

CONSTITUTIONAL RIGHTS FOUNDATION

Bill of Rights in Action

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An Independent Judiciary

One hundred years ago, a spirit of reform swept America. Led by the progressives, people who believed in clean government and that government had to help solve society's problems, the movement elected representatives to Congress and to statehouses around America. Progressives passed legislation aimed at improving working conditions, breaking up business monopolies, creating welfare programs for the poor, and assuring pure food and drug standards. Businesses hurt by this new legislation often opposed the new laws and challenged them in court.

Many of these lawsuits ended up in the U.S. Supreme Court led by Chief Justice Melville Weston Fuller. Fuller and a majority of the justices at the time often took a dim view of government regulation and believed that social problems would best be solved by the workings of a free and uncontrolled market. They based many of their court opinions on the due process clause of the 14th Amendment, which says no state shall "deprive any person of life, liberty, or property, without due process of law" In interpreting this clause, they developed the doctrine of substantive due process.

Under this doctrine, the court would review the substance of governmental laws and would find unconstitutional those laws that interfered with a right to property, or freedom to make contracts, or some other liberty. For example, in 1897 the state of New York passed a labor law forbidding employees of a company from working more than 60 hours in one week. An employer sued claiming that the law violated the Constitution. The Supreme Court, in the case of *Lochner v. New York* (1905), struck down the law reasoning that there was "no reasonable ground for interfering with the liberty of persons or the right of free contract, by determining the hours of labor." The court went on to strike down dozens and dozens of progressive-passed laws.

The actions of the Supreme Court raised a storm of controversy. Progressives complained that the court was countering the will of the majority and usurping the powers of the legislature. Others claimed that the court lack judicial restraint and was too eager to declare laws unconstitutional. Yet, the Fuller court's decisions stood until the 1930s when a later court all but abandoned the doctrine of substantive due process.

Criticism of the role of courts in our society, however, did not end. Ironically, in recent years, conservatives often complain about "activist" judges or fear that judges are legislating from the bench. Some have favored laws that would restrict judicial power by limiting courts' jurisdiction or judges' discretion in sentencing. Other groups target

judges who render unpopular decisions for removal from office through impeachment, recall, or re-election.

Defenders of the courts worry that political attacks on judges and basic changes to our judicial system could undermine the independence of the judiciary and seriously affect the delicate balance of powers contained in our constitutional system. But how did an independent judiciary come about and what does it mean to have one?

The Third Branch of Government

When the framers of the Constitution arrived in Philadelphia in 1787 to consider a new form of government for the United States, it was a foregone conclusion that it would have three branches. Well-educated students of history, the framers had been influenced by great political thinkers of the past, including the Frenchman Montesquieu. Central to his ideas about government was the concept of separation of powers. He believed that the best way to preserve individual liberty and avoid tyranny was to divide the powers of government into the legislative, executive, and judicial function. In this way, none of the branches would possess all of the power and each would balance one another off.

Those at the Constitutional Convention worried about power too. Fresh from the revolutionary experience, they wanted to make sure that the government had enough power to solve the country's problems, but not too much power to ride roughshod over the states or individual citizens. Many viewed the judicial branch as, in the words of Alexander Hamilton, "the least dangerous to the political rights of the Constitution" and as a necessary buffer between the powerful presidency and Congress.

Article III of the Constitution states: "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 article goes on to describe what kinds of cases the "judicial Power" would be empowered to hear. Language in the article suggests that the framers wanted the judicial branch to serve an independent role free from political pressure. It stated that judges should "hold their Offices during good Behavior." This meant judges could only be removed for misconduct. It also stated that judges should receive a salary that could not be reduced during the time they held office. This would assure that judges could not be punished by salary reductions if they made unpopular decisions.

Though the framers created an independent judiciary in Article III, they also included some checks and balances against too much judicial power. The Constitution gave the president the power to appoint judges with the "Advice and Consent of the Senate." It gave Congress the power to create or eliminate lower federal courts and determine what cases could be appealed to them.

Oddly, the Constitution says nothing about the one job the Supreme Court is most known for today. That is the power to review federal and state laws to determine whether or not they are constitutional. Some scholars have argued that the framers assumed that the

Supreme Court would have this power without having to spell it out in the Constitution. They cite, for example, Alexander Hamilton in *The Federalist Papers*, a series of articles published to support the ratification of the Constitution. He wrote:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by judges, as fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

Once the Constitution was ratified, the First Congress of the United States went about establishing the rest of the federal courts under the powers given to it. The Federal Judiciary Act of 1789 laid out a plan that today has grown into an extensive system of federal trial and appeal courts. It also gave federal courts the power to take appeals from state decisions.

The Power of Judicial Review

The judiciary asserted its independence and power when John Marshall became the Supreme Court's fourth Chief Justice in 1801. The question of whether the court could declare governmental actions unconstitutional had not yet been settled. The opportunity came with the case of *Marbury v. Madison* in 1803.

In the last hours of his administration, President John Adams had appointed William Marbury as a justice of the peace in the District of Columbia. Unfortunately, Marbury did not receive the appointment papers before Adams left office. The new president, Thomas Jefferson, ordered Secretary of State James Madison not to deliver the appointment to Marbury. Marbury sued to get his appointment, citing the Judiciary Act of 1789. This law had given the Supreme Court the power to order judges and government officials to act.

In his majority opinion in the case, Marshall agreed that Marbury had a right to the appointment. He ruled, however, that the Supreme Court did not have the power to order Madison to deliver the appointment and make it official. The section of the Judiciary Act in question, he determined, gave the Supreme Court a power that it did not have under the Constitution. Since the Constitution was the supreme law of the land, Marshall reasoned, any statute that violated it could not stand and it was the duty of the Supreme Court to overturn the statute. In giving up the power in the Judiciary Act, Marshall carved out for the court a much greater one—the power of judicial review.

Over the years, the court expanded the power of judicial review to cover not only acts of Congress, but executive and administrative orders as well. In time, it also became the power of the lower federal courts and many state courts as well. In many ways, this power was unique to the American experience. Even England, the origin of so many of our political and legal principles, did not give its judges the power to overrule acts of parliament on constitutional grounds.

Judicial review does have limits. Judges can only review laws or other governmental acts that are challenged in court. And once a ruling is made, judges must rely on the other branches of government to enforce them.

While judicial review expanded the power of the judiciary, it also placed judges in a new role. In deciding whether a governmental act meets constitutional standards, judges had to *interpret* the meaning of the Constitution. Their interpretation, even if based on law and reason, can run contrary to the views of legislators, presidents, or the public. As we saw with the Fuller court and its doctrine of substantive due process, this can lead to political controversy and charges that the court is not interpreting the Constitution, but making its own laws.

Politics and the Judiciary

Ever since the time of John Marshall, the judiciary has been embroiled in political squabbles, some that have threatened its independence. In fact, the famous case of *Marbury v. Madison* itself began when President Adams tried to appoint a loyal federalist party man to a judgeship, and the new president Jefferson rejected the appointment favoring judges from his own political viewpoint.

President Andrew Jackson quarreled with Chief Justice Marshall over the court's decision in the case of *Worcester v. Georgia*. Jackson reportedly said, "Well, John Marshall has made his decision, now let him enforce it." Though it is likely that Jackson never really used these words, the statement illustrates one of the real limits on judicial power. It must rely on the other branches of government to enforce its rulings.

Democratic President Franklin Roosevelt, frustrated with Supreme Court actions striking down much of his New Deal legislation, proposed a plan to increase the number of justices so that his appointees would be able to outvote the sitting justices. He also once prepared a radio address to tell the American people why he would not comply with a Supreme Court ruling, but at the last minute the court voted in his favor. Roosevelt's proposed plan to "pack" the Supreme Court set off a firestorm of public criticism, even from his own supporters. Viewed as a naked attack on the independence of the judiciary, no one ever proposed such a strategy again. (Later, the number of Supreme Court Justices was set at nine by federal statute.)

At times the court has also made decisions that have run contrary to the will of Congress. Under the Constitution, Congress has numerous checks that it can use against the judiciary. First, it has control over funding the federal judiciary's budget. Though it cannot lower judges' salaries during their terms in office, it can reduce staff, lower operating costs, and withhold money for court-ordered actions. Second, Congress can propose new laws or constitutional amendments to override specific court decisions. Third, it can restrict the kinds of cases that can be appealed to the federal courts. In fact, though unlikely, Congress has the power to completely abolish the lower federal courts.

Courts in Controversy

Over the last five decades, America's independent judiciary has done much to shape our history. Through its decisions, the court extended voting rights, abolished laws legalizing racial segregation, recognized the rights of those accused of crime, and expanded the rights of free speech and the press. While many of these decisions became accepted by the vast majority of Americans, others have raised ongoing controversy. Court decisions guaranteeing a woman's right to an abortion, banning prayers and Bible reading in schools, excluding illegally seized evidence in criminal trials, and permitting the burning of the American flag have led to charges that the court has gone too far in interpreting the Constitution.

These decisions have given rise to new calls for limiting the power of the judiciary. In recent years, Congress has passed legislation limiting the discretion federal judges have in determining sentences in criminal trials. Proposals have been made to limit the jurisdiction of federal courts in certain matters. The Senate has also shown its willingness to carefully scrutinize presidential appointments to the Supreme Court and to the lower federal courts under its "advice and consent" power. The trend toward limiting the power of the judiciary can also be seen at the state level.

Some worry that if these trends continue, the delicate balance between the powers of the judiciary and the other branches of government in our system could be undone. Others fear that these trends could compromise judicial independence making judges less likely to make decisions based on law and conscience and more likely to make decisions that serve political ends.

As we have seen, these debates are not new to our history. It is likely that they will continue into the new millennium and beyond.

For Discussion and Writing

1. What evidence in the Constitution suggests that the framers wanted an independent judiciary?
2. What checks against judicial power did the Constitution give Congress?
3. How did the power of judicial review increase the political pressure on judges?
4. Do you agree or disagree with Hamilton's statement that the judiciary is the "least dangerous" branch of government? Why?