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"Reader Asks: How Do We Rein in Supreme Court
Justices?"

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A reader recently wrote to ask a question on the minds of many Americans: "If the courts check the other branches of government, who checks the courts?" The reader continued: "Since the Supreme Court enforces constitutional limits on the presidency and Congress through the exercise of judicial review, who can restrain the Court, particularly at a time when public opinion registers strong opposition to the Court's interpretation of the Constitution?"

This good question has been raised at other junctures in American history when the citizenry was dismayed by the performance of the Supreme Court. Thomas Jefferson believed that if the Constitution were ever destroyed, that it would be destroyed by interpretation, most likely by the federal judiciary. He warned of the danger in converting the Constitution "into a thing of wax."

In the 1930s, the Court rendered multiple decisions that blocked the efforts of the Roosevelt Administration to lift the country from the depths of the Great Depression. President Franklin D. Roosevelt effectively campaigned against the Court in 1936, attacking the Four Horsemen for their "Horse and Buggy jurisprudence."

There is no justification for judicial usurpation of power, what Alexander Hamilton criticized as encroachments on the legislative function, whether

undertaken for conservative or liberal causes. Judicial policymaking without foundation, an exercise in the discredited doctrine that the ends justify the means, recalls John Stuart Mills' warning about the disposition to "impose our own opinions as a rule of conduct for others."

Is it true, as Justice Harlan Fiske Stone wrote in 1936, that "the only check upon our own exercise of power is our own sense of self-restraint." If Stone's dictum applies to the behavior of Supreme Court Justices, then we are right to worry, since the fundamental premise of our constitutional system is that unchecked power in any hands is intolerable.

Fortunately, that is not the case. "Unchecked power," Hamilton wrote in Federalist No. 81, was not granted to the judiciary, which is why the Framers of the Constitution provided for the impeachment of Justices. President William Howard Taft, a staunch conservative and the only president in our history to serve as Chief Justice, complained in 1911 about the conduct of the judiciary He observed: "Make your judges responsible. Impeach them. Impeachment of a judge would be a very healthful thing in these times."

Taft may have been correct in his assumption about the "healthful" nature of the impeachment power, but our nation, across a vista of two centuries, has impeached just one Justice—Samuel Chase, in 1805—and the Senate trial failed to remove him from the High Bench. If the remedy of impeachment is largely unavailing, what else, if anything, might be done to restrain judges?

There is much to be said about an aroused public opinion, which is a powerful engine for change, as President Richard Nixon learned after the Saturday Night Massacre in October of 1973. A sustained public

repudiation of Supreme Court rulings and its legitimacy is impossible to ignore. Justices have said as much.

Scholarship heightens public awareness that the Court is leaping its boundaries. Justice Felix Frankfurter wrote, "Scholarly exposure of the Court's abuse of its powers would bring about a shift in the Court's viewpoint." Frankfurter could say that because he, like other members of the Court, had been academics prior to judicial appointment and enjoyed revealing insider conversations with Justices about their work.

Frankfurter, an intimate of Justices Louis Brandeis and Oliver Wendell Holmes, understood the impact of scholarly criticism on Holmes's free speech jurisprudence. Indeed, scholarly criticism, principally from Harvard Law Professor Zechariah Chaffee persuaded Justice Holmes to reformulate his conception of the Clear and Present Danger Test, which shaped the law governing free speech for the next half century.

Scholarly commentary can open lines of inquiry and criticism for editorial writers and other citizens who will speak publicly and write letters to the editor. In 1952, then Supreme Court law clerk William Rehnquist, later Chief Justice Rehnquist, observed first-hand the influence of newspaper editorials on the Court's ruling that President Harry Truman had unconstitutionally seized the steel mills to end a nationwide steel strike.

Criticism of judicial decisions, moreover, will draw attention to the presidents and senators responsible for judicial appointments, and further inform public opinion. Governmental accountability, James Madison explained, is the linchpin of American Constitutionalism.

The importance of calling the Court to account for inadequate reasoning or failure to answer persuasive counter arguments cannot be overestimated. Justice Robert H. Jackson, on more than one occasion, urged the public to shine a light on the Court's shortcomings. To the extent that the work of the Court is an intellectual enterprise, in which authors take pride in the quality and craftsmanship of their opinions and the ability to draw logical conclusions from the premises of their argument, reasonable criticism should always find traction.

American citizens, including judges and Justices, should not countenance a gulf between constitutional principle and governmental practice. Certainly, we should not tolerate the spectacle of a Court that pretends to lay down constitutional principles while in fact rewriting them in a manner that reflects their own political views.

