Judicial Activism and the Threat to the Constitution

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warned that judicial review would lead to a form of despotism.[2] Notably, the power of judicial review is nowhere mentioned in the Constitution. The courts themselves have claimed the power based on inferences drawn from the Constitution's identification of itself as supreme law, and the nature of the judicial office.[3] But even if we credit these inferences, as I am inclined to do, it must be said that early supporters of judicial review, including Marshall himself, did not imagine that the federal and state courts would claim the sweeping powers they exercise today. Jefferson and other critics were, it must be conceded, more far-seeing.

After ***Marbury***, the power of the judiciary expanded massively. However, this expansion began slowly. Even if ***Marbury*** could be described as telling the Congress what it could and could not do, it would be another 54 years before the Supreme Court would do it again. And it could not have chosen a worse occasion. In 1857, Chief Justice Roger Taney handed down an opinion for the Court in the case of ***Dred Scott v. Sandford***.[4] That opinion declared even free blacks to be non-citizens, and held that Congress was powerless to restrict slavery in the federal territories. It intensified the debate over slavery and dramatically increased the prospects for civil war.

Dred Scott was a classic case of judicial activism. With no constitutional warrant, the justices manufactured a right to hold property in slaves that the Constitution nowhere mentioned or could reasonably be read as implying. Of course, the Taney majority depicted their decision as a blow for constitutional rights and individual freedoms. They were protecting the minority (slaveholders) against the tyranny of a moralistic majority who would deprive them of their property rights. Of course, the reality was that the judges were exercising what in a later case would be called "raw judicial power"[5] to settle a debate over

a divisive moral and social issue in the way they personally favored.

It took a civil war and several constitutional amendments (especially the 14th Amendment) made possible by the Union victory to reverse ***Dred Scott v. Sandford***.

The ***Dred Scott*** decision is a horrible blight on the judicial record. We should remember, though, that while it stands as an example of judicial activism in defiance of the Constitution, it is also possible for judges to dishonor the Constitution by refusing to act on its requirements. In the 1896 case of ***Plessy v. Ferguson***,[6] for example, legally sanctioned racial segregation was upheld by the Supreme Court despite the 14th Amendment's promise of equality. In ***Plessy*** the justices announced their infamous "separate but equal" doctrine, a doctrine that was a sham from the start. Separate facilities for blacks in the South were then, and had always been, inferior in quality. Indeed, the whole point of segregation was to embody and reinforce an ideology of white supremacy that was utterly incompatible with the principles of the Declaration of Independence and the 14th Amendment. Maintaining a regime of systematic inequality was the object of segregation. As Justice John Harlan wrote in dissent, segregation should have been declared unlawful because the Constitution of the United States is colorblind and recognizes no castes.[7]

A half century and more passed before the Supreme Court got around to correcting its error in ***Plessy*** in the 1954 case of ***Brown v. Board of Education***.[8] In the meantime the Court repeated the errors that had brought it to shame in the ***Dred Scott case***. The 1905 case of ***Lochner v. New York***[9] concerned a New York law limiting to 60 the number of hours per week that the owner of a bakery could require or permit his employees to work. Industrial bakeries are tough

this subject was already going forward in the states—it had begun in Hawaii in the early 1990s where a State Supreme Court ruling invalidating the Hawaii marriage laws was overturned by a state constitutional amendment. ***Lawrence*** turned out to be a new and powerful weapon to propel the movement forward and embolden state court judges to strike down laws treating marriage as the union of a man and a woman.

The boldest of the bold were four liberal Massachusetts Supreme Judicial Court justices who ruled in ***Goodridge v. Massachusetts Department of Public Health***[18] that the Commonwealth's restriction of marriage to male-female unions violated the state constitution. The state legislature requested an advisory opinion from the justices about whether a scheme of civil unions, similar to one adopted by the Vermont state legislature after a like ruling there, would suffice. However, the four Massachusetts justices, over the dissents of three other justices said, "No, civil unions will not do."[19] And so same-sex marriage was imposed on the people of Massachusetts by unelected and electorally unaccountable judges.

Clearly, the United States has endured episodes of judicial activism throughout its history. Just as clearly, incidents of judicial overreaching, much of it spurred by issues of sexual morality, are accelerating.

Here, there is a double wrong and a double loss, a crime with two victims. The first and obvious victim is the injured party in the case—the endangered worker, the unborn child, or the institution of marriage itself. The second is our system of deliberative democracy. In case after case, the judiciary is chipping away at the pillars of self-rule, undermining laws and practices, from statutes outlawing abortion to public displays of the Ten Commandments, that are deeply rooted in the American tradition.

Checking the "raw power" of today's judicial activists will require changes both in judicial personnel and targeted measures designed to remedy their specific abuses. For example, there is no alternative, in my judgment, to amending the Constitution of the United States to protect marriage. The Massachusetts state legislature has made an initial move towards amending the state constitution to overturn ***Goodridge***, but the outcome is uncertain. The process of amending the Constitution of the Commonwealth of Massachusetts is lengthy and arduous (except, apparently, for the judges themselves). Even if the pro-marriage forces in Massachusetts ultimately succeed, liberal judges in other states are not far behind their colleagues on the Massachusetts bench. Hovering over the entire scene, like a sword of Damocles, is the Supreme Court of the United States which could, at any time, invalidate state marriage laws across the board. You may think: "They would never do that." Well, I would echo Justice Scalia: "Do not believe it." They would. And if they are not preempted by a ***federal*** constitutional amendment on marriage, they will. They will, that is, unless the state courts get there first, leaving to the U.S. Supreme Court only the mopping up job of invalidating the Defense of Marriage Act and requiring states to give "full faith and credit" to out-of-state same-sex "marriages."

My own view, however, is that we need a uniform national definition of marriage as the union of one man and one woman. Here is why: Marriage is fundamental. Marriage is the basis of the family, and it is in healthy families that children are reared to be honorable people and good citizens. Marriage and the family are the basic units of society. No society can flourish when they are undermined. Until now, a social consensus regarding the basic definition of marriage meant that we didn't need to resolve the question at the federal level. Every state recognized marriage as the exclusive union of one man and one

unjustified ruling simply to submit to their ukase. Of course, the American people are under no obligation to "end their differences" by capitulating to judicial usurpation. On the contrary, they have every right under the Constitution to continue to oppose ***Roe v. Wade*** and work for its reversal. When judges exercising the power of judicial review permit themselves to be guided by the text, logic, structure, and original understanding of the Constitution, they deserve our respect and, indeed, our gratitude for playing their part to make constitutional republican government a reality. But where judges usurp democratic legislative authority by imposing on the people their moral and political preferences under the guise of vindicating constitutional guarantees, they should be severely criticized and resolutely opposed.

Footnotes

[1] 5 U.S. (1 Cranch) 137 (1803)

[2] See Thomas Jefferson's criticism of claims by the judiciary of authority to bind the other branches of government in matters of constitutional interpretation ("making the judiciary a despotic branch") in his Letter to Abigail Adams, September 11, 1804, in 11 WRITINGS OF THOMAS JEFFERSON (Albert E. Bergh ed. 1905), pp. 311-13.

[3] See Marbury v. Madison.

[4] 60 U.S. (19 How.) 393 (1856).

[5] Roe v. Wade 410 U.S. 113, 222 (1973) (Justice Byron White, dissenting).

[6] 163 U.S. 537 (1896).

[7] Plessy v. Ferguson, 559 (Justice Harlan, dissenting).

[8] 347 U.S. 483 (1954).

[9] 198 U.S. 45 (1905).

[10] See Lochner v. New York, 54-55 (Justice Holmes, dissenting). *This is the standard reading of Lochner, shared by contemporary conservatives and liberals alike. For a powerful challenge to the standard reading, and a thoughtful defense of the majority opinion, see Hadley Arkes, "Lochner v. New York and the Cast of Our Laws," in Robert P. George (ed.), Great Cases in Constitutional Law (Princeton: Princeton University Press, 2000), ch. 5.*

[11] 381 U.S. 479 (1965).

[12] See Griswold v. Connecticut, 482.

[13] 405 U.S. 438 (1972).

[14] 478 U.S. 186 (1986).