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Constitutional Law without the Constitution: The Supreme Court's Remaking of America

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The President, who exercises a limited power, may err without causing great mischief in the state. Congress may decide amiss without destroying the Union, because the electoral body in which Congress originated may cause it to retract its decision by changing its members. But if the Supreme Court is ever composed of imprudent or bad men, the Union may be plunged into anarchy or civil war.

—Alexis de Tocqueville, *Democracy in America*

The function of law in a society, at least a democratic society, is to express, cultivate, and enforce the values of the society as understood by the majority of its people. In our society today, this function has been perverted. Much of our most basic law, largely taken out of the hands of the people and their elected representatives by the Supreme Court, functions instead to overthrow or undermine traditional values, customs, and practices through the mechanism of judge-made constitutional law divorced from the

Epigraph: Alexis de Tocqueville, *Democracy in America*, p. 172 (Harvey C. Mansfield & Delba Westhrop ed. 2000).

Constitution. Instead of serving as a guarantor of basic rights, the Constitution has been made the means of depriving us of our most essential right, the right of self-government. The system of decentralized representative self-government with separation of powers created by the Constitution has been converted by the Court into government on basic issues of domestic social policy by a tiny judicial oligarchy—by majority vote of a committee of nine lawyers, unelected and holding office for life, making policy decisions for the nation as a whole from Washington, D.C.—completely centralized, completely undemocratic, with the judiciary performing the legislative function.

The Overthrow of the Constitution by Constitutional Law

Constitutional law may be defined for most practical purposes as the product of “constitutional judicial review,” the power of judges, and ultimately the justices of the Supreme Court, to declare invalid and unenforceable the laws and acts of other officials of government on the ground that they are prohibited by the Constitution. The central fact of contemporary constitutional law, however, is that it has very little to do with the Constitution. Nearly all the Supreme Court’s rulings of unconstitutionality have little or no basis in, and are sometimes in direct violation of, the Constitution. Their actual basis is nothing more than the policy preferences of a majority of the Court’s nine justices. The power to assert that the Constitution prohibits any policy choice of which they disapprove has enabled the justices to make themselves the final lawmakers on any public policy issue that they choose to remove from the ordinary political process and to assign for decision to themselves.

Over the past half-century the justices have chosen to make themselves the final lawmakers on most basic issues of domestic social policy in American society. These include issues literally of

life and death, as in the Court's decisions on contraception, abortion, capital punishment, and assisted suicide; issues of public order, as in its decisions on criminal procedure, public demonstrations, and vagrancy control; and issues of public morality, as in its decisions on pornography and homosexuality. These are the issues that determine the basic values, nature, and quality of a society. In essence, the Court now performs in the American system of government a role similar to that performed by the Grand Council of Ayatollahs in the Iranian system: voting takes place and representatives of the people are elected as lawmakers, but the decisions they reach on basic issues of social policy are permitted to prevail only so long as they are not disallowed by the system's highest authority. The major difference is that the ayatollahs act as a conservative force, while the effect of the Supreme Court's interventions is almost always—as on every one of the issues just mentioned—to challenge, reverse, and overthrow traditional American practices and values. Another major difference is that the name and function of the chief ayatollah is openly stated and apparently well understood in Iran. In the United States the name of the single most important figure in the making of domestic social policy in the last half of the twentieth century, William J. Brennan Jr., was and is known to very few of those he effectively governed, a shameful indictment of a supposedly democratic system.

The salient characteristic of contemporary American society is a deep ideological divide along cultural and class lines, a higher degree of polarization on policy issues than at any time within memory. On one side of this "culture war" is the majority of the American people, largely committed to traditional American values, practices, and institutions. On the other side is what might be called the "knowledge" or "verbal" class or "cultural elite," consisting primarily of academics, most importantly at elite schools, and their progeny in the media, mainline churches, and generally, the verbal or literary occupations—people whose only tools and

products are words. At one time the most educated and successful members of a society could be expected to be its strongest defenders. Today, however, for a variety of reasons, they—particularly academics—often see it as part of their function to maintain an adversary relationship with their society, to challenge its values and assumptions, and to lead it to the acceptance of newer and presumably better values.¹

The justices of the Supreme Court, usually products of elite schools, especially law schools, are themselves members of this cultural class. Sharing its values and seeking its accolades, they are strongly tempted to see that its values and policy preferences prevail. Possessing nearly unlimited de facto power, though not legal authority, to advance those policy preferences by enacting them into law in the name of enforcing the Constitution, they rarely resist the temptation for long. The extraordinary result in a supposedly democratic society is a system of law based on the values and preferences of a powerful nine-person elite, enacted by as few as five of its members, contrary to the values and preferences of the majority of the American people. William F. Buckley Jr., famously and with good reason, said he would rather be governed by the first two thousand names in the Boston phone book than by the Harvard faculty.² Incredible as it may seem, on basic issues of social policy, we are in effect being governed by the Harvard faculty and its counterparts in other elite educational institutions through the medium of constitutional law.³ Government by an elite

1. See David Brooks, *Bobos in Paradise: The New Upper Class and How They Got There* (2000).

2. See William F. Buckley, Jr., "Au Pair Case No Reason to Condemn Courts," *Houston Chronicle* (Nov. 8, 1997) at 36 (quoting his earlier statement).

3. *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), provides a particularly clear example. The use of race preferences in granting and denying admission to a state institution was upheld, despite supposed constitutional and explicit statutory (Title VI of the 1964 Civil Rights Act) prohibitions, by appending to the opinion of the Court and effectively enacting into constitutional law the race preference program devised by Harvard University. This opinion was reaffirmed and made

is precisely the form of tyranny by a minority that the Constitution—a radical experiment in self-government at the time—was meant to prevent. The American people face no greater challenge than finding the will and means of bringing this perversion of the constitutional system to an end.

The Dubious Origin of Constitutional Judicial Review

The most striking thing about judicial review, at first, is that it is not explicitly provided for in the Constitution, although it was unprecedented in English law—the source of our basic legal institutions and practices—and poses an obvious threat to representative self-government.⁴ If the framers—the authors and, most important, the ratifiers of the Constitution—had decided to grant the power, one would expect to see it, like the analogous presidential veto power, not only plainly stated but limited by giving conditions for its exercise and by making clear provision for Congress to have the last word.⁵ It appears that the framers mistakenly envisioned the power as involving merely the application of clear rules to disallow clear violations, something that in fact rarely occurs.

Antinationalist opponents of the Constitution (misnamed Antifederalists) foresaw that federal judges would claim the power to invalidate legislation, and pointed out the dangerous potential of this power. One, writing as “Brutus,” warned that the Constitution would give judges “a power which is above the legislature, and which interest transcends any power before given to a judicial by any free government under heaven.” It would make them, he presciently warned,

the basis of current constitutional law on the subject in *Grutter v. Bollinger*, 123 S. Ct. 232 (2003).

4. The concept may have arisen, however, because the acts of colonial legislatures operating under royal charters were subject to the review of the Privy Council in London.

5. U.S. Const. art. I, sec. 7.

independent, in the fullest sense of the word. There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.⁶

Alexander Hamilton, perhaps the least committed to democracy of the American founders and, with James Madison, one of the two most important proponents of the Constitution, responded to this criticism not by denying that the Constitution provided for judicial review but by arguing, naively or disingenuously, that it would not give judges policymaking power. The judiciary, he said, quoting Montesquieu, “is next to nothing,” lacking “influence over either the sword or the purse,” able to exercise “neither FORCE nor WILL but only judgment.” Judicially enforced constitutionalism would serve only “to guard the Constitution and the rights of individuals from the effects of those ill humors” to which, he believed, the people are sometimes subject. It would not make judges superior to legislators, because judges would use the power only to enforce “the intention of the people” expressed in the Constitution over the contrary intention of legislators, their “agents,” invalidating only laws that were in “irreconcilable variance” with the Constitution. “[T]he supposed danger of judiciary encroachments on the legislative authority” is therefore, he reassured the ratifiers, “in reality a phantom.” Not only has the judiciary no control of funds or force, but Congress’s power of impeachment is in itself “a complete security” against judicial usurpation of lawmaking power.⁷

Hamilton’s defense of judicial review reads, unfortunately, like pure fantasy today. Rather than being “next to nothing,” the judi-

6. Brutus, Essay XV (Mar. 20, 1788) in *The Complete Anti-Federalist* at 437 (Herbert J. Storing ed., 1981).

7. *The Federalist Papers* No. 78 (Clinton Rossiter ed., 1961).

ciary has succeeded in making itself, as a practical matter, virtually everything on issues of domestic social policy. It has all the control of force it needs in that it has long been unthinkable—though it was not to Presidents Jefferson, Jackson, Lincoln, and Franklin Roosevelt—that its decisions will not be enforced.⁸ The judiciary’s control of the purse is secure enough that its approval of a federal district judge’s orders requiring a state to spend billions of dollars in a self-defeating attempt to increase school racial integration is automatically complied with.⁹ As Jefferson concluded when he failed to remove Justice Samuel Chase, impeachment is a “farce,” “not even a scarecrow.”¹⁰ The only security provided by impeachment today is the secure belief of judges that they have nothing to fear.

Laws in “irreconcilable variance” with the Constitution, it happens, are rarely, if ever, enacted. The Constitution wisely precludes very few policy choices, and even fewer that elected legislators—fully as capable as judges of reading the Constitution and at least as committed to American values—might be tempted to make. The people do not need unelected, life-tenured judges to protect them from their electorally accountable legislators; their clear and urgent need today is for protection from judges by legislators.

8. Jefferson: to “consider the judges the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed and one which would place us under the despotism of an oligarchy.” Jackson: “The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.” Lincoln: “[I]f the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.” Roosevelt: Proposed speech stating that if the Supreme Court should invalidate a certain New Deal measure, he would not “stand idly by and . . . permit the decision of the Supreme Court to be carried through to its logical incapable conclusion.” Quoted in Kathleen M. Sullivan et al., *Constitutional Law* 20–24 (15 ed., 2004).

9. See *Missouri v. Jenkins*, 515 U.S. 70 (1995).

10. Sullivan, *Constitutional Law*, *supra* n. 8 at 12.

Hamilton theorized judicial review; Chief Justice John Marshall, his political ally and acolyte, made it a reality in *Marbury v. Madison* in 1803 by invalidating an insignificant provision of a federal statute in an otherwise insignificant case.¹¹ Marshall begged the basic question by assuming, rather than showing, the source of the Court's authority to substitute its interpretation of the Constitution, finding an inconsistency with a federal law, for that of Congress and the president, who presumably found none.¹² Marshall then first misinterpreted the statute to create a constitutional question that did not exist and then misinterpreted the Constitution to find a violation that also did not exist.¹³ Because the result was dismissal of the case against Madison, Jefferson's secretary of state—a case both had simply ignored—there was no occasion for Jefferson, Marshall's political enemy, to make an official response. Judicial review was born in sin and has rarely risen above the circumstances of its birth.

It's Not the Constitution, It's the Justices

Judicially enforced constitutionalism, the disallowance of policy choices favored by most people today because of contrary choices made by others in the past, is inherently undemocratic and in need of justification in a supposedly democratic society. It can be argued that constitutional limits on policy choices can advance democracy by correcting or counteracting some supposed defect in the dem-

11. 5 U.S. (1 Cranch) 137 (1803).

12. See, e.g., *Eakin v. Raub*, 12 S. & R. 330 (Pa. 1825) (dissenting opinion, Gibson J.); Alexander Bickel, *The Least Dangerous Branch* (1962).

13. Marshall read a sentence of Section 13 of the Judiciary Act of 1789, 1 Stat. 73, as adding to the original jurisdiction granted the Court by the Constitution, although the sentence does not even mention original jurisdiction. He then found that this supposed grant of additional jurisdiction was prohibited by the Constitution, although the Constitution contains no such prohibition. See William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L. J. 17; Morris Cohen, *The Faith of a Liberal*, 178–180 (1946).

ocratic political process. A “balanced budget” amendment, for example, is arguably justifiable to prevent “special interest” legislation from bringing about a higher level of total federal spending than most people want. Term limits, such as the amendment limiting the president to two terms, might similarly be justifiable if long-term officeholding is seen as giving the incumbent enough advantages to prevent fair election contests and thereby to frustrate the popular will.¹⁴

The standard and much more common justification for constitutionalism, the only one given by Hamilton, is not that it facilitates but that it temporarily frustrates the will of the people, although supposedly only to further it in the end. Judicially enforced constitutional limits can serve, he argued, to protect the people from the occasional “ill humors” that may cause them to adopt policy choices they will later regret.¹⁵ Since constitutional limits can come only from the people themselves in a democracy, the argument rests on the extremely implausible proposition that the people of the past acted in a calmer time or were more knowledgeable about present day problems than are the people of today. Constitutional provisions, for example, the all-important Fourteenth Amendment, are rarely adopted in times of calm. In any event it would be difficult to find an example of a ruling of unconstitutionality actually serving this supposed long-term democratic purpose. None of those made by the Court in the last fifty years would seem to qualify. It is unlikely that a majority of the American people have with time come to be grateful to the Court for its decisions, say, prohibiting suppression of the pornography trade, removing state-supported prayer from public schools, or requiring the busing of children for school racial balance. “Ill humors”—that is, intellectual fads, such as admiration for the former Soviet Union—are more common

14. U.S. Const. Amend. XXII.

15. *Federalist*, *supra* n. 7.

among the cultural elite, including judges, than among ordinary people. The highly educated, George Orwell once noted, are capable of preposterous beliefs that could not occur to the common man.

To the extent that we believe in popular self-government, we should be skeptical of the value of constitutional restrictions on policy choices, favor their narrow interpretation, and adopt a strong presumption against the creation of new ones. Such restrictions make sense when a government is seen as the result of a contract between the people and their sovereign, but much less so, as Hamilton pointed out, when the people are themselves the sovereign.¹⁶ Constitutionalism, as Jefferson and other believers in democracy have noted, can amount to the rule of the living by the dead.

It is not rule by the dead, however, that is now challenging and undermining American democracy; it is judicial activism, rule by judges who are all too much alive.¹⁷ “Judicial activism” can most usefully be defined as rulings of unconstitutionality not clearly required by the Constitution—“clearly” because in a democracy the opinion of elected legislators should prevail over that of unelected judges in cases of doubt. Rulings upholding as constitutional the laws that the Constitution clearly prohibits are not only extremely rare (at least apart from the question of federalist limits on national power) but should, in any event, be seen as examples not of activism but of restraint, refusals by judges to overturn the policy choices made in the ordinary political process.¹⁸ Decisions over-

16. “[B]ills of rights are, in their origin, stipulations between kings and their subjects. . . . they have no application to constitutions, professedly founded on the power of the people and executed by their immediate representatives and servants.” *The Federalist Papers* No. 84, 513, *supra* n. 7.

17. As then-Harvard law professor and later Supreme Court Justice Felix Frankfurter pointed out to President Roosevelt during the New Deal constitutional crisis, supposedly “when the Supreme Court speaks it is not they who speak but the Constitution, whereas, of course, in so many vital cases it is *they* who speak and *not* the Constitution. And I verily believe this is what the country most needs to understand.” Max Friedman, *Roosevelt and Frankfurter* 383 (1967).

18. The clearest example may be *Home Building and Loan Ass’n v. Blaisdell*, 290

turning activist decisions should be seen, of course, as not activist but de-activist, as undoing activism and returning policy issues to the ordinary political process.

All or almost all the Supreme Court's rulings of unconstitutionality, beginning at least with the Warren Court, are examples of judicial activism—usurpations of legislative power—in that they were not clearly, and usually not even arguably, required by, and indeed were sometimes in violation of, the Constitution. It is not the power of judicial review as such, therefore, that accounts for the dominant policymaking role the Court has assumed in our society but the Court's abuse of the power. If the Court did in fact only what it invariably claims to do—enforce the Constitution—occasions for its invalidation of policy choices made in the ordinary political process would be rare enough to make judicial review a matter of little more than academic interest. The central question, of course, is why, in a supposedly democratic society, these judicial usurpations of legislative power to impose policy choices that legislators could not impose are permitted to continue.

The Irrelevance of the Constitution to Constitutional Law

Part of the answer undoubtedly is that the proponents and beneficiaries of rule by judges, the cultural elite, have succeeded in keeping the nature and source of constitutional law mysterious and obscure. Americans have been taught almost from birth to respect judges as part of respect for the rule of law. Only judges, of all our government officials, dress in robes and issue decrees from structures resembling temples. Judges, the public understandably wants to believe, are servants of the law, protectors of citizens from

U.S. 398 (1934), upholding, 5–4, state debtor-relief legislation clearly prohibited by the Contracts Clause. On this rare, if not the only, occasion that the Court actually encountered a clearly unconstitutional statute, it upheld it, illustrating that constitutional limits depending on judicial enforcement may prove to be no limits at all.

powerful and untrustworthy bureaucrats and other government officials. It is apparently difficult for the public to recognize the extent to which the judges are power-wielding government officials themselves, and indeed the most dangerous because for relief from the decrees of oppressive judges, as in the forced-busing cases, there is no court to which one can turn.

That the Constitution has little to do with constitutional law should be too clear to be a serious matter of controversy. The Constitution is a very short and apparently straightforward document, easily printed with all amendments, repealers, and obsolete matter on a dozen ordinary book pages. It is not at all like the Bible, the Talmud, or even the Tax Code, extensive tomes in which many things may be found with diligent search. It was adopted in 1789, replacing the short-lived Articles of Confederation, not to provide greater protection for individual rights—a stronger national government was rightly seen as a danger to liberty—but mainly for pressing financial and commercial reasons. The new national government, the Constitution’s proponents claimed, would be a government of limited powers, but its powers—including the power to tax in order “to provide for the common defense and general welfare,” the power to regulate interstate and foreign commerce, and the power to make war—were stated broadly enough to make them, as proved to be the case, very difficult to confine. Nor does it seem that the American people really want them to be confined; federalism is highly praised in theory, but rightly or wrongly, the people seem in practice to want a “normal” national government, one that is, like those of other countries, capable of dealing with whatever comes to be seen as a widespread problem.

The original Constitution placed very few restrictions on the exercise of granted national powers and even fewer on the general legislative authority of the states. Both were prohibited, for example, from passing *ex post facto* laws or bills of attainder and from

granting titles of nobility.¹⁹ The only significant limitation on state power in constitutional litigation was the clause prohibiting any state “law impairing the Obligation of Contracts,” meant to disallow debtor-relief legislation.²⁰ More restrictions on the exercise of federal, but not state, power were imposed by the adoption of the first ten amendments in 1791, the so-called Bill of Rights, but they are of limited scope, having mostly to do, apart from the First Amendment’s guarantees of freedom of religion, speech, and the press, with criminal procedure.

Not only is the Constitution short but very little of it is even purportedly involved in most so-called constitutional cases. The great majority of such cases involve state, not federal, law, and nearly all of them purport to be based on a single constitutional provision, one sentence of the Fourteenth Amendment, which has in effect become our second Constitution, largely replacing the original. The all-important sentence provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”²¹

The origin and purpose of this provision are not mysterious or obscure. The “one primary purpose” of all the Civil War or Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth—the Court said in its first consideration of the question in the 1872 *Slaughter-House Cases*, “without which none of them would have been even suggested,” was “the freedom of the slave race, the security and firm establishment of that freedom. . . .”²² The Thirteenth Amendment abolished slavery, the Fourteenth

19. U.S. Const. art I, secs. 9, 10.

20. U.S. Const. art. I, sec. 10.

21. U.S. Const. amend. XIV, sec. 1.

22. 83 U.S. 36, 71 (1872).

granted blacks basic civil rights (to own property, make contracts, have access to courts), and the Fifteenth added a political right, the right to vote.

In the *Slaughter-House Cases*, the majority in effect read the “privileges or immunities” clause out of the Fourteenth Amendment on the ground that the way it was being interpreted by the minority and plaintiffs (white butchers challenging the regulation of slaughterhouses in New Orleans) would have made it applicable to almost any law. The result, the majority feared, would have been to make the Court “the perpetual censor” of all state laws and end the federalist system by making Congress’s power to enforce the amendment (granted by its Section 5) a grant of unlimited power. The due process clause, the Court indicated, obviously imposed only a procedural, not a substantive, requirement on state law, and the Court “doubt[ed] very much” that the equal protection clause would ever be applied to anything except “discrimination against the negroes as a class.”²³

The abnegation displayed by the majority in *Slaughter-House* was not due to last. Judicial review means that the losing side of an issue in the ordinary political process has an alternative way of becoming the winning side. For lawyers representing railroads and other business interests, the Fourteenth Amendment was a cornucopia of verbal ammunition with which to induce sympathetic judges to rescue their clients from a growing array of state regulatory measures.²⁴ After at first protesting incredulously that the Fourteenth Amendment gave it no such power,²⁵ the Court finally

23. *Id.* at 78, 81.

24. See Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (1942).

25. *E.g.*, *Davidson v. New Orleans*, 96 U.S. 97 (1877): “there exists some strange misconception of the scope” of the due process clause, “looked upon as a means of bringing to the test of a decision of this Court every abstract opinion of every unsuccessful litigant in a state court of the justice of a decision against him.”

succumbed.²⁶ Because “natural law” concepts had gone out of fashion, it was necessary that constitutional decisions purport to be based on constitutional language. The due process clause and, to a lesser extent at first, the equal protection clause were seized on to meet the need.

The Court converted the due process clause from a requirement of procedural regularity—essentially, that criminal trials be in accordance with the preexisting legal procedure—to a restriction on the substance of laws, creating the oxymoronic doctrine of “substantive due process.” The justices thereby effectively empowered themselves to pass on the substance of all laws and to invalidate any they considered “unreasonable.” The result was to convert the clause from a legal rule to the simple transference of decision-making power, making the Court precisely the “perpetual censor” of all state and (under the due process clause of the Fifth Amendment) federal laws that the Court had resisted becoming in *Slaughter-House*. The Court later similarly converted the equal protection clause from a prohibition of racial discrimination into a prohibition of any discrimination—for example, on the basis of sex, alienage, or illegitimacy—that a majority of the justices considered “unreasonable.”²⁷ Since nearly all laws limit liberty (restrict conduct) and discriminate (classify), the Court in effect granted itself an unlimited power of judicial review by merely citing one or both of the clauses, enabling it to invalidate almost any law on no other basis than a disagreement by a majority of justices with the policy choice involved.

From the late nineteenth century until the “constitutional revolution” of 1937 that took place under the pressure of President Roosevelt’s proposed “Court-packing plan” and his appointment of

26. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), which invalidated a law limiting the working hours of bakers.

27. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (sex); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Levy v. Louisiana*, 391 U.S. 68 (1968) (illegitimacy).

his own justices, the Court used the doctrine of substantive due process to invalidate both state and federal business and economic regulations. Justices Hugo Black and William Douglas and other New Deal justices, more inclined to favor than oppose business and economic regulation, rightly denounced these decisions as usurpations of legislative power and vowed that the Court would never again “sit as a ‘super legislature’ to weigh the wisdom of legislation.”²⁸ The Court did cease protecting business and economic interests after 1937, but its renunciation of the role of “super legislature” was short-lived.

In its famous footnote four of the *Carolene Products* case, the Court announced that its newfound restraint in business and economic matters would not extend to all matters. It would engage now in what might be called a “functional” judicial review, intervening in the political process, not necessarily because of the Constitution but because of a belief that its intervention was “needed.” It would intervene now, for example, to protect “discrete and insular” minorities that it considered insufficiently protected by the political process and to improve the political process itself by correcting what it considered defects.²⁹ The result was a 180-degree turn away from the Court as the protector of property rights and of the economic and social status quo to the Court as the champion of egalitarianism and engine of social reform.

The Court attempted at first to distinguish its new program of active reentry into the political process from the renounced doctrine of substantive due process by showing that its current interventions were based on something in the Constitution, not merely on the justices’ subjective determinations of the “reasonableness” of policy choices. To this end, it greatly increased the amount of constitutional language apparently available to it by announcing, in a

28. *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963).

29. *United States v. Carolene Products Co.*, 304 U.S. 144, n. 4 (1938).

series of decisions mostly in the 1960s, that the Fourteenth Amendment's due process clause "incorporated"—that is, made applicable to the states—most (though not all; the Court gets to choose) of the provisions of the first eight amendments.³⁰ First among the many reasons to reject this implausible conclusion is that so basic a change in our federalist system should not be assumed unless stated in unmistakable terms. Further, the addition or expansion of constitutional restrictions should be disfavored because they limit self-government and, much worse, because in the hands of judges they inevitably evolve from legal rules to simple transferences of policymaking power. The historical evidence is strongly against the claim that the states that ratified the Fourteenth Amendment willingly and knowingly bestowed on the Court the enormous power it now exercises over them under the rubric of the selective incorporation doctrine.³¹

The doctrine does not, in any event, legitimate the Court's rulings of unconstitutionality, because they do not in fact follow from the supposedly incorporated provisions. It is not clear, to say the least, that the First Amendment's prohibition of laws respecting an establishment of religion, for example, even if incorporated, prohibits a state from making provision for prayer in public schools or from allowing the display of the Ten Commandments in a courthouse.³² It is even less clear, in fact surely incorrect, that the First Amendment's protection of "the freedom of speech" was meant to protect nude dancing, flag burning, and political demonstrations in an elementary school classroom.³³ To take another example, the

30. See, e.g., *Duncan v. Louisiana*, 391 U.S. 748 (1968).

31. See, e.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 5 (1949); Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (2d ed. 1997); contra, see, e.g., Michael Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1985).

32. *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer); *Stone v. Graham*, 449 U.S. 39 (1980) (Ten Commandments).

33. *Shad v. Mount Ephraim*, 452 U.S. 61 (1981) (nude dancing); *Texas v. Johnson*,

incorporation of the Fifth Amendment's prohibition of double jeopardy, if held to its intended meaning, would not invalidate any state law because no state permits, or has ever permitted, two complete, separate trials for a single offense.³⁴

Even the selective incorporation doctrine and an expansive interpretation of the Bill of Rights provisions proved inadequate, however, to the justices' need to purport to find constitutional grounds to invalidate laws that they strongly disapproved of. *Griswold v. Connecticut*, for example, involved a challenge (in fact, the third challenge) to Connecticut's anticontraception law.³⁵ Connecticut was not big enough for both Yale University and a law so offensive to the Yale law faculty (a member of which argued for plaintiffs), and Connecticut proved no match for Yale in the Supreme Court. The Court, accordingly, in an opinion by Justice Douglas, a former Yale law professor, found that the law was unconstitutional but had some difficulty in stating the ground.

Having renounced and reviled substantive due process for so many years, Douglas could hardly simply declare the law invalid because it was "unreasonable," and he explicitly declined to do so. The Court would no longer, he reiterated, "sit as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs, or social conditions"; it would now only enforce actual constitutional rights. The inconvenient fact that there was no relevant constitutional right Douglas overcame by imagining and enacting a new one, the right of "privacy." Although this right could not be found in the Bill of Rights itself, it could be found, Douglas explained, in the "penumbras, formed

491 U.S. 397 (flag burning); *Tinker v. Des Moines Ind. Community School District*, 393 U.S. 503 (1969) (demonstration).

34. See *Palko v. Connecticut*, 302 U.S. 319 (1937) (upholding retrial after successful state appeal); *overruled in Benton v. Maryland*, 395 U.S. 784 (1969).

35. 381 U.S. 479 (1965). Earlier attacks on the law were rejected in *Tileston v. Ullman*, 318 U.S. 44 (1943), and *Poe v. Ullman*, 367 U.S. 497 (1961).

by emanations” from Bill of Rights provisions.³⁶ How this juvenile maneuver conceals better than the doctrine of substantive due process the fact that the Court is acting as a superlegislature is not apparent, except perhaps to the justices who joined the opinion. What the alleged right of privacy had to do, in any event, with a law prohibiting the public operation of a birth control clinic, the issue in the case, is also unclear.

Another way by which the Court purported to avoid the dreaded doctrine of substantive due process and acting as a superlegislature was by finding surprising new meanings in the equal protection clause. In *Levy v. Louisiana*, for example, it took the Court less than four pages of the United States Reports to overturn the centuries-old distinction in Anglo-American law, European civil law, and probably the law of all developed societies, between legitimate and illegitimate birth. Illustrating his typical contempt for traditional values and popular opinion as well as the Constitution, Justice Douglas, writing for the Court, found support for this revolutionary decision in a speech by Edmund the Bastard in Shakespeare’s *King Lear*.³⁷ It would be difficult to imagine a distinction that the Fourteenth Amendment was less meant to prohibit, but that is irrelevant to justices who see no need to look outside themselves for wisdom or authority.

Illegitimates, Justice Douglas considered it sufficient to point out, were not responsible for their legal status, something, he apparently thought, his less perceptive or benevolent predecessors in the history of western civilization had failed to realize. That removing or lessening the social stigma previously attached to illegitimacy is responsible for its subsequent explosion we cannot be certain, but

36. *Id.* at 482, 484.

37. 391 U.S. 68 (1968). “We can say with Shakespeare: ‘Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam’s issue? Why brand they us With base? with baseness? bastardy? base, base?’” *Id.* at 72, n. 6.

it cannot have helped. It also served to make clear that nothing is so universally accepted and fundamental a part of American (or Western) civilization that it cannot be obliterated by a Supreme Court decree.

Griswold and *Levy* exemplify Supreme Court decision making on matters of fundamental social importance on no basis other than the justices' arrogant confidence in the rightness of their policy preferences and willingness to impose them on their fellow citizens. Because this constitutes an obvious abuse of office, convention requires that they make a pro forma attempt to show that the decision follows from the Constitution. This impossible task requires the permissibility of standards of reasoning in Supreme Court opinions that would not be acceptable in a discipline that aspired to the level of intellectual respectability of astrology. The justices, we are apparently expected to understand, are after all only lawyers, professionally permitted the unembarrassed assertion of whatever is needed to reach a desired result. The misstatements of fact and defects of logic, almost inevitable in Supreme Court opinions explaining rulings of unconstitutionality, do not make the rulings—any more than does the absence of a constitutional basis—less authoritative. “We are not final,” Justice Robert Jackson famously pointed out, “because we are infallible, but we are infallible because we are final.”³⁸ The Court is not supreme only in name.

Griswold's ludicrous but widely lauded invalidation of Connecticut's anticontraception law emboldened the Court to go on to the next step of invalidating anti-abortion laws as well. In *Roe v. Wade*, these laws were also found to violate the right of privacy announced in *Griswold*, but the right was now said to be based not on any constitutional penumbra—once was apparently enough for that joke—but on a frank revival of substantive due process.³⁹ An

38. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (concurring opinion).

39. 410 U.S. 113, 153 (1973).

unlimited power to invalidate laws as “unreasonable” (i.e., as contrary to a majority of the justices’ policy preferences) was clearly a very bad thing, the justices and constitutional scholars had only shortly before agreed, but that was when in the hands of conservative justices the power was used as a brake on social change. In the hands of liberal justices, it became, they now also agreed, an indispensable means of achieving social reforms achievable in no other way. It was not the Court’s acting as a superlegislature that was objectionable, after all, but its legislating policies and preserving values that today’s justices and scholars do not share.

It is not possible to criticize the Court’s explanation of the constitutional basis of *Roe*, because there is no explanation, only assertion. Surely no one believes that abortion became a constitutional right in 1973 because the Court discovered in the then-105-year-old due process clause of the Fourteenth Amendment something no one had noticed before. But it was no longer necessary that anyone believe this. The Court now felt confident enough of its policymaking status to abandon—except for a pro forma mention of the “Fourteenth Amendment’s concept of personal liberty”—any pretense that its rulings of unconstitutionality necessarily had any constitutional basis.⁴⁰

Roe is widely condemned as the clearest example of judicial activism since the infamous *Dred Scott v. Sandford* decision that returned plaintiff Scott to slavery,⁴¹ but it is not less legitimate than most or all of the Court’s other rulings of unconstitutionality, which are equally without constitutional basis. *Roe* is important because by effectively disallowing all state laws protecting the unborn, it is seen by many, probably most, Americans as imposing a sentence of death on millions of human beings and, at the same time, by the cultural elite as a crucial egalitarian social advance. It is an

40. *Roe v. Wade*, 410 U.S. 113 at 158.

41. 60 U.S. 393 (1856).

impressive display of the Court's power—though not necessarily more so than its redistricting, busing, criminal procedure, pornography, and many other decisions—to fundamentally remake American society on no other basis than the commitment by a majority of the justices to an elite minority view. What is most revealing about the Court's position in our political system is the utter futility of all attempts by the ordinary political system to respond. The election and reelection of a president strongly opposed to unlimited abortion, his appointment of Supreme Court justices, and a stream of state laws and proposals seeking some small protection for the unborn have all proved insufficient not only to significantly limit the Court-created abortion right but even to dissuade the Court from extending it.⁴²

That the irrelevance of the Constitution to the Court's abortion decisions is in no way unique can be seen in almost any of the Court's interventions in the political process. Consider, for example, that there was a time when the assignment of children to public schools on the basis of race was constitutionally permissible, a time when it was constitutionally prohibited, and a time, the present, when it is sometimes constitutionally required.⁴³ That covers all the possibilities, yet in all that time, the Constitution was not amended in any relevant respect. An impartial observer would have no trouble concluding that the Constitution is not the operative variable.

That the Constitution was not necessarily the basis of even the great *Brown* decision can be shown with a conclusiveness approaching that of a scientific experiment. School racial segregation by law was held unconstitutional in *Brown*, as everyone

42. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000) (rejecting an effort by Congress and the president to obtain the Court's permission for a restriction on at least so-called partial-birth abortions).

43. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (permitted); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (prohibited); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (required).

knows or at least believes, because it was found to be prohibited by the equal protection clause of the Fourteenth Amendment. What if it were possible to test that hypothesis scientifically by a controlled experiment, rerunning the *Brown* case without the equal protection clause? If the hypothesis is that chemical X causes a complex solution to turn blue, it can be tested by compounding the solution without chemical X, and disproved if the solution still turns blue. Such experiments can rarely be conducted in social science and law. But as if to advance the cause of science, one was in effect conducted on the school racial segregation issue.

On the day the Court decided *Brown*, it also decided the constitutionality of school racial segregation required by federal law in the District of Columbia, where the equal protection clause, applicable only to the states, was not available. What difference in result did this make? Why, none at all. School segregation was also unconstitutional in the District of Columbia, but now because it was found to be prohibited by the due process clause of the Fifth Amendment, which does apply to the federal government.⁴⁴ That the Fifth Amendment was adopted in 1791 as part of a Constitution recognizing and protecting slavery has no relevance, of course, to the role it can be made to play in the Supreme Court's constitutional law ruse. The solution still turned blue!

Consider, finally, the Court's decisions holding unconstitutional, because prohibited by the First Amendment as "incorporated" in the Fourteenth, state-sponsored prayer in public schools, state assistance to religious schools, and the display of religious symbols on public property.⁴⁵ These decisions are in a sense even less legitimate than, say, *Griswold*, *Levy*, or *Roe*. The purpose of the religion clauses of the First Amendment was to preclude federal interference in matters of religion, leaving them exclusively to the

44. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

45. *E.g.*, *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (assistance); *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989) (display).

states.⁴⁶ While *Griswold*, *Levy*, and *Roe* are based on nothing in the Constitution, the Court's religion decisions are actually in violation of the very provisions on which they purport to be based. Similarly, the fact that the Constitution explicitly recognizes capital punishment in several places did not prevent Justices William J. Brennan Jr., Thurgood Marshall, and Harry Blackmun from insisting that it is constitutionally prohibited.⁴⁷

Constitutional law without the Constitution—policymaking for the nation as a whole by majority vote of a committee of nine electorally unaccountable lawyers—is the antithesis of the constitutional system, whose basic principles are representative self-government, federalism, and separation of powers. We should return to the constitutional system not only because it is the one we are supposedly living under, but more important, because it is still the best system of government ever devised, the basis of our extraordinary success as a nation. But why, then, is our present inconsistent and indefensible system permitted to continue and how, most important, can the constitutional system be reinstated?

Judicial Review: From Conservative Force to Engine of Social Change

That allowing judges to have the final say on any issue of public policy they choose is not an improvement on the constitutional scheme can be seen not only on the basis of theory and principle, but also of experience. The Court's first significant exercise of the power of judicial review, fifty-three years after *Marbury*, to invalidate a federal statute was its 1856 decision in *Dred Scott v. Sand-*

46. See, e.g., Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (1995).

47. *Gregg v. Georgia*, 428 U.S. 153 (1976) (dissenting opinions of Brennan and Marshall, JJ.); *Collins v. Collins*, 510 U.S. 1141 (1994) (dissenting opinion of Blackmun, J.).

ford, invalidating, on no discernible constitutional basis, Congress's attempt to settle the slavery question with the Missouri Compromise.⁴⁸ The result was to leave it for settlement by the Civil War. That experience alone, the possibly otherwise avoidable deaths of over six hundred thousand American men, should have been enough to make clear almost from the beginning that judicial review was, as Tocqueville presciently warned, a very dangerous innovation.⁴⁹

The Court's most significant next use of the power was its invalidation of the 1875 Civil Rights Act's prohibition of racial segregation in public accommodations.⁵⁰ The result was to give us segregation for an additional eighty-nine years, until it was prohibited again by Congress in the 1964 Civil Rights Act. The most significant uses of the power in the first half of the twentieth century were to invalidate two federal anti-child labor laws and to bring to a temporary halt President Franklin Roosevelt's New Deal.⁵¹ As to the states, it was used mainly at first to protect municipal bond holders under the contracts clause and, later, to disallow various business and economic regulations under the doctrine of substantive due process.

Hamilton and Marshall, assuming that Supreme Court justices would always be successful, conservative, property-holding lawyers like themselves, undoubtedly thought that judicial review could be a useful restraining force in a democracy. As solid conservatives they most likely believed, along with their contemporary, Edmund Burke, that an inherent danger of popular government is a tendency to make basic social changes too rapidly, rather than

48. 60 U.S. 393 (1856).

49. *Supra*, p. 1.

50. Civil Rights Cases, 109 U.S. 3 (1883).

51. *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Bailey v. Drexel Furniture Co.* (Child Labor Tax Case), 259 U.S. 20 (1922). See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *United States v. Butler*, 297 U.S. 1 (1936).

too slowly, to enact too many laws, rather than too few. An inherently conservative institution capable only of invalidating laws might provide a safety valve or brake on the radical experiment in democracy contemplated by the Constitution. As plausible as the idea may seem in theory, it is almost surely mistaken, as the *Dred Scott* decision quickly demonstrated, because power in the hands of government officials remote from popular control is much more likely to be a source of, rather than a correction for, governmental error—that, at least, is the theory of democracy.

Although the history of judicial review would seem to demonstrate its harmfulness, its proponents contend that judicial review has, like the practice of medicine, recently so much improved that it no longer does more harm than good. Whether or not it has improved, it certainly has radically changed. Largely because of the Court's 1954 decision in *Brown v. Board of Education*, the pivotal event in constitutional law in the twentieth century, it now performs a very different function in American government.⁵² As important as *Brown* was for what it held, prohibiting school racial segregation and, it soon appeared, all official racial discrimination, it was even more important for its effect on the understanding of the country—and most important, on the judges themselves—of the judges' role in our system of government. Its eventual success, when it was in effect ratified and expanded by the great 1964 Civil Rights Act, made it the basis of modern constitutional law, with a Court of vastly enhanced power and prestige.

The obvious political, social, and moral rightness of prohibiting racial oppression seemed to demonstrate for many the superiority of policymaking by the Court, supposedly on the basis of principle, even if not necessarily constitutional principle, to policymaking through the often-stymied ordinary political process. If the Court could do so great and good a thing as *Brown*, what other great

52. 347 U.S. 397 (1954).

things could it not do, and if it could, why shouldn't it? The near-universal acclaim bestowed on *Brown* converted the Court from a defender of the status quo and a brake on social change into the nation's primary initiator and accelerator of social change. To question judicial policymaking after *Brown* was to be met with the response, "So you disagree with *Brown*?" As it is not politically, socially, or academically permissible to disagree with *Brown*, the desirability of leaving basic issues of social policy to the justices rather than electorally accountable legislators seemed to be put beyond question.

Although Hamilton and Marshall no doubt thought that the justices would always be conservative defenders of traditional values and mores, it has happened in modern times—largely because of the rise and influence of left-liberal academia—that persons can be and are appointed Supreme Court justices who are or turn out to be far from conservative. They can be, on the contrary, like Justices Douglas and Brennan, on the far left-liberal end of the American political spectrum. When Arthur Goldberg was added to the Court to join them and Chief Justice Earl Warren and Justice Black in 1962, the result was a solid liberal-activist majority in a position to remake America and eager to undertake the task. The Court became so firmly established and recognized as an engine of liberal social change that not even ten consecutive appointments to the Court—beginning with President Nixon's appointment of Chief Justice Warren Earl Burger in 1968—by Republican presidents supposedly committed to "strict construction" of the Constitution have been sufficient to alter its course.

The second defining characteristic of the constitutional law of the past half-century—besides the irrelevance of the Constitution—is that it has served almost uniformly to move social policy choices to the left. One could illustrate this by noting, with only slight exaggeration, that the American Civil Liberties Union, avatar of left-liberalism, nemesis of traditional American values, and para-

digmatic constitutional litigator of our time, never loses in the Supreme Court, even though it does not always win. It either obtains from the Court a policy decision, such as the prohibition of state-sponsored prayer in public schools, that it could obtain in no other way because opposed by a majority of the American people, or it is simply left where it was to try again on another day. The opponents of Connecticut's anticontraception law, for example, finally got the Supreme Court to invalidate it in *Griswold* only on their third try.⁵³

The effect of the Court's interventions in the political process since the Warren Court has been overwhelmingly to undermine or overthrow traditional American beliefs and practices on basic issues of domestic social policy. Some of the more revolutionary changes include creating the virtual right of abortion on demand and abolishing capital punishment for a number of years and then permitting it only with so many and accumulating restrictions and conditions as to make efforts to preserve it seem almost not worthwhile. Jurors in capital cases must be given both ample discretion and not too much discretion, making it very difficult for the states and federal government to get it just right.⁵⁴ The Court has prohibited state-sponsored prayer in the public schools, while also prohibiting most forms of government aid to religious schools and the display of religious symbols on public property.⁵⁵ It has created and imposed on the states and the federal government a system of criminal procedure, with *Miranda* rights, exclusionary rules, innumerable appeals, and other impediments to law enforcement, known to no other system of law.⁵⁶ The result is seemingly inter-

53. *Supra*, n. 35.

54. See *Furman v. Georgia*, 408 U.S. 238 (1972) (too much discretion); *Lockett v. Ohio*, 438 U.S. 586 (1978) (not enough discretion).

55. *Supra*, n. 31. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (government aid).

56. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (exclusion of testimony given without required warnings); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusion of "improperly" obtained evidence). As early as 1953, Justice Jackson noted that the Court "has sanctioned progressive trivialization of the writ [of habeas corpus] until

minable trials and retrials in which the question of guilt or innocence is often the least relevant consideration. In this country it often takes longer to select a jury than it takes in other countries to complete a criminal trial.

Because “the freedom of speech” is a phrase of very uncertain content—it cannot mean what it says—the First Amendment is capable of unlimited expansion and ever greater reach. It has proved to be one of the Court’s most potent weapons, second only to the due process and equal protection clauses, in pursuit of the justices’ and academia’s vision of a remade American society. It severely limits, for example, the ability of the states and the federal government to restrict the publication and distribution of pornography, including child pornography, while protecting nude dancing and public displays of vulgarity.⁵⁷ Historic champerty and maintenance laws, meant to protect society’s fundamental interest in limiting litigation, were found to be prohibited by the First Amendment, because suing may be—and, by reason of the Court’s purely political constitutional decisions, often is—a form of political speech.⁵⁸ The First Amendment severely limits the power of the states to maintain order by regulating marches—even by neo-Nazis in an area with Holocaust survivors—and other public demonstrations, and totally disables the states from prohibiting public burning of the American flag.⁵⁹ Even elementary school children are protected from a state’s attempt to maintain order in the classroom by prohibiting divisive political displays.⁶⁰ The Court’s intervention

floods of stale, frivolous and repetitious petitions inundate the dockets of the lower courts and swell our own.” *Brown v. Allen*, 344 U.S. 443, 536 (1953).

57. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (child pornography); *Schad v. Mount Ephraim*, 452 U.S. 61 (1991) (nude dancing); *Cohen v. California*, 403 U.S. 15 (1971) (vulgarity).

58. *NAACP v. Button*, 371 U.S. 415 (1963).

59. *Village of Skokie v. Nat’l Soc. Party of Am.*, 69 Ill.2d 605, 373 N.E.2d 21 (1978) (Nazis); *Cox v. Louisiana*, 379 U.S. 536 (1965) (public demonstration); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning).

60. *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969).

in the running of the nation's public schools, the effect of which has been to seriously impair school discipline and the ability of teachers to teach, should be enough to illustrate the danger of giving the Court the final word on matters about which it can know very little.⁶¹

At the height of the Cold War, the "First Amendment" denied the federal government the power to exclude Communist Party members from working in defense plants and denied the states the power to exclude them as teachers in public schools.⁶² The American Communist Party, the justices, led by Douglas and Black, insisted, reflecting a central and unshakable liberal belief, was an organization of loyal Americans fighting for "social justice," not, as proved the case, a tool of the Soviet Union. Proving the justices wrong on issues where they can be proven wrong never serves, of course, to shake their confidence in the superiority of their insights. The Court has remade, or unmade, libel law, overthrowing traditional notions of the importance of protecting reputation.⁶³ It has contributed substantially to the deterioration of the quality of life in our cities by seeing only oppression in traditional vagrancy control ordinances. "[P]oor people, nonconformists, dissenters, idlers," Justice Douglas instructed, cannot "be required to comport themselves according to the lifestyle deemed appropriate" by public authorities.⁶⁴ City dwellers may have reason to disagree, but their municipal governments cannot argue with the First Amendment.

The failure of the proposed Equal Rights Amendment—which would have equated sex discrimination with race discrimination—to gain adoption in the political process was taken by the justices

61. See Heather MacDonald, "Unsafe at Any Grade," *Wall St. J.*, March 25, 2004, p. D6, reviewing Richard Arum, *Judging School Discipline* (2003) and Elizabeth Gold (2003), *Brief Intervals of Horrible Sanity*: "How did things get so bad? Blame one of the most ill-conceived chapters of 1960s legal activism."

62. *United States v. Robel*, 389 U.S. 258 (1917) (defense plants); *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (schools).

63. See, e.g., *Curtis Publishing v. Butts*, 388 U.S. 130 (1967).

64. *Papachristou v. Jacksonville*, 405 U.S. 156, 170 (1972).

as evidence of another defect in the process that required their remedy. It had already been adopted, the Court in effect declared in a series of decisions, by ratification of the Fourteenth Amendment, illustrating how much easier it is to amend the Constitution by a Supreme Court decision than by the onerous and contentious constitutional process. The Court, in an opinion by Justice Brennan, came within one vote of enacting the Equal Rights Amendment in all but name by equating sex and race discrimination.⁶⁵ A state may not, the Court held in an opinion by Justice Sandra Day O'Connor, operate a nursing school for women even though it operated a co-ed nursing school as well.⁶⁶ Not even a military school, the Court held in an opinion by Justice Ruth Bader Ginsburg, may operate as an all-male institution consistently with the Fourteenth Amendment.⁶⁷

By disallowing nearly all distinctions based on alienage or illegitimacy, the Court has made American law probably unique in both respects.⁶⁸ In no other country can the distinction between citizenship and alienage and between legitimacy and illegitimacy be less important. The Court has ordered the redistricting of all political entities, state and federal, on a “one-person, one-vote” basis, excepting only the United States Senate⁶⁹—existence of which might be taken to show that the framers did not share the Court’s view.

In each of these important, if not revolutionary, decisions the Court, without exception, held unconstitutional a policy choice made in the ordinary political process, reflecting traditional values, only to substitute an innovative policy further to the political left. It would be difficult to find a decision of comparable importance

65. *Frontiero v. Richardson*, 411 U.S. 677 (1973).

66. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

67. *United States v. Virginia*, 518 U.S. 515 (1996).

68. *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Levy v. Louisiana*, 391 U.S. 68 (1968) (illegitimacy).

69. *Reynolds v. Sims*, 377 U.S. 533 (1964).

during the same period that had the opposite effect. In the guise of enforcing the Constitution, the Court faithfully enacted the political program of the liberal cultural elite, working a thoroughgoing revolution in American law and life.

The Myth of a Conservative Supreme Court

But, liberal academics and media are constantly telling us, while it may be true that the Court's rulings of unconstitutionality have for some decades enacted the Left's political agenda—that now is history. The role of the Court has been drastically changed, if not reversed, the public is led to believe, beginning in 1986 under the “Rehnquist Court,” which is at least as activist in the service of conservative causes as its two immediate predecessors, the Warren (1959–1969) and Burger (1969–1986) Courts, were in the service of liberal causes.⁷⁰ This claim has been so confidently and frequently asserted as to become, at least in the liberal media, conventional wisdom, despite the fact that the Court's rulings of unconstitutionality continue overwhelmingly to favor liberal causes.

The public's view of the Court necessarily comes mainly from the media, and the media's view mainly from liberal academics. For a Court to be considered conservative in liberal academia, it is not necessary that it give conservatives positive victories similar to those it gives liberals—by holding, for example, that abortion is not only not constitutionally protected, overruling *Roe v. Wade*, but

70. According to two prominent constitutional law scholars: “[C]onservative judicial activism is the order of the day. The Warren Court was retiring compared with the present one.” NYU law professor Larry Kramer, “No Surprise It's an Activist Court,” *N.Y. Times*, Dec. 12, 2000, at A33; “We are now in the midst of a remarkable period of right-wing judicial activism. The Supreme Court has moderates but no liberals.” University of Chicago law professor Cass Sunstein, “Tilting the Scales Rightward,” *N. Y. Times*, April 26, 2001, at A23.

is constitutionally prohibited. Nor is it even necessary that the Court rescind some earlier liberal victories by, for example, overruling *Miranda* or the prayer decisions. It is quite enough that the liberal victories come less quickly or surely, and it is unacceptable, an abuse of judicial power, that there should be an occasional positive conservative victory. A half-century of consistent liberal victories has made them seem the normal and appropriate result of the Court's rulings of unconstitutionality, virtually the point of constitutional law.

Because conservatives, by definition, seek to preserve rather than uproot traditional practices and values, they are much less in need than liberals of constitutional victories, and they have, in any event, been granted very few by the Rehnquist Court. The Burger Court, to the disappointment of opponents of the Warren Court revolution and to the surprise of nearly everyone, was, as the title of a book on the subject put it, "the counter-revolution that wasn't."⁷¹ Rather than overruling the major victories that the Warren Court gave liberals, the Burger Court gave them more, and sometimes even more radical, victories of its own. It was the Burger, not the Warren, Court that, for example, first prohibited sex discrimination, created a constitutional right to an abortion, and ordered busing for school racial balance.⁷² The Rehnquist Court has failed to overturn the major liberal victories of either the Warren or the Burger Court.⁷³ Instead, it has accepted them as legiti-

71. *The Burger Court: The Counter-Revolution That Wasn't* (Vincent Blasi ed. 1983).

72. *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (busing); *Reed v. Reed*, 404 U.S. 71 (1971) (sex discrimination).

73. *Employment Division v. Smith*, 494 U.S. 872 (1990), in effect overruling *Sherbert v. Verner*, 374 U.S. 398 (1963), a Brennan opinion creating a religious exemption from the application of ordinary law (which, however, had almost never been followed) is an exception. Ironically, Congress then attempted to overrule *Smith* by the so-called Religious Freedom Restoration Act of 1993, which the Court, insisting on

mate additions to the Constitution, available as springboards for still further liberal advances.

The Rehnquist Court not only failed to overrule *Roe v. Wade*, as it was expected to do, but extended it to protect even so-called partial-birth abortions.⁷⁴ It not only failed to overrule the prayer in the schools decisions but extended them to prohibit even a non-sectarian evocation of the deity at a middle-school graduation ceremony.⁷⁵ Far from overruling or even relaxing the Burger Court's prohibition of sex discrimination, the Rehnquist Court extended it to even an all-male military school.⁷⁶ The Rehnquist Court failed to overrule *Miranda* and its exclusionary rule and instead held unconstitutional a congressional attempt to limit it.⁷⁷ Rather than overruling *Mapp v. Ohio* and its exclusionary rule—excluding evidence obtained by a search the Court deems impermissible—the Court continues to extend it by, for example, excluding evidence obtained by pointing a heat-sensing device at the exterior of a building or by having a drug-sniffing dog walk around an automobile.⁷⁸

The Rehnquist Court held unconstitutional an amendment to the Colorado Constitution adopted by referendum by the people of Colorado to prevent the grant of special rights to homosexuals.⁷⁹ It invalidated federal attempts to limit child pornography on the Internet and continued the Court's long-term drive toward the abolition of capital punishment.⁸⁰ It invalidated state laws limiting the

having the last word, then held unconstitutional. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

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

75. *Lee v. Weisman*, 505 U.S. 577 (1992).

76. *United States v. Virginia*, 518 U.S. 515 (1996).

77. *Dickerson v. United States*, 530 U.S. 428 (2000).

78. *Kyllo v. United States*, 533 U.S. 27 (2001) (heat sensor); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (drug-sniffing dog).

79. *Romer v. Evans*, 517 U.S. 620 (1996).

80. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 918 U.S. 727 (1996)

number of terms their congressional representatives are eligible to serve.⁸¹ Just last term, it invalidated Texas's prohibition of homosexual sodomy and upheld the use of race preferences in granting admission to selective institutions of higher education.⁸² If this is a conservative Court, what more could a liberal Court do?

The explanation for the continuing string of important liberal victories from a supposedly conservative Court is that it is misleading to label it, according to convention, as the "Rehnquist Court," as if the chief justice were the dominant figure. Although he can do surprisingly liberal things, such as lead the Court in invalidating Congress's attempt to limit *Miranda*,⁸³ he is, by today's standard, generally conservative, but he has only one vote. The reality is that the Court has four highly reliable liberal activists, Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer (in order of seniority, but also, roughly, of their liberal activism), and only three, not quite as reliable, conservatives, the chief justice and Justices Antonin Scalia and Clarence Thomas. To prevail, the conservatives need the votes of both the less predictable Justices Sandra Day O'Connor and Anthony Kennedy, while the liberals need only one, and on basic social policy issues such as in the sodomy decision, one or both is usually available.

The rulings of unconstitutionality favoring conservatives by the Rehnquist Court are few, mostly short lived, and likely to prove relatively unimportant. The principal one is surely the Court's decision in *Bush v. Gore*, ending the vote count in the Florida election and settling the 2000 presidential election.⁸⁴ That was undoubtedly

(child pornography); *Atkins v. Virginia*, 122 S. Ct. 2242 (2003) (capital punishment); *Ring v. Arizona*, 122 S. Ct. 2428 (2002) (same).

81. *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

82. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (sodomy); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003) (race preferences).

83. *Dickerson v. United States*, 533 U.S. 27 (2001).

84. 531 U.S. 98 (2000).

an activist decision but one dealing with a unique event and arguably justifiable as counteracting the judicial activism of the Florida Supreme Court. The greatest fear of liberals about the Rehnquist Court was that it would invalidate, as its precedents seemed to require, the use of race preferences in making admission decisions by colleges and universities. With the Court's 2003 decision in *Grutter v. Bollinger*, that fear has been removed.⁸⁵

Over the adamant protest of the four consistent liberals, the Rehnquist Court attempted to reinvigorate the Fifth Amendment's prohibition ("incorporated" in the Fourteenth Amendment) against the "taking" of property without just compensation. In a series of decisions, the Court upheld "regulatory taking" claims, that is, claims for loss of property values resulting from land-use regulations, rather than from the government taking possession of or claiming title to the property.⁸⁶ This development has now largely been brought to a halt, if not actually reversed, by the Court's most recent decision on the issue.⁸⁷ Justices O'Connor and Kennedy both defected to the side of the four consistent liberals to deny a claim that seemed quite solid under recent prior decisions.

The most discussed and berated example of alleged conservative activism by the Rehnquist Court is some of its decisions on the federalism issue. The conservatives, usually joined on this issue by Justices O'Connor and Kennedy, with the liberals always heatedly dissenting, have clearly undertaken to protect a degree of state autonomy from national power. The Court held, in several cases, that Congress may not authorize certain suits against the states

85. 123 S. Ct. 2472 (2003).

86. *E.g.*, *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S. C. Coastal Council*, 505 U.S. 13 (1992); *Nolan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

87. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002).

without their consent;⁸⁸ in two cases, that Congress may not require the states to cooperate in certain ways in the enforcement of federal law;⁸⁹ and most strikingly, in two cases, that Congress may not regulate certain noncommercial activities on the basis of the commerce clause.⁹⁰

The Court's most recent decision on the issue of suits against the states indicates, like the latest case on the regulatory taking issue, that the movement has been brought to a halt or even cut back.⁹¹ On the compulsory cooperation issue, Congress can usually prevail by simply placing conditions on federal monetary grants.⁹² The Court's two decisions invalidating purported exercises of the commerce power are likely to prove more a matter of form than substance. The Court has gone out of its way to emphasize that Congress may achieve noncommercial ("police power") objectives through the commerce power, providing it does so by placing restrictions on the interstate movement of people or goods.⁹³ In sum, with few deviations, not likely to prove important, and almost no steps backward, the Rehnquist Court, like the Burger Court, continues on the path of liberal activism set by the Warren Court.

88. *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002); *Kimel v. Florida Bd. of Reports*, 528 U.S. 62 (2000); *Florida Prepaid Post-secondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 666 (1999); *Alden v. Maine*, 527 U.S. 706 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

89. *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

90. *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 592 (2000).

91. *Nevada Dep't of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003).

92. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987).

93. The principal effect of American constitutional federalism, therefore, is to require Congress to do indirectly, by pretense, what it cannot do directly. Congress, for example, clearly has no authority to define sexual crimes—that is exclusively a matter for the states—but Congress can make it a crime to cross a state line for an improper sexual purpose. See, e.g., *Caminetti v. United States*, 242 U.S. 470 (1917).

Judicial Review: The Trump Card of the Cultural Elite

In the cultural war being fought out in America, the mass of the American people have the numbers, but the cultural elite has judicial review. The nightmare of the elite is that decision making on basic issues of social policy should fall into the hands of the American people. The American people favor capital punishment, restrictions on abortion, prayer in the schools, suppression of pornography, strict enforcement of criminal law, neighborhood schools, and so on, all anathema to the cultural elite. Could anyone really want to live, they wonder, in a society with such policies? Policymaking by a committee of life-tenured lawyers might not be the cultural elite's ideal alternative to popular government—moral philosophers or sociologists, for example, might be better—but it is all that is available. Nothing is more important to them, therefore, than that the power of the Court to invalidate policy choices made in the ordinary political process be defended and preserved.

The dilemma of defenders of judicial review is that it is hardly possible to defend the Court's rulings of unconstitutionality as interpretations of the actual written Constitution in any ordinary sense and even less possible to openly advocate, as an improvement on democratic federalism, policymaking for the nation as a whole by as few as five electorally unaccountable officials. What they attempt, therefore, is to show that though the Court's rulings of unconstitutionality may not exactly be derived from the words of the Constitution, neither are they simply the result of the justices' personal policy preferences; they are the result, instead, of the justices' discovery and disinterested application of universal principles of justice or good government that should prevail whether the people agree with the Court's supposed application of them or not. The ordinarily most secular of scholars become for this purpose advocates of some form of "natural law."

All attempts to make this showing are based on two assertions, both mistaken. The first is that there are authoritative, preexisting, and objectively discernible principles—apart from the Constitution or any enacted law—that provide, although perhaps only to the exceptionally skilled and only after Herculean effort, objectively “correct” resolutions of difficult social policy issues.⁹⁴ The second is that Supreme Court justices, perhaps aided by the work of constitutional scholars, can be trusted, more than other government officials can, to possess the skill needed to discover these principles and the integrity to apply them in a disinterested manner.

These theories are similar to Plato’s argument for rule by philosopher kings, persons of exceptional wisdom, integrity, and erudition, but not even Plato, presumably, would favor rule by lawyer kings. As one would go to an expert cabinetmaker to have a good cabinet made, the theory is, one should go to social policy experts to have good social policies made. The theory of democracy, however, repeatedly confirmed by experience, is that there are no superior beings—there’s nobody here but us—to whom ordinary people can safely delegate final decision-making power about how they should live. “For myself it would be most irksome,” the great judge Learned Hand objected to the Supreme Court activism of his day, “to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.”⁹⁵ It is even more irksome to be ruled by lawyer guardians who must pretend to reach their policy decisions by studying—as witch doctors do the entrails of birds—the Constitution.

A problem of social choice is a problem not because we have difficulty discovering the resolving principle but because we have many principles, and they, like the interests they represent, inevitably come into conflict. There is no way to resolve the problem

94. See, e.g., Ronald Divorkin, *Taking Rights Seriously* (1977).

95. Learned Hand, *The Bill of Rights* (1958).

except by evaluating the conflicting interests and making some sort of compromise or trade-off, usually sacrificing each interest to some extent to the other. For example, parades may be a valuable form of political expression, but they unavoidably impede the flow of traffic. As an economist would put it, these conflicting interests cannot simultaneously be maximized. The conflict cannot be resolved purely by logic or empirical investigation but only by a policy choice evaluating the relative importance of unimpeded traffic flow and of this form of political expression at the particular time and place. The essence of democracy is that these judgments are to be made by the people affected or by their elected representatives. Leaving the decision to the Supreme Court instead does not produce a “better” decision but only one almost surely more in accord with elite policy preferences. In the stated example, the speech interest will be evaluated very highly—speaking is what the cultural elite do—and the inconveniences and losses involved—which members of the elite are often in a position to avoid—very much less so.

The second assertion, that Supreme Court justices are people of exceptional skill and integrity as policy analysts, with no personal interest in the resolution of policy issues, is, if anything, even more clearly mistaken. The justices are, for two reasons, the least likely public officials to make informed, disinterested decisions on public policy issues. First, their only professional qualification is that they must be lawyers, professionally skilled in the manipulation of language to achieve a predetermined result. Nothing in the study or practice of law is calculated to inculcate exceptional candor, ethical refinement, or habits of intellectual integrity. The study or practice of law is more likely to inculcate the ability to blur the distinction between truth and falsehood and to accommodate the mind to the untroubled assertion of fiction.

It is not likely that many Supreme Court justices strongly committed to a result have felt themselves unable to reach it because they lacked the lawyerly linguistic or rhetorical skills necessary to

overcome some impediment of law, fact, or logic.⁹⁶ Consider, for example, the opinions of Justices Brennan, Marshall, and Blackmun on the unconstitutionality of capital punishment,⁹⁷ the opinion of Justice Ginsburg on the unconstitutionality of an all-male military school,⁹⁸ the opinion of Justice O'Connor upholding racial discrimination by a state university in the face of *Brown* and of Title VI of the 1964 Civil Rights Act's explicit prohibition,⁹⁹ or for that matter, the Court's latest opinion justifying a ruling of unconstitutionality.

Second, Supreme Court justices are the public officials least to be trusted to make policy decisions on any basis other than personal preference, for the further and more fundamental reason that they are the public officials least accountable to the public or otherwise subject to external control. It is not that they are morally inferior beings but only that they are human beings, no more exempt than others from the corrupting effect of uncontrolled power. Power corrupts less by making men (and women) venal than by distorting their judgment. It is apparently bad for the human soul to be always obeyed and freed from contradiction. The result seems inevitably to be an exaggerated view of one's knowledge, wisdom, and benevolence and a narrow view as to the possible possession of those qualities by others. One cannot study the Court's opinions justifying rulings of unconstitutionality without being struck by the authors' extraordinary confidence in their own wisdom and goodness, as well as by their distrust of their fellow citizens and their consequent lack of compunction in imposing their views on those who disagree.

96. In fact, the revival of explicit substantive due process that began with *Griswold* means that the making of constitutional law without or despite the Constitution requires no more than a willingness to assert that the opposite of the favored result would be "unreasonable."

97. *Supra*, n. 47.

98. *United States v. Virginia*, 518 U.S. 515 (1996).

99. *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

The justices clearly operate on the assumption, common to wielders of uncontrolled power, that their undoubted good intentions grant them exemption from the obligations of honesty and good faith applicable to other public officials. This is nowhere more clear than in their decisions on race, the area that is the basis of the modern Court's power and prestige. In the 1964 Civil Rights Act, Congress in effect ratified what it understood to be *Brown's* prohibition of all official racial discrimination, made it effective as to the assignment of students to schools (Title IV), and expanded it to apply to all institutions that receive federal funds (Title VI) and even to private employers (Title VII). The history of race discrimination law since the Act is a hardly believable (at least for nonlawyers) history of the Court standing each of these titles on its head, converting them—exactly as Southern opponents of the Act feared and as proponents insisted could never happen—from prohibitions of race discrimination to permission for, or even requirements of, race discrimination.

The end of compulsory racial segregation did not mean, it soon appeared, the end of all racial separation; it was time, therefore, the Court concluded—riding a crest of moral fervor and urged on by the “civil rights” establishment that had grown up after *Brown*—to move on to compulsory integration by law. The law of race discrimination with which we struggle today derives not from *Brown's* prohibition of segregation, but from the Court's far more ambitious and questionable 1968 decision in *Green v. County School Board* to impose, without admitting it, a requirement of integration.¹⁰⁰ The South had no sooner finally been made to comply with *Brown's* prohibition of racial discrimination, because of the 1964 Act, than it was required to begin racially discriminating again, now to increase school racial integration or balance. For several reasons, the Court could not make this move openly. For

100. 391 U.S. 430 (1968).

one thing, it would be expected to explain the benefits of compulsory integration, something it has never attempted to do. More important, the requirement would have applied at once not just to the South but to the racial separation that exists in the school systems of all our major cities, which would have caused massive national resistance to the decision. The Court imposed it, instead, in the North and West one city or area at a time, which operated to avoid unified opposition. Perhaps most important, the Court would have had to overrule or at least qualify what everyone, including the Congress, understood to be the nondiscrimination principle of *Brown*—the last thing the Court wanted to do.

That the Court could not make the move to compulsory integration openly did not stop it from making the move. The Court explicitly denied that it was imposing a requirement of integration in *Green* but imposed the requirement nonetheless by holding unconstitutional a racially imbalanced school system that concededly had ended all racial discrimination. The only requirement, the Court insisted, was “desegregation,” nothing more than the requirement of *Brown*. “Desegregation,” however, now meant not ending but practicing racial assignment. To this day, the Court insists that there is no constitutional requirement of integration or racial balance—that one-race schools are not unconstitutional—even while ordering that students be bused across citywide school districts that, like Denver’s, were never segregated, in order to increase racial balance.¹⁰¹ Rather than having to reverse *Brown*, the Court was thus able to wrap itself in the protective mantle of *Brown*, performing the feat, possible only for an institution both subject to no review and unscrupulous, of requiring racial discrimination in the name of prohibiting it.¹⁰² The restraining power of law—rules stated in words—is entirely dependent on the good faith of the

101. *Keyes v. School District*, 413 U.S. 189 (1973).

102. For a full discussion see Lino A. Graglia, *Disaster by Decree: The Supreme Court Decisions on Race and the Schools* (1976).

interpreters of the words, and good faith has been entirely absent from many of the Court's decisions on race.

Chief Justice Warren Burger—newly appointed by President Nixon, who ran for president as an opponent of racial busing—tried to get the Court to state honestly the meaning of “desegregation” and the “nonracial unitary system” that was supposedly the constitutional requirement. Justice Brennan successfully prevented the Court from doing so by arguing that for it to openly state that the actual constitutional requirement was not desegregation but simply integration “would, given the views of most whites, simply be impractical.”¹⁰³ When honesty is impractical for the justices to achieve their objective, they can and do simply turn to its alternative. School boards would continue to be told that they were required to operate nonracial school systems, while at the same time being ordered to assign students to schools by race.

Another difficulty faced by the Court in imposing a requirement of school racial integration in the name of desegregation is that this requirement is precisely what Congress was most concerned to avoid in enacting Title IV of the 1964 Act. Opponents of Title IV insisted, correctly, that zealous judges and bureaucrats would not be satisfied with Congress's purpose to make *Brown*'s prohibition of segregation by law a reality, and would seek, instead, to move to forced integration. Senator Hubert Humphrey, floor manager of the bill in the Senate, dismissed their fears as “bogeymen and hobgoblins” and undertook to give opponents every assurance that what they feared could not happen.¹⁰⁴

After all, Senator Humphrey pointed out, Title IV defines “desegregation” as “the assignment of students to public schools . . . without regard to their race,” and in a seeming excess of

103. See Lino A. Graglia, “*When Honesty Is ‘Simply . . . Impractical’ for the Supreme Court: How the Constitution Came to Require Busing for School Racial Balance*,” 85 Mich. L. Rev. 1193 (1987).

104. 110 Cong. Rec. 6552 (1964).

caution, repeats that it “shall not mean the assignment of students to public schools in order to overcome racial imbalance.”¹⁰⁵ What could be clearer than that? The prohibition is then repeated twice more in Title IV.¹⁰⁶ As the ultimate assurance to skeptical southern senators, Senator Humphrey stated that Congress could not impose a requirement of busing for school racial balance even if it wanted to, because that would be a constitutional “violation, because it would be handling the matter on the basis of race and we would be transporting children because of race.”¹⁰⁷

All to no avail. In 1971 in *Swann v. Charlotte-Mecklenburg Board of Education*, a unanimous Court blandly asserted, with no citation to the Congressional Record, that the definition of “desegregation” as nonracial assignment, and not as assignment to overcome racial imbalance, was not meant to apply to the formerly segregated school systems of the South, the only place where, Congress thought, a requirement of desegregation could be applied.¹⁰⁸ As Senator Sam Ervin of North Carolina, considered the Senate’s leading constitutionalist at the time, commented:

[T]he Congress decided to take no chances with the courts, so it put in something else that even a judge ought to be able to understand. It not only defined “desegregation,” affirmatively, but also defined what “desegregation” is not. The Supreme Court adopted exactly the opposite interpretation of the meaning of the word “desegregation.” . . . [T]he Supreme Court nullified this act of Congress by holding that Congress was a bunch of legislative fools. . . .¹⁰⁹

In *Regents of the University of California v. Bakke*, the Court

105. 42 U.S.C. sec.202000c (2003), 78 Stat. 246.

106. 42 U.S.C. secs. 2000c-6(a)(2), 2000c-9 (2003), 78 Stat. 248, 249.

107. 110 Cong. Rec. 12717 (1964).

108. 402 U.S. 1 (1971).

109. “Busing of School Children, Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate,” 93d Cong. 2d Sess. [1974], 42–43.

similarly held that Title VI's prohibition of racial discrimination by institutions receiving federal funds was not violated by the practice—by a state university that received federal funds—of racially discriminating in granting or denying admission.¹¹⁰ In *Griggs v. Duke Power Co.*, a unanimous Court effectively converted Title VII's prohibition of racial discrimination into a requirement of discrimination by holding that Congress meant to forbid an employer's use of such ordinary employment criteria as a verbal test or a high school education when the effect was to disproportionately disqualify blacks.¹¹¹ In fact, Congress had specifically considered the issue, and made it clear that employers acting in good faith were free to set qualifications as high as they wished regardless of disproportionate racial effects.¹¹² It is unlikely that any public officials other than Supreme Court justices could engage in comparable acts of malfeasance and bad faith without being subject to serious sanction.

“[N]o one—absolutely no one,” not even the president, Special Prosecutor Leon Jaworski proudly asserted, when President Nixon was forced to succumb to a Supreme Court order that he release his infamous tapes, “is above its law.”¹¹³ A more accurate statement of what the incident illustrated would be that even the president is subject to the Supreme Court. But to whom, Jaworski unfortunately did not go on to inquire, is the Supreme Court subject? No one issues orders to it or reverses its decisions, and espe-

110. 438 U.S. 265 (1978).

111. 401 U.S. 424 (1971).

112. Senators Case and Clark, co-managers of the bill that became Title VII, stated in an authoritative memorandum that Title VII “expressly protects the employer’s right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications,” 110 Cong. No. 7247 (1964), and in an earlier memorandum, “There is no requirement in Title VII that the employer abandon bona fide qualification tests where . . . members of some groups are able to perform better on those tests than members of other groups.” 110 Cong. Rec. 7213 (1964).

113. Leon Jaworski, *The Right and the Power* 279 (1976).

cially in constitutional cases, it is not only above the law but its decisions, it insists, are the law.¹¹⁴

Bishop Hoadly famously pointed out to the King of England in 1717 that “[w]hoever 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.” Charles Evans Hughes, later chief justice, made the same point in a speech in 1907: “We are under a Constitution, but the Constitution is what the judges say it is.”¹¹⁵ Which is to say, of course, that we are under only the Court, and the Court is under no one. Power without accountability is the definition of tyranny, and even good people when made tyrants take on characteristics of tyrants. Tocqueville has been proven correct in that the Supreme Court is not the least, as Hamilton argued, but the most dangerous branch of the national government, such that if it “is ever composed of imprudent or bad men, the Union may be plunged into anarchy or civil war,”¹¹⁶ which, of course, is exactly what happened.

The Means of Limiting the Supreme Court’s Power

The means of limiting the power of the Supreme Court and returning the nation to the constitutional plan of democratic federalism clearly exist in theory. The justices, after all, number only nine and control, as Hamilton pointed out in defense of judicial review, neither the sword nor the purse, implying that those who do may use them, if need be, to control the Court. Finding the will to use them is another matter. Most Americans and, apparently even more so,

114. See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958) (“the federal judiciary is supreme in the exposition of the Constitution,” and the Court’s interpretation of the Constitution “is the supreme law of the land”).

115. Quoted in Jesse H. Choper et al., *The American Constitution* 1, 8 (9th ed., 2001).

116. *Supra*, p. 1.

their political leaders have become so thoroughly accustomed or resigned to leaving basic social policy decisions to the Court that it seems to have become part of the natural order and taken on aspects of a religious faith. The Constitution is our holiest scripture, but rather than therefore fiercely defending it against the Court's desecrations, we have allowed ourselves to accept the Court as its oracle. Liberal legal academia has largely succeeded in establishing that blunt criticism of the Court is an attack on both judicial independence and—like noting the emperor's nakedness—a necessary public faith. The result is that we have allowed a handful of electorally unaccountable public officials, acting in the name of protecting our constitutional rights, to deprive us of our most important right, the right of self-government.

If the Court's decisions on, for example, abortion (converting an issue that was being peacefully settled on a state-by-state basis, generally in favor of liberalization, into an intractable issue inflaming national politics) or forced busing (devastating the nation's public school systems at the cost of billions of dollars for no benefit) were not enough for the people to demand and for Congress to take action to curb the Court's power, it is hard to see what could be.¹¹⁷ Democracy is not self-preserving; it can be ended by popular vote or, as here, by the failure of elected representatives to protest as issue after issue of basic social policy is removed from their control. The crux of the problem, as already noted, is that the cultural elite distrusts and fears popular rule, much preferring rule by the Court; and the elite dominates communication and education.

Justices can, of course, be impeached, which Hamilton saw as a "complete security" against misuse of the power of judicial

117. In carrying out a single federal district judge's orders, billions of dollars were spent on Kansas City, Missouri's school system alone. See *Missouri v. Jenkins*, 515 U.S. 70 (1995). How much would a federal judge have to order spent, one must wonder, before he met resistance—ten billion, one hundred billion?

review. Sufficient ground for impeachment, as then Representative Gerald Ford said about the attempted impeachment of Justice Douglas, is “whatever a majority of the House of Representatives considers [it] to be,”¹¹⁸ Congress apparently having on this, if on little else, the last word. A justice’s demonstrable deliberate dishonesty in the performance of judicial duty would, in a system insisting on judicial integrity, be grounds enough. By this standard, very few justices of the past fifty years would not have had short careers. It would seem that the justices can hardly be impeached, however, for continuing to do—though at an accelerating pace—what they have always been known and permitted to do; they must at least be given notice that a certain minimum level of integrity will be required from now on. In any event, impeachment is a crude, disputable, and unseemly means of remedying judicial misbehavior.

The Constitution provides that the Supreme Court exercise appellate jurisdiction subject to “such Exceptions and under such Regulations as the Congress shall make.”¹¹⁹ Theoretically, Congress could use this power to virtually take the Court out of the business of manufacturing constitutional law, leaving it with only the very limited original jurisdiction granted it by the Constitution. Attempting to limit the Court’s power by laws restricting its jurisdiction is subject, however, to the Catch-22 problem that the constitutionality of the laws will itself be subject to judicial review, with the result that the attempt will be successful only to the extent that the Court permits.¹²⁰ Use of the power would also leave the Court’s activist rulings of unconstitutionality standing and very likely to be followed by other courts. Congress can presumably also limit the jurisdiction of the lower federal courts, which it cre-

118. 116 Cong. Rec. 11, 913 (1970).

119. U.S. Const. art. III, sec.202.

120. And the Court has not always permitted it, even though the power has been very rarely used. See *United States v. Klein*, 80 U.S. 128 (1972).

ated by statute, but state courts—often at least as activist as the Supreme court—would remain, subject only to such controls as are available to state legislatures.

Congress's use of the jurisdiction-limiting power also has an unfortunate aspect of seeming to win the game by silencing the umpire. The restrictions on abortion and pornography and state-sponsored prayer in schools will be no less unconstitutional, protestors will insist—*e pur se muove* (“and still it moves” legend has Galileo saying when forced to renounce the heliocentric planetary theory)—simply because the Court can no longer declare them so. Despite these problems and although the power has been used so infrequently that its scope is uncertain and disputed, it remains an extremely important power. The Court will surely feel compelled, in the face of a revived and determined Congress, to uphold at least some carefully drafted measures. Any actual exercise of the power by Congress would have the extremely valuable effect, apart from what it actually does, of advising the Court that Congress has at last become seriously concerned with the Court's usurpation of legislative authority and has mustered the political will to do something about it.

Finally, the Court's power can be limited in various ways by a constitutional amendment, even though amendments, too—short of one abolishing judicial review—would be subject to the Court's interpretation. The United States Constitution is, however, exceedingly difficult to amend, perhaps the most difficult of any developed nation's. An amendment must be proposed by a vote of at least two-thirds of each house of Congress or at least two-thirds of the states meeting in a convention and, in either case, then ratified by three-quarters of the states.¹²¹ Disapproval by one-third plus one of the members of either House of Congress or by one legislative body in one-quarter plus one of the states would be sufficient to defeat it. The amendment process does very little to reconcile gov-

121. U.S. Const. art. V.

ernment by judges with democracy. It was apparently thought that its use would rarely be necessary, but the framers could not have foreseen that the result would be a system of government by judges who can be highly confident that their decisions, no matter how harmful and unwanted by the people, will not be overturned.

A frequently suggested amendment would eliminate life tenure for Supreme Court justices, limiting their terms of office to, for example, twelve or sixteen years. The result would be to ensure or nearly ensure that each newly elected president made one or more appointments to the Court. President Bush has not yet made an appointment to the Court; President Clinton, like President Reagan, during two terms in office was able to make only two. Along with life tenure, the robe today seems to confer longevity, and few justices do not exhaust it; presidents leave office after four or eight years while their appointees to the Court remain over three or four decades. Lifetime judicial tenure may have had more to be said for it when the average life span was forty or fifty years. The present Court has remained unchanged in membership for over ten years.

Other suggestions include selecting the justices by election, usually for a fixed term, rather than by appointment, and requiring that rulings of unconstitutionality be by a unanimous, or at least more than majority, vote. These, like almost any amendment seeking to limit the power of the Court, are likely to be highly beneficial, if only because they at least demonstrate a popular and political awareness that there is a problem needing correction and a willingness to act. The same may be said of proposed amendments to overturn particular Supreme Court rulings of unconstitutionality. The Court's decision that public burning of the American flag is constitutionally protected "speech," for example, may not be among its most socially harmful decisions, but overturning it by constitutional amendment would, again, at least provide a much needed demonstration that the Court need not on every issue have the last word.

None of these proposed amendments would, however, address

the root problem of judicial review. Electing justices and limiting their term of office would not eliminate the Court's policymaking power or its inconsistency with the constitutional scheme, though success in obtaining an amendment would no doubt cause the justices, at least at first, to be more cautious in its exercise. It is conceivable, however, that having only a limited term of office, appointed or elected, might be seen by some justices as all the more reason to act quickly and decisively while they can. Requiring a supermajority or even unanimous vote for rulings of unconstitutionality should reduce, but would certainly not eliminate, unjustifiable invalidations. The dishonest and indefensible *Green* and *Swann* decisions, for example (as well as *Griggs*, a statutory case) were decided unanimously.

Robert H. Bork has made the valuable suggestion of a constitutional amendment authorizing Congress to overturn Supreme Court constitutional decisions by a supermajority vote. This would undoubtedly be a significant limitation on the Court's power, as it would create a realistic possibility of elected legislators having the last word on fundamental social policy issues, a minimum requirement of democratic government. Because it is much easier to defeat than to enact legislation, however, the Court would as a practical matter still often have the last word, and all the more so, of course, to the extent that more than a majority vote in Congress is required. The amendment would nonetheless make so great an improvement in our present situation that it should be fully and enthusiastically supported by opponents of rule by the Court, especially in the very unlikely event that it should appear to have any chance of being adopted.

The surest and most complete—and therefore least likely to be adopted—response to the usurpation of legislative power by judges is, of course, a constitutional amendment simply abolishing judicial review. The result would be to return the nation to the experiment in popular self-government with which it began and make a strong

statement of renewed self-confidence by the American people in their ability to govern themselves without the guidance, supervision, and permission of their supposed moral and intellectual superiors. All that is needed to support the move is agreement with Churchill that imperfect as democracy may be, it is less so than all the other forms of government that have been tried. Whatever the best form of government, surely government by majority vote of nine unelected, life-tenured lawyers pretending to interpret the Constitution is one of the worst.

A much less drastic constitutional amendment, fortunately, is likely to be almost as effective and more difficult to oppose. As noted above, it is not judge-enforced constitutionalism, as such, but judicial activism, rulings of unconstitutionality not based on the Constitution, that gives the Court its ruling power. Whatever might be said for real constitutionalism—judicial enforcement of meaningful constitutional provisions—as an aid to or improvement on democracy, there would seem to be nothing to be said for constitutionalism without the Constitution, for treating constitutional provisions as meaningless except as transfers of policymaking power to judges.

Because the Court's activism is very largely based on what the Court has made of the Fourteenth Amendment—rendering the due process and equal protection clauses empty vessels into which it can pour any meaning—a very large part of the answer to the problem of rule by the Court would be simply to return the Fourteenth Amendment to its intended meaning or to give it any specific meaning. If Representative Thaddeus Stevens, leader of the Radical Republicans in the House, and other proponents of full legal equality for the newly freed blacks had had their way, the Fourteenth Amendment would have simply prohibited all official racial discrimination. Concern that such an amendment would not be ratified (and would lead to the defeat of Republicans in the coming election), because of northern opposition to giving blacks the right to

vote, resulted in rejection of the proposal and in adoption instead of the first section of the Fourteenth Amendment in its present, much more elaborate form.¹²² If interpreted to mean what it was intended to mean, it would, as noted above, guarantee blacks basic “civil” (but not “political”) rights. The right to vote was granted to blacks, however, two years later with the adoption of the Fifteenth Amendment, effectively abolishing the civil-political distinction. There is much to be said, therefore, for returning the Fourteenth Amendment to the clear, appealing, and easily administratable meaning that Representative Stevens intended, a simple prohibition of all official racial discrimination. This is the interpretation the Court adopted in one of its earliest and most important decisions under the amendment.¹²³

Returning the Fourteenth Amendment to a specific meaning would very largely end extraconstitutional judicial review and, therefore, rulings of unconstitutionality against state laws. Doing so should be easy to support, and difficult to oppose, on the ground that if it is constitutionalism we truly want, not government by judges, it is necessary to have a Constitution with meaning. The Supreme Court would still be able in theory to enforce its imaginative interpretations of the first eight amendments against federal law, but Congress would be much more likely to assert itself if it became nearly the sole victim of the Court’s interventions. The Court, too, would undoubtedly find reasons for restraint in the face of a demonstrated public resolve to limit judicial power by reestablishing a Constitution with meaning.

In sum, if opponents of government by judges should ever gain sufficient political strength to obtain a constitutional amendment, they should not use it merely to tinker with the method of selecting Supreme Court justices or of deciding their term of office or with

122. See, e.g., Charles Fairman, *Reconstruction and Reunion: 1864–1888, Part One* 7 (1971).

123. *Strauder v. West Virginia*, 100 U.S. 303 (1879).

the requirement of a supermajority vote for rulings of unconstitutionality. They should use it, ideally, to abolish judicial review altogether, or at least to give Congress the last word on constitutional questions. Most easily defended and perhaps politically feasible—if any Court-limiting proposal can be—would be simply to give the Fourteenth Amendment a specific meaning. Such a change would amount to little more than a requirement that the justices use the power of judicial review honestly, do only what they purport, and are supposedly authorized, to do, and disallow only those policy choices made by the elected representatives of the people that the Constitution in fact disallows. It would reaffirm and reinstitute the federalist system of representative self-government with separation of powers that was created by the Constitution and bring to a halt the Court's continuing assault on American society.