By Professor Mark A. Graber

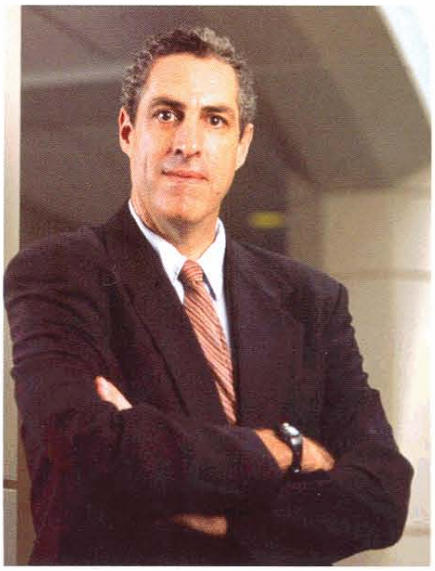
"The Forum of Principle" Revisited

Don't look to the Supreme Court to show constitutional fidelity.

Most law professors and lawyers are convinced that the Supreme Court has a special capacity to be guided by constitutional values. Professor Ronald Dworkin of Oxford and New York University Law School described the Supreme Court as "an institution that calls some issues from the battleground of power politics to the forum of principle." The Supreme Court "is predestined in the long run not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions," Professor Henry Hart of Harvard Law School agreed, "to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law." Elected officials who make the slightest effort to limit federal judicial power bring down the wrath of a united bar. Lawyers of different political persuasions do not agree on much, but most wax eloquent about the virtues of an independent judiciary.

American constitutional history does not support these ritual celebrations. Everyone lionizes the judicial decision in *Brown v. Board of Education* (1954). A fair consensus has developed that the Supreme Court during the 1950s and 1960s improved the quality of constitutional justice in the United States by prohibiting official school prayer, protecting free speech, providing counsel for impecunious criminal defendants, and requiring more equitable legislative districting. When discussion moves from the Warren Court to the other 204 years of American history, the merits of judicial review and judicial independence are less clear. By almost any standard, the Court performed worse than Congress until 1954 and arguably has not performed better (or much better) after 1969.

Judicial review of federal legislation does not appear to have served any noble purpose for the first 165 years of constitutional life. Not one Supreme Court decision declaring an important federal law unconstitutional in this time period is presently thought correct by most scholars or informed citizens. More often, a broad consensus chastises the justices for striking down beneficial policies well within the constitutional powers of Congress. Most lawyers praise *Marbury v. Madison* (1803) for justifying judicial review of federal legislation, but few insist that the decision declaring unconstitutional an obscure section of the Judiciary Act was important or correct. Almost all lawyers condemn



Dred Scott v. Sandford (1856), the next instance when the Supreme Court declared a federal law unconstitutional. Very few law professors have good words for *Hepburn v. Griswold* (1869), the decision declaring that Congress unconstitutionally made paper money legal tender during the Civil War, *Pollock v. Farmers' Loan and Trust Company* (1895), the decision declaring the federal income tax unconstitutional, and the judicial decisions striking down New Deal legislation during the 1930s. *Bolling v. Sharpe* (1954) is the first

case in American history in which a consensus now exists that the Supreme Court correctly declared a federal law unconstitutional.

Whether the Burger, Rehnquist, and Roberts Courts have demonstrated more constitutional fidelity than national elected officials is controversial at best. The Supreme Court during the Rehnquist years declared more federal laws unconstitutional than at any other time in American judicial history. The federal laws struck down included affirmative action policies, regulations on campaign finance, limits on commercial advertising, measures expanding religious freedom, restrictions on state sovereignty, and efforts to use the interstate commerce power to regulate non-economic activities. No consensus exists as to whether any of these decisions was correct. Many conservatives believe the Rehnquist Court correctly interpreted the Constitution of the United States. Liberals disagree. Whatever the constitutional merits of the decisions, few would argue that the Supreme Court in recent years has shown special solicitude for discrete and powerless minorities, unless one regards the Coors Brewing Company or persons wishing to spend millions of dollars in political campaigns as the most unfortunate Americans.

Readers who question this assessment might consider doing a survey using any constitutional law text commonly assigned in undergraduate or law classes. Leave out the Warren years and consider only Supreme Court decisions declaring federal laws unconstitutional or perhaps only Supreme Court decisions declaring important federal laws unconstitutional. Most scorecards, I suspect, will include more cases in which the Supreme Court struck down constitutional laws than instances when the justices voided unconstitutional measures. The survey of decisions declaring state laws unconstitutional is likely to be more complicated. Still, for every *Brown v. Board of Education*, there is a *Prigg v. Pennsylvania* (1842) holding that northern states could not provide statutory protections for free residents of color accused of being fugitive slaves.

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When thinking about the role of courts, lawyers, legal scholars and citizens should not automatically treat *Brown* as a paradigm and such cases as *Dred Scott, Hepburn, Pollock* and others as anomalies. Seen from broader history perspective, *Brown* is far more anomalous than *Dred Scott*. Throughout most of American history (and in many new constitutional democracies), progressives sought legislative victories and played defense in court. The Supreme Court, reformers understood, was far more likely to declare unconstitutional legislative efforts to promote political equality than prevent elected officials from discriminating unjustly. Times may change, but a good case can be made that, by protecting white persons from affirmative action programs and affluent Americans from campaign finance restrictions, the contemporary Supreme Court is merely reverting to form.

Professor Mark Graber is recognized as one of the leading scholars in the country on constitutional law and politics. His books include Dred Scott and the Problem of Constitutional Evil, Rethinking Abortion, *and* Transforming Free Speech, *and he is the author of scores of law review articles. Professor Graber has taught at the law school since 2002 and organizes its annual Constitutional Law "Schmooze," the nation's leading gathering of law and political science professors. He holds a joint appointment with the law school and the Department of Government and Politics at the University of Maryland, College Park.*