What Progressives Get Wrong About Judicial Review

Without judicial review, liberals confronting a Republican-controlled legislature will have no opportunity to seek constitutional redress in federal court.

Damon Root From the February 2022 issue

(Illustration: Joanna Andreasson)

In February 1958, a distinguished liberal jurist named Learned Hand told a distinguished liberal audience something that it did not want to hear. The U.S. Supreme Court's celebrated power of judicial review, Hand declared in a

lecture at Harvard Law School, was fundamentally illegitimate.

Hand was talking specifically about *Brown v. Board of Education* (1954), the now-landmark case declaring Kansas' "separate but equal" public education system to be unconstitutional. Hand did not personally support the state's racist school system. Rather, his argument was that the Supreme Court had no business passing judgment on it in the first place. Nine unelected judges, Hand said, should not be allowed to substitute their constitutional values for those of the democratically accountable officials that had created the policy.

The problem with the *Brown* Court, Hand told his increasingly unsettled audience, was the same as the problem with the *Lochner* Court, which had once struck down Progressive-era economic regulations in the name of its constitutional vision. Both then and now, Hand said, the Supreme Court's use of judicial review was a "patent usurpation" by which the judiciary overruled the wishes of popular majorities and transformed itself into "a third legislative chamber."

Hand spoke at Harvard that day adorned with many impressive liberal credentials. In 1912 he had been a key adviser to Theodore Roosevelt's Progressive Party campaign for the presidency. In 1914 Hand had joined Herbert Croly in founding *The New Republic*, which quickly became America's most influential liberal magazine. In 1924 he would join the U.S. Court of Appeals for the 2nd Circuit, where his judicial career would stretch across three decades, making him one of America's most celebrated liberal judges. When he died in 1961, a *New York Times* obituary called him "the greatest jurist of his time."

Yet Hand's liberal audience in 1958 wanted nothing to do with his attack on judicial review. Liberals at the time not only cheered the Supreme Court's actions in *Brown* but cheered again a few years later when the Court struck

down democratically enacted bans on birth control and abortion. In the years ahead, legal liberalism would become practically synonymous with the vigorous use of judicial review by the federal courts.

Those liberals were right not to buy what Hand was selling. Unfortunately, that was then. A growing number of lefty activists today seem ready and willing to join Hand's camp. "It's perfectly reasonable to ask if we should abolish the Supreme Court, or at the very least strip the Court of its ability to overturn laws that it rules unconstitutional," asserted *Vox* writer Sean Illing in 2018. "Disempowering the federal courts is the most democratic type of reform," declared Harvard law professor Nikolas Bowie in 2021. "No reform short of ending the power of judicial review," argued *New York Times* columnist Jamelle Bouie in 2019, will be sufficient to stop "judges nominated by Trump."

Six decades after Hand discomfited the crowd at Harvard, the case for ending judicial review is finding fans on the legal left. But abolishing judicial review is a misguided idea at odds with the Constitution, and one that will do lasting damage to liberalism itself.

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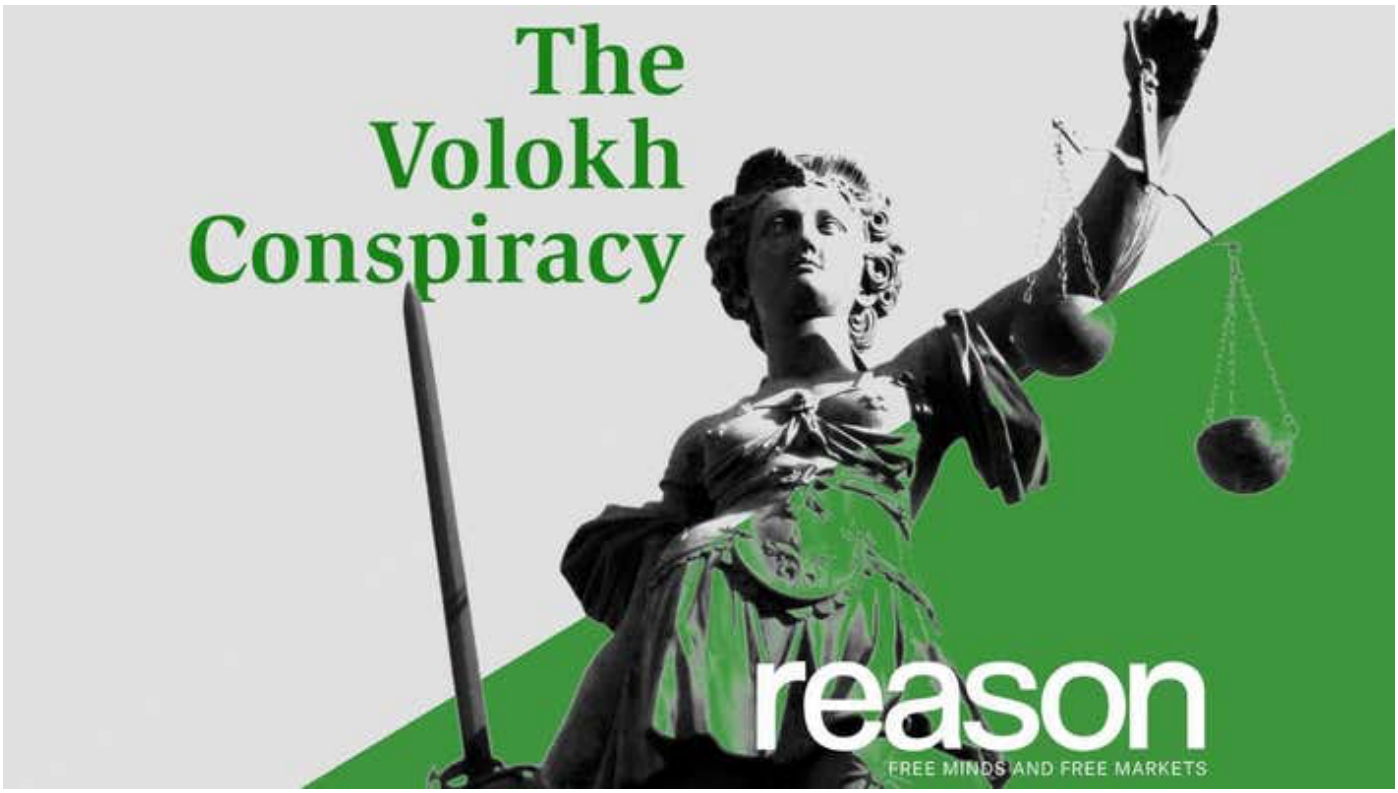
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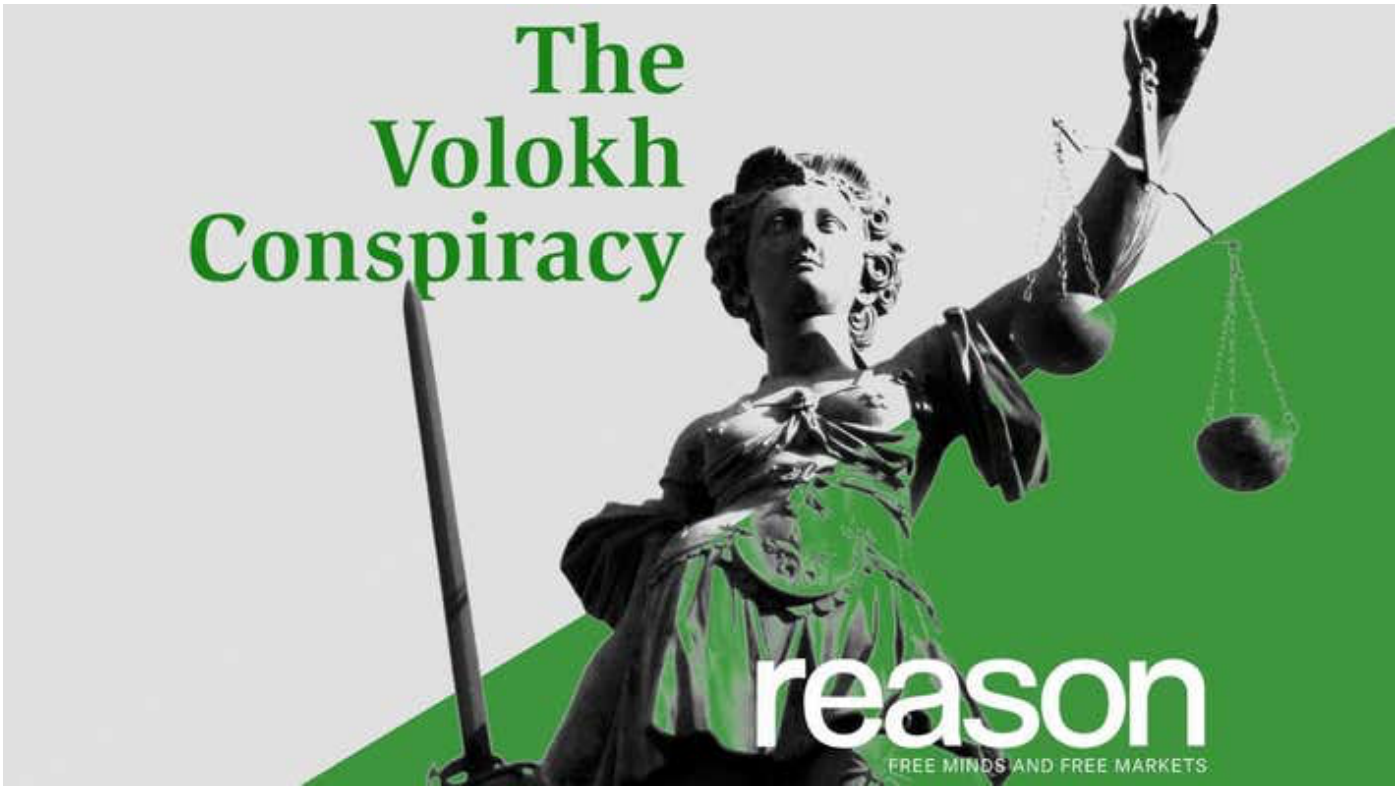
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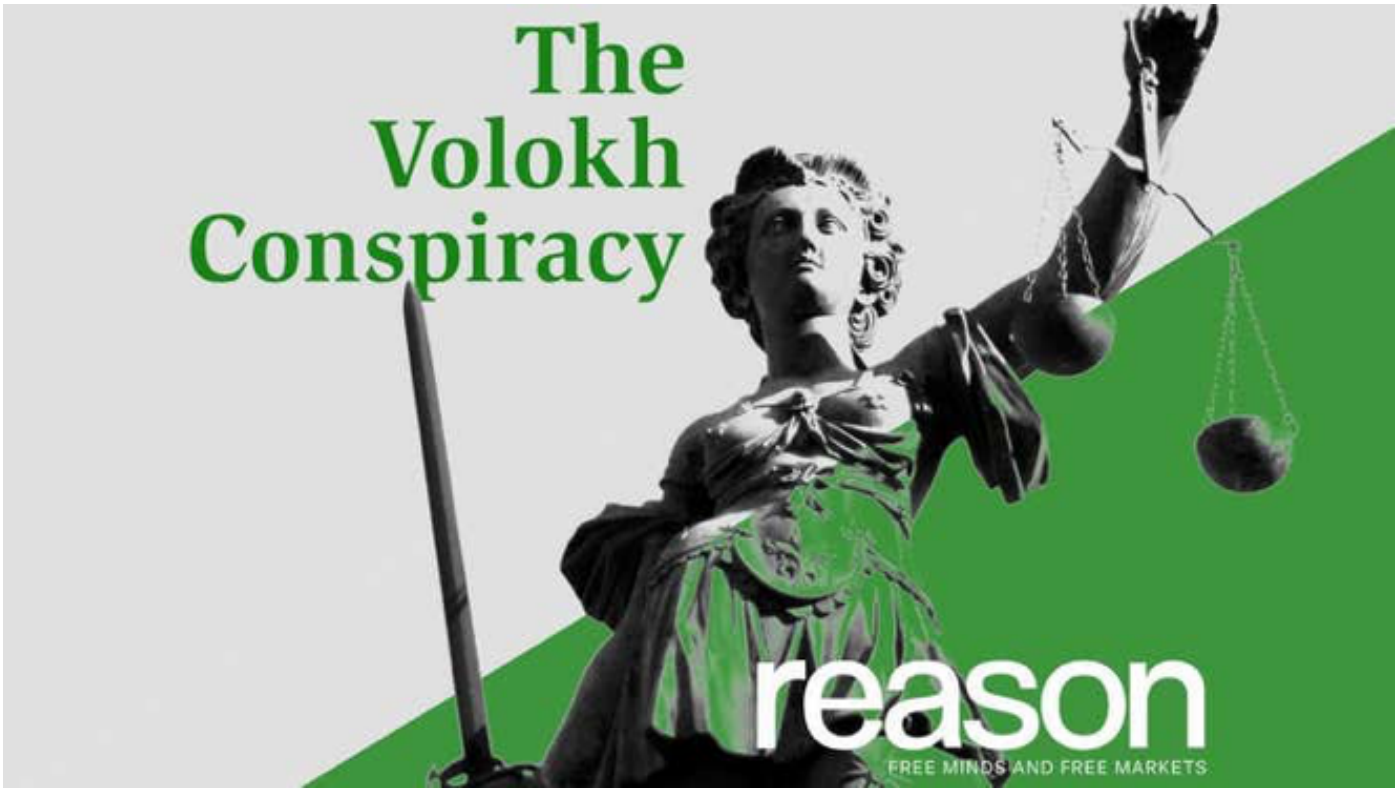
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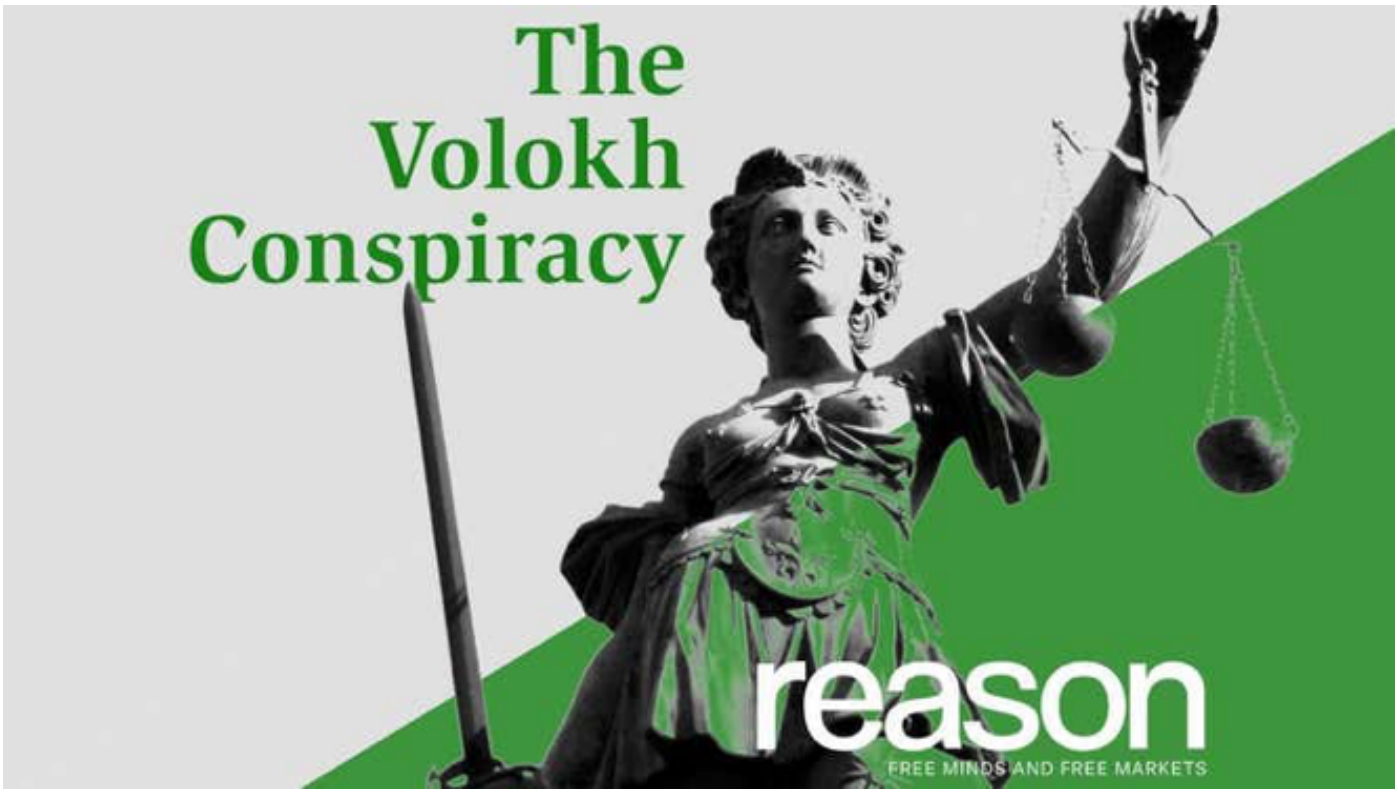

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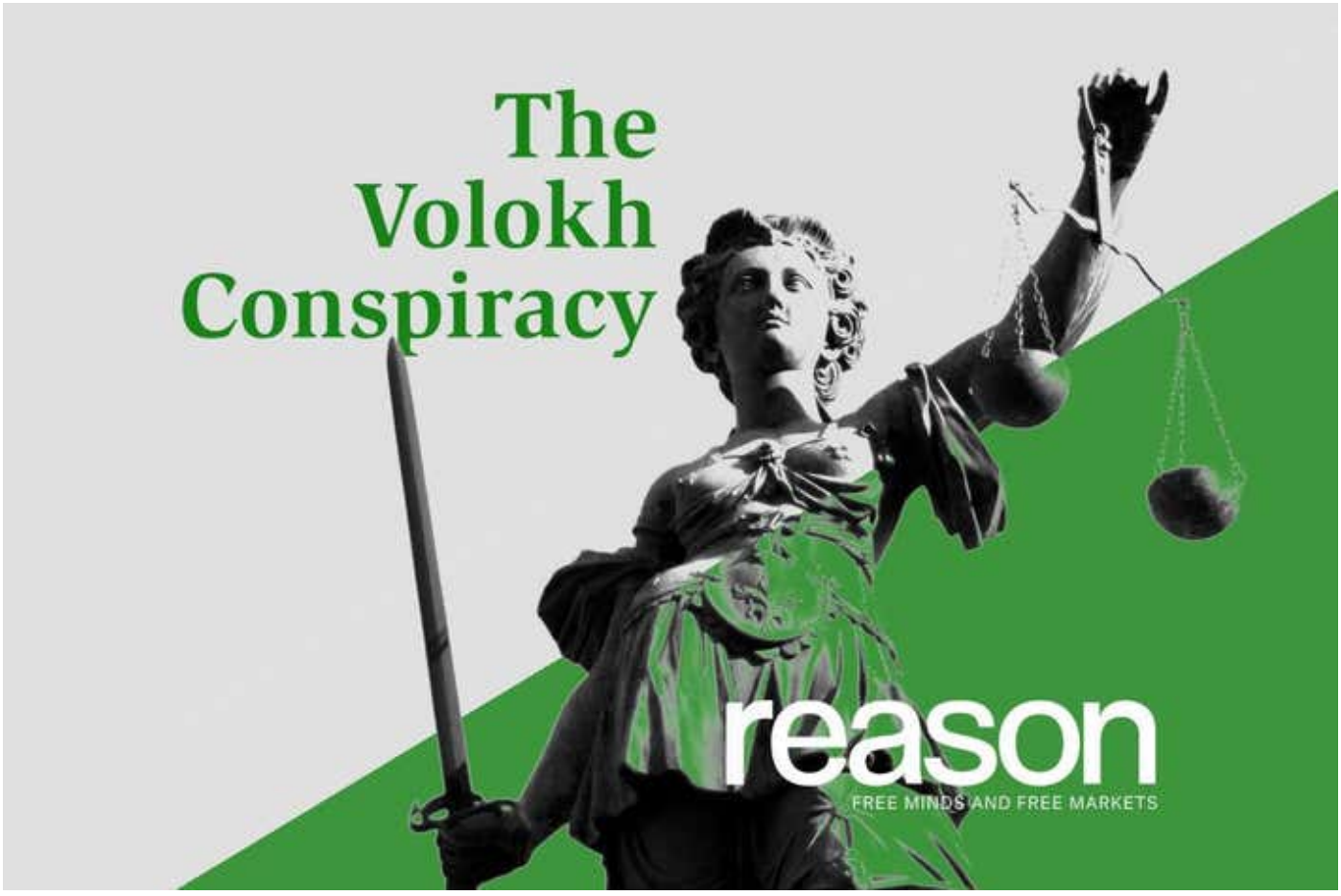

'The Judicial Power'

Today's liberal critics of judicial review make two principal claims, both of which Learned Hand made too. First, they say that judicial review is repugnant to democracy. To allow unelected judges to void the actions of democratically elected legislators, presidents, or governors, the argument goes, is to allow the judiciary to subvert the will of the majority. Second, these critics say, judicial review "wasn't enumerated in the Constitution and isn't inherent in the court as an institution," as Bouie put it. Thus, the act of abolishing judicial review does not raise any constitutional concerns.

These liberal critics are right on the first count and wrong on the second. The judiciary is undoubtedly the least democratic branch of government. But that is *by design*. The role of the federal courts, as James Madison once put it, is to stand as "an impenetrable bulwark against every assumption of power in the legislative or executive." Lawmakers and presidents sometimes assume powers that they should not, and popular majorities sometimes support those power grabs. The judiciary is meant to stand in the way even if judicial review thwarts the will of such majorities. Indeed, the judiciary is meant to act as a check against the tyranny of such majorities.

What is more, contra Bouie, this authority is firmly located in the Constitution and fully inherent in the judicial branch. According to Article III, Section 1, "the judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Framers and ratifiers of the Constitution understood the phrase "the judicial power" to include the power of federal judges to nullify legislative and executive acts that violate the Constitution, which is the power that we call judicial review.

'A Negative on the Laws'

An examination of American legal history reveals the solid constitutional foundations of judicial review. Take the 1787 Constitutional Convention in Philadelphia, where the document was drafted. Speaking on July 21, Luther Martin gave voice to the consensus view. "As to the constitutionality of laws," Martin observed to his fellow delegates, "that point will come before the judges in their proper official character. In this character they will have a negative on the laws." George Mason made the same point on the same day. Under the Constitution, he said, judges "could declare an unconstitutional law void." Nobody at the convention disagreed with any of that.

This same understanding of "the judicial power" is also evident in the Framers' debates about a proposal that did not make it into the final document. James Madison was foremost among those at the convention who thought that Congress should have the constitutional power to veto state laws. Madison had watched as various states, under the Articles of Confederation, erected tariffs and other costly impediments to interstate commerce (among other barriers to the economic and political harmony of the new nation). Madison wanted to see a congressional check put in place against such state actions.

The states "can pass laws which will accomplish their injurious objects before they can be…set aside by the national tribunals," Madison told the convention on July 17. In other words, Madison worried that judicial review by the federal courts might take too long in such cases and therefore wanted Congress to be able to move even more quickly against especially dangerous state laws.

Gouverneur Morris spoke for the opposition to that proposal. "A law that ought to be negatived," Morris replied, "will be set aside in the judiciary department." Morris did not favor a congressional veto over state legislation because he thought the veto power of the federal courts—judicial review—

would do the trick.

Morris beat Madison in that particular debate. The Constitution would not contain a congressional "negative" over state laws. But both sides in the debate did think—indeed, both sides simply took it for granted—that the federal courts would have the constitutional power to "set aside" unconstitutional laws. They all agreed that the federal courts would have the power of judicial review.

'A Constitutional Check'

That same understanding of "the judicial power" is evident when you examine the records of the state ratifying conventions. For example, after helping to draft the document in Philadelphia, James Wilson led the Federalists in pushing for ratification at the Pennsylvania convention. In a widely reprinted speech delivered on December 4, 1788, he explained the role of the federal courts under the new Constitution. "If a law should be made inconsistent with those powers vested by this instrument in Congress," Wilson said, "the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void; for the power of the Constitution predominates." That is judicial review in a nutshell.

Oliver Ellsworth made the same point with particular clarity at the Connecticut Ratification Convention on January 7, 1788. An unjustly forgotten Founding Father, Ellsworth was both a member of the Continental Congress and a delegate to the Philadelphia Constitutional Convention. While serving in the U.S. Senate, he was the principal author of the Judiciary Act of 1789, which is still on the books. And from 1796 to 1800, he sat on the Supreme Court as chief justice of the United States. Ellsworth did as much as any Founder to give shape to the new federal judiciary.

"This Constitution defines the extent of the powers of the general government," Ellsworth told the Connecticut Ratification Convention. "If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void." And, Ellsworth added, "if the states go beyond their limits, if they make a law which is a usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so."

Even the Anti-Federalist opponents of the new Constitution understood that "the judicial power" included the power of judicial review by the federal courts. Speaking at the Virginia Ratification Convention on June 12, 1788, for example, Patrick Henry praised the local judges of his state for having the "fortitude to declare that they were *the judiciary*, and would oppose unconstitutional acts." He then questioned whether the proposed federal judges could be counted upon to do the same. "Are you sure that your federal judiciary will act thus?" Henry demanded. In other words, he asked whether the federal courts would be up to the challenge of exercising the authority of judicial review that the Constitution granted to them.

And then there's Alexander Hamilton, who played a leading role at the Philadelphia convention and then wrote the bulk of the *Federalist Papers*, a series of influential essays that both explained the document's meaning and successfully urged its ratification. The "duty" of the judicial branch, Hamilton explained in *Federalist* 78, "must be to declare all acts contrary to the manifest tenor of the constitution void."

The writings of St. George Tucker provide yet another important piece of contemporaneous evidence about what the founding generation thought

about the meaning of "the judicial power." Tucker was a veteran of the Revolutionary War, a colleague of James Madison, and a professor of law at the College of William and Mary. He watched in real time as the ratification debates unfolded and then, in 1803, published the first extended analysis and commentary about that founding document. In the years ahead, Tucker's *View of the Constitution of the United States* would serve as a sort of go-to constitutional law textbook for students, lawyers, and judges.

The judicial branch is "a necessary check upon the encroachments, or usurpations of power, by either of the other," Tucker explained. "Thus, if the legislature should pass a law dangerous to the liberties of the people, the judiciary are bound to pronounce, not only whether the party accused hath been guilty of any violation of it, but whether such a law be permitted by the constitution." In that sense, he wrote, the judiciary "is that department of the government to whom the protection of the rights of the individual is by the constitution especially confided, interposing its shield between him and the sword of usurped authority, the darts of oppression, and the shafts of faction and violence." It is sometimes the job of the courts, Tucker made clear, to thwart the will of overreaching majorities.

In sum, the evidence from the Philadelphia convention, the several state ratifying conventions, the *Federalist Papers*, and the first published constitutional treatise all point in the same direction: The Constitution places the power of judicial review in the hands of the federal courts.

'It Would Be Most Irksome'

The legal case against judicial review is a constitutional loser. As we have seen, the authority of the courts to "void" unconstitutional laws was originally understood to be part of "the judicial power" set forth in Article III.

What about the political case against judicial review? When he spoke at Harvard in 1958, Hand said he opposed judicial review because he thought it was bad for democracy. "For myself," he said, "it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs."

Those sentiments are probably attractive to many liberals today, who fear the actions of a Supreme Court with six Republican appointees on it. Is there really a downside, these liberals might think, to stripping the "Trump Court" of its judicial power?

Hand understood the downside perfectly well and said that he was prepared to live with it. No judicial review means no *Brown v. Board of Education*, as Hand frankly acknowledged. No judicial review means no *Griswold v. Connecticut* (1965), which struck down a ban on birth control; it means no *Roe v. Wade* (1973), which struck down a ban on abortion; it means no *Lawrence v. Texas* (2003), which struck down a ban on "homosexual conduct"; it means no *Obergefell v. Hodges* (2015), which struck down a ban on gay marriage.

No judicial review means that these resounding liberal victories never would have happened in the first place. And it means no future Supreme Court decisions that strike down other laws on constitutional grounds. Simply put, without judicial review, liberals confronting a Republican-controlled legislature will have no opportunity to seek constitutional redress in federal court.

Is that really the legal landscape that liberals want to see?