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# REFLECTIONS UPON JUDICIAL INDEPENDENCE AS WE APPROACH THE BICENTENNIAL OF *MARBURY V. MADISON*: SAFEGUARDING THE CONSTITUTION'S “CROWN JEWEL”

*Honorable Gerald E. Rosen\* and Kyle W. Harding\*\**

## I. INTRODUCTION

By 1787, the Revolution had been won and a new, independent nation born.<sup>1</sup> But, the new nation had yet to clearly define a governmental structure to maintain the principles over which the Revolution was fought. Thus, when the fifty-five delegates to the Constitutional Convention assembled in Philadelphia in May of 1787,<sup>2</sup> they had the daunting task of fashioning a government that would protect the ideals that sparked the birth of the United States: freedom and the rule of law.

After five months of debate, controversy, and compromise, the Framers emerged with a document that would prove the most enduring constitution ever drafted. Shaped as much by the failure of the Articles of Confederation as the experience of European governments,<sup>3</sup> the United States Constitution creates a network of institutions to protect people against intrusive government and the misappropriation of power by government leaders. One such institution unique to the American Constitution was the establishment of a judiciary independent of both the legislative and the executive branches. Chief Justice William Rehnquist has called the judicial independence enjoyed by federal judges a “crown jewel” of our Constitutional design.<sup>4</sup>

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1. See JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 376 (1979).

2. *Id.*

3. See, e.g., CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 43-44 (1914).

4. See Linda Greenhouse, *Rehnquist Joins Political Fray on Rulings, Defending Judicial Independence*, N.Y. TIMES, Apr. 10, 1996, at A4 (quoting Chief Justice William H. Rehnquist).

The independence of our federal judiciary unites two distinct principles. The first, provided by Article III, protects federal judges against diminished salary and provides for life tenure "during good behaviour."<sup>5</sup> In affording federal judges these protections, the Founders provided judges with decisional independence. The second principle is the vesting of judicial power in a Supreme Court and lower courts separate from the other branches of government.<sup>6</sup> By making the third branch an effective check on the legislative and executive branches, the Constitution provides the judiciary with institutional independence. The Framers clearly understood the importance of separating the judicial branch from the political branches of government.

While the Constitution laid the political foundation of judicial independence, it remained for the Supreme Court itself to fully establish the role of the independent judiciary as a co-equal branch of the government. The American Revolution was fought for the freedom to live under a government chosen by the people, while the Constitution—the bedrock of our polity—defines the limits on government. In *Marbury v. Madison*,<sup>7</sup> Chief Justice John Marshall harmonized these two notions of self-government under a constitutional rule of law. Thus, the Constitution—as our fundamental law—is interpreted by an independent judiciary acting in relatively rare circumstances to limit the power of the executive and legislative branches.

The importance of *Marbury* cannot be underestimated, as it is the power of review that gives the courts the final authority to say what the law is. But, without complete independence, the authority for the power of review would be a meaningless illusion. Thus, by shielding the courts from specific retaliation when they exercise the power of review, the institutional and decisional independence provided by the Constitution preserves the judiciary's authority to exercise the power of review "without fear or favor."<sup>8</sup> However these two linchpins of the third branch—independence and judicial review—were not achieved without obstacle, and even after *Marbury*, they have been challenged.

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5. U.S. CONST. art. III, § 1.

6. *See id.*

7. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

8. Prior to serving, many judges take an oath to, among other things, perform their duties without fear or favor. *See* Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 542 n.30 (1999).

## II. JUDICIAL INDEPENDENCE IN THE RATIFICATION DEBATE

Judicial independence was a point of great contention in the ratification debate over the Constitution.<sup>9</sup> In the aftermath of a revolution fought over the right to establish a “government of the people and by the people,” opponents of Article III’s ratification feared that it consolidated too much power in an independent judiciary, an “undemocratic” body removed from the people.<sup>10</sup> The Federalists responded by highlighting the relative weakness of the judiciary compared to the democratic branches. In Federalist No. 78, Alexander Hamilton commented:

The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.<sup>11</sup>

The Federalists argued that the legislature—the government institution subject to the fewest constraints—was more dangerous to the people’s freedom than the judiciary.<sup>12</sup> They reasoned that an independent judiciary, confined by law, together with an energetic executive, was necessary to balance the excessive power of the legislature.<sup>13</sup>

The anti-Federalists did not necessarily oppose the Constitutional safeguards that protected decisional independence. Thomas Jefferson, an anti-Federalist and noted critic of the judiciary, nevertheless understood the importance of influence-free judges. The Declaration of Independence, principally authored by Jefferson, complains of colonial judges made subject to the King’s will alone.<sup>14</sup> The anti-Federalists’ main opposition to the Constitution’s ratification was that it afforded no means to balance judicial independence with judicial accountability.<sup>15</sup> Under the pen name

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9. See HAINES, *supra* note 3, at 143.

10. See *id.* at 140.

11. THE FEDERALIST NO. 78, at 227 (Alexander Hamilton) *reprinted in* THE FEDERALIST PAPERS: A COLLECTION OF ESSAYS IN SUPPORT OF THE CONSTITUTION OF THE UNITED STATES (Roy P. Fairfield ed., 2nd ed. 1966).

12. *Id.* See Edward J. Erler, Remarks at a Panel Sponsored by The Claremont Institute (Sept. 3-6, 1998), <http://www.claremont.org>.

13. See Edward J. Erler, Remarks at a Panel sponsored by The Claremont Institute (Sept. 3-6, 1998), <http://www.claremont.org>.

14. See DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

15. CHARLES GARDNER GEYH, ABA COMM’N ON THE SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY, THE ORIGIN AND HISTORY OF FEDERAL JUDICIAL INDEPENDENCE app. A (1997).

"Brutus," an anti-Federalist wrote, "If . . . the legislature pass any laws inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature."<sup>16</sup>

Jefferson, too, feared that the independence of judges would lead to the gradual ascendance of the federal judiciary over the other branches and the states. In 1821 in a letter to Charles Hammond, he expressed his fears of a slow build-up of federal power:

It has long been my opinion, and I have not shrunk from its expression . . . that the germ of dissolution of our federal government is in the constitution of the Federal Judiciary; an irresponsible body (for impeachment is scarcely a scare-crow), working like gravity day and night, gaining a little to-day and a little to-morrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all shall be consolidated into one.<sup>17</sup>

The ratification debate highlights the issues underlying the contentious nature of the establishment of an independent judiciary. The fear of judicial oligarchy articulated by Brutus and Jefferson two hundred years ago is still echoed today by talk show hosts, politicians, and political pundits. In fact, they make a valid and important point. While judicial independence allows judges the freedom to interpret and follow the law, it also provides them protection if they do not.

### III. *MARBURY V. MADISON*: THE JUDICIARY GAINS CO-EQUAL STATUS

Many opponents of Article III believed their worst fears of judicial supremacy were realized in *Marbury v. Madison*.<sup>18</sup> William Marbury, the justice of the peace in the District of Columbia, asked the Supreme Court to issue a mandamus to Secretary of State Madison, who, according to President Jefferson's request, had re-

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16. *Id.* "Brutus" is believed to be Robert Yates, an anti-Federalist New York Supreme Court Judge, who was a delegate to the federal Constitutional Convention. Anthony v. Baker, "So Extraordinary, So Unprecedented An Authority": A Conceptual Reconsideration of The Singular Doctrine of Judicial Review, 39 DUQ. L. REV. 729, 744 n.65 (2001).

17. Letter from Thomas Jefferson to Charles Hammond (Aug. 18, 1821), in THE WRITINGS OF THOMAS JEFFERSON 330, 331-32 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904).

18. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

fused to deliver a commission.<sup>19</sup> Chief Justice Marshall wrote the Court's unanimous opinion, in which he refused to order that the commission be delivered, reasoning that the Court lacked the jurisdiction to do so (despite a 1789 congressional act that seemingly authorized the Supreme Court to take such action).<sup>20</sup> Marshall held that the congressional act was in violation of the Constitution, based on the power of judicial review, which he believed to be a necessary component of limited government:

The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time, be passed by those intended to be restrained?<sup>21</sup>

Marshall argued that there would be no reason for the Constitution to articulate any limits upon the legislature, if the legislature could exceed those limits at its pleasure.<sup>22</sup> Thus, the role of the judiciary is to ensure that the actions of the other branches fall within these constitutional limits. Central to this role is the judiciary's ability to exercise the power of review by striking down government actions that traverse the Constitution.

President Jefferson did not accept the Chief Justice's opinion as final,<sup>23</sup> and the Court did not invalidate an other act of Congress until *Dred Scott*,<sup>24</sup> fifty years later. Nevertheless, *Marbury's* doctrine of judicial review has become imbedded in American jurisprudence.<sup>25</sup> The independence of the judiciary, necessary to effectuate power of review, however, has not gone unchallenged. In fact, the Court's exercise of the power of review has at times sparked retaliatory measures by the policy branches. In 1832, for example, during Andrew Jackson's presidency, some states openly defied Supreme Court decisions, and the president questioned

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19. HAINES, *supra* note 3, at 168. The great irony in *Marbury* is that the commission in controversy was made out during the time Marshall was both the secretary of state and Chief Justice, and therefore, responsible for the failure to deliver the commission in the first place. *Id.*

20. *Marbury*, 5 U.S. at 175-80.

21. *Id.* at 176.

22. *Id.*

23. HAINES, *supra* note 3, at 171.

24. *Scott v. Sanford*, 60 U.S. (119 How.) 393, 419-20 (1856) (holding that Dred Scott, a slave, did not gain his freedom by being transferred into a U.S. territory that was declared free by Congress because the law making the territory free was unconstitutional).

25. HAINES, *supra* note 3, at 170-71.

whether he had the power to enforce those decisions.<sup>26</sup> He disagreed with the Court's decision in a dispute between the Cherokee Tribe and the State of Georgia<sup>27</sup> and reputedly commented, "John Marshall has made his decree, now let him enforce it."<sup>28</sup> President Roosevelt was similarly annoyed with the Supreme Court's rejection of his New Deal reforms<sup>29</sup> and proposed augmenting the number of sitting justices in an effort to change the ideological balance of that bench.<sup>30</sup>

#### IV. JUDICIAL INDEPENDENCE TODAY

The federal judiciary of today is not the judiciary of Hamilton's Federalist No. 78. While the federal judiciary continues to depend on the legislature for funding and on the executive to enforce its decisions, as Supreme Court Justice Clarence Thomas has said, "What is truly surprising about today's judiciary is how strong it really is."<sup>31</sup> Justice Thomas continued:

Long past are the days when President Lincoln might make the argument that the Court's decisions bind only the parties before it. No one is suggesting, as President Jefferson and Jackson did, that the Court's decisions should be ignored or remain unenforced. No one has suggested altering the number of seats or the composition of the Supreme Court to alter its decisions. . . . If anything, the judiciary's authority in our society is at its peak.<sup>32</sup>

An independent, unelected judiciary that has the final say on the constitutionality of law is a substantial check on the legislative and executive branches. Such a judiciary is an independent safeguard against the "tyranny of the majority"<sup>33</sup> and trampling of legitimate

26. Barry Friedman, *Attacks on Judges: Why They Fail*, 81 JUDICATURE 150, 153 (1998).

27. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 562-63 (1832) (overturning a state court ruling sentencing Samuel A. Worcester to four years. Because the crimes were committed in what was then the Cherokee nation, a separate nation under the Hopewell Treaty, the case was beyond the jurisdiction of the state court).

28. Friedman, *supra* note 26, at 153.

29. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 314-17 (1936); *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 550 (1935).

30. Friedman, *supra* note 26, at 152.

31. Honorable Clarence Thomas, Remarks at the Federalist Society National Convention, Annual Lawyer's Banquet (Nov. 12, 1999), <http://www.fed-soc.org/Publications/Transcripts/justicethomas.htm>.

32. *Id.*

33. THE FEDERALIST NO. 10, at 16-23 (James Madison) reprinted in THE FEDERALIST PAPERS: A COLLECTION OF ESSAYS IN SUPPORT OF THE CONSTITUTION OF THE UNITED STATES (Roy P. Fairfield ed., 2nd ed. 1966).

minority rights. Still, concerns remain over the potential usurping of policy-making authority by the unelected judiciary.<sup>34</sup> Just as Congress and the president have a duty to respect the independence of the courts, the privilege of independence carries reciprocal obligations upon the judiciary. Federal judges must understand the need for institutional respect and restraint.

The Constitution has been, and continues to be, criticized for not balancing judicial independence with judicial accountability.<sup>35</sup> Still, federal judges are accountable to the people. While the guarantees of life tenure and protection against salary diminishment shield judges from political pressure, these guarantees will only exist as long as the majority accepts the system that provides them. By insulating judges from political and public pressure, judicial independence affords courts the freedom to decide cases based on the law. Judges must abide by the institutional constraints inherent in a democratic society or risk losing that independence.

The responsibility of protecting this crown jewel belongs to federal judges and their ability to decide cases impartially in accordance with the law. Many factors exist which challenge a judge's ability to do so. Defining these threats and describing how judges can follow the law in their wake will be the focus of the balance of this essay.

## V. PUBLIC AND POLITICAL PRESSURE ON THE FEDERAL JUDICIARY

In Federalist 78, Alexander Hamilton wrote, "It would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community."<sup>36</sup> As Justice Thomas has stated, this point is rarely stressed enough.<sup>37</sup> Judges make a lifetime commitment to public service when they leave the lucrative private sector for the federal bench. Such sacrifice deserves the public's appreciation and understanding. How-

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34. See, e.g., Edwin Meese III, *Putting the Judiciary Back on the Constitutional Track*, 14 GA. ST. U. L. REV. 781, 781-82 (1998) (suggesting ways in which Congress can limit judicial activism).

35. Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 32 (1998).

36. Clarence Thomas, *Be Not Afraid*, 12 AM. ENTERPRISE 44, 44-45 (2001) (quoting THE FEDERALIST NO. 78, at 231 (Alexander Hamilton) reprinted in THE FEDERALIST PAPERS: A COLLECTION OF ESSAYS IN SUPPORT OF THE CONSTITUTION OF THE UNITED STATES (Roy P. Fairfield ed., 2nd ed. 1966)).

37. *Id.*



ever, this does not mean judges should get a free pass from media and public scrutiny. Indeed, they never have. From the Jeffersonian assault on the Federalist judiciary<sup>38</sup> to public backlash stemming from the Court's recent abortion and election decisions,<sup>39</sup> the history of the judiciary has been one punctuated by controversy.

The fact that our judiciary has survived two centuries of challenges to its independence is a reflection of the institution's importance in our system of government. Although judges, by and large, possess a high level of intellectual and legal ability, they are fallible and their opinions are susceptible to political influences.

Rare is the national news program or newspaper that does not take public opinion polls, or the politician who stumps without citing polling data supporting his or her campaign proposals. In the political arena, public opinion has become an unparalleled agenda-setting agent. Thanks to professional pollsters and the mass media, policy-makers are able to access and respond to public opinion on a daily basis. Given this prevalence, it is entirely understandable, and perhaps even appropriate, that our elected representatives should be affected by polling data. Politicians have a responsibility to represent their constituency, and their tenure may ultimately depend on how faithfully they represent their constituents' views.

However, genuflecting before polling data is not—and must not be—part of a judge's job description. The federal judiciary was not intended to be a representative branch of government.<sup>40</sup> The role of the judiciary is to protect against majority excess when that excess violates fundamental liberties.<sup>41</sup> A judge need not give credence to a legal argument simply because it is supported by public opinion. In fact, if a popular law clearly contradicts constitutional freedoms, the Court has a duty to strike it down.

This is not to say that fulfillment of that duty is not without risk to the judicial institution (or, for that matter, to an individual judge). History demonstrates that in striking down popular laws, the judiciary exposes itself to backlash from both the people and

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38. See *supra* notes 14-17 and accompanying text.

39. See generally *Bush v. Gore*, 531 U.S. 98, 120-23 (2000) (reversing and remanding a Florida Supreme Court decision ordering a manual recount of ballots in the 2000 presidential election and effectively ending the election); *Roe v. Wade*, 410 U.S. 113, 153-60 (1973) (holding unconstitutional a Texas statute prohibiting abortions at any stage of pregnancy except to save the life of the mother).

40. THE FEDERALIST NO. 78, at 226-33 (Alexander Hamilton) *reprinted in* THE FEDERALIST PAPERS: A COLLECTION OF ESSAYS IN SUPPORT OF THE CONSTITUTION OF THE UNITED STATES (Roy P. Fairfield ed., 2nd ed. 1966).

41. *Id.*

the political branches.<sup>42</sup> One example of this, discussed above, was President Jackson's resolve not to enforce Supreme Court decisions that he did not agree with.<sup>43</sup>

While Jackson's defiance of the Court was notable in its pithiness, his attack against the judiciary was not the most direct launched by a sitting president. That dubious distinction belongs to President Franklin Roosevelt and his infamous court-packing plan.<sup>44</sup> By 1937, President Roosevelt had grown impatient with the Supreme Court.<sup>45</sup> Just one year earlier, he had been overwhelmingly re-elected.<sup>46</sup> Yet after key elements of his New Deal program suffered defeat in the Supreme Court,<sup>47</sup> his legislative mandate was in danger of being undone by the courts.<sup>48</sup> As public anti-judicial sentiment escalated, many critics began to question the Court's power of judicial review.<sup>49</sup> President Roosevelt entered the fray by launching his plan for "judicial reform," forever known as his court-packing plan.<sup>50</sup> Roosevelt's reasons for attempting to increase the number of Justices were purely ideological.<sup>51</sup> In a "fire-side chat" on March 9, 1937, the President delivered the following criticism of the judiciary:

Last Thursday I described the American form of government as a three-horse team provided by the Constitution to the American people so that their field might be plowed. The three horses are, of course, the three branches of government—the Congress, the executive, and the courts. Two of the horses are pulling in unison today; the third is not.<sup>52</sup>

In attempting to pack the Supreme Court, the politically well-attuned president hit an uncharacteristic false note. Roosevelt's efforts to change the composition of the Court resulted in public out-

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42. See, e.g., JACK BASS, *TAMING THE STORM* 124-26 (1993) (discussing the violence surrounding the desegregation and civil rights cases, including a bomb being detonated outside the home of Judge Frank M. Johnson, Jr. following a district court ruling).

43. See *supra* note 28 and accompanying text.

44. See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 322-23 (1999) (discussing the effect of Roosevelt's court packing plan).

45. Friedman, *supra* note 26, at 152.

46. *Id.* at 154.

47. *Id.* at 152.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 152 (describing how Roosevelt justified the attempt in terms of reducing the sitting Justices' workload and increasing judicial efficiency).

52. *Id.*

rage and, ultimately led to the failure of his reform plan.<sup>53</sup> Though his plan failed, Roosevelt arguably did succeed in moving the Court. Following the court-packing debacle, the Supreme Court upheld several legislative programs nearly identical to those it had previously stricken.<sup>54</sup>

Congress too, has responded to perceived excesses by the judiciary. In 1984, Congress passed the Sentencing Reform Act in an effort to reign in judges whom they felt were too lenient in sentencing.<sup>55</sup> The resulting system employed today allows judges far less discretion in sentencing by imposing guidelines for sentencing and mandatory minimum sentences.<sup>56</sup>

When the political branches perceive the judiciary as overstepping its role, the response may be directed at the governance of the judiciary itself. Just this year, legislation was introduced in the Senate requiring that seminars attended by judges be pre-approved and funded by the Federal Judicial Center under a pre-set congressional formula.<sup>57</sup> The stated goal of this legislation is to limit judges' attendance to "seminars that are conducted in a manner so as to maintain the public's confidence in an unbiased and fair-minded judiciary."<sup>58</sup> Currently, federal judges must already file annual disclosure reports of all "non-case" related travel, including information related to reimbursement of expenses.<sup>59</sup> These reports are, as they should be, available for public scrutiny.<sup>60</sup>

However, the judicial independence concerns raised by the pre-approved seminar requirement and the accompanying prohibition of attendance at seminars funded by non-government sources trump any public good that would derive from them. In opposing this legislation, Chief Justice William Rehnquist and the Federal

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53. *Id.* at 154.

54. *See, e.g.,* *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1, 37 (1937) (upholding the National Labor Relations Act as a proper exercise of Congress's power to regulate interstate commerce); *W. Coast Hotel v. Parrish*, 300 U.S. 379, 396 (1937) (finding no due process violation in recognizing a state's interest in protecting female employees through a minimum wage act).

55. The Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984).

56. 28 U.S.C. § 994 (1994). *See* *Mistretta v. U.S.*, 488 U.S. 361, 363-65 (1989) (describing the intended effect of the Act on sentencing).

57. S. 2990, 106th Cong. (2000), legislation introduced by senators John F. Kerry (D-MA) and Russell D. Feingold (D-WI). *See also* *Chief Justice Supports Judges' Education*, 33 THE THIRD BRANCH (Administrative Office of the U.S. Courts, Washington D.C.), June 2001, at 1, 6, <http://www.uscourts.gov/ttb/June01.html> (discussing the proposal).

58. S. 2990, 106th Cong. (2000).

59. *Chief Justice Supports Judges' Education*, *supra* note 57, at 1.

60. *Id.*

Judges Association have argued that to bar federal judges from participation in non-governmental seminars is a congressionally-imposed limit on judicial education.<sup>61</sup> Congress's attempt to regulate the information content and viewpoints presented to the federal judiciary is a serious violation of the institutional separation of the branches.

Even more radical incursions upon the independence of the courts have been proposed by Congress in recent years. The 105th Congress, for example, proposed an amendment to the Constitution which provided for the reconfirmation of federal judges by the Senate every twelve years.<sup>62</sup> Other attempts by the political branches to assert control over federal courts, including creating term limits for judges, have surfaced periodically in recent years.<sup>63</sup>

These examples illustrate another aspect of judicial independence, what the Chief Justice has called the paradox of judicial independence.<sup>64</sup> While sitting federal judges enjoy tenure during good behavior and non-diminishable salaries, the Senate has the ultimate confirmation authority. Only Congress can create new federal judgeships, appropriate money for the judiciary's budget, and to a certain extent, determine the procedures judges must follow. Perhaps most tellingly, Congress holds the power of the purse over judicial compensation.<sup>65</sup> Although it cannot diminish judicial compensation, it can disapprove judicial pay raises, including cost-of-living increases.<sup>66</sup> This irony prompted the Chief Justice to comment, "We have as independent a judiciary as I know of in any democracy, and yet the judges are very much dependent on the

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61. *Id.* at 2.

62. H.R. 63, 105th Cong. (1997) (introduced by Congressman Paxon (R-NY)).

63. *See, e.g.*, H.R. 74, 105th Cong. (1997) (introduced by Congressman Riggs (R-CA); proposing an amendment to the Constitution that would have provided for eight-year terms of office for federal judges other than Supreme Court Justices).

64. ABA COMM'N ON THE SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY, THE ORIGIN AND HISTORY OF FEDERAL JUDICIAL INDEPENDENCE 3 (1997).

65. U.S. CONST. art. III, § 1.

66. This aspect of congressional leverage is so fraught with institutional tension that a prominent group of sitting judges has brought a class action against the government under Article III's compensation clause over Congress's failure to provide cost-of-living increases to judges over the past decade as allegedly required under the Ethics Reform Act of 1989, 5 U.S.C. § 5318 (2001). The judges prevailed in the federal district court, *see Williams v. U.S.*, 48 F. Supp. 2d 52 (D.D.C. 1999), but lost in a split vote before the court of appeals, *see Williams v. U.S.*, 240 F.3d 1019 (Fed. Cir. 2001). Petition for certiorari is currently pending in the Supreme Court.

legislature and executive for the enactment of laws to enable the judges to do a better job of administering justice.”<sup>67</sup>

## VI. SELECTION AND CONFIRMATION OF JUDGES

In addition to direct administrative interaction with the judiciary, the political branches make their presence felt during the appointment and confirmation process. While the independence of the judiciary requires strict neutrality of judges, the policy branches are partisan institutions and their members are free to advocate policy. Although judicial independence insulates the judiciary from the executive and the legislature, all three branches intersect at the nomination and confirmation process, resulting in the potential for political influence upon judicial decisions.

To enter and advance within the federal judiciary, judges are dependent upon partisan politicians, who weigh political considerations heavily in the selection and confirmation process.

In a perfect world, this intersection of the political and judicial institutions would be limited to evaluating the professional qualifications and character of judicial candidates, with perhaps only a passing inquiry into the candidate's jurisprudential philosophy. When Justice Thomas met with President Bush in 1991, the president's only inquiry for the potential Supreme Court Justice was whether Thomas “could call it as he saw it” when he became a member of the Court.<sup>68</sup> “In a perfect world,” Justice Thomas commented, that question “would be the only one members of the Court should ever have to answer, either to a president or to the legislators that confirm their appointments.”<sup>69</sup> Justice Thomas's comment is deliberately ironic, for his own volatile confirmation experience highlights the degree to which the nomination and confirmation of federal judges has become anything but a clean merits review.<sup>70</sup> That a nominee must be willing to endure a very public—

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67. William H. Rehnquist, Remarks at Washington College of Law of American University (Apr. 9, 1996), <http://supct.law.cornell.edu/aupct/justices/rehnav96.htm>.

68. Clarence Thomas, Remarks at Francis Boyer Lecture, American Enterprise Institute for Public Policy Research (Feb. 13, 2001), <http://www.aei.org/boyer/Thomas.htm>. We are confident that President Bush's question referred to whether Justice Thomas could follow the law as best he could derive it, and that is how Justice Thomas understood it.

69. *Id.*

70. See, e.g., William Schneider, *Engagement vs. Isolation: A Nation of Defiant Optimists*, L.A. TIMES, Oct. 28, 2001, at M6 (discussing the complacency of Americans and their obsession with outlandish events in the 1990s, beginning with the confirmation hearings of Clarence Thomas).

and very partisan—confirmation process seems an unavoidable result of our highly polarized society.

Judges can be highly sensitive to this. The ambition to become a judge, which helps in traveling the difficult road to the federal bench, does not always subside upon confirmation. The role ambition plays in judicial decision-making is not frequently discussed, but is relevant when analyzing potential threats to judicial independence. The vast majority of men and women on the federal bench respect the important public service they provide and strive mightily to be true to their oath of impartiality. But, while a federal judgeship may be the capstone of a notable legal career, some may aspire to higher rungs—whether that be service on a higher court, the attainment of a different office, or otherwise. For those judges, the chance of undermining their further advancement in the judiciary by decisions which may offend appointing or confirming authorities can—given today's poisoned partisan atmosphere—loom large over the decisional process. Sometimes it can require extraordinary effort to set aside such considerations.

## VII. PERSONAL PHILOSOPHY OF JUDGES

The Constitution envisions the judiciary as a guard against the transitory will of the people, when that will violates Constitutional freedoms. This principle of judicial review is as important today as when the Founders penned it. Still, the Founders did not consider themselves to be creating a judicial government. Rather, the Constitution was drafted to create a limited self-government. It follows that for the people to truly rule in spite of the independent judiciary, judges must themselves remain ever cognizant of their limited governmental role.

When federal judges substitute their own policy views for those in the Constitution, or attempt to write their own philosophy into law, the invariable result is that the people lose legislative authority, and with it, their self-government. Unwarranted judicial forays into the policy arena unavoidably lead to a situation in which judges jeopardize the very rights the Constitution expects them to protect. As Senator Orrin Hatch of Utah aptly questioned, when judges do not follow the law, who guards the guardians?<sup>71</sup>

The simple answer to Senator Hatch's rhetorical question is the Constitution. Our legal system is based on the precept that we are

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71. *Hatch Fires Warning Shot on Judges*, *LEGAL TIMES*, Nov. 18, 1996, at 14.

a government of laws and not men.<sup>72</sup> Judicial discretion is constrained, not only by the Constitution, but also by the legislature and the executive, the authority of higher courts, and the evidentiary record. Without such constraints, the law would become only that which any judge, or panel of judges, believes it should be.

In drafting the Constitution, the Framers did not wish to constrain future generations by the beliefs they held. Therefore, they provided an amendment process in the Constitution. Yet, the strength of the Constitution is not that its provisions can be amended, but that its core principles are indelible. As Hamilton wrote in Federalist No. 78:

. . .in questioning that fundamental principle of republican government, which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay a hold of a majority of their constituents, incompatible with the provisions in the existing Constitution, would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape, than when they had proceeded wholly from the cabals of the representative body.<sup>73</sup>

Hamilton's reasoning is persuasive, for if the principles of the Constitution were ultimately subservient to the legislature, our constitutional rights would cease to exist without the approval of a prevalent majority.

While the problems our society encounters today are vastly different from the experiences of these first Americans, the principles of limited self-government, natural rights, and freedoms are as applicable today when the Constitution was signed. Although these principles have never been fully realized and, no doubt, never will be, they constitute our nation's lodestar. A society that allows freedom and self-determination cannot address every instance of injustice. It is not, and cannot be, the role of the judiciary to right

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72. John Adams, writing in the Boston Gazette, attributed the phrase a 'government of laws and not of men' to James Harrington, an English political theorist. 1 THE FOUNDERS' CONSTITUTION 336 (Philip B Kurland & Ralph Kerner eds., 1987). More to our purposes, John Marshall appropriated the phrase in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

73. THE FEDERALIST NO. 78, at 231 (Alexander Hamilton), reprinted in THE FEDERALIST PAPERS: A COLLECTION OF ESSAYS IN SUPPORT OF THE CONSTITUTION OF THE UNITED STATES (Roy P. Fairfield ed., 2nd ed. 1966).

every perceived wrong, or to discover new rights that are being violated in the Constitution. Instead, the Constitution requires judges to apply the principles of the Constitution to each particular case, without substituting their own philosophy for the Constitution itself. A conversation between Justice Oliver Wendell Holmes and Judge Learned Hand, two of the greatest legal figures of the twentieth century, epitomizes this point.<sup>74</sup> After having lunch together one day, Hand bid Holmes farewell, saying, "Do justice sir, do justice."<sup>75</sup> To which Holmes, a great advocate of judicial restraint, replied, "That is not my job. It is my job to apply the law."<sup>76</sup>

In recent years, criticism of judges "doing justice"—writing their own philosophical biases into the law—has been encompassed under the broad rubric of judicial activism. But, this characterization of activism is misleading. As Professor Edward Erler has noted:

A viable theory of constitutional jurisprudence cannot be built merely upon opposition to judicial activism. Rather, the proper question is whether the court is pursuing constitutional principles—sometimes this requires activism and sometimes restraint. A court that was passive in the face of constitutional violations by Congress would be remiss in its constitutional duties.<sup>77</sup>

The so-called judicial activism of judges in the South who decided the school desegregation cases is such an example. In this challenging chapter of our history, judicial decisions regarding desegregation and civil rights were met with opposition and hostility.<sup>78</sup> Some of the judges who made these decisions faced tremendous strain in their communities.<sup>79</sup> They were ostracized socially and routinely threatened due to what was misperceived as unwarranted judicial activism.<sup>80</sup> Yet, in the face of this public backlash, many judges retained their impartiality and advocated

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74. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 6 (1990).

75. *Id.*

76. *Id.*

77. Edward J. Erler, Remarks at a Panel Sponsored by The Claremont Institute (Sept. 3-6, 1998), <http://www.claremont.org>.

78. See, e.g., BASS, *supra* note 42, at 124-26.

79. See, e.g., *id.*

80. See, e.g., *id.*



the constitutional principles that had not yet been expressed in society or law.<sup>81</sup>

The Constitution is clearly silent on certain issues, and though it may not speak directly to a legal issue, it still provides the principles judges must use when deciding cases that pose those difficult questions. It is with respect to these cases, with issues that venture into uncharted constitutional waters, that judges are especially susceptible to their own notions of morality. As Judge Bork has stated, "Courts have become quite adept at disguising their own moral judgments as mere obedience to law."<sup>82</sup>

While constitutional jurisprudence is replete with accusations of judicial legislating, two important cases are often cited examples of unwarranted activism. In *Lochner v. New York*,<sup>83</sup> the Supreme Court invalidated a state law that prohibited the employment of bakery workers more than ten hours per day and sixty hours per week.<sup>84</sup> The New York legislature had passed the statute to protect the health of bakers, in response to the incidence of lung problems that coincided with long periods of breathing in flour.<sup>85</sup> Despite the apparent health risk the law addressed, the Court held that regulating bakery workers hours violated a "right of contract" between the employer and employee.<sup>86</sup> Although the Constitution says nothing about a "right of contract," the majority ruled that such a right was implied in the Fourteenth Amendment's substantive due process clause.<sup>87</sup> *Lochner* represents the Court's decision to enlist on one side of an economic debate—the side of laissez-faire capitalism.

At the other end of the spectrum is *Griswold v. Connecticut*,<sup>88</sup> wherein the Fourteenth Amendment was again the source for a substantive due process right.<sup>89</sup> In *Griswold*, the Court struck down a law that made the use of contraceptives illegal, even by married couples.<sup>90</sup> The Court's majority held that the 1879 statute violated a constitutional "right to privacy," finding it antiquated

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81. See generally *id.* (describing Judge Johnson's perseverance in the face of violence and threats).

82. Robert H. Bork, *Activist Judges Strike Again*, WALL ST. J., Dec. 22, 1999, at A8.

83. *Lochner v. New York*, 198 U.S. 45 (1905).

84. *Id.* at 64.

85. *Id.* at 69-70 (Harlan, White, and Day, J.J., dissenting).

86. *Id.* at 59.

87. *Id.* at 53.

88. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

89. *Id.* at 481-82.

90. *Id.* at 485.

and arcane.<sup>91</sup> Justice Stewart dissented and elaborated on his view of a judge's proper role in such circumstances:

I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable . . . . As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice . . . . As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.<sup>92</sup>

Justice Hugo Black, by joining Justice Stewart and dissenting in *Griswold*, may have stunned and even disappointed some of his greatest admirers. As a result of his absolutist interpretation of the First Amendment, the aging Justice was widely regarded as one of the Court's most prominent liberal voices. However, Black's dissent contains a strong denunciation of the majority's discovery of a new "right to privacy" in the Constitution: "Use of any such broad, unbounded judicial authority would make [this Court's] members a day-to-day constitutional convention."<sup>93</sup>

Some judges undoubtedly believe that a judge's proper role is to modify the Constitution as society changes. Those who believe that the Constitution is a "living document" would empower judges to decide what new rights exist and determine where they are found in the Constitution. This would be a judicial oligarchy fully realized. Of course, this begs the question: If rights do exist in the shadows and folds of our Constitution, and we are a government of the people, why should unelected judges enjoy the privilege of discovering such rights instead of the people or their elected representatives? Justice Scalia once quipped, "What secret knowledge, one must wonder, is breathed into lawyers when they become Justices of this Court?"<sup>94</sup>

Criticism of the judiciary comes from all sides of the political spectrum, and those who would defend the decisions in *Griswold* and *Lochner* are certainly entitled to do so. Judges must always be mindful that, in seeking the lofty goal of influence-free judging, the

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91. *Id.* at 485-86.

92. *Id.* at 527 (Stewart, J., dissenting).

93. *Id.* at 520 (Black, J., dissenting).

94. Robert H Bork, *Our Judicial Oligarchy*, FIRST THINGS, NOV. 1996, at 26, <http://www.firstthings.com/ftissues/ft9611/articles/bork.html>.

judiciary particularly opens itself to such criticism. Ultimately, when judges become policymakers, the institutional distinctions between the policy branches and the judiciary blur in the public mind. The protections of decisional and institutional independence provided by the Constitution are invariably put in jeopardy, as the people increasingly see the judiciary as just another political institution—and begin to wonder why judges should not be treated accordingly.

### VIII. THE CHALLENGE OF JUDGING

A judge's duty to render decisions in accordance with the law presents a great challenge, and the contentious environment in which judges must fulfill this duty only adds to the challenge. Obviously, the first part of this challenge is often trying to figure out what the law is. Many cases that come before the court present complex and subtle legal issues concealed within each other like Russian nesting dolls. These cases create an intellectual strain, but do not threaten the independence of the judiciary.

It is the second part of the challenge that tests the impartiality of judges. After determining, as best he or she can, what the law necessitates, a judge must then follow that decision through. The cases in which that result is not consistent with a judge's personal view of what is "just" or "fair" are the ones that present a judge's greatest challenge. Following the law requires self-discipline on the part of judges to resist the temptation to bend the law to reach a "just" result. The judiciary demands fortitude of its members, as Hamilton wrote, to withstand the scourge of popular criticism and to combat personal bias and ambition.<sup>95</sup>

All too often, judicial restraint is cast as a "school" of constitutional interpretation, as if it were one choice on a menu. To the contrary, minimizing judicial policy-making is the cornerstone of an independent judiciary. It is a rare case in which the Constitution or settled precedent offer little advice or direction. Judges should not search for ambiguity as a ruse to mask a policy agenda. Such jurisprudential adventures do not serve "justice"; they promote disrespect for the judiciary and undermine the institution's penultimate mission of deciding cases and rendering justice under the law.

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95. THE FEDERALIST NO. 78, at 231 (Alexander Hamilton), *reprinted in* THE FEDERALIST PAPERS: A COLLECTION OF ESSAYS IN SUPPORT OF THE CONSTITUTION OF THE UNITED STATES (Roy P. Fairfield ed., 2nd ed. 1966).

The approaching bicentennial of *Marbury v. Madison*<sup>96</sup> reminds us that judicial restraint is not a school of jurisprudence, but a vital component to judicial independence. By fulfilling the limited role the Constitution envisions for the judiciary, federal judges ensure that the authority over uncharted legal or cultural issues is reserved to the executive and legislature branches, and ultimately the people, as our Founders intended. Although courts retain the power of judicial review, when the policy branches' actions truly offend the Constitution, the people need not surrender their sovereignty over important societal questions to federal judges, and the proper balance between the judiciary and the political branches can be maintained.

Nevertheless, the jurisprudence of restraint is exercised within a broad spectrum. At one end are judges who feel the Constitution is elastic and must adapt to changes in society, at the other are judges endeavoring to limit their role to the strict application of the literal language of the Constitution. Unfortunately, this continuum roughly parallels our political spectrum. A highly partisan selection and confirmation process is the result, and will undoubtedly continue.

Herein lies perhaps the greatest threat to judicial independence. Although partisan politics have always played a role in the selection and confirmation of judges, partisanship is no longer limited to pressure by one political party or another. Rather, the rise of single, or special, interest groups on both sides of the political divide has an enormous influence on the selection and confirmation of judges. Because these special interest groups are often orientated around a specific group of issues, these issues create a crucible through which judicial candidates must pass. A judicial candidate must withstand the political pressure of interest groups who research and react against the policy results of decisions a candidate has rendered, or on which the candidate has written or spoken. Although the political players resist the claim that they use these issues as a "litmus test," there is no question that, if these groups do not have absolute veto power over every candidate, they substantially influence the selection and confirmation process. Nominees or prospective nominees can be discarded on the basis of a single decision or even a single written statement.

For judicial candidates who are already sitting judges, this is enormously threatening to their independence in judging. If candi-

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96. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

dates are evaluated on the basis of a very narrow range of their prior rulings, then the judiciary ceases to be separate from the political branches.

The danger posed by the intrusion of special interest groups into the judicial selection and confirmation process is not simply that these groups will influence who sits on the federal bench and who does not, but that their influence will ultimately infect the very decision-making process of judging itself. Although judges strive to remain outside of politics once on the bench, they are acutely aware of the political winds that swirl around them, particularly since most had some political experience prior to becoming judges. Once judges realize that they will be evaluated based upon the policy outcomes of one or two of their decisions, there is a real threat that, even subconsciously, this will chill their ability to follow the law strictly. This is especially true where he or she might not like the result. This is not simply a minor factor; because these issues often present close questions of constitutional or statutory construction, the presence of this factor can cause a judge to "hear footsteps" before rendering a decision. Thus, these groups—who often celebrate and proclaim victory if they have "killed" a selection or nomination—can effectively intimidate judges. This is the end of judicial independence.

As easy as it is to state the problem, the tension between the judiciary and the political branches is not easily resolved. The Constitution provides the third branch with a bulwark to protect the rights of the minority. Politicians however, clearly have a stake in implementing majority viewpoints and protecting against judicial excess. The historical clashes between our governmental branches—from President Jackson's refusal to enforce certain Marshall Court decisions to President Roosevelt's attempt to pack the Court—were, to a great degree, born of these conflicting constituencies.

This potential for conflict must not thwart judges from fulfilling their Constitutional obligations. Judges must be vigilant not to exceed their assigned role in the constitutional structure and unduly agitate political branches to the point where they must respond to judicial excess. In this governmental system of overlapping authority, judges must always be able to decide their cases "without fear or favor," even when that may upset the established political authority. This is the value of judicial independence: protecting the ability of judges to follow the law, even in the vortex of political tension.