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The American Krytocracy

The Role of Judges Throughout American History

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Abstract

Before the United States Supreme Court issued the historic decision of *Brown v. Board of Education* in 1954, Justice Stanley Reed announced to one of his law clerks his fear that the Court, in issuing this decision, was becoming a krytocracy, or a "rule by judges." With the recent landmark case, *Citizens United v. FEC,* bringing into question the power of the judiciary in a democratic society, this paper will examine an historical arc of the progression of the power of judges in America. To do so, this paper will answer four research questions stemming from Justice Reed's comments. It will define a traditional judiciary, kritarchy, and krytocracy, in order to delineate the different stages of the development of judicial power. Then using a historical progression of Supreme Court cases, this paper will argue that the Court is firmly on the path of increasing judicial power, and that Justice Reed's fear of a krytocracy has indeed come to pass.

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He then inquired whether I believed in "krytocracy." When I confessed my ignorance of the definition of such term he directed me to one of his favorite sets of books, The Oxford English Dictionary, from which I learned that krytocracy means government by the Judges[1].

John Fassett on Justice Stanley Reed - 1953

1. Intro

Before the United States Supreme Court issued the historic decision of *Brown v. Board of Education* in 1954, Justice Stanley Reed announced to John Fassett, a law clerk, his fear that the Court, in issuing this decision, was becoming a krytocracy or a "government by the Judges." The fears of Justice Reed involve the creation of a Supreme Court in which justices, not law, bear the legal standards of American society. Is the so-called American democracy in reality a system of "rule by judges" as Justice Reed dreads, or is he simply crying wolf in a system that is operating on higher ideals – popular will, the rule of law – and is upset with an outcome that is not in line with his own personal beliefs? This question has important relevance today. With the recent political controversy around the appointment of Justice Sonia Sotomayor and the inevitable political battle concerning the confirmation of Justice John Steven's replacement, the role of judicial power in the United States is continually the topic of political debate. The reason that such events are hotly contested political battles is because of the implicit notion that all politicians recognize: The Supreme Court *is* the ultimate authority in America, and individual justices *do* make a difference.

A recent example of judicial authority in politics can be seen in the landmark decision, *Citizens United v. Federal Election Commission* (2010). *Citizens* serves as a starting point for this project, and the dynamics of the decision have led to an investigation into Justice Reed's

[1] Qtd in Din, Viet. "Structures of Governance: "Fixing" International Law with Lessons from Constitutional and Corporate Governance," *NYU Journal of Law and Liberty* Vol 3:423, 2008. *pg* 429-30

comments. In *Citizens*, the Court yet again established its power over the American political process by eliminating restrictions on corporate spending for elections, arguably overturning centuries of legal reasoning. Such a decision raises the novel possibility that perhaps Justice Reed's fears have been correct after all. Maybe the Court has done away with the traditional role of the judiciary outlined in the separation of powers doctrine. And maybe the Supreme Court really is the ultimate authority in American governance. If so, has American democracy been replaced with an American krytocracy?

1.1 Research Questions

This questions raises concerns about the true structure of American governance, with the supposed reliance on a separation and balance of powers, the sovereignty of the democratic will, and the rule of law. The logical extension of Justice Reed's claim unfolds into four main questions through which this paper will be structured as it analyzes the dynamics of judicial power:

1. What does Justice Reed mean by "rule by judges"? What is a Krytocracy?
2. What is the relationship between a Krytocracy and American Democracy?
3. How can we recognize a Krytocracy?
4. What are the implications of an American Krytocracy today?

1.2 Hypothesis

This paper will argue, through a combination of legal and political theory, as well as a historical analysis of certain landmark Supreme Court cases, that the power and authority of the

Supreme Court has undermined the rule of law and the sovereignty of the people, and today we are governed by exactly what Justice Reed feared, an American Krytocracy.

2. What is a Krytocracy?

The obvious first step of this process is to provide a definition for the elusive term. A basic definition of krytocracy provides that it is a "rule by judges". However, such a simple definition does not provide the information needed to comprehensively determine the remaining research questions. Therefore, this paper will first define the initial stages of the progression of judicial power and authority, a traditional judiciary and a kritarchy.

2.1 Traditional Judiciary

The development of the traditional role of the judiciary in Western legal culture has been distilled from two key sources. The first is in the writings of the ancient Greek historian, Polybius, who chronicled the style of government of the Roman Republic, including an analysis of the unwritten Roman constitution. The motive of his writings was to preserve and explain the "greatness of Rome"[2]. He describes how the Roman form of "mixed constitution" created a system of checks and balances. It is to this important element that Polybius attributes the power and longevity of the Roman Republic, and it is also the element that many modern Western forms of government have since sought to emulate and perfect. According to Polybius, the Roman constitution had three elements, each with sovereign powers, and "their respective share

[2] Coker, Francis. *Readings in Political Philosophy.* MacMillan Co.: New York. 1938. pg 113.

of power in the whole state had been regulated with such a scrupulous regard to equality and equilibrium, that no one could say… whether the constitution … were an aristocracy or democracy or despotism"[3]. Yet, as Fritz concludes in his analysis of Polybius, although the Roman system did not actually exist as what people today would describe as a system of checks and balances it did provide for important limits to the powers of the aristocracy[4]. However, the writings of Polybius emphasize the role of separation of powers to such an extent that the idealistic nature of the concept survived in the broadest sense: *No branch of the government should have unlimited and supreme authority and power.*

Another key source of the formation of the concept of the traditional judiciary comes from the work of Charles de Secondat, Baron de Montesquieu. Like Polybius, Montesquieu advocated for a system of checks and balances. He viewed it not through the lens of promoting the power and endurance of an empire, but as the only way to ensure that the liberty of the people will not be encroached. He analyzed the English government of the time as an example of liberty being upheld by governmental checks and balances[5]. Montesquieu wrote that protection of liberty is directly related to judicial powers stating:

> There is no liberty if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control: for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression[6].

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[3] Polybius. Qtd. in Coker, Francis. *Readings in Political Philosophy.* MacMillan Co.: New York. 1938. pg 121.
[4] Fritz, Kurt Von. *The Theory of the Mixed Constitution in Antiquity: A Critical Analysis of Polybius' Political Ideas.* Columbia University Press*:* New York, 1954. pg. 219.
[5] Coker, Francis. *Readings in Political Philosophy.* MacMillan Co.: New York. 1938. pg 594.
[6] Montesquieu Qtd. in Coker, Francis. *Readings in Political Philosophy.* MacMillan Co.: New York. 1938. pg 619.

The extension of the separation of powers concept to the judiciary is an important development in Western legal culture. At this point, legal rules had usurped the "rule of God" or the "rule of the monarch," and judges' interpretations of the law became crucial in defining how the government could and could not act. Hence, a traditional judiciary reflects the core values of the separation of powers.

2.2 Kritarchy

In a kritarchy, the power of judges is increased substantially compared to a traditional judiciary. Like a krytocracy, a kritarchy also elevates judges as "rulers". However, in a kritarchy, judges get their authority from the rule of law and are consequently bound to it. In order to develop the concept of a kritarchy, this paper will examine two main legal doctrines and philosophies, legal positivism and originalism. Both of these legal constructs involve a heavy reliance on the written laws and precedents developed by all branches of government. The important distinction that this paper will be making, however, is that any action within a kritarchy necessitates that the judicial branch is the implicit or explicit ruling body of government. Therefore, judges in a kritarchy are overstepping their bounds within the traditional landscape of separation of powers.

Because judges in a kritarchy are acting beyond the traditional role laid out by Polybius and Montesquieu, they must derive authority from a different source than traditional judges. The basis of that authority can be seen in the philosophies of legal positivism. A broad characterization of legal positivism would be that the "only legitimate sources of law are those written rules, regulations, and principles that have been expressly enacted, adopted, or

recognized by a governmental entity or political institution, including administrative, executive, legislative, and judicial bodies" [7]. The application of legal positivism to the definition of a kritarchy captures the way in which judges are bound to preexisting legal reasoning and doctrine.

Another important aspect of a kritarchy can be best understood with an inspection of the origins of the term. A "kritarchy" was coined by English author Robert Southey. It is derived from the Greek word "krito" meaning "to judge," and was used by Southey to describe the Jewish form of governance chronicled in the Biblical book of Judges. Although the "judges" in this system were not judges as we would view them today, the concept still transfers into a contemporary context. In Judges, the leaders were best described as patriarchs that were unelected, had no birthright to their rule, and were "heroes upon whom 'rested the spirit of God'"[8]. The "judges" were beholden to the rules and regulations outlined in their religious beliefs, particularly those found in the Ten Commandments. Thus, this type of direct application of preexisting laws and regulations fits nicely into an additional legal philosophy that can be applied to a kritarchy, originalism.

The idea that the rules and laws come from a divine and unquestionable power, or God, mirrors the fealty and reverence that an originalist in the United States holds for the Constitution. In the case of the Israeli kritarchy, the judges had such faith in the omniscience of God that they did not need to rely on their own opinions or biases. They simply needed to apply the word of God in such a way that He would approve. The same goes for an originalist judge in the United States. The Constitution is backed by the ideals that birthed America, and therefore the provisions of the document should be considered infallible. The explicit implication of such a

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[7] *West's Encyclopedia of American Law*. West Group Publishing. 1998. pg. 240
[8] *Encyclopaedia Judaica*. Ed. Michael Berenbaum and Fred Skolnik. Vol. 11. 2nd ed. Macmillan Reference: Detroit. 2007. p561.

philosophy is that the words written in the Constitution must be applied today in such a way that the founding fathers would acknowledge as appropriate. Therefore, a kritarchy is an application of supreme judicial power based on the Constitutional rule of law.

2.3 Krytocracy

With the definitions of the initial stages of judicial power in place, this paper now turns to the original term that prompted clerk John Fassett to utilize the Oxford Dictionary. A krytocracy exists along similar lines as a kritarchy. In fact, many reference books use the terms interchangeably, stating that both mean a "rule by judges." However, an important distinction exists. While a kritarchy is a government of rule by judges, tied to the rule of law, a krytocracy allows for judges to rule *and* allows them to rule in a way that strongly reflects their individual principles and opinions. Judges in a krytocracy utilize their supreme power to impose their personal discretion in order to reach "preferred" outcomes to legal decisions. Stated in this way, it may seem like a perversion of the very concept of equality and justice. However, a judge reaching a "preferred" outcome does not necessarily imply that the decision is the judge's moral or ideological preference, but instead may be the outcome that the judge "prefers," or deems just, based on all the legal and extra-legal factors in the case. Therefore, a krytocracy provides for the possibility of very equitable judgments, in the same sense that a monarch with supreme power can provide similar benefits. The issue, of course, is the possibility of abuse that such a system inevitably creates. What happens when the benevolent king passes the crown to his power-hungry and irrational son? Where does that leave justice?

Because a krytocracy allows for such a wide possibility of conclusions to any given legal problem, it is imperative that, for purposes of focusing the definition, a distinction is made between the outer edges of the term. The first form of krytocracy corresponds with the philosophy of legal scholar Ronald Dworkin. The second form can be best compared to Legal Realism as developed by the traditional scholars of the school.

Dworkin's main focus lies in his "'moral reading' of American legal materials that pays full attention to the principles ostensibly underlying our institutions"[9]. His importance in the development of the term krytocracy stems from his ultimate rejection of positivism. Dworkin rejects "the idea that the law on a particular question can be identified exclusively by its sources"[10]. Instead he embraces the concept that judges must utilize their principles to achieve the appropriate application of laws. Therefore, a krytocracy does not rely solely upon the written laws, but it allows judges to make justifiable decisions in light of the circumstances, whether they are legal, moral, political, etc.

Legal realism can best be stated as "skeptical about the efficacy of [legal rules] in the real world of adjudication," and therefore views the legal system as a "function of the ever-changing social and cultural context"[11]. Some of the most prominent legal minds of the twentieth century, including Jerome Frank and Oliver Wendell Holmes, promoted this belief. Yet, for the later part of the century, Realism has been highly discredited as impractical because of its over-reliance on everything other than law – social science, politics, judges' ideology, pragmatism – to predict legal outcomes. However, radical departure from legal norms is exactly what judges in a

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[9] Levinson, Sanford. "Hercules, Abraham Lincoln, the United States Constitution, and the Problem of Slavery," *Ronald Dworkin.* Ed. Arthur Ripstein. Cambridge University Press: New York. 2007. pg. 136-7.
[10] Ripstein, Arthur. *Ronald Dworkin.* Ed. Arthur Ripstein. Cambridge University Press: New York. 2007. pg. 3.
[11] Been, Wouter de. *Legal Realism Regained: Saving Realism from Critical Acclaim.* Stanford University Press: Stanford. 2008. pg 7.

krytocracy have the ability to do. Therefore, though a Realist krytocracy less likely than the more moderate theory promoted by Dworkin, it serves as an extreme limit to where the power and expanse of the judicial branch could theoretically go.

Taking into account the upper and lower limits of judicial power within a krytocracy, the term is made clear. In both cases, judges exercise supreme authority over the other branches of government. The difference lies in the extent that the judges are able to implant their own personal beliefs into the legal system. That difference is also key in relating the other stages of judicial power to a krytocracy. Each stage – traditional judiciary, kritarchy, and krytocracy - has a basis of authority, and analyzing the relationship of that authority to the concept of American democracy, answers the next important question about a krytocracy.

3. How Does a Krytocracy Relate to American Democracy?

To answer this question, this paper will begin by examining theories about how the power of the judiciary has been able to expand to create a krytocracy. This discussion will highlight how a krytocracy can exist in the face of what is, in theory, a representative democracy ruled by elected officials.

Next this paper will examine the way in which the law and democracy interact through the interplay of will versus reason. In a democracy, leaders must have legitimacy. In most cases that legitimacy is derived from the people through elections. However, Supreme Court Justices are not popularly elected, and can theoretically establish their authority from another source. Thus, this paper will argue that each stage on the progression of judicial power has a different source from which judges maintain their authority. Additionally, it will show how judges at each

stage can use their discretion within the limits of their authority to expand the boundaries of their power.

3.1 Growth of Judicial Power

Two theories describe why the power of judges has increased to the point of krytocracy despite the ideal of American democracy. The first is Max Weber's theory of "rationalization," and the second is Paul Pierson's theory of retrenchment

3.1.1 Max Weber's "Rationalization"

One of the central tenets of Max Weber's political philosophy is the "irreversible trend toward rationalization in Western civilization"[12]. It was this theory that led to predictions that societies would essentially become swallowed up by bureaucracy, which Weber thought was the most efficient and rational form of government. He argued that this type of rationalization would "produce an iron cage of future serfdom in which men will have to live helplessly," and therefore needed the counterbalance of a "charismatic politician" to stop it from overtaking society[13]. He correctly predicted that Soviet Russia, lacking such charismatic leadership, would be consumed by over-rationalization of its bureaucracy.

Weber argues that rationalism is based on pragmatism and the intelligence seen in man's ability to reason[14]. Weber also said that different societies rationalize in different ways[15]. His

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[12] Dronberger, Ilse. *The Political Thought of Max Weber: In Quest of Statesmanship*. Meredith Corporation: New York. 1971. pg 1.
[13] Qtd. in Mommsen, Wolfgang. *The Political and Social Theory of Max Weber: Collected Essays.* The University of Chicago Press: Chicago. 1989. pg. 116-7.
[14] Dronberger, Ilse. *The Political Thought of Max Weber: In Quest of Statesmanship*. Meredith Corporation: New York. 1971. pg 2.

theory of rationalization taking the form of bureaucracy was founded on his examination of German society. Therefore, in American society, rationalization could take an alternate form. Although it is clear that the United States has seen an increase in its bureaucracy, the area of government that is typically viewed as the most rational is the rule of law. In this sense, the American form of rationalism is reliance upon legal reason. Therefore, If Weber's philosophy is correct; America will trend towards rationalization, and continue to create more laws. The increase in rationalization will inherently increase not only the number of laws but also their scope, as society becomes more complex, more areas exist for laws to be applied. Because judges have the ultimate authority over laws, an increase in laws inevitably increases judicial power. Thus, Weber's theory of "rationalization" as applied to the United States is a catalyst for a constant increase in the power of the judiciary.

3.1.2 Paul Pierson's Theory of Retrenchment

Paul Pierson's theory of retrenchment argues that government size and power is very difficult to eliminate once it is in place. He argues that politicians, like Ronald Reagan and Margaret Thatcher in the 1980's, are extremely limited in the amount of success they can achieve in retrenching the power of the government. They may be able to weaken certain "left wing" strongholds, like unions and left-of-center parties associated with "big government." Yet, the overall effect of reducing the reach of government (i.e. spending and overall power) is negligible[16]. The reason for this is that once government programs are created, they establish

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[15] Mommsen, Wolfgang. *The Political and Social Theory of Max Weber: Collected Essays.* The University of Chicago Press: Chicago. 1989. pg. 162.
[16] Pierson, Paul. *Dismantling the Welfare State?: Reagan, Thatcher, and the Politics of Retrenchment.* Cambridge University Press: New York. 1994. pg. 28-9.

constituencies at all levels of society. Then, those entrenched interests are practically impossible to eliminate. Therefore, even though Reagan had a powerful popular mandate to reduce "big" government and spending, he was ultimately unable to do so.

If a political movement, like Reagan's, or an individual judge attempt to make efforts to retrench the power and scope of the judiciary, they will most likely be unsuccessful. That is because, like government spending, additional legal rights and privileges create "constituencies." These constituencies are constructed, not of interest groups and lobbyists, but instead of lower-level judges (i.e. not Supreme Court Justices) and lawyers that have to work every day with legal rules. Institutional actors such as these, while typically never in total agreement, traditionally work within the rules that have been established by more powerful entities, such as the Supreme Court or Congress. However, once one of these more powerful actors creates a new legal rule – for example, the right to privacy - the lower level actors instantly begin expanding that rule in whatever way suits their specific needs. Once this occurs, an individual judge or political actor will find it extremely hard retrench the consequential expansion of judicial authority. Like a runaway train, new legal rules create precedent on top of additional legal rules that become entrenched in the legal culture, expanding judicial power by giving it more avenues to influence policy.

Thus, if Pierson's theory of retrenchment is combined with Weber's rationalization, the result is a system of government that is continually giving more and more power to the judiciary but is unable to take it back. Therefore, once the forces of rationalization impose a government in which judges have ultimate authority, the people and other branches of government will most likely be unsuccessful in any attempts to retrench that power.

3.1 Balance of Popular Will and Legal Reason

One of the fundamental divides that exists in the American legal system is the appeal to both the rule of the people and the rule of the law. These two concepts traditionally have equal importance in what the proper role of a democratic government is thought to be. Jefferson extols the need to rely on the popular majority proposing that all laws (including the Constitution) should terminate after 19 years, allowing the popular will to reassert its authority each generation[17]. Conversely, the Supreme Court declared in *Marbury v. Madison* (1803) that "the government of the United States has been emphatically termed a government of laws, and not men"[18]. Hence, the ideas of the rule of law and rule of the majority seem to exist simultaneously, yet in many ways seem to be incompatible. Laws are typically thought to be the product of reason while majority rule is thought to be irrational and unreasonable (though not necessarily unjust). The rule of law is constant, engrained in writing or precedent and slow to adapt. Popular will ebbs and flows with the passing of time, evolving with the development of society. Paul Kahn writes that "the ambition of law's rule in a democratic polity is to reach a coincidence of will – popular consent – and reason"[19]. He goes on to declare that this ambition is never fully achieved, and that the "debate about the Court's role revolves endlessly around the dilemma of reconciling reason and will"[20]. This dilemma identifies another way in which Weber's philosophy can be incorporated. Weber argued that the only way to control the process of

[17] Kahn, Paul. *Reign of Law:* Marbury v. Madison *and the Construction of America.* Yale University: 1997. Pg 9.
[18] *Marbury v. Madison* (1803)
[19] Kahn, Paul. *The Cultural Study of Law.* Chicago: University of Chicago Press. 1999. pg 8.
[20] Kahn, Paul. *The Cultural Study of Law.* Chicago: University of Chicago Press. 1999. pg 14.

rationalization, was through charismatic leaders which were by definition irrational[21]. Therefore, in the dilemma of will versus reason, one can also see the efforts of society to balance rationalization with irrationality. Thus in order to truly define a krytocracy as the ultimate form of judicial power (and "rationalization") it is necessary to articulate the interplay between will and reason of each definition on the progression of judicial power.

3.1.1 Traditional Judiciary: Popular Will

A traditional judiciary maintains its authority from the popular will. Certainly, judges in a traditional role consider the rule of law as origin of their power, but their authority comes from the people. This type of legal structure holds each branch of the government in equal accord. Courts must give deference to their two companion branches, both popularly elected. Decisions must be measured so as to avoid the pitfalls pronounced by traditional Western thought. Judges must adhere to Montesquieu. They must avoid acting as legislators or executors in order to ensure that the political liberty of citizens is preserved. They must also maintain equilibrium with the other branches so that the longevity of the American system of government is maintained, in accordance with Polybius. These ideals require that Congress and the President each control an equal share of the power, necessarily resulting in a system that bestows more authority to elected officials. Thus, a structure adhering to the definition of a traditional judiciary gives judges only the amount of power that is afforded to them by the popular will.

Judicial discretion inevitably plays a role in a traditional judiciary, but in the most limited way feasible. Discretion is required for a judge to make any judgment, and that discretion can

[21] Dronberger, Ilse. *The Political Thought of Max Weber: In Quest of Statesmanship*. Meredith Corporation: New York. 1971. pg 2.

manifest itself in simply the choice to make any judgment at all. Hence, the lowest level in the hierarchy of utilization of judicial discretion is the "gate keeping" responsibility played by judges. The decision to even hear a case can have important implications. A judge will most likely choose not to hear cases concerning the possibility of overturning existing policies. The logical implication of this limited scope of discretion is to rely on the traditional governmental structure and legislative process to implement social and legal change and to assume those actions to be constitutional. Therefore, the relationship between a traditional judiciary and a democracy enforces the fact that a traditional judge is granted authority by the popular will. Thus, judges must enforce the will of the people and utilize their discretion accordingly.

3.1.2 Kritarchy: Legal Reason

Reliance on the Constitution as the most important legal authority places kritarchy heavily on the side of legal reason. The Constitution upholds the rule of law in American society as a beacon of the supremacy of reason. Despite the fact that the Constitution was ultimately a result of popular will, with the requirement of ratification, "belief that the Constitution is a product of reason, deliberation, and political science remains a vital part of [American] political self-understanding"[22]. Therefore, a kritarchy is embedded with the imperative conclusion that a discussion of democracy in the United States begins and ends with analyzing the Constitution.

Nevertheless, that is not to say that a kritarchy does not afford any courtesy to the popular will. With the tenets of legal positivism in place, a kritarchy is still required to recognize the legitimacy and importance of rules and laws that have been created by other branches of

[22] Kahn, Paul. *The Cultural Study of Law.* Chicago: University of Chicago Press. 1997. pg 10.

government. However, not all actions of the popular will are to be treated with the same reverence. The important distinction is made clear through the writings of H.L.A. Hart as he describes a term that plays a prominent role in the Utilitarian definition of positivism. He states that the Utilitarian relies on "commands" as the ultimate authority of judicial power. Hart distinguishes commands as only those laws that satisfy two conditions:

> First, they must be general; second, they must be commanded by what exists in every political society whatever its constitutional form, namely, a person or group of persons who are in receipt of *habitual obedience* from most of the society but pay no such obedience to others. These persons are its sovereign. Thus law is the command of the uncommanded commanders of society – the creation of the legally untrammeled will of the sovereign who is by definition outside the law [emphasis added][23].

Hart's concept of an acceptable law that a judge within a kritarchy must obey highlights an important point. In this definition, the Constitution is the sovereign. The key phrase is "habitual obedience," which eliminates a single Congress or President from being around long enough in the American system for a "habit to grow up"[24] (Interestingly, federal judges are the only individuals that serve life-terms in the United States, possibly enough time to grow a "habit"). Therefore, the elected branches of government cannot, by themselves create a command. It requires an engrained legal culture or rule that can only be created over large spans of time. Thus, in most cases the commands that judges in a kritarchy must follow derive directly from the

[23] Hart, H.L.A. "Separation of Law and Morals." *The Philosophy of Law.* ed. R.M. Dworkin. Oxford University Press: New York, 1977. pg 19
[24] Hart, H.L.A. "Separation of Law and Morals." *The Philosophy of Law.* ed. R.M. Dworkin. Oxford University Press: New York, 1977. pg 19.

source that has had the longest reign (with only twenty-seven Amendments), the U.S. Constitution.

The function of judicial discretion within a kritarchy plays a more important factor than in a traditional judiciary. While in both definitions a judge must give deference to a higher ideal, separation of powers and the rule of law respectively, judges in a kritarchy control a substantially greater amount of power and authority. Thus, any amount of discretion used in a kritarchy will inherently have more of an impact than the same amount of discretion used within a traditional judiciary. One may question the ability for discretion to play a role because of the strict reliance upon the rule of law. However, within a kritarchy judges are forced to use discretion when ambiguous legal concepts are in question. Such concepts are not inquiries into principles or morals, but, instead, into meaning. Hart illustrates this concept with the example of the word "vehicle" used in a statute that forbids taking a vehicle into a public park. He states that:

> Plainly this [rule] forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about aeroplanes? Are these, as we say, to be called 'vehicles' for the purpose of the rule or not? … There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable or obviously ruled out[25].

It is within this penumbra, Hart argues, that judges must use their discretion. They must decide how to solve the "problem of the penumbra" by incorporating social aims, purposes, and policies to the language of the law. Sole reliance upon logical application of the rule of law in the kritarchy only gets a judge so far. There is also a need for interpretation of legal terms that can

[25]Hart, H.L.A. "Separation of Law and Morals." *The Philosophy of Law*. ed. R.M. Dworkin. Oxford University Press: New York, 1977. pg 22.

have multiple reasonable meanings. Hence, discretion is necessary to make such distinctions, but that discretion is not applied "in the light of anything we would call moral principles"[26].

A kritarchy's relationship to American democracy stems from its authority rooted in the Constitution. Americans recognize the authority of the rule of law, and therefore accept judges who act in accordance to legal reason instead of popular will. Therefore, judges have the ability to utilize their discretion by interpreting the rule of law through the application of legal reasoning.

3.1.3 Krytocracy: Personal Discretion

A krytocracy all but dispatches the need to debate the role of will versus reason. The definition of a krytocracy expands the field from which a judge can gain authority. Because a judge can operate on legal principle, moral principle, or even political principle, and still make enforceable decisions, the concept of one ultimate authority is obsolete. In a krytocracy, a judge can appeal to the authority of just about anything.

Dworkin's view restricts that authority. In fact, he is able to reconcile the popular will and legal reason in his frameworks, stating that it may "seem as if democracy and the rule of law were at war," but that it "is not so"[27]. He argues that the rule of law, which is not based solely on written laws but instead on a moral outlook, "enriches" democracy by ensuring individual rights. The issue is that he incorporates morals into the concept of the rule of law, giving judges more discretion than in a kritarchy, and thus more power.

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[26] Hart, H.L.A. "Separation of Law and Morals." *The Philosophy of Law.* ed. R.M. Dworkin. Oxford University Press: New York, 1977. pg 28.
[27] Dworkin, Ronald. *A Matter of Principle.* Harvard University Press: Cambridge. 1985. pg 32.

A realist interpretation of the will versus reason question is much more cynical than that of Dworkin. With this interpretation, the rule of law and popular majority are both simply tools that a judge can utilize to arrive at the preferred conclusion. However, this creates a problem for the definition of a krytocracy in its relationship to democracy. When does a judge who "prefers" the outcome reached aligned with the *rule of law* enter into a kritarchy? How can a judge be acting under the traditional judiciary if his or her actions are inevitably spurred by a "preference" for the separation of powers? The answer rests with the judicial discretion. Because a krytocracy does not base its authority in either the popular will or legal reason, judges must depend on personal discretion. Whether it is a moral "rule of law" or simply a political preference, that personal discretion is ultimately the source of a judge's authority.

In discussing the range of judicial discretion for a krytocracy, this paper will once again establish the outer limits by turning to the philosophies of Dworkin and Legal Realism. Dworkin states that there are two ways in which judges can legitimately rest their legal claims on political arguments, either utilizing political principles that "appeal to the political rights of individual citizens" or political policies that promote "some conception of the general welfare or public interest"[28]. However, he rejects the notion that judges should simply vote "their personal political convictions as much as if they were legislators or delegates to a new constitutional convention"[29]. Therefore, with Dworkinian discretion, judges can use political will to decide cases, as long as they appeal, in good faith, to a coherent interpretation of societal norms and welfare. Judges in this system are actually tied to the rule of law in a greater degree than judges in a traditional judiciary, because they must take legal principles into account before a decision is

[28] Dworkin, Ronald. *A Matter of Principle.* Harvard University Press: Cambridge. 1985. pg 11.
[29] Dworkin, Ronald. *A Matter of Principle.* Harvard University Press: Cambridge. 1985. pg 2.

reached. However, judges can alter the rule of law based on principle to obtain the "right answer," acting as "heroic Dworkinian judges"[30].

On the other hand, a Realist based interpretation of judicial discretion allows for a much wider array of variables than that of Mr. Dworkin. Jerome Frank argued that judges use inordinate amounts of discretion even in the application of logic to a legal analysis. Frank claims that the "joker" in logic is the "selection of premises" which is "full of hazards and uncertainty"[31]. To make a distinction between a wide array of possible premises, a judge will inherently utilize a bias. Frank's assertion makes clear that in a krytocracy, judges do not have to necessarily admit, or even realize, that they are in fact imparting their own prejudices when selecting premises. He famously argued that these types of biases can be influenced by things as mundane as what a judge may have eaten for breakfast[32]. Therefore, for Frank, judicial discretion provides the basis for every legal decision. In this sense, krytocratic judges are appealing the authority of their own biases.

In relation to democracy, a krytocracy is not necessarily an anathema. As Dworkin claims, judges relying on moral principle can actually "enrich" democracy. However, a krytocracy does not base its authority on either the popular will or legal reason, and thus judges are free to utilize their own discretion as a basis for authority. Judges can rely on more concrete ideals, but are not beholden to them like a traditional judiciary or kritarchy. Therefore, a krytocracy puts a democracy in a precarious situation, relying on the personal discretion of judges.

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[30] Nourse, Victoria and Gregory Shaffer. "Varities of New Legal Realism: Can a New World Order Prompt a New Legal Theory?" *Cornell Law Review.* 95 Rev. 61. pg 135.
[31] Qtd. in Been, Wouter de. *Legal Realism Regained: Saving Realism from Critical Acclaim.* Stanford University Press: Stanford. 2008. pg 142.
[32] *West's Encyclopedia of American Law*. West Group Publishing. 1998. pg. 240

In summary, in defining a krytocracy and its relationship to American democracy, three key factors can be identified. When each of these factors is present, then an American krytocracy must be in power.

1. The judicial branch has supreme authority over the actions of the other branches.

2. The scope of the judiciary has increased due to "rationalization" and difficulty of retrenchment.

3. Judges appeal to their own principles rather than the authority of popular will or the rule of law.

4. How Can We Recognize a Krytocracy?

A krytocracy can be recognized when the main factors shown above are present at the Supreme Court level and in society. Such recognition is not always easy, and is open to varying interpretation. However, this paper will argue that these factors are present in America, and have been since *Brown v. Board of Education.* In order to establish that a krytocracy has developed, this paper will utilize a historical progression beginning with *Marbury v. Madison* and ending with *Citizens United,* the case that sparked this research project.

4.1 Why a Historical Progression?

The definition of a krytocracy involves the establishment of a judicial branch that employs supreme authority. Such a power shift cannot happen overnight. Additionally, Weber's rationalization takes years to develop, and it is not until these two important factors are in place

that judges have the established authority to begin to rely upon their own discretion. Therefore, this paper will argue that by tracing a historical progression across five landmark Supreme Court decisions it will be able to show the social and legal development that was necessary to produce an American krytocracy.

The inclusion of a historical progression illustrates the inevitable legal transformations that have taken and will continue to take place in American society. One of the main shapers of each of these transformations is the Supreme Court. Because Supreme Court decisions have precedent that lengthens their impact on society, each consecutive decision increases judicial power and is built "out of materials inherited from the past" [33]. This "building-block" development explains why the definitions of a traditional judiciary and a kritrachy are so important. Only when those stages of judicial power have established themselves, can a krytocracy develop. Therefore, with each landmark decision, this paper will show how the Court was able to establish itself either as a traditional judiciary, kritarchy, or krytocracy.

Nevertheless, the strategy of developing a historical progression is not foolproof, and counterarguments do exist. The first that this paper will address is the argument that it is impossible to determine that all decisions in a given time period reflect the judicial power of either a traditional judiciary, kritarchy, or krytocracy. A response would be simple. Within a given time period, decisions can occur by judges that reflect any of the three terms. Therefore, when a definition is applied, it reflects trends in the power of the courts. These trends portray how a *majority* of crucial and pivotal cases reflect judicial power and authority, especially at the level of the Supreme Court. Once a level of judicial power has been established, judges are more likely to maintain that level in accordance with Pierson's theory of retrenchment. This paper

[33] Ackerman, Bruce. *We the People: Transformations.* Harvard University Press: Cambridge. 1998. pg 384.

works with broad strokes through history to paint a big picture, and a more detailed examination containing a case-by-case analysis of every decision encompassed in American history, must be reserved for future projects.

A second counter-argument to a historical progression is that all of the cases that this paper will discuss can be interpreted to reflect a greater or lesser degree of judicial power. While that is most definitely true, this paper hopes to provide enough evidence to fit each case into a progression that will show that the United States has ultimately become a krytocracy.

The third and final counter-argument that this paper will address is the argument that five cases do not signify a large enough portion of history to show a true progression. This paper will be arguing that because each case took place during such a pivotal point in American history, their inclusion is sufficient. In an attempt to distill over two-hundred years of history, this paper will once again be using broad strokes. It will only focus on a handful of important historical events that have had the greatest impact on American law and society.

4.1.2 *Marbury v. Madison*

As America came to terms with itself as a nation, the effort to lay the groundwork of the political structure of the young country began as various parties struggled to establish themselves. Judicial power was at the traditional judiciary stage with judges lacking judicial review of actions taken by Congress and the Presidency. Therefore, judges were beholden to the will of the people. During this time period, a battle between the rule of law and the will of the people commenced. On one side was Thomas Jefferson and his self-proclaimed Second American Revolution after the election of 1800, and on the other, the Federalists like John Adams and John Marshall with their vision of the permanent rule of law based on the

Constitution[34]. Eventually, the Court's decision under Chief Justice Marshall in *Marbury v. Madison* claimed victory from Jefferson and established the rule of law as the centerpiece of U.S. jurisprudence. Instituting what would eventually become an American kritarchy.

Because judges maintained authority from the people, their arguments were most often based on politics. During the years after ratification, "federal courts were more likely to appear as simply another forum for the pursuit of political action"[35]. Judges and politicians alike recognized this fact, and adjusted their strategies accordingly. President Adams and the Federalists passed the Judiciary Act of 1801 as their terms waned to a close, allowing Adams to appoint an additional sixteen federal judges while reducing the number of Supreme Court Justices from six to five, eliminating the ability for the Republicans to replace a retiring Federalist Justice. Adams filled the federal vacancies with loyal partisans, complimenting a Supreme Court with Adams' Secretary of State John Marshall as Chief Justice. These actions resulted in a Federalist "barricade" with the ability to destroy "all the bulwarks" of the incoming Republican administration[36]. Recognizing the political philosophy of the courts, Republicans, like Senator William Giles of Virginia, called for the impeachment of "all the Judges of the Supreme Court" because they held "dangerous opinions," arguing that the legislature had the right to remove them from the bench in favor of "men who will fill [it] better"[37]. Holding that Congress could supplant the entire Supreme Court for political reasons is an argument that many current politicians may secretly dream of but never realistically deem possible. However,

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[34] Hall, Kermit. ed. et al. *American Legal History: Cases and Materials: Third Edition.* Oxford University Press: New York. 2005. pg. 136.
[35] Kahn, Paul. *Reign of Law:* Marbury v. Madison *and the Construction of America.* Yale University: 1997. Pg 11.
[36] Kahn, Paul. *Reign of Law:* Marbury v. Madison *and the Construction of America.* Yale University: 1997. pg 11-13.
[37] Quoted in Smith, Page. *The Shaping of America.* McGraw Hill: New York. 1980. pg 496-7.

because the traditional judiciary placed so much authority on the popular will, politicians had much more influence on judicial power.

Before *Marbury,* federal courts did not have the power of judicial review and could not declare acts of Congress unconstitutional. That allowed the will of the people, fresh off of an election putting Thomas Jefferson into office, to dominate the political actions of the country. The arguments of Jefferson rejected a rule of law. He claimed that "no society can make a perpetual constitution or even perpetual law" stating that "the earth belongs to the living generation"[38]. The Constitution had been ratified, but its implications were not yet fully accepted, especially by Jefferson. Hence, at a time when judges had limited authority from any source other than the majority, *Marbury* established the rule of law as the authority of judicial power. This action began the progression that would eventually lead to a krytocracy.

The facts of *Marbury* are simple. William Marbury was nominated by President Adams as a justice of the peace and confirmed by the Senate during the last days of the Adams administration. Marbury was never able to take office because confusion during the changing of administrations left him without his commission signed by Adams. A year later, Marbury filed suit against Secretary of State James Madison for recovery of the commission and the position that went with it[39].

The case brims with political implications. The Federalist Chief Justice, John Marshall, has to pass judgment upon his party compatriot. Given the accepted practice of judges during that time to behave politically, the assumed outcome would be one in favor of Marbury.

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[38] Quoted in Kahn, Paul. *Reign of Law:* Marbury v. Madison *and the Construction of America.* Yale University: 1997. Pg 9.
[39] Kahn, Paul. *Reign of Law:* Marbury v. Madison *and the Construction of America.* Yale University: 1997. pg 11-12

However, Marshall takes this opportunity to give the Court its greatest power. He argues that Marbury should be entitled to his position, but he concludes that the Court would violate the Constitution if it enforced such a decision. This is because it would require the Court to issue a writ of mandamus (legally binding order) to a public official, in this case Madison, ordering that Marbury be given his position. The authority to do so, Marshall argues, comes from the Judiciary Act, which he subsequently labels as unconstitutional based on the separation of powers outlined in the Constitution. Therefore, instead of enforcing actions taken by those representing the popular will, Marshall adheres to the rule of law. He installs the doctrine of judicial review while "refusing to give it effect,"[40] not through argument, but by showing that the decision itself was the "operation of the rule of law"[41].

Although the establishment of judicial review is typically the most celebrated effect of *Marbury,* it is but a corollary to the assertion that the rule of law is the supreme authority in the United States. Thus creating a nation in which laws, not men, govern. Marshall states that when "declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally"[42]. Hence, the decision in *Marbury* enforced the rule of law and elevated the power of the judiciary. Judges no longer were tied to the popular will and their decisions had authority that trumped the other branches. Nevertheless, although the Court had now begun to increase its power, it would not fully reach the level of a kritarchy until after the Civil War Reconstruction period and the landmark *Slaughterhouse Cases.*

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[40] Hall, Kermit. ed. et al. *American Legal History: Cases and Materials: Third Edition.* Oxford University Press: New York. 2005. pg. 136.
[41] Kahn, Paul. *Reign of Law:* Marbury v. Madison *and the Construction of America.* Yale University: 1997. pg 17
[42] *Marbury v. Madison.* Hall, Kermit. ed. et al. *American Legal History: Cases and Materials: Third Edition.* Oxford University Press: New York. 2005. pg. 144.

4.1.3 Slaughterhouse Cases

Although *Marbury* built the foundations for a kritarchy, judicial power did not initially reach that level for two reasons. First, the Constitution was still young and the full precedent of *Marbury* unrealized. Therefore, judges had yet developed absolute reverence to the Constitution. It had not yet become a habitual command that would require obedience. Judges did begin to expand their power in other ways however. During this era, termed the "golden age" of American law by legal scholars, judges began to "create" many legal rules. These rules birthed concepts like corporations and eminent domain as well as increases in the use of contracts and torts. As the idea of the rule of law began to take root in American legal culture, these new rules increased judicial power by giving judges authority over an increasingly larger portion of society[43].

Another reason for the slow progression towards a kritarchy stems from the precedent of the action of the Court in *Marbury.* Because the Court demonstrated its power of judicial review while not actually using it, the concept of restraint was established. Thus, the Court did not fully utilize its power. During this time, the Court invalidated a number of state statutes and court decisions, but it was not until 1857 that it again reached the pinnacle of its power by overturning a federal law in the infamous *Dred Scott Decision*[44]. However, the transition from a more restrained, weaker judiciary into a kritarchy was not complete until the rule of law established its utter dominance in the legal culture. That did not occur until after the *Slaughterhouse Cases* and its preceding historic events.

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[43] Hall, Kermit. ed. et al. *American Legal History: Cases and Materials: Third Edition.* Oxford University Press: New York. 2005. pg. 146-206.
[44] Mannino, Edward. *Shaping America: The Supreme Court and American Society.* The University of South Carolina Press: Columbia. 2009. pg 14-6.

The true impact of the *Slaughterhouse Cases* on judicial power can only be understood after examining the effects of the Civil War and Reconstruction period. The Civil War fundamentally altered the course of the American judiciary. It "destroyed forever the once commonly accepted theory of state sovereignty"[45]. The idea of state sovereignty was what propelled the South, legally speaking, to secede from the Union. By 1861, almost every state had asserted its sovereignty by resisting at least one federal law. Such appeals to sovereignty were remnants of the debate still alive between Jefferson and the Federalists. Allowing state sovereignty increases the authority of the popular will because the states are able to act as their popularly elected officials see fit. However, the Civil War secured "federal supremacy, not by legal theory and doctrine, but by the unanswerable arguments set forth by Generals Grant and Sherman"[46]. The resulting unquestionable federal dominance established the judiciary, and more exactly the Supreme Court, as the ultimate governmental authority, vastly increasing judicial power.

The Reconstruction period had an impact on the American legal system because of the ratification of the "Reconstruction Amendments." These three amendments, the Thirteenth, Fourteenth and Fifteenth, were intended to modify the Constitution, which had upheld slavery and racial inequality in numerous cases. In fact, many Northern judges before the Civil War professed to be anti-slavery but "asserted that they were duty bound" by the Constitution to recognize a "fundamental" right for slaveowners to continue the practice[47]. Therefore, it would necessarily require Constitutional Amendments altering the rule of law to afford African

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[45] Hall, Kermit. ed. et al. *American Legal History: Cases and Materials: Third Edition.* Oxford University Press: New York. 2005. pg. 217

[46] Hall, Kermit. ed. et al. *American Legal History: Cases and Materials: Third Edition.* Oxford University Press: New York. 2005. pg. 217.

[47] Levinson, Sanford. "Hercules, Abraham Lincoln, the United States Constitution, and the Problem of Slavery," *Ronald Dworkin.* Ed. Arthur Ripstein. Cambridge University Press: New York. 2007. pg. 136.

Americans Constitutional rights. Thus, the Reconstruction Amendments provided for freedom, equal protection, and voting rights for all citizens. However, the way in which the Fourteenth Amendment was ratified brings its legality into question, and eventually puts the Court in a position in which it must choose between the popular will and the rule of law. Ultimately, in the *Slaughterhouse Cases,* the Court chooses the rule of law based on the original Constitution, nullifying the popular will.

The "struggle over the Fourteenth Amendment marks the greatest constitutional moment in American history," and as Bruce Ackerman argues, it was not ratified in accordance with the principles of Article Five of the Constitution[48]. In 1866, the Republican controlled Congress proposed the passage of the Fourteenth Amendment which would guarantee equal protection and due process of the laws to all people. The problem? Not all states from the former Confederacy had been given back their Congressional representation, even though they were legally states. Therefore, under the provisions for Amendments of Article Five, the "Northern Congress" could not represent the judgment of "We the People of the United States"[49].

To avoid this pitfall, the "Congress" relied on the election of 1866 as a mandate of the popular will. During that election, the Republicans ran on the platform of passage of the Fourteenth Amendment, explicitly asking Americans to decide between either the "party of the white Southerner" (Democrats) or the party asserting that "all persons born or naturalized in the United States … are citizens" and that "no State shall abridge the privileges or immunities of citizens"[50]. After the dust settled from the election, the Republicans emerged with a three-to-one advantage in Congress (excluding the South), giving them the two-thirds majority needed under

[48] Ackerman, Bruce. *We the People: Transformations.* Harvard University Press: Cambridge. 1998. pg 160, 99.
[49] Ackerman, Bruce. *We the People: Transformations.* Harvard University Press: Cambridge. 1998. pg 183.
[50] Ackerman, Bruce. *We the People: Transformations.* Harvard University Press: Cambridge. 1998. pg 182.

Article Five to propose the Fourteenth Amendment. However, the Amendment's proposal would have unquestionably failed had the South been given representation in Congress.

If the South had indeed been accepted back into the Union, how could it not be allowed to participate in such an important law-making process? Article Five explicitly declares that in order for an Amendment to be valid, "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate"[51]. The former Confederate states had been repositioned in the Union and thus *required* suffrage under Article Five and the rule of law. Additionally, the process of gaining ratification of the Amendment by three-fourths of the states would raise even more legal questions. The Northern Congress used the strategy of only allowing Southern states to participate in Congress after they had ratified the Amendment. This action clearly establishes that the States *were* part of the Union, but simply had been forbidden from participating in Congress when the Amendment was proposed, an obvious violation of the text of Article Five. It took until July of 1868 to finally obtain ratification by the necessary amount of states, and eventually all the states were able to take their seats in Congress. However, after the Amendment "passed," many Southern states continued to question its legitimacy, and it was not until 2003 that all of the thirty-seven states that were part of the Union at that time ratified it[52].

The intersection of the consequences of the Civil War and Fourteenth Amendment set up an inevitable conflict. The Fourteenth Amendment ultimately has been recognized as part of the rule of law. However, it was up to the Court of the time to make the initial interpretation, and that interpretation first occurred, five years after the Fourteenth Amendment was ratified, in the *Slaughterhouse Cases.*

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[51] U.S. Constitution, Article Five

[52] Chin, Gabriel J.; Abraham, Anjali. "Beyond the Supermajority: Post-Adoption Ratification of the Equality Amendments". *Arizona Law Review* 50: 25. 2008.

The *Slaughterhouse Cases* (1873) were based on a collection of suits brought by white butchers in Louisiana over a public health law. The law required all butchering of animals in New Orleans to take place at a central location outside of the downtown area. All other slaughterhouses would be closed, but every butcher regardless of race could use the central slaughterhouse. The butchers argued that they had a right to exercise their trade protected by the Fourteenth Amendment's defense of the "privileges" and "immunities" of United States citizens. They asserted that the law created a private monopoly in the form of the new central slaughterhouse which impinged on their right to do business[53].

Slaughterhouse is important because the Court did two things. First, by taking the case it affirmed the legitimacy of the Fourteenth Amendment. To that point debate still existed as to the Amendment's authority, but with *Slaughterhouse,* the Court "ended all serious legal debate" on the issue[54]. Thus, the Court, at least to an extent, affirmed the popular mandate authorizing the actions taken by Northern Republicans.

However, the second act of the Court encroached upon the impact of authorizing the Amendment's legitimacy. The Court decided in favor of Louisiana by holding that the privileges and immunities clause only guaranteed "fundamental" rights to citizens of the United States as established in the original Constitution. The opinion distinguished between United States citizenship and state citizenship. If rights are not fundamental, then it is up to individual states to confer them upon their own citizens. Justice Samuel Miller, who wrote the Court's opinion, argued that the rights of the Fourteenth Amendment were not fundamental and therefore did not apply to United States citizens. Accordingly, the state of Louisiana could take those rights away

[53] Mannino, Edward. *Shaping America: The Supreme Court and American Society.* The University of South Carolina Press: Columbia. 2009. pg 62.
[54] Ackerman, Bruce. *We the People: Transformations.* Harvard University Press: Cambridge. 1998. pg 246.

if it so desired. Miller stated that he did not see in the Fourteenth Amendment "any purpose to destroy the main features of the general system"[55]. Hence, the Court's decision about the *meaning* of the Amendment showed the justices' true allegiance. The Court did not believe that the Fourteenth Amendment had brought about fundamental change. Instead it argued that it could be constructed to be consistent with the primary features of the original Constitution, which allowed for slavery and discrimination. Thus, the Court "sought to reconcile the Fourteenth Amendment with other parts of the Constitution … and with features of the constitutional order," avoiding interpreting the Amendment on the same level of authority as the Constitution[56].

By ultimately maintaining the rule of law and refusing to recognize as a command the popular will of the Fourteenth Amendment, the Court enforced the dominance of judicial power. The Court exemplified that it had the ultimate authority in ensuring that actions authorized by the will of the people were in accordance with legal reason.

4.1.4 West Coast Hotel Co. v. Parrish

In the period after Reconstruction, the judiciary continued to expand its power. Because of this, courts applied the rule of law to increasingly new areas of society, necessitating the use of judicial discretion to parse legal rules within the "problem of the penumbra." Perhaps one of the most prominent doctrines that was developed during this time was that the Constitution

[55] Qtd. in Mannino, Edward. *Shaping America: The Supreme Court and American Society.* The University of South Carolina Press: Columbia. 2009. pg 63.
[56] Moore, Wayne. "(Re)Construction of Constitutional Authority and Meaning" *The Supreme Court & American Political Development*. Eds Ronald Kahn and Ken Kersch. University Press of Kansas: Lawrence. 2006. pg 249.

contained "fundamental limitations" upon state regulation of the marketplace[57]. As the United States coped with unprecedented social and economic change, this doctrine produced such legal concepts as "liberty of contract" and "substantive due process" which "bedeviled" labor reform and economic regulation into the twentieth century[58]. It was this vision of limited government that came into direct conflict with the policies enacted by Roosevelt and Congress during the New Deal, putting the nation on the path towards yet another Constitutional confrontation. Although Roosevelt eventually achieved his policy goals against the will of the Court, judicial power remained unscathed. In *West Coast Hotel v. Parrish* (1937), the infamous "switch in time that saved nine," the Court was able to continue the growth of judicial authority and maintain the progression towards krytocracy.

One again, to fully understand the impact of *West Coast Hotel,* an understanding of the preceding events is necessary, beginning with the Great Depression of the 1930's. The Great Depression created "the most cataclysmic social crisis in American history"[59]. In order to heal the crisis, President Franklin D. Roosevelt began instituting policies strengthening the federal government and regulating the economy. These policies ranged from the National Industrial Recovery Act (NIRA), which "proposed to *abolish* market capitalism and replace it with a corporatist structure under Presidential leadership," to the creation of a multitude of agencies and programs ranging from Social Security to the SEC[60]. Of these, the NIRA proved to be the most controversial for the way in which it transferred power from Congress to the President. These types of actions, according to the development of the rule of law, were strictly prohibited under

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[57] Ackerman, Bruce. *We the People: Transformations.* Harvard University Press: Cambridge. 1998. pg 256.
[58]Hall, Kermit. ed. et al. *American Legal History: Cases and Materials: Third Edition.* Oxford University Press: New York. 2005. pg. 385.
[59] Garry, Patrick. *An Entrenched Legacy: How the New Deal Constitutional Revolution Continues to Shape the Role of the Supreme Court.* Pennsylvania State University Press: University Park. 2008. pg 11.
[60]Ackerman, Bruce. *We the People: Transformations.* Harvard University Press: Cambridge. 1998. pg 286.

Article One's nondelegation doctrine. This doctrine states that "all legislative Powers … shall be vested in a *Congress* of the United States" [emphasis added][61]. The New Deal legislation first came to the Court in 1935, calling for a departure from that doctrine. Thus, the Court, abiding by the rule of law, rejected the policies.

Unlike a common interpretation, these decisions by the Court were not in fact "diabolical", but instead a reasonable application of the accepted rule of law. In fact, Roosevelt's Attorney General was so convinced that the NIRA was unconstitutional, that he refused to argue in favor of it in front of the Supreme Court. Additionally, Milton Handler, a chief legal scholar of the time, wrote in 1933 that in order for the NIRA to be sustained, it would require "a change of the attitude on the part of the Supreme Court no less revolutionary than the law itself"[62]. In the famous unanimous decision that rejected the NIRA, *Schechter Poultry Corporation v. United States* (1935), the Court stated that while "extraordinary conditions may call for extraordinary remedies … the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority"[63].

How then, could FDR claim in a Fireside Chat of 1937 that "there is no basis for the claim made by some members of the Court that something in the Constitution has compelled them regretfully to thwart the will of the people"[64]? Roosevelt was asking the Court to place its authority in the popular will. Such an action would fundamentally alter the trajectory of the Court and reverse the progression of judicial power. Eventually Roosevelt was able to get his

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[61] Garry, Patrick. *An Entrenched Legacy: How the New Deal Constitutional Revolution Continues to Shape the Role of the Supreme Court.* Pennsylvania State University Press: University Park. 2008. pg 14.
[62] Qtd in Ackerman, Bruce. *We the People: Transformations.* Harvard University Press: Cambridge. 1998. pg 293.
[63] Qtd in Ackerman, Bruce. *We the People: Transformations.* Harvard University Press: Cambridge. 1998. pg 295.
[64] Fireside Chat on Reorganization of the Judiciary. March 9, 1937.

way, utilizing a popular mandate similar to the one enjoyed by the Reconstruction Republicans in 1866.

In the election of 1936, "Americans went to the polls – and gave Roosevelt and the New Deal Congress the greatest victory in American history" leaving Republicans with only eighty-nine seats in the House and a paltry sixteen in the Senate[65]. The landslide embedded the ideals of the New Deal into American society and left the Supreme Court to defend the rule of law in the face of a powerful popular mandate. Almost instantaneously, the Court was identified as an antagonistic regime of "conservatives" and "old men" who sought to stamp out the life-saving policies of the New Deal in favor of retaining the status quo[66]. The Court was trapped. It could not simply deny the existence of the rule of law that it had established as the authority to its supreme power, and yet it could not seemingly maintain that authority against the unprecedented barrage of public opinion. On February 5, 1937, Roosevelt increased the pressure on the Court with the Judiciary Reorganization Bill, often referred to as the "Court Packing Plan." The proposal "authorized [Roosevelt] to appoint one new Supreme Court Justice for each sitting Justice who had served ten years or more and had not retired within six months after his seventieth birthday" [67]. Because of the current composition of the Court, the plan would have effectively raised the total Justices to fifteen. With the expectation that new Justices appointed by Roosevelt would vote in favor of his policies and the popular will, the proposal was attempting to overturn the rule of law. If Roosevelt's "Court Packing Plan" were to take effect, it would severely limit the power of the Court by establishing that Congress and the President had the

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[65] Ackerman, Bruce. *We the People: Transformations.* Harvard University Press: Cambridge. 1998. pg 311.
[66] Kersch, Ken. "The New Deal Triumph as the End of History?" *The Supreme Court & American Political Development*. Eds Ronald Kahn and Ken Kersch. University Press of Kansas: Lawrence. 2006. pg 172.
[67] Garry, Patrick. *An Entrenched Legacy: How the New Deal Constitutional Revolution Continues to Shape the Role of the Supreme Court.* Pennsylvania State University Press: University Park. 2008. pg 17.

ability to trump the judiciary in favor of the popular will. However, the Court was able to retain its power with the decision of *West Coast Hotel v. Parrish.*

West Coast Hotel dealt with a challenge to a Washington state minimum wage law for women. The challenge was based upon the liberty of contract doctrine which had struck down a similar law only fourteen years prior in *Adkins v. Children's Hospital* (1923). Chief Justice Charles Hughes penned the opinion, but perhaps the most well known Justice in regards to *West Coast* is Justice Owen Roberts. Justice Roberts had been in the majority when *Adkins* was decided, and his "switch in time" has been subject to endless controversy[68]. The Court justified its reversal of *Adkins* on the "economic conditions which have supervened" in the time between the cases[69]. Essentially, the Court gave in to the popular will demanding a change from the preexisting legal doctrines. Thus, the Court began to downgrade its protections of substantive due process that had previously been ingrained in the rule of law[70].

The legal issues that the Court reversed were not simply "problems of the penumbra," but departures from longstanding legal doctrines. Thus, the "switch in time" shows an expansion of judicial discretion, because that use of discretion also expanded judicial power. The individual case in this instance is less important than the ensuing events. Roberts and the Court continued to support the activist legislation they had once opposed to help cement its legitimacy. After *West Coast Hotel* the Court upheld the "Second New Deal," including the Social Security Act, the Wagner Act, and the *second* Agricultural Adjustment act (the first had been overturned by the Court).

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[68] [68] Ackerman, Bruce. *We the People: Transformations.* Harvard University Press: Cambridge. 1998. pg 364.
[69] Mannino, Edward. *Shaping America: The Supreme Court and American Society.* The University of South Carolina Press: Columbia. 2009. pg 110.
[70]Garry, Patrick. *An Entrenched Legacy: How the New Deal Constitutional Revolution Continues to Shape the Role of the Supreme Court.* Pennsylvania State University Press: University Park. 2008. pg 17.

By affirming the Second New Deal, the Court allowed for the abandonment of "all restraints on the growth of federal power"[71]. Therefore, even though the Court deserted the rule of law, albeit on a single doctrine, it was able to simultaneously expand federal power and consequently its own. Thus the "switch in time" shows the strength of the judiciary. The Court demonstrated its power by breaking away from the rule of law and utilizing a high level of discretion. Roosevelt's proposal may have worked in the short term, but if his goal was the restriction of judicial power, he ultimately failed. He cut the head off the Court by forcing it away from the rule of law, only to allow two more to grow in its place. Therefore, because of *West Coast Hotel v. Parrish* and its ensuing precedents, the Court took a big step towards achieving the level of krytocracy.

4.1.5 *Brown v. Board of Education*

The period after the "switch in time" was extremely turbulent. The national mobilization of World War II followed by the threat of the Cold War produced a period in which the judiciary was in limbo. After rejecting strict adherence to the rule of law the Court had taken steps towards krytocracy but had not developed fully into what Justice Reed so prominently feared. It was not until the monumental decision of *Brown v. Board of Education* that the Court realized its full power and authority.

Because *Brown* established a krytocracy, it is necessary to examine how the "rationalization" of American society created an environment of utmost judicial power. The legacy of the New Deal has had a huge impact on the power of the Court in addition to the

[71] Mannino, Edward. *Shaping America: The Supreme Court and American Society.* The University of South Carolina Press: Columbia. 2009. pg 111.

obvious "switch in time." The New Deal, and subsequent WWII, initiated a myriad of government programs and agencies, and after these types of programs had now become were unquestionably Constitutional. The result was, as Weber predicted, an accelerated increase in rationalization with a surge in laws stemming from the emergence of regulatory and administrative law. This increase in laws, or rationality, gave the judiciary more and more power and authority. Additionally, the power granted by Congress to the influx of new agencies, has flowed directly to the courts because they hold an even greater authority over the agencies than the legislature[72].

While the Court's power was increasing with the growth in government, it also began to enhance its authority in an area of law that had only recently begun to develop, civil liberties. Prior to WWII, individual rights and liberties cases had not reached nearly the prominence seen today. Most of relatively few previous cases dealt only with free speech issues generated by dissent during times of war[73]. By developing new rights, the Court was able to continue to augment its reach into society, and in *Brown v. Board of Education* (1954), it made a decision that cemented its role in developing civil liberties, entrenching its power for years to come.

When *Brown* was decided, the habitual rule of law was founded on the doctrine of "separate but equal" stemming from the case *Plessy v. Fergusson* (1896). *Plessy* had been decided within the "problem of the penumbra" as the Court attempted to reconcile a Constitution that had upheld slavery with the newly affirmed – yet of questionable meaning – Fourteenth Amendment. The Justices incorporated social standards of the time into their decision to interpret the legal questions. Thus, while most would agree that "*Plessy* may always have been evil … the

[72] Garry, Patrick. *An Entrenched Legacy: How the New Deal Constitutional Revolution Continues to Shape the Role of the Supreme Court.* Pennsylvania State University Press: University Park. 2008. pg 40.
[73] Mannino, Edward. *Shaping America: The Supreme Court and American Society.* The University of South Carolina Press: Columbia. 2009. pg 118.

fact that it was morally wrong did not make it any less the rule of law"[74]. Thus, a departure from *Brown* would necessitate a departure from the rule of law.

Brown was also decided at a time when no popular mandate existed for racial integration. Unlike *West Coast Hotel*, the Court was under no pressure from the will of the people. During his presidency, Harry Truman tried unsuccessfully to push for racial equality with his "Fair Deal" initiative. However, his proposal was met with massive disapproval from the American public. According to a Gallup poll taken in 1948, 82 percent of Americans opposed the president's plan. Despite such statistics, Truman proposed a strong civil rights program to Congress in 1949 which, unsurprisingly, failed to garner significant support[75]. Therefore, when Truman decided not to run in the 1952 Presidential election and Republican Dwight Eisenhower was voted into office, it became clear that the popular will was not overly concerned with the issue of segregation. Thus, the lack of authority from both the will of the people and the rule of law to establish desegregation at the time of *Brown,* points to a decision that fits the definition of neither a traditional judiciary nor a kritarchy.

The Court's decision in *Brown* was unprecedented in the way that the Court incorporated political principle. With a lack of legal precedent or clear mandate from the public, the Court was left to grapple with the application of the "separate but equal" doctrine to public education. In writing for a unanimous majority, Chief Justice Earl Warren wrote a short – only nine pages - opinion substantially lacking in concrete legal reasoning. Instead, the decision is broadly based on "principles of equity"[76]. The Court endeavors to differentiate *Brown* from *Plessy* by citing

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[74] Kahn, Paul. *Reign of Law:* Marbury v. Madison *and the Construction of America.* Yale University: 1997. pg 232.
[75] Mannino, Edward. *Shaping America: The Supreme Court and American Society.* The University of South Carolina Press: Columbia. 2009. pg 198.
[76] Hall, Kermit. ed. et al. *American Legal History: Cases and Materials: Third Edition.* Oxford University Press: New York. 2005. pg. 500.

that public education should be taken into special consideration[77]. In attempting to rectify the decision in *Brown* with the rule of law, Warren focuses on previous interpretations of the Fourteenth Amendment lamenting:

> In approaching this problem, we cannot turn back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws[78].

By elevating education as an area that requires unique application of the law, Warren is able to essentially create his own "problem of the penumbra" into which he can insert his political principles. In so doing, he is able to justify overturning the "evil" *Plessy* and putting in its place the "good" *Brown.* Thus, the Court in *Brown* fits most closely into the Dworkinian principled model of judicial power.

The Court began with the assumption that the principle of equality was crucial, and then, recognizing that the doctrine in *Plessy* placed a "badge of inferiority" on African American children, not to mention the educational disparity, interpreted the law accordingly to achieve the appropriate ends. The decision both appeals to the individual rights of citizens while attempting to promote the public good. Most now agree that *Brown* was the "right" decision; however, it was a clear signal that the Court was no longer tied to the rule of law and was free to apply large amounts of discretion to cases that would have a great impact on society.

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[77] *Plessy* dealt with equality on public transportation.
[78] *Brown v. Board of Education,* 347 U.S. 483 (1954)

The result of *Brown* expanded the power and authority of the judiciary in two ways. First, it set precedent for incorporating a variety of extra-legal factors into judicial discretion. The Court determined the detrimental effect of segregation, not by a thorough legal analysis, but by psychological studies and equitable principles[79]. It was the application of the principle that such effects were undesirable that set in motion the establishment of a new legal doctrine, repudiating "separate but equal". The second effect was the creation of the Court's identity as a platform by which groups could attempt to achieve "total justice"[80]. Now that the Court had shown that it was capable to doling out legal rights radically opposed to the rule of law and the popular majority, the quests for justice by fringe groups were turned towards the judicial branch. It was no longer necessary to rely on legal reason or the popular will for such rights when they could be provided fully by the Court. This can be seen clearly in the follow up case, *Brown II* (1955), in which the Court proclaimed the remedy states must enact to achieve desegregation. In this way, the Court acted as both a legislator and an executor, inserting the judiciary into the policies and actions taken by Southern schools to ensure compliance of *Brown*[81]. With *Brown II,* the Court continued to flex its muscles and expand the scope of its jurisdiction.

It was during the deliberations of *Brown* that Justice Stanley Reed uttered his trepidation that the Court's decision would usher in a krytocracy. This paper began by defining a krytocracy and determined that it requires these three factors:

1. The judicial branch has supreme authority over the actions of the other branches.

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[79] Mannino, Edward. *Shaping America: The Supreme Court and American Society.* The University of South Carolina Press: Columbia. 2009. pg 204-5.
[80] Hall, Kermit. ed. et al. *American Legal History: Cases and Materials: Third Edition.* Oxford University Press: New York. 2005. pg. 495.
[81] Mannino, Edward. *Shaping America: The Supreme Court and American Society.* The University of South Carolina Press: Columbia. 2009. pg 205.

2. The scope of the judiciary has increased due to "rationalization" and difficulty of retrenchment.

3. Judges appeal to their own principles rather than the authority of popular will or the rule of law.

After *Brown,* the Court met the criteria for a krytocracy. First, *Marbury v. Madison* established the Court's dominance of the other branches because of judicial review. Second, the policies stemming from the New Deal and end of WWII caused a sharp increase in rationalization. Additionally, the Court began to expand its scope to civil liberties. Third, the decision in *Brown* went against both the popular will and rule of law and was based on the principle that "separate but equal" was detrimental to society. Hence, judicial power had grown into a krytocracy.

4.1.6 *Citizens United v. Federal Election Committee*

This paper will now return to the case that ignited this project. An examination of *Citizens United* will provide a window through which the entrenchment of judicial power can be seen. The period from *Brown* until *Citizens United* has been written about *ad nauseam*. However, the discussions most often involve a look at individual cases or individual judges and not a holistic overview. The fact that the dialogue has taken such a form is itself telling of the way in which the Court has operated during this time period. The importance of discussions about case-by-case analysis and individual justices is an indication of the pervasiveness of the concept that those issues *matter*. Viewed as a progression of judicial power, it becomes evident as to why that is true. An individual case can be decided in a variety of ways, depending on what principles are relied upon to make a judgment. Individual judges matter because they are the

vehicles carrying those principles and biases and do not simply apply an objective rule of law. These factors continue to prove that America is still a krytocracy.

Additionally, despite attempts by politicians, like Reagan in the 1980's, to reduce the scope of judicial power, the continual expansion of legal rights as well as the continued growth of government size and regulations has made any effects of such a policy negligible. In the past half century, there have been unprecedented increases in the breadth and depth and of the law. An exact numerical count is almost impossible to determine because laws are constantly being amended or nullified. Yet, some statistics do exist, mostly on the federal level which leaves the large amount of legislation done by states out of the picture. In terms of sheer volume, the Federal Registry, which contains all the government regulations on businesses, covers over 75,000 pages. Additionally, according to the Cato Institute, the Federal Tax code increased to over 60,000 pages in 2005, a 48 percent increase over the previous nine years[82]. Criminal law has seen a similar trend. There are currently over 4,000 offenses that carry federal criminal charges, an increase of one-third since 1980[83]. As a consequence, the prison population has sky-rocketed, giving the United States the highest incarceration rate in the world[84].

New advances in technology and society have also given rise to an increase in the areas affected by law. The dawn of the internet has given the law a new avenue for regulation, with issues like net neutrality and internet privacy only now scratching the surface of the Court's docket. Also, the concept of internet piracy has made most college students in America criminals.

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[82] Farrell, Chris "Toward a Saner Tax Code," *BusinessWeek.* October 25, 2005.
[83] Baker, John and Dale Bennent. "Measuring the Explosive Growth of Federal Crime Legislation," *The Federalist Society for Law and Public Policies Studies.* 2003. pg 3.
[84] Hall, Kermit. ed. et al. *American Legal History: Cases and Materials: Third Edition.* Oxford University Press: New York. 2005. pg. 552.

New legal rights have also expanded the judiciary's power. Society has become increasingly diverse and new issues have arisen in recent years. From sexual orientation to terrorism, the concepts of freedom and equality are constantly forcing the Court to examine more and more aspects of civil liberties. Plus, problems with illegal immigration have provoked states to pass strict and broad immigration laws that threaten the liberties of many citizens and non-citizens alike[85]. Technological advances and expansions in civil liberties are just a few of the areas that have grown the scope and power of the Court. Add to that the politics surrounding judges' actions and judicial confirmations, most prominently controversies about the always-inflammatory *Roe v. Wade* (1973), and the result is a judiciary that dominates almost all facets of American life.

That progression has led to the current day. However, an analysis of *Citizens United v. FEC* will provide additional evidence that a krytocracy still exists. In *Citizens,* the Court overturned a federal law, the Bipartisan Campaign Reform Act of 2002 (BCRA), that "prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an 'electioneering communication' or for speech expressly advocating the election or defeat of a candidate"[86]. It also overturned recent Supreme Court precedent. Overturning *Austin* v. *Michigan Chamber of Commerce* (1990) in full and the decision based on *Austin, McConnell* v. *Federal Election Commission* (2003), in part. The facts of the case involve a non-profit organization, Citizens United, that wanted to air a documentary entitled *Hilary: The Movie* through video-on-demand less than thirty days prior to the 2008 primary elections. The film amounted to a campaign ad because it could be interpreted no other way than as a statement that "Senator Clinton is unfit for office" and viewers should vote against

[85] Archibald, Randal. "Arizona Enacts Stringent Law on Immigration." *The New York Times.* April 23, 2010.
[86] *Citizens United v. FEC, (2010)*

her[87]. Therefore, the FEC claimed that it fell within the category of electioneering specifically banned by the BCRA, and barred Citizens from airing the ad. Citizens, citing Freedom of Speech, sued to allow them to air the ad and to avoid enforcement of disclaimer and disclosure rules. Originally, when the Court heard arguments for this case in the 2008-09 term, it heard them on narrow terms. Both sides mostly argued on whether or not a video-on-demand "documentary" was actually in the same category as a standard "attack ad," and thus restricted by the BCRA. However, the Court asked both sides to reargue the case in the Fall of 2009 with the direct orders to examine the broader implications of the case in relation to *Austin* and *McConnell.* After exercising this power, the Court then was able to make the determination that *Hilary* was indeed in the same category as an "attack ad," but that those types of ads are now afforded full First Amendment rights, broadly allowing corporations to spend unlimited funds in support of candidates as an enactment of Free Speech.

The Court's decision establishes that Political Action Committees (PACs), were creating a "chilling effect" on the political speech of corporations. PAC's were created to prevent corporations from spending treasury funds on elections while still allowing them to spend some money from other sources. The Court rejects the basis for such regulations by stating that "political speech of corporations or other associations" should not be treated "differently under the First Amendment simply because such associations are not 'natural persons'"[88]. The opinion holds that Free Speech is so important to democracy that it cannot be restricted to any person or group.

[87] *Citizens United v. FEC, (2010)*
[88] *Citizens United v. FEC, (2010)*

However, as Justice Stevens points out in his "emphatic" ninety-page dissent, the Court's finding "rejects a century of history when it treats the distinction between corporate and individual campaign spending" as nonexistent.[89] Steven cites the Tillman Act of 1907 as the first instance of legislative restrictions on corporate spending in elections. He also argues that giving a corporation the same rights as an individual perverts the rule of law that had been established since the days of the nation's birth. Stevens cited Chief Justice Marshall, who wrote in 1817 that:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it[90].

Therefore, Stevens' argues that because a corporation is created by legal rules, the rule of law enables the legislature to have authority over its actions. Thus, the decision by the Court rejects the established rule of law by giving corporations rights not conferred to them by Congress.

Citizens' enormous political and social impact has shown that the decision also rejects the will of the people. The decision made front page news and sparked controversy from both political parties. According to Reclaim Democracy, a non-profit that advocates politics based on popular will, over 2,000 news articles were published on *Citizens* within a day of the decision's release[91]. The vast amount of media and political coverage was also largely negative. From the *New York Times* to the *Christian Science Monitor,* editorials proclaimed how the Supreme Court had dealt a severe blow to democracy. Additionally, less than three weeks after the Court issued its opinion, Congress already began the process of passing legislation aimed at limiting the scope

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[89] Stevens (dissenting), *Citizens United v. FEC, (2010)*
[90] Qtd. in Stevens (dissenting), *Citizens United v. FEC, (2010)*
[91] "Citizens United v. FEC Ruling and Selected Media Coverage" *Reclaim Democracy.* Jan. 20, 2010 <http://www.reclaimdemocracy.org/corporate_speech/cu_fec_coverage.php>.

of the decision.[92] Also, an ABC-Washington Post poll reported that 80 percent of those surveyed disagreed with the Court's outcome[93]. *Citizens* also prompted President Obama, in his 2010 State of the Union Address, to argue that American elections should not "be bankrolled by America's most powerful interests" and call upon Congress to "pass a bill that helps correct some of these problems"[94]. Evidence shows that if any popular mandate did exist on the issues in *Citizens,* it would exist for the continuation of restrictions on spending by corporations and not the other way around. Therefore, like *Brown,* the Court in *Citizens* lacks both the rule of law and the will of the people. Because of this, it must rely on the authority of the Justices' own personal discretion.

The discretion used by the Court reflects the principles of the conservative bloc of justices, Samuel Alito, John Roberts, Anthony Scalia, and Clarence Thomas. Dworkin argues that these justices have been on a mission:

> To destroy the impressive constitutional structures that a long succession of prior justices built and shaped in the decades following the Second World War, and to replace them with cruder principles that burden if not eliminate abortion rights, forbid any use of race-conscious policies to alleviate racial injustice, *block any attempt to reduce power of money in American politics*, and allow the executive branch near-dictatorial powers in the so-called "war" against terror[95] [italics added].

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[92] Kirkpatrick, David. "Democrats Try to Rebuild Campagin Spending Barriers," *The New York Times.* Feb. 11, 2010.
[93] "Washington Post – ABC New Poll," *Washington Post.* Question # 35 <http://www.washingtonpost.com/wp-srv/politics/polls/postpoll_021010.html>.
[94] Barack Obama 2010 State of the Union Address. *CNN.com* http://www.cnn.com/2010/POLITICS/01/27/sotu.transcript/index.html
[95] Dworkin, Ronald. *The Supreme Court Phalanx: The Court's new Right-Wing Bloc.* The New York Review of Books: New York. 2008. pg xii.

Notice the emphasis on the fact that the Court is now operating on "cruder principles" in reinterpreting these legal issues, and not upon a strict originalist reading on the Constitution as most of the conservative bloc would argue. Dworkin writes that current Justices "who call most loudly for 'originalism,' actually argue *against* textual fidelity as a constitutional standard" instead relying on "other standards and values as *substitutes* for fidelity"[96]. Therefore, the narrower question of whether or not the principles are truly "cruder" is not the real issue. The real issue is simply the acknowledgment of the broader concept that something beyond a strict interpretation of the Constitution authorizes judicial power. This reliance on principle and personal discretion shows that nothing has fundamentally changed the power of the judiciary since *Brown,* and only the ideological composition of the Court has been altered. Therefore, the decision in *Citizens* corresponds with a general ideological principle held by the Court and *not* in accordance to any type of shift in judicial power. The application of those principles may produce drastic changes in the legal culture as those Justices continue to apply their discretion to cases, but it does not change the Court's basis of authority.

Justices are still able to depend on their own personal discretion despite the popular will and established legal reason, still able to dominate the other three branches, and still increasing the scope of their power because of the rationalization of American society. Hence, the Court's power has not been retrenched since *Brown,* and continues the progression as a krytocracy. Therefore, the historical progression has given insight on how to recognize a krytocracy by confirming that judicial power continues to operate at that level.

[96] Dworkin, Ronald. *Justice in Robes.* Harvard University Press: Cambridge. 2006. pg 118.

5. Conclusion

This paper has answered three of the four research questions. First it answered the question of "what is a krytocracy?" by developing the three stages of judicial power. It defined a traditional judiciary founded on the concepts derived from the writings of Polybius and Montesquieu. Next, this paper moved to a kritarchy. A kritarchy is the next step in the progression of judicial power based on positivist and originalist theory, representing a "rule by judges" based on the U.S. Constitution. Then, this paper described a krytocracy, the highest stage of judicial power. A krytocracy is based on the theories espoused by Ronald Dworkin and Legal Realists. Judges within a krytocracy rely on extra-legal factors like political principles or biases to interpret the laws beyond the scope of popular will or legal reason.

After defining the terms, this paper moved to the second question of "how does a krytocracy relate to American democracy?" To answer this question, the paper first discussed the theories behind the growth of judicial power despite its anti-democratic nature. Weber's rationalization theory argues that Western civilizations always tend towards over-rationalization. In American society that manifests itself in the creation of more laws, increasing judicial authority. Pierson's theory of retrenchment argues that once governmental power is in place, in is extremely difficult to retrench. Therefore, once the United States begins to expand judicial power through rationalization, the trend is practically irrevocable.

Next this paper answered the second question by looking at the idea of popular will versus reason, and how each stage of judicial power derived its authority in relation to democratic principles. It also looked at how judicial discretion plays a role at each stage in expanding power. A traditional judiciary is equal in power to Congress and the President,

deferring to the will of the people represented by the popularly elected branches. Therefore, judges' authority comes from popular will, and they only use limited discretion by "gate keeping" which cases to hear. A kritarchy develops the supremacy of legal reason above the authority of the will of the people. In a kritarchy, judges use discretion, but only as it applies to strict legal interpretation within the "problem of the penumbra." Conversely, a krytocracy relies neither on the popular will nor legal reason, but instead upon the personal discretion of individual judges. Judges in a krytocracy utilize their discretion at a high level to ensure the expansion of their power. This can either be a boon or an anathema to American democracy, depending on the judge.

In completing the answer to the second research question, this paper developed three factors that must be present when judicial power has reached the level of krytocracy. They are as follows:

1. The judicial branch has supreme authority over the actions of the other branches.

2. The scope of the judiciary has increased due to "rationalization" and difficulty of retrenchment.

3. Judges appeal to their own principles rather than the authority of popular will or the rule of law.

Next, this paper asked "how can we recognize a krytocracy?" To answer the third question this paper developed an historical progression of judicial power in order to show how that power can be identified. It focused on five landmark Supreme Court decisions that represented important stages in judicial development.

It began with *Marbury.* After ratification of the Constitution, judges' power was limited and tied to the popular will. *Marbury,* expanded the Court's power past a traditional judiciary by establishing judicial review. However, the most important aspect of that decision that allowed the Court to eventually extend its authority throughout society was the establishment of the rule of law as the supreme command in the United States.

As the rule of law become "habitual" throughout the "golden age" of American legal culture, the power of the law, and consequently, judges began to increase. After the Civil War and Reconstruction period, legal reason and popular will came into a conflict eventually settled in the *Slaughterhouse Cases*. The Civil War enforced the dominance of the Constitution over state sovereignty and popular will. However, the Fourteenth Amendment challenged that dominance through its ratification outside of the text of Article Five based on a "popular mandate." The Court settled the dispute in *Slaughterhouse* by adhering to the original rule of law found in the Constitution, as opposed to the newly minted Fourteenth Amendment. After the Court established the rule of law, it achieved the level of kritarchy. As rationalization increased, the courts were forced to continually apply the law within the "problem of the penumbra." This gave birth to many new legal rules including the doctrines of "substantive due process" and nondelegation.

Both of these established legal rules were challenged by the catastrophic changes that occurred because of the Great Depression. FDR's New Deal directly opposed engrained doctrines by implementing policies of economic regulation and transfer of legislative power to the executive branch. The Court struck down these policies as a violation of the Constitutional rule of law. However, after Roosevelt's "court packing" proposal backed by yet another "popular mandate," the Court performed the "switch in time" in *West Coast Hotel* that acquiesced to the

New Deal's Constitutional Revolution while retaining judicial power. The result was a Court that removed restrictions on the growth of federal power, in turn growing the power of the judiciary. The Court also moved away from the reliance on legal reason, establishing a level of discretion beyond the scope of a kritarchy.

After a period of relative limbo during WWII and the birth of the Cold War, in 1954 the level of judicial power finally reached krytocracy with *Brown v. Board of Education.* In *Brown* the Court was faced with the rule of law establishing the doctrine of "separate but equal" and a popular will that was indifferent, at best, and radically opposed, at worst, to the idea of integration. Therefore, the Court had to operate on its personal discretion, utilizing authority outside the traditional legal or popular basis. It relied on psychology and theories of equity to determine that the "separate but equal" doctrine was inherently unequal when applied to public education. By relying on these "principles," and not strict legal reasoning or popular will, the Court ushered in the power of krytocracy.

The time period after *Brown* was one of unprecedented increases in the scope of judicial power due to rationalization. The government continued its rapid expansion even in the face of Reagan's attempted retrenchment. It also began to regulate more and more as technological innovations opened new areas to apply legal rules. During this time, the Court exercised its power and discretion by creating and developing a multitude of legal rights. In analyzing the impactful *Citizens United* case, this paper concluded that it was a continuation of the fundamental properties of krytocratic judicial power. In *Citizens,* the Court applied its discretion in the face of the rule of law and popular majority to overturn legal precedent and federal law. Because of that reliance on personal discretion and the continuation of judicial power and rationalization, the United States can be recognized as a krytocracy.

5.1 What are the Implications of an American Krytocracy?

This paper will now answer the fourth and final research question. In *Federalist* 78, Alexander Hamilton famously described the Supreme Court as being the "least dangerous branch"[97]. In light of the current state of the Court, Hamilton's statement seems antiquated. Clearly the founders were not planning on the judiciary usurping the power of the legislative and executive branches. The goal of maintaining equilibrium espoused by Polybius has vanished. In its place is a bloated and unchecked judiciary with increasing power and authority. The repercussions of this echo down every corridor of our society. The expansion of government and increase in laws has allowed the Court to become involved in more issues than ever before. With no indication of that trend subsiding, the Court seems unlikely to turn away from a krytocracy.

The continued expansion of the scope of government and creation of laws in accordance with the philosophies of Weber and Pierson seems too strong to allow a regression in the power of the judiciary. The calls to the higher ideals of the Constitution can no longer pass through the maze of legal rules and Court decisions that have developed. Additionally, society's continual polarization on important issues lacks any popular mandates. Therefore, a strictly logical application of the rule of law or the will of the people in America is impossible. Legal interpretations *require* the discretionary application of *principles*. The public sphere has become so flooded with laws and precedents, many conflicting, that a "reasonable" interpretation of the rule of law or popular will can provide for a multitude of conclusions. The result is a form of logic outlined by Jerome Frank, in which the method of choosing the premises to apply to the

[97] Qtd. in Mannino, Edward. *Shaping America: The Supreme Court and American Society.* The University of South Carolina Press: Columbia. 2009. pg 251.

logical process is the "joker" that opens the gates for judicial discretion to expand judicial power. Essentially, Hart's "problem of the penumbra" has been extended beyond applications like defining the word "vehicle" in a statute, to applications that have profound effects on judicial authority. Because the "penumbra" has invaded all aspects of a society that is extremely complex and diverse, judges are forced to parse through and include interpretations of legal rules that extend into the realms of ideology and principle. The selection of premises must occur in order to determine the "societal purpose," or relevance, of a given law, even the Constitution.

However, the scope of judicial power can foreseeably be limited by the imposition of a new authority that is not based on personal discretion. That authority could theoretically come from international law. Already, some Supreme Court Justices have, albeit controversially, incorporated international law into their principles. If an overarching legal "new world order" were to develop, it could force the Court to again apply a rule of law that is not weighted down by the "rationalization" of American society. If the problem of judicial power is not uniquely American, then perhaps the authority of other nations could retrench that power in the United States. However, if the development of the judiciary in other Western countries or the European Union has seen a similar enlargement, then the likelihood of breaking away from this progression seems dim. The possibility that a "new world order" could somehow cope with a global mishmash of legal theory and ideals, establish itself as the supreme legal authority, and retrench judicial power is unknowable. However, what is knowable is that the current state of judicial power of the Supreme Court leaves no question that the United States continues to operate as an American Krytocracy.

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