The keepers of the Constitution

Sonia Sotomayor’s Supreme Court nomination has sparked renewed debate over the proper role of the federal judiciary.

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Historian Samuel Eliot Morison has called the Supreme Court “the keystone in the federal arch,” because virtually all Americans are affected by the issues it tackles. “An alphabetical list,” says veteran Washington, D.C., attorney Robert Bauer, “would begin with abortion and proceed through campaign finance, church-state relations, euthanasia, pornography, presidential selection, and voting rights.” In Democracy in America, Alexis de Tocqueville wrote of the high court, “A more imposing judicial power was never constituted by any people.” As one old quip goes, the only appeal after the Supreme Court is to God.

Was it always this way?
No. There are only a few references to the Supreme Court in the Constitution, and that document merely states that the court will have original jurisdiction “in all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.” Writing in The Federalist, Alexander Hamilton predicted that the federal judiciary would be the weakest and “least dangerous” of our fledgling republic’s three branches of government because it had “no influence over either the sword or the purse” and “neither force nor will, but merely judgment.” Indeed, in its first 10 years, the court decided only about 100 cases.

So what happened?
A simple but powerful doctrine known as judicial review. Soon after John Marshall became chief justice, in 1801, he determined that the Supreme Court had the power to uphold or nullify the actions of the other branches of federal government, to assure that the Constitution was being honored. In Marbury v. Madison (1803), which marked the first time the court overturned an act of Congress, Marshall declared, “It is emphatically the province and duty of the judicial department to say what the law is.” President Thomas Jefferson was aghast, warning that the Constitution was now “a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.”

How did later courts use this power?
By exercising an ever-wider purview over a vastly expanded caseload. McCulloch v. Maryland (1819) posited the doctrine of implied constitutional powers, and in subsequent cases, the court claimed the right to review the actions of state courts and agencies in addition to those of the federal government. As the 19th century gave way to the 20th, the court continued to increase its influence, reaching deep into the economy through its antitrust and regulatory caseload. The court reached a new watershed with Brown v. Board of Education (1954), which held that segregated public schools violated the Constitution’s Equal Protection Clause. In one stroke, Chief Justice Earl Warren and his fellow justices upended decades of Jim Crow in the South. Historians consider Brown to mark the beginning of the modern court era—not solely because of the breadth of the ruling but also the reaction to it.
What happened after Brown?
Conservatives began mobilizing around the complaint that unelected judges were not merely interpreting the law, but improperly legislating from the bench. Their protests grew as the Warren Court followed Brown with a series of decisions that greatly expanded individual rights and liberties. Mapp v. Ohio (1961), for instance, prohibited the use of evidence obtained in violation of the Fourth Amendment, while Engel v. Vitale (1962) outlawed prayer in public schools. For many conservatives, the last straw was Roe v. Wade (1973), which held that anti-abortion laws violated an unwritten “right of privacy” inherent in the Fourteenth Amendment’s Due Process Clause. Millions of Americans celebrated the newly declared right to abortion. But among millions of others, the case and its novel legal reasoning sparked a full-scale backlash against judicial power that reverberates to this day.

What have been the implications of Roe?
Galvanized by Roe, conservatives demanded that only “strict constructionists”—that is, judges who would hew to a narrow reading of the Constitution’s original intent—be appointed to the bench. Railing against “activist judges” has now become standard operating procedure for Republican officeholders and candidates. But “judicial activism” can be a very slippery concept. In 2005, Yale Law School’s Paul Gewirtz calculated that justices regarded as the most conservative were arguably the most activist, as measured by their willingness to overturn laws passed by the public’s representatives in Congress. Conservative Clarence Thomas voted to overturn 65 percent of the statutes that came before the court, while liberal Stephen Breyer voted to overturn only 28 percent. In other words, justices of any political bent can find reasons to overrule the other branches and, thus, make law.

So is the court a law unto itself?
It can seem that way. Justices are not elected, but appointed by the president, and the Constitution provides that they may remain on the bench for as long as they exhibit “good Behaviour.” In practice, justices are serving longer than ever. In the last quarter-century, they have lasted an average of more than 26 years—a full decade more than they did through 1970. Yet periodic calls to rein in the power of what has been called “the supreme legislature” invariably go nowhere. For better or for worse the Supreme Court is, as Woodrow Wilson put it, “a kind of constitutional convention in continuous session.”

Nine is just a number
Originally constituted with six members in 1789, the Supreme Court expanded to seven in 1807, nine in 1837, and 10 in 1863. The Judiciary Act of 1869 set the number again at nine, where it has remained since. The only serious challenge to this figure came when Franklin D. Roosevelt pushed a bill that would have allowed the president to name one additional justice, up to six in total, for every sitting justice over the age of 70 years and six months. The bill became known as FDR’s “court-packing plan” because it was seen as a thinly disguised attempt to gain political control of the court, which had ruled against much of FDR’s New Deal legislation. Though FDR had been re-elected overwhelmingly the year before, public opinion turned solidly against him. The Senate rejected the measure by a 70–20 vote.