New American

Written by **Steve Byas** on December 22, 2021

Published in the January 17, 2022 issue of the New American magazine. Vol. 38, No. 01

The U.S. Supreme Court: The Enemy of the Constitution?

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While arguing for ratifying the proposed Constitution in the *Federalist Papers*, Alexander Hamilton sought to reassure those who had expressed concern about creating a federal judiciary by calling it the least-dangerous branch and "beyond comparison the weakest."

Hamilton reasoned the judicial branch "has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society, and can take no active resolution whatever." He added, "It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

Under the system of separation of powers and checks and balances created by the U.S. Constitution, all legislative power was given to Congress, all executive power was vested in the president of the United States, and the judicial power — the power to interpret and apply the law in individual cases arising under the law and the Constitution — would be in the hands of one Supreme Court and such inferior courts as Congress might create.

The only "law" created by the Supreme Court, or any other federal court, would be the law of a particular case, and the judgment rendered would apply only to the litigants in that case. None of the framers of the Constitution envisioned any judge changing the Constitution.

Yet, even many self-described conservatives will routinely refer to Supreme Court decisions as "the law of the land." This is either in ignorance of or defiance of the "supremacy clause," which makes the Constitution (and laws passed by Congress in pursuance of the Constitution) the supreme law of the land.

A Look Back

How did this happen? Early in American history, there were some who argued that the Supreme Court had already usurped power it did not hold. "It has long, however, been my opinion," Thomas Jefferson wrote in an 1821 letter, "and I have never shrunk from its expression … that the germ of dissolution of our federal government is in the constitution of the federal judiciary; an irresponsible body (for impeachment is scarcely a scarecrow)." Continuing, Jefferson noted that, ultimately, federal judges would usurp power from the states and consolidate the government "into one."

Jefferson took specific aim at the idea (not found in the Constitution) that only the federal judiciary should interpret the meaning of the Constitution. "To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the

despotism of an oligarchy."

If Jefferson had concern in his day about the doctrine that only judges should render a judgment on the constitutionality of a governmental action, what would he think about our current situation? Few members of Congress and few presidents even bother to consider the constitutionality of their actions in our day. Consider that President George W. Bush signed the McCain-Feingold law, despite offering his opinion that it violated the constitutional protections of free speech. He brushed off any such concerns, arguing that the Supreme Court would decide! Bush had, however, along with every other president and every member of Congress, taken an oath to uphold the Constitution — not simply await rulings from the Supreme Court.

Constitutional supremacy: The Constitution of the United States — not decisions of the Supreme Court — is the supreme law of the land. Members of Congress, the president, and federal judges all take an oath to uphold it, regardless of their own personal political preferences.

In determining when this slide toward judicial supremacy on constitutional interpretation began, some have cited the case *Marbury v. Madison* of 1803. In that case, Chief Justice John Marshall refused to issue a *writ of mandamus* (an order to a public official to do his duty) to Secretary of State James Madison, ordering him to give William Marbury his commission as a justice of the peace in Washington, D.C. President John Adams had named Marbury to the post only hours before his term ran out in March of 1801, but had not yet delivered the commission.

Incoming President Jefferson directed Madison not to deliver the commission, so Marbury sued Madison under a provision of the Judiciary Act of 1801. Marshall and the rest of the Supreme Court found, however, that the provision was an unconstitutional grant of power to the court, and declined to issue the *writ of mandamus*. Since that time, the popular explanation for the court's refusal to award the writ was that it established the power of judicial review — the power of the federal judiciary to rule acts of Congress unconstitutional and set them aside.

The Duty to Follow the Constitution

Marshall made no such claim of judicial *power,* but rather wrote in his opinion that he had a *duty* to follow the Constitution. This was not a novel viewpoint, but had been written about by Hamilton in the *Federalist Papers* years earlier. Hamilton wrote in *The Federalist*, No. 78, that the Court would have the

power to interpret the Constitution in cases that came before it, but would not have any more power to do so than the other two branches. "Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, *declared in the Constitution*, the judges ought to be governed by the latter rather than the former." (Emphasis added.)

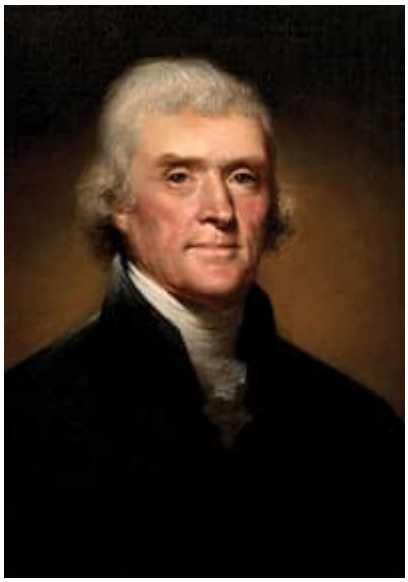
In other words, the Constitution was supreme over the actions of all three branches, and the courts did not have the right to substitute their judgment for the Constitution.

Unfortunately, it is quite clear that many people, including members of the Supreme Court, now believe that courts do have a right to second-guess the legislative and executive branches, or the states, if they do not like their actions in some regard. However, it is not the constitutional role of a judge to decide as to the wisdom of a law or presidential action, but only whether either conforms to the Constitution. In an interview with *New York* magazine, the late Justice Antonin Scalia said, "A lot of stuff that's stupid is not unconstitutional." He added that he sometimes would like to remark on a case, "Stupid but constitutional." The issue is whether a law conforms to the U.S. Constitution.

George Washington, in his Farewell Address, put it more eloquently: "If in the opinion of the people, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."

One could certainly question some rulings of the Supreme Court in the first half of the 19th century (such as *McCulloch v. Maryland*, which upheld the constitutionality of the Second Bank of the United States), but perhaps the greatest deviation from the standard set by Hamilton, Jefferson, Marshall, and Washington was the 1857 Supreme Court decision *Dred Scott v. Sandford.*

Dred Scott was a slave residing in Missouri — a state in which slavery was protected by law — who was taken by his master, an army surgeon, into Illinois, and on into Wisconsin Territory. Wisconsin Territory was part of the Northwest Territory, where slavery had been banned by an act of Congress in 1787 (at the urging of Thomas Jefferson). Scott sued for his freedom on the grounds that having been taken by his master into a free territory, he was thus freed. Logically, this would seem to make sense. After all, this action was taken by the Confederation Congress even before the adoption of the Constitution, and the right of states to make slavery illegal had never been questioned.



He feared the worst: Thomas Jefferson feared that the federal judiciary would eventually change the Constitution through their decisions. Not only has Jefferson's prediction come to pass, but many on the left celebrate this duplicitous method of implementing their radical agenda through judicial fiat.

Scott's case eventually made it to the Supreme Court, which ruled against him, with Chief Justice Roger Taney writing the majority opinion. Taney held that descendants of African slaves were not citizens of the United States, and had no standing in federal courts under the Constitution. But Taney did not stop there, which he should have done if he believed he had no authority to hear the case.

Instead, Taney added that Congress had no authority to declare any territory off-limits to slavery, as it had done with the Northwest Ordinance and with the 1820 Missouri Compromise. Taney said, "An act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law."

Writing in *Scalia Speaks*,the late Justice Scalia said of Taney's argument, "This is the first instance of the Supreme Court's use of what has become known as the doctrine of substantive due process — that is, the notion that the Due Process Clause guarantees not merely certain procedures, but certain absolute rights *to be identified by the Court.* I do not believe in that doctrine." (Emphasis added.)

Scalia noted the dissenting opinion responded that "when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we no longer have a Constitution; we are under a government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it *ought to* mean." (Emphasis added.)

Some historians who have studied the case think that Taney may have thought, by ruling as he did, he would settle the slavery issue, which had been bedeviling American politics for a generation. If so, he certainly miscalculated, as the decision only hardened positions on the issue and contributed to the divisions that led to secession and civil war.

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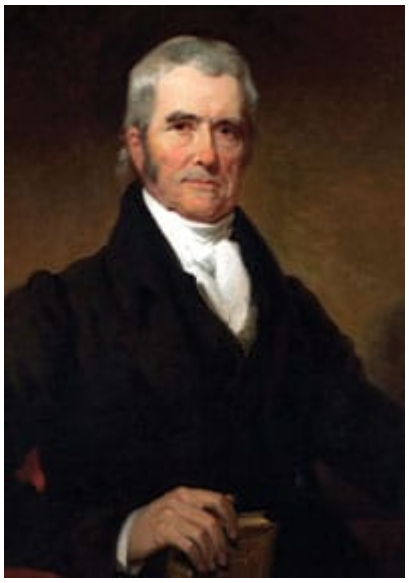
The 14th Amendment and the Incorporation Doctrine

The *Dred Scott* decision also played a significant role in the passage of the 14th Amendment a decade later, which has been used by subsequent Supreme Courts to force abortion on demand upon the states, to legalize same-sex "marriage" throughout the country, and as the basis of a multitude of other controversial rulings by the Court. Specifically, the Incorporation Doctrine, an interpretation of the 14th Amendment adopted decades after its passage, held that the Bill of Rights found in the federal Constitution to restrict the federal government also restricted the states and their local governments.

And it has been used to transfer power from states to the federal government — mostly to the federal courts.



Judicial usurper? Many hold that Supreme Court Chief Justice John Marshall began the practice of judicial usurpation in the *Marbury v. Madison* case of 1803. Marshall did not claim the Court had the power of judicial review, however. He argued that the justices had a duty to interpret the Constitution as it was written, and that the Constitution should supersede any contrary action of the government.

Because of the *Dred Scott* ruling, which held that descendants of African slaves could not be citizens of the United States, and thus could not receive civil-rights protections guaranteed to American citizens, Congress felt the need to pass a constitutional amendment to make them citizens. It needs to be stressed that Congress' purpose in passing the 14th Amendment was to ensure citizenship rights to a group of people — former slaves — *not* to create a right to abortion or same-sex "marriage."

If it were not for the Incorporation Doctrine, many issues that dominate national politics would be left to the states to resolve — as the constitutional framers intended.

It is quite clear that the framers of the Constitution did not intend for federal courts to routinely exercise veto powers over state government actions. While he has been blamed for this result due to his decision in *Marbury v. Madison*, Chief Justice John Marshall did not favor such a transfer of power. In an 1833 case, *Barron v. Baltimore*, it was argued that the Fifth Amendment restricted the states as well as the federal government, but Marshall rejected that assertion. Marshall cited the Ninth and 10th Amendments, which clearly stated that the purpose of the Bill of Rights was to restrict the federal government, not the states. Marshall said, "Had the framers of these amendments [the Bill of Rights]

intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original [1789] Constitution, and have expressed that intention.… These amendments contained no expression indicating an intention to apply them to the state governments. This Court cannot so apply them."

Likewise, Justice Samuel Miller held in the *Slaughter-House Cases* that the 14th Amendment's Privileges or Immunities Clause affected only the rights of U.S. citizenship, not state citizenship.

But while advocates of increased federal power — especially federal judicial power — might admit that the original purpose of the Bill of Rights was to restrict the federal government, not the states, they then make the argument that the 14th Amendment somehow "incorporated" the Bill of Rights so as to restrict the states and their local governments as well.

The historical record indicates that this is not the case.

In 1922, the Supreme Court rejected arguments that the Bill of Rights restricted state governments, although, oddly enough, they soon carved out such an exception in *Gitlow v. New York* (1925) for freedom of speech and freedom of the press. Legal scholar Charles Warren predicted the next year that this would open the door to applying the rest of the Bill of Rights to the states.

As Warren predicted, in 1947 Justice Hugo Black, in a dissent in *Adamson v. California*, discovered in the legislative history of the 14th Amendment "an intention to incorporate the Bill of Rights therein." The Supreme Court majority rejected Black's wholesale incorporation thesis, but did promulgate a doctrine of "selective incorporation." They argued that it derived from the due process clause found in the Fifth Amendment, combined with its mention in the 14th Amendment.

But Alexander Hamilton had argued shortly before the Constitutional Convention of 1787 that the words "due process" have a "precise technical import, and are only applicable to the process and proceedings of courts of justice; they can never be referred to an act of the legislature."

One framer of the 14th Amendment, future President James Garfield, held the same view, opining that the phrase "due process of law" referred to "an impartial trial according to the law of the land."

A dreadful decision: The infamous *Dred Scott* decision of 1857 was cited by the late Justice Antonin Scalia as the first example of the Supreme Court's use of substantive due process — in which the

justices substitute their own judgment of what should be in the Constitution, rather than simply applying the text to a case.

Despite this clear historical record, federal courts today routinely order the states to take all manner of actions in the name of the Bill of Rights — ironic, since the Bill of Rights was added to the Constitution in 1791 to *protect* the states and the people from efforts by the federal government to dominate them. Justice Byron White dismissed the Incorporation Doctrine as simply a means for the Supreme Court to impose "its own philosophical predilections upon state legislatures or Congress." Judge Richard Posner said the application of the Bill of Rights to the states is a method for judges to take control of "large areas of public policy," adding, it "is hard to believe that this was intended by all the state legislators whose votes were necessary to ratify the [14th] Amendment."

Because of this immense power now wielded by the federal courts, it is not surprising that each open seat on the Supreme Court becomes an intense battleground — after all, why bother trying to get a bill through Congress or the state legislatures if one can ram the progressive agenda through via a Supreme Court decree? The progressive movement was designed to change the very purpose of government. While the Founders saw government as a necessary institution to protect life, liberty, and property, the progressives saw government as a tool to impose by force their agenda upon individual Americans. But because members of Congress and state legislators have to answer to their constituents at election time, the progressive agenda is often rejected — thus the need for a progressive Supreme Court to enact it.

The Left Uses the Courts to Advance Its Agenda

With the election of President Franklin Delano Roosevelt in 1932, and his 12 years in the White House, the Supreme Court began its transformation into an institution of nine unelected judges whose decisions have drastically altered American society.

In the early years of Roosevelt's presidency, the Supreme Court actually decided cases according to what the Constitution stipulates, and thus ruled against much of Roosevelt's New Deal agenda.

Rosalie Gordon, in her book *Nine Men Against America*, described the Supreme Court's members when Roosevelt took office this way: "They did not, as later Courts were to do, ever consider the Constitution a mere scrap of paper to be tossed out the window whenever they chose to arrogate to themselves those powers which were intended only for Congress or the states."

In 1935, Congress passed into law President Roosevelt's takeover of the U.S. economy through the creation of the National Recovery Administration (NRA). As Gordon explained, "In the NRA, Congress had handed over to the President dictatorial powers by which the central government would have complete control in the management and regulation of every phase of American industry — big and little — from the smallest tailor shop in an American town to the giant steel industry. Although most Americans did not realize it at the time, the NRA was patterned almost exactly after the fascist corporative state which Mussolini had set up in Italy."

Under its regulations, a tailor was actually jailed for pressing a suit for 35 cents instead of the NRA-prescribed 40 cents. Then, the government tried to send some Jewish brothers, involved in the kosher chicken business, to prison. The NRA had a rule against selling diseased poultry (already against the law in New York, where the brothers lived) and against letting consumers pick out their chicken to be

purchased.

The brothers were convicted of selling diseased poultry and of violating the "straight killing" rule. "When the case reached the Supreme Court, the defendant explained that under 'straight killing' a buyer had to put his hand in the coop and take whatever chicken he touched first," Gordon wrote. Justice James McReynolds asked the defendant's counsel: "And it was for that your client was convicted?"

In the end, the Supreme Court, by a 9-0 decision, ruled that Congress had violated the Constitution with the creation of the NRA, making its regulations unenforceable. The Court proceeded to strike down other New Deal laws, and Roosevelt was angry. After winning reelection in 1936, he asked Congress to increase the membership of the Court from nine to 15, which would allow him to nominate six new members to the Court. Despite having an advantage of 76 Democrats to only 16 Republicans in the Senate, Roosevelt's "court-packing" plan was defeated, 70-20.

But Roosevelt would be president for another eight years, and members of the Court who had dared to defy him began to die or retire. Others simply opted to go ahead and rule in favor Roosevelt's proposals, stretching the Constitution beyond recognition in order to do so. By the time Roosevelt died on April 12, 1945, the Supreme Court's membership was more to the liking of progressives, and would remain so for the next several decades.

All the Court needed now to implement the progressive agenda was an excuse to consider cases that would have never been placed before them a few decades earlier, because the Constitution had left most legal matters in the hands of the states. The Supreme Court began to move the country to the left in two ways: 1) refusing to overturn unconstitutional usurpations of state power by Congress, presidents, and federal bureaucrats; and 2) using the Incorporation Doctrine to advance the progressive agenda by declaring that a state or one of its agents, such as a school district, was somehow violating some provision of the federal Bill of Rights.

It should be stressed that the states already had their own lists of protected rights in their own constitutions. The issue was not that states were routinely abridging freedom of speech, press, religion, and the like. The issue was that federal judges were now making decisions that state judges, state legislators, and state governors should otherwise be making.

Roosevelt's first nominee to the Supreme Court was Hugo Black, whose previous judicial experience consisted of 18 months as a police-court judge. It was Black who championed using the Incorporation Doctrine to advance the left-wing agenda of the New Deal and later President Harry Truman's Fair Deal. Roosevelt's second nominee was Stanley Reed, who, as solicitor-general of the United States, had argued for the constitutionality of the NRA and other New Deal programs that had been struck down by the Supreme Court.

After Black and Reed, Roosevelt picked several more members of the Court, including Justice William O. Douglas, who remained on the Court until the 1970s. When the Court was asked to grant a stay of execution to Ethel and Julius Rosenberg, two scientists who had given atomic secrets to the Soviet Union, Douglas joined with Black and Felix Frankfurter (another FDR nominee) in voting to give the stay, but they were in the minority, and the Rosenbergs paid for their betrayal with their lives.

Following Roosevelt's death in 1945, President Harry Truman continued to fill the Court with progressive-leaning jurists for the next eight years.

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Republicans and Democrats Pick Left-leaning Judges

By 1952, it was expected that Republican President Dwight Eisenhower would use his nominations to move the Court back into its pre-Roosevelt role, but his first nominee was Earl Warren, a California governor and left-leaning Republican who had no judicial experience whatsoever. Warren's tenure as chief justice, if anything, moved the Court even further to the left. Sadly, Republican presidents have only a spotty record of nominating constitutionally minded judges to the Supreme Court. Whereas Democrat-nominated justices since President John F. Kennedy's nomination of Byron White have been uniformly left-of-center, Republican presidents have managed to nominate liberal justices at least half the time.

Doing his job: Late Supreme Court Justice Antonin Scalia said that just because a law is stupid does not mean that it is unconstitutional. He explained that the role of a judge is not to make law, but rather to follow the Constitution. *(Photo credit: AP Images)*

For every William Rehnquist, Antonin Scalia, and Clarence Thomas, Republican presidents have named other justices that are barely distinguishable from the Democrat-nominated judges. It is not surprising that Richard Nixon, Gerald Ford, and the two Bushes have sent some duds to the Supreme Court, but even Ronald Reagan named some judges who have left a lot to be desired, Sandra Day O'Connor and Anthony Kennedy being two Reagan flops.It is still too early to completely judge Trump's three nominees.

Even when conservatives have "victories" with Supreme Court decisions, it is disturbing when the Second Amendment's protection of the individual right to keep and bear arms is upheld by *one vote*, or state laws restricting abortion survive by the same margin. These are not decisions that federal judges should be making. But power can be intoxicating. If a black-robed judge is handed such power, the temptation is to use it.

As Justice Byron White said in his dissent to the *Roe v. Wade* decision of 1973, it was a decision of "raw, judicial power." This practice of federal judges changing the Constitution by judicial decree is not what the Founders intended.

Many members of Congress or the several state legislatures often publicly criticize the decisions of the

Supreme Court, while secretly breathing a sigh of relief that they did not have to vote on the issue themselves. A judge is not supposed to be making the rules any more than a football official makes the rules of football. They only apply the rules. The rules of our republican form of government — the Constitution — have already been made. And the Constitution did not create a system in which judges can decide whether students can open a school day with Bible reading, decide whether states can protect the lives of unborn children, or redefine marriage from what it has meant since the Garden of Eden.

So, what can be done? Under the Constitution, Congress has the authority to rein in the federal judiciary by limiting its appellate jurisdiction. Citizens must refuse to allow members of Congress to simply throw their hands up and say that there is nothing they can do about it, when there *is* something they can do about it. The Founders included this provision, found in Article III, Section 2, of the Constitution, for a reason — it is part of the principle of checks and balances.

State legislators do not get a pass, either. They can nullify unconstitutional rulings of the Supreme Court and simply refuse to follow unconstitutional usurpations of state sovereignty. Again, citizens should not allow their state lawmakers to get away with claiming that they are powerless to do anything about federal violations of the Constitution by any of the three branches of the federal government — including the courts.

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