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Constitutional Law: A Ruse for Government by an Intellectual Elite

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CONSTITUTIONAL LAW: A RUSE FOR GOVERNMENT BY AN INTELLECTUAL ELITE

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The topic of our symposium, the appropriate role of the judiciary in the American system of government, is also the central question of constitutional law. The only thing common to the myriad subjects considered under the rubric of constitutional law is that in each the Supreme Court has decided to disallow a policy choice made in the ordinary political process and to substitute a policy choice it prefers. Every constitutional case presents two questions: the ultimate question of the policy choice involved (should pornography be suppressed, should there be state-sanctioned prayer in public schools); and the threshold question, our question: what, if anything, justifies decision of the policy issue by the Supreme Court? During the past four decades, constitutional law has made the Supreme Court the most important institution of American government in terms of fundamental issues of domestic social policy. The seriousness of the threshold question, therefore, could hardly be greater.

UNELECTED JUDGES, OUR PRIMARY LAWMAKERS

During the past four decades, the Court has decided for the nation as a whole questions literally of life and death, as in its decisions on abortion[1] and capital punishment,[2] questions of sexual morality, as in the decisions on pornography[3] and homosexual rights,[4] and questions of basic social control and public order, as in its decisions on enforcement of the criminal law[5] and the regulation of street demonstrations.[6] It has ordered the reapportioning of our legislatures, state and federal, on a

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1. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).
2. *See, e.g.*, Furman v. Georgia, 408 U.S. 238 (1972).
3. *See, e.g.*, A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413 (1966).
4. *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996).
5. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).
6. *See, e.g.*, Gregory v. City of Chicago, 394 U.S. 111 (1969).

mathematically precise population basis.[7] It has disallowed state provisions for prayer and Bible reading in public schools[8] while also disallowing most forms of state aid to religious schools[9] and most state-sanctioned public displays of religious symbols.[10] On the other hand, it has decreed that persons claiming religious objections be exempted from requirements, such as compliance with education laws, applicable to all others.[11] The Court has disallowed most distinctions on the basis of sex,[12] illegitimacy,[13] and alienage,[14] and it has remade and largely abolished the law of libel.[15] At the height of the Cold War, the Court disallowed the exclusion of members of the Communist Party from public school teaching[16] and even from defense plants.[17]

In perhaps the most impressive demonstration of its irresistible power, at least in terms of the number of people directly and immediately affected, the Court has ordered that public school children be excluded from their neighborhood schools and transported to more distant schools because of their race.[18] This requirement, serving no known social good, has had the principal effect of driving the middle class, white and black, first from our public school systems, leaving them as preserves for the poor, and then from our cities. The result is that the school systems of nearly all our major cities are now overwhelmingly non-white.[19] In Kansas City alone, a single federal district judge has issued orders requiring expenditures totaling over two billion dollars in a futile effort to lure whites back to Kansas City schools.[20] The orders have totally failed to achieve their purpose and have left schools elsewhere in Missouri

7. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).
8. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962).
9. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977).
10. *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573 (1989).
11. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972).
12. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).
13. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968).
14. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971).
15. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964).
16. *See, e.g.*, Elfbrandt v. Russell, 384 U.S. 11 (1966).
17. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967).
18. *See, e.g.*, Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971).
19. *See* LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS (1976).
20. *See* Missouri v. Jenkins, 515 U.S. 70 (1995).

in desperate need of funds,[21] but they have nonetheless been, and continue to be, obeyed. What, then, are the limits on the power of a federal judge acting in the name of the Constitution? At what point, if any, would such orders not be obeyed? When the required expenditures reach ten billion dollars? A hundred billion?

Astounding as it may seem in a supposedly democratic nation, for the past four decades virtually every change in basic social policy, the policies that determine the nature of a society and the quality of a civilization, has come not from elected legislators, state or federal, but from Supreme Court justices. It is possible as a matter of political theory to favor a system of government by a central committee of wise men not elected by or electorally accountable to the people. Plato, after all, favored government by philosopher kings, persons supposedly particularly well trained and suited for the art of government.[22] How is it possible, however, to favor a system of government by lawyer kings, persons trained in little other than the manipulation of words and hardly noted as moral paragons? We purport to continue to be committed to the basic principles of the Constitution—representative self-government, federalism, and separation of powers—that have served to create a nation of unprecedented freedom and prosperity. In reality, however, we have allowed the system of government created by the Constitution to evolve into its antithesis: a system of government by majority vote of a committee of nine lawyers, unelected and holding office for life, issuing decrees for the nation as a whole from Washington, D.C. Having repudiated the principles that have been the foundation of our national success, we are in serious and rapid decline. It is not clear whether that decline can be arrested.

IT'S NOT CONSTITUTIONALISM, BUT JUDICIAL ACTIVISM

The appropriate role of judges in the American system of government, one might suggest, is the same as the role of judges elsewhere: performance of the ordinary judicial function, which does not involve the power to question the authority of the

21. *See* Frank J. Murray, *Schools Plan Will End; Feud Will Not; Desegregation Case Leaves Judge Bitter*, WASH. TIMES, Mar. 27, 1997, at A1.

22. *See* PLATO, THE REPUBLIC (Richard W. Sterling & William C. Scott, trans., W.W. Norton & Co. 1985).

lawmaker. That such a power is obviously subject to abuse, never existed in Great Britain, and is not explicitly provided for in the Constitution, gives reason to doubt that it was knowingly granted by the framers and ratifiers of the Constitution. If a considered judgment to grant the power had been reached, one would expect that, as with the analogous veto power of the president, the conditions of and limitations on its exercise would have been spelled out and elected legislators would undoubtedly have been given the last word. The framers and ratifiers may have intended judges to have a role in the enforcement of constitutionalism, but they clearly did not intend judges to have substantial policymaking power.[23] To the extent that our judges exercise such power today, we can be sure that something has gone wrong and the constitutional scheme is not being implemented, but perverted.

Constitutionalism in a democracy is the attempt to limit majority rule by imposing restrictions on policy choices that only a super-majority can change. Judicial review is judicially enforced constitutionalism—the power of judges to invalidate policy choices made by other officials or institutions of government on the ground that they are prohibited by the Constitution. All constitutionalism limits democracy and raises the difficult question of rule of the living by the dead. Once it is recognized that constitutional restrictions on policy choices are not mandates of heaven, but themselves merely policy choices made by other people in the past, they become extremely difficult to justify. The subjects of a sovereign may understandably seek to limit the sovereign's power. Why, however, should people who are themselves sovereign in a system of self-government, as Alexander Hamilton pointed out,[24] seek to limit their own policymaking power or, worse, the policymaking power of other people in the future? Surely the problems of any given time can better be dealt with in accordance with the knowledge and views of the people of that time rather than those of people in the past.

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23. Alexander Hamilton, for example, defended judicial review on the ground that judges would invalidate laws only if they were "contrary to the manifest tenor" and in "irreconcilable variance" with the Constitution. THE FEDERALIST NO. 78. Elbridge Gerry argued at the convention that "[i]t was quite foreign from the nature [of the office of judges] to make them judges of the policy of public measures." JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 101 (E. H. Scott ed., Chicago, Albert, Scott & Co. 1894) (1840).

24. *See* THE FEDERALIST NO. 84 (Alexander Hamilton).

The usual justification for constitutionalism, that the people in times of calm thereby protect themselves from making decisions in times of passion that they know they will regret,[25] is extremely implausible—the Fourteenth Amendment, for example, the supposed basis for most constitutional law, was not adopted in a time of calm—and it explains none of the Supreme Court's controversial constitutional decisions.

The framers of the Constitution were wise enough to limit very few policy choices. The Constitution is a very short and apparently straightforward document, easily printed with all amendments, repealers, and obsolete matter on fourteen or fifteen pages. It is not at all like the Bible, the Talmud, or even the Tax Code—lengthy tomes in which many things may be found with diligent search. The original Constitution created a national government of limited powers, but placed very few restrictions on the exercise of those powers and even fewer on the policymaking authority of the states. Virtually the only significant limitation on state lawmaking, at least in terms of litigation, was the prohibition of abridging the obligation of contracts, that is, of debtor-relief laws.[26] It is true that the framers of the Constitution were concerned with protecting individual rights, but they were primarily concerned with the rights of bankers.

The so-called Bill of Rights, adopted in 1791, two years after the ratification of the Constitution, imposed additional restrictions, but only on the federal government. It added important protections of religion, speech and the press, and the right to bear arms.[27] It prohibited the confiscation of property and provided several procedural protections for the criminally accused.[28] Later amendments protect against denial of the right to vote on grounds of race or sex or to persons over eighteen years of age. Finally, the Fourteenth Amendment was meant to provide a federal guarantee against state denial of certain basic civil rights to blacks.[29] This is not an impressive list in comparison with the grand declarations of positive rights, including welfare rights, found in, for example, the French

25. *See* THE FEDERALIST No. 78 (Alexander Hamilton).
26. *See* U.S. CONST. art. I, § 10.
27. *See id.* amends. I-II.
28. *See id.* amends. IV-VI, VIII.
29. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).

Declaration of the Rights of Man and the United Nations Charter.

The restrictions on policy choices found in the Constitution are not only few, but also generally noncontroversial. American legislators, all American citizens generally sharing American values, ordinarily have little occasion, and are little tempted to violate them. The result is that examples of the enactment of clearly unconstitutional laws are extremely rare. Perhaps the clearest example to come to the Court is the Minnesota Mortgage Moratorium Act of 1933, a debtor-relief measure of precisely the sort that the Contracts Clause was meant to preclude. The clause would have deprived the people of Minnesota of the power to deal with a crisis in the depths of the Great Depression by limiting farm foreclosures, even though impoverished farmers about to be rendered homeless by foreclosure were threatening violence against sheriffs and judges. The incident provides an excellent illustration of the difficulty of justifying constitutional restrictions on self-government. In *Home Building & Loan Ass'n v. Blaisdell*,[30] the Supreme Court, apparently cognizant of this, upheld the law, although only by a five-to-four vote. By upholding the result of the political process in Minnesota, the decision served the cause of democracy, though not of constitutionalism. In doing so, however, the Court missed its best, if not its only, chance to hold unconstitutional a law that really was.

The paucity and noncontroversial nature of constitutional restrictions means that if judicial review involved in practice what it involves in theory—the invalidation of laws clearly prohibited by the Constitution—occasions for its exercise would be so rare as to make it a matter largely of academic interest. The problem of judicial review we face today is not a problem of constitutionalism—the disallowance of policy choices prohibited by the Constitution—but of judicial activism—the disallowance of policy choices not clearly prohibited by the Constitution. Only policy choices clearly prohibited should be judicially disallowed, of course, because in a system of representative self-government, the views of elected representatives should prevail in cases of doubt. Constitutionalism presents the problem of rule of the living by the dead; judicial activism presents the very different

30. 290 U.S. 398 (1934).

problem of government by electorally unaccountable judges who are all too much alive.

THE FRAUD OF CONSTITUTIONAL "INTERPRETATION"

By far, the most important thing to understand about constitutional law is that it has almost nothing to do with the Constitution. The conventional justification for judicial invalidation of a policy choice—that the Court is merely enforcing a constitutional prohibition—is purely fictional in almost every case. This may seem shocking or at least exaggerated, but it is literally true, as can easily be shown. It should be clear enough, indeed, simply from the past that so little of the Constitution is even purportedly involved in the making of constitutional law. The vast bulk of rulings of unconstitutionality involve federal, not state, law, and nearly all of these rulings purport to be based on a single constitutional provision: one sentence of the Fourteenth Amendment and, indeed, on one or both of two pair of words—"due process" and "equal protection." It does not require a high degree of jurisprudential sophistication to understand that the Justices of the Supreme Court do not determine national policy on a vast range of difficult issues by studying those four words.

The irrelevance of the Constitution to constitutional law can also be clearly seen in, for example, the fact that there was a time when the Constitution *permitted* the assignment of students to schools on the basis of race, as the Court told us in *Plessy v. Ferguson*[31] in 1898 and later cases.[32] There then came a time, however, when the Constitution *prohibited* the assignment of students on the basis of race, as the Court told us in *Brown v. Board of Education*[33] in 1954. Finally, there came a time, the present, when the Constitution often *requires* the assignment of students to school on the basis of race, as the Court told us in *Swann v. Charlotte-Mecklenberg Board of Education*[34] in 1971. That covers the possibilities—permitted, prohibited, required—but in all that time the Constitution was not changed in any

31. 163 U.S. 537 (1896).
32. *See, e.g.*, Gong Lum v. Rice, 275 U.S. 78 (1927).
33. 347 U.S. 483 (1954).
34. 402 U.S. 1 (1971).

relevant respect. A scientific observer would have little trouble concluding that the Constitution was not the operative variable.

To take another example from the same area of law, everyone knows, or thinks he knows, that school racial segregation was held unconstitutional in *Brown* because the Court found it prohibited by the Equal Protection Clause of the Fourteenth Amendment. My contention, however, is that the Equal Protection Clause was not necessary to the decision; that is, the same result could and would have been reached in its absence. Real science differs from social science in that it makes predictions that can be tested by controlled experiments. For example, if it were hypothesized that it is chemical X that causes a certain liquid to turn blue, the hypothesis would be considered refuted if it could be shown that the liquid turns blue even in the absence of chemical X. Would not it be wonderful if it were possible to test my Equal Protection Clause hypothesis, as in a controlled scientific experiment, by in effect running that *Brown* decision again, but this time without the clause. Amazingly enough, as if to serve the cause of jurisprudential science, this is exactly what happened.

On the same day the Court decided *Brown,* it also decided *Bolling v. Sharpe*,[35] a challenge to school racial segregation by federal law in the District of Columbia. Because the Equal Protection Clause occurs only in the Fourteenth Amendment, which does not apply to the federal government, it was not available for the case. What difference did its absence make in the result reached? None at all; school segregation was found no less constitutionally prohibited in the District of Columbia. The liquid still turned blue! This time, however, segregation was found to violate the Due Process Clause of the Fifth Amendment,[36] which does apply to the federal government. In other words, we are asked to believe that a constitutional provision adopted in 1791 as part of a Constitution that explicitly recognized and protected slavery was meant to prohibit school racial segregation. If the Due Process Clause of the Fifth Amendment did not exist, the Court would simply have had to rely, with equal validity, on some other constitutional provision, perhaps the provision prohibiting discrimination among seaports.

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35. 347 U.S. 497 (1954).

36. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law.").

Since the Fourteenth Amendment also contains a Due Process Clause, one effect of the decision was to make the Equal Protection Clause redundant.

To take another example, in *Roe v. Wade,*[37] the Court announced that the Constitution prohibits state restrictions on the practice of abortion. The prohibition was found, of course, in accordance with convention—in the always handy Due Process Clause of the Fourteenth Amendment. The Court has converted the Due Process Clauses into empty vessels into which it can pour any meaning, thereby giving itself unlimited policy discretion. It would have been no more fictional to find the prohibition in, for example, the clause prohibiting the granting of titles of nobility. The Fourteenth Amendment was 105 years old in 1973 when *Roe* was decided, and all states had restrictions on abortion. Is it not odd that no one noticed that these laws were constitutionally prohibited until Harry Blackmun came along to point it out? *Roe v. Wade* is often considered the clearest example of Supreme Court constitutional decisionmaking having nothing to do with the Constitution, but in fact it is no less justifiable, than the Court's other controversial rulings of unconstitutionality, all of which are equally baseless.

Indeed, the Court's decisions on prayer in the schools,[38] state-aid to religious schools,[39] and the display of religious symbols in public places[40] can be said to be even worse than *Roe.* They purport to be based on the religion clauses of the First Amendment, supposedly made applicable to the states by the Due Process Clause of the Fourteenth Amendment. The purpose of the religion clauses, however, was to protect the states from precisely the type of federal interference in matters of religion that the religious decisions of the Supreme Court, an arm of the federal government, represent.[41] *Roe v. Wade* is rightly criticized as based on nothing in the Constitution, but the religion decisions are not only unsupported by, but are also in violation of, the constitutional provisions on which they purport to be based. Another example of so-called constitutional

37. 410 U.S. 113 (1973).

38. *See, e.g.,* Engel v. Vitale, 370 U.S. 421 (1962).

39. *See, e.g.,* Wolman v. Walter, 433 U.S. 229 (1977).

40. *See, e.g.,* County of Allegheny v. ACLU, 429 U.S. 573 (1989).

41. *See, e.g.,* ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982).

"interpretation" not merely without basis in but in defiance of the Constitution is the constantly reiterated insistence by former Justices Brennan, Marshall, and Blackmun[42] that capital punishment is constitutionally prohibited despite the fact that it is explicitly recognized and provided for in several constitutional provisions.[43] In short, all talk of the Supreme Court "interpreting" the Constitution in reaching its controversial rulings of unconstitutionality is purely conventional and entirely misleading. No question of constitutional interpretation was in fact involved in any such ruling of the past four decades.

JUDICIAL POLICYMAKING FAVORED AS A RELIABLE MEANS OF PUSHING POLICY CHOICES TO THE LEFT

If the first thing to understand about constitutional law is that it has very little to do with the Constitution, the second and final thing to understand—this will complete the course—is that the Supreme Court's rulings of unconstitutionality have not been random in terms of their political impact. On the contrary, they have almost uniformly served to advance the political agenda of those on the far left of the American political spectrum. Consider the Court's revolutionary decisions on abortion, capital punishment, criminal procedure, busing for school racial balance, prayer in the schools, government aid to religious schools, display of religious symbols in public places, pornography, libel, street demonstrations, discrimination on the basis of sex, alienage or illegitimacy, reapportionment, and so on almost endlessly. These decisions on a vast range of subjects have in common only that in each case a policy choice made in the ordinary political process was disallowed by the Court in favor of a policy choice further to the left. That did not happen by coincidence.

It would be only a small exaggeration to say that the American Civil Liberties Union (ACLU), the paladin of far-left causes and paradigmatic constitutional litigator of our time, never loses in the Supreme Court, even though it does not always win. It either obtains from the Court a policy choice it cannot obtain in any other way because opposed by a majority of the American

42. *See, e.g.*, Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (Brennan, J., dissenting and Marshall, J., dissenting); Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting).

43. *See, e.g.*, U.S. CONST. amend V; *id.* amend. XIV, § 1.

people—for example, the removal of restrictions on pornography or the prohibition of prayer and Bible reading in public schools[44]—or it is left where it was to try again on another day. It took three tries for the ACLU position on contraception, for example, finally to prevail in 1965 in *Griswold v. Connecticut*,[45] the progenitor of *Roe v. Wade*.[46]

For conservatives or defenders of traditional values, the situation is precisely the reverse. They almost never win in the Supreme Court even though they do not always lose. For conservatives, a "victory" in the Court usually means, not obtaining a policy choice they could not obtain in the ordinary political process, but merely being permitted to continue to fight for their position in that process. It is rarely recognized that a victory for anti-abortionists, for example, equal to the victory pro-abortionists obtained in *Roe v. Wade* would be a decision not merely overruling *Roe v. Wade*, but a decision holding that no state may *permit* abortion. Such a decision is, however, simply unthinkable. In fact, even simply the overruling of *Roe v. Wade* has been more than conservatives have been able to obtain.

Liberals often argue, and some befuddled conservatives agree, that the situation has recently changed, that today we have a "conservative" Court. To liberal academics and the media, however, a conservative Court is merely one in which liberal victories come less quickly or frequently. A Court that took away a past liberal victory by, for example, overruling *Miranda v. Arizona*,[47] would be considered not merely conservative but reactionary. A Court that gave conservatives positive policy victories by, for example, *requiring* the suppression of pornography or provision for prayer in the schools would be denounced as tyrannical. It is only because liberal victories are seen as the norm and conservatives are grateful for even small favors that one can claim to see as conservative a Court that has recently reaffirmed its position on abortion and prayer in the schools and, for the first time, declared unconstitutional the operation of an all-male military school,[48] the denial of special

44. *See* Engel v. Vitale, 370 U.S. 421 (1962).
45. 381 U.S. 479 (1965).
46. 410 U.S. 113 (1973).
47. 384 U.S. 436 (1966).
48. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (abortion); Lee v. Weisman, 505 U.S. 577 (1992) (prayer); United States v. Virginia, 518 U.S. 515 (1996).

rights to homosexuals,[49] the prohibition of obscenity on the Internet,[50] and the enactment of term limits.[51]

In sum, in the last four decades, constitutional law has operated essentially as a cover or ruse for a system of government by judges and ultimately the Justices of the Supreme Court. The Court functions today primarily as the mirror and mouthpiece of liberal academia, especially legal academia, and the enacting arm of the ACLU. The nightmare of the American intellectual is that policymaking should fall into the hands of the American people. The American people favor capital punishment, effective enforcement of the criminal law, prayer in the schools, suppression of pornography, restrictions on abortion, and the assignment of children to their neighborhood schools, all anathema to our intellectual elite. It is only the power of the Supreme Court to create constitutional law that prevents these unenlightened views from prevailing. Policymaking by a committee of nine lawyers with no particular training or expertise relevant to the issues they decide is far from ideal in the view of academia—policymaking by sociologists, anthropologists, and moral philosophers would surely be better—but it is the only available alternative in America to government by the people. The self-assigned primary function of constitutional law professors, therefore, overwhelmingly far to the left of the American people, is to defend and support what the Supreme Court has done and see that this particular system of government continues.

Defenders of the Supreme Court's decisionmaking of the past four decades are, however, faced with a dilemma. On the one hand, it is not possible in the American context for them to come clean and openly defend a system of totally centralized and totally undemocratic government by majority vote of nine unelected lawyers. The only reason this system of government is favored is that it has overwhelmingly pushed and can be relied on to continue to push policy choices to the left, hardly a reason that can be publicly offered in its defense. On the other hand, it has become increasingly difficult to defend with a straight face the Court's rulings of unconstitutionality as the unavoidable dictates of the Constitution—the only ground generally

49. *See* Romer v. Evans, 517 U.S. 620 (1996).
50. *See* Reno v. ACLU, 117 S. Ct. 2329 (1997).
51. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

recognized as legitimate. Even the least sophisticated observer must be aware by now that this is not the case; indeed, it is only the most sophisticated who claim to believe otherwise.

The result has been the creation of a law school industry in the production of "constitutional theory." Some of the best minds of our time have been devoted to explicating the complexities and profundities of constitutional interpretation and formulating ever more subtle and ingenious theories to explain how the Supreme Court's surprising and unwanted decisions are really the mandates of the Constitution. "Hermeneutics," a term derived from the interpretation of theological writings, has become an essential part of the constitutional scholar's vocabulary. Borrowing from "post-modern" literary theory, according to which there is no objective reality or fixed meaning in a "text," has proved particularly useful. Some scholars have even openly opted for "noninterpretive interpretivism,"[52] even though the average citizen probably is not even aware that that is one of our interpretive options.

The task of justifying the Supreme Court's controversial rulings of unconstitutionality to a nation still purportedly committed to representative self-government in a federalist system is not merely difficult, however, but impossible. It is to be hoped that the increasingly apparent deleterious effects of the Court's remaking of our society will ultimately convince the American people that government by judges is not an improvement on the constitutional scheme—that our four-decade experiment in policymaking by the Supreme Court has been a failure. Nothing is more important to our political health and our continued freedom and prosperity than that the American people reassert their most precious and fundamental right—the right of self-government—and find a means to make the reassertion effective.

52. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980).