

PANEL DISCUSSION

After Professor Summers' speech, Professor Graglia was given a chance to reply:

I have argued that insofar as constitutional rights are restrictions on self-government, they require justification, that in our system of self-government local autonomy should ordinarily be favored. Professor Summers' response that by local autonomy or federalism I mean "states rights" and by self-government I mean "white power" is an outrageous piece of demagoguery. As a true liberal, he simply cannot resist the temptation to call his opponent a racist; he has found that it is always a winning move, at least before a presumably equally liberal academic audience, sure to terminate any further thought or debate.

I also said that constitutional rights (restrictions on self-government) are generally not good ideas, that in general today's policy decisions should be made by today's people; the living should not be governed by the dead. Professor Summers believes, however, that a system of constitutional rights enforceable by the Supreme Court is desirable because it brings us back to our "best moments." The practical result of Summers' view is a unique system of government: government on basic issues of social policy by majority vote of a committee of nine lawyers, unelected and holding office for life, who are assigned the task of bringing us back to our best moments. I call this the "Ulysses theory" of constitutional restrictions. Ulysses ordered his men to tie him to the mast in order to disable himself from being seduced by the Sirens' song. There are many problems with this. How are a people to tell their better moments from their other moments? Why should people not assume that their present views on any current issue, always the best informed, are most likely to be better?

In any event, the Ulysses theory does not explain much of constitutional law. For example, when the Court suddenly invalidated the abortion laws of all fifty states, there was no basis for any argument that it was bringing us back to one of our better moments. When the Court created a system of criminal procedure that makes the criminal law ever more difficult to enforce, few people in this country could think that it brings us back to one of our finer moments. Only an elevated thinker and idealist like Summers can think the incredible system of criminal procedure the Court has imposed on the states in the name of the Constitution is an expression of our finer moments.

The real difference between Summers and me, however, is not over whether there should be constitutional rights, that is, whether some issues should be removed from the political process by a difficult-to-amend Con-

stitution. The problem with contemporary constitutional law is that it is *not* based on the Constitution, that the Court does not confine itself to enforcing constitutional rights, but feels free to create new rights. For example, if a state denies blacks the right to vote, even if by complex or indirect means, it is entirely appropriate for the Court to hold, as I tried to indicate in my discussion of the White Primary cases, that it can't do that. Why not? Because it's written in the laws of God or nature that blacks must be allowed to vote? No, because it's written in the Constitution. The fifteenth amendment is clear, understandable, and meaningful law, and it is appropriate that the Court enforce law. It is not appropriate, however—it is not consistent with either self-government or federalism—that the Court impose upon us the Justices' views of good social policy, which is what Professor Summers' view amounts to.

There happens to be nothing in the Constitution that takes from the states the power to make policy regarding abortion or that prohibits owners of shopping malls from excluding Vietnam War protestors. There is a first amendment protecting speech, but its first word is "Congress"; it provides that "Congress shall make no law . . .," and plainly has no application to the states. The argument that by ratifying the fourteenth amendment the states imposed the first amendment on themselves reduces law to trickery, not an intellectually respectable discipline. I don't know whether privately-owned shopping malls should be prohibited from excluding political protestors and demonstrators, but I do know that there is no good reason to permit that issue to be settled for the whole country by Brennan and Blackmun. They have no authority to decide it.

If policymaking by Supreme Court Justices, totally centralized and undemocratic, is a good form of government, one must wonder why other countries don't adopt it. I was in Japan a few weeks ago and learned that under their constitution, adopted during the American occupation, the Japanese Supreme Court can declare laws unconstitutional. The Japanese, however, are a practical, realistic people, and so their Supreme Court has never exercised this power. Lower courts have sometimes held a law unconstitutional, but the Supreme Court Justices take the sensible position that in all actual cases, the alleged unconstitutionality of a law is at best a debatable and questionable issue and that such issues are, in a democracy, to be left to the legislature. It is ironic that the United States, which began as an experiment in democracy, can now take lessons in democracy from others.

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What has the wonderful institution of judicial review actually done for us? Has it brought us to a better, higher moral plane, as Summers believes? In its first significant exercise of the power, the Court gave us the *Dred*

*Scott*¹ decision and the Civil War. Was it a good thing to have judicial review so that the Court could hold, on no good basis, that Congress could not disallow slavery in new territories? Summers is right that the 1964 Civil Rights Act came later than it should have, but this is only because of judicial review. Congress had acted to prohibit racial discrimination in places of public accommodation eighty-nine years earlier in the 1875 Civil Rights Act. In the *Civil Rights Cases*,² however, the Court held the 1875 Act unconstitutional. If Congress had been given the benefit of the doubt, as the legislature is in Japan, public segregation would have ended almost a century sooner. If judicial review is the wonderful thing Summers thinks it is, it must be only because of what it has accomplished more recently, since really wise and good people like Brennan and Douglas, people who agree with him and most other law professors, came into control.

A member of the audience challenged that Professor Summers' solution was not principled. One cannot argue a libertarian interpretation under the first amendment, letting people say what they want, but deny such freedom and demand an egalitarian result under the fourteenth amendment. Professor Summers responded:

I will acknowledge that my approach to these problems is "unprincipled" as that term is often used in the legal context. My view is that we are engaged in an enterprise of trying to run, to manage, to construct, to enrich a democratic society. We generally have consensus, when our own oxen are not being gored, that certain values shall be treated as fundamental, that they should be protected, that a democratic society requires their recognition. That consensus is, of course, hazy and uncertain at the outer boundaries. The rights and values cannot be refined down to specific quantities that can be put in a computer so that one can find all the answers by punching the right keys. That is why I say that we are involved in the art of government, not the science of government.

Now, more specifically, what is the role of the court as to discrimination? There seems no dispute when the discrimination is because of race. Should its function be the same in sex discrimination, nationality discrimination, discrimination against homosexuals or those who have AIDS? What we shall consider inappropriate classifications and what the role of the Court shall be are not easy questions and cannot be answered by "principled" decisions. But we do have some sense of the values which we share and what we consider to be humaneness in our society. Our sense of these values, our sense of what we want to protect, are not to be looked at by asking what did Jefferson think 200 years ago. One would hope that in 200 years

1. *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

2. *Civil Rights Cases*, 109 U.S. 3 (1883).

we have progressed from the values shared when people were hung for stealing, and slavery was constitutionally enforced—that we would have developed a greater humaneness. Our sense of values and rights must be measured by our present consensus. This does not provide positive or principled answers, for the outer bounds of consensus are disputed. But it does provide a way of viewing the role of the court in our art of government.

Let me now come back to the role of the Court in discrimination, and particularly a case like *Shelley v. Kraemer*. The Court's minimum responsibility is not to be used to aid discrimination, but to refuse to allow the judicial process, which is specially charged with protecting rights, to be used to enforce discrimination. It may be that the courts cannot reach out to all acts that are discriminatory, but when someone comes to court and says, "I want your help because our property rights or our contract rights justify it," the least the courts can do is to say "You may have property rights, you may have contract rights, but they are subordinate to the rights of others to protection against discrimination." The message of the court should be, "Be gone with you." In my view, *Shelley v. Kraemer* could have been properly disposed of within the simple framework of contract law if the state courts had had the gumption to simply say, "This is a contract contrary to public policy which we will not enforce." That, it seems to me, is the minimum level of the court's role in the absence of legislation, to protect against discrimination.

I will go one step further to elaborate on what I said earlier. When Congress has passed a law, like the civil rights law, where the political branches have acted on their constitutional responsibility, the function of the Court at that stage in the reading of that statute is to resolve doubts and ambiguities in a way that will move us in the direction of further protection against discrimination. Thus, the Court should read the Civil Rights Act with enlarging generosity, not mutilating narrowness. That is the function of the Court with reference to the political branches, to act with and in aid of the political branches in protecting against discrimination and enriching personal freedoms.

Professor Graglia addressed Professor Summers' reply:

To attempt to state the issue in terms of "humaneness" and "decency" is to avoid stating any issue. No one here, I take it, is against humaneness and decency; at least, I represent to you that I am not. The issue is not whether we favor humaneness, but who should be making the difficult policy choices that all real cases involve. To have the Court enforce definite and knowable constitutional provisions, such as the prohibitions on denial of the vote on grounds of race or sex, is one thing. To permit the Court to advance undefined and unspecified constitutional "values," or simply act to make this a

more humane or better society, however, is nothing other than to permit the judges to make public policy.

The Constitution, very sensibly, imposes few restraints on self-government, and those restraints are rarely violated. The one giant exception in our history has to do with race, where violations of clear constitutional prohibitions have occurred. In most cases, however, it is by no means clear what decision morality and humaneness require. It is at least debatable whether a regime of abortion on demand, for example, is an advance in morality and humaneness.

Professor Gerard noted that Professor Graglia tolerates judicial review in the area of race relations because of the difficulties which stymied the political processes there. He inquired whether, therefore, Professor Graglia is espousing a view similar to that of John Hart Ely.

No, I do not agree with Ely. Ely approves of everything the Court has done since 1937 with the exception of its abortion decisions, and I disapprove of nearly everything the Court has done, including the abortion decisions. Except on race issues, all of the Court's controversial so-called constitutional decisions have no basis in the Constitution; Ely is wrong in thinking that *Roe v. Wade* is unique in this respect. Nor would I agree that a Supreme Court decision holding a law unconstitutional is justified if that decision is allegedly "representation reinforcing" or corrects an alleged defect in the political process. The only thing that justifies holding a legislative policy choice unconstitutional is that it is clearly prohibited by the Constitution. Otherwise, the Justices are simply substituting their policy views for those of the people's elected representatives, and I know of no way to justify that. It is obviously exceedingly dangerous for Supreme Court Justices to decide for themselves whether the political process is working properly or needs their help.

Professor Buss then commented on the presentations in general.

I've been thinking that the success of Professor Graglia's first book, *Disaster by Decree*, has led him to want to write the same book again—not just to repeat what he said before, but to extend his charge of "disaster" to all of the other areas to which the Supreme Court has addressed itself.

He was just saying that race is unique. I think his exact words were that it is "realistic and accurate" to say that there was a national consensus about race. But I doubt that the national consensus went into very much detail. That a consensus operated at some level may be true, but exactly what the consensus meant and how it should be carried out is the problem that someone—either the courts or others—had to resolve and to put into effect, which the Supreme Court obviously did, sometimes successfully and sometimes unsuccessfully. But it seems to me that there is a national con-

sensus that we have judicial review. It turns out that very much of what Professor Graglia said by way of criticizing *Marbury v. Madison* and other specific cases I tend to agree with, or at least, in making that criticism I play the same games as Professor Graglia plays when I teach constitutional law. But it does seem to me that that's a game that doesn't make a great deal of sense to keep playing. We do have judicial review in this society. I'm prepared to say it doesn't matter very much what the intentions of the framers were on that issue, because we have the experience of the entire life of the constitutional system since *Marbury*. I am also prepared to say that it may not be working to the satisfaction of everyone, but what that really tells us is we have to focus on particular exercises of that power and explain why we think those exercises are wrong, rather than to suggest that every time we don't agree with particular decisions we can simply go back and say the Court shouldn't have the power at all. One might suggest that Professor Graglia's chief concern about judicial review is reminiscent, not of Ulysses, but of James Joyce's pre-*Ulysses* work, *A Portrait of the Artist as a Young Man*. Professor Graglia suggests to me a portrait of the old man who wouldn't grow up because, it seems to me, we have to accept the consensus on judicial review that is a consensus on the basis of what the country has done over a couple of hundred years. . . . I admire, and to some extent, as I've said, agree with a good part of Professor Graglia's criticism. In fact, I suspect I would agree with him on particular cases about as often as I would agree with Professor Summers. But it seems to me that he's wrong in suggesting that the underlying evil that explains all this is that constitutional law is a ruse or a farce or whatever words he used. I think constitutional law is partly like other law and is partly unique. It's partly like other law in one respect—I think I'm quoting something Professor Graglia said in referring to a particular case—it's not what the Court says but what it does that's important. . . .

Let me turn now to the part of constitutional law that I think is unique. That is that it does involve policy decisions—it does involve what Professor Graglia has just been talking about in terms of making value judgments. Here I think Professor Graglia's last statements are right, but I don't think he takes them totally to heart. It seems to me that it is absolutely correct that to say the Court should implement fundamental values often isn't going to tell us very much because fundamental values are in conflict and the Court has to make choices.

That finally brings us back to the state action point. . . . There is no possible way one can read the fourteenth amendment state action provision without being influenced by one's own values—in particular circumstances, about the extent to which the individual interest in doing something may be regarded as impermissibly destructive of someone else's equality. To what

extent should that interest be protected in the name of treating it as private action, and to what extent shouldn't it be protected on the theory that the things being done are state action? There's no way that one can avoid that kind of difficult determination. I don't see how it helps to suggest that it's non-law or some sort of fraudulent practice that the Court is involved in when it engages in what are in fact extraordinarily difficult controversies that are not going to have consensus by anyone's view. But there are going to be results that will be satisfactory to some people—satisfactory to more if the Court explains its result better, satisfactory to fewer if it explains its results more poorly. It seems to me that's what we have to focus on: how persuaded we are by what the Court is saying.

Judge Frankel closed out the session by noting the overwhelming support for incorporation of the first amendment, reaffirmed by Chief Justice Rehnquist in the recent Hustler Magazine litigation.³ "I would agree with Professor Buss that some things we should take as established and get on with it from there."

3. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

