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Aggressive Judicial Review, Political Ideology, and the Rule of Law

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1. INTRODUCTION

One of America's greatest Founding Fathers, Alexander Hamilton, explained in the Federalist Papers why the American constitutional system requires judges to play an important role in our system of checks and balances and separation of powers. After discussing the importance of an independent judiciary, he said the following in *Federalist No. 78*:

> The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind 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[1].

Similarly, in 1803, Chief Justice John Marshall, in the landmark case *Marbury v. Madison*[2], after noting that the United States Constitution is the Supreme Law of the land, observed that "it is emphatically the province and duty of the Judicial Department to say what the law is"[3]. According to both men, laws that are inconsistent with the Constitution have no legal effect, and judges must declare such legislation null and void. The point of a written Constitution is to limit what future government actors may do, and the only effective way to keep leaders within the scope of their constitutional authority is to authorize judges to enforce those limitations.

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[1] A. Hamilton, *The Federalist No. 78*, "Independent Journal" 1788.
[2] *Marbury v. Madison*, 5 U.S. 137 (1803).
[3] *Ibidem* at 177.

There is little doubt that constitutional limitations would be ineffective, and the separation of powers harder to enforce, without some government institution separate from the legislature and the executive having the authority to decide when those two branches of government have exceeded their authority. One issue left unresolved by the Founding Fathers of American democracy, however, was how to limit the authority of judges. Judicial review makes sense when constitutional limitations are clear, such as with the requirements that in the United States the President must by thirty-five or there must be two Senators from every state. But many of the United States Constitution's most important provisions, and the ones that are most often litigated, involve vague commands such as the government may not abridge the freedom of speech, establish a religion, or deny to the people the equal protection of the laws or due process of law. These directives are anything but self-defining and have led to judicial resolution of some of the most difficult social, political, and legal issues faced by the American people. Abortion, affirmative action, and campaign finance reform are just three issues that the United States Supreme Court has largely taken away from the American people. It is questionable at best whether the Founding Fathers wanted judges to play that major a role in American politics.

This paper focuses on what should be the appropriate role of life-tenured, unelected federal judges in the American system of separation of powers. The tension is between needing judges to enforce the supreme law of the Constitution while at the same time keeping judges within their assigned roles of enforcing not making the law. Much of constitutional scholarship in the United States is devoted to resolving this tension. The thesis of this paper is that, absent much needed structural reform, which is most unlikely to occur, only a clear error rule, where judges don't strike down laws unless the inconsistency between the statute and the Constitution is clear beyond reasonable dispute, can both allow judges to limit elected leaders to their constitutional responsibilities but also not transfer too much power to government officials who the people do not elect and who hold their positions for life.

1.1. THE CYCLES OF JUDICIAL REVIEW

The Supreme Court has played many different political roles over the course of American history. In 1857, with the country torn apart by the issue of slavery, the Justices decided to enter this dangerous thicket. In the infamous *Dred Scott* case[4], the Court ruled that African-Americans were not and could not be citizens of the United States, and Congress did not have the authority to prohibit slavery in the new American territories. This decision, which many scholars believe moved

[4] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

the United States much closer to civil war[5], was based on questionable interpretations of text and history. More likely, the Justices in the majority thought that they could bring this controversial issue to a close. Ideology not law was the true basis for the holding, and that pattern continues to this very day.

From 1900-1936, the Supreme Court of the United States invalidated over 200 laws pertaining to workplace issues such as minimum wages, overtime rules, employee safety, and child labor[6]. This time period, often referred to by legal scholars as the *Lochner* era, was based on the Justices' emphasis on a *laissez faire* economic philosophy not any clear constitutional text, obvious history, or even prior case law. The Justices' improper meddling into economic issues eventually led to President Roosevelt's infamous "court packing" plan and possibly a political metamorphosis by Justice Owen Roberts which became known as the "shift in time that saved nine"[7]. Whether or not the political pressure of the plan led to Roberts' shift, eventually new Justices appointed by Roosevelt overturned much of the *Lochner* era case law not because they discovered new constitutional evidence but because they held substantially different political views.

Beginning in the early 1960's, the Warren Court (and later the early Burger Court) unleashed a torrent of important personal rights decisions which dramatically altered the American political landscape. The Court promulgated constitutional rules regarding voting rights, defamation, abortion, free speech, the free exercise of religion and a series of cases protecting the rights of criminal defendants and limiting police practices. This era didn't last long but it did fundamentally alter America's constitutional landscape[8].

What is perhaps most interesting about these decisions is that in many of them the Court did not try hard to justify overturning longstanding state and federal laws through a careful review of constitutional text and history or even prior Supreme Court decisions. For example, Justice Douglas' plurality opinion in the landmark case *Griswold v. Connecticut* striking down a state ban on contraceptive use, and finding a constitutional right to privacy that would later be used by the Court in *Roe v. Wade,* is only six pages long[9]. Similarly, the Court's opinion in *Brandenburg v. Ohio,* which set forth the fundamental test for determining whether inflammatory speech (in that case, racist epithets) is constitutionally protected is only five pages long without any mention of the First Amendment's original meaning[10]. For more than a decade, the Court issued major constitutional

[5] See P. Finkelman, S. V. Sandford, *The Court's Most Dreadful Case and How It Changed History*, "Chicago-Kent Law Review" 2007, Vol. 82, No. 3.

[6] See S. A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, "North Carolina Law Review" 1991, Vol. 70.

[7] See *https://www.yalelawjournal.org/forum/west-coast-hotels-place- in-american-constitutional-history* (visited February 25, 2019).

[8] See E. Segall, *Originalism as Faith*, New York 2018.

[9] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[10] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

decisions with "no coherent jurisprudence 'apart from the results reached'"[11]. The Justices were much more concerned with their own ideological notions of fairness, justice, and equality, than legal reasoning, just as was true during the *Lochner* era, albeit with substantially different values at play.

There was a major backlash to the Warren Court's liberal decisions among scholars, judges, and politicians. Although this criticism often came in the form of accusing the Court of not focusing on the "original intent" or "original meaning" of the Constitution[12], the true source of the critic's displeasure was ideological and political disagreement with the results reached by the Court. This disconnect became obvious when, after twelve years of federal court judges and Supreme Court Justices appointed by Republican Presidents Ronald Reagan and George H.W. Bush, a new conservative Supreme Court also paid little attention to text and history while aggressively striking down laws based on a different set of values. Starting around 1995, the Court strongly favored states rights, limited or reversed many Warren Court precedents protecting defendants' rights, applied strict scrutiny to affirmative action, used the first amendment to overturn commercial speech laws, cut back on voting rights, and maybe most importantly overturned a series of campaign finance reform laws[13]. Again, what was at play in these cases was values and politics, not prior positive law, such as text and history.

The history of the Supreme Court of the United States can be divided into different eras of judicial review depending on the political make-up of the Court. As I've written elsewhere, in virtually every area of litigated constitutional law, the relevant legal doctrine has changed dramatically over the years while the text and history of the Constitution has stayed the same[14]. Given the open-ended nature of most litigated constitutional text, the reasonable debates over the Constitution's original meaning, and the Supreme Court's discretion to reverse its own decisions whenever it feels doing so is necessary, it is not surprising that the Court's decisions reflect the Justices' personal and political values much more than prior positive law.

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[11] J. O'Neil, *Originalism in American Law and Politics*, The Johns Hopkins University Press, 2005 (quoting L. A. Powe Jr., *The Warren Court and American Politics*, Cambridge 2000, pp. 214-215).

[12] See R. H. Bork, *Neutral Principles and Some First Amendment Problems*, "Indiana Law Journal*"* 1971, Vol. 47, No. 1.

[13] See M. A. Graber, *Does It Really Matter? Conservative Courts in a Conservative Era*, "Fordham Law Review" 2006, Vol. 75, pp. 675-708.

[14] See E. J. Segall, *Constitutional Change and The Supreme Court: The Article V Problem,* "The University of Pennsylvania Journal of Constitutional Law" 2013, Vol. 16.

1.2. HOW TO LIMIT THE JUSTICES' OVERSIZED POWER AND INFLUENCE

American law reviews and scholarly books discussing the Supreme Court are full of theoretical models designed to limit the power of the Justices. These efforts to devise theoretical or intellectual pre-commitments to cabin the judicial discretion of the Justices have so far been wholly unsuccessful. As most political scientists agree, the Justices decide hard constitutional cases based on their own politics, values and life experiences, not prior legal rules[15].

One way to weaken the Court and make it more responsive to the law would be to reform how the Court operates. In the wake of the confirmation of Justice Brett Kavanaugh, giving conservatives a solid five vote majority on the Court, many liberal law professors in the United States have set forth proposals to restructure the Court. These suggestions include ending life tenure[16], requiring a super-majority vote to overturn laws[17], and even stripping the Court of jurisdiction over various controversial areas of constitutional law[18].

Weakening the Court just because of its current political make-up is wrong-headed. The United States should restructure the Supreme Court not because it is too conservative, too liberal, or even too moderate. The Court simply wields far too much power and influence regardless of which political side benefits from its decisions[19]. Unfortunately, it is highly unlikely that any of these reforms will ever take place.

Another method of limiting the Court's power would be for the Justices to return to the original rationale for judicial review which included a strong presumption in favor of legislation. In *Federalist No. 78*, Alexander Hamilton, in response to concerns by people opposed to the very idea of judicial review, said that the Court would only overturn laws when there is in "irreconcilable variance" between the challenged statute and the Constitution[20]. Additionally, early state and federal cases suggest strongly that, unless the judiciary's power was directly at stake, such as with jury or evidentiary issues, the Founding Fathers expected judges to only interfere with the decisions of more accountable governmental

[15] See H. J. Spaeth, J. A. Segall, *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court,* New York 1999.

[16] *See https://www.nytimes.com/2018/09/18/opinion/columnists/brett-kavanaugh-supreme-court-term-limits.html* (visited February 26, 2019).

[17] See *https://concurringopinions.com/archives/2018/10/recusal-practice-in-the-supreme-court.html* (visited February 26, 2019).

[18] See *https://www.huffingtonpost.com/entry/supreme-court-kavanaugh-gorsuch_us_5b-f806e3e4b077lfb6b8489a* (visited February 26, 2019).

[19] See *https://www.salon.com/2018/12/04/its-time-to-reform-the-supreme-court-but-not-for-the-wrong-reasons/* (visited February 26, 2019).

[20] A. Hamilton, *The Federalist*...

officials in cases where the constitutional violation amounted to clear error[21]. The men who wrote and ratified the Constitution never intended the Supreme Court to play the role of the ultimate guardian of the country's moral choices on issues where the Constitution does not speak clearly. Where reasonable people can disagree over the constitutional validity of laws voted on by the people's representatives, the Constitution's original meaning dictated that judges stay out of the political thicket[22]. Unfortunately, the Supreme Court has for over a century played a much different and more active role in America's politics.

As I've written elsewhere, over the last century or so, the Court has imposed its will on a plethora of difficult policy decisions even though text and history did not clearly call for the Court to strike down the legislation. The Court at one time or another has "invalidated laws pertaining to minimum wages, overtime rules, child labor, abortion, affirmative action, campaign finance reform, gay rights/same-sex marriage, how states carve up voting districts, pure commercial speech, aid to religious schools, religious symbols on government property, and speech rules in schools and government offices"[23].

The problems with unelected, life-tenured judges having so much authority to dictate answers to these kinds of questions are well-documented. Replacing political debate and legislative efforts to achieve consensus with judicial edicts from nine judges in the nation's Capitol makes it harder to achieve compromise among warring sides and elevates the Supreme Court nomination process to an importance that affects elections and distorts normal politics. Justice Antonin Scalia, who throughout his career voted to overturn law after law even where text and history did not justify those results[24], nevertheless described accurately the problems with the Court's overly aggressive acts of judicial review:

> As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here – reading text and discerning our society's traditional understanding of that text – the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making value judgments, then a free and intelligent people's attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school – maybe better. If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people should demonstrate, to protest that we do not implement their values instead of ours. Not only that, but confirmation hearings for new Justices should deteriorate into qu-

[21] See E. Segall, *Originalism as Faith*…, pp. 15-25.

[22] See E. Segall, *Judicial Engagement, New Originalism, and the Fortieth Anniversary of Government by Judiciary*, "Fordham Law Review Online" 2017, Vol. 86.

[23] See *https://www.salon.com/2018/12/04/its-time-to-reform-the-supreme-court-but-not-for-the-wrong-reasons/* (visited February 26, 2019).

[24] See E. J. Segall, *The Constitution According to Justices Scalia and Thomas: Alive and Kickin'*, "Washington University Law Review" 2014, Vol. 91.

estion and answer sessions in which Senators go through a list of their constituents' most favored and most disfavored alleged constitutional rights, and seek the nominee's commitment to support or oppose them. Value judgments, after all, should be voted on, not dictated[25].

It is not impossible to imagine a system or tradition of judicial review wherein the Supreme Court does not invalidate laws absent clear and convincing evidence that the challenged statute violates the Untied States Constitution. Since 1936, the Justices have applied a highly deferential rational basis test to run-of-the-mill economic legislation that did not implicate other textual constitutional limitations. Although some argue that this test may be too deferential and amounts to an automatic rubber-stamping of state and federal laws[26], this model of decision-making applied to the entire Constitution, perhaps strengthened just a bit, would take the Court out of normal politics and return it to the role envisioned by the founding fathers as a bulwark against only clear constitutional violations.

Similarly, when federal appellate judges review the factual findings of lower courts, they are only allowed to review such findings under a "clearly erroneous" standard of review[27]. This standard works well in practice and leads to very few trial court factual conclusions being overturned on appeal by appellate judges. Of course, no legal standard can guard against bad-faith judging but an assumption of good faith is implicit in any democratic legal system. This kind of clearly erroneous standard applied to the validity of state and federal laws would still deter obvious constitutional violations but would substantially decrease the Court's ability to invalidate laws they do not like when their only basis for doing so is political disagreement with other more accountable governmental officials.

The political nature of the Court's present decision-making process is taking a serious toll on the American political system. Exit polls taken after the 2016 Presidential election showed that "seven in 10 voters nationwide say Supreme Court appointments were either the most important factor or an important factor in their decision to support a candidate"[28]. Additionally, 21% of voters said that the future of the Supreme Court was the reason they voted for one candidate or the other, and 57% of those voters preferred Donald Trump (even though Trump lost the popular vote)[29]. Elections should be about economics, foreign policy, social and cultural issues, and leadership, not nine unelected, life-tenured judges. The reality, however, is that the American people know that the Supreme Court

[25] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (Scalia, J., dissenting).

[26] See C. Neily, *No More Make-Believe Judging*, "George Mason Law Review" 2012, Vol. 19.

[27] See K. Kunsch, *Standard of Review (State and Federal): A Primer*, "Seattle University Law Review" 1994, Vol. 18.

[28] https://www.nbcnews.com/card/nbc-news-exit-poll-future-supreme-court-appointments-important-factor-n680381 (visited February 27, 2019).

[29] https://www.vox.com/2018/6/29/17511088/scotus-2016-election-poll-trump-republicans-kennedy-retire (visited February 27, 2019).

will have the final say over the kinds of issues elections should be fought over even when the Constitution does not favor one resolution or another concerning those issues. That document is silent about abortion, affirmative action, campaign spending by big corporations and many other issues the Court has taken away from more democratic political processes. A more deferential standard of review is sorely needed to return the Court to its proper place of enforcing the Constitution's real limits on governmental power not the imaginary and largely unwritten Constitution that authorizes the Court to resolve many of America's most important and controversial public policy questions based on politics and personal values not constitutional text and history.

2. CONCLUSIONS

The Supreme Court of the United States is by far the most powerful judicial institution in the free world. The Justices of that Court are the only high court judges in any Democracy to have life tenure. The Justices for the most part select their own cases and define their own workload. And, they are currently part of a long tradition of overturning state and federal laws even when the alleged constitutional violation is far from clear. The combination of all these factors has led to a political system where judges play too important a role in the resolution of controversial and important policy issues. It is one thing for judges to overturn laws clearly in conflict with written constitutional limitations on government behavior. It is quite another thing, however, for judges to invalidate the decisions of elected and more accountable government officials and voters based on the personal values, politics, and experiences of the judges, not the rule of law.

There are two possible ways to limit the damage caused by an overly aggressive Court. One is to put in place structural reforms to weaken the institution itself. Most of the recent suggested reforms, however, such as imposing term limits, or requiring two-thirds of the Justices to agree before a law would be struck down, would likely take a constitutional amendment which in the United States requires a super-majority of both Congress and the states and is therefore highly unlikely to happen.

Another possible solution to the problem of judicial overreaching is to select more deferential judges or perhaps even by political protest or even an unwillingness on the part of politicians or the people to obey Supreme Court decisions. The mere threat of the latter might just encourage the former. If something does not encourage more humble, modest, and deferential judicial review in the near future, the United States may well find itself in the midst of a constitutional crisis.

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Summary

For over one-hundred and fifty years, the United States Supreme Court has been the most powerful judicial body in the world with life-tenured judges consistently invalidating state and federal laws without clear support in constitutional text or history. This paper focuses on what should be the appropriate role of life-tenured, unelected federal judges in the American system of separation of powers. The tension is between wanting judges to enforce the supreme law of the Constitution while at the same time keeping judges within their assigned roles of enforcing not making the law. Much of constitutional scholarship in the United States is devoted to resolving this tension. This article argues that the Court should take a set back and defer more to elected leaders and voters. Although structural reform might help, most needed changes would require a constitutional amendment and are therefore unlikely to occur. The Justices should take it upon themselves to act with more humility and modesty and only overturn laws where there is strong evidence of clear constitutional error.

KEY WORDS

U.S. Supreme Court, Constitutional Law, Constitutional Interpretation

Streszczenie

Od ponad stu pięćdziesięciu lat Sąd Najwyższy Stanów Zjednoczonych jest najpotężniejszym organem sądowniczym na świecie, złożonym z sędziów mianowanych na całe życie, którzy są uprawnieni do tego, aby podważać przepisy stanowe i federalne bez wyraźnego umocowania w tekście konstytucji lub w zwyczajach. Niniejszy artykuł koncentruje się na tym, jaka powinna być rola sędziów federalnych, nie pochodzących z wyborów. Autor argumentuje, że Sąd Najwyższy Stanów Zjednoczonych powinien zrobić krok do tyłu i oprzeć się bardziej na wyborcach oraz liderach pochodzących z wyborów. Mimo, że reforma strukturalna Sądu Najwyższego byłaby pomocna, to najbardziej potrzebne zmiany wymagałyby zmian tekstu konstytucji, a zatem są mało prawdopodobne do przeprowadzenia. Sędziowie powinni podjąć działania z większą pokorą i skromnością, a prawo zmieniać jedynie tam, gdzie istnieją mocne dowody wyraźnego błędu konstytucyjnego

SŁOWA KLUCZOWE

Sąd Najwyższy Stanów Zjednoczonych, prawo konstytucyjne, interpretacja konstytucji