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5 U.S. (1 Cranch) 137, 175

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What an assignment! Select one moment from constitutional history, extinguish it from memory, and then describe all the consequences, desirable and not, that flow from the destruction of that legal moment. Talk about legal indeterminacy. Of course, *Dred Scott* would be high on my list, but that's too easy. There is a constitutional evil, however, that if eliminated would probably have led to a different result in *Dred Scott* and in many other questionable cases as well. Although I can identify that evil, isolating its specific cause is a more difficult task. I will, therefore, work backwards, first describing the problem and then discussing the legal moment that made it possible.

For most of its history, the Supreme Court has exercised what I will call strong judicial review. The Court has invalidated actions of the political branches and the states even in the absence of clear textual or historical support. Whether one agrees or disagrees that the Constitution prohibits prayer in school, affirmative action, campaign finance reform, hate speech regulations, undue interference with a woman's right to have an abortion, political patronage, the legislative veto, and federal commandeering of state governments (to name just a few modern examples), it is virtually impossible to argue that these decisions were based on unambiguous constitutional text or generally accepted historical accounts. Rather, these cases, like most of the Court's constitutional law cases, are based primarily on prior Supreme Court doctrine and the personal judgments or values of the Justices.

This strong or active model of judicial review can be contrasted with a weak one, under which judges would refuse to strike down a political decision absent an "irreconcilable vari-

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ance" between that action and clear constitutional text or tradition.[1] A good faith application of the "irreconcilable variance" standard by judges would result in a deferential system of judicial review similar to the "rational basis" model the Court has used for ordinary economic legislation for the last sixty years.

The justification for deferential judicial review in a constitutional democracy is easy to articulate. The people agree to fundamental principles limiting future governments and assign the enforcement of those principles to independent political officials such as judges. Under this system, the judges act as agents for the drafters of the fundamental principles. Although there may be "dead hand" objections to such a system, there are also easily identifiable benefits, such as the strong sense of national unity that emerges from intergenerational agreement over shared values and political procedures.

This agency theory of judicial review, however, does not even remotely describe our current system.[2] As already noted, for almost two hundred years the Court has consistently invalidated the political decisions of other governmental units, even where the relevant constitutional text was vague, the applicable history indeterminate, and therefore the agency theory of judicial review unavailable. The justification for this kind of political system is much more difficult to articulate, especially when judges have life tenure and cannot be removed from office when they fall out of step with the people they are supposed to serve.

Would anyone favor calling a new constitutional convention to identify fundamental norms and invite only lawyers and judges? Of course not. But when judges are free to create new constitutional principles and limitations out of hopelessly vague aspirations such as "due process," "equal protection," and "freedom of speech," don't we end up in a similar place? The ultimate resolution (except for the difficult constitutional amendment process) of many social, economic, and political issues, is in the hands of judges who do not operate under any clear burden of proof, who are working with indeterminate text and history, and who often approach these issues with a less than deferential perspective on other political institutions. This is not a good po-

1. The Federalist No. 78 (Alexander Hamilton), in E.H. Scott, ed., *The Federalist and Other Constitutional Papers* 424, 426-28 (Albert Scott & Co., 1894). See also James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

2. See Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 Nw. U. L. Rev. 145, 147 (1998).

litical system unless you are a lawyer (or even better a law professor, and best of all, a federal judge).

This strong system of judicial review has also removed many important social and political issues from meaningful public debate and placed them in an adversarial process which more often than not fails to address the most important factors in the debate. I can't say it any better than Michael McConnell:

> The Court's [constitutional law cases are] . . . typically long on manipulation of precedent and low on intelligible principle.
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> Nor . . . has there been much more moral deliberation behind the curtains. The Justices are far too busy to spend much time thinking about the cases, and their conferences are largely perfunctory. . . . In contrast to the months, even years, that are devoted to major legislative deliberation, the Justices devote one hour to oral argument and somewhat less than that to discussion at conference . . . . The appearance of debate and deliberation created by the opinions is largely a sham . . . .
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> . . . [N]ot only do Supreme Court opinions contain little serious moral reflection, but they serve as an excuse for dispensing with moral reflection at other levels of government. Supporters of a right to abortion do not have to engage in a serious discussion of their position in the state legislatures . . . all they need do is cite *Roe v. Wade*.[3]

Our current system of strong judicial review has also led, not surprisingly, to the imposition of fundamental principles favored by the class of people who usually serve on the Supreme Court—upper middle-class, well-educated lawyers.[4] More often than not, and contrary to what most liberal academics believe, these principles are usually quite conservative. The Supreme Court has a long history of favoring the rich and the powerful over the poor and the downtrodden and has often tried to block important change. Among many examples, the Court has delayed or prevented legislative efforts to alleviate slavery, to improve unjust working conditions with minimum wage laws and maximum hour regulations, to impose a progressive income tax, to eradicate child labor, to decrease job place inequalities due to racial discrimination, to draw legislative districts to include more

3. Michael W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 Yale L.J. 1501, 1537 (1989).

4. Id. at 1537-38. See also Klarman, 93 Nw. U. L. Rev. at 189 (cited in note 2).

minority representation, and to devise campaign finance reform. And, for those who think that the conservative Court died away with the New Deal, the last three of those sets of cases were decided in the past thirty years.

Some people, of course, favor many of the results discussed above and instead would lament the Court's decisions which have furthered more liberal causes. Although these cases have been few and far between, the Court's decisions on racial segregation, abortion, prayer in school, and occasionally free speech have been looked at with favor by the left and have angered the right. Nevertheless, forty-five years after *Brown,* school segregation remains a major problem in most areas of the country; twenty-six years after *Roe,* poor women still face serious obstacles when trying to secure safe timely abortions; and the clear trend in First Amendment doctrine for the last thirty years has been to protect the speech of big corporations, wealthy politicians, and racists. The point is that when the Court tries to force progressive change on an unwilling populace, it is usually unsuccessful and often results in a conservative backlash.[5]

Whether one sits on the left or the right, however, the following is clear: our system of strong judicial review places lawyers, judges, and the adversarial process in which they operate at the forefront of many of the most difficult and controversial social and political issues of our day. Because I don't think this system adequately resolves those questions, the butterfly I would like to stomp is strong judicial review—judicial review not limited to extremely clear violations of constitutional text or tradition.

Is there one specific moment in time to which we can attribute the Court's decision to exercise strong judicial review? Probably not. Government officials tend to assert as much power as they can. Nevertheless, consider what *might* have happened had John Marshall taken a different turn in *Marbury.* When considering whether Section 13 of the Judiciary Act of 1789 unconstitutionally conferred original jurisdiction on the Supreme Court in mandamus cases, what if Marshall had said something along the following lines:

> The applicant argues that jurisdiction is proper because Congress may add to the Court's original jurisdiction. The consti-

5. See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment,* 1990 Duke L.J. 375, 383-85.

> tutional text does not support this construction but neither does it absolutely foreclose it. Because this Court's sole province is to inquire whether there is an irreconcilable variance between an act of the legislature and the Constitution, and because all doubts must be resolved in favor of the challenged legislation, the Court has no choice but to agree with the appellant and find that Congress may add to the Court's original jurisdiction. In reaching this decision, we must be mindful that the legislature has just as much responsibility to consider the constitutional validity of its actions as does this Court and that, absent clear inconsistency, this Court's function is not to substitute its judgment for that of the legislature.[6]

John Marshall's views on federalism expressed in *McCulloch v. Maryland* and *Gibbons v. Ogden,* as well as his description of "arising under" jurisdiction in *Osborn v. Bank of the United States,* have largely survived the test of time. Had Marshall really applied the limited type of judicial review he talked about in dicta in *Marbury,*[7] it is possible that a much more deferential system of judicial review would have emerged. If so, then perhaps we would have a culture in which the Congress and the President take seriously their oaths to uphold the Constitution because the Court is rarely there as a backstop; a culture in which the people take most of the responsibility for living up to our vague foundational values while the Court ensures that clear violations of the Constitution are redressed; and a culture in which those with a progressive vision do not waste their energies trying to persuade nine elite lawyers to see the world their way but instead focus on the people and their elected lawmakers to try and convince them that strong action is needed to remedy society's most fundamental problems.[8] It is past time that we realize that "[j]udicial decisions have the ability to sap the strength of political movements while lacking the ability to ensure much in the way of meaningful social change."[9] That being the lesson of two hundred years of strong judicial review, it is time to re-

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6. To the extent that John Marshall was concerned that Jefferson would not obey a decision in favor of William Marbury, there were of course many ways for Marshall to avoid that result. For example, he could have ruled that delivery was necessary to complete the commission or that Marbury's rights expired when the new Administration came into office.

7. See *Marbury v.* Madison, 5 U.S. (1 Cranch) 137, 179 (1803).

8. See generally Robin West, *The Aspirational Constitution*, 88 Nw. U.L. Rev. 241, 267 (1993).

9. See Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. Colo. L. Rev. 975, 976-77 (1993).

consider whether Alexander Hamilton had it right. Judges should only reverse the judgment of other political institutions if there is an irreconcilable variance between that decision and the Constitution. In all other cases, let the people decide.