

## *How Judicial Supremacy Began*

FEDERAL JUDGES AND LAW PROFESSORS all say that the most important legal case in American history is the U.S. Supreme Court case of *Marbury v. Madison* (1803). They assert that this case established the principle of judicial review and made it central to our legal and political system.

*Marbury v. Madison* was, in fact, a narrowly decided case. It became significant because of the way that later judges have used it. The facts were simple, but the opinion is convoluted. Thomas Jefferson called it “merely an *obiter* dissertation of the Chief Justice.”

In the last days of his administration, President John Adams appointed William Marbury to the minor office of justice of the peace, but the formal commission was never delivered to him. After Thomas Jefferson became president, Marbury sued, asking the court to issue a writ of mandamus ordering Secretary of State James Madison to

deliver Marbury's commission. Chief Justice John Marshall ruled that the congressional law authorizing the Supreme Court to issue writs of mandamus to public officers was unconstitutional, so the Court could not issue the writ and Marbury didn't get the job.

One sentence in John Marshall's decision articulated the power of judicial review and the Court's authority to declare laws unconstitutional: "It is emphatically the province and duty of the judicial department to say what the law is." That key sentence has been used to promote judicial review, a concept that is not in the Constitution. Since the Warren Court, it has also been used to promote judicial supremacy.

But there is a huge difference between a judiciary that says what the law *is*, and a judiciary that insists what *it* says *is* the law. The former is the rule of law; the latter is judicial tyranny. There is no quarrel with judicial review in the way it was carried out in *Marbury*. If a law is clearly unconstitutional, the courts *should not* enforce it. Judicial review is a long, long way from the judicial supremacy we suffer today.

*Marbury v. Madison* was actually a model of judicial restraint, not an activist decision. Marshall narrowly construed the Court's own powers and refused to accept what he thought was an unconstitutional grant of power by Congress to the courts. Marshall then refused to interfere with the presidential appointments.

The two sentences that immediately follow the famous line quoted above show that Marshall simply meant that the courts should apply the law in particular cases and resolve

any conflict between two laws as necessary to decide the case. Later in *Marbury*, Marshall wrote that the Constitution is “a rule for the government of courts, as well as the legislature” and that “courts, as well as other departments, are bound by that instrument.” *Marbury v. Madison*, therefore, did not give us judicial supremacy. *Marbury* did no damage to our separation of powers.

It was fifty-four years before the Supreme Court declared another federal law unconstitutional. During all those years, our nation’s leaders understood the proper role of the judiciary, and they never espoused any theories of judicial exclusiveness. For example, President Andrew Jackson’s veto of the bill to recharter the Bank of the United States (July 10, 1832) stated: “The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.”

Jackson’s often-quoted remark in regard to another controversy, “John Marshall gave his opinion, now let him enforce it,” may be apocryphal. But if he didn’t say it, he could have said it because presidents and justices in those years knew and accepted their proper role under the separation of powers, recognizing that we should not permit one court opinion to decide major policy questions.

#### EMBARRASSMENT FOR SUPREMACISTS

The judicial supremacists like to cite *Marbury v. Madison* because it is just too embarrassing to cite the case that really

started judicial supremacy: *Dred Scott v. Sanford* (1857), the first case in which the Supreme Court tried to expand its power over other branches of government. It was for many reasons one of the most disastrous decisions in history.

Dred Scott was a black slave who traveled to free territories and then sued for his freedom. Instead of simply deciding the controversy, the Supreme Court handed down an aggressively activist, judicially supremacist, pro-slavery decision. It dismissed Dred Scott's complaint, saying that he didn't even have the right to be a plaintiff in a lawsuit: blacks "had no rights which the white man was bound to respect," and even the free blacks in the Northern states didn't have the right to be citizens. The Court declared unconstitutional the federal law, passed in 1820 as part of the Missouri Compromise, forbidding slavery in most of the Western territories. It was only the second federal law in history declared unconstitutional.

The Constitution limits the jurisdiction of the federal courts to "cases and controversies." Federal courts are not supposed to give advisory opinions about issues that are not before them as a case or controversy. *Dred Scott* is a good example of the Court trying to decide issues that were not necessary to its decision, and the Court ended up causing gross injustices.

Abraham Lincoln refused to accept that the Supreme Court could set public policy, and he endured much criticism for attacking the *Dred Scott* decision. But Lincoln was absolutely correct in identifying not only the intrinsic wrongness of the decision, but also its terrible consequences in upsetting our form of government.

In his First Inaugural Address (March 4, 1861), Lincoln admitted that the Supreme Court decision was personally binding on plaintiff Dred Scott, but Lincoln expressed the hope that its “evil effect” would be “limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases.” In other words, Lincoln accepted judicial review as binding in the case, but he rejected judicial supremacy—the notion that the Supreme Court was supreme in creating new laws for the nation—because that would abolish self-government and submit us to the rule of judges. Lincoln identified the evil of judicial supremacy: “If the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.”

Precisely. Lincoln agreed that the Supreme Court could decide the fate of Dred Scott. But Lincoln rejected the notion that an “eminent tribunal” should be allowed to make public policy. That would mean submitting to the rule of judicial supremacists rather than to the Constitution and the rule of law.

Lincoln defied the *Dred Scott* opinion by issuing passports to blacks and otherwise treating them as citizens, and he signed legislation to place limits on slavery in the Western territories. The *Dred Scott* decision exacerbated the conflict over efforts to restrict slavery and pushed our coun-

try toward a terrible war to correct the injustice wrought by the power-grabbing Supreme Court.

Anyone who thinks that we need judicial supremacy to protect the rights of minorities must accept that judicial supremacists gave us the injustice of the *Dred Scott* decision. Anyone who thinks we need judicial supremacists to protect civil rights should remember George Washington's warning that we should permit the Constitution to be amended only in the way that the Constitution provides: "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."

13 *How Judicial Supremacy Began*

- This law review article gives some of the history of *Marbury v. Madison*: “There is, then, no doctrine of national, substantive judicial supremacy which inexorably flows from *Marbury v. Madison* itself, i.e., no doctrine that the only interpretation of the Constitution which all branches of the national government must employ is the interpretation which the Court may provide in the course of litigation.” “A Critical Guide to *Marbury v. Madison*” by William W. Van Alstyne, 18 *Duke Law Journal* 1-47 (1969).
- Jefferson’s “obiter dissertation” comment is from his letter to Justice William Johnson, Monticello, June 12, 1823.
- The concept of judicial review has a strong form and a weak form. The weak form of judicial review occurs when, in the course of deciding a specific case, a court construes a statute in the light of a superior interpretation of the Constitution. The strong form of judicial review consists of using the Constitution (or previous judicial interpretations of it) to override the plain text meaning of a statute, and construing the statute as it might apply hypothetically to entities that are not parties to the case before the court. Chief Justice John Marshall only gave us the weak form of judicial review. He had nothing to do with the strong form of judicial review so prevalent today. This book is concerned with the strong form of judicial supremacy and concludes that it has become entrenched in American government only recently. See the law review article by Brian M. Feldman, “Evaluating Public Endorsement of the Weak and Strong Forms of Judicial Supremacy,” 89 *Virginia Law Review* 979 (2003), which argues that the American public has never endorsed the strong form of judicial supremacy, and that such an endorsement would be essential to its legitimacy.

- The notion of judicial supremacy should not be confused with federal supremacy. Federal supremacy is the principle that federal laws override or preempt state and local laws, but only in the use of the federal government's delegated powers as defined by the Constitution.
- The opposition to judicial supremacy by Jefferson and Lincoln is explained in "Lincoln on Judicial Despotism" by Robert P. George, *First Things*, Feb. 2003, 130: 36-40.

## *How Judicial Supremacy Grew*

**A** HUNDRED YEARS WENT BY after *Dred Scott v. Sanford*. Then came the gigantic grab for judicial supremacy led by Chief Justice Earl Warren, a politician who had no previous judicial experience. His ideology was so mixed that both Republican and Democratic parties nominated him for governor of California. He was appointed to the Supreme Court as the political payoff for delivering the sixty-eight votes of the California delegation to help Dwight Eisenhower defeat Robert A. Taft at the 1952 Republican National Convention. Ike later admitted that he regretted the appointment.

As California's attorney general, Warren had presided over the infamous internment of Japanese-Americans during World War II. After he assumed the title of Chief Justice, he seemed to believe he could use Supreme Court decisions to write his own political views into law. In a 2005 speech at Vanderbilt University, Justice Scalia blamed Chief Justice Earl Warren for increasing the political role of the

Supreme Court, saying that Warren had been “a governor, a policy-maker, who approached the law with that frame of mind.”

No sooner was Warren confirmed as Chief Justice than he began to assert judicial supremacy, overturning established laws about criminal procedures, prayer in schools, internal security, obscenity, and legislative reapportionment. In those days, not only the public but the legal community objected vigorously to the high-handed, wrong-headed decisions of what became known as the Warren Court.

Even the associate justices on the Warren Court realized that Supreme Court decisions were going so far afield from proper judicial authority that they were in fact amending the Constitution. Justice Hugo Black dissenting, joined by Justice Tom Clark, wrote that the New York criminal law knocked out in the *Jackson v. Denno* decision (1964) “. . . should not be held invalid by the Court because of a belief that the Court can improve on the Constitution.”

Justice John Harlan, in dissent, wrote that the Court’s action in *Reynolds v. Sims* (1964) “. . . amounts to nothing less than an exercise of the amending power by this Court. . . . For when, in the name of constitutional interpretation, the Court *adds* something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.”

#### ASSAULT ON INTERNAL SECURITY

In 1957 the American Bar Association (ABA) Committee on Communist Tactics, Strategy and Objectives, chaired

by Herbert R. O'Connor, a former Democratic U.S. Senator from Maryland, presented the annual ABA Convention delegates with a stinging criticism of fifteen decisions in which the Warren Court had ruled in favor of Communists and against U.S. internal security. At that time, Soviet Communism was the greatest threat to American security. Communist spies had infiltrated high levels of our government and stolen our atomic bomb secrets.

All fifteen decisions were reversals of lower court decisions. Most of them voided laws or procedures which the ABA Committee, the Congress, and the American people believed were necessary to protect our national security. The ABA report pointed out that "the repeal or the weakening of these anti-Communist laws and committees is in the forefront of the program of the Communist Party of the United States." (See Appendix for the list of cases.)

*Pennsylvania v. Steve Nelson*, one of those fifteen cases, was an example of the new Warren Court doctrine of making law for the whole country instead of just deciding only the case before the Court. The Supreme Court not only held it was unlawful for Pennsylvania to prosecute a Pennsylvania Communist Party leader under the Pennsylvania Sedition Act, but indicated that the anti-sedition laws of forty-two other states (which were not parties to the case) likewise could not be enforced.

The ABA report emphasized that many of the cases represented a direct attack on the authority of Congress to conduct investigations in order to do its job of legislating. Prior to the Warren Court, the Supreme Court had always

refused to interfere with the investigative function of congressional committees. A unanimous Court had ruled in *McGrain v. Daugherty* (1927): “The power to legislate carries with it by necessary implication ample authority to obtain information needed in the rightful exercise of that power, and to employ compulsory process for the purpose.”

But the Warren Court demonstrated its disrespect for Congress’s constitutional authority to conduct investigations by drastically clipping Congress’s investigative and legislative powers, as well as powers of the executive branch and of federal and state law enforcement agencies to protect our national security.

The media treated the ABA report as big news. Headlines in New York newspapers proclaimed: “Bar Association Told High Court Weakens Security Against Reds” and “Warren Court Kicked in Teeth.” *U.S. News & World Report* published the text of the ABA report.

*U.S. News & World Report* also published an analysis by Senator James O. Eastland of the way the Warren Court ran roughshod over laws and procedures for the benefit of the Communists. This included a tally on whether the individual justices voted to uphold the position advocated by the Communists or not. Hugo Black voted to uphold the Communist position in every one of seventy-one decisions. William O. Douglas voted for the Communists in sixty-six cases, against them in three. Felix Frankfurter’s score was fifty-six to sixteen. Earl Warren’s score was thirty-six to three. William Brennan’s score was eighteen to two. Senator Eastland showed that “the Court has been expanding its

usurpation of the legislative field and purporting to make new law of general application which will be favorable to the Communist position.”

In the early days of the new era of judicial supremacy, Congress and the media had the courage to speak out against Supreme Court arrogance. Close observers clearly understood that the Warren Court was making dramatic departures from previous Courts, that it was boldly seizing legislative functions, and that Congress had a duty to halt the Court’s assault on other branches of government. On August 7, 1957, the Senate Subcommittee on Internal Security held a hearing on the “Limitation of Appellate Jurisdiction of the United States Supreme Court” at which Senator William E. Jenner testified: “There was a time when the Supreme Court conceived its function to be the interpretation of the law. For some time now, the Supreme Court has been making law—substituting its judgment for the judgment of the legislative branch. . . . We witness today the spectacle of a Court constantly changing the law, and even changing the meaning of the Constitution, in an apparent determination to make the law of the land what the Court thinks it should be.”

After spelling out how the Supreme Court had indulged in unprecedented activism in the areas of criminal procedure and property law, Jenner addressed himself particularly to the decisions that dismantled U.S. internal security:

What shall we say of this parade of decisions that came down from our highest bench on Red Monday after Red Monday? The Senate was wrong. The House of

Representatives was wrong. The Secretary of State was wrong. The Department of Justice was wrong. The State legislatures were wrong. The State courts were wrong. The prosecutors, both Federal and State, were wrong. The juries were wrong. The Federal Bureau of Investigation was wrong. The Loyalty Review Board was wrong. The New York Board of Education was wrong. The California bar examiners were wrong. The California Committee on Un-American Activities was wrong. The Ohio Committee on Un-American Activities was wrong. Everybody was wrong except the attorneys for the Communist conspiracy and the majority of the United States Supreme Court. . . .

That is why we in Congress must fulfill our plain duty and act immediately in the way the Constitution empowers us to act, to repair as much of the damage as we can and prevent even worse damage in the future.

But Congress failed to do its plain duty. Congress did not act to protect the authority of the legislative branch against judicial tyranny. So the judicial supremacists keep seizing more and more power over the other branches of government in many areas of law, and Americans are still suffering the consequences.

#### MISREADING MARBURY V. MADISON

The case that gave legal life to the false but now widely held concept of judicial supremacy is *Cooper v. Aaron* (1958). It

wasn't the decision itself, but the extra unnecessary language in the opinion that facilitated the justices' grab for power.

The facts in this case were fairly simple. Desegregation of the public schools in Arkansas in 1958 was highly controversial. The Little Rock school board sought a postponement of the desegregation program and won approval in the U.S. District Court. That decision was reversed by the U.S. Court of Appeals, and the Supreme Court affirmed the appellate court's decision to go forward with immediate desegregation. The Court could have ended its opinion right there. Indeed, the Court admitted this, stating: "What has been said, in the light of the facts developed, is enough to dispose of the case."

But instead of confining itself to implementing the timetable for desegregation ordered by the Court of Appeals, the Supreme Court immediately added a "However" and proceeded to use the desegregation issue to elevate the federal judiciary to the most powerful branch of government. Claiming that it was quoting "some basic constitutional propositions which are settled doctrine," *Cooper v. Aaron* asserted that John Marshall's famous line from *Marbury v. Madison* (1803) had "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land. . . ."

None of this was “settled doctrine.” *Cooper v. Aaron* was not merely a restatement of *Marbury v. Madison*. *Marbury v. Madison* did not claim that “the federal judiciary is supreme.” The notion was not a “basic principle.” No such supremacy theory had previously been recognized as an “indispensable feature of our constitutional system.” No one before had ever asserted that a Supreme Court decision is “the supreme law of the land.” The Constitution clearly defines the supreme law, and the judiciary is not part of the definition.

When judges ramble on in their opinions with discussions that are unnecessary to the decision, their extra words are called “dicta.” Dicta have been with us from the beginning of the federal courts, but in the 1950s the Warren Court began pretending that dicta were part of the decisions. These gratuitous words have now become so common in court opinions that many people don’t realize that they are beyond the scope of judicial authority.

Many mistakenly believe that *Brown v. Board of Education* was the landmark case that changed everything, but it wasn’t. *Brown* simply reversed the Court’s 1896 pro-segregation decision of *Plessy v. Ferguson*. The vast expansion of judicial authority by the Warren Court was not caused by *Brown v. Board of Education*.

*Cooper v. Aaron* was the case that grabbed judicial exclusiveness and supremacy over the other branches of government. And it was all so unnecessary to accomplish the goal of school desegregation. *Cooper* was the work of a petty politician, Earl Warren, reaching for power to which

he was not entitled. Then, having gotten by with *Cooper v. Aaron's* grab for power by intimidating anyone who might challenge it, the judicial supremacists extended their new authority into other areas.

More and more frequently, we began to hear the refrain that the U.S. Constitution is whatever the Supreme Court says it is. Supreme Court Justice Stephen Breyer, in his new book *Active Liberty*, openly attacks strict construction and “textualism.” He urges us to accept the notion that U.S. constitutional law is whatever a majority of the Supreme Court justices decide, based on their own notions of “democracy” and “active liberty.” His book illustrates the difference between a justice appointed by Bill Clinton (Breyer) and a justice appointed by George W. Bush (Samuel Alito), who said in his confirmation hearings: “I think we should look to the text of the Constitution, and we should look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption.”

The concept of judicial supremacy did not originate with the Constitution, and it did not come from *Marbury v. Madison*. It is an outrageous assertion of judicial exclusiveness that dates from unprecedented overreaching by the Warren Court in the 1950s and 1960s. Yet it has now become so ingrained in our legal culture that many people wonder how our society could function without it. What is needed today is for judges to return to their traditional respect for the Constitution and its separation of powers into three branches.

14 *How Judicial Supremacy Grew*

- *U.S. News & World Report* published the text of the ABA *Report on Communist Tactics, Strategy and Objectives*, Aug. 16, 1957, p. 135. The 1958 report of the same ABA committee, which was very similar, was placed in the *Congressional Record* by Senator Styles Bridges on Aug. 22, 1958, and again by Senator Everett Dirksen on March 1, 1962.
- Senator James O. Eastland's analysis of the Warren Court was published in *U.S. News & World Report*, July 18, 1958, 81.
- Justice Brennan took the judicial supremacy of *Cooper v. Aaron* to new extremes when he invoked the "spirit" of a statute in order to violate its express language and thereby embrace the use of quotas in a hiring agreement (*United Steelworkers v. Weber*, 1979). That led Rehnquist in dissent to mock Justice Brennan's decision as "a tour de force reminiscent not of jurists such as Hale, Holmes, and Hughes, but of escape artists such as Houdini." Since then, thirty court opinions have questioned, criticized or distinguished the supremacist ruling in *Steelworkers*.
- The Latin phrase *obiter dicta* (meaning words said in passing, or by the way) is used to describe extraneous parts of a court opinion. This is often abbreviated as *dicta* (meaning words). Sometimes the words help explain the decision or are otherwise informative, but they aren't necessary to reach the conclusion. Law schools used to teach courses in "Legal Method" or "Ele-

ments of the Law” in which students were taught to distinguish and disregard dicta as nonbinding and non-precedential. However, the Warren Court popularized reliance on dicta so much that those courses aren’t even taught any more. Thomas Jefferson used a variation of the phrase obiter dicta when he called *Marbury v. Madison* an “obiter dissertation.”

- Judicial supremacy is promoted with various myths and misconceptions about the history of the Court. For example, Justice Stephen Breyer gave a speech to a 2001 American Bar Association meeting, citing two cases he thought were particularly instructive. He was trying to teach the lesson that poor defenseless people need judicial supremacy, and that America would be a better place if the other branches of government took their policy orders from the Supreme Court.

Referring to the 1832 Cherokee Indian case (*Worcester v. Georgia*), Breyer said that thousands of Indians died because Andrew Jackson refused to enforce a Supreme Court order. Referring to *Cooper v. Aaron*, Breyer said that Eisenhower enforced the court order by sending federal troops so that black children could attend good schools.

But Justice Breyer’s facts are completely wrong. The Supreme Court in 1832 ruled only in favor of a couple of white missionaries, not the Cherokees. Jackson did not defy a Supreme Court decision. Several thousand Cherokees did die, but that had nothing to do with any Supreme Court decision and it happened six or seven years later after Jackson left office.

Breyer said that Eisenhower sent troops to enforce *Cooper v. Aaron*. In reality, Eisenhower sent the troops in 1957 and withdrew the troops at the end of the school year in 1958, before *Cooper v. Aaron* was decided. The Arkansas schools were being desegregated. Then, *Cooper v. Aaron* threw the Little Rock schools into such chaos that the high schools were closed for the entire 1958-59 academic year.

Of course, Breyer likes *Cooper v. Aaron* because it was the first statement of judicial supremacy since *Dred Scott* in 1857, but that is no excuse for getting the facts wrong. It appears

that the whole basis for his belief in judicial supremacy is in these myths.

## LESSON THIRTEEN

### HOW JUDICIAL SUPREMACY BEGAN AND GREW

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#### QUESTIONS FOR DISCUSSION:

- ★ Explain how the famous early case of *Marbury v. Madison* started judicial review but not judicial supremacy.
- ★ What's the difference between saying "what the law is" and saying "what it [the court] says is the law"?
- ★ What was the first judicial supremacist decision and why don't liberals like to talk about that case?
- ★ Explain how Abraham Lincoln understood the proper role of judges.
- ★ How did Earl Warren get the job of Chief Justice in 1953, and how did he set out to change the role of judges and the power of the Supreme Court?
- ★ Discuss the pro-Communist decisions of the Warren Supreme Court in the 1950s and how Congress, the American people, and the ABA reacted to them.
- ★ What was the little-known Supreme Court decision that grabbed judicial supremacy over the other branches of government?
- ★ If the concept of judicial supremacy was not in the Constitution, and not in *Marbury v. Madison*, who started it and when did that happen?