

## 2.11

### Checks on the Judicial Branch

#### **Explain how other branches in the government can limit the Supreme Court's power.**

The Court's power has also evolved over time due to certain key landmark precedents. In addition to *Marbury* and judicial review, *McCulloch v. Maryland* (1819) established national supremacy. In the Fulton steamboat monopoly case, *Gibbons v. Ogden* (1824), the court reinforced national supremacy by ruling broadly on the Constitution's commerce clause. Today the most notable issues facing the court revolve around civil liberties and civil rights. Nevertheless, there are many other important issues that our court faces. Yet with all of this newfound authority, we should not forget that like other institutions in our government the Court faces serious checks on its power. The United States Supreme Court is restricted in many different ways.

One significant check on the Supreme Court is its lack of enforcement. If court decisions deviate too far from national consensus the American public will simply not follow the opinion. Impeachment is another check but rarely used and never used successfully on a Supreme Court judge. Perhaps the most significant check on the Supreme Court is public opinion. The court is apprehensive to lose its prestige by ruling in ways that dismiss what broad majorities hold. In this way the Court is held in check.

In more traditional ways the other institutions of government can also limit the Supreme Court's power. Congress can pass legislation to modify the impact of prior Supreme Court decisions. Seemingly Court decisions are final. They cannot be overturned by Congress or vetoed by the president. Political science tells us, however, that:

*On both statutory and constitutional questions, Congress has significant power and responsibility to respond to Supreme Court decisions. On statutory matters, there is no question that Congress may negate a Supreme Court interpretation by enacting new legislation...Congress, for example, may enact legislation that seeks to limit the reach of Supreme Court rulings. After the Supreme Court upheld abortion rights in *Roe v. Wade* (1973), Congress blocked the use of Medicaid and other federal funds to pay for abortions. Congress also offered religious organizations federal funds to promote sexual abstinence as a method of birth control.*

The will of the people, through their popularly elected Congress, can moderate and in some cases alleviate the sting of Court opinions. Article III of the U.S. Constitution also gives to Congress the authority to control the Court's appellate jurisdiction. In no small way our Congress can impact the Court's docket. Acts of Congress can impact the cases the Court is allowed to hear. Our Congress can impose real limits on Court power.

So too can our president limit the Court's power. The president along with state governments can ignore Supreme Court decisions. Recent political science has postulated,

*We live in a legal culture besotted by the myth of judicial supremacy...According to this myth, the Constitution means whatever five Supreme Court justices claim it means, and all other governmental actors are duty-bound to abide by that supposed meaning.*

This argument claims that presidents are not duty bound by the Constitution to enforce court opinions. The Obama Administration fought against Court precedent in the area of Voter ID laws and chose not to enforce previously accepted federal cannabis policy. Filling Court vacancies is another way in which presidents can impact Court outcomes.

Judicial appointments and confirmations also check the Supreme Court's power. The constitutional process on paper seems simple enough. The president of the United States appoints and the Senate confirms. Yet rarely is it this simple, especially when the president and the Senate majority are from different political parties.

Presidents attempt to pack the court with judges who share his/her political bent. This usually involves prospective judges passing a president's litmus test. Every president typically has an issue or two that defines their respective political party. For Republicans a litmus test issue might be holding a pro-life position. Democratic presidents might demand prospective judges to hold broad commerce clause opinions. In either case the opposing party always complains. The opposition reminds the American people that justice is supposed to be blind. The Court is not supposed to reflect our political arena. It is for this reason that our founders gave our Supreme Court judges life terms. They are appointed and not elected. Nevertheless, the battle over judgeships in no small way can limit the Court's power.

Finally, it can be argued that federalism itself imposes limits on Court power. Through federalism Constitutional amendments are enacted. Though Congress proposes amendments, they are ratified by state legislatures. Infrequently used, the amendment process is nevertheless an important check on Court authority to change policy in American political life. No one is calling the Supreme Court today "the least dangerous branch." Yet our Court is not really supreme either. Today's judicial branch faces significant limits. Our system of the separation of powers still works. So too checks and balances. Looking under the hood of our two-hundred-year-old constitution shows an engine that still works.