While the framers clearly intended that there be a judicial branch, at the Philadelphia Convention of 1787 they spent little time mulling how far the “judicial power” might extend. They spent far more time debating the powers the new federal government would have, the composition of the federal Congress, the balance which ought to be struck between state and federal power, and the nature of the new federal executive. When the proposed Constitution was put to the several states for their approval, the ratification debates focused heavily on concerns about federal power generally—and on the lack of a bill of rights.

At the state level, judicial review—the power of a court to declare a legislative act to be unconstitutional—was only just beginning to emerge in the early years of the republic. The very idea of democracy was thought to emphasize the role of legislatures as being the voice of popular will. But Americans soon discovered that their own legislatures, like kings or parliaments, could threaten rights and freedoms. Hence, along with ideas like separation of powers and checks and balances, judicial review emerged as a linchpin of ensuring constitutional supremacy.

At the federal level, it was Chief Justice John Marshall who, in 1803, made explicit the courts’ power of judicial review. In famous language, oft quoted in later cases, Marshall declared, “It is emphatically the province and duty of the judicial department to say what the law is.” And that duty, he concluded, encompasses the courts’ power to strike down even acts of Congress if they are found to conflict with the Constitution.

Until the American Civil War, the Supreme Court’s constitutional jurisprudence focused largely on matters of federalism. The Bill of Rights, added to the Constitution in 1791, applied only to federal actions, not to the states. After the Civil War, however, the adoption of the Fourteenth Amendment enjoined the states from denying any person due process of law or equal protection of the laws. In time these provisions would be the basis both for major congressional actions (such as the Civil Rights Act of 1964) and for more sweeping judicial power (notably including
the Supreme Court’s 1954 decision in *Brown v. Board of Education*, finding racial segregation in public schools to be unconstitutional.

In the early decades of the twentieth century, the Supreme Court was often perceived as protecting property and enterprise against progressive legislation. In 1905, for example, the Court, striking down a New York law limiting the number of hours bakers could work in a day, called such statutes “meddlesome interferences” with the rights of individuals. That kind of judicial thinking put the Court on a collision course, in the 1930s, with President Franklin Roosevelt’s New Deal. Threatened with “Court packing”—the proposal that further seats might be added to the Court—the justices changed course and took a more deferential approach to state and federal social and economic reform legislation.

Today’s Supreme Court undertakes to review a remarkable range of issues. America is sometimes referred to as a “litigious society.” Certainly Americans seem to have a knack for converting disputes into judicial contests—a trait commented on in the nineteenth century by Alexis de Tocqueville. In the 1960s, in the era of Chief Justice Earl Warren, the Court embarked on an especially ambitious agenda. The Warren Court decreed one person, one vote to be the rule in legislative appointment, applied most of the procedural guarantees of the Bill of Rights to the states, gave heart to the civil rights movement, and opened the door to a constitutional right of privacy and autonomy. Even with justices appointed by more recent Republican presidents, the Court has shown a discernable self-confidence in tackling many of the country’s great issues.

What role does the Supreme Court play in American life? Among its key functions is that of being an arbiter of the federal system. No issue occupied more of the framers’ attention at Philadelphia than giving the national government adequate powers while at the same time protecting the interests of the states. Thus the Supreme Court regularly is called upon to decide whether a federal statute or regulation preempts a state action. Likewise, the Court is often asked to decide whether a state law, otherwise valid, impinges upon some national interest such as the free flow of commerce. For example, when North Carolina passed a law that,
neutral on its face, discriminated against Washington state apples in favor of local growers, the Court saw protectionism at work and invalidated North Carolina’s law.

The Supreme Court also plays a fundamental role in ensuring the rights and liberties of individuals. James Madison once worried lest the Bill of Rights be only a “parchment barrier.” In modern times the Court has been active in enforcing the guarantees of the Bill of Rights, not only against the federal government (their original purpose), but also against the states. The Court’s reading of constitutional protections has often been robust and assertive. For example, in 1963 the Court held that the Sixth Amendment’s guarantee of the right to counsel means, not only one’s right to have a lawyer in court, but also the right to have counsel appointed, at state expense, if the defendant is too poor to afford a lawyer. The justices are especially solicitous of freedom of expression. Thus, in 1965 the Court held that, if a public officials who bring libel suits must meet a demanding standard— “actual malice,” that is, proving that the speaker knew that the statement was false or acted in reckless disregard of its truthfulness.

One hears lively debate over whether the Constitution should be read as a “living” document. Some argue that judges should search for the Constitution’s “original meaning,” that is, the meaning ascribed it to by its framers, augmented perhaps by tradition and precedent. Others see the document as more organic. Thus in cases arising under the Eighth Amendment’s ban on cruel and unusual punishment, the Court has invoked a notion of “evolving standards,” permitting the Court, as it did in 2005, to declare the death penalty for youthful offenders to be unconstitutional.

There is no doubt that the Court has gone beyond the literal text of the Constitution in recognizing and securing particular rights. A conspicuous example is the right of privacy or autonomy. Drawing upon the Fifth and Fourteenth Amendment’s guarantee of due process of law, the Court has found constitutional protection for such interests as the right of contraception, a woman’s right to choose to have an abortion, and, in 2004, the right not to be punished by a state for homosexual behavior. The Court’s abortion decisions have been especially controversial, but, whatever the Court may do in future abortion cases, it is hard to imagine the
justices’ declaring that there is no constitutional basis, in general, for some notion of personal privacy.

Under the Constitution, justices of the Supreme Court serve for life or good behavior. No justice has ever been removed from the Court by impeachment. Nominations to the Court, however, have in recent decades become highly political events. The more territory the Court’s decisions cover, the higher the stakes when a vacancy occurs. To what extent, then, do the Court’s decisions reflect the social and political attitudes of the day? Some cynics suggest that the justices “read the newspapers”—that they take public opinion into account when they shape opinions. There is little basis for this view. A fairer judgment is that, over the long term, the Court tends to reflect the country’s dominant mood. Thus the Warren Court, in the 1960s, was sympathetic to national solutions for national problems. Under the leadership of Chief Justice Rehnquist, the Court in more recent years became, in some respects, a more conservative tribunal, more respectful of the states’ place in the federal union. As the Roberts Court gets underway, the struggle between the more conservative and liberal justices on the Court seems to have become sharper.

The Supreme Court’s decisions raise a fundamental question: What is the place of an unelected judiciary in a democracy? There is an inherent tension between two basic principles in a constitutional liberal democracy—accountable government by a democratically elected majority, and enforcement of the Constitution even if it requires striking down laws favored by that majority. Judicial review is especially attractive when it reinforces democratic principles such as one person, one vote, free and fair elections, and freedom of speech and press. The rule of law—indeed, the very idea of a constitution—requires that the Constitution be enforced as the supreme law of the land. The Supreme Court may err in particular cases. But the Court’s role in ensuring the rule of law commands widespread assent among the American people.

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