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Presidential Review

Frank H. Easterbrook

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ARTICLES

PRESIDENTIAL REVIEW

Frank H. Easterbrook*

JUDGES ARE FOND of claiming the power to say what the law is. As the Supreme Court held in *Marbury v. Madison*,[1] the power to interpret the law includes the power to interpret the

could be a citizen of the United States. Lincoln said:

> [T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between private parties in

[redacted]

> rules, having to that extent practically resigned their Govern-

[redacted]

laws. It has prevailed in this fight.[21] State legislatures regularly enact laws concerning abortion in order to challenge *Roe v. Wade*,[22] and the contours of that decision have changed under pressure.[23] Legislation that bumps against accepted bounds is a force for change as legitimate as the arguments of lawyers who try to curtail governmental powers by asking for the invalidation of laws previously sustained. There is no ratchet in constitutional law.

(3) Congress may impeach and remove from office all who violate the Constitution, as Congress understands it. The principal efforts —the impeachment and acquittal of Samuel Chase and Andrew Johnson, the campaigns to impeach Earl Warren and

Notice that Wilson first justifies judicial review and then equates the President with the judges in ability and authority to set the Constitution over a statute.[50]

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If arid logic and history do not persuade, what about an example? Inflamed by the latest scandal in defense procurement, Congress passes this law:

> Section 1. The President shall execute the CEO of Apex Mis- [illegible]
>
> shall confiscate their property, and none of their lineal descendents shall be eligible for any office under the United States, or any of them.
>
> Section 2. No court of the United States shall have jurisdiction [illegible]

have know it, is gone." The projects are different in principle, though. Real "nullifiers" assert that the Constitution does not govern state and local affairs, and none of the arguments I have advanced would give comfort to a nullifier. Interpretation and nullification have nothing in common.

To say that a power to interpret may be used as cover for the power to nullify is not condemn it. Powers of all sorts may be put to poor use. and those wielding power may dissemble about their

[illegible]

reasons and objectives. The same power of judicial review that gave us *Brown v. Board of Education* also gave us *Dred Scott*, *Plessy v. Ferguson*, and *Lochner v. New York*. If [illegible]

[illegible]

interpretation counsel against the exercise of constitutional review, we shall have to abandon the project: the great majority of constitutional opinions in the Supreme Court these days come with dissenting opinions.[54] If misuse of power in the name of the Constitution is enough to condemn it, then we shall have to abandon judicial review: *Lochner* and *Plessy* reigned longer than *Brown*.

[illegible]

This leads to a related objection: presidential review will prevent the courts from deciding constitutional questions. If the Pres-

III.[60] Foreign policy and fiscal affairs rarely end up in court, mak-

Congress's constitutional decision would be, if we were to deny the existence of presidential review.

(3) Many more disputes fester for years, decades, even centuries between enactment of the legislation and authoritative resolution by a court. The Sedition Act took 163 years, the Tenure of Office Act 60 years, and these are not isolated examples. In the interim legislative and executive officials must decide whether the law is constitutional or not, and act accordingly. No one doubts that Senators could vote yea or nay on the articles of impeachment laid against President Johnson on the basis of their conclu-