The Supreme Court, Judicial Review, and American Democracy

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THE SUPREME COURT, JUDICIAL REVIEW, AND AMERICAN DEMOCRACY

by

Gary C. Roberts

A Thesis
Submitted to the
Faculty of The Graduate College
in partial fulfillment of the
requirements for the
Degree of Master of Arts
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Western Michigan University
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ENTITLED The Supreme Court, Judicial Review, and American Democracy

AS PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE

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The purpose of this thesis is to find some rational justification for the existence of the Supreme Court and its power of judicial review within a democratic framework of government. The avenue I take to complete this task involves two aspects: (1) questioning the validity of American democracy, and (2) examining the effectiveness of various influences or restraints on the power of the Court.

My conclusions are somewhat mixed. First of all, I feel it more accurate to refer to American government not as a democracy but as a constitutional democracy. In that respect, we are a government with limited power.

Secondly, there are various influences or restraints on the power of the Court that exist within the Constitution and outside of it. Historically, on several occasions, the Court's power has been curtailed by any one of these influences or restraints. However, we might add that the failures to restrain the Court do far outweigh the successes. Does this imply we are a government by judiciary? I say not.
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CHAPTER I

INTRODUCTION

Statement of the Problem

Substantive Problem

In Federalist No. 78, Alexander Hamilton argued that the United States Supreme Court would be the weakest of the three branches of government. However, in 1962, Alexander Bickel wrote that "the least dangerous branch of American government had become the most extraordinarily powerful court of law the world had ever known" (Bickel, 1986, p. 1). It is this enormous growth of judicial power that places the Supreme Court in the midst of American political controversy.

What explains this enormous growth in judicial power? Obviously, it can be attributed to the Court's power of judicial review which the Court assumed for itself in the Marbury vs. Madison decision in 1803. With this power of judicial review, the Court places itself in a rather unusual circumstance within America's constitutional framework of government. As defined, judicial review gives the Court the authority to review the constitutionality of legislative and executive acts
(Fisher, 1990, p. A-21). If, as asserted by Chief Justice John Marshall, there is a conflict between the Constitution and ordinary law, it will be the job of the courts to resolve the conflict and to do so by giving effect to the supremacy of the Constitution (Barnum, 1993, p. 252). In this respect, the Supreme Court, with its power of judicial review, becomes a "quasi-guardian" to the American Constitution.

Why is this so controversial? The fact remains that the Supreme Court is neither elected nor accountable to the American people. Article II of the Constitution specifically states that Supreme Court justices shall be nominated by the president with the advice and consent of the Senate. Likewise, the Court's very own power of judicial review is nowhere explicitly stated in the Constitution. Yet, at the same time, the Court engages in what can be referred to as policy-making.

Howard Ball, in his book, COURTS AND POLITICS, refers to this unusual situation as simply a "paradox of judicial review" (Ball, 1987, p. 7). The paradox rests on the fact that "the political system is democratic, yet a nonelected, lifetime appointed set of jurists are normatively and constitutionally committed to preserving and maximizing the contours of the democratic system" (p. 10). He refers to the Supreme Court as "an oligarchic institution functioning within
the confines of a democratic environment" (p. 10).

Hence, the controversy is rather obvious. We have an inherently non-democratic institution, the Supreme Court, holding the democratic institutions, the presidency and the Congress, accountable to the American Constitution.

Research Problem

Without a doubt the Supreme Court is an integral part of America's complex system of democratic self-government (Barnum, 1993, p. 312). It fulfills an essential governmental function by assuming primary responsibility for enforcing the minority protection features of the Constitution (p. 312). At the same time, however, the Court is constrained in a variety of ways by the political environment in which it operates (p. 312). In that respect, I would argue that there are several reasons to conclude that the Supreme Court is not beyond majoritarian control and that its power of judicial review is not necessarily inconsistent with the fundamental ideals of a democracy (p. 312).

To this, I would also add that the very essence of the Supreme Court's prestige rests upon the paradoxical nature of its judicial power. With respect to its power of judicial review, it is the primary responsibility of the Court to hold government, both
national and state, in conformity to the parameters given in the Constitution. When, however, the Court goes beyond these given parameters, it not only jeopardizes the very paradox on which its own power rests, it also jeopardizes the very nature of our democratic system of government. The Supreme Court holds an unusual position within America's democratic system of government. It must learn not to abuse that position.

Review of the Literature

The literature in the field of judicial politics ranges on a continuum from the more conservative to the more liberal. Those who advocate a more conservative approach tend to favor a judiciary that is self-restrained politically and is more adept to interpret the Constitution using its framers' original meaning. Those who favor the liberal approach, however, tend to want a judiciary more active in public policy and one that is more inclined to view the Constitution as a "living document." Those between the two opposing ideologies tend to want the best of both sides. They believe that the Court plays a fundamental role in American society. Yet, they fully understand the implications of the Court's existence. Their approach tends to look for means to reconcile the Court and its
power to a democratic framework of government.

Constitutional Conservative Approach

The primary basis of the conservative approach is its emphasis on strict constructionism or on strict interpretivism of the Constitution. This viewpoint, which is most clearly evidenced in the writings of both Raoul Berger and Robert Bork, also attaches on the need for the Court to be self-restrained and to be deferent to the wishes of Congress.

Understandably, the conservative approach recognizes the unusual position of the Court in an American democratic framework of government. The Court is not elected nor is it accountable to the American people. Its power of review is nowhere explicitly stated in the Constitution but is merely based upon precedent. As such, conservatives believe that this should provide sound reason for the Court to remain aloof of public policy issues. The Court, as Robert Bork asserts, should not "begin to rule where a legislator should" (Bork, 1990, p. 1). The Court should abide by the principles contained in the Constitution and by the original intentions of the framers to the Constitution. It is not the duty of the Court to legislate policy, nor is it the duty of the Court to redefine the intentions of the framers.
The Reconcilable/Middle Approach

Those advocates that I would consider in the middle along the spectrum of judicial politics tend to look for means of reconciling the Supreme Court and its power of judicial review to American democracy. Their effort begins by first acknowledging that the Court exists and that it has, and does, play a major role in the formation of American public policy. For those, such as Alexander Bickel, the ultimate objective is not to attack the Supreme Court for its decisions but to somehow justify them within the confines of the political process.

Indeed, it must be remembered that "it would be intolerable for the Court finally to govern all that it touches, for that would turn us into a Platonic kingdom contrary to the morality of self-government" (Bickel, 1986, p. 200). Certainly, the Court and judicial review are beneficial to a democratic society. For Bickel, the Court is the "best equipped" to serve as a guardian of the people's values (p. 24). In essence, by the fact that the Supreme Court is not accountable to the American people makes it the "most suitable institution" to uphold the countermajoritarian ideals of the Constitution (Barnum, 1993, p. 271). As such, this, alone, makes the Court "fully entitled"
to engage in judicial policy-making (p. 271).

Nevertheless, at the same time, it must also be remembered that there are necessary limits on the Court's power. David Barnum asserts that these limits can be easily found in the Constitution itself. Undoubtedly, "one of the essential purposes of the Constitution is to place limits on governmental power and to protect individual rights" (p. 271).

Constitutional Liberal Approach

The liberal approach places judicial activism as its primary focal point. Likewise, it tends to see the Constitution as a flexible document—a "living Constitution."

Advocates of the liberal approach, such as John Agresto, believe that the Court should be able to use its power more freely and without necessary self-restraint. As guardian of the countermajoritarian provisions of the Constitution, it is the duty of the Court to play an active role in policy formation. Henry Abraham asserts that these "activists believe in a more affirmative, aggressive judicial policy" (Abraham, 1991, p. 72). As such, these "activists are more inclined" to want the judiciary "to legislate, to prescribe policy" (p. 72).

For liberal advocates such as John Agresto, this
does not imply an advocation of government by judiciary (Agresto, 1984, p. 11). Of course, the Court should be active, but the presidency and Congress should also be active (p. 11). The president and Congress should play a more active role in issues of Constitutional concern (p. 11). Indeed, the judiciary checks both the executive and legislative branches of government, but who checks the judicial branch? Agresto argues that the president's and Congress's acceptance of as well as their reliance on the Court's constitutional decision-making is inherently dangerous (p. 11). The Court should not, by itself, become a generator of social change (p. 11). It should only be one component of a mutually checked and balanced system of government.

Supporters of a more liberal stance for the judiciary also tend to view the Constitution as a "living" source of government. These "nonoriginalists" believe that the Constitution is not a fixed document--its meaning can be reinterpreted to apply to the generation for which it currently exists. Because of the Constitution's very broad and general language, these nonoriginalists believe that the framers intended it to be that way. Certainly, the framers could not have foreseen the invention of wiretaps or surveillance cameras when they incorporated the Fourth Amendment's search and seizure clause into the Constitution. As
such, the Constitution must be viewed as an adaptable creation of government—one that can be changed to fit the environment under which it exists.

Hypothesis

I feel that the Supreme Court is an essential component within America's democratic framework of government. While on its surface the Court appears to be undemocratic, it does perform a vital role as a protector and guardian of the Constitution (Barnum, 1993, pp. 311-312). At the same time, the Court does not hold a monopoly on government power. It is still part of the complex network of checks and balances that our founding fathers created. Obviously, the Court's power can be "constrained [or checked] in a variety of ways by the political environment in which it operates" (p. 313). In that respect, I would have to argue that the Court is not an inherent threat to the democratic principles on which our government is founded (p. 312). Indeed, there are an abundance of reasons to conclude that the Supreme Court is not beyond the control of the majority and that its power of judicial review is not totally contradictory to the fundamental principles of a democratic government (p. 312).
The primary objective of this research is to examine justifications for the Court's use of its judicial review power within America's democracy. In trying to consider a supporting rationale, I will examine the various "checks" on the Court's power. David Barnum refers to these various constraints on Court power as "formal" and "informal." By formal constraint, Barnum is referring to, for example, Congress's control over the Court's appellate jurisdiction. In regards to informal constraint, Barnum is speaking more to public opinion and how it influences the Court. Obviously, both types of constraints represent a potential check on the Court's power. My objective is to examine the historical usefulness of each one of these checks on the Court. Have they historically been formidable tools to restrain the Supreme Court's use of its judicial review power?

I will also examine the Supreme Court and its power of judicial review in a democracy. Indeed, the Supreme Court is said to be an undemocratic institution operating within the confines of a democratic framework of government. David Barnum, however, questions the validity of whether or not the United States is a democracy. He argues that it would probably be more appropriate to characterize the United States as a constitutional
democracy. We are a nation built upon a document that limits the power of government and protects the rights of its citizens. That document is the United States Constitution. In this respect, I would like to examine this theory, as proposed by Barnum, that attempts to justify a supreme court with a reviewing power within a constitutional democracy. As stipulated by Barnum, the primary goal of this theory "is not to excuse or downplay the Court's role in the political process, but to establish that it is fully entitled to play an active and at times a countermajoritarian role in the policy-making process" (p. 271).
CHAPTER II

A HISTORY OF JUDICIAL REVIEW

Introduction

Justice Oliver W. Holmes once observed that the Supreme Court was a "storm centre" in American political controversy (O'Brien, 1990, p. 13). Indeed, it certainly has been. From Dred Scott vs. Sandford to Brown vs. Board of Education to Roe vs. Wade, the Supreme Court has been, and is, a pinnacle of controversy in American politics. Ironically, Alexander Hamilton wrote that the Supreme Court would be the weakest of the three coordinate branches of government (Fisher, 1990, p. 59). Certainly, history has shown otherwise. At times, the Supreme Court has proven itself to be an "extraordinarily powerful court of law" (Bickel, 1986, p. 1). For nearly fifty years, the Court was able to restrain the government, both state and federal, from interfering in what it considered as matters of economics (Schwartz, 1968, pp. 50-56). In effect, by infusing a laissez-faire orthodoxy into the Constitution, the Supreme Court was able to prevent the government, at both levels, from regulating American business. At other times, the Court has been able to place itself in a rather unusually
preeminent position as a "guardian" of civil rights and liberties as well as of criminal rights (pp. 70-80).

Without a doubt, the core of much of the controversy encircling the Supreme Court is its unusual power of judicial review. Why is this power so unusual? First, there really is no clear specification of a power of judicial review in the Judiciary Article of the Constitution--Article III. And second, the fact that the Supreme Court has used this power to assume for itself a guardian role to the Constitution. Of primary concern here is the origination of judicial review and the role it has played in American constitutional history.

Early Justifications of Judicial Review

Certainly, anyone who knows anything about American judicial politics has come across the celebrated case of Marbury vs. Madison (1803). It, effectively, serves as a legal precedent for the establishment of a power of judicial review for the Supreme Court of the United States. However, it is not the first instance of the concept of judicial review. Historically, the roots of judicial review go much further back in time. Indeed, a number of precedents prepared the way for Marbury vs. Madison.
The Dr. Bonham's Case

Undoubtedly, the most famous of the early references to a judicial review power was Chief Justice Edward Coke's opinion in the Dr. Bonham's Case of 1610. Viewed as an authority on English common law, Sir Edward Coke, in his INSTITUTES, asserted that the Magna Charta as well as common law "embodied certain fundamental principles of right and justice" (Kelly and Harbison, 1963, p. 46). As such, these principles of "natural law," he argued, gave the Magna Charta and common law a sense of legal supremacy over both the king and Parliament (pp. 46-47). His dictum in the Dr. Bonham's Case embellish much of this viewpoint (p. 46).

In 1610, while Sir Edward Coke was serving as chief justice on the King's Bench, an opportunity arose which called into question an act of Parliament. This particular act empowered the London College of Physicians to make mandatory the licensing of medical doctors within the city. The act also gave the College the power to penalize physicians who continued to practice medicine without this license. Dr. Bonham was charged with having violated this act. However, Chief Justice Coke believed otherwise (p. 46). Coke released Dr. Bonham on the grounds that the act of Parliament in question was void (p. 46). He said that when an act of Parliament "is
against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void" (Fisher, 1990, p. 43).

Ironically, while in this case Chief Justice Coke was very successful in setting a precedent, the idea itself of a court being able to declare an act of Parliament void never really took root on English soil (p. 43). Certainly, in later years, other English judges would rely on Coke's dictum, but their usage of it remained, for the most part, very limited (Agresto, 1984, p. 41).

The Writs of Assistance Case

Indeed, while Coke's argument may have gone unnoticed in England, it certainly was not in pre-revolutionary America. In fact, throughout the eighteenth century, Coke was considered the legal authority to many a colonial lawyer in America (Kelly and Harbison, 1963, p. 47). His idea that natural law carried preeminence over any act of Parliament was quite appealing to Americans (p. 47). Especially, in a time when Great Britain was making concerted efforts to reestablish its eminence over the American colony.

The first clear American application of Coke's idea was the Writs of Assistance Case of Massachusetts
in 1761. Writs of assistance were authorized under an act of Parliament in the year 1662. The writs, for the most part, were merely nothing more than search warrants. They gave English officials the authority to search any premise at virtually any time (p. 47).

The controversy over the writs of assistance occurred when King George II died in 1760 (p. 47). Since writs were issued in the king's name, this required that they be renewed under the new king's name--King George III. However, at the time, several merchants of Massachusetts were angered by England's recent tightening of regulations over their commercial activities (p. 47). When English customs officials in Massachusetts sought to apply for the new writs, the disgruntled merchants decided to challenge them in court.

Representing the merchants before the Superior Court of Massachusetts was James Otis. Using the Dr. Bonham's Case as reference, Otis argued that the writs of assistance were fundamentally illegal (p. 48). As such, they were against the very essence of common law which protected the security of every man in his own home (p. 48). Since the writs were in violation of common law, this implied that the very act of Parliament itself authorizing the writs was also against common
law (p. 48). Common law being supreme, Otis asserted,

Thus reason and the constitution are both against this writ. . . . No acts of Parliament can establish such a writ; though it should be made in the very words of the petition, it would be void. An act against the Constitution is void (p. 48).

By declaring that Great Britain was ruled over by a higher law, a common law, Otis, like Chief Justice Coke, was making the assertion that Parliament was limited by and subserviant to this supreme law (p. 48). Any act of Parliament in contradiction to this supreme law was necessarily null and void (Fisher, 1990, p. 43).

While James Otis was unsuccessful in proving his case before the Massachusetts Superior Court, his attempt to do so would serve as a foundation for others to continue onward.

Early State Court Decisions

By the time of the American Revolution, several of America's courts had ruled that acts of Parliament could be held void if they violated the fundamentals of common law (p. 43). However, it would take much more than voiding acts of Parliament to assert that American courts possess an inherent right to a judicial review power over legislation (p. 43). Between the American Revolution and the drafting of the Constitution, several state courts tried their hand at reviewing state
legislation. In most cases, the results of their actions were less than promising.

One of the first cases to involve a sense of judicial review was Rutgers vs. Waddington in 1784 (Agresto, 1984, p. 58). The focus of the case was primarily on a New York law which allowed an individual to sue for damages those who had invaded his property during a time of war (p. 58). At issue was the right of the state legislature to confiscate property (Tory) even though such an action clearly violated the Treaty of Peace negotiated between the United States and Great Britain (Kelly and Harbison, 1963, p. 105). In deciding the case, the New York City Court disregarded the state law (Agresto, 1984, p. 58). It ruled that the statute was in clear conflict with both "the international custom of nations and the recent treaty with Great Britain" (p. 58). However, the results of its "judicial review" were not all that impressive (p. 58). Following the decision, the New York State legislature voted to censure the court for its actions (p. 58).

In 1786, another case arose which tested the possibility of a court of law exercising a sense of judicial review over state legislation. The case was Trevett vs. Weeden; its results were equally unimpressive. At issue in this case was a Rhode Island law which made it mandatory for individuals to accept paper
money for payment in place of gold or silver (p. 56). John Weeden, a butcher, had refused to accept paper money for payment of his services. Under Rhode Island law, the penalty for such a violation was severe. "Anyone accused of the crime was given only three days to prepare for trial, no jury was allowed, no appeal from a conviction was allowed, and the fine was fixed, steeply, at 100 pounds" (p. 56).

The legal issue before the Superior Court of Rhode Island was whether the Rhode Island legislature could effectively deny an individual his right to a jury by trial (p. 57). In reaching its decision, the court fell short of declaring the law as unconstitutional. Instead, it merely ruled that it was "not cognizable" (p. 57). As such, Weeden's case was dismissed and he was allowed to go free (p. 57). The aftermath for the court, however, was not quite so simple. Determined to prevent such an action from reoccurring, the state legislature ordered the judges arrested to stand trial on impeachment charges (p. 57). They were later released, however, on the grounds that what they had done could not necessarily be considered "criminal" (p. 57). In any effect, the state legislature was still able to have its revenge; it merely refused to reappoint the judges at the end of their term (p. 57).

Probably the clearest example of a court exercising
a sense of judicial review power was the Bayard vs. Singleton case of North Carolina in 1787 (Kelly and Harbison, 1963, p. 99). In this case, the Supreme Court of North Carolina openly held a state law "unconstitutional and void" (Agresto, 1984, p. 59). The state law in question provided for the recovery of property under an earlier Tory confiscation law (Kelly and Harbison, 1963, p. 99). The court ruled that the law violated the constitutional guarantee that "every citizen had undoubtedly a right to a decision of his property by trial and by jury" (p. 99). As with the other cases, the judges in this case were, likewise, not immune to legislative scrutiny and threat (p. 100).

These cases were certainly not the only ones in which a court of law challenged a legislative statute on the grounds of its constitutionality (p. 100). In most instances, in each case, like these, the judges involved were put under the pressure of a protesting legislative assembly (p. 100). And, in most instances, like these, the judges were made to pay the penalty for their decisions. Yet, even with all these set-backs, the concept of judicial review survived. In fact, after 1789, "the doctrine of judicial review itself would pass into the new federal judiciary under the [new] Constitution" (p. 100).
Many of the founding fathers were emphatic in their belief that the United States should be based upon and guided by a written constitution. Fearful of concentrated power, they believed a written constitution would place limits on the powers of government. No governmental institution and certainly no governmental official would be all powerful. Under a written constitution, the powers of government would flow from the constitution and would be subject to the limitations prescribed in it.

Nevertheless, by 1787, their first attempt at such an arrangement, the Articles of Confederation, was proving itself to be an unworkable constitution. Its "league of friendship" format left states with virtually "undepleted sovereignty" and the national government with very little power (p. 103). Under the Articles, the United States was not one nation but, instead, thirteen "sovereign, free, and independent" states (p. 103). With little power, the national government often found itself unable to resolve urgent issues in the economy or in foreign policy (Gruver, 1985, pp. 147-155). By 1787, the urgency of these problems prompted the calling of a convention to recommend revisions to the Articles of Confederation (p. 162). However, the result
of this convention would not be a revised Articles but
a completely new Constitution.

Of primary concern for many of the convention's
members was the belief that the United States needed
a stronger national government. Essentially, a national
government that would be "more effective at resolving
disputes among the states over legal and monetary issues"
(Fisher, 1990, p. 44). Their viewpoint, in the end,
became Article VI of the Constitution.

The Constitution and the laws of the United
States which shall be made in pursuance
thereof shall be the supreme law of the
land; and the judges in every state shall
be bound thereby (U.S. Constitution, art. 6).

Emphatically, the supremacy clause placed the Constitu-
tion at the helm of the American political process.

Unlike the Articles of Confederation which enu-
merated only one supreme Congress, the new Constitution
would be composed of three co-equal branches of govern-
ment--the executive, the legislative, and the judiciary
(Fisher, 1990, p. 44). More respectfully, it would
be composed of the president, the Congress, and the
Supreme Court. Article III of the Constitution would
create the Supreme Court; it would, likewise, give
to Congress the power to create lesser courts.

Article III, Section 1, of the Constitution states
that "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" (U.S. Constitution, art. 3, sec. 1). It then goes on and effectively enumerates the extent of judicial power the Supreme Court possesses. For instance, it can hear all cases affecting ambassadors or cases involving a controversy between two or more states. Article III divides the Court's jurisdiction into two arenas--original jurisdiction and appellate jurisdiction. Original jurisdiction allows the Court to hear cases first while appellate jurisdiction allows the court to review the judicial decision of a lower court. Article III, Section 2, specifically defines the extent of the Court's original jurisdiction while it leaves its appellate jurisdiction in the hands of Congress.

The Convention and Judicial Review

Needless to say, a judicial power of review is nowhere explicitly stated in the Judiciary Article. Initially, the relationship between the Constitution and other laws was generally believed to be unequal. The framers assumed that it was possible for ordinary law to fail to satisfy the requirements of the Constitution. As the supreme law of the land, the Constitution would serve as the basis from which all
other laws were created. It, in essence, would serve as the "blueprint" from which all functions of government would originate. Thus, in the supremacy clause, the framers asserted that national laws, in order to join the Constitution in the category described as the "supreme law of the land," must be made in "pursuance" of the Constitution (U.S. Constitution, art. 6). Clearly, should any conflict arise between the Constitution and ordinary law, the Constitution must always prevail.

Within the Constitution, nevertheless, the language was unclear as to which institution of government should be empowered to resolve such alleged conflicts between the Constitution and other laws. By itself, the Constitution was only a document--a simple piece of paper. To be an effective basis of government, it would require an instrument of enforcement. If it was to be supreme to all other laws, then who would decide the implications of its existence to those laws?

During the convention, the idea of a judicial review power was discussed at great length as possibly being a "check" on Congress and states (Fisher, 1990, p. 44). The concern, however, over "contradictory state rulings on matters of national concern" was largely dampened with the incorporation of the supremacy clause into Article VI of the Constitution (p. 44). If conflict
should arise between national law and state legislation, the supremacy clause would necessarily hold that the national law should prevail (p. 45).

But, of more far reaching concern to the framers was the fear of national legislative power—in this case, Congress. Indeed, of the several debates over judicial review, this one was probably the most important (p. 44). In Federalist No. 48, James Madison asserted that the "legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex" (p. 44). Certainly, Madison was not the only one concerned with this fear of overreaching legislative power (p. 44).

Edmund Randolph devised a plan that he felt would "check" the ambitions of legislative power. His idea, the Council of Revision, would pair the executive with the judiciary against the legislature.

The executive and a convenient number of the national judiciary... with authority to examine every act of the national legislature before it shall operate, and every act of a particular legislature before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the national legislature be again passed (p. 44).

In the end, his Council of Revision was eliminated from the debates.

Indeed, other framers simply believed that the judiciary possessed an inherent right to a power of
judicial review. James Wilson asserted that the legislature would be "kept within its prescribed bounds" by a judicial review power (p. 45). Oliver Ellsworth believed that federal judges were clearly expected to void legislation contrary to the parameters of the Constitution (p. 45). And, John Marshall believed that the federal judiciary would declare as unconstitutional any act of Congress lacking conformity to the Constitution (p. 45).

Clearly, what can be accurately deduced from the various debates over judicial review was the fact that several of the delegates to the convention favored some form of its existence (p. 44). The question remains--why wasn't it explicitly incorporated into the text of the Constitution?

Alexander Hamilton and Federalist No. 78

For the most part, Federalist No. 78 deals directly with the doctrine of judicial review (Agresto, 1984, p. 64). In it, Hamilton attempted to lay a foundation for what he believed would be a defense of the federal judiciary in using judicial review (Kelly and Harbison, 1963, p. 229).

Hamilton designed his defense of a judicial review power primarily within the context of the check and balance system promulgated in the Constitution (Agresto,
1984, pp. 64-65). In laying out his argument, Hamilton acknowledged the apparent weaknesses of the judicial branch (p. 64). The federal judiciary, he asserted, "may truly be said to have neither Force nor Will, but merely judgment" (Fisher, 1990, p. 59). In essence, having "no influence over either the sword or the purse," "the judiciary, from the nature of its functions, will always be the least dangerous" (p. 59). To overcome this apparent weakness, the judiciary would necessarily need a defense against both the legislature and the executive (Agresto, 1984, p. 64). Its first defense would be its sense of "permanency of office" (p. 64). Its second defense would be its ability to review legislation (p. 64). In essence, "without the power to disregard unconstitutional laws, there would be little to prevent the erosion of what few powers the judicial branch did itself in fact possess" (p. 65).

Hamilton, likewise, defended the power of judicial review in terms of its merit to society (p. 65). Here, Hamilton argued that without judicial review, "all the reservations of particular rights or privileges would amount to nothing" (Fisher, 1990, p. 59). A constitution implies limits and those limits "can only be preserved through the medium of judicial review" (Agresto, 1984, p. 65). Without judicial review serving as a "check," "legislative authority" could easily develop into
"legislative autocracy" (p. 65).

Federal Court Decisions

Between the ratification of the Constitution and the development of the Marbury case, federal courts had used a sense of judicial review several times in striking down state laws that were not in clear compliance with the Constitution (Fisher, 1990, p. 46). In regards to federal statutes, the federal judiciary wasn't nearly as bold. By 1801, the Supreme Court had yet to solidify its position as a truly co-equal branch of government. While it had upheld the constitutionality of Congressional statutes, it had never struck one down (p. 46).

In the case of Hylton vs. United States in 1796, the Supreme Court upheld the constitutionality of a federal law which placed a tax on carriages (p. 46). From this, the question was raised that if the Supreme Court could uphold a federal statute's constitutionality, why couldn't it just as well declare its unconstitutionality? (p. 46). In the case's opinion, however, Justice Chase stipulated that "if this Court should possess the power to declare an act of Congress void, it should only exercise that power in very clear cases" (p. 46).

Nevertheless, until the Marbury case, the federal
judiciary would remain cautious in exercising judicial review powers. For the most part, it would confine its review of legislation to state laws (p. 46).

The Politics of 1800 to 1803

Ironically, the actual preceded creation of judicial review was largely attributable to the partisan politics that had developed during the late 1790s. During the election year of 1800, the United States had become divided between two warring political camps--the Federalists and the Jeffersonian-Republicans. Since the days of the constitutional convention, the Federalists had been in control of the national government. Their views largely favored the supremacy of the federal government and the centralization of its power. However, by 1800, their national popularity had considerably waned. Thomas Jefferson, leader of the newly formed Republican Party, had become concerned over the growth in the power of the federal government. Favoring more of a state's rights approach in government, the Jeffersonian-Republicans seized upon the Federalists' unpopularity and overwhelmingly swept the elections of 1800. The Republicans were able to gain control over both houses of Congress as well as to take control of the presidency. Realizing a disastrous defeat, the Federalists looked for ways to salvage their dwindled
power.

Having lost both the presidency and Congress to the Republicans, the Federalists looked to the judiciary as a "safe-haven" for political power. Within days before the newly-elected Republicans were to enter office, the Federalists passed the Judiciary Act of 1801 which effectively created a number of new federal judge positions. In days following, President John Adams nominated a number of Federalists to fill the new posts. The so-called "midnight" appointments were all sent to the Senate and were confirmed. However, some of the new commissions, William Marbury's among them, were never delivered. When Thomas Jefferson assumed the presidency, he ordered the commissions to be withheld. He also urged the newly-elected Congress to repeal the Judiciary Act of 1801 that had created the new federal judgeships. This, they immediately did.

**Marbury vs. Madison**

Under Section 13 of the Judiciary Act of 1789, the Supreme Court was empowered to issue writs of mandamus--orders requiring public officials to perform their duties. When William Marbury was informed that his appointment was void, he petitioned the Supreme Court, under its original jurisdiction, to issue a writ
of mandamus ordering the new administration to deliver his commission. The Supreme Court, predominantly Federalist in character, was in a difficult position. Without a doubt, if the Court chose to issue the writ, it would be going "head to head" against President Jefferson (Gruver, 1985, p. 199). Likewise, in such a scenario, the President likely would refuse to comply with such an order resulting in overwhelming embarrassment for the Court (p. 199). If the Court refused to act, it would, in effect, be yielding to the power of the presidency (p. 199). Such an action would set a dangerous precedent for future institutional conflicts (p. 199).

In the end, the Court would make a decision that would allow it to "have its cake and eat it too." In writing the opinion for the Court, Chief Justice John Marshall asked whether or not "the applicant had a right to the commission he demanded" (Kelly and Harbison, 1963, p. 227). Marshall believed that he did. Since the commission had been signed and sealed, Marshall asserted, "to withhold it would, therefore, be an act deemed by the Court not warranted by law, but violative of a vested legal right" (p. 227).

As such, assuming the fact that William Marbury's rights were violated, Marshall then proceeded to ask whether or not "the laws of this country afforded him
a remedy" (p. 227). Marshall believed that the remedy for Marbury's problem was simply to let him have his commission. Since Marbury had been nominated and confirmed for the commission, it was his constitutional right to receive the commission. In this case, the President was clearly directed by an act of Congress to carry out his duty— that duty being the deliverance of Marbury's commission (p. 227).

However, in this case, the Court was being asked to issue a writ of mandamus ordering the President to deliver Marbury's commission. In this scenario, it was the Court that was being asked to remedy the problem. As such, for Marshall, the question was whether or not the Court could issue such a writ. Clearly, Section 13 of the Judiciary Act of 1789 authorized the Supreme Court "to issue writs of mandamus to persons holding office under the authority of the United States" (p. 228). For Marshall, the question remained whether or not the Court could legally issue such a writ under its original jurisdiction. He concluded that it could not.

His reasoning was that Marbury had come to the Court under its original jurisdiction requesting a remedy for his legal problem. The remedy he requested was for the Court to issue a writ of mandamus ordering the President to deliver his commission. Nevertheless,
Article III, Section 2, of the Constitution specifically defined for the Court the extent of its original jurisdiction powers. The ability to issue a writ of mandamus was not one of those specified powers in the Court's original jurisdiction. Given this, Congress was not within its power to alter the Court's original jurisdiction; it could only change its appellate jurisdiction. Thus, the ability of Congress to give the Court such a power in the Judiciary Act of 1789 "was not to be warranted by the Constitution" (p. 228). Clearly, as such, Congress could not delegate such a power, nor could the Court accept such a power (Gruver, 1985, p. 199).

By the fact that President Jefferson accepted the Court's decision effectively established precedent for the Court's usage of a judicial review power (p. 199). If, as Marshall stipulated, the Constitution was to be accepted as a "fundamental and paramount law of the nation, then any law repugnant to the Constitution must be void" (Kelly and Harbison, 1963, p. 228). If any statute conflicted with the Constitution, then it would be the obligation of the Court to enforce the Constitution and to declare the statute as unconstitutional (p. 228). For, as Marshall asserted, it was the duty of the Court "to say what the law is" (p. 228).
In the years since the Marbury case, the Supreme Court has effectively used its power of judicial review to become an active member in the political process. In fact, with judicial review, the Court has been able to give in-depth definition to the scope of the American Constitution. Likewise, acting as the Constitution's guardian, the Supreme Court has been able to insure its supremacy to all other laws. The Supreme Court has also been responsible for resolving a myriad of public issues. From desegregation, to affirmative action, to abortion, the Supreme Court has been an active participant in the policy-making process. As a result, on several occasions, the Court has fallen "prey" to a facade of criticism.

Anytime the Supreme Court engages in policy issues, its decisions take on extra dimension. Normally, within a democracy, decisions of a political magnitude are made by those who are directly accountable to the people. However, because of the Court's unusual position within the American Constitution, its members are not directly answerable to society. Still yet, using its power of judicial review, the Court engages in policy that carries serious societal ramifications. In so doing, it is permissible to ask the question whether or not the
Supreme Court should be involved in deciding issues of this sort. Within a democratic society, is it entirely appropriate for the Court to be exercising such overwhelming power over public policy issues?
CHAPTER III

THE SUPREME COURT AND DEMOCRATIC GOVERNANCE

Introduction

Of all the controversial issues surrounding the Supreme Court, none are anymore preeminent than the fact that the Court is a seemingly undemocratic institution operating within the confines of a democratic framework of government. Democratic theory holds that the people, in some respect, take part in government either directly or indirectly. Direct, or sometimes referred to as pure, democracy implies that the people, the citizenry, are responsible for government decision-making. In essence, the people themselves make the laws for their own community. Indirect, or representative, democracy is where the people elect a certain number of members of the citizenry to make decisions for all the people. The United States is a representative democracy.

On examination, what distinguishes a democracy from other political systems? Generally, a democracy is governed by principles of political equality, political freedom, and majority rule (Mayo, 1960, pp. 58-71). As defined,
a democratic political system is one in which public policies are made, on a majority basis, by representatives subject to effective control at periodic elections which are conducted on the principles of political equality and under conditions of political freedom (p. 70).

In sum, a democracy is a form of government in which the supreme power is vested in the people. Ideally, in a democracy, the citizenry retains the right to choose for itself the persons who will exercise decision-making power on its behalf (Barnum, 1993, p. 9). Specifically, the exercise of decision-making power by governmental leaders rests on the consent of the governed--the people (p. 9).

Indeed, the Court and its power of judicial review have become a focal point of controversy in American politics. By what right do life-tenured judges invalidate policies adopted by popularly elected government representatives? If judicial review is of such crucial importance for a written constitution, why did the framers omit it? Why is it based on implied, rather than explicit, language? Indeed, the Supreme Court occupies an unusual position in the American political spectrum. By using judicial review, the Court becomes a policy-maker. As Chief Justice Charles E. Hughes stated, "the power to interpret the law is the power to make the law" (Fisher, 1990, p. 50). However, unlike a congressman or a president, justices are not directly
accountable to the American people. The Constitution holds that justices shall hold their offices during "good behavior" (U.S. Constitution, art. 3, sec. 1). On historical analysis, this implies life.

As a result of this unusual status, many legal scholars, such as Raoul Berger and Robert Bork, allege that the Court is an undemocratic policy-making institution and that judicial review is an undemocratic feature of the political process. In essence, "it is an oligarchic institution functioning within a democratic environment" (Ball, 1987, p. 9). Clearly, the Court's special status requires both explanation and justification.

Democratic Theory

Before permanently casting the Supreme Court as an undemocratic institution, we need to first define what we mean by democratic government. More specifically, what is a democracy?

Popular Control of Policy-Makers

Undoubtedly, the most important aspect of a democracy is its emphasis upon popular sovereignty--the fact that the people have some essence of control over the policy-making process. Under pure democracy, the people are directly responsible for government policy creation
The closest example in history of such a system was ancient Athens and, even here, it is certainly questionable as to whether or not a "pure" democratic process really existed. Today, as in the United States, representative democracy has become a chosen form of democratic governance. Under representative democracy, the people choose a select few from the citizenry to make decisions for them in government.

At the heart of representative democracy is the idea of political accountability (Mayo, 1960, p. 61). In essence, public officials or policy makers must be answerable to the people from which they were chosen. The "institutional embodiment of the principle universally regarded as indispensable" to this process is the election (p. 61). Through regularly held elections, the people can hold public officials accountable for their actions. While the people do not have direct control over government policy, through elections, they do have direct control over those making government policy (p. 63).

Political Equality and Freedom

With respect to political equality, the first and foremost fundamental premise is that all adult citizens have the right to vote—a recognition of universal suffrage (p. 63). Likewise, each eligible voter should
only have one vote and that particular vote should count equally with anyone else's vote (p. 63). And, ideally, representatives should be elected in numbers proportional to the votes cast for them (p. 63).

Democratic theory also holds that there should be some guarantee of political freedom.

The electoral process must not be contaminated by coercion or corruption, and voting itself must take place by means of secret ballot. Aspiring candidates must be free to form political organizations and to campaign openly for the office they seek. Freedom of speech and press must be protected, and voters must have access to various sources of information—not just information supplied, for instance, by government itself—so they can make an informed choice among candidates (Barnum, 1993, p. 9).

Henry B. Mayo argues that these rules, both political equality and political freedom, are essential to the functioning of democratic government (Mayo, 1960, p. 66). Their purpose,

to enable the effective choice of representatives to take place, i.e. to ensure the popular control of decision-makers at election time, and to keep the channels open to legitimate influence at all times (p. 66).

Together, political equality and political freedom provide the voter with political power over government—democracy (p. 66).

**Majority Rule Principle**

Within the political process, decisions must be
made. These range, of course, from the selection of representatives to the adoption of legislation. In arriving at these decisions, often times, conflicts of interest may arise. These various conflicts may be between political decision-makers, interest groups, or the public at large. Howard Ball stipulates that the political decisions developed from these various "factions of interests" are the "outcome of intense, complex negotiations" (Ball, 1987, p. 5). As such, democratic theory holds that when there is a "clash of wills," the majority shall decide which decision prevails (p. 5).

Certainly, within a democratic system of government, majority rule provides for a means of selecting "among alternative courses of action" (p. 5). Indeed, it is a means to filter and to determine the outcome of political disputes among the various interests involved (Barnum, 1993, p. 9). Whether it determine the winner of an election or it decide which legislative proposal shall become law, its ability to "govern the outcome of disputes" makes it an essential part of the democratic process (pp. 9-10).

Democratic Theory and the Supreme Court

On comparison, how well does the Supreme Court conform to the ideals of democratic theory? David Barnum
asserts that the Court, by its very existence, "violates several key principles which distinguish a democracy" (p. 10). In his analysis, Barnum considers four areas in which the Court seemingly disrupts democratic theory.

The first area Barnum examines involves the method by which Supreme Court justices are selected (p. 10). Article II, Section 2, of the Constitution states that the "Judges of the supreme Court shall be nominated by the President with the Advice and Consent of the Senate" (U.S. Constitution, art. 2, sec. 2). Certainly, with respect to democratic theory, this does not conform to the idea of popular sovereignty. By the fact that justices of the Court are selected by the president makes them faintly accountable to the American people.

The second area Barnum examines involves what he terms "the extraordinary job security of Supreme Court justices" (Barnum, 1993, p. 10). Article III, Section 1, of the Constitution states that Supreme Court justices "shall hold their Offices during good Behavior" (U.S. Constitution, art 3, sec. 1). On historical analysis, "good behavior" simply implies life-tenure. Again, with respect to democratic theory, justices are not susceptible to the periodic elections as are other members of the political process. Representatives, presidents, and senators must, at periodic intervals, face the electorate for approval or disapproval (Barnum,
The third area Barnum examines focuses on how justices are removed from the Court (p. 11). Given that justices serve for "good behavior" and that they are not directly responsible to the electorate, it appears that there is no real means to remove a justice involuntarily. However, this is not exactly so. Article II, Section 4, of the Constitution provides that "all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors" (U.S. Constitution, art 2, sec. 4). Historically, on only one occasion did impeachment charges against a sitting justice come to complete fruition in Congress. The circumstance, which occurred in 1804, involved Justice Samuel Chase. The charges against him, political in nature, however, were found not to be adequate enough to influence a necessary two-thirds of the Senate to convict him and remove him from the bench (Barnum, 1993, p. 203). Hence, given that justices are not directly accountable to an electorate and that they are rarely ever removed from the bench by any other means, it stands to argue that the justices of the Supreme Court are quite comfortably secure in their positions.

And finally, the fourth area Barnum examines involves the "unusual finality" of the Supreme Court's
decisions (p. 11). More specifically, its interpretations which give meaning to the parameters of the Constitution (p. 11). Here, the concern lay with the virtual inability of the political branches, both Congress and the presidency, to override Supreme Court constitutional decisions. The only means possible, constitutionally, is to adhere to the amending process defined in Article V of the Constitution. Article V states that,

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress (U.S. Constitution, art. 5).

Since only four amendments have been passed which have directly overridden Supreme Court constitutional decisions, it quite logically stands to reason that the amending process is not quite a feasible method of altering the Court's rulings. As David Barnum states, "once again it becomes clear that the Court's power is not entirely compatible with the basic principles of democratic self-government" (Barnum, 1993, p. 11).
A Justification for Judicial Review

Where exactly does this leave the Supreme Court in American democracy? If the United States is defined as a democratic system of government, how can we explain the mere existence of the Supreme Court? How can we justify the Supreme Court's exercise of a judicial review power over legislation if the Court itself is in violation of democratic principle?

Certainly, one avenue that might be taken to defend the Supreme Court, and its power of judicial review, leads us down a path which questions the very validity of American democracy. The essence of this argument lays in the fact that it asserts that the United States might not be the "pristine example" of democratic government we all admire and respect (pp. 13-14). Indeed, there might be other features of American government, like the Supreme Court, that are not quite compatible to democratic theory or to democratic governance (pp. 13-14). These include, for instance, the electoral college system, state legislative selection of U.S. senators (although, now abolished by Amendment XVII), congressional committees, the Senate filibuster, to name but a few (pp. 13-14). These, as the Supreme Court, are as well violations of key principles of majoritarian democracy (pp. 13-14).
Nevertheless, can we adequately justify the Court's exercise of a judicial review power by merely pointing out that it is only one of several non-democratic aspects of American government? As David Barnum stipulates, can we defend the Supreme Court and its power by arguing "that two wrongs make a right" (p. 14)? If we cannot, then, where do we turn in an attempt to provide some sense of justification for the Court's use of a judicial review power?

**Constitutionalism**

Constitutionalism refers to a "written document which sets forth the structure of the government and specifies the power of those who serve in its offices" (Schrems, 1986, pp. 225-226). Of key significance to constitutionalism is its emphasis upon limited government and rule of law (p. 226). As such, government power is "proscribed and procedures prescribed" within the parameters of a constitution (Andrews, 1968, p. 13). Meaning, more specifically, that government power emanates from and is limited by a constitution. A constitution provides for a framework of government. It formally establishes the government's institutions, defines their functions, and spells out the extent of their power (p. 13). Likewise, it is also a "contract" between the government and the people. By limiting
government power, a constitution can provide for the security of the people against governmental encroachments or abuses. Clearly, "the state is forbidden to trespass in areas reserved for private activity" (p. 13).

American Constitutionalism

Fearful of absolute power, the founding fathers were emphatic in their belief that American government should be based upon and guided by a written constitution—a constitution which would, for all intents and purposes, set limits on the power of government. No governmental institution and certainly no governmental official would be all powerful. Under a written constitution, the powers of government would flow from the constitution and would be subject to the limitations prescribed in it. The framers, aware of the potential for government abuses of political power, built into the American Constitution certain "correctives" that would limit this possibility (Ball, 1987, p. 6).

Among these "correctives" is the Bill of Rights—the first ten amendments of the Constitution (p. 6). The purpose of the Bill of Rights is largely to protect the minority against the "popular will" of the majority (p. 6). Here, majority is referring to those who are in control of government power—the majority of Congress, for instance (p. 6). The individual's right to speech
and protection against unlawful searches and seizures must take precedent over the will of the majority. In that respect, the Bill of Rights serves as a "safe-haven" against the potential "tyranny of the majority." Certainly, it is an embodiment of rights and protections for the individual against the encroaching, and sometimes abusive, power of government.

Among other "correctives" built into the Constitution, that would limit government power, are what James Madison referred to as "auxiliary precautions" (p. 6). These "auxiliary precautions" include separation of powers, checks and balances, and federalism (p. 6). In order to protect against the abuses of government power, the founding fathers believed that power must not be allowed to concentrate; it must be "separated and fragmented" (p. 6). Power would be divided and overlapped between three branches of government--the executive, the legislative, and the judiciary. No one branch of government would possess enough power for itself to take complete command of the governmental apparatus.

Likewise, governmental power would be divided between two levels of government--the national level and the states. As Amendment X to the Constitution states,

The powers not delegated to the United States
by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people (U.S. Constitution, amend. 10).

Clearly, in this respect, the power of the national government is merely a delegation of power to it from the states and the people. More specifically, it is a power that rests upon the consent of the governed—the sovereignty of the people.

Constitutional Democracy

Where does this tangent on constitutionalism lead us with respect to finding some justification for the Supreme Court's exercise of judicial review? David Barnum believes it leads us back to questioning the validity of American democracy (Barnum, 1993, pp. 248-272). Can we truly say that the United States is a perfect example of majoritarian democracy? Barnum asserts that we cannot (pp. 248-272). Instead, we must categorize the United States as a constitutional democracy—a democracy that both respects majoritarianism and fears it (pp. 250-251). It is a democracy that is based upon a written Constitution—one that prescribes government powers and limits them (pp. 250-251). Indeed, it is a democracy premised upon a Madisonian ideal of democratic self-governance.

Madison and other framers supported the establishment of a representative democracy based
on principles of popular sovereignty and majority rule. At the same time, they insisted on the need for constitutional limits on governmental power and constitutional guarantees of individual rights. In the end, therefore, the democracy they envisioned was not exclusively majoritarian in its features. Rather, it was a constitutional democracy, that is, a democracy premised on the need to maintain a delicate balance between majority rule and minority rights (p. 251).

It is this aspect of American democracy that can be used as a defense for the Court's exercise of a judicial review power.

The Supreme Court and Constitutional Democracy

In order to effectively defend the Supreme Court's exercise of judicial review, we must return to Chief Justice Marshall's opinion in the Marbury vs. Madison case.

In his obiter dictum, Marshall begins by questioning whether or not "an act repugnant to the constitution can become the law of the land" (Fisher, 1990, p. 64).

The constitution is either a supreme paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it (pp. 64-65).

Marshall argues that a written constitution is designed to be "supreme" and "permanent" (p. 64). If it is not, and it can be changed at will, then written constitutions are nothing more than "absurd attempts, on the part
of the people, to limit a power in its own nature illimitable" (p. 65). Written constitutions, as Marshall reiterates, must be viewed as a "fundamental and paramount law"—a law that both establishes and limits government power (p. 65). As such, it is only obvious that "an act... repugnant to the Constitution is void" (p. 65).

Marshall places the duty to "expound and interpret" the meaning of the Constitution in the hands of the judiciary (p. 65). Indeed, "it is emphatically the province and duty of the judicial department to say what the law is" (p. 65). Clearly, if any "ordinary act" is in direct conflict with the Constitution's language, the Court, must out of necessity, rule in favor of the Constitution (pp. 64-65).

For support of his premise that the Court is obligated to uphold the meaning of the Constitution, Marshall turns to the Constitution itself.

Could it be the intention of those who gave this power to say that in using it the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? Ought the judges to close their eyes on the constitution, and only see the law? (p. 65).

Marshall believes that the language of the Constitution is "addressed especially to the courts" (p. 66). It is an outline which provides for the following:
(a) creation of government, (b) limits on government, and (c) rules of evidence (p. 66). In that respect, the legislature, nor any other department of government, can arbitrarily change the rules of the game. All "are bound by that instrument"—the Constitution (p. 66).

If the Constitution is to be accepted as "the supreme law of the land," then all laws must "be made in pursuance of the Constitution" (p. 66). Those laws that are not must of necessity be declared as unconstitutional by the Court. If the Court cannot possibly possess such a power, they why does the Constitution "direct the judges to take an oath to support it (p. 66).

Conclusion

The democracy envisioned by the framers to the Constitution was not a democracy based on pure majoritarian principles (Barnum, 1993, p. 258). Indeed, it was a democracy that attempted to find some balance between majority rule and minority rights (p. 258). Moreover, it was a democracy that sought to limit government power and to protect the individual's rights (p. 258). In that respect, it might be more accurate to refer to the American system of government as a constitutional democracy, not a majoritarian one (p. 258). The United States government is based upon and is limited
CHAPTER IV

RESTRAINTS ON THE SUPREME COURT'S POWER

Introduction

Since Marbury vs. Madison, the Supreme Court has exercised a "guardian" role to the American Constitution. In that role, the Court has been primarily responsible for insuring that the other political branches of the government adhere to the language found within the Constitution. As stipulated by Chief Justice John Marshall,

> If the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply (Fisher, 1990, p. 65)

Indeed, the language in the Constitution is general and vague; its language could mean several things to different people. "Freedom of speech," "unreasonable searches and seizures," "necessary and proper," and "due process of law" are incredibly broad phrases. Their scope could cover a wide spectrum of definitions. The Court must give meaning to this type of vague terminology, found within the Constitution, for it to be an effective tool of government. Certainly, the founding fathers gave us an elaborate framework of government,
but they left to succeeding generations the responsibility of bringing life to it. In that respect, the Court has played, and does play, a key role in defining constitutional law.

This role, however, has placed the Supreme Court in the midst of immense political controversy. Indeed, it has earned the Court the name "continuous constitutional convention" (Berger, 1977, p. 2). Anytime the Court interprets the Constitution, it must find some way for justification of its opinion. In many cases, that may require that the Court give new or revised definition to a broad constitutional clause. Indeed, there are several ways the Court can go about this task. It can examine, for instance, any of the following: (a) the text of the Constitution, (b) the original intent of the framers to the Constitution, (c) implicit premises or "tacit postulates" of the Constitution which order the relationship between the institutions of government and with the people, (d) legal precedent, (e) evidence on American traditions and practices, (f) evidence on contemporary morality and attitudes, and (g) considerations of practicality and prudence (Geel, 1991, p. 67).

Problems arise, however, when the Court's decisions appear as if there is really no clear justification for their conclusions. Raoul Berger argues, for
instance, that the Supreme Court has taken the Fourteenth Amendment and has dangerously distorted its original intent.

The Fourteenth Amendment is the case study par excellence of what Justice Harlan described as the Supreme Court's 'exercise of the amending power,' its continuing revision of the Constitution under the guise of interpretation (Berger, 1977, p. 1).

Obviously, at times, it is quite evident that the Court has gone beyond the Constitution for justification of its opinions. Indeed, Justice Douglas used some exquisite judicial craftsmanship when he cited, in Griswold vs. Connecticut (1965), that the "right to privacy" could be found within the "penumbras" or "shadows" of the First, Third, Fourth, Fifth, and Ninth Amendments and could be made applicable to the states through the guise of the Fourteenth Amendment (O'Brien, 1991, pp. 283 & 308-319). Undoubtedly, it is this type of judicial creativity that has brought the Court to the "storm centre" of political controversy (O'Brien, 1990, p. 13).

But, we must ask, is the Supreme Court truly deserving of these characterizations? Are we to assume, as a nation, that we have evolved into a "government by judiciary"? Has this "least dangerous branch" of government altered its own position in such a way as to become our most dangerous branch? Or, have we
inflated the dangers we believe to be apparent in the Supreme Court? Has, in fact, the Supreme Court only been doing what it was intended to do—interpret the Constitution?

Lest we forget, the Supreme Court is not the only institution of government. It is still part of a complex system of checks and balances. As such, there are numerous means, both within the Constitution and outside of it, by which the Court's power can be restrained. Undoubtedly, these "checks" can serve as a potential means by which society can retain majoritarian control over the Supreme Court's power.

Restraints on the Supreme Court's Power

Certainly, there are numerous restraints on the power of the Supreme Court (Barnum, 1993, pp. 194-195). Among these, are what David Barnum refers to as "informal" restraints on the Supreme Court's power and "formal" restraints on the Supreme Court's power (p. 197).

Informal Restraints

David Barnum defines informal restraints as "those methods of exerting pressure on the Court which are not explicitly or formally authorized by the Constitution" (p. 197). These include, for instance, both political reaction to the Court and public reaction
Political Reaction

Anytime the Supreme Court involves itself in controversial issues--abortion, school prayer, desegregation--it is more than likely that the Court will elicit some kind of a response--either positive or negative--from political leaders or the public (pp. 198-199).

The Court, throughout its history, has received its fair share of negative political criticism. Indeed, with respect to the other political branches of government, much of this criticism has come from the president himself.

For obvious reasons, the president's views on the Supreme Court may carry special weight. In 1937, President Roosevelt proposed to enlarge the Court to fifteen members. He recommended adding one justice to the Court for every sitting justice over the age of seventy. Defending his plan in a 'fireside chat' to the nation, Roosevelt said that 'we have . . . reached the point as a Nation where we must take action to save the Constitution from the Court and the Court from itself.' Sharpening his political rhetoric, Roosevelt went on to say that his plan to appoint additional justices to the Court would bring into the judicial system 'new and younger blood' and would 'save our National Constitution from hardening of the judicial arteries' (p. 198).

Although Roosevelt's Court-packing plan was later condemned as a "needless, futile, and utterly dangerous
abandonment of constitutional principle," it is evident that the Supreme Court, during the same year, "had become more accepting of New Deal programs" (Fisher, 1991, p. 542). As Roosevelt later asserted, "the old minority of 1935 and 1936 had become the majority of 1937--without a single new appointment of a justice" (p. 542). As Table 1 suggests, there have also been other occasions in American history in which a sitting president has come into conflict with the Court.

Table 1
Presidents in Conflict With the Supreme Court

<table>
<thead>
<tr>
<th>PRESIDENT</th>
<th>ISSUE</th>
<th>YEARS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Thomas Jefferson</td>
<td>Judicial review</td>
<td>1800s</td>
</tr>
<tr>
<td>Andrew Jackson</td>
<td>Bank (Fed) charter</td>
<td>1830s</td>
</tr>
<tr>
<td>Abraham Lincoln</td>
<td>Slavery</td>
<td>1860s</td>
</tr>
<tr>
<td>Franklin Roosevelt</td>
<td>New Deal programs</td>
<td>1930s</td>
</tr>
<tr>
<td>Dwight Eisenhower</td>
<td>Desegregation</td>
<td>1950s</td>
</tr>
<tr>
<td>Richard Nixon</td>
<td>Criminal Rights</td>
<td>1960s</td>
</tr>
</tbody>
</table>

Source: Barnum, David. THE SUPREME COURT AND AMERICAN DEMOCRACY. New York: St. Martin's Press, 1993, pp. 198 & 205

This is certainly not to say, however, that criticism of the Court has been limited to the Oval Office. Congressmen, senators, governors, civil rights leaders,
religious leaders, and even other judges have all at one time or another expressed their disappointment with a particular Supreme Court decision (Barnum, 1993, pp. 199-200). The point to be made is that we all live in a "free country"; "politicians and other influential citizens" have a right "to criticize the Supreme Court" (p. 198).

Public Reaction

As with political figures, the people can, likewise, become disillusioned over a Supreme Court decision. In many cases, they, too, can become "vocal" over what they perceive as an incorrect Supreme Court ruling. Certainly, in 1973, when the Supreme Court handed down its opinion for the Roe vs. Wade case, it ignited immense public outcry from those who were fundamentally opposed to abortion (pp. 200-201). The same can also be said in 1989 when the Court struck down a state anti-flag burning statute in the Texas vs. Johnson case (Baum, 1992, p. 137).

Accordingly, public reaction to the Court can take numerous "shapes." David Barnum cites at least four: (1) public reaction to Court decisions through opinion polls, (2) public demonstrations for or against Court decisions, (3) public intimidation of Court personnel, and (4) public resistance to Court decisions (Barnum,
The Effectiveness of Informal Restraints

The point to be made from these brief discussions of political and public reaction is that the Supreme Court does not operate in a "political vacuum." Indeed, it is susceptible to a wide array of criticism—both within government and outside of it. The effectiveness of this criticism, however, remains the only question. Are Supreme Court justices influenced by what other political leaders or the public have to say about its decisions?

Without a doubt, the Supreme Court "enjoys greater freedom from environmental pressures than do most other policy makers" (Baum, 1992, p. 135). Indeed, according to Lawrence Baum, the Court's apparent freedom from its "environment" has several sources:

The most important is the lifetime term, which reduces tremendously justices' dependence on public opinion and on other policy makers. Formal and practical constraints on interest group activity in the judiciary augment the Court's freedom. Finally, the Court's status as the highest judicial body eliminates the review by judicial superiors that limits the autonomy of lower courts (p. 136).

As to whether or not the Court is isolated to political or public influence, Baum continues,

But by no means is the Court completely insulated from the outside world. Indeed,
each element of the environment--public opinion, media, interest groups, Congress, president, other policy makers--exerts a meaningful influence on the Court. Collectively, they have a substantial impact on the Court's decisions (p. 136).

Public Opinion Illustrated: The War on Drugs

In 1986, Justice William Brennan was asked whether or not public opinion had any impact on Court decisions (p. 137). His response was, "None!" (p. 137). But is that true? His ideological counterpart, Chief Justice William Rehnquist asserted in the same year that,

Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs (p. 138).

Baum argues that the Supreme Court is not like most other policy makers in that it is not directly accountable to an electorate (p. 136). For instance, a legislator will attempt to act more in tune with his constituents' viewpoints so that he may serve them more "effectively" (p. 136). His objective is to please his constituency so that he can "maintain its support for future elections" (p. 136). Justices of the Court, on the other hand, do not represent any constituency (p. 136). Clearly, they "do not depend on public opinion to keep their positions" (p. 136). But, as Baum points out,
Still, justices might pay attention to public opinion simply because they want to be liked, and a few justices have been concerned about their popularity because they harbored political ambitions. More important, justices are concerned about public regard for the Court, because high regard can help to protect the Court in conflicts with other branches and increase people's willingness to carry out its decisions (p. 136).

Baum cites the current "war on drugs" effort as an example of what he believes to be a case par excellence of the Supreme Court seemingly aligning itself with public opinion. As society's concern over the drug issue intensifies, "the Court has shown a striking willingness to approve of government actions that are aimed at controlling illegal drugs" (p. 137).

1. In United States vs. Monsanto (1989), the Supreme Court ruled 5-4 that a federal statute providing for pretrial freezing and posttrial forfeiture of the proceeds from violations of the drug laws, including assets that a defendant sought to use for attorneys' fees, does not violate the Sixth Amendment right to counsel (p. 138).

2. In Employment Division vs. Smith (1990), the Supreme Court ruled 6-3 that an Oregon statute that prohibits the use of the drug peyote, when applied to its use in a ceremony of the Native American Church, does not violate the First Amendment's protection of the free exercise of religion (p. 138).
3. In Harmelin vs. Michigan (1991), the Supreme Court ruled 5-4 that a state law requiring a sentence of life imprisonment without the possibility of parole for possession of more than 650 grams of cocaine does violate the Eighth Amendment prohibition of cruel and unusual punishment (p. 138).

Baum argues that each of these cases serves as an example of a Court willing to limit an individual's civil liberties in an effort to "help attack what is widely viewed as a major national problem" (p. 137). In each of these cases, according to Baum, it is clear that the Court has aligned itself to public opinion.

Conclusion: Informal Restraints

In reality, however, how much do political and public opinion influence the Court's decisions? What impact, if any, do they have on the decision-making behavior of Supreme Court justices? Is there some empirical means by which we can measure a relationship between political and public opinion and Court decisions?

Lawrence Baum indicates that it is evident that the Court does sometimes align itself to political and public opinion. But he also asserts that these "instances are difficult to pinpoint" (p. 136). The Court was designed "to be an institution capable of withstanding political pressure" (Barnum, 1993, p. 201).
Indeed, there are numerous occasions throughout American history when the Court has "adopted highly unpopular policies"—pre-1937 New Deal decisions (Baum, 1992, p. 137). And, likewise, there are occasions in American history when the Court seems to exhibit a preference for political and public opinion in its decisions—post-1937 New Deal decisions. The fact is that we really are unsure as to how much both political and public opinion can influence the Supreme Court (Barnum, 1993, p. 201). It is probably safe to say that political and public opinion do influence the Court, but to what extent, who knows? (p. 201).

Formal Restraints

Formal restraints on the Supreme Court's power are those methods which "are more formal in nature" (p. 197). In that respect, these type of restraints are more likely to be found within the confines of the Constitution or to be implied by it. Formal restraints can be considered as part of our government's system of checks and balances; they are powers given to the president and to Congress by the Constitution which may be prescribed by them as "checks" against the Supreme Court's power.
Article II of the Constitution stipulates that the president "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Judges of the Supreme Court" (U.S. Constitution, art. 2, sec. 2). While the appointment power is not, in itself, a recognized restraint on the power of the Court, it can, nevertheless, "represent an effective way to keep the Court in line with the preferences of a majority of the American people" (Barnum, 1993, p. 220). In that respect, "the president's power to appoint Supreme Court Justices [can serve as] a viable strategy by which the political system can exert 'internal influence' on Supreme Court decision making" (p. 220).

The appointment of new justices to the Supreme Court is a highly politicized process. Indeed, justices on the Court, according to Article III, "shall hold their offices during good Behavior" (U.S. Constitution, art. 3, sec. 1). However, on historical analysis, "good behavior" simply translates into life tenure. Thus, any new appointment to the Court will remain on the high bench, in all likelihood, for the remainder of his life. In this regard, his legal viewpoints become matters of extreme political significance.

A president who has a desire to leave his imprint
on the Court will consider these legal viewpoints as criteria for recourse in his selection of a nominee to the Court. Hence, any nominee that he chooses for the Court will more than likely share with himself a similar ideological orientation. Obviously, when President Roosevelt had an opportunity to nominate his first justice to the Court in 1937, he was looking for somebody who shared with himself a similar viewpoint on national economic policy--the New Deal. As Table 2 suggests, this has, historically, been a common practice.

Table 2
Federal Judicial Appointments With Same Party Affiliation as the President, 1888-1985

<table>
<thead>
<tr>
<th>PRESIDENT</th>
<th>PARTY</th>
<th>PERCENTAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cleveland</td>
<td>Democrat</td>
<td>97.3</td>
</tr>
<tr>
<td>B. Harrison</td>
<td>Republican</td>
<td>87.9</td>
</tr>
<tr>
<td>McKinley</td>
<td>Republican</td>
<td>95.7</td>
</tr>
<tr>
<td>T. Roosevelt</td>
<td>Republican</td>
<td>95.8</td>
</tr>
<tr>
<td>Taft</td>
<td>Republican</td>
<td>82.2</td>
</tr>
<tr>
<td>Wilson</td>
<td>Democrat</td>
<td>98.6</td>
</tr>
<tr>
<td>Harding</td>
<td>Republican</td>
<td>97.7</td>
</tr>
<tr>
<td>Coolidge</td>
<td>Republican</td>
<td>94.1</td>
</tr>
<tr>
<td>Hoover</td>
<td>Republican</td>
<td>85.7</td>
</tr>
<tr>
<td>F. D. Roosevelt</td>
<td>Democrat</td>
<td>96.4</td>
</tr>
<tr>
<td>Truman</td>
<td>Democrat</td>
<td>90.1</td>
</tr>
</tbody>
</table>
The Senate, too, can play an important role in shaping the ideological perspective of the Court. Undoubtedly, while the president may select a nominee for the Court, it is the Senate that must give final confirmation to his choice (by a majority vote). Historically, the Senate has, for the most part, been rather consonant to most of the presidents' choices for the high bench. This is certainly not to say, however, as clearly indicated in Table 3, that the Senate has never been reluctant to exercise its constitutional prerogative to reject a president's nominee. Indeed, since 1789, out of a total of 147 nominations to the Supreme Court, 28 have failed to gain Senate confirmation.
Table 3

Supreme Court Nominations Rejected, Postponed, or Withdrawn Because of Senate Opposition

<table>
<thead>
<tr>
<th>NOMINEE</th>
<th>YEAR</th>
<th>NOMINATED BY</th>
<th>ACTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>William Paterson</td>
<td>1793</td>
<td>Washington</td>
<td>Withdrawn</td>
</tr>
<tr>
<td>John Rutledge</td>
<td>1795</td>
<td>Washington</td>
<td>Rejected</td>
</tr>
<tr>
<td>Alexander Wolcott</td>
<td>1811</td>
<td>Madison</td>
<td>Rejected</td>
</tr>
<tr>
<td>John Crittenden</td>
<td>1828</td>
<td>J.Q. Adams</td>
<td>Postponed</td>
</tr>
<tr>
<td>Roger Taney</td>
<td>1835</td>
<td>Jackson</td>
<td>Postponed</td>
</tr>
<tr>
<td>John Spencer</td>
<td>1844</td>
<td>Tyler</td>
<td>Rejected</td>
</tr>
<tr>
<td>Reuben Walworth</td>
<td>1844</td>
<td>Tyler</td>
<td>Withdrawn</td>
</tr>
<tr>
<td>Edward King</td>
<td>1844</td>
<td>Tyler</td>
<td>Postponed</td>
</tr>
<tr>
<td>Edward King</td>
<td>1844</td>
<td>Tyler</td>
<td>Withdrawn</td>
</tr>
<tr>
<td>John Read</td>
<td>1845</td>
<td>Tyler</td>
<td>No Action</td>
</tr>
<tr>
<td>George Woodward</td>
<td>1845</td>
<td>Polk</td>
<td>Rejected</td>
</tr>
<tr>
<td>Edward Bradford</td>
<td>1852</td>
<td>Fillmore</td>
<td>No Action</td>
</tr>
<tr>
<td>George Badger</td>
<td>1853</td>
<td>Fillmore</td>
<td>Postponed</td>
</tr>
<tr>
<td>William Micou</td>
<td>1853</td>
<td>Fillmore</td>
<td>No Action</td>
</tr>
<tr>
<td>Jeremiah Black</td>
<td>1861</td>
<td>Buchanan</td>
<td>Rejected</td>
</tr>
<tr>
<td>Henry Stanbery</td>
<td>1866</td>
<td>Johnson</td>
<td>No Action</td>
</tr>
<tr>
<td>Ebenezer Hoar</td>
<td>1869</td>
<td>Grant</td>
<td>Rejected</td>
</tr>
<tr>
<td>George Williams</td>
<td>1873</td>
<td>Grant</td>
<td>Withdrawn</td>
</tr>
<tr>
<td>Caleb Cushing</td>
<td>1874</td>
<td>Grant</td>
<td>Withdrawn</td>
</tr>
<tr>
<td>Stanley Matthews</td>
<td>1881</td>
<td>Hayes</td>
<td>No Action</td>
</tr>
</tbody>
</table>
Table 3--Continued

<table>
<thead>
<tr>
<th>NOMINEE</th>
<th>YEAR</th>
<th>NOMINATED BY</th>
<th>ACTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>William Hornblower</td>
<td>1893</td>
<td>Cleveland</td>
<td>Rejected</td>
</tr>
<tr>
<td>Wheeler Peckham</td>
<td>1894</td>
<td>Cleveland</td>
<td>Rejected</td>
</tr>
<tr>
<td>John Parker</td>
<td>1930</td>
<td>Hoover</td>
<td>Rejected</td>
</tr>
<tr>
<td>Abe Fortas</td>
<td>1968</td>
<td>Johnson</td>
<td>Withdrawn</td>
</tr>
<tr>
<td>Homer Thornberry</td>
<td>1968</td>
<td>Johnson</td>
<td>No Action</td>
</tr>
<tr>
<td>Clement Haynsworth</td>
<td>1969</td>
<td>Nixon</td>
<td>Rejected</td>
</tr>
<tr>
<td>G. Harrold Carswell</td>
<td>1970</td>
<td>Nixon</td>
<td>Rejected</td>
</tr>
<tr>
<td>Robert Bork</td>
<td>1987</td>
<td>Reagan</td>
<td>Rejected</td>
</tr>
<tr>
<td>Douglas Ginsburg</td>
<td>1987</td>
<td>Reagan</td>
<td>Withdrawn</td>
</tr>
</tbody>
</table>


Without a doubt, the appointment process can be, and has been, used as a means to "control or reshape" the political orientation of the Supreme Court (Barnum, 1993, p. 244). As such, anytime a president can appoint a new justice to the Court, it is an opportunity for him to influence the internal political make-up of the Court. As stipulated by David Barnum,

Overall, presidents have been successful about 75 percent of the time in selecting justices who continue, during their tenure on the Court, to reflect the president's views. A president who is careful in selecting justices and makes ideological compatibility a principal criterion for selection can practically guarantee that his
Court ruled that a state could be sued in federal court by a plaintiff from another state. Its decision, however, was overruled by Amendment XI (1795) to the Constitution which stated that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign States" (U.S. Constitution, amend. 11).

2. In Dred Scott vs. Sandford (1857), the Supreme Court ruled that blacks as a class were not citizens protected under the Constitution. Its decision was overruled by Amendment XIV (1868) to the Constitution which stated that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside" (U.S. Constitution, amend. 14, sec. 1).

3. In Pollock vs. Farmers' Loan and Trust Co. (1895), the Supreme Court ruled that a federal income tax was unconstitutional. However, its decision was overruled by Amendment XVI (1913) to the Constitution which stated that "The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration" (U.S.
4. In Oregon vs. Mitchell (1970), the Supreme Court ruled that Congress did not possess the constitutional power to lower the minimum voting age in state elections to eighteen. Its decision was overruled by Amendment XXVI (1971) to the Constitution which stated that "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age" (U.S. Constitution, amend. 26, sec. 1).

There have, of course, been several other attempts to amend the Constitution in an effort to override Supreme Court constitutional decisions. But these efforts, however, have not met with similar success.

Court Packing

Nowhere within the Constitution does it give a specific indication as to the number of justices that should sit on the Supreme Court. Indeed, "the Constitution says nothing about the size of the Supreme Court" whatsoever (Barnum, 1993, p. 202). As a result, throughout the Supreme Court's history, it has been either the president or the Congress which have been responsible for setting the number of Court justices (p. 202). This number, of course, has ranged anywhere from as
low as five justices to as high as ten justices. In 1869, however, Congress set the number of Court justices at nine; it has remained that number ever since (p. 202).

The most notorious attempt in American history to change the Court's size for political reasons was President Roosevelt's infamous Court-packing plan in 1937. Faced with a Court whose laissez-faire views were adamantly against any of his New Deal policies, President Roosevelt believed he had no other option than to "pack" the Court with more accepting justices.

President Roosevelt's plan stipulated that he would be authorized to appoint a new justice for every sitting justice that was over the age of 70; the Court, however, would be limited to a maximum of 15 justices. Given this, President Roosevelt would most assuredly be allowed to appoint at least six new justices to the Court--six new justices who were likely to be supportive of his New Deal. As a disguise for his real intent, President Roosevelt asserted that the "additional justices would help relieve the delay and congestion that resulted from aged or infirm judges" (Fisher, 1990, p. 541). His plan would serve as a means to help these elderly justices complete their workload in a timely fashion.

In its examination of his Court-packing bill,
however, the Senate Judiciary Committee was not completely taken in by President Roosevelt's "helping-hand" argument. Indeed, it viewed his plan as nothing more than contemptible. It was clear to the committee that President Roosevelt's ultimate objective was nothing more than an underhanded effort to "apply force to the judiciary" (p. 542). The bill, the committee asserted, was "needless, futile, and utterly dangerous" (p. 542). In its final report, the committee used excessively harsh language so as to insure "that [a] parallel [to Roosevelt's Court-packing plan would] never again be presented to the free representatives of the free people of America" (p. 542). As Louis Fisher points out,

Its report methodically and mercilessly [shredded] the bill's premises, structure, content, and motivation. This searing indictment constituted an extraordinary determination on the part of the committee to pulverize Roosevelt's creation and bury it forever (p. 541).

This objective, the Senate Judiciary Committee succeeded in doing quite well.

Response to Decisions: Statutory

Anytime Congress passes legislation, its subject matter is potentially open to Supreme Court review. While the Supreme Court, in most cases, will attempt to adhere to the legislation's actual intent, there are those instances when its interpretation of that
legislation might differ with what Congress originally intended. Lawrence Baum argues that when this happens,

If an effective majority in Congress disagrees with the Court's interpretation of a provision, that provision simply can be changed in new legislation to overcome the Court's interpretation (Baum, 1992, p. 230).

But as Baum continues, "most of the Court's statutory decisions arouse little notice or controversy in Congress" (p. 230). This is certainly not to say, however, that Supreme Court statutory decisions always go unnoticed. There are times when members of Congress do attempt to override such rulings.


2. The Veterans Benefits and Programs Improvement Act of 1988 overturned Traynor vs. Turnage (1988) by declaring that the disabling effects of chronic alcoholism are not the result of willful misconduct for purposes of determining eligibility for veterans' benefits (p. 230).

3. The Anti-Drug Abuse Act of 1988 overturned McNally vs. United States (1987) by holding that a "scheme or artifice to defraud" under the mail fraud statute includes defrauding people and governments of
the intangible right to honest public services (p. 230).

4. The Federal Courts Study Committee Implementation Act of 1990 overturned Finley vs. United States (1989) by giving the federal courts broader power to hear claims under state law that are related to claims that fall under federal jurisdiction (p. 230).


These attempts, nevertheless, for the most part fail (p. 230). Indeed, as Baum asserts, "a great majority of the Court's statutory decisions are left standing" (p. 230). He points out, for instance, that between 1950 and 1972, out of 222 decisions in labor and antitrust law, Congress was only able to successfully overturn nine (p. 230). In another study, between 1968 and 1988, Baum points out that only 33 statutory decisions were overruled successfully, "only a fraction of the bills introduced for that purpose" (p. 230). Still yet, Baum argues that "Congress does intervene often enough to play a significant role in reshaping the Court's interpretations of statutes (p. 230).

Response to Decisions: Constitutional

As stipulated earlier, the Supreme Court is the
final arbiter in matters of constitutional interpretation. Short of amending the Constitution, there would appear to be very little Congress or the president could do with respect to overriding Supreme Court constitutional decisions. But as David Barnum asserts, "in the real world of constitutional politics, nothing is quite that simple" (Barnum, 1993, p. 209). He stipulates that there are "a number of purely legislative options for at least circumventing, if not reversing, the Court's constitutional decisions" (p. 209). These include:

1. Nothing in the Constitution prevents Congress from going further than the Court in protecting rights.

2. The Court itself can invite Congress to adopt legislation that overcomes a particular constitutional problem identified by the Court (pp. 209-210).

Certainly, whenever the Supreme Court hands down a constitutional decision, it must, often times, provide parameters for what it believes are the protections granted to us in the Constitution. However, nothing in the Constitution stipulates that Congress [or the states] are limited to these protections. Obviously, Congress cannot pass legislation that falls short of these protections, but it can, if it wishes, pass legislation that goes beyond them. As such, "Congress may pass legislation protecting individual rights, even though the Court has concluded that the Constitution
itself does not do so" (p. 209). For instance, in 1978, the Supreme Court ruled in Zurcher vs. Stanford Daily that "the Fourth Amendment did not prevent the police from searching a newspaper office provided they were armed with a search warrant" (p. 209). However, Congress, in 1980, passed a statute which provided that the police could, in most instances, "proceed on the basis of a subpoena" (p. 209). As opposed to a search warrant, Congress believed that a subpoena would provide the newspaper "an opportunity to challenge the validity of the search before rather than after it [had] occurred" (p. 209).

Often times, whenever the Supreme Court makes a decision, it may, in its opinion, encourage Congress [or the states] to pass legislation that corrects "the particular constitutional problems identified by the Court" (p. 209). This is clearly evident in the Furman vs. Georgia case (1972) in which the Supreme Court declared that capital punishment was in violation of the Eighth and Fourteenth Amendments to the Constitution. However, in its opinion, the Court was sharply divided. In fact, "the opinion announcing the Court's decision was a brief per curiam opinion followed by 231 pages of separate opinions filed by all nine justices" (O'Brien, 1991, p. 1075). Nevertheless, Justice Potter Stewart, in his plurality opinion, stipulated that "if
states could reduce the capriciousness with which the
depth penalty was actually imposed, he and other members
of the Court might be disposed to reconsider their deci-
sion" (Barnum, 1993, p. 209). This they did, in the
1976 case of Gregg vs. Georgia in which the Court ruled
that capital punishment was constitutional (p. 209).

As these two examples suggest, Congress [or the
states] can, if they wish, "[reverse] a Supreme Court
decision with which they disagree" (p. 210). Clearly,
in neither case, did Congress [or the states] have to
resort to the cumbersome process of amending the Consti-
tution. They were both able to circumvent a Supreme
Court decision merely by statutory means.

Withdrawing Jurisdiction

Article III of the Constitution asserts that "the
supreme Court shall have appellate Jurisdiction, both
as to Law and Fact, with such Exceptions, and under
such Regulations as the Congress shall make" (U.S. Con-
stitution, art. 3, sec. 2). It is the Exceptions Clause
that gives Congress the "plenary" power over the Court's

However, it must be noted, as stipulated by Louis
Fisher, that this power is not absolute (p. 543). In-
deed, "the Exceptions Clause must be read in concert
with other provisions in the Constitution" (p. 543).
Certainly, "the mere existence of a power does not mean that it may be used without limit" (p. 546). When Congress constructs exceptions to the Court's jurisdiction, it must give "due regard to all provisions of the Constitution"--an independent judiciary, the Supremacy Clause, and the constitutional rights available to citizens (pp. 545-546). While the Constitution "may give [Congress the power to] withhold or restrict such jurisdiction at its discretion, [it may only do so] provided it be not extended beyond the boundaries fixed by the Constitution" (p. 545).

The most infamous, and the only successful, case that involves the Congress tampering with the Supreme Court's jurisdiction is the Ex parte McCardle case (1869). The case falls during the aftermath of the Civil War. Fearing that the Supreme Court might become involved in deciding the constitutionality of post-Civil War Reconstruction legislation, Congress, in 1868, decided to repeal an 1867 act which granted to the Supreme Court the jurisdiction to hear appeals from circuit courts on matters of habeas corpus (p. 544). Although the Court was already in the midst of deciding a case (William McCardle) on habeas corpus grounds, it yielded to Congress' new act. In its opinion, written by Chief Justice Chase, the Court stated that it was,

not at liberty to inquire into the motives
of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words (pp. 544-545).

The Supreme Court, in effect, dismissed the case on grounds that it no longer had jurisdiction over the matter (p. 545).

Indeed, the Ex parte Mccardle case serves as the only example in American history in which Congress was successful at limiting the Court's jurisdiction. There have been other attempts, but they have failed largely because of the controversy over whether or not it is actually constitutional for Congress to restrict the Court's jurisdiction (Barnum, 1993, p. 211). As David Barnum asserts,

The issue is not whether Congress possesses the basis power to make exceptions to the appellate jurisdiction of the Supreme Court, but whether there are any limits on that power, and if so, what are they (p. 211).

In 1981 and 1982, nearly 30 bills were introduced to curtail the federal court system of appellate jurisdiction; none of them were successfully passed (p. 212). In 1990, Congress (Senate) attempted to limit the Court's jurisdiction over flag desecration cases; it, likewise, failed--90 to 10 (Baum, 1992, p. 234).

Conclusion: Formal Restraints

The Constitution of the United States provides
for a system of checks and balances between the three branches of government. Each branch--Congress, president, Supreme Court--possesses a wide array of powers that it can use to "check" or "curb" the power of the other two branches of government. Here, the concern is over whether or not the Supreme Court and its power of judicial review are adequately "checked" by the presidency and Congress. Certainly, the Constitution "formally" gives to the president and to Congress numerous powers they both can use to "check" the Supreme Court. But the question remains, just how successful are they both at implementing those powers against the Court?

We might begin by saying that the conclusions are mixed. Certainly, whenever the Congress and the president have been successful in implementing their power, they have both been able to restrain the Court. Congress was successful when it was able to overturn the Supreme Court's constitutional decisions by passing the Eleventh, Fourteenth, Sixteenth, and Twenty-sixth Amendments. It was, likewise, successful in restricting the Court's appellate jurisdiction in the Ex parte McCordle case (1869). President Ulysses Grant was successful in getting the Legal Tender Cases through the Supreme Court when Congress authorized that he could appoint an extra justice to the Court--raising it up to nine (Fisher,
1990, p. 540). President Franklin Roosevelt, too, was successful when he was able to recompose the Court (following several retirements after 1937) with new justices who were more favorable to his New Deal policies.

As these examples suggest, there have been successful attempts to restrain or influence the Supreme Court's power. But as history also suggests, the failed attempts to do so have far out numbered the successful ones. Congress and the president both possess an array of constitutional measures they can use to restrain, reverse, or influence the Supreme Court (Barnum, 1993, p. 214). Nevertheless, as David Barnum asserts, "what is perhaps as remarkable as the number and diversity of these options, is the infrequency with which they have been used successfully" (p. 214).
CHAPTER V

CONCLUSION: THE SUPREME COURT IN PERSPECTIVE

Introduction

Since Marbury vs. Madison, the Supreme Court has exercised the role as "guardian" to the American Constitution. Holding that the other institutions of government--Congress, presidency, states--are accountable to the Constitution, the Supreme Court has insured that Constitution has remained "the supreme Law of the Land" (U.S. Constitution, art. 6). As Chief Justice John Marshall reiterates,

If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply (Fisher, 1990, p. 65).

Indeed, it is this principle that has guided the Supreme Court in its numerous deliberations on constitutional issues. Through its use of judicial review, the Supreme Court has insured that the supremacy of the Constitution is upheld and that all "law[s] repugnant to [it are] void" (p. 66).

Since Marbury vs. Madison, the Supreme Court has, likewise, been the focus of a great deal of political
controversy in American politics. Much of this controversy has focused primarily on the fact that justices of the Court are not directly accountable to the American people. They are nominated by the president, confirmed by the Senate, and seated on the Court for what amounts, in most cases, as life tenure. They appear as if they are, in effect, isolated to political accountability. Yet, at the same time, they hold enormous power within America's democratic framework of government. Together, these justices serve as "guardian" and "protector" of the American Constitution. Necessarily, any law they find repugnant to the American Constitution is unconstitutional, even though that law was passed by a majority of the people's representatives—representatives that were, for all intents and purposes, directly elected by the people.

Given this, how can we justify the Supreme Court's role within American government? How is it that a non-elected body of jurists holds democratically elected institutions of government accountable? Have we evolved into what Raoul Berger refers to as a "government by judiciary"? Are there no restraints on the power of the Court?

These are questions that have been asked and, for the most part, answered throughout the course of this thesis. The purpose here is not to rehash them over
again but to put them into some kind of an understandable perspective—one that justifies the existence of the Supreme Court and its use of a judicial review power.

The two fundamental arguments I raise in support of the Supreme Court and a judicial review power are:

1. The United States cannot be considered a pure majoritarian democracy; rather, it is a constitutional democracy. A constitutional democracy implies limits on the powers of government. It, likewise, provides for the protection of the rights of the individual—the minority against the tyranny of the majority. This clearly leaves the Supreme Court a role as "protector" of the countermajoritarian provisions of the Constitution.

2. The United States cannot be accurately characterized as a "government by judiciary." Indeed, there are numerous means, both within the Constitution and outside of it, by which the Court's power can be influenced or restrained.

Constitutional Democracy

To argue that the United States is a pristine example of a majoritarian democracy would be to argue in error. Indeed, the United States is a democracy, but it is not one based on pure majoritarian principles (Barnum, 1993, p. 258). Instead, it is a democracy
that is based upon the premise that absolute power corrupts. Certainly, the framers to the Constitution understood the necessity of majority rule; they, likewise, understood the tyranny that could evolve from it. As such, the democracy they envisioned would be one that balanced majority rule with minority rights (p. 258). Moreover, their democracy would seek to limit government power and, at the same time, to protect the individual's rights (p. 258). In that respect, it might be more plausible to refer to American government not as a majoritarian democracy, in its purest sense, but as a constitutional democracy--a democracy with limitations.

The United States government is based upon and is limited by a Constitution. It is a Constitution which creates a working framework of government, provides it with powers as well as limits, and embodies a series of individual protections. Indeed, it is a Constitution which adheres to both principles of majoritarianism and countermajoritarianism (p. 254). Since Marbury vs. Madison (1803), it has been the duty of the Supreme Court to uphold the supremacy of the Constitution. The Supreme Court, through its use of judicial review, has held primary responsibility for holding government in conformity to the language found within the Constitution (p. 259). As Chief Justice Marshall wrote in
Marbury vs. Madison, "it is emphatically the province and duty of the judicial department to say what the law is" (Fisher, 1990, p. 65). Clearly, if any law is in clear conflict with the Constitution, it is "the province and duty" of the Supreme Court to declare it void (p. 65).

Given this, if we are to accept that the United States is premised upon limited government and limited democracy, it is only reasonable we conclude that the Supreme Court must possess some inherent right to a judicial reviewing power. A constitution implies limits and those limits, accordingly, "can only be preserved through the medium of judicial review" (Agresto, 1984, p. 65). As Alexander Hamilton argued in Federalist No. 78, "all the reservations of particular rights or privileges would amount to nothing" without judicial review (Fisher, 1990, p. 59).

Restraints or Influences on the Supreme Court

Certainly, there are numerous means, within the Constitution and outside of it, by which the Supreme Court's power can be either restrained or influenced. Some of these means are more informal in nature--political and public reaction to Court decisions--while others are more formal--appointment of new justices to the Court, amending the Constitution to override Court
constitutional rulings, and withdrawal of Court appellate jurisdiction. Each one of these restraints or influences can serve as a formidable Court-curbing measure when successfully implemented. However, as already acknowledged, on historical analysis, the success in using any of these "tools" to restrain or influence the Court has been mixed.

We are quite certain that the Supreme Court is influenced by both political and public reaction to its decisions; however, to what extent, we are unsure. As Lawrence Baum argues,

[The Supreme Court does] enjoy greater freedom from environmental pressures than do most other policy makers. But by no means is [it] completely insulated from the outside world (Baum, 1992, pp. 135-136).

The Supreme Court does not operate inside of a political vacuum. Certainly, it is susceptible to both political and public criticism of its decisions. The problem arises, however, as Baum asserts, in the fact that these "instances are difficult to pinpoint" (p. 136).

Probably, the most effective tool used to influence the Court, we can argue, is the appointment process. Anytime a president can appoint a new justice to the Supreme Court, it is an opportunity for him to influence the internal make-up of the Court. As David Barnum stipulates,

Overall, presidents have been successful
about 75 percent of the time in selecting justices who continue, during their tenure on the Court, to reflect the president's views (Barnum, 1993, p. 244).

With respect to the use of the appointment process as a means to retain majoritarian control over the Supreme Court, David Barnum cites Robert Dahl,

National politics in the United States is dominated by relatively cohesive alliances that endure for long periods of time. Except for short-lived transitional periods when the old alliance is disintegrating and [a] new one is struggling to take control of political institutions, the Supreme Court is inevitably a part of the dominant national alliance. As an element in the political leadership of the dominant alliance, the Court of course supports the major policies of the alliance (p. 308).

As such, while the appointment process might be "tortuous and indirect," it does "constitute a discernible mechanism by which the [people] can influence the course of Supreme Court decision making" (p. 308).

With respect to the actual restraints on the power of the Court, we can truthfully argue that the failures do far outweigh the successes. Congress has only four times overridden Supreme Court constitutional decisions by means of the amendment process. It has, likewise, only been successful once in withdrawing the Court's appellate jurisdiction to hear particular cases. What explains this lack of success on the part of Congress to challenge the Supreme Court's power? David Barnum believes that the problem can be explained in three
ways:

1. Congress faces a genuine dilemma in trying to decide which mechanism to use to challenge the Court.

2. The distribution of political and ideological forces in American politics.

3. There is a discrepancy between the values of ordinary citizens and those held by particular subgroups in the population (pp. 306-307).

While David Barnum does acknowledge that the success of Congress "in challenging the Supreme Court is [clearly] open to different interpretations," he is still disposed to conclude that,

Apart from isolated instances, Congress has not successfully invoked any of the various weapons at its disposal for imposing external restraints on the Court (p. 307).

Observations

From this, can we successfully argue that we have evolved into a government by judiciary? We must remember that while the Supreme Court, on its surface, appears to be an institution that is politically isolated, it is not. It must depend for the enforcement of its decisions upon the consent and cooperation of the other institutions of government--most notably, the president and Congress. As Alexander Hamilton wrote in Federalist No. 78,
The Judiciary has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE NOR WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments (Fisher, 1990, p. 59).

As such, institutionally, without the support of the president or Congress, the Supreme Court could truly be said to be the "least dangerous branch" of government.

Moreover, the Supreme Court must ultimately depend for the enforcement of its decisions upon the consent and cooperation of the governed--the people. As President Abraham Lincoln once said, we are a government "of the people, by the people, and for the people" (Garraty, 1989, p. 71). Without the support of the people, the Supreme Court would not only be the "least dangerous branch" of government, it could not fundamentally survive.
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