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Alexander Hamilton wrote in *The Federalist* No.78 that the judiciary "has no influence over . . . the purse."[1] Yet in *Missouri v. Jenkins*,[2] the Supreme Court approved indirect judicial taxation. Hamilton wrote that the judiciary "will always be the least dangerous" and "beyond comparison the weakest" branch of government.[3] Yet in *Roe v. Wade*,[4] the Supreme Court created out of nothing a right to choose abortion, invalidated the abortion laws of all fifty states developed over more than a century, and shut millions of Americans out of the process of developing public policy on this important political issue. Hamilton wrote that the "liberty of the people can never be endangered from [the judicial] quarter."[5] Yet in *Employment Division v. Smith*,[6] the Supreme Court virtually eliminated the constitutional protection for citizens to freely exercise their religion.

Judicial review has always presented a very real challenge to the principles underlying our political system. In a system of limited republican government, operating under a written constitution, where power is separated among three co-equal branches, how can an unelected judiciary be given the power to invalidate actions of the two elected branches without returning to tyranny? If the Constitution is to be the law that governs government, how can its interpretation be left up to one of the branches of that government? This is a very tenuous balance, with "government by judiciary," in Professor Raoul Berger's words, always just around the corner.[7]

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1. THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
2. 495 U.S. 33 (1990).
3. THE FEDERALIST No. 78, *supra* note 1, at 465.
4. 410 U.S. 113 (1973).
5. THE FEDERALIST No. 78, *supra* note 1, at 466.
6. 494 U.S. 872 (1990).
7. RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

Even liberals such as Supreme Court Justice William O. Douglas have said that it is the Constitution, and not what the Court has said about it, that must prevail.[8] This suggests that there is such a thing as "the Constitution" separate from what the Court has said about it. Therein lies the solution to the "Madisonian dilemma" of reconciling an antimajoritarian judiciary with the principles of republican government — the judiciary has a duty to determine what the law is, not what it should be.

Meaning does not change, grow, or evolve; the Constitution itself is stable. But social facts, conditions, and circumstances do change. The Constitution is in this sense an organic document in its application but not in its meaning. The Fourth Amendment can thus be applied to wiretaps even though that provision's Framers had never seen a telephone. The Sixth Amendment can be applied to testimony by child witnesses even though the Founding Fathers never contemplated videotape.

Thus it is how the Supreme Court conducts its judicial review function that makes all the difference. James Madison himself knew this and wrote that if "the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers."[9]

The greatest impact of judicial activism — judges imposing value or policy preferences in the name of the law rather than determining and applying the meaning of statutory or constitutional provisions intended by their Framers — is to deflate the political system, to suck the vitality out of our system of self-government. When courts are willing to do the job politicians were elected to do, politicians gladly acquiesce in government by judiciary. Our elected representatives enjoy judicial activism because they can blame the judges who, in turn, can blame the Constitution.

Returning a runaway activist judiciary to its proper place by appointing individual judges committed to principles of judicial restraint will be the greatest legacy of the last dozen years. It is already paying off. Regardless of the actual political outcome, the recent battle over civil rights policy occurred exactly where it should have — in the Legislature. The fight was precipitated be-

8. William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

9. BERGER, *supra* note 7, at 3 (quoting 9 JAMES MADISON, THE WRITINGS OF JAMES MADISON 191 (G. Hunt ed., 1900-1910)).

cause the Supreme Court faithfully interpreted the law but refused to re-write it. The Court no longer uses the Constitution as a tool to affirmatively dictate police practices, but rather to set outer boundaries.

Supreme Court Justice Clarence Thomas once called for "a judiciary active in defending the Constitution, but judicious in its restraint and moderation."[10] That is, within the bounds that mark the judiciary's proper role, the Court must be vigorous and consistent; outside those bounds, it must be silent. Judiciary, know thy place!

10. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y 63, 63-64 (1989).