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COMMENTARY

“THE SUPREME COURT AS A LEGISLATURE”: A DISSENT

Raoul Berger †

Unlike his zealous brethren who would not have the Founders rule us from their graves, who deride resort to the “original intention” to ascertain the limits of delegated power,¹ Professor Geoffrey Hazard would derive “the premise that the Court is a legislature” from the Constitution.² That the Court “formulate[s] general rules of law” reflecting the “value[s] held by its members,” that it formulates “policy”, that is, “the specific social purposes that a legislative body seeks to fulfill through its enactments,”³ is undeniable. Nor is it questionable that in diverse common law areas such as torts and contracts, courts traditionally have been left to make “policy,” but always subject to overruling by the legislature. Even that traditional power has its limits, as Justice Holmes remarked:

[J]udges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it⁴

At issue is not, therefore, whether judges make “policy” but whether they are authorized to *supplant the policy choices of the legislature* by their own.⁵

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¹ Brest, Book Review, N.Y. Times, Dec. 11, 1977 (Book Review), at 10; Cover, Book Review, THE NEW REPUBLIC, Jan. 14, 1978, at 26-27; Miller, Book Review, Washington Post, Nov. 13, 1977, § E, at 5; Murphy, Book Review, 87 YALE L.J. 1752 (1978).

² Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 1 (1978).

³ *Id.* at 2.

⁴ Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (dissenting opinion). Even in the adjudication of common law cases, the norm was to leave “novel or unique” changes to the legislature, not “to replace a durable impersonal body of common law principles with intuitive individual notions of justice in a given case.” G.E. WHITE, THE AMERICAN JUDICIAL TRADITION 277 (1976).

⁵ Apparently Hazard does not argue that the Court may supplant the policy changes of the Framers.

Hazard is not one to shut his eyes to the formidable obstacles that loom before him. He recognizes that the Constitution "distinguishes [judicial] power from 'legislative Powers,'" that it "refers to 'Cases' and 'Controversies' in 'Law and Equity' . . . , terms that unequivocally suggest an adjudicative tribunal in the mold of English antecedents and state counterparts."⁶ Neither knew of a judicial power to reject the *authorized* policy decisions of a legislature. The Court's contemporaneous constructions, Hazard observes, rejecting advisory opinions and the imposition of administrative responsibilities, "plainly indicate that the Supreme Court thought itself to be a court" and "has never [explicitly] departed from this interpretation."⁷ For a "different view" one "must rely almost entirely on inference," but he asserts that "there is an evidentiary basis for inference."⁸ I beg to differ.

To begin with judicial review in general, Hazard notes that the Convention did not "explicitly confer on the judiciary the authority to declare legislation invalid"; its "silence in [this] respect is now taken as an implicit but unmistakable recognition of the power of judicial review."⁹ "Silence" is a slender reed on which to rest so great a power,¹⁰ particularly when it departs from "the mold of English antecedents."¹¹ Elsewhere I have shown that the Framers employed language which *they* considered conferred the power of judicial review.¹² Here it suffices to note that Edward Corwin, whose view my own research confirmed, concluded that the Framers contemplated judicial review, and that "on no other feature of the Constitution with reference to which there has been any considerable debate is the view of the Convention itself better

⁶ Hazard, *supra* note 2, at 2 n.4 (citations omitted).

⁷ *Id.* at 2 n.5. Hazard would soften the impact of these rejections on the ground that "such invitations [by Congress] surely would not have been extended if there were not good reason for thinking that the Court had authority to accept them." *Id.* at 6. But the Court has the last word in these matters; as Hazard reminds us, "the Court could well say '[i]t is emphatically the province and duty of the [judiciary] to say what the law is.'" *Id.* at 7. Activists eagerly welcome the Court's *assumption* of dubious power over segregation and suffrage, although it runs counter to the Framers' choices. I would attach more weight to decisions that *renounce* power, particularly when they are contemporaneous constructions. And if "advisory opinions" are indeed not "judicial" in nature, then Congress could no more add them to the jurisdiction of the courts than Congress could add to the "original jurisdiction" of the Supreme Court. See text accompanying notes 66-68 *infra*.

⁸ Hazard, *supra* note 2, at 3.

⁹ *Id.* at 3-4.

¹⁰ See text accompanying note 73 *infra*.

¹¹ Hazard, *supra* note 2, at 2 n.4.

¹² R. BERGER, CONGRESS V. THE SUPREME COURT 198-284 (1969).

attested."¹³ True, Judge Learned Hand and Professors Archibald Cox and Leonard Levy regard the evidence on this score as inconclusive,¹⁴ a view that challenges the validity of judicial review altogether, but the Framers were scarcely "silent."

"[A]t the time," Hazard states, there was "no settled view of the concept and proper scope of judicial review."¹⁵ There was however a quite clear conception of its limits, as a brief historical survey will show. Blackstone declared in mid-eighteenth century that courts could not curb Parliament's omnipotent power.¹⁶ In the struggle to throw off the bonds of Parliament, the colonists invoked Coke's dictum in *Dr. Bonham's Case*.¹⁷ But the fact remains that judicial review had not taken root in the mother country. The few pre-1787 state cases in which the power was asserted proceeded for violations of express constitutional provisions, such as trial by jury.¹⁸ Not one represents a take-over of legislative policymaking. Even so, a few cases excited stormy disapproval leading to removal proceedings,¹⁹ because the Founders were attached to legislative paramountcy, the consequence of the fact that judges and governors were thrust upon them by the Crown whereas they elected their own darling assemblies.²⁰ Hence Madison stated in *The Federalist*, "[i]n republican government, the legislative authority necessarily predominates."²¹ Understandably

¹³ *Id.* at 105 (citing E. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 12-13 (1914)). See R. BERGER, *supra* note 12, at 47-119.

¹⁴ A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 12-16 (1976); L. HAND, *THE BILL OF RIGHTS* 15 (1958); Levy, *Judicial Review, History, and Democracy: An Introduction*, in *JUDICIAL REVIEW AND THE SUPREME COURT* 2-3 (L. Levy ed. 1967). Judge Hand concluded that the power of judicial review is "not a logical deduction from the structure of the Constitution but only a practical condition upon its successful operation" (L. HAND, *supra*, at 15) because he was "unwilling to rest on the historical evidence." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 46 (1962).

¹⁵ Hazard, *supra* note 2, at 4.

¹⁶ 1 W. BLACKSTONE, *COMMENTARIES* *91.

[N]otwithstanding what was attributed to Lord Coke in *Bonham's Case*, 8 Rep. 115, 118 *a*, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

Hurtado v. California, 110 U.S. 516, 531 (1884).

¹⁷ 8 Coke 113b, 118a, 77 Eng. Rep. 646, 652 (K.B. 1610).

¹⁸ Berger, "*Law of the Land*" *Reconsidered*, 74 Nw. U.L. REV. 1, 13-17 (1979).

¹⁹ R. BERGER, *supra* note 12, at 38, 40, 42.

²⁰ JAMES WILSON, *Of Government*, in 1 *THE WORKS OF JAMES WILSON* 292-93 (R.G. McCloskey ed. 1967). As late as 1791, Justice Wilson declared it was "high time" to regard executive and judges equally with the legislative as representatives of the people. *Id.* at 293.

²¹ *THE FEDERALIST* No. 51 (J. Madison), at 338 (Mod. Lib. ed. 1937). Justice Brandeis referred to the deep-seated conviction of the English and American people that they "must

Hamilton felt constrained to assure the Ratifiers that of the three branches "the judiciary is next to nothing."²² From "next to nothing" it is not easy to blow up a conception of judicial policymaking that could displace that of the legislature. Indeed, Hazard handsomely acknowledges that "any such overt role for the judiciary" in "lawmaking" was "then, as now, politically controversial. An explicit provision on the subject would have added to the burden of political initiative that the proponents of the Constitution well knew was already formidable."²³ More crudely, advocacy of a broad judicial role might have doomed the Constitution altogether, particularly when exercised over states jealous for their own prerogatives. To read expansive judicial review into the Constitution on the theory that there was a conspiracy to make no disclosure would undercut the effectiveness of ratification, for there is no ratification of the undisclosed.²⁴

Today it is unfashionable to take account of the separation of powers, and no reference thereto is made by Hazard. But it played a central role in the thinking of the Founders on this very issue. Thus Chief Justice Hutchinson of Massachusetts stated in 1767 that "the *Judge* should never be the *Legislator*: Because then the Will of the *Judge* would be the Law: and this tends to a State of Slavery."²⁵ Such sentiments were made explicit in John Adams' 1780 Massachusetts Constitution which provided "The judicial shall never exercise the legislative and executive powers" to the end "it may be a 'government of laws and not of men.'"²⁶ These sentiments derived from Montesquieu, who was to be the oracle of the several constitutional conventions and who had written that if Judges were to be the Legislators, the "life and liberty of the subject would be exposed to arbitrary control."²⁷ Such

look to representative assemblies for the protection of their liberties." Myers v. United States, 272 U.S. 52, 294-95 (1926) (dissenting opinion). For a similar view expressed in the Convention by Elbridge Gerry, see text accompanying note 48 *infra*.

²² THE FEDERALIST No. 78 (A. Hamilton), at 504 n.* (Mod. Lib. ed. 1937) (quoting 1 MONTESQUIEU, THE SPIRIT OF LAWS, bk. 11, ch. 6, at 185 (Philadelphia 1802)).

²³ Hazard, *supra* note 2, at 4.

²⁴ See Bennecke v. Insurance Co., 105 U.S. 355, 360 (1881); Owings v. Hull, 34 U.S. (9 Pet.) 607, 628-30 (1835).

²⁵ R. BERGER, GOVERNMENT BY JUDICIARY 307 (1977) (quoting Charge to the Grand Jury by the Chief Justice, Quincy's Mass. Rep. 234 (1767) (emphasis in original)).

²⁶ R. BERGER, *supra* note 25, at 250 n.5, 290 (quoting MASS. CONST. OF 1780, pt. 1, art. XXX). Madison stated in the First Congress, "if there is a principle in our Constitution . . . more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers." 1 ANNALS OF CONG. 581 (Gales & Seaton eds. 1789) (print bearing running title "History of Congress").

²⁷ 1 MONTESQUIEU, *supra* note 22, bk. 11, ch. 6, at 181.

were the suppositions the Founders brought to fashioning the novel judicial review.

When Hazard reads "Hamilton's famous defense of judicial review in No. 78 of *The Federalist*" as "ascribing a broad meaning to a concept whose connotation had been unresolved at the drafting stage [because "controversial" and perilous],"²⁸ he overlooks a group of remarks by Hamilton that run strongly counter to that interpretation.²⁹ Echoing Montesquieu, he stated "'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'"³⁰ Having divorced judging from legislation, he hardly contemplated that legislating would be taken over by the judiciary. Instead he wrote that courts may not, "on the pretence of a repugnancy, . . . substitute their own pleasure to the constitutional intentions of the legislature."³¹ That is, they may not intrude *within* the boundaries of legislative power. Hamilton also assured the Ratifiers that judges could be impeached for "deliberate usurpations on the authority of the legislature."³² However "broad" Hamilton's view of judicial review may have been, it plainly did not encompass exercise of legislative power. By these statements Hamilton sought to allay fears of an innovative power that was admittedly "politically controversial," fears which might wreck ratification altogether. He cannot now be read to endorse a view which he in fact disavowed.

Nor would I concur in Hazard's view that the connotations of judicial review were "unresolved at the drafting stage." To the contrary, all the Founders' remarks about judicial review were in a narrow frame, referring solely to the *policing* of constitutional limits; the solitary attempt to have the judiciary participate in legislative policymaking was unequivocally rejected.³³ For example, James Wilson said that Congress may be "kept within its prescribed bounds, by the interposition of the judicial depart-

²⁸ Hazard, *supra* note 2, at 4.

²⁹ Jefferson regarded *The Federalist* as "evidence of the general opinion of those who framed . . . the Constitution." C. ROSSITER, *ALEXANDER HAMILTON AND THE CONSTITUTION* 52 (1964) (quoting Resolution of Board of Visitors of the University of Virginia on "Political Science" (Mar. 4, 1825), reprinted in *THE COMPLETE JEFFERSON* 1112 (S. Padover ed. 1943)). Edward Corwin concurred: "It cannot be reasonably doubted that Hamilton was here [judicial review], as at other points, endeavoring to reproduce the matured conclusions of the Convention itself." E. CORWIN, *supra* note 13, at 44.

³⁰ *THE FEDERALIST* No. 78 (A. Hamilton), at 504 (Mod. Lib. ed. 1937) (quoting MONTESQUIEU, *supra* note 22, bk. 11, ch. 6, at 181).

³¹ *Id.* at 507.

³² *THE FEDERALIST* No. 81 (A. Hamilton), at 526-27 (Mod. Lib. ed. 1937).

³³ See text accompanying notes 45-52 *infra*.

ment.”³⁴ The courts, said Oliver Ellsworth, were a “check” if Congress should “overleap their limits,” that is, “make a law which the constitution does not authorise.”³⁵ Long before *Marbury v. Madison*, John Marshall stated in the Virginia Ratification Convention (1788) that judges could declare void “a law not warranted by any of the powers enumerated.”³⁶ Hamilton stressed that the courts were to serve as “bulwarks of a limited Constitution against legislative encroachments.”³⁷ But “within those limits,” Madison said, there were “discretionary powers,” and the exercise of that discretion was for the branch to whom it was confided.³⁸ This differentiation was clearly spelled out by Justice James Iredell, who had anticipated Hamilton in explaining the basis for judicial review.³⁹ In *Ware v. Hylton* (1796),⁴⁰ he declared, “[t]he power of the legislatures is limited” by the several constitutions:⁴¹

Beyond these limitations, . . . their acts are void, because they are not warranted by the authority given. But *within them*, . . . they are in all cases obligatory . . . because . . . the legislatures only exercise a discretion expressly confided to them by the constitution of their country It is a discretion no more controllable . . . by a court of justice, than a judicial determination is by them, neither department having any right to encroach on the exclusive province of the other, in order to rectify any error in principle, which it may suppose the other has committed.⁴²

In an early landmark decision laying claim to the power of judicial review, Judge Henry, of the General Court of Virginia, declared:

³⁴ 2 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 417 (2d ed. Washington 1836).

³⁵ 2 *id.* at 198.

³⁶ 3 *id.* at 503.

³⁷ *THE FEDERALIST* No. 78 (A. Hamilton), at 508 (Mod. Lib. ed. 1937).

³⁸ 1 *ANNALS OF CONG.* 438 (Gales & Seaton eds. 1789) (print hearing running title “History of Congress”). “The Legislative powers,” Madison stated, “are vested in Congress, and are to be exercised by them uncontrolled by any other department, except the Constitution has qualified it otherwise.” *Id.* at 463. Justice Field declared for a unanimous Court: “When once it is established that Congress possesses the power to pass an act, our province ends with its construction” *The Chinese Exclusion Case*, 130 U.S. 581, 603 (1889). Control of *executive* discretion, for example, lies beyond the judicial function. See *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 515 (1840); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 169-70 (1803).

³⁹ See R. BERGER, *supra* note 12, at 82-83 (quoting Letter from James Iredell to Richard Spaight (Aug. 26, 1787), reprinted in *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 172-73 (G. McRee ed. 1858) (emphasis in original)).

⁴⁰ 3 U.S. (3 Dall.) 199 (1796).

⁴¹ *Id.* at 266.

⁴² *Id.* (emphasis added).

The judiciary, from the nature of the office . . . could never be designed to determine upon the equity, necessity, or usefulness of a law; that would amount to an express interfering with the legislative branch [N]ot being chosen immediately by the people, nor being accountable to them, . . . they do not, and ought not, to represent the people in framing or repealing any law.⁴³

James Bradley Thayer and Judge Learned Hand were therefore on solid ground when they emphasized that the courts were confined to *policing* constitutional boundaries in order to insure that the departments did not "overleap" their bounds.⁴⁴

Hazard would draw some intimations to the contrary from the Framers' action on the Council of Revision. Consideration of his argument requires a rather full statement of the historical facts. Edmund Randolph proposed in the Convention that the President, "and a convenient number of the National Judiciary, ought to compose a council of revision" to examine every act of Congress and by its dissent to constitute a veto.⁴⁵ Arguing for judicial participation in the veto, George Mason recognized that judges already

could declare an unconstitutional law void. But with regard to every law however unjust, oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He wished the further use to be made of the Judges, of giving aid in preventing every improper law.⁴⁶

A similar differentiation was drawn by James Wilson:

Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary [veto] power [in order to "counteract"] the improper views of the Legislature.⁴⁷

⁴³ *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 47 (1793). For remarks to the same effect by Elbridge Gerry in the Convention, see text accompanying note 48 *infra*. See also note 57 *infra*.

⁴⁴ L. HAND, *supra* note 14, at 31, 66; Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893).

⁴⁵ 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (1911).

⁴⁶ 2 *id.* at 78.

⁴⁷ 2 *id.* at 73.

This proposal was rejected for reasons that unmistakably spell out the exclusion of the judiciary from even a share in policymaking. Elbridge Gerry, one of the most vigorous advocates of judicial review, opposed judicial participation in the Council:

It was quite foreign from the nature of ye. office to make them judges of the policy of public measures

. . . .
 . . . It was making Statesmen of the Judges; and setting them up as the guardians of the Rights of the people. He relied for his part on the Representatives of the people as the guardians of their Rights & interests. It was making the Expositors of the Laws, the Legislators which ought never to be done.⁴⁸

Nathaniel Gorham saw no "advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures."⁴⁹ Charles Pinckney also "opposed the interference of the Judges in the Legislative business."⁵⁰ Rufus King opposed judicial participation on the ground that as "the Judges must interpret the Laws they ought not to be legislators."⁵¹ Roger Sherman "disapproved of Judges meddling in politics and parties."⁵²

Hazard's efforts to diminish the force of these statements are unpersuasive:

It is of course true that the debate in the Constitutional Convention sought to distinguish the power to veto legislation from the power to find legislation unconstitutional in an adjudication. . . . But then as now the distinction could not be clearly drawn. Moreover, the political consideration supporting the two concepts is the same—fear of pernicious laws.⁵³

For the latter statement he cites George Mason. But Mason plainly distinguished between an "unconstitutional law" and one that was

⁴⁸ 1 *id.* at 97-98; 2 *id.* at 75.

⁴⁹ 2 *id.* at 73. Such views are mirrored in the opinion of Justice James Iredell, who led the fight for ratification in North Carolina: "These are considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a court of justice." *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 260 (1796). Almost one hundred years later, Justice Brewer explained: "The courts . . . make no laws, they establish no policy, they never enter into the domain of public action. They do not govern." *The Movement of Coercion*, Address by Justice Brewer, New York State Bar Association (Jan. 1893), quoted in E. CORWIN, *THE TWILIGHT OF THE SUPREME COURT* at xxv (1934).

⁵⁰ 2 *id.* at 298.

⁵¹ 1 *id.* at 108.

⁵² 2 *id.* at 300.

⁵³ Hazard, *supra* note 2, at 4 n.13 (citations omitted).

“oppressive or pernicious” but not unconstitutional and to which the judges must give a “free course.” It was for that reason that he desired judicial interposition at the legislative stage to prevent a law that was constitutional but “improper.” Wilson underscored that “Laws may be unjust . . . and yet not be so unconstitutional as to justify the Judges in refusing to give them effect.” The Founders, we have seen, clearly understood by an “unconstitutional law” one which “overleapt” the “limits” of the delegated authority. As Iredell made clear, they appreciated the difference between a law that went “beyond” such “limitations” and one, however “unwise” that “was within them.” The latter, as both Madison and Iredell held, was not “controlable” by the judiciary. Where Hazard sows doubt I find a “clearly drawn” distinction: Judicial participation in a presidential *veto* at the enacting stage bears no resemblance whatever to *adjudication* of a “case or controversy” respecting an enacted statute. The distinction between legislation and adjudication could hardly be more clearly drawn.

Against this factual background Hazard’s version of “one [“significant”] argument against the proposed Council was that its function could be performed by the judiciary in the course of adjudication”⁵⁴ obliterates the very distinction the Framers so clearly drew. For both Mason and Wilson urged judicial participation in the Council precisely because judges could *not* in adjudication refuse effect to “pernicious” but constitutional laws. Their jurisdiction was limited to unconstitutional laws; it did not extend to laws that were merely impolitic.

Next Hazard argues that though “the Convention did not adopt the proposal for a Council of Revision . . . neither did it explicitly confer on the judiciary the authority to declare legislation invalid.”⁵⁵ From this he would infer “that the Convention, in implicitly affirming the legitimacy of judicial review, also implicitly affirmed the version of judicial review that tended toward the function of a Council of Revision.”⁵⁶ This errs on two counts: (1) the records show that the Founders *explicitly* contemplated judicial review and that it would be confined to policing constitutional limits; and (2) they categorically *rejected* judicial participation in policymaking at the legislative stage by barring them from the Council. That which was explicitly rejected cannot have been implicitly adopted. To regard “[t]he action of the Conven-

⁵⁴ *Id.* at 3.

⁵⁵ *Id.*

⁵⁶ *Id.* at 4.

tion regarding the Council of Revision and judicial review . . . simply as a postponement of the issue of the judiciary's function in lawmaking"⁵⁷ simply does not square with the historical facts. Hamilton's remarks confirm that judicial "usurpations on the authority of the legislature" were out of bounds.

Hazard states that the Judiciary Act of 1789 provision for "appellate review over lower federal courts" read "along with that concerning review of state court decisions leads compellingly to the inference that there was similar authority to pass upon the *validity* of legislative enactments."⁵⁸ Hazard concludes that this, "empowered the Supreme Court to act as a Council of Revision so far as concerns maintaining the legal structure of federalism."⁵⁹ He notes that:

[Q]uestions of "validity," [imply] nothing more than a power to compare the text of the Constitution with the text of the subordinate legal authority and to nullify the latter when it is discrepant with the former. But a study of *McCulloch v. Maryland* . . . suggests that the power involves a decisional process going beyond analysis of texts.⁶⁰

I would maintain that no "decisional process" can transform the power to examine "validity" of a state enactment into power to displace the state's policy making within its constitutional bounds. Moreover, the "decisional process" in *McCulloch* did not go beyond *sustaining* Congress' choice of means to effectuate its delegated powers. The test of "validity" was simply stated by Lee in the Virginia Ratification Convention: "When a question arises with respect to the legality of any power," the question will be, "*Is it enumerated in the constitution?*" . . . It is otherwise arbitrary and unconstitutional."⁶¹ Nor can comfort be drawn either from the Act of 1789 or *McCulloch* for displacement of state policy making. The powerful attachment to states rights, soon to be expressed in the tenth amendment, the jealousy of encroachment by the re-

⁵⁷ *Id.* Judge St. George Tucker, one of the earliest commentators on the Constitution and subsequently promoted to the Virginia Court of Appeals, quoted Vattel: the legislature "ought to consider the fundamental laws as sacred, if the nation has not in *express terms* given them power to change them." *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 75 (1793) (emphasis partially omitted). Of the courts he stated their duty is "declaring what the law is, not making a new law" (*id.* at 96), much less "to change" the "fundamental law."

⁵⁸ Hazard, *supra* note 2, at 5 (emphasis added).

⁵⁹ *Id.*

⁶⁰ *Id.* at 5 n.18.

⁶¹ 3 J. ELLIOT, *supra* note 34, at 192 (emphasis in original).

mote federal government,⁶² repels the view that what was withheld from the Court vis-a-vis Congress was cheerfully surrendered to the Court as against the states.

To round out his historical discussion, Hazard turns to *Marbury v. Madison*⁶³ and concludes that while it "may not sustain the proposition that the Supreme Court is a legislative body . . . it certainly sustains the *broadest claims* of authority *ever made* by or on behalf of the Supreme Court."⁶⁴ True it is that it "held *invalid* a statutory enactment of Congress—the most sovereign expression of the legislative function," and "asserted its authority to adjudge the *legality* of actions taken by officials of the Executive."⁶⁵ When we look behind the "measured dicta" to what was actually decided, *Marbury* emphatically does not illustrate "authority . . . to declare the law *beyond* what the Legislature has said it is."⁶⁶ The statute sought to enlarge the "original jurisdiction" conferred on the Court and thus was "invalid" in the sense understood by the Founders. Marshall himself in the Virginia Ratification Convention had stated the consequences if Congress were to "go beyond the delegated powers If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the constitution They would declare it void."⁶⁷ No power to alter the delegation made to the Court in the Constitution was granted to Congress, and when it added to the Court's "original jurisdiction" it "overleapt" its "limits" and infringed the Constitution. This was what "invalidity" meant to the Framers, and it set the pattern for better than 150 years—review confined to nay-saying, what Justice Field called the "negative power" of the Court.⁶⁸ It remained for the Warren Court to make "the broadest claims of authority ever made," to initiate policy in spite of the contrary choices made by

⁶² R. BERGER, *supra* note 12, at 9, 32-33, 260-63. See H. ADAMS, JOHN RANDOLPH 18, 38 (1883); 2 J. ELLIOT, *supra* note 34, at 240, 260-61, 352, 415; 3 *id.* at 59-60, 385-86; 4 *id.* at 300; M. FARRAND, *supra* note 45, at 345, 445, 500, 530; 2 *id.* at 386; Speech by Alexander Hamilton, New York Assembly, First Speech on the Address of the Legislature to Governor George Clinton's Message (Jan. 19, 1787), reprinted in THE PAPERS OF ALEXANDER HAMILTON 11 (H. Syrett & J. Cooke eds. 1962).

⁶³ 5 U.S. (1 Cranch) 137 (1803).

⁶⁴ Hazard, *supra* note 2, at 7 (emphasis added).

⁶⁵ *Id.* at 6-7 (emphasis added).

⁶⁶ *Id.* at 7 n.24.

⁶⁷ 3 J. ELLIOT, *supra* note 34, at 503.

⁶⁸ R. BERGER, *supra* note 25, at 305 (quoting Letter from Justice Stephen Field to the Supreme Court (Oct. 12, 1897), reprinted in 168 U.S. 713, 717 (1897)).

the Framers. As Professor Archibald Cox, a commentator sympathetic to the Warren Court, observed, "where the older activist decisions [*e.g.* *Lochner v. New York*⁶⁹] merely blocked legislative initiatives, the decisions of the 1950's and 1960's *forced changes* in the established legal order,"⁷⁰ a revolutionary departure from the judicial role conceived in *Marbury*.

Professor Hazard concludes that "[t]he argument that legally the Court is not a legislative body is thus at least legally debatable. Perhaps even those who would most narrowly define the Court would concede that their position is not textually demonstrable."⁷¹ This erroneously shifts the burden of proof. He himself recognizes that the text "unequivocally suggest[s] an adjudicative tribunal in the mold of English antecedents,"⁷² which knew no judicial displacement of legislative policy. Consequently, as Chief Justice Marshall held, "an opinion which is . . . to establish a principle never before recognized, should be expressed in plain and explicit terms,"⁷³ a rule peculiarly pertinent to a claim of constitutional power. Under our system of limited delegations, the legality of a claimed power may always be challenged by Lee's test: "*Is it enumerated in the Constitution?* . . . It is otherwise arbitrary and unconstitutional."⁷⁴

The fact, so conveniently overlooked today, is that the American people, in the words of Elbridge Gerry, relied "on the Representatives of the people as the guardians of their Rights & interests."⁷⁵ The call on the Court to take over that role is made by those, as Hazard's Yale colleague, Professor Joseph Bishop has

⁶⁹ 198 U.S. 45 (1904).

⁷⁰ R. BERGER, *supra* note 25, at 428 app. (emphasis added) (quoting Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791, 802 (1976)). "The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist . . ." *United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950).

⁷¹ Hazard, *supra* note 2, at 8.

⁷² *Id.* at 2 n.4.

⁷³ *United States v. Burr*, 25 F. Cas. 55, 165 (C.C.D. Va. 1807) (No. 14,693).

⁷⁴ See text accompanying note 61 *supra*. Justice Story wrote:

Nor should it ever be lost sight of, that the government of the United States is one of limited and enumerated powers, and that a departure from the true import and sense of its powers is *pro tanto* the establishment of a new constitution. It is doing for the people what they have not chosen to do for themselves. It is usurping the functions of a legislator, and deserting those of an expounder of the law. Arguments drawn from impolicy or inconvenience ought here to be of no weight.

1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 426, at 325-26 (5th ed. 1891).

⁷⁵ See text accompanying note 48 *supra*.

written, who “obviously have no faith whatever in the wisdom or the will of the great majority of the people who are opposed to them. They are doing everything possible to have those problems resolved by a small minority in the courts and the bureaucracy.”⁷⁶

⁷⁶ Bishop, *What is a Liberal—Who is a Conservative?*, 62 COMMENTARY, September 1976, at 47. See generally R. BERGER, *supra* note 25, at 313 (quoting A. Cox, *supra* note 14, at 34).