quo absent my intervention in place." The Constitution: "I instruct you to intervene in some circumstances about which I am otherwise silent." The Ninth Amendment itself is open to interpretation, of course, but among its possible readings the most direct and plausible is exactly this.⁷ The hapless instruction-taking judge is thus in the position of the army barber who is ordered to shave every man on the post who does not shave himself.

We should not regard these features of the Constitution and/or our constitutional practice as causally accidental or normatively incidental. The generations responsible for framing the text of the Constitu-

5. See Lawrence Sager, *Back to Bork*, N.Y. Rev. Books, Oct. 25, 1990, at 23.

6. U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

7. See Lawrence Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What on Earth Can You Do with the Ninth Amendment?*, 64 Chi.-Kent L. Rev. 239 (1988).

tion could have chosen to speak in gritty detail rather than moral generality; in making the choice that they did, they depended upon the collaboration of those who would be responsible for implementing the broad values invoked in the Constitution's text. The Ninth Amendment, in turn, is best understood as responding to the worst fears of those who loved liberty but had doubts about the wisdom of including what ultimately became the Bill of Rights in the Constitution: that no simple list of the liberties of a free people could do justice to justice, and that by the principle of *expressio unius, exclusio alterius* a bill of rights would do more harm than good.

These choices of the framing generations are in turn causally connected to our constitutional structure. Article V was expected to make the Constitution obdurate to amendment and it succeeded in so doing to an extraordinary degree. Faced with the prospect of an extremely long-lived Constitution, and the requirements of Articles V and VII for a broad geographic consensus—a reasonable proxy for cultural consensus, especially at the most pertinent times in our constitutional history—the framing generations naturally opted for general moral commitments rather than a plethora of concrete instantiations of those commitments. Collaboration rather than instruction-taking is built into the structure of our constitutional practices, from the ground up.

This last observation brings us to a still more telling criticism of reluctant judgment theories. Because they maintain instruction-taking as the ideal, and make room for independent judgment only out of reluctant necessity, the reluctant judgment theorists are constrained to see our constitutional practices as they actually are as an embarrassment. The broad moral commands of the liberty-bearing provisions of the Constitution on their view constitute a rather fundamental mistake, and the Ninth Amendment, unless it can be banished by construal, a disaster. Indeed, the very idea of a Constitution is rendered suspect if we regard popular judgment as talismanic and the independent judgment of the constitutional judiciary as unwelcome. An enduring constitution is almost certain to raise special problems of translation and synthesis as Lessig and Ackerman use those terms; parliamentary democracy would surely reduce the independent judgmental freight of the judiciary. And even if in some preternatural way an enduring constitution could be crafted so as to issue completed instructions to judges and other public officials—instructions completed in the sense that they would not in principle require independent normative judgment on the part of the instruction-taker—why would we be inclined to let the judgment of political generations long since dead govern us today?

In contrast, the partnership model invites reflection on the practical virtues of our constitutional practices as they actually are. The partnership model is open to (indeed, depends upon) the belief that the

collaboration between a popular constitutional decision-maker which paints in broad strokes and a judicial constitutional decision-maker which fills in these strokes with close and reflective detail is reasonably well-suited to the enterprise of securing the fundamentals of political justice.⁸ This is the *justice-seeking* account of our constitutional practice, and I believe it to be the best account of that practice.

The reader may feel that I am forcing constitutional theory, and hence constitutional theorists, against an artificially sharp dichotomy between the agency model with its instruction-taking ideal and the partnership model with its collaborative ideal. It may appear that I have somehow lumbered reluctant judgment theory with conceptual entailments that it need not accept. But the point is this: either we value the independent judgment of judges as collaborators in the constitutional project of identifying the fundamental demands of political justice or we do not. If we do not, then it makes perfectly good sense to regard the presence of such judgment in our constitutional practice as necessary but of no positive value—and more likely, of considerable negative value—outside the compass of that necessity. In turn, it makes perfectly good sense to cabin the license of judges to the bounds of that necessity. In contrast, if we do value the independent judgment of judges as an important part of a collaboration reasonably well-suited to the important constitutional project of securing the fundamentals of political justice, then it is wrong to confine the exercise

8. See Lawrence Sager, *The Domain of Constitutional Justice*, in *Constitutionalism: Philosophical Foundations* (Larry Alexander ed., forthcoming 1997) (Sager's manuscript at 7-8, on file with the *Fordham Law Review*).

In the end, that belief may rise or fall on an assessment of our actual national experience in comparison with the experience of other nations. But several features of constitutional adjudication make it *ex ante* a promising candidate for the role assigned to it. First, the constitutional judiciary is specialized and redundant, like a quality control inspector. Judges are steeped in the tradition of constitutional discourse, and their job is pointed towards the evaluation of governmental conduct against the norms of the Constitution. Second, the coherence-driven protocol of adjudication is well-suited to normative reflection. In the course of deciding a case before them, judges are responsible to both past decisions and future possibilities; they must test the principles upon which they are tempted to rely against these other outcomes, real and imagined. The enterprise of adjudication is thus a kind of institutional reflective equilibration. Third, judges are obliged to give each other and the broader audience of their opinions reasons for their decisions, and these reasons are of a special sort. Judges' reasons are in principle publicly accessible and publicly defensible, they are exemplars of what some philosophers have called 'public reason.' Fourth, these features of constitutional adjudication are strongly reinforced by the collegial, deliberative nature of important constitutional tribunals, most particularly, of the Supreme Court itself. Fifth, constitutional adjudication as a process is reflective of what we might call the egalitarian logic of democracy: every claimant before a court stands on equal footing; the force of her claim is the force of reason—the strength of its connection to an articulated scheme of principle—not her wealth, popularity, or social stature.

Id.

of that judgment to those circumstances where the exercise of judgment is parasitic to the task of following instructions. Constitutional theorists have to choose up, and I understand reluctant judgment theorists like Larry Lessig and Bruce Ackerman to have cast their lot with the impoverished agency model of our constitutional practice.

IV. BETRAYAL

In his article for this Symposium, Bruce Ackerman takes a step beyond the normal mode of academic persuasion and scolds those who do not join him in recognizing the existence of a tacit New Deal amendment to the Constitution.⁹ He accuses those of us who hold a more conventional view of how the Constitution comes to be amended—namely, by various actors who are aware that they are considering the profound act of amending the Constitution, and who seek to conform their behavior to the requirements of Article V—of betraying the constitutional legacy of the New Deal. I think that Ackerman is wrong in this, and wrong for reasons closely associated with the conceptual blinkers of reluctant judgment theory.

A. *What Is Interesting About Ackerman's View of Constitutional Change*

There are obvious points about which most readers of the constitutional history of the New Deal agree. Certainly there were important changes in constitutional doctrine: the Court's experiments with constitutionalizing a free market economy which reached their apogee in *Lochner v. New York*¹⁰ were set aside—definitively, we now know; the prevailing jurisprudence of the commerce clause was refashioned along lines generously permissive of federal governmental activity; and, despite earlier misgivings, the administrative agency was accommodated in a constitutional framework not natively receptive to this new mechanism of governance. These developments were somewhat evulsive, and they were arrived at under the press of national and international circumstances which combined to convince many Americans of the necessity of a strong and nimble national government. They were goaded by a strong and well-supported President who threatened to pack the Court and who did make strategic appointments with doctrinal changes of exactly this sort in mind. In the end, these changes in doctrine did more than permit Congress and President Roosevelt to pursue the mature New Deal agenda; they remade the Court's constitutional jurisprudence in enduring ways.

With this general picture widely accepted and well understood it may seem that there is little left to worry about. Plainly constitutional

9. See Bruce Ackerman, *A Generation of Betrayal?*, 65 *Fordham L. Rev.* 1519, 1526 (1997).

10. 198 U.S. 45 (1905).

law—and more, the constitutional order—changed during this period. Why quarrel with *amendment* as the trope by which that change is crystallized and displayed? If all that was at stake were rhetorical flourish, we could concede that field to Ackerman and turn to more interesting matters. But considerably more is at stake. This becomes clear if we consider Ackerman's account of constitutional change from the vantage of a conscientious judge.

Imagine that it is 1937, and all that actually happened has happened. A justice of the Supreme Court, heretofore a champion of a rather restrictive view of the Commerce Clause, sits in his study, and decides that, notwithstanding his prior judgment and the substantial force of *stare decisis*, Congress should have broad, largely unfettered authority to pursue its New Deal agenda. Now we can imagine two very different sort of reasons our justice might have for this conversion. Having been educated by experience of and reflection upon the Great Depression and its aftermath, he might have altered his judgment as to the best understanding of what limits on governmental structure were appropriately assignable to the Constitution in the time and place he found the nation and its economy. Or, looking back over the political events of the last months or years, he might believe that an appropriately formed and expressed political consensus had emerged and produced a popular amendment to the Constitution, just as though the text was formally amended in accord with Article V. In the first story, the Constitution has remained constant but the judge's understanding of it has changed; we can call this the judgmental account. In the second, the Constitution itself has changed, and this is the reason that the judge has altered his understanding of what it permits; we can call this the positivist account.

Now it is important to note that both the judgmental and the positivist accounts can and are likely to be sensitive to history and social context. Both might even be sensitive to the same features of the practical world on occasion. For example, in both the judgmental and the positivist account a justice might be influenced by the widely held view that the commerce clause was being improperly invoked by the Supreme Court to impede the national recovery effort; for the justice in the judgmental account, this mounting consensus might be an important reason to reconsider his views. But the difference between these accounts is profound, and profoundly important. In the judgmental account, it is the judge's own judgment that governs her interpretive obligation; in the positivist account, it is the formation of a popular consensus under stipulated extra-Article V circumstances that governs her interpretive obligation.

B. *Instruction-Taking and Collaboration Revisited*

For our purposes here, I want to confine myself to two observations about Ackerman's view of constitutional change. First, though he has

at times argued for this view as though it could be defended simply on grounds of its better fit with unarguable historical data, this simply cannot be the case. The more conventional understanding of the New Deal includes by implication the judgmental account, and it can quite satisfactorily embrace all the available data. If either view has difficulty on grounds of fit it is Ackerman's view, which labors against what the Justices of the Supreme Court said and presumably thought they were doing, and assigns to the mass of American voters a role as constitutional decision-makers that they could hardly have realized might be retroactively bestowed upon them. But my point is not that fit decides the case against Ackerman, but rather that fit cannot decide the case, and that we need a strong normative ground for choosing between these accounts.

This brings me to my second observation. I think that there are a number of normative grounds upon which to disprefer Ackerman's account of constitutional change. But for now, I want to invoke the distinction between the instruction-taking (agency) view and the collaborative (partnership) view of the role of the judiciary. We can now see how deep Ackerman's commitment to the instruction-taking view runs, notwithstanding his softening that view with the need for synthesis. For Ackerman, the judicial role in its essence is strictly backward-looking, with judges constantly attentive to the instructions given by the popular political process, whenever political events combine in the right fashion. Constitutional choice is quintessentially popular choice, and judicial judgment has only an incidental and (by implication) unfortunate role to play. In contrast, the judgmental account of New Deal constitutionalism comfortably accommodates the collaborative view of our constitutional practice. This alone is reason enough to reject Ackerman's account. As we have seen, the agency view neither fits nor flatters our constitutional practice.

C. *Who Exactly Is Betraying Whom?*

Early in his article, Ackerman contrasts the "intellectual curiosity of a juristic elite" with the aspects of our constitutional practice which on his account we should most highly value.¹¹ Thus we dismiss the spark of Holmes' dissent in *Lochner* (indeed, Ackerman's position commits us to the view that Holmes and the other three Justices who dissented in *Lochner* were wrong); and thus we dismiss the sound judgment of the New Deal Court which ushered in the modern era of constitutional understanding; and thus we dismiss the moral wisdom of the Warren Court in *Brown v. Board of Education*;¹² and thus we dismiss

11. Ackerman, *supra* note 8, at 1.

12. 347 U.S. 483 (1954).

the courage and keen sense of justice of the current Court in *Romer v. Evans*,¹³ . . . all this the intellectual curiosity of a juristic elite.

In the course of mounting his charge of betrayal, Ackerman speaks of the tremendous political achievements of the New Deal as the work of our parents' generation. In his and my case (oldish fogies that we be), this is true, or very nearly true, . . . our parents were too young to be the architects of the New Deal but not too young to be active members of the electorate that supported the architects in their efforts. But he and I are also children of the Warren Court. We cut our constitutional teeth on the achievements of the Warren Court; and I very much doubt that he or I would have devoted so much of our working lives to the regard of the Constitution were it not for the contributions of that Court to our national political experience.

I think that Professor Ackerman's understanding of our constitutional practice betrays the character and judgment of the judges who have worked to uphold their end of our constitutional partnership, that it betrays the very genius of our constitutionalism.

13. 116 S. Ct. 1620 (1996).