The Role of the Supreme Court in Interpreting the Constitution

When the Supreme Court issues an opinion, it is binding on the litigants, is enforced by the U.S. government, and serves as precedent for future cases. It is the "law of the land."

However, many Supreme Court decisions have been actively opposed by significant segments of the population over long periods of time. Sometimes the decisions have been explicitly or implicitly reversed. For example: *Brown v. Board of Education* (1954) reversed *Plessy v. Ferguson* (1896) which had allowed state sanctioned racial segregation; *Lawrence v. Texas* (2003) reversed *Bowers v. Hardwick* (1986) which had allowed criminal sodomy laws involving consenting adults; and *DC v. Heller* (2008) effectively reversed *Miller v. Texas* (1894) to find that the Second Amendment protects an individual's right to possess a firearm. More often, the Court has nibbled around the edges of a precedent to limit it until the core holding is unrecognizable, which appears to be happening with regard to abortion rights.

There are two fundamental ways that Supreme Court decisions can, and have been, directly overturned: 1) by changes in the membership and/or philosophical outlook of the Court itself, and 2) by direct constitutional amendment. Indirectly, Supreme Court decisions may also be implicitly overturned by contesting new cases at the margins in order to bend the implementation and interpretation of the original decision.

Other strategies have been suggested over the years to contain Supreme Court power, but they have not been successful in modern times.[1]

History of Judicial Supremacy

In 1803, the Supreme Court decided *Marbury vs. Madison* and introduced the principle of judicial review. The Constitution established the Supreme Court, but it does not confer on the Court the power of judicial review of acts of Congress. That power was inferred from the nature of the judicial power, which extends, in part, "to all cases…arising under this Constitution; the laws of the United States…to controversies to which the United States shall be a party."[2] The little discussion that occurred at the constitutional convention of the basis for such a power was ambiguous.[3]

The Constitution established three co-equal branches of government−legislative, executive, and judicial−and the supremacy of Supreme Court interpretations of the Constitution remained contested through the Civil War.[4] It is still disputed by movement conservatives.[5] The supremacy of Supreme Court decisions has been generally accepted, however, at least since President Franklin Roosevelt's 1937 attempt to pack the Court by increasing the number of justices to obtain favorable rulings regarding New Deal legislation.

Changing Supreme Court Decisions by Changing the Court

Constitutional interpretation can have profound consequences on the kind of society and government we have, and the Supreme Court has engaged in periods of judicial activism that alienated different constituencies at different times. For example, during the Lochner era in the early 20th century the Supreme Court of the United States made it a common practice to strike

down economic regulations, alienating progressives; the Warren Court of the 1950s and 1960s expanded civil rights for minorities and criminal defendants, alienating conservatives.[6]

The conflict between Lochner jurisprudence and New Deal economic legislation illustrates how changing the composition of the Court can lead to long-term changes in the content of Supreme Court decisions.

In 1932, Franklin Roosevelt was elected President with a mandate to end the suffering of the Great Depression. He quickly caused Congress to pass aggressive economic legislation, which the Supreme Court ruled unconstitutional. At that time, the Court consisted of four staunch conservatives, three liberals, and two swing votes. In the fall of 1936, the Court granted certiorari in *West Coast Hotel Co. v. Parrish*, which asked the Court to overrule an earlier decision striking minimum wage legislation. In November 1936, Roosevelt won re-election in a landslide, and on February 5, 1937, he announced his court packing plan. In March 1937, the Supreme Court announced its decision in *Parrish* overturning precedent to find minimum wage legislation constitutional. Legal historians consider this to be the end of the Lochner era. Justice Owen Roberts voted with the majority in *Parrish* and also voted with the majority in the earlier decision that found minimum wage legislation unconstitutional. His vote has been called "the switch in time that saved nine."[7]

Congress did not support Roosevelt's court packing plan, and it died in committee; but court packing proved to be unnecessary. In May 1937, Justice Willis DeVanter retired. DeVanter had been one of the four staunch conservatives whom pundits referred to as "The Four Horsemen"; he was replaced by liberal Justice Hugo Black, giving Roosevelt an operational majority. The three other "Horsemen" died and were replaced by Roosevelt appointments between 1938 and 1941.

Over the course of his presidency, Roosevelt appointed eight Supreme Court justices. In general, Roosevelt's appointees endorsed an expansive federal government role in economic regulation and the application of the Bill of Rights to the states through incorporation into the Fourteenth Amendment's guarantee of due process of law. The jurisprudential sea-change proved to be durable and continued through the Warren Court.

A concerted effort to return the Court to a more conservative jurisprudence began in the 1970s. Supported by conservative business leaders, well-funded think tanks advocated for an activist jurisprudence based on the founding fathers' "original intent," which they said promoted small-government, states' rights, and traditional morality. Conservative legal scholars created an infrastructure within elite law schools that funneled promising law students into high visibility government jobs, and Republican politicians openly campaigned for a program of changing American law by appointing only judges who shared their conservative judicial philosophy.

In 1980, President Ronald Reagan was elected with a conservative mandate. At that time, the Supreme Court consisted of four liberals, three conservatives, and two moderates. Seven of the nine justices had been appointed by Republican presidents, including three of the four liberal justices. Reagan implemented a program of strategically appointing ideologically committed judges and justices, and Democratic presidents responded by appointing traditional liberals. All

of the justices currently sitting on the Supreme Court were appointed after Reagan's election, and the current Supreme Court is polarized along partisan and ideological lines.

In 2015, the Court is comprised of four ideological conservatives, one traditional conservative, and four traditional liberals. Four of the justices are at least 77 years old: two liberals and two conservatives. Under the circumstances, it is highly likely that the conservative jurisprudence of recent years will be either confirmed or changed in the near future by changes in the composition of the Supreme Court.

Changing Supreme Court Decisions by Constitutional Amendment

Very few constitutional amendments have been enacted to reverse Supreme Court decisions. Amendments for the purpose of overturning Supreme Court decisions include amendment XIV (1868) which guaranteed birthright citizenship for African Americans despite *Dred Scott v. Sanford*; amendment XVI authorizing an income tax (1913) which overruled *Pollock v. Farmers' Loan & Trust Co*.; and amendment XVIII (1919) prohibiting the sale or transportation of intoxicating liquors, which was necessary because the Commerce Clause precluded dry states from preventing the interstate movement of alcoholic beverages (*Bowman v. Chicago & NW RR Co., 1888*).

The Constitution prescribes two methods for proposing constitutional amendments, but so far all constitutional amendments have been proposed by the method calling for a 2/3 majority of both houses of Congress and submission to the states for ratification by 3/4 majority. Supermajorities make the enactment of a constitutional amendment very difficult. Please consult the 2015 LWVUS Constitutional Amendment Study for further information on the amendment processes.

What Can Be Done?

There is an obvious conflict in political theory that permits unelected judges with lifetime tenure to strike down laws enacted by a democratically elected legislature. Scholars refer to this conflict as the "countermajoritarian difficulty."[8] In a series of articles, however, legal scholar Barry Friedman has argued that the problem may be overblown because the Supreme Court usually tracks popular opinion over the long run, as judges change their opinions or as the composition of the Court changes. Furthermore, some political scientists suggest that legislation is not very democratic because it reflects the preferences of powerful interest groups over the preferences of the wider public, a problem that is aggravated by unrestrained campaign finance.[9]

In our system of government, the democratic check on unelected judges is the appointment of judges by elected officials. Engaged public citizens can strive to make Supreme Court decisions more responsive to the public will by educating themselves and voting for candidates who will appoint or confirm judges who share the citizens' judicial philosophy. Engaged citizens can also work to educate the public on the role of the courts and of the importance of considering candidates' judicial philosophy when voting. They can support constitutional amendments to correct Supreme Court decisions they believe wrongly decided, and they can work to educate the public on sound constitutional interpretation. Historically, constitutional change at the Supreme Court has happened only when advocates made concerted arguments over a long period of time,

explaining the correctness of their understanding of the Constitution and creating public pressure for change.

[1] . For the attempt to strip the Court of jurisdiction in 1957, see Barry Friedman, "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five," Yale Law Journal 112(2002): 193-97. On Reconstruction, see Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Two: Reconstruction's Political Court," *Georgetown Law Journal* 91(2002): 7-44. For an extensive discussion of the New Deal relationship with the Court, see Barry Friedman, "The Countermajoritarian Difficulty, Part Four: Law's Politics," *University of Pennsylvania Law Review* 148(2000):971-1064.

[2] U.S. Constitution Art. III, §2.

[3] Robert A. Burt, *The Constitution in Conflict* (Cambridge: Harvard University Press, 1992), 52-58

[4] Burt at 202-204; Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," *New York University Law Review* 73(1998): 222-32

[5] See, David Corbin and Matt Parks, "Court and Constitution: The Argument Against Judicial Supremacy," *The Federalist Today,* http://thefederalist.com/2015/02/02/court-and-constitution-the-argument-against-judicial-supremacy/ (2015); Joel Alicea, "Questioning the Supreme Court's Supremacy," *National Review,* http://www.nationalreview.com/article/281166/questioning-supreme-courts-supremacy-joel-alicea (2011), accessed 03/13/2015.

[6] The era is named after *Lochner v. New York (1905),* in which the Court invalidated state regulation of working conditions because of a "liberty to contract." For an insightful discussion of the Lochner era see Barry Friedman, "The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner," *New York University Law Review* 78(2001): 1383-1455.

[7] The historiography on FDR and the court packing plan is extensive. For an overview, see Laura Kahlman, "The Constitution, the Supreme Court, and the New Deal," *American Historical Review* (October 2005): 1052-1080.

[8] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962) coined the phrase.

[9] Friedman, Countermajoritarian Difficulty, Part One, 337-39, including notes 12 and 13.