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JUDICIAL REVIEW: WRONG IN PRINCIPLE, A DISASTER IN PRACTICE

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The history of the American search for a good method of selecting judges is easily told, but the result is perhaps best summed up by the statement by a leading student of the question: "The experience with the selection of judges in the states proves conclusively that there is no good way to select judges."[1]

Methods of judicial selection can be classified broadly into two groups: election, which emphasizes judicial accountability, and appointment, which emphasizes judicial independence. Election can be further divided into partisan and non-partisan, and appointment can be by either the legislature, the governor, or some combination of both. Finally, the so-called merit plan (also known as the Missouri plan or commission plan) attempts to combine elements of both election and appointment plans. The initial selection and screening of candidates is done by an appointed commission—thus supposedly reducing political influences—which makes recommendations to the governor who then makes the appointments. After a period of service, the judges must submit to a "retention election" in which they face no opponent and voters simply vote yes or no. This supposedly introduces an element of accountability. In practice, merit plans come very close to appointment plans because retention elections rarely (in less than 2 percent of the cases) result in the removal of a judge.[2]

In the beginning, the states agreed with Alexander Hamilton's argument in the *Federalist* that judicial independence—that is, freedom from political pressure—required that judges be appointed rather than elected.[3] Eight of the original states gave the power of appointment to the legislature and five gave it to the governor with the approval of the legislature. The more democratic and populist frontier states, however—including Mississippi, admitted to the Union in 1817—favored the filling of political offices by election. This method became even more pronounced and widespread with the coming of Jacksonian Democracy. Beginning with Mississippi in 1832, many states opted for the selection of judges by partisan election.[4]

In the last half of the 19th century, however, many states, under the influence of the Progressive Movement, adopted non-partisan elections, which were seen as a compromise between the opposing interests of judicial independence and judicial accountability. The early part of the 20th century saw the development of the merit plan, and the last fifty years have seen a movement away from partisan and toward non-partisan and, particularly, some form of merit plan, selection.[5] The merit plan has not, however, as two commentators recently noted, "fulfilled its promise" of providing "'quality' judges" even though this fact "is often

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1. JUDICIAL REFORM IN THE STATES 15-16, (Anthony Champagne & Judith Haydel eds., 1993).
2. JUDICIAL REFORM, *supra* note 1, at 12.
3. THE FEDERALIST, NO. 78 at 469, (Alexander Hamilton) (Clinton Rossiter, ed., 1961).
4. JUDICIAL REFORM, *supra* note 1 at 3-6.
5. JUDICIAL REFORM, *supra* note 1, at 6-8.

ignored in the effort to correct the defects of partisan judicial selection."[6] As a result, there may currently be some movement away from merit plans.

Surely the most salient fact about the various methods of judicial selection is that they seem to make so little difference. Most studies of the subject show that judges chosen under a merit plan are not generally distinguishable from judges chosen by other methods.[7] This may be another way of saying that the merits of merit selection are fewer than meet the eye. Under such a system, judges are still ultimately selected by a political actor or actors, and it is unrealistic to think that partisan considerations will not continue to be important.

An important exception to the general conclusion of scholars that the method of selection makes little difference in the quality of judges is demonstrated in a recent study by political scientist Daniel R. Pinello. In his 1995 book, *The Impact of Judicial-Selection Method on State-Supreme-Court Policy: Innovation, Reaction, and Atrophy,* Professor Pinello concludes that "the conventional wisdom of the 1980s among professional political scientists that selection method has no meaningful impact on policy is mistaken."[8] He reaches three important contrary conclusions. First, he finds that "elected judges are reactive to public opinion while appointed ones who never face popular confrontation are largely free of its constraint."[9] Second, he finds that "the 19th-century view of appointed and elected judges is . . . anachronistic to the late 20th century: appointed judges today are not protectors of business and property, while elected judges do not more readily uphold voter claims against those interests."[10] Finally and most important, he finds that legislatively-appointed judges are most deferential to the legislative and executive departments and least likely to attempt to take over their functions: "they tread ever so carefully with both legislative and executive dominance in governance."[11]

Although Professor Pinello's conclusion about the deference of legislatively-appointed judges is obviously of potential importance, if accepted, it is based unfortunately on a very small sample. Only three states, Virginia, South Carolina, and Rhode Island, had legislatively appointed judges at the time of Pinello's study, and Rhode Island has since moved to a merit plan. Nonetheless, the idea that legislatively selected judges—who are often themselves former legislators—are likely to be more respectful of legislators and legislation than elected judges is sufficiently plausible to be entitled to consideration in choosing a method of judicial selection.

The crux of the problem with the American judiciary is not, however, the difficulty of choosing between alternative methods of judicial selection. Judicial selection is a very serious problem because the judges we select are permitted to exercise extraordinary power. The individuals that we select to perform the judicial function in theory exercise a power much greater than the judicial in fact. Our need, therefore, is not so much to find the best means of selecting judges as it is to find a means of making the selection of judges less important by confin-

6. JUDICIAL REFORM, *supra* note 1, at 14.
7. JUDICIAL REFORM, *supra* note 1, at 12.
8. DANIEL R. PINELLO, IMPACT OF JUDICIAL-SELECTION METHOD ON STATE SUPREME COURT POLICY: INNOVATION, REACTION, AND ATROPHY, 130 (1995).
9. *Ibid.*
10. *Ibid.*
11. *Ibid.*

ing them to performance of the judicial role. No other change that we could make in our system of government would make a greater contribution to our nation's political health.

The power of our judges is the power of constitutional judicial review, America's unique and unfortunate contribution to the science of government. Constitutional judicial review is, in theory, the power of judges to disallow policy choices made by other government officials on the ground that they are prohibited by a constitution, state or federal. In practice, however, the judges have made of it simply the power to substitute their policy preferences for the policy preferences of elected representatives of the people. The beginning of understanding American constitutional law, federal or state, is to understand that it has very little to do with any constitution, that is, that it is essentially a fraud.

Surely the most striking thing about constitutional judicial review, initially, is that it was not expressly provided for, as one would certainly expect for such an unprecedented and potentially dangerous power, in either the United States or any state constitution. Although some such power was discussed at the time of the framing and ratification of the United States Constitution, most notably by Alexander Hamilton in *Federalist* No. 78, apparently no final decision was reached as to its scope and application. If a final decision had been made to permit constitutional review, it seems certain that it would have been with a proviso, as in the case of the analogous presidential veto power, that Congress would have the last word. We can be certain, in any event, that the framers did not mean to give judges policymaking power.

Constitutional review was established, instead, by Chief Justice John Marshall in *Marbury v. Madison*[12] by means of some highly questionable maneuvers and on the dubious ground that it is inherent in a written constitution. In *Marbury,* Marshall created a statute that did not exist (one adding to the Court's original jurisdiction) in order to find a conflict with the Constitution (a prohibition of Congress's adding to the Court's original jurisdiction) that also did not exist.[13] This enabled him to declare a law unconstitutional in a context that gave a victory to his political opponent, President Jefferson, who was therefore disabled from opposing it. Whatever else might be said of judicial review, there can be no doubt that it was born in sin.

Judicially enforced constitutionalism, which is what judicial review purports to be, raises the problem of rule of the living by the dead. It is difficult to see why a majority of the people living today should be precluded from adopting a policy they favor because a different policy was favored by different people in the past. Present-day people are obviously better situated to deal with present-day problems. The frequently stated justification that the people in times of calm undertook to restrain themselves from misguided policy choices in times of passion has no validity. Constitutional provisions are not usually adopted in times of

12. 5 U.S. (1 Cranch) 137 (1803).

13. *See* William Von Alstyne, *A Critical guide to Marbury v. Madison,* 1969 DUKE L.J. 1. In *Marbury,* Marshall gave us an example of an unconstitutional law a law that requires only one witness for the crime of treason despite the fact that the Constitution (Art. III, Sec. 3) specifies two. Such laws very rarely occur.

calm. It would be difficult to find a ruling of unconstitutionality for which the people, recognizing a mistake, were later grateful.

Our problem is not constitutionalism, however, but judicial activism. Judicially enforced constitutionalism means judges holding unconstitutional laws that are such; judicial activism means judges holding unconstitutional laws that are not. Judicial activism means, that is, judges making, rather than following, the law. Constitutional judicial activism, which is the most important kind because the decisions are hardest to change, means judges disallowing as unconstitutional policy choices that the constitution they are purporting to enforce does not in fact disallow. If judicial review were in fact what it is in theory and what Hamilton and Marshall proclaimed it to be,[14] the power to invalidate laws clearly prohibited by a constitution ("clearly" because in cases of doubt the legislative judgment should prevail), occasions for its exercise would be so few as to make the power a matter of little more than academic interest. Our short and simple Constitution wisely precludes very few policy choices and even fewer that American legislators might otherwise be tempted to make. The result is that examples of clearly unconstitutional laws are difficult to find. Our problem is not constitutionalism, rule by the dead, but judicial activism, rule by judges who are all too much alive.

If judicial review was born in sin, the uses to which it has been put throughout our history demonstrate that it has rarely risen above the circumstances of its birth. The use to which it was put in *Marbury* was essentially of no significance. Its first significant use to invalidate a federal statute was in the infamous *Dred Scott* decision fifty years later, holding, with no substantial constitutional basis, that Congress could not prohibit the spread of slavery to new territories and the states could not make even a free black a citizen.[15] If this decision did not make the Civil War inevitable, it at least contributed significantly to the war's coming and to its 620,000 battlefield deaths.

Judicial review exercised only every fifty years, the *Dred Scott* decision illustrates, is still judicial review exercised too frequently. *Dred Scott* should have been enough in and of itself to permanently discredit judicial review. It demonstrates conclusively and tragically that permitting basic issues of social policy to be decided by majority vote of a small committee of unelected, life-tenured lawyers is not an improvement on self-government through elected representatives.

The Court's next most significant use of judicial review, in the 1883 *Civil Rights Cases,*[16] was to invalidate the 1875 Civil Rights Act's prohibition of racial segregation in public places, thereby permitting such segregation to continue for another eighty-nine years, until prohibited again in the 1964 Civil Rights Act.

14. The power, Hamilton said, would be to invalidate laws "contrary to the manifest tenor" or in "irreconcilable variance"with the Constitution. FEDERALIST PAPERS, *supra* note 3, at 466-67. In *Marbury,* Marshall gave us an example of an unconstitutional law a law that requires only one witness for the crime of treason despite the fact that the Constitution (Art. III, Sec. 3) specivies two. Such laws very rarely occur.

15. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

16. 109 U.S. 3 (1883).

The Court's most important use of the power in the early 20th century was its invalidation of two federal anti-child labor statutes,[17] followed in the 1930s by Court's attempt to invalidate President Franklin Roosevelt's New Deal.[18] Although few would contend that this is a glorious or confidence-inspiring history, defenders of judicial review believe that it has been put to much better uses more recently. Perhaps like the practice of medicine, which undoubtedly killed many more people than it cured during most of its history, judicial review has been recently greatly improved.

Judicial review has historically served, particularly in regard to state law, as a conservative force, primarily concerned with the protection of property, as the highly property-protective Chief Justice John Marshall and his mentor Alexander Hamilton no doubt intended. With the so-called constitutional revolution of 1937, however, the Court withdrew from the protection of property,[19] and with the climactic *Brown* decision in 1954,[20] it completely changed direction. With *Brown*'s invalidation of a basic social practice of one third of the nation, the Court went from being a conservative force, a brake on social change, to becoming the nation's primary initiator and accelerator of social change.

The evident moral rightness and eventual near-unanimous approval of *Brown* gave the Court a status and prestige that enabled it to assign to itself control over more and more areas of American life. *Brown* convinced many people, especially academics, and certainly many judges themselves, of the superiority of social policymaking by judges, supposedly on the basis of principle and morality, over policymaking by elected representatives, mere politicians subject to popular control. To question the Court's ever-expanding policymaking power after *Brown* was only to be met with the response, "So you disagree with *Brown*?" As it is not politically or socially permissible to disagree with *Brown*, opponents of government by judges have been largely reduced to ineffectiveness.

The power the Court acquired as a result of *Brown* proved to be sufficient, incredibly, to allow the Court to subvert the very principle that was the basis of its power. In the 1964 Civil Rights Act, Congress ratified, endorsed and made effective what it understood to be the *Brown* principle, a prohibition of all official racial discrimination.[21] As a result, segregation—the assignment of children to separate schools by race—quickly came to an end. *Brown* was thus changed from a daring social experiment to a complete success. The Court saw this success however, not as a source of satisfaction, but as the basis for an even more daring social experiment: compulsory school racial integration.[22]

While always insisting that it was only continuing to enforce *Brown*, the Court in fact changed *Brown*'s prohibition of all official racial discrimination into a requirement of racial discrimination in school assignment. In the name of

17. Hammer v. Dagenhart, 247 U.S. 251 (1918); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

18. *E.g.*, Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); United States v. Butler, 297 U.S. 1 (1936).

19. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); West Coast Hotel v. Parrish, 360 U.S. 369 (1937).

20. Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483 (1954).

21. 42 U.S.C. §§ 1971, 2000 a-h (1970); Public Law No. 88-352, 78 Stat. 241.

22. Green v. County School Board of New Kent County, Va., 391 U.S. 430 (1968).

enforcing *Brown,* that is, the Court was able to require what everyone—most certainly the Congress that passed the 1964 Civil Rights Act—thought *Brown* had prohibited. It is doubtful that a greater feat of judicial *leger de main* can be found in the history of law.[23]

It soon became apparent that compulsory school racial integration or "balance" would require the massive transportation of children on the basis of race away from their neighborhood schools to more distant schools. The Court took this step in *Swann v. Charlotte-Mecklenberg* in 1971,[24] a decision that has had a devastating effect on the nation's public school systems and cities, while producing no apparent educational or other benefit. It has been counter-productive even in terms of increasing integration; by driving the mostly white middle class from our public school systems and cities, it has resulted in more rather than less racial separation. Perhaps nothing more strikingly demonstrates the scope of the power exercised by our judges today than the so-called desegregation orders issued by a single federal district judge in Kansas City, Missouri, requiring the expenditure of an incredible two billion dollars in an effort to integrate the Kansas City school system.[25]

Neither integration nor any educational benefit resulted from the Kansas City district judge's massive social experiment, yet year after year his orders continued to be handed down and enforced. At what point, if any, one must wonder, would such orders not be enforced? When the required expenditure reaches ten billion dollars? One hundred billion? Or is there no point today at which the American people or their elected representatives are prepared to say to judges that their will is not the ultimate source of authority in our society? If *Dred Scott* did not conclusively establish that judicial review is a very bad idea, surely the Court's busing orders have done so. Unlike medicine, judicial review has not improved with age.

Compulsory school racial integration by busing is far from the only disastrous policy imposed on the nation by judicial review. In 1973, in the notorious *Roe v. Wade* decision,[26] Justice Harry Blackmun and some of his colleagues deemed themselves competent and authorized to settle the extraordinarily intractable issue of abortion by invalidating the laws of forty-six states on the subject and decreeing for the nation as a whole a regime of virtual abortion on demand. Like the *Dred Scott* decision, far from settling the issue, the result has been only to make it more contentious and difficult to resolve.

The pro-abortionists certainly won a great victory in *Roe v. Wade,* but the anti-abortionists have good reason never to cease to protest that the victors won illegitimately, only because of the personal views on the issues of a majority of Supreme Court justices. An issue that was being effectively dealt with on a state-by-state basis, with restrictions on abortion generally being relaxed, became an enormously divisive and polarizing issue of national politics that no national

23. *See generally,* LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT'S DECISIONS ON RACE AND THE SCHOOLS (1976).

24. 402 U.S. 1 (1971).

25. Missouri v. Jenkins, 495 U.S. 33 (1990); *id.* 515 U.S. 70 (1995).

26. 410 U.S. 113 (1973).

political leader or judicial candidate could thereafter avoid. If *Dred Scott* and *Swann,* the busing decision, have not sufficiently demonstrated the devastating potential of judicial review, surely *Roe v. Wade* has done so.

During the past four decades, the Court has purported to settle for the nation as a whole many of our most difficult and divisive issues of basic social policy. It is no exaggeration to say that the Court made itself and continues to be the nation's most important law-making institution in terms of domestic social policy, the initiator and proponent of almost every basic social change. The Court, for example, effectively abolished capital punishment for a period of seventeen years and now permits it only with such conflicting and confusing requirements as to make its use seem hardly worthwhile.[27] The Court has remade the code of criminal procedure for every state, creating rights for the criminally accused that are known to no other system of law and that often seem to make guilt the least relevant consideration in a criminal trial.[28]

Wielding the power of judicial review, the Court has, during the past four decades, in effect mounted a sustained attack on conventional American morality and traditional practices, undertaking to remake America in accordance with what the justices see as the more enlightened notions of a contemporary cultural elite. Beginning in the early 1960s, for example, the Court has consistently insisted that states may no longer make provision for prayer or Bible reading in the public schools,[29] while at the same time prohibiting most forms of aid, state or federal, to religious schools[30] and most public displays of religious symbols.[31] The Court has disabled the states from maintaining traditional notions of order and decency by severely restricting their ability to prohibit the distribution of pornographic materials,[32] by disallowing controls on vagrancy,[33] and by invalidating efforts to control street demonstrations, including flag burning.[34]

Rejecting as outdated what had been a virtually unanimous and universal policy of civilized society, the Court has disallowed all legal distinctions on the basis of illegitimacy,[35] a decision that by lessening the stigma formerly attached to illegitimacy may have contributed to the subsequent explosion of out-of-wedlock births. The Court has similarly disallowed almost all distinctions on the basis of sex, recently holding, for example, that even a military school may not be maintained on a single-sex basis.[36] It has invalidated the libel laws of all states, substituting a national rule of its own devising which effectively grants the media near-immunity from damages for even false attacks on a person's reputation.[37] The Court has recently overturned the decision the people of Colorado made by referendum to preclude the grant of special rights to homosexuals.[38]

27. *E.g.*, Furman v. Georgia, 408 U.S. 113 (1973).
28. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).
29. *E.g.*, Engel v. Vitate, 370 U.S. 421 (1962).
30. *E.g.*, Walman v. Walter, 433 U.S. 229 (1977).
31. *E.g.*, Allegheny County v. American Civil Liberties Union, 492 U.S. 573 (1989).
32. *E.g.*, Memories v. Massachusetts, 383 U.S. 413 (1966).
33. *E.g.*, Papachristou v. Jacksonville, 405 U.S. 156 (1972).
34. *E.g.*, Texas v. Johnson, 491 U.S. 397 (1989).
35. *E.g.*, Levy v. Louisiana, 391 U.S. 681 (1968).
36. United States v. Virginia, 518 U.S. 515 (1996).
37. *E.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964).
38. Romer v. Evans, 517 U.S. 620 (1996).

The list could be indefinitely extended to illustrate the Court's extension of its control over virtually every area of American life. Incredible as it seems, the fundamental policy issues that determine the quality of a society and the nature of a civilization have been and are now being decided not by elected representatives, state or federal, but by majority vote of a committee of unelected and unremovable lawyers deciding for the nation as a whole from Washington, D.C. Our judges, as a newspaper columnist recently pointed out, now constitute "a priesthood, an oracular class that shapes the way we behave, or, more accurately, the way we are allowed to behave . . . . The courts—more so than the legislatures—now determine the way we live . . ."[39]

Nearly all of the Supreme Court's controversial rulings of unconstitutionality of the past several decades have two and only two things in common. First, they have little or nothing to do with the Constitution, involving no real issues of constitutional interpretation. What do you suppose Harry Blackmun was "interpreting" in *Roe v. Wade*, for example, in finding a constitutional right to an abortion in the due process clause, the word "due" or the word "process?" Second, the effect of the decisions, almost without exception, has been to reject a policy choice made in the ordinary political process in order to substitute a policy choice further to the left.

It is only a small exaggeration to say that the ACLU, the paradigmatic constitutional litigator of our times, never loses in the Supreme Court even though it does not always win. It either gets a policy decision—e.g., on busing, pornography, prayer in the schools—that it could not get in the ordinary political process because opposed by a majority of the American people, or it is simply left where it was to try again on another day. It took three tries, for example, before the Court finally invalidated Connecticut's anti-contraception law.[40] For conservatives or traditionalists, however, the situation is exactly the reverse. For them, a so-called victory in the Supreme Court is not the Court's adoption of a conservative position—*e.g.,* that the states *must* prohibit abortion or provide for prayer in the schools—but instead merely the Court's permitting them to continue to fight for their position in the political process.

There can be little doubt that some of the United States Supreme Court's social policy choices, for example on busing, abortion, and in many of its criminal procedure decisions, have been clearly mistaken and enormously socially harmful. The issue is not, however, whether one agrees or disagrees with a court's social policy choices, but whether one is willing to accept that it is appropriate for a court to make these decisions. Nothing could be more inconsistent with the federalist system of representative self-government created by the Constitution than to have basic issues of social policy decided by electorally unaccountable offi-

39. Tanku Varadarajan, WALL STREET JOURNAL, Sept. 14, 2001, at A18.
40. Griswold v. Connecticut, 381 U.S. 479 (1965).

cials for the nation as a whole from Washington, D.C. The Court's decisions removing policy issues from the ordinary political process supposedly on the basis of enforcing our constitutional rights in fact deprive us of our most basic constitutional right, the right to representative self-government.

The situation is very much the same with state courts; indeed some state court justices consider it their responsibility to step in and remove from the political process for their own decision any policy issue that the United States Supreme Court has not yet taken over. For example, when the Supreme Court in *San Antonio v. Rodriguez*[41] declined, at least for the moment, to step in and assume control of state funding of public school systems, many state courts, led as is often the case by California, decided to assume the function themselves.[42] Similarly, because the Supreme Court has so far declined to create a clear constitutional right to engage in homosexual conduct, several state courts have stepped in to create state constitutional rights to homosexual unions.[43]

A major and much needed movement is currently taking place—strongly backed by George W. Bush, for example, when he was governor of Texas—for tort reform. This would mean less litigation and less work for lawyers and is therefore, as was to be expected, strongly opposed by the trial bar. It would also mean, however, a somewhat diminished importance for judicial lawmaking on the subject, and it seems therefore to be equally strongly opposed by judges. The response of state-court judges has been rapid and effective: some element of tort reform legislation has now been invalidated in twenty-six states, still another clear example of judicial review operating against the public good.[44]

Judicial review has put our judges in a position similar to that formerly held by military juntas in some Latin American countries. Elections would continue to take place, allowing the people to express their opinions on policy issues at the polls, but the results of the elections would be permitted to prevail only to the extent that the junta did not disapprove. The trappings of self-government remained, but the junta, like our judges today, always had the last word.

The quest for a good method of selecting judges is bound to be futile as long as judges are permitted to function as ultimate policy makers on basic issues of social policy. Plato favored government by philosopher kings, supposed experts in the science of government, but how is it possible to favor government by lawyer kings, experts in nothing but the manipulation of language in order to reach predetermined results? It may be difficult to say what is the best form of government, but surely government on basic issues of social policy by majority vote of a small committee of lawyers pretending to interpret a constitution must be one of the worst.

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41. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

42. *E.g.*, Serrano v. Priest, 557 P.2d 929 (Cal. 1976).

43. *See, e.g.*, Tanner v. Oregon Health Services University, 971 P.2d 435 (Or. 1998); Baker v. State, 744 A.2d 864 (Vt. 1999).

44. *See,* Samuel Jan Brakel, *"Besting" Tort Reform in Illinois (and Other Misnomers): A Reform Supporter's Lament,* 28 CAP. U. L. REV. 823 (2000).

The greatest contribution Mississippi can make to its own and the nation's political health would be to bring that form of government to an end. The Mississippi constitution should be amended to make clear that Mississippi state judges are not authorized to override the judgment of legislators and the governor as to the constitutionality of laws. There is no reason to think that judges are superior to legislators and governors in this regard, and, as already noted, clearly unconstitutional laws, that is, real issues of constitutionality, are extremely rare. State constitutions, like the federal Constitution, typically and wisely preclude very few policy choices. State constitutions do not for example preclude policy choices on such issues as single-sex "marriage" and methods of funding of public education, despite the decisions of many state court judges to the contrary.

Because constitutions, state and federal, have very little to do with constitutional law, the only real issue presented by judicial review is whether the views of judges should prevail over the views of elected legislators on basic issues of social policy. Both principle and experience made clear that government by judges on such issues is not an improvement on government by the elected representatives of the people. Judicial policymaking violates the basic constitutional principles of representative self-government and separation of powers that have been the basis of our freedom and prosperity. Government by electorally unaccountable officials is the definition of tyranny. From *Dred Scott* through *Swann, Roe v. Wade* and the Supreme Court's latest criminal procedure decisions, judicial review, state as well as federal, has served overwhelmingly to cause or exacerbate rather than resolve social problems.

Selection of judges presents an insuperable problem—there is no good method of selecting judges—only because our judges are permitted to perform a task, the making of social policy, for which they are not competent and which is inconsistent with our basic constitutional principles. There are methods of selecting judges who are competent to perform the judicial function, but there are no good methods of selecting moral and political philosophers who wield lawmaking power and are not subject to effective popular control.

The problem of selecting judges can easily be solved, but only by making clear that those selected are authorized to act only as judges, not as autocrats. This can only be done by abolishing the power of judicial review. By doing so, Mississippi would provide a much-needed demonstration to the nation that the American people can be trusted—as the framers of the Constitution believed—to govern themselves effectively and well without the supervision and direction of lawyers in robes.