INTRODUCTION*

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The Supreme Court of the United States is truly a remarkable institution. Its members are appointed not elected, it operates without a large supporting bureaucracy, it is forced to decide sensitive issues that divide the nation (and often have been avoided by the Congress and the President), yet its power to decide and rule and the authority of its command rival that of the other branches of government today.

It was not always so, as constitutional scholars and historians remind us. The Supreme Court's authority to declare acts of the federal government in violation of the Constitution was not established until the Court's second decade[1] and it took another fifteen years for the Court to firmly establish its authority over state law.[2] These and other decisions in the Supreme Court's history have often placed it at the center of controversy and subjected it to pointed attack for exceeding its constitutional mandate, violating recognized norms, or ignoring the popular will. Thus, during its 190 year history, the Court has at times faced powerful pressures. Even the number of sitting justices has been altered by Congress—over the years it has ranged from six to ten, with the current nine having been "settled" upon over a century ago. The Court has survived both court-packing plans and efforts to rein in its jurisdiction, scandals that resulted in an impeachment trial of one (Samuel Chase) and forced the resignation of another (Abe Fortas), and, more recently, exposure of its inner workings and of divisive personal relationships.[3] Still, these events have seldom been repeated and when compared to the Court's longevity they seem small and insubstantial.

Over the years the Court has been sustained by a consistency and stability rivaled by few other institutions of man and no other branch of government. In nineteen decades of constitutional government, this nation has been served by thirty-nine presidents and even more vice presidents. Yet, during this same period, there have been only fifteen chief justices and fewer than 100 associate justices. This constancy is all the more noteworthy when one recalls that the lengendary John Marshall was already the fourth chief justice when he took office in 1801, just twelve years after the Court was first organized.

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1. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

2. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

3. S. ARMSTRONG & B. WOODWARD, THE BRETHREN (1979).

Even more remarkable is the fact that the Court has never been overruled by an amendment adopted because the country strongly believed that the Court had misread the Constitution.[4] To be sure, constitutional amendments have been adopted to overturn decisions of the Court, but in each instance it seems clear that the amendments were passed for other reasons. Thus, the *Dred Scott* decision[5] holding the Missouri Compromise unconstitutional was overruled by the thirteenth amendment but only after the Civil War had effectively reversed the Court's ruling; the sixteenth amendment permitting an income tax effectively reversed the Court's five-to-four decision in *Pollock v. Farmers' Loan & Trust Co.*,[6] but even the amendment's backers generally conceded that the Court's decision was a reasonable interpretation of the founder's intent in Article I, Section 9; and the eleventh amendment which denied the federal courts jurisdiction over suits brought against state governments, while a direct response to the Court's decision in *Chisholm v. Georgia*,[7] is more accurately described as an effort to complete the federal structure and the concept of federalism established in the Constitution.

This is not to say, of course, that the Court has been right on all the great constitutional issues decided in its history. One has only to point to its decisions in *Plessy v. Ferguson*,[8] holding that the equal protection clause of the fourteenth amendment permitted separate but equal public facilities segregated by race, or the substantive due process rulings, as in *Lochner v. New York*,[9] holding that New York could not limit bakers to ten working hours per day, to demonstrate the Court's fallibility. While the Court may eventually concede its errors, at least in these instances it did so only decades later and after great cost to the country.

This dichotomy between the Court's stability and authority, on the one hand, and its general insulation from reversal or effective pressure (even when clearly wrong), on the other, makes the Court unique as well as remarkable. No other institution can disregard popular sentiment and still supply sustained leadership that is so readily accepted. If *Plessy*[10] shows how this strength has not always served the country well, *Brown v. Board of Education*[11] illustrates the contrary. For whatever the cause or the depth of disaffection, there are few formal procedures in addition to constitutional amendment with which to confront decisions of the Court. The only tool recognized, for exam-

4. For a similar recollection of Supreme Court history, but for a different purpose, see Moynihan, *What Do You Do When the Supreme Court Is Wrong?*, THE PUBLIC INTEREST, Fall 1979, at 1.

5. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

6. Pollock v. Farmers' Load & Trust Co., 157 U.S. 429 (1895).

7. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

8. Plessy v. Ferguson, 163 U.S. 537 (1896).

9. Lochner v. New York, 198 U.S. 45 (1905).

10. *Supra* note 8.

11. Brown v. Board of Educ., 347 U.S. 483 (1954).

ple, in *The Federalist Papers*[12] is impeachment. While Hamilton asserted that therein lies "complete security" against "deliberate usurpations . . . [of] authority"[13] by the Court, experience teaches that it is not an effective tool. Indeed it has been tried only once for a Supreme Court justice, and without success. Another device is legislation, either to overturn or mitigate a ruling, for Congressional enactments can be powerful persuaders encouraging the Court to reconsider past positions. In addition, a related course is to relitigate the issue because, as we remind our students, the facts and surrounding conditions can and do affect Court rulings. Both approaches, however, are difficult and often costly. Each bears the risk of failure, and if it does, the questioned decision will be further entrenched making subsequent reversal even more difficult. Moreover, neither addresses the fundamental problem of persuading the Court of its error (except indirectly).

This brings me to my final point and the reason for yet another series of papers and discussion on the Supreme Court's performance over the past decade. It is simply that the most powerful check on the Court is public discussion and debate. And it is here that the legal profession, and in particular the academic community, has a special role to play. For when issues rouse strong emotions, dispassionate analysis is more necessary than ever. In a recent talk at a law school, Justice William Rehnquist made the same point, albeit somewhat differently:

> [T]o the extent that the criticism is what I would call 'result-oriented'—that is, obviously determined by the fact that the critic is unhappy with the rule which the court has laid down—it will offer little help to the court subject to the criticism in making future decisions unless it is backed up with some sort of reasoning.[14]

Or, as the Chief Justice aptly noted (when still a member of a lower court): "A court which is final and unreviewable needs more careful scrutiny than any other."[15] It is in this spirit that our Symposium was organized and is being presented.

This is not to say that the Court has gone unnoticed in recent years, or even that its work the past ten years since Chief Justice Earl Warren's retirement has not been summarized, analyzed, reviewed and criticized. Even a casual reader of newspapers, magazines and books, much less law reviews, cannot but be impressed by the quantity if not the quality of numerous contributions. With this background in mind, we have sought to assemble a distinguished panel of constitutional law scholars to discuss the Court's performance.

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12. THE FEDERALIST No. 78 (A. Hamilton); THE FEDERALIST No. 81 (A. Hamilton).
13. THE FEDERALIST No. 23 (A. Hamilton) 599 (J. Hamilton ed. 1866).
14. Address by Justice William Rehnquist, Pepperdine University School of Law (November 17, 1979).
15. S. ARMSTRONG & B. WOODWARD, THE BRETHREN 5 (1979).