Overview of an Organization's Legal Environment

Top Management

Production and Transportation
- Contracts
- Environmental Law
- Product Liability
- International Law
- Insurance

Marketing and Sales
- Contracts
- Antitrust Law
- Consumer Protection
- Business Torts
- International Law
- Franchising

Research and Development
- Business Torts
- Product Liability
- Environmental Law
- Intellectual Property

Finance and Accounting
- Contracts
- Securities Regulation
- International Law
- Credit Regulation
- Bankruptcy

Personnel
- Contracts
- Employment Law
- Labor Law
The Death of Common Sense

Philip K. Howard

In the winter of 1988, nuns of Mother Teresa’s Missionaries of Charity were walking through the snow in the South Bronx in their saris and sandals to look for an abandoned building that they might convert into a homeless shelter. They came to two fire-gutted buildings on 148th Street and, finding a Madonna amid the rubble, thought that perhaps Providence itself has ordained the mission. New York City offered the abandoned buildings at $1 each, and the Missionaries of Charity set aside $500,000 for the reconstruction. The only thing unusual about the plan was that the nuns, in addition to their vow of poverty, avoid the routine use of modern conveniences, and there would be no washing machines or other appliances. For New York City, the proposed homeless facility would literally be a godsend.

Although the city owned the buildings, no official had the authority to transfer them except through an extensive bureaucratic process. For 18 months, the nuns were directed from hearing room to hearing room discussing the project with bureaucrats. In September 1989, the city finally approved the plan, and the Missionaries of Charity began repairing the fire damage.

Providence, however, was no match for law. New York’s building code, they were told after almost two years, required an elevator. The Missionaries of Charity explained that because of their beliefs they would never use the elevator, which also would add upward of $100,000 to the cost. The nuns were told the law could not be waived even if an elevator didn’t make sense.

Mother Teresa gave up. Her representative said: “The Sisters felt they could use the money much more usefully for saris and sandwiches.” In a polite, regretful letter to the city, the Missionaries of Charity noted that the episode “served to educate us about the law and its many complexities.”

No person decided to spite Mother Teresa. It was the law of government, which controls almost every activity of common interest—fixing potholes, running schools, regulating day-care centers, controlling workplace behavior, cleaning up the environment and deciding whether to give Mother Teresa a building permit. And what it required offends common sense. Law designed to make Americans’ lives safer and fairer has now become an enemy of the people.

Government acts like some extraterrestrial power, not an institution that exists to serve us. The bureaucracy almost never deals with real-life problems in a way that reflects an understanding of the situation. We seem to have achieved the worst of both worlds: a system of regulation that goes too far while it also does too little.

This paradox is explained by the absence of the one indispensable ingredient of any successful human endeavor: the use of judgment. In the decades since World War II, we have constructed a system of regulatory law that basically outlaws common sense. Modern law, in an effort to be “self-executing,” has shut out our humanity.

The motives to make the law this way had logic. Specific legal mandates would keep government in check and provide crisp guidelines for citizens. Layers of “process”—procedural deliberations—would make sure decisions were responsible. Handing out “rights” would cure injustice. But it doesn’t work. Human activity can’t be regulated without judgment by humans, adjusting for circumstances and taking responsibility.

The public’s fury with government was demonstrated in the November election, and the Republicans who won power now promise to get government off our backs. This rhetoric never turns to reality, though, because the public does not want to cut government essential services. The public is mad at how government works—its perpetual ineptitude and staggering waste—not mainly what government aims to do.

Moreover, the GOP’s Contract With America proposes to take only small steps in the direction of real reform. One proposal would impose a moratorium on many pending regulations—an idea equivalent to cutting off your leg to lose weight. Another Republican theme is to return government functions to the states, which could be a real benefit in certain areas like welfare but disastrous in others like environmental protection. The federalism idea ignores the fact that state governments are typically as ineffective and wasteful as the federal government. To liberate Americans from red tape, real reform must be aimed at simplifying how government works. Ending our suffocating legal system should be reformers’ goal.

longer remember that words can impose rigidity as well as offer clarity. Law had an identity crisis when Oliver Wendell Holmes Jr., then a law professor, suggested in 1881 that law was not certain after all but depended on how the judge and jury saw the facts. This stimulated a wide range of reform movements, especially to codify the common law into statutes. Progressives at the turn of the century, New Dealers in the 1930s and Great Society reformers in the 1960s expanded the role of government in huge ways.

Another form of lawmakersing also took hold in the '60s that focused not on government's role but on its techniques. Legal details proliferated. The Federal Register, a report of new and proposed regulations, increased from 15,000 pages in the final year of John Kennedy's presidency to over 70,000 pages in the last year of George Bush's.

Precision became the goal. The ideal of lawmakersing was to anticipate every situation, every exception and codify it. With obligations set forth precisely, according to this rationale, everyone would know where he stood. But the drive for certainty has destroyed, not enhanced, law's ability to act as a guide. "Regulation has become so elaborate and technical that it is beyond the understanding of all but a handful of mandarins," argued former Stanford Law Dean Bayless Manning. No tax auditor, no building code examiner can possibly know all the rules in thick government volumes. What good is a legal system that cannot be known?

Instead of making law a neutral guidepost protecting against unfairness and abuse, this accretion of law has given bureaucrats almost limitless arbitrary power. A few years ago, the federal Occupational Safety and Health Administration decided workers needed more protection from hazardous chemicals. Bureaucrats decided that everything that could conceivably have a toxic effect should be shipped with a Material Safety Data Sheet describing the possible harmful effects of each item. The list grew and grew until it totaled over 600,000 products. In 1991, OSHA turned its attention to bricks. Bricks can fall on people, of course, but they had never been considered poisonous. The OSHA regional office in Chicago sent a citation to a brick maker for failing to supply an MSDS form with each pallet of bricks. If a brick is sawed, OSHA reasoned, it can release small amounts of the mineral silica. The fact that this doesn't happen much at construction sites was of no consequence. Brick makers thought the government had gone crazy, and they feared a spate of lawsuits. They began sending the form so that workers would know how to identify a brick (a "hard ceramic body with no odor") and giving its boiling point ("above 3,500°F") Fahrenheit. In 1994, after three years of litigation, the poison designation was moved by OSHA.

The proliferation of rules may not produce the benefits of certainty and fairness, but it creates endless opportunities for smart lawyers seeking angles and advantages. Law, supposedly the backdrop for society, has been transformed into one of its main enterprises. For some, billionaires, cable-TV companies, congressmen and litigators, close scrutiny and manipulation of the rules are a means to an end. The words of law give them lower taxes, a way to circumvent price controls, a secret means of playing favorites and a tool to grind the other side into the ground.

The rest of us feel like law's victims. We divert our energies into defensive measures to avoid tripping over the rules. Knowing for certain that full compliance is impossible, and that the government's reaction may be wholly out of proportion, law has fostered what Prof. Joel Handler has described as a "culture of resistance" where everyone is a potential adversary.

Law that leaves no room for judgment loses its original goal. Safety inspectors wander around without even thinking about safety. The YMCA of New York City, one of the last providers of low-cost, transient housing, gets regular citations for code violations like malingering windows and closed doors that do not close tightly. Does the city think that those clean, inexpensive rooms are somehow unworthy of a city that itself provides cots 18 inches apart for those who have no place to sleep? A city inspector recently told the YMCA, after it had virtually completed a renovation, that the fire code had changed and a different kind of fire-alarm system, costing an additional $200,000, would have to be installed. "Don't they realize that the $200,000 can provide yearlong programs for a hundred kids?" asked Paula Gavin, the YMCA's president. In our obsessive effort to perfect a government of laws, not of men, we have invented a government of laws against men.

THE NEVER-ENDING PROCESS

In 1962, Rachel Carson shocked the nation by exposing the effects of DDT and other pesticides in her book Silent Spring. There was also another side to the issue: Pesticides give us apples without worms and the most productive farms in the world. In 1972, Congress required the newly created Environmental Protection Agency to review all pesticides (about 600 chemical compounds at that time) and decide which should be removed from the market. The deadline was three years. More than 20 years have passed, and yet only 30 pesticides have been judged. Birdwatchers of others, including some on which there are data suggesting significant risk, continue to be marketed. "At this rate," said Jim Aída, a onetime congressional pesticide expert, "the review of existing pesticides will be completed in the year 15000 A.D."

Making decisions, it almost seems too obvious to say, is necessary to do anything. Every decision involves a choice and the likelihood that somebody will lose something; otherwise, there would be no need to decide. This is the issue that paralyzed government decision-making. "The problem with government," argues economist Charles Schultz of the Brookings Institution, "is that it can't ever be seen to do harm." Bureaucrats find it nearly impossible to say yes. Yet the act of not choosing is not benign: We may eat something bad because the EPA never made a decision.

Sometimes government cannot act even in the face of imminent peril. In the early morning hours of April 13, 1992, in the heart of Chicago's downtown loop, the Chicago River broke through the masculinity of an old railroad tunnel built in the last century. Several hundred million gallons of water from the river were diverted into the basements of downtown office buildings, knocking out boilers, short-circuiting countless electric switches.
His Mushed the river only a few feet above the line. Any potential nado procedures. usable had thrown out a broken federal lawn mower (after saving why the lawn "miew" favoritism. But lawn an they several meetings with high-level federal officials. After months, the lawn mower broke. McGuire decided to buy another one. During a subsequent routine audit, the federal auditor asked why the lawn mower was different. McGuire told the truth: He had thrown out a broken federal lawn mower (after saving usable spare parts). That prompted an investigation resulting in several meetings with high-level federal officials. After months, they rendered their findings: They could find no malice, but they determined McGuire to be ignorant of the proper procedures. He received an official reprimand and was admonished to study VA procedure, which he noted was "about the sue of an encyclopedia." One other fact: McGuire bought the lab's lawn mower with his own money.

Orthodoxy. not practicality, is the foundation of process. Its credo is for complete fairness: its demons are corruption and favoritism. But concepts like equality and uniformity have no logical stopping point: no place where they say, "The Chicago Commissioner shouldn't worry about bidding procedures with the river only a few feet above the leak."

No one risks drawing the line. Any potential complaint is answered with one more "review" or "fact finding" procedure.

One destructive message of this is that bureaucrats can't be trusted to exercise their judgment. And the case of this mistrust is almost inconceivable. The paperwork it generates in the name of "oversight" and "accountability" often costs more than the product it purchases. The Defense Department announced last year that it spent more on procedures for travel reimbursement ($2.2 billion) than on travel ($2 billion).

Setting priorities is difficult in modern government because process has no sense of priorities. Important, often urgent, projects get held up by procedural concerns. Potentially important breakthroughs in medicine wait for years at the Food and Drug Administration. Even obviously necessary safety projects can't break through the thick wall of process. In 1993, during a snowstorm at New York's La Guardia Airport, a Continental Airlines DC-9 had to abort a takeoff and ended up with its nose in Long Island Sound. Another 100 feet and many lives would probably have been lost. Two years earlier, another plane had slid off the runway, killing 27 people. The 7,000-foot runway is about 70 percent as long as those at most commercial airports, and the Port Authority of New York and New Jersey, which runs the airport, had been trying to add 460 feet for six years. But the agency had spent years talking to environmental agencies and community groups whose procedural rights took precedence over making the airport safer.

The irony of our obsession with process is that it has not prevented sharp operators from exploiting the government's contracting system, as the weapons-procurement scandals of the 1980s showed us. Its dense procedural thicket is a perfect hiding place for those who want to cheat. It has also led to a system so inconsistent that fairness is lost: Advocates can bludgeon their adversaries endlessly in public disputes that become too costly to see to a conclusion. And nothing ever gets done.

We must remember why we have process at all. It exists to serve responsibility. Process was not a credit card given out to each citizen for misconduct or delay; nor was it an invisible shield given to each bureaucrat. Responsibility, not process, is what matters.

A NATION OF ENEMIES

Finding a public bathroom in New York City is not easy. To remedy the problem, Joan Davidson, then director of the J. M. Kaplan Fund, a private foundation, proposed in 1991 to finance a test of six sidewalk toilet kiosks in different sections of the city. The coin-operated toilets, which cleaned themselves after every use, were small enough not to disrupt pedestrian traffic and would pay for themselves with the sale of advertising for the side panels. The proposal was greeted with an outpouring of enthusiasm. Then came the problem: Wheelchairs couldn't fit inside them. The director of the mayor's Office for People with Disabilities said the idea was "discrimination in its purest form." The city's antidiscrimination law, she pointed out, made it illegal to deny to the disabled any access to public accommodation. A protracted battle ensued.

The ultimate resolution, while arguably legal, was undeniable silly. Two toilet kiosks would be at each of the three locations, one for the general public and the other, with a fulltime attendant, for wheelchair users only. The test proved how great the demand was. The regular units averaged over 3,000 flushes per month. The wheelchair-friendly units were basically unused; the cost of the attendant was wasted.

Making trade-offs in situations like this is much of what government does. Almost every government act, whether allocating use of public property, creating new programs or granting subsidies, benefits one group more than another, and
usually at the expense of everyone else. Most people expected leaders to balance the pros and cons and make decisions in the public interest. The government of New York, however, lacked this power because it had passed an innocuous-sounding law that created “rights” elevating the interests of any disabled person over any other public purpose.

Rights have taken on a new role in America. Whenever there is a perceived injustice, new rights are made up to help the victims. At these new rights are intended as an often invisible form of subsidy. They are provided at everyone else’s expense, but the check is left blank. They give open-ended power to one group, and it comes out of everybody else’s hide. The vocabulary of accommodation, the most important language for a democracy, is displaced.

The “rights revolution” did not begin with any of this in mind. It was an effort to give to blacks the freedom the rest of the citizenry enjoyed. The relatively simple changes in law in the Civil Rights Act of 1964 sparked a powerful social change for the good. But that inspired reformers in the 1960s to consider using “rights” as a method to eliminate inequality of all kinds. Reformers zeroed in on the almost nuclear power that “rights” could bring to their causes. People armed with new rights could solve their own problems by going straight to court, bypassing the maddeningly slow proms of democracy.

The most influential thinker was Charles Reich, at Yale. In his 1964 article “The New Property,” Reich laid out a simple formula to empower citizens: Government decisions should be considered the property of the people affected. Government employees facing termination, professionals licensed by the state and contractors doing government business no longer would be subject to the judgment of government officials. Everyone would have a “right” that government would have no choice but to respect. In a follow-up article, Reich focused on what he thought was the area in which government largess was most important to the individual: welfare. He called for a “bill of rights for the disenherited.” His vision heralded a new era of self-determination. Power would be transferred to the wards of the welfare state. Who would draw the line? “Lawyers,” he proclaimed, “are desperately needed now.”

Reich got his wish. Today, even ordinary encounters—between teachers and students, between supervisors and employees—involve lawyers. Like termites eating their way through a home, “rights” began weakening the lines of authority of our society. Traditional walls of responsibility—how a teacher manages a classroom or how a social worker makes judgments in the field—began to weaken.

The Supreme Court embraced Professor Reich’s concepts in a 1970 decision. Goldberg v. Kelly, which held that welfare benefits were “property” and could not be cut off without due process. Congress began handing out rights like land grants. Floodgates opened allowing juveniles, the elderly, the disabled, the mentally ill, immigrants and many others—even animals included under the Endangered Species Act—their days in court.

After 30 years of expanding rights against workplace discrimination, Congress has succeeded in “protecting” over 70 percent of all American workers. But are we witnessing a new age of harmony and understanding in the workplace? Hardly. Even those who are successful are bitter. Ellis Cose, in The Rage of a Privileged Class, describes the extraordinary anger of successful blacks—partners in law firms, executives in companies—who feel they are being held back because of race. These feelings, however, mirror those of white professionals who believe blacks are promoted primarily because they are black.

A paranoid silence has settled over the workplace. Only-a fool says what he really believes. It is too easy to be misunderstood or to have your words taken out of context. Those hurt, most by the clamped-up workplace are minorities and others whom the discrimination laws were intended to help. The dread of living under the cloud of discrimination sensitivity and the lurking fear of potential charges often act as an invisible door blocking any but the most ideal minority applicant.

Beyond the workplace, public schools have been the hardest hit by the rights revolution, especially when it comes to special education. Timothy W., a profoundly disabled child, born with quadriplegia, cerebral palsy, cortical blindness and virtually no cerebral cortex. His mother thought he should go to school. Experts consulted by the Rochester, N.H., school district concluded he was not “capable of benefiting” from educational services. But a federal judge ruled that the school was obligated to provide a program because under the Individuals with Disabilities Education Act, it didn’t matter whether he could benefit. Law books are filled with such cases as local school districts try to stem the hemorrhaging of their budgets. But the districts almost always lose. A right is a right.

Teachers, too, have suffered as the “rights” accorded students have allowed disruptive students to dominate classrooms. Except in the cases of egregious student conduct, most teachers often don’t bother to act at all against misbehaving students. The easiest course is just to do nothing.

Rights are not the language of democracy. Compromise is. Rights are the language of freedom and are absolute because their role is to protect our liberty. By using the absolute power of freedom to accomplish reforms of democracy, we have undermined democracy and diminished our freedom.

THE RETURN TO PRINCIPLES

Like tired debaters, our political parties argue relentlessly over government’s goals, as if our only choice is between Big Brother and the laissez-faire state. They miss the problem entirely. Our hatred of government is not caused mainly by what government aims to do. It’s how law works that drives us crazy.

Law is hailed as the instrument of freedom because without law there would be anarchy, and we would eventually come under the thumb of whoever gets power. Too much law, we are learning, can have a comparable effect. It is no coincidence that Americans feel disconnected from government: The rigid rules shut out our point of view. By exiting judgment, modern law changed its role from useful tool to brainless tyrant.

Before American law became the world’s thickest instruction manual, its goal was to serve general principles. The sunlight of
common sense shines high whenever principles control; What is right and reasonable, not the parsing of legal language, dominates the discussion. With the goal always shining before us, the need for lawyers fades. Both regulators and citizens understand what is expected of them and can use their judgment. They can also be held accountable.

We have invented a hybrid government form that achieves nearly perfect inertia. No one is in control. No one makes decisions. This legal experiment hasn't worked out. It crushes our goals and deadens our spirits. Modern law has not protected us from stupidity and caprice but has made stupidity and caprice dominant features of our society. And because the dictates are ironclad, we are prevented from doing anything about it. Our founders would wince; they knew that "the greatest menace to freedom," as the late Chief Justice Earl Warren reminded us in 1972, "is an inert people."

Law cannot save us from ourselves. Waking up every morning, we have to go out and try to accomplish our goals and resolve disagreements by doing what we think is right. Energy and resourcefulness, not millions of legal cubicles, are the things that make America great. Let judgment and personal conviction be important again. There is nothing unusual or frightening about it. It's just common sense.
Where Do Today's Values Come From?

**Question:** What do you think (has/should have) the most influence on the values of young people today?

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**Source:** Survey by Mellman & Lazarus for Massachusetts Mutual Life Insurance Co, September 1991.

**Question:** What do you feel has been the single most important factor in influencing your beliefs about what is right or wrong?

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**Source:** Survey by Yankelovich Clancy Shulman for Time, January 19-21, 1987.
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<td>Car salesmen</td>
<td>1</td>
<td>4</td>
<td>32</td>
<td>39</td>
<td>22</td>
<td>2</td>
<td>26</td>
<td>26</td>
</tr>
</tbody>
</table>

*Rank based on "Very high" and "High" combined.

Relationship Between Compensation and Ethics

You are a manager of a company bidding on a contract for the U.S. Navy. Although your price is the same as your competitor's, your engineers have told you that it will take your firm longer to develop and manufacture the product. What would you tell the Navy if the Navy asked about your development and manufacture schedule? Here's how the managers in Industry Week's survey responded.

<table>
<thead>
<tr>
<th>Salary under $40K</th>
<th>Salary $40K-$80K</th>
<th>Salary $80K-$120K</th>
<th>Salary over $120K</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manager indicates company can match competitor's schedule and hopes to find a solution later.</td>
<td>5%</td>
<td>12%</td>
<td>18%</td>
</tr>
<tr>
<td>Manager describes company's production schedule as engineers outlined it.</td>
<td>78%</td>
<td>59%</td>
<td>51%</td>
</tr>
</tbody>
</table>

In Brief: Relationship of Ethics to Law

Behavior (corporate, government, professional or personal)

Illegal behavior follows unethical conduct

Source: Dr. Charles J. Cunningham, Jr., former director, Ethics Crater, The University of Tampa. Used by permission.
Judicial Dictatorship

William J. Quirk

Judges in European countries do not declare legislative acts to be illegal. A European intellectual, looking at the Supreme Court's unreviewable power to do so, would probably say the United States is an operating judicial dictatorship. The United States legislature, he would say, can raise taxes and build masts but the important questions, those that determine the kind of country it is, are all decided by the Supreme Court. We would answer that the Court is the "least dangerous" branch; it has no executive or legislative authority; it does not make laws; it just decides cases that come before it. The trouble with this answer is that the Supreme Court is able to select the cases it will hear from among the large number that come before it. During its 1991 term, the Court refused to hear 5,630 cases while it decided to hear 195. The Court's ability to pick from among such a large number of cases gives it the practical power to rule on the issues it thinks important. The Court, of course, may have the power to pursue a legislative agenda, but not exercise it.

"I have scant fear of the tyranny of the majority," said Theodore Roosevelt. A majority in a democracy is free to oppress a minority. The majority, however, is rarely inclined to do so for two reasons: First, as issues change, so do majorities—any individual may find himself on the minority side on the next issue. In a democracy, there is rarely a majority so unified that it is able to wield significant oppressive power for long. Second, the cost of oppression will normally exceed any benefits to be realized from the exercise of such power. A minority becomes oppressee only when the majority deems the minority to be of so little value that it is unworthy of protection—it is oppressee when the majority would be perfectly happy if it left.

A minority in a democracy is not without recourse. If a group believes itself consistently treated unfairly by the majority, it has four options. It can 1) try to change the majority's mind; 2) accept what the majority has relegated them to; 3) revolt; or 4) leave the country. The majority, of course, will modify its behavior toward any person or group if it is persuaded that its behavior is unfair or immoral.

In our current system, however, even where the minority has failed to persuade the majority, the Supreme Court may intervene and grant the minority what the majority will not provide. The criminal, for example, is granted freedom; the pornographer, the right to publish; the prisoner, a comfortable cell. The Supreme Court, in essence, substitutes its judgment of what is right or wrong for that of the majority.

In a democracy, the ultimate question is how much power the current majority has. A constitution distributes political power and describes the basic procedures to be followed in its exercise. Also, the constitution outlines certain individual freedoms which are beyond the power of the majority to interfere with. Finally, the Supreme Court has the task to delineate the individual freedoms and protect them from the will of the majority.
The majority today only has the most limited kind of power. It has no final power over education, criminal justice, taxation, voting, employment, immigration, and deportation. In these areas, as in all others, the majority can take initial action but it is always up to the Supreme Court to make the final decision. It may find a 'constitutional right' and find the majority's plan violates it. End of majority's plan. The public's understanding of the Court is obstructed by the media's use of misleading terms—whether it is 'conservative' or 'liberal' or 'liberal' or 'activist' or 'restrained.' Labels obscure the real problem which is that the Court may be any of those things at its choosing—it has the unlimited power to define its own powers. The issue is the Court's power rather than its orientation. The question is whether a Court with unreviewable power to decide basic social and economic issues is consistent with the theory that government derives just powers from the consent of the governed. Is this the system Washington, Jefferson, and Madison intended? Is it better than what they intended?

Some large differences between what the founders intended and what we have now are obvious and no longer controversial. The founders had a well-known fear of power because of their experience with King George. They believed that power ultimately resides in the people. Government was delegated certain powers to be exercised as specified. They divided the governmental power and then hedged it so it could not oppress the individual. Power was divided between the states and the national government—the federal system. They gave the national government specifically defined powers including the power to make war, enter into treaties with foreign powers, issue currency, and regulate commerce between the states and with foreign nations. All residual powers remained with the states. Then the federal power was divided into three parts—the executive, legislative, and judicial. Together, these devices of separated powers with checks and balances and limited taxing authority were intended to check the national power. The founders intended to brake the power of both the executive and the national legislature. The intended limits on the judiciary, however, were less clearly defined. The failure to check the power of the judiciary allowed the Supreme Court to expand the power of the other federal branches, most particularly, the legislature, and in doing so, to expand its own powers as to impose its will even if it is contrary to that of the majority.

The founders clearly intended a system of limited national power but it is equally clear that the present system is an unlimited one. There are no serious limitations on the national power—that issue was decided against the founders a long time ago and is not likely to be reversed. The constitutional historian Edward S. Corwin wrote in his book *Cour Over Constitution*, published in 1941: "The National Government is entitled to employ my and all of its powers to forward my and all of the objectives of good government." Only one branch, the judiciary, could justify the takeover of powers by the others. The Court did this by assuming powers not granted to it in the Constitution.

Until the 1960s, the Court's power as well as the national power were held in check by a series of barriers: 1) Defined Powers. The founders were very clear that the national government was granted only defined powers and the states reserved all those powers not granted to the national government. This barrier collapsed in the 1920s when the Supreme Court determined that the spending power was not limited to acting in aid of a specific defined power but could be in aid of the 'general welfare' clause. (*Massachusetts v. Mellon* and *Frothingham v. Mellon*, 262 U.S. 447 [1923]).

The failure to check judiciary power allowed the Supreme Court to expand the power of other federal branches.

2) The Commerce Clause. One of the defined powers granted to Congress is the power 'to regulate commerce' between the states. How expansively could this be read? In the 1940s, the Court held that a farmer growing wheat for his family had an effect on interstate commerce which authorized regulation of his planting (*Wickard v. Filburn*, 317 U.S. 111 [1942]).

The Court also held that the commerce power can be used to regulate matters with slight or no apparent relation to commerce, for example, the transportation of plural wives across state lines by Mormons (*Cleveland v. U.S.*, 329 U.S. 14 [1946]) and banning racial discrimination in motels, local restaurants and recreation parks on grounds that food served had ingredients from other states (*Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 [1964]; *Katzbach v. McClung*, 379 U.S. 294 [1964], and *Daniel v. Paul*, 395 U.S. 298 [1969]). Justice Black's dissenting opinion in Daniel stated that there was no finding that an interstate traveler had ever visited the park which lay in a sleepy hollow in the Arkansas hills miles away from any interstate highway.
The Court was able to crash through the restraining barriers because it determines its own powers. The Court, in both instances, acted with popular support. By extending the power of the national majority (for example, depression economic regulation and 1964 anti-discrimination statutes) beyond what the instrument contemplated, the Court in effect assumed the power to amend the Constitution without ratification by three-fourths of the states. The Court did what Jefferson warned against; it made the written Constitution "a blank paper by construction." The Court rolled over the barriers—the federal system, the power of the states, and, at the national level—the separation of powers. The founders' basic theory that governmental power should be diffused was destroyed. The majority, by allowing the Supreme Court the power to usurp the amendment process and condoning a Court that defined its own powers, unleashed forces it could not control. In a short time, the new creature turned on its master.

A minority can oppress a majority if it is protected by the Court's power.

In Brown v. Board of Education, 347 U.S. 483 (1954), the Court held unconstitutional state laws requiring racial segregation. Gallup polls reported that a strong majority of the public supported Brown in all regions outside the South. Brown, in retrospect, is the high water mark of majority power. Since Brown, the national power has been used to support minority, not majority, interests. It is contradictory to speak of a minority oppressing the majority in a democracy. But, a minority can oppress the majority if it is protected by the Court's coercive power.

Since the 1960s, the Supreme Court has acted as part of what Paul Hollander calls, in his book Anti-Americanism, the "adversarial culture"—the intellectual elite estranged from society's majority middle class values. This elite is detached and alienated from what they see as a corrupt society. The Court styles itself the protector of individual rights and self-expression against the will of the oppressive bourgeois majority. Crime, in this context, is a form of self-expression as well as social protest and criticism. The Court routinely overturns the actions of the local police, boards of education, and the state laws under which they act. The beneficiaries of the Court's protection are criminals, atheists, homosexuals, flag burners, Indians, illegal entrants (including terrorists), convicts, the mentally ill, and pornographers. The Court, as Robert Nagel points out in Constitutional Cultures, calls the deleted state laws "arbitrary" or "without rational basis", extravagant language which shows no respect for the acts of popular assemblies. The Court, Nagel notes, has acted "to isolate itself from the general culture, retaining ties of language and intellectual approach only to an academic elite."

For a long time, the Court has recognized its power to label something a "constitutional right" and remove it from the political process. Chief Justice Charles Evans Hughes, while governor of New York, said, "We are under a Constitution, but the Constitution is what the judges say it is." Chief Justice Harlan Stone, in U.S. v. Butler, 297 U.S. 1 (1936), wrote, "...while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." The Court's self-restraint proved a slender reed to rely on and over the years, great chunks of the public business have been removed from the political process.

A democracy dependent on the self-restraint of some judges is not what Madison and Jefferson had in mind. For Madison the "fundamental principle of republican government [was] that the majority who rule in such governments are the safest guardians both of public good and private rights." Very few people happily submit to majority decisions of which they do not approve but they go along in the hope of changing the decision later. The theory of democratic consent includes the ability to change the result. In a democracy, Sidney Hook remarked in Political Power and Personal Freedom, the appeal from an "unenlightened majority is to an enlightened majority." It is possible, at least theoretically, to have majority rule without democracy. What is unique about Western democracy is that the majority allows the minority to enjoy political expression. The minority is granted the right of opposition and consequently the opportunity to become a majority.

Madison and Jefferson were not looking for a system that would find and declare absolute truth. The Old World had been ruled for centuries by prince and priest in search of that. The people were oppressed and the truth was elusive. The founders set up a new experiment, a process based upon the sovereignty of the people under a system that would be self-correcting, stable, and would allow the utmost individual freedom. The Constitution, which creates the three branches, does not set one over the other.
process, by which the people can change the fundamental rules, is deliberately cumbersome. Three-fourths of the states must ratify a proposed amendment, which, not counting the original ten amendments, has only been done sixteen times.

The Constitution, in fact, is so hard to amend that we had to have a war. In 1820, Congress enacted the Missouri Compromise prohibiting slavery in any state formed from the Louisiana Territory north of latitude 36° 30' except for Missouri. In Dred Scott v. Sanford, 60 U.S. 393 (1856), the Court ruled the Compromise unconstitutional, holding that Congress could not ban slaveholding in the territory because the owner of the slave had a property interest in the slave which was a right protected by the Fifth Amendment.

Lincoln did not accept the Court's power. He conceded that the Court had the power to dispose of the particular case before it but denied it could fix the meaning of the Constitution: "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." Dred Scott, despite Lincoln's opinion, nevertheless fixed the meaning of the Constitution. It destroyed the existing compromise and prevented any future political compromise. A war and the Fourteenth Amendment were needed to get the Dred Scott decision out of the system.

As did Lincoln, Jefferson believed the Court was not the ultimate interpreter of the constitution's meaning. He saw that this "would make the judiciary a despotic branch." At another point, he stated that this was a "very dangerous doctrine... which would place us under the despotism of an oligarchy." The oligarchy's high spirits are captured in a 1991Nat Hentoff Playboy interview with Justice William Brennan. Hentoff writes of him that he has never known anyone who loved his work more than Brennan. A couple of years ago, as they were walking out of the Supreme Court building, Brennan took Hentoff by the elbow, looked around the marble hall, and said, "This is just incredible being here -- I mean the opportunity to be a participant in decisions that have such an enormous impact on our society."

In the 1930s the Court declared unconstitutional major New Deal legislation. In 1937, however, prod- ded by the court-packing plan, the Supreme Court reversed field. It would no longer block the majority will. (West Coast Hotel Co. v. Parrish, 300 U.S. 379 [1937]). Change, subsequently, was able to go forward if a legislative majority voted for it. Beginning in the 1960s, however, the Court itself became the mechanism for change. In a recent U.S. News & World Report article, John Leo writes, "Reformers now routinely skip the legislative process and take their issues directly to Court." The reformers believe that since "majorities are wrongheaded and oppressive... why not try for a judge-imposed quick fix?" However, the court-imposed solutions, writes Leo, "lack the stability of a social consensus, they often just breed more trouble." They run into severe resistance.

Probably, the institution most comparable to the Court is the Papacy. Like the Papacy, the Court determines for itself when it chooses to speak ex cathedra; that is, when it will declare a "constitutional right." The Court's declarations are, as are the Papacy's, infallible or, at least, unreviewable; the losing party has no appeal. The main difference between the two institutions is that the Papacy has to persuade people that what it declares is really the truth while the Court's orders are enforced by the coercive power of the state.

The Court enlisted in the cause of capital and threw out all social legislation on the basis of "substantive due process."

In 1912, while campaigning in Columbus, Ohio for the presidency, Theodore Roosevelt tried to corral the Court's power. "The people," he declared, "should have the right to recall any decision if they think it is wrong." The Court's power, by Roosevelt's time, had driven the country into another blind alley. Industrialization, following the Civil War, brought Ricardo's iron law of wages to this country. Workers stayed at a subsistence level no matter how long or how dangerous the conditions under which they worked. The states enacted laws to limit child labor, working hours, and to regulate working conditions as well as curb harmful business practices.

The Court, enlisting in the cause of capital, threw out all the social legislation on the basis of the newly invented theory of "substantive due process," to which it held from 1880 to 1937 and which basically incorporated laissez faire economics into the Constitution. For example, the Court invalidated New York's Bakeshop Act, a maximum hours law, because it interfered with the worker's 'liberty of contract.' (Lochner v.
New York, 198 U.S. 45 (1905)), The Court overruled the will of the majority time after time.

Roosevelt thought it outrageous that the Court should cross the line of its proper role and should be openly engaged in allocating wealth and power in American society. He proposed to give the people a chance to overrule the Court if the Court overrules the people. Anytime the Court throws out a law, or whenever it finds a "constitutional right," the decision is to be put on the ballot at the next general election. "It is the people," he said, "and not the judges, who are entitled to say what their constitution means, for the constitution is theirs, it belongs to them and not to their servants in office—any other theory is incompatible with the foundation principles of our government."

Roosevelt’s idea contains the essence of a simplified, specific amendment procedure that would round out Jefferson’s theory that each branch has an equal and independent obligation to interpret the Constitution. Under Jefferson’s approach the Court can interpret the Constitution to decide the case before it. But if the majority disagrees with the Court it needs some method of instructing the Court of its error. It could do so by an ordinary law but Roosevelt’s referendum idea is more coherent with constitutional theory since it allows the people—the source of power—to decide. An expansive Court is balanced by a simplifed amendment process.

The best argument the Court can put forth for retaining its unreviewable power is that it is necessary to keep the majority from trampling on the rights of an unpopular minority or individual. It is the institution, the Court says, that protects individuals against the majority will. A vigorous democracy, the Court believes, is dangerous for minorities. This is, at best, a peculiar reading of history. Indeed, the most dangerous form of government for a minority, judging by modern history, is an ineffectual democracy on the model of Weimar Germany. The English, who do not have any judicial check on the majority will, have preserved their individual rights.

In Korematsu v. U.S., 323 U.S. 214 (1944), the United States Supreme Court upheld an executive order authorizing the military to intern U.S. citizens of Japanese ancestry during World War II and in Snepp v. U.S., 444 U.S. 507 (1980), the Court upheld prior restraint against manuscripts of former CIA employee critical of Vietnam policy even though classified material not involved. These cases show that the Court’s protection may fail when most needed. Protection that works some of the time. like a difficult car, loses its charm.

‘Liberty,’ writes Learned Hand, "is the product not of institutions, but of a temper, of an attitude toward life: ...of a faith in the sacredness of the individual." Courts do not, in fact, act on neutral principles. The spirit of liberty is the "spirit which is not too sure it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs its interests alongside its own without bias."

Liberty "will prevail only as long as it is supported by the community. ...a society so riven that the spirit of moderation is gone. no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit. that spirit in the end will perish." Ultimately the question is whether the rights of the individual are safer in the hands of the majority than in the hands of appointed guardians.

With power goes responsibility. The Court, writes Corwin, has "made itself morally answerable for the safety and welfare of the nation to an extent utterly without precedent in judicial annals." And in the words of Learned Hand, 'A free society will find its own solutions more successfully if it is not constricted by judicial intervention." The Court, at will, takes great chunks of public business away from public control. The public, at some point, will have to regain control of its business. "The judiciary," said Hand, "will then cease to be independent" and "its independence will be well lost." The people, after all, are the only ones who can keep liberty in the country.

Readings suggested by the author: Corwin, Edward S. The Twilight of the Supreme Court. New Haven, Conn.: Yale University Press, 1934.


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