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The Historic Supreme Court

THE ISSUE IN BRIEF

- Alexander Hamilton famously described the judiciary as the "least dangerous" of the three branches of government. This was because the judiciary was vested with "neither Force nor Will, but merely judgment."
- Today, however, the Supreme Court decides nearly every important question of legal, political, and even social significance.
- The power and influence of the Court has grown dramatically since the Founding.
- Indeed, in the beginning, it was not a foregone conclusion that the federal courts would exercise the power of judicial review—the power to declare void acts of the other branches.
- In other respects, too, the Supreme Court was less influential, functioning primarily as a court that corrected trial court errors. Congress required the Court to hear almost every civil case in which review was sought, and Justices were required to "ride circuit" traveling the country to sit as district court judges.
- *Marbury v. Madison* settled the question of judicial review and set the Supreme Court on its present course.
- Other changes, too, increased the Supreme Court's power and prestige: The Justices' circuit-riding duties were eliminated; Congress created the courts of appeal, which took over the duty to correct lower court errors; and Congress eliminated almost all of the Supreme Court's mandatory jurisdiction, leaving it to the Court to decide which cases merited its review.
- The Court today exercises an important role in checking the excesses of the coordinate branches. As Hamilton saw it, a limited Constitution is of little value unless the courts have the ability to declare the laws and actions that violate it void.
- Yet there is danger, too, in the Court's expanded role. As an unelected body, the Supreme Court must carefully confine itself to the actual text of the Constitution and of statutes. If the Justices instead substitute their own policy preferences—asking what the law *should* say, rather than what it *does* say—then we are indeed governed by an unelected majority of five.

EXECUTIVE SUMMARY

Alexander Hamilton famously described the federal judiciary as the "least dangerous" branch of government. According to Hamilton, the powers granted to the federal courts were to be viewed with magnanimity because the Supreme Court was vested with "neither Force nor Will, but merely judgment." Fast forward 200 years and it is the Supreme Court that is deciding nearly every important question of legal, political, and even social significance. Today, Hamilton's least-dangerous-branch idea is quoted only ironically—not as a description of the actual powers of the Third Branch.

That the Supreme Court is an important branch of government is apparent from newspaper headlines. In just the last few years, the Supreme Court has ruled on numerous cases that deeply affect the fabric of our nation. The Court, for example, has addressed, no less than three times since its enactment, fundamental questions regarding the Affordable Care Act—the Obama administration's signature achievement.

- It has also decided that the Second Amendment is an individual right;
- reaffirmed *Roe v. Wade*'s controversial holding that women have a constitutional right to an abortion;
- held that race may be considered explicitly in law school, but not college, admissions;
- required warrants prior to a cell phone search;
- declared that terrorism suspects held at Guantanamo Bay may challenge the constitutionality of their detention;
- held that states may not impose the death penalty for child rape;
- struck down a regulation that required business owners to pay for insurance coverage that violated deeply held religious beliefs;
- permitted the forced transfer of private property to private companies for economic development;
- held that the federal government must provide benefits to legally married same-sex couples; and
- legalized same-sex marriage in all 50 states.

And all of these decisions are from just the Court's most recent terms. That the Third Branch is an influential branch of government seems self-evident.

But this was not always the case. At the country's inception, Alexander Hamilton's narrower view of the role of the judiciary was quite accurate. The Supreme Court

was not the power player of today. The Court was a sleepy little institution held in relatively low esteem. It was not uncommon for an individual to turn down a Supreme Court appointment, in part because of the additional and arduous "circuit riding" duties required of the Justices.

Gradually, the Supreme Court's docket grew, and Congress relieved part of the workload by creating the federal courts of appeal. This, perhaps more than any other factor, has changed the role of the Supreme Court. It is no longer a court that is required to hear nearly every case and exists primarily to correct the legal or factual errors of the lower courts. Instead, the Court's docket is almost entirely discretionary and composed of important federal questions that have bedeviled the Courts of Appeal.

This legal brief describes the way the Third Branch has changed over time. This history is important to understanding how the Supreme Court functions today and to evaluating its role in our government.

MORE INFORMATION

The Constitution says surprisingly little about the Supreme Court. Article III declares 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." The Constitution also largely defines the jurisdiction of the federal courts and the Supreme Court, grants life tenure to federal judges, and provides that judicial compensation may not be reduced during time in office.

What the "judicial power" is and how it works, however, is not specified. Instead, Congress is given broad authority to establish and structure the federal courts. As the Supreme Court's website puts it:

> The Constitution elaborated neither the exact powers and prerogatives of the Supreme Court nor the organization of the Judicial Branch as a whole. Thus, it was left to Congress and to the Justices of the Court through their decisions to develop the Federal Judiciary and a body of Federal law.

As a result, the role of the Supreme Court has grown and changed over time. The degree of change in influence and power, however, may surprise some. For example, it was not obvious at the time of the Founding that the Supreme Court would have the power of judicial review—the power to declare acts of Congress and the President unconstitutional.

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Further, the early Supreme Court's jurisdiction was mandatory. In contrast to the pick-and-choose system that exists today, the Court was required to decide almost every case before it. Indeed, the courts of appeal did not exist, and most of the Supreme Court's cases were run-of-the-mill error correction cases from federal trial courts. In large part because Justices were required to travel the country by horseback, stagecoach, or riverboat to sit as trial judges throughout the growing nation, the job of Supreme Court Justice was less prestigious, and indeed, on occasion turned down. In short, the Supreme Court of the late Eighteenth Century and the Supreme Court of today are worlds apart.

Power of Judicial Review

It is well established today that the federal courts may exercise the power of judicial review. It is not uncommon for the Supreme Court to invalidate a statute or Executive Action as contrary to the Constitution. But this was not always so. The Constitution itself does not explicitly authorize judicial review, and at the time of the Founding, it was not a foregone conclusion that the federal courts would have such a power. Indeed, the Founders expressed differing views over the legitimacy of the power of the federal courts to declare invalid the actions of the other branches.

On one account, the very nature of a limited Constitution demanded judicial review—meaning the power to review and declare void as unconstitutional acts of the other two branches. As Alexander Hamilton famously put it in **Federalist 78**,

> [A limited Constitution] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

James Madison took a **similar view**, arguing in favor of a bill of rights because he thought an independent judiciary with the power of judicial review would exist to safeguard those rights.

> If [a bill of rights is] incorporated into the [C]onstitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the [C]onstitution by the declaration of rights.

Not all of the Founders agreed that the judiciary should have the final say on constitutional issues. Thomas Jefferson, for example, worried about the unaccountability of the judicial branch. Jefferson **disagreed** that the Constitution gave to the judiciary, "an unelected and independent" branch, "the right to prescribe rules for the government of others." "The constitution, on this hypothesis," he argued, "is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please." He continued: "It should be remembered … that whatever power in any government is independent, is absolute also."

Others like Andrew Jackson believed that each branch had the authority to decide the constitutionality of its own actions. As a result, the Supreme Court, **Jackson argued**, should not be allowed "to control the Congress or the Executive … but to have only such influence as the force of their reasoning may deserve."

Marbury v. Madison

It was not until 1803 that the issue of judicial review was settled in Chief Justice John Marshall's landmark opinion in ***Marbury v. Madison***. In that politically charged case, the Supreme Court famously and emphatically endorsed judicial review. This case firmly established the authority of the Supreme Court to find a statute passed by Congress unconstitutional and to declare it void.

The underlying facts of the case provide the political color necessary to understanding the genius of Marshall's opinion. The presidential election of 1800 was one of the nation's most hotly-contested; Thomas Jefferson ultimately defeated the Federalist incumbent John Adams. Before Adams left office, however, he delivered one final political blow to his adversary. He and the lame-duck Federalist Congress enacted the Judiciary Act of 1801, better known as the Midnight Judges Act. This new law dramatically expanded the federal judiciary. It created ten new district courts, doubled the number of circuit courts from 3 to 6, and created numerous justice of the peace positions. The catch, of course, was that the *outgoing* President would be able fill the newly created judgeships.

John Adams did just that. On the eve of the transition, President Adams appointed and the Senate confirmed 16 circuit judges and 42 Justices of the Peace. (The Midnight Judges Act also sought to deny Thomas Jefferson a Supreme Court appointment; it *decreased* the number of Supreme Court Justices from six to five, effective upon the next vacancy.)

The task of delivering the commissions fell to Adams' Secretary of State—none other than Chief Justice John Marshall himself who had continued to act as Secretary of State in addition to serving as Chief Justice. Time ran out and not all of the commissions were delivered before Adams' presidency expired. (In a way, then, by failing to deliver the commissions on time, Chief Justice Marshall created the very controversy he ultimately decided.)

> ***"This difference between the [Judiciary Act] and the Constitution gave Chief Justice Marshall the conflict he needed to establish judicial review."***

President Jefferson took office and ordered James Madison, his Secretary of State, not to deliver certain commissions. Meanwhile, the newly sworn in Congress replaced the Judiciary Act of 1801, with the Judiciary Act of 1802, eliminating all of the new courts, and leaving the newly confirmed judges with no judgeships. To preclude judicial review of the latter Act, it also replaced the Court's two annual sessions with a single session and cancelled entirely the Supreme Court term for June of 1802. The end result: forced adjournment at the Supreme Court for 14 months. Meanwhile, William Marbury, one of the men denied a justice of the peace commission, sued Madison directly in the Supreme Court, in the case that became ***Marbury v. Madison***.

Chief Justice John Marshall decided the controversy in a feat of political genius, announcing judicial review in an opinion that erstwhile gave his political opponents a victory. The Chief Justice first found that the commissions should have been delivered. Marbury and the other confirmed judges and justices had a vested legal right to their commission. Thus, Madison's refusal to deliver them was illegal. Marshall then found that Marbury had a remedy, stating, "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right." The remedy in Marbury's case was a writ of mandamus to Secretary Madison ordering him to deliver the commission.

In a twist, however, Marshall then declared that the Court was without power to issue said mandamus because it had no jurisdiction (legal authority) to hear the case. The problem was that Marbury had brought his suit originally in the Supreme Court without first seeking review by a lower tribunal. Marshall found that the statutory authority for Marshall's suit—a provision of the Judiciary Act of 1789—conflicted with Article III of the Constitution, which permitted mandamus actions only as part of the Court's appellate (not original) jurisdiction.

This difference between the statute and the Constitution gave Chief Justice Marshall the conflict he needed to establish judicial review. Marshall first held that an Act of Congress that is contrary to the Constitution is not law at all. Thus, the federal courts are required to disregard it and to instead follow the Constitution. To Marshall, this point was self-evident: a written constitution was useless if the federal courts could ignore it. Further, it was the judicial duty to decide cases, and thus to decide which law applied. In an oft-quoted line, Marshall declared, "It is emphatically the province and duty of the Judicial Department to say what the law is.... If two laws conflict with one each other, the Courts must decide on the operation of each." Finally, Chief Justice

Marshall pointed to the Supremacy Clause, which provides that the Constitution is the supreme law of the land.

After marshaling all of these arguments, Chief Justice Marshall concluded that "the judicial power" referred to by Article III of the Constitution included the power to review a statute and declare it void if contrary to the Constitution.

William Marbury never did get his commission. Because the Judiciary Act of 1789 conflicted with Article III of the Constitution, the Supreme Court declared the former Act void, and thus the Supreme Court was without jurisdiction to hear the case. Thus, the case was a victory of sorts for the Jefferson Administration.

But *Marbury v. Madison* decided far more than whether Marbury should get a commission; in it the Marshall Court firmly established the power of judicial review. This power is *the* power that put the Supreme Court on a trajectory to sit at the center of today's legal, social, and political disputes.

Mandatory v. Discretionary Jurisdiction

In addition to the power of judicial review, Congress' creation of the federal courts of appeal and its elimination of a mandatory docket also had profound impacts on the Supreme Court's role.

During the first 100 years of its existence, the Supreme Court acted mostly to correct lower court errors. The Judiciary Act of 1789 mandated that the Supreme Court hear and decide most civil appeals from federal trial courts. It didn't matter whether the issue was significant only to the parties or whether the lower court decision was clearly correct. If a losing party appealed, the Court usually was required to hear and decide the case. There were no federal courts of appeal to weed out the mundane cases. The fact of mandatory jurisdiction meant that the Supreme Court had little ability to set its own agenda.

Initially, the Supreme Court's caseload was small. The Court did not hear a single case during its first two years and heard fewer than 50 cases during in its first 10 years. The Court's docket rose slowly and steadily until the Court was hearing approximately 70 cases a year in 1850 (approximately the number of cases the Supreme Court hears today).

A rapidly expanding docket in the mid-Nineteenth Century led Congress to create the courts of appeal and to begin the shift from a mandatory docket to a discretionary

one. Beginning with the Reconstruction Congress, Congress started enacting more regulatory legislation. That legislation, and the growing administrative state, gave rise to an exploding federal docket. As Chief Justice Rehnquist detailed in a Florida State Law Review article, the Court's caseload grew from 250 cases per year in 1860, to 636 in 1870, and over 1200 in 1880. The Court's overloaded docket meant that each case received little time and that decisions were delayed by years.

Enter the Courts of Appeals. In 1891, Congress substantially changed the role of the Supreme Court by creating the federal courts of appeal to relieve some of the workload. Cases involving state law (in federal court because of diverse citizenship) went straight to the courts of appeal; subsequent Supreme Court review was granted only on a discretionary basis.

Then, in 1925, with the Judges Act, Congress made the vast majority of the Supreme Court's docket discretionary. With a few exceptions, a losing litigant in a trial court must first appeal to the Court of Appeals, before asking for Supreme Court review. For nearly 100 years, then, the Supreme Court has largely set its own agenda by selecting the cases it will hear.

Today, around 70 cases are selected from approximately 10,000 petitions for review. **Supreme Court Rule 10** describes the criteria the Court considers in choosing the cases it reviews. Rule 10 clearly explains, "Review on a writ of certiorari is not a matter of right, but of judicial discretion." As a result, review is only granted "for compelling reasons." In deciding whether compelling reasons exist, the Court considers whether the courts of appeal (or state courts of last resort) have disagreed about an important question of federal law. The most frequent and compelling reason that the Court grants certiorari review today is when there is such a "circuit split." Occasionally, the Supreme Court will grant review apart from a circuit split to settle an "important question of federal law."

> ***"The Supreme Court's ability to leave routine questions of law to the lower courts fundamentally has changed the role of the Supreme Court."***

As Rule 10 **makes clear**, the Supreme Court docket today is a matter of "judicial discretion." The Supreme Court's ability to leave routine questions of law to the lower courts fundamentally has changed the role of the Supreme Court. Unlike the early Court,

the Court today is not primarily an error-correction court, but instead operates to ensure the uniformity of federal law and to decide important questions of federal law.

Two more features of the early Court emphasize its changing role in American life: First, the Justices' "circuit-riding" duties. Second, the siting of the Supreme Court itself.

Riding Circuit

During the Eighteenth and early Nineteenth Centuries, the job of Supreme Court Justice was not quite the position it is considered today. Recall that the very early days at the Supreme Court were sleepy ones. Yet the job was still arduous because of the Justices' circuit-riding duties.

The Judiciary Act of 1789 divided the country into 13 judicial districts. The Supreme Court Justices were required to "ride circuit" and to act as federal trial judges twice a year in each of the 13 districts. As a result, the majority of their time was spent trekking across the country by horse, stagecoach, and river boat. Justice John McKinley, for example, reported to Congress that he had travelled 10,000 miles in 1938.

These circuit-riding duties were a common source of controversy. Proponents argued that the Justices needed exposure to state law to better decide state law questions. Opponents cited the travel demands on middle-aged and elderly judges and wondered whether this was the best use of judicial resources.

The Justices' circuit-riding duties made the job considerably less attractive. Indeed, a number of individuals declined the post. For instance, Alexander Hamilton declined to serve as the Chief Justice of the United States, preferring to return to his law practice. John Jay stepped down as Chief Justice to run for Governor of New York, and John Rutledge resigned his seat to serve on the South Carolina Court of Common Pleas. It was not until 1869, and over laments for the "good old days," that Congress finally eliminated the Justices' circuit-riding duties.

Location

That the early Supreme Court was not the power player of today is also evident from its early location. The Court first convened in 1790 in New York City, then the nation's capital. From 1791 to 1800 it met in Philadelphia while the government buildings were under construction in Washington, D.C. But when the new government moved to Washington, it was discovered that a site for the Supreme Court had been entirely overlooked.

As a result, the Supreme Court sat in a very small and very modest committee room on the first floor of the Capitol building from 1801 to 1808. The Court continued to meet in various rooms of the Capitol building for more than a century—even meeting in a private home when the British burned the Capitol.

It was not until 1929 that Congress authorized funds to build the Supreme Court building. Cass Gilbert, the architect, modeled the building on the classical roman temple form. Today's **impressive white marble structure** ensures the privacy of the Justices and conveys solemnity and dignity. Complete with an ascending staircase and large marble pillars, the current Supreme Court building is of a piece with the housing of the other branches of government and miles apart from an unused committee room.

Conclusion

Today Alexander Hamilton's famous description of the federal judiciary as the "least dangerous" branch of government is quoted only ironically. But it was a fairly accurate description of the federal courts in the late Eighteenth and early Nineteenth centuries. During this time period, the federal courts of appeals did not exist, and the Supreme Court's main role was to correct the work-a-day errors of the federal trial courts. Further, the Supreme Court was required to review almost every civil case that came its way and had no power to influence the cases that it heard. The job of an early Supreme Court Justice was even such that notable individuals, including Alexander Hamilton, turned the job down.

Hamilton's description of the federal judiciary now seems quaint. The Supreme Court of today decides the most significant legal, political, and social questions of our time. From *Roe v. Wade*, to the definition of marriage, to how the government must detain enemy combatants in the war on terror, it is the Supreme Court who decides.

> ***"The Supreme Court of today decides the most significant legal, political, and social questions of our time."***

To put it mildly, the Supreme Court has grown in influence and power over the centuries. And there is much to say for the power of judicial review. As a check on the elected branches, the Supreme Court can ensure that our written Constitution remains limited. As John Marshall put it long ago, "[t]he Constitution is either a superior, 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." The power of judicial review thus makes good on the Founders' promise of limited government and acts to protect the individual rights guaranteed to every American by the structural constitution and the bill of rights.

But make no mistake; the power vested in the current judiciary is dangerous, too. The problem, of course, is that the judiciary is unelected and thus unaccountable. The counter-majoritarian dilemma **made famous by Alexander Bickel** is very real. When the federal courts strike down a law of Congress, they invalidate the decisions made by the People's representatives. This is all well and fine when the federal courts stick to the text and original intent of the Constitution and laws they are interpreting.

The judicial power is more suspect, however, when federal courts stray beyond the text and original meaning of the Constitution. Federal courts today are inundated with every social question of our time. But a limited Constitution necessarily leaves most issues to individuals, states, and localities. When federal courts decide significant social questions, they take those questions out of the hands of the people—where they are subject to legitimate debate—and decide them once and for all. As the late Justice Scalia put it when **dissenting from the recent marriage decision**, "Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court." This practice of "constitutional revision by an unelected committee of nine," he argued, "robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves."