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The Question of Judicial Legitimacy and Popular Will

One of the most storied institutions in the history of the United States, as a nation-state, is its judiciary: originally a carry-over of England’s common law system, the judiciary of the United States, with its reliance on precedent and review, has reserved for itself a place as one of the most important institutions in government, and indeed in the values of citizens regarding government. But a singular problem has always plagued this venerable institution: that of legitimacy. Briefly, we can summarize the problem simply by juxtaposing the fact that the judiciary has no inherent enforcement mechanism with its own aspirations to being obeyed and taken seriously, that is, viewed as a legitimate authority. In the United States, this question is best investigated in the context of the Supreme Court, which has accrued for itself the power as the arbiter for the other branches and adjudicator of what is deemed ‘constitutional’ or not. Much of what the court does is weighed by considerations of legitimacy and legal theory, which merits investigation. The decisions and actions of the court, for example, influence how the people view its legitimacy, and in turn the court contemplates popular perception of itself when acting. This question of popular will and sovereignty forms an omnipresent backdrop for the actions of the Supreme Court, perhaps superseding the law as well, as we will see when considering theories of law such as the Hard Right Answer thesis and various schools of jurisprudence. Ultimately, the will of the people reigns supreme: “vox populi, vox dei,” after all: a study of the Supreme Court demonstrates that the concern of legitimacy, intertwined with the question of popular will, overrides the court’s imperative to resolve the law objectively. As the opinions of the people ebb and flow, so too does the direction of the Supreme Court, presenting a serious complication to the judiciary’s conceit of objectivity.

A good cornerstone for such a query lies with the seminal case Marbury v. Madison, which the Supreme Court considered in 1803. This case was the culmination of the political tensions of the time, which deserve a short elucidation. The election of 1800 was hotly contested between incumbent John Adams, of the Federalist Party, and Thomas Jefferson, of the Democratic-Republican party, Jefferson emerging the victor. With a party transition on the way, Adams and the Federalists sought to frustrate the incoming administration and resolved to handicap it by packing the judiciary with Federalist appointees: the Judiciary Act of 1801, passed by a Federalist Congress, gave the President the authority to essentially fill the judiciary with an unlimited quantity of judges, which Adams did in quite literally the hours before leaving office, spending the waning hours of his term feverishly signing commissions to be delivered. To finalize the process of appointing a judge, this signed commission had to be delivered by hand, of course, but due to the belated nature of the appointments a fair share of these commissions went undelivered, one of which was intended for one William Marbury. Jefferson’s administration, evidently not seeking to injure itself by filling the judiciary with antagonistic judges, with James Madison, the other party to the case, being Jefferson’s secretary of state responsible for delivering the commissions. Marbury sued for a writ of mandamus (essentially a court order) and brought his case before the Supreme Court, where sat the Chief Justice John Marshall, himself a Federalist.

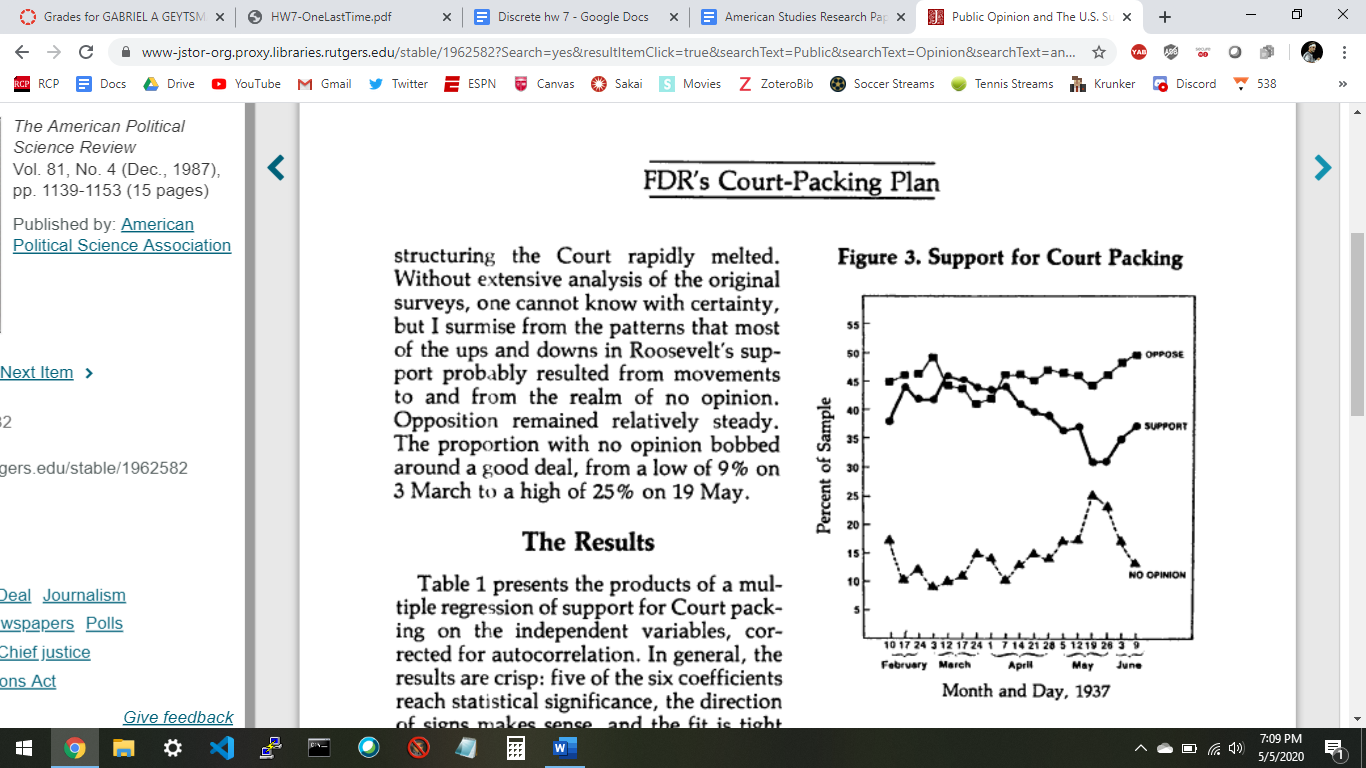
So much for the political circumstances and facts of the case. The issues John Marshall had on his plate were threefold in quantity: was Marbury entitled to his commission; and if so, what remedy was appropriate; and if the writ of mandamus Marbury sought was appropriate, if the Supreme Court had the authority to issue such a writ. In response to the first order of questioning, the Chief Justice wasted no time in delivering his verdict, writing thus: “Having this legal right to the office, he has a consequent right to the commission, a refusal to deliver which is a plain violation of that right for which the laws of the country afford him a remedy” (Marbury v. Madison, 5 U.S. 137 (1803)). The second question, Marshall rules, is also decided in favor of Marbury. Marbury’s case belonged to class of cases considered *damnum absque injuria*, loss without injury, due to the failure of some government official to fulfill their designated duty. The sought after writ of mandamus is the proper remedy for such a case, Marbury opines, citing the very able judge Lord Mansfield, the Lord Chief Justice of the King's Bench from 1756-1788, thus: “Whenever there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern or attended with profit), and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, this court ought to assist by mandamus” (Marbury v. Madison, 5 U.S. 137 (1803)).

But these rulings were widely anticipated and not particularly controversial. What makes this case a significant one is the ruling on the third question. Marbury was aware of two clashing imperatives: to faithfully uphold the law was one, but he was equally interested in maintaining the legitimacy of the fledgling Supreme Court. Up to that point that institution, scarcely credible though it may seem to us in our time, was a seldom considered and borderline irrelevant institution. Thomas Jefferson, the President, had already made the claim that if the ruling went against him, he would simply refuse to obey it. Given the already flimsy concentration of power the Supreme Court had at the time, John Marshall was keenly aware of the fact that should he gainsay the President in his ruling the Supreme Court may be abandoned altogether and lose all legitimacy in one fell swoop. Marshall therefore had to juggle these competing issues in his ruling, and he did so masterfully.

In answering the third part of the question before him, concerning whether the Supreme Court was the right place for Marbury to attain his remedy of the writ of mandamus, Marshall pulled off a stroke of genius. A moment of legal context to elaborate on how Marshall wiggled out of the tricky wormhole that he was in at the time. The Constitution of the United States, in Article III, establishes, loosely, what the judiciary branch of the federal government will look like, placing few but firm stipulations on what the Supreme Court should do and directing Congress to construct the rest of the judiciary as it pleases. One of these contourings of the power of the Supreme Court was in defining where the Supreme Court held original jurisdiction, that is, where the Supreme Court had the right to hear the case first, and the list of such situations is specific and lengthy, not warranting repetition here. The rest of the judiciary was up to Congress to create. Responding to this obligation to form the judiciary branch, Congress passed the Judiciary Act of 1789, which structured the district courts, courts of appeals, and gave a full incarnation to the skeleton of the judiciary laid out in the Constitution; one of the things this act allowed the Supreme Court to do was issue writs of mandamus to public officers (that is, provide the exact remedy that Marubry was after). But Marshall saw here a contradiction between the Constitution’s specifications of original jurisdiction and the Judiciary Act’s allocation of the power to issue such writs to the Supreme Court: in allotting it such a power, Congress expanded the Supreme Court’s original jurisdiction to include suits where individuals sought writs of mandamus from public officers. Marshall argued that therefore the act on which Marbury relied to get his case to the Supreme Court contradicted the Constitution, and furthermore, that according to Article VI of the Constitution, the Constitution was superior to all laws of Congress. Accordingly, Marshall reasoned, the Supreme Court did not have the authority to hear this case and issue such a writ because the act that gave it such power was *unconstitutional*.

Marshall ostensibly ruled against Marbuy in the name of preserving the limited power of the Supreme Court as defined in the Constitution but in doing so simply invented out of thin air the power now known as judicial review, whereby the Supreme Court can review laws passed by Congress or and legislative body in the nation, or executive actions, and determine if they are unconstitutional. How did Marbury manage to satisfy all the self-interested parties at hand while simultaneously accruing massive power for the Supreme Court that was previously almost irrelevant? Intrinsic to this great coup is the notion of legitimacy. Marshall couldn’t deny Marbury’s right to a commission because it would be illegitimate of the Supreme Court to deny the blatant, obvious legal answer; Marshall couldn’t just let him win because Jefferson would refuse to listen and the Supreme Court would be abandoned altogether and no executive would listen to it ever again. But Marshall’s ruling satisfied every party, and accordingly, both the people and the other branches were prepared to accept as legitimate this newfound power of judicial review: since Marbury later won his case in a lower court, and ultimately got his post, and Jefferson technically won the case, all parties concerned were happy with the ruling and thus Marshall’s power grab was accepted by all. Here it is most principally evident that there was no objective legal basis for the action of the court, no law or text or precedent referenced that guided Marshall in his creation of judicial review; all that mattered was that his decision was popular and thus agreed upon to be legitimate. This is how legitimacy affects the law: ultimately, regardless of any protestations of the contrary regarding the objectivity or correctness of the courts, judges can and do simply rule with the popular will close in mind, legitimacy trumping the question of law itself.

Another critical moment where the question of the Supreme Court’s standing with the public shaped decisions through the concept of legitimacy was during the Great Depression, during an episode known as the ‘court-packing’ plan of President F. D. Roosevelt. Gregory A. Caldeira’s “Public Opinion and The U.S. Supreme Court: FDR's Court-Packing Plan” gives us plenty of analysis regarding this particular historical instance. As with Marbury v. Madison, context is required (indeed, as with most legal issues, the facts come before the issues and the rulings). In 1937 President Roosevelt attempted to push through constitutional reforms to “pack the court,” and it is exceedingly important to understand the chain of events that preceded this radical reform attempt. As Caldeira writes, “from the outset of Roosevelt’s administration, the president and Court were at cross-purposes” (Caldeira 1140). The Great Depression motivated Roosevelt to expand the scope of the federal government’s powers to address the crisis and provide expansive programs that were unlike anything the federal government had orchestrated before; the court, in keeping with its purpose, was interested in constraining federal power, both legislative and executive. After all, much of what Roosevelt wanted to accomplish required powers that reached far beyond the meagre allocations of the Constitution.

The Supreme Court’s frustration of the President’s legislative agenda was far-reaching: in May of 1935 the Court struck down Railway Pension Act, the National Industrial Recovery Act, and the Frazier-Lemke Act, as well as “reversing FDR’s dismissal of a member of the Federal Trade Commission” (1140). The Court struck down New York state’s attempt to set a minimum wage for women later, as well as host of other laws; it is over-burdensome to list them all. Legislative attacks on the Court sprung up, even though FDR himself did nothing, yet; among these was a measure proposed in Congress to abolish judicial review as a whole, the very purpose of the court as established in Marbury v. Madison. FDR waited until after reelection in 1936 to propose a measure which would allow him to appoint another justice for every one that had served for more than 10 years; this would allow him to pack the court with justice favourable to his conception of federal power. The Supreme Court was keenly aware of the implications of this move. At the heart was a clash between the legitimacy of the court and the massively popular programs FDR had enacted that were struck down. Gallup polling at the time provides data that concretizes how citizens related to the Court at the time, as the controversy had taken up so much media space that the esteemed polling agency took it upon itself to put the question to the people. Caldeira provides us with a handy chart representing this polling information from Gallup:

Briefly, a quick timeline of events needs to be narrated to understand why the court packing scheme eventually fell apart, both in the eyes of the public and in Congress. After President Roosevelt had announced the move and made the case at a rally after his election, support was largely divided along partisan lines, but one key argument of Roosevelt’s stood out: he urgency of the state of affairs facing the nation demanded action, and the Supreme Court was frustrating needed change as well as, according to Roosevelt, usurping power for itself by denying the rights of states to legislate (after denying efforts of state legislatures to enact their own little New Deals of sorts). The response of the Supreme Court is precisely the matter that merits discussion of this entire episode. In what is widely viewed as a step towards reconciliation with the President and accordingly a redemption of legitimacy in the eyes of the people, the Supreme Court ruled several times in favor of President’s Roosevelt’s programs, many times completely surprising even the President’s own team of lawyers. The Supreme Court upheld, on 29 March 1937, a Washington state minimum wage law in West Coast Hotel v. Parrish, seemingly overturning its own small-government intentions previously mentioned when striking down a New York state similar minimum wage law, less than a year before. Next, and perhaps most significantly, on April 4 1937 the Court deemed constitutional several major components of the Wagner Act, which was one of the most far-reaching reforms of the New Deal, and considered “arguably the most important piece of legislation to date protecting workers’ and unions’ rights,” being the foundational law for the rights of workers to form unions and engage in collective bargaining (Roosevelt Institute: Wagner Act). At the crux of this surprising decision was a reversal of position by Chief Justice Hughes, who “articulated a vision of national power ample enough to accommodate much of the New Deal” (Caldeira 1142). Finally, the decision of Justice Van Devanter, the leader of the anti-Roosevelt conservatives, to retire seemingly handed Roosevelt a reliable majority in the Supreme Court.

These decisions, specifically the one on April 4 (regarding the Wagner Act), proved sufficient to drive down support for President Roosevelt’s court-packing agenda, as demonstrated in Figure 3. The court, contemplating its own dwindling legitimacy (support for Roosevelt’s Supreme Court reform exceeded 50% in the early stages of Roosevelt’s push) deliberately reversed course on several key issues. While the court has overturned precedent before, it is the timing of these decisions, and specifically the lack of time between ruling one way and then ruling the other way, that is most damning when considering how the court weighed popular support when making its decisions. Intrinsic to the court’s evaluation of the situation is the question of whether belief in the legitimacy of the court hinges on public approval of the court’s rulings; this question is investigated by Johnson, Hillygus, and Bartels in “IDEOLOGY, THE AFFORDABLE CARE ACT RULING, AND SUPREME COURT LEGITIMACY,” which considers public faith in the court during the national debate over the Supreme Court’s two rulings on the Affordable Care Act, the piece of legislation commonly referred to as Obamacare. Their findings, summarized briefly, are mainly that people’s opinion of the legitimacy of the Supreme court does vary along partisan lines when presented with the information that the Supreme Court, with a conservative majority, delivered a liberal verdict: there is an “ideological foundation to Supreme Court legitimacy in the mass public [ … ] our results unequivocally demonstrate that legitimacy varies as a function of citizen ideology” (Johnson et al. 972).

This finding can be compounded upon by considering the results of another study which examined whether an individual “rogue” actor can influence public perception of Supreme Court legitimacy. In “Extra-Judicial Actor Induced Change in Supreme Court Legitimacy,” Miles Armaly investigates whether Donald Trump’s rhetoric attacking the Supreme Court on the grounds that it was liberally biased had an effect on whether citizens viewed it as legitimate; this is particularly useful insofar as it mirrors the efforts of President Roosevelt, in the aforementioned situation with the court packing scheme, to undermine the Supreme Court’s legitimacy on the grounds that it had a conservative bias and was usurping power. If, as shown by Johnson, partisanship affects perception of legitimacy, and if in addition legitimacy can be swayed by the President, then it stands to reason that the Supreme Court was astutely observant of the situation at hand and conscious of the fact that its legitimacy was genuinely under threat. Armaly’s warning that “members of elected branches … may be capable of altering this support is troublesome, as it would offer these institutions license to curb court authority” (Armaly 672). Indeed, the study points to the notion that “an extra judicial political figure can alter the diffuse support for the Supreme Court,” indicating that such fears are fully merited (Armaly 609).

Considering Louis Althusser’s description of how the mode of production reproduces the conditions for production, a similar sort of analysis can be extrapolated onto the juristic maneuverings of the Supreme Court1. As Althusser writes of the economy at large, “The ultimate condition of production is therefore the reproduction of the conditions of production,” so too can we posit that the Supreme Court rules in such a way as to reproduce the conditions where it can continue ruling, in perfect consonance with our thesis (Althusser 86). While Althusser’s mono-dimensional presentation of the courts as part of a single oppressive state apparatus does not really h[[1]](#footnote-0)armonize with an analysis of judicial review and the Supreme Court on the level of jurisprudence, the overall observation of the behavior of institutions towards self-preservation is congruent to the notion that the Supreme Court keeps legitimacy as a concern in close proximity to its own decision-making process (Althusser 90).

Ultimately, reuniting all the separate strands that are to be woven together into the cloth of one thesis, a faithful examination of the Supreme Court’s jurisprudence in the most extraordinary of times reveals a singular preoccupation with legitimacy; in times when this singular preoccupation of the Supreme Court is genuinely at stake, one can expect the Court to act in consonance with the popular will to preserve itself. In turn, the notion of law, and the conception of the rulings of the Supreme Court as being based in objective interpretation of what is legal and constitutional and what is not, is completely replaced and outmoded when brought into conflict with the mere notion that the Supreme Court acts to maintain its legitimacy, and, when it can, acts above and beyond what is expected of it so long as it is considered legitimate. As seen in Marbury v. Madison, the ruling of John Marshall was not influenced by the legal facts at hand, which were as one-dimensionally obvious as can be, but rather by the concern for legitimacy that prevented him from handing down a straightforward, correct ruling; in turn, his resolution massively expanded the power of the Supreme Court, out of thin air, which succeeded not out of an objective basis in legal fact but because all parties at the time were prepared to admit that his move and newfound power was legitimate. Likewise, in other drastic times of power shifts, such as during the Great Depression when the federal and state governments assumed powers far beyond what was originally allotted to them in the constitution, the Supreme Court seemingly vacated its obligation to frustrate the attempts of other branches to amass power, owing to the threat made upon its legitimacy by the President and dwindling popular support. Indeed, research supports the notions that legitimacy is both a function of, and swayed by, partisan lean (of the individual, and of the rulings) and can be moved significantly by the proclamations of popular elected leaders that are, by definition, extra-judicial actors. Althusser’s notion that institutions will insure their own conditions for survival is an apt lens to contemplate the Supreme Court’s dealings with the popular will when ruling. The Supreme Court, it seems, rules based on this consideration of legitimacy moreso than based on cold, hard, legal fact, and is a servant to popular will and its own self-perception of legitimacy.

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1. Althusser, a Marxist, would object to any sub-categorization of the government as espoused by Montesquieu into branches, subsuming it into the ‘superstructure’ upheld by an economic base, but the method of analysis is nevertheless malleable enough to apply here. [↑](#footnote-ref-0)