Curbing the Courts: The Constitution and the Limits of Judicial Power

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CURBING THE COURTS

THE CONSTITUTION AND
THE LIMITS OF
JUDICIAL POWER

GARY L. McDOWELL

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During the past thirty years or so two remarkable developments have been taking place in the way people think about the role of the judiciary under the Constitution. On one hand, the Supreme Court has grown increasingly bold in proclaiming itself to be the ultimate interpreter of the Constitution; the belief seems to be that there is no meaningful distinction between the Constitution and constitutional law. The Constitution has become in the eyes of many (as Charles Evans Hughes once quipped) merely "what the judges say it is."1

On the other hand, it is widely asserted today that judges and other public officials—but especially judges—are not bound by the text or original understanding of the Constitution. A common scholarly sentiment is that fidelity to text and intention need not be considered the touchstones of constitutional decisionmaking. Indeed, this scholarly sentiment has now been adopted by a growing number of jurists. Justice William Brennan, for example, has argued that the belief that a judge can divine the original intention of the Constitution is "little more than arrogance cloaked as humility." For Justice Brennan and his kind the main touchstone of constitutional interpretation is contemporary economic, social, and political realities. The Constitution, in this view, is unmoored and impermanent; it is a living constitution with an ideological vengeance.2

The practical consequence of these two doctrinal developments has been a judiciary increasingly immersed in what can only be called policy making. As the procedural requirements governing the judicial process—standing to sue, class actions, consent decrees, and so forth—have been loosened, judges have increasingly taken the plunge into the administrative minutiae of the policy process. And their opinions have reflected this substantive shift. Many judges have developed a knack, as Henry Monaghan has said, "of writing constitutional opinions that look like detailed legislative codes." Further, and more troubling, the Supreme Court has "fostered the impression that every detailed rule

Preface and Acknowledgments

laid down has the same dignity as the constitutional text itself.” More
than a few commentators have now joined Monaghan in his belief that
such an impression is simply a constitutional “illusion.”

Although throughout our history there have always been calls for
radical political responses to what have been deemed judicial excesses
and the presumption of judicial power, no period in our history has
equaled either in duration or intensity the current period of antijudicial
sentiment. What has been especially striking about this era, which
began to emerge around 1954 with the advent of Warren Court activ­
ism, is the marked lack of success of political retaliations against this
so-called government by judiciary. While judges have taken over the
operation of school boards, mental health facilities, and prisons, their
critics have fumed and fussed but little more. Judicial activism has
come to be much like Charles Dudley Warner’s weather: Everybody
talks about it but nobody does anything.

This book is an effort to point toward an old but largely ignored
way by which judicial power may be effectively curbed within the pru­
dent guidelines provided by the Constitution itself. Article III of the
Constitution provides that judicial power is subject not only to any ex­
ceptions Congress may see fit to make to appellate jurisdiction, but
also to “such Regulations as the Congress shall make.” While many
critics of judicial activism have approached the problem from the per­
spective of carving out politically dramatic jurisdictional exceptions,
few have looked to the power of Congress to regulate the procedures
of the judicial process. However, the most effective way to curb the
courts is through the various procedural arrangements that serve to
guide and hem in the exercise of substantive judicial power.

As with any scholarly undertaking, a good many friends and col­
leagues lent their support along the way. Their willingness to read and
criticize the manuscript—and, most of all, their persistence in attempt­
ing to convince me of the error of my ways in a good many instances—
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3 Henry Monaghan, “Supreme Court 1974 Term Foreword: Constitutional Com­
Steven, David O'Brien, Peter Schultz, Charles J. Cooper, and Terry Eastland for their helpful comments on portions of the book.

In many ways, William Kristol's research and thinking on these issues made this project possible. Bill pointed me in directions I had not considered. The constant support—both moral and financial—of James McClellan and the Center for Judicial Studies made this a far easier task than it otherwise would have been.

John Agresto's careful reading of the entire manuscript provided me an especially rich opportunity for second thoughts. His many comments and suggestions taught me a great deal about the Constitution and constitutional law; my stubborn resistance no doubt deprived me of a good deal more.

Stephen J. Markman, then chief counsel of the Subcommittee on the Constitution of the Judiciary Committee of the United States Senate, was kind enough to read the sections dealing with the legislative history of court-curbing efforts. His encyclopedic knowledge of the subject and his suggestions were essential to the completion of the book.

My family offered unfaltering support and encouragement throughout this often seemingly endless project. Victoria Kuhn faithfully typed, read, and offered her usual gentle suggestions on the manuscript. Such a friend is rare indeed. Ron Tomalis and Eric Jaso were especially helpful in rendering the manuscript ready for publication.

This book grew from a paper I gave at a conference entitled "Judicial Power in the United States: What are the Appropriate Constraints?" sponsored by the American Enterprise Institute and held in Washington, D.C., on October 1 and 2, 1981. I am especially grateful to Bill Schambra for arranging for that invitation. As the project developed, it was generously supported by a grant from the Institute for Educational Affairs. Philip Marcus' early confidence in the ideas developed here is truly appreciated. The grant allowed me the luxury of spending a year as a Fellow in Law and Political Science at the Harvard Law School. Harold J. Berman, John Hart Ely, Paul Bator, and Abram Chayes made that year one of the most intellectually invigorating I have known. Although they obviously did not always convince me, they nevertheless made me see things and think about things in new ways. For that I am especially grateful.

The opportunity to conduct a study group on curbing the courts at the Institute of Politics at Harvard's Kennedy School of Government during the academic year 1981-82 was a rare opportunity to work
through a good many ideas at the most important, formative stages. Those who participated in that seminar—especially Nathan Glazer, Abram Chayes, Henry Abraham, Eugene Hickok, and Hrach Gregorian—contributed much to my efforts to think about the virtues and vices of judicial power under the Constitution.

I owe a special debt to Raoul Berger. His *Government by Judiciary: The Transformation of the Fourteenth Amendment* was the intellectual spark that first set fire to my scholarly interest in these matters. Since then, during the time this book was in progress, I have had the pleasure not only of his teaching but also of his friendship. For both, I am very grateful indeed.

Last but not least, this volume is dedicated to a man who has been a constant source of inspiration and direction to me, first through his books and essays, and then when I became his student at the University of Virginia in 1977. In the strictest sense, this work would not have been possible without him. Such is the influence of truly great teachers.