

# ROUNDTABLE: THE SUPREME COURT AS A POLITICAL INSTITUTION\*

## DO JUDGES HAVE A POLICY-MAKING ROLE IN THE AMERICAN SYSTEM OF GOVERNMENT?

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What should be the role of judges in the American system of government? Should judges be policymakers or should they confine themselves to deciding cases by applying the policies, expressed in law, made by others? The question does not seem difficult. The concept of the lawmaking judge is oxymoronic: Lawmaking power is precisely what defines the legislative function and distinguishes it from the judicial.<sup>1</sup> Further, lawmaking by judges is obviously inconsistent with the most basic principles of the Constitution: separation of powers, republican self-government, and federalism.

Policymaking by courts is inconsistent with the system of federalism established by the Constitution. The Constitution's explicit assignment of the legislative function to Congress<sup>2</sup> and the judicial power,<sup>3</sup> defined as power to decide a specified class of cases,<sup>4</sup> to courts precludes any contention that lawmaking can be a function of federal judges. The Constitution's creation of a republican form of government and guarantee that state governments will remain republican are also inconsistent with lawmaking by unelected federal judges. In our federal system, a central government of limited specified powers coexists with the States, which

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\* The roundtable discussion was moderated by Laurence Silberman, Judge, United States Court of Appeals for the District of Columbia Circuit.

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1. The very essence of the legislative function is the exercise of legislative power, the power to "make . . . laws for a time or . . . abrogate . . . those that have been made." CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 156 (Cambridge University Press ed., 1989) (1748). By contrast, the essence of the judicial function, the judicial power, is the power to "punish . . . crimes or judge . . . disputes." *Id.* at 157.

2. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

3. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

4. *See* U.S. CONST. art. III, § 2.

retain power over most issues of social policy.<sup>5</sup> Policymaking by the Supreme Court in Washington, D.C., therefore, is the antithesis not only of representative self-government, but also of decentralized government.

The paradox is that although judicial policymaking is both oxymoronic and unconstitutional, it is one of the most prominent and distinguishing features of our present system of government. Asking whether judges have a policy-making role in the American system of government is like asking whether gravity has a role in the solar system. One could argue that the Supreme Court has been our most important institution of government over the past third of a century, deciding basic issues of domestic social policy.<sup>6</sup> Justice Brennan, the Court's most influential member during that period, has undoubtedly been the nation's most important political leader, even though the vast majority of Americans would probably not recognize his name. Indeed, the scope and significance of judicial policymaking continue to expand.

Today, American judges decide questions literally of life and death, such as abortion<sup>7</sup> and capital punishment,<sup>8</sup> and basic morality, such as pornography,<sup>9</sup> nude dancing,<sup>10</sup> and public displays of vulgarity.<sup>11</sup> Judges determine whether provision may be made for mentioning the name of God in public schools,<sup>12</sup> and whether government may give aid to schools with a religious affiliation.<sup>13</sup> The Supreme Court has ordered and brought about leg-

5. As Madison wrote:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

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

7. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

8. See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

9. See, e.g., *Miller v. California*, 413 U.S. 15 (1973).

10. See, e.g., *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456 (1991).

11. See, e.g., *Cohen v. California*, 403 U.S. 15 (1971).

12. See, e.g., *Lee v. Weisman*, 112 S. Ct. 2649 (1992); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engle v. Vitale*, 370 U.S. 421 (1962).

13. See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985).

islative redistricting, state and federal.<sup>14</sup> It has also disallowed most legal distinctions on the basis of sex,<sup>15</sup> alienage,<sup>16</sup> and illegitimacy.<sup>17</sup> The Court has created and imposed on the States an array of protections for the criminally accused<sup>18</sup> that are known to no other legal system. These protections have produced a criminal justice system of such complexity, cost, and opportunity for delay, that attempts to enforce the criminal law often are pointless.

Federal judges have instituted and continue to administer what is perhaps the boldest and most expensive social experiment in the nation's history: the exclusion of children from their neighborhood schools and their transportation to more distant schools, in an effort to foster racial integration. One federal district judge has issued orders to the State of Missouri requiring the expenditure of over one billion dollars on the Kansas City school system, which has since shrunk to only 35,000 students—less than half its former size.<sup>19</sup> The result is that the Kansas City school system now has a twenty-five acre nature area, a planetarium, a model United Nations, and an Olympic-sized swimming pool, while other school districts in Missouri lack funds to buy books or maintain basic facilities.<sup>20</sup> The district judge nonetheless continues to order new expenditures for the Kansas City schools, and his orders continue to be faithfully obeyed.<sup>21</sup> Would they still be obeyed by the political leaders of Missouri if, instead of one billion dollars, the judge ordered the expenditure of ten or one hundred times that amount? The question obviously is not whether judges have policy-making power. They do. The question is: What are the limits, if any, on that power? Is there a point at which the American people, or their political representatives, will decide that a federal court order is so obviously destructive of a functional society that they will refuse to carry it out?

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14. *See, e.g.*, Connor v. Finch, 431 U.S. 407 (1977).

15. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).

16. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

17. *See, e.g.*, Clark v. Jeter, 486 U.S. 456 (1988); Levy v. Louisiana, 391 U.S. 68 (1968).

18. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

19. Jenkins v. Missouri, 639 F. Supp. 19, 43-44 (W.D. Mo. 1985), *aff'd as modified*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987).

20. *See* Mary Jordan, *Kansas City's Costly Integration System: Results Mixed in \$1.2 Billion School Plan*, WASH. POST, Apr. 11, 1992, at A1.

21. *See, e.g.*, Jenkins v. Missouri, 672 F. Supp. 400 (W.D. Mo. 1987).

How did federal judges acquire such policy-making power, and why is its exercise permitted to continue? Essential to the present role of our courts, of course, is the early establishment of the power of judicial review.<sup>22</sup> Although it was not explicitly provided for in the Constitution, Alexander Hamilton argued for judicial review,<sup>23</sup> and Chief Justice John Marshall established it on the specious ground that it is inherent in a written constitution that places limits on legislative power.<sup>24</sup> Chief Justice Marshall argued that laws inconsistent with the Constitution must be considered void because the Constitution is by its own declaration "the supreme law of the land."<sup>25</sup> This argument is persuasive enough, except that it does not establish that the Court is in fact authorized to make the determination of inconsistency. Marshall's argument in *Marbury* assumed an inconsistency so clear that the question of who discovered it was irrelevant. He gave as an example a law that permits conviction for treason on the basis of a single witness' testimony, in the face of the constitutional provision that requires two such witnesses.<sup>26</sup> Yet such laws do not occur: Congress has never passed a one-witness treason statute, because legislators as well as judges are capable of reading the Constitution. If judicial review were in practice what it is in theory and justification—namely, the disallowance of laws clearly prohibited by the text of the Constitution—it would be exercised so infrequently as to be of little interest.

Judicial review, therefore, is not necessarily inconsistent with judges performing only the judicial, or law-applying, function. It is surely unrealistic, however, to expect that lifetime appointees with the power to invalidate laws will not be tempted to declare unconstitutional those laws with which they disagree. New federal judges certainly develop a talent for discovering constitutional objections—if not in actual constitutional provisions, then perhaps in their penumbras<sup>27</sup>—that had previously been overlooked and that others are still unable to see. Simply performing

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

23. As Hamilton explained, "[constitutional] [l]imitations . . . can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." THE FEDERALIST No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

24. *Marbury*, 5 U.S. (1 Cranch) at 176-77.

25. *Id.* at 180.

26. *Id.* at 179.

27. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (arguing that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees").

the judicial function, which in constitutional cases almost always means upholding the challenged law or governmental action, can, unfortunately, be unexciting work. In contrast, successfully substituting one's own policy preferences for those of less enlightened citizens, in the interest of advancing justice, equality, and decency, can be exhilarating. It can also be the road to fame and kudos, at least if the judge is closely attuned, as Justice Brennan always was, to current academic fads. It is not the plodding, law-applying judge whose face adorns national magazines, whose life becomes the subject of admiring television shows, and who is invited to speak at law school symposia.<sup>28</sup> The corruptions of power, in short, do not operate less powerfully on judges than on others. If we do not wish judges to be our policymakers, we must deny them the power to make and unmake law in the name of the Constitution.

While some degree of judicial policymaking is no doubt inherent in judicial review, the magnitude of the power may vary to some extent with the nature of the constitution supposedly being enforced. A constitution that authorizes judges to pursue justice, advance morality, or advance the overall social interest in each case would obviously amount to a simple authorization of judges to legislate. A constitution with very specific limitations, on the other hand, would seem to present judges with fewer policy-making opportunities.

The very essence of lawyerly skill, however, is the ability to accomplish a great deal on the basis of very little. A truly great lawyer, such as Justice Douglas in *Griswold*, can achieve the result he prefers on the basis of nothing. Although our Constitution is one that imposes relatively specific limitations on government, the Court has effectively created a newer and much grander Constitution through the Fourteenth Amendment. The Court has held that the Fourteenth Amendment authorizes it to discover "fundamental rights," which may be restricted only by laws that survive the Court's "strict scrutiny."<sup>29</sup> The practical result, of course, is to give the Justices unlimited policy-making power and to make the

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28. For an examination of the impact of liberal media coverage on the jurisprudence of a press-conscious Justice Kennedy, see Terry Eastland, *The Tempting of Justice Kennedy*, AM. SPECTATOR, Feb. 1993, at 32.

29. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (establishing a right to travel); *Reynolds v. Sims*, 377 U.S. 533 (1964) (establishing a right to vote); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (establishing a right to procreate).

text of the Constitution practically irrelevant to the substance of constitutional law.

The scope of the power of judicial review, however, depends on the views of the people or their leaders, especially the views of the judges themselves, about what it is appropriate or even possible for judges to do. These views were changed by the climactic constitutional event of this century: the Court's decision in *Brown v. Board of Education*.<sup>30</sup> As important as *Brown* was for the decision it reached, it was vastly more important for the revolution it worked on the meaning of judicial review. It transformed judicial review from the conservative force that Hamilton and Marshall intended, a brake on social change,<sup>31</sup> into our society's most important initiator and accelerator of change. *Brown* seemed to establish for many observers the superiority of decisionmaking by judges, on the basis of principle, to decisionmaking by politicians responsible to an electorate. *Brown* delivered a *coup de grace* to arguments for judicial restraint, because to oppose judicial activism was to oppose *Brown*, and to oppose *Brown* was not socially or politically permissible.<sup>32</sup> If the Court could end racial segregation in the South, what further moral advances could it not decree, and if it could, should it not do so? Should we not be grateful to have an institution that can produce moral advance so readily? For most professors of constitutional law, who are more committed to advancing a liberal agenda than to democracy, and apparently even for most elected representatives, the answer to these questions is clear: Judicial policymaking is a wonderful thing.<sup>33</sup>

A problem with governmental power to enact "good" social policies without popular consent is that it necessarily includes the power to enact "bad" social policies without popular consent. Even more fundamentally, the essence of a system of government based on the consent of the governed is that the question of whether a social policy is "good" gets answered by the governed.

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30. 347 U.S. 483 (1954).

31. Alexander Hamilton argued that judicial review would be the "bulwark . . . of a limited Constitution against legislative encroachments" and would "guard the Constitution and the rights of individuals" from "dangerous innovations in the government" brought about by "the arts of designing men." THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

32. See BORK, *supra* note 6, at 76-77.

33. See, e.g., Duncan M. Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

One's attraction to government by judges increases in direct proportion to two traits: first, the extent to which one believes that difficult questions of social policy can be decided on the basis of principles that judges can be expected to discern and apply;<sup>34</sup> and second, the extent to which one distrusts government by the people through elected representatives.<sup>35</sup>

The first belief, though of irresistible appeal to many because it is based on an understandable desire for objective certainty in a dangerously uncertain world, is simply mistaken. Difficult issues of social policy are difficult, not because of a failure to discern a resolving principle, but because they involve conflicting principles, or conflicting interests that are recognized as legitimate. Leafletting on public streets, for example, serves the interest of increasing opportunities for expression, but does not serve our interest in clean and unobstructed streets. Whether and to what extent leafletting should be permitted is not a question of logic or fact, but one of public policy, and republican government provides that public policy issues are to be determined by the people through elected representatives. Further, to the extent, if any, that policy issues can be decided on the basis of principle, there is little reason to think that judges—whose only educational requirement is a law degree—are more likely than legislators to discern the relevant principle. There is even less reason to think, in any event, that judges are likely to decide such issues on any basis other than personal preference.

The second characteristic of those who defend government by judges through judicial review is an extreme suspicion of government by the popular will. This suspicion, unlike the belief that policy controversies can be decided by judges on the basis of principle, cannot be dismissed as mistaken. Government is undoubtedly dangerous, and skepticism as to the benefits of coercive government action is always healthy. There is nothing in human history or experience, however, to bolster the belief that government is more likely to be beneficial and trustworthy if it is *not* based on the consent of the people. This is merely to repeat the truth, noted by Churchill, that there is little to be said for democracy except its alternatives.<sup>36</sup>

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34. See, e.g., RONALD M. DWORKIN, *A MATTER OF PRINCIPLE* 69-71 (1985).

35. See, e.g., Abram J. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

36. Churchill stated that:

Proponents of judicial activism invariably contrast judges, depicted as disinterested pursuers of the public good, with politicians, who are viewed as servants of special interests. A professor of jurisprudence at a leading Catholic institution once argued in a debate with me that democracy was fine up to a point, but that activist judicial review provided an essential improvement because it served to take the results of the democratic process and move them in a more moral direction. Of course, *Brown* was his leading example. I pointed out that although I took no position on the question of abortion, I was surprised to hear from a member of a Catholic institution that instituting a policy of abortion on demand was an unambiguous move in a more moral direction. Like many other liberal constitutional scholars, he was in effect defining activist judicial review as applied moral philosophy.<sup>37</sup> The study and practice of law, however, is not ordinarily thought of as a prescription for the inculcation of a refined moral sensibility. If it is moral philosophers we want as rulers, we should seek out moral philosophers, not lawyers, for appointment to the Court.

If politicians are frequently tempted to venality, the professional temptation of judges—overestimation of one's competence—is even more dangerous. It is not good for the soul to be a judge for very long; it produces a loss of perspective. If term limits are useful for elected representatives, they are essential for unelected judges. Although arguments for activist judicial review invariably take as a given that judges are models of integrity, they are in fact among the least trustworthy of government officials. This is to be expected, since they are least subject to external restraints. Firm conviction as to one's goodness and wisdom, the liberal-activist judge's disease, leads readily to justifying the use of all possible means to achieve one's ends.<sup>38</sup>

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Many forms of government have been tried and will be tried in this world of sin and woe. No one pretends that Democracy is perfect or all-wise. Indeed, it has been said that Democracy is the worst form of government except all those other forms that have been tried from time to time.

Winston Churchill, *SPEECH BEFORE PARLIAMENT* (1947), reprinted in *THE CHURCHILL WIT*, at 13 (Bill Adler ed., 1965).

37. See, e.g., RONALD M. DWORIN, *TAKING RIGHTS SERIOUSLY* (1977); MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988).

38. As Justice Holmes observed in his celebrated *Abrams* dissent: "If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

In *Green v. New Kent County*,<sup>39</sup> for example, Justice Brennan changed *Brown's* prohibition of segregation into an affirmative requirement of integration: He not only failed to admit, but *denied* that a change had been made.<sup>40</sup> Justice Brennan was committed to compulsory school racial integration, despite the fact that it requires the assignment of children to schools on the basis of race, which is precisely what everyone thought *Brown* had *prohibited*.<sup>41</sup> It was not feasible openly to overturn or qualify *Brown*, but the Court was determined not to let that stand in its way. Thus, it simply imposed a policy of compulsory integration by race and denied having done so.<sup>42</sup> As Justice Brennan explained in a Court memorandum, honesty was simply "not practical" in this area, given the Court's objectives and public disagreement with those objectives.<sup>43</sup> Being "supreme" means never having to worry about truth or logic. If we seek a high level of integrity in our rulers, a committee of lawyer-judges responsible to no one is the last place to look.

There is really only one reason, however, why we have arrived at a system of policymaking by judges to the extent that we have today. This reason is simply that such activism has reliably served the advancement of liberal causes. If one peruses the controversial constitutional decisions of the last few decades—for example, those concerning abortion, school prayer, busing, pornography, and criminal procedure—one is soon struck by the peculiarity that the position of the American Civil Liberties Union (ACLU) prevailed on every issue.<sup>44</sup> The ACLU almost never loses when policymaking is transferred from the ordinary political process to the Supreme Court: It either gets a policy decision it could not get in any other way, or it is simply left to try again.

Further, the ACLU has no reason to fear that this situation will change, despite much talk in the media about a conservative, right-wing Court. To the media, in order to be "conservative" the Court need not give conservatives victories they could not win in

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39. 391 U.S. 430 (1968).

40. *See id.* at 437.

41. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

42. For a further elaboration of this argument, see LINO A. GRAGLIA, *DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS* 72 (1976).

43. *See* BERNARD SCHWARTZ, *SWANN'S WAY: THE SCHOOL BUSING CASE AND THE SUPREME COURT* 29-90 (1986); Lino A. Graglia, *When Honesty is "Simply Impractical" for the Supreme Court*, 85 MICH. L. REV. 1153, 1169 (1985).

44. *See generally* SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* (1990).

the political process, by holding, for example, that permitting abortion—rather than restricting it—is unconstitutional. A “conservative” Court need not even rescind some previous liberal victories, for example, by overruling *Miranda*,<sup>45</sup> the exclusionary rule of *Mapp v. Ohio*,<sup>46</sup> or the busing,<sup>47</sup> or school prayer<sup>48</sup> decisions. For the Supreme Court to be conservative in the media’s perception, it is enough that liberal victories come less frequently or with less certainty. In the last Term, for example, a Court described by the media as captured by conservatives made some twenty rulings of unconstitutionality, all but two of which further advanced liberal causes.<sup>49</sup>

The vast majority of constitutional law professors share the policy preferences of the ACLU, which the Supreme Court has advanced for over forty years. They therefore take it as their primary professional responsibility to justify what the Court has done by concocting theories of constitutional “interpretation” to justify constitutional decisionmaking that is not based on the Constitution.<sup>50</sup> The nightmare of the American intellectual is that decisionmaking on issues of public policy may fall into the hands of the American people. This frightens the American intellectual because the American people are, after all, unenlightened and self-interested enough to favor such things as capital punishment, prayer in the schools, and suppression of pornography, all of which are anathema to liberal sensitivity. The function of constitutional law, as our intellectual elite sees it, is to prevent this from happening. It is all well and good for the people to play their little electoral games, voting representatives in and out of office, but the last word on basic issues that determine the nature of society obviously must be kept in the hands of their moral and intellectual betters. Supreme Court Justices, lawyers all, may not make up an ideal panel of moral philosophers, but as a practical matter they are all that is available in the American system to perform this function.

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45. *Miranda v. Arizona*, 384 U.S. 436 (1966).

46. 367 U.S. 643 (1961).

47. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

48. *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38 (1985).

49. In fact, despite 10 consecutive Court appointments by Republican Presidents, liberal judicial activism has become institutionalized to such an extent that judicial policy-making furthering the objectives of the political and cultural Left is now the American norm. *See* Lino A. Graglia, *Is This a Conservative Court? No*, 1993 PUB. INTEREST L. REV. 147.

50. *See, e.g.*, BORK, *supra* note 6, at 187-221; JOHN H. ELY, *DEMOCRACY AND DISTRUST* 43-72 (1980).

In sum, policymaking by judges may not always push policy decisions in a more "moral" direction, but it will almost always push them in a more liberal direction. If you favor liberalism, defined as ever-increasing government coercion in pursuit of egalitarian ends, and are willing to have liberal policies imposed on the American people without their consent, then you will favor activist judicial review. If, on the other hand, you see liberalism as a prescription for social dissolution, or are humble enough to accept that, regardless of your personal beliefs, basic policy decisions should be made in accordance with the collective judgment of your fellow citizens, you will favor separation of the judicial and legislative roles.

The search for "statesmanship" in judges is therefore an improper and futile quest. Because the ideal function of judges is simply to ascertain and apply the law, they should, ideally, pay absolutely no attention to the practical consequences of their constitutional decisions. For example, there can be no doubt that the consequences of the privilege against self-incrimination are uniformly undesirable and unfortunate. No sensible policymaker would propose today that the country needs a device that can serve no purpose except to enable the guilty to escape punishment.<sup>51</sup> Yet with judicial review, there can be no doubt that a law requiring the defendant to take the stand in a federal criminal trial must be declared unconstitutional. This is because the function of the judge is to apply the law, not concern himself with the law's consequences. That enforcing the Constitution can produce disastrous consequences shows only that constitutionalism can be a bad idea, not that judges should be allowed to make up constitutional law as they see fit.

It was a concern with consequences that led the Court in *Brown* to hold that, although plaintiffs had a right to be assigned to school without regard to race, that right did not need to be enforced. The result was to require not the end of segregation, but the production of a desegregation plan and the continuation of segregation for another ten years in the deep South. The result was also to complicate the law enormously, to put judges in the business of overseeing the operation of schools, and, finally, to convert the triumph of *Brown* into the disaster of busing.<sup>52</sup> If the Constitution prohibited racial assignment, as the Court held, the

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51. See Robert Kaus, *Abolish the Fifth Amendment*, WASH. MONTHLY, Dec. 1980, at 12-19.

52. See GRAGLIA, *supra* note 42, at 37.

Court should have had no alternative but to order that racial assignment must stop regardless of the consequences.

We do indeed need statesmen who can gauge the long-run and multifarious effects of changes in basic social policy. We are in deep trouble, however, and will have abandoned decentralized, representative self-government, if we look for statesmanship from a committee of nine lawyers, unelected and holding office for life. Consequences are the concern of politicians. Applying the law is the only legitimate function of judges.