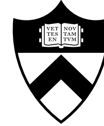
Princeton Legal Journal Forum



Volume 2 Spring 2022

FORUM

The Problems with Legislative Overrides of Judicial Rulings

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In April 2021, President Joe Biden signed an executive order establishing the 'Presidential Commission on the Supreme Court of the United States,' a commission of legal scholars formed to discuss potential reforms to the Supreme Court. In October of that same year, the Commission released discussion materials prepared in advance of its fourth meeting. These materials outline a variety of proposed reforms to modify "the Court's role in the constitutional system."[1] One reform that the Commission considers is the establishment of "legislative overrides of Supreme Court decisions."[2] The purpose of such overrides would be "to minimize judicial supremacy—i.e., the system under which the Court is the final and authoritative arbiter of the constitutionality of statutes or executive action."[3] These concerns about the Court wielding quasi-legislative power are valid. We believe, however, that legislative overrides are a poor solution for two important reasons: (1) they would undermine the principle of checks and balances, which is central to the functioning of our constitutional system, and (2) they would be contrary to one of the key purposes of the Court—to keep some fundamental issues (e.g. the right to vote, the free exercise of religion, etc.) *out* of the democratic sphere and safe from the influence of political majorities.

[1] https://www.whitehouse.gov/wp-content/uploads/2021/10/COURTS-ROLE.pdf, pg. 1.
[2] See footnote 1, pg. 25.
[3] Ibid.

The system of checks and balances is one of the most important features of the United States' constitutional system. In the words of James Madison, the purpose of checks and balances is to keep the branches of government "in their proper places."[4] Congress's gaining the power to override judicial decisions would threaten the proper functioning of this system. For one, the Court would lose its ability to prevent the legislature from passing unconstitutional laws, since the legislature could simply overrule any judicial ruling that invalidated a recently passed law. There would be no reason to expect Congress to ever invalidate a law it had just passed: if a congressperson who voted in favor of a law were to then vote to uphold the Court's decision that the law did not pass constitutional muster, it would amount to an admission that they voted for an unconstitutional law. The vote to overrule the Court, then, would most likely be simply a rehash of the vote to pass the bill. With a simple majority, Congress could exceed *any* constitutional limits put in place to restrain it, thereby defeating the purpose of imposing any restrictions upon Congressional authority at all. In an effort to combat judicial supremacy, a system of legislative overrides would result in judicial impotence: a judiciary incapable of checking a legislative branch that would instead be left to check itself.

The severity of these problems would be reduced if legislative overrides required a supermajority, rather than a simple majority of half of each legislative chamber. (The Commission's document does not specify what the necessary voting threshold would be.) This, however, would then become redundant with the amendment process, which requires a two-thirds majority of both chambers of Congress. So if legislative overrides were to be meaningfully distinct from the existing amendment process, they would have to require something *less* than a supermajority—and we would run into the same issues described above.

One could argue that legislative overrides would actually reinforce the system of checks and balances by imposing a check upon the judicial branch. We do not find this very plausible. It is not the purpose of a check or balance to render the checked or balanced branch too weak to properly function. The purpose of checks and balances is to ensure that no branch *exceeds* its constitutional limits, not to prevent one branch from fulfilling its role in the constitutional system while letting another branch enjoy *carte blanche*.

Another of the Commission's worries is that in interpreting the Constitution, the Court wields too much power. Giving a democratically elected branch the final

[4] James Madison, "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments" in *The Federalist Papers*.

say on issues of constitutionality, it thinks, would be more in line with the ideals underlying our system of government. The "chief aim" of legislative overrides, the Commission writes, "is to allocate power away from the Supreme Court and toward the elected branches…the Supreme Court exercises excessive power over the resolution of major social, political, and cultural decisions – decisions that would be better resolved through the democratic process" (p. 25). As expressed earlier, we are very sympathetic to these concerns. But we think questions of hermeneutics – and the controversies that arise for the Court boil down to debates about interpretation, *not* normativity – are not ones that are best resolved democratically. Leave normativity to the people; let them decide what things they value as a society. But let a separate, highly qualified panel deal with the issue of how to interpret complicated, often vague texts. Conflating these two distinct tasks into a common enterprise will only lead to each being performed less effectively and correctly.

The Court is a check on democracy, an (ideally) independent body that reviews the legislature's acts and determines whether or not it meets the acceptable standards of law *as previously set out by the people themselves.* This seems to us to be the point of a Bill of Rights in the first place. Deciding which rights are so basic and valuable as to merit their removal from the democratic sphere is up to the people's delegates. The legislature has expanded and shrunk the list from time to time via constitutional amendment. There is definitely value in designating some rights as 'off-limits' like this: it prevents the government from acting poorly towards groups that are underrepresented in the legislature. Who should determine whether or not Congress has violated these 'rules of the legislative game'? An extra-legislative body, one intimately familiar with the rules. As argued above, it would be pointless at best and dangerous at worst for this body to be the legislature itself, since the legislature obviously has a vested interest in a given law's passage.

We are not sure how best to prevent a supposedly independent Court from abusing its considerable power, though. The best fix, we think, would be for Justices to interpret the Constitution and statutes as tightly as they can, with as little room for ambiguity or creativity as possible. This, however, gets us into other hermeneutical controversies that we do not have the space to address. In any event, for the above reasons, it seems to us that granting the legislative branch itself the power to override judicial decisions would be one of the *worst* solutions to this problem—a solution that is fundamentally contrary to the purpose of the Court itself.