Princeton University

Checking Judicial Power in the Twenty-First Century

Hayley Roth

Class of 2017

November 2014

*“Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.”*

So spoke President Andrew Jackson in 1832 in accordance with his decision to veto the congressional bill intended to reestablish the National Bank. The bill came in the wake of *McCulloch v. Maryland,* a bold decision by the Marshall-led Supreme Court of 1819 to constitutionally validate the existence of a National Bank. At this time, the doctrine of judicial review had already been fundamentally institutionalized by *Marbury v. Madison* in 1803*.* Judicial review allows American courts to have a say in evaluating the constitutionality of legislative and executive action; however, this premise does not undermine Jackson’s sentiment. In fact, judicial review is of vital importance to the democratic checks-and-balances system that dampens potentially dangerous law and protects the rights of the minority, whose voices can often be drowned out by the popularly-elected representatives of the legislative and executive branches. Yet the doctrine of judicial supremacy, which surpasses judicial review in scope and potency, asserts that the courts have the *final* say over the constitutionality of these actions. The validity of this doctrine itself is highly debatable; in fact, I am prepared to argue that the President is in no way bound to acknowledge the decisions of the Supreme Court as fundamentally inalterable as if protected by the impenetrable shield of judicial supremacy. Although a preeminent practice throughout the twentieth and twenty-first centuries, judicial supremacy remains constitutionally unfounded. Former Presidents Jefferson, Jackson, and Lincoln fought vigorously and successfully against the threat of judicial supremacy by emphasizing not only the trifold equality of the individual branches of federal government, but also the ensuing duty of each branch to uphold the Constitution in the way that it sees fit.

The rationales for justifying judicial supremacy often place the Court above human error; it is seen as the great leveler, the incorruptible interpreter of constitutional justice, the “bulwark of a limited constitution against legislative encroachments” (Alexander Hamilton, Federalist No. 78). Congress cannot be a constitutional check upon itself; in the wake of haggling, negotiations, and compromises, the representatives are apt to overlook constitutional improprieties, to say nothing of personal partialities towards expounding the limits of their own power. Elected representatives are also subject to the whims of the day favored by the electorate and less likely to be grounded in impartial analysis of constitutionality. If the judiciary department is not secured against the corrupt influence of the legislative department, then the very fiber of democracy is at risk of devolving into a parliamentary system akin to that of Great Britain. A similar threat of the abuse of power exists for the executive branch. It is because of this danger that the judiciary branch, as the nonpartisan and disinterested third prong of federal government, is supposedly justified in maintaining superior control over the constitutionality of congressional and presidential decisions.

Yet for the Supreme Court to act as supreme guardian, one must dissociate it entirely from its innately human tendency towards error; this is a task which we, and any other impartial observer of historical fact, are unable to do. As President Lincoln stated in his First Inaugural Address, “… it is obviously possible that decisions may be erroneous in any given case.” Perhaps the most infamous example is *Dred Scott v. Sandford* (1857). In the wake of the disastrous verdict, Lincoln fought to counteract judicial supremacy by reminding the legislature that the result was not etched in stone as an unbreakable precedent. Rather, representatives should attempt to pass laws almost indistinguishable from those found to be unconstitutional in order to halt “the evil effect following [a case such as *Dred Scott*]… with the chance that it may be over-ruled, and never become a precedent for other cases” (First Inaugural Address). The very nature of the “head count” of conservatives and liberals on the bench destroys the argument that the court is immune to partisan tendencies.

Therefore, judicial authority should be restrained by legislative and executive minimization of the precedents that the verdicts attempt to set. The recent decisions of the Supreme Court in *Citizens United v. Federal Election Commission* (2010), *National Labor Relations Board v. Noel Canning* (2014)*,* and *Burwell v. Hobby Lobby* (2014), have dangerous potential if their precedents are in no way to be challenged or countered. The reach of *Citizens United* has stretched to allow not just non-profit organizations, but also corporations and labor unions to spend unlimited funds on direct advocacy for or against political candidates. *Noel Canning* has catalyzed the invalidation of all decisions put forth by the NLRB since the recess appointments of President Obama in early 2012. *Hobby Lobby* could cause swarms of companies to claim widespread exemption from various federal laws on religious grounds. If the scope of these verdicts goes unchecked, such constitutionally unfounded actions could exponentially increase.

Congressional actions to lessen or negate the effects of the verdict can be accomplished through the passage of new laws, the amending of old laws to circumvent precise provisions, and the refusal to provide the necessary funding for the implementation of judicial decisions. Thus the federal government would be preventing the unchecked reign of judicial supremacy without flouting the authority of the Supreme Court that Lincoln himself acknowledged to be worthy of “high respect and consideration” (First Inaugural Address). For instance, Congress could enact a tax incentive to benefit non-profit organizations that choose to restrict the amount of funding spent on political campaigning. Such an incentive is not unconstitutional; in the landmark case of 2012, *National Federation of Independent Business v. Sibelius,* Chief Justice Roberts acknowledged that “taxes that seek to influence conduct are nothing new.” Another possible legislative response includes provisions to limit the types of laws from which closely-held corporations are religiously exempt. *Hobby Lobby* specificallystruck down the contraceptive mandate under the Affordable Care Act, but legislative barriers can be implemented to restrict the amount of related eligible mandates for which exemption is possible. Additional legislative action can be undertaken to protect women’s access to health care in other ways.

Such measures are only enforceable through the action of the President. It is also a possibility for the President to veto any Congressional acts that are made in accordance with Supreme Court decrees, in the tradition of Andrew Jackson’s aforementioned veto of the Bank Bill. It is of primary importance for the President to serve as the figurehead in the fight against unconstitutional verdicts; just as Lincoln and Jackson voiced their criticism of the Court and urged the legislature to take counteractive measures, the President should spearhead the effort to communicate to the other branches of federal and local government and to the citizenry the recent transgressions of judicial power and the intent to lessen their effect.

Judicial review is a necessary component of the democratic system, but judicial supremacy is a usurpation of the authority entrusted to the unelected officials who head this nation’s highest court. It is just that the aforementioned legislative and executive measures should be implemented to reduce the scope of *Citizens United, NLRB v. Noel Canning, Hobby Lobby,* and similar unwarranted flexes of judicial power and potency. Without the implementation of the so-called “sword” of the Executive or the “purse” of Congress (Federalist No. 78), the decision of the Supreme Court is nothing more than words on paper. It is via this implementation that judicial power can be controlled.