News

Washington Post — The history of Supreme Court nominations is dominated by tales of picks the Senate debated and approved with little angst. President Barack Obama’s upcoming effort to fill the vacancy created by Antonin Scalia’s death doesn’t seem to be one of those stories. Senators were returning to Washington Monday from a weeklong recess that saw the 79-year-old justice’s unexpected passing inject a blaring new issue into this election year. Senate Majority Leader Mitch McConnell’s declaration that the vacancy should remain “until we have a new president” infuriated Democrats who want the spot filled promptly, setting up a lengthy fight for which each side is still mapping its moves.
Andrew Prokop, Vox: My fellow Americans, let me address you frankly about the choice our nation faces. Justice Scalia was a strong, solid conservative. And whoever Barack Obama nominates to replace him is certain to be well to his left — and will likely be very, very, very far to his left.

This would upset a balance of power in the Court that has existed for decades. Instead of a five-vote majority that is generally conservative, a Scalia replacement appointed by President Obama would allow a new majority bloc of five solid liberals to form. On issues affecting free enterprise, the sanctity of human life, and federal power, sweeping new liberal rulings could reshape law and precedent across America.

I believe this would be a disaster for the country. Most members of my party believe this would be a disaster for the country. And most of my party's voters believe it would be a disaster for the country. So I'm going to do my best to stop it from happening.

You'll notice that I am very straightforwardly framing this question of Justice Scalia's replacement as an ideological question. And this might strike you as unusual, even though essentially every member of Washington's bipartisan political elite privately understands this is true and has long acted like it's true.

That's because our political norms around Supreme Court nominations are silly, outdated, and inadequate for our modern polarized politics. Members of both parties have to pretend that we really, truly care about each nominee's individual traits and qualifications. So no president these days would ever nominate anyone who'd openly admit to having — gasp — an ideology.

In reality, though, presidents of both parties try to game the system here. They nominate people, like John Roberts or Elena Kagan, who lack long paper trails and profess to be, and appear to most casual observers to be, ideology-free. But when they get on the Court, they generally join one bloc or the other — Roberts generally votes with the conservatives, and Kagan votes with the liberals (though there are some important exceptions, like Roberts's votes to uphold Obamacare!).

Take abortion. Barack Obama is never going to nominate anyone who he thinks disagrees with the Roe v. Wade ruling to the Supreme Court. And a Republican president will never nominate anyone who he thinks agrees with that ruling. There shouldn't be anything shameful about this. Many hugely important and unavoidably political cases involving issues that could affect millions of people across the country reach the Supreme Court. So a president will naturally seek out a nominee who shares his or her views on those issues.

But that means senators should also feel perfectly free to oppose a nominee on ideological grounds. We don't know who Barack Obama's nominee will be, but we know perfectly well that Obama will never nominate a conservative. Why should we pretend we don't know that?

I want to address my liberal friends for a moment, and ask them to put themselves in my shoes — by thinking back to President George W. Bush's final year in office. At that point, President Bush had already nominated two conservatives to the court, including one, Justice Samuel Alito, who many liberals argued had moved the balance far to the right. Since then, the Democrats had taken the Senate. And there were widely understood to be five votes on the court to uphold Roe v. Wade. Now, what if a staunchly liberal justice had, God forbid, suddenly died?
What McConnell would say about blocking a Scalia replacement if he were brutally honest

Of course Democrats wouldn't have just sat back and let Bush appoint a replacement who they had good reason to believe would overturn Roe. Come on, take off your partisan blinders and admit it.

Not convinced? Well, did you know that back in 2007, current Democratic Senate leader-in-waiting Chuck Schumer said his party shouldn't confirm any other Supreme Court nominee from President Bush "except in extraordinary circumstances?" He even went so far as to say they "should reverse the presumption of confirmation" because "the Supreme Court is dangerously out of balance."

Sen. Schumer — who's a mainstream Democrat, and not at all on the party's left flank — has long been refreshingly honest about the role of ideology in judicial nominations. But rest assured, this is what his party's leaders believe, it's what his party's activists believe, and when push comes to shove, it's what his party's voters believe. Whoever President Bush nominated in that hypothetical 2008 vacancy would have been blocked by Democrats.

Yes, yes, in suggesting that President Obama shouldn't appoint any replacement for Scalia, and that he should just leave it to the next president, I am rhetorically going further than others have in the past. But really I've just hit the fast-forward button. We would have ended up opposing whomever Obama nominated, because that person would, of course, have had liberal views. And my party's senators would never have approved any other Obama Supreme Court nominee anyway, because they're terrified of losing their seats in primaries. So maybe my "no nominees in the final year" position hasn't explicitly been taken by anyone before, but it hardly means the death of our constitutional democracy. The near-term upshot is that one Supreme Court seat stays vacant for a year. Some closely divided cases will effectively remain unresolved for a bit. Big deal.

Point is, the gridlock will likely be cleared up in 2017. If we win the presidency, the next president will nominate a conservative, and, ideologically, the court will stay where it was before Justice Scalia's passing. And if Democrats win in 2016, they'll most likely take over the Senate too, and will be able to get a liberal justice through.

But there's one scenario I'm not quite sure about — and that's if a Democrat wins the presidency but my party keeps the Senate. My senators and I will still have those same ideological incentives to block a Democratic nominee. Yet it really would seem shocking and unprecedented for us to block every single nominee put up by the new president for four years. So that's a tough one.

We'll cross that bridge if we come to it, though. For now I've helped clarify this year's electoral stakes for both parties, and for voters in general. So let the people weigh in, and let the chips fall where they may.
Law and Politics

Law and courts are political institutions, and the legal system is but a subsystem of the larger political system. We should expect that political parties to use courts for their policy goals, individuals to use the legal system to make their political careers, that those with resources will fare better than those without resources, and that many of the rules that apply to the other political institutions will also apply to the courts. Nevertheless, there still tends to be a tugging feeling that law and politics ought to be separate and distinct.

The Federal Judiciary in National Politics

How appropriate is it that unelected, life-tenured judges can decide on the constitutionality of acts of Congress?

- Violates the republican principles of majority rule.
- Meets the Framers’ broader concerns for balanced political system.

But who is to guard the guardian? Judicial review seems to give the Court the last word on much of public policy, but there are limitations:

- Constitutional limits.
- Internal, organizational weaknesses of the judiciary.
- Various and subtle ways that Congress and the president can redirect judicial doctrine.
The Federal Judiciary in National Politics

Constitutional amendment process offers one certain way to countermand the Court’s ruling of unconstitutionality (process is difficult and rarely employed).

Legislative responses to disagreeable Supreme Court interpretations to public laws are straightforward and routine.

- One study found that from 1967 to 1990 Congress averaged a dozen new laws a year explicitly designed to reverse or modify a federal court ruling.

Constitution also empowers Congress to alter the size (and therefore ideological complexion) of the Court as well as change its jurisdiction.

- Ploys like this attempted even less than constitutional amendment.

To enforce its policies, the judiciary depends on the compliance of other institutions (e.g. absence of enforcement authority).

- When there is opposition, the court may find it difficult to change public policy.

The fact that presidents appoint justices and that Congress can expand the number of district courts allow the elected branches to pull a straying Court back to the mainstream of opinion.

Today, judicial review is taken for granted. Where did it come from?
Recall that the Founders “punted” on the question of the Federal Court structure at the Constitutional Convention.

In the first U.S. Congress, they pass the Judiciary Act of 1789.

- The act established the federal court structure. Six Supreme Court Justices. 13 District Courts. Three Circuit Courts.
- Established the Attorney General’s office.
- Congress authorized all people to either represent themselves or to be represented by another person. The Act did not prohibit paying a representative to appear in court.
- It also specified jurisdiction: Gives the Supreme Court “original jurisdiction in some areas.” In particularly, it provided that individuals could petition the court for a writ of mandamus,

The election of 1800: Adams knows he lost (though isn’t sure to whom).

In the final two weeks of his presidency, he approves 16 additional judgeships. Appoints John Marshall, his Secretary of State and an ardent Federalist party member Chief Justice of the Supreme Court. Democratic Republicans are incensed.
**Marbury v. Madison (1803)**

**The Facts:** Marbury is appointed a justice of the peace by Adams – one of the “midnight judges.” His commission was supposed to be delivered by Secretary of State John Marshall, but Marshall was unable to complete all the necessary delivers.

Madison – the new Secretary of State – refuses to deliver the commission. As proscribed by the Judiciary Act of 1789, Marbury petitions the court to issue a writ of mandamus.

**The Question(s):** Who is in the right here? Is there a remedy to Marbury’s problem?

Can the Supreme Court issue a writ of mandamus?

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**Holding:** Chief Justice Marshall (4-0 decision): Marbury is in the right. The commission is complete when the seal has been affixed. Withholding the commission is illegal.

Further, this is a government of laws – so there is surely a remedy.

Finally, the Secretary of State is a federal employee and thus should be someone the Court could issue a writ to under the judiciary act.

**However,** according to the Constitution, the court has appellate jurisdiction. Mandamus writs are not specified as original. Hence, that portion of the judiciary act is “repugnant to the Constitution” and it is void. 4-0 decision.
Do Oral Arguments Affect Supreme Court Justices? A Reprise.
From Johnson, Wahlbeck and Spriggs: We posit that Supreme Court oral arguments provide justices with useful information that influences their final votes on the merits. To examine the role of these proceedings, we ask the following questions: (1) what factors influence the quality of arguments presented to the Court; and, more importantly, (2) does the quality of a lawyer’s oral argument affect the justices’ final votes on the merits? We answer these questions by utilizing a unique data source—evaluations Justice Blackmun made of the quality of oral arguments presented to the justices. Our analysis shows that Justice Blackmun’s grading of attorneys is somewhat influenced by conventional indicators of the credibility of attorneys and are not simply the product of Justice Blackmun’s ideological leanings. We thus suggest they can plausibly be seen as measuring the quality of oral argument. We further show that the probability of a justice voting for a litigant increases dramatically if that litigant’s lawyer presents better oral arguments than the competing counsel. These results therefore indicate that this element of the Court’s decisional process affects final votes on the merits, and it has implications for how other elite decision makers evaluate and use information.

The Federal Judiciary in National Politics
Doctrinal review has worked.
- Why? It does not foreclose effective responses from the other branches.

The Court’s decisions are not eternal.
- They come and often go.
- The fear of finality is generally unfounded.

On close inspection, the federal judiciary appears to lack the kinds of internal resources that would allow it to be a powerful, autonomous policymaker (huge caseload it can’t deal with).
- Small capacity, no enforcement mechanisms
- Rarely falls too far out of step with the public mood

Overall, the courts rather ill-designed to formulate and implement public policy
Structure of the Federal Judiciary

Several hundred federal courts, but only the Supreme Court is explicitly mentioned in the Constitution’s Article III.

The Framers deferred the task of determining the nature of the judiciary beyond the Supreme Court to the Congress.

With the Judiciary Act of 1789 Congress created the federal judiciary.

Constitutional courts are of most interest
- Vested with the general judicial authority outlined in Article III
- Nonconstitutional courts are U.S. Tax Court, bankruptcy courts, etc.

Structure of the Federal Judiciary

Federal courts are courts of limited jurisdiction. Generally speaking, have jurisdiction to hear two types of cases:
- Those concerning federal questions (i.e. Constitutional law or involving the judiciary interpreting and applying federal statutes to criminal and civil cases.)
- Those involving citizens of different states.

Jurisdictional questions can be complicated by the fact that state courts also have jurisdiction over federal civil claims unless Congress has given the federal courts exclusive jurisdiction in an area.

Also may hear cases where a criminal defendant who has been convicted under a state criminal law, but who feels that his federal constitutional rights have been violated, appeals his case to the Supreme Court.

Finally, federal courts also have jurisdiction under federal law to hear habeas corpus petitions.
- Basic idea: criminal defendant in state court may file an action in federal court alleging that the state’s incarceration violates the Constitution or another federal law.
Most state courts follow this format.

Circuit courts of appeals—Georgia is in the 11th Circuit.
Structure of the Federal Judiciary

The Supreme Court, while at the apex of the judicial network, depends heavily on the lower courts behaving like loyal agents in deciding thousands of cases annually.

Does not equal great control over the administration of justice.

- The judiciary is a decentralized organization
- Physically dispersed across the nation
- Administered at every level by independent, life-tenured judges. This insulates the Court from the other branches and each other.

Only Congress can remove a federal judge and only for serious offenses. Neither can the Court distribute the caseload to the lower courts. Why?

- Distribution of cases depends on geographical jurisdictions
- Depends on decisions by litigants as to which court or judge they would prefer to have hear their case.

SCOTUS cannot countermand a lower court’s decision

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Structure of the Federal Judiciary

SCOTUS can reverse (or threaten to reverse) lower-court decisions when it disagrees.

When a lower court disregards a directive (implementation of a decision), the Court has several options available:

- It may hear the case a second time
- Rebuke the lower-court judge
- Issue a writ of mandamus ordering the lower-court judge to take a specified action
- Or assign the case to a different court.

All of these alternatives are costly in terms of time and monitoring. AND the risk of reversal is typically pretty low because the federal courts system has a tremendous caseload.

- In 2009 the district courts handled approximately 276,000 criminal and civil cases.
- The appeals courts almost 58,000 cases.
- The Supreme Court, in contrast, decides fewer than 100 cases annually or about 1 percent of the appeals it receives. In 2008 term, 7,738 cases were filed in the Supreme Court, but only 87 cases were argued.
- Reveals that the appeals level of the judiciary, not the Supreme Court, oversees the district courts’ compliance with prevailing doctrine.
Judicial Selection

Judicial selection—especially to the Supreme Court is highly controversial. District court vacancies are often filled via senatorial curtesy. Appeals and Supreme Court vacancies… The President takes most interest.

- Senate Judiciary Committee
- Hearings
- Confirmation process
- Role of interest groups

Judicial Selection

1. “John, who the hell is that clown?”

2. “Well, that God **** Douglas is no good example. The old fart, though, he looked so good at that funeral, I said, oh Jesus, he’s [going to be around awhile].”

3. “I’m not going to his funeral. I’m just not going to go. And I don’t want the staff to think I approve of this now, I just want you to know that I went under duress.”

4. “I’m not for women, frankly, in any job. I don’t want any of them around. That God we don’t have any in the Cabinet. But I must say the Cabinet’s so lousy we [might] just as well have a woman [there] too.”

5. “It isn’t a man’s world anymore, unfortunately. So I lean to woman only, because, frankly, I think at this time, John, we got to pick every half percentage point we can.”
Obama’s judicial appointments: liberal, but not that liberal

Monkeycage, John Sides: The debate about Obama’s judicial appointments — which includes not just predictable conservative opposition but disappointed liberals too — now has some better data:

What is the ideological direction of the judges appointed by President Barack Obama during his first five years in office? To answer this question we analyzed 683 U.S. district court decisions handed down by judges appointed to the trial court bench by President Obama. These decisions were studied along with over 106,000 opinions by over 2,300 judges published in the Federal Supplement from 1932 through 2013. We find that while the Obama cohort is more liberal than the appointees of recent GOP presidents, they are not as liberal overall as some critics have at times suggested. Overall, the Obama judges are somewhat more liberal than the Clinton judges but slightly less liberal than the Carter and Johnson jurists. The Obama judges are effectively deciding cases as we might expect from mainstream Democrats.

This is from a new paper by political scientists Robert Carp and Kenneth Manning. They examined each of these opinions to capture whether it was in the liberal direction or conservative direction. For example, they argue, a liberal decision would tend to expand civil rights or civil liberties, uphold government intervention in the economy, and side with criminal defendants arguing against police overreach. Here is the percent of decisions by district court judges that were liberal, broken down by the president who appointed those judges.

Judicial Decision-Making

The Supreme Court is largely insulated from American politics.

- Lifetime tenure.
- Court of last resort.
- Restricted interest group activity.
- Chooses its own docket.

Court decisions are largely political decisions that are greatly influenced by individual policy values. Further, all questions can be legal questions – so the Court can influence an extremely wide range of policy.

What constitutes an “activist” judge?
Judicial Decision-Making

Supreme Court has substantial discretion to choose the cases it reviews. Litigants must file a *writ of certiorari*. This requests that the Court order a lower court to send it the records of the trial in question. The Court receives thousands of requests (approx. 8K) for cert
- Amicus curiae (friend of the court) briefs
- Solicitor general is highly influential

How does it choose? The *rule of four* is a rule employed by the Supreme Court stating that when four justices support hearing a case the certiorari petition is granted.

SCOTUS does not have a large bureaucracy helping it cull through the piles of petitions it receives.
- Each justice is permitted to hire up to four clerks, usually the top graduates of the top schools.
- Clerks form a “cert pool” to review the petitions and make recommendations to the justices.
- Judges make strategic choices before promoting it to their colleagues

Judicial Decision-Making

Judicial doctrines—guidelines for other judges to apply when trying similar cases—come in two forms:

- **Procedural doctrine**: specific ways in which the lower courts should do their work, e.g. *stare decisis*, standing, mootness (no ruling on hypothetical issues)

- **Substantive doctrine**: principle that guides judges on which party in a case should prevail – akin to policymaking.
Every Supreme Court decision contains two elements essential to creating doctrine:

- The vote that decides the case in favor of one of the parties.
- And the opinion—a statement or set of statements in which the majority explains the rationale for its decision in such a way as to create doctrine (that is, make policy).
- The binding opinion is the majority opinion.

A unanimous Court decision is less likely to be reversed in the future. And creates more compelling precedent than a case decided by a 5-4 vote.

A justice who disagrees with the majority of the Court may elect to explain why in a dissenting opinion. A justice who has unique reasons for supporting the majority may choose to write a concurring opinion.

The prevalence of non-unanimous and closely divided decisions is a modern development (rise in opinion writing)
Three Eras of the Court

Nation v. State Authority

Government Regulation of the Economy.

Civil Rights and Liberties

The Nation v. State Authority

1790 – 1860: First and least active of these issue eras

Unresolved jurisdictional boundaries between the national and state governments

Heart of the judiciary’s most significant cases. Marshall and his Court maintained that the national government’s legitimacy was both independent of and superior to that of the individual states.
**McCulloch v. Maryland (1819)**

**Facts:** In 1816, a new national bank gets re-chartered. It’s not-popular.

Maryland is one of the states that is particularly cheesed with this new bank. They levy a 2% tax on it.

James McCulloch – a bank agent – refuses to pay the tax.

**Questions:** (1) Can Congress charter a bank? (2) Can a state tax a federal entity?

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**Holding:** A unanimous Supreme Court rules for the federal government on both questions. In the majority opinion, Chief Justice John Marshall rules that:

(1) Yes. Under the necessary and proper clause, this is a Constitutional exercise of federal power.

(2) No. The 10th Amendment reserves to the states only powers not delegated to the federal government and the Constitution already gives the federal government the power to tax. Further, as the “power to tax involves the power to destroy,” the federal government is exempt from state taxes under the Supremacy Clause.
The Nation v. State Authority

Gibbons v. Ogden (1824)


Gibbons is upset – pressures New York to ban Gibbons. Gibbons hires Daniel Webster and this goes to the Supreme Court.

Questions: (1) Does the Constitution permit the federal government to regulate navigation? (2) Is the New York monopoly Constitutional under the 10th Amendment or does this violate the Commerce Clause?

The Nation v. State Authority

Holding: A unanimous Supreme Court rules for the federal government on both questions. In the majority opinion, Chief Justice John Marshall rules that:

(1) Yes, Congress can regulate navigation. Commerce is more than just buying and selling, and while the power to regulate commerce within a state belongs to the state, commerce among the states does not stop at the border.

(2) No, the NY monopoly is unconstitutional because the Supremacy Clause gives the federal government’s laws precedent here despite the 10th Amendment. However, the monopoly would have been fine if the federal government did not choose to regulate.
The Nation v. State Authority

_Dred Scott v. Sandford (1857)_

Facts: Scott is a slave belonging to a Dr. Emerson of Missouri. In 1834, Emerson takes Scott to the free state of Illinois. In 1838, they return to Missouri. After Emerson’s death, Scott is sold to John Sandford. Scott brings suit, arguing that because of his move to a free state he was a citizen capable of bringing suit for his freedom.

Questions: Does Dred Scott have a right to bring suit?

Holding. Chief Justice Roger Taney (7-2): No. Scott has no right to bring suit. While he could be a citizen of a state – the Constitution and American history prohibit his being a federal citizen. Further, Congress can NOT regulate slavery in the territories because the government protects property. This invalidates the Missouri Compromise. Finally, the status of slaves depended on the states in which they returned, therefore, Missouri has control.
The Nation v. State Authority

Holding. Chief Justice Roger Taney (7-2): “It is difficult at this day to realize the state of public opinion in regard to that unfortunate race which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted; but the public history of every European nation displays it in a manner too plain to be mistaken. They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far unfit that they had no rights which the white man was bound to respect.”

Dissent. J. McLean: “such an exertion of judicial power transcends the limits of this Court.”

The Nation v. State Authority

Buchanan is elected in 1856. He desperately wants to mention slavery in his inaugural address but is unsure of how the Supreme Court is going to rule. He places on Grier to vote with the Southern wing of the Court.

Justices Catron and Grier send him letters telling him how the Court is going to split and what he should say about the case in his address.
The Nation v. State Authority

New York Tribune: The decision, we need hardly say, is entitled to just much moral weight as would be the judgment of a majority of those congregated in any Washington bar-room.”

Louisville Democrat: The decision “is right, and the argument unanswerable, we presume, but whether or not, what this tribunal decides the Constitution to be, that it is; and all patriotic men will acquiesce.”

Civil War: Population of 30 million, roughly 1 million killed or wounded.

The Nation v. State Authority

“I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the union would be imperiled if we could not make that declaration as to the laws of the several states.”
– Oliver Wendell Holmes, Jr.
Government Regulation of the Economy

1865 to the late 1930s: major issue was the government’s regulation of the economy. This regulation frequently challenged property rights.

Scope of government powers at both levels (national and state) was in question. Rapid industrial expansion after the Civil War. Call for government (both national and state) to regulate monopolies and provide new services to citizens.

Government attempted to win public support by regulating industry — railroads for example.

The courts were generally unsympathetic. By the late 19th century a Constitutional tradition emerged that shielded business from economic regulation.

• Had its beginnings in the fundamental right of private property espoused by the Framers.
• 14th amendment applied to business (corporations defined as people)

Government Regulation of the Economy

U.S. v. E.C. Knight (1895)

The Facts: American Sugar Company makes deals acquiring 98% of the market for sugar refining. Federal government sues to have the deals cancelled under the Sherman Anti-Trust Act.

Greenspan -> Trusts promote inefficiency, kill innovation.

The Question: Does the Sherman Act apply to manufacturing?

The Holding (8-1), Fuller -> No. Manufacturing is NOT interstate commerce.
**Government Regulation of the Economy**

*Lochner v. New York (1905)*

**Facts:** New York passes a statute limiting bakers to 10 hours a day or 60 hours a week. They claim that it can regulate working conditions for the health of workers and consumers. Lochner, the owner of a bakery is arrested and challenged the law.

**Question:** Does the New York statute interfere with Lochner’s right to enter a contract – guaranteed by the 14th Amendment?

**Holding** (5-4), Peckham -> Yes. The law is invalid. There is no reasonable purpose for this law.

**Dissent, Holmes ->** Accuses the majority of “activism.”

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**Government Regulation of the Economy**

As the 1929 depression deepened, the federal government attempted to intervene more substantially, **BUT** the Supreme Court reaffirmed its commitment to a hands-off economy philosophy.

*Pollack v. Farmer’s Loan and Trust (1895)* – Strikes down the income tax.

*Adkins v. Children’s Hospital (1923)* – Strikes down a minimum wage law for the District of Columbia


From 1934 to 1937, the Court rejected twelve statutes enacted during FDR’s first term. These included laws creating emergency relief programs, controlling the production of coal and basic agricultural commodities, regulating child labor, and providing mortgage relief.
Government Regulation of the Economy

FDR is angry… In 1936, after a landslide reelection, Roosevelt proposed a plan for revamping the judiciary (Court-packing plan)

- The attempt to “pack the court” was unpopular and ultimately failed in Congress.

But Court did begin to change its tune. In a 5–4 decision (resulting from one justice changing his mind) in a case about wage and working conditions, the Court began to uphold economic regulation that it had rejected for two years prior.

- **NLRB v. Jones & Laughlin Steel Co. (1937)** – NLRB settles wage disputes. Jones & Laughlin are discriminating against union workers. The court decides in favor of the NLRB.

FDR also benefited from the fact that in the ensuing years (1937–1941) he was able to fill seven vacancies with appointees more in tune to the needs and desires of the elected branches.

Civil Rights and Liberties

The third era of judicial review began in earnest in the 1940s.

Court’s main object of concern the relationship between the individual and government.

A number of historical reasons may have inspired this focus:

- The rise of totalitarian regimes in Europe and the horrors of World War II.
  - More focus on the preservation of personal freedom

The rise of civil rights proponents who would no longer allow their plight to be ignored, e.g. returning veterans
Mapp v. Ohio (1961) – Protects against "unreasonable searches and seizures." Evidence found during said searches should be excluded from Court.

Gideon v. Wainwright (1963) – Requires states to appoint counsel for indigent defendants.

Escobedo v. Illinois (1964) – Criminal suspects have a right to counsel during police interrogations. Escobedo’s lawyer was in the police station but he was refused access to him.

Miranda v. Arizona (1966) -

Facts: Miranda is arrested for kidnapping and rape. During police interrogation, he confesses. Prosecutors use that confession and Miranda is convicted and sentenced to 20-30 years in prison. Miranda appeals.

Question: Are statements obtained from a defendant questioned while in custody admissible if the defendant was not informed of his rights on the outset of the interrogation process?

Holding (5-4), Warren -> No. “The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him.”
Civil Rights and Liberties

“In some unknown number of cases, the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection, and who, without it, can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.” – Miranda v. Arizona (1965), J. White dissenting

Civil Rights and Liberties

Plessy v. Ferguson (1896) – Homer Plessy is arrested for sitting in a railroad coach reserved for whites. He appeals.

Holding (7-1), Brown -> “Laws permitting, and even requiring, their separation in places where they are liable to brought into contact do no necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislature in the exercise of their police power.”

Dissent, Harlan -> “But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.”
Civil Rights and Liberties

1953 – Seventeen states and the District of Columbia require segregated schools.

*Brown v. Board of Education (1954)* – Linda Brown (and others) are prohibited from attending a white public school in Topeka, Kansas. Brown asserts that segregation results in inferior accommodations for blacks, violating the equal protection clause of the 14th Amendment.

**Holding, 9-0 (Warren)** -> “A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected. We conclude that, in the field of public education, the doctrine of "separate but equal" has no place.”

Civil Rights and Liberties

*Roe v. Wade (1973)*

The facts: A Texas law makes it a criminal office to attempt an abortion except for the purpose of saving the mother’s life. Under the pseudonym “Jane Roe,” Norma McCorvey, a pregnant single woman, brings a lawsuit challenging the Constitutionality of that statute.
Civil Rights and Liberties

Roe v. Wade (1973)

Holding, 7-2 (Blackmun) -> “The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, in the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights, in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment…We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”

Civil Rights and Liberties

Roe v. Wade (1973)

Dissent, White -> “I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but, in my view, its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.”
A Fourth Era? Court as Referee

Three eras are important because they led to major changes in the country but also because they represent periods of sharp disagreement between the Court and the elected branches.

Once the Court left the policy domain of economic regulation, it removed a major source of friction between these institutions. Modern era has seen fewer eruptions of conflict and confrontation.

But: Current Court may be tentatively ushering in a fourth era…

Government could only grow if Congress and the president were willing to delegate authority to new agencies.

The Court has increasingly issued rulings limiting the federal government’s ability to delegate and impose policy and administrative restrictions on the states.

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A Fourth Era? Court as Referee

*INS v. Chadha (1983)*

Limits to legislative delegation…

**Facts:** The Immigration and Nationality Act passed by Congress authorized either House to suspend decisions regarding deportations by the Attorney General. Chadha is a Kenyan national who is past his VISA deadline. The AG gives him a reprieve. The House vetoes this decision. Accordingly, Chadha is set to be deported.

**Question:** Did the INA, which allocates a one-house veto to Congress, violate the doctrine of Separation of Powers?
A Fourth Era? Court as Referee

Holding: Burger (7-2) -> Yes, this section of the INA is unconstitutional. Article 1, Section 1, requires all powers to be vested in the House and Senate. Article 1, Section 7 requires passage of both Houses and the President.

Dissent: White -> This is idiotic: over 200 statutes are now unconstitutional. This is a “necessary check on the unavoidably expanding power of the agencies, both executive and independent as they engage in exercising authority delegated by Congress.”

Bowsher v. Synar (1986)

Facts: In the face of rising budget deficits, Congress passes the Balanced Budget and Emergency Deficit Control Act. The Act empowers the Comptroller General to make spending cuts if they were not made by Congress. The Comptroller General is appointed by the President but could be removed by Congress.

Question: Does the delegation violate the Constitution’s principle of Separation of Powers?
A Fourth Era? Court as Referee

**Holding:** Burger (7-2) -> No. Under the Constitution’s principle of Separation of Powers, Congress can not resolve for itself the removal of an agent charged with executive powers except by impeachment. There is no merit to the argument that the comptroller general performs her duties independently of Congress. He/she can be removed by joint resolution. Therefore, the comptroller general has been inappropriately delegated executive powers.

**Dissent:** White -> This is too formulistic. Is this really a threat to SoP? The joint resolution is still subjected to bicameral constraints and narrow reasoning for dismissal. This is the “worst crisis since the depression.”

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**Clinton v. City of New York (1998)**

**Facts:** In 1994, voters elected a Republican majority to Congress for the first time in many years. One of the planks of the “Contract with America” was to control spending, and to do so, Congress approved a line-item veto. President Clinton uses the line-item veto on a pork provision in the balanced budget act providing money to New York City hospitals. New York City challenges.

**Question:** Did the President’s ability to selectively cancel individual portions of bills, under the line-item veto act, violate the president clause of the Constitution?
A Fourth Era? Court as Referee

**Holding:** Stevens (7-2)-> Yes. Amending two acts of Congress by repealing a portion of each. According to Article 1, Section 7, the veto must occur BEFORE the bill becomes law, NOT afterwards.

**Concurrence:** Kennedy -> This enhances the President’s ability to “play favorites.”

**Dissent:** Breyer -> This is a major problem. “Novel” methods like the line-item veto may be “implied” powers.

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**Conclusion**

Questions?

Enjoy the rest of your day!