2.8
The Judicial Branch

Explain the principle of judicial review and how it checks the power of the other institutions and state governments.

Article III of the U.S. Constitution did not say much. It established a judicial branch but left the details out. How things have changed. At the time our constitution was ratified Alexander Hamilton, in Federalist 78, referred to the United States judiciary and its Supreme Court as "the least dangerous branch." It did not take long before Alexis de Tocqueville recognized that "scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." Today the federal judiciary led by the United States Supreme Court resolve our most vexing political quandaries. **The design of the judicial branch protects the Court's independence as a branch of government, and the emergence and use of judicial review remains a powerful judicial practice.** Our least dangerous branch has evolved into our most potent political player.

The weapon that propelled the federal judiciary into the political limelight is judicial review. The precedent of judicial review was established in the courts case *Marbury* v. *Madison* (1803). Chief Justice John Marshall wrote famously, "It is emphatically the province and duty of the Judicial Department [the judicial branch] to say what the law is." In other words, the court would be the final arbiter in all-constitutional matters. The federal judiciary has the authority to rule on the constitutionality of all government activity on a case-by-case basis. This gives the federal judiciary tremendous power.

Legal scholars debate whether or not judicial review was anticipated by our Founding Fathers. Perhaps it was the vague wording of Article III of the United States Constitution that permitted this expansion of judicial power. Clearly judicial review is a major check on the power of other governing institutions including state governments. Judicial review has its critics. Some have called it "alien to the constitutional design." Others have claimed this expansive power has created "politicians in robes." Most notably, Alexander Bickel found this judicial power to invalidate legislation as counter to democratic principles. He argued,

> *Judicial review is a counter majoritarian force in our system…When the Supreme Court declares unconstitutional a legislative act…it thwarts the will of representatives of the actual people of the here and now.*

Protection against the tyranny of the majority has always been a central aim of our legal system. Irrespective of reasonable debate, judicial review is the primary tool to this end. Our Supreme Court is "a critical bulwark against tyranny." The result is often tension between the branches. A critical example of this was when the Supreme Court ruled a

number of Franklin Roosevelt's New Deal policies as unconstitutional. The legitimacy of our system of checks and balances was severely tested during this period.

The supremacy clause as well demonstrates how the judiciary checks the power of other institutions and state governments. *McCulloch* v. *Maryland* (1819) established the supremacy of the national government. In this case the court recognized the necessary and proper clause as authoritative when creating a national bank despite the constitution's silence on the matter. This case would have far reaching consequences in the battle between the national government and the states. When disputes arise over the proper balance of federalism, the supremacy clause typically prevails in favor of the national government.

The principle of legal standing can also demonstrate how the judiciary checks the power of government. Cases that are heard in the U.S. Supreme Court must first show standing. Standing means that there is a constitutional question at stake. We are a nation of law, not men. Under the Court's supervision, the principle of standing holds our governing officials to a legal standard and not merely personal whim.

Judicial review has empowered the court far beyond what many think the original constitution had intended. Used rarely at first, judicial review is now used quite frequently. Some might think this activism would stir public opinion against the court. On the contrary more and more Americans are not bothered by judicial activism. A powerful court is no longer feared.

Former Chief Justice Charles Evans Hughes wrote, "We are under a Constitution, but the Constitution is what the judges say it is." This kind of court confidence might have surprised Alexander Hamilton but it does not seem to bother you and I. The federal judiciary is no longer "the least dangerous branch." It may be the most dangerous. As we learn more about the dysfunctions of our political institutions perhaps a powerful court is just what we need.