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Congressional Responses to Judicial Decisions

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CONGRESSIONAL RESPONSE TO JUDICIAL DECISIONS

On both statutory and constitutional questions, Congress has significant power and responsibility to respond to Supreme Court decisions. On statutory matters, there is no question that Congress may negate a Supreme Court interpretation by enacting new legislation. Consider, for example, congressional efforts to countermand Rehnquist Court interpretations of federal civil right statutes, the 1987 Civil Rights Restoration Act, and the 1991 Civil Rights Act. The 1987 statute negated a 1984 Supreme Court decision, *Grove City College v. Bell*, 465 U.S. 555 (1984). Ruling that only the parts of the college that actually received federal aid were subject to federal civil rights laws (and not the college as a whole), *Grove City* severely limited the reach of federal civil rights protections. The Restoration Act rejected that interpretation, making clear that the entire organization is subject to federal civil rights protections when any program or activity receives federal assistance.

The 1991 Civil Rights Act is a more dramatic example of Congress's power to respond. In 1989, the

Supreme Court began to backtrack from its previous positions on civil rights and issued five rulings that made it more difficult to prove discrimination under Title VII (employment discrimination) and other statutes. Congress, working in tandem with civil rights groups, crafted legislation that nullified these and other restrictive decisions. By enacting the 1991 Act, Congress overturned nine Rehnquist Court decisions, made it easier for civil rights plaintiffs to bring lawsuits, and became the civil rights establishment's so-called court of last resort.

CONSTITUTIONAL ISSUES

On constitutional questions, there is significant controversy about the scope of Congress's power to respond. The reason for this is that the press, the American people, some members of Congress, and especially the Supreme Court treat Court constitutional rulings as final and definitive. For example, when reporting that six out of ten Americans thought the Supreme Court was the ultimate constitutional arbiter, newspapers simply noted that those six were "correct" (Marcus 1987, p. A13). Likewise, after Reagan's attorney general, Edwin Meese (1931–), argued that Supreme Court decisions were not "binding on all persons and parts of government henceforth and forevermore," the Senate Judiciary Committee was alarmed, asking Supreme Court nominees to comment on Meese's speech (Meese 1987, p. 983).

For its part, the Supreme Court stridently defends its power to interpret the Constitution. Beginning with Chief Justice John Marshall's declaration in *Marbury v. Madison*, 5 U.S. 137 (1803) that it is "emphatically the province and duty of the judicial department to say what the law is," the Supreme Court regularly insists that it alone delivers the final word on the meaning of the Constitution. According to a subsequent decision, *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution" (*Cooper v. Aaron*, 358 U.S. 1 [1958]). In a memorable aphorism, Justice Robert H. Jackson claimed that decisions by the Supreme Court "are not final because we are infallible, but we are infallible only because we are final" (*Brown v. Allen*, 344 U.S. 443 [1953]). Yet, the historical record, as well as the text of the Constitution, provides overwhelming evidence that Court pronouncements are anything but final. Instead, Court pronouncements are part of a circular process binding the parties in a particular case but otherwise serving as one moment in an ongoing constitutional dialogue between the courts, elected officials, and the American people.

The Constitution, for example, anticipates that Congress will play an important part in shaping the Constitution's meaning. All public officers are required by Article VI, clause three "to support this Constitution." That obligation is supplemented by federal law, under

which all legislative officials “solemnly swear (or affirm) . . . to support and defend the Constitution” (5 U.S.C. § 3331 [1994]). The Constitution, moreover, anticipates that lawmakers will respond to Supreme Court rulings. It empowers Congress to, among other things, impeach judges, make exceptions to the jurisdiction of federal courts, confirm judicial nominations, and amend the Constitution (in conjunction with the states, three-fourths of which must approve constitutional amendment proposals). Over the years, Congress has made use of all of these powers to signal its approval or disapproval of federal court decisions.

In the twenty-first century it seems farfetched that Congress would impeach federal court judges to express disapproval with court decisions. At the time of *Marbury v. Madison*, however, Congress seemed quite willing to use its impeachment power to check the federal judiciary. After the 1800 elections (where the Jeffersonians took control of the White House and Congress from the Federalists), Federalist district judge John Pickering (1737–1805) was impeached and removed, and action against Supreme Court Justice Samuel Chase (1741–1811) began. For this very reason, the Supreme Court could not issue a meaningful remedy against the Jefferson administration in *Marbury v. Madison* (a case in which a Federalist judicial appointee challenged the Jefferson administration for failing to deliver his judicial commission to him). Indeed, Chief Justice Marshall was concerned about impeachment, writing to Justice Chase that “a reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the Judge who has rendered them unknowing of his fault” (Beveridge 1919, p. 177).

COURT JURISDICTION

Article III, clause two makes the Supreme Court’s appellate jurisdiction subject to “such exceptions” and “such regulations as the Congress shall make.” On numerous occasions, Congress has threatened to strip the Court of jurisdiction in response to decisions it dislikes. From 1953 to 1968, Congress saw Court stripping as a way to countermand the Warren Court—over sixty bills were introduced to limit the jurisdiction of the federal courts over school desegregation, national security, criminal confessions, and much more. And while only one of these bills passed (limiting the access of alleged Communists to government documents), Congress came close to enacting legislation that would have stripped the Supreme Court of jurisdiction in five domestic security areas. In the late 1970s and 1980s, Congress again targeted the Supreme Court. An amendment to strip the federal courts of jurisdiction over school prayer was approved by the Senate in 1979; proposals to limit court jurisdiction over abortion and school desegregation were also given serious consideration. More recently, Congress has taken aim at federal and state

court decisions on gay marriage, the pledge of allegiance, the public display of the Ten Commandments, and judicial invocations of international law. None of these statutes was enacted, although limits on court jurisdiction over same-sex marriage and the pledge of allegiance were approved by the House of Representatives in 2004.

In 2005 and 2006, Congress responded to court decisions by enacting legislation affecting federal court jurisdiction. In 2005, Congress expressed disapproval with state court decision-making in the Terri Schiavo case by expanding federal court jurisdiction. Specifically, rather than accept state court findings that Schiavo, then in a persistent vegetative state, would rather die than be kept alive artificially, Congress asked the federal courts to sort out whether the removal of a feeding tube violated Schiavo’s constitutional rights (For the Relief of the Parents of Theresa Marie Schiavo Act).

In 2006, Congress limited the habeas corpus rights of detainees held at Guantanamo Bay. Responding to a Supreme Court ruling *Hamdan v. Rumsfeld*, 548 U.S. ____ (2006), which extended Geneva Convention protections to enemy combatants, Congress enacted the Military Commission Act. This statute authorized limited federal court review of military commission determinations that a detainee is an enemy combatant. More significant, the Military Commissions Act prohibited federal court consideration of habeas corpus petitions by Guantanamo detainees, limiting their rights to those afforded them by military commissions. When enacting the statute, it is unclear whether lawmakers intended to countermand the *Hamdan* Court or, instead, accepted the Court’s invitation to grant “the President the legislative authority to create military commissions at issue here.”

Another constitutionally authorized mechanism to countermand Supreme Court decision-making is the Article V amendment process. The Eleventh Amendment (ratified in 1795) was a response to the Supreme Court’s decision in *Chislm v. Georgia*, 2 U.S. 419 (1793). *Chislm* ruled that states could be sued in federal courts by citizens of another state; the Eleventh Amendment explicitly forbids such lawsuits. The Thirteenth Amendment (ratified in 1865) outlawed slavery and, in so doing, nullified *Dred Scott v. Sandford*, 60 U.S. 393 (1857). Since the Reconstruction, however, Congress has rarely amended the Constitution in response to Court decisions. That has not stopped lawmakers from seriously contemplating such amendments and constitutional amendment proposals have been considered in response to Court decisions on child labor, abortion, school prayer, and gender equality.

APPOINTMENT OF JUSTICES

Perhaps the principal way that Congress responds to Court decisions is through its power both to confirm Supreme Court nominees and determine the number of justices who

sit on the Court. The process by which the president appoints and the Senate confirms Supreme Court nominees is often used to change the direction of Court decisions. For example, after the Supreme Court ruled paper money unconstitutional in 1870, President Ulysses S. Grant (1822–1885) nominated, and the Senate confirmed, two justices who voted the very next year to overturn that decision in *Legal Tender Cases*, 79 U.S. 467 (1871). The Senate likewise backed President Franklin D. Roosevelt's efforts to appoint justices supportive of economic regulation, especially Congress's use of the commerce clause as an agent of social change. From these New Deal appointees overturned decisions and, in so doing, paved the way for the modern regulatory state. During the period from 1937 to 1944, thirty decisions were overruled.

Senate support for Roosevelt's Supreme Court picks, however, did not translate into Senate support for Roosevelt's controversial Court-packing plan. Before Supreme Court vacancies allowed him to reshape constitutional law, Roosevelt felt stymied by a pro-business Supreme Court. His solution was to increase the size of the Court so that the balance of power would shift to pro-New Deal Justices. Congress took this proposal seriously and there was good reason to think that it would back the President. However, through the so-called switch in time that saved nine, the Supreme Court reversed course on its own. For its part, Congress saw no reason to check a Court that seemed willing to check itself.

LEGISLATIVE RESPONSES

The above inventory, while significant, merely scratches the surface of possible congressional responses to Supreme Court decisions. Congress, for example, may enact legislation that seeks to limit the reach of Supreme Court rulings. After the Supreme Court upheld abortion rights in *Roe v. Wade*, 410 U.S. 113 (1973), Congress blocked the use of Medicaid and other federal funds to pay for abortions. Congress also offered religious organizations federal funds to promote sexual abstinence as a method of birth control. The Supreme Court approved both of these statutes and, in so doing, validated Congress's use of its appropriation powers to respond to Supreme Court rulings (*Harris v. McRae*, 448 U.S. 297 [1980]). The Supreme Court also upheld a 2003 federal statute prohibiting intact dilations and extractions, enacted in response to a 2000 Court ruling that a state ban on so-called partial birth abortions was unconstitutionally vague (*Gonzales v. Carhart*, 550 U.S. ____ [2007]).

Congress may also respond to a Supreme Court decision by reenacting a statute that the Court struck down. For example, Congress strongly disagreed with the Court's 1918 ruling that the commerce power could not be used to regulate child labor (*Hammer v. Dagenhart*, 247 U.S. 251 [1918]). The very next year, Congress sought to

make use of an alternative power (the taxing power) to enact child labor legislation. Again, the Supreme Court struck the statute down (*Child Labor Tax Case*, 259 U.S. 20 [1922]). In 1938, after the Court's composition had changed, Congress again based child labor legislation on commerce clause legislation that a unanimous Court upheld (*United States v. Darby*, 312 U.S. 100 [1941]).

Congress has also taken aim at Court decisions through its powers to enforce the Fourteenth (equal protection) and Fifteenth (voting rights) Amendments. Rejecting a 1980 Supreme Court decision requiring civil rights plaintiffs to prove intentional discrimination in vote dilution cases (*Mobile v. Bolden*, 446 U.S. 55 [1980]), Congress amended the Voting Rights Act to allow for impact-based proofs of vote dilution. Congress likewise disapproved of the 1990 Supreme Court decision in *Employment Division v. Smith*, 494 U.S. 872 (1990) that limited the ability of plaintiffs to succeed in religious liberty lawsuits, and enacted legislation that required governmental actors to have a "compelling governmental interest" whenever religious liberty was "burdened." This legislation, the Religious Freedom Restoration Act (RFRA), was subsequently invalidated by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Unwilling to accept defeat, Congress enacted a scaled down version of the RFRA, the Religious Land Use and Institutionalized Persons Act (RLUIPA), a statute that the Supreme Court upheld (against a preliminary challenge) in 2005 (*Cutter v. Wilkinson*, 544 U.S. 709 [2005]).

The RLUIPA statute highlights Congress's willingness to respond to a Court ruling by advancing its policy agenda in ways that it thinks the Court will approve. When enacting RLUIPA, lawmakers paid close attention to the Supreme Court decision invalidating the RFRA with *Boerne v. Flores*, 521 U.S. 507 (1997), seeking to advance their policy agenda while not calling into question the Court's handiwork. Likewise, after the Supreme Court invalidated a statute banning guns within 1,000 feet of a school (as an impermissible exercise of Congress's commerce power) in *United States v. Lopez*, 514 U.S. 548 (1995), Congress amended the Gun-Free School Zones Act to require the federal government to prove that the firearm had either moved in interstate commerce or otherwise affected interstate commerce.

Another way that Congress expresses its disagreement with the Supreme Court is to protect rights that the Court says it need not protect. Following a 1986 Supreme Court decision upholding an Air Force regulation that had prohibited an observant Jew from wearing a yarmulke in *Golden v. Weinburger*, 475 U.S. 503, Congress enacted legislation allowing service members to express their faith by wearing neat and conservative religious apparel. In 1999, Congress responded to concerns that independent counsels were overzealous when investigating high-ranking

executive branch officials. Specifically, notwithstanding the Supreme Court's lopsided seven-to-one approval of this statute with the decision of *Morrison v. Olson*, 487 U.S. 654, in 1988, Congress concluded that the statute was fundamentally flawed and ought not to be reauthorized with the Ethics in Government Act.

Congressional responses to Supreme Court decisions are not always hostile. Sometimes the Court invites Congress to enact legislation that would effectively negate a Court ruling. For example, when upholding state power to issue search warrants of newspapers, the Court invited a legislative response noting that its decision "does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure" (*Zurcher v. Stanford Daily*, 436 U.S. 547 [1978]). Congress accepted the invitation, passing the Privacy Protection Act of 1980 to prohibit third-party searches of newspapers.

On other occasions, Congress affirmatively assists in the implementation of a Court decision. In response to resistance in the South to school desegregation, Congress took bold steps to make *Brown v. Board of Education*, 347 U.S. 483 (1954), a reality. In 1964, it prohibited segregated school systems from receiving federal aid and authorized the Department of Justice to file desegregation lawsuits. These federal efforts proved critical to ending dual school systems. More desegregation took place the year after these legislative programs took effect than in the decade following *Brown*.

As the above discussion makes clear, the Supreme Court does not speak the last word on the meaning of federal statutes or the Constitution. Congress can nullify Supreme Court interpretations of federal statutes by enacting a new statute or amending an existing law. On constitutional issues, the dynamic is more complex. Congress can respond to Supreme Court constitutional rulings through a variety of techniques, ranging from the enactment of the very same statute to the confirmation of Supreme Court justices who are likely to distinguish or overturn disfavored rulings. Through these varied responses to Supreme Court rulings, Congress plays a critical role in shaping constitutional values.

SEE ALSO *Eleventh Amendment; Fourteenth Amendment; Jurisdiction Stripping; Reconstruction*

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