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The Supreme Court: Hybrid Organ of State

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PERMIT me at the outset to express my appreciation for the invitation extended to me to deliver the 1967 Robert G. Storey Lecture. It is a high privilege indeed to be asked to participate in this series which honors Dean Emeritus Robert G. Storey, whose contributions to legal education and scholarship, dedication to the rule of law and selfless service in the public interest have earned for him a solid and enduring place both in the world of legal affairs and in the community at large.

I have chosen to speak on the United States Supreme Court, an institution which is a continuing subject of discussion, debate and controversy. Because of the authority it commands and the power it wields, the Supreme Court exercises a profound and pervasive influence on many important facets of American life. Even now we continue to hear the reverberations of its decision last June in the *Miranda* case, a decision having enormous consequences on the whole law enforcement process. Although it is not vested with the power of the sword and the purse and was characterized by Hamilton as "the least dangerous branch of the government," the Supreme Court, by virtue of the role it has assumed, is appropriately characterized as a powerful organ of state.

The title of this article might equally well have been put in the form of a question, "The Supreme Court: Judicial Tribunal or Political Organ?" but such a question poses a false disjunctive. The truth is that the Supreme Court is both a judicial tribunal and a political organ of state. In the exercise of its jurisdiction to deal with cases arising under the laws and treaties of the United States, it exercises a familiar role as a judicial tribunal. But it also passes on constitutional questions, and in the exercise of its judicial review function it deals with important policy questions going to the distribution and allocation of governmental powers and the protection of basic rights. These questions deal with fundamental concerns of American life and involve the Court in its relationship both to the other branches of government and to the American people. It is as a policy determining agency that the Court is a political organ, even though in handling constitutional questions the Court’s task in its formal aspects is that of a judicial tribunal engaged in the business of interpreting a written document and acting in accordance with familiar and well-established judicial procedures.

To point up the significance of this thesis, it is useful at the outset to go back to the theory of judicial review under our system and to contrast

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2 *The Federalist* No. 78, at 395 (Everyman’s Library ed. 1911) (Hamilton).
it with a theory which finds expression in significant constitutional developments in other countries. The critical aspect of judicial review is the power of a court to pass upon the validity of legislation and particularly upon the legislation of a coordinate level of the government—a power which assumes that it is the function of the court to have the final authoritative voice on the meaning of the Constitution. Judicial review of the legality of administrative and executive action and of the action of subordinate courts is a common phenomenon of the rule of law in most legal systems of civilized nations. Direct enforcement of rights declared in a constitution is a familiar judicial function. What is unusual is the power of a court to pass judgment on the validity of legislative acts, and thereby assert the ultimate supremacy of the court in the structure of governmental power.

The classical American theory of judicial review, enunciated by Chief Justice Marshall in Marbury v. Madison, is that the power to pass judgment on a constitutional question, including the question of validity of a statute, is incident to the judicial power to dispose of a case. The federal judicial power extends only to the decision of controversies between parties whose concrete and antagonistic interests are at stake. If a statute is relied on as an element of the case, it is the Court's function, as the agency charged with the interpretation of law, not only to interpret the statute but to determine whether it is consistent with the Constitution. The Court has no power to give advisory opinions and it will entertain a suit involving constitutional questions only at the instance of a person whose rights or interests are adversely affected. This is known as incidental review—the power to deal with a constitutional problem only as an incident of the power to decide a concrete case. In short the Supreme Court, according to this conception, is not peculiarly a court of constitutional review—a conclusion further buttressed by the consideration that the Court's jurisdiction extends to other types of cases involving federal statutes and treaties, controversies between states, and diversity cases, and that its jurisdiction for the most part is appellate in character. As Justice Frankfurter once observed, whether a constitutional question reaches the Court depends upon the contingencies of litigation.

The theory and practice of incidental review stands in formal contrast to the theory and practice of judicial review embodied in constitutional systems established in the wake of World War II. I single out for special attention the constitutional courts established in West Germany and Italy and the Constitutional Council established under the contemporary French Constitution. These tribunals are sharply distinguished from the regular judicial tribunals since their peculiar and limited function is to pass on constitutional questions, although the function of the French Constitutional Council is much more limited than that of the constitutional

\[^{3} 5 \text{ U.S. (1 Cranch) 137 (1803).}\]
courts of West Germany and Italy. These courts function according to a theory of direct as distinguished from incidental review (although the latter is not precluded) and the jurisdictional and procedural provisions are designed to facilitate review. For instance, the Federal Constitutional Court of West Germany has jurisdiction to pass on the validity of a statute of the federal government when a proceeding is brought before it by one or more of the constituent states of the federation or by one-third of the members of the Parliament, and to pass on the validity of a statute of one of the states in a proceeding brought by the federal government. This is direct and original jurisdiction in a proceeding instituted by public authority for the sole purpose of deciding constitutional questions. The Constitutional Court also has original jurisdiction in a proceeding brought before it, known as a constitutional complaint proceeding, by a person who alleges that the action of some governmental agency or official has violated his guaranteed constitutional rights.

The function of these constitutional courts is to maintain the integrity of the constitutional order. For example, the German Constitutional Court feels a special responsibility as the “chief guardian” of the constitutional order.

The recognition that a court like this, charged with the power to review legislative enactments, is something other than a regular court and that its power penetrates into areas of vital political concern is evident also in the provisions respecting the appointment and tenure of the judges. In West Germany the appointment and promotion of judges of the regular courts, a part of the civil service system, is made by the Minister of Justice, for life, subject to retirement and removal provisions. The judges of the Constitutional Court, on the other hand, are appointed in turn by the two houses of the Parliament as vacancies occur. The appointments are not limited to persons serving in the regular judiciary, and, except in the case of judges taken from one of the regular courts, are for a term of eight years. The judges therefore owe their appointment and reappointment to the two houses of the national legislative body, one of which distinctively represents the interests of the constituent states. The judges of the Italian Constitutional Court are appointed one-third by the President of the Republic, one-third by Parliament in joint session, and one-third by the
supreme magistracy. They are appointed from the regular judiciary, from university professors of law and from the legal profession. Their appointment is for twelve years and they are not immediately eligible for reappointment. The members of the French Constitutional Council are appointed for a non-renewable term of nine years. Three are appointed by the President of the Republic, three by the President of the National Assembly, and three by the President of the Senate.10

The contrast with our Supreme Court is in many respects a very sharp one. All of our federal judges are appointed by the President, with the approval of the Senate, for life, and cannot even be subjected to a compulsory age retirement limitation. But the more important contrast appears at least on the surface to lie in the distinction between direct and incidental review of constitutional questions, for it is the feature of incidental review practice by our Supreme Court, in keeping with the case and controversy limitation, which lends at least a surface credibility to the idea that this is an exercise of the usual judicial power.

I suggest that this distinction is not as substantial as may first appear. As Professor Charles Haines pointed out years ago, the notion of review of constitutional issues simply as an incident of deciding cases is somewhat illusory.11 The truth is that a substantial body of litigation culminating before the Supreme Court is directed wholly to the end of raising the constitutional issue. The use of the equitable remedy and of the declaratory judgment remedy has greatly facilitated litigation aimed at the very purpose of getting a decision by the Supreme Court on a constitutional matter. Congress has further contributed to this result by giving the Supreme Court a broad discretionary power to choose the cases it will hear and has facilitated the expeditious handling of constitutional cases through the three-judge court procedure.

To be sure, constitutional questions can reach the Supreme Court only through the avenue of a case or controversy initiated by a person with a recognizable legal interest which bears a relation to the constitutional claim he is asserting. It is evident, however, that we are seeing a substantial dilution of the traditional standing requirement. Pursuant to congressional authority, the Attorney General may intervene in a proceeding in a federal court when the constitutionality of a federal statute is challenged12 and he may in certain instances bring suit to assert the constitutional rights of private persons.13 The class suit is being used much more widely. Institutional litigation directed to the end of obtaining decisions on constitutional questions is increasingly common. Such organizations as the National Association for the Advancement of Colored People, the Civil Liberties Union, and Protestants and Other Americans United for the Separation of Church and State are responsible for initiating and financing

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8 CONSTITUZIONE art. 135 (Italy).
9 CONSTITUTION art. 56 (Fr.).
10 CONSTITUTION art. 56 (Fr.).
litigation on important constitutional issues even though the litigation is nominally brought by a private person asserting his own rights.

Some years ago the Supreme Court held that a taxpayer did not have standing to question the constitutionality of federal spending. This proposition, if adhered to, would preclude a suit by a taxpayer to challenge federal grants under various statutes to church-related institutions on the ground that such grants violate the establishment clause of the first amendment. To remedy this situation a proposal is currently being advanced for federal legislation which would authorize taxpayers to challenge federal grants on first amendment grounds. I feel reasonably certain that the Court would uphold such a statute if enacted, and I am sure that one of the considerations would be the importance, from the Court’s viewpoint, of opening up the opportunity to pass on an important constitutional question. Indeed, a familiar argument heard these days is what is the Court’s purpose if not to decide constitutional questions? We are accepting the notion that the Court is the guardian of the Constitution and that we should not tolerate road blocks standing in the way of the Court’s opportunity to decide constitutional issues. As we progress with this idea the old notion that the power to pass on constitutional questions is simply incident to the power to dispose of a concrete case loses much of its substance.

The Supreme Court itself in some instances reveals an impatience with the question of standing and an eagerness to get to constitutional questions. In Engel v. Vitale, where the Court first invalidated a public school prayer exercise on the basis of the establishment clause, the opinion by Justice Black did not even mention the important question of standing. In the later Schempp opinion Justice Clark treated the question briefly in a footnote, and Justice Brennan, sensing the difficulties, dealt with the question at greater length in a footnote. Perhaps we are headed for the day when a person, simply because he is a citizen interested in maintaining the limitations of the constitutional order, will have standing to raise certain kinds of constitutional questions. If this day arrives, some of the illusions attending the strict theory of incidental review will be completely dispelled, and the Supreme Court will be even more distinctively recognized as a special organ for constitutional review.

The theory that in our system of review the decision on the constitutional issue is simply an incident of the power to dispose of a concrete case also loses much of its force when we consider the effect given to a Supreme Court decision. Far more significant than the resolution of a

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20 Id. at 224 n.9.
21 Id. at 266 n.30.
specific controversy is the principle which emerges from the case. Standing on a par with the Constitution itself, this exposition binds all other courts and the other departments of the government and acquires a precedent value within the Supreme Court itself. As Chief Justice Warren said in Cooper v. Aaron, the Court's interpretation of the Constitution is "the supreme law of the land." While, therefore, a decision of the Court is technically binding only on the parties to the case, the significance of the concrete decision is usually merely incidental to the principle which emerges. In dealing with constitutional matters the Supreme Court sits not really as a high court of justice but as the organ of state for authoritative interpretation of the Constitution. This is further evident from the discretionary power of review by certiorari which is exercised through the discriminate choice of cases turning on issues of broad constitutional significance.

It seems clear, therefore, that the function of our Supreme Court in deciding constitutional cases is substantially identical with that of the constitutional court established under other systems. The Supreme Court, like a constitutional court, performs a function which transcends that of the ordinary judicial tribunals because it deals with matters of large political significance—political both in the sense that the Court's work requires it to pass judgment on the other organs of government and in the sense that policy considerations necessarily play a large part in the process of constitutional interpretation.

It is easy to assume that, because the Supreme Court is interpreting a written text and employs the usual procedures of a judicial tribunal in determining constitutional issues, it is performing a regular judicial function. There are significant considerations, however, that distinguish the process of constitutional interpretation. In the first place, when a court interprets and applies either the common law or a statute, it is recognized that the ultimate law making and policy determination resides in the legislature. Judicial interpretation of the Constitution, on the other hand, is final. The judicial process of constitutional law making is not subject to revision except by the formal processes of constitutional amendment. Secondly, the very fact that the organic law is involved suggests a latitude and reach of the interpretative process denied in other areas where the judicial process is at work. Chief Justice John Marshall said that we must remember that it is a constitution which we are expounding, "a constitution intended to endure for ages to come and, consequently, to be adapted to the various crises of government." This is no ordinary statute or legal document. By means of the judicial process the Supreme Court has assumed the task of accommodating the Constitution to new circumstances and conditions, to changes in the deeply felt needs of the times, to evolving conceptions of national policy and values dictated by the political, moral and intellectual climate of the day. The more flexible interpretative

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22 358 U.S. 1, 17-18 (1958).
process has served as a substitute for frequent recourse to the formal amendment process.

Thirdly, the broad formulations of constitutional language, deliberately adopted by the drafters, leave wide discretion to the Court to interpret on the basis of policy considerations. The generality of the text as it bears on very large issues relating to the power of government and to the rights of persons yields no compelling answers. Does the congressional power to regulate commerce include the power to impose a rule of non-discrimination on a restaurant owner who buys his food from out-of-state sources or the power to prohibit the interstate transportation of women for immoral purposes? Does the due process clause protect the fundamental rights and in turn does this clause, in the context of the fourteenth amendment, incorporate the specific guarantees of the Bill of Rights? Does the equal protection clause embody a one man, one vote rule which requires the reapportionment of state legislatures? Does the establishment clause forbid official prayer exercises in the public schools? Does the self-incrimination clause apply to the police station and require the code of rules prescribed by the Court in Miranda to limit the interrogation of suspects by the police? Various answers may reasonably and plausibly be given to these questions. The text is ambiguous. To be sure we are occasionally told that the Court does no more than measure the challenged action against the language in the four corners of the document, and occasionally members of the Court repeat the old, stuffy and bland cliché that what the Court is doing is "required" by the Constitution. Such statements, however, cannot obscure or conceal that these texts mean just what the Court makes them mean and that Charles Evans Hughes went to the heart of the matter when he said that we live under a Constitution but the Constitution is what the judges say it is. Indeed our constitutional law consists for the most part of the judicially created common law of the Constitution.

Of course, the exercise of discretion in constitutional interpretation is not peculiar to the judicial process. The common law develops and continues to develop through a creative and dynamic use of judicial power which admits of a large measure of discretion and which expressly or impliedly takes into account the requirements of justice and the policy and value factors underlying rules formulated by the courts.

The Supreme Court is theoretically free to fashion its own judicial process in dealing with constitutional issues. If it wished, the Court could engage wholly in a process of free decision untrammeled by history and precedent. It does not do so, and this is not surprising for a court consisting of lawyers trained in the tradition of the common law. The Court seeks to minimize its subjective role in constitutional interpretations; it is concerned about its image as a tribunal which interprets and applies the

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55 Addresses of Charles Evans Hughes 185 (2d ed. 1916).
law but does not make it. The Court does seek to minimize the element of subjectivity by recourse to limiting factors which are invoked to restrict and canalize discretion and to emphasize the element of judicial detachment and objectivity. It falls back on the text and on general principles expressed or implied in the Constitution, it relies on precedent, and it has recourse to history to justify its interpretations. Probably no member of the present Court has been more explicit and even vehement in demanding that the Court curb its subjective judgment than Justice Black with his insistence that the Court return to the Constitution. The Court's business, according to him, is to give effect to the Constitution and not to sit as "a bevy of Platonic Guardians," to use the late Judge Learned Hand's phrase, to interpret the Constitution according to the judge's conception of current political and social philosophies.

Yet it is evident that historical considerations play only a limited role in the Court's process. In its momentous decision in the school desegregation case the Court said that the appeal to history was inconclusive and that the real question was the impact of segregated education on Negro children in the setting of contemporary society and in the light of current findings by social psychologists. Religious exercises in the public schools have had a long history, yet this was not enough to preclude the judgment that they were invalid as an establishment of religion. In the legislative reapportionment cases the Court flew in the face of historical precedent and experience in compelling reapportionment on the basis of the one man, one vote principle formulated by the Court in the interpretation of the vague contours of the equal protection clause. Consider also the recent decision invalidating the Virginia poll tax under the equal protection clause and the Miranda decision extending the privilege against self-incrimination and concomitant right to counsel to police interrogation—results in derogation of historically sanctioned policies and established practices.

History, when resorted to as a guide to interpretation, may prove to be slippery ground on which to rest constitutional interpretation, since the interpretation of history is itself selective and subjective. Justice Black's attempt in his dissent in Adamson to prove that it was the historical intent behind the fourteenth amendment to make the Bill of Rights apply to the state loses its persuasiveness in the light of Professor Fairman's scholarly refutation. Likewise, we need only to read Justice Harlan's dissent in Westberry v. Sanders to raise questions as to the historicity of Justice

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37 Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 STAN. L. REV. 5 (1949).
38 376 U.S. 1 (1964).
Black's opinion holding that it was the intention of the framers that the one man, one vote rule apply in congressional districting.

If the appeal to history is inconclusive, so likewise the rule of precedent operates in only a limited way to restrict discretion in constitutional interpretation. Again, generally, courts are not rigidly bound by the doctrine of stare decisis. A flexible use of precedent characterizes American courts, and it may be noted that only recently the Law Lords of the English Parliament, departing from their prior practice, have announced that hereafter they will feel free to overrule precedent when they deem it proper. Yet a special measure of flexibility attends the rule of precedent in constitutional adjudication. The Court has made this explicit. As Justice Brandeis pointed out, it is particularly important that the Court feel free to reconsider and, if necessary, overrule its prior decisions since there is no recourse from them except by the process of constitutional amendment. Moreover, the very role the Court has assumed—maintaining the viability of the organic law as an enduring document—operates as an internal compulsive force to free the Court from rigid adherence to precedent. The overruling of decisions is not a modern phenomenon, but the recent plethora of overrulings is an indication of the freedom asserted and practiced by the Court in fashioning new constitutional interpretations. It is not being suggested that the Court is irresponsible or that it acts capriciously or arbitrarily or that it is unmindful of the importance of stability in the constitutional order. Indeed, in the usual case of an overruling the Court states reasoned grounds for its action: some factors were inadequately considered in prior decisions, or new circumstances force a re-examination of the problem, or the rule of a prior decision has proved unworkable in practice, or the force of a case as a precedent has been eroded by another line of decisions. These are all rational and substantial considerations. But it is also true, and this has clearly been the case in a number of recent overrulings, that changes in interpretation often result from the appointment of a new Justice who aligns himself with a position previously taken only by a minority of a closely divided court. Here the subjective element of constitutional interpretation stands out in bold relief. It is clear that the appointment of Justice Goldberg, later replaced by Justice Fortas, was the prelude to writing new chapters of constitutional law.

Individual Justices do of course differ in the weight to be attached to precedent and the adequacy of the considerations claimed to warrant a departure from prior cases. Basic differences in judicial temperament, in the intensity with which views are held, and even in the conception of the judicial role play their part here. Justices Black and Douglas, from the time of their dissent in Adamson, persisted in the view that the privilege

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against self-incrimination applied to the states, notwithstanding precedent and the Court's affirmation on reconsideration of its earlier position. With this we may contrast, as an interesting study in judicial behavior, the recent statement by Justice Harlan that, although he had dissented in the legislative reapportionment cases, he now felt obliged to accept the authority of those decisions.

Precedent does play a role in restricting judicial subjectivity but it should not be exaggerated. It may well be that the more important role of case law is the use of cases as stepping stones for the further growth and development of the law or to sustain what are essentially new positions. In this positive and creative use precedent plays its most influential role, and here again the discretionary element is significant. A prior case means exactly what a later court makes it mean. As an extreme and atypical example, reference may be made to Justice Douglas' use of the old Meyer case in his Griswold opinion. The Meyer case, resting on the fundamental rights interpretation of the fourteenth amendment, held invalid a state law which by prohibiting the teaching of the German language in private schools was found to be an arbitrary intrusion on the liberties of the children, parents and teachers. Yet Justice Douglas makes it stand for the proposition that government may not, consistently with the first amendment, contract the spectrum of available knowledge! Surely this would have come as a great surprise to Justice McReynolds who wrote the Meyer opinion.

The conclusion drawn from all this is that the process of constitutional adjudication leaves much to subjective interpretation in the sense that the Court is free to decide cases on the basis of policy predilections and value choices which are not explicit in the text. No better illustration is found than the long line of cases interpreting the due process clause of the fourteenth amendment. For years the Court interpreted this clause to protect fundamental rights which had no necessary relationship to the specifics of the Bill of Rights. Justice Black protested against what he regarded as an attempt to smuggle natural law into the Constitution by a process that magnified the judicial choice of the basic freedoms. More recently the Court has been reinterpreting the fundamental rights so as to equate them with the rights enumerated in the first eight amendments. But the recent Griswold case, holding invalid the Connecticut birth control statute on the ground that it interfered with the right of marital privacy, is a clear

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41 "Because judicial responsibility requires me, as I see things, to bow to the authority of Reynolds v. Sims . . . despite my original and continuing belief that the decision was constitutionally wrong (see my dissenting opinion . . .), I feel compelled to concur in the Court's disposition of this case." Burns v. Richardson, 384 U.S. 73, 98 (1966) (concurring opinion).
44 Id. at 482.
indication that the old fundamental rights thinking is still alive, despite Mr. Justice Douglas' attempt to find this right included among the emanations or in the peripheries of other specifically guaranteed rights, and despite Justice Goldberg's reliance on the ninth amendment as a source of unenumerated rights. Justice Black's dissent directed against fundamental rights thinking which is not anchored in the text of the Constitution is impressive. Yet it was Justice Black who spearheaded the modern movement to use the fourteenth amendment as a judicial vehicle for making the Bill of Rights apply to the states. Moreover, the breadth of judicial subjectivity in determining what is a fundamental right is matched by the subjectivity in interpreting what are usually characterized as the specifics of the first eight amendments. When the Court says that the cruel and unusual punishment clause prohibits a state from prescribing penal treatment for drug addiction; or that the free speech guarantee keeps a state from applying its usual rules respecting the practice of law to the activities conducted by a railroad employee's union; or that a right of marital privacy may be distilled from the Bill of Rights; it appears that the old due process idea that a state may not act arbitrarily in limiting the fundamental liberties of its citizens is bobbing up again, but clothed in a different constitutional text. The raiment may be that of Esau but the voice is still that of Jacob. In this connection attention may be called to the new interpretation of the equal protection clause, as in the legislative reapportionment and poll tax cases. Such interpretation suggests that the equal protection clause is now going to render the same service once rendered in a very large way by the due process clause, as a point of departure for protection of judicially formulated policy objectives and value concerns.

In recent years we have witnessed a resurgence of what is often described as judicial activism, a term used to describe the vigorous use of judicial power to advance policy conceptions and protect values which the Court finds explicit or implicit in our constitutional order. To illustrate, I need only mention the long line of cases dealing with racial discrimination, the legislative reapportionment cases, the prayer and Bible reading cases, the cases arising under the first amendment dealing with obscenity and libel, and the whole new development, culminating in Miranda, on the rights of the accused. Indeed, the end of this new wave of activism is not in sight. Waves or cycles of interpretations marking the rigorous use of judicial force to achieve certain objectives are not new to American jurisprudence. During the first half of the nineteenth century a dominant concern of the Court, particularly in the Marshall era, was the legitimation of federal authority and supremacy, and it should not be forgotten that judicial review serves the function both of legitimizing power and of enforcing

restraints on that power. Beginning with the last quarter of the nineteenth century and continuing until the early 1930's, the Court, over the dissents of Justices Holmes, Brandeis and Stone, effectively used its power, chiefly in the name of the due process clause, to advance the implications of a laissez faire economic policy. The main thrust of today's activism is directed to protection of the values and objectives, as the Court sees it, of a free and open society—a society founded on democratic presupposition. The worth and the dignity of the individual, as the important substantive values, and the processes that nourish a democratic order, give a certain coherence to the current movement in constitutional interpretation. The concern for protection of the accused, for protection of racial and religious minorities, for freedom of speech, press, and for the right to vote all evidence a resolution to employ the judicial power in a bold and aggressive way to mould the constitutional order in accordance with the evolving ethos of a democratic society. This in turn means the subordination of other values once deemed highly important. The principle of federalism has assumed a secondary significance with a majority of the present Court. Responding to the centripetal factors evident in our national life, the Court's concern is with national values and standards and the maintenance of federal supremacy. More and more the actions of the states are drawn under the Court's surveillance as manifest in the criminal procedure, legislative apportionment, and prayer cases.

A singular feature of the new judicial activism which distinguishes it from other eras of resolute use of judicial review is the Court's use of its power to fashion creative standards and objectives which make it incumbent upon legislative bodies and other governmental agencies to act in a positive way in order to carry out the Court's directives. Mention may be made in this connection of the decisions forcing legislative reapportionment, the decisions forcing school boards to act in accordance with judicial mandates to integrate school systems, and the Miranda decision with its sets of specific rules designed to regulate the interrogation of suspects. Except for relatively few amendments, the text of the Constitution has remained unchanged. But the Court reinterprets the text according to what it regards as the demonstrated needs of our contemporary society and what Professor Freund in the first Storey Lecture referred to as the "intellectual and moral climate of the age." For all practical purposes the Court does sit as a continuing body of informal constitutional revision.

The new activism has not gone unchallenged in the Court itself. The dissents in the legislative apportionment cases, in cases arising under the first amendment, in the Griswold case and in the criminal procedure cases

53 This Court's apportionment and voting rights decisions soundly reflect a deepening conception, in keeping with the development of our social, ethical, and religious understanding, of the meaning of our great constitutional guaranties. As such, they have reinvigorated our national political life at its roots so that it may continue its growth to realization of the full stature of our constitutional idea.


54 Freund, The Supreme Court in Contemporary Life, 19 Sw. L.J. 439, 440 (1965).
all evidence a concern that the majority is either disregarding principles of federalism well rooted in the Constitution or encroaching on the legislative department or unduly weighing personal liberties at the expense of competing public interests. Justices Harlan and Black have challenged the notion that it is the Court’s role to accommodate the Constitution to contemporary political and social philosophies and thereby to use the judicial power as a substitute for the formal amendment process.

The enormous power inherent in the authority claimed and exercised by the Supreme Court in the name of constitutional interpretation—a power to make policy decisions on vital phases of the whole life of the nation—has from the outset provoked discussion of the legitimacy of judicial review. For nine men to sit in judgment on all the other branches of the government, particularly the legislative branches, is on its face a contradiction of the principle of majority rule as embodied in the political processes of representative government. So viewed, judicial review is itself anti-democratic.

Certainly in a federal system a supreme court serves the indispensible purpose of an umpire in order to preserve the integrity of the federal structure and particularly to assure federal supremacy within the spheres allocated to the federal government. Justice Holmes stated that he did not see how the system could work without judicial review of state action.

But this does not necessarily answer the question of the Court’s supremacy vis-à-vis Congress, or the concerns of the Court in exercising its power,

56 [T]hese decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional ‘principle,’ and that this Court should ‘take the lead’ in promoting reform when other branches of government fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.


The Court’s justification for consulting its own notions rather than following the original meaning of the Constitution, as I would, apparently is based on the belief of the majority of the Court that for this Court to be bound by the original meaning of the Constitution is an intolerable and debilitating evil; that our Constitution should not be ‘shackled to the political theory of a particular era,’ and that to save the country from the original Constitution the Court must have constant power to renew it and keep it abreast with this Court’s more enlightened theories of what is best for our society. It seems to me that this is an attack not only on the great value of our Constitution itself but also on the concept of a written constitution which is to survive through the years as originally written unless changed through the amendment process which the Framers wisely provided. Moreover, when a ‘political theory’ embodied in our Constitution becomes outdated, it seems to me that a majority of the nine members of this Court are not only without constitutional power but are far less qualified to choose a new constitutional political theory than the people of this country proceeding in the manner provided by Article V.


56 O. HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920).
or the kinds of questions it will sweep within its power. Unlike some modern constitutions, the Constitution of the United States does not expressly vest in the Supreme Court the final authority on constitutional questions. In his famous opinion in Marbury v. Madison, Chief Justice Marshall rested the case for judicial review on the normal function of the judiciary to interpret the law, but this reasoning assumes the basic premise that the Constitution is to be treated as ordinary law so far as the exercise of judicial power is concerned. Today we hear persuasive voices raised in defense of the theory and practice of judicial review, but not primarily for the reasons advanced by John Marshall. Judicial review is defended on pragmatic grounds as not only being consistent with, but required in, the interests of furthering the values and goals of a democratic society. A democratic society presupposes more than rule by the transient majority. Respect must be paid to the values and traditions established by past generations also. Moreover, there must be protection of the minority against the majority—a point that assumes great relevancy when we consider the Supreme Court’s role in the civil rights struggle. A democratic society presupposes certain processes such as the right to vote and the freedom of expression on matters of political concern, and judicial review serves the purpose of maintaining these processes. To others it appears that judicial review serves as a useful and needed check on intemperate and hasty legislative action in response to the heat and passion of the day. It forces the taking of a second look by an organ of the government less vulnerable to the forces of emotion and prejudice. Some see the Supreme Court as a vehicle for sensitizing and directing the conscience of the nation. Finally, there is support for the idea that the Court serves a particularly useful function as an organ which can move into a vacuum resulting from the failure of the other branches of the government to deal with problems which urgently require attention. The Court’s bold action in dealing with racial segregation and the legislative apportionment problems are cited as prime examples of the useful function of the Court in dealing with great issues where the other branches have abdicated responsibility.

The new defense of judicial review, resting on a certain degree of skepticism and mistrust of popular democracy and majority rule, parallels the new respect accorded the idea of judicial review in modern constitutions adopted in the post-war era. The new emphasis on the rule of law, on limitation of legislative and executive power and on the protection of basic rights has given enhanced respectability to the idea of a tribunal serving as the guardian of the constitution.

Whatever the rationale to support the theory and practice, Americans

57 5 U.S. (1 Cranch) 137 (1803).
take it for granted that the Supreme Court will exercise this power. We accept the Court as an organ necessary to the constitutional order. If a national referendum were held on whether the Court's power to review legislation should be abolished, the proposal would probably be defeated. Most Americans appreciate and respect the Court's overall contributions to our national life through exercise of the role it has assumed of accommodating the structure of government to the problems and conditions of our day, protecting the basic rights of the person and advancing the ideal of equality under law.

While acknowledging the great contributions made by the Supreme Court to our constitutional order, it is also appropriate to recognize the perils to a democratic society of a tribunal, which, while not amenable to the usual political processes, is nevertheless in a position to make decisions on basic policy questions by wrapping them up in the form of a legal proposition and which assumes the role of accommodating the constitutional order to the political climate and evolving values of our day. Government by what Professor Burgess described as "the aristocracy of the robe," or, to use Judge Learned Hand's vivid phrase, by "a bevy of Platonic Guardians," deciding what is good for the country, does pose a threat to the capacity for self-government.

Any examination of formal restraints on the Court's power points rapidly to the conclusion that of all the tribunals in the world exercising a power of constitutional review, the Supreme Court of the United States enjoys the greatest independence and freedom. Unlike judges of the special constitutional tribunals mentioned earlier, the Justices of the Supreme Court are appointed for life and cannot even be subjected to a law prescribing retirement at a given age. Except for the necessity of the Senate's approval of the President's appointments, the Congress, unlike parliamentary bodies in countries with constitutional courts, has no voice in the appointments. Individual Justices may be impeached, but we can be grateful that the tradition is well established that this procedure is aimed only at flagrant personal misconduct and should not be used as a vehicle for expressing congressional or popular disapproval of the Court's decisions. Congress may limit the Court's appellate jurisdiction, but any such restriction designed to defeat the Court's authority to deal with certain kinds of problems nullifies the purpose of having a supreme court in the judicial system, and its use to deny access to the Court by certain classes of appellants might itself offend constitutional limitations. Congress can manipulate the Court's size as was done in earlier stages of our history, sometimes to insure the right majority, but the fact that the Court's size has been stabilized at its present figure for the larger part of a century and the fate of President Roosevelt's Court-packing proposal indicate that resort to this means of curbing the Court is not likely to occur except under circumstances presenting a constitutional crisis of the first magnitude. The possibility and even the bare threat of drastic action of this

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602 J. Burgess, POLITICAL SCIENCE AND CONSTITUTIONAL LAW 365 (1890).
kind may serve as a restraining influence on the Court. Looking at the consequences, it may well be true that President Roosevelt, in pushing for his Court reorganization proposal, lost the battle but still won the war.

A corrective power is found in the process of constitutional amendment which has in at least several instances been employed to override the effect of judicial interpretation of the Constitution. But our amendment process is a far more formidable one than that of many countries with written constitutions, including countries with constitutional courts. The fate of some recently proposed amendments, designed to override certain decisions by the Court, makes clear that the requirement of a two-thirds vote in both houses of Congress to submit an amendment stands as an effective bulwark against free and easy use of the amendment process to escape the consequences of the Court's decisions.

A survey of these limitations brings to mind Justice Stone's aphorism that the only restraint on the Court is its own sense of self-restraint. What Justice Stone had in mind was a wise, careful and moderate use of judicial power which concedes the appropriate function of the other departments in determining public needs and policy formulation in response to these needs. In recognition of the sensitive aspects of judicial review, the Court itself has formulated a series of self-imposed limitations designed to keep the power of judicial review within narrow limits. But these self-imposed limitations mean exactly what the Court makes them to mean, and an observance of the Court's actions supports the conclusion that they are often honored in the breach. The differences at present on important issues within the closely-divided Court turn on the very issue of how actively the Court should exercise its powers to achieve what may be regarded as desirable constitutional goals. Adherence to the passive virtues is not a distinguishing characteristic of the present Court.

In the end the influence and forces which are most effective are those found in other than formal sources or in the Court's own self-restraint. First, the nature of the process employed by the Court is itself an effective restraint. It deals with constitutional issues as a judicial tribunal and in accordance with judicial procedures. Important policy determinations come before it in the form of issues clothed in constitutional language. This insures the pragmatic determination of a question by reference to concrete facts, consideration of the full range of competing arguments inherent in the adversary process, and above all the reasoned opinion written for all the world to read and to judge. This is the great redemptive feature of a system which permits the solution of momentous questions of national policy by a tribunal of nine men not subject to the usual political restraints. Great issues are resolved by a process of free and open inquiry on the part of a tribunal skilled and disciplined in the art of weighing and arriving at judgment. The freedom of the Justices to write concurring and dissenting opinions is an invaluable feature of this process. It is a process

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63 The classic statement of these self-imposed limitations is found in Justice Brandeis' concurring opinion in Ashwander v. TVA, 297 U.S. 288, 346-48 (1936).
well calculated to expose the competing policy considerations at stake, the false and specious use of precedent, and the adequacy of the reasoning process.

The importance of the Court's process points up the significance of the presidential power of appointment. By the appointment he makes, the President exercises an enormous power over the course of constitutional interpretation. The fact that throughout our history Presidents have taken political considerations into account in making appointments to the Supreme Court is itself evidence of the hybrid political-judicial nature of the Court's task. A President should be concerned with a prospective appointee's political and social philosophy and his sense of values, and it is important that the Court reflect differences in points of view that bear on the questions of basic policy which confront the Court. But it is also imperatively important that the appointee, whether with or without prior judicial experience, bring to his tasks the highly developed skills and discipline of the lawyer in the analysis of issues, the examination of authority, and the identification and weighing of the competing interests.

The second restraining factor is the force of public opinion. The Court exposes its reasoning and judgment to the comments, criticisms and discussion of the legal community, the press, and the general public. Here the issues are and should be debated on their merits. The Court has made mistakes and it will continue to make some mistakes. Its judgments on what are essentially policy questions are properly subject to the kind of criticism directed against policy judgments of the other branches of the government. A decision by the Court may reflect an inadequate appraisal of basic considerations or inadequate weighing of competing considerations. We may consider, for example, the Court's decision last June in the Miranda case, when the Court drew on the privilege against self-incrimination and the right to counsel to forge a series of new rules designed as limitations on the interrogation of suspects by the police. This result was not required by the text of the Constitution. Other options were open to the Court as indicated by the previous treatment of the problem and the dissenting opinions. The decision may appropriately be viewed as a policy judgment by the Court that the protection of the accused against potentially unfair interrogation was more important than the prejudice which might result to law enforcement and public safety from the new rules. Eminent voices have been raised in protest against what are believed to be the unduly restrictive consequences of this decision on the interrogation process. The fact that the Court plunged into this decision while eminent committees of the American Bar Association and of the American Law Institute were studying the problem suggests also that the Court acted prematurely in legislating these new rules. But the essential point is that Miranda is not necessarily a wise or desirable solution, and the fact that this policy decision is clothed in constitutional language should not deter criticism, discussion, consideration of alternative proposals, and support

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for a constitutional amendment that may be deemed necessary to achieve these proposals.

History demonstrates that the Supreme Court is responsive to criticism and to the forces of public opinion. The Court, in terms of formal sources of power, is the weakest branch of the government, and must be concerned about its public image. The reputation it has acquired and the great power it commands in American life depend on the goodwill and respect of the people who are the ultimate source of power. The Court must rely on the persuasiveness and moral force of its judgment to retain this support. It is this same public support that restrains Congress from exercising powers it may have to curb the Court. It is clear then that ultimately the Court’s actions must commend themselves to the intelligence, conscience and good sense of the American people. The Court itself is a teacher and it may lead and help shape the force of public opinion, but it ignores this opinion at the risk of forfeiting the support which is its source of strength.

The Supreme Court is a hybrid organ of state. It combines political and judicial functions. To say that the Court’s decision on constitutional interpretations involve policy and value judgments is not to indicate disrespect for the Court. This is the role it has assumed, and it cannot escape the political implications of its power. Justice Brennan has said that it is important that the public understand the nature of the Court’s task. It is particularly important that the people understand that when the Supreme Court hands down decisions on important constitutional issues, it is not reaching results inexorably commanded by a written text or established by history or precedent but exercising a broad discretion in arriving at what it considers to be the just resolution of the problem. Policy factors and value judgments inevitably play their part in the process. To some it may appear that a frank recognition of the political aspects of the Court’s role is to be avoided since this leads to an erosion or impairment of a popular image of the Court as a disinterested judicial tribunal deciding cases by an objective law found in the language of the Constitution. But no image of the Court should rest on fiction or myth. We do not need to resort to fiction to justify the Court’s function as a court of constitutional review. Other countries, in creating special courts of constitutional review, have more explicitly recognized that these tribunals are to be distinguished from the regular courts. It is perhaps a mark of political sophistication that we permit a tribunal of nine men to exercise such great authority. But it is also the part of wisdom that we understand the Court’s role and function. The Court’s decisions are properly subject to debate and criticism. But let our criticism be rational, temperate and well-founded, and do not let it blur or blunt our appreciation of the difficult problems faced by the Court, the dedication, integrity and patriotism it brings to its task, and the extraordinary contribution it has made to the theory and practice of constitutionalism and to our system of ordered liberty.

Brennan, Constitutional Adjudication, 40 Notre Dame Lawyer, 559, 566 (1965).