

## A Response to David Forte

Hadley Arkes

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# A RESPONSE TO DAVID FORTE

HADLEY ARKES

It would almost be churlish to return to the exchange of arguments and reasons after the way in which David Forte has framed his commendation of my project, of my work, and (I'm embarrassed to note) of me. Professor Forte is a man of measured judgments, and he is measured, as ever, in his praise. I'm certain that he meant what he said, but for my own part I know that I could not deserve that praise, in the fullness in which he offered it. Perhaps I could gently divert attention from that praise by recalling that cartoon in the *New Yorker*, showing the statue of an outsized figure in nineteenth-century garb, with craggy face, one arm lifted, pointing toward a lofty goal at hand, or pointing to the future. At the base of the statue, the people, walking, looked in comparison like dwarves. And on the pedestal the inscription read: "Soldier . . . Statesman . . . Patriot . . . Author . . . But Still A Disappointment to His Mother." I may have to induce David Forte to modulate his praise so that I could return, with the proper focus, and with energy unimpaired, to resume the conversation, and the useful "argument," that we had arranged here.

I had asked the editors of the *University of St. Thomas Journal of Law & Public Policy* to invite David Forte to offer a critique of the paper I was presenting, because I genuinely wanted to get a reaction to the argument by a lawyer of uncommon philosophic reflection; someone who would be skillful in testing the argument at the seams. If we put aside the argument over abortion itself, the serious constitutional question is just how a federal government, of constrained powers, could legislate in forbidding the acts of private persons in arranging, and performing, partial-birth abortions. For the States, that is not a problem—if States were free to legislate on abortion. But the question that would create a genuine strain for conservative jurists was whether a federal bill of that kind could be justified by invoking the familiar, and (to many of us) implausible formulas of the Commerce Clause. In my own work for the bill that became known as the Born-Alive Infants' Protection Act,<sup>1</sup> I offered a different argument, grounded in the axioms of the Constitution. In league with John Eastman and Edwin Meese, I sought to offer that argument again in defending the federal bill on partial-birth abortion. And part of our purpose was to offer, for Justice

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1. 1 U.S.C § 8 (2005).

Thomas, a constitutional ground that would not depend on the Commerce Clause. That was the problem on which Professor Forte came to focus his critique, with his usual laser-like precision.

But before he reached that point, where he called to his aid the devices of symbolic logic, I am afraid that, in a move quite uncharacteristic for him, he made a slip in his casting of my argument. Or he curiously misread it, in a way that would lead the reader, I fear, to misunderstand that argument. And because it involves the very framing of the argument, it is worth dealing with that matter first.

Professor Forte notes my own work on Kant, but then imputes to me a sweeping “Kantian principle of universality” that quite overshoots the matter. Nowhere in my paper did I mention Kant or invoke such an understanding to explain the issue at hand. What I invoked rather was the distinct character of the American constitution and the axioms that were central to the Constitution, as explained by Chief Justice Marshall in *Cohens v. Virginia* (I’d refer the reader here back to the body of my essay).<sup>2</sup> If there was any philosopher, not American, whose understanding had a more direct bearing on my argument, it was the decidedly un-Kantian John Locke. The telling passage was in the Second Treatise, where Locke touched the logic of the separation of powers:

[I]n well-ordered commonwealths, where the good of the whole is so considered as it ought, the legislative power is put into the hands of divers persons who, . . . have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the laws they have made; which is a new and near tie upon them to take care that they make them for the public good.<sup>3</sup>

That is, it makes the most notable difference for the discipline of legislating that legislators have this obdurate fact in mind: Whatever they legislate will be put in the hands of other people to administer, and those could be the hands of people quite unfriendly to them. And so one had better take care not to legislate for others a law that one would not readily see applied to oneself.

Chief Justice Marshall caught part of the way in which that understanding expressed itself in our own separation of powers: “the judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.”<sup>4</sup> With the exception of some rather special cases that we could explain, the main presumption in place is

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2. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

3. JOHN LOCKE, CONCERNING CIVIL GOVERNMENT, SECOND ESSAY § 143 (Blackwell 1956) (1690).

4. *Cohens*, 19 U.S. (6 Wheat.) at 384

that any issue that arose under the Constitution and laws of the United States had to come within the jurisdiction of the federal courts. I have been bringing out the corollary, which seems to come as news to many lawyers: that any question coming within the reach of the judiciary may come within the reach of the political branches as well. Or as the point was expressed with more edge here: If the Supreme Court can articulate new rights under the Constitution, the legislative branch must have the authority to vindicate those *same rights*, based on the *same grounds*, or the same clauses, on which the Court discovered them in the Constitution. And in filling out those rights, the Congress would have the authority then to mark their limits. What should not be tenable, under the logic of this Constitution—not under anything, mind you, in the writings of Kant, but *of this Constitution*—is that the Court may not articulate new rights, and then assign to itself a monopoly of the legislative powers in shaping those rights. Under the logic of the Constitution, the branches are not entirely in control of their own powers. That is the peculiar character of a regime of checks and balances, and it is the wholesome discipline of the separation of powers.

This matter came up in the discussion, and I had sought to offer a gentle correction to Professor Forte on this point: He suggests that my argument depends distinctly on the Fourteenth Amendment, and on Section 5, which authorizes Congress to enforce the Amendment. But as I pointed out in the discussion, my argument is not bound to the Fourteenth Amendment or to any particular clause in the Constitution: The argument would be the same if the Court had found the right to abortion in the Privileges and Immunities Clause of Article IV, in the original text of the Constitution. Or even in the clause authorizing Letters of Marque and Reprisal. The argument hinges, again, on the deep axioms or logic of the separation of powers: If the Court found a “right to abortion” in the Privileges and Immunities Clause, the Congress could plausibly then legislate to protect those newly found constitutional rights, in the same way that the Congress may protect the civil rights mentioned in the Fourteenth Amendment.

Now quite contrary to what Professor Forte suggests, nothing in this argument rests on the assumption that the branches are wholly the same, and that the powers exercised by the officers in those branches are the same. Nothing here dislodges the understanding that these institutions do work that is notably different; and yet more than that, it could be said that the Constitution itself would be impaired in serving its purposes if those institutions were themselves impaired in the work they distinctively did. In one of his rare moments of lucidity, Chief Justice Taney gave us a clear teaching on this matter in *Luther v. Borden*.<sup>5</sup> That improbable case sprung

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5. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

from the civil War in Rhode Island. A decision had to be made by someone in the federal government as to which group affecting to be the legislature, and which man affecting to be the governor of Rhode Island, had the standing to seek the intervention of the federal government. As Taney explained, courts were simply not constituted to deal with civil insurrections and matters of this kind. The crisis could not be dealt with by a trial court, for example, taking time to impanel a jury, hear witnesses, and sort out matters of law and fact. And it was especially implausible that the crisis could be handed by an appellate court. Surely there was no time to call in the briefs, with lawyers on either side making oral arguments, and with the judges retiring to their chambers to compose, at length, an opinion to command a majority. In crises of this kind, the matter had to be dealt with at once if it were going to be dealt with at all. And in fact, the crisis was settled rather quickly when President Tyler announced that he was coming in on the side of the established government in Rhode Island. The deep lesson here was that it was not always the courts that preserved constitutional government. At times it was the “sword of the law,” wielded by the Executive, which preserved that framework of lawfulness in which courts were free to function.

Professor Forte has fetching things to say about the ensembles made more wondrous and loving by meshing people strikingly different in their natures and gifts. He should be pleased to be confirmed in the sense that my own argument has incorporated that same understanding. None of that dislodges the concern that the logic of the Constitution, the wholesome discipline of the separation of powers, is subverted if the Court can articulate new rights, sweep away the protections of law furnished by governments in the States, and then assign to itself a monopoly of the legislative power in dealing with those rights. Under those conditions, as I point out, the Court may now license private killings, for wholly private reasons, and the legislative branch somehow cannot reach to protect the victims. The decisive point about a national government, in contradistinction to a confederacy, was that the national government may act directly on persons. We seem to be backing into an arrangement in which the *federal courts* may reach directly to persons (in creating licenses to take life) but in which the legislative branch cannot reach directly in that way in order to protect the victims of the killing: We are asked to believe that the Congress cannot act directly on persons here, even when it is a branch of the federal government that created this new class of victims, by sweeping away the protections of the law that had been provided by the laws of the States. To acquiesce in this arrangement seems to me to accept a state of affairs quite detached from the telos, the purposes, and the deep principles of the Constitution.

There is one notable exception to the argument I have put forth: It has

been long recognized that judges and courts should not interfere with the decisions made by the Executive in recognizing foreign governments, directing troops in the field, or negotiating foreign crises. (The courts were in no position, for example, to undo the arrangements made by President Carter as he settled the hostage crisis in Iran in 1981 and determined just what compensation would be given to those American businesses who had bills unpaid by Iran.)<sup>6</sup> But this exception to the scheme I have put forth is explained and governed by an axiom running even more deeply in the American regime, an axiom that is truly prior to the Constitution itself. And that is: the safety and security of the American people cannot be placed in the hands of officers, either in the British parliament or in courts of law, who bear no direct responsibility to the people whose lives are at stake.

#### THE VENTURE INTO SYMBOLIC LOGIC

Professor Forte penetrates more deeply into my argument, and deploys the arts of symbolic logic to make these critical points: My scheme depends on the claim that the Congress is acting upon the same rights that the Supreme Court has found in any section of the Constitution—in this case, a right to abortion, grounded in the Fourteenth Amendment. But in scaling down, or even countering those rights, he insists that I'm not actually upholding the rights articulated by the Court. I would in fact be subverting them. I would have Congress putting in place a rule of law strikingly at odds with what the Court has declared. But beyond that, he argues, if I am not subverting the Court, if I would have the Congress simply giving proportion to the rights declared by the Court, I am virtually endorsing the main body of rights in *Roe v. Wade*.<sup>7</sup> And in that way, Professor Forte suggests, I am not subverting the Court; I am subverting myself and my own life-long project in the pro-life cause.

The argument is quite arresting, but I would earnestly offer, in response, that this chain of moves unfolds a meaning quite different from the one that Forte finds in it. In the first place, it could be pointed out that there is nothing novel, or even wrong, in the Congress countering a decision taken by the Court. As Lincoln pointed out, the decision of the Court can be narrowed to the settling of the case in controversy between the two litigants. But as Lincoln argued, the political branches need not accept the deeper principle of the decision if they have not be persuaded of its rightness.<sup>8</sup> And so, with that understanding, Congress passed and Lincoln signed, a bill that would bar slavery from the territories of the United States.

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6. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

7. *Roe v. Wade*, 410 U.S. 113 (1973).

8. See HADLEY ARKES, *FIRST THINGS* 418-22 (Princeton Univ. Press 1986); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 275 (1994).

That is, the political branches had acted to counter, through an act of *ordinary legislation*, the holding of the Court in the *Dred Scott* case.<sup>9</sup> The President had been elected by mobilizing opposition in the country to that decision, and now the Executive and Congress were putting the question to the Court in a pressing way: They were inviting the judges to take a sober second look at what they had done, and consider whether they might have been mistaken.

On the other hand, the bill on partial-birth abortion need not be read in that way. It could be read as compatible with *Roe v. Wade*, as indeed the Solicitor General, Paul Clement, suggested in the oral argument.<sup>10</sup> And in that event, the Congress would be putting this proposal before the Court: Whatever the Justices might have meant by a “right to abortion,” surely they could not have meant a right to destroy a child at the very point of birth. And even if they had meant that, they might not have meant the freedom to destroy that child with this method of gratuitous cruelty. The bill on partial-birth abortion, presented in that way, might well be seen to be compatible with *Roe v. Wade*; it might indeed be read as accepting the rightness of *Roe*, at least for the moment. But could anyone doubt that the measure, as it was presented, sprung from an understanding quite critical of *Roe*, that it was part of a project to induce the Court to begin scaling down, scaling back, that rather sweeping right to abortion that the Court had brought forth in 1973?

But to recognize that meaning in the encounter of the branches is to open oneself to a notably different understanding from the one that David Forte fears I am backing into, almost without noticing. Forte argues, quite forcefully, that if I would have Congress acting on the same rights articulated by the Court, but giving proportion to them, or scaling them down, I would have Congress legislating on the premise that the rights proclaimed in *Roe v. Wade* were indeed legitimate and settled. But there is another way of looking at the matter—another way that is fully understandable if we simply grasp the point that the separation of powers gives us an ongoing conversation among the branches. It is often said that the Court settles these matters of constitutionality. But that is a point proclaimed by judges, and if we had the space I would argue that it is manifestly untrue. For these judicial decisions have a quality that the philosophers refer to as “open-textured.” There are always openings in the weave, or strands left dangling. Senator Specter famously remarked that *Roe v. Wade* must be a “super-duper” precedent because it has been affirmed, he said, about 38 times. What he did not apparently notice is that, in 38 cases, questions arose about the meaning or implication of what had

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9. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

10. Transcript of Oral Argument, *Gonzales v. Carhart*, 126 S. Ct. 1314 (No. 05–380), 2006 WL 3230271 (U.S.).

been “settled” in *Roe v. Wade*.<sup>11</sup>

And so we may just recall the Hyde Amendment, which refused to provide the public funding of abortions.<sup>12</sup> As the argument ran, if abortion were really a private choice, so private that even the father of the child has no standing in making the decision to abort the child, why was that surgery now regarded as a *public good*, which ought be funded by the public at large? To the surprise of many advocates of abortion, the Court sustained the Hyde Amendment in *Harris v. McRae*, and the understanding that seemed to emerge was this: Abortion is a private liberty, but there is no right to have the public fund that private liberty.<sup>13</sup> The comparison was made to rights of speech: there may be right to speak, but the government is not obliged to pay for a hall.

In accepting the Hyde Amendment, the Court gave a certain proportion to the right it had articulated in *Roe v. Wade*; it scaled back or limited that right in a manner that delivered a jolt of news to many supporters of “abortion rights.” Could it plausibly have been said that Henry Hyde and his supporters had *endorsed* the right to abortion, had accepted its legitimacy, as they set about trying to put boundaries on that right? Clearly, Hyde and his allies did not mean to deepen the premises and the durability of *Roe v. Wade*. They were earnestly seeking to put that decision on the course of extinction. But they would seek that end by drawing the courts into a conversation on what exactly that right to abortion meant. The Justices evidently had not thought out all of the dimensions of that right. And when the matter is put to them, in a concrete way, in one case after another, it is not to be ruled out that some of the Justices may indeed come to take a sober second look. Some of them may even come, over time, to the judgment that the earlier Court might have been mistaken.

It may seem paradoxical that the political branches may engage the judges in this way, accepting for a moment what the courts have decided, but then seeking to cut back or undo what the judges have done. And yet, we need to remind ourselves that this exercise is precisely what may be enjoined upon us by an ethic of collegial respect in the separation of powers. As Lincoln argued, once the Court had decided the *Dred Scott* case, he and his friends would not form a mob to free *Dred Scott*.<sup>14</sup> A

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11. *The Hearing on the Nomination of Judge Samuel Alito to the Supreme Court Before the Senate Committee on the Judiciary*, 113th Cong. (2006), 2006 WL 75414 (F.D.C.H.).

12. Hyde Amendment, Pub. L. No. 94-439, §209, 90 Stat. 1434 (1976).

13. *Harris v. McRae*, 448 U.S. 297 (1980).

14. “...We oppose the *Dred Scott* decision in a certain way, upon which I ought perhaps to address you a few words. We do not propose that when *Dred Scott* has been decided to be a slave by the court, we, as a mob, will decide him to be free. We do not propose that, when any other one, or one thousand, shall be decided by that court to be slaves, we will in any violent way disturb the rights of property thus settled; but we nevertheless do oppose that decision as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which



decent respect for a regime of law impelled the political officers to respect the judgments of the courts, at least as those judgments bore on the parties before the court. Still, it was quite compatible with a regime of law to accept the decisions of the Justices, to treat them with respect, and yet with full honesty and conviction to challenge them, step by step, in an effort to put to them, in a concrete way, the implications of what they had done. And in that manner, of course, to induce them to step back or change their minds. Surely there would be no more dramatic example under this head than that crafty opinion written by Lincoln's Attorney General, Edward Bates, as he issued an Opinion of the Attorney General on the way that the Lincoln Administration would understand the holding in the Dred Scott case. Bates recalled that the Court, under Chief Justice Taney, had cast its judgment under a "plea of abatement." The Justices would find a want of jurisdiction for the courts in hearing the case, and a want of standing on the part of Dred Scott to contest it. Bates recalled Lord Coke's insistence that pleas of abatement had to be constrained; they had to be "certain to a certain intent in every particular." "In practice," said Bates, these pleas "are always dealt with very strictly." With that sense of the matter, he "explained" the meaning that the Lincoln Administration would give to the decision in Dred Scott:

Taking the plea, then, strictly as it is written, the persons who are excluded by this judgment from being citizens of Missouri must be negroes, not mulattoes, nor mestizos, nor quadroons. They must be of *African* descent, not Asiatic, even though they come of the blackest Malays in southeastern Asia. They must have had *ancestors*, (yet that may be doubtful if born in slavery, of putative parents, who were slaves, and, being slaves, incapable of contracting matrimony; and therefore every child must needs be a bastard, and so, by the common law, *nullius filius*, and incapable of ancestors.) His ancestors, if he had any, must have been of *pure* African blood, not mixed with the tawny Moor of Morocco, or the dusky Arab of the desert, both of whom had their origin in Asia. They must have been *brought* to this country, not come voluntarily; and *sold*, not kept by the importer for his own use, nor given to his friends.<sup>15</sup>

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shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision. We do not propose to be bound by it as a political rule in that way, because we think it lays the foundation not merely of enlarging and spreading out what we consider an evil, but it lays the foundation for spreading that evil into the states themselves. We propose so resisting it as to have it reserved if we can, and a new judicial rule established upon this subject." Abraham Lincoln, *The Lincoln-Douglas Debates*, in 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 255 (Roy P. Basler, ed., Rutgers Univ. Press 1953)

15. Edward Bates, *Opinion on "Citizenship," November 29, 1862*, in 10 *OPINIONS OF THE ATTORNEYS GENERAL OF THE UNITED STATES* 382, 412 (J. Hubley Ashton, ed., W.H. & O.H.

With this construction, of course, there was nothing left of the holding in *Dred Scott*, and yet, as Bates remarked, “In this argument, I raise no question upon the legal validity of the judgment in *Scott v. Sandford*.”<sup>16</sup> I submit again: It is possible to respect the judgments of the Court, without endorsing them; to challenge the Court, while engaging earnestly in a conversation or argument, to induce the Justices to recede from their judgments.

I am tempted to recall that old line from a common law judge of the nineteenth century, who professed not to be sure whether he had settled the law with his judgment—or unsettled it. But he lodged the hope that, in another case, a judge more gifted than he would one day settle it. I know that the argument I have put forth, as compelling as it seems to me, has not yet settled even the judgment of my friends and allies. But David Forte, with his critique, has sharpened the question in the most illuminating way. And perhaps then the two of us, in combination, have helped to move other writers to the kind of clarity of mind that may indeed, one day soon, settle the understanding here more surely.

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Morrison 1868).

16. *Id.*