Principles, Politics, and Preferences at the Supreme Court

Howard Tolley
OLLI. - October 2021. Week 1
Political Checks on the Court’s “Supreme” Power
Introductory Overview

• Week 1  Political Checks on the Court’s “Supreme” Power

• Week 2  The Roberts Court Use of Judicial Power 2005-2020

• Week 3  Roberts Court: 2020-2022
2021 Abortion Rights in Texas

State law barring abortion after 6 weeks only enforceable by private citizens entitled to $10,000 for bringing state court actions.

Supreme Court 5-4 refused to block implementation with an emergency order that would allow for time to adjudicate the denial of constitutional rights granted in *Roe* and *Casey* precedent.
Democratic Executive and Legislature v. Republican Court
Democrat’s grievances against Roberts Court

• Stole Obama’s Garland appointment for Gorsuch
• Denied Biden an appointment with Barrett for 6-3 control
• Court “shadow” docket, unprecedented, arbitrary lawmaking
• Total disregard for and overruling of precedent with new law
Executive Order appoints 36 members to report by November 15 on reform proposals

1. Size of the court — additional members
2. 18 year term limits or mandatory retirement
3. Super majority to find law unconstitutional
4. Increased number of cases on the merits docket
5. Restricting the Emergency “shadow” docket

Are new law/constitutional amendments needed to cure ills?

Questions/Comments?
1960s Partisan Divide

Democratic Presidents, Congress, and Court (8-1)
Republican grievances against Warren Court
• Total disregard for and overruling of precedent with new law
• School desegregation with busing
• Criminal due process *Miranda v. AZ, Gideon*,
• School prayer, free exercise for religious minorities
• Conscientious objection to war
• Free speech
• Civil rights — miscegenation, restrictive covenants
• Upholding Congressionally mandated voting + civil rights
1968 Backlash

- Nixon’s successful southern strategy to become President
- Replace Warren with Republican Burger as Chief Justice
- Democrats reject 2 southern conservatives, OK Republican Blackmun
- Senate confirms Democrat Powell and Republican Rehnquist
- Republicans appointed 10 of the last 14 Justices, currently 6-3 restoring 1930s pre-FDR New Deal conservative majority

Questions/Comments?
Original Political Principles: Civil Religion

Sacred Texts:
- Declaration of Independence
- Constitution
- Bill of Rights
- 14th Amendment
Declaration of Independence

3 Self Evident Truths
• Individual liberty
• Equal Opportunity
• Popular Sovereignty

Tension Between
• Equality and Liberty
• Majority Rule and Minority Rights
4th Century BC Greek Philosophy

• Polis: City State

• Polity: Community

• Politics: Public Service for the Common Good
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<th>Common Good</th>
<th>Partisan Self Interest</th>
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<td>Popular Sovereignty</td>
<td>Democracy</td>
<td>Mob Rule</td>
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Federalist Papers Rationale for the US Constitution

Madison:
Assure that ambition counters ambition, checks + balances
Lord Acton: “Power tends to corrupt, and absolute power corrupts absolutely

Hamilton:
Judiciary the “Least Dangerous Branch” without power of sword or purse
## Separated Institutions Sharing Powers

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Seedtime of the Republic

**Structural Flaws:**

- Electoral College: Amended once
- Unrepresentative Senate: Amended once
- Life Terms for Supreme Court Justices: Unchanged
- Unspecified Number of Supreme Court Justices: Unchanged

**Institutionalized Inequality:** Slavery

**Unwritten inequities:** Indigenous Americans, Women, Workers

**Firm Foundation for Progress**

Checks on Tyranny

Democratizing Amendments binding states, promoting due process, equal protection

Questions/Comments?
We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common Defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.
US Constitution

Article I. Congress
- Section 8 lists powers expressly granted to federal government
- Senators elected by state legislatures confirm Court nominees
- Sec. 3. Chief Justice Presides when President Impeached

Article II Executive
- Appoints Supreme Court justices and lower federal court judges
- Power to pardon the convicted of federal crimes
US Constitution Article III

Section 1

• “Judicial power vested in one Supreme Court.”

• Number of Supreme Court Justices determined by Congress for Presidential appointment and confirmation by the Senate to life terms with guarantee of no reduction in pay but with no specification of qualifications

Section 2

• The judicial power shall extend to . . . . “appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”
US Constitution. Supremacy Clause

- **Article IV. States**

- **Article V. Amendments**
  - 2/3 of Congress to propose. 3/4 of States to adopt

- **Article VI:**
  - This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land
Bill of Rights: 1st 10 Amendments

#1. “Congress shall make no law . . .

#4 The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

#5. No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

#10. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

#14 (1868) No state shall deny to any person due process or equal protection of the law.

Questions/Comments?
From Principle into Practice

The Judiciary Act of 1789

1. Set the number at six: a chief justice and five associate justices

2. Granted Supreme Court original jurisdiction to issue *writ of mandamus* + appellate jurisdiction over newly created US trial courts
Marbury v. Madison 1803

Federalist Pres. Adams appointed Marbury as magistrate.

Federalist Secretary of State Marshall leaving office failed to deliver his commission.

Incoming Sec. of State Madison, a Democratic-Republican, refused to deliver commission.

Plaintiff asked Supreme Court to exercise original jurisdiction granted by statute.

Power of Judicial Review to find Acts of Congress and State legislatures unconstitutional. Article VI. Supremacy
Modes of Constitutional Interpretation

Types of Western Legal Systems
1. English Common Law judge made in cases for which there no clearly legislated rule
2. European Civil Law limits judges to legislated code, bars creative lawmaking

Fundamentalist v. Progressive Constitutional Interpretation
1. Strict construction, plain meaning, textualism, originalism.
2. Evolving standards, liberal construction for new times. Broad construction of text for adaptation as an organic charter. Reliance on natural law when positive man-made law found inadequate.
1802 President Adams + Federalist Congress lost to President Jefferson and Republican-Democrat Congress

- Repeal Federalist Judiciary Act, abolish lower courts
- Impeach Samuel Chase, Senate failed to convict

Induce resignation. LBJ replace Goldberg with Fortas

Forced resignation. Nixon investigate Fortas
1. Jefferson increased to 7 Justices, appointed 3

2. Later increased to 9 and then 10 by 1866 when Congress legislated a reduction. In order to prevent Andrew Johnson, a southern sympathizer from filling vacancies the number was reduced first to 9 and then 8 following two departures, before adoption of the 1869 statute establishing 9, the number still in effect after 152 years.

3. 1930s FDR effort to add up to six justices based on age of incumbents rejected by both parties.
Political Check: Appointments

Andrew Jackson appointed Roger Taney Chief Justice to succeed Marshall seeking enhanced states’ rights

17th Amendment change to direct election of Senators triggers first contested confirmation hearings. Shenanigans

Interest Groups: Federalist Society v. American Constitution Society
Democrats successfully block Republicans
Parker, Haynesworth, Carswell, Bork, Ginsburg.
Republicans successfully remove Fortas, block Garland, add Cohen
Appointments: Mixed Results Post 1968

1. 3 Nixon appointees ruled against his effort to withhold tapes leading to forced resignation
2. Bush #1 disappointed by Souter to replace Brennan
3. Bush #2 pleased by Alito to replace O’Connor
4. 6 Moderate Republicans - Blackmun, Stevens, Souter join liberals Powell, Kennedy, O’Connor centrist swing votes
5. 8 Conservative Republicans - Chief Justices Burger, Rehnquist, Roberts, Scalia, Thomas, Roberts, Gorsuch, Kavanaugh, Cohen

Questions/Comments?
1. 11th Amendment bars citizen lawsuits against states. *Chisholm v Georgia*

2. 14th Amendment grants citizenship to all born on U.S. soil. *Dred Scott* decision denied rights to former slaves

3. 16th Amendment gives Congress power to tax personal income. *Pollock v. Farmers Loan + Trust*

4. 24th Amendment forbids poll tax. *Breedlove v. Suttles*,

5. 26th Amendment grants the vote to 18 year olds in state elections. *Oregon v Mitchell*

6. Proposed 27th Amendment Corporations not entitle to constitutional rights as “persons” *Citizen’s United*
1. 1965 voting rights act amended by Democratic Congress to expand protection of minority voting rights from changes in election law creating a disparate impact even if intentional discrimination not proven. *Mobile v. Bolden.*

2. Reagan administration unsuccessfully opposed, raising Justice Department objections drafted by John Roberts.

3. Following appointment as Chief Justice Roberts authored opinions striking down enforcement provisions based on a new majority’s revised interpretation of the statute.
Only one exception, in 1867 when Congress denied the court authority to hear an appeal brought by an editor arrested for critique of reconstruction. *Ex Parte McCordle*
Political Check: Mobilize Opinion

Reputation and Legitimacy

Legal Elites
- Bar Association Resolutions,
- Law School Journals
- Journalists, Newspaper Columnists

Mass Publics

Questions/Comments?
Preview Questions for Week 2

1. Should the Supreme Court have final authority to decide the individual right to bodily integrity in deciding whether a woman can abort a viable fetus in the third trimester of pregnancy and whether a skeptic can be compelled to receive a vaccine against COVID-19?

2. If not, who should have that authority?
   - Each individual citizen has that personal right
   - Elected Executive — US President, Governor, Mayor
   - Elected Legislature — US Congress, State Assembly, City Council, School Board
   - Whichever decides either issue in accord with my preference either for or against abortion, for or against vaccination.
What was Chief Justice John Marshall’s 1803 decision in *Marbury v. Madison*?

Which applies to Chief Justice Earl Warren?

Which political check on Judicial Review has been successfully used 5 times?
Websites

•  https://www.scotusblog.com Latest updates, data, analysis

•  https://www.oyez.org
  https://www.oyez.org/cases/2020/19-1257

•  https://www.supremecourt.gov Briefs, Transcripts, Audio
Practice Test Questions

All answers submitted on the Zoom poll will be anonymous.
All questions identified as “Multiple Choice” have at least two correct answers.
All questions can be answered using class notes without hearing the Zoom presentation
Q 1  Week 1 Choose the one correct answer

What was Chief Justice John Marshall’s 1803 decision in *Marbury v. Madison*?

A. That the trial court erred in granting freedom to the slave William Marbury.

B. That the lower court decision granting Marbury’s magistrate commission was wrongly decided and should be reversed.

C. That the Article VI Supremacy Clause Congress and Article III on the judiciary empowered the Supreme Court to determine a Congressional statute violated the Constitution

D. That President Jefferson had the executive authority under Article II to deny a judicial commission to William Marbury
Q. 2 Week 1. Multiple Choice — at least two correct answers.

Which applies to Chief Justice Earl Warren?

A. when he retired from the court was the only remaining Republican Justice

B. issued rulings on the rights of criminal defendants consistent with his former practice as a tough on crime prosecutor in California

C. was denounced by conservatives as a judicial activist for invalidating innumerable state laws as violations of the equal protection clause

D. When deciding on the constitutionality of 1960s civil rights laws upheld Congressional authority over commerce to prohibit segregation by private business
Q 3  Week 1 Choose the one correct answer

Which political check on Judicial Power has been successfully used 5 times?
A. Constitutional Amendment
B. Removal of a Justice
C. Blocking an Appointment
D. Creating an exception to the Court’s Jurisdiction