The Growth of National Judicial Power

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Abstract

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The history of American constitutionalism is the history of the aggrandizement of centralized power and, most particularly, of centralized judicial power. The purpose of the Constitution was not, as many seem to think today, to provide additional protections for individual liberty or freedom. Its purposes were primarily commercial and financial, in particular to provide for the establishment of a national common market by creating a central government with the power to remove state-imposed impediments to interstate trade. Far from being seen as a protector of rights, the strengthened national government created by the Constitution was correctly seen by the Constitution’s opponents, the Anti-federalists, as a threat to individual liberty.

Liberty consists of having decision-making authority remain with the individual. However, to form a political society—a government—it is necessary to take some decision-making authority from the individual and give others, the officials of the state, control over other individuals, by force if necessary. The interest of liberty requires that the centers of power—the governing individuals—be kept as close to the governed as possible—that local autonomy be maximized. The proposal for a new constitution was a proposal that local autonomy be substantially reduced, and friends of liberty, such as Patrick Henry, were therefore strongly opposed.

The principal proponents of the Constitutional Convention and of the proposed Constitution it produced were ardent nationalists, and ardent nationalism rarely coexists with a strong faith in democracy and individual freedom. For example, Alexander Hamilton, a major force in bringing about the convention, argued openly and at length at the convention in favor of the establishment of a national monarchy. Although the Confederation Congress authorized the convention only to consider amending the Articles of Confederation, James Madison, then in a nationalist phase of his varied career, showed up with a fully formulated plan for an essentially unitary system of government—the so-

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called Virginia Plan.

The Virginia Plan would have effectively ended local autonomy at once—abolishing the states as independent decision-making entities—by granting Congress a general, undefined power to legislate on matters of national concern and giving the national government a veto over state laws. Madison’s shrewd move of presenting a plan for a unified national government effectively set the agenda for the convention, putting the burden on defenders of local autonomy to find and argue for a means of limiting the centralized power Madison’s plan would have created. It was clear, however, that a constitution centralizing power to the extent contemplated by Hamilton and Madison had no chance of being ratified by the people of the various states. As actually proposed, the Constitution limited Congress to enumerated powers—powers basically limited to matters of trade, finance, and defense—and eliminated the proposal for a national veto on state law.

Having obtained from the convention as a strong plan for national government as they could hope to persuade the people to adopt, Hamilton and Madison then very much changed their tune and argued to the general public, particularly in the series of propaganda pieces known as the Federalist Papers, that the power of the proposed national government would actually be very limited and would probably not interfere with local autonomy at all. “The powers delegated by the proposed Constitution to the executive government,” Madison assured the people, “are few and defined. Those which are to remain in the State governments are numerous and indefinite.” National power “will be exercised principally on external objects, [such as war, peace, negotiation, and foreign commerce ...] and will “be most extensive and important in times of war and danger.” Therefore, Madison said, “state governments could have little to apprehend” from national power. Even so, the ratification of the Constitution by the states, although it is not generally recognized today, was a very shaky matter. In Virginia and New York, the two largest and most important states, crucial to the new union, the Constitution was ratified by very close votes after extensive debate and much political maneuvering.

The representations of Hamilton and Madison that states would be able to protect themselves against the encroachments of the national government have proved to be incorrect, of course. The opponents of the Constitution were correct in warning that its adoption would effectively centralize all power in the national government it created, with local autonomy over any matter permitted to continue only so long as the national government wished it to continue. Even the most prescient opponents of the Constitution could not have foreseen, however, that its adoption would create a national government so powerful that it would be able to wage a war, at the cost of the lives of 620,000 men, in order to prevent the reassertion of local autonomy and the voluntary withdrawal from the union by states that had once voluntarily joined it. The American people have paid a high price indeed for the creation of a government strong enough to prevent impediments to interstate trade.

Under the Articles of Confederation, the central government consisted essentially of a legislative body that could legislate only with the unanimous consent of the states. The Constitution substituted a complex system of government with, or with provisions for, independent and separate legislative, executive, and judicial branches. The judicial branch was a particular subject of contention at the convention and in the ratification debates. Madison’s Virginia Plan, in conformity with its purpose to centralize power, provided that the new national government would have its own complete and separate system of courts. Defenders of local autonomy, however, saw no need to duplicate the already existing court systems. The creation of a separate federal supreme court would be sufficient, in their view, to ensure the enforcement and uniformity of federal law. Adopting this view, the convention initially agreed that the Supreme Court would be the only federal court. But Madison and James Wilson of Philadelphia, another lawyer and perhaps, after Madison, the most influential convention delegate, suggested as a “compromise” that although the Constitution should provide for only the Supreme Court, Congress should be given the power to create lower (“inferior”) federal courts. This compromise was agreed to by the delegates. The product of two clever nationalistic lawyers, it was, of course, no compromise at all. To say that the national government would have its own complete system of courts and to say that the national government would have the power to give itself a complete system of courts was to say essentially the same thing.

As was to be expected, the exercise of the national government’s power to create additional national courts became virtually its first item of business. Senate Bill No. 1 of the First Session of the First Congress became the Federal Judiciary Act of 1789—officially, “An Act to es-
called Virginia Plan.

The Virginia Plan would have effectively ended local autonomy at once—abolishing the states as independent decision-making entities—by granting Congress a general, undefined power to legislate on matters of national concern and giving the national government a veto over state laws. Madison’s shrewd move of presenting a plan for a unified national government effectively set the agenda for the convention, putting the burden on defenders of local autonomy to find and argue for a means of limiting the centralized power Madison’s plan would have created. It was clear, however, that a constitution centralizing power to the extent contemplated by Hamilton and Madison had no chance of being ratified by the people of the various states. As actually proposed, the Constitution limited Congress to enumerated powers—powers basically limited to matters of trade, finance, and defense—and eliminated the proposal for a national veto on state law.

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establish the Judicial Courts of the United States—that set the ever-

expanding federal court system on its way. The Act created a Supreme

Court of six members, a district court in each state, and a circuit court

with both original and appellate jurisdiction, in each of three circuits.

Each of the three circuit courts was to be manned by a district court

judge and two Supreme Court Justices, which explains why the Su-

preme Court was given six members and why its membership increased

with the creation of additional circuits.

The Act's creation of a complete system of federal courts resulted in

an arrangement unique in the history of government, a duplication

and redundancy of government institutions such as no other people had

ever imposed upon themselves. Because of the Constitution and the

1789 Act, every spot of ground in the United States, then and now,

is subject to two complete and, in theory at least, largely independent

systems of government: two lawmaking bodies, two executives, and two

systems of courts. The result was the creation of a lawyer's paradise

of such complexity and inevitable conflict of government institutions as

to ensure that armies of lawyers, no matter how numerous, would never

again be without work. Lawyers purporting to understand the compli-

ance and organization of this judicial system would thereafter be as necessary in America

as scientists and engineers purporting to understand the complexities

of nature are necessary in other societies.

There can be no explanation for the establishment and continu-

ation of the American judicial system but that the unhappy fact that lawyers have dominated our political

institutions from the very beginning. Even in the First Congress, law-

by way of contrast, lawyers appear in the national legislature only in

proportion to their numbers in the general population, and the number

much too small to explain why Japan increasingly produces the goods the world

are mistaken that the inherent contradictions of our society is that the

law, the better it is for the lawyers, and we permit the lawyers to

make the law, which must surely ultimately drive the nonlawyers to

revolution.

Having succeeded in creating a national judicial system, the Fed-

eralist Party, the party of centralized power, soon found it useful for

two purposes. First, it provided a haven for Federalist politicians out of

office—soon to be many—and party workers in need of reward. Second, and

much more important, it potentially provided a means by which the

party could continue to further its political objectives despite the

rejection of those objectives by the people at the polls. In the election of

1800, the people rejected John Adams and his Federalist Party in favor

of Thomas Jefferson and his Republican Party—the party of democracy,

local autonomy, and limited national power—an election rightly

described as the Second American Revolution. The people's rejection

of John Adams for Thomas Jefferson, an open admirer of the French

Revolution and a dangerous radical who actually believed in represen-

tative self-government, confirmed the Federalists' suspicion that the

people were not to be trusted and that the American experiment in

democracy could not be made to work. Like all proponents of unwanted

political views ever since, the Federalists therefore sought to frustrate

the will of the people by capturing the judiciary where, immune from

the uncertainties of elections, they could work to overturn the results of

elections.

The first order of business for the Federalists was to take the

strongest nationalist and anti-democrat they could find—Hamilton or

someone sharing Hamilton's views—and make him Chief Justice of the

United States. The lame duck John Adams did this by nominating

John Marshall, his Secretary of State and fellow ardent Federalist, for

Chief Justice in January 1801, rushing his confirmation through the

lame duck Federalist Senate, and installing him in office for life before

the new administration elected by the people could take office. For

three and a half decades, long after the rejected John Adams and ex-

tinct Federalist Party were mere memories, the nation was blessed with

the man who, for his great contributions to the centralization of power

in Washington, became known as the Great Chief Justice.

John Marshall fully earned this title by faithfully and unwaver-

ingly advancing the rejected policies of the Federalist Party by every

possible means and, even more important, by making the Supreme

Court an instrument by which the Constitution's two most basic principles,

government by the people and decentralized power, could be sub-

verted. Marshall took an essential step in the performance of this feat

5. 1 Stat. Ch. 20, 73 (1799).
establish the Judicial Courts of the United States— that set the ever-expanding federal court system on its way. The Act created a Supreme Court of six members, a district court in each state, and a circuit court, with both original and appellate jurisdiction, in each of three circuits. Each of the three circuit courts was to be manned by a district court judge and two Supreme Court Justices, which explains why the Supreme Court was given six members and why its membership increased with the creation of additional circuits.

The Act’s creation of a complete system of federal courts resulted in an arrangement unique in the history of government, a duplication and redundancy of government institutions such as no other people had ever imposed upon themselves. Because of the Constitution and the 1789 Act, every spot of ground in the United States, then and now, with the exception of the few square miles of the District of Columbia, is subject to two complete and, in theory at least, largely independent systems of government: two lawmaking bodies, two executives, and two systems of courts. The result was the creation of a lawyer’s paradise that has grown only more paradisiacal with each passing year, a system of such complexity and inevitable conflict of government institutions as to ensure that armies of lawyers, no matter how numerous, would never again be without work. Lawyers purporting to understand the complexities of this judicial system would thereafter be as necessary in America as scientists and engineers purporting to understand the complexities of nature are necessary in other societies.

There can be no explanation for the establishment and continuation of the American judicial system that began with the 1789 Act other than the unhappy fact that lawyers have dominated our political institutions from the very beginning. Even in the First Congress, lawyers made up three-quarters of the House of Representatives. In Japan, proportion to their numbers in the general population, and the number much to explain why Japan increasingly produces the goods the world are mistaken that the inherent contradictions of our society is that to revolution; the inherent contradiction is that the more and the worse the law, the better it is for the lawyers, and we permit the lawyers to

make the law, which must surely ultimately drive the nonlawyers to revolution.

Having succeeded in creating a national judicial system, the Federalist Party, the party of centralized power, soon found it useful for two purposes. First, it provided a haven for Federalist politicians out of office—soon to be many—and party workers in need of reward. Second, and much more important, it potentially provided a means by which the party could continue to further its political objectives despite the rejection of those objectives by the people at the polls. In the election of 1800, the people rejected John Adams and his Federalist Party in favor of Thomas Jefferson and his Republican Party—the party of democracy, local autonomy, and limited national power—an election rightly described as the Second American Revolution. The people’s rejection of John Adams for Thomas Jefferson, an open admirer of the French Revolution and a dangerous radical who actually believed in representative self-government, confirmed the Federalists’ suspicion that the people were not to be trusted and that the American experiment in democracy could not be made to work. Like all proponents of unwanted political views ever since, the Federalists therefore sought to frustrate the will of the people by capturing the judiciary where, immune from the uncertainties of elections, they could work to overturn the results of elections.

The first order of business for the Federalists was to take the strongest nationalist and anti-democrat they could find—Hamilton or someone sharing Hamilton’s views—and make him Chief Justice of the United States. The lame duck John Adams did this by nominating John Marshall, his Secretary of State and fellow ardent Federalist, for Chief Justice in January 1801, rushing his confirmation through the lame duck Federalist Senate, and installing him in office for life before the new administration elected by the people could take office. For three and a half decades, long after the rejected John Adams and extinct Federalist Party were mere memories, the nation was blessed with the man who, for his great contributions to the centralization of power in Washington, became known as the Great Chief Justice.

John Marshall fully earned this title by faithfully and unwaveringly advancing the rejected policies of the Federalist Party by every possible means and, even more important, by making the Supreme Court an instrument by which the Constitution’s two most basic principles, government by the people and decentralized power, could be subverted. Marshall took an essential step in the performance of this feat
in *Marbury v. Madison*, decided in 1803, in which he established the power of judicial review: the power of judges, unelected and holding office for life, to substitute their policy views for the policy views of the elected representatives of the people in the guise of enforcing the Constitution. Marshall could hardly have acted more quickly, since one of Jefferson's first acts upon assuming office was to put the Court entirely out of business for fourteen months, including all of 1802—my favorite year in constitutional law, the only year in our history in which the Court had no opportunity to injure the country.

The most important thing to note about judicial review initially is that it is not explicitly provided for anywhere in the Constitution. Given that the power was unprecedented in English law—in England, Parliament, not a court, is said to be supreme—and the power's obvious potential for abuse and the judicial tyranny it has in fact produced, it is safe to assume that no such power was granted the courts by the ratifiers of the Constitution. It seems clear that the Framers of the Constitution had actually provided for such a power, they would have also provided for some limit on it by Congress, as they did when they explicitly granted the executive branch the somewhat analogous power of the veto.*

Like many leading cases in constitutional law, *Marbury v. Madison* was likely a setup, brought for no other purpose than to give formance—an unexcelled demonstration of lawyerly skills producing a closely, surely they should aspire to emulate the Great Chief Justice all that all beginning law students do study *Marbury* and other works of John Marshall no doubt goes far to explain the reputation of lawyers in our society. In the first place, it was improper for Marshall even to sit on *Marbury*, since it was his failure as Secretary of State to deliver Marbury's and other justice-of-the-peace commissions that gave Marshall the opportunity to castigate his political opponent Jefferson, accusing him in detail and at length, although on no good basis, of denying Federalist office-seekers their legal rights. Marshall was careful never actually to rule against Jefferson, however. Jefferson was rightly outraged at this cowardly act until his dying day.

Marshall then concocted a statute that did not exist so that he could rule it in conflict with a constitutional provision that also did not exist. Quoting only a few words from section 13 of the 1789 Judiciary Act, Marshall purported to find that it added to the original jurisdiction granted the Court in the Constitution. In fact, however, the sentence from which he quoted makes no mention of original jurisdiction and speaks only of appellate jurisdiction. I must point out to the beginning lawyer, however, that this technique is not likely to be effective unless you find yourself, like Chief Justice Marshall, in a position in which you are subject to no review.

Having invented a statute for the purpose of holding it unconstitutional—inverting the usual rule that interpretations upholding constitutionality are strongly favored—Marshall's next task was to discover a constitutional prohibition of his own invention—a prohibition of congressional additions to the Court's original jurisdiction. The Constitution provides that the Court shall have original jurisdiction over certain matters, thereby guaranteeing that that jurisdiction cannot be reduced, but it does not say that Congress cannot add to the Court's original jurisdiction. There is no reason, therefore, to think that section 13 would not be perfectly constitutional even if it did what Marshall said it did. Indeed, the Court itself, in effect, admitted this when it later held, contrary to *Marbury*, that Congress can constitutionally make adjustments between the Court's original and appellate jurisdiction. It is also interesting to note that the Judiciary Act was:

10. The Act, Marshall said, authorizes the Supreme Court to issue "writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (emphasis in the original).

11. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States. *Id.* (emphasis in the original).

6. 5 U.S. (1 Cranch) 137 (1803).
7. 2 Stat. Ch. 8, 132 (1802).
9. 1789, 1 Stat. 316 (emphasis in the original).
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That all beginning law students do study *Marbury* and other works of John Marshall no doubt goes far to explain the reputation of lawyers in our society. In the first place, it was improper for Marshall even to sit on *Marbury,* since it was his failure as Secretary of State to deliver Marbury's and other justice-of-the-peace commissions that gave rise to the purported complaints. Having decided to sit nonetheless, Marshall took the opportunity to castigate his political opponent Jefferson, accusing him in detail and at length, although on no good basis, of denying Federalist office-seekers their legal rights. Marshall was careful never actually to rule against Jefferson, however. Jefferson was rightly outraged at this cowardly act until his dying day.

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12. 1 U.S. Const. art. III, § 2.
1) largely written by Oliver Ellsworth, Marshall's predecessor as Chief Justice; 2) enacted by a Congress that included James Madison and others who had attended the constitutional convention; and 3) signed by President George Washington, who had presided at the convention. Only Marshall, however, we must believe, understood what the Constitution really meant.\textsuperscript{14}

Having supposedly found a conflict between the statute and the Constitution, Marshall stated that the Constitution, which declares itself to be the "supreme Law of the Land,"\textsuperscript{15} must be given precedence, and the statute, therefore, must be treated as a nullity. The real question presented by judicial review, however, is not whether the Constitution takes precedence over a conflicting statute, but what authorizes the Court to raise the question of whether or not there is a conflict. The legislature had presumably decided there is no conflict; why should not its, rather than a court, judgment be final? How can it be the role of a court to question the authority of a legislature and supercede its judgments? As Justice Gibson of the Supreme Court of Pennsylvania, the leading contemporary critic of judicial review, pointed out, while the Constitution and a legislative act may come into collision, "it is a fallacy to suppose that they can come into collision before the judiciary;" the question of collision is simply not a "legitimate subject for judicial determination.\textsuperscript{16}

Judicial review necessarily makes unelected judges, not elected legislators, the real rulers. As Bishop Hoadley pointed out in a famous sermon to the King in 1717, "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.\textsuperscript{17} If judges are to police the authority of legislators, who are subject to the restraint of the ballot, who is to police the authority of the judges, who are subject to no such restraint? Uncontrolled power in the hands of unelected officials is, Madison pointed out, the "very definition of tyranny.\textsuperscript{18}

Marshall asserted that judicial review is inherent in a written constitution that places limits on government, but many nations had and have written constitutions defining the power of government without judicial review, and no nation had judicial review. Judicial review would not lead to policymaking by judges and thus make them superior to legislators, the people were assured by Hamilton, the original theorist of judicial review in Federalist No. 78, and by Marshall. Judges would simply perform the ordinary judicial function of interpreting and applying the law and giving effect to the more authoritative law in the case of conflict; no more was involved than the ability of judges to read and reason. Judges, Hamilton said, though he could hardly have believed it would remain feeble and innocuous; having "neither Force nor Will, but merely judgment . . . " they would be able to "take no active resolution whatever.\textsuperscript{19} "Judicial power," Marshall insisted with equal lack of candor, "has no existence. Courts are mere instruments of the law, and can will nothing.\textsuperscript{20}

In Marbury, Marshall illustrated the extremely limited nature of judicial review by supposing that Congress passed a law making the testimony of one witness sufficient for conviction of treason, despite the constitutional provision requiring at least two witnesses.\textsuperscript{21} If application of this law should be involved in a case properly before the Court for decision in the required exercise of its jurisdiction, he said, the Court, pointing out that one is not two, would simply refuse to give it effect. It happens, however, that Congress has never passed and is unlikely ever to pass such a law, and the Constitution, happily, does not prohibit a great deal more. The Constitution, it is easy to forget, given what the Court has done in its name, is a short and simple document, easily printed with all amendments, repeaters, and obsolete matter on fourteen or fifteen pages. It is not at all like the Bible, the Talmud, or even the Tax Code—all lengthy treatments of arcane subjects in which skilled practitioners can find almost anything with sufficient search.

Apart from the fact that Congress' legislative authority is restricted essentially to matters of trade, finance, and defense—so as to leave authority over most policy issues with the states—the Constitution places very few restrictions on representative self-government. Basically, the states and the national government are prohibited from enacting ex post facto laws and bills of attainder,\textsuperscript{22} and the states and

\textsuperscript{14} See M. Cohen, Faith of a Liberal, 178-80 (1946).
\textsuperscript{15} U.S. Const. art. VI, cl. 2.
\textsuperscript{16} Bakin v. Raub, 12 Serg. & Rawle 330 (Pa. 1825).
\textsuperscript{17} As quoted in 1 W. Lockhart, Y. Kamisar, J. Cooper, \\& S. Shefflin, Constitutional Law 66 (6th ed. 1959).

23. U.S. Const. art I, § 9, cl. 3.
1) largely written by Oliver Ellsworth, Marshall’s predecessor as Chief Justice; 2) enacted by a Congress that included James Madison and others who had attended the constitutional convention; and 3) signed by President George Washington, who had presided at the convention. Only Marshall, however, we must believe, understood what the Constitution really meant.14

Having supposedly found a conflict between the statute and the Constitution, Marshall stated that the Constitution, which declares itself to be the “supreme Law of the Land,”15 must be given precedence, and the statute, therefore, must be treated as a nullity. The real question presented by judicial review, however, is not whether the Constitution takes precedence over a conflicting statute, but what authorizes the Court to raise the question of whether or not there is a conflict. The legislature had presumably decided there is no conflict; why should not its, rather than a court’s, judgment be final? How can it be the role of a court to question the authority of a legislature and superecede its judgments? As Justice Gibson of the Supreme Court of Pennsylvania, the leading contemporary critic of judicial review, pointed out, while the Constitution and a legislative act may come into collision, “it is a fallacy to suppose that they can come into collision before the judiciary, the question of collision is simply not a legitimate subject for judicial determination.”16

Judicial review necessarily makes unelected judges, not elected legislators, the real rulers. As Bishop Hoadley pointed out in a famous sermon to the King in 1717, “Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.”17 If judges are to police the authority of legislators, who are subject to the restraint of the ballot, who is to police the authority of the judges, who are subject to no such restraint? Uncontrolled power in the hands of unelected officials is, Madison pointed out, “the very definition of tyranny.”18

Marshall asserted that judicial review is inherent in a written constitution that places limits on government, but many nations had and have written constitutions defining the power of government without judicial review, and no nation had judicial review. Judicial review would not lead to policymaking by judges and thus make them superior to legislators, the people were assured by Hamilton, the original theorist of judicial review in Federalist No. 78, and by Marshall. Judges would simply perform the ordinary judicial function of interpreting and applying the law and giving effect to the more authoritative law in the case of conflict; no more was involved than the ability of judges to read and reason. Judges, Hamilton said, though he could hardly have believed it would remain feeble and innocuous; having “neither Force nor Will, but merely judgment...” they would be able to “take no active resolution whatever.”19 “Judicial power,” Marshall insisted with equal lack of candor, “has no existence. Courts are mere instruments of the law, and can will nothing.”20

In Marbury, Marshall illustrated the extremely limited nature of judicial review by supposing that Congress passed a law making the testimony of one witness sufficient for conviction of treason, despite the constitutional provision requiring at least two witnesses.21 If application of this law should be involved in a case properly before the Court for decision in the required exercise of its jurisdiction, he said, the Court, pointing out that one is not two, would simply refuse to give it effect. It happens, however, that Congress has never passed and is unlikely ever to pass such a law, and the Constitution, happily, does not prohibit a great deal more. The Constitution, it is easy to forget, given what the Court has done in its name, is a short and simple document, easily printed with all amendments, repealers, and obsolete matter on fourteen or fifteen pages. It is not at all like the Bible, the Talmud, or even the Tax Code—all lengthy treatments of arcane subjects in which skilled practitioners can find almost anything with sufficient search.

Apart from the fact that Congress’ legislative authority is restricted essentially to matters of trade, finance, and defense22—so as to leave authority over most policy issues with the states—the Constitution places very few restrictions on representative self-government. Basically, the states and the national government are prohibited from enacting ex post facto laws and bills of attainder,23 and the states are

15. U.S. CONST. art. VI, cl. 2.
23. U.S. CONST. art I, § 9, cl. 3.
Additionally prohibited from "impairing the obligation of contracts." Even the later-adopted so-called Bill of Rights deals primarily with criminal procedure and was meant, of course, to apply only to the national government, not the states. Substantively, the Bill of Rights prohibits the national government from interfering with freedom of speech, freedom of religion, and the right to bear arms, and from confiscating property. The purpose of the fourteenth amendment was to prohibit the states from denying blacks certain basic civil rights, and other amendments protect the right to vote.

American legislators are all American citizens living in America and at least as committed as judges to American principles and values. Because they ordinarily have little inclination to violate the Constitution, and the Constitution, in any event, restricts them very little, examples of clearly unconstitutional laws in our history are extremely difficult to find. The clearest example is probably Minnesota's Mortgage Moratorium Act of 1933, a debtor-relief law, clearly prohibited by the Contracts Clause, which was enacted in the depths of the depression to delay farm foreclosures. In a five to four decision, however, the Supreme Court upheld the law, thereby missing its best opportunity to make a legitimate finding of unconstitutionality.

Judicial review was born in sin in Marbury, and it has rarely risen above the circumstances of its birth. But what, a cynic might argue, is a little—or even not so little—lying and cheating in the service of a good cause? Maybe Marshall did engage in a little chicanery, to put it mildly, in Marbury. But he did give us judicial review, and where would we be today without judicial review? We would have been denied all of the Court's great contributions to our history, and we would not have had the opportunity to correct mistakes and failures of their less enlightened or less well-intentioned fellow citizens. They have been able to wake up each morning and ask what evil remained in the world for them to correct that day, what new constitutional rights they could discover and bestow upon us; surely constitutional rights are good things—things we just cannot have too many of.

But what exactly has been the contribution of judicial review to the betterment of American government and our lives? After Marbury, the Court waited for more than fifty years to exercise judicial review again to invalidate a federal statute when it held in Dred Scott v. Sandford in 1856, on no good basis, that Congress could not limit the extension of slavery to new territories, and that a state could not grant citizenship to blacks. The result was to remove the question of slavery from the political process and thereby help bring about the Civil War, the bloodiest conflict in our history. That war is surely judicial review's most significant contribution to American life, and it is a contribution that will be difficult to outlive. Judicial review made another major contribution to American government and human rights when the Court held in the 1883 Civil Rights Cases that Congress could not prohibit racial segregation in places of public accommodation despite the thirteenth and fourteenth amendments. The result of this holding was to give us such segregation for another eighty years, until Congress acted again in the 1964 Civil Rights Act. For about fifty years thereafter, the principal effect of judicial review was to prevent social experimentation by both the state and national governments by invalidating many economic and business regulations, including two federal statutes that would have restricted child labor.

Perhaps, however, judicial review is like the medical profession, which, while it has undoubtedly killed more people than it has cured at the most times in its long history, may have improved its performance lately. Modern judicial review begins with the Court's 1954 decision in Brown v. Board of Education prohibiting—though only in theory until Congress acted ten years later—compulsory school racial segregation and, it soon appeared, all racial discrimination by government. The decision established in many minds, certainly in the minds of many judges, the moral superiority of policymaking by judges to policymaking by mere politicians. Dred Scott, the Civil Rights Cases, and all the rest were somehow forgiven and forgotten. To oppose judicial activism—constitutional decision-making not based on the Constitution—after Brown, was to open oneself up to the inevitable question, "So, you disagree with Brown?" As no one could disagree with Brown,

27. 109 U.S. 3 (1883).
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no one, it seemed, could question the legitimacy of free-wheeling judicial policymaking.

The enhanced status and immunity from criticism gained by the Court as a result of Brown enabled it to go on to perform an endless series of constitutional miracles. Instead of performing its historic role of acting as a brake on social change, the role contemnpted no doubt by Hamilton and Marshall, the Court became the nation’s primary initiator and accelerator of change. For 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. The Court has effectively remade America in its own image by imposing upon the nation its own favored policies on a range of matters including abortion,61 capital punishment,62 busing for school racial balance,63 prayer in the schools,64 reapportionment,65 pornography,66 criminal procedure,67 government aid to religious schools,68 street demonstrations,69 libel,70 control of subversive activities,71 discrimination on the basis of sex,72 alienage,73 legitimacy,74 and so on.

Judicial review has certainly served different ends during the past three and a half decades than it served during the rest of the Court’s history, but its conversion from an impediment to an aid in the creation of a good society is, to say the least, doubtful. One of the Court’s major contributions during the period has been the creation of a system of criminal justice with impediments to the prevention and punishment of crime such as are known in no other system of law. The Court has made the enforcement of the criminal law so onerous, costly, and time-consuming as to make the effort often seem almost not worthwhile. It is the poor and the elderly who must live in fear behind bars in America’s cities today, while the enemies of society walk the streets unmolested, and the nation leads the world in levels of criminal activity.

The Brown decision itself has been perverted from a prohibition against a requirement of race discrimination in the assignment of children to schools—to a hardly credible requirement that children be excluded from their neighborhood schools because of their race and transported to more distant schools in an effort to achieve school racial balance.66 The result has been to drive the middle class from the public school systems of our major cities, making them, not more, but less racially integrated, the preserves of the nonwhite and the poor. As destructive and unwanted as these decisions are, they nonetheless continue to be faithfully carried out across the nation, monuments to the effects of power divorced from accountability. The result of the Court’s gratuitously reaching out to impose its views of abortion on the nation was to take an issue that was being effectively resolved through the political process on a state-by-state basis and make it an emotional national issue that has had a distorting effect on national politics. Geraldine Ferraro would not have had to devote her vice-presidential campaign to explaining her position on abortion if the Court had not converted it from merely an issue of local politics.

But how has the Court been able to do so much on the basis of a Constitution designed to establish a federalist system of representative self-government, a democratic system with a high degree of local autonomy? The first and most important thing to know about constitutional law is that it has nothing to do with the Constitution. This can be seen, by anyone willing to see, from the simple fact that the vast bulk of the Court’s rulings of unconstitutionality concerns state, not federal, law, and nearly all of these rulings purport to be based on a single constitutional provision—one sentence of the fourteenth amendment, and specifically upon four words: “due process” and “equal protection.” It is clear to everyone, I trust, that the Justices do not reach their decisions on enormously difficult and complex issues of social policy by studying those four words.

Everyone must know that the states did not lose the power to make policy regarding the availability of abortion in 1973,45 for example, because the Court decided to take one more look at the Constitution to see what it had to say on the subject and discovered in the then 105.

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year-old Due Process Clause of the fourteenth amendment what had never been noticed before—that the abortion laws of all fifty states were constitutionally prohibited. The states did not lose the right to make policy regarding prayer in the schools in 1963 (Watkins v. U.S.) because of the first amendment—supposedly applicable to the states by reason of the fourteenth—but despite the first amendment, the purpose of which was to protect the states from such interference by the national government. Everyone understands, I am sure, that Justices Brennan and Marshall insist at every opportunity that capital punishment is unconstitutional, not because it is prohibited by the Constitution, but despite the fact that it is explicitly and repeatedly provided for in the Constitution.

The second thing to know about constitutional law is that the Court's controversial constitutional decisions have not been random in their political impact. They have served without exception to advance a particular political point of view, the point of view of the A.C.L.U. The situation can be summed up by saying that the A.C.L.U. never loses in the Supreme Court, even though it does not always win; it either obtains a policy decision—such as the removal of restrictions on the distribution of pornography or the prohibition of prayers in public schools—that it could obtain in no other way because its views are opposed by the vast majority of the American people, or it is simply left where it was to try again on another day. For opponents of the A.C.L.U., however—for example, opponents of unrestricted abortion—a “victory” in the Supreme Court is simply to be permitted to continue to fight for their point of view in the political process. One can get elected president of the United States by opposing the views of the A.C.L.U., and they are so offensive to the American people, but they are regularly imposed from Washington as compulsory policy in every state, nonetheless, thanks to judicial review and the Supreme Court.

1989

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It happens that the political ideology uniformly advanced by the Supreme Court's so-called constitutional decisions is also the ideology of the vast majority of professors of constitutional law in the law schools and political science departments. Indeed it is the ideology of academics in general and of other members of the New Class—media people, representatives of mainline churches, and others—whose only have, therefore, taken as their primary professional responsibility the attempted justification of what the Supreme Court has done. They labor to convince their fellow citizens that the unwanted and harmful policies imposed on them by the Court are not the result of a simple abuse of power by the Justices, but are somehow the result of the Constitution, a sacred and mysterious doctrine the consequences of which are beyond the understanding and control of the ordinary person. Contemporary constitutional scholarship consists in large part in the invention and elaboration of theories to this effect. These theories of constitutional interpretation are now often openly described as “non-originalist” or “non-interpretivist,” even though the average person probably does not even realize that non-interpretation is one of our interpretational options.

The net result of these scholarly efforts is to permit the federal courts, in the name of enforcing constitutional rights, to continue to deprive the American people of their most fundamental constitutional rights, the rights of self-government and local autonomy. This result would hardly be possible except for the creation of the separate and complete federal court system that began with the enactment of the Judiciary Act of 1789. The bicentennial of that enactment is certainly an occasion for commemoration; whether it is an occasion for celebration is a different question.
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