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From Constitutional Interpretation to Judicial Activism: The Transformation of Judicial Review in America

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The context for understanding contemporary political debates regarding judicial power is provided by a proper account of the theory and history of judicial review. Judicial review is not the limited power now that it was in 1789; it has been transformed into something new and completely different. It is impossible to understand current debates—such as bitterly contested judicial nominations and the problem of judicial activism—without understanding this all-important shift.

Judicial review has really been three different sorts of power, during three distinct eras of American judicial history.[1] The first or "traditional" period, from the birth of the Constitution until the end of the 19th century, embraced a notion of interpretation based on the "fair reading" of the document and a moderate form of judicial review. The second or "transitional" period, from the end of the 19th century until 1937, maintained the theory of the traditional era while in practice giving birth to a more activist form of judicial review. The third or "modern" period, from 1937 until the present, developed new activist theories of constitutional interpretation and judicial review.

For the first time in several generations, however, there is at least something of a possibility that a new era could be in the offing.

THE TRADITIONAL ERA

The chief features of the traditional era can be seen most clearly by examining its approach to constitutional interpretation and its manner of exercising judicial review.

Constitutional Interpretation. Two of the most striking facts about rules of interpretation during the Founding were the relative paucity of discussions about them and the apparent assumption of widespread agreement on them.[2] Constitutional interpretation was viewed as a special case of the rules of statutory interpretation developed in British law, which were simply common-sense rules for ascertaining the meaning of a document. Interpretation began by looking at the words of the document in their ordinary popular usage and interpreting them in light of their context. That context included the words of the provision at issue and extended to the much broader context

[1] The account of the history of judicial review offered here is drawn in part from the introductory chapter of Christopher Wolfe, *Judicial Activism: Bulwark of Freedom or Precarious Security*, rev. ed. (Lanham, Md.: Rowman and Littlefield, 1997), which itself is based on Christopher Wolfe, The Rise of Modern Judicial Review (Lanham, Md.: Rowman and Littlefield, 1994).

[2] For a different view, see H. Jefferson Powell, "Consensus and Objectivity in Early Constitutional Interpretation: An Unproven Thesis," in 65 *Texas Law Review* 859 (1987). A key question here is whether the very different applications of rules of interpretation, including different ideas as to the "nature" of our constitutional government, by people such as Hamilton and Jefferson demonstrate that the Founders disagreed about the "fundamental" principles of constitutional interpretation itself. See also Wolfe, *The Rise of Modern Judicial Review*, pp. 384–388.

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of the document as a whole, especially its structure and subject matter and apparent purposes.

The intent of provisions was commonly ascertainable from the terms and structure of the document; that is, intent could be grasped by an analysis of the document itself. The document was assumed to be not a mere grab bag of disparate provisions, but a coherent whole, with objects or purposes which could be inferred from it and in light of which it ought to be read. Extrinsic sources of intent, such as contemporary exposition of it by its supporters, were very subordinate forms of evidence to explain the text, not to modify it.

The Founders' rules of constitutional interpretation emerge from a study of the whole range of constitutional issues in the first years of American government, and not merely from judicial instances of it. In the early days, much of the outstanding debate over the meaning of the Constitution occurred within the Cabinet and Congress and in public discussions (e.g., the debate over the constitutionality of the national bank, removal power, the Jay Treaty debate, and the controversy surrounding the Alien and Sedition Acts). While there was certainly a great deal of disagreement about important questions of constitutional interpretation, especially federalism and slavery, the more striking fact is that there was general agreement on the question of *how* to go about interpreting the Constitution and what the rules of interpretation were. That did not eliminate controversy, especially considering the "nature" of the government created by the Constitution. It did, however, limit the range of disagreement and provide generally accepted criteria for resolving such questions. The most fundamental shared assumption was that the Constitution did have an ascertainable meaning given to it by its authors and that that meaning was the end or object of constitutional interpretation: It was authoritative.

This does not mean that there were no provisions of the Constitution whose meanings were unclear. Early constitutional interpreters would not have denied this possibility. The "meaning" of the Constitution in such cases was more a question of limiting the possible readings than of finding the one sole legitimate reading. "Interpretation" in those cases resulted in the conclusion that several readings were plausible, and it (and, therefore, the possibility of judicial review) ended at that point.

Judicial Review. The classic statements of the case for judicial review were *Federalist* No. 78 and *Marbury v. Madison*. The first, and more important, argument presented in both statements flows from reasoning about the nature of a written constitution. A written constitution that contains limits on government must be regarded as superior to ordinary law, for otherwise the limits are illusory. Laws contrary to the Constitution are therefore void. Because "[t]he interpretation of the laws is the proper and peculiar province of the courts" (*Federalist* No. 78), because "[i]t is emphatically, the province and duty of the judicial department, to say what the law is" (*Marbury v. Madison*), and because the Constitution is the fundamental law, judges must, in cases to which the Constitution applies, give preference to it over ordinary laws.[3]

This primary argument is supplemented by Chief Justice John Marshall in *Marbury* with some textual observations. For example, the federal judicial power is extended by Article III to "Cases, in Law and Equity, arising under this Constitution," as well as under federal laws and treaties, which suggests that judges must look into the Constitution rather than confining themselves to the laws. The supreme law of the land, according to the Constitution, includes not federal laws in general, but only those made "in pursuance of" the Constitution, suggesting that laws *not* made in pursuance thereof—laws incompatible with it in some way—are not really law, but rather null and void.

Although judicial review was supported by most of the Founders, it was not the unquestioned power it has become. Today there is controversy about the scope or use of the power, but hardly anyone denies the power itself. In the Founding, on the other hand,

[3] Madison, *The Federalist*, No. 78, p. 395; *Marbury v. Madison*, 1 Cranch 177.

there were some substantial theoretical criticisms of judicial review and significant political action directed against it.[4] A straightforward assertion of *judicial supremacy* (something never attempted) might very well not have won out in the early debate but, in a more moderate form, judicial review did emerge victorious.

The most important argument in defense of judicial review against the charge that it was undemocratic was that the power did not imply the supremacy of judicial will over the legislature, but merely the supremacy of the fundamental popular will over both. Judicial review simply gave effect to the will of the people contained in the Constitution over the more transient popular will represented by the legislature (and executive) at given moments. Thus, the very nature of judicial review kept it quite limited. To the extent that it was undemocratic, that was accounted for primarily by the nation's commitment to the principle of constitutionalism, whereby present majorities are limited by earlier extraordinary majorities.

Early defenders of judicial review also pointed out the limits that flowed from the nature of judicial power. For example, in *Federalist* No. 81, Hamilton argued that the danger of judicial encroachments on legislative power was really "a phantom." Besides the most important external check—the impeachment power of Congress—as grounds for his assertion, he gave these factors: (1) the general nature of the judicial power, (2) the objects to which it relates, (3) the manner in which it is exercised, and (4) its comparative weakness and incapacity to support usurpation by force.

The last point is obvious because judges ultimately depend on the executive for the execution of their decisions; however, the first three points are less obvious. What they refer to is the fact that judicial power consisted primarily of the power to decide individual cases in accordance with law: Judges did not lay down general rules for society, as the legislature did; they did not initiate action but had to wait for litigants to bring cases, and so they received them "after the fact"; they dealt only with a certain range of issues which were susceptible to being presented in the form of a case, and many issues were not eligible because they did not involve tangible rights of particular parties; the form of judicial commands in cases of judicial review was negative—that is, a command to stop doing something unconstitutional, not a command to do something affirmatively. These facets of ordinary judicial power were significant limits on the scope of the "political" power of judicial review. This reflected the fact that judicial review was not an explicit "independent" judicial prerogative, but an implied power derived from its essential task of deciding cases according to law.

Moderate judicial review also acknowledged the republican principle underlying the case for legislative supremacy in the form of a "rule of administration" known as *legislative deference*.[5] Judicial review was not to be exercised in doubtful cases. Only where there was a clear incompatibility between a law and the Constitution would the judges declare the law void. Of course, there were enough varying opinions about when a "clear" violation had occurred to give rise to plenty of sharp controversy over the role of the Court in American politics. (Chief Justice Marshall's opinions on the Contract Clause and the Necessary and Proper Clause, for instance, were the object of considerable criticism, and the Court under his successor, Roger Taney, made the mistake of trying to resolve the slavery issue with the *Dred Scott* decision.) Nonetheless, the scope of disagreement on constitutional issues was confined by the general agreement that judicial review ought not to be exercised in doubtful cases.

The basis for this rule of administration lay in the very grounds for judicial review. The only justification for judicial review in a republican government, in this traditional era, was the fact that the judiciary was enforcing the Constitution rather than its own will. To

[4] For a discussion of these alternatives, see Wolfe, *The Rise of Modern Judicial Review*, Chapter 3.

[5] James Bradley Thayer calls legislative deference a "rule of administration" in his classic article "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harvard Law Review* 123 (1893).

the extent that there was doubt about whether the Constitution was incompatible with a challenged law, there was doubt as to the propriety of judicial review. Judicial review did not consist in *giving* meaning to provisions that were unclear, but rather in enforcing the meaning that could clearly be found in the Constitution.[6] (If constitutional provisions were unclear, the task of choosing how to interpret and apply them was left in the hands of the political—the democratically accountable—branches of government.)

Moderate judicial review also acknowledged limitations derived from the principle of separation of powers, especially in its understanding of the limited authority of Supreme Court interpretations of the Constitution. Classic defenses of judicial review such as *Federalist* No. 78 and *Marbury v. Madison* do imply that the Court's interpretation of the Constitution has a special authority; that is, it is not *just* for the purposes of deciding a given case.[7] But that authority is not rightly characterized as "judicial supremacy."

The best-known historical example is Lincoln's response to the *Dred Scott* case. By denying Congress's power to prohibit slavery in the territories, Taney's decision struck at the heart of the Republican Party's position on the issue, the *raison d'être* of the party, which was built on the notion that slavery violated the nation's most fundamental principles contained in the Declaration of Independence. Lincoln adopted a carefully nuanced position in dealing with the case. First, he noted that the decision itself was binding, but that there was a distinction between the decision and its weight as a precedent or as an authority for the actions of other branches of government. Second, he acknowledged that the Court's interpretation "when fully settled" controlled not only the immediate case, but the "general policy of the country" as well. But, third, he asserted that under some circumstances, the Court's interpretation could not be considered settled or authoritative.

He then spelled out some of the grounds which might undercut the authority of the Court's interpretation: lack of unanimity on the Court, the use of clearly incorrect historical facts as premises, apparent partisanship, and conflict between the decision and legal public expectation and the steady practice of different branches throughout history. Even where these problems existed, the decision might be settled by being affirmed and reaffirmed over a course of years. But to say that the Court's decision on a vital public issue in the context of a single case irrevocably fixes national policy would mean that "the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal." Thus, he argued, members of other branches of government need not feel bound by every Court decision; for example, legislators could feel free to pass another law prohibiting slavery in the territories, hoping (either with or without new appointments to the Court) to secure a reversal of the earlier decision in the event of new litigation.

These limits on judicial review should not obscure the fact that it was a very important power. I emphasize them because they help to clarify the nature of the power. However important it may have been in early American history, judicial review was a different and much more limited kind of power than what it has become, and no discussion of the appropri-

[6] No one claims that this principle was always followed in practice. People of every political stripe can point to some cases where it was arguably violated. But there is a considerable difference between negating a theoretical position or an ideal by falling short of it in some cases and denying it in principle and setting up another theoretical norm in its place. The key question is whether the ideal was so consistently negated in practice by those who espoused it seriously that one would have to consider it an impracticable ideal. I think justices like Marshall generally did live up to the ideal.

[7] Of the two, Hamilton states the power more strongly. Marshall focuses particularly on whether a court should treat a legislative act as controlling the court even when the Constitution prescribes a different rule. Hamilton is more expansive in asserting that "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority" (*Federalist* No. 78).

ate extent of judicial power (especially the Supreme Court's) can proceed well without a recognition of this fact.

Contemporary Critique. This understanding of the early history of judicial review does not generally prevail today. More common is the legal realist view that judges back then were pretty much the way judges are now; that is, the ultimate grounds for their constitutional interpretation, within certain unavoidable constraints, include their own political ideals and preferences, their own conceptions of what is required by the nation's ideals. The history of judicial review, from the legal realist perspective, is the history of courts confronting the central political problems of their day and working out their own syntheses between the Constitution, precedent, and a significant measure of their own political views.

There is no doubt truth in the proposition that all judges are eminently human and that they fall short in some cases of the ideal enunciated by Chief Justice Marshall: that they are to apply the will of the law rather than their own wills.[8] But it is a mistake to focus on particular shortcomings vis-à-vis the ideal and to dismiss the ideal itself. The problem is quite similar to a perennial issue of philosophy: If man is defined as a rational animal, then there are no men, for no man is perfectly rational. The classic resolution of that difficulty was that the definition focuses on the "nature" of a thing, what it is when it is fully developed, even though many, or most, or even all of the particular individuals in the category may not ever be *perfectly* developed.

Some would go so far as to say that early American constitutional interpretation did not merely fall short of the ideal in some cases, but consistently did something quite different. Whether consciously or not, they would argue, the ideal the Founders enunciated was verbal camouflage for what was really going on. How could one argue, for example, that Marshall, that "old Federalist war-horse" as even his admirer Henry Cabot Lodge called him, came down with "Federalist" constitutional interpretation *apart from* his own Federalist convictions?

The response to this claim is simple: Marshall could do it because the Constitution was fundamentally a Federalist document. The crucial linchpin of most legal realist arguments is that the Constitution is a thing of wax, not just because of what judges do *to* it, but because of what it *is*. If the Constitution has no clear meaning, then any interpreter necessarily proceeds by reading something into it. The crucial assumption behind the traditional position, to the contrary, was that the Constitution is a substantive, intelligible document: It has a meaning, and that meaning can be known with some reasonable certainty.[9]

Whether an individual or court was or is right about the meaning of the Constitution is a question that cannot be dealt with abstractly. The Constitution and the particular interpretation offered must be examined. My argument about the traditional era is not that judges and outstanding political figures of the era were always correct in their interpretations. It is that there were generally agreed-on rules of interpretation during that era; that these rules, properly employed, are generally an adequate guide to the meaning of the document; and that where fair interpretation does not yield a clear meaning of the document, a necessary condition for judicial review is absent.

The judicial review of that era is distinctive because subsequent eras saw the emergence of different ways

[8] *Osborn v. Bank of U.S.*, 9 Wheaton 738 (1924), at 866. *Cf.* Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), p. 169.

[9] And, it is worth noting, part of the meaning is that the Constitution says nothing about certain issues. To say that the Constitution says something when it says nothing is as much a misinterpretation as to say that it means A when it means B. This is important because some legal commentators argue that there is a great difference between going *against* the Constitution's provisions and "merely" adding to it. The fact is that adding to it is one way of going against it, changing it.

of interpreting the Constitution: Above all, interpretation became a process of creating new meaning rather than of ascertaining and enforcing an already existing constitutional meaning.

THE TRANSITIONAL ERA

The first fundamental shift in the nature of judicial review came toward the end of the 19th century. The most salient feature of this new era was the use of "substantive due process"—an expansive version of due process (now including the Fourteenth Amendment Due Process Clause that applied to the states) that regulated the substance of law as well as legal procedure—to protect property rights and economic liberty. Between 1890 and 1937, the Court used substantive due process to strike down a great deal of economic regulation at both the federal and state levels. Because the now vague contours of the Due Process Clause provided the judges with an opportunity to read their own economic philosophy into the Constitution, this form of judicial review can fairly be considered an essentially new and activist form.[10]

During this same period of time, the Court, under the influence of the same laissez-faire economic philosophy, struck down laws passed under the authority of Congress to regulate interstate commerce. This interpretation of the Constitution was a more plausible one (relative to the implausibility of substantive due process[11]) because it rested on the clearly implied distinction between interstate and intrastate commerce, with congressional power restricted to the former. It was still doubtful enough, however, clearly to violate traditional norms of legislative deference. Marshall, after all, had maintained that commerce "among the several states" was "that commerce which concerns more states than one," and modern economic conditions have made that a broad category indeed.

The transitional era reached a climax in the 1930s, when the Supreme Court struck down many parts of Franklin Delano Roosevelt's popular New Deal. Roosevelt counterattacked with his Court-packing plan, and in the middle of that battle, it appeared, the Court switched its position.[12] After 1937, buttressed by eight Roosevelt appointments to the Supreme Court over the next seven years, the Court consistently upheld economic regulation against challenges based on both due process and the Commerce Clause.

One of the distinctive features of this first era of judicial activism—the reason why I describe it as "transitional"—was the justices' apparent conviction that they were merely carrying out their traditional task of enforcing the Constitution: according to the terms of *Federalist* No. 78, exercising "judgment" rather than "will." There was little trace of either the argument that what the Court was doing was changing or modifying the Constitution in light of changing circumstances or the argument that the task of judges was fundamentally legislative.[13]

The irony is that the *critics* of the laissez-faire Court were the ones who, despite their apparently deferential stance toward legislative power, had adopted views which would ultimately lead to a more self-conscious theory of judicial activism.

THE MODERN ERA

The roots of the modern era go back well into the transitional era. Throughout the laissez-faire Court

[10] For a description of this laissez-faire jurisprudence, see Robert McCloskey, *The American Supreme Court* (Chicago: University of Chicago Press, 1960), Chapters 5 and 6.

[11] For a critique of the notion of substantive due process, see "The Original Meaning of the Due Process Clause" in Christopher Wolfe, *How to Read the Constitution* (Lanham, Md.: Rowman and Littlefield, 1996).

[12] How much the Court-packing plan can be credited for the Court's switch, however, is a matter of some dispute. See Felix Frankfurter, "Mr. Justice Roberts," 104 *University of Pennsylvania Law Review* 313 (1955), for a convincing argument that Roberts's due process views antedated the Court-packing plan. And in the Commerce Clause area, the author of *NLRB v. Jones-Laughlin* was Chief Justice Hughes, who had written a broad Commerce Clause opinion many years earlier (1914) in *The Shreveport Case*.

[13] For a strongly contrary argument, in fact, see Sutherland's dissents in *Home Building and Loan v. Blaisdell*, 290 U.S. 398 (1934), and *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

period, the Court's decisions had been subject to persistent criticism, and the character of that criticism had crucial implications for the succeeding era.

Origins. One of the reasons that the laissez-faire Court had been able to maintain a traditional theory of judicial review while departing from its practice was its understanding of the Framers, property rights, and the Constitution. Late 19th century admirers of the Framers often played up the idea that the judiciary had been intended to be a bastion of property rights against the attempts of the democratic mob to plunder the propertied. (The kernel of truth in this belief was that the Framers did expect the judiciary to prevent the violation of contractual rights through the constitutional provision which forbade states to impair the obligation of contracts. But this more focused protection of property rights was not equivalent to a Due Process Clause which was virtually a blank check for the judges to strike down regulations of property they considered arbitrary.)

The critics of the laissez-faire Court might have rejected this approach, citing evidence that the founding generation readily accepted the idea that property rights were subject to a broad range of legislative regulations.[14] Instead, the critics accepted the assertion that what the laissez-faire Court was doing more or less conformed to the Founders' desires and expectations. The point of their attack was not that the Court had departed from the original meaning of the Constitution, but rather that the meaning of the Constitution had to be understood in light of the new needs of an era whose circumstances could not have been foreseen by its Framers.[15] It had to be "adapted" to the times.

It is not surprising that the critics took this line. Late 19th century thought was profoundly influenced by the impact of evolutionary thought. Charles Darwin was a major intellectual force of the age. As Woodrow Wilson argued in his book *Constitutional Government in the United States*, the Constitution was made in light of a more Newtonian view of the world, but late 19th century thinkers were more likely to see it in Darwinian terms.[16]

This emphasis on evolution was also a major factor in the developing view of judicial power. A crucial turning point in American thought was the publication in 1881 of *The Common Law* by Oliver Wendell Holmes, Jr. Holmes argued that prevailing views of the common law had not given an adequate account of its historical development. The life of the law had not been logic, he said in a famous epigram, but experience. The most crucial factor in the development of the law was considerations of social policy, what was best for society. Judging was not distinct from legislation, but a different form of it, in the "interstices" or gaps of the law.

This new, "legislative" conception of judicial power was explicitly held to apply to constitutional law and statutory law, as well as the common law. While the former appear to be different at first glance because they involve judicial interpretation of written documents rather than judicial decision in the absence of written law, that is misleading. The common law judge did not act in a vacuum, but rather employed principles from earlier cases that were more or less applicable to the current case. Those precedents were then applied to the case at hand, taking into consideration appropriate differences. Holmes and his disciples argued that constitutions and statutes provided principles to resolve cases, but the task of applying them to particular cases often involved as much indeterminacy as applying precedents did. Defining and applying the principles of written documents, then, involved legislation in the interstices of the law just as common law adjudication did. In fact, it could be argued that the very generality of constitutions made constitutional law an area of

[14] For an argument to this effect, see Gary Jacobsohn, *Pragmatism, Statesmanship, and the Supreme Court* (Ithaca: Cornell University Press, 1977), Chapter 2.

[15] While Supreme Court opinions tend not to be explicit about this important shift, it makes an appearance in Justice Holmes's opinion in *Missouri v. Holland*, 252 U.S. 416 (1920), at 433.

[16] Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908).

unusual indeterminacy, and therefore an area particularly in need of judicial legislation to "fill in the gaps" of the law.[17]

This new approach was the basis for an attack on the conservative, property rights activism. The laissez-faire Court, its critics said, was guilty of "mechanical jurisprudence," thinking that the law—in this case the Due Process and Commerce Clauses—contained within itself the set answer to all problems, good for all times and circumstances. In reality, they said, such "majestic generalities" had to be understood as dynamic rather than static principles, with full recognition of the need to adapt them to changing economic realities. In the free-for-all of 19th century individualism, laissez-faire economic ideas had once been appropriate for the nation's economic life. But times had changed with the development of more complex economic relations (e.g., change of a largely agricultural economy through industrialization, the increasing economic interdependence that transcended state boundaries, the growth of large corporations, the elimination of the frontier as an economic outlet), and laissez-faire economic ideas had become fundamentally outdated. New policies—and new constitutional interpretations—were necessary for a new age.

Ironically, the initial impact of these new ideas about the Constitution—which obscured their long-term implications—was a tendency to be much more deferential to legislative judgments in matters such as economic regulation. The judges' job of adapting the Constitution meant that they should "re-interpret" the Constitution so that legislatures would have wider discretion in dealing with new problems. Laws providing for maximum hours and minimum wages, for example, which had been incompatible with older due process ideas of liberty of contract, ought to be accepted under the new dispensation. The switch of the Court in 1937, then, together with Roosevelt's subsequent appointment of justices committed to such judicial reform, was widely perceived as a blow against judicial activism.

There were hints even earlier, however, that the result might be quite different. If Justice Holmes was generally a great apostle of legislative deference, there was an important exception—freedom of speech. Together with Justice Louis Brandeis, Holmes developed the "clear and present danger test" to evaluate what speech remained unprotected by the First Amendment. The clear and present danger test treated the First Amendment as a strong, but not absolute, "presumption" in favor of free speech. The circumstances under which speech could be curtailed were quite limited—there must be a serious and imminent evil that the legislature had a right to prohibit—and judges would have the ultimate say regarding these issues. In effect, the judges would make the policy judgments on where to draw the line between protected and unprotected speech.[18]

Holmes's approach to free speech, in which justices effectively balance a heavy presumption in favor of free speech against countervailing state interests and decide where to draw the line between protected and unprotected speech, was the harbinger of the modern approach to constitutional interpretation and judicial review.

Modern Constitutional Interpretation. Under the modern approach, judges are concerned less with *interpretation* in the strict sense of the term than with "specifying the application of vague constitutional generalities." Judges do not simply announce what the Constitution says about certain questions; rather, they are, in effect, delegated power to determine what policies will best harmonize the document's allegedly vague presumptions and countervailing state interests. This new, broader view of interpretation is defended as the best way to combine the principle of apparently permanent constitutional principles and the reality of constant change.

[17] For a developed expression of these views, see Cardozo, *The Nature of the Judicial Process*.

[18] For a discussion of the contrast between the clear and present danger test and the original intention of the First Amendment, see Wolfe, *The Rise of Modern Judicial Review*, Chapter 8.

Modern constitutional interpretation requires a reading of certain key constitutional phrases as vague general presumptions or guiding principles instead of reading them as "absolutes" to be construed "literally." The difference between traditional and modern interpretation, then, starts out with differences over the meaning of certain key phrases. Were they intended to have, or do they in fact have, some relatively determinate content that interpreters are to discern and enforce; or were they intended to be, or are they in fact, open-ended provisions, whose content must be determined by courts over time? Modern judges have wrongly opted for the latter approach.[19]

The most important phrases have been the Due Process Clauses of the Fifth and Fourteenth Amendments, the Fourteenth Amendment's Equal Protection Clause, the guarantees of freedom of speech and religion in the First Amendment, and occasionally the Ninth Amendment.[20] Modern interpreters have given the Due Process Clause a very broad meaning: It is a guarantee of fundamental rights against arbitrary deprivation. However, the Constitution does not specify which rights are fundamental and what constitutes arbitrary deprivation; the judges must develop these answers by adjudication over time. Likewise, the Equal Protection Clause guarantees against unreasonably unequal or different treatment; the standard formulation is that people situated similarly must be treated equally. The "interpreter" is left the task of specifying what kinds of different treatment would be unreasonable.

The First Amendment guarantee of free speech establishes the principle that free speech is very important, and it requires state interests justifying restrictions on free speech to be very important ones. The guarantee of free exercise of religion (until an unusual about-face in 1990) meant that religious belief could not be mandated or prohibited and that religiously based action could be restricted only for "compelling state interests."

Interestingly, this same approach can be transferred relatively easily from more general constitutional principles to more specific ones. For example, the Court had effectively killed off the Contract Clause in *Home Building and Loan v. Blaisdell* in 1935, in which it upheld a law fairly close to the paradigm case the Contract Clause was meant to prohibit. It resurrected the clause, however, in 1977 in *U.S. Trust v. N.J.*—but in a distinctively modern form. The Contract Clause more or less explicitly was changed from "No state shall pass any law…impairing the obligation of contract" to "No state shall pass any law…*unreasonably* impairing the obligation of contract."

Thus, the main job of interpretation in the modern era is not so much ascertaining the meaning of the words of the Constitution—the general presumptions are relatively easy to establish—as giving those general presumptions more specific content in the process of applying them to particular cases. The method for accomplishing this application is "balancing." In each case, judges must evaluate (1) the importance of the asserted right, especially in the form in which it is presented in the case; (2) the importance of the state interests said to justify impinging on the right; and (3) whether the state interests justify such impingement upon the right as the case involves. In some areas, modern judges engage in this process with a presumption in favor of the right (i.e., the burden of proof is on the government, at least after a *prima facie* showing that a constitutional right has been restricted in some way), although the frequency and extent of that presumption varies.

The content of the balancing process clearly reveals the similarity between the judges' new duties and what goes on in the normal legislative process. It is not a question of simply applying a determinate principle to facts which fall within the operation of the principle. Rather, it is a question of giving content to

[19] For a discussion of the Fourteenth Amendment's key phrases, see Wolfe, *The Rise of Modern Judicial Review*, Chapter 5. On the Ninth Amendment, see Wolfe, *How to Read the Constitution*, pp. 95–96.

[20] Another phrase that might have been employed more, but for its narrow reading in *The Slaughterhouse Cases*, 16 Wallace 36 (1873), is the Privileges and Immunities Clause.

a vague principle in a case involving its application to certain factual circumstances. This is what Holmes and others referred to as "legislating in the gaps of the law." The major considerations shaping a judge's decisions will be broad notions of what is good public policy—what is most consistent with a broad conception of the Constitution's general "ideals" (e.g., liberty, equality, human dignity).

Features of Modern Judicial Review. The modern approach to constitutional interpretation and judicial review is a fundamental transformation of older notions; it is, in fact, essentially a different power. Some of the implications of that transformation can be seen by comparing some of the corollaries of modern or "expansive" judicial review with the features of traditional or "moderate" judicial review.

Traditional judicial review tried to maintain its "democratic credentials" by arguing that judges were not enforcing their own wills, but simply the will of the people contained in the Constitution. (If this was undemocratic, it was because at one point in history, a popular majority—even though a special kind of popular majority acting in its "constitutive" capacity—had laid down the law that bound future, non-constitutive majorities.) With the emergence of a new form of judicial review more self-consciously legislative in character, that older defense was no longer available. As Alexander Bickel argued after his critique and rejection of *Marbury v. Madison* in *The Least Dangerous Branch*, it was necessary to develop a new and more adequate theory of judicial review. Producing such theories subsequently became a cottage industry in law schools, largely in the service of liberal egalitarian political ideals.[21] Most of them could be fairly characterized as defenses of Warren Court political and social reforms; promotion of further liberal policymaking (as in *Roe v. Wade*); and criticism of later Courts for refusing to extend liberal precedents, or for occasionally engaging in conservative policymaking (e.g., on behalf of federalism and property rights).

Most modern theories of judicial review dispense with the traditional principle of legislative deference. In the traditional era, there were frequent complaints that courts had exceeded their legitimate powers, but there was general agreement on the principle that laws should be struck down only when they clearly violated the Constitution. Twentieth century jurisprudence is different because it is based on a theory of judicial review that, by its very nature, cuts heavily into traditional presumptions of constitutionality. Modern judicial review is precisely the process of giving meaning to the allegedly "open-ended" generalities of the Constitution. Resolving the *ambiguity* of unspecified constitutional content is the *raison d'être* of modern judicial review.

The Court signaled its rejection of legislative deference in *United States v. Carolene Products* (1938). Its famous footnote 4 suggested that "[t]here may be narrower scope for operation of the presumption of constitutionality" under certain circumstances—circumstances which have become the bulk of the Court's business: cases involving specific prohibitions of the Constitution (including the Bill of Rights as applied to the states); the "political processes which can ordinarily be expected to bring about the repeal of undesirable legislation"; and the rights of "discrete and insular minorities" (e.g., religious, national, or racial). These kinds of circumstances were said to call for a "more searching judicial inquiry" and "more exacting judicial scrutiny."[22]

That closer judicial look or "narrower scope for the presumption of constitutionality" turned out to be a presumption of unconstitutionality in many of the modern civil liberties cases that followed. Legislative deference was turned upside down as the Court placed the burden—often a quite heavy one—on government to justify its acts where, on their face, they impinged

[21] Alexander Bickel, *The Least Dangerous Branch* (Indianapolis, Ind.: Bobbs-Merrill, 1962). For some of the better-known theories of judicial review, see Ronald Dworkin, Jesse Choper, and John Hart Ely, discussed in the Conclusion of Wolfe, *The Rise of Modern Judicial Review.*

[22] 304 U.S. 152 (1938).

upon a growing class of rights judged to be fundamental. This reflected justices' growing conviction that the protection of fundamental rights had been entrusted to, and could only be adequately done by, the judiciary. The Court became convinced that, often, minorities could get a truly fair hearing only in the courts. In general, it was said, legislatures are so taken up with the play of various powerful interests that they cannot be expected to be sufficiently attentive to the rights of those who are relatively powerless. That leaves a vacuum that calls for a special judicial role in protecting minority rights.

Traditional limits on the authority of the Supreme Court's interpretations of the Constitution have also been supplanted. *Marbury v. Madison* actually said nothing specific about the general authority of the Court's constitutional interpretation—*Marbury*'s intent was to show that the courts can refuse to give effect to unconstitutional laws in the process of performing their duties. Nonetheless, the reasoning does suggest a certain preeminence of judicial construction of laws, with the Constitution being treated as one form of law: It is, after all, "emphatically the province and duty of the judicial department to say what the law is." Thus, Abraham Lincoln gave an accurate statement of the traditional approach to judicial review when he said that, normally, the Court's interpretation of the Constitution, when fully settled, is authoritative not only for given cases, but as precedent for the future "general policy of the country" as well. Lincoln limited that power, however, in the name of the principle of republicanism: Other branches could be justified by certain circumstances in not considering themselves bound by the Court's interpretation.

Chief Justice Marshall was so successful in establishing judicial review that, over time, Americans began habitually to identify the task of constitutional interpretation with the judiciary and to lose sight of the distinction between moderate judicial review and judicial supremacy.[23] By the 1950s, it was possible for the Court to say, in *Cooper v. Aaron*, that *Marbury* stood for the proposition that "the federal judiciary is supreme in the exposition of the law of the Constitution" and to imply that the oaths of state officials to uphold the Constitution were oaths to uphold the Court's interpretation of it.[24] That view lay behind critical responses to legislative efforts to modify or restrict major controversial decisions of the modern Court, such as *Roe v. Wade*. A particularly striking version appeared in the argument of the plurality opinion in *Planned Parenthood v. Casey* that the Court's very legitimacy is undermined by overturning highly controversial precedents.[25] The influence of such notions of judicial supremacy was especially notable in the hostility that greeted Attorney General Edwin Meese's speech at Tulane University in 1986, which did little more than repeat Lincoln's position.

CONCLUSION

This thumbnail sketch of the history of judicial review provides us with a necessary framework for understanding the contemporary debates regarding the judiciary. Americans are divided on the issue of which form of judicial review is the proper one. Mainstream legal scholarship and client groups that benefit from court activism embrace modern judicial power: the exercise of essentially "legislative" power by courts. An articulate minority of scholars (represented substantially in the Federalist Society[26]), supported by a large number of conservative voters (who have often felt themselves to be on the short end of modern judicial activism), incline toward a more traditional form of judicial review that is limited to enforcement of the clear commands of an intelligible Constitution.

[23] For an interesting revisionist discussion of *Marbury* as an argument for a very narrow form of judicial review, and of the subsequent history of the use of *Marbury*, see Robert Clinton, *Marbury v. Madison and Judicial Review* (Lawrence, Kan.: University Press of Kansas, 1989).

[24] 358 U.S. 1.

[25] *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), at 867–868.

[26] But note that the Federalist Society also includes libertarian and conservative judicial activists. It is by no means unanimous in its adherence to a more traditional approach to constitutional interpretation and judicial review.

The battles over judicial nominations are simply a reflection of this fundamental division. These fights generally pit liberal defenders of judicial activism against conservative opponents who generally appeal to traditional principles that judges limit themselves to enforcing the Constitution. The former, who generally admire Warren Court jurisprudence that gave very short shrift to precedent, have become staunch defenders of precedent, at least as long as it serves their purposes (e.g., regarding *Griswold v. Conn*. and *Planned Parenthood v. Casey*, but not in *Lawrence v. Texas*). The latter are divided on precedent, some recognizing the leading role it played in traditional American jurisprudence, while others radically subordinate it to the fair reading of the text itself. The latter are also divided on what a more traditional approach to constitutional law means with respect to certain issues, such as federalism (the Commerce Clause, federal "commandeering" of state governments, and the Eleventh Amendment); property rights (the Takings Clause); and affirmative action.[27]

What makes this battle so tense is the possibility—inconceivable until recent years—that the center of gravity of the Supreme Court might actually in the near future shift from justices committed to modern judicial review to justices committed to a more traditional approach. Even as the Supreme Court under Warren Burger and William Rehnquist became more conservative with Republican presidential appointments to the Court, it did not move away from its modern approach to judging. Justices like Lewis Powell, Sandra Day O'Connor, and Anthony Kennedy were more politically conservative in some of their decisions, but their general approach to constitutional law continued to be modern.

Justice Antonin Scalia, appointed in 1986, was the first recent Supreme Court justice to adopt squarely a traditional approach (though Justice Rehnquist had preceded him in important ways), and he was joined in 1992 by Justice Clarence Thomas. While predicting the path of newly appointed Supreme Court justices is risky, Chief Justice Roberts and Justice Samuel Alito seem likely to pursue a principled traditional approach to judging. Whether an actual "traditional" Court majority will emerge is impossible to say, since it is largely dependent on the electoral fortunes of the two parties and the outcomes of future nominations, both of which are dependent on many chance circumstances. In the past, it might have been plausibly assumed that the traditional approach to constitutional jurisprudence was a matter of primarily historical interest. It is now clearly an intensely practical issue as well.

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[27] My own view is that the Rehnquist Court, on certain occasions, succumbed to temptations to judicial activism. See "The Rehnquist Court and 'Conservative Judicial Activism'" in Christopher Wolfe, ed., *That Eminent Tribunal: Judicial Supremacy and the Constitution* (Princeton, N.J.: Princeton University Press, 2004).