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Is It Judicial Review *or* Judicial Activism?

The New Hampshire Center for Constitutional Studies Newsletter

CHAIRMAN'S CORNER
It's But A Short Trip From Judicial Review To Judicial Tyranny

Dianne Gilbert

American government, under the U.S. Constitution, is closing in on its 216th anniversary; and, anyone with an interest to understanding where it has been, what it is doing today and where it appears to be headed, has only to study the history of the United States Supreme Court. Herein, the curious will come face to face with how issues such as school prayer, for example, having passed constitutional muster for more than a century, could suddenly be found unconstitutional;[1] or, how a small, mid-western wheat farmer can be found guilty of violating the Constitution's Interstate Commerce clause for growing wheat to feed his own cattle.[2] Then of course, there is the entire controversy surrounding what's in and what's out of the reach of the national government by way of the Fourteenth Amendment's due process clause.

What the curious will find in the annals of the Court's history, is the makings of a schizophrenic judicial system, at the head of which sits the Supreme Court meting out justice through decisions all too often based upon a prevailing ideology rather than guided by the instrument to which it owes its existence, to which its members are sworn to uphold and under which it sits, alongside the Legislative and Executive branches of American government.

Originally designed as a non-policy-making arm of the national government, by mid-19th century, the Court was well on its way to becoming a highly politicized institution. By early-20th century, having passed from the grasp of the Federalists, into the hands of the Democratic Republicans, then to the hands of the Jacksonian Democrats, and ultimately coming under the influence of the Progressives, Supreme Court jurisprudence underwent an amazing metamorphosis as the Court's decisions became more and more populistic and less and less reflective of the text of the Constitution.

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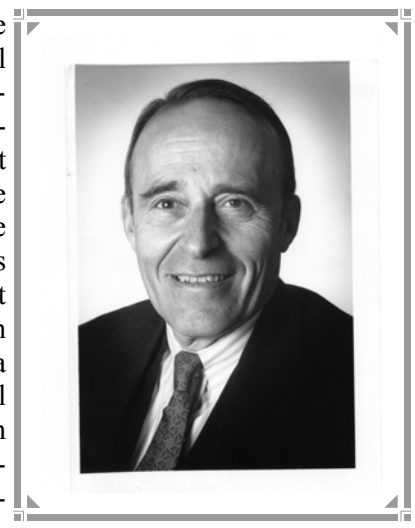
It's Not the Constitution; It's Judicial Activism:
The Need for Restraint on the Policymaking Power of Judges

_ By Professor Lino A. Graglia
A. Dalton Cross Professor of Law
University of Texas School of Law, Austin, Texas

The most serious defect in the American system of government as it currently operates is the policymaking role assigned to itself by the Supreme Court. The Court has in recent decades evolved into the most important institution of American government in terms of domestic social policy. It has made itself the final arbiter on issues literally of life and death, as in its abortion and capital punishment decisions, issues of sexual morality, as in its decisions on contraception, homosexuality, and the regulation of pornography, and issues of social order, as in its decisions on criminal procedure, street demonstrations, and vagrancy. It is the Court that now decides such additional fundamental policy issues as the place of religion in public life, prayer in the schools, government aid to religious schools, and the permissibility of distinctions on the basis of race, sex, alienage, and illegitimacy. In sum, the issues that determine the nature of a civilization or culture and the quality of life in a society are no longer determined on a local basis by elected representatives, but for the nation as a whole by majority vote of a committee of nine lawyers unelected to office, unremovable by elections, and holding office essentially for life.

Policymaking by the Court is obviously inconsistent with the basic constitutional principles of separation of powers, representative self-government and federalism that are the only real protection against governmental tyranny. Judicial policymaking usurps the legislative power that the Constitution assigns exclusively to Congress in part and otherwise reserves to the states; it replaces representative self-government with government by electorally unaccountable officials; and it decides for the nation as a whole policy issues that the Constitution leaves for the most part for decision on the state or local level, by officials closest and most responsive to the people the policies affect. It amounts, in short, to a near-total subversion of the system of government created by the Constitution. How has this come to be, and why is it permitted to continue?



Professor Lino A. Graglia

American constitutional law is for most practical purposes the product of "judicial review." Judicial review is the power of American courts to refuse to enforce, and therefore effectively to invalidate, the acts of other institutions and officials of government on the ground that they are prohibited by the Constitution. Surely the most remarkable feature of the power, initially, is that it is not explicitly provided for in the Constitution. No such power existed under British law, the source of most American legal practices and institutions. It was Parliament, of course, not a court, that was said to be supreme.

It is not judicial review itself, however, but only its abuse that presents the problem of uncontrolled judicial power; although given the power, its abuse by lawyer-judges is almost surely inevitable. All constitutionalism may be criticized as essentially antidemocratic, as an

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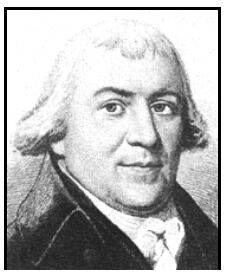
What Would They Say...

"Every member of the state, ought diligently to read and study the constitution of his country, and teach the rising generation to be free. By knowing their rights, they will sooner perceive when they are violated, and be the better prepared to defend and assert them."

_John Jay—First Chief Justice of the U.S. Supreme Court

Biographical Sketch: James Iredell ~ *Reluctant Revolutionary & Supreme Court Justice*



James Iredell
1751 -1799

Christian James Iredell was born October 5, 1751 in Lewes, Sussex County, England. He was the eldest of five children of Frances Iredell and Margaret McCulloh Iredell originally of Dublin. James, as he was known, was sent to America after his father fell ill due to a stroke. He left school to accept work found for him by his relatives living in North Carolina as Comptroller of the Customs in Port Roanoke. His salary of £30 went directly to support his parents.

Iredell fit right in with a circle of friends who would stand behind him the remainder of his life; these same friends helped him to define his place in Southern society, state politics, and eventually "American politics at large."

James Iredell began his law career by reading law with Samuel Johnston, who later became the Governor of North Carolina. In 1770, he earned his license to practice law in the lower courts of the colony; and, by 1771 he had received a license to practice law in Superior Court.

In 1773, Iredell married Samuel Johnston's sister, Hannah, and by 1774 he would join the cause for liberty supporting the resistance to British abuses of the colonists and then independence.

Iredell justified his decision believing that North Carolina's government was a royal charter awarded by the Crown thereby protected by the terms of the English Constitution. Parliament was to have no role regarding North Carolina's internal affairs. By July 1788, he would argue the cause for the ratification of the proposed new Constitution for the United States.

His allegiance to his new country would cost him dearly. He was disowned by a wealthy uncle—to whom he was previously an heir. He was cut off from his closest relations for many years; and, "he lost his powerful patrons in England and Ireland."

However, his family and friends in the new world would more than make up for the losses. The young attorney would fully participate in the "public life of North Carolina" becoming "one of the representative Southerners of his time."

Over the period, 1773-1778, Iredell would develop a series of essays describing the American cause and at the same time deliver his views on what should be in a constitution for the United States. He wrote in response to the Declaratory Act (1766), the Coercive Act (1774) and the 'Declaration for Suppressing Rebellion and Sedition (1775). Therein, he concluded that the Crown and Parliament would never yield to any restraint over their authority of the Colonies; thereby, they yielded all authority.

It is said, that Iredell initially wrote of his politics in a manner that suggested a hope in preserving a connection with Great Britain as well as "the liberty of his neighbors" under the British Constitution. His essays, namely: *Essay on the Law Court Controversy*; *To the Inhabitants of Great Britain*; *The Principles of an American Whig*; *Causes of the American Revolution*; *To His Majesty George the Third*; *To the Commissioners of the King of Great Britain*; and *To the Commissioners of the King of Great Britain for Restoring Peace, etc…* typically contemplated an *"empire of equal parts."* He said: *"I have always been taught and, till I am better informed, will continue to believe that the Constitution of this country [North Carolina] is founded on the Provincial Charter, which may be considered the original contract between King and inhabitants."*

He later informed King George that a Revolution could have been avoided *"if your Majesty had disliked innovation as much as we did."*

"[I]t has ever been my opinion that an act inconsistent with the [state] Constitution was void, and that the judges, consistently with their duties, could not carry it into effect. The Constitution appears to me to be a fundamental law, limiting the powers of the legislature, and with which every exercise of those powers must, necessarily, be compared."

"In a Republic...the Law is superior to any or all Individuals, and the Constitution superior even to the Legislature of which the Judges are the guardians and protectors."

Iredell believed that the great failing of the British system was the lack of a judiciary powerful enough to protect the British constitution from the "abusive acts of the Crown and Parliament." Moreover, long before most other Americans would come to believe, Iredell subscribed to the notion of judicial review. He saw it as being *"essential to any hope for a government of laws."* As an attorney, he would establish the doctrine of judicial review in North Carolina, as early as 1787, in the case *Baynard v Singleton.* He would affirm the doctrine at every opportunity available to him thereafter.

He held many government positions within the commonwealth of North Carolina ranging from State Attorney for Chowan County, to a seat on the bench of the State Superior Court, to State Attorney General.

He left politics in 1781 to write and speak about government in general. Although generally approving of the "high spirits of the people of his State," he became suspicious of democracy and would suggest *"... some restriction on the right of voting."*

Iredell was a follower of Edmund Burke and a spokesman for the Federalist view of government. He wrote, under the name of "Marcus," a political essay entitled: *"Answers to Mr. Mason's Objections to the New Constitution Recommended by the Late Convention of Philadelphia."* It answered the charges placed against the Constitution by George Mason

Iredell would lead the ratification debates in the conventions assembled "for the purpose of deliberating and determining on the proposed Plan of Federal Government." The Federalists counted on the people's desire to maintain some connection with the other twelve states, as under the Articles of Confederation. Hence, Iredell was given the job of containing the Anti-Federalists. He was to place them "between the horns of a dilemma where they must either surrender their position or admit that they anticipate a complete separation of their state from the other twelve.

The first attempt to ratify the Constitution would go down in defeat, but then it would be accepted at the Fayetteville convention on November 21, 1789. Iredell played to the people through the Federalists' *"all or nothing"* rhetoric; yet, he was careful to speak to the fears of the Anti-Federal men whose main concern was that the Constitution transferred too much power through what they perceived as 'implied powers'."

But, Iredell argued that the Constitution affirms that "*no power can be exercised but what is expressly given." "What is not enumerated is not granted."* He claimed a citizen holding a *"Constitution in his hands ...may see if a power claimed is enumerated. If it is not, he will know it to be a usurpation."*

James Iredell was appointed to the Supreme Court on February 10, 1790. A disciple of strict construction of the Constitution, he would uphold this line of reasoning throughout his appointment to the High Court.

In the famous case of Chisholm v. Georgia, which prompted the 11th Amendment, Iredell stood alone. Even his good friend and colleague, James Wilson, would oppose him in upholding the right of citizens of one state to sue the government of another state. But Iredell said he could find no instance of an implied power in the Constitution allowing a sovereign state to be sued. He said it was the function of Congress to set the jurisdiction of the Supreme Court—an argument we live with today: *" [E]very state in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to power surrendered…"*

Iredell would spend the end of his life counseling his "kinsmen against the temptations of deism," putting his house in order and "reflect [ing] on that moment when *'we shall be examined into a place where one day kings and subjects'* shall be considered without *'dread.' "*

He died at the family home in Edenton, North Carolina. He is buried with the Johnstons at, Hayes Plantation. *Adapted from M.E.Bradford "The Reluctant Revolutionary: James Iredell of North Carolina. Christian Liberty Series, Plymouth Rock Foundation Publication.*

(Continued from page 1 - Chairman's Corner)

Inch by Inch Like A Thief In The Night…

The gradual transformation of the Supreme Court from what the Framers' said would be the weakest of the three branches, thereby providing the least threat to the people's liberties, to what some have come to regard as a *"super-legislature"* has its roots in the doctrine of *judicial review*. A doctrine that states, in its now expanded view, that the Court, or courts, may review the acts, or actions, of the coordinate branches along with those of the state legislatures. History's knighted hero, to whom the establishment of judicial review is attributed, is the legendary Chief Justice John Marshall who is said to have accomplished the act in the now famous, but highly political, decision rendered in Marbury v. Madison [3].

For certain, Marshall's influence upon Supreme Court jurisprudence did not end with *Marbury*. He is further credited with what modern text books declare to be: *"four of the most momentous decisions in the nation's history":* [4]

(1) Marbury v. Madison (1803), said to have established *judicial review;*

(2) McCulloch v. Maryland (1819), said to have established the notion of *"implied powers"* under the Constitution, along with the *"reaffirmation of the supremacy of the Constitution, federal immunity from involuntary state taxation,"* and the firm establishment of the Constitution as a government of the people, *not of the States*, from whom the *"federal government… derive[s] its powers…"*[5]

(3) Dartmouth College v Woodward (1819) which established the *"inviolability of contracts"*; [6]and,

(4) Gibbons v. Ogden (1824) establishing *"plenary federal authority over interstate and foreign commerce"*.[7]

Although it pleases the liberals to think so, the Marshall court was not the first to exercise judicial review. Political Science Professor Craig R. Ducat asserts that Marshall's opinion was merely the Court's *"first genuine attempt to justify the practice";* that, in fact, the Jay court was the first to exercise judicial review in the 1792 *Hayburn's Case*, followed later by *Ware v Hylton* and again in *Hylton v United States* in 1796.[8]

Nevertheless, it is generally agreed, that Marshall's decision in *Marbury v Madison* made a lasting and profound impact upon the future role of the Court. And, considering the role that party politics played in *Marbury*, one cannot help but wonder how much better off we might be today had Jefferson just delivered the coveted commissions.

Forewarned Is Forearmed…

It seems clear, however, that Marshall's intended goal was not to suppress American federalism and replace it with the nationalism we labor under today, but merely to establish constitutional supremacy as specified in Article 6.2 of the United States Constitution. It is more the case, that Marshall sought to use the constitutional powers given the Supreme Court to protect the people from the arbitrary abuses of State government, which he had, all too often, witnessed as a member of the Virginia state legislature. [9]

Unfortunately, in his zeal to protect the people's liberties from encroachment by the State, Marshall overlooked the potential provided by judicial review to do exactly the same. Its abuse by activist judges would ultimately become the Achilles' Heel of the Framers' system of *constitutional supremacy*.

Blinded by his own purity of motive, Marshall failed to see how a future and perhaps well intended, then again perhaps not, Court, in being handed this power, might use it to become as abusive of the people's liberties as that of any State government. But, Marshall's greater error, in the first place, was his failure to question the omission of such a grant of power within the text of the Constitution itself. And, secondly, the Philadelphia Convention's decision to deny Madison his request for a *Council of Revision* that would sit with the Supreme Court justices, and the President and his cabinet to review all laws before they went into effect. All this not withstanding, Marshall certainly had to have heard the alarm expressed by the Anti-federalists concerning the dangers of *judicial supremacy*. Brutus' example of how Britain's Court of Exchequer[10] worked to expand its own powers should have been enough to make Marshall think twice.

The Proof Is In The Pudding…

Hence, we should not be surprised to find both Marshall and his crown jewel, *judicial review,* delivered up a mere 15 years after ratification of the Constitution, being hailed by 19th and 20th century progressivist lawyers, professors, historians, political scientists and justices who have no qualms seeing well-settled precedent reversed when it suits their purpose. Here then, the *Marbury* decision plays well with the objectives of justices who view the Court as a *super-legislature;* wherein, its powers may be deployed to mold and shape American society as they see fit. One example is Justice Benjamin Cardozo who openly revered the great John Marshall:[11] *"Marshall gave to the Constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is, because he moulded it while it was still plastic and malleable in the fire of his own intense convictions".* [12]

Therein, it is most interesting to note that Cardozo's high praise for Marshall is rooted in the latter's boldness to read into the Constitution what the text itself fails to provide. Cardozo was not alone in supporting this mode of broad constitutional interpretation; others, both before and after his ascension to the Bench, expressed similar views. Justice Oliver Wendell Holmes, who remained on the bench until asked to step down at 91-years old, was yet another. He too held no reservations about his authority to impress his mind upon the meaning of the Constitution, and at that, according to *"the felt necessities of the times"*. He explains: *"[T]he justification of a law for us cannot be found in the fact that our fathers always have followed it. It must be found in some help which the law brings toward reaching a social end."*[13]

These are the frightening voices of people on a mission prepared to toss aside, the proven principles so carefully chosen by the Framers, for having stood the test of time, as undergirding for a *written* Constitution our that forefathers intended to endure for the ages.

A Fine Line
Between Justice and Judicial Tyranny…

Clearly, the power of *judicial review* is not spelled out in the text of the Constitution. Nonetheless, as Alexander Hamilton points out in Federalist Paper 78: *"The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body."*[14]

But then, in what is almost his next breath, Hamilton defines where judicial interpretation ends and judicial activism begins*: "It can be of no weight to say, that the courts on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature…The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body."*[15]

It would seem that the Great John Marshall understood this; what he did not understand is where his invention could, and would, end up.

Enter Governor Charles Evans Hughes, later to become Chief Justice Hughes: *"We are under a Constitution, but the Constitution is what the judges say it is."* Marshall must be rolling over in his grave.

God Save The Republic…

To look for a remedy within the major political parties seems hopeless. For, in too many instances, Presidents have used their nominating power, to the High Bench, to repay political favors, even worse, to stack the Court with a prevailing ideology as FDR did in requiring his nominees to be hard-core New Dealers. Moreover, the present system of appointing and approving justices has fallen victim to the undue influence of powerful liberals, like Senator Ted Kennedy, who have openly vowed to block the approval of justices who admit to a strict construction of the Constitution.

Hence, it would appear that a Constitutional amendment is needed to reign in a Supreme Court that has elevated itself to sit *above* the Constitution, no longer guided by it.

_Dianne Gilbert

1. Engel v. Vitale; 370 U.S. 421 (1961)
2. Wickard V. Filburn, 317 U.S. 111, 63 S. Ct. 82, 87 L.Ed. 122 (1942)
3. Marbury v Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803)
4. Justices, Presidents, and Senators: A History of the U.S. Supreme Court from Washington to Clinton; Henry J. Abraham, P. 62-63
5. Ibid.
6. Ibid.
7. Ibid.
8. Constitutional Interpretation: Powers of Government Volume I, P. 4
9. Making of America, Dr. W. Cleon Skousen, P. 572
10. Brutus – Essays IV, XI, XII and XV – The Essential Anti-Federalist, William B. Allen
11. Justices, Presidents, and Senators: A History of the U.S. Supreme Court from Washington to Clinton; Henry J. Abraham; Appendix P. 369,– *Survey taken among 65 Law school Deans, Professors of law, history and political science, to include the author, Henry J. Abraham.*
12. [Ibid; P. 63]
13. Collected Legal Papers (NY: Harcourt, Brace and Company, 1920), P. 225, "The Law in Science – Science in Law", as quoted in Original Intent, P. 229, Note 5.
14. Jacob E. Cooke, The Federalist, Essay 78, P. 525
15. Ibid

Did You Know?

The Folding of the Flag

Do you know that at military funerals, the 21-gun salute stands for the sum of the numbers in the year 1776?

Have you ever noticed the honor guard pays meticulous attention to correctly folding the American flag 13 times? You probably thought it was to symbolize the original 13 colonies, but [here] we learn something new:

The **1st fold** of our flag is a symbol of life.

The **2nd fold** is a symbol of our belief in eternal life.

The **3rd fold** is made in honor and remembrance of the veterans departing our ranks who gave a portion of their lives for the defense of our country to attain peace throughout the world.

The **4th fold** represents our weaker nature, for as American citizens trusting in God, it is to Him we turn in times of peace as well as in time of war for His divine guidance.

The **5th fold** is a tribute to our country, for in the words of Stephen Decatur, "Our Country, in dealing with other countries, may she always be right; but it is still our country, right or wrong.

The **6th fold** is for where our hearts lie. It is with our heart that We pledge allegiance to the flag of the United States Of America, and the Republic for which it stands, one Nation under God, indivisible, with Liberty and Justice for all.

The **7th fold** is a tribute to our Armed Forces, for it is through the Armed Forces that we protect our country and our flag against all her enemies, whether they be found within or without the boundaries of our republic.

The **8th fold** is a tribute to the one who entered into the valley of the shadow of death, that we might see the light of day.

The **9th fold** is a tribute to womanhood, and Mothers. For it has been through their faith, their love, loyalty and devotion that the character of the men and women who have made this country great has been molded.

The **10th fold** is a tribute to the father, for he, too, has given his sons and daughters for the defense of our country since they were first born.

The **11th fold** represents the lower portion of the seal of King David and King Solomon and glorifies in the Hebrew's eyes, the God of Abraham, Isaac and Jacob.

The **12th fold** represents an emblem of eternity and glorifies, in the Christian's eyes, God the Father, the Son and Holy Spirit.

The **13th fold,** or when the flag is completely folded, the stars are uppermost reminding us of our nations motto, "In God We Trust."

After the flag is completely folded and tucked in, it takes on the appearance of a cocked hat, ever reminding us of the soldiers who served under General George Washington, and the Sailors and Marines who served under Captain John Paul Jones, who were followed by their comrades and shipmates in the Armed Forces of the United States, preserving for us the rights, privileges and freedoms we enjoy today. In the future, you'll see flags folded and now you will know why.

_Author Unknown

(Continued from page 1- Lino A. Graglia)

attempt to limit the policy choices of todays majority by policy choices made by others in the past. The American Constitution, however, wisely places very few and largely uncontroversial restrictions on popular government. The enactment of a clearly unconstitutional law, a law passed in ignorance or defiance of a constitutional prohibition, is, therefore, a very rare occurrence. The result is that if judicial review were what it purports to be, occasions for its exercise would be so infrequent as to make it a matter largely of academic interest.

The problem of judicial review as actually practiced is not the problem of constitutionalism, rule of the living by the dead, but the problem of judicial activism, rule by judges who are very much alive. Judicial activism can be most usefully defined as the judicial invalidation of laws that are not clearly prohibited by the Constitution. Only laws *clearly* prohibited by the Constitution should be invalidated, of course, because if representative self-government is the norm, the judgment of elected representatives should prevail in cases of doubt.

The first and most important thing to know about constitutional law is that it has virtually nothing to do with the Constitution. Discussions of constitutional law and the role of the Supreme Court in the American system of government are almost exclusively in terms of how the Court should interpret the Constitution in deciding so-called constitutional cases. This, however, is a mere legal fiction, a verbal convention used, like other legal fictions, to conceal what is actually going on. In almost no controversial Supreme Court decision of recent decades was any question of interpretation in fact involved. The real question presented by the Courts controversial rulings of unconstitutionality, is not *how* the Court should interpret the Constitution, but *whether* it should confine itself to that limited task in making its "constitutional" decisions.

Sufficient evidence that constitutional interpretation plays little role in constitutional decision making is the fact that so little is supposedly being interpreted. The Constitution is a very short and apparently straightforward document, easily printed with all amendments, repealers and extensive obsolete matter on a dozen or so ordinary book pages. It is not at all like the Bible or Talmud or even the tax code, massive tomes in which many things can be found with sufficient search. The vast bulk of rulings of unconstitutionality involve state, not federal, law, and nearly all of them purport to be based on a single constitutional provision, the Fourteenth Amendment, and indeed, on a single sentence of that amendment and ultimately on one or both of two pair of words, "due process" and "equal protection."

It does not require a high degree of jurisprudential sophistication to recognize that Supreme Court justices do not make their decisions on a vast array of difficult and complex issues of social policy by studying the words "due process" and "equal protection." The Fourteenth Amendment was 105 years old when, for example, the Court decided *Roe v. Wade* in 1973. All or nearly all states had laws restricting the practice of abortion. Isn't it odd that no one noticed that these laws were prohibited by the due process clause of the Fourteenth Amendment until Harry Blackmun came along to point it out?

As another example, there was a time when the Constitution *permitted* the assignment of children to schools on the basis of race, as the Court told us in *Plessy v. Furgeson* in 1896 and later cases. There then came a time when the Constitution *prohibited* the assignment of children to public schools on the basis of race, as the Court told us in *Brown v. Board of Education* in 1954. Finally, there came a time, the present, when the Constitution often *requires* the assignment of children to public schools on the basis of race, as the Court held in *Swann v. Charlotte-Mecklenberg* in 1971. In all that time, however, the Constitution was not changed in any relevant respect. A scientific observer would have no difficulty concluding that the Constitution was not the relevant variable.

Indeed, the Court has even made it possible to prove scientifically that the Constitution has nothing to do with constitutional law. The defining characteristic of science is that it makes predictions based on hypotheses testable by controlled experiments. For example, if the hypothesis is that it was the addition of chemical X to a certain solution that caused it to turn blue, the hypothesis can be tested by compounding the solution without the addition of chemical X. If it nonetheless turns blue, the hypothesis must be considered refuted. Controlled experiments are rarely possible in the so-called social sciences and law, but the Court has in effect provided us with one on the issue of school racial segregation.

The *Brown* decision, of course, held legally required school racial segregation unconstitutional. It was based, the Court told us and virtually everyone believes, on the equal protection clause of the Fourteenth Amendment. What if the *Brown* decision could in effect be run again, as in a controlled experiment, this time without the equal protection clause, to see what difference, if any, its absence would make? As if to serve the case of legal science, this is essentially what occurred.

On the day the Court decided *Brown*, it also decided a much less famous case, *Bolling v. Sharpe*, involving the constitutionality of school racial segregation laws, enacted by Congress, in the District of Columbia. As it happens, the equal protection clause does not apply to Congress and the District of Columbia. What difference did that make in the result reached? Why, none at all: school segregation laws were found equally unconstitutional in the District of Columbia. The liquid still turned blue!

School segregation was unconstitutional in the District of Columbia, Chief Justice Earl Warren explained for a unanimous court, because it was "unthinkable that the same Con-

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The New Hampshire Center for Constitutional Studies

Announces Its...

HILLARY HIPPO AWARD

To Be Presented Annually to an ELECTED / APPOINTED PUBLIC OFFICIAL

***VOTED*...The MOST EGREGIOUS VIOLATOR Of His/Her Oath of Office**

THE "SOLID GOLD" HYPOCRITE Trophy

Recipient To Be Announced On:

SEPTEMBER 19, 2004

CONSTITUTION DAY CELEBRATION

Commemorating

The 217th Anniversary of The Signing of

The United States Constitution

The "Solid Gold" Hippo is as fake as "Fools Gold"
& how appropriate to the hypocrite who receives it!

NOMINATIONS RESTRICTED TO LOCAL, COUNTY, STATE OR NATIONAL ELECTED / APPOINTED PUBLIC OFFICIALS

Hillary Hippo Award

Our public officials are required to take an oath or affirmation to uphold our state and national constitutions. But apparently, this requirement is not taken seriously by all public officials. Certain NH Legislators have been heard to say, for example, that they are "tired of hearing about the Constitution." Other public officials rely upon "not being lawyers," to relieve them of their obligation to read and understand these documents.

When public officials ignore their *oath of office,* for ANY reason, the people's trust is violated. This practice, left to stand, will ultimately degrade the principles that America's Founding Fathers relied upon to ensure our unalienable rights to *"life, liberty and the pursuit of happiness."*

American freedom must never be subordinated to ignorance or political agenda. Hence, to heighten awareness that our constitutions were written to LIMIT what government can do, NHCCS has instituted the Hippo Award to be presented annually to the elected or appointed official voted the most egregious offender of his/her oath of public office. Email your nomination including a brief explanation of the violation to: Chat@nhccs.org., or mail to: NHCCS, PO Box 7104, Nashua, NH 03060.

The Northwest Ordinance of 1787:
Affirms the Framers' Reliance Upon Religion To Ensure Good Government.

In 1787 as the Delegates to the Constitutional Convention were meeting in Philadelphia, the United States Congress passed the 3rd of 4 documents that would ultimately comprise American Organic Law. The Northwest Ordinance of 1787 was passed to establish the criteria by which new states, carved out of the North West Territory, could petition the Congress for entry into the Union. But more importantly, the ordinance sheds light on the ideas and ideals of the generation that drafted the Constitution and the Bill of Rights.

In addition to providing a frame of government for the western territories, the Ordinance also contains six articles that set up a binding "compact between the original States, and the people and States in the said territory," to "forever remain unalterable unless [changed] by common consent." These same six articles debunk much of the *dis*information propagated today about the Founding Fathers. In particular, Article 3 dispells the notion that the Framers wanted a complete "separation of church and state."

Article Three of the Northwest Ordinance:

"Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged…"

Equally key here is that this law would be **REPASSED** by the First Congress under the United States Constitution in 1789. It would hold under the United States Constitution as it did under the Articles of Confederation.

This begs the question: "What basis did the Court use to kick religion out of American government? How is it, that the Ten Commandments, once considered the root of American jurisprudence, is now treated as a curse upon the Framers government?"

Winds of Change

The Reverend James R Patrick, explains: "In less than two hundred years, the federal government of the United States of America has turned from its original course and turned on its people. It has repudiated the faith of the Founding Fathers and now stands diametrically opposed to the very principles of freedom that gave birth to the nation...a nation that was founded upon Biblical principles, has become a nation that is corrupt and immoral. We are a nation that openly flaunts its total disregard for that which was once divine. How could a nation, so blessed of God, become so reprobate in such a short span of time?

We could point to any number of reasons but in most cases that which would be singled out would only be a reflection of the society as a whole. We must never forget that actions are not only a reflection of that which is around us, but, more importantly, that which is within us. We would be wise to remember that… *'Those things which proceed out of the mouth come from the heart; and defile a man. For out of the heart proceed evil thoughts, murders, adulteries, fornications, thefts, false witness, and blasphe*mies: *These are the things which defile a man…'* Matthew 15:18-20." He continues: "America was founded on Biblical principles. Civil law was based on Biblical law. The Fathers fully realized that political freedom could be achieved only if the foundations of religion, morality, and knowledge were firmly implanted in the hearts and minds of its people. Therefore, they took deliberate steps to encourage the people to strengthen their hold on religious freedom and to incorporate it into their educational and political fabric of the nation.

Our first and most noble President stated in his farewell address: *'Of all the dispositions and habits which lead to political prosperity; religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—these firmest props of the duties of men and citizens.'*

In closing, may we recognize our error and return to the ancient truths that gave birth to freedom… May we once again understand that where the spirit of the Lord is, there is liberty!"

Adapted from 'Foundations of Liberty: Faith of Our Fathers'; Rev. Patrick operates the East Moline Christian School. Write him at 900 46th Ave. East Moline, Ill. 61244.

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stitution would impose a lesser duty on the Federal Government" than on the states. This may be taken as a typical example of Supreme Court reasoning, reasoning that would not be acceptable in any intellectually respectable discipline. The Constitution has many provisions imposing different duties on the federal government and the states. The contracts clause, for example, restricts only the states, while the first eight amendments restrict only the federal government. Since segregation in the District of Columbia had to violate *something* in the Constitution, however, according to the Court, the only problem was to decide which constitutional provision it would be.

Having very few good options, the Court settled on the always handy due process clause of the Fifth Amendment, which happily, does apply to the federal government. The only difficulty is that this requires one to believe that a constitutional provision added in 1791 to a Constitution that explicitly recognized and protected slavery was meant to prohibit sending blacks and whites to separate schools. If the due process clause of the Fifth Amendment was not available for some reason, the Court undoubtedly would have turned, with equal validity and no greater embarrassment, to some other constitutional provision, perhaps the clause prohibiting the federal government from discriminating among seaports.

The Courts abortion decisions are rightly castigated as based on nothing in the Constitution, on prohibitions created by the Court out of whole cloth. The Courts decisions on religion, however, illustrate the irrelevance of the Constitution to constitutional law in possibly even more dramatic form. The purpose of the religion clauses of the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." was to safeguard the freedom of the states from federal interference in matters of religion. The Courts decisions on state provisions for prayer and Bible reading in public schools, state aid to religious schools, and state permission for religious symbols in public places, stand these constitutional guarantees on their head.

Purporting to "incorporate" the religion clauses into the due process clause of the Fourteenth Amendment, the Court, an arm of the federal government, has made of them all the authority it needs for precisely the type of interference with state policymaking on matters of religion that they were meant to preclude. This is not merely the making of constitutional law without constitutional warrant, as in *Roe v. Wade*, but the making of constitutional law in defiance of the Constitution. Similarly, the fact that the Constitution expressly recognizes capital punishment in several places did not prevent Justices Brennan, Marshall and Blackmun from insisting that capital punishment is constitutionally prohibited.

The second and final thing necessary to understand American constitutional law, in addition to the essential irrelevance of the Constitution, is that the Courts constitutional decisions of the last four decades have not been random in their ideological thrust and political impact. On the contrary, they have almost uniformly served to enact the left-liberal position on the policy issue involved, whether it is abortion, prayer in the schools, aid to religious schools, public display of religious symbols, capital punishment, criminal procedure, discrimination on the basis of sex, illegitimacy or alienage, pornography, libel, busing for school "racial balance," and so on almost without end.

The only thing these decisions on a vast array of subjects have in common is that each invalidates a policy choice made in the ordinary political process in order to substitute a choice further to the left on the American political spectrum, the choice favored by the American Civil Liberties Union. Indeed, it is only a small exaggeration to say that the ACLU never loses in the Supreme Court, even though it does not always win. It either obtains from the Court a policy choice it could not obtain through the ordinary political process because opposed by a majority of the American people or it is left where it was to try again on another day.

The position of defenders of conservative or traditional values in the Supreme Court is precisely the reverse of that of the ACLU. They rarely win, that is, obtain a policy choice they could not obtain in the ordinary political process, even though they do not always lose. The crucial distinction between failing to win, the worst that can usually happen to liberals, and failing to lose, the best that can usually happen to conservatives, is rarely noted. A reversal of *Roe v. Wade*, for example, would not be a positive victory for opponents of abortion; it would merely leave them free again to fight for their position in the ordinary political process. A victory for opponents of abortion equivalent to the victory gained by proponents in *Roe v. Wade* would require, of course, not merely the reversal of *Roe,* but a decision prohibiting abortion by holding, for example, that the fetus has a constitutionally protected right to life.

Such victories by conservatives in the Supreme Court are, however, simply unthinkable in the American context. We hear much these days about an alleged "conservative" Supreme Court, even though the Court continues to deliver such major liberal victories as its recent decisions invalidating term limits, disallowing the operation of all-male military schools, and invalidating a state constitutional provision that disallowed special rights for homosexuals. For a liberal, a conservative Court is simply one in which liberal victories come less frequently or quickly. A Court that reversed a prior liberal victory, returning the issue to the political process, would be denounced as not merely conservative but reactionary. A Court that regularly gave conservatives positive victories equivalent to those it has given liberals for over four decades would be castigated for usurpation of legislative powers, and demands to end judicial tyranny would soon follow.

How did it happen that the Supreme Court, wielding the power of judicial review, should become in effect the enacting arm of the ACLU? Judicial review was defended by Alexander Hamilton and established by Chief Justice John Marshall, ardent defenders of property rights and economic liberty, on the assumption that it would serve, in the hands of conservative lawyers like themselves, as an obstacle to sudden or radical social change. This is the function it in fact performed during the first century and half of the nations history. The 1954 *Brown* decision, however, worked a radical change. *Brown's* real significance lay less in what it held, as important as that was, than in the change it brought about in popular perception as to the proper role of judges in the American system of government.

The *Brown* decision became effective and enforceable only with the enactment of the Civil Rights Act of 1964, but the glory of starting the civil rights revolution was nonetheless seen as belonging to the Court. Policymaking by the Court supposedly on the basis of principle came to be seen, at least by liberals eager for further "basic social change," as an improvement over policymaking by mere politicians subject to electoral constraints.

If the Court could bring about the end of segregation in the South, altering the basic social arrangement of one-third of the nation, what was it that the Court could not do? And if it could do other great things, why shouldn't

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it? It was inevitable, therefore, that the Court would move on to other achievements. Many of these, such as the creation of a right to abortion on demand, may be less justifiable than *Brown*, but *Brown* nonetheless served to immunize the Court from criticism. To argue after *Brown* that the Court was not authorized or qualified to make society's most basic social policy decisions was only to invite the response, "So, you disagree with *Brown*?" As it was not permissible to disagree with *Brown*, disagreement meant political oblivion and, at least in academia, social ostracism, there could be no response but silence. The result of "playing the *Brown* card" was to make the Court the unchallengeable final arbiter of domestic social policy and to convert judicial review from its intended role as a brake on social change, to a new role as the accelerator and initiator of change.

But why has Congress permitted the Court to become the nations ultimate policy maker on basic issues of social policy? Why has it never in the past four decades taken effective action to reassert legislative supremacy? One reason is simply that judicial activism, by definition, makes the Court the leading actor; the Court's policies automatically gain the advantages of becoming the status quo and of the force of inertia. Opponents of the Courts policies must undertake the burden of trying to change them. For several reasons, including the Senate filibuster, it is much easier to defeat a proposed change than it is to bring it about.

Further, during the relevant decades and until 1994, at least one and usually both houses of Congress were in the control of the Democratic Party. The left-wing of that party shared the Court's policy preferences and knew that the Court was the only means by which they could be enacted into law. Liberal congressmen were prepared, therefore, to defend the Court against any challenge to its power, regardless of agreement or disagreement with the Court on the particular issue involved. It is doubtful, for example, that many congressmen agreed with the Courts racial busing decisions. A measure proposed by President Nixon to restrict the Court's power to order busing was nonetheless defeated in the Senate by means of a filibuster led by Senator Edward Kennedy. Busing is a disastrous social policy, but it is more important to the long range interest of liberalism that no liberal Supreme Court decision ever be overturned. That would only encourage conservatives to believe that more such victories are possible.

The apparent invulnerability of the Courts power derives primarily, however, from the fact that the Court now functions essentially as the mirror and mouthpiece of liberal academia and others of America's intellectual, or at least articulate, class, the class of people whose only tools and products are words. The occupational hazard of people who live primarily in a world of words is a tendency to confuse control of words with control of reality, which in turn permits seeing hope in utopian schemes that to persons more regularly in contact with reality seem absurd. This is the basis of George Orwell's observation that there are some ideas so preposterous that only the highly educated can believe them.

The economist Joseph Schumpeter noted as an inherent contradiction of capitalism that it will serve to produce a prosperity that will cause intellectuals to become alienated and disaffected. Capitalism does not always reward intellectuals in proportion to their natural superiority, whereas socialism involves planning that more closely requires their talents. Whatever the reason, Liberal academics tend to adopt a strongly adversarial attitude toward the values and beliefs of the more conservative and traditionalist average citizen, and liberals tend to be influential disproportionately to their numbers. It is liberals who by definition want to change things, and liberals, therefore, who are most willing to make the effort to assume leadership positions. It is surely this that explains the unfortunate but near-universal phenomenon that the leaders of almost any group, political, religious, academic, are more liberal than most members of the group.

The nightmare of the American intellectual is that the control of public policy should fall into the hands of the American people. In the American context, policymaking by the justices of the Supreme Court in the name of the Constitution, is the only way in which this can be prevented. The American people actually favor such unenlightened policies as capital punishment, restriction of abortion and pornography, prayer in the schools, effective enforcement of the criminal law, neighborhood schools, and so on. The citizens of Colorado recently went so far in a popular referendum, indeed, as to disallow laws granting special legal protections to homosexuals. It was only the Constitution, as interpreted by the Supreme Court, that prevented the people of Colorado from making this policy decision.

As the function of judicial review since *Brown* has been to substitute the policy views of liberal academics for the views of a majority of the American people, the basic function of constitutional law professors has been, in turn, to defend and justify judicial review to the American people. The task is a difficult one. Although government by Supreme Court justices is obviously inconsistent with the fundamental principles of government established by the Constitution, it must somehow be defended as a product of the Constitution. It is not politically possible for defenders of judicial activism to come clean and openly argue, with Plato, that government by philosopher kings is an improvement on representative self-government. Democracy is the norm in American political life, and must be paid lip service even by intellectuals who hold it most in disdain. Further, even if it were possible to defend government by philosopher kings, how is it possible to defend government by lawyer kings?

Judges do not cease being lawyers, professionally trained advocates for any assigned or adopted cause, upon being elevated to the bench and clothed in black robes. They retain the skills and ethical standards of advocacy, which permit the less than total attachment to factual accuracy and logic that is characteristic of their profession. As a result, Supreme Court opinions are often characterized by misstatements of fact and defiance of logic that would not be considered permissible in statements by other public officials.

Policymaking by judges is not favored by liberal constitutional theorists, however, because they consider our lawyer-judges exceptionally knowledgeable or otherwise qualified in making policy decisions. It is favored only because it has since *Brown* reliably pushed social policy choices to the left and can be expected to continue to do so regardless of who makes the judicial appointments. One reason for this is that the judicial landscape, in particular, the view of

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judges as to their proper role, has so changed as a result of decades of hyper-activism since *Brown* that there seems to be no going back. The center has moved so far to the left that a so-called conservative judge today can be to the left of where a liberal judge was forty years ago.

What then can be done to reduce the role the Court has assumed in the past four decades as, in effect, the enacting arm of the ACLU? Means of asserting legislative supremacy over the Court are available in theory, but experience has shown, not in practice. The only real hope conservatives have had to change the direction of the Court over the past forty years was to put conservative presidents in charge of the appointing process. This, too, however, has proven a futile hope. President Franklin Roosevelt needed only one or two appointments to turn the Court completely around and guarantee that the Constitution would never again give the New Deal the least bit of trouble. President Nixon, however, blessed with the extraordinary good fortune of having four appointments, including a replacement for Chief Justice Warren, at the beginning of his term of office, was not able to bring about the overturning of a single one of the Warren Courts major innovations. On the contrary, he produced a Court that went on to new heights of hyper-activism, as in its abortion and racial busing decisions.

Republican presidents supposedly committed to limiting judicial activism made six more consecutive appointments after the Nixon four. Even ten consecutive appointments were not enough, however, to change the direction of the Court. Perhaps Republican presidents have all just been especially inept at making appointments, as in Nixon's appointments of Chief Justice Burger and Justices Blackmun and Powell, Reagan's appointments of Justices O'Connor and Kennedy, President Ford's appointment of Justice Stevens and President Bush's incredible blunder in appointing Justice Souter. Change any one of these appointments for the better and the United States would be a different country. It does not seem likely, therefore, that new appointments will suffice to change the policymaking role the Court has assumed. It is necessary that the role itself somehow be redefined.

The surest remedy for the degeneration of the American system of government into a system of rule by judges is, of course, simply to abolish judicial review. This, however, is unthinkable, even by conservatives who have seen their country stolen from them by judicial review for more than forty years. Even conservatives apparently cannot imagine the country managing somehow to get by without the supervision and ultimate control of Supreme Court Justices. Liberals at least know where their interest lies; conservatives are merely confused.

A much less drastic remedy would be sufficient, however, to bring government by judges virtually to an end. As already noted, the problem is not judicial review as such, but judicial activism which is based almost entirely on the due process and equal protection clauses of the Fourteenth Amendment. The Court has acquired and exercises supreme policymaking power by simply divorcing these two clauses from their historic meaning and treating them as a blanket grant of authority to make itself the final arbiter on any policy issue. An effective and appropriate remedy for the situation, therefore, would be a constitutional amendment restoring the Fourteenth Amendment to what it was intended to be: a federal guarantee of basic civil rights to blacks. Even better would be to extend it to a simple prohibition of all official racial discrimination.

A proposal that constitutional provisions enforceable by judges to preclude popular policy choices should have a definite meaning would not seem to be a controversial one. Realistically, however, the notion that the Fourteenth Amendment will be amended to give it a more definite meaning is little less fanciful than the hope of amending the Constitution to abolish judicial review. It may be useful, however, to point out that there is a remedy for a disease and what it is, even if the patient cannot yet be induced to take it. There should be no doubt, in any event, that our four decade experiment with policymaking by judges has not proven to be an improvement on representative self-government. On the contrary, it has clearly caused the nation great harm. The egalitarian and libertarian policy preferences of the ACLU, so appealing to intellectuals, are inconsistent, unfortunately, with the maintenance of a viable society. No issue facing Americans is more urgent, therefore, than finding an effective means of limiting judicial power. Permission granted to reprint. Previously submitted to the Subcommittee on Courts & Intellectual Property of the Comm. on the Judiciary, U.S. House of Representatives Hearing on Judicial Misconduct—May 15, 1997

NHCCS
PO Box 7104
Nashua, NH 03060
www.nhccs.org
Tel: 603-679-1320 ~ FAX: 603-679-5552

Constitutional Minute
_Donald Conkey

Principle: "Civil liberty" Edmund Burke, the English philosopher, in 1791 said "What is liberty without wisdom and without virtue? It is the greatest of all possible evils; for it is folly, vice, and madness, without restraint. Men are qualified for 'civil liberty' in exact proportion to their disposition to put 'moral chains on their appetites.' ... Society can not exist unless a controlling power upon the will and appetite be placed somewhere, and the less of it there is within, the more there must be without. It is ordained in the eternal constitution of things, that men of intemperate minds cannot be free. Their passions forge their fetters."

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