Has the Supreme Court Gone Too Far?

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A Symposium

In an effort to assess current attitudes toward the judiciary and its place in American democracy, the editors of COMMENTARY asked a group of prominent intellectuals and scholars to address the following questions:

1. Have recent rulings by the Supreme Court subverted fundamental elements of our constitutional order? If so, exactly how grave is the situation, and is responsibility to be laid equally at the feet of liberal and conservative Justices?
2. Controversial court decisions have been rationalized by appeals to an "emerging" democratic consensus or (as in Lawrence) to human-rights norms elsewhere in the world. Is there any legitimacy to this development? In deciding constitutional questions, are there circumstances in which the Supreme Court is justified in reaching beyond its own precedents and the Constitution itself?
3. Do you see any merit in proposals to limit the power of the Court? More broadly, what (if anything) should be done to contain or roll back the imperial judiciary?

Robert H. Bork

The question of whether “recent rulings by the Supreme Court [have] subverted elements of our constitutional order” has by now acquired a quaint, antique ring. Even to ask the question seems almost a piece of drollery. The Supreme Court has been beavering away at the underpinnings of the Constitution for 50 years; before that, its acts of subversion were less frequent and served a different ideology but were no less real. Prior to 1937, when FDR remade the Court, conservative Justices worked occasional miracles of transubstantiation with the Bill of Rights. The classic examples are, of course, Dred Scott (1857) and Lochner (1905), the one creating a right to hold slaves under the due-process clause of the Fourteenth Amendment, the other creating a right to make contracts under the same clause. Neither decision had any support in the actual document.

Judicial invention of new and previously unheard-of rights accelerated over the past half-century and has now reached warp speed. It is not just Grutter's permission to discriminate against white males and Lawrence's creation of a right to homosexual sodomy. The Court has created rights to televised sexual acts and computer-simulated child pornography and, in direct contradiction of the historical evidence, has continued its almost frenzied hostility to religion. The list of activist decisions constitutionalizing the Left-liberal cultural agenda is lengthy.
The term “activism”—the reaching of results that cannot plausibly be related to the Constitution—is used to describe this process and to serve as invective by both sides in arguments between liberals and conservatives. Though there have been conservative activists, it seems to me undeniable that the activism of the Court from the Warren era on has been overwhelmingly liberal. It is interesting that the dominant theme of the Warren Court was equality, hence its heavy reliance upon the equal-protection clause of the Fourteenth Amendment, while today's Court stresses individualism and emphasizes the liberty component of the same Amendment's due-process clause. Though both are misuses, the shift does correspond to the movement of Left-liberalism from concern with economic inequality to absorption with “lifestyle” freedoms.

One result of rampant activism is the decline in the intellectual quality of the Court's opinions. *Grutter* and *Gratz* accepted the transparent false-hoods of the University of Michigan about the need for racial diversity in the student body to provide a quality education, abandoning the constitutional practice of strict scrutiny of racial classifications and utterly ignoring the flat prohibition of racial discrimination in the 1964 Civil Rights Act. *Lawrence* said little more than that attitudes toward homosexual sodomy have changed in the past 50 years and, citing a decision of the European Court of Human Rights, that Europe now recognizes a right to engage in it.

There is an increasing tendency for the Court to rely upon such decisions of foreign courts in creating the constitutional law of the United States. That, to put it gently, is flabbergasting. What the decisions of foreign courts have to do with what the framers and ratifiers of the U.S. Constitution understood themselves to be doing is not explained, and cannot be explained. The result of this trend, if it continues, as it seems likely to do, will be a homogenized international constitutional law reflecting the trendy views of liberal elites here and abroad.

How grave is the situation? Though ludicrous, it is extremely serious. In these and other judgments, the Court is steadily shrinking the area of self-government without any legitimate authority to do so, in the Constitution or elsewhere. In the process, it is revising the moral and cultural life of the nation. The constitutional law it is producing might as well be written by the ACLU.

That fact alone should make it clear that conservatives do not bear the responsibility; they spend their energies writing splenetic dissents and dyspeptic comments like this one. True, liberals grow apoplectic over *Bush v. Gore*, which they see as their one chance to convict conservatives of activism. Unfortunately for that tactic, the concurring opinion by Chief Justice Rehnquist (joined by Justices Scalia and Thomas) was solidly based on the Constitution and a federal statute, and two members of the liberal bloc on the Court agreed with the majority that the
judgment of the Florida Supreme Court in Gore's favor had to be reversed. To repeat, activism in our time is a liberal phenomenon.

If judicial activism, which means ruling contrary to the Constitution, is improper, which both sides concede, at least rhetorically, then there is no justification for any court's reaching beyond the Constitution. Ours is a democratic polity, and the Constitution provides the sole authority any judge has for nullifying democratic choices. When there is a felt need for new law, the legislature is capable of providing it. Reaching beyond constitutional precedents, however, is another matter altogether. Judicial misinterpretation of a statute can be rectified by the legislature, but only a court can overrule an erroneous constitutional decision. Correcting a constitutional error is not judicial activism.

The framers made a fundamental mistake by creating a body of lawyers with uncheckable power. That mistake was understandable, because they had no reason to know what courts could become, but the result is that we have an untethered power that overrides democratic governance whenever the mood strikes it. There is no obvious cure for the situation. Congress's power to make exceptions to the Supreme Court's jurisdiction, given in Article III, provides no solution. Jurisdiction would then lodge in the state courts under Article IV and could not be removed. Many state courts have become as unrestrained and trendy as the federal courts. In short, there appears to be no way to contain the imperial judiciary.

There was a time when it was said that the Court's improper expansion of its powers would be held in check by informed criticism from the legal profession. To the contrary, much of the profession, seeing the Court as its lever of power, urges it on to further adventures. In any case, the Court is impervious to criticism. Its attitude is that of the Arab saying, “The dogs bark but the caravan moves on.”

**Lino A. Graglia**

Recent rulings by the Supreme Court are instances of judicial activism that do indeed subvert the system of government contemplated by the Constitution. But this subversion has been going on for a long time.

The three basic principles of our system of government are democracy (or republicanism—i.e., popular self-government through elected representatives; federalism—i.e., decentralized power, with most social-policy decisions made at the state rather than the national level; and separation of powers. Judicial activism—which for practical purposes may be defined as rulings of unconstitutionality not required by the Constitution—amounts to rule by judges and ultimately the Supreme Court: a committee of nine lawyers, unelected and holding office for life, making
policy for the nation as a whole from Washington, D.C. The resulting system of government, totally undemocratic, totally centralized, and with the judiciary performing the legislative function, is in violation of all three constitutional principles.

What has subverted our constitutional order is not just the Court's most recent rulings but the unprecedented power of judges to invalidate as unconstitutional the acts of other officials of government. The consequences could hardly be more grave. The first significant exercise of the power of judicial review against a federal statute was the 1856 *Dred Scott* decision; by invalidating a political resolution of the slavery issue, this decision seemed to make the Civil War inevitable. More recent exercises of the power of judicial review have given us a system of criminal justice in which the guilt or innocence of the accused is often the least relevant consideration; busing of children in an attempt to increase racial “balance” in schools; the conversion of the abortion issue from one that was being dealt with on a state-by-state basis, with abortion generally being liberalized, into an extremely divisive topic of national moment.

The central fact about constitutional law is that it has very little to do with the Constitution, a brief document that wisely precludes very few policy choices. The great bulk of constitutional cases involve state, not federal, law. Nearly all of them purport to be based on a single provision, the Fourteenth Amendment, or rather on four words in that amendment: “due process” and “equal protection.” In fact, however, the Court's decisions on basic issues of social policy turn not on those words at all but on the policy preferences of a majority of the Justices. Those preferences almost always mirror those of a liberal cultural elite of which the Justices are a part and, most importantly, the views of elite law-school faculties.

Virtually every one of the Court's rulings of unconstitutionality over the past 50 years—on abortion, capital punishment, criminal procedure, busing for school racial balance, prayer in the schools, government aid to religious schools, public display of religious symbols, pornography, libel, legislative reapportionment, term limits, discrimination on the basis of sex, illegitimacy, alien status, street demonstrations, the employment of Communist-party members in schools and defense plants, vagrancy control, flag burning, and so on—have reflected the views of this same elite. In every case, the Court has invalidated the policy choice made in the ordinary political process, substituting a choice further to the political Left. Appointments to the Supreme Court and even to lower courts are now more contentious than appointments to an administrative agency or even to the Cabinet—matters of political life or death for the cultural elite—because maintaining a liberal activist judiciary is the only means of keeping policymaking out of the control of the American people.

Today's liberal complaint—that the situation has changed under the current Rehnquist Court—is almost entirely a myth. The Rehnquist Court, constant in membership since 1994, consists of four very reliable liberals: Justices Stevens, Souter, Ginsburg, and Breyer. These four can count
on being joined on most issues of basic social policy by either Justice O'Connor or Justice
Kennedy or, as in Lawrence, both. Thus, the Rehnquist Court not only reaffirmed the
constitutional right to abortion created in Roe v. Wade but extended it to so-called partial-birth
abortions; not only refused to overrule the infamous Miranda decision but invalidated a federal
statute that would have limited it; not only reaffirmed the constitutional prohibition of state-
sponsored prayer in schools but extended it to prohibit a nonsectarian, student-composed
invocation of the deity at a high-school graduation ceremony. It found the operation of an all-
male military academy to be unconstitutional sex discrimination. In a preview of Lawrence, it
overturned a provision of the Colorado constitution adopted by popular referendum that
precluded special rights for homosexuals. It has now upheld race preferences and disallowed
sodomy laws. If this is a conservative Court, what would a liberal Court do?

The Grutter case, while undoubtedly an important victory for liberals, must be distinguished
from Lawrence and Bush v. Gore in that it upheld rather than invalidated the challenged policy
choice. Actually, it is unlikely that the Fourteenth Amendment, guaranteeing certain basic civil
rights to blacks, was meant to prevent a state from granting preferential treatment to blacks. But
the Grutter decision is inconsistent with Brown v. Board of Education, once universally
understood as prohibiting all official race discrimination; it is also inconsistent with Title VI of
the 1964 Civil Rights Act, which prohibits all racial discrimination by institutions that accept
federal funds. The Court's refusals to apply the Act, first in Bakke (1978) and then in Grutter,
cannot be seen as other than acts of judicial bad faith.

Liberal complaints about conservative activism by the Rehnquist Court rest almost entirely on
Bush v. Gore, a series of federalism decisions, and the fear, now shown to be unfounded, that the
Court would disallow race preferences. The five-to-four decision in Bush v. Gore was
undoubtedly activist, but arguably consistent with the Court's earlier interventions in the political
process and justifiable as countering the liberal activism of the Florida Supreme Court. The
Court's federalism decisions, whatever their merits, are not likely to prove successful in limiting
federal legislative authority.

If one accepts, along with Churchill, that democracy with all its faults is the best form of
government—and even the most ardent defenders of judicial review purport to accept this—one
must reject the notion that some issues of basic social policy are better decided by electorally
unaccountable officials. In our system, the only rationale for unelected judges to overrule policy
choices made by elected representatives is that the judges are effectuating the true will of the
people as expressed in the Constitution. To accept that judges may invalidate such policy choices
on other grounds is to accept not only that they may act dishonestly but, more significantly, that
they are the appropriate policymakers on the issue involved. At the very least, this proposition
should be openly defended, not established by a ruse. As for permitting judges to conform
domestic law to foreign law, that is to abandon national sovereignty, something almost no
political leader would undertake to defend. Finally, the idea of an “emerging democratic consensus” would seem to obviate any need to argue for judicial intervention in the first place.

The claim that the Court's rulings of unconstitutionality are based on the Constitution has been patently fictional for so long as almost, one might suppose, to achieve a degree of legitimacy. Since no one can actually believe these are the commands of the Constitution, might it not be fair to assume that the Constitution has in effect been amended by popular acquiescence in the Court's power to assign to itself the final decision on any issue it may choose? That power is, in any event, the present reality, and constitutional scholars have created a cottage industry devising ingenious theories to show that the Court's decisions result not from indefensible policymaking but from some esoteric form of constitutional interpretation.

The available means of limiting the Court's power—constitutional amendment, impeachment, limitation of jurisdiction—have for various reasons turned out to be more theoretical than real. Hope once lay in the making of new appointments, but the failure of ten consecutive appointments by four Republican Presidents to change the direction established by the Warren Court has shown this hope, too, to be unreliable. Rule by judges can certainly be solved by abolishing judicial review, but the real problem resides less in judicial review as such than in the Court's reading of the Fourteenth Amendment as a text without any definite meaning. That problem could be solved either by returning the Fourteenth Amendment to its original meaning or by giving it any definite meaning, thus making it a judicially enforceable rule.

The system of checks and balances set up by the Constitution has broken down where the Supreme Court is concerned; that institution now checks but is not checked by the other branches. President Lincoln dealt with the abuse of judicial power by announcing that although he would not defy the Court's Dred Scott decision, neither would he accept it as settling the slavery issue. Congress and the President could similarly make clear that contemporary Supreme Court rulings of unconstitutionality without basis in the Constitution deserve not respect but censure. If the political will were there, means could be found to return the country to the experiment in popular self-government in a federalist system with which we began.

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