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Judicial Activism and the Threat to the Constitution

BY ROBERT P. GEORGE

Judicial power can be used, and has been used, for both good and ill. However, in a basically just democratic republic, judicial power should never be exercised—even for desirable ends—lawlessly. Judges are not legislators. The legitimacy of their decisions, particularly those decisions that overturn legislative judgments, depends entirely on the truth of the judicial claim that the court was authorized by law to settle the matter. Where this claim is false, a judicial edict is not redeemed by its good intentions or consequences. Decisions in which the courts usurp the authority of the people are not merely incorrect; they are themselves unconstitutional. And they are unjust.

Unfortunately, such decisions are growing in their number and the range of topics they cover. A crisis is at hand, and solutions must be found.

Should courts be granted the power to invalidate legislation in the name of the constitution? In reaction to Chief Justice John Marshall's opinion in the 1803 case of ***Marbury v. Madison***,[1] Thomas Jefferson

ROBERT P. GEORGE is McCormick Professor of Jurisprudence and Director of the James Madison Program in American Ideals and Institutions at Princeton University. This article is based substantially upon an article by Professor George, "High Courts and Misdemeanors," in Touchstone magazine (www.touchstonemag.com) and a lecture, "Judicial Usurpation and the Constitution," given at the Heritage Foundation in spring 2005. It is reprinted here with permission of both Touchstone and the Heritage Foundation.

warned that judicial review would lead to a form of despotism.[2] Notably, the power of judicial review is nowhere mentioned in the Constitution. The courts themselves have claimed the power based on inferences drawn from the Constitution's identification of itself as supreme law, and the nature of the judicial office.[3] But even if we credit these inferences, as I am inclined to do, it must be said that early supporters of judicial review, including Marshall himself, did not imagine that the federal and state courts would claim the sweeping powers they exercise today. Jefferson and other critics were, it must be conceded, more far-seeing.

After ***Marbury***, the power of the judiciary expanded massively. However, this expansion began slowly. Even if ***Marbury*** could be described as telling the Congress what it could and could not do, it would be another 54 years before the Supreme Court would do it again. And it could not have chosen a worse occasion. In 1857, Chief Justice Roger Taney handed down an opinion for the Court in the case of ***Dred Scott v. Sandford***.[4] That opinion declared even free blacks to be non-citizens, and held that Congress was powerless to restrict slavery in the federal territories. It intensified the debate over slavery and dramatically increased the prospects for civil war.

Dred Scott was a classic case of judicial activism. With no constitutional warrant, the justices manufactured a right to hold property in slaves that the Constitution nowhere mentioned or could reasonably be read as implying. Of course, the Taney majority depicted their decision as a blow for constitutional rights and individual freedoms. They were protecting the minority (slaveholders) against the tyranny of a moralistic majority who would deprive them of their property rights. Of course, the reality was that the judges were exercising what in a later case would be called "raw judicial power"[5] to settle a debate over

a divisive moral and social issue in the way they personally favored.

It took a civil war and several constitutional amendments (especially the 14th Amendment) made possible by the Union victory to reverse ***Dred Scott v. Sandford***.

The ***Dred Scott*** decision is a horrible blight on the judicial record. We should remember, though, that while it stands as an example of judicial activism in defiance of the Constitution, it is also possible for judges to dishonor the Constitution by refusing to act on its requirements. In the 1896 case of ***Plessy v. Ferguson***,[6] for example, legally sanctioned racial segregation was upheld by the Supreme Court despite the 14th Amendment's promise of equality. In ***Plessy*** the justices announced their infamous "separate but equal" doctrine, a doctrine that was a sham from the start. Separate facilities for blacks in the South were then, and had always been, inferior in quality. Indeed, the whole point of segregation was to embody and reinforce an ideology of white supremacy that was utterly incompatible with the principles of the Declaration of Independence and the 14th Amendment. Maintaining a regime of systematic inequality was the object of segregation. As Justice John Harlan wrote in dissent, segregation should have been declared unlawful because the Constitution of the United States is colorblind and recognizes no castes.[7]

A half century and more passed before the Supreme Court got around to correcting its error in ***Plessy*** in the 1954 case of ***Brown v. Board of Education***.[8] In the meantime the Court repeated the errors that had brought it to shame in the ***Dred Scott case***. The 1905 case of ***Lochner v. New York***[9] concerned a New York law limiting to 60 the number of hours per week that the owner of a bakery could require or permit his employees to work. Industrial bakeries are tough

places to work, even now. They were tougher—a lot tougher—then. Workers risked lung disease from breathing in the flour dust and severe burns from the hot ovens, especially when tired and less than fully alert. The New York state legislature sought to protect workers against abuse by limiting their working hours. But the Supreme Court said "no."

The justices struck down the law as an unconstitutional interference by the state in private contractual relations between employers and employees. The Court justified its action with a story similar to the one it told in ***Dred Scott***. Again, it claimed to be protecting the minority (owners) against the tyranny of the democratic majority. It was restricting government to the sphere of public business, and getting it out of private relations between competent adults, namely, owners and workers.

The truth, of course, is that the Court was substituting its own laissez-faire economics philosophy for the contrary judgment of the people of New York acting through their elected representatives in the state legislature. On the controversial moral question of what constituted real freedom and what amounted to exploitation, unelected and democratically unaccountable judges, purporting to act in the name of the Constitution, simply seized decision-making power.[10] Under the pretext of preventing the majority from imposing its morality on the minority, the Court imposed its own morality on the people of New York and the nation.

Like ***Dred Scott***, ***Lochner*** eventually fell, brought down not by civil war, but by an enormously popular president fighting a great depression. Under the pressure of Franklin Roosevelt's plan to pack the Supreme Court, the justices in 1937 repudiated the ***Lochner*** decision and got out of the business of blocking state and federal social welfare and worker protection

legislation. Indeed, the term "Lochnerizing" was invented as a label for judicial rulings that overrode democratic law-making authority and imposed upon society the will of unelected judges.

For many years, the Court took great care to avoid the least appearance of Lochnerizing. In 1965, for example, in a case called ***Griswold v. Connecticut***[11], the justices struck down a state law against contraceptives in the name of an unwritten "right to marital privacy." Justice William O. Douglas, who wrote the opinion, explicitly denied that he was appealing to the principle of ***Lochner***.[12] Indeed, to avoid invoking ***Lochner's*** claim of a so-called "substantive due process" right in the 14th Amendment, Douglas went so far as to say that he had discovered the right to privacy in "penumbras formed by emanations" of a panoply of Bill of Rights guarantees, including the Third Amendment's prohibition against the government quartering of soldiers in private homes in peacetime, and the Fourth Amendment's ban on unreasonable searches and seizures.

Griswold, though plainly judicial activism, was not an unpopular decision. The Connecticut statute it

invalidated was rarely enforced and the public cared little about it. Its significance was mainly symbolic, and the debate about it was symbolic. The powerful forces favoring liberalization of sexual mores in the 1960s viewed the repeal of such laws—by whatever means necessary—as essential to discrediting traditional Judeo-Christian norms about the meaning of human sexuality. But the Court was careful to avoid justifying the invalidation of the law by appealing to sexual liberation or individual rights of any kind. In Douglas's account of the matter, it was not for the sake of "sexual freedom" that the justices were striking down

the law, but rather to protect the honored and valued institution of marriage from damaging intrusions by the state. Otherwise uninformed readers of the opinion might be forgiven for inferring mistakenly that the ultraliberal William O. Douglas was in fact an archconservative on issues of marriage and the family. They would certainly have been justified in predicting—wrongly as it would turn out—that Douglas and those justices joining his opinion would never want to see the Griswold decision used to break down traditional sexual mores or encourage non-marital sexual conduct.

A mere seven years later, however, in ***Eisenstadt v. Baird***,[13] the Court forgot everything it had said about marriage in the ***Griswold*** decision, and abruptly extended the "constitutional right" to use contraceptives to nonmarried persons. A year later, the justices, citing ***Griswold*** and ***Eisenstadt***, handed down their decision legalizing abortion in ***Roe v. Wade***. And the culture war began.

The ***Roe*** decision was pure Lochnerizing. ***Roe*** did for the cause of abortion what ***Lochner*** had done for laissez-faire economics and what ***Dred Scott*** had done for slavery. The justices intervened in a large scale moral debate over a divisive social issue, short circuiting the democratic process and imposing on the nation a resolution lacking any justification in the text or structure of the Constitution. Indeed, Justice Harry Blackmun, writing for the majority, abandoned ***Griswold's*** ideas of "penumbras formed by emanations" and grounded the new constitutional right to feticide in the Due Process Clause of the 14th Amendment, just where the ***Lochner*** court had claimed to discover a right to freedom of contract. Dissenting Justice Byron R. White accurately described the Court's abortion ruling as an "act of raw judicial power."

Having succeeded in establishing a national regime of abortion-on-demand by judicial fiat in ***Roe***, the cultural left continued working through the courts to get its way on matters of social policy where there was significant popular resistance. Chief among these was the domain of sexual morality. Where state laws embodied norms associated with traditional Judeo-Christian beliefs about sex, marriage, and the family, left-wing activists groups brought litigation claiming that the laws violated 14th Amendment guarantees of due process and equal protection, and First Amendment prohibitions on laws respecting an establishment of religion. The key battleground became the issue of homosexual conduct. Initially, the

question was whether it could be legally prohibited, as it long had been in the states. Eventually, the question became whether homosexual relationships and the sexual conduct on which such relationships are based must be accorded marital or quasi-marital status under state and federal law.

In 1986, the Supreme Court heard a challenge to Georgia's law forbidding sodomy in ***Bowers v. Hardwick***.[14] Michael Hardwick had been observed engaging in an act of homosexual sodomy by a police officer who had lawfully entered Hardwick's home to serve a summons in an unrelated matter. Left-wing activist groups treated Hardwick's case as a chance to invalidate sodomy laws by extending the logic of the Court's "right to privacy" decisions. This time, however, they failed. In a five-to-four decision written by Justice White, the Court upheld Georgia's sodomy statute as applied to homosexual sodomy. The justices declined to rule either way on the question of heterosexual sodomy, which the majority said was not before the Court.

The ***Bowers*** decision stood until 2003, when it was reversed in ***Lawrence v. Texas***,[15] the case that set the stage for the current cultural and political showdown over the nature and definition of marriage. In ***Lawrence***, the Court held that state laws forbidding homosexual sodomy lacked a rational basis and were invasions of the rights of consenting adults to engage in the type of sexual relations they preferred. Writing for the majority, Justice Anthony Kennedy claimed that such laws insult the dignity of homosexual persons. As such, he insisted, they are constitutionally invalid under the doctrine of privacy whose centerpiece was the ***Roe*** decision.

Kennedy went out of his way to say that the Court's ruling in ***Lawrence*** did not address the issue of same-sex marriage or whether the states and federal government were obliged to give official recognition to same-sex relationships or grant benefits to same-sex couples.[16] Writing in dissent, however, Justice Antonin Scalia said bluntly: "Do not believe it."[17] The ***Lawrence*** decision, Scalia warned, eliminated the structure of constitutional law under which it could be legitimate for lawmakers to recognize any meaningful distinctions between homosexual and heterosexual relationships.

On this point, many enthusiastic supporters of the ***Lawrence*** decision and the cause of same-sex "marriage" agreed with Scalia. They saw the decision as having implications far beyond the invalidation of anti-sodomy laws. Noting the sweep of Kennedy's opinion, despite his insistence that the justices were not addressing the marriage issue, they viewed the decision as a virtual invitation to press for the judicial invalidation of state laws that treat marriage as the union of a man and a woman. Indeed, litigation on

this subject was already going forward in the states—it had begun in Hawaii in the early 1990s where a State Supreme Court ruling invalidating the Hawaii marriage laws was overturned by a state constitutional amendment. ***Lawrence*** turned out to be a new and powerful weapon to propel the movement forward and embolden state court judges to strike down laws treating marriage as the union of a man and a woman.

The boldest of the bold were four liberal Massachusetts Supreme Judicial Court justices who ruled in ***Goodridge v. Massachusetts Department of Public Health***[18] that the Commonwealth's restriction of marriage to male-female unions violated the state constitution. The state legislature requested an advisory opinion from the justices about whether a scheme of civil unions, similar to one adopted by the Vermont state legislature after a like ruling there, would suffice. However, the four Massachusetts justices, over the dissents of three other justices said, "No, civil unions will not do."[19] And so same-sex marriage was imposed on the people of Massachusetts by unelected and electorally unaccountable judges.

Clearly, the United States has endured episodes of judicial activism throughout its history. Just as clearly, incidents of judicial overreaching, much of it spurred by issues of sexual morality, are accelerating.

Here, there is a double wrong and a double loss, a crime with two victims. The first and obvious victim is the injured party in the case—the endangered worker, the unborn child, or the institution of marriage itself. The second is our system of deliberative democracy. In case after case, the judiciary is chipping away at the pillars of self-rule, undermining laws and practices, from statutes outlawing abortion to public displays of the Ten Commandments, that are deeply rooted in the American tradition.

Checking the "raw power" of today's judicial activists will require changes both in judicial personnel and targeted measures designed to remedy their specific abuses. For example, there is no alternative, in my judgment, to amending the Constitution of the United States to protect marriage. The Massachusetts state legislature has made an initial move towards amending the state constitution to overturn ***Goodridge***, but the outcome is uncertain. The process of amending the Constitution of the Commonwealth of Massachusetts is lengthy and arduous (except, apparently, for the judges themselves). Even if the pro-marriage forces in Massachusetts ultimately succeed, liberal judges in other states are not far behind their colleagues on the Massachusetts bench. Hovering over the entire scene, like a sword of Damocles, is the Supreme Court of the United States which could, at any time, invalidate state marriage laws across the board. You may think: "They would never do that." Well, I would echo Justice Scalia: "Do not believe it." They would. And if they are not preempted by a ***federal*** constitutional amendment on marriage, they will. They will, that is, unless the state courts get there first, leaving to the U.S. Supreme Court only the mopping up job of invalidating the Defense of Marriage Act and requiring states to give "full faith and credit" to out-of-state same-sex "marriages."

My own view, however, is that we need a uniform national definition of marriage as the union of one man and one woman. Here is why: Marriage is fundamental. Marriage is the basis of the family, and it is in healthy families that children are reared to be honorable people and good citizens. Marriage and the family are the basic units of society. No society can flourish when they are undermined. Until now, a social consensus regarding the basic definition of marriage meant that we didn't need to resolve the question at the federal level. Every state recognized marriage as the exclusive union of one man and one

woman. (The federal government did its part at one point in our history to ensure that this would remain the case by making Utah's admission to the Union as a state conditional upon its banning polygamy.)

The breakdown of the consensus certainly does not eliminate the need for a uniform national definition. If we don't have one, then marriage will erode either quickly—by judicial imposition, unless judges are stopped—or gradually by the integration into the formal and informal institutions of society of same-sex couples who, after all, possess legally valid marriage licenses from some state.[20] In the long run, it is untenable for large numbers of people to be considered married in one or some states of the United States yet unmarried in others. As Lincoln warned it would be with the evil of slavery in his time, it is inevitable that the country will go "all one way or all the other."

Slavery would either be abolished everywhere or it would spread everywhere. The same is true of same-sex "marriage," in the long run—and perhaps even in the not-so-long run.

Besides addressing specific examples of judicial activism, as the Federal Marriage Amendment would do, Americans can and should work to ensure the nomination and confirmation of constitutionalist judges to our courts, especially the Supreme Court.

If personnel on the Supreme Court do change, the question follows: is it legitimate for the Court to change its view of the law, and here, specifically, the Constitution? The legal doctrine of stare decisis – literally, to stand on what has been decided – is important and worthy of respect. That doctrine does not strictly bind, however, in cases in which a judicial decision is a gross misinterpretation of the Constitution, and especially where a decision constitutes a usurpation of the constitutional authority of the people to govern themselves through the institutions of deliberative democracy. The Supreme Court, over time, gradually backed away from its "freedom of contract" decisions and completely reversed itself in its decisions on racial segregation and the Jim Crow laws—and it was right to do so.

In Planned Parenthood v. Casey, the basic holding of ***Roe*** was reaffirmed by the Court on stare decisis grounds. Three of the justices who joined the majority—all Republican appointees—called on the "contending parties" in the debate over legal abortion to end their differences and accept the Court's ruling as a "common mandate rooted in the Constitution."

This was little more than a call for one side of the argument – the pro-life side - to surrender. Having written a series of abortion rulings lacking any basis in the Constitution, the justices took it upon themselves to ask the millions of Americans who oppose their

unjustified ruling simply to submit to their ukase. Of course, the American people are under no obligation to "end their differences" by capitulating to judicial usurpation. On the contrary, they have every right under the Constitution to continue to oppose ***Roe v. Wade*** and work for its reversal. When judges exercising the power of judicial review permit themselves to be guided by the text, logic, structure, and original understanding of the Constitution, they deserve our respect and, indeed, our gratitude for playing their part to make constitutional republican government a reality. But where judges usurp democratic legislative authority by imposing on the people their moral and political preferences under the guise of vindicating constitutional guarantees, they should be severely criticized and resolutely opposed.

Footnotes

[1] 5 U.S. (1 Cranch) 137 (1803)

[2] See Thomas Jefferson's criticism of claims by the judiciary of authority to bind the other branches of government in matters of constitutional interpretation ("making the judiciary a despotic branch") in his Letter to Abigail Adams, September 11, 1804, in 11 WRITINGS OF THOMAS JEFFERSON (Albert E. Bergh ed. 1905), pp. 311-13.

[3] See Marbury v. Madison.

[4] 60 U.S. (19 How.) 393 (1856).

[5] Roe v. Wade 410 U.S. 113, 222 (1973) (Justice Byron White, dissenting).

[6] 163 U.S. 537 (1896).

[7] Plessy v. Ferguson, 559 (Justice Harlan, dissenting).

[8] 347 U.S. 483 (1954).

[9] 198 U.S. 45 (1905).

[10] See Lochner v. New York, 54-55 (Justice Holmes, dissenting). *This is the standard reading of Lochner, shared by contemporary conservatives and liberals alike. For a powerful challenge to the standard reading, and a thoughtful defense of the majority opinion, see Hadley Arkes, "Lochner v. New York and the Cast of Our Laws," in Robert P. George (ed.), Great Cases in Constitutional Law (Princeton: Princeton University Press, 2000), ch. 5.*

[11] 381 U.S. 479 (1965).

[12] See Griswold v. Connecticut, 482.

[13] 405 U.S. 438 (1972).

[14] 478 U.S. 186 (1986).

[15] 123 S. Ct. 2472 (2003).

[16] Lawrence v. Texas, 2484.

[17] Lawrence v. Texas, 2498 (Justice Scalia, dissenting)

[18] 798 N.E.2d 941 (Mass. 2003).

[19] Opinion of the Justices to the Senate, 802 N.E.2d 565 (2003).

[20] See Christopher Wolfe, "Why the Federal Marriage Amendment is Necessary," UNIVERSITY OF SAN DIEGO LAW REVIEW (forthcoming, 2005).