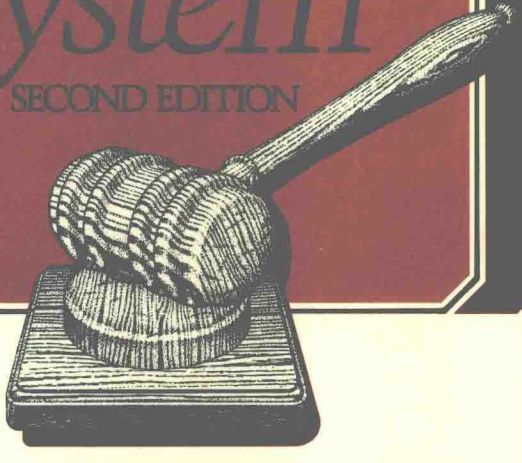
COURTS AND POLITICS

The Federal Judicial System

SECOND EDITION



HOWARD BALL

SECOND EDITION

Courts and Politics

The Federal Judicial System

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PRENTICE-HALL, INC., Englewood Cliffs, New Jersey 07632

Library of Congress Cataloging-in-Publication Data

BALL, HOWARD (date)
Courts and politics.

Bibliography: p. 299
Includes index.
1. Courts—United States. 2. Judicial process—United States. 3. Political questions and judicial power—United States. 4. Judges—United States. I. Title.
KF8700.B33 1987 347.73'2 86–25420
ISBN 0–13–184664–7 347.3071

Editorial/production supervision and interior design: Debbie Ford
Cover design: Lundgren Graphics, Ltd.
Manufacturing buyer: Barbara Kelly Kittle

FOR CAROL

Printed in the United States of America

10 9 8 7 6 5 4 3 2

ISBN 0-13-184664-7 01

Prentice-Hall International (UK) Limited, *London*
Prentice-Hall of Australia Pty. Limited, *Sydney*
Prentice-Hall Canada Inc., *Toronto*
Prentice-Hall Hispanoamericana, S.A., *Mexico*
Prentice-Hall of India Private Limited, *New Delhi*
Prentice-Hall of Japan, Inc., *Tokyo*
Prentice-Hall of Southeast Asia Pte. Ltd., *Singapore*
Editora Prentice-Hall do Brasil, Ltda., *Rio de Janeiro*

Preface

The purpose of *Courts and Politics* remains the same as the first edition: to examine the federal judicial system in a clear, refreshing way so that its processes and its politics are understood by college students. The impact of the federal courts on the lives, fortunes, and liberties of persons living in our society is enormous. It is important that we understand *how* and *why* the federal courts act as they do.

This second edition, I hope, does a number of things to improve the original. First, it brings up-to-date figures and data into the text that help students grasp fully both the caseload dilemma and the changes in the organization of the federal courts. Second, there is an expanded discussion of judicial review, the role of federal courts as "disinterested umpires," and the efforts of the Carter and Reagan administrations to redirect—in dramatically different ways—the federal judicial-selection process. Finally, I have added new sections on some important topics: (1) the state judiciary's relationship to the federal courts, (2) the Edwin Meese–William Brennan debate on constitutional interpretation, (3) another policy-making example from the U.S. district court (the *Allen* v. *U.S. atomic testing in Nevada* tort trial), (4) the Reagan administration's judicial selection process, (5) the nomination of William Hellerstein to be a U.S. district court judge, (6) lower federal court policy-making processes, and (7) new insights into U.S. Supreme Court decision making.

Many new developments have occurred in the life and times of federal court judges. My hope, in this new edition, is that these additional perspectives, insights, case studies, and data will provide the college student with a clear, detailed portrait of the men and women who staff the federal judicial system.

Acknowledgments

I want to take this opportunity to thank a number of persons who have helped me as I have put together this second edition.

Phil Cooper (SUNY-Albany), Tom Lauth (University of Georgia), and Dalmas Nelson (University of Utah) are three colleagues of mine who have been of great help to me in planning for the second edition. In addition, students in my Judicial Process classes over the years have given me ideas and suggestions for improving the book. Federal District Court Judge Bruce S. Jenkins (Utah) and William Hellerstein—formerly Chief Counsel, Criminal Division, Legal Aid Society; presently Professor of Law, Brooklyn Law School—provided me with insights and data on the new case studies, and I appreciate their help very much.

Marc Young, my research assistant, has been very busy. His initiative and very good work have been greatly appreciated throughout this revision project. Finally, Rosalie Cline, my very capable and creative secretary, did her usually outstanding work in preparing the materials for the second edition of *Courts and Politics*. I greatly value the help these fine persons have given me.

Last, I want to once again thank my older, wiser, but still gorgeous and bright daughters, Sue (my actress), Sheryl (my dreamer), and Melissa (my future veterinarian). And I fondly rededicate this second edition to my lovely wife, Carol—with love and affection.

H. B.

Contents

CHAPTER 1

Judicial Review by the Federal Courts

ROLES AND FUNCTIONS OF THE FEDERAL COURTS: AN OVERVIEW

We Americans like to go to court. We have a passionate love affair with courts and the law, and we have been brought up to believe that if "we take it to the judge" we can resolve conflicts we have with our boss, our wife or husband (or, in some states, our lover), our neighbor, and our government. As Alexis de Tocqueville observed in his *Democracy in America* (1835):

> Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings.

In America, "judges both resolve disputes and create rules."[1] Resolving disputes is essentially backward-looking. The federal judge will review the facts in the litigation and, based on known rules, issue an order that, hopefully, will resolve the conflict. Rule creation is essentially prospective, in that the federal judge, as an aid in the dispute resolution phase of his or her business, may have to fashion a new rule of behavior. As will be shown, rule creation is essentially the function of the federal appellate judge, especially the Justices of the U.S. Supreme Court, while dispute resolution is essentially the responsibility of the trial judges in the federal judicial system. However, all federal judges function in both arenas—dispute resolution and rule creation—from time to time.

We Americans go to court in such great numbers for two significant reasons. First of all, there is a significant shift in American jurisprudence from a contractual to a fiduciary jurisprudence. Federal judges no longer limit themselves to hearing cases and controversies dealing with tort liability, violation of contract, admiralty and maritime clashes, and so forth. There has been an increase in the number of substantive rights recognized within the meanings of such terms as "due process" and "equal protection of the laws." Today, for example, a person residing in a state mental hospital may come into federal court (1) arguing that the state hospital administrator has the duty and trust to provide a basic "standard of care" that will enable the patient to recover from the mental illness and (2) initiating a civil suit against the administrator and the state for failing to adhere to that basic standard of care and therefore denying the patient the "due process of the law" guaranteed by our system of justice.

Second, there has been an explosion of federal legislation—with its accompanying new legal questions involving, for example, the environment, health, abortions, medicare and medicaid, municipal liability, and other new social and political issues—that has led to a 300-percent increase in the filing of civil cases in the United States district courts between 1960 and 1980.[2] This huge increase has given federal judges more opportunities for dispute resolution and rule creation. In 1984, the average number of cases for each federal district court judge in America stood at 508—*in one year an 8.1-percent increase over the 1983 caseload* (of 470 per judgeship)![3]

In 1984, in the three primary federal constitutional courts—that is, the 94 United States federal district courts (which are the trial courts of original jurisdiction in the federal system), the 13 United States courts of appeals, and the United States Supreme Court—there were approximately 335,000 filings of complaints, briefs, petitions, and appeals before the 685 judges and justices by unhappy persons and groups.[4] These people come to the courts because they believe that their problems can be resolved in the judicial system. They are able to use the federal courts because both the Constitution and the United States Congress gave these courts *jurisdiction,* that is, legitimate powers to hear certain kinds of cases and controversies.

The federal courts, however, are courts of *limited jurisdiction;* they can hear and decide only those kinds of controversies that are enumerated in Article III of the United States Constitution. If a person suffers a wrong not listed in the Article, the federal courts *lack the power* to hear and resolve that issue and therefore cannot devise a needed remedy. The Constitution, written in 1787, outlines the powers and the limits on power of the three branches of the national government. For any governmental action to be legitimate, it must be based on a grant of power found somewhere in the U.S. Constitution. Article III, the Judiciary article, enumerates the powers of the Supreme Court and all those "inferior courts as the Congress may from time to time ordain and establish." It describes in broad terms the *scope* of federal judicial power; this power encompasses:

1. all cases in law and equity arising under the Constitution, laws, and treaties of the United States;
2. all cases affecting ambassadors, other public ministers, and consuls;
3. all cases of admiralty and maritime jurisdiction;
4. controversies between two or more states;
5. controversies to which the United States is a party;
6. controversies between a state and citizens of another state;
7. controversies between citizens of different states;
8. controversies between citizens of the same state claiming lands under grants of different states; and
9. controversies between a state, or its citizens, and foreign states, citizens, or subjects.

As modified by the Eleventh Amendment, adopted in 1798, which prohibited constitutional courts to hear and decide controversies between a state and a citizen of another state or by citizens or subjects of any foreign state, the above list establishes the parameters of judicial power *if* the Congress confers this power on the courts through statutory grants of jurisdiction.

This "if" is an important condition of federal judicial power. While Article III enumerates the scope of federal judicial power it also reflects the eighteenth-century commitment to "checks and balances." Article III indicates quite clearly that, except for original jurisdiction conferred upon the Supreme Court of the United States by the Constitution, the Congress can, if it desires, grant to all the federal courts the power to hear cases and controversies.[5] In order for a person to be able to bring a case to a federal district court and appeal the judgment all the way up to the United States Supreme Court, the problem must (1) fall somewhere within the judicial powers of the Courts as defined in Article III, and (2) be covered by a statutory grant of power to the courts by the United States Congress.

With the passage of the first Judiciary Act in 1789 by the Congress, the federal courts have been given broadly defined grants of power by the national legislature. As will be pointed out in the chapter on jurisdiction, the power of the federal courts to hear cases and controversies, civil and criminal, is quite broad—too broad for many harried federal judges whose dockets are crowded and whose staff is small.

Because the federal courts have been given the power to hear cases arising under the Constitution and can also hear disputes that arise as a consequence of congressional legislation, the political impact of these legal agencies is great. The first two chapters of this book will examine the basic functions of the federal courts, given the jurisdiction they have, and will point out the critical importance of the concept of judicial review. Chapter 1 will examine the concept of judicial review by the federal courts. Chapter 2 will (1) examine the norm enforcement function of the courts and (2) discuss the policy-making role of the federal courts.

What emerges from an examination of the functions of the federal

courts is a portrait of judges as political actors. Although the legal language in the federal judicial system is unfamiliar or alien to many people listening to arguments in a federal court, the outcome can be very political because these federal judges are being asked to examine and to interpret the language of the Constitution, statutes, administrative rulings, and so forth. Because the judges have jurisdiction to hear all cases "arising under the Constitution," the decisions they make fall into the realm of political jurisprudence. This is a fact of judicial life in America.

SUMMARY

An aggrieved person comes into the federal court system believing that a particular case can be heard by the federal judge. This belief is based on either facts that he or she knows or because counsel has advised that the federal court has *jurisdiction* to hear the problem by virtue of a particular section of the United States Code (USC) granting the federal court the power to hear that kind of dispute. Congress, in its wisdom, has decided that that particular kind of problem falls within the scope of federal judicial power, as enumerated in Article III, and it has legislated accordingly.

Given the jurisdiction it has and given the existence of "standing"[6] on the part of the person bringing the suit into the federal court system, judges must act to resolve the dispute. In the resolution of the conflict, the judges and justices in the federal judicial system continuously attempt to resolve disputes and, to a lesser extent, create rules for the future resolution of conflict. The federal judges (1) legitimize public policies that have come under attack in the courts, or (2) develop new policy through basic constitutional interpretation. In effect, by functioning in these two ways the federal judges are continuously defining and redefining the boundaries of political authority. It is, to say the least, an extremely difficult and sensitive task.

FEDERAL JUDICIAL REVIEW

Our Constitution "proclaims its own supremacy and the supremacy of the laws of Congress passed in pursuance of it". But as the authors of a modern case book of constitutional law note, "no precise line is drawn" regarding the outer limits of governmental powers.[7] Can a president withhold information from an inquiring congressional committee investigating impeachment charges? Can the Congress force a restaurant to integrate its facilities? Can New York State restrict the manner of usage of the American flag? Can the president claim executive privilege and thus deny requests from the special prosecutor for information allegedly material and relevant

for a criminal trial? Can the government—the FBI—use wiretaps without search warrants? Can a state use the death penalty or is that "cruel and unusual punishment"? Can a school board order the use of busing to achieve the end of school segregation? Can an abortion be paid for using federal funds? Is affirmative action an unconstitutional "quotas" program?

These are but a few of the many controversial questions that have been raised in the past few years regarding the issue of governmental abuses of power. These questions arise because, in part, the Constitution is vague as to the extent of the powers of the Congress or of the president, and some agency has had to resolve these dilemmas. "Applying standards drawn from these vague words (of the Constitution), the Supreme Court is the ultimate guardian of individual privilege and governmental prerogative alike. It is, Woodrow Wilson observed, 'the balance wheel of our entire system.'"[8] That it is a *nonelected* governmental agency within a working democratic political system to which citizens *ultimately* turn to resolve major questions affecting them is the essence of the paradox of the United States Supreme Court.

POLICY MAKING IN A DEMOCRACY

Our political system—constitutional democracy—is based on a profoundly simple compound premise. Policies—public laws—are the outcome of intense, complex negotiations between political decision makers chosen in free elections and other interested groups representing various publics in America. In this energetic activity there will be the clash of wills, and the underlying theory of democracy posits majority rule as the method of resolving this kind of disagreement.

In a democratic system, majority rule is the only basis for choosing among alternative courses of action presented to and by policy makers.[9] It is the only feasible choice given the limited number of options for the making of public policy: majority rule, unanimity, or institutionalized minority rule. The last is tyranny, the middle is impossible to achieve, the remainder—majority rule—becomes the standard by process of elimination.[10]

In only one way is majority rule consistent with the other option, minority rule: there will always be a loser in the policy-making process. Policies—laws—discriminate because they are essentially categorizations and classifications of various segments of the community. You, Mr. Smith, pay Y dollars in taxes and you, Mr. Green, pay Z dollars; you, Mr. Stone, must report to the army whereas you, Mrs./Ms. Nathan, need not, etc. So long as the categorization is a valid one the policy is legitimate.

Remember, however, that the words of the Constitution—which grants powers to the president and to the Congress (as well as limiting their

activities)—are vague and that there will be abuses of political power, both intentional and unintentional. The framers of the Constitution, mindful of this possibility, built certain correctives into the political system. First, majority rule itself is not without limitation. The popular will is constrained by the presence in the Constitution of certain vested rights that cannot be easily ignored by the popular majorities in the Congress and in the executive branch. These "unceded rights" of speech, press, association, religion, and petition (among others) may not be violated by democratic government—even one that was elected by an overwhelming majority and voices the feelings and attitudes of the overwhelming majority of citizens in that constituency.[11]

In addition to basic protections within the body of the Constitution and the Bill of Rights for persons and citizens—applicable now to both national and state governments—there are other correctives in the Constitution to ensure that democracy, in the words of the late Clinton Rossiter, "will be carried on through safe, sober, predictable methods." There are the constitutional provisions for open and free elections where all people who meet minimal requirements can register and vote. And if a legislator is not representing the best interests of his or her constituency, that legislator can be removed from office at the next election.

The Constitution also provides, in James Madison's words, "auxiliary precautions" against the abuse of governmental powers. Madison meant by that phrase the "separation of powers," and "checks and balances," and the "federal" character of the political system itself. The institutions of government developed in the summer of 1787 reflected the idea that power had to be separated and fragmented.[12] Frightened of absolute power, distrustful of popular majorities, keenly aware of the need for some form of national government, but appreciative of the aphorism that power corrupts and absolute power corrupts absolutely, the men in Philadelphia skillfully created our constitutional pattern.

Their belief was that there would be sufficient checks on abuses of power by the various participants within the system by the other policy makers. But with the fragmentation brought on by separation and checks and federalism, questions and controversies arose. Does the Congress have exclusive control over interstate commerce? Can a state legislate in the absence of commercial legislation of Congress? Can the president commit armed forces in the absence of a declaration of war? Can Congress pass an income tax bill without regard to apportionment of population? Can the state tax products that are traveling in commerce? Do the federal courts have jurisdiction to hear lawsuits involving a state? Can the federal government lower the voting age of citizens in both federal and state elections? And so questions go on and on because of the fact that even where there are the "auxiliary precautions" there are the questions as to boundaries and limits of these checks.

The federal courts—from the very first problem of extent of governmental prerogatives[13] to the present—have been called upon to clarify the ambiguities in the Constitution that have created the dilemmas of power and responsibility. The power of "judicial review," an extraconstitutional power nowhere mentioned in the Constitution and developed by the Supreme Court itself in 1803,[14] has been used to clarify the words of the Constitution and in so doing has ameliorated the conflict that arose due to ambiguity. Judicial review has, in one sense, become the overarching, all-encompassing auxiliary precaution. The federal courts, especially the Supreme Court, have become the "balance wheel" of the political system.

THE PARADOX OF JUDICIAL REVIEW

Very early in our history the Supreme Court became the fulcrum of the constitutional system because citizens viewed the federal courts as the agent to resolve questions regarding abuses of power. Article III of the Constitution gave the Supreme Court and all other federal courts created by Congress the power to hear certain types of cases and controversies between specified parties arising "under the Constitution."

Concerning the application of these judicial powers, the framers of the Constitution suggested that the Supreme Court review acts of Congress at the appropriate time and, if necessary, check abuses of power. During a prolonged discussion in July of 1787, the members of the Constitutional convention on the judiciary committee debated the merits of having the president and the Court form an "offensive and defensive alliance against the legislature."[15] Their fear was legislative usurpation of powers and their concern focused on measures to be developed to prevent that eventuality. James Madison and others saw the executive judicial alliance as a necessary "auxiliary precaution."[16] But arrayed against Madison were John Rutledge and Luther Martin who argued the danger of having the judiciary participate in such judgment *at that time.*

With respect to the question of the constitutionality of the laws passed by the Congress, Luther argued that "that point will come before the judges in their official character."[17] No need for the Court to act as a council of revision with the president because Article III gave the Court the reviewing power "in their official character." Rutledge "thought the judges of all men the most unfit to be concerned in the revisionary council. The judges ought never to give their opinion on a law *until* it comes before them."[18]

On July 21, 1787, the amendment attempting to join the judiciary to the executive in a veto power over the Congress was defeated, four to three. However, the notion that the judges of the Supreme Court would at a later time in the political process review the acts of the Congress—and all

other actions that came under the judicial powers described in Article III—was presented and there was no disagreement noted in committee about that role of the Court.[19]

Two political scientists have written that there was little doubt that the framers intended the Supreme Court to have this power of judicial review.

> Unquestionably, "the framers anticipated some sort of judicial review. . . ." Why, then, did the framers not specifically provide for judicial review? Probably because the power rested on certain general provisions that made specific statements unnecessary.[20]

In the 1803 U.S. Supreme Court opinion of *Marbury* v. *Madison,* Chief Justice John Marshall voiced the beliefs of the men of the 1787 convention when he said that it is "emphatically the province and the duty of the judicial department to say what the law is." And if a law is in conflict with the Constitution, then the "duty" of the judiciary is to declare that law void as being "repugnant to the Constitution, and that courts, as well as other departments, are bound by that instrument."

William Marbury "filed the most significant lawsuit in American history."[21] He was one of many "federalists" appointed by President John Adams just days before the federalist executive left office in March 1801. Marbury's nomination (to serve as Justice of the Peace in Washington, D.C.) had received the U.S. Senate's advice and consent, his commission of office had been signed by President Adams, and the great seal of the U.S. government had been affixed upon the document. However, when Thomas Jefferson assumed the presidency, the Marbury commission had not been delivered and the president, choosing to disregard this appointment, instructed his secretary of state, James Madison, not to deliver the document to the federalist. (Basic political movements therefore led to this watershed constitutional case being heard and resolved in 1803.) William Marbury, joined by three other men who had not been given their commissions by Madison, then asked the United States Supreme Court to issue a writ of mandamus commanding the secretary of state to deliver the signed and sealed commissions of appointment to these men.

Due to a congressional action that delayed the convening of the Supreme Court, the case was not heard until February 1803. When the opinion was announced one month later, it reflected the perception of judicial review discussed in the constitutional convention and in the *Federalist Papers.* John Marshall, for the Court, raised and answered three basic legal and political questions. (1) Did Marbury have the right to the commission? Answer: yes. (2) If he has a right, is there an available remedy to provide the injured person relief from the wrong? Answer: yes, there is a remedy—mandamus. (3) If there is a remedy, mandamus, can the Supreme Court issue the writ? It was this last question that led the Court to the conclusion

that federal courts have broad, potent reviewing powers that they can exercise.

Marbury had asked the Supreme Court to issue the writ of mandamus under its original jurisdiction in light of Section 13 of Judiciary Act of 1789, 1 Stat 73 (which was the congressional act that established the U.S. federal courts and enumerated their jurisdiction). That section said, in part, that the Supreme Court was authorized to issue writs of mandamus "in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." Congress, wrote the Chief Justice in this major opinion, was attempting to enlarge the original jurisdiction of the U.S. Supreme Court. However, it could not do this because Article III gave Congress control over only the appellate jurisdiction of the Supreme Court.

Marshall's opinion reached the height of judicial craftsmanship when he wrote that the Court could not provide the remedy because Section 13 of the Judiciary Act of 1789 gave the Court original jurisdiction. If the Constitution is the fundamental law of the land, can ordinary legislation modify its commands? asked Marshall. The "very essence of judicial duty" is to determine which of the conflicting rules "governs the case." Given the supreme, paramount character of the Constitution, Marshall was led to conclude that "a law repugnant to the Constitution is void."

It was in these paragraphs that the concept of judicial review, incipient in 1787 debates, broadsides, and brochures, emerged. Although there have been countless arguments devoted to the question of judicial usurpation, the point is that after *Marbury* v. *Madison* judicial review was a legal fact of life, and it has long been accepted, although not without its critics, by society as a uniquely American characteristic of democratic government. Employing the power of judicial review, the Supreme Court (and other federal constitutional courts) has throughout our history performed two less than distinct functions: (1) validation of legislation passed by the Congress (and the states)—*norm enforcement;* and (2) *policy making* through examination and interpretation of a statute or of the Constitution in a case or controversy properly before the Court.

By employing judicial review, the federal courts become policy makers and norm enforcers. By 1984 the U.S. Supreme Court, employing judicial review, had invalidated over 110 congressional statutes, 1050 state laws or municipal ordinances, and had also reversed 175 earlier Supreme Court decisions.[22] There is, however, in the words of U.S. Supreme Court Justice Robert Jackson, "no evading the basic inconsistency between popular government and judicial supremacy."[23]

The paradox lies there: The political system is democratic, yet a nonelected, lifetime appointed set of jurists are normatively and constitutionally committed to preserving and maximizing the contours of the democratic system. The federal court system is an oligarchic institution func-

tioning within a democratic environment.[24] Some of the judges and justices of these tribunals have been profoundly affected by the paradox and have sought to restrain the judiciary from taking too active a role in the policy-making process. Associate Justice William Brennan, commenting on this sensitive matter, said, "when justices interpret the Constitution, they speak for their community, not for themselves alone."[25] Others have been less constrained by the paradox, but all are aware of it. As Chief Justice Harlan Fiske Stone once remarked, "the only check on the justices' exercise of power is their own sense of self-restraint."[26] While not a totally accurate comment, for there are other checks on judicial power, judicial self-restraint is certainly a very important limitation.

More than any other justice, Felix Frankfurter as Justice of the Supreme Court of the United States reflects upon this paradox in the most poignant terms. In a letter to Chief Justice Stone, written shortly before the Court announced its original opinion upholding the constitutionality of statutes making flag saluting compulsory, Frankfurter wrote:

> There is for me, as I know also for you, a great makeweight for dealing with this problem; namely, that we are not the primary resolvers of the clash. We are not exercising an independent judgment; we are sitting in judgment upon the judgment of a legislature. . . . What weighs with me strongly is . . . that we do not exercise our judicial power unduly, and as though we ourselves were legislators by holding too tight a rein on the organs of popular government.[27]

When, three years later, the Supreme Court reversed its stand on the question of flag salutes, Justice Frankfurter was one of three dissenters and wrote what many believe to be the classic expression of judicial restraint and of the paradox of judicial review.

> One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the great libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. . . . As a member of this Court I am not justified in writing my private notions of policy into the Constitution. . . . Our functions are not comparable to that of a legislature nor are we free to act as though we were a super legislature.[28]

Awareness of this apparent paradox between judicial review and democratic theory by the federal judges has been evident since the Supreme Court of John Marshall. In any event, "no matter what jurisprudential doctrines judges follow, as long as access to the courts remains open and as long as judges retain some measure of the power that they have historically possessed, it is inevitable that individuals, groups, and public officials will attempt to utilize the judicial process to achieve their policy