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*How Public Opinion Has Influenced  
the Supreme Court  
and Shaped the Meaning  
of the Constitution*

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## INTRODUCTION

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*"[T]o decide upon the meaning of the constitution"*

In the first half of the 1930s, the American people faced two seemingly intractable problems. The first was the Great Depression, the country's worst-ever economic downturn. Desperate for a leader, if not a savior, the people elected Franklin Roosevelt President and gave him a strong Democratic majority in Congress. Following Roosevelt's inauguration, Congress began adopting New Deal measures with alacrity; the pace of legislation was simply breathtaking. Many today dispute how effective these measures ultimately were, but at the time, Roosevelt's program offered something people sorely needed: hope.

The second problem was the Supreme Court. In case after stunning case the justices struck down New Deal legislation, ruling that it violated the Constitution. To Roosevelt and the millions who supported him, the Supreme Court's persistent veto was an unfathomable breach of the democratic principle: that the will of the people should govern.

In the winter of 1937, Roosevelt struck back at the Court. Fresh from a landslide victory that *The New York Times* dubbed "a political Johnstown flood," Roosevelt determined that the justices would no longer stand in the way of his popular agenda.<sup>1</sup> He asked Congress to give him the power to add an additional appointee to the Court for every justice over the age of seventy who refused to retire. Should the elderly and recalcitrant justices not yield, Roosevelt planned to "pack" the Court with as many as six new members of his choosing.

For five anxious months, the question of whether or not Congress should approve Roosevelt's dramatic plan gripped the country. In the very thick of it *Newsweek* reported that "state legislators, public officials, editors, and millions of plain John Does had joined in a furious debate." Gallup polling, still in a relatively primitive state, showed voters shifting to and fro in response to the latest development. "Street-corner discussions, arguments at restaurant tables, a seemingly endless stream of radio addresses and newspaper reports, protracted hearings before the Senate Judiciary Committee and animated congressional debates" convinced Merlo Pusey, a prominent historian and editorialist who chronicled the fight and went on to write the Chief Justice's biography, that "our national conscience has been deeply stirred."<sup>2</sup>

How Congress voted on Roosevelt's plan would say much about the future of the Supreme Court. But it would say far more about the American people and the sort of government they preferred. To hear it told, they faced a stark choice: either demand the triumph of the popular will and approve FDR's proposal to subjugate the Court, or insist that even a democratic government must operate within the limits of the Constitution and reject the plan.

As it happened, the country and the Court found a way out of the seeming dilemma, a solution that has influenced the nature of American government ever since. Congress rejected Roosevelt's plan. But it did so only after the Court signaled its capitulation and began to approve New Deal measures, at which point public opinion turned squarely against the plan. In effect, a tacit deal was reached: the American people would grant the justices their power, so long as the Supreme Court's interpretation of the Constitution did not stray too far from what a majority of the people believed it should be. For the most part, this deal has stuck.

Roosevelt's attack on the Court was brazen, but it was only one of many that have occurred throughout the nation's life. What follows is the chronicle of the relationship between the popular will and the Supreme Court as it unfolded over two hundred-plus years of American history. It reveals how the Supreme Court went from being an institution intended to check the popular will to one that frequently confirms it. And it explains that this occurred as the American people gradually came to understand and then to shape the role played by the justices, thus defining the terms of their own constitutional democracy.

#### JUDICIAL REVIEW AND DEMOCRACY

The specific target of Roosevelt's ire was the power of judicial review, the practice by which courts, and particularly the Supreme Court, determine whether

government actions are consistent with the Constitution. In American life, the Constitution reigns supreme. Exercising judicial review, courts have the power to strike down even congressional statutes and acts of the President when they are found out of keeping with constitutional standards.

Throughout history, the chief complaint against judicial review has been that it interferes with the right of the people to govern themselves. After the Supreme Court struck down yet another New Deal measure in 1936, the *New York Daily News*, the country's first tabloid, with a circulation at the time of well over one million, thundered: "We do not see how old judicial gentlemen . . . can forever be permitted to override the will of the people as expressed through the people's own elected Legislatures, Congress and President."<sup>3</sup> A union official, expressing support for Roosevelt's plan, explained the problem: "Unless all branches of our national government are made responsive to changing conditions and thereby truly democratic, popular elections are turned into a farce. The judiciary is no exception."<sup>4</sup> The President, the members of Congress, and the states' chief executives and legislators all are accountable to the people through regular elections. Not so the justices of the Supreme Court, who are appointed (not elected) and who—short of removal by impeachment, which has never happened—serve for life. Yet when the justices base a ruling on the Constitution, the country must live with that decision unless and until the Court reverses itself or the rare constitutional amendment is adopted. There is no overriding the Court otherwise.

This extraordinary power was a rather uniquely American innovation, emerging without plan or design in the period prior to the Constitutional Convention as a means of checking the excesses of democracy.<sup>5</sup> In the years following independence, increasing numbers of Americans watched with apprehension as legislative assemblies trampled fundamental rights. Gradually, almost imperceptibly, judges answered the call of lawyers to refuse to enforce such laws on the ground that they were "repugnant to" the state constitutions. Then the framers of the United States Constitution adopted the innovation of judicial review to solve a problem of their own: how to ensure that the state governments followed national authority. James Madison, one of our most revered founders, suggested that Congress have a veto over every state law, but few of his colleagues were willing to go that far. Instead, they left it to the judges to decide if particular state laws (and perhaps federal laws as well) conflicted with national authority, and in particular with the Constitution.

Although few in the early days of American democracy recognized the full potential of judicial review, some who did were alarmed. As the struggle over ratification of the Constitution entered its most heated days, the Anti-

Federalist (i.e., anti-ratification) pamphleteer “Brutus” weighed in, expressing grave concern about the proposed federal judiciary. He thought it almost unimaginable to give judges the power “to decide upon the meaning of the constitution.”<sup>6</sup> Brutus pointed to Great Britain, where “I believe [the judges] in no instance assume the authority to set aside an act of parliament under the idea that it is inconsistent with their constitution.” Brutus reminded his readers that the judges possessing this extraordinary authority “cannot be removed from office or suffer a diminution of their salaries.” “The supreme court under this constitution,” Brutus predicted—some would say quite accurately—“would be exalted above all other power in the government, and subject to no control.” No fewer than four times he intoned: “[T]here is no power above them.”<sup>7</sup>

When Roosevelt defended his Court-packing plan, he joined hands across the ages with Brutus in condemning the Supreme Court’s unaccountability to the popular will. Devoting one of his legendary fireside chats to the plan, Roosevelt described American government as a “three horse team provided by the Constitution to the American people so that their field might be plowed. . . . Two of the horses [the Congress and the executive] are pulling in unison today; the third is not.” Roosevelt stressed that this was not as it should be: “It is the American people themselves who are in the driver’s seat. It is the American people themselves who want the furrow plowed. It is the American people themselves who expect the third horse to pull in unison with the other two.”<sup>8</sup> Many at the time were of like mind.

These sorts of challenges to the Supreme Court’s power should sound extremely familiar. Throughout the course of American history, many of the United States’ most revered public figures have expressed similar sentiments. Like Roosevelt and his followers in the 1930s, Thomas Jefferson, Abraham Lincoln, and Theodore Roosevelt before them all struggled with the judiciary, and all said essentially the same.<sup>9</sup> Jefferson, who fought history’s first great battle against the Court, complained that “our judges are effectually independent of the nation.”<sup>10</sup> In its notorious 1857 decision, in *Dred Scott v. Sandford*, the Supreme Court denied Congress had the constitutional authority to resolve the question of slavery in the territories. Lincoln responded: “[I]f the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court . . . the people will have ceased, to be their own rulers.”<sup>11</sup> In his 1912 third-party bid for the presidency, Theodore Roosevelt concurred: “The American people and not the courts are to determine their own fundamental policies.”<sup>12</sup>

The current mantra against “activist judges” is simply the latest incarnation of this persistent complaint about judicial accountability. If anything is

new today, it is only that, for the first time in American history, the Supreme Court's power of judicial review has come under siege simultaneously from both sides of the ideological spectrum.<sup>13</sup> Modern-era critics on both the political left and the right paint a picture in which Brutus's worst nightmare has come true in spades. The problem is no longer judicial review, they say; it is "judicial supremacy"—on issue after issue of grave public concern the justices insist on having the last word, if not the only one. Critics who agree on little else now unite in decrying the Court's all-powerful approach.

#### DEBATING CONSTITUTIONAL MEANING

There is a weighty response to this complaint about judicial hegemony. In the American system of democracy, the popular will nonetheless is subject to those boundaries specified in the Constitution. What is the point of having a written Constitution if government officials can transgress it at will?

When the justices strike down laws, they are quick to offer reassurance that they are not imposing their own will on the American people; rather, they simply act in the name of the Constitution. "There should be no misunderstanding as to the function of this court," urged Justice Owen Roberts, one of the men in the middle on a divided Supreme Court during the New Deal struggle. "This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."<sup>14</sup>

Roberts's absolutism—"the Constitution made us do this"—reverberates throughout history's most famous decisions, both those reviled and those admired. When the Supreme Court limited Congress's power over slavery in *Dred Scott*, it was (naturally) offered as a necessary interpretation of the Constitution. When the Supreme Court struck down school segregation in *Brown v. Board of Education*, the reason was that the Constitution's Equal Protection Clause demanded it. When the Court protected the right of Jehovah's Witnesses children who refused to salute the flag in public schools because their religion forbade it, the First Amendment to the Constitution was determinative. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities," explained the Court majority.<sup>15</sup>

Anytime the Supreme Court is under attack, its defenders will quite naturally brandish the Constitution, insisting that those who govern must play by its rules. Opponents of the Court plan—and in the 1930s this included many of FDR's political supporters—argued that threatening the Court effec-

tively threatened constitutional government itself. Frank Gannett owned a chain of newspapers in the Northeast; he favored Roosevelt early on but came to have a change of heart and ultimately led the attack against the Court plan through his National Committee to Uphold Constitutional Government. Gannett and many others saw Roosevelt's proposal as a giant end run around the Constitution. Gannett penned an open letter to the American people in which he said: "If it is necessary to change the Constitution it should be done in the regular way."<sup>16</sup> The respected historian James Truslow Adams, one of a flood of notables who took to the radio to debate Roosevelt's proposal, worried aloud that "if the Constitution is to be changed by packing the Court, then that same method might some day be used to alter those parts which guarantee us our religious and other liberties."<sup>17</sup>

The great problem, of course, is that when the issue is fraught, the American people typically disagree over what the Constitution means. So do the justices themselves. That is why judicial decisions interpreting the Constitution become so controversial.

Roosevelt did not challenge the Supreme Court merely by relying on the election returns (though he surely did allude to the strength of his popular majority). Instead, he argued that the justices' understanding of the Constitution was wrong. During his fireside chat on his plan to reorganize the judiciary, Roosevelt pointed to vehement dissent within the Court itself over the proper outcome of New Deal cases. "In the face of these dissenting opinions, there is no basis for the claim made by some members of the Court that something in the Constitution has compelled them regretfully to thwart the will of the people." His plan, Roosevelt explained, was simply a way "to take an appeal from the Supreme Court to the Constitution itself." He insisted that if read properly, the Constitution provided ample power to address the problems of the Depression. Roosevelt urged the American people to read the Constitution for themselves: "Like the Bible, it ought to be read again and again."<sup>18</sup>

As often as not, fights over judicial power really are fights over the meaning of the Constitution. This is not to say that judicial power isn't an issue in and of itself; it is always a fair question in a democracy whether a public official has too much power, or is insufficiently accountable to the people. But judicial power becomes an issue precisely because judges interpret the Constitution and because judicial decisions seem so very final. This has been the case from the start. Brutus did not challenge the authority of the Supreme Court in the abstract. Rather, he opposed adoption of the Constitution because he feared the power of a strong central government. Brutus be-

lieved the Court inevitably would side with the national government against the states, and so he fretted over the extent of judicial power. The very same was true of Jefferson, Lincoln, and Theodore Roosevelt: each attacked the Court precisely because he had a very different understanding of the Constitution from the one held by a majority of the justices.

Caught up in immediate controversy, Americans can overlook this point. They fail to see that what looks to be a roaring battle over judicial power is simply the latest round in a much broader struggle over the proper interpretation of the Constitution. In a constitutional democracy, majority will regularly is pitted against minority rights. This tension, which is at the heart of constitutional democracy, would exist even if there were no judges. It is the meaning of the Constitution itself that is up for grabs, and judicial power is nothing more than a pawn in that battle.

In a sense, the history of the relationship between judicial review and the popular will has been one of great continuity. The justices decide cases involving constitutional questions of substantial importance to the American people. Given the seeming finality of judicial decisions, those who disagree with the justices lash out at the Court and the power of judicial review. Those who agree with the justices jump to their defense, waving the Constitution. And a fight over the Constitution becomes one about the judges.

#### CONSTRUCTING JUDICIAL POWER

Although this is a story of continuity, it also is one of fundamental change. The nature and extent of the Supreme Court's authority have plainly grown over time, in ways that are both unmistakable and undeniable. The power the Court wields is the product of a lengthy evolution in American political thought. In the course of struggling over judicial review as a proxy for their greater constitutional disagreements, the American people came to tailor, and then ultimately to accept, the role of the Supreme Court.<sup>19</sup> We have the Court we do because the American people have willed it to be so.

History makes clear that the classic complaint about judicial review—that it interferes with the will of the people to govern themselves—is radically overstated. The American people have always had the ability to limit judicial review—or even to eliminate it entirely. The persistent question throughout history has been whether, and to what extent, they should exercise this power. In the course of answering that question, the American people have confronted, and given meaning to, the idea of democratic government under a constitution.



During the debate over ratification of the Constitution, Alexander Hamilton, writing as "Publius" in *The Federalist Papers*, rejected Brutus's prediction that the judiciary would prove all powerful. Hamilton's "Federalist No. 78" remains today one of history's great defenses of judicial independence. But the most memorable part of Hamilton's tract was his point that there was no need to worry about the judges because they had little capacity to threaten democratic principles.

Judges, Hamilton explained, lacked both the executive's control over the "sword" and Congress's control over the "purse." Possessing "neither FORCE nor WILL, but merely judgment," the judiciary "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." For this reason, he assured his readers, the judiciary would be "the least dangerous" of the three branches of government.<sup>20</sup> It turned out that Hamilton was at least as prescient as Brutus about judicial power.

It is difficult to appreciate today the devastating nature of some of the early challenges to judicial authority. In the aftermath of the Civil War, Congress had the task of "reconstructing" the southern states as part of restoring the Union. Many at the time believed that given the chance, the Supreme Court would render a decision invalidating continued military rule of the South before Congress could consolidate the gains the Union had achieved on the battlefield. But quite unlike all the hand-wringing we hear today, judicial supremacy did not trouble members of Congress then. Listen to Representative John Bingham of Ohio, a Republican leader of the Congress:

If . . . the court usurps power to decide political questions and def[ies] a free people's will it will only remain for a people thus insulted and defied to demonstrate that the servant is not above his lord by procuring a further constitutional amendment and ratifying the same, which will defy judicial usurpation by annihilating the usurpers in the abolition of the tribunal itself.<sup>21</sup>

As it turned out, Bingham's colleagues did not have to go nearly so far as "annihilating" the Supreme Court to ensure they controlled it. Rather, Congress simply withdrew the Court's jurisdiction at a critical moment, and the justices bowed to a greater power. So much for Brutus's worries.

The irony of the defeat of Roosevelt's Court-packing plan is that the very weapon denied him in his struggle against judicial authority was used freely by Abraham Lincoln's generation. Lincoln and his fellow Republicans swept into power as the Civil War began. The *Dred Scott* decision having made the potential dangers of judicial review perfectly clear, the newly Republican Congress was hardly going to stand pat and allow the justices to threaten its

efforts to hold the Union together. Three times during the Civil War and its aftermath, Congress altered the number of justices who sat on the Supreme Court. In each instance, proponents of enlarging or reducing the number of justices offered a reason that had nothing to do with ensuring political control of the Court, just as Roosevelt wrapped his own plan in the flimsy gauze of an argument that the elderly justices were behind in their work and needed help. But those watching were perfectly aware that by altering the number of justices, Congress ensured that the Court majority rested in hands that could be trusted.<sup>22</sup>

Roosevelt failed where the Civil War Congress succeeded in part because Americans' understanding of the Supreme Court and its role had changed between 1868 and 1937. This was not history's first change of attitude toward judicial review. When the Supreme Court decided the *Dred Scott* case, holding that Congress could not regulate slavery in the territories, many of Lincoln's generation feared the decision would ultimately tear the country asunder. Yet very few of them said that *Dred Scott* should simply be ignored or defied. This may not be surprising to us today, when talk of defying the Supreme Court is taboo, a signal that one is unwilling to play by the basic rules of American governance. It was apparently unsurprising to many Americans in 1857 as well. Nonetheless, a generation or two earlier, defiance of the Supreme Court by state governments was the order of the day.<sup>23</sup>

Some prominent works of political science and history have taken into account the relationship between the popular will and judicial power, but they fail to capture how that relationship has evolved throughout the course of American history. This is unfortunate, because it is only through observing this evolution that we can begin to really understand the authority the Supreme Court wields today. In 1960, Harvard political scientist Robert McCloskey published a wonderful, engaging history entitled *The American Supreme Court*, in which he argued that the justices ignore public opinion at their peril. For this reason, he concluded, the Court "seldom strayed very far from the mainstreams of American life and seldom overestimated its own power resources."<sup>24</sup> Despite its remarkable insight, McCloskey's justly famous history failed to grapple with just how judicial power had been sculpted by those very instances in which the justices did in fact overestimate their own power. The justices today unequivocally exercise more authority than they did at the founding. But that authority exists as it does today only because through a process of trial and error, step and misstep, the country came to understand what it wanted out of the Supreme Court, as well as what it would tolerate.

## THE CONTOURS OF THE HISTORY

There have been four critical periods in the American people's changing relationship with judicial review and the Supreme Court. The lines between the periods are hardly distinct. History resists easy categorization; major developments come in fits and starts. Still, attention to these periods allows us to see how American thought about the role of judicial power has evolved over time.<sup>25</sup>

The first period—from the time of independence until the early 1800s—saw the remarkably quick acceptance of judicial review, followed by grave threats to the independence of the judiciary as the implications of the practice became evident. It was in this period that judges began to strike state legislative measures and the Constitutional Convention in Philadelphia adopted judicial review as a means of keeping the states in line with national authority. Soon enough, though, the country saw the danger of unaccountable judges with the power to interpret the Constitution. In the late eighteenth century, the country split into two political parties, which had great enmity for each other. Following the "Revolution of 1800," in which Thomas Jefferson's Republicans captured the executive branch and the Congress, the Federalist Party tried to fight a rearguard action from the judiciary. The newly empowered Republicans were not prepared to accept such partisan conduct on the bench. Congress abolished some of the judgeships created by the Federalists and threatened the impeachment of Supreme Court justices, acts that were criticized by the Federalists as a grave disregard for the independence of the judiciary. This first period came to a close in the early 1800s only after a tacit deal had been reached by which judicial independence was guaranteed so long as the judges refrained from engaging in blatant partisan politics from the bench.<sup>26</sup>

The second period, which ran from roughly the War of 1812 until the Nullification Crisis of 1832–1833, was characterized by frequent, officially sanctioned defiance of judicial decrees. Most of the Supreme Court's constitutional decisions in this period were aimed at state governments. Yet in the states' rights environment in which the Court was operating, the states would regularly fail to show up when haled before the justices and would often defy orders the Court issued. Virginia's highest court refused to concede that the Supreme Court had the authority to review its decisions. Georgia actually hanged a man in the face of a Supreme Court order to the contrary.<sup>27</sup>

This period of defiance came to a gradual close only when the national leaders recognized they needed the Supreme Court to help keep the states in line. President Andrew Jackson had no particular fondness for the Su-

preme Court, whose rulings often conflicted with his policies. In 1832, however, when South Carolina claimed the power to nullify federal laws and threatened to secede from the Union, Jackson did an abrupt about-face. He in turn threatened to use force against South Carolina and placed the authority of his office squarely behind the Supreme Court as an arbiter of constitutional disputes.<sup>28</sup>

The Supreme Court's reviled decision in *Dred Scott* ushered in the third period of judicial authority, that of controlling the courts. Though the nation had come gradually to reject official defiance of Court decisions, what was to be done if the Court put the country into a seemingly impossible situation, as it seemed to many to have done in *Dred Scott*? If judicial decisions were going to stick, in ways potentially in conflict with the popular will, then the answer was to exercise control over the courts to make sure the judges handed down only those decisions the people were prepared to accept. It was in this period that John Bingham uttered his threat to annihilate the Court, while his colleagues manipulated the size of the Court thrice and stripped it of jurisdiction.<sup>29</sup>

The third period continued until 1937. During this time the Supreme Court learned the importance of playing to a constituency, of having a patron that could protect it. Between the end of Reconstruction and the Great Depression, the judiciary grew in power by offering its backing to corporate and commercial interests that exercised enormous authority throughout the country.<sup>30</sup> In the late 1800s, the federal judiciary eliminated state laws that interfered with interstate commerce. In the early 1900s, the courts struck down progressive legislation adopted to ease the plight of workers caught up in America's industrial revolution. Throughout this long period there were many attempts to control the judges; some were successful, but many failed. Although the reasons why it proved so hard to control the judges in struggle after struggle were complex, the impact of the failure was not. The result was a great loss of faith in the objectivity of the judiciary and of law itself.<sup>31</sup>

The Court fight of 1937 served as the threshold to the modern era. Central to the importance of these events was Roosevelt's success in assembling a coalition of the common people of the country. With Roosevelt's chief constituency signaling its disapproval of the Court-packing plan, the idea of control gave way to the seeming supremacy for which the Court is noted today. In retrospect, the Supreme Court's breathtaking 1954 decision in *Brown v. Board of Education* barring segregated public schools was but the opening salvo in what has been sweeping judicial intervention in some of the country's most controverted issues. Since the 1950s, the Supreme Court has

granted women equality, legalized abortion, expanded the rights of criminal defendants, taken control over imposition of the death penalty, recognized gay rights, banned prayer in schools, limited Congress's power to regulate as it sees fit, and even decided one of history's closest presidential elections.

No wonder that today the Supreme Court is described as practically impregnable. Politicians decry the justices; scholars condemn them. Remedies for judicial power are sought. Yet year after year, the nine members of the Court take their seats on the nation's highest bench and continue to tell Americans what the Constitution means, seemingly aloof from the controversy that swirls about them.