

## 2.9

### Legitimacy of the Judicial Branch

**Explain how the exercise of judicial review in conjunction with life-tenure can lead to controversy about the legitimacy of the Supreme Court's power.**

The once “least dangerous branch” now faces the prospect of possessing too much power. No longer hindered by a “political thicket,” the Supreme Court routinely exercises its expanding authority to provide meaning to just about every issue facing our time. The modern Supreme Court has been accused of aiding and abetting “the end of democracy.” Through judicial review the Court can somewhat innocuously invalidate the political process. Some scholars have written about a “judicial usurpation of politics.” When combined with the life tenure given to federal judges, the Supreme Court’s power has grown increasingly controversial even to the point of challenging its legitimacy.

The bedrock of the American legal system is justice for all. Throughout our history we have committed to equality under the law. An important pillar of this system is the use of legal precedence. Precedents and stare decisis play an important role in judicial decision-making.

Precedent simply means that once a court acts in a certain way there is an expectation that all who face similar circumstances will therefore be treated accordingly. In Latin this is referred to as “stare decisis.” This literally means “let the decision stand.” Rooted in fairness, the practice of stare decisis assures that every citizen, regardless of race or class, is treated the same. Much of this is borrowed from English common law. In this way our law lives organically. As courts rule in individual cases our law and its protections also grow. This is another way in which our judicial system, through informal means, continues to grow in its authority and importance.

Controversial or unpopular court decisions illustrate how judicial review can lead to challenges of the Court’s legitimacy and power. Few cases have been more controversial than *Citizens United v. FEC* (2010). In this case, a Court majority allowed for American corporations to participate in donating independent expenditures during national campaigns. The perception that corporate-America and its special interests play a disproportionate role in our government seemingly received an endorsement by our highest Court. Many were outraged, including the President of the United States. Just days after the *Citizens United* decision was announced, President Obama in his State of the Union speech said,

*With all due deference to separation of powers...Last week, the Supreme Court reversed a century of law that I believe will open the floodgates for special interests – including foreign corporations – to spend without limit in our elections.*

Sitting just below the president that night was Judge Samuel Alito. Upon hearing the president's rebuke, Alito was clearly seen mouthing the words "not true." Right or wrong our Court today is clearly seen as acting overtly political. Dispute over court nominations bear witness to this fact. In the end the Court's legitimacy is challenged.

Another highly controversial decision in recent years was *District of Columbia v. Heller* (2008). In this case the Court seemingly turned its back on decades of case law regarding the Second Amendment. Writing for the majority Justice Scalia wrote, "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." Soon this precedent would be used to invalidate laws throughout the country that attempted to limit the sale of firearms. In dissent Justice Stevens wrote,

*The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.*

It appeared the Court was imposing its conservative will upon the wishes of state and local governments hoping to stem the outbreak of an epidemic of gun violence. The Court's authority to use judicial review had empowered it to reverse decades of accepted law. The stature, prestige and therefore legitimacy of the Court was both weakened and compromised. Rather than serving as objective arbitrators over our most serious legal disputes, the Supreme Court is increasingly seen as just another politically partisan institution.

The legitimacy of the Court often gets embroiled in the debate over how judges go about making their decisions. Controversy about the Supreme Court's decision-making power is illustrated by the ongoing debate over judicial activism versus judicial restraint.

The process of making a judicial decision is called jurisprudence. Ideally, we all wish to believe that "justice is blind." We hope that judges base their opinions upon what the law says and not on personal bias. There are two primary schools of jurisprudence.

One school of jurisprudence is called judicial restraint. These strict constructionists attempt to reserve their judgments to the original intent of the law. They often defer to the other branches and try to avoid making politically explosive decisions. Today conservatives tend to consider themselves practicing judicial restraint.

Another school of jurisprudence is called judicial activism. Activist judges see themselves as the last resort for the powerless. They are not afraid to see the constitution as a living document. Furthermore, when Congress writes vague laws it is the Court, they say, that needs to clearly define the government's intent. Today liberals tend to support judicial activism.

Regardless of one's jurisprudence, there is an expectation that the Court follows stare decisis. This is a Latin phrase that means, "Let the decision stand." In our legal system court precedent is the basis by which other like-minded cases are decided. In this way we all receive equal justice.

When the court does deviate from precedent it can be accused of becoming a policy-making institution. Here again we see why the court is no longer "the least dangerous branch." The Court has evolved into an important political force. It is for this reason that court appointments have become major political battlegrounds. Presidential appointments can change the ideological composition of the Court. This in part can replace old precedents with new precedents. It is for these reasons that the exercise of judicial review in conjunction with life-tenure can lead to controversy about the legitimacy of the Supreme Court's power.