# Why We Fight So Ferociously Over the Supreme Court

Judicial ambition and congressional dysfunction have given an unelected body enormous power to shape American society

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*Wall Street Journal*
September 26, 2020

If you want to know the roots of the country's present polarization over the Supreme Court, we have to go back. No, not to the contentious hearings for Brett Kavanaugh two years ago, nor to Sen. McConnell's decision to deny a hearing or confirmation vote to Merrick Garland, who was President Obama's 2016 pick to replace Justice Scalia. We must go even farther back than the drama of the Clarence Thomas hearing in 1991 or the attacks on Robert Bork's character in 1987.

The real point of origin is one of the first judicial controversies in the history of the American republic, decided in the landmark 1803 Supreme Court case of Marbury v. Madison. If you think judicial politics is polarizing and opportunistic now, consider what John Adams and his partisan allies did in the closing days of his one and only presidential term.

After losing the election of 1800, the lame-duck Congress and Adams administration, both controlled by the defeated Federalist Party, enacted a law reducing the size of the Supreme Court, eliminated the justices' obligation to "ride the circuit," and created six new judicial circuits, 16 judicial positions and a series of other court-related offices.

The judges nominated by Adams and quickly confirmed by the Federalists were the country's first true attempt at "court packing," at least in lower courts. The incoming president, Thomas Jefferson, immediately worked to reverse the new law, in part by refusing to deliver the commissions that would commence the nominees' terms of service.

William Marbury, a nominee for District of Columbia justice of the peace, did not take kindly to losing his job, and he sued. The precise outcome isn't that interesting (Marbury lost). The reasoning, however, changed history. The court ruled against Marbury because it said that the law that permitted him to bring his lawsuit conflicted with the Constitution. As Chief Justice John Marshall famously wrote: "Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void."

Just like that, Marshall recognized and established judicial review, the authority of the Supreme Court—as a necessary implication of Article III of the Constitution investing it with "the judicial Power of the United States"—to strike down statutes, regulations and other governmental enactments that conflict with the Constitution.

The power of judicial review, especially as exercised by unelected justices with lifetime tenure, is immense. They possess a potential (and often actual) veto over every single public action in the U.S., and history has proven that this power has few real limits. In fact, the chief limitation is simply any given justice's own judicial philosophy and sense of personal restraint.

But that is hardly the whole story. America's modern Supreme Court wars are not simply the result of judicial power and overreach. They are also a consequence of failures at other levels of government, especially the legislative branch. As the Supreme Court has advanced over the past half-century, deciding ever more questions of American life, Congress has retreated, steadily and increasingly abdicating its own constitutional role. Progress against today's polarization over the Supreme Court does not just depend on what the justices do.

Judicial review has a long history of roiling the American body politic. Few rulings by the Supreme Court have had more catastrophic effects, for example, than the infamous 1857 decision in the case of Dred Scott, which gratuitously struck down the Missouri Compromise of 1820, denying the federal government the authority to ban slavery even in the territories it controlled. The ruling's many depredations against justice also included denying citizenship to free Black Americans.

The use of judicial review to invalidate key early provisions of the New Deal led to Franklin D. Roosevelt's court-packing threat. The threat was powerful enough to likely trigger Justice Owen Roberts's famous "switch in time that saved nine," the otherwise mysterious change in his jurisprudence that permitted the remainder of the New Deal to roll forward, unmolested by the judiciary.

Such decisions, for good and ill, are an inescapable part of the Court's power under the Constitution as set out by Marshall and now accepted as a bedrock of American government. But there's no avoiding the fact that our fights over the Supreme Court have ratcheted up in both intensity and consequence in the modern era.

Here we must turn to the history and legacy of the Warren Court. As chief justice from 1953 until 1969, Earl Warren led the Court through a comprehensive and profound constitutional revolution, often over the strong and bitter objections of a majority of the American people and with no meaningful input from Congress.

This shift, which continued even after Warren's tenure, largely dismantled what Ross Douthat and others have called the "soft" establishment of Protestantism as America's official religion. In a series of decisions, the Court established precedents that, among other things, ended school prayer, ended daily Bible readings, blocked displays of the Ten Commandments and banned the teaching of creationism. Many of those practices dated back to the dawn of the American public school system. At a stroke, they were gone.

At the same time that it struck down a number of public religious traditions, the Warren Court created an entirely new body of case law surrounding sexual and bodily autonomy. This jurisprudence was based not on the explicit text of the Constitution but on a right of privacy that was said to be implied by the existence of other rights.

Justice William Douglas's formulation of this right in Griswold v. Connecticut, the 1965 case that struck down Connecticut's ban on contraceptives, is now the stuff of legal legend. Douglas held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." If rights can be created through judicial discernments of "penumbras, formed by emanations," then there are few philosophical limits on the reach of judicial power.

The ultimate expression of this right of privacy was, of course, the Court's ruling in Roe v. Wade, which was handed down in 1973, four years after Warren retired. The case extended the right of

privacy (this time based in an expansive reading of the 14th Amendment's Due Process Clause) to encompass the right of a mother to terminate her pregnancy.

The Roe decision was so broad that it eventually came under fire from surprising sources. For example, in a 1992 law review article published a year before her appointment to the Supreme Court, Ruth Bader Ginsburg called Roe "breathtaking" and inquired whether more "measured motions" would have been appropriate.

She noted that the Texas law at issue in the case permitted abortion only if it was a "lifesaving" procedure. "Suppose the Court had stopped there, rightly declaring unconstitutional the most extreme brand of law in the nation and had not gone on…to fashion a regime blanketing the subject, a set of rules that displaced virtually every state law then in force. Would there have been the 20-year controversy we have witnessed?"

Beyond its sex and religion jurisprudence, the Warren Court also remade American criminal law. It's easy to forget how many of the present institutions of criminal defense are in fact rooted not in congressional statute but in decisions of the Warren Court, including Miranda warnings, the right to appointed counsel regardless of ability to pay and an expanded exclusionary rule (which broadly prohibits the use of illegally obtained evidence in criminal trials).

If these decisions often represented overreach in the use of judicial power, it's also important to note instances in which the Warren Court's rulings vindicated core constitutional principles. This is most notably true of Brown v. Board of Education—the 1954 case that at long last declared public school segregation unconstitutional, while also setting off a cultural and political firestorm across the American South. Sometimes, even the proper and virtuous exercise of constitutional authority can divide and inflame.

Whatever one's assessment of the rulings of the Warren Court, one thing is clear: They demonstrated the power of the Supreme Court, acting on its own authority, to remake much of American law and in many ways to reorder American society. It should be no surprise that such a revolution, imposed from outside the give and take of democratic politics, sparked so much protest and resistance, and continues to roil our public life.

Still, it is impossible to analyze modern controversies about the Supreme Court without also citing a range of destructive developments in Congress. The geographic sorting and ideological clustering of much of the American population, with our now familiar divide between red and blue states, has meant that more congressional seats are safely partisan. The trend has been enhanced by gerrymandering and amplified by the resulting ideological polarization.

A member of Congress from a red or blue district thus needs to worry mainly about his ideological base. A primary challenge is the principal threat to his career, and his most engaged voters are often the most partisan and least concerned with compromise. They want a warrior in the halls of Congress. And so the legislature has become what my colleague Jonah Goldberg calls a "parliament of pundits," often focused more on "owning" or "destroying" opponents on cable news than on engaging in the messy business of coalition-building and compromise.

This phenomenon had been building for some time, but the 2010 battle over Obamacare—a major piece of social legislation that passed over almost unanimous Republican opposition—heralded the new era. The result has been a decade of legislative dysfunction and near deadlock.

As the courts ascended and Congress descended, the American people responded. They began to do the logical thing: They concentrated their efforts on the seats of real power in the U.S., the federal courthouses. They turned to litigation over legislation because they know that the law requires the courts to respond.

If you write to your member of Congress, after all, she is free to completely ignore your correspondence and will likely never act on any request you make. Moreover, even if she does attempt to legislate, she's unlikely to succeed in vindicating your rights or improving your living conditions in any concrete way.

If you file a lawsuit, however, the judge has to respond. He will consider your case. He may not rule for you, but you will get your day in court. If you lose, you can appeal, and a panel of three judges will read your brief. And if they choose to act, they have very real and considerable power. Your life will change.

Intelligent activists of every stripe have thus concentrated their efforts on the courts. They have flooded the nation with litigation, designed in some cases to extend the legacy of the Warren Court (resulting, for example, in Justice Kennedy's 2015 opinion creating a constitutional right to same-sex marriage) and in other cases to bring American law back to the intent of the nation's founders (as in the 2008 opinion by Justice Scalia striking down a handgun ban that violated the Second Amendment).

Is it any wonder, then, that there's an immense amount of frustration and anxiety around every Supreme Court pick? At unpredictable intervals, all of the hopes and fears, rage and angst of an increasingly polarized political era are poured into the few fleeting hours of Supreme Court hearings and the few moments of a Senate vote.

What is to be done? There's no easy answer, and we certainly can't forsake judicial review. It is the necessary implication of placing "the judicial power of the United States" in the federal courts, and it is an indispensable check on majoritarian tyranny. But there are ways to lawfully decrease judicial power without removing necessary judicial restraints on the elected branches of government.

A simple and modest start would be to end the issuing of nationwide injunctions by federal district courts. District court judges are judicial masters of their districts, not temporary Supreme Court justices, issuing rulings binding on an entire, vast republic. It would be a small but important way to hand more power back to elected officials.

A tougher but more consequential reform would be term limits for Supreme Court justices. The most viable and interesting proposal comes from the advocacy group Fix the Court, which suggests that justices be nominated for 18 year terms, after which they'd be forced to take "senior status." On senior status, they'd still possess the same office and compensation and could serve on lower courts, but they'd no longer be active on the Supreme Court.

Fix the Court's proposal of 18-year terms would provide each president with two choices in each term, in their first and third years. It could halt the present trend of nominating younger judges in the hopes that they can serve for 30 years or more—terms in office longer than the reigns of many kings. And while it wouldn't politicize the Supreme Court with outright judicial elections, it would measurably democratize the process and decrease the stakes of each nomination.

But we can't forget a final necessary change: voluntary judicial restraint. As the nation mourns the loss of Justice Ginsburg, perhaps it's time to remember her admonition that "measured motions" are often preferable to "breathtaking" judicial strokes. While there are moments when the defense of the Constitution requires bold action, there are many others when the answer is to leave the question of justice to the people's elected representatives—and to let American democracy run its messy, necessary course.

Mr. French is senior editor of the Dispatch and a columnist for Time. His new book is "Divided We Fall: America's Secession Threat and How to Restore Our Nation," which has just been published by St. Martin's Press.