VOLUME XIV, NUMBER 3, SUMMER 2014

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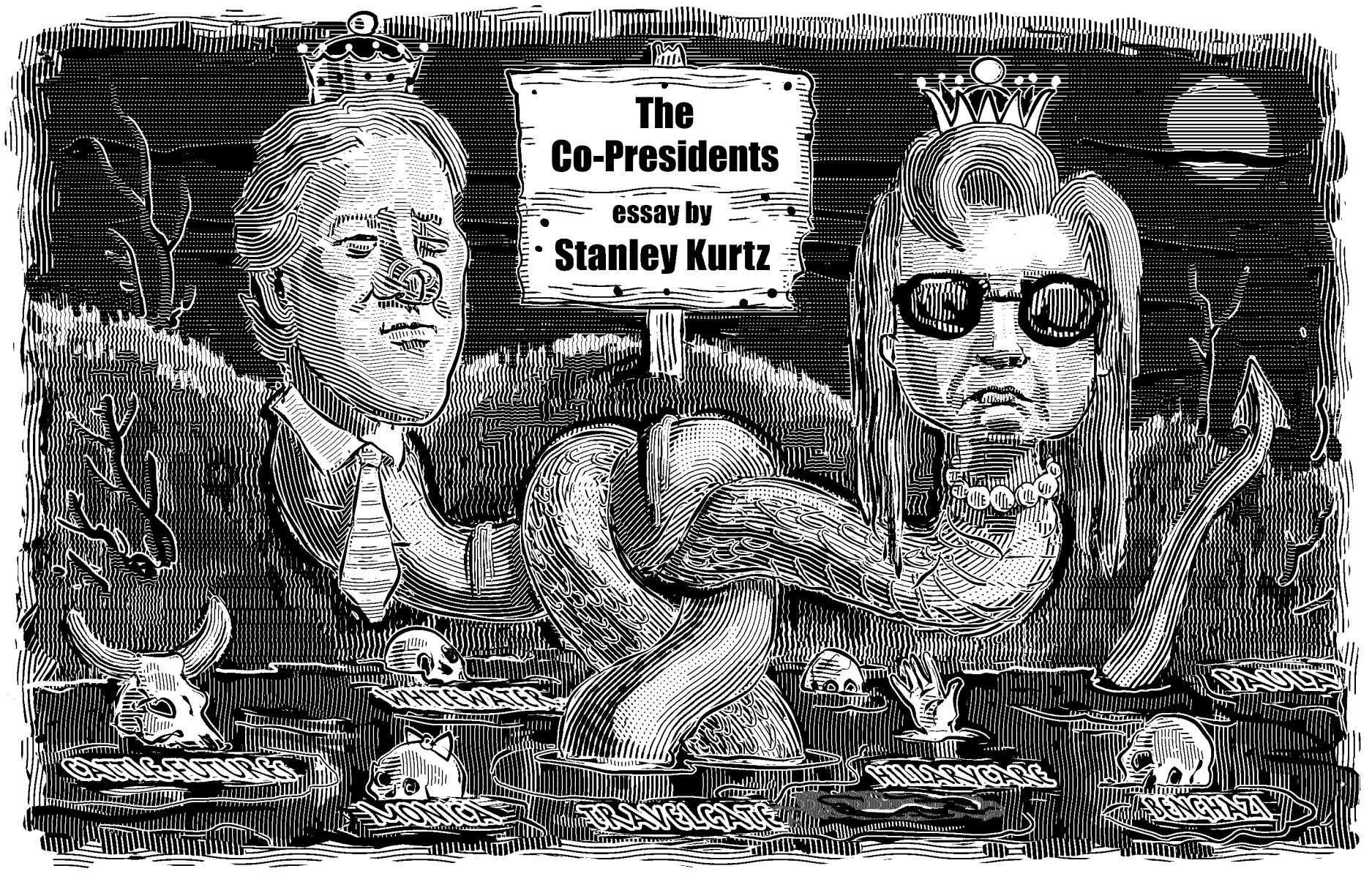
REVIEW OF BOOKS

A Journal of Political Thought and Statesmanship



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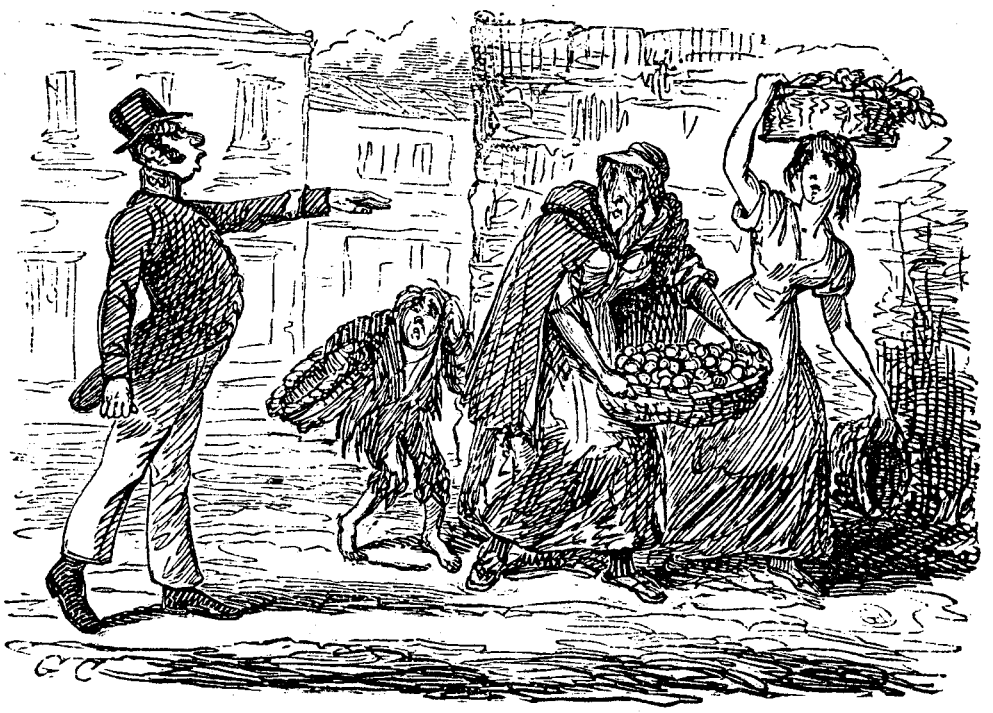
A Publication of the Claremont Institute
PRICE: $6.95
IN CANADA: $7.95

Book Review by Jeremy Rabkin

A Broadside for Liberty

Terms of Engagement: How Our Courts Should Enforce the Constitution's Promise of Limited Government, by Clark M. Neily III.
Encounter Books, 232 pages, $23.99



Drawing by George Cruikshank

In the *Wall Street Journal*, Randy Barnett, a libertarian professor at Georgetown Law School, hailed Clark Neily's *Terms of Engagement* as "a compelling examination of how…constitutional limits on government can effectively be restored." Meanwhile, in *National Review Online*, Ed Whelan of the Ethics and Public Policy Center criticized the book for promoting "judicial activism." Neily wants courts to take a more active role in questioning statutes that restrict liberty, especially economic liberty. He insists this role should not be regarded as activism, but simply as the honest "engagement" that is the constitutional responsibility of the judiciary.

In the introduction, Neily cautions that his book "is not about constitutional theory" but about "constitutional reality as experienced by ordinary people trying to live their lives free from unwarranted government interference." *Terms of Engagement* is neither a how-to manual for practicing attorneys nor an extended treatise for legal scholars, but a popular broadside, aimed at changing—if just a little—the opinions of voters, politicians, and judges. Although he offers some historical arguments for giving broader reach to the Contract Clause and the Privileges or Immunities Clause, Neily isn't much concerned with the precise reach of particular constitutional provisions.

Neily spent much of his career as a practicing attorney for the Institute for Justice, which since its founding in 1991 has doggedly fought state and local restrictions on citizens' rights to earn a living or educate their children. He does not recycle libertarian harangues against the New Deal or the Great Society here, but sticks to ordinary people and the special interest laws that get in their way.

The book tells about women barred from operating hairdressing salons because they had not taken specialized courses and passed an elaborate exam in "cosmetology." And others prevented from selling flowers because they had not undertaken required training in horticulture. In one case, monks who made wooden coffins as a religious vocation mounted a successful challenge to a restrictive state law, secured by the funeral industry. Federal judges on the Fifth Circuit held that the "great deference due to state economic regulation does not…require courts to accept nonsensical explanations for regulation." But that case is the rare exception.

Judges, Neily argues, should require governments to provide evidence that restrictions on economic freedom serve a legitimate purpose and that the law pursues that purpose in a legitimate and consistent way. He is particularly critical of judges who uphold statutes on the basis of speculative claims, without evidence that the particular measure before the court would actually advance its ostensible purpose. If the government can't carry the burden of proof when a law is challenged, the court, says Neily, should hold that law unconstitutional.

Neily's brisk presentation skips past a number of important complications. Most regulatory measures are implemented by specialized agencies. At the federal level, administrative law already allows challengers to complain that regulations would be "arbitrary and capricious" (and therefore unlawful) if not justified by evidence that they will actually secure the benefits claimed for them. Although challengers sometimes do get courts to order agencies to provide more evidence or better explanations, which sometimes prompt adjustments, agency regulations are rarely blocked entirely. Does Neily think standards of justification in federal administrative law

also need to be tightened? Or does he think even those standards, if applied to state legislation, might make a big difference? He doesn't say enough for readers to tell.

So, too, with larger questions about federalism. Neily complains that courts fail to enforce those limits on federal power intended to preserve a role for states in our system. But interference with federal statutes, affecting the whole country or at least national constituencies, would usually provoke much more political resistance than invalidating particular—often rather idiosyncratic—state measures. So would we actually get more liberty by imposing more constraints on federal power? If courts could actually restrain federal regulatory reach, would that be an argument for leaving states more leeway, since the effects of state laws would only be felt locally and might be somewhat mitigated by interstate competition? Again, Neily does not say enough to show where his arguments lead.

Still, greater judicial skepticism might make for improvements at the margin. Neily acknowledges that greater judicial engagement will face resistance from conservative critics of judicial activism. *Roe v. Wade* (1973), he says, has become "a jurisprudential black hole, bending the light of reason and warping the surrounding constitutional space." Even those otherwise doubtful of "the efficacy, wisdom or justice of government" may oppose judicial engagement from the "desire to deny any purchase to arguments in favor of a constitutionally protected right to abortion."

Neily's plea for "keeping Roe in perspective" does not really answer the concern. Given *Roe*'s cascading moral costs, a reasonable person might very reasonably favor constraints on judges that would undermine or isolate *Roe*, even if that meant foregoing chances to challenge abusive economic regulation. The most serious objection to Roe was not that it was "activist." I would not hesitate to confine the judicial role across the spectrum of constitutional dispute if that promised to avert such terrible rulings in the future.

But such a grand bargain is not now on offer. Just in the past two years, a succession of courts, including the U.S. Supreme Court, have held that the Constitution bars laws limiting marriage to the union between a man and a woman. We don't know the consequences of same-sex marriage because it has never existed in any society at any time in recorded history. We do know that many societies have allowed marriage with children, close relatives, and with multiple wives, so rulings on same-sex marriage are bound to generate a whole series of disturbing new claims for courts to sort through in coming years. There is a lot of unhappiness with court rulings on same-sex marriage but that mostly reflects disagreement over the policy. There must be some scholars who favor same-sex marriage but don't think the dispute about it should be settled by courts. You just need the Missing Persons Bureau to find such scholars.

So appeals to "judicial restraint"—the mainstay, as Neily shows, of all recent Supreme Court confirmation proceedings—have not made much difference on the hottest of hot button issues. Perhaps that is not surprising. "Judicial restraint" is at best a method of legal interpretation or a procedure or technique for judging. No one would risk his life for a method, procedure, or technique. Pleas for judicial deference do not stir men's souls.

More to the point, repeated admonitions to restraint don't impress advocates for progressive causes. Such rhetoric simply inspires fury when conservative justices, after deferring and deferring, finally decide that some favored progressive policy runs afoul of what conservatives view as a clear constitutional prohibition. Witness the outrage over the Supreme Court's rulings against campaign finance regulations in the name of free speech.

But there are good reasons for courts to recognize claims to economic liberty in the ways Neily urges. In the prevailing view since the New Deal, government must have vast power to regulate and control the general economy, so courts can only intervene to protect special islands of autonomy. As Justice Anthony Kennedy put it in the 1991 *Casey v. Planned Parenthood* decision, reaffirming the right to abortion, the "heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.... [P]eople have organized intimate relationships and made choices that define their views of themselves and their places in society." Challenges based on this philosophy direct courts toward spiritual, metaphysical, or psychotherapeutic speculations about the meaning of autonomy. Economic challenges push courts toward hard data. That's much safer ground. Advocates of different views can at least use accepted techniques for analyzing common facts.

At a deeper level, the debate is not really about differing notions of liberty but about individual liberty as against social equality. Advocates for the right to choose an abortion, for example, focus on the undeniable fact that women face the burdens of pregnancy in much more immediate ways than men. Feminists view ready access to abortion (and other means of birth control) not merely as liberating but as equalizing. The same is true for arguments about sexual freedom and same-sex marriage: the issue is much more about equality than liberty. So, too, with debates about government entanglement in religion: the concern is often less about the liberty of religious minorities or nonbelievers than their concern at being marginalized or deprived of equal standing.

It's not true that the American Founders only cared about limiting government for the sake of liberty. But it's fair to say preserving limits for the sake of liberty was a large part of their concern. The strongest argument for Neily's approach is that it reminds citizens about constitutional basics. At the least, it restores issues to the debate that go beyond the equality fixations of the Left.

Whatever happens, we won't arrive at libertarian paradise through "judicial engagement." Not even a Republican-dominated Congress would stand for a wholesale repeal of a century's worth of economic regulation. Judges will have to be judicious in invoking constitutional limits. But it might be helpful for all sides to think more carefully about what is an adequate ground for laws that constrain the liberty of our fellow citizens.

Government health care mandates, government programs to assure social equality, and government efforts to protect us from crime and terror threats will pose this question more and more insistently in the coming years. Clark Neily's book does a service if it prompts more thought on how we should answer it.

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