

PostEverything

How the Supreme Court dominates our democracy

Judicial review gives any five justices power over the whole government. Why?

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Perspective by Nikolas Bowie

The United States calls itself the world's oldest democracy, which would be true if the world began in 1965. That was the year John Lewis marched to the Edmund Pettus Bridge, the president said "We shall overcome" and Congress passed the Voting Rights Act, which allowed many citizens to exercise their right to vote for the first time.

Yet the legislation of 1965 wasn't Congress's first attempt to build a multiracial democracy. A century earlier, lawmakers enacted a half-dozen laws that protected the right to vote, punished political violence, and banned racial discrimination in public places. But as Frederick Douglass lamented in 1883, those laws were "grievously wounded" and cut down during his lifetime. Their assassin was the Supreme Court.

“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders” the court wrote in 1876, as it struck down the first federal voting rights act. “It does not appear that it was their intent to interfere with any right granted or secured by the constitution,” the court wrote that same year of a White mob that murdered more than 100 Black voters. “A name on a piece of paper will not defeat them,” the court wrote in 1903, as it explained why federal law was powerless to stop “the great mass of the white population [that] intends to keep the blacks from voting.”

Because the Supreme Court undermined or ignored Congress’s attempts to enforce the Constitution, the racial caste system that we know as Jim Crow emerged like an invasive species. With the court’s approval, White people in the South terrorized Black voters, disenfranchised them and enacted state laws to codify their place at the bottom of a racial hierarchy.

Today, as American democracy enters a midlife crisis, the Supreme Court has often been heralded as democracy's guardian. Decisions dating from 1954's *Brown v. Board of Education* are seen by many as essential responses to the tyranny of the majority. Yet it appears that the court has reverted to its older ways. In 2013, a justice sneered at Congress's nearly unanimous reauthorization of the Voting Rights Act, calling it the "perpetuation of a racial entitlement." He was soon joined by four of his colleagues in the *Shelby County* decision, which treated a central provision of the Voting Rights Act as beyond Congress's power to enact "appropriate" legislation. And in its *Brnovich* decision this month, the court stuck a second dagger into the act, calling it too "radical" to be enforced as written.

In the wake of these decisions — as before — Jim Crow laws are reemerging. By declining to enforce federal laws because it disagrees with Congress about whether they're constitutionally appropriate, the Supreme Court has functioned as an antidemocratic institution that produces antidemocratic results.

In his inaugural address in 1861, President Abraham Lincoln offered perhaps the best argument for why Congress, and not the Supreme Court, should have the final word on what the Constitution requires. The court had just held in its infamous *Dred Scott* decision that Congress had no power to restrict the spread of slavery. "The candid citizen must confess that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by the Supreme Court," Lincoln said, ". . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal." Lincoln thought that a self-governing people should have the power to determine what their fundamental law meant.

Lincoln's argument wasn't that the Constitution shouldn't be enforced, but rather that Congress was the best institution to enforce it. Most of the Constitution's limits are vague: The 15th Amendment permits Congress to enact "appropriate legislation" to protect the right to vote, for example, while the Fifth Amendment prohibits Congress from violating the "due process of law." For as long as these limits have existed, there have been passionate disagreements about what they require. Congress offers a relatively democratic method for resolving these disputes. If people or state governments disagree about a law's constitutionality, they can campaign to repeal that law.

By contrast, when the Supreme Court decides not to enforce a federal law, the justices in the majority effectively declare that their view is superior to everyone else's. Even if the president, more than 500 members of Congress and four justices interpret the Constitution as permitting a law, if five justices disagree, then the law is not enforced. This was the scenario in 2013, when five members of the court held that a key section of the Voting Rights Act wasn't "appropriate legislation."

Yet no democratic procedure requires the justices to think of themselves as political equals with people who disagree with them. And while later generations of justices can revisit and overturn any of the court's precedents, everyone else has the formal power to overrule the court only if two-thirds of both houses of Congress and three-quarters of the 50 states approve a constitutional amendment.

Indeed, it's difficult to explain why, in a democracy, the constitutional interpretation of five justices should be superior to the constitutional interpretation of the elected officials who appointed and confirmed them.

One possible answer is that it's the court's job to interpret the Constitution. "It is emphatically the province and duty of the judicial department to say what the law is," Chief Justice John Marshall wrote in his famous 1803 opinion in *Marbury v. Madison*. "The constitution controls any legislative act repugnant to it." But Marshall's emphatic response, as one critic put it, "begged the question-in-chief, which was not whether an act repugnant to the Constitution could stand, but who should be empowered to decide that the act is repugnant."

A second possible answer is that everyone, the justices included, should follow their own interpretation of what the Constitution requires. But we all expect presidents, federal officials, state officials and even state judges to comply with federal law, regardless of whether they personally believe that the law is constitutional. As Lincoln well knew, it would be profoundly antidemocratic for a member of a state militia or the military to resist federal law. So the question — again — is what makes the justices different?

The only honest answer is that the justices are *supposed* to be antidemocratic. As Justice Robert Jackson wrote in 1943, "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." Other scholars have joined him in accepting the "countermajoritarian difficulty" of judicial review. This perspective concedes that judicial review is antidemocratic — yet necessary for democracy to function properly.

This embrace of a judicial aristocracy affects much of the culture surrounding the Supreme Court. For the past hundred years, nearly every justice has been a graduate of an elite law school. New appointments are generally praised for their brilliance, credentials, professionalism and collegiality. And written briefs, adversarial argument, secretive deliberation, highly educated law clerks and a lack of political accountability are considered tools that allow the justices to resolve fraught questions correctly, even when their interpretations are politically unpopular.

But there is little historical reason to believe there is anything intrinsically correct about the Supreme Court's constitutional interpretations. No expertise on the planet can determine whether Congress's 1875 ban on racial discrimination, its 1965 expansion of voting rights, or its 2010 expansion of health insurance is "appropriate" or providing for the "general Welfare." Resolving those questions requires the same trade-offs among competing principles that a democracy makes when it decides to enact any law. Our democracy suffers when an unelected group of lawyers take away our ability to govern ourselves.

This isn't to say that Congress hasn't adopted any horrific laws over the past 250 years. But there are few examples of the Supreme Court intervening in a timely fashion to overturn them. The court was silent at best when Congress violently captured fugitives from slavery, dispossessed Native American tribes, excluded Chinese immigrants, persecuted political dissidents, withheld civil rights from U.S. citizens in territories and interned Japanese Americans. Efforts to remedy these injustices have been achieved not by courts, but by expanding our democracy.

The history of judicial review of federal legislation shows that the principal "minority" most often protected by the court is the wealthy. Wealthy litigants can muster the skills, time, money, influence and capacity to challenge the same legislation over and over in court. For example, in 1895's *Pollock v. Farmers' Loan and Trust Co.*, the Supreme Court invalidated a century of precedent to hold that a federal income tax would violate "one of the bulwarks of private rights and private property." And in 2010's *Citizens United*, the court threw out another century of federal campaign finance laws.

The best examples of judicial review working as expected by its proponents are cases such as the 2013 Windsor decision, which invalidated the Defense of Marriage Act of 1996, the 2008 Boumediene decision, which guaranteed minimal due process protections for Guantánamo detainees, and decisions in the 1970s that prohibited Congress from “protecting” women by engaging in sex discrimination. But when these cases are compared with rulings that directly contributed to the rise of Jim Crow, it becomes pretty evident that the court is, at best, no more reliable than Congress as a safeguard of political equality.

Of course, the Supreme Court has advanced democratic equality at the state level, from *Brown v. Board* in 1954 and *Roe v. Wade* in 1973 to *Obergefell v. Hodges* in 2015. But in these cases, federal judges didn’t disagree with Congress about the constitutionality of a federal law. To the contrary, they all enforced a federal law — the Ku Klux Klan Act of 1871. Congress enacted that law in response to Southern officials’ inaction against white supremacists terrorizing Black people. In its current form in the U.S. Code, the Klan Act instructs federal courts to invalidate state actions that violate the Constitution.

As the legal theorist James Bradley Thayer observed over a century ago, when the Supreme Court invalidates a state law, it is doing something far less objectionable from what it does when it refuses to enforce a federal law. In any federal system in which a national government disagrees with a state government, one side has to prevail. There is nothing undemocratic about our system in which the federal government decides who should win. And when Congress instructs federal courts to preempt state laws — whether with the Klan Act or even with an ordinary federal law — the effect is as consistent with democracy as when President John F. Kennedy instructed federal troops to integrate the University of Mississippi. Either way, the federal government is simply seeking that its commands be enforced.

The situation profoundly changes when the Supreme Court goes rogue. For precisely the same reason that it can be democratic for federal troops to enforce Congress's interpretation of the Constitution but extremely antidemocratic for them to disregard it, the proper role for federal courts in a democracy is to serve as its agents, not as a countervailing force. Democratic decision-making belongs in the hands of democratic bodies, not people with robes or guns.

Indeed, what a case like *Brown* actually illustrates is how federal legislation has successfully expanded American democracy when the Supreme Court serves as Congress's enforcer. As the law professor Michael Klarman has observed, Southern schools remained almost as racially segregated in 1964 as they had been 10 years earlier, when *Brown* was decided. Formal segregation drew to a close in the South only after Congress enacted the Civil Rights Act and the Voting Rights Act.

Yet both laws stood in the face of Supreme Court precedents that restricted Congress's power. Because the court continued to hold itself as the supreme interpreter of the Constitution, it had to give Congress permission to evade its own bad precedents — at least until it recently took that permission away.

Which returns to the original problem: Why should a court be in charge of a democracy? The answer is: It shouldn't.

A few years before he wrote the opinion invalidating a key part of the Voting Rights Act, Chief Justice John Roberts compared his role to that of an umpire. “It’s my job to call balls and strikes,” he said, “and not to pitch or bat.”

A better metaphor is that of a horse-and-buggy driver. Most of the time, the court gives Congress free rein to act as it pleases. But the justices are quick to pull on the reins when lawmakers move to disrupt hierarchies of wealth or status. Either way, the court arbitrarily dominates Congress: Even when the court is permissive, Congress can make no law without permission.

What makes that domination arbitrary is that the justices themselves are unbridled. Federal laws stand and fall on the votes of nine unaccountable lawyers, all appointed for life because of their educational backgrounds and relationship to the governing elite.

As a result, the political choices available to us as a democracy depend not on our collective will but on the will of people who hold power until they resign or die. This is precisely what the Declaration of Independence protested. As absurd as it was then for a continent to be perpetually governed by an island, it is equally absurd now for a nation of 300 million to be perpetually governed by five Harvard and Yale alumni.

As we debate new legislation to expand the franchise and protect the right to vote, the threat of judicial invalidation has forced our elected representatives to lower their expectations about how democratic our nation can become. In the name of protecting us from the excesses of democracy, the judicial review of federal laws is costing us democracy itself.

This essay was adapted from testimony delivered to the Presidential Commission on the Supreme Court of the United States.

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