Judge, Jury, and Executioner: The Evolution of Judiciary Power from the Framer’s Intent

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 On March 3rd 1801, on his last night in office, President John Adams likely would have been musing the end of his tenure as President of the United States. He would have had the unfortunate burden of carrying thoughts that only one person before him had ever had, and considering that the next day his administration would turn the government over to the opposing party for the first time in the nation’s very short existence, he likely thought it necessary to consider many things that his predecessor did not. Peaceful transitions of power, to opposing parties nonetheless, were few and far between at the turn of the 19th century. Assumedly, it was in these thoughts and musings that President Adams would determine it appropriate to appoint his infamous “Midnight Judges”. In an effort to pack the federal judiciary and prevent its imminent corruption from soon-to-be President Jefferson’s Democratic-Republican values, forty-two federal Justices of the Peace were appointed to be approved by the senate. Problematically, his Secretary of State, one John Marshall, would fail to deliver all forty-two of the appointments in time.

 From this Dilemma[[1]](#footnote-1), would come one of the most prescient Supreme Court cases in American History. Following Jefferson’s ascension to the Presidency, and his subsequent rejection of the “Midnight Judges”, a clerical error would set precedent that defined constitutional law indefinitely. Did the Framer’s intend for the Federal Judiciary, and the Supreme Court specifically, to have such broad ranging powers to declare laws passed by congress as invalid? The Founders’ original interpretation and assumptions about the highest court in the land has come to represent originalist ideology and deep-rooted beliefs on the role of an activist court in modern American policy. Determining what the Framers truly intended for John Jay’s original court and what that determination led to and created provides a deeper understanding of the projection of contemporary values onto founding figures, and the assumptions made about them.

 The Supreme Court was a measure of considerable discussion at the constitutional convention. The question at hand for most of the convention participants was whether or not the existence of a Federal Judiciary was even relevant in the creation of American state. Proponents of state power, likely a loosely based tribe of Anti-federalists, considered states and their respective courts to be the best proponents of conflict resolution between their own entities. James Madison however, embracing some of his more federalist tendencies, found the need for a Federal Judiciary not only to be high, but immediately pressing. [[2]](#footnote-2) In order to guarantee a mechanism that would have the capacity to settle disputes between states, the Judiciary would function as a third branch of Federal Power. Something that was widely lacking from the discussion of the Court however, was the question of scope. The extent to which the Federal Judiciary would wield power was largely left up to Congress, or at least it seemed to be. Even Madison, widely considered one of the principle architects of Article Three, seemed unable to grasp the power that a Federal Judiciary might wield. David O’Brien writes in 1991 that *“Madison failed to foresee the major role that the Court could (and came to) play in defending national supremacy and the rights of individuals and minorities. Besides underestimating the Court's power, he worried that states might refuse to comply with its rulings”.[[3]](#footnote-3)*

 After Jefferson’s assumption of office, one of the “Midnight Judges” who (removed had) felt slighted by the removal of his Judicial appointment was William Marbury. A wealthy businessman hailing from Georgetown, Washington D.C., practically a stone’s throw away from the Judicial office he believed he was destined to occupy. Marbury would bring his case before the Supreme Court in one of the most famous cases the Court would ever hear. In *Marbury v. Madison*, Chief Justice John Marshall, an actor already closely intertwined with the controversy at hand, would establish Judicial review. The case asked three legal questions of the court. In the words of the opinion itself, these questions were *“1. Has the applicant a right to the commission he demands? 2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? 3. If they do afford him a remedy, is it a mandamus issuing from this court?”[[4]](#footnote-4)*  In these questions, the Court sought to discover where the powers of the court began and ended, by discovering what relief they were entitled to give to Mr. Marbury. Justice Marshall writes that at the core of the case is *“The question whether an act repugnant to the Constitution can become the law of the land is a question deeply interesting to the United States, but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it*.”[[5]](#footnote-5) These principles, and their roles in decisions regarding the constitution as it conflicts with legislative goals and laws, would be decided henceforth by the Supreme Court. This would give the Supreme Court the power to declare laws unconstitutional, in a move that was widely regarded as a massive power grab by what Alexander Hamilton called *“the weakest of the three departments of power.”[[6]](#footnote-6)*

 In contemporary American politics, the Judiciary is rarely called weak. At the dinner for Associate Justice Brown in 1906, Theodore Roosevelt would jokingly tell the crowd there gathered that “*It is sometimes a good thing to be heard first. It is always a good thing to have the right to speak last. That right belongs to the Supreme Court.”[[7]](#footnote-7)* President Roosevelt was often known and referenced for his sense of humor, but more often for his sense of honesty. Here, we see both. Through the power of Judicial Review, established in *Marbury*, the Supreme Court had gained the last word in almost every legal discussion in the United States. In contemporary American politics, this has spurred a wide berth of academic research and theory regarding the role of the court in a modern political system. Most scholars contend that Judicial Review was an unprecedented establishment of Judicial power, which has come to create an activist court, whether that activism may land on the right or the left on any particular issue.[[8]](#footnote-8) As a result, public opinion regarding the court has become rather tumultuous. Justices are often portrayed to be impartial interpreters of the law, a notion that could not be further from the truth. The Supreme Court is bereaved for its “activist” tendencies by either ideological tribe when the activism fails their clearly superseding moral code. At the center of all of these controversies is the ever abounding and speculative body of Framers’ intent.

 Problematically, contemporary American legal questions often cover topics the Framers could never have conceptualized in their time. Issues regarding the balance of Free Speech and Civil Rights, laws on socialized medicine, and protections for LGBTQ+ individuals all post-date the social constraints of the revolutionary age. As a result, polarized parties tend to project their own values and doctrines onto abstract ideas of the Founders, with no utter regard for their actual doctrines. Reaching back to direct statements from the Constitutional Convention and State Ratification Conventions, it is clear to see that the ideology of the Framers did in fact predicate and allow for Judicial Review. Beyond that, their ideas regarding the role of the judiciary was far closer to a modern interpretation than almost any Thanksgiving day discussion would allow for. This reality is not pleasant for most dinner table rhetoricians, since it predicates the common argument that the Founding Fathers must be on their side. In fact, the Framers were likely on no one’s side. They avoided taking sides by creating a judiciary that would.

At the Constitutional Convention, discussions on the power of the Judiciary often included explicit references to the power to negate active laws. In James Madison’s notes on the debates regarding ratification, Connecticut’s Roger Sherman found that the power of Judicial Review was *"unnecessary, as the Courts of the States would not consider as valid any law contravening the Authority of the Union."[[9]](#footnote-9)* The vocabulary in use in this instance proves that despite Sherman’s finding of Judicial Review as “unnecessary”, the power was assumed to exist nonetheless. James Madison himself likely favored a negative power, saying that without it states *"will accomplish their injurious objects before they can be ... set aside by the National Tribunals"[[10]](#footnote-10)*

Writing on this topic at large, Randy Barnett finds that *“The evidence from the Constitutional Convention and from the state ratification conventions is overwhelming that the original public meaning of the term "judicial power" included the power to nullify unconstitutional laws.”[[11]](#footnote-11)* The question that is often passed over however, is what does this interpretation of founding principle and opinion mean for the frequent originalist references to Framers’ intent? Much can be said about the intentional ambiguity of the Framers creations as well as their speech. Few Founders ever expressly shared their intentions for the governmental functions they crafted. In Federalist 78, Alexander Hamilton writes on the original intent and jurisdiction of the court. He finds that the power to address contradictory laws is fundamental, writing that *“Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void”[[12]](#footnote-12)* This surely does not account for the degree of Judicial activism present today, but does establish that the fundamental principle of declaring laws void was on the minds of one of the principle federalist architects of the era. What is quite clear from these writings then, is that the Framers did not fail to predict entirely the existence of an activist court.

What is likely far more true of the recent grumblings regarding the highest court in the land is that as the power of the court has grown, and so has their impact on tribalism. Contemporary American politics is far more polarized than any time in recent history. Americans are more likely to view members of the opposing party with disdain, and are less likely to be willing to engage with them meaningfully.[[13]](#footnote-13) Modern American polarization has found battlefields in every issue from free speech to equal protections. Coincidentally, these issues are most often resolved in the Federal Judiciary. In fact, Dr. Gibson of Washington University wrote on this issue in far more detail, declaring that *“These issues clearly divide Americans of different ideological and partisan persuasions, and much of the contemporary debate focuses on what the Supreme Court has, or has not, ruled”[[14]](#footnote-14)* As a result, a branch which holds the final word on issues of polarization is likely to be accused of inappropriate activism when it reaches a decision unfavorable to a particular tribe. Though Dr. Gibson ultimately finds that this polarization has failed to encroach upon faith in the integrity of the court itself, he recognizes the central role the court plays in ideological disputes.

 This projection of modern issues onto an ever present branch of Federal government is not unique to the court, but it is often exaggerated due to the nature of the Court itself. With nine Justices serving life terms by appointment, it is often easy to regard the court as a branch of power with no meaningful check, and the rhetoric flows accordingly. This perhaps is the burden the court is destined to shoulder. The Framers saw what power the Court may one day wield, and left it to Congress to determine precisely what form that power may take. The Supreme Court may not be allowed to cave to polarization, and as a result, exists as a testament to American longevity. The Framers’ intent then, as it likely was with all American inventions, was to insulate the Federal Judiciary from public chaos. Here, the Framers may not have taken a side regarding the activism of the court, but may have helped to create it.

1. Why is this capitalized [↑](#footnote-ref-1)
2. Watson, Bradley C.S. "Supreme Court." Heritage Foundation. 2017. Accessed March 26, 2018. https://www.heritage.org/constitution/#!/articles/3/essays/103/supreme-court. [↑](#footnote-ref-2)
3. O'Brien, David M. "The Framers' Muse on Republicanism, the Supreme Court, and Pragmatic Constitutional Interpretivism." *The Review of Politics* 53, no. 2 (1991): 251-88. http://www.jstor.org.proxy-remote.galib.uga.edu/stable/1407755. [↑](#footnote-ref-3)
4. Marbury v. Madison, 5 U.S. 137 (1803), Opinion of the Court [↑](#footnote-ref-4)
5. Marbury v. Madison, 5 U.S. 137 (1803), Opinion of the Court [↑](#footnote-ref-5)
6. Hamilton, Federalist 78 [↑](#footnote-ref-6)
7. Roosevelt, Theodore. "AT THE DINNER TO ASSOCIATE JUSTICE BROWN." Speech, May 31, 1906. [↑](#footnote-ref-7)
8. Randy E. Barnett, "The Original Meaning of the Judicial Power," Supreme Court Economic Review 12 (2004): 115-138 (117-119) [↑](#footnote-ref-8)
9. James Madison, Notes of Debates in the Federal Convention of 1787 304 (Norton, 1987) (statement of R. Sherman). [↑](#footnote-ref-9)
10. Id (statement of J. Madison). [↑](#footnote-ref-10)
11. Randy E. Barnett, "The Original Meaning of the Judicial Power," Supreme Court Economic Review 12 (2004): 115-138 (138) [↑](#footnote-ref-11)
12. Hamilton, Federalist 78 [↑](#footnote-ref-12)
13. Jacobson, Gary C. "Partisan Polarization in American Politics: A Background Paper." Presidential Studies Quarterly 43, no. 4 (December 2013): 688-708. International Security & Counter Terrorism Reference Center, EBSCOhost (accessed March 27, 2018). [↑](#footnote-ref-13)
14. Gibson, James L., The Legitimacy of the United States Supreme Court in a Polarized Polity (December 3, 2006). [↑](#footnote-ref-14)