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Judicial Adaptation

The likeness to a living organism that social systems possess is striking. Reminiscent of the Hobbesian notion of the Leviathan, most social systems mimic the biological behaviors of those that comprise it. Evolution, adaptation, and the struggle to survive within dynamic, unpredictable environments define this similarity. These are indeed traits of the judicial branch of the United States, as well as of the officials that comprise that branch. As part of a national government that rose from the remains of colonial and monarchial rule, the judiciary has experienced evolution its Constitutionally constructed rejection of despotism. Such centralization of power is addressed by dissipating power both federally and functionally. In other words, power could be seen as stretched vertically amongst multiple bereaucratic levels of governance from the national government to the state and local governments, as well as horizontally, amongst co-equal, functionally exclusive branches that also serve to check each other. This checking function can be construed as being maintained by competition between the branches for limited amounts of power, whether fueled internally by individual political greed or other forces. Any branch then, that were not to exercise its checking power could find itself illegitimate and powerless, just as any organism that did not defend its territory could find itself without food or shelter, or worse yet, made extinct by its competitors. This competition model is equivalently viewed in terms of both the undending struggle for legitimacy and the struggle to repress the seeds of despotism. Such a system, ideally constructed, would achieve equilibrium even in the face of dynamism in the external and internal social environment. In this paper, I examine the adaptations the judicial branch has taken with respect to judicial review, standing,

methods of constitutional interpretation, and the effects of the Fourteenth Amendment.

The history of the judicial branch can be broken into three general eras: pre-Civil War; Reconstruction and the Industrial Revolution; and Civil Rights. Each of these eras have corresponding and reinforcing views of judicial review and supremacy, methods of constitutional intepretation, and civil liberties, with the Civil Rights era also being characterized by important developments in judicial standing. The judciary in the pre-Civil War era was characterized largely by youthful caution. Justices were meek in asserting their power of judicial review; in the 72 years between the beginning of the Union and the Civil War, only two of many potential cases saw the overturning of congressional statute as unconstitional. The episode of the first of these led many to believe, as anti-Federalist Alexander Hamilton had asserted, that the judiciary would be "the least dangerous branch." In *Chisholm v. Georgia*, 2 U.S. 419 (1793), Justice Wilson delivered the court's opinion that citizens of one state can indeed use the federal court system to sue a citizen of another state. The Congress reacted swiftly to pass the Eleventh Amendment, directly re-asserting the sovereign immunity of states from lawsuits of citizens of other states. It was the view of many anti-Federalists that each branch had their own authority to interpret the Constitution, and needed to be bound by the interpretation of any other, particularly the judiciary. This prevailing tripartite constitutional interpretation left the entire power of judicial review up in the air. Ten years later, in *Marbury v. Madison*, 5 U.S. 137 (1803), Chief Justice John Marshall, in delivering the opinion of the court, asserted that the Congress cannot by statute expand the original jurisdiction of the federal courts, as they had attempted to do so in passing the Judiciary Act of 1789. Alas, the court had already adapted from its previous flirtation with judicial review; the overturning of the Judiciary Act was tied to the political success of newly elected President Jefferson, who could only ignore the ruling only at high political cost in public opinion and support from judicial appointees. In this way, *Marbury* is infamous for its

shrewd effectiveness at establishing the power of review for the judiciary. This ruling relied on simple and common sense methosd of reading the Constitution, as *Chisholm* did, but due to the political context was successful in claiming legitimacy and power to enforce its decisions. Such detail and thoroughness acknowledges the courts counter-majoritarian nature within the Madisonian dilemma – rule either by majority or by minority – and serves to enhance the public and political legitimacy of the court. According to volume two of David O'Brien's *Constitutional Law and Politics*, "Jefferson, Jackson and subsequent presidents concede that the Court's rulings are binding for the actual cases decided and handed down." (33) It was not until 1857 in *Dred Scott v Sandford*, 60 U.S. 393, that judicial review again come to the forefront of American politics. Rather than look to developing social norms or fundamental democratic principles that characterize later courts, the court examined the original intention of the Constitution to hold, as delivered by Chief Justice Taney, that blacks "were at that time considered as a subordinate and inferior class of beings... and had no rights or privileges but such as those who held the power and the Government might choose to grant them." This ruling was highly unpopular to abolishionists, and severely curtailed the legitimacy of the court. Amongst a series of events which led to the Civil War, this ruling signified the end of the pre-Civil War judicial era. During this era, the court applied conservative methods of constitutional interpretation effectively to establish its power of judicial review, as well as disasterously to hinder its political support from the other branches to heed their rulings. The judiciary, however, would then quickly learn and adapt.

Reconstruction and the Industrial Revolution marked the following era, from 1865 into the Depression, insomuch as Congressional economic regulation and court relief thereof increased dramatically. The first important case of this era was the block appeal of Lousiana butchers known as the *Slaughterhouse Cases*, 83 U.S. 36 (1873). In ruling against the butchers,

the decision delivered by Justice Miller scrutinzied the verbage of the Constitution to determine that the immunities and privileges clauses of the Fourteenth Amendment applied strictly to the protection of the rights each state citizen is granted by other states. The end effect was a cooling of civil liberties developments, signaling a distinct direction towards defending business interests that the court would take. A mix of forces, including social upheavel resulting from the the legislative aftermath of the Civil War as well as burdgeoning technological and economic development influenced the court method of constitutional interpretation during this era. No longer could society be appropriately compared to that of the framers of the Constitution, and no longer could interpretivism withstand charges that justices must in fact still choose amongst a plurality of viable conceptions of particular concepts they find underlying the Constitution. Thus such methods of constitutional interpreation were attacked as illegitimate, and in response, new multidisciplinary methods gained favor. This was instigated by Louis D. Brandeis' brief in *Muller v. Oregon*, 208 U.S. 412 (1908), and furthered by the legal realist movement. Among there tenants was the assertion of wide discretion judges apply in determing law. These movements were very relevant to the era of extensive socioeconomic development, and led to many rulings sympathetic to business rather than worker thoughout the Depression. The court proved so frustrating to economic reform that President Roosevelt threatened to expand the bench explicitly to appoint a friendly majority of justices. Another characteristic case was *Frothingham v. Mellon*, 262 U.S. 447 (1923), in which the Taft court decided that a taxpayer did not have standing to argue the tax policy because there was no direct injury extraneous to the actual income loss. This was based on recognition of the complex social environment that had developed, and the staggering consequential difficulty inherent in tracing the effect of national tax spending policy on a single taxpayer. Thus, during this era we see an increase in economic cases following Congressional regulation of exploding industry, as the judiciary sought to

maintain its legitimacy with multidisciplinary methods of constitutional interpretation. As these methods develop, however, the bases for court decisions becomes less restrained and more discretionary.

Indications of a new judicial paradigm were apparent as early as 1925, when *Gitlow v. New York*, 268 U.S. 652 held that parts of the First Amendment were "among the fundamental rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states." This markedly open language was reinforced by no particular judicial philosophy, and instead appears to be a power grab the court felt necessary to keep pace with changing social norms. This was prescient of many civil rights rulings, which comprised the incorporation doctrine whereby the Supreme Court incorporated provisions from the Bill of Rights into the due process clause of the Fourteenth Amendment. In 1937, Justice Cardozo so incorporated parts of the First, Fifth, and Sixth Amendments, claiming they were "fundamental" and "implicit in the concept of ordered liberty." The rest of the 20th century finds most provisions of the Bill of Rights being incorporated in similar fashion. Other liberal rulings were reached pertaining to standing. In *Flast v. Cohen*, 392 U.S. 83 (1968) Chief Justice Warren wrote for the court that the absolute barrier to standing reached in the Frothingham case be overturned and that taxpayers be granted standing if they can challenge the Constitutionality of congressional tax statutes. Moreover, in *United States v. Students Challenging Regulatory Agency Procedure*, 412 U.S. 669 (1973) the Burger court held that the protection of interests that are by nature shared by "the many" rather than "the few" can form the basis for judicial standing of individuals, citing "important ingredients to the quality of life in our society." These expansions in standing represent attempts to retain legitimacy in the public and political environments, and so succeed based on open-textured arguments. Indeed, the continued development of legal realism might have only left the theoretical sphere hyper-pluralistic,

permitting any interpretation of law to appear theoretically legitimate. This is supported recently by the exceptions to standing carved out by Justice Scalia's "prudential standing" requirements in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004) and the exceptions to state compliance of incorporated rights, carved out by Chief Justice Renquist. (O'Brien, 318) This open-textured nature has given the judiciary the legitimacy that assisted in the achievement of populist goals, such as increased standing and widened protection of civil rights.

Along with the achievement of such goals, the court had amassed a wealth of populist support throughout much of the 20th century, making it highly defended to encroachment by the legislature. Without that legislative check, the judiciary does indeed become, as Professor Schuele puts it, "the most dangerous branch." It follows then that the court system has evidently been the most successful of the three political structures erected by the Constitution at adapting its competitive strategies to changing social forces. While not prevalent on the nightly news broadcast, there are few political issues that consistently generate as much passion and discourse in the public as the issues within the hard, important cases brought before the Supreme Court. This can be attributed to the expanded standing and review powers the court has been able to attain. Nonetheless, though it is too early to tell, it can be argued that the judiciary may have overreached their hand, as there currently exists intense legislative posturing to curtail their powers. Perhaps this can be attributed to the legislative and executive branches' capitalization upon media resources and the party system, or perhaps to social forces of war sympathy and religion. Regardless, with in light of the major sociotechnological shifts or on the horizon – illicited by advancements in information exchange, genetic engineering, and new energy sources – the judiciary may well continue to reign supreme in the American political jungle.

Works Cited

O'Brien, David M. *Constitutional Law and Politics.* Vol. 2, 6th ed. New York: W. W. Norton and Company. 2005.