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Remarks of Gillian E. Metzger

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REMARKS OF GILLIAN E. METZGER†

PROF. GILLIAN E. METZGER*

Thanks for having me, I'm glad to be here. I'm going to take for granted the principle that candor and transparency in judicial reasoning is a very good thing. The process of judicial decision making is a process of giving reasoned explanations, of holding up reasons and arguments for refutation. Whether adjudication turns mainly on such reason giving or instead on judicial policy preferences is of course a matter of some dispute, but I think it is relatively noncontentious to say that reason giving is both an important constituent of, and an important constraint on, the process of adjudication—particularly constitutional adjudication. And it follows that candor about these reasons—about what's really driving a judicial decision—is important. Such candor is particularly important in regard to precedent, because another important constraint in the area of constitutional adjudication is the need to take seriously decisions that courts, both yours and others, have previously issued.

The difficult part is taking this principle of candor and translating it down into specific contexts. Then it becomes necessary to address harder questions, such as how much candor is needed, when less candor is a source of concern and when it is not. That is more the level on which I am going to focus my remarks on the importance of candor today, and I thought that I would address it through the prism of some of the Supreme Court's decisions of this last term, as Cristina [Rodriguez] mentioned.

It's fair to say, I think, that candor and transparency in judicial decision making, particularly in regard to precedent, didn't fare that well last term. There were a number of decisions that seemed inconsistent with prior precedent, where the Court either failed to acknowledge and really front that inconsistency, or failed to explain and adequately distinguish the precedent. When I actually started thinking about these decisions, however, I was surprised to find out that in the end, the Court's lack of candor about precedent was not,

† This is a modified transcript of remarks given by Professor Gillian E. Metzger at the 2008 Symposium of the *New York University Annual Survey of American Law* (March 11, 2008). The Symposium was entitled *Tradeoffs of Candor: Does Judicial Transparency Erode Legitimacy?* Professor Metzger spoke on the panel entitled "Transparency and Stare Decisis." The recording of the speech is on file with the *New York University Annual Survey of American Law*.

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on its own, that troubling to me. What I did find troubling was when that lack of candor and failure to take precedent seriously had other effects, such as leading to confusion or uncertainty. But I was more concerned about those effects, and in addition about what the lack of candor might suggest regarding the extent to which the Roberts Court takes precedent seriously, than I was about lack of candor and transparency *per se*.

The conclusion that I've come to is that criticism about the Court simply in terms of transparency and candor may lack some candor in its own right. What I mean by this is that I think such criticisms are often driven more by substantive and normative disagreements with the results the Court reached than by neutral concerns about candor. I tend to think it is better to acknowledge and front those substantive disagreements in their own terms and directly engage in a debate about which values should govern constitutional adjudication and which shouldn't.

Let me talk a little bit about some of the decisions to justify this view. There are so many decisions you could use; I'm not going to talk about all of them, maybe we'll add some more to the mix later on. The three I thought I would focus on are the *Hein* decision,¹ the *United Haulers* decision²—probably not on many people's lists of the top ten from last year, but as a dormant Commerce Clause aficionado it's one I like—and also *Gonzales v. Carhart*.³

Hein arose out of President Bush's effort to expand participation of faith-based organizations in government programs.⁴ This led to creation of certain faith-based offices in government agencies and in the White House. Some taxpayers and an association brought suit, challenging actions by the heads of these offices as violating the Establishment Clause.⁵ The issue in the case was not the merits of the Establishment Clause challenge, but instead the question of taxpayer standing and whether or not the 1968 decision in *Flast v. Cohen*,⁶ which allowed taxpayer standing in the context of an Establishment Clause challenge, should govern. The decision of the Court was that it should not,⁷ but there was no majority opinion for that result. You had three justices in an opinion by Justice

1. *Hein v. Freedom from Religion Found.*, 127 S. Ct. 2553 (2007).

2. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786 (2007).

3. 127 S. Ct. 1610 (2007).

4. *Hein*, 127 S. Ct. at 2559.

5. U.S. CONST. amend. I.

6. 392 U.S. 83 (1968).

7. *Hein*, 127 S. Ct. at 2559.

Alito saying that *Flast* didn't give standing in the current case because the faith-based program initiative was an instance of executive action rather than a congressional statute.⁸ One of those Justices was Justice Kennedy, who in a separate concurrence emphasized that he thought *Flast* was correct,⁹ whereas Justice Alito's stance was simply that he wasn't going to extend *Flast* to the full logic of its reasoning and instead was limiting it to allowing a suit to challenge congressional action.¹⁰ Justice Scalia, who concurred in the result, thought that this distinction between congressional action and executive action in the context of standing to bring an Establishment Clause challenge made absolutely no sense whatsoever. He pilloried Justice Alito's opinion for lacking principle and logic, and concluded that *Flast* should be overruled because it rested on notions of what he called "psychic injury" that were incompatible with current standing jurisprudence.¹¹ Meanwhile, Justice Souter, writing for the four dissenters, continued to adhere to *Flast*, arguing that it was rightly decided. But Justice Souter agreed with Justice Scalia that the plurality's distinction between congressional action and executive action made no sense.¹²

I think Justice Scalia and the dissenters are correct that the distinction between congressional action and executive action here has little basis in logic or principle. I also think this distinction is not particularly normatively or functionally appealing. It seems to just offer up an immediate loophole for evasion of Establishment Clause constraints, allowing more of a wink-and-a-nod kind of an approach when Congress wants to bypass the possibility of an Establishment Clause challenge. And the only reason to have this distinction is not to have to overrule *Flast*. Now, that's a potentially legitimate basis for a distinction, but it does seem to require some account of why it is that the result in *Flast* was correct and worth keeping. Instead of providing that account, Justice Alito and Justice Kennedy basically said taxpayer standing for Establishment Clause challenges goes this far and no further, and that was the end of their reasoning.

So I think the Court's treatment of *Flast* is flawed, though the flaws are more failures of reasoning than lack of candor. In the end, however, these failures don't bother me that much. Part of why I'm not that bothered is that I don't think that *Hein* had that

8. *Id.*

9. *Id.* at 2572 (Kennedy, J., concurring).

10. *Id.* at 2568 (majority opinion).

11. *Id.* at 2573–74 (Scalia, J., concurring).

12. *Id.* at 2584 (Souter, J., dissenting).

much of a practical effect (Steve [Shapiro], who actually litigates here, can correct me on this), because after the prior decision in *Valley Forge*, *Flast* had already been significantly narrowed.¹³ True, *Valley Forge* could be read as emphasizing either the clause involved (the Property Clause as opposed to the Taxing and Spending Clause) or the type of action at stake (congressional versus executive), and a subsequent decision involving executive action, *Bowen v. Kendrick*,¹⁴ had muddied the waters somewhat regarding when taxpayer standing was available. But to the extent these intervening decisions sowed confusion, *Hein* provided clarity. Basically, it's clear after *Hein* that if you are going to sue on an Establishment Clause basis and taxpayer standing, then you had better find very specific congressional authorization to which you can tie your challenge.

Thus, although arbitrary, the distinction between executive and congressional action in *Hein* has the advantage of adding greater certainty about when standing is and is not available for Establishment Clause challenges. In addition, I think it is hard to decide whether or not to overrule *Flast* without taking on some bigger picture issues. In particular, if you look at all of the opinions, one of the issues in debate is whether non-concrete or more aesthetic injuries should ever suffice for standing. Justice Scalia was very dubious about that basis for standing, emphasizing more wallet or more concrete injuries.¹⁵ That is a point on which the dissent disagreed, arguing that there are instances in which we tolerate standing based on aesthetic injuries.¹⁶ But as a result of its willingness to allow aesthetic injury, the dissent is faced with the question of why allowing standing here does not serve to open up the executive branch to continual challenges, posing a real threat of intrusion on its functioning. One way the dissent tried to limit that effect on the

13. *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). In *Valley Forge*, the Court rejected claims of taxpayer standing to challenge the transfer of government property to a religious college, emphasizing that the challenge was to executive rather than congressional action and involved the Property Clause rather than the Establishment Clause to distinguish *Flast*. *Id.* at 478–80. The Court also noted that even if the respondents had satisfied the *Flast* analysis, they would encounter “serious difficulty in establishing that they ‘personally would benefit in a tangible way from the court’s intervention.’” *Id.* at 480 n.17 (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)).

14. 487 U.S. 589 (1988).

15. *Hein*, 127 S. Ct. at 2574 (Scalia, J., concurring).

16. *Id.* at 2587 (Souter, J., dissenting).

executive branch was to draw a distinction between the Establishment Clause and other kinds of constitutional challenges.¹⁷

In other words, there were distinctions that were being drawn in the other opinions too, and I'm not sure that you can figure out whether it was better to front and either overrule or not overrule *Flast* without deciding which of these other distinctions, if either, had more merit. Another reason why I'm not too concerned about *Hein* is because it involves standing doctrine, which is known to be easily manipulatable. An additional example of that manipulability last term came in *Massachusetts v. EPA*.¹⁸ In that 5-4 decision, a majority of the Court held that Massachusetts had standing to challenge the EPA's failure to regulate greenhouse gases, and claimed that this holding was in keeping with an earlier major decision on standing, *Lujan v. Defenders of Wildlife*.¹⁹ I think that *Massachusetts* and *Lujan* are actually in considerable tension, but such inconsistency among precedents is not unusual in the standing area. The bigger question is whether we should have an area of our jurisprudence that is so manipulatable, but given that we do, I'm not that surprised by the Court's lack of candor regarding how its approach in a case fits with other standing precedent.

Let me turn now to *United Haulers*.²⁰ *United Haulers* involved a dormant Commerce Clause challenge to a municipal flow control ordinance which required that all solid waste in a couple of counties be taken for disposal at a county-owned solid waste facility.²¹ In 1994, in a case called *C & A Carbone, Inc. v. Town of Clarkstown*, also involving New York counties, the Court had held that a county's similar flow control ordinance violated the dormant Commerce Clause when it required that waste be taken to a facility that was privately owned for processing.²² In the *United Haulers* case, the Court said the distinction between publicly owned and privately owned facilities has constitutional significance, and rejected the claim that use of a flow control ordinance in conjunction with a publicly owned waste facility violated the dormant Commerce Clause.²³

17. *Id.* at 2585-88.

18. 127 S. Ct. 1438 (2007).

19. *Id.* at 1455 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

20. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786 (2007).

21. *Id.* at 1790.

22. 511 U.S. 383, 386 (1994).

23. *United Haulers*, 127 S. Ct. at 1795-97.

That's all well and good. The problem is that the facility in *Carbone* was essentially public. It was privately owned for five years, and then the county could buy it for a dollar.²⁴ In other words, it was a different funding mechanism, but both decisions involved essentially public facilities in their practical effect. As a result, the *United Haulers* dissent complained that in fact this case could not be meaningfully distinguished from *Carbone*, and that the dormant Commerce Clause claim should win here too.²⁵ The *United Haulers* majority insisted that the issue of public ownership had not been reached in *Carbone*, and therefore it was free to find that that public ownership in fact made a difference.²⁶ That's debatable, but regardless, once the Court held that public ownership makes a difference, it needed to explain why the kind of mechanism for funding that was present in *Carbone* still should be unconstitutional. And that's exactly the question the majority didn't reach. It never explained why that kind of funding mechanism is still problematic because it never took on *Carbone*.

I'm more skeptical and more critical of the Court's lack of candor here. Why? Well, one reason is I think that the decision in *United Haulers* creates much more uncertainty and imposes more significant costs than the Court's decision in *Hein*. Counties are now faced with trying to figure out how they thread the needle between these two decisions. Suppose a county has a publicly owned facility, but wants to contract out its management. Is that going to fall on the *United Haulers* side, or is that going to fall on the *Carbone* side? In addition, there are costs attached to rejecting the funding mechanism of having a private facility build and run the waste authority facility for a few years, recoup a profit, and then turn it over to the county. A county may not be as efficient a manager in getting such a facility off the ground. Because the Court never took on the question of why *Carbone* should continue to govern here, we don't really have a good explanation of why localities should be subject to those costs. In short, there's a real lack of justification here that results in imposition of costs and uncertainties in ways that I find more troubling than I do in the *Hein* context.

I would raise similar concerns about uncertainty in regard to the *Wisconsin Right to Life* case,²⁷ which I'm not going to talk that much about. There you basically have the Court upholding an as-applied challenge to the McCain-Feingold issue advocacy bans in a

24. *Carbone*, 511 U.S. at 383.

25. *United Haulers*, 127 S. Ct. at 1803 (Alito, J., dissenting).

26. *Id.* at 1790 (majority opinion).

27. *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007).

way that is simply at odds with its decision in 2003 in *McConnell*.²⁸ That engendered some uncertainty about what continuing effect *McConnell* has. I am also more troubled here by the sense that the Court claimed to be adhering to *McConnell* in order to avoid acknowledging that it is, in such short order, changing its view on such a politically salient issue. In other words, this strikes me more as possibly intentional public dissembling. On the other hand, seven Justices stated that they believed that *Wisconsin Right to Life* and *McConnell* could not be squared,²⁹ so it's hard to conclude that the Court as a whole was dissembling and lacking candor, even if *McConnell* was not expressly overruled.

Finally, let me just say a couple of words about *Gonzales v. Carhart*.³⁰ Here the Court sustained, against a facial challenge, the federal ban on so-called "partial birth" dilation and extraction abortions despite having, seven years earlier, invalidated on facial challenge a similar Nebraska measure.³¹ The *Gonzales* Court sought to distinguish the earlier case, *Stenberg v. Carhart*, arguing in part that different language in the federal act addressed the vagueness and overbreadth concerns in *Stenberg* with respect to which procedures were covered.³² What the Court didn't address adequately was the fact that core to *Stenberg*, indeed core to *Casey*,³³ core to *Roe*,³⁴ core to the Court's abortion jurisprudence generally, has been an insistence on the need for a medical health exception for when an abortion restriction might harm the health of the woman. Yet in *Gonzales v. Carhart*, the Court upheld the federal ban despite the fact it lacked such a health exception. In so doing, the Court emphasized medical uncertainty about the possibility of harm to a

28. *McConnell v. FEC*, 540 U.S. 93 (2003).

29. *Wisconsin Right to Life*, 127 S. Ct. at 2684–86 (Scalia, J., concurring); *id.* at 2704–05 (Souter, J., dissenting).

30. 127 S. Ct. 1610 (2007).

31. *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000).

32. *Gonzales*, 127 S. Ct. at 1628.

33. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879–80 (1992) (stating that "the essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health" and concluding that a measure that imposes "significant health risks" on a woman seeking an abortion would be unconstitutional, though finding that the medical exception in the Pennsylvania law at issue satisfied this requirement).

34. *Roe v. Wade*, 410 U.S. 113, 164–65 (1973) (holding that the state may "regulate the abortion procedure in ways that are reasonably related to maternal health" and may even proscribe abortion post-viability provided an exception is made for instances when abortion "is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother").

woman's health and that the case arose on a facial challenge.³⁵ But in *Stenberg*, medical uncertainty—the presence of some substantial belief in the medical community that banning the procedure might harm women's health—had been a reason why the Court had concluded that a health exception was required.³⁶ And, of course, *Stenberg* had arisen on a facial challenge.³⁷

Thus, I think the Court failed to acknowledge the extent to which its decision in *Gonzales* was inconsistent with *Stenberg*. But again, I am not that troubled by the Court's lack of candor *per se*; I am more concerned about what this inconsistency signals about the extent to which the Roberts Court feels bound by prior abortion jurisprudence. I am also again concerned that the Court's recent emphasis on the facial versus as-applied nature of a challenge has the potential to lead to quite a lot of confusion. Although emphasizing this distinction, the Court hasn't explained at all when an as-applied challenge should be available, what form that challenge would take, and how to distinguish an as-applied challenge, particularly if it is pre-enforcement, from a facial challenge.

Hence, as you can see, I do not in the end put that much weight on candor about precedent for its own sake. Part of the reason why I'm not so bothered by what appear as fairly specious attempts to distinguish precedent is that it's often possible to read precedent in different ways. Clearly wrong answers on that front are, I think, somewhat rare. It's also because I can see some reasons why candor may not always be the best approach. There are instances where the Court has to reach a certain answer and it can't necessarily get there and explain its actions unless it does so *post hoc*. The Court is also a multi-member body, and reaching agreement on a rule that everyone can sign onto sometimes may require less explanation rather than more. As all of this suggests, I think ultimately whether or not candor and candor about precedent are valuable is an instrumental question. And you have to weigh factors such as the uncertainty and confusion engendered by a decision, and not simply the value of candor alone.

Finally, what I find lacking in these decisions is more an overt, normative engagement with the real issues involved. In particular, underlying these decisions is a debate over how much weight to give *stare decisis*. It is not to me very surprising that Justice Scalia and Justice Thomas are often the most insistent that rule of law and

35. *Gonzales*, 127 S. Ct. at 1637.

36. *Stenberg*, 530 U.S. at 938.

37. *Id.* at 922.

principles of reasoning require overruling of prior decisions. They are more willing to take that stance because I don't think they put as much of a weight on stare decisis, particularly in the context of constitutional adjudication.³⁸ I would rather see the argument directly engaged on the question of stare decisis and when it should bind than on the question of whether the Court is being adequately open and honest in its treatment of precedent.³⁹

38. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 601 & n.8 (1995) (Thomas, J., concurring).

39. Many of the concurring and dissenting opinions in last Term's decisions attempted to do so. *See, e.g.*, *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 2684–86 (2007) (Scalia, J., concurring); *id.* at 2704–05 (Souter, J., dissenting); *Hein v. Freedom from Religion Found.*, 127 S. Ct. 2553, 2584 (2007) (Scalia, J., concurring); *Gonzales*, 127 S. Ct. at 1652–53 (Ginsburg, J., dissenting).

