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Judicial Review in the United States

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THE LEGITIMACY OF JUDICIAL REVIEW

It was a Frenchman, Alexis de Tocqueville, perhaps the most acute observer of American society since our nation was founded, who remarked more than a century ago: "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[1] The judicial role is even more intrusive now, in a decade that has seen judges consider the alleged privacy of papers and tapes produced by the Chief Executive, weigh the validity of laws forbidding abortion, assess the legitimacy of capital punishment and take an active role in the supervision of schools, jails, and a variety of other public institutions.

Those judicial decisions that truly shape American political life frequently are raised as questions of constitutional interpretation. The role of courts in our system of government is based on the fact that the United States as a nation and each of the states that constitute it are governed by written constitutions mandating a division of powers among the various branches of government—executive, legislative and judicial. That division, by its very nature, creates the foundation for the doctrine of judicial review. Because distinctive attributes of the United States Constitution with respect to this doctrine are mirrored by the constitutions of each of the fifty states, generalizations regarding judicial review in the federal courts may ordinarily be applied to state judicial review as well.

The doctrine of judicial review may be briefly stated: the courts are vested with the authority to determine the legitimacy of the acts of the executive and the legislative branches of the government. The doctrine arose in a restricted context and is sometimes understood narrowly: when the decision of a case before a court depends upon the application of a statute or upon the validity of an executive action, the court has the power and the obligation to determine whether that statute or act conforms with the provisions of the applicable constitution. All of the state, as well as the federal

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1. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (P. Bradley ed. 1945).

courts, are bound preeminently by the federal Constitution, whose authority is supreme. A constitutional statute controls the court's decision. An executive act, once determined to be unconstitutional, will be set aside, and may even give rise to a claim for damages. The courts have, however, asserted the power of judicial review broadly. If the validity of an executive action is challenged in litigation as violative of a controlling statute, it is equally the duty of the judiciary to decide whether or not the executive action is invalid under the statutory mandate.

For convenience, I will direct my attention in this essay to the role of the federal courts with respect to the United States Constitution, although similar observations are of course pertinent when state courts consider the validity of state statutes or actions of a state executive under the federal Constitution and the relevant state constitution. The basic tenet of judicial review is that, where applicable, the provisions of the United States Constitution must control judicial decision-making. Chief Justice John Marshall first addressed the question whether the Congress, as the federal legislature, has the power to enact a law contrary to the provisions of the Constitution. In *Marbury v. Madison*,[2] Marshall wrote as if the answer were self-evident; the Chief Justice asserted as a "proposition too plain to be contested"[3] that the Constitution is paramount and a legislative act contrary to its mandates is not law. Some still do not agree with the early Chief Justice's answer. They would say that the acts of legislative bodies or of the executive are themselves the law of the land. If these acts conflict with the Constitution, then the people—and the courts—must abide by the later wisdom.

However, the very fact that a written constitution has been adopted seems to buttress Chief Justice Marshall's view. The expression of popular will in the particular form of a written constitution would appear to be valueless if a lawmaker may defy the written words.[4] The writing itself suggests permanence and timelessness; it underscores the primacy of the Constitution in delimiting the powers of each branch of government. The Constitution must control if the limits it imposes on the branches of government are to be given effect.

The next question to be addressed was troublesome in 1803, and, to some, it is still vexing today: in whom lies the power to determine that a statute or an executive action violates the Con-

2. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
3. *Id.* at 177.
4. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 3 (1962).

stitution? The legislature might undertake the task, as might the Chief Executive, or juries at trial, or the public at the polls through their ballots. Chief Justice Marshall argued that the power is inherent in the judiciary, originating in its duty to decide cases arising under the Constitution. This duty implied that the courts have the responsibility to examine and apply that document. Additionally, the Constitution limits the powers of the legislature; according to Marshall, these strictures must be enforced by a body other than Congress. It would be insupportable, Marshall suggests by implication, that each branch of government should construe the Constitution for itself in regard to that branch's own functions. If a court must apply a statute of Congress to a particular case, it follows, in Marshall's view, that the courts must determine whether Congress had the power to enact that statute. Furthermore, since judges take an oath to support the Constitution, they cannot be expected to uphold laws repugnant to it.

The degree of popular acceptance enjoyed by the doctrine of judicial review cannot be attributed entirely to the persuasiveness of Marshall's argument. It is marred at points with well-noted sophistry.[5] First, his decision in *Marbury* that Congress could not, conformably with the Constitution, grant to the Supreme Court the power involved in that case was itself a construction of the Constitution by one branch—the judiciary—interpreting its own functions. Marshall failed to make clear why courts should inherently enjoy the privilege of construing the Constitution in regard to their own function while the Congress should not. Our legislators and executive officers take oaths to support the Constitution that are every bit as compelling on their face as the oath of the judiciary. On that basis the other branches would appear to be entrusted equally with the task of constitutional interpretation. The other branches do routinely interpret the Constitution in the course of legislating and administering the law, and those interpretations, though often tacit, prevail in the working of government unless and until a successful challenge is brought in a court.

Some have found a rationale for judicial review in the text of the supremacy clause of the federal Constitution. That clause provides:

5. The legitimacy of judicial review of Congressional action may not have been controversial at the time Chief Jutice Marshall wrote, and may not have required an air-tight defense. The power of judicial review was asserted or assumed in a number of statements made during the Constitutional Convention itself. Similar statements were made to ratifying conventions in the thirteen states. *The Federalist Papers*, written to persuade the people of New York to ratify the proposed Constitution, state that the power exists, and argue in favor of it. *See* references to these and other views supporting Chief Justice Marshall's decision in A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 15 (1976).

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[6]

In specifying what shall be the "supreme Law of the Land," the clause includes "[t]his Constitution" and "Laws made in Pursuance thereof." If "in Pursuance thereof" means "conformably with," it follows that laws not conformable to the Constitution are not supreme and must, under the authority of the Constitution, be declared null. But this observation only poses again the unanswered question: who is to decide whether a law conforms to the Constitution?

The supremacy clause, however, does supply another source of support for judicial review of legislative and executive actions because of that clause's implications for the structure of American federalism.[7] Though our states are united, they still retain wide areas of sovereignty. State law is the ordinary source of criminal law. In addition, state law provides most of our private civil law, typically regulating the ownership and transfer of property, personal status, marriage and divorce, commercial transactions, and nearly all of the daily affairs both of individuals and of business. Nevertheless, the Constitution imposes restrictions on what the states may do; for example, it explicitly prohibits the states from passing certain types of laws, such as ex post facto criminal statutes.[8] The constitutional grant of powers to the federal government in some areas impliedly denies control over those areas to the states. However, the inhibition on state action may prove to be only partial, as is the case in the field of admiralty law.

Due to the supremacy of federal law over state law, as dictated literally by the supremacy clause, and as required functionally for the growth and stability of a national union, it was essential to have some method of deciding what state legislation was forbidden. To leave the question to the individual states would have placed the national interest in the hands of parochialism. National conformity in areas where it is constitutionally ordained would have been defeated, not only to the prejudice of legal doctrine, but also to the detriment of free trade and the easy movement of people and ideas. The doctrine of nullification, the theory according to which the states may ignore federal action they deem unconstitutional, died

6. U.S. CONST. art. 6, ¶ 2.
7. *See generally* A. COX, *supra* note 5, at 19-23.
8. U.S. CONST. art. 1, § 10.

only with the Civil War. Had this theory been adopted, it would have undermined the progress of American nationalism. Although it was necessary that the mechanism for review of state law be federal, it would have been impractical to leave to Congress, a legislative body, the decision as to which of a multitude of state statutes did or did not transgress constitutional mandates. Litigation being the most practical method for uncovering conflicts between state law and the Constitution, federal courts became the natural repository for ultimate constitutional review of state action.

It has been argued that judicial review of federal statutes and executive actions might have been accepted by the other branches of government as a kind of "fair play" equivalent, in recognition of the necessity for federal judicial review of state action.[9] In fact, given the overwhelmingly greater frequency with which the federal power of judicial review has been applied to state, as opposed to federal action, this concession by Congress and the executive, if genuine, would appear minor indeed.[10]

There are doubtless other reasons for the popular acceptance of the doctrine of judicial review. One is a historic distrust, embodied in the Constitution itself, of the legislature and of the executive. As pointed out by one writer, the institution of judicial review is a powerful countermajoritarian force:

> Many of those who have talked, lectured, and written about the Constitution have been troubled by a sense that judicial review is undemocratic. Why should a majority of nine Justices appointed for life be permitted to outlaw as unconstitutional the acts of elected officials or of officers controlled by elected officials?[11]

Alexander Hamilton, a member of the Constitutional Convention, supported judicial review in *The Federalist*,[12] a series of papers

9. A. Cox, *supra* note 5, at 23.

10. The most thorough survey available indicates that, since the Supreme Court's 1789 term through its term commencing on October 1, 1975, the Supreme Court has declared 102 acts of Congress unconstitutional, in whole or in part, as compared to 873 state constitutional and statutory provisions plus an additional 98 local ordinances, all held unconstitutional on their face or as administered. In the four terms between October, 1972, and July, 1976, the survey shows 9 acts of Congress, 77 state laws, and 5 ordinances held unconstitutional by the Supreme Court. THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION, S. DOC. NO. 82, 92d Cong., 2d Sess. 1597-785 (1973), *supplemented by*, S. DOC. NO. 200, 94th Cong., 2d Sess. S187-203 (1977) [hereinafter cited as THE CONSTITUTION].

11. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

12. A. HAMILTON, J. JAY & J. MADISON, THE FEDERALIST No. 78 (Modern Library ed. 1937).

published to gain support for ratification of the Constitution. Hamilton argued that popular sovereignty itself belied the notion that judicial review was undemocratic:

> [Judicial review] only supposes that the power of the people is superior to both [the legislature and the judiciary]; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than by the former.[13]

Even if judicial review does not imply judicial supremacy, it does imply a purposeful distrust of pure majoritarianism. The Constitution creates three branches of government; it makes none supreme. It imposes an elaborate set of checks and balances against the usurpation of absolute authority by any branch. Separation of powers, an organic feature of the Constitution, serves the ends of a society that wishes to be democratic, but not absolutely so; it limits the roles of the several branches of government and protects the citizen himself, as well as the branches of government, against unlawful encroachments from any source. "The root idea of the Constitution is that man can be free because the state is not."[14] As Mr. Justice Brandeis has said:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of govenmental powers among three departments, to save the people from autocracy.[15]

The regard for judicial review may also imply popular acceptance of the notion that the court is institutionally better equipped than is the executive or the legislature, to fulfill the role of supreme arbiter of the Constitution. This idea is only instinctively grasped and is seldom fully articulated by the public. The Court is not merely countermajoritarian, it is also insulated from democratic impulse. The very purpose of a constitution is to ensure that certain enduring values prevail despite the vacillating moods of the moment, and that certain rights and privileges be provided even where they are unpopular. Democracies, of course, flourish elsewhere in the world without judicial review. American public acceptance of judicial review depends more on the nation's historical experience and on

13. *Id.* at 506.

14. Rostow, *supra* note 11, at 195.

15. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

the nature of the Constitution of the United States than on any inherent superiority of courts in exercising the ultimate interpretational function.

The Supreme Court itself has helped to secure acceptance for judicial review through the recognition of significant limitations on the doctrine, including those limitations imposed by the Constitution, as well as some limitations created by the Court. Because the Constitution restricts the jurisdiction of the Court to "cases and controversies," the Court has held that it may not render advisory opinions,[16] pass on the constitutionality of legislation in advance, or decide moot issues. It may not act as counsel to Congress or to the President; it passes on constitutionality only when necessary to the decision of a case pending before it. The Court has derived further limitations to judicial review; for example, the Court will not rule on what it calls "political issues." This limitation is not a bar to the Court's review of all politically sensitive issues, such as whether states may proscribe abortions or whether the *New York Times* may be enjoined from publishing the Pentagon Papers. Rather, the Court has held that those questions deemed to be entrusted by the Constitution to another branch of the government for final resolution are by the Constitution itself put beyond the scope of judicial review.

Professor Charles Black, Jr. has noted that judicial review enables the Court not only to restrain legislative and executive action but also to perform the function he calls a "legitimizing one."[17] When the Court strikes down the action of another branch, it is restricting the operations of that branch; but when it upholds the constitutionality of that conduct, it validates the statute or action involved. This validation, however motivated, is significant because the American symbol of nationhood is the Constitution, and no legitimation is greater than the imprimatur of the Supreme Court, as the concrete embodiment of the Constitution.[18]

This function of the Supreme Court underscores the Court's stabilizing influence, the disruptive potential of judicial review notwithstanding. As the late Professor Alexander Bickel, a leading constitutional scholar, observed, the Court is: "seen as a continuum. It is never like other institutions, renewed at a single stroke. No one or two changes on the Court, not even if they include the advent of a new Chief Justice, are apt to be as immediately momentous as a turnover in the presidency."[19] Bickel also noted that "[c]ontinuity is

16. State practice, notably in Massachusetts, does not always follow this doctrine.
17. C. BLACK, THE PEOPLE AND THE COURT (1960).
18. A. BICKEL, *supra* note 4, at 31.
19. *Id.*

a chief concern of the Court, as it is the main reason for the Court's place in the heart of its countrymen."[20]

This discussion of the legitimacy of judicial review has focused chiefly on the Court's interpretation of legislative acts. The growth of bureaucratic government and the burgeoning of the federal executive branch suggest that the role of the federal judiciary in reviewing the constitutionality or statutory validity of executive actions, federal as well as state, will increase. The Watergate cases demonstrate the profound importance of this function, and the Court's willingness to face up to it. However, time and further study will be necessary before we fully understand whether the rationales so long accepted with respect to judicial review of congressional acts can be generalized with respect to the review of executive functions as well. In considering this problem, one might question whether, had the Supreme Court enjoined Abraham Lincoln from fighting the Civil War, history would have looked kindly on the President for obeying that injunction.[21] In some instances, for example in the case of Japanese confinement during World War II, the Court has found it comfortable not to interfere with executive action that it might, in more placid times, have considered invalid.[22]

The viability of the doctrine of judicial review, as applied to any branch of the federal government or to the states, depends upon a consensus of respect for the Court. The Court has no power to enforce its decrees against the executive; it relies on the executive to enforce its decrees against all others. It possesses:

> neither the purse nor the sword. Constitutionalism as a constraint upon government depends, in the first instance, upon the habit of voluntary compliance and, in the last resort, upon a people's realization that their freedom depends upon observance of the rule of law. The realization must be strong enough for the community to rise up and overwhelm, morally and politically, any notable offender.[23]

There is yet another reason why the courts' role in constitutional interpretation is of the greatest importance. I reach it last because it raises what, for judges, is the most perplexing methodological problem posed by a system of law that is governed by a written constitution—the problem of giving contemporary meaning to a purportedly timeless, but largely unspecific statement

20. *Id.* at 32.

21. Professor Charles Black, Jr. of Yale Law School made this point, and I am happy to acknowledge his priority.

22. Korematsu v. United States, 323 U.S. 214 (1944).

23. A. Cox, *supra* note 5, at 7.

of general principles. Particularly in the first ten amendments, ratified by each state as a single package between 1789 and 1791,[24] the Constitution employs general and sweeping clauses. In areas where the Constitution is specific, for example, where it requires that the President be thirty-five years of age, the prerogative of constitutional review imparts little power to the interpreter. However, a limitation that Congress shall make no law that abridges the freedom of speech or of the press, is not by its nature capable of precise application. No computer can determine with unerring accuracy whether a person has been deprived, as the Constitution forbids, of life, liberty or property without due process of law. Such a provision demands a mechanism for interpretation that will give it operative meaning. The inherent necessity for interpretation that such clauses embody generates obvious difficulties; the duty to interpret and the power to execute that duty are attended not only by grave responsibilities, but also by intricate problems of divining the significance to be given mandates that are almost oracular.

THE JUDGE'S APPROACH TO JUDICIAL REVIEW

I have so far discussed the legitimacy of judicial review and, by implication, some of the responsibilities attending that process. How a judge confronted with the necessity of deciding a constitutional issue approaches its resolution, like the broader riddle as to how a judge decides any perplexing case, is probably an unanswerable question. There are perhaps some judges, only a few I hope, who secretly decide merely on the result they would like to reach for political or personal reasons, and then find some plausible rationale for it. Even these judges may be hard pressed to know the ultimate reason why they behave as they do.

Most judges, however, consider that it is part of their task to reach a conclusion based on comprehensible logic and on factors that may in a juridical sense properly be weighed, and then to set forth both process and conclusion in a written opinion. This written opinion is of particular importance in our judicial system that, like our society, celebrates the individual. Each judge joins in the opinion as an individual. If he agrees with the result, but differs with the rationale, he may write a separate concurrence. If he differs with the result, in whole or in part, he may dissent. In any event, each judge states in some way the thought processes that make a certain result

24. Ratification of the first ten amendments required approval of three-fourths of those states that had entered the union prior to their adoption. Three original states, Massachusetts, Georgia, and Connecticut did not in fact ratify the Bill of Rights until 1939. THE CONSTITUTION, *supra* note 10, at 25-26 n.2.

appear to him to be legally correct. It is impossible at this stage of psychological knowledge for any of us to know definitely whether this process masks from even the most dedicated judge the operations of his subconscious and makes his opinion the mere rationalization of a result-oriented decision, based on bias or sheer emotion. Nor is it possible to know whether this process is based on judicial reasons not fully articulated, or whether the exposition given by the judge is ornamentation rather than a true account of the process.

Let us assume that the judge is conscientious and faithful to at least some sound jurisprudential doctrine. Not only does he believe that the case requires a considered decision, but he also regards the duty to explain his decision in a written opinion as one calling for honesty and candor. On this basis, we can review the interpretational methods open to him, attempt to discern how the judge's awareness of his responsibilities affects his use of those techniques, and try to convey a sense of what judicial review requires of the jurist-reviewer.

Among American scholars, lawyers, and judges, profound differences exist concerning the proper approach to constitutional interpretation. To some extent, these differences are matters of emphasis, rather than of insistence or disavowal. At the poles of the debate, however, are two basic views, a comparison of which may be helpful.

One set of commentators urges a principally literal and historical reading of the Constitution. Justice John Harlan, one of our great conservative judges, represented this point of view; he argued that the Supreme Court should be guided by the express intent and understanding of the men who prepared the Constitution in Philadelphia almost 200 years ago. Change should be left to the process of amendment.

Even a literal reading of the Constitution together with the historical evidence of the intention of the framers may, of course, lead different readers to different conclusions; nevertheless, the standard by which any result should be measured under this theory is rooted somewhere in the past. This approach recommends itself in constitutional theory, as it does also in the interpretation of codes, contracts, and other legally important documents, because we must naturally assume that one motive for reducing legal obligations to writing is the desire to express controlling principles as clearly and as unalterably as possible, avoiding a continual quest for elusive precepts.

Opposed to the historical method of interpretation is the so-called liberal view of the Constitution, an approach that seems largely

to have prevailed in the last quarter century. This view holds that the written Constitution embodies principles that may evolve, and indeed transform, in the light of changed events. This school accommodates many different and conflicting attitudes. It includes activists who would reflect in every judicial decision the result they think that contemporary needs demand, and it embraces those who view constitutional flexibility as one of gradual accommodation of fundamental principles to changing social and political conditions. There is extensive literature discussing the evolutionary method of constitutional interpretation;[25] indeed, one liberal scholar, Professor Charles L. Black, recommends the accommodation of change as a kind of faithfulness to a timeless political system that the Constitution mandates. Professor Black advocates a departure from the basic method of "purported explication or exegesis of the particular textual passage considered as a directive of action," and the adoption of a method of inference from the structures and relationships created by the constitution in all its parts or in some principal part."[26]

These opposed views of the Constitution and of constitutional interpretation do not, however, each result in a pattern by which the decisions of judges can be predicted, given a knowledge of a judge's political beliefs and jurisprudential philosophy. It is impossible to say boldly that, the more activist a judge, the less inclined he is to adopt the fetters of judicial restraint in decision-making; nor is it possible to conclude that judges more resistant to change are likely to resist not only liberal constitutional interpretation, but even decisive consideration of constitutional issues themselves. Such sweeping generalizations offer no sure basis for forecasting the decision of the judge.

A literal reading of the Constitution may not result in what has been called "strict construction," which in Nixonian terms meant "political conservatism." Justice Black's precise reading of the words of the first amendment led him to opinions of the most liberal sort. That amendment says, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." Justice Black understood this to forbid any statute or rule of decision that would attach unfavorable legal consequences to speech; thus, he would have held unconstitutional all actions for damages for defamation of character. The type of conservative admired by so-called strict constructionists would reach exactly the opposite conclusion.

25. For a recent book attacking the evolutionary method of constitutional interpretation, *see* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977). For a dramatically different point of view, *see* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

26. C. BLACK, *supra* note 25, at 7.

Even with respect to questions without obvious emotional impact, the problems of literal reading may divide a court. Let us take as an example the following constitutional provision: "No state shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ."[27] In *Northwestern States Portland Cement Co. v. Minnesota*,[28] the Supreme Court held that the net income from the interstate operations of a corporation organized in one state might be subjected to taxation by the various states in which the corporation does business. Thereafter, a number of states agreed to share information and act together to determine the tax liability to each state of such multi-state corporations.

In February, 1978, the Supreme Court considered the constitutionality of this agreement in *United States Steel Corp. v. Multistate Tax Commission*.[29] The Court immediately acknowledged that the constitutional provision quoted, read literally, made the interstate agreement invalid. However, if the clause were read in this fashion and applied to the utmost limits, it would forbid any kind of contract between the states, including any sale of property, any informal ageement, and any mutual cooperation based on agreement. The "Compact Clause could not have been intended to reach every possible interstate agreement."[30] Therefore, it became necessary to construe its terms by reference to the object sought to be achieved by the clause. The Court concluded that the clause forbids only those agreements that have an adverse impact on the federal structure, as discerned by the Court.

Of course, the clause does not by its own terms thus restrict its applicability. It is categorical. Even the two justices who dissented in *United States Steel Corp.* conceded that many interstate agreements are legally effective without congressional consent. Their view would invalidate this compact because it was so complex and had such a potential effect on non-compact states that congressional sanction was required. Thus neither the majority nor the dissent was willing to be confined to the text of the Constitution even though it appears clear on its face.

Hence, we perceive a willingness by justices of different views to look beyond the precise words of the Constitution. This does not mean abandonment of the text. In *United States Steel Corp.*, the Court was guided by the purpose of the constitutional clause, the structure of the federal-state relationship involved, and the implications of its decision with respect to state actions that might be

27. U.S. CONST. art. I, § 10, cl. 3.
28. 358 U.S. 450 (1959).
29. 434 U.S. 432 (1978).
30. *Id.* at 468.

beneficial to the state and helpful, or at least not harmful, to the federal polity. We will return to some of these factors in a moment.

Judges must achieve some balance between iron literalism and absolute accommodation to contemporary moods. Good judgment, moreover, entails a sensitivity to the symbolic, as well as to the functional aspect of a court's constitutional role. People and constitutions ordinarily resist sudden, dramatic change in favor of alteration by gradual evolution. Doctrine should evolve, not spring full-blown from the brows of a majority of nine. There will be only rare instances when it is better to decide dramatically. In those exceptional cases, doctrine, public mood, and surrounding circumstances may dictate, in the words of Macbeth: "If't were done, 'twere better it were done quickly."

Precedent, of course, is an important safeguard; it fosters continuity and confidence. Courts build on prior decisions. Though precedent is not all-commanding, it must be such that the other branches of government and the citizenry are able to act without daily anxiety that the law is quicksilver or that particular decisions are as unpredictable as the throw of dice or the whims of tomorrow's judges. Through precedent, courts benefit from the lessons of prior experience. Yet the Supreme Court has not considered that the rule of stare decisis applies in judicial review. We are guided by the past but not confined by yesterday's errors.

The judge who decides constitutional issues must be impressed by the possible permanence of his decision. One can only speculate concerning the thought processes of those who sit on the Supreme Court, the tribunal whose decisions are the most permanent in our judicial hierarchy. Nevertheless, as all judges know, there is a pervasive difference between decisions of constitutional issues and determinations of the results in ordinary civil and criminal trials. In ordinary civil litigation, it is of some importance merely to resolve a dispute. In the run-of-the-docket case, community peace demands that argument and litigation be ended. In many complex, borderline cases, it is nearly impossible to ordain one result definitively right and condemn another as indubitably wrong. In some situations, we deliberately adopt elastic standards, expecting that judges may reach different conclusions in applying them. One of the desiderata in such cases is merely that a neutral authority reach a fair decision on some reasonable basis. Community welfare is enhanced by the end of ordinary civil disputes, and social order is rarely disrupted by the enrichment or impoverishment of the individuals involved.

Democratic judicial systems all act more carefully in matters of criminal law. Even an ordinary case obviously affects the whole life of the individual defendant. The community's values are also more

directly engaged. Hence, the litigation process in criminal cases tends to be more consciously deliberative and the search for ultimate truth, so far as it may be ascertainable, more serious. However, even in criminal cases involving grave charges, the decision is not usually one that affects a nation's future.

In matters of constitutional interpretation, however, judges do more than adjudicate the results of past conduct; they determine what the legislature or the executive or the courts may or may not do in the future. The result is not merely of prospective impact; it may be unalterable by the democratic process. If a judge interprets a statute in a manner that the legislature disapproves, or reaches a decision that offends the legislative wishes, the legislature may amend the statute or adopt a new one, thus changing the law. Overcoming constitutional decisions that forbid legislative solution, however, by any means other than judicial reconsideration, requires constitutional amendment. This amendment process is so difficult that only in rare instances—sixteen times in our national history—has the basic document, which includes the first ten amendments, been altered.

Moreover, in our federal system, while judges are appointed for life, they are not political ingenues. They have been nominated as a result of a political process, and most have some considerable familiarity with the necessary compromises of our democratic procedures. Such a judge must be conscious that he is neither elected initially, nor is he subject to scrutiny at the polls once appointed. Recognizing his non-elected status, the judge reviews the actions of persons who have some kind of popular mandate: lawmakers, the chief executive, or lesser officials appointed by the executive to whose actions the elective process may respond. The judge must be aware that the *vox populi* has designated others to manage the business of government. He has neither an organized constituency to support him, nor an elective process to ratify or disavow his actions expressly.

Such considerations undoubtedly affect judges' notions not only for what constitutional interpretation is proper, but also of when particular issues are ripe for decision. The jurisdiction of the Supreme Court is today based chiefly on writs of certiorari. This means that the Court must consent to hear most of the cases that it adjudicates, and it does so only on a small percentage of those occasions when its opinions is sought—about eight per cent of the cases.[31] What distinguishes such cases is primarily the importance of the issues they raise. But the denial of certiorari, without reasons,

31. *Symposium—The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 298 (1977).

may itself be a way to avoid hearing issues that the Court simply deems not ready for judicial decision.

Notwithstanding this catalogue of factors militating for judicial caution, the duty of judicial review remains a national imperative to the judge. As Professor Herbert Wechsler has said:

> [Judicial review is] not that of policy or advising legislatures or executives, nor even, as the uninstructed think, of standing as an ever-open forum for the ventilation of all grievances that draw on the Constitution for support. It is the duty to decide the litigated case and to decide it in accordance with the law, with all that implies as to a rigorous insistence on the satisfaction of procedural and jurisdictional requirements . . . .[32]

If judges were paralyzed by the enormity of this task, our constitutional system would break down. The duty must be performed and the results of the process measured ultimately by what each person, making his own assessment of the nation's needs, would call "good judgment."

A good decision, a decision that ought to command respect whether or not it is conclusively correct, ordinarily manifests certain recognizable characteristics. The first might be described as a seriousness of purpose. The logic of an opinion should demonstrate a genuine attempt to understand what the Constitution means. A judge should be self-consciously eclectic where the text is not itself decisive he should consider its historical background and the future implications of all possible decisions. The attempt should be neither to perpetuate an ancestral ideal nor to create a particular future, but to enrich one's reasoning as much as possible by all information relevant to a just result.

A second desirable element comprises both a personal and an institutional selflessness. The process of judicial review is prostituted if the sole criterion for decision is whether a result will serve or retard the judge's personal interests or the values he avows. The relevant standards must be supported, as much as possible, by authority beyond the judge's personal predilections. The aim is to achieve a decision that may justly be called "principled." Professor Wechsler has defined a principled decision as "one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[33] Moreover, the judge must consider what Pro-

32. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959).

33. *Id.* at 19.

fessor Black aptly calls the structural arrangement of government embodied in the Constitution.

This sort of selflessness also includes a judicial respect for the other branches of government. For example, in reviewing executive action, it is appropriate to consider whether the Constitution requires a certain result at all costs and in all events, or whether the invalidity of the action presently being reviewed may be remedied by legislative action to provide some other solution such as, perhaps, some other kind of due process. Thus, the rule that evidence obtained unconstitutionally may not be used in a trial, embodied in *Weeks v. United States*,[34] and in *Mapp v. Ohio*,[35] rests in part on a judicial effort to restrain law-breaking by police officers in the executive department of the federal government and the states. The cases hint, and many scholars teach, that, if the Congress should provide some other adequate solution to police misconduct, the judicial suppression rule might yield. These hints suggest to the judge that, in reflecting on the results of judicial review, he should consider the possibility that the Constitution does not require only one result, but may offer the possibility of several valid approaches.

Another safeguard lies in the future; the true appraisal of the correctness of any judicial decision is not made by judges, by lawyers, or by law professors, but by the muse of history. I have spoken of the near-unalterability of constitutional decisions by non-judicial bodies. Future judges, however, may alter or modify our present efforts. Whether a judge's decision today on the perplexing issues he faces is correct or incorrect cannot be decided by the newspapers, by the law journals, or by scholars who write in the heat and temper of the times. Ultimate judgment lies ahead. History will have little tolerance for even those reasonable judgments that have gone wrong.[36] For those of us who today perform the duty of judicial review, it is possible and necessary to have faith both that we can discern what is correct and that if we are mistaken, other judges may be able in the course of history to correct our errors in a manner denied to those whose actions are irretrievable.

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34. 232 U.S. 383 (1914).
35. 367 U.S. 643 (1961).
36. Josephus, *quoted in* Wechsler, *supra* note 32, at 11.