American government, under the U.S. Constitution, is closing in on its 216th anniversary; and, anyone with an interest to understanding where it has been, what it is doing today and where it appears to be headed, has only to study the history of the United States Supreme Court. Herein, the curious will come face to face with how issues such as school prayer, for example, having passed constitutional muster for more than a century, could suddenly be found unconstitutional, or, how a small, mid-western wheat farmer can be found guilty of violating the Constitution’s Interstate Commerce clause for growing wheat to feed his own cattle. Then of course, there is the entire controversy surrounding what’s in and what’s out of the reach of the national government by way of the Fourteenth Amendment’s due process clause.

What the curious will find in the annals of the Court’s history, is the makings of a schizoid judicial system, at the head of which sits the Supreme Court meting out justice through decisions all too often based upon a philosophical judicial system, at the head of which sits the Supreme Court meting out justice through decisions all too often based upon a prevailing ideology rather than guided by the instrument to which it owes its existence, to which its members are sworn to uphold and under which it sits, alongside the Legislative and Executive branches of American government.

Originally designed as a non-policy-making arm of the national government, by mid-19th century, the Court was well on its way to becoming a highly politicized institution. By early-20th century, having passed from the grasp of the Federalists, into the hands of the Jacksonian Democrats, and ultimately coming under the influence of the Progressives, Supreme Court jurisprudence underwent an amazing metamorphosis as the Court’s decisions became more and more populist and less and less reflective of the text of the Constitution.

The most serious defect in the American system of government as it currently operates is the policymaking role assigned to itself by the Supreme Court. The Court has in recent decades evolved into the most important institution of American government in terms of domestic social policy. It has made itself the final arbiter on issues literally of life and death, as in its abortion and capital punishment decisions, issues of sexual morality, as in its decisions on contraception, homosexuality, and the regulation of pornography, and issues of social order, as in its decisions on criminal procedure, street demonstrations, and vagrancy. It is the Court that now decides such additional fundamental policy issues as the place of religion in public life, prayer in the schools, government aid to religious schools, and the permissibility of distinctions on the basis of race, sex, alienage, and illegitimacy. In sum, the issues that determine the nature of a civilization or culture and the quality of life in a society are no longer determined on a local basis by elected representatives, but for the nation as a whole by majority vote of a committee of nine lawyers unelected to office, unremovable by elections, and holding office essentially for life.

Policymaking by the Court is obviously inconsistent with the basic constitutional principles of separation of powers, representative self-government and federalism that are the only real protection against governmental tyranny. Judicial policymaking usurps the legislative power that the Constitution assigns exclusively to Congress in part and otherwise reserves to the states; it replaces representative self-government with government by electorally unaccountable officials; and it decides for the nation as a whole policy issues that the Constitution leaves for the most part for decisions on the state or local level, by officials closest and most responsive to the people the policies affect. It amounts, in short, to a near-total subversion of the system of government created by the Constitution.

How has this come to be, and why is it permitted to continue?

American constitutional law is for most practical purposes the product of "judicial review." Judicial review is the power of American courts to refuse to enforce, and therefore effectively to invalidate, the acts of other institutions and officials of government on the ground that they are prohibited by the Constitution. Surely the most remarkable feature of the power, initially, is that it is not explicitly provided for in the Constitution. No such power existed under British law, the source of most American legal practices and institutions. It was Parliament, of course, not a court, that was said to be supreme.

It is not judicial review itself, however, but only its abuse that presents the problem of uncontrolled judicial power; although given the power, its abuse by lawyer-judges is almost surely inevitable. All constitutionalism may be criticized as essentially antidemocratic, as an

"Every member of the state, ought diligently to read and study the constitution of his country, and teach the rising generation to be free. By knowing their rights, they will sooner perceive when they are violated, and be the better prepared to defend and assert them."

—John Jay—First Chief Justice of the U.S. Supreme Court
Christian James Iredell was born October 5, 1751 in Lewes, Sussex County, England. He was the eldest of five children of Frances Iredell and Margaret McCulloh Iredell originally of Dublin. James, as he was known, was sent to America after his father fell ill due to a stroke. He left school to accept work found for him by his relatives living in North Carolina as Comptroller of the Customs in Port Royal. His salary of £30 went directly to support his parents.

Iredell fit right in with a circle of friends who would stand behind him the remainder of his life; these same friends helped him to define his place in Southern society, state politics, and eventually “American politics at large.”

James Iredell began his law career by aiding in the law with Samuel Johnston, who later became the Governor of North Carolina. In 1770, he earned his license to practice law in the lower courts of the colony; and, by 1771 he had received a license to practice law in Superior Court.

In 1773, Iredell married Samuel Johnston’s sister, Hannah, and by 1774 he would join the cause for liberty supporting the resistance to British abuses of the colonists and then independence.

Iredell justified his decision believing that North Carolina’s government was a royal charter awarded by the Crown thereby protected by the terms of the English Constitution. Parliament was to have no role regarding North Carolina’s internal affairs. By July 1788, he would argue the cause for the ratification of the proposed new Constitution for the United States.

His allegiance to his new country would cost him dearly. He was disowned by a sister, Hannah, and by 1774 he would join the cause for liberty supporting the resistance to British abuses of the colonists and then independence.

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Iredell believed that the great failing of the British system was the lack of a judiciary powerful enough to protect the British constitution from the “abusive acts of the Crown and Parliament.” Moreover, long before most other Americans would come to believe, Iredell subscribed to the notion of judicial review.

Iredell saw as being “essential to any hope for a government of laws.” As an attorney, he would establish the doctrine of judicial review in North Carolina, as early as 1787, in the case Baynard v Singleton. He would affirm the doctrine at every opportunity available to him thereafter.

He held many government positions within the commonwealth of North Carolina ranging from State Attorney for Chowan County, to a seat on the bench of the State Superior Court, to State Attorney General.

Iredell had the power to make decisions that would affect the lives of the people of his State; he became suspicious of democracy and would suggest “…some restraint on the right of voting.”

Iredell was a follower of Edmund Burke and a spokesman for the Federalist view of government. He wrote, under the name of “Marcus,” a political essay entitled: “Answers to Mr. Mason’s Objections to the New Constitution Recommended by the Late Convention of Philadelphia.” It answered the charges placed against the Constitution by George Mason.

Iredell would lead the ratification debates in the conventions assembled “for the purpose of deliberating and determining on the proposed Plan of Federal Government.” The Federalists counted on the people’s desire to maintain some connection with the other twelve states, as under the Articles of Confederation. Hence, Iredell was given the job of containing the Anti-Federalists. He was to place them “between the horns of a dilemma where they must either surrender their position or admit that they anticipate a complete separation of their state from the other twelve.

The first attempt to ratify the Constitution would go down in defeat, but then it would be accepted at the Fayetteville convention on November 21, 1789. Iredell played to the people through the Federalists’ “all or nothing” rhetoric; yet, he was careful to speak to the fears of the Anti-Federal men whose main concern was that the Constitution transferred too much power through what they perceived as “implied powers.”

But, Iredell argued that the Constitution affirms that “no power can be exercised but what is expressly given.” “What is not enumerated is not granted.” He claimed a citizen holding a “Constitution in his hands ...may see if a power claimed is enumerated. If it is not, he will know it to be a usurpation.”

James Iredell was appointed to the Supreme Court on February 10, 1790. A disciple of strict construction of the Constitution, he would uphold this line of reasoning throughout his appointment to the High Court.

In the famous case of Chisholm v. Georgia, which prompted the 11th Amendment, Iredell stood alone. Even his good friend and colleague, James Wilson, would oppose him in holding the right of citizens of one state to sue the government of another state. But Iredell said he could find no instance of an implied power in the Constitution allowing a sovereign state to be sued. He said it was the function of Congress to set the jurisdiction of the Supreme Court—an argument we live with today: “[E]very state in the Union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to power surrendered...”

Iredell would spend the end of his life counseling his “kinsmen against the temptations of desirous,” putting his house in order and “reflect[ing]” on that moment when ‘we shall be examined into a place where one day kings and subjects shall be considered without dread.’

He died at the family home in Edenton, North Carolina. He is buried with the Johnstons at, Hayes Plantation. Adapted from M.E.Bradford "The Reluctant Revolutionary: James Iredell of North Carolina. Christian Liberty Series, Plymouth Rock Foundation Publication."
judicial review to do exactly the same. Its abuse by activist judges would ultimately become the Achilles’ Heel of the Framers’ system of constitutional supremacy. Blinded by his own purity of motive, Marshall failed to see how a future and perhaps well intentioned, then again perhaps not, Court, in being handed this power, might use it to become as abusive of the people’s liberties as that of any State government. But, Marshall’s greater error, in the first place, was his failure to question the omission of such a grant of power within the text of the Constitution itself. And, secondly, the Philadelphia Convention’s decision to deny Madison his request for a Council of Revision that would sit with the Supreme Court justices, and the President and his cabinet to review all laws before they went into effect. All this not withstanding, Marshall certainly had to have heard the alarm expressed by the Anti-federalists concerning the dangers of judicial supremacy. Brutsa’s example of how Britan’s Court of Exchequer5 worked to expand its own powers should have been enough to make Marshall think twice.

The Proof Is In The Pudding...

Hence, we should not be surprised to find both Marshall and his crown jewel, judicial review, delivered up a mere 15 years after ratification of the Constitution, being hailed by 19th and 20th century progressive lawyers, professors, historians, political scientists, and justices who have no qualms seeing well-settled precedent reversed when it suits their purpose. Here then, the Marbury decision plays well with the objectives of justices who view the Court as a super-legislature; wherein, its powers may be deployed to mold and shape American society as they see fit. One example is Justice Ben-jamin Cardozo who openly revered the greater John Marshall:11 “Marshall gave to the Constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is, because he moulded it while it was still plastic and malleable in the fire of his own intense convictions.”

Therein, it is most interesting to note that Cardozo’s high praise for Marshall is rooted in the latter’s boldness to read into the Constitution what the text itself fails to provide. Cardozo was not alone in supporting this mode of broad constitutional interpretation; others, both before and after his accession to the Bench, expressed similar views. Justice Oliver Wendell Holmes, who remained on the Court until well into the 1920s, expressed similar views. Justice Cardozo himself, while fully aware of the new direction his views were taking, expressed similar views.

The Proof Is In The Pudding...

It seems clear, however, that Marshall’s intened goal was not to suppress American federalism and replace it with the nationalism we labor under today, but merely to establish constitutional supremacy as specified in Article 6.2 of the United States Constitution. It is more the case, that Marshall sought to use the constitutional powers given the Supreme Court to protect the people from the arbitrary abuses of State government, which he had, all too often, witnessed as a member of the Virginia state legislature.

Fortunately, in his zeal to protect the people’s liberties from encroachment by the State, Marshall overlooked the potential provided by...
The Folding of the Flag

Did you know that at military funerals, the 21-gun salute stands for the sum of the numbers in the year 1776? Have you ever noticed the honor guard pays meticulous attention to correctly folding the American flag 13 times? You probably thought it was to symbolize the original 13 colonies, but [here] we learn something new: the 1st fold of our flag is a symbol of life. The 2nd fold is a symbol of our belief in eternal life.

The 3rd fold is made in honor and remembrance of the veterans departing our ranks who gave a portion of their lives for the defense of our country to attain peace throughout the world.

The 4th fold represents our weaker nature, for as American citizens trusting in God, it is to Him we turn in times of peace as well as in time of war for His divine guidance.

The 5th fold is a tribute to our country, for in the words of Stephen Decatur, "Our Country, in dealing with other countries, may she always be right; but it is still our country, right or wrong.

The 6th fold is for where our hearts lie. It is with our heart that We pledge allegiance to the flag of the United States Of America, and the Republic for which it stands, one Nation under God, indivisible, with Liberty and Justice for all.

The 7th fold is a tribute to our Armed Forces, for it is through the Armed Forces that we protect our country and our flag against all her enemies, whether they be found within or without the boundaries of our republic.

The 8th fold is a tribute to the one who entered into the valley of the shadow of death, that we might see the light of day.

The 9th fold is a tribute to womanhood, and Mothers. For it has been through their faith, their love, loyalty and devotion that the character of the men and women who have made this country great has been molded.

The 10th fold is a tribute to the father, for he, too, has given his sons and daughters for the defense of our country since they were first born.

The 11th fold represents the lower portion of the seal of King David and King Solomon and glorifies in the Hebrew's eyes, the God of Abraham, Isaac and Jacob.

The 12th fold represents an emblem of eternity and glorifies, in the Christian's eyes, God the Father, the Son and Holy Spirit.

The 13th fold, or when the flag is completely folded, the stars are uppermost reminding us of our nations motto, "In God We Trust."

After the flag is completely folded and tucked in, it takes on the appearance of a cocked hat, ever reminding us of the soldiers who served under George George Washington, and the Sailors and Marines who served under Captain John Paul Jones, who were followed by their comrades and shipmates in the Armed Forces of the United States, preserving for us the rights, privileges and freedoms we enjoy today. In the future, you'll see flags folded and now you will know why.

_Author Unknown_
In 1787 as the Delegates to the Constitutional Convention were meeting in Philadelphia, the United States Congress passed the 3rd of 4 documents that would ultimately comprise American Organic Law. The Northwest Ordinance was passed to establish the criteria by which new states, carved out of the North West Territory, could petition the Congress for entry into the Union. But more importantly, the ordinance sheds light on the ideas and ideals of education shall forever be encouraged…”

“Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged…”

In addition to providing a frame of government for the western territories, the Ordinance also contains six articles that set up a binding “compact between the original States, and the people and States in the said territory,” to “forever remain unalterable unless [changed] by common consent.” These same six articles debunk much of the disinformation propagated today about the Founding Fathers. In particular, Article 3 dispells the notion that the Framers wanted a complete “separation of church and state.”

Article Three of the Northwest Ordinance: “Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged…”

Equally key here is that this law would be REPASSED by the First Congress under the United States Constitution in 1789. It would hold under the United States Constitution as it did under the Articles of Confederation. This begs the question: “What basis did the Court use to kick religion out of American government? How is it, that the Ten Commandments, once considered the root of American jurisprudence, is now treated as a curse upon the Framers government?”

Winds of Change

The Reverend James R Patrick, explains: “In less than two hundred years, the federal government of the United States of America has turned from its original course and turned on its people. It has repudiated the faith of the Founding Fathers and now stands diametrically opposed to the very principles of freedom that gave birth to the nation…a nation that was founded upon Biblical principles, has become a nation that is corrupt and immoral. We are a nation that openly flaunts its total disregard for that which was once divine. How could a nation, so blessed of God, become so repugnant in such a short span of time? We could point to any number of reasons but in most cases that which would be singled out would only be a reflection of the society as a whole. We must never forget that actions are not only a reflection of that which is around us, but, more importantly, that which is within us. We would be wise to remember that… Those things which proceed out of the mouth come from the heart; and defile a man. For out of the heart proceed evil thoughts, murders, adulteries, fornications, thefts, false witness, and blasphemies: These are the things which defile a man…” Matthew 15:18-20.” He continues: “America was founded on Biblical principles. Civil law was based on Biblical law. The Fathers fully realized that political freedom could be achieved only if the foundations of religion, morality, and knowledge were firmly implanted in the hearts and minds of its people. Therefore, they took deliberate steps to encourage the people to strengthen their hold on religious freedom and to incorporate it into their educational and political fabric of the nation.

Our first and most noble President stated in his farewell address: ‘Of all the dispositions and habits which lead to political prosperity; religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—these finest props of the duties of men and citizens.’

In closing, may we recognize our error and return to the ancient truths that gave birth to freedom… May we once again understand that where the spirit of the Lord is, there is liberty!”

The federal government, has made of them all the authority it needs for precisely the type of interference with state policymaking on matters religious that they were meant to preclude. This is not merely the making of constitutional law without constitutional warrant, as in Roe v. Wade, but the making of constitutional law in defiance of the Constitution. Similarly, the fact that the Constitution expressly recognizes capital punishment in several places did not prevent Justices Brennan, Marshall and Blackmun from insisting that capital punishment is constitutionally prohibited.

The second and final thing necessary to understand American constitutional law, in addition to the essential irrelevance of the Constitution, is that the Courts constitutional decisions of the last four decades have not been random in their ideological thrust and political impact. On the contrary, they have almost uniformly served to enact the left-liberal position on the policy issue involved, whether it is abortion, prayer in the schools, aid to religious symbols, capital punishment, criminal procedure, discrimination on the basis of sex, illegitimacy or alienage, pornography, libel, busing for school "racial balance," and so on almost without end.

The only thing these decisions on a vast array of subjects have in common is that each invalidates a policy choice made in the ordinary political process in order to substitute a choice further to the left on the American political spectrum, the choice favored by the American Civil Liberties Union. Indeed, it is only a small exaggeration to say that the ACLU never loses in the Supreme Court, even though it does not always win. It either obtains from the Court a policy choice it could not obtain through the ordinary political process because opposed by a majority of the American people or it is left where it was to try again on another day.

The position of defenders of conservative or traditional values in the Supreme Court is precisely the reverse of that of the ACLU. They rarely win, that is, obtain a policy choice they could not obtain in the ordinary political process, even though they do not always lose. The crucial distinction between failing to win, the worst that can usually happen to liberals, and failing to lose, the best that can happen to conservatives, is rarely noted. A reversal of Roe v. Wade, for example, would not be a positive victory for opponents of abortion; it would merely leave them free again to fight for their position in the ordinary political process. A victory for opponents of abortion equivalent to the victory gained by proponents in Roe v. Wade would require, of course, not merely the reversal of Roe, but a decision prohibiting abortion by holding, for example, that the fetus has a constitutionally protected right to life. Such victories by conservatives in the Supreme Court are, however, simply unthinkable in the American context. We hear much these days about an alleged "conservative" Supreme Court, even though the Court continues to deliver such major liberal victories as its recent decisions invalidating term limits, disallowing the operation of all-male military schools, and invalidating a state constitutional provision that disallowed special rights for homosexuals. For a liberal, a conservative Court is simply one in which liberal victories come less frequently or quickly. A Court that reversed a prior liberal victory, returning the issue to the political process, would be denounced as not merely conservative but reactionary. A Court that regularly gave conservatives positive victories equivalent to those it has given liberals for over four decades would be castigated for usurpation of legislative powers, and demands to end judicial tyranny would soon follow.

How did it happen that the Supreme Court, wielding the power of judicial review, should become in effect the enacting arm of the ACLU? Judicial review was defended by Alexander Hamilton and established by Chief Justice John Marshall, ardent defenders of property rights and economic liberty, on the assumption that it would serve, in the hands of conservative lawyers like themselves, as an obstacle to sudden or radical social change. This is the function it in fact performed during the first century and half of the nation's history. The 1954 Brown decision, however, worked a radical change. Brown's real significance lay less in what it held, as important as that was, than in the change it brought about in popular perception as to the proper role of judges in the American system of government. The Brown decision became effective and enforceable only with the enactment of the Civil Rights Act of 1964, but the glory of starting the civil rights revolution was nonetheless seen as belonging to the Court. Policy-making by the Court supposedly on the basis of principle came to be seen, at least by liberals, as more effective for further "basic social change," as an improvement over policymaking by mere politicians subject to electoral constraints. If the Court could bring about the end of segregation in the South, altering the basic social arrangement of one-third of the nation, wasn't it time the Court should not do? And if it could do other great things, why shouldn't...
nedy. Busing is a disastrous social policy, but nonetheless defeated in the Senate by means.

A measure proposed by President Nixon to the Court on the particular issue involved. It is more important to the long range interest of liberalism than no liberal Supreme Court decision ever be overturned. That would only encourage conservatives to believe that more such victories are possible.

The apparent invulnerability of the Courts power derives primarily, however, from the fact that the Court now functions essentially as the mirror and mouthpiece of liberal acade-

miae and others of America’s intellectual, or at least articulate, class, the class of people whose only tools and products are words. The occupational hazard of people who live pri-

marily in a world of words is a tendency to confuse control of words with control of real-

ity, which in turn permits seeing hope in utro- 

gram schemes that to persons more regularly in contact with reality seem absurd. This is the basis of George Orwell's observation that there are some ideas so preposterous that only the highly educated can believe them.

The economist Joseph Schumpeter noted as an inherent contradiction of capitalism that it will serve to produce a prosperity that will cause intellectuals to become alienated and disaffected. Capitalism does not always re-

ward intellectuals in proportion to their natural superiority, whereas socialism involves plan-

ning that more closely requires their talents. Whatever the reason, Liberal academics tend to adopt a strongly adversarial attitude toward the values and beliefs of the more conserva-

tive and traditionalist average citizen, and lib-

erals tend to be influential disproportionately to their numbers. It is liberals who by defini-

tion want to change things, and liberals, there-

fore, who are most willing to make the effort to assume leadership positions. It is surely this that explains the unfortunate but near-

universal phenomenon that the leaders of al-

most any group, political, religious, academic, are liberals, liberal more than members of the group.

The nightmare of the American intellectual is that the control of public policy should fall into the hands of the American people. In the American context, policymaking by the jus-
tices of the Supreme Court in the name of the Constitution, is the only way in which this can be prevented. The American people actually favor such unlightened policies as capital punishment, restriction of abortion and por-

nography, prayer in the schools, effective en-

forcement of the criminal law, neighborhood schools, and so on. The citizens of Colorado re-
cently went so far in a popular referendum, in-

deed, as to disallow laws granting special legal protections to homosexuals. It was only the Constitution, as interpreted by the Supreme Court, that prevented the people of Colorado from making this policy decision.

As the function of judicial review since Brown has been to substitute the policy views of liberal academics for the views of a majority of the American people, the basic function of con-

stitutional law professors has been, in turn, to defend and justify judicial review to the Ameri-

can people. The task is a difficult one. Although government by Supreme Court justices is obvi-

ously inconsistent with the fundamental princi-

gles of government established by the Constitu-
tion, it must somehow be defended as a product of the Constitution. It is not politically possible for defenders of judicial activism to come clean and openly argue, with Plato, that government by philosopher kings is an improvement on rep-

resentative self-government. Democracy is the norm in American political life, and must be paid lip service even by intellectuals who hold it most in disdain. Further, even if it were possible to defend government by philosopher kings, how is it possible to defend government by law-

yer kings?

Judges do not cease being lawyers, profes-

sionally trained advocates for any assigned or adopted cause, upon being elevated to the bench and clothed in black robes. They retain the skills and ethical standards of advocacy, which permit the less than total attachment to factual accuracy and logic that is characteristic of their profession. As a result, Supreme Court opinions are often characterized by misstatements of fact and defiance of logic that would not be consid-

ered permissible in statements by other public officials.

Policymaking by judges is not favored by lib-

eral constitutional theorists, however, because they consider our lawyer-judges exceptionally knowledgeable or otherwise qualified in making policy decisions. It is favored only because it has since Brown reliably pushed social policy choices to the left and can be expected to con-

tinue to do so regardless of who makes the judi-

cial appointments. One reason for this is that the judicial landscape, in particular, the view of
judges as to their proper role, has so changed as a result of decades of hyper-activism since Brown that they seem to be no going back. The center has moved so far to the left that a so-called conservative judge today can be to the left of where a liberal judge was forty years ago. What then can be done to reduce the role the Court has assumed in the past four decades as, in effect, the enacting arm of the ACLU? Means of asserting legislative supremacy over the Court are available in theory, but experience has shown, not in practice. The only real hope conservatives have had to change the direction of the Court over the past forty years was to put conservative presidents in charge of the appointing process. This, too, however, has proven a futile hope. President Franklin Roose-
velt needed only one or two appointments to turn the Court completely around and guarantee that the Constitution would never again give the New Deal the least bit of trouble. President Nixon, however, blessed with the extraordinary good fortune of having four appointments, in-
cluding a replacement for Chief Justice Warren; at the beginning of his term of office, was not able to bring about the overturning of a single one of the Warren Courts major innovations. On the contrary, he produced a Court that went on to new heights of hyper-activism, as in its abor-
tion and racial busing decisions.

Republican presidents supposedly committed to limiting judicial activism made six more con-
secutive appointments after the Nixon four. Even ten consecutive appointments were not enough, however, to change the direction of the Court. Perhaps Republican presidents have all just been especially inept at making appoint-
ments, as in Nixon’s appointments of Chief Jus-
tice Burger and Justices Blackmun and Powell, Reagan’s appointments of Justices O’Connor and Kennedy, President Ford’s appointment of Justice Stevens and President Bush’s incredible blunder in appointing Justice Souter. Change any one of these appointments for the better and the United States would be a different country. It does not seem likely, therefore, that new ap-
pointments will suffice to change the policy-
making role the Court has assumed. It is neces-
sary that the role itself somehow be redefined.

The surest remedy for the degeneration of the American system of government into a system of rule by judges is, of course, simply to abolish judicial review. This, however, is unthinkable, even by conservatives who have seen their country stolen from them by judicial review for more than forty years. Even conservatives apparently cannot imagine the country manag-
ing somehow to get by without the supervi-
sion and ultimate control of Supreme Court Justices. Liberals at least know where their interest lies; conservatives are merely con-
fused.

A much less drastic remedy would be suffi-
cient, however, to bring government by judges virtually to an end. As already noted, the prob-
lem is not judicial review as such, but judicial activism which is based almost entirely on the do ex due process and equal protection clauses of the Fourteenth Amendment. The Court has acquired and exercises supreme policymaking power by simply divorcing these two clauses from their historic meaning and treating them as a blanket grant of authority to make itself the final arbiter on any policy issue. An effective and appropriate remedy for the situation, therefore, would be a constitutional amend-
ment restoring the Fourteenth Amendment to what it was intended to be: a federal guarantee of basic civil rights to blacks. Even better would be to extend it to a simple prohibition of all official racial discrimination.

A proposal that constitutional provisions en-
forceable by judges to preclude popular policy choices should have a definite meaning would not seem to be a controversial one. Realisti-
cally, however, the hope that the Fourteenth Amendment will be amended to give it a more definite meaning is little less fanciful than the hope of amending the Constitution to abolish judicial review. It may be useful, however, to point out that there is a remedy for a disease and what it is, even if the patient cannot yet be induced to take it. There should be no doubt, in any event, that our four decade experiment with policymaking by judges has not proven to be an improvement on representative self-
government. On the contrary, it has clearly caused the nation great harm. The egalitarian and libertarian policy preferences of the ACLU, so appealing to intellectuals, are in-
consistent, unfortunately, with the mainte-
nance of a viable society. No issue facing Americans is more urgent, therefore, than finding an effective means of limiting judicial power. Purposely granted to report. Previously submitted to the Subcommittee on Courts & Intellectual Property of the Comm. on the Judiciary, U.S. House of Representatives Hearing on Judicial Manage-
duct—May 9, 1987

Constitutional Minute
Donald Conkey

Principle: “Civil liberty” Edmund Burke, the English philosopher, in 1791 said “What is liberty without wisdom and without virtue? It is the greatest of all possible evils; for it is folly, vice, and madness, without restraint. Men are qualified for ‘civil liberty’ in exact proportion to their disposition to put ‘moral chains on their appetites.’... Society can not exist unless a controlling power upon the will and appetite be placed somewhere, and the less of it there is within, the more there must be without. It is ordained in the eternal consti-
tution of things, that men of intermixture minds cannot be free. Their passions forge their fetters.”

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(Continued from page 7 - Lino A. Graglia)