

2014

The modern court and the reprisal of Lochner in election law and campaign finance

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The modern court and the reprisal of *Lochner* in election law and campaign finance

by

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A thesis submitted to the graduate faculty
in partial fulfillment of the requirements for the degree of

MASTER OF ARTS

Major
Major: Political Science

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Ames, Iowa

2014

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ABSTRACT

It has long been debated as to the proper role of the United States Supreme Court in the American political and legal process. This paper focuses on continuing that debate by arguing that the role of the Supreme Court should be limited in the specific realms of election law and campaign finance. By reviewing contemporary Supreme Court cases and scholarly works, I analyzed the Court's actions, and found the Court using legal principles to interfere with the legislative power of creating public policy in the fields of election law and campaign finance. Since Congress is granted certain powers to act, it is for Congress to create policy in these areas, not the Court. That is why the Court's role should be limited in these fields to actions that are beyond a reasonable doubt as promoted by James Bradley Thayer. By taking this limited approach, the modern Court under the cases of *Bush v. Gore*; *Citizens United v. Federal Election Commission*; *Shelby County v. Holder*; and *McCutcheon v. Federal Election Commission*, has violated its powers of judicial review by overstepping into public policy determinations.

CHAPTER I: INTRODUCTION

The Supreme Court's only armor is the cloak of public trust; its sole ammunition, the collective hopes of our society.

- Irving R. Kaufman
(ThinkExist.com 1999)

The role of the Supreme Court in the American political and legal system has been an area of debate since the founding of the United States government. The Court has come to be seen as a body of social and political change, but also as a body of partisan politics that does not have to fear the dismissal of elections. These competing views over the Court have led to a long dispute as to the proper role of the Court. The function of this paper is to continue this debate in the more narrow arenas of election law and campaign finance by answering the question of whether the Court has returned to a more *Lochner*-era type jurisprudence in these specific areas. More specifically, are the Court's more recent decisions over election law and campaign finance a repetition of the policy mistakes made in *Lochner v. New York*?

Modern cases have come to show that the Court, in handing down its decisions, has come back towards a jurisprudence that dominated the now repudiated *Lochner*-era of the Court. More specifically, the Court has done so in the public policy arenas of election law and campaign finance. These contemporary cases show the Court using Constitutional provisions within these given arenas to appropriate powers for itself by taking such powers away from the legislature and executive.

In making such an argument, this paper will begin by discussing and summarizing the theoretical debate that surrounds the political and legal role of the Court made by a variety of political theorists, including John Hart Ely, Ronald Dworkin, and Cass R. Sunstein. However, this paper will defend the interpretation argued for by James Bradley Thayer: that the Court should have a very limited role in the political process.

After reviewing and discussing the arguments and counter-arguments made by each of the above mentioned theorists and the role they see fit for the Court, this paper will defend the side of Thayer and discuss why each of the previous theorists' ideals are insufficient. After this discussion, this paper will summarize how the Court itself, since its inception, has never fully decided on its own proper role within the American political system. This section will be a walk-through of how the Court has established itself as the final arbiter of constitutional legal questions, but has both extended and retracted the power it has in making such determinations.

Lastly, this paper will take contemporary cases determined by the modern Court in election law and campaign finance and explain why each marks the idea that the Court has returned to an era of granting itself more expansive powers over the legislature and executive within each realm. The modern cases under review include *Bush v. Gore*; *Citizens United v. Federal Election Commission*; *Shelby County v. Holder*; and *McCutcheon v. Federal Election Commission*. After discussing how the Court has extended its powers, it will be shown how each of these cases fails to meet the standards created under the theory advocated by Thayer.

In the end, the role of the Supreme Court and the judiciary is one that will never be fully understood or established. However, this paper is meant to be seen as an argument of why the role of the Court should be one of limited powers and interference into the political process; specifically in the areas of election law and campaign finance. Without a limited role for the Court, the political process can be turned on its head, and policy issues left to the body of 9 unelected officials, instead of the legislature or executive.

CHAPTER II: COMPETITION OVER INTERPRETATION

The constitution of the United States is to receive a reasonable interpretation of its language, and its powers, keeping in view the objects and purposes, for which those powers were conferred. By a reasonable interpretation, we mean, that in case the words are susceptible of two different senses, the one strict, the other more enlarged, that should be adopted, which is most consonant with the apparent objects and intent of the Constitution.

- Joseph Story
(Story 1833)

These words by Supreme Court Justice Joseph Story purport that when there is competition about how the United States Constitution should be interpreted; the view that follows the will of the document itself should prevail. However, this seems to be easier said than done. Since the Constitution's inception in 1789, the method of its interpretation has been in constant competition. Furthermore, the debate as to the proper interpretation has not subsided by any means over the course of the Constitution's history. However, the one position I find legitimate and rooted in American history is that made by James Bradley Thayer.

James Bradley Thayer determined that the idea of judicial review is well rooted in American legal history dating back to the Revolution. (Thayer 1893, 7). The concept of holding political actions by either the legislature or executive as against the constitution had come into existence by assertions made by English judges and writers and further favored among the American founders. (Ibid.). Even though the idea was never given in any exact language in any legal document, the concept had always remained "inferential" in the legal processes. (Ibid., 3).

It may be remarked here that the doctrine of declaring legislative Acts void as being contrary to the constitution, was probably helped into existence by a theory which found some favor among our ancestors at the time of the Revolution, that courts might disregard such acts if they were contrary to the fundamental maxims of morality, or, as it was phrased, to the laws of nature. (Ibid., 7).

However, Thayer articulates that even though this power has its historical roots, it has also been historically limited. (Ibid., 8). When the governments of the nation and the states began to form towards the end of the Revolution, most Constitutions, such as the Massachusetts Constitution, established a limited power of the Court in that the Court ““Shall never exercise the legislative and executive powers or either of them.”” (Ibid., 8). The trend towards a limited role of the Court was seen that “[i]n the case of purely political acts and of the exercise of mere discretion, it mattered not that other departments were violating the constitution, the judiciary could not interfere.” (Ibid., 8-9). This implied power of the Courts needs to be instead restricted to issues that are very clear. (Ibid., 25).

The constant declaration of the judges that the question for them is not one of the mere and simple preponderance of reasons for or against, but of what is very plain and clear, clear beyond a reasonable doubt, – this declaration is really a steady announcement that their decisions in support of the constitutionality of legislation do not, as of course, import their own opinion of the true construction of the constitution, and that the strict meaning of their words, when they hold an Act constitutional, is merely this, – not unconstitutional beyond a reasonable doubt. (Ibid.).

I believe Thayer’s overall position seems to possibly have two different underlying interpretations as to why beyond a reasonable doubt should apply towards the Court. The first interpretation is that Thayer adopted the beyond a reasonable doubt rule because the Founders had clearly intended that such a rule apply upon the

Court in a more Originalist approach. That this standard presented by Thayer, was specifically meant to apply towards the Court when making Constitutional determinations. Such an interpretation would hold a strong position upon Court power with the logic being that if the Founders specifically intended the Court to follow such a limited standard from the time of its inception, then the Court must continue to maintain such a role and hold steady in the position to which it was intended and not overreach. Thayer's approach could be seen as including this interpretation with how he specifically refers back to documents deriving from the time of the founding of our national government and their individual wording. The second interpretation is that history has shown a large concern and fear over the government becoming undemocratic in nature when an over-reaching Court could interfere into the deliberative process and make political and discretionary policy determinations. This theory still maintains a historical precedent as does the former interpretation, but is based more on maintaining a democratic form of government with less interference by an unelected body. It is this latter interpretation that I believe holds the most strength. The Originalist interpretation holds a strong position, but does not give the flexibility of expanding the Constitution towards the time and manner of a changing world. However, the interpretation that revolves around the fear of undemocratic government can change based on the times. If the government and people see it necessary to expand or retract the specific roles of each of the branches of government, such as the Court taking a more political role, then such an interpretation can be expanded or retracted, as will be shown later with my own expansion of Thayer's approach, as

necessary without specifically changing or amending the Constitution itself to circumvent the Founders' intentions. However, if the Constitution were in need of change, the government would always be limited in a manner as was specifically given by the Founders, who had no regard as to how the times would change. Furthermore, it seems Thayer's argument was far more concerned with the latter interpretation based on the precedent he used; that this fear should remain and justify a more restrictive role for the Court in being able to reach into the political decisions made by the other branches of government. Thayer never mentions that the Founders specifically stated the Court could only interfere when there is a violation beyond a reasonable doubt. However, Thayer was able to use historical precedent to show that there seems to be a historical fear or democratic justification for limiting the Court to his standard of beyond a reasonable doubt.

The interpretation of an underlying fear of an over-reaching Court appears from the idea that Thayer reasoned that this determination, that the Court should only review issues that exist beyond any reasonable doubt, falls into agreement with the oath judges take, and that their constitutional description does not in itself say that when an executive or legislature takes an action it is constitutionally permitted to take can be simply overruled by the Court. (Ibid., 4). If the Court was meant to be included in the political, policy making process, such a power would have been expressly included instead of being given as such an "incidental and postponed control." (Ibid., 10).

Thayer's main concern in describing the limited impact of the Court was to keep the body outside of the realm of politics and the idea of discretionary, policy making

decisions. The power of judicial review seems to remain strictly judicial and may not decide cases based on policy. (Ibid., 8-9). The Court should maintain this strict, limited role in order to remain seemingly unpolitical and not interfere or restrict the powers of the other branches of government. (Ibid., 25). Judicial review is only meant to interfere when the other branches have acted in a manner that is an express violation of the Constitution “beyond a reasonable doubt.” (Ibid.). The body of government who has been expressly granted the power to act must be given room to sufficiently do so. (Ibid., 10). Thayer specifically mentions how the Court is not to read in its own interpretations and therefore “step into the shoes of the law-maker.” (Ibid., 26). Therefore, “[u]nder no system can the power of courts go far to save people from ruin, our chief protection lies elsewhere.” (Ibid., 30).

It is this interpretation of Thayer and his argument that will be the underlying theme and interpretation used in the following arguments throughout the remaining chapters. Thayer has presented a clear argument as to why the Court has been historically limited and gives a straight-forward standard that the Court must follow when making Constitutional determinations. Such an interpretation has set a foundation to prevent and alleviate the fear of political interference by the Court. However, many political theorists, including John Hart Ely, Ronald Dworkin, and Cass R. Sunstein would argue that Thayer’s proposal does not extend far enough in granting the Court necessary powers.

Modern political theorists still strongly debate as to how the Constitution should be viewed, especially in the realm of “Judicial Review,” which has been defined by the

Black's Law Dictionary: Third Pocket Edition as the "power to review the actions of other branches or levels of government; [especially] the courts' power to invalidate legislative and executive actions as being unconstitutional." (Black's Law s.v. "judicial review"). No matter the view, many theorists would argue that Thayer's textualist view does not allow enough Court interaction. The issue of how far the Court should interfere with the political processes has itself remained a very controversial area for debate throughout America's political history. The main divide falls between two large encompassing groups, Interpretivism and Non-Interpretivism.

Within the Interpretivism camp we see those who believe "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution." (Ely 1980, 1). If the Court is to strike down the actions of the political branches, it must base its decisions on something that can be found within the Constitution. (Ibid., 2). Instead, the Constitution and all its differing sections should be seen as "self-contained units" that should only be defined by their language and the accompanying legislative history. (Ibid., 12-13).

However, the Interpretivist approach towards Constitutional review by the Court seems to be the least accepted amongst Constitutional theorists, mainly because the interpretation of any text such as the Constitution will always allow for interpretive principles in deciding for substantive rights; "[t]he meaning of any text, including the Constitution, is inevitably and always a function of interpretive principles, and these are inevitably and always a product of substantive commitments." (Sunstein 1993, 8). Furthermore, the driving force behind Interpretivism fails to address that many of the

most important clauses of the Constitution were written in largely vague terms. (Ibid., 93-94). If the Constitution were limited to an Interpretivist, or a more formalistic/originalist reading, the rights of American citizens would be very limited, with no terms containing such rights as the right to privacy, one-person-one-vote, or terms preventing compulsory sterilization, higher scrutiny for discrimination based on sex, or terms preventing affirmative action. (Ibid., 97).

Non-Interpretivism instead argues “that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.” (Ely 1980, 1). Places to which judges may look for outside principles of law and interpretation include, but are not limited to “the judge’s own values,” “natural law,” “neutral principles,” “reason,” “tradition,” or “consensus.” (Ibid., 43-72). However, it is how far the Court should be able to reach beyond the Constitution that brings about much debate within the Non-Interpretivist view.

A. John Hart Ely

John Hart Ely argues that the Court should be limited in its actions and instead lean towards a more “participation-oriented, representation-reinforcing approach to judicial review.” (Ibid., 87). Ely states that the idea of Interpretivism holds our traditional notions of how law works, but the voices to which the Constitution interprets are those “of the people who have been dead for a century or two.” (Ibid., 11). Furthermore, the idea of a “clause-bound” interpretation of the Constitution is difficult to make. (Ibid., 11-41).

Ely instead argues that the Constitution itself leaves the idea of substantive values to the political branches of government and instead concerns itself mainly “with procedural fairness in the resolution of individual disputes . . . ” (Ibid., 87). Throughout the early history of the American colonies, many constitutional claims made by the residents were, more often than not, participatory or jurisdictional. (Ibid., 89). Early legal challenges focused upon the lack of citizen input into the government and the unequal distribution of certain rights. (Ibid.). That is why, as Ely observes, the main body of the original Constitution is dedicated to structuring the government and its procedural actors, not at identifying specific substantive values. (Ibid., 92). Even the addition of the Bill of Rights focused more upon procedural protection of political participation for both majority and minority groups. (Ibid., 93-98). Also, the development of the Constitution after the Civil War had “extended the franchise” to other minority groups in the political system. (Ibid., 99). This shows the Constitutional theme from its inception has been “the achievement of a political process open to all on an equal basis and a consequent enforcement of the representative’s duty of equal concern and respect to minorities and majorities alike.” (Ibid.).

Ely states that because our Constitutional and governmental history has been driven more towards a proper representative democracy, it shows how improper it is for judges to echo what values Americans hold over elected representatives. (Ibid., 102). Instead, the Court should devote “itself instead to policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent.” (Ibid.). Ely gives what he calls a “referee analogy” towards judicial participation based on the

procedural nature of the Constitution. (Ibid., 103). Here, the Court does not “dictate substantive results” but only steps in when the governmental system is malfunctioning, not when an opposing side has won and a justice disagrees with the outcome; but only when “the channels of political change” are blocked or when the majority is continuously taking minority interests away. (Ibid., 102-03). A few areas the Court can therefore review, without any doubt, are “impediments to free speech, publication, and political association.” (Ibid., 105).

Therefore, the Court should preeminently focus upon “unblocking stoppages in the democratic process” such as voting restrictions. (Ibid., 117). In the context of voting rights, the Courts should not be deciding who participates and who doesn’t, but instead whether the reasons for denial of voting rights are “convincing,” instead of there being a denial for “no reason.” (Ibid., 120). The legislature must be seen as having a “policy direction” in which it is heading. (Ibid., 133). Therefore, it is within the legislature that we can finally determine whether there has been a proper majority for us to proceed. (Ibid., 134). Such a consensus of the people cannot be found in the realm of unelected judges. (Ibid.). Instead the Court should let our legislators actually legislate in order for us to see the policy direction in which the legislature is heading. (Ibid.). However, Ely’s proposal fails to take into consideration the Court overstepping into other areas of public policy under the guise of trying to help, and allow for more citizen political participation.

There is no doubt that it is the government’s job to help protect the political participation of its citizens. However, even though Ely seemingly aims at maintaining a

more democratic process, which seemed to be the underlying purpose for Thayer, the limited role Ely proposes could still lead to large interference by the Court than shown. As was the case in *Lochner v. New York*, where the Court gave its own very broad reading of the 14th Amendment Due Process Clause to include the principle of “Liberty of Contract,” the Court under Ely’s standard could apply the same method under the right of political participation. (*Lochner v. New York*, 198 U.S. 45, 53-54 (1905)). The Court could under the specific instances mentioned by Ely; freedom of speech, publication, and political association; give its own broad reading of the First Amendment to include a vast array of unintended variations of speech and association to restrict any actions that could possibly be taken by the legislature, even when helping the participation of any previously restricted minority group. As will be shown, this overbreadth can be seen in the modern cases of *Citizens United v. Federal Election Commission* and *McCutcheon v. Federal Election Commission*.

In any instance, Ely’s “referee analogy” can still be applicable under the standard advocated by Thayer. The Court would still devote “itself instead to policing mechanisms by which the system seeks to ensure that our elected representatives will actually represent.” (Ely 1980, 102). However, the Court will not be able to interfere to the degree to which Ely states, but only when there is a clear-cut constitutional violation as promoted by Thayer.

B. Ronald Dworkin

Ronald Dworkin, in a more expansive manner, argues for a broad reach of the Court in determining Constitutional principles. Dworkin begins his argument by stating

that the decisions the Court makes are always political in nature because they always resolve a dispute over a political issue that will favor one political group over another. (Dworkin 1985, 9). Therefore, the issue should not be whether the Court should make political decisions, but whether it should make those decisions on “political grounds.” (Ibid.). Dworkin’s overall principle lays on the idea that “judges do and should rest their judgments on controversial cases on arguments of political principle, but not in arguments of political policy.” (Ibid., 11). First, Dworkin sees that the courts should have the power to change legislation, because if such legislation has remained vague as to what the true basis of judgment should be, the Court must make the determination as to how it must be enforced. (Ibid., 18-19). Furthermore, the argument that the legislature is a more appropriate body to make politically principled decisions lacks any substantial evidence to show that such legislative decisions are “more likely to be correct than judicial decisions.” (Ibid., 24). In addition, “the technique of examining a claim of right for speculative consistency is a technique far more developed in judges than in legislators or in the bulk of the citizens who elect legislators.” (Ibid.). Institutionally, judges are not under the pressures of re-election from the constituency as are legislators, and therefore are more likely to reach more correct and sound decisions. (Ibid., 25).

Dworkin remains correct in the assumption that the Court makes decisions that are political in nature because they resolve a political controversy. There is no avoiding this type of decision. However, the Court must answer any of these types of questions in a strictly legal manner without any political or partisan interference. Dworkin does make

a very compelling distinction between decisions of “political principle” and “political policy.” (See *Ibid.*, 11). However, allowing any political ideals, even principle, to come into a strictly legal decision allows the justices to consider far more ideals than what the law simply says. This may reach past the true reasons for why the legislature passed the law, by allowing the Court to consider degrees of necessity based on their individual principles.

As far as what Dworkin says about the Court being a principled body, the legislature has always been the body and voice of the people, because it voices the rules that controls the rights of all citizens. (Hamilton 1961, 464). It has always been the house of political debate and reason. The Constitution specifically grants the legislature the powers over determination of what is necessary, because without this determination, the legislature cannot act at all. (Thayer 1893, 9). The Court in the view of the Founding Fathers, as shown in *Federalist 78*, was meant to only view violations against the “manifest tenor of the Constitution.” (Hamilton 1961, 465). The Court was to be the far weakest of the three branches of government; “the judiciary from the nature of its function, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.” (*Ibid.*, 464). It was the legislature who was meant to ensure rights of the People and how such are to be regulated; “[t]he legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated.” (*Ibid.*).

Furthermore, judges may be under no pressures of re-election, but this may also be seen as a very negative consequence, which Dworkin seems to ignore. Judges,

because of their lack of credibility to the people, may simply ignore the public opinion favoring any type of reformation of policy. By being unelected officials, it seems having a Court who may interfere into the discretionary arena of determining public policy ignores the democratic justifications behind a limited Court. Based on Thayer's explanations, there seemed to be historical precedent in limiting a Court in the democratic process. Because the Founders found it necessary to not give the Court, who remained unelected, the powers of the legislature, the Court should remain separate from those policy determinations made by elected officials. The *Lochner*-era remains a perfect example of this type of threat. By the time *Lochner v. New York* was overturned, "most Americans had soberly repudiated the old views." (Ackerman 1998, 376). With the onset of the Great Depression, the people, wanted and needed, change and so "the People had spoken decisively on behalf of activist national government," and it was the Court preventing the application of this strong public opinion. (Ibid., 377).

In addition to his argument that the Court is as principled as the legislature, Dworkin responds to the notion of the Court deciding only procedural issues argued by Ely above. Dworkin initially agrees with the idea that the Court should respond to procedural-based decisions, but "not in order to avoid substantive political questions," instead to simply answer the question before the Court. (Dworkin 1985, 58). Dworkin further deviates from Ely's ideals by arguing that the institution of democracy does not support only the Court making process-based decisions, but allows for the Court to determine a wider jurisprudence including substantive decisions. (Ibid., 59). Ely's argument is described as defining democracy in one specific concept and that the Court

should be limited to identifying and protecting that specific concept. (Ibid.). Instead, Dworkin argues that it is a mistake to believe, as Ely does, that procedural judicial review could be applied without judges having to face some type of substantive decision. (Ibid., 66). “Judges must decide that pure utilitarianism is wrong, for example, and that people do have rights that trump both maximization of unrestricted utility and the majoritarian decisions that serve unrestricted utility.” (Ibid.). The idea that the Court can only be about protecting process versus substantive rights is misleading because one must choose what substantive theory makes one process correct over another. (Ibid.). Judges cannot make such a theoretical decision without first determining which substantive rights they believe over another within each given theory. (Ibid., 67).

It may seem impossible to ask judges to ignore their own personal theoretical interpretations and subjective views when interpreting the law, but the judges must do their absolute best to try and prevent such subjective interference. Chief Justice John Marshall specifically stated in *Marbury v. Madison* that decisions of political discretion were not to be left to the Court. (*Marbury v. Madison*, 5 U.S. 1 Cranch 137, 166 (1803).). I believe this can be held to also apply to how judges are to interpret the Constitution. The judges in any case must remain in full compliance with the specific letter of the law in determining each outcome. If the language remains vague, it is the legislative intent that must control over any ambiguity, not Court discretion. If requiring the legislature to give its reasoning for passing Constitutionally significant laws needs to occur, then such a practice should be established. If instead, the Court were to substitute its own discretion over that of the legislature’s, as was the case in *Lochner v. New York*, then the

law cannot be implemented to prevent the harms to which it was aimed. (*Lochner v. New York*, 198 U.S. 45, 64 (1905).). The letter of the law and the intentions of the legislature must be the controlling factors over interpretation of the law, not how judges on their own accord decide how to bend the words as they see fit.

If, as Dworkin says, the Court should make “decisions about what rights people have under our Constitutional system,” then we will systematically run into the roadblock issues the nation faced during the *Lochner*-era. (Dworkin 1985, 69). If the Court becomes the body determining what specific rights we as citizens possess, the Court, as in *Lochner*, will become the final arbiter of what any public policy is based on its own definitions. The Court could then arbitrarily determine any right citizens do or do not possess whenever they felt it was needed; without any substantive evidence or debate that Congress is supposed to conduct in consideration of its own decisions.

In the end, Dworkin believes that we must accept the Court making political decisions if we accept the overall idea of Judicial Review on any level. (Ibid.). The Court should only be limited to choices of principle over policy; “decisions about what rights people have under our constitutional system rather than decisions about how the general welfare is best promoted.” (Ibid.). In order to make these decisions, the Court must not remain passive:

Passivists cite *Lochner* and other cases in which the Supreme Court, wrongly, it is now agreed, appealed to individual rights to forestall or cripple desirable and just legislative programs. But we would have more to regret if the Court had accepted passivism wholeheartedly: southern schools might still be segregated, for example. Indeed, if we were to collect the Court’s decisions most generally regretted over the course of constitutional history, we would find more in which its mistake lay in failing to intervene when, as we now think, constitutional principles of

justice required intervention. Americans would be prouder of their political record if it did not include, for example, *Plessy* or *Korematsu*. In both these cases a decision of a majoritarian legislature was seriously unjust and also as most lawyers now believe, unconstitutional; we regret that the Supreme Court did not intervene for justice in the Constitution's name. (Dworkin 1986, 375-76).

However, what Dworkin fails to consider in arguing against a passive Court is the effects that the Court leaves when it takes a more active or aggressive role. When the Court takes a stand and gets their decision wrong as against public opinion or policy trying to be promoted to help society by Congress or any other legislature, it may result in another *Lochner*-era. As its been discussed, the Court going against such opinion can create a large road-block in the implementation of legislation that is trying to be passed for the betterment of society or the economy. Though, when the Court has acted strongly against such progress, nothing can be done until the Court has moved away from its stance. Furthermore, when the Court gets it right and moves in the same direction as the legislature, the Court has been shown to not have a real strong public impact on its decisions. Cass R. Sunstein talks about research conducted that statistically shows the true impact of the Court. (Sunstein 1993, 146-47). This research is discussed in full in *The Hollow Hope* by Gerald N. Rosenberg. Rosenberg discusses how there is no statistical evidence that has shown the Court is the political body that introduces societal concerns or policy to the people. (Rosenberg 2008, 121). "Most Americans neither follow Supreme Court decisions nor understand the Court's constitutional role. It is not surprising, then, that change in public opinion appears to be oblivious to the Court." (Ibid., 131). Events show, especially in the context of the Civil Rights Movement, that the number of demonstrations and political activism over minority rights began

before the action taken by the Court in deciding *Brown v. Board*. (Ibid., 135). “[G]rowing civil rights pressure from the 1930s, economic changes, the Cold War, population shifts, electoral concerns, the increase in mass communication—created the pressure that led to civil rights. The Court reflected that pressure, it did not create it.” (Ibid., 169). This same increase in activism before Court action could also be seen in other public policy areas, specifically abortion. Beginning in 1966, there was a sharp increase in the amount of abortions way before the Court case of *Roe v. Wade* in 1973. (Ibid., 179). The active Court as Dworkin sees it, is not the body of change. When the Court takes the path away from public opinion, large problems may occur. Yet, when the Court goes in the same direction, it is not the body of change as one may believe.

C. Cass R. Sunstein

Lastly, Cass R. Sunstein argues for a limited role of the Court in a more democratic manner. Sunstein first begins by discussing the idea of “Status Quo Neutrality.” (Sunstein 1993, 3). This idea consists of the baseline decisions for what people and certain groups possess in rights and entitlements. (Ibid.). “A departure from the status quo signals partisanship; respect for the status quo signals neutrality.” (Ibid.). Any choice the government makes against the current status quo is seen as “action” versus remaining the same being seen as “inaction.” (Ibid.). However, Sunstein sets out to first state that the idea of a status quo neutrality as an ideal, is largely a mistake. “Status quo neutrality disregards the fact that existing rights, and hence the status quo, are in an important sense products of law. It is a matter of simple fact that people own things only because the law permits them to do so.” (Ibid., 4). People have tended to

forget that our entitlements have derived from law and the constitution and not necessarily from nature. (Ibid., 5). Therefore, the argument that status quo neutrality must be held stable is a mistake because the entitlements we look to change by law originally grew out of the old law and are now simply being changed to the given circumstances. (Ibid.).

This type of thinking, in the view of Sunstein, has allowed for a mistaken “court-centeredness” view towards the American constitution. (Ibid., 9). Instead, the interpretation should be directed more towards a “general commitment to deliberative democracy.” (Ibid., 123). Sunstein states that there are a couple of reasons as to why the Court should be limited in its powers. First, the Courts have a variety of institutional limitations that are placed upon its powers. (Ibid., 145). Sunstein states that relying on the courts “may impair democratic channels for seeking changes, and in two ways. It might divert energy and resources from politics, and the eventual judicial decision may foreclose a political outcome.” (Ibid.). If a political outcome is stopped by the courts, the democratic process itself is damaged due to the stoppage of other political channels through elections and debates. (Ibid.). Sunstein discusses how, in response to this argument for a limited Court, Ronald Dworkin’s argument for a more active Court, being a “forum of principle,” failed to consider how the Court was not the only body of government to be seen as a principled institution. (Ibid., 146). If all principled decisions were left to the Court, each would disregard the American ideal of democratic politics by forgoing a deliberative government and reviewing any of the possibilities that could be observed in practice. (Ibid.).

Second, as a matter of efficacy, the Court is lacking. (Ibid.). The Court has been historically seen as ineffective in bringing about any major social change. (Ibid.). The limited focus of adjudication limits the scope any case could possibly have upon social reform. (Ibid., 147). Litigated cases are always limited in their scope to simply the case and facts at hand. (Ibid.). Judges are prevented from understanding “the complex, often unpredictable effects of legal intervention” due to the limited nature of litigation. (Ibid., 148).

They [judges] are in a poor position to assess the relationship between that right and other desirable social goals, including the provisions of training and employment programs, not to mention incentives for productive work. Judicial recognition of a right to subsistence might also have harmful effects on democratic deliberation about various methods for helping poor people out of poverty; it might even preempt such democratic effects. (Ibid., 149).

However, to Sunstein this does not mean the Courts should simply abandon legal determinations upon the Constitution. (Ibid.). As a principle, the idea of status quo neutrality should be left to the democratic processes where the Court should simply uphold legislation that retains status quo entitlements while also being “inclined to validate legislation attempting to disrupt them.” (Ibid.). Therefore, the Court is there to make sure that those within the other branches live up to their own departmental responsibilities derived under the Constitution. (Ibid., 158).

The arguments made by Sunstein and Thayer have a lot of overlap, but one key difference remains. Sunstein and his political system rely heavily on the democratic process of debate and representation. The people and their representatives are to determine whether or not to maintain the status quo. (Ibid., 146). However, Thayer

remains indifferent towards the overall status quo. As a textualist, Thayer believes that if the process and powers are within the Constitution, the people have spoken and that granted method is to control, without any regard to whether it keeps or changes the status quo, even if not within the democratic process. (See Thayer 1893).

Yet, it is Thayer's argument that remains strong. The American Constitution has specifically laid out the various roles of each branch of government. If the democratic process was to have unbridled power to determine the variance of the status quo, it would have been granted such powers. Additionally, if the American system wanted the status quo within the Constitution to be altered in a more open manner, it would have allowed for Constitutional amendment in a less restrictive manner. Furthermore, as described by Thayer, the concept of judicial review has remained in political practice since the time of English courts in the colonies. (Thayer 1893, 4). The Court, under Article III of the United States Constitution, was given full power of review within various arenas, including issues arising under the Constitution and those amongst the States. Sunstein remains correct that the Court has not brought about social change in the manner that the legislatures have and that the Courts should make sure those in the other branches remain within the Constitution; with statistical data backing up this assertion. (Sunstein 1993, 146-47; See Rosenberg 2008). However, it should be the text of the Constitution that determines the status quo and its variances. If the democratic process were to have unbridled power over such decisions, then the Constitution and the American form of government would have been formed in such a manner.

The difference between Sunstein and Thayer can be seen in decisions revolving around political campaign financing. Based off of Sunstein's theory, if Congress seemingly passed a law with a complete ban on private funding and only permitted public funding, this law would remain constitutional because it was the democratic process and legislature that determined to deviate from the status quo, even with it being a complete ban on private funding and speech. However, under the theory advocated by Thayer, this type of complete ban would be an obvious constitutional violation, beyond any reasonable doubt, because it implements a complete ban on a certain type of private speech. It is in this type of decision where Thayer's ideology and theory remains superior to Sunstein's even though only slightly different. However, in the context of the cases to be discussed later, Sunstein would agree fully in the determinations to be made and no difference applies between Sunstein and Thayer.

Overall, there are a vast number of ways to argue for or against extensive judicial participation in the political process. Each theorist above gives extensive and far reaching arguments that have constitutional grounds within the American political system. However, the problem still remains on what a clear violation of the Constitution is when permitting Court interference via judicial review. Thayer does not delve enough into the idea by only stating the violation must be "beyond a reasonable doubt" and that the decision by the Court must only be "a naked judicial one." (Thayer 1893, 9; 25). As long as there is no real definitive standard on what meets beyond any reasonable doubt, too much discretion lays with the Court to determine which cases may or may not come before them. First and foremost, as a baseline standard the constitutional

violation must still remain on the face of the complaint under the “Well-pleaded Complaint” rule under the Black’s Law Dictionary: Third Pocket Edition, where the violation must be able to be seen on the face of the complaint instead of only being derived out of a defense to the challenge or determined later by a judge on his/her own accord. (Black’s Law s.v. “well-pleaded complaint”). Though, what is a clear-cut constitutional violation?

Before giving a final definition, a division must be made between when the Constitution gives the legislature an express grant of power and when the Constitution is lacking in an express grant. It seemed Thayer lacked an exact distinction between express grants and implied powers. However, one must be made for that Congressional power would seem to be more concrete and implicit when the Constitution specifically grants powers versus when they are simply implied elsewhere. When the Constitution gives an exact grant of power to the legislature, such as in Article I, Section 8 and the 14th Amendment Enforcement Clause, Congress should have absolute and plenary discretion in acting within those specific powers. Therefore, any conceivably reasonable determination made by the legislature in acting should be sufficient for Constitutional action. The Court itself in the cases of *James Everard’s Breweries v. Day* and *Edward & John Burke v. Blair* itself admitted that when Congress acts under any granted powers the Court “may not inquire into the degree of their necessity.” (*James Everard’s Breweries v. Day; Edward & John Burke v. Blair*, 265 U.S. 545, 559 (1924).). The violation must be of an expressed right given in another part of the Constitution. (Ibid.). Full discretion must be placed upon the legislature and the legislature alone. This is where

Thayer's standard of a Constitutional violation of being "beyond a reasonable doubt" should hold true.

Yet, when the legislature has been given only implied powers in any Constitutional arena, the power remains strong, but not absolute as when the powers have been expressly granted. Here, the standard of power to which the Court should relinquish to the legislature should follow the reasoning given by Chief Justice John Marshall in the case of *McCulloch v. Maryland*. As will be discussed in Chapter III, Chief Justice Marshall determined that when Congress is acting under its "incidental or implied powers" given to it, and no other Constitutional provision expressly limits such actions, the Court may not interfere in Congressional action when the actions taken were seen as legitimate and appropriate. (*McCulloch v. Maryland*, 17 U.S. 4 Wheat. 316, 406; 421 (1819).). It is Congress to which the Court should relinquish the determination of what is necessary. (Ackerman 1991, 332 n. 30). The Court should simply determine whether Congress was able to give any simple or legitimate reasoning for the legislation, unless it violates the express wording of the Constitution itself. This is slightly less restrictive upon the Court in that, beyond a reasonable doubt requires substantial proof and no sensible doubt that there has been a Constitutional violation, while this lesser standard looks at whether the benefit of action outweighs the benefits of inaction. This difference resembles the differences the Plaintiff, in this instance the Court, must overcome in criminal versus civil trials. However, this standard still strongly favors legislative action, but is slightly less strict upon the Court than when the legislature has been given express powers under the Constitution.

In the end, this does not leave the legislature with unlimited powers with the Court helplessly sitting on the sidelines. The Court still remains a principled body of law because it has been granted the power of judicial review even when not specifically granted within the Constitution. It is the Court that still remains the highest body of American law. Furthermore, even with the Court still restricted under the proposed system, the People of the nation will still be protected by other checks upon the legislature if the political body steps out of bounds without Court intervention. The Constitution still permits the Executive to have the power of enforcement, and if the legislation is undoubtedly unconstitutional and the Court has yet to act or is restricted from doing so, the Executive can still refuse enforcement and make the law a dead letter.

CHAPTER III: THE PROGRESSION OF THE COURT

Neither the written form nor the oath of the judges necessarily involves the right of reversing, displacing, or disregarding any action of the legislature or the executive which these departments are constitutionally authorized to take, or the determination of those departments that they are so authorized.

- James Bradley Thayer
(Thayer 1893, 4)

Because the Constitution is silent on the issue of judicial review over the acts taken by either the legislative or executive branches, the argument over judicial review has not only become theoretical, but has also been one of great legal significance. Not only have political and constitutional theorists debated constitutional interpretation and the proper role of the United States Supreme Court in the overall government, the Court itself has long showed, it too, does not fully know or understand how far its own powers reach in the political process. A brief glimpse over the history of Court decisions can show that the Court has pushed and pulled its powers in and out of the political arena on numerous occasions. This process has not just taken place at one specific time in the Court's history, but has come and gone over the entire course of American history. This fluctuation can be seen in, but not limited to, the cases of *Marbury v. Madison*, *McCulloch v. Maryland*, *Hammer v. Dagenhart*, *Lochner v. New York*, *West Coast Hotel Co. v. Parrish*, *United States v. Darby*, *South Carolina v. Katzenbach*, and *United States v. Carolene Products Co.*.

In the landmark case of *Marbury v. Madison*, the Supreme Court, led by Chief Justice John Marshall, took what has been historically seen as the largest step by legally

establishing judicial review over the political process. The case arose when William Marbury was denied his appointment as a minor judicial officer by then President Thomas Jefferson and Secretary of State James Madison. (*Marbury v. Madison*, 5 U.S. 1 Cranch 137, 153-54 (1803).). In determining whether Marbury was entitled to his commission, Chief Justice Marshall, in his opinion for the Court, first determined whether the Court itself could hear such a case involving the act of governmental appointments made by another branch. (*Ibid.*, 154). Chief Justice Marshall determined that the Court had the power within the constitution to determine whether actions made by governmental branches are in violation of the peoples' rights and whether any injury is placed upon those rights. (*Ibid.*, 166).

But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy. (*Ibid.*).

However, Chief Justice Marshall did not allow an unrestricted grant of power upon the Court and therefore limited the scope of review the Court may conduct upon governmental acts. (*Ibid.*, 165-66). This limitation fell upon the idea that the Court may not review discretionary or political questions made by the Executive Branch of the government. (*Ibid.*). "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience." (*Ibid.*). When the executive or his agents make any decision based on his "constitutional or legal discretion," the Court may not review the action as they are "only politically examinable." (*Ibid.*, 166). Chief Justice Marshall did not argue that the

Court had a “counter-majoritarian” duty or that there were natural rights underlying Court action that allowed for judicial review; he instead anchored the principle in the idea that the Constitution was the highest law of the land and that the People must be protected from its “erosion by normal lawmaking.” (Ackerman 1991, 72). However, this action by the Court to overturn a national statute was one of only two such actions taken by the Court during the early years of American history; the other being *Dred Scott v. Sandford*. (Ibid., 63).

In another landmark case, Chief Justice Marshall took a different approach and instead decided to enlarge the powers granted to Congress under the Constitution. In *McCulloch v. Maryland*, the State of Maryland tried to tax the Federal Reserve Bank branch located within the State. (*McCulloch v. Maryland*, 17 U.S. 4 Wheat. 316, 317 (1819)). In denying the legality of the taxation and allowing for the establishment of the bank, Chief Justice Marshall determined that under the “Necessary and Proper Clause” of the Constitution, art. I, §8, cl. 18, Congress had the power to further its enumerated powers with the use of “incidental or implied powers” because no constitutional phrase limits such application. (Ibid., 406-412). The Court may not interfere into such legislative powers as long as the ends to the actions are legitimate; “let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional.” (Ibid., 421). The final determination of what was in fact necessary or proper was to be left to Congress itself. (Ackerman 1991, 332 n. 30). This determination favored a more “nationalistic approach to the un-enumerated powers granted Congress

by the original Constitution, and cast the Court as an aggressive warrior against state efforts to undermine the Congressional exercise of these powers.” (Ibid., 74).

However, one of the largest steps in expanding the powers of the Court and restricting the powers of the legislature came in 1905 with the case of *Lochner v. New York*. The case arose in 1897 when New York State passed a law restricting the hours a baker may work to 60 per week. (*Lochner v. New York*, 198 U.S. 45, 52 (1905).). The Court determined the law to be in violation of the 14th Amendment’s Due Process Clause due to its restriction upon the “Liberty of Contract.” (Ibid., 53-54). “The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.” (Ibid., 53). Even though there seemed to be a showing of evidence that longer hours of work could in fact affect the production of bakers, the Court instead determined that “any law . . . might find shelter under such assumptions, and conduct, properly so called . . . would come under the restrictive sway of the legislature.” (Ibid., 58-60). The Court appeared to have made such an argument in order to try and display any underlying motives the legislature had in passing the law. (Horwitz 1992, 30). “In short, every time a legislature offered statistics to argue that there was a continuum of unhealthy occupations, a court, suspecting its redistributive motives, needed to inquire whether the particular occupation in question was ‘in and of itself’ unhealthy.” (Ibid.). The Court seemed to ignore that the development of the industrial age in America would bring about redistribution of wealth with the development of inequality in the work place and

economy, and that the common law methods of protecting stability were becoming less likely to apply. (Ibid.).

Under the theory prescribed in Chapter II, the Court had begun to overstep its judicial authority in *Lochner*. The States had been granted an implied authority under the Constitution based on their so called “police powers.” (*Lochner v. New York*, 198 U.S. 45, 53 (1905).). These powers included action to help the health, safety, and welfare of its citizens. (Ibid.). Therefore, as long as the New York legislature was able to give a legitimate and appropriate reason for enacting the hours law, the Court should not have interfered.

However, as was shown the Court simply ignored the legislature’s reasoning and instead read into the law its own conjecture of an underlying legislative motive. (Horwitz 1992, 30). Furthermore, the Court read into the Due Process Clause the idea of a liberty of contract which is not an express right granted under the Constitution. Therefore, because there were no express Constitutional violations by the New York legislature, the Court under the proposed theory, had failed to give proper consideration towards the legislature’s legitimate concern over worker health and safety. Instead the Court used the Constitutional principle of liberty of contract as an excuse to limit legislative action and failed to give the legislature due consideration and deference over the health and welfare of its citizens.

By determining the law did not fall under the “police powers” of the state, the statute was in violation of “liberty” protected by the 14th Amendment. (*Lochner v. New York*, 198 U.S. 45, 53-57 (1905).). The Court set in motion what would become known as

the “*Lochner*-era” of the Supreme Court where the Court consistently struck down economic reform legislation by Congress. This era of Supreme Court history has come to be seen “as a (complex) story about the fall from grace – wherein most of the Justices strayed from the path of righteousness and imposed their laissez-faire philosophy on the nation through the pretext of constitutional interpretation.” (Ackerman 1991, 42-43). By doing so, the Court gave to itself the expansive power of defining the scope to which legislatures, later including Congress, may act, by being the body who defines “liberty” under the Due Process Clause. The precedent set by *Lochner* would again be affirmed in 1923 with the case of *Adkins v. Children’s Hospital*. (See *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923).).

The limitation of Congressional powers and the expansion of Court power was not only limited to the 14th Amendment during the “*Lochner*-era.” In the case of *Hammer v. Dagenhart*, the Court expanded its reach over the Commerce Clause of the Constitution, art. I, §8. In this case, the Court determined that Congress did not have the power under the Commerce Clause to enact a law prohibiting the transportation of goods in interstate commerce that were made in violation of certain restrictions upon child labor. (*Hammer v. Dagenhart*, 247 U.S. 251, 268-69 (1918).). The Court held that commerce contained a very restrictive definition, which in turn substantially restricted the actions Congress could take; “[t]he manufacture of goods is not commerce, nor do the facts that they are intended for, and are afterwards shipped in, interstate commerce make their production a part of that commerce subject to the control of Congress.” (Ibid., syllabus 251). The Court restricted Congressional reach over manufacturing only

to occasions when it is in “accomplishment of harmful results.” (Ibid., 271). “If Congress could not take steps to express the nation’s condemnation of a shocking abuse like child labor, its powers were limited indeed.” (Ackerman 1998, 257). As was the case in *Lochner*, the Court seemed to have taken it upon itself to define what “commerce” was under the Constitution, restricting the scope of Congressional power under its enumerated power granted by the same clause. This case began to mark the final acquiescence to the Court. (Urofsky and Finkelman 2011, 619). The support against child labor was widespread across the nation and therefore the Court’s decision in *Hammer* became a surprise to a nation trying to reform economic conditions, showing the jurisprudence of the Court during this time period would eventually come to an end. (Ibid.).

Beginning in 1937, with the end of the “*Lochner*-era,” the Court started to shift power back to the legislature by overturning the cases *Lochner* and *Hammer*. This new regime change would begin to strike down the leading decisions arising out of the “*Lochner*-era” and would give a broader view towards legislative and executive lawmaking. (Ackerman 1991, 42; Ackerman 1998, 26). The new Court would begin to show the nation they were no longer following the view of a limited government. (Ackerman 1998, 263). In the case of *West Coast Hotel Co. v. Parrish*, the Court took one final step in overturning the type of judicial review associated with *Lochner* by departing from *Lochner*-type constitutional interpretation. (Ibid., 400). In determining the validity of a Washington State minimum wage law for women and minors, the Court shifted back to Congress’ large discretion when acting under the 14th Amendment. (*West Coast*

Hotel, Co. v. Parrish, 300 U.S. 379, 387 (1937).). The Court held that “liberty” under the 14th Amendment Due Process Clause is not “an absolute and uncontrollable liberty.” (Ibid., at 391). By limiting such a right, the Court determined that Congress may act within reasonable grounds in which the “health, safety, morals, and welfare” of the people are protected. (Ibid.). “Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.” (Ibid.).

Similarly, by 1941 it seemed clear that most Americans were now rejecting the ways of the *Lochner*-era. (Ackerman 1998, 376). The Court, in *United States v. Darby*, further relinquished powers back to the legislature, this time in the realm of interstate commerce, moving away from the previous decision rendered in *Hammer*. The Court had to determine the constitutionality of a Congressional act that prohibited the transportation in interstate commerce of lumber manufactured by companies who were in violation of prescribed employee wage and hours limits. (*United States v. Darby*, 312 U.S. 100, 108 (1941).). While upholding the statute, the Court again shifted large discretionary powers back to Congress. The Court reasoned that Congressional control over interstate commerce reached farther than just the actual transportation of goods and into the process and manufacturing of those goods:

While manufacture is not, of itself, interstate commerce, the shipment of manufactured goods interstate is such commerce, and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power to prescribe the rule by which commerce is governed. (Ibid., 113).

The Court determined that Congress could act under its enumerated power to control interstate commerce to its fullest extent only being limited by express prohibitions within the Constitution. (Ibid., 114). The Court had now approved the idea of Congressional control over noncommercial activities, which was previously rejected in *Hammer*, further ignoring the *Lochner*-era principles of relying upon the common law. (Urofsky and Finkelman 2011, 779; Ackerman 1998, 373). This therefore became the first time Congress was granted powers to fully protect against inadequate labor conditions, previously restricted by the Court. (Urofsky and Finkelman 2011, 620). “It no longer made any difference why Congress wanted to prohibit the interstate movement of particular goods; legislative motive did not matter so long as the power existed.” (Ibid., 778). After the issuing of the *Darby* opinion, the Court would “never again cite *Lochner* with approval.” (Ackerman 1998, 375).

The Court has continued its discretion towards the legislature in more far-reaching cases such as in *South Carolina v. Katzenbach*. The case arose in 1966 when the State of South Carolina filed suit seeking a declaration that certain parts of the Voting Rights Act of 1965 were unconstitutional and the issuance of an injunction to prevent its enforcement. (*South Carolina v. Katzenbach*, 383 U.S. 301, 307(1966).). In upholding the law as appropriate, the Court determined that Congress had a wider power to enforce Amendments, the Fifteenth Amendment for this particular case, beyond the mere general terms of the language given in the Constitution. (Ibid., 327). Therefore, the idea that

“fashioning specific remedies or applying them to particular localities must necessarily be left entirely to the courts” was rejected. (Ibid.). As was the case in *McCulloch v. Maryland*, the Court determined that powers granted to Congress within the Constitution are “complete in itself” and can “be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution.” (Ibid.). Therefore, the Court determined that Congress has a large range of discretion when enforcing its powers granted under the Constitution and may only be restricted when the Constitution says otherwise. The legislation must simply be “appropriate” in carrying out the motives the amendments of the Constitution have in mind. (Ibid.). With the final determination of what is appropriate seemingly being left to Congress. (Ackerman 1991, 332 n. 30).

Lastly, the Court in *United States v. Carolene Products Co.*, tried to make a final determination as to the full extent of the Court’s judicial review powers. In Footnote 4 of the case, Justice Stone stated:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, . . . dissemination of information, . . . on interferences with political organizations, . . . as to prohibition of peaceable assembly . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities, . . . whether prejudice against discrete and insular

minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry . . . (*United States v. Carolene Products Co.*, 304 U.S. 144, 155 n. 4 (1938).).

This footnote has been seen as the Court stating that it should defer to legislative actions in the realm of economics, but also that the Court “should impose higher standards of review in areas of civil liberties and civil rights.” (Urofsky and Finkelman 2011, 791). This separation tried to create a stronger foothold for the Court in fundamental rights, but also tried to maintain in the field of economic rights the progressive ideal of judicial restraint. (Horwitz 1992, 252). This proposal “laid the basis for differentiated review, one of the contemporary Court’s strongest weapons in its defense of individual rights.” (Urofsky and Finkelman 2011, 791). The idea of *Lochner*-era assumptions about implementing the common law seemed to no longer be the norm for the Court. (Ackerman 1998, 372). By making such a move, the Court allowed minorities and other smaller groups to argue for broader readings of the Constitution. (Urofsky and Finkelman 2011, 794).

In the end, it seems that the Court, as with many political theorists, have not been able to make a final determination as to how the Court may act when implementing judicial review. The Court first began by declaring that it contained the overall power of judicial review over the acts of the executive and legislature, but immediately limited such power to certain non-political circumstances. However, in the early 20th Century, the Court took what has historically been seen as a wrong turn towards limiting the reformative acts of the legislature in the “*Lochner*-era,” significantly

limiting the actions the legislature may take based on what seems to be the Court's own discretionary definitions of the Constitution. However, since 1937 the Court has changed course and expanded the powers granted to the legislature by the Constitution. As will be argued in the next chapter of this paper, the Court has in recent decades swayed back towards jurisprudence limiting the role and actions of the legislature in determining public policy, as seen in the *Lochner*-era of the Court. The argument, in using the before mentioned cases, is that the role of the Court should be limited.

CHAPTER IV: THE MODERN COURT AND ITS POWER

Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere.

- James Bradley Thayer
(Thayer 1893, 30)

Now that the various roles of the Supreme Court have been examined, it is time to determine where the modern Court has fallen, and whether it has met my proposed standard of judicial participation. Since the year 2000, there have been a vast array of cases that stand on their own, but 4 specific cases stand above the rest. Those cases are *Bush v. Gore*; *Citizens United v. Federal Election Commission*; *Shelby County v. Holder*; and *McCutcheon v. Federal Election Commission*. These four cases demonstrate that the Court has, in the realm of election law and campaign finance, returned to a *Lochner*-type jurisprudence exemplified by the Court in the early 21st-Century. The modern application and consequence of the actions the Court took in *Lochner v. New York*, in overstepping its judicial bounds, now further permits the Court to overstep into other areas of public policy by the use of legal and constitutional principles. Within each of these individual cases, the Court can be seen as taking established constitutional principles and applying them in a manner that places itself in the shoes of the legislature, becoming the final arbiter of a group of public policy issues. Lastly, before I begin, I want to make it known that I do not want to be seen as taking any specific partisan side, because that is not my intention. I do not mean to argue for or against the specific policy arising out of each case, but the method to which the Court used in making such a decision. It is not the outcome I argue against, but the path used to get there.

A. Bush v. Gore

First in the line of modern cases is the case that helped determine the 2000 Presidential election; *Bush v. Gore*. The case arose during the 2000 presidential election when the State of Florida took to a recount to determine the winner of its electoral votes for the Presidency. (*Bush v. Gore*, 531 U.S. 98, 100 (2000).). After the Florida Supreme Court demanded a hand recount of disputed votes in various counties throughout the State, Republican candidates George W. Bush and Richard Cheney filed for an emergency stay against the recount. (*Ibid.*). The Court would then grant certiorari. (*Ibid.*). The Court held that even though State legislatures are granted the power to determine electors for the Presidential election, the States must guarantee and maintain equal protection of the law. (*Ibid.*, 106). In the realm of equal protection, the State must maintain “[t]he formulation of uniform rules to determine intent” of the voter. (*Ibid.*). However, the Court determined that the differing means between Florida counties in the method of recounting votes by hand varied extensively enough to violate equal protection. (*Ibid.*). A recounter in one county may observe a registered vote in a far differing manner than someone else in another county. (*Ibid.*).

Under the proposed standard of review discussed in the previous chapter, the public policy issues arising out of the Court decision over the Florida recount are very complex. Article 2, Section 1, Clause 2, of the United States Constitution, states that “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors,” who will then vote for the Office of President. This Constitutional provision implies that any citizen does not have a right under federal law to vote for the

electors of Presidential elections. (*Bush v. Gore*, 531 U.S. 98, 104 (2000)). It is the state legislatures who have the sole power for selecting electors and may grant the power to do so to any party, either itself or the people. (*Ibid.*). The decisions of how the State elections for President have been given expressly to the State legislatures, under the Constitution, the States therefore should retain full power of such decisions and Court interference can only occur with a violation beyond any reasonable doubt. “[W]e defer to the agencies unless their interpretation violates ‘the unambiguously expressed intent of Congress.’” (*Ibid.*, Ginsburg, dissenting 136). The Court, and other Federal branches, have historically left such discretion to the States, and the States alone as a plenary power. (*Ibid.*, 104). However, every State legislature has granted the power of selecting electors to the people of the State and this vestment of power is fundamental in nature. (*Ibid.*). The federal government will only interfere if voters’ rights have been violated. (*Ibid.*, 104-05).

However, when the Court decided the outcome of this case, it ignored the plenary powers of the State of Florida to determine the outcome of the election process of their given electors. During the deliberation over the recount, it had been shown that there was a large inconsistency within the Florida election code. (*Ibid.*, Breyer, dissenting 149). One provision stating that the Florida Secretary of State shall not accept votes counted late and another provision stating the Secretary may accept late votes. (*Ibid.*). This type of inconsistency within any State law has historically been left to the State courts for clarification. It is to be the State who interprets State law. (*Ibid.*, Rehnquist, concurring 114; Ginsburg dissenting 138; 142). The Federal government will

only interfere into State interpretation upon exceptional circumstances. (Ibid., Rehnquist, concurring 114). In her dissenting opinion, Justice Ruth Ginsburg discusses precedent that states that the federal courts will only interfere if the States have violated a provision of the Constitution beyond any question of doubt. (Ibid., Ginsburg, dissenting 136). Furthermore, in his concurring opinion, Chief Justice William Rehnquist states that the discretion left to the States seems, as Justice Ginsburg hints, to be similar to rational basis. (Ibid., Rehnquist, concurring 115). Chief Justice Rehnquist stated that Federal court interference will only occur when the “laws [are] impermissibly distorted [] beyond what a fair reading [would require].” (Ibid.). However, in its’ *per curiam* opinion, the Court does not seem to give any true discretion towards the Florida Supreme Court’s interpretation of Florida law. Simple disagreements as the Court seemed to hold, is not enough to allow for the Court to disregard Constitutionally acceptable interpretations of law made by the Florida Supreme Court. (Ibid., Ginsburg, dissenting 136).

Overall, the Constitution had granted the specific authority of choosing Presidential electors to the States under Article 2, Section 1, Clause 2. Furthermore, States had historically granted the power and process to the people by law. Therefore, the Court should have only interfered based on an express Constitutional violation beyond any reasonable doubt. Even with the inconsistency within the Florida statute determining the process of the election, it has historically remained in State hands to determine the true meaning of any ambiguities within State law. (Ibid., Rehnquist, concurring 114; Ginsburg, dissenting 138; 142).

The Court failed to cite an express grant within the Constitution that the State of Florida had violated beyond any reasonable doubt. Doubt still had arisen as to whether Florida had encountered any unconstitutional behavior. As shown above, the Court throughout all the opinions had stated how the States retain considerable powers over elections and that there is no set of expressed standards as to when the Court may step in. (See *Ibid.*, Rehnquist, concurring 114). Therefore, doubt still remained as to whether the Court had given such reason beyond clear doubt in order to legitimately interfere into the case at hand. The Court failed to give specific, express Constitutional wording as evidence that the State of Florida had issued determinations that would unconstitutionally fail to count votes of individuals, while unreasonably failing to read those made by others. The Florida Supreme Court determined to issue the recount, because they found it reasonable to interpret State law in such a manner as allowed under law, giving what seemed to be specific doubt as to how the Supreme Court would then later reason that such a determination would be unconstitutional. There was no clear issue that the State of Florida did not follow proper procedure in determining its electors when it was the State's Supreme Court who determined the inconsistencies within its own State law.

The dangerous result of this case is the precedent that the Court sets in its decision. Even though the Court, in its' *per curiam* opinion, seemed to state that *Bush v. Gore* should never be followed as precedent, the actions taken by the Court show otherwise. (*Ibid.*, 109). Chief Justice Rehnquist stated in his concurring opinion that "[t]hough we generally defer to state courts on the interpretation of state law . . . there

are of course areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law.” (Ibid., Rehnquist, concurring 114). This statement leaves a very ambiguous determination to the Court in determining State law even when the Constitution specifically grants the States the power to determine the election process. The Constitution does not grant the Court the power to undertake such an independent determination of State law. If this remained the case after *Bush v. Gore*, the Court may now, at its own discretion, determine when and when not it should interfere with the plenary powers of the States, by simply disagreeing with the Constitutionally valid methods the State has taken. This type of discretion is not to be granted to the Court. The Court, as stated by Chief Justice John Marshall in *Marbury v. Madison*, should only be limited to pure legal questions that do not involve the implementation of discretion in making policy determinations upon the government. (*Marbury v. Madison*, 5 U.S. 137, 166 (1803).). Precedent has stated that the Court may not interfere with the plenary powers of the States unless there is an expressed violation of the Constitution. (*Bush v. Gore*, 531 U.S. 98 (2000) (Ginsburg, dissenting, 136).). However, the Court now has set the dangerous precedent that it may, based on its own accord, step in and interfere with any electoral determination, even if such a decision is Constitutionally sound.

B. Shelby County v. Holder

Second in line of the Court’s modern jurisprudence is the 2013 decision of *Shelby County v. Holder*. In 1965, Congress passed the Civil Rights Act (hereinafter “the Act”) with the purpose of ending the historical discrimination of minorities in the voting

process. (*Shelby County v. Holder*, 570 U.S. ___, 3 (2013).). The Court determined the Act, specifically section 5, requires certain United States districts to gain federal pre-clearance, by federal officials, before the district may make any changes to its laws or procedures involving the election process. (*Ibid.*, 4). The Court then stated that such pre-clearance requires the district to show the “change had neither ‘the purpose [nor] the effect of denying or abridging the right to vote on account of race or color.’” (*Ibid.*). The Court also stated that section 4(b) of the Act defined those covered districts as those “States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election.” (*Ibid.*, 3).

In 2010, Shelby County, located in Alabama, brought suit in District Court against the United States Attorney General, seeking a declaratory judgment and permanent injunction that both sections 5 and 4(b) of the Act were unconstitutional. (*Ibid.*, 7). After moving through the District Court and United States Court of Appeals of the D.C. Circuit, both Courts siding with the Attorney General, the case reached the United States Supreme Court in late 2012. (*Ibid.*, 7-8). In an opinion delivered for the Court by Chief Justice John G. Roberts, Jr., the Court held section 5 of the Act to be unconstitutional because the current conditions within the designated districts show the constraints placed upon the designated districts are no longer permitted constitutional violations over the traditional local power to regulate such elections. (*Ibid.*, 12-14). The conditions that were once present over the last few decades are no longer prevalent, and therefore do not permit such interference into the realm of regulating elections. (*Ibid.*, 13-20).

Within his opinion for the Court, Chief Justice Roberts relied heavily on the use of the constitutional principle of equal sovereignty amongst the States to strike down section 5 of the Act. (Ibid., 9-10). The purpose of the analysis given by Chief Justice Roberts, as given in *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 577 U.S. 193, 203 (2009), was to determine whether “the Act imposes current burdens and must be justified by current needs.” (Ibid., 9). Therefore, the Court first set out to determine whether the circumstances surrounding the Act were still necessary for the restrictions upon the States to be justified.

Chief Justice Roberts quickly deliberated and decided that the Act and its restrictions were no longer necessary for the circumstances that arose out of modern voting restrictions by noting that over the course of the last 50 years, these given circumstances had “changed dramatically.” (Ibid., 13). Additionally, modern changes to voting laws have shown no blatant attempt to discriminate against minorities in an attempt to evade federal laws. (Ibid., 14). Based on this lack of modern occurrences involving discrimination, and a large drop in the percentage of challenged laws under the Act, the Court held the States should not be bound by coverage created off the circumstances of years past. (Ibid., 23-24).

In addition to the analysis over whether the Act was justified based on the given circumstances, the Court relied heavily on the idea of equal sovereignty amongst the States in striking down section 5. Chief Justice Roberts cited *Bond v. United States*, 564 U.S. __, __ (2011) (slip op., at 9) in stating that “[t]his ‘allocation of powers [by the Tenth

Amendment] in our federal system preserves the integrity, dignity, and residual sovereignty of the States.” (Ibid., 9-10). Therefore, “[n]ot only do States retain sovereignty under the Constitution, there is also a ‘fundamental principle of *equal* sovereignty’ among the States.” (Ibid., 10). In determining the validity of section 5, Chief Justice Roberts determined that the Act “sharply departs” from the basic principle of equal sovereignty by only applying to 9 States and only several other counties throughout the country. (Ibid., 11). The Court reasoned that the Act intruded substantially into the realm of federalism and was a large departure from the familiar relationship between the federal government and the States. (Ibid., 12, citing *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) and *Presley v. Etowah County Comm’n*, 502 U.S. 491, 500-01 (1992)). States have historically been granted wide control over the process and execution of federal elections even though the federal government establishes the time and manner of such elections. (Ibid., 10). However, not allowing some States to immediately enact what they deem to be a proper process because of the delays in federal approval under the Act, while other States may immediately enact the same exact process without the interference by the federal government; established unequal treatment amongst the States, violating the constitutional and “‘fundamental principle of *equal* sovereignty’ amongst the States.” (Ibid., citing *United States v. Louisiana*, 363 U.S. 1, 16 (1960)). It was this particular constitutional principle that was used to usurp Congressional power in the same manner that the right of contract was used in *Lochner v. New York*.

Chief Justice Roberts points out that the dissenting opinions refused to cite this constitutional “principle of equal sovereignty.” (Ibid., 23). However, Chief Justice Roberts, in giving the opinion of the Court, failed to consider the historical precedent of the Court giving wide discretion to Congress when enacting legislation over the power of the States which was specifically brought up in the dissent given by Justice Ruth Ginsburg:

So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end. ‘It is not for us to review the congressional resolution of [the need for its chosen remedy]. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.’ (Ibid., Ginsburg, dissenting 10).

This concept of giving Congress wide discretion when enacting legislation over the States has had a long precedent in the decisions rendered by the Supreme Court, to which Chief Justice Roberts makes not such mention of in any part of his opinion for the Court. Instead, he seemingly used the principle of equal sovereignty to disregard and usurp the legislative power of Congress to rationally be able to act over the States.

The power of Congress over the States dates back to the origins of the Court itself. In *McCulloch v. Maryland*, Chief Justice Marshall determined that Congress need not be restricted to specific enumerated powers within the text of the constitution itself. (*McCulloch v. Maryland*, 17 U.S. 4 Wheat. 316, 406 (1819).). Furthermore, Chief Justice Marshall reasoned that Congress as the national legislature must be granted discretion in applying the means it deems necessary to carry into execution the powers conferred to it. (Ibid., 421). In *Shelby County*, Congress should have been given similar

discretion. Congress had been given the power to implement any legislation deemed appropriate by the Enforcement Clause of the 15th Amendment of the United States Constitution. Therefore, based on the historical implications of *McCulloch*, the Court should have similarly granted Congress wider discretion.

Furthermore, in a variety of contexts, the Court has consistently given Congress rational basis in enacting legislation over the power of the States. In *Ex Parte Virginia*, a case revolving around a Judge being indicted for selecting jurors based on race, the Court determined that the Civil War Amendments were “intended to be what they really are – limitations of the power of the States and enlargements of the power of Congress.” (*Ex Parte Virginia*, 100 U.S. 339, 340; 345 (1879).). The Court further reasoned that any legislation contemplated by Congress “to make the amendments fully effective” and adapted to carry out the enforcement of the amendments “whatever tends to enforce submission to the prohibitions they contain” is therefore brought within the powers conferred upon Congress. (*Ibid.*, 345-46). “It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial.” (*Ibid.*, 346). Instead, Chief Justice Roberts only brings up the history of the Civil War Amendments as intended to not punish for past acts but instead to help promote a brighter future. (*Shelby County v. Holder*, 570 U.S. ___, 20 (2013).). Based off of this reasoning, the Court should have not applied the principle of equal sovereignty as strictly as it did, due to the Civil War Amendments were established as limitations upon the power of the States, especially when they have historically acted against the spirit of the constitution. Instead, the

Court should have applied the Act as a legitimate action conferred upon Congress over the States based on the true purpose of the 15th Amendment.

Additionally, in the consolidated cases of *James Everard's Breweries v. Day* and *Edward & John Burke v. Blair*, the Court determined that Congressional power, even though granted as concurrent with the States by the 18th Amendment, was not to be "impaired by reason of any power reserved to the States." (*James Everard's Breweries v. Day; Edward & John Burke v. Blair*, 265 U.S. 545, 558 (1924).). Even though the 18th Amendment is no longer a part of the constitution, its' wording is similar to the Civil War Amendments and its' enforcement is similar to other sections of the constitution. The Court reasoned that when Congress and States have been given concurrent powers over any particular area, concurrent does not mean joint or that the enactments of Congress need to be approved or sanctioned by the States for legitimacy. (Ibid.). Since there was no such requirement, "if the act is within the power confided to Congress, the Tenth Amendment, by its very terms, has no application, since it only reserves to the States 'powers not delegated to the United States by the Constitution.'" (Ibid.).

Based on this reasoning, the Voting Rights Act was improperly struck down with the Court taking legislative powers away from Congress by using the broad language of the 10th Amendment. Chief Justice Roberts extensively talks about how the States have been given the power to regulate elections under the constitution, especially under the 10th Amendment. (*Shelby County v. Holder*, 570 U.S. ___, 10 (2013).). Specifically "[e]ach State has the power to prescribe the qualifications of its officers and the manner in

which they shall be chosen' . . . Drawing lines for congressional districts is likewise 'primarily the duty and responsibility of the State.'" (Ibid., citing *Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892) and *Perry v. Perez*, 565 U.S. __, __ (2012) (slip op., at 3)). However, the quote just used by Chief Justice Roberts says it is primarily the duty of the States, which is not in absolute terms. (Ibid.). Furthermore, Chief Justice Roberts admits the federal government keeps to itself "significant control over federal elections." (Ibid.). One specific example is Article I, Section 4, Clause 1 of the United States Constitution granting the power to Congress in determining the time and manner of electing Senators and Representatives. Based on the legal definition of "concurrent" given by Black's Law Dictionary: Third Pocket Edition, "[h]aving authority on the same matters," it seems that Congress and the States maintain concurrent powers over federal elections based on the explanation given by Chief Justice Roberts. (Black's Law, s.v. "concurrent"). Therefore, based on the Supreme Court's reasoning in *James Everard's Breweries*, the State powers and rights granted under the 10th Amendment, such as equal sovereignty and primary control over federal elections as prescribed by Chief Justice Roberts, should take a back seat to those powers conferred upon Congress, such as those created under the Act.

Additionally, the Court in *James Everard's Breweries* reasoned that when Congress does in fact enact legislation under its granted powers, the Court "may not inquire into the degree of their necessity" as implicated in *McCulloch v. Maryland*. (*James Everard's Breweries v. Day; Edward & John Burke v. Blair*, 265 U.S. 545, 559 (1924)). Congress "may adopt any eligible and appropriate means to make that

prohibition effective.” (Ibid., 560). The controlling question therefore should only be whether Congress has exceeded any other constitutional limitations that were put upon “its legislative discretion.” (Ibid. 559-60).

In enacting this legislation Congress has affirmed its validity. The determination must be given great weight; this Court by an unbroken line of decisions having ‘steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt.’ (Ibid., 560).

This method of review by the Court over Congressional legislation enacted over the power of the States was further established in a case often cited in *Shelby County; South Carolina v. Katzenbach*. In the Court’s opinion over whether to uphold the Act after a previous constitutional challenge in 1966, it was consistently reasoned that any legislation is appropriate when it was meant to “carry out the objects the [Civil War] amendments have in view” and whatever enforcement is necessary to help protect the equalities of civil rights and equal protection. (*South Carolina v. Katzenbach*, 383 U.S. 301, 307; 327 (1966).). Furthermore, the court held:

We therefore reject South Carolina’s argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms – that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under §2 of the Fifteenth Amendment. In the oft-repeated words of Chief Justice Marshall, referring to another specific legislative authorization in the Constitution. ‘This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution.’ (Ibid.).

Chief Justice Roberts' opinion often cites this precursor case, but fails to ever mention this historical deference given to Congress over legislative actions taken over the power of the States.

It was based on this specific grant of power to Congress by the Enforcement Clause of the 15th Amendment that the Court overstepped its procedural bounds and instead took discretionary powers away from the legislative duties of Congress. When Congress has been granted the power to act, it is not for the Court to step in and restrict that power unless it has a reason to do so beyond any reasonable doubt. Throughout the opinion, Chief Justice Roberts continuously mentions that Congress has argued that the Act remains necessary for the deterrent of discriminatory voting violations. (*Shelby County v. Holder*, 570 U.S. ___, 21 (2013).). However, Chief Justice Roberts uses his own analysis to determine the Act was no longer necessary, ignoring the rational basis only needed by Congress in order to maintain the enforcement of such legislation, instead placing a higher burden on Congress to trump the principle of equal sovereignty. (*Ibid.*, 9).

In addition to making the Court's argument, Chief Justice Roberts even admits that there are still problems within the given States; "[p]roblems remain in these States and others, but there is no denying that, due to the Voting Rights Act, our Nation has made great strides." (*Ibid.*, 16). In making such a statement, the Court has admitted the rational means necessary for Congress to maintain the legislation. Chief Justice Roberts consistently gives the Act credit for lowering the discrimination that was rampant in the

given districts throughout American history; “There is no doubt that these improvements are in large part *because* of the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process.” (Ibid., 15). As additional evidence, Chief Justice Roberts specifically mentions the dissenting opinion of a lower court judge that the correlations found from the given evidence showed he viewed it “the other way: ‘condemnation under §4(b) is a marker of *higher* black registration and turnout.’” (Ibid., 8). Furthermore, Congress’ own admission that significant progress had been made by the Act destroying “first generation” barriers of racism was cited by the Court as evidence of change. (Ibid., 14). However, in making all these proclamations and stating how important the Act has been to disintegrating racial barriers, the Court ignores the risk that all such progress made by the Act could be dissolved once the Act and its restrictions are removed. By giving the Act so much historical credit, the Court is admitting to its rational importance, and by not listing other larger circumstances that could have led to change other than that created by the Act, the Court is admitting the Act was the driving force in such change. Therefore, the Court gives itself the rational basis it has historically required for Congressional legislation over the States. The Court ignores the rational risk involved; that if the driving force behind such change is removed, any previous positive changes could be dissolved into the ways of old.

Based on the theory advocated for in Chapter II, the Court has extensively overstepped its judicial bounds. It has been shown that Congress had express authority to act under the 15th Amendment Enforcement Clause when passing the Act. Therefore,

the Court must cite a Constitutional violation beyond a reasonable doubt in order to enact judicial review. However, as was shown, that doubt still existed in the Court's determination. First, the principle of Equal Sovereignty amongst the States that the Court relied upon is not an express grant under the 10th Amendment or Constitution, therefore giving reasonable doubt as to whether such a Constitutional provision should legitimately be applied. Because the Federal Government has historically been granted wider powers under the Constitution, outside of the 10th Amendment, doubt seems to remain that a right of Equal Sovereignty amongst the States should have existed within the Constitution in order to restrict the powers of the Federal Government. Second, even the Court itself admitted there are still problems remaining within given States that the Act was aimed at resolving, even though it has been shown it is not within the Court's power to determine necessity. (Ibid., 16). If the current times still have situations that call for the applicability of the Act upon the States, then the times call for such mandated restrictions upon the States to be enforced. Therefore, this admittance by the Court itself showed any other reasonable person may disagree or see doubt upon the Court's determination that the Act has not remained necessary in the perspective determined by Congress. Even if people agreed upon the idea of an Equal Sovereignty amongst the States, doubt still exists as to whether the Act has become unnecessary as the Court had determined. Because the Court had reasoned that there is no Constitutional violation when the times call for such restrictions, there remains doubt that the Court had fully considered the necessity of the Act when determining that it is

now unconstitutional. The Court therefore failed to cite a clear Constitutional violation beyond any reasonable doubt in order to make this determination.

Shelby County is the perfect example of the Court interfering into an area in which it does not belong. It has been shown that Congress was specifically granted the power to act appropriately under the 15th Amendment and such a grant gives it plenary power to act as it sees fit. The Court needs far more evidence to justify interference than by simply disagreeing as to the degree of necessity for the Act. Simple disagreement as to necessity does not equal a constitutional violation beyond any reasonable doubt. The issue of restoring State sovereignty does not apply to this specific instance. The 15th Amendment gives an express grant of power to Congress enabling legislation, and there must therefore be clear Constitutional violations to override this power. The Court must rely on Congress under its express grant of power to use its discretion wisely enough. If it seemed the Act was reaching too far into State autonomy, the Attorney General is also there as a constitutional check upon Congress with the ability to refuse enforcement or allowing more lenient standards in allowing for procedural changes by the States.

In the end, the decision rendered for the Court by Chief Justice Roberts has usurped the legislative power of Congress to determine what is appropriate under the 15th Amendment. As was the case in *Lochner*, the Court becoming the final arbiter of what "liberty" meant under the due process clause, substantially limiting the permissible action Congress may have taken, the Court has done the same in becoming

the final determinate of what “appropriate” means under the 15th Amendment’s Enforcement Clause. Even if the Court was trying to promote State autonomy as opposed to restricting it in *Lochner*, the Court has overstepped its bounds with the express grant of power towards Congress under the 15th Amendment. The Court has simply ignored a long line of precedent that allowed Congress great latitude in enacting what itself deems appropriate, more specifically when enacting legislation that is aimed against the laws of the States.

C. Citizens United/McCutcheon v. FEC

Lastly, are the cases of *Citizens United v. Federal Election Commission* and *McCutcheon v. Federal Election Commission*. These two cases and the arguments surrounding them, have been consolidated into a single sub-chapter because their subject matter revolves around the same legal and political issue, campaign finance reform and the power of Congress and the Federal Election Commission.

First, the case of *Citizens United v. Federal Election Commission* began in 2002 when the Bipartisan Campaign Reform Act was passed to amend the already existing Federal Election Campaign Act of 1971, prohibiting any union or corporation from using funds out of its direct general treasury to make any independent expenditure that promotes the campaign for or against any specific candidate who at the time was running for office. (*Citizens United v. Federal Election Commission*, 558 U.S. ___, 3 (2010).). The Court determined that this type of “electioneering communication” was “defined as ‘any broadcast, cable, or satellite communication’ that ‘refers to a clearly

identified candidate for Federal office' and is made within 30 days of a primary election or 60 days of a general election." (Ibid.).

In 2008, Citizens United, a non-profit organization, distributed "Hillary," a documentary that was very negative towards Senator Hillary Clinton of New York, who was at the time a candidate for President. (Ibid., 2). Citizens United immediately sought a declaratory judgment and injunctive relief due to the possibility of the documentary and its advertising being released within the statutorily prohibited 30 days prior to the then upcoming primary election. (Ibid., 4). The case primarily sought to find the restriction upon unions and corporations as unconstitutional. (Ibid.). The case began as an as-applied challenge to the statute, but the Court decided to determine the overall impact the federal statute had on similar speech throughout the country. (Ibid.).

In overruling the previous case of *Austin v. Michigan Chamber of Commerce*, which had upheld the provisions against a similar facial challenge, the Court held the limitation upon the donations as an "outright ban" on speech in violation of the First Amendment. (Ibid., 20). The idea of a PAC as a separate body from the actual corporation had been previously determined and therefore this restriction upon such donations is a strict ban on corporate expenditures and speech. (Ibid., 21-22). According to the Court, this restriction upon certain types of speech did not pass strict scrutiny. (Ibid., 23-24). This extension of free speech, the Court determined, had arisen under previous decisions that had extended the protections of the First Amendment to corporations and their political speech. (Ibid., 20-24). Overall, the Court determined that

corporate speech remains just as important as speech rendered by an individual. (Ibid., 50).

In *Citizens United*, the Court began its opinion by specifically stating itself, as a body of government, must not redraw the lines of the Constitution even with changing technologies; “Courts, too, are bound by the First Amendment. We must decline to draw, and then redraw, constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker.” (Ibid., 9). However, the Court itself takes Constitutional interpretation away from the legislature and instead gives itself the power of interpretation in a manner that began to restrict Congressional control or involvement in campaign financing. (Ibid., 11-12). It is the job of Congress to interpret public policy and act. However, in *Citizen’s United*, the Court refused to give any reasonable basis towards Congress’ own arguments or the idea that each case must be treated differently instead of the Court taking one large step in banning any type of Congressional regulation. (Ibid.).

Additionally, the Court cites that during the 19th Century, the State and Federal governments “imposed a ban on corporate direct contributions to candidates.” (Ibid., 26). However, when Congress determined it was necessary to act further under such historical precedent, the Court instead decided on its own to take down such history and grant First Amendment protections to corporations, extending the legal fiction that corporations are somehow human. (Ibid., 25-26). When confronted with such a strong precedent over implied powers, the Court, under the prescribed theory, must give rational reasoning towards Congressional determinations. Instead, in *Citizens United*,

the Court chooses to follow its own personally made precedent to follow and disregard the historical precedent created by Congress and State legislatures.

Congressional positioning was formed around the idea that such restrictions were created to try and limit the overall influence those with large capital and money had over those who did not, and that donating money on behalf of an entire corporation from its own treasury failed to protect the interests of the shareholder and only promoted the interests of those in charge of the corporation and its funds. (Ibid., 32). However, the Court determined to ignore this long line of reasoning and instead follow its own created precedent that permits and protects corporate speech. (Ibid.). The Court does argue that if such power is given to Congress, media outlets whom make money under the corporate form would be extensively restricted because this regulation would lead to Congress banning the “political speech of media corporations.” (Ibid., 35). However, this would not be an outright ban when it is limited to only a period immediately before elections. Furthermore, this is where the limit proposed by Thayer upon Congressional power would begin. The law already exempted media outlets from the ban, but if Congressional control began limiting free press, such an action would be an unreasonable violation beyond any reasonable doubt, that the free press was not meant to be targeted, but instead only the direct funding of campaigns. (Ibid.). The Court fails to make the distinction between donations made directly from corporate funds and those media corporations discussing and arguing policy on their individual networks or in their papers which was not banned. (Ibid., 37).

Instead, the Court somehow, as against the body of the people in Congress, determined that corporate political speech is the source of a vast amount of wealth that the people must have in order to make any political decisions; “The Government has ‘muffle[d] the voices that best represent the most significant segments of the economy.’ And ‘the electorate [has been] deprived of information, knowledge and opinion vital to its function.’” (Ibid., 38 citing *McConnell v. Federal Election Commission*, 540 U.S. 93, 257-58 (2003)). Making such a determination is not the correct role of the Court. Congress is the body of public policy, determining whether corporate speech is the true source of such important information. The Congressional reasoning seemed to distinguish between corporations and media outlets by exempting them from the coverage of the Act. (Ibid., 35). Therefore, the Court must rely on the determination of Congress who has the power to delve into public issues with committees, and testimonies to determine whether corporate speech is as important as the Court determined from their own overview of the limited record before them.

Based on the prescribed theory within Chapter II, this type of Congressional power falls under the implied powers standard. Therefore, Thayer’s exact principle of beyond a reasonable doubt does not apply and instead Congress must give an appropriate and legitimate reason behind enacting the law as was described by Chief Justice Marshall in *McCulloch v. Maryland*. (*McCulloch v. Maryland*, 17 U.S. 4 Wheat. 316, 421 (1819)). However, as discussed, the Court seemingly disregarded the legitimate Congressional reasoning that was given within the case that they were protecting those who are not in control of large sums of capital. (*Citizens United v.*

Federal Election Commission, 558 U.S. ___, 32 (2010).). Furthermore, the Court used the principle of corporate speech as its reasoning in order to circumvent Congressional reasoning which is not an express grant under the Constitution. (Ibid., 32; 38). As long as Congress' reasoning had not been completely arbitrary or out of leftfield, which had been shown not to be the case in that Congress gave a specific reason related directly to the subject matter of the law for passing the provisions, the Court should not have interfered into this specific instance of Congressional authority.

Second, the case of *McCutcheon v. Federal Election Commission* arose under the most recent challenge against the Bipartisan Campaign Reform Act of 2002. The Act gave a distinction between two differing types of bans towards campaign contributions. (*McCutcheon v. Federal Election Commission*, 572 U.S. ___, 3 (2014).). The first, a base line restriction, set upon donations a limit on how much any given person or contributor could donate to one given candidate in a specific campaign cycle. (Ibid.). The second was an aggregate limit which set an overall limit upon how much a contributor may donate to an overall number of candidates in a campaign cycle. (Ibid.). It was this second, aggregate limit that came into question when *McCutcheon*, during the 2011-2012 campaign cycle, was prevented from donating to 12 additional candidates due to reaching the aggregate limit allowed under the Act. (Ibid., 5-6).

The Court determined that the main focus was "on an individual's right to engage in political speech, not a collective conception of the public good." (Ibid., syllabus 3). In striking down the aggregate limit provision, the Court determined that the limit did not serve the same purpose as the base limits in preventing quid pro quo

corruption or the appearance of such corruption. (Ibid., 19-22). This type of corruption being the only type the government may restrict speech in order to prevent. (Ibid., 2).

Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties. (Ibid., syllabus 4).

There is no express grant of power within the Constitution that specifically authorizes Congressional power over campaign financing. However, Congress has historically regulated the rules of federal elections along with the States. (*Shelby County v. Holder*, 570 U.S. ___, 10 (2013).). Therefore, this type of power exercised by Congress falls into the implied powers of Congress and must be treated and respected as such by the Court.

In *McCutcheon*, the issues and similarities with *Lochner*, are far more apparent than in *Citizens United*. Throughout its opinion, the Court acknowledges that Congress retains the Constitutional power to limit campaign financing only when preventing the occurrence or appearance of quid pro quo corruption. (*McCutcheon v. Federal Election Commission*, 572 U.S. ___, 2; 8 (2014).). The Court had again affirmed that the base limits under the Bipartisan Campaign Reform Act were permissible and reasonable methods towards restricting quid pro quo corruption. (Ibid., 3). Congress had stated that the aggregate limits were passed to prevent a circumvention of the base limits in order to prevent any specific individual from donating to an unlimited amount of PACs or organizations who in-turn would donate all those funds to the same candidate. (Ibid., syllabus 4). The Court in *Buckley v. Valeo* had a "fear that an individual might 'contribute

massive amounts of money to a particular candidate through . . . unearmarked contributions' to entities likely to support the candidate." (Ibid., syllabus 4).

However, the Court completely disregards this argument by Congress: "The Government's scenarios offered in support of that possibility are either illegal under current campaign finance laws or implausible." (Ibid., syllabus 4). This is where the Court has overstepped. The Court had previously allowed Congress wide power in setting base limits to prevent corruption. (Ibid., 3; 8). Therefore, Congress, under this implied power, should be able to do what it believes to be reasonably necessary to prevent further corruption or its appearance. This should include allowing the aggregate limit to prevent the circumvention of the base limits. Yet the Court took it upon itself to determine the reasonableness of the law. "As an initial matter, there is not the same risk of *quid pro quo* corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly." (Ibid., 22). The Court is not the body of government that has the ability to research and determine the actual risks involved in these types of decisions. This was a clear violation of the policy role of the Court, by refusing to give Congress reasonable power to act based on the research and determinations made by committees who are specifically tasked to research such issues.

In addition to its denying of reasonable power to Congress, the Court took things one step further. In delivering the opinion for the Court, Chief Justice John Roberts defined the type of corruption which Congress may act to prevent:

Moreover, the only type of corruption that Congress may target is *quid pro quo* corruption. Spending large sums of money in connection with

elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to *quid pro quo* corruption. Nor does the possibility that an individual who spends large sums may garner 'influence over or access to' elected officials or political parties. (Ibid., syllabus 4).

This very narrow definition leaves very little room for Congressional action in the future.

The only type of corruption left to fend off is the actual existence of corruption or exchange of money specifically meant for the services of the office holder. (Ibid.). This definition leaves out the entire purpose of preventing the appearance of such corruption and only limits action to the actual existence of corruption. Yet, Congress had previously been given the power to prevent the appearance of *quid pro quo* corruption which now seems to be abandoned by the Court for the express showing of corruption. (Ibid., Breyer, dissenting, 3-4). "In making this argument, the plurality relies heavily upon the narrow definition of 'corruption' that excludes efforts to obtain 'influence over or access to elected officials or political parties.'" (Ibid., Breyer, dissenting, 3 citing *Citizens United v. Federal Election Commission*, 558 U.S. ___, 389 (2010).).

Furthermore, as was the case in limiting the definition of Due Process in *Lochner v. New York*, and limiting the definition of "reasonable" under the 15th Amendment to restrict Congressional action in *Shelby County v. Holder*, the Court has defined a term of corruption describing the power of Congress in such a manner that extensively limits the remedies and protections Congress may offer. Even though Congress does not have the express authority to regulate campaign financing, the Court must still grant wide discretion to act in this policy realm.

Congress had determined that the aggregate limits were reasonable and legitimate in preventing the existence and appearance of quid pro quo corruption:

In reality, as the history of campaign finance reform shows and as our earlier cases on the subject have recognized, the anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions. And it is an interest rooted in the Constitution and in the First Amendment itself. (Ibid., Breyer, dissenting, 4).

This type of restriction remains reasonable as it is not an outright ban upon speech. If Congress determines this type of limitation is legitimate in its goal of preventing circumvention of the base limits, it should suffice for the Court. It does not become the role of the Court to instead ignore the reasons advocated for by Congress, and define corruption in such a manner that all but shuts out Congressional regulation of any possible appearance of corruption that is not as apparent as now required by the Court.

Overall, as was the case in *Citizens United*, this action by Congress falls under the implied powers of the theory described in Chapter II. Therefore, as long as Congress was able to give an appropriate and legitimate reason for passing the law, the Court should not have interfered. As was shown, the Court seemingly admitted and agreed with Congress that there was a reason for preventing the risk of corruption behind enacting the aggregate limits, but only disagreed as to its full necessity. (*McCutcheon v. Federal Election Commission*, 572 U.S. ___, 22 (2014).). By making this decision, the Court seems to admit the legitimacy of the Congressional action but because it disagreed as to the level of necessity, such reasoning was disregarded in violation of the overall theory to which the Court should comply. Furthermore, the Court, based on this disregard for

Congressional reasoning, took it upon itself to define the type of corruption that Congress had been historically able to prevent in such a manner that now limits future Congressional action only towards the actual exchange of money for political favor. (Ibid., Breyer, dissenting, 3 citing *Citizens United v. Federal Election Commission*, 558 U.S. ___, 389 (2010).). Therefore, because the Court had seemingly agreed that there may be a level of legitimacy behind the aggregate limits but then disregarded such legitimacy based on an arbitrary level of necessity, the Court had overstepped its bound based on the prescribed theory of judicial review because it lacked the proper authority to make such a determination.

In both *Citizens United* and *McCutcheon*, the Court took it upon itself to set the limits of Congressional control over campaign finance. Within both instances, the Court took what was once held to be reasonable actions by Congress and instead redefined the parameters of Congressional control in a manner that all but eliminates action except in extreme circumstances.

Overall, these four cases show that the Court has returned to a more *Lochner*-type jurisprudence in its Constitutional determinations over election law and campaign finance law. The Court has used Constitutional provisions in order to grant itself wider powers and discretion in making Constitutional determinations, while also limiting the powers of other governmental institutions. The cases of *Bush v. Gore* and *Shelby County v. Holder* showed how the Court failed to grant plenary powers of State governments and Congress in making sound decisions under their Constitutionally granted powers. While *Citizens United v. Federal Election Commission* and *McCutcheon v. Federal Election*

Commission showed the Court failing to give Congress the necessary discretion it should maintain under its implied powers under the Constitution. In all four cases, the actions taken by the Court have set a now dangerous precedent once seen during the now repudiated *Lochner*-era. By giving itself the final power to define specific terms within Constitutional grants of power, the Court has set itself up as the final arbiter of each area of public policy shown in the four cases, including election law, voting rights, and campaign financing. Even though the Court in *Shelby County* only created a sunset provision, the Court has given itself the power to define reasonableness and can now further restrict the definition as it sees fit. (*Shelby County v. Holder*, 570 U.S. ___, 24 (2013)). This type of action has now limited the powers of the State and Federal government to initiate any further policy determinations in reforming these areas. It is now the Court's discretion on whether or not policy reformation may take place, the one body of government to which policy discretion should not be allowed.

CHAPTER V: CONCLUSION

Presidents come and go, but the Supreme Court goes on forever.

- William Howard Taft
(BrainyQuote 2001)

This paper has continued the debate over the role of the Supreme Court by showing that the modern Court has returned to a *Lochner*-era type jurisprudence in the areas of election law and campaign finance. The Court must instead restrict its actions in order to leave public policy determinations for Congress. In so doing, this paper has argued that the proper role of the Court should be one of reviewing and determining Constitutional violations that only appear beyond a reasonable doubt. Contemporary cases in election law and campaign finance have shown that the Court has failed to make such determinations and instead has used Constitutional principles to appropriate powers for the Court away from the legislature and executive in these specific arenas; as the Court had previously done in *Lochner v. New York*.

Chapter 2 set out to describe and summarize the theoretical debate over the role of the Court, from extremely active to quite limited. However, the position taken by James Bradley Thayer was argued as most compelling because the Court must prove a constitutional violation beyond a reasonable doubt before taking action. Next, Chapter 3 summarized how the Court itself, throughout history, has debated and acted in a manner where it too does not know how far itself can reach. Lastly, in Chapter 4, the modern cases of *Bush v. Gore*; *Citizens United v. Federal Election Commission*; *Shelby County v. Holder*; and *McCutcheon v. Federal Election Commission* were used to show

how the Court itself has returned to a jurisprudence closely resembling that of *Lochner v. New York* in the areas of election law and campaign financing. Furthermore, these cases are perfect examples of how the Court has failed to take action based on those principles exemplified by Thayer.

In the end, the role of the Court in the American political structure will always be an issue of great importance. This paper has shown that the role of the Court has been at issue since the dawn of the country and gives no signs of ever dying out. The Court has become a body of politics and gives no signs of changing. This politicalization of the Court is best exemplified in the case of Harriet Miers. Miers, in 2005, was nominated by President George W. Bush to become a Justice of the Supreme Court after the retirement of Justice Sandra Day O'Connor. (Fletcher and Babington 2005). However, Miers' nomination was struck down by members of her own party, Republicans, who thought her "conservative credentials" did not meet the required standard for upholding cases in the manner of those such as *Bush v. Gore*. (Ibid.). Therefore, President Bush withdrew the nomination and appointed the conservative federal appellate judge, Samuel A. Alito, Jr. (Ibid.).

However, this paper has only been limited to showing politicalization of the Court in the areas of election law and campaign finance, and no further. Because this paper has been limited to only two sub-sections of the large area of Constitutional Law and the role of the Court, further research must be done to determine whether such politicalization has occurred, or is about to occur, in other arenas of Constitutional Law. Because there seems to be no real end to the politicalization of the Court, it must

remain an area of contention that this type of jurisprudence shown above could continue into other realms of public policy outside of election law and campaign finance. However, only time will tell as to how far the Court will reach. Whether, the current Justices maintain their jurisprudence or whether their replacement with newer Justices will change how far the Court will reach and make a retreat to the way things were before and after the *Lochner*-era remains to be seen.

Overall, the law is determined by society and its specific needs, it is not for the Court to determine what law it believes to fall within or outside of “immutable natural rights.” (Gray 1892, 24). It is Congress who can rely on expert opinions and interpret national conditions, and who therefore should be able to make these larger interpretations over public policy, not the Court who is “limited to legal briefing and oral argument.” (Pound 1908, 3833; Pound 1909, 464). The Court must naturally give Congress far more deference in their legal determinations. (Bernstein 2011, 42). Hopefully this new modern era of the Court will not last 40 years as was the case for the *Lochner*-Era. Otherwise, there is no telling how far this Court will overstep into the political arena.

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