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Michael J. Polelle

*Professor, John Marshall Law School*

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## SELECTION OF FEDERAL JUDGES: TIME FOR REFORM?

Michael J. Poelle\*

The time has come to reconsider the selection and appointment of federal judges. The question is important because in the glare of a media age the process of selection and appointment will come under increasing public scrutiny. The troubled and tumultuous confirmation hearings of Robert Bork and Justice Clarence Thomas evidence a growing dysfunction between our inherited myth of federal judicial power and its modern reality as we approach the twenty-first century. This article suggests that the original Hamiltonian model of the federal judiciary no longer accords with our experience. We can no longer assume that federal judges, especially Supreme Court judges, are passionless automatons rendered innocuous by the chains of statutory and constitutional text.

Few constitutional maxims have more bedazzled our national consciousness than the maxim that ours is emphatically “a government of laws, and not of men.”<sup>1</sup> The maxim conjures up the image of official automatons who have no choice but to do good because our Constitution and laws are a seamless web that prevents them from exercising discretion in any seriously deleterious way. What is overlooked is that in uttering this oft-quoted statement, Chief Justice John Marshall was concerned about the wilful disregard of a vested, clear, and ministerial right by the President of the United States. In a less famous part of *Marbury v. Madison*, John Marshall darkly alluded to hypothetical instances of political discretion where a President was only accountable to the voters and his own conscience.<sup>2</sup> Less famous, because as a country we have preferred to believe that good laws are more important than good officials. How many are familiar at all with the observations of William Penn in the *Frame of Government of Pennsylvania*, April 25, 1682?:

I know some say, let us have good laws, and no matter for the men that execute them: but let them consider, that though good laws do well, good men do better: for good laws may want good men, and be abolished or evaded by ill men; but good men will

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\* Professor of law, John Marshall Law School; L.L.M., John Marshall; J.D., Harvard. The author teaches constitutional law, evidence, and tort law. He is a former Fulbright scholar and Special Assistant State's Attorney of Cook County, Ill.

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).  
2. *Id.* at 165-66.

never want good laws, nor suffer ill ones.<sup>3</sup>

The generation that has lived through Vietnam, Watergate, the assassinations of the Kennedys and Martin Luther King is shaken precisely because neither the Constitution nor the laws were sufficient to prevent serious political evil from occurring. The age of innocence is gone forever and the country has come of age. The country is prepared to examine anew the question of whether the Constitution and laws are adequate to guarantee the selection of good persons or at the very least to prevent the plots of bad persons from prevailing. Opinion polls are unnecessary to confirm dissatisfaction across the land in the way the Senate confirmation hearings have been conducted in relation to Supreme Court nominations, especially those of Robert Bork and Justice Clarence Thomas. Whatever view we take of those controversies, at the bottom of much dissatisfaction lies the reality that while questions of character and judicial temperament are often distasteful, these questions are of key importance in the selection of individuals who for all practical purposes serve for life in what is, paradoxically, a republican form of government. Today, few disguise the important principles at stake under the shibboleth that ours is a detached government of laws and not of men. In an age of television where every real or seeming defect of appearance, intelligence, and impartiality are revealed to the public, neither Senators, nominees, witnesses, nor the public can pretend that ours is a government of disembodied laws.

For a long time, we have chosen to believe that unlike the constitutions and laws of other countries, our Constitution and laws are so exemplary that the harmful effects of incompetent or wrong-headed officials are automatically limited by a finely-tuned system of checks and balances. We have worshipped the golden calf of constitutionalism and have expected the Constitution to substitute for a careful examination of the way we select the officials provided for in that Constitution. Paradoxically, the pragmatic and compromising Framers, who were pre-eminently men of the Age of Reason, produced a constitutional document that has survived in part because of its mythological appeal. The Constitution has taken on overtones of a civic religion in a society largely become secular. Whole generations have been educated by the catechism of civics courses in which the primary object was veneration rather than understanding.

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3. William Penn, *Preface to Frame of Government of Pennsylvania*, in *SOURCES OF OUR LIBERTIES* 211 (Richard L. Perry ed., 1959).

The Supreme Court Justices and even the lower federal court judges have assumed the role of Roman censors and high priests. Their duty is not merely to parse words in documents, but to tend to the sacred text of the Constitution. I recall a disgruntled parent urging other disgruntled parents of handicapped children to throw around the phrase "due process hearing" with school administrators because the phrase had a magical uncertainty that would instill in them the fear of an unknown constitutional deity. Arguably, this parent had not the slightest inkling of the tortuous course of that constitutional phrase. But this phrase sufficed for her purposes as it was synonymous with truth and justice.

The exquisite irony of all of this is that most of the Framers had no such vision of a sacred text tended to by high priests. The Constitution is one compromise after another. Even slavery, which was too indelicate to be mentioned by name in the Constitution, was resolved by the skilled politician's art of the deal. Even the Bill of Rights, which we celebrate this year, was an afterthought considered unnecessary by Alexander Hamilton and his followers.<sup>4</sup> This is not to disparage the political sophistication of the Framers nor their obvious wisdom in devising a document admired the world over. Nevertheless, the source of our recent dissatisfaction with the manner of judicial selection in the federal courts cannot simplistically be laid at the feet of the Senate or the maliciousness of our opponents in the selection of judicial candidates for the federal courts. We search everywhere for the presumed flaw in the Senate hearings involving the appointment of federal judges, especially justices of the Supreme Court. We prefer not to think that constitutional structures, designed for another age, may be the source of the flaw. In his correspondence Thomas Jefferson dissociated himself from this religious reverence toward the Constitution:

Some men look at constitutions with sanctimonious reverence and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. . . . But I know also that laws and institutions must go hand in hand with the progress of the human mind.<sup>5</sup>

Does the Constitution require change regarding the way federal judicial nominations are considered? The pertinent provision

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4. THE FEDERALIST No. 84 (Alexander Hamilton).

5. Letter from Thomas Jefferson to S. Kercheval (1816), in THOMAS JEFFERSON ON DEMOCRACY 67 (Saul K. Padover ed., 1939) [hereinafter JEFFERSON].

of the Constitution regarding judicial nominations simply provides that the President has the power to nominate and "with the advice and consent of the Senate" to appoint "ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."<sup>6</sup> The general dissatisfaction from every quarter regarding the nomination of Justice Thomas requires a re-examination of this constitutional process.

The first major complaint involving the examination of Justice Thomas was the extent to which the Senate probed the unsavory details of a sexual harassment charge. Joseph Story in his *Commentaries on the Constitution* noted, however, that if Presidents were to ignore public opinion by surrendering "public patronage into the hands of profligate men, or low adventurers, it will be impossible for him to long retain public favor."<sup>7</sup> Alexander Hamilton also assumed that "integrity" was as essential to the role of a federal judge as legal skill.<sup>8</sup> Most of the debate at the Constitutional Convention itself involved a difference of opinion as to whether the President or the Senate would be the greatest instigator of intrigue and political partiality in the selection of judges. Yet evidence exists that the Framers were also concerned with whether the President or the Senate would have "a better knowledge of characters."<sup>9</sup>

For the Framers and their contemporaries, questions of character were matters properly considered by the Senate before it gave advice and consent to the nomination of federal judges. Issues of whether the hearings in our own time should be held *in camera* or whether witnesses should be required to waive confidentiality before providing information are not matters of constitutional law but rather debatable issues of policy. The wide-open avenues that the Constitution provides for examination of judicial character have served the country well and do not merit change. A substantial part of the population would not likely find issues of character totally irrelevant to the office of judge. Indeed, it has often seemed the converse in American society. High intelligence is often more suspect as a qualification for judicial office than character. Not so long ago, a former United States Senator declared that the multi-

6. U.S. CONST. art. II, § 2, cl. 2.

7. Joseph Story, 3 *COMMENTARIES ON THE CONSTITUTION* § 1523, at 375 (Da Capo Press Reprint ed. 1970).

8. *THE FEDERALIST* No. 78 (Alexander Hamilton).

9. JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1797*, at 345 (Ohio Univ. Press 1966).

tude of mediocre people in the United States also deserved representation on the United States Supreme Court.<sup>10</sup>

A second and far more serious concern involving the Constitution is whether its vision of the role of federal judges reflects the reality of their role over 200 years later. The remarkable lack of controversy concerning the role of federal judges and the paucity of discussion concerning this subject at the Constitutional Convention are due in part to the minor role federal judges were expected to perform in the new government. Alexander Hamilton argued in the *Federalist Papers* that the federal judiciary was the "least dangerous" branch of the federal government due to its inherent weaknesses.<sup>11</sup> Most intriguing is Hamilton's major argument for the permanency of federal judges which he premised on the belief that legal precedents are so complex and voluminous that only a few people in society understand them. Therefore, these unusual individuals should be lured to the bench with a lifetime tenure lest they decline the bench for a more lucrative private practice.

Hamilton's argument so reveals the substantial difference between the way the Framers viewed law and the way we do that it is important to consider this portion of his argument:

To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind, that the records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.<sup>12</sup>

Reflected here is the image of the judge as robot. The judges in Hamilton's model have as their only function the application of an already given law. If the judges do not find and state the law clearly and correctly, they either have not thoroughly studied the voluminous precedent or, in the worst case, they simply are corrupt. This Hamiltonian image of the federal judge as a legal functionary most likely influenced John Marshall's conclusion that the

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10. In defending Judge Carswell's nomination to the Supreme Court, Senator Roman Hruska said: "Even if [Carswell] were mediocre, there are a lot of mediocre judges and people and lawyers. They are entitled to a little representation, aren't they . . . ?" Dennis DeConcini, *Examining the Judicial Nomination Process: The Politics of Advice and Consent*, 34 ARIZ. L. REV. 1, 5 (1992).

11. THE FEDERALIST No. 78 (Alexander Hamilton).

12. THE FEDERALIST No. 78, at 490 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888).

United States was a government of laws and not of men.<sup>13</sup> If we accept this image, federal judges exist as factotums of a disembodied law, comprehensive enough to resolve every problem without any discretion to speak of and with precedents clear enough that simple study will be enough to fashion coherent reason from the ever greater proliferation of precedents.

Under this view it is heresy to imagine the federal judge primarily or substantially as a creator of law. The federal judge's only duty is to find the law and then simply apply it to the facts. We might quibble in some cases as to how the law applies, but there can be no argument about the source of the law. The law exists not as the will of the judge, but as something external to the judge. Even the common law is seen largely as an unchanging body of principles adequate to resolve cases before the judge. But even if we assume that Hamilton's view allows for rapid and sometimes unrecognizable growth in modern common law, his view cannot permit an inkling of the notion that federal judges are the creative source of law where a statute or the Constitution is involved. The entire premise of many Federalists rested on the notion that only a written constitution was real because anything unwritten was too uncertain to be considered a true constitution.<sup>14</sup> Under this perspective, the written word of the Constitution becomes a text only slightly less sacred than Scripture, and the judge's authority is limited to following its plain meaning.

The debates at the Constitutional Convention shed little light on the extent to which Senators were expected to interrogate judicial nominees about legal principles and how the nominees would apply those principles in specific situations. It is revealing, however, that at the Constitutional Convention Madison expressed the view that judges should have the "essential qualifications for an expositor of the laws."<sup>15</sup> The basis for Madison's statement lies in the Hamiltonian image of the judge; judges should reveal, but not create, the law they apply. The fact that Madison saw legislative talents as "very different" from those of a judge indicates that his thinking paralleled that of Hamilton's on this same point. For example, when the new government was established under the Constitution, Madison opined that when the Comptroller of the United States acted like a judge in deciding claims between the United

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13. Compare the similarity of Marshall's views on judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-80, with the earlier views of Hamilton in *THE FEDERALIST* No. 78 (Alexander Hamilton).

14. See *Marbury v. Madison*, 5 U.S. (1 Cranch) at 178.

15. MADISON, *supra* note 9, at 113.

States and its citizens, the Comptroller was a quasi-judicial officer. Therefore, the Comptroller should not simply be classified as a quasi-executive officer removable at the pleasure of the President.<sup>16</sup> Among some of the leading men of the time, especially those of Federalist persuasion, judges were supposed to have a law-applying, non-political role that clearly differentiated them from the law-creating, political role of legislators.

Understandably, this model of judge as functionary was the prevailing model at the time. After all, Montesquieu, an oft-quoted authority for the Framers, held that government is beneficial only insofar as it separates executive, legislative, and judicial powers. The legislature creates the laws, the judiciary interprets them, and the executive enforces them. For Montesquieu, good government avoids the confusion of functions between one or more of the branches.<sup>17</sup> Thus, for the Framers to concede that judges were more than mere interpreters of the law would have violated the fundamental principle of separation of powers. While the principle of separation of powers greatly influenced the Framers in shaping the Constitution, the principle is not discernible in the prior Articles of Confederation.

The foregoing model of the judge as simply an interpretive functionary logically leads to the conclusion that it is not only improper but irrelevant to question judicial nominees about their views of legal principles and how they might apply them in hypothetical situations. Under the Hamiltonian view, judges have no authority but to accept the law contained in precedent as binding, whatever their personal opinions. The only variables were the facts, and until those facts appeared in a concrete case, it was not the habit of common law judges to render advisory or hypothetical opinions. The much-taken-for-granted notion that judges, and especially justices of appellate courts, make law as well as interpret it was not generally conceded until after the rise of legal realism in the twentieth century.<sup>18</sup> Not until recent times has the House of Parliament even acknowledged that it has the power to outright overrule prior precedent.<sup>19</sup>

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16. MADISON, *supra* note 9, at 68; ANNALS, HOUSE OF REPRESENTATIVES, TREASURY DEPT. (1789) *Reprinted in*, 4 THE FOUNDERS' CONSTITUTION 103 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter FOUNDERS'].

17. Montesquieu specifically criticized the combination of legislative and judicial power "for the judge would be then the legislator" and thought the position of judge should be non-permanent. 1 CHARLES LOUIS DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS 163-64 (J.V. Prichard ed. & Thomas Nugent trans., 1906).

18. 4 ENCYCLOPEDIA OF PHILOSOPHY 420-21 (Edwards, ed. 1967).

19. MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 571 (1985).

Given the ideological and historical background of the judge's role in American society, it is understandable that not until 1958 did Senators begin to query Supreme Court nominees about controversial Supreme Court precedent. At that time nominee Potter Stewart responded with a phrase that has often been invoked by subsequent Supreme Court nominees in one form or another: "It would be inappropriate to comment and compromise the appearance of impartiality."<sup>20</sup> This maintaining of appearances is after all the remnant of this older tradition that expected judges to merely apply the law as given to them from the legislature or legal precedent without injecting their own personal opinions. For many of the Framers, judges were expected, in fact as well as in appearance, to apply the law as given regardless of their personal opinions.

This largely Federalist model of the judge's role in general, and federal judges in particular, won the ascendancy in the history of ideas at the same time that the Federalists rode the coattails of George Washington to entrenched power in the judicial branch of government. Many Federalists were inclined to invoke the settled rights of Englishmen in opposing the English Crown; the Anti-federalists, especially Jefferson and his followers, were more inclined to invoke the rights of man and natural law.<sup>21</sup>

Therefore, it is not surprising that Jefferson strongly opposed the growing power of the federal judiciary. He sensed that inevitably the federal judiciary would develop a will of its own independent of the national will. In the accustomed Hamiltonian tradition of honoring federal judges as non-dangerous and completely neutral high priests of interpretation, it is unsettling to read what Jefferson said of these priestly guardians of unchanged law: "The judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric."<sup>22</sup> A law of natural justice fit for the political purposes of the Declaration of Independence could be dangerous if left to the unbridled discretion of judges in the interpretation of the legal rights and powers in a specific constitutional

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20. Linda P. Campbell & Glen Elsasser, *Supreme Court Confirmations, a Battleground with Long History*, CHI. TRIB., Oct. 20, 1991, § 1, at 8.

21. See THE ANTI-FEDERALISTS xcix (Cecelia M. Kenyon ed., Northeastern Univ. Press 1985) (1966). Jefferson himself noted that unlike the Anti-federalists the Federalists relied on "European writings and practices, believing the experience of old countries, and especially of England, abusive as it was, to be a safer guide than mere theory." See Letter from Thomas Jefferson to Judge Johnson (1823), in JEFFERSON, *supra* note 5, at 44.

22. Letter from Thomas Jefferson to T. Ritchie (1820), in JEFFERSON, *supra* note 5, at 63.

text. Jefferson expressed a fear which Federalists either did not share or did not wish to express for fear of undermining the drive for a new Constitution. Jefferson feared that no body of law was sufficiently self-evident to guarantee that federal judges would resist the temptation to remold the law to their own liking. If all positive laws are subject to the inherent rights of man and nature, then no body of precedent is ever sufficient to bind a federal judge, even in theory, to a rule that a judge thinks unjust. From his perspective Jefferson was correct in opposing the power of the federal judiciary to declare what was constitutional for the executive and legislative branches of government. Inevitably, federal judges, as human beings, would be inclined even in good faith to expand their federal jurisdiction because the cushion of lifetime tenure renders them practically immune from correction.

This revolutionary tradition of the judge's role as a doer of justice rather than a follower of precedent was not unknown to the colonialists. The *Philadelphia Gazette*, when informed of the legal principle that truth was not a defense to a charge of seditious libel brought against John Peter Zenger, responded, "if it is not law, it is better than law, it ought to be law, and will always be law wherever justice prevails."<sup>23</sup> Some of those attending the Constitutional Convention probably opposed placing the power to select Supreme Court Justices either completely in the hands of the Senate or completely in the hands of the President because the views of individual judges might affect the content of the law. For example, Roger Sherman opposed John Adams' argument that the President should have the power to appoint officers free of legislative interference, and stated: "It was a saying of one of the kings of England, that while the king could appoint the bishops and judges, he might have what religion and law he pleased."<sup>24</sup>

While the Framers may have suspected that federal judges would not be chained to the rock of precedent, their suspicion has grown beyond substantial doubt to a recognized legal theory. The once revolutionary view that judges make law is taken for granted in the aftermath of the jurisprudential tides of legal positivism, legal realism, and deconstructionism. Today, the only significant debate involves how much law judges, especially federal judges and Supreme Court Justices, should make. Because many statutes, the

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23. Robert S. Peck, *Speaking and Writing Truth in SPEAKING AND WRITING TRUTH: COMMUNITY FORUMS ON THE FIRST AMENDMENT* 171 (Robert S. Peck & Mary Manemann eds., 1985).

24. Letter from Roger Sherman to John Adams (July, 1789), in *FOUNDERS'*, *supra* note 16, at 108.

common law, and parts of the Constitution are so hopelessly vague, it is inevitable that judges will fill the void with their own notions of justice and sound public policy. As the twenty-first century approaches, however, we have moved beyond this understanding. Now, respected legal scholars and justices openly argue that divination of the Framers' original intent is ultimately a futile quest. Bereft of an original understanding, either unknowable or irrelevant, the text of the Constitution is, under this fashionable view, merely a cursory outline of a more complete and unwritten higher law based on some personalized vision of truth and justice. For the avant-garde, the meetings of the Supreme Court have become a continuing kind of Constitutional Convention in which the justices are basically free to make up the law as they go along.

As Thomas Jefferson said not quite so approvingly: "An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning."<sup>25</sup> Ironically, Jefferson saw Chief Justice John Marshall as his worst nightmare come true. I shudder to think what Jefferson would say of the Court some 200 years later given that he viewed the cautious John Marshall as a Supreme Court Justice run amuck beyond the written bounds of the Constitution. Whether we approve or not, the Court has entered into vast discretionary realms of legislative apportionment, desegregation supervision over schools, protected political representation for selected racial minorities, trusteeships for labor unions, unexpressed rights of privacy, and matters of affirmative action and racial quotas, to name but a few. Federal judges now have more power than possibly conceived of by even the most ardent Federalist. The Framers could not have foreseen the development of the federal courts into what appears today as general courts of equity.<sup>26</sup>

Reaction to the steady augmentation of federal judicial power can proceed along one of two basic lines. One line of thought suggests a return to a presumed golden age that existed before the federal courts were allegedly seduced and corrupted by modern constitutional theories which made these courts creators of legal change rather than applicators of handed-down legal doctrine.

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25. Letter from Thomas Jefferson to T. Ritchie (1820), in JEFFERSON, *supra* note 5, at 63-64.

26. DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 51 (1990) ("The lack of controversy was also due to the delegates' view of the minor role they expected the judiciary to play.").

Even if desirable, this view is impractical because much of the legal creativity of federal judges was spurred by a sincerely felt need to accommodate law to changed social conditions in situations where, rightly or wrongly, the federal judiciary perceived that legislators and executive officers had shirked their responsibilities. This modern role of the Supreme Court will not so easily be undone unless Congress and the President are prepared to take more responsibility for accommodating social change.

The second line of thought involves facing the inevitable reality that no Constitution can accommodate 200 years of social change without amendments. To pretend that there is no need to formally amend the document in effect provides further support for those who seek change outside of the text of the Constitution. Amending the Constitution can hardly be considered radical when the Framers themselves provided the mechanism to amend the document.

In what way might the document be changed in regard to the selection of Supreme Court Justices and perhaps other federal judges? The need for change arises only if we conclude that the role of federal judges will remain legislative in character. If the modern federal judge both makes and interprets law in substantial ways, then it is inevitable and proper that nominees for federal courts should be questioned regarding legal principles and their hypothetical application. That judicial nominees have been asked these questions with increasing frequency is not by accident. Senators, as well as their constituents, know that the personal views of modern Supreme Court Justices will impact decisions as long as federal judges are encouraged to, and in fact do, create law. It is then quite logical to attempt to find the bottom line: How will the nominee vote? The question is no more than what citizens are accustomed to asking those who seek to exercise legislative power.

The nominee need not respond to the question, however, especially if to do so would violate the nominee's own sense of what is proper constitutional theory. There is, however, no constitutional harm in asking. Even if the Framers had foreseen the extent to which the personality of a justice might affect judicial outcome, they suggested no limits whatsoever to the questions that could be asked of judicial nominees. An argument that these questions are improper cannot be based either on the constitutional text or the debates surrounding the drafting of the appointments clause. If the legislative function of federal courts continues to grow, probing into personal legal visions of judicial candidates may be insufficient to restrain judicial excess in the exercise of subterranean legislative

power.

Given the developments leading to the increasingly legislative function of the federal judiciary, it is tempting to reconsider an amendment Thomas Jefferson proposed once he saw how the federal judiciary was developing. Jefferson's proposal is contained in a letter to Pleasants in 1821: "[T]he best [remedy] I can devise would be to give future commissions to judges for six years [the Senatorial term] with a re-appointmentability by the [P]resident with the approbation of *both* houses. If this would not be independence enough, I know not what would be."<sup>27</sup>

Jefferson correctly saw impeachment as a generally useless threat against judicial misinterpretation of the Constitution in cases where federal judges often had the best of intentions for doing what they thought was right in the immediate case. We may not agree entirely with the scope of Jefferson's risky remedy. Nevertheless, Hamilton's justification for appointing judges for life was his belief that a judge was chained by precedent. The argument for permanent appointment is diminished to the extent that the complexity and discretionary nature of modern law allows a federal judge to sometimes escape the chains of precedent with the agility of a jurisprudential Houdini. Whatever the merits of Jefferson's specific proposal, the Hamiltonian model of a federal judiciary bound hand and foot to the letter of the law is an inaccurate representation of the evolution of federal judicial power in our own time. Federal judges now shape basic decisions of public policy not clearly reflected either in statutory or constitutional text. The basic choice we have to make as a society is whether that policy should be shaped by non-elected federal judges or by elected representatives. The choice cannot be avoided by hiding behind the old Federalist canard that ours is a government of laws and not of men. Natural science is governed by pure physical laws. But our government, like all democratic governments, is governed by people as well as by laws. The nature of the people who interpret our laws and the extent of their power is crucial to the vitality of the law itself.

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27. Letter from Thomas Jefferson to Pleasants (1821), in JEFFERSON, *supra* note 5, at 65.