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Abstract

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Professor Graglia raises the question: why do we have federal courts?[1] He suggests that the reason for this is the dominance of our political institutions by lawyers from the very beginning. It's a good question: why do we need a dual set of courts? The rationale for diversity jurisdiction is obvious, although not necessarily persuasive. As to the rest of the judicial power defined in article III, it all relates to federal law. Does one need a great deal of justification for providing a set of federal tribunals to interpret, apply, and enforce federal laws? One might readily accept that the hope here was (1) freedom from local political pressures, and (2) uniformity of interpretation. If so, the wonder is not why we have a separate federal court system, but, rather, why the state courts have concurrent jurisdiction over the great bulk of cases arising under federal law.

For whatever it is worth, there was some debate at the Constitutional Convention about the desirability of a separate federal court system. Rutlidge of South Carolina argued "that the state tribunals might and ought to be left in all cases to decide in the first instance, the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of judgment."[2] Madison responded, in part: "What was to be done after improper verdicts in state tribunals obtained under the biased directions of a dependent judge, or the local prejudices of an undirected jury?"[3]

In any event, we have a separate system of federal courts, and we were bound to have a federal Supreme Court. Professor Graglia obviously questions the legitimate existence of a power of judicial review and, in particular (we might surmise), of federal judicial review of legislative action. Does the exercise of a power of judicial review represent a usurpation of power by the federal judiciary?

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1. Graglia, *The Growth of National Judicial Power*, 14 NOVA L. REV. 53 (1989).

2. J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 71 (Ohio U. Press 1984).

3. *Id.* at 72.

Yes, we have no "judicial review" clause in our Constitution. But is it "safe to assume," as Professor Graglia says, "that no such power was granted the courts by the ratifiers of the Constitution?" I do not agree that that is a "safe" assumption. Little was said, at the Constitutional Convention, about the prospect of judicial invalidation of legislation. Mercer of Maryland "disapproved of the doctrine that the judges as expositors of the Constitution should have authority to declare a law void."[4] And Dickinson of Delaware agreed. But Morris of Pennsylvania "could not agree that the judiciary . . . should be bound to say that a direct violation of the Constitution was law."[5] In the debate over the adoption of the clause prohibiting bills of attainder and ex post facto laws, Williamson of North Carolina stated: "Such a prohibitory clause is in the Constitution of North Carolina, and tho [sic] it has been violated, it has done good there & may do good here, because the judges can take hold of it."[6]

What is the alternative to the institution that we know as judicial review? Professor Graglia suggests that, when a legislature has "decided" (has it really?) that there is no conflict between a statute and the Constitution, "why should not its, rather than a court's, judgment be final?"[7] Presidents Jefferson, Jackson, and Lincoln all made similar arguments at one time or other,[8] and I guess that is the alternative: the Supreme Court could believe that a statute was in conflict with the Constitution, but say (or do, at any rate) nothing about it. How satisfying is that? Could we really depend on the legislators to think hard, and consistently, about whether a statute that they really wanted to enact was or was not in conflict with the Constitution? I always found John Marshall's justification of judicial review in *Marbury v. Madison*[9] to be pretty convincing; the practice, at any rate, seems to me to be at least arguably consistent with the document we received from the Framers.

Professor Graglia also says that, if the Framers had contemplated the power of judicial review, "they would have also provided for some limit on it by Congress."[10] There is a provision, in article III, section 2

4. *Id.* at 462.
5. *Id.* at 463.
6. *Id.* at 511.
7. Graglia, *supra* note 1, at 60.
8. G. GUNTHER, CONSTITUTIONAL LAW 22-24 (11th ed. 1985).
9. 5 U.S. (1 Cranch) 137 (1803).
10. Graglia, *supra* note 1, at 58.

of the Constitution, by which Congress can limit the jurisdiction of the Supreme Court. It is ambiguous, as to the scope and extent of that Congressional power, but it is there. And, of course, Congress has undisputed power to regulate the jurisdiction, as well as the very existence, of the lower federal courts.

Professor Graglia says that the exercise of judicial review has "[made] the Supreme Court an instrument by which the Constitution's two most basic principles, government by the people and decentralized power, could be subverted."[11] Well, is that true?

First of all, are those the Constitution's two most basic principles? The Constitution created a new government possessing some centralized power, albeit limited, so I am not sure how accurate it is to say that "decentralized power" is one of the Constitution's most basic principles. "Government by the people" will do nicely as a major constitutional principle; but is it fair to say that the federal courts have, on balance, "subverted" that principle? In its decisions striking down various aspects of racial discrimination in voting, and establishing the "one person, one vote" principle, for example, the Court has surely contributed something to the reality of "government by the people" in this country.

But surely another paramount principle of our Constitution—with or without the Bill of Rights, but surely with it—is the principle that there are limits to what government can do, particularly with respect to certain rights of the individual. I think I would put that second—after "government by the people," but before "decentralized power." And surely the greatest achievement of judicial review has been in this realm.

Professor Graglia is clearly quite unconvinced by the Marshall opinion in *Marbury v. Madison*. I see no reason to debate with him about the correctness or incorrectness of the result in that case, other than to make a comment or two about his provocative suggestion that the case "was likely a setup, brought for no other purpose than to give the Court an opportunity to act."[12] First, I commend to him the excellent recent article on the history and contemporary understanding of the *Marbury* decision by my colleague Professor Burris.[13] Second, I find it a little odd to suggest that the case gave the Court "an opportu-

11. *Id.* at 57.
12. *Id.* at 58.
13. Burris, *Some Preliminary Thoughts on a Contextual Historical Theory for the Legitimacy of Judicial Review*, 12 OKLA. CITY U.L. REV. 585 (1987).

nity to *act*," considering that Chief Justice Marshall put forth the power of judicial review by way of explaining why the Court, in this instance, could *not* act; the unconstitutional statutory provision was a grant of jurisdiction to the Supreme Court itself. But perhaps I quibble.

One of Professor Graglia's major themes, here and elsewhere, is that judicial review enables judges "to substitute their policy views for the policy views of the elected representatives of the people in the guise of enforcing the Constitution."[14] Further, he says, "[j]udicial review . . . makes unelected judges, not elected legislators, the real rulers."[15] And, he further states, "[f]or the past three and a half decades, virtually every major change in domestic social policy has come, not from our elected legislators, but from the Court."[16]

I think he is on to something here—which is to say that, in part, I agree. But I think he exaggerates, and he probably knows that he is doing so. The Supreme Court *has* wrought enormous changes in our society over the last few decades, and much of what it has done is open to genuine criticism and questioning, in terms of whether the Justices have or have not interpreted the Constitution "correctly." But, before exploring that enormous question a bit further, a few preliminary points seem worth making, by way of responding to Professor Graglia's sweeping generalizations:

(a) Generally speaking (and particularly in the realm of substance, as opposed to procedure), the Court cannot initiate an affirmative policy choice, but can only react. Thus, the Court cannot give us regulation of abortion, for example, but can only decide whether regulation of abortion, by other government entities, is or is not constitutional. The same is true with respect to capital punishment and prayer in the public schools. Granted, courts do at times impose remedies for past constitutional violations that have major effects upon our society—such as reapportionment of state legislatures, school desegregation, and court-imposed affirmative action remedies for employment discrimination. But it remains true that, generally speaking, the power of courts to impose their own "policy choices" is inherently limited.

(b) While, again, the Supreme Court has been as important as any of our institutions in re-making American society over the past few decades, it has not done it alone. Congress has taken major initiatives to

14. Graglia, *supra* note 1, at 58.
15. *Id.* at 60.
16. *Id.* at 64.

combat racial and gender-based discrimination in employment and housing, and these have withstood judicial challenges. Congress and the states have taken major initiatives in the form of "affirmative action" plans to rectify the effects of racial and gender-based discrimination, and most of these actions have similarly withstood judicial challenges. Also. in the "pure" regulatory area, much has been done by Congress to protect our environment. And there is no longer any question about legislative power to take these important initiatives unimpeded by judges who may disapprove of them.

(c) Even if one focuses solely on the controversial decisions by which the Court has so greatly affected American society over the last few decades, it ought to be recognized that, for the most part, and even if one ultimately disagrees with how the Court has interpreted the Constitution, there *is* an identifiable basis in the Constitution for judicial consideration of the point at hand. Thus, for example, there *is* a first amendment that says something about "freedom of speech" and that prohibits the "establishment of religion," there *is* an equal protection clause that was obviously intended to prohibit some kinds of governmental discrimination, and there *are* a series of provisions in the Bill of Rights pertaining to the rights of the accused in the criminal justice area—as well as a clause specifically prohibiting "cruel and unusual punishment." It *may* be true, as Professor Graglia argues, that our Constitution, properly understood, does not really prohibit all that much; but it seems to me that, with the major exception of the area of marital and familial privacy, the Court cannot justifiably be accused of having roamed freely in search of textually unsupportable ways of imposing its collective will on society.

(d) Related to that observation, I think, is a response to Professor Graglia's charge that the Court's controversial decisions "have served without exception to advance a particular political point of view, [that] of the far left of the American political spectrum." This suggestion would come as a surprise, I think, to the late Justice John Harlan, author of the unforgettable decision protecting offensive speech in *Cohen v. California*,[17] to the late Justice Tom Clark, who wrote for the Court in the 1963 case striking down religious Bible-reading in the public schools,[18] and to Justice Harry Blackmun, who wrote for the Court in *Roe v. Wade*,[19] a decision that was joined by Chief Justice Burger and

17. 403 U.S. 15 (1971).
18. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).
19. 410 U.S. 113 (1973).

the late Justice Potter Stewart, among others. But I suppose one is entitled, if one wishes, to call these jurists dupes of the American Left.

Speaking of radicals, the ACLU comes in for some sharp criticism at Professor Graglia's hands, and I think that part of his presentation really detracts from his argument, and needlessly so. The 1988 presidential election was hardly a referendum—and certainly not an informed one—on the policy positions of the ACLU, despite Mr. Bush's regrettable attempt to get political mileage out of his attacks on that organization. Indeed, I would argue that the Bork nomination came closer to providing a referendum on the Supreme Court's work-product in the realm of civil liberties—and I will admit to being surprised at the outcome.

Having said all that, I happen to agree with Professor Graglia that the Supreme Court has at times found much more in the Constitution than many of us would have suspected was there. It has done so, typically, not by looking *to* the "original intent" of the Framers, but by ignoring any such evidence. I am inclined to agree that the Court has put some heavy weight on the words "due process" and "equal protection." Perhaps the most questionable bit of interpretation in which the Court has engaged—and perhaps the most important—is its gradual determination that almost all of the provisions of the Bill of Rights are "incorporated" in the Due Process Clause of the fourteenth amendment. Think about the import of that doctrine. The debate rages, but I am not convinced that the Framers of the fourteenth amendment had any such understanding. Then again, perhaps the natural reading of the discarded Privileges and Immunities Clause of the fourteenth amendment is, as some have argued, a reference to those "privileges" embodied in the Bill of Rights. Perhaps the Court reached the right result with the wrong reasoning.

In sum, I think Professor Graglia has an important message that deserves to be considered and taken seriously. All it needs is a little editing.