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VOLUME 1

SOURCES OF POWER AND RESTRAINT

[Insert UNF p. 1-1 here]

"Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

—JUSTICE SANDRA DAY O'CONNOR, WRITING FOR THE COURT IN *GREGORY V. ASHCROFT* (1991)

CHAPTER ONE

THE SUPREME COURT IN THE CONSTITUTIONAL SYSTEM

[Insert UNF p. 1-2 here]

"It is emphatically the province and duty of the judicial department, to say what the law is."

—CHIEF JUSTICE JOHN MARSHALL, WRITING FOR THE SUPREME COURT IN *MARBURY V. MADISON* (1803)

Chapter Outline

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INTRODUCTION

The U.S. Supreme Court is the leading actor on the stage of American constitutional law. While other courts (federal and state) have occasion to interpret the U.S. Constitution, they can be and often are overruled by the Supreme Court. Unlike the decisions of other non-specialized courts, Supreme Court decisions have authoritative nationwide application. Accordingly, the Supreme Court occupies a position of preeminence in the American constitutional system.

The Supreme Court operates within an elaborate framework of legal principles, precedents, and procedures. Because of its institutional status as an independent branch of government, and the fact that the legal questions it addresses often involve important issues of public policy, the Court is both a political and a legal entity. The Court's political role is highlighted every time the Court addresses a controversial public issue such as abortion, school prayer, gay rights, affirmative action, or the death penalty. On occasion the Court's decisions have immediate impact on the political process itself. Such was the case in *Bush v. Gore* (2000), in which the Court effectively decided the outcome of a presidential election (for further discussion and an excerpt of this remarkable decision, see Chapter 8, Volume II).

Because the Supreme Court is at once a legal and a political institution, an understanding of the Court and its most significant product, constitutional

interpretation, requires knowledge of both law and politics. In this book we attempt to enhance both. In this first chapter we examine the Supreme Court as an institution—its practices, powers, and procedures. We explain how constitutional cases reach the High Court and how they are decided once there. Most importantly, we describe the origin and development of judicial review, the crux of judicial power and the principal means by which constitutional law develops. We examine the exercise of judicial review and, just as important, the constraints on the exercise of this power. Finally, we examine the behavior of the Court from the standpoint of modern political science.

[Begin "Case in Point" box here]

Case in Point

A Supreme Court Decision Brings Down a President

United States v. Nixon (1974)

This case stemmed from President Nixon's refusal to comply with a *subpoena duces tecum* obtained by Watergate Special Prosecutor Leon Jaworski. The subpoena directed President Nixon to produce the infamous Watergate Tapes on which were recorded conversations that took place in the Oval Office between President Nixon and his advisers. In refusing to honor the subpoena, President Nixon argued that the tapes were protected by executive privilege. Indeed, the President's counsel asserted that executive privilege is absolute and not subject to subpoena. The United States District Court for the District of Columbia, which had issued the subpoena, rejected the President's arguments and ordered him to produce the tapes. The President sought review by the Court of Appeals, but before the Circuit Court could act the Supreme Court granted Leon Jaworski's petition for certiorari, citing the great public importance of the matter and the need for prompt resolution of the conflict. On the

merits, the Supreme Court ruled in favor of the Special Prosecutor. Writing for a unanimous Supreme Court, Chief Justice Warren E. Burger (a Nixon appointee) concluded that "when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice." President Nixon reluctantly complied with the Supreme Court's decision, surrendered the incriminating tapes, and resigned as President. *United States v. Nixon* is generally regarded as a vindication of the rule of law over political power and a fundamental reaffirmation of our constitutional democracy.

[End "Case in Point" box here]

THE COURTS: CRUCIBLES OF CONSTITUTIONAL LAW

Constitutional law evolves through a process of judicial interpretation in the context of particular cases. These cases may arise in either federal or state courts. The federal courts are those established by Congress to hear cases arising under federal law and certain disputes where the parties reside in different states. State courts are those established by each of the fifty state governments within the United States. Most cases in state and federal courts do not pose constitutional questions. But when they do, the courts' decisions in those cases contribute to the development of constitutional law.

[Insert Figure 1.1 here]

State Court Systems

Each of the fifty states has its own court system, responsible for cases arising under the laws of that state. These laws include the state constitution, statutes enacted by the state legislature, orders issued by the governor, regulations promulgated by various state agencies, and ordinances (local laws) adopted by cities and counties. But state courts also have occasion to consider questions of federal law, including federal constitutional questions.

Although no two state court systems are identical, all of them contain trial and appellate courts (see Figure 1.1). **Trial courts** make factual determinations based on the presentation of evidence and apply established legal principles to resolve disputes. **Appellate courts,** on the other hand, exist to correct legal errors made by trial courts and to settle controversies about disputed legal principles. Both trial and appellate courts are called on from time to time to decide questions of constitutional law. Each state has a court of last resort, usually called the state supreme court, which speaks with finality on matters of state law. To the extent that a state supreme court decision involves a question of federal law, however, its decision is reviewable by the U.S. Supreme Court.

[Insert Figure 1.2 here]

The Federal Court System

The national government operates its own system of **federal courts** with authority throughout the United States and its territories. Federal courts decide cases arising under the Constitution of the United States and statutes enacted by Congress. In addition, the **jurisdiction** of these courts extends to cases involving executive orders issued by the president, regulations established by various federal agencies, and

treaties and other agreements between the United States and foreign countries.

The **court of last resort** in the federal judiciary is, of course, the U.S. Supreme Court. The Supreme Court sits atop a hierarchy of appellate and trial courts, as displayed in Figure 1.2. Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Beginning with the landmark Judiciary Act of 1789, Congress used this authority primarily to create and empower the federal court system. Over the years Congress has expanded and modified the system, giving us the three-tiered structure we have today.

U.S. District Courts The **U.S. District Courts** are the major trial courts in the federal system. These courts are granted authority to conduct trials and hearings in civil and criminal cases arising under federal law. Normally, one federal judge presides at such hearings and trials, although federal law permits certain exceptional cases to be decided by panels of three judges. According to figures compiled by the Administrative Office of the U.S. Courts, during the twelve-month period ending on September 30, 2008, approximately 267,000 civil and 71,000 criminal cases, totaling approximately 338,000 cases, were filed in the federal district courts, down slightly from 349,000 for the twelve-month period ending on March 1, 2005.

[Insert Figure 1.3 here]

Section 2 of the Judiciary Act of 1789 created thirteen District Courts, one for each of the eleven states then in the Union and one each for the parts of Massachusetts and Virginia that were later to become the states of Maine and Kentucky, respectively. From the outset, then, the District Courts have been state contained, with

Congress adding new districts as the nation has grown. Today, there are ninety-four federal judicial districts, each state being allocated at least one. Tennessee, for example, has three federal judicial districts corresponding to the traditional eastern, middle, and western "grand divisions" of the state. California, New York, and Texas are the only states with four federal judicial districts.

U.S. Courts of Appeals The intermediate appellate courts in the federal system are the **U.S. Courts of Appeals.** With the exception of a short-lived measure creating six separate courts of appeals in 1801, these courts were not established until passage of the Judiciary Act of 1891. Prior to that time, appeals from the decisions of the District Courts were heard by the Supreme Court or by Circuit Courts that no longer exist. Today, the Courts of Appeals are commonly referred to as the "circuit courts," because each one of them presides over a geographical area known as a circuit (see Figure 1.3). The nation is divided into twelve circuits, each comprising one or more federal judicial districts, plus one "federal circuit" that is authorized to grant appeals from decisions of specialized federal courts. Typically, the circuit courts hear appeals from the federal districts within their circuits. For example, the U.S. Court of Appeals for the Eleventh Circuit, based in Atlanta, hears appeals from the District Courts located in Alabama, Georgia, and Florida. The Court of Appeals for the District of Columbia Circuit, based in Washington, D.C., has the very important additional function of hearing appeals from numerous quasi-judicial administrative agencies in the federal bureaucracy.

Appeals in the circuit courts are normally decided by rotating panels of three judges, although under exceptional circumstances these courts will decide cases en banc, meaning that all of the judges assigned to the court will participate in the

decision. On average, twelve judges are assigned to each circuit, but the number varies according to caseload. According to data compiled by the Administrative Office of the U.S. Courts, during the one-year period ending on September 30, 2008, approximately 61,000 were commenced in the U.S. Courts of Appeals, down from approximately 65,000 during the twelve-month period ending on March 1, 2005.

Specialized Federal Courts Congress has also established a set of specialized courts, including the Tax Court, which exists to resolve disputes between taxpayers and the Internal Revenue Service; the Court of International Trade, which adjudicates controversies between the federal government and importers of foreign goods; the Court of Veterans' Appeals, which reviews decisions of the Board of Veterans' Appeals regarding veterans' claims to benefits; and the Court of Federal Claims, which is responsible for adjudicating civil suits for damages brought against the federal government.

Military Tribunals Under the Uniform Code of Military Justice, crimes committed by persons in military service are prosecuted before courts-martial. Each branch of service has its own court of military review, the decisions of which are subject to review by a civilian court known as the U.S. Court of Appeals for the Armed Forces. In the wake of the terrorist attacks of September 11, 2001, President George W. Bush issued a controversial executive order allowing international terrorists to be tried by "military commissions" rather than by federal district courts.

The U.S. Supreme Court Although the **U.S. Supreme Court** is explicitly recognized in Article III of the Constitution, it was not formally established until

passage of the **Judiciary Act of 1789.** This act provided for a Court composed of a chief justice and five associate justices. In the Judiciary Act of 1801, hurriedly passed in the waning days of the John Adams Administration, Congress decreased the number of Supreme Court justices to five. This legislation was repealed in March 1802, however, consistent with President Thomas Jefferson's repudiation of the Federalist Party's attempted reorganization of the federal judiciary. In 1807 the Court was expanded to include seven justices, and in 1837 Congress increased the number to nine. During the Civil War, the number of justices was briefly increased to ten. In 1869 Congress reestablished the number at nine, where it has remained to this day. Although Congress theoretically could expand or contract the membership of the Court, powerful tradition militates against doing so.

The Supreme Court's first session opened in New York City on Monday, February 1, 1790. Because no cases appeared on the docket, the session was adjourned ten days later. During its first decade, 1790–1801, the Court met twice a year for brief terms beginning in February and August. Over the years, the Court's annual sessions have expanded along with its workload and its role in the political and legal system. As society has grown larger, more complex, and more litigious, the Supreme Court's agenda has swelled. The Court now receives some 10,000 petitions each year from parties seeking review, and there is no indication that its caseload will soon decline.

Since 1917, the Court's annual term has begun on the "first Monday of October." Until 1979, the Court adjourned its sessions for the summer, necessitating sessions to handle urgent cases arising in July, August, or September. Since 1979, however, the Court has stayed in continuous session throughout the year, merely declaring a recess at the end of each Term (typically near the end of June) for a summer vacation. For

example, the Court's October 2008 Term ended on Friday, June 29, 2009.

Federal Court Jurisdiction

The jurisdiction of the federal courts is determined both by the language of Article III of the Constitution and statutes enacted by Congress. The jurisdiction of the federal courts, while broad, is not unlimited. There are two basic categories of federal jurisdiction. First, and most important for students of constitutional law, is **federal question jurisdiction.** The essential requirement here is that a case must present a federal question—that is, a question arising under the U.S. Constitution, a federal statute, regulation, executive order, or treaty. Of course, given its expansive modern role, the federal government has produced a myriad of statutes, regulations, and executive orders. Consequently, most important questions of public policy can be framed as issues of federal law, thus permitting the federal courts to play a tremendous role in the policy making process. The second broad category, **diversity of citizenship jurisdiction,** applies only to civil suits and is unrelated to the presence of a question of federal law. To qualify under federal diversity jurisdiction, a case must involve parties from different states and an amount in controversy that exceeds $75,000.

Although the issue of jurisdiction can be viewed as an external constraint on the courts, in that Congress actually writes the statutes that define jurisdiction, it functions as an internal constraint as well. This is especially true at the Supreme Court level, where the exercise of jurisdiction is subject to the discretion of the justices. In 1988 Congress made the appellate jurisdiction of the Supreme Court almost entirely discretionary by greatly limiting the so-called **appeals by right.** Today, the Court's appellate jurisdiction is exercised almost exclusively through the **writ of certiorari,**

which is issued at the Court's discretion. Federal law authorizes the Court to grant certiorari to review all cases, state or federal, that raise questions of federal law. This extremely wide discretion permits the Court to set its own agenda, facilitating its role as a policy maker, but allowing the Court to avoid certain issues that may carry undesirable institutional consequences. The Court may deflect, or at least postpone dealing with, issues that it considers "too hot to handle." This flexible jurisdiction, then, can be used as a means to expand or limit the Court's policy making role, depending on the issue at hand.

Article III of the Constitution declares that the Supreme Court shall have **original jurisdiction** "[i]n all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party" (modified by the Eleventh Amendment). Congress has enacted legislation giving the District Courts **concurrent jurisdiction** in cases dealing with "Ambassadors, other public Ministers and Consuls," as well as in cases between the U.S. government and one or more state governments. As a result, the Supreme Court has exclusive original jurisdiction only in suits between state governments, often involving boundary disputes. These cases, while important in themselves, represent a minute proportion of the Court's caseload.

The Supreme Court's **appellate jurisdiction** extends to all federal cases "with such Exceptions, and under such Regulations as the Congress shall make" (U.S. Constitution, Article III, Section 2). Appellate cases coming to the Supreme Court from the lower federal courts usually come from the thirteen Courts of Appeals, although they may come from the U.S. Court of Appeals for the Armed Forces, or, under special circumstances, directly from the District Courts. Appellate cases may also come from the state courts of last resort, usually, but not always, designated as state supreme courts.

Although Congress is authorized to regulate the appellate jurisdiction of the Supreme Court, it has rarely used this power to curtail the Court's authority. Rather, Congress has facilitated the institutional development of the Court by minimizing its mandatory appellate jurisdiction and thus giving it control over its own agenda. Likewise, Congress has delegated to the Court the authority to promulgate **rules of procedure** for itself and the lower federal courts. Consequently, the Supreme Court is nearly autonomous with respect to the determination of its decision making process.

TO SUMMARIZE:

- Constitutional law evolves through a process of judicial interpretation in the context of particular cases. These cases may arise in either state or federal courts.
- The most authoritative judicial interpretations of the Constitution are those rendered by the U.S. Supreme Court.
- Although the Supreme Court has both original and appellate jurisdiction, its appellate jurisdiction is far more important because the Court's principal function is to review lower federal court decisions and state court decisions involving federal questions. Federal law authorizes the Court to grant certiorari to review all cases, state or federal, that raise substantial federal questions. Because certiorari is granted at the Court's discretion, the Court has extensive control over its own agenda. This facilitates the Court's role as a policy making body.

CROSSING THE THRESHOLD: ACCESS TO JUDICIAL REVIEW

Throughout its history the Supreme Court has consistently refused to render advisory opinions. This policy dates from an early circuit court opinion in which two members of the Supreme Court joined a federal district judge in refusing to advise Congress

and the Secretary of War on soldiers' pension applications (see *Hayburn's Case* [2 U.S. 408 1792]). In 1793 Chief Justice John Jay, expressing the view of the Court, wrote a letter to President George Washington declining his request for advice regarding the status of American neutrality in the war between France and England.

The Genesis of Constitutional Law Cases

Consistent with its refusal to render advisory opinions, the Supreme Court's decisions are limited to real controversies between adverse parties. These controversies take the form of cases. The court case is the basic building block of American law. Cases, including those presenting constitutional questions, begin in one of two ways: as **civil suits** or **criminal prosecutions.**

A civil suit begins when one party, the **plaintiff,** files suit against another party, the **defendant**. Sometimes, a plaintiff files a **class action** on behalf of all "similarly situated" persons. In some civil cases, the plaintiff accuses the defendant of violating his or her constitutional rights. Because constitutional rights are essentially limitations on the actions of government, the **respondent** in such a civil suit is generally a governmental official. Suits against government agencies per se are often, but not always, barred by the doctrine of **sovereign immunity.** Congress and every state legislature have passed laws waiving sovereign immunity with regard to certain types of claims.

Every civil suit seeks a remedy for an alleged wrong. The remedy may be monetary compensation for **actual damages** or **punitive damages.** It may be a court order requiring **specific performance** from or barring specified action by the defendant. It may be a simple **declaratory judgment**—a statement from the court declaring the rights of the litigants. Sometimes, a plaintiff will seek an **injunction**

against a defendant to cause an ongoing injury to cease or to prevent an injury from occurring.

In a civil suit alleging the violation of a constitutional right, all of the aforementioned remedies are available to the plaintiff. However, because many government officials (judges, legislators, governors, and so forth) are immune from suits for monetary damages stemming from their official decisions or actions, suits against government officials tend to seek declaratory judgments and/or injunctions. A person who is threatened with criminal prosecution under an unconstitutional statute may seek an injunction against enforcement of the law by filing a civil suit against the prosecutor. *Roe v. Wade,* the landmark abortion decision, began when Jane Roe, an unmarried pregnant woman, brought suit against Henry Wade, the district attorney in Dallas, Texas, seeking to permanently enjoin Wade from enforcing the state's abortion law against her and other "similarly situated" women (see Chapter 6, Volume II).

In certain instances individuals whose constitutional rights have been violated may recover monetary damages. The Civil Rights Act of 1866 (42 U.S.C. § 1983) permits courts to award monetary damages to plaintiffs whose constitutional rights are violated by persons acting under "color of law." A good example of this type of action is seen in the Rodney King case, in which the plaintiff recovered monetary damages in a Section 1983 lawsuit stemming from an incident of police brutality in Los Angeles that was witnessed on TV by the entire nation.

Criminal prosecutions often raise constitutional issues. As noted above, one who is threatened with criminal prosecution under an unconstitutional statute can seek an injunction to bar the prosecutor from enforcing the law. Once a prosecution is under way, however, the usual means of challenging a statute is by filing a **demurrer** to an

indictment or through the appropriate **pretrial motion.** If one is convicted under an arguably unconstitutional statute, the appropriate remedy is, of course, an appeal to a higher court. Many criminal convictions are challenged in this way. As an illustration, consider the case of *Texas v. Johnson* (1989), the landmark "flag burning" case. Gregory Johnson was convicted of violating the Texas law making it a crime to desecrate the American flag. He appealed his conviction to the Texas Court of Criminal Appeals, the state court of last resort in criminal cases, arguing that the conviction violated his constitutional rights. The Court of Criminal Appeals agreed, saying the state flag desecration law was unconstitutional. The state of Texas obtained review in the U.S. Supreme Court on a writ of certiorari, but to no avail. The Supreme Court, in a highly publicized and controversial decision, agreed with the Texas Court of Criminal Appeals: It was held unconstitutional to punish someone for the act of burning the American flag as a form of political protest (see Chapter 3, Volume II).

Very often constitutional issues arise in criminal cases owing to the actions of the police or the prosecutor, or decisions made by the trial judge on the admission of evidence or various trial procedures. The federal Constitution provides a host of protections to persons accused of crimes, including freedom from unreasonable searches and seizures, compulsory self-incrimination, double jeopardy, and cruel and unusual punishments (see Chapter 5, Volume II). Frequently, these protections are invoked by persons challenging their convictions on appeal. While the overwhelming majority of these appeals are resolved by intermediate appellate courts or state courts of last resort, a small number of such cases are heard each term by the U.S. Supreme Court. Some of the Supreme Court's most famous decisions, e.g., *Mapp v. Ohio* (1961), *Miranda v. Arizona* (1966), *Roper v. Simmons* (2005), and *Kennedy v. Louisiana* (2008) have involved the rights of persons accused of crimes. (These cases

are discussed and excerpted in Chapter 5, Volume II.)

Habeas Corpus The Constitution explicitly recognizes the **writ of habeas corpus,** an ancient common law device that persons can use to challenge the legality of arrest or imprisonment. One who believes that he or she is being illegally detained, even if that person is in prison after being duly convicted and exhausting the ordinary appeals process, may seek a writ of habeas corpus in the appropriate court. In 2002, relatives of foreign nationals apprehended pursuant to the "war on terrorism" and incarcerated at the American naval base at Guantanamo Bay, Cuba sought habeas corpus relief in the federal courts. Despite lower court decisions holding that federal courts did not have jurisdiction, the Supreme Court held that "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority." This controversial decision opened the door to judicial review of the confinement of hundreds of alleged enemy combatants being held in indefinite detention by the military pursuant to an order of the President (see *Rasul v. Bush* [2004]). **This case will not be excerpted in the 5th edition.**

The federal habeas corpus statute affords opportunities to persons convicted of crimes to obtain review of their convictions in federal courts, even if they received appellate review in the state courts. Some of the Supreme Court's most important decisions in the area of criminal procedure, for example, *Gideon v. Wainwright* (1963), have come in federal habeas corpus cases filed by state prisoners. A proliferation of such cases beginning in the 1960s led critics to call for the curtailment or outright abolition of federal habeas corpus review of state criminal cases. Although it has not been abolished, federal habeas corpus review has been restricted in recent years, both through congressional and judicial action (see Chapter 5, Volume II).

Standing

After determining that a real case or controversy exists, a federal court must ascertain whether the plaintiff or petitioner has **standing.** This is simply a determination of whether these parties are the appropriate ones to litigate the legal questions presented by the lawsuit. The Supreme Court has developed an elaborate body of principles defining the nature and contours of standing. Essentially, to have standing a party must have a personal stake in the case. Thus, a plaintiff must have suffered some direct and substantial injury, or be likely to suffer such an injury if a particular legal wrong is not redressed. A defendant must be the party responsible for perpetrating the alleged legal wrong.

In most situations a taxpayer does not have standing to challenge policies or programs that he or she is forced to support. In *Frothingham v. Mellon* (1923), the Supreme Court held that one who invokes federal judicial power "must be able to show that he has sustained or is immediately in danger of sustaining some direct injury as the result of the statute's enforcement, and not merely that he suffers in some indefinite way common with people generally." (Refer here to Flast v. Cohen and recent Roberts Court decisions on standing.)

In *Raines v. Byrd* (1997), the Supreme Court denied standing to six members of Congress who sought to challenge the constitutionality of an act of Congress providing the president with line-item veto authority. Each of the plaintiffs had voted against the act, but the Court concluded that because the president had not yet exercised his line-item veto power, they could not show that they had been injured by the measure. By the end of 1997, President Bill Clinton had exercised the line-item

veto a number of times, and several of these instances provoked affected parties to file suit. In *Clinton v. City of New York* (1998), the Court reached the merits of the dispute and declared the line-item veto law unconstitutional (see Chapter 3).

Another example of the Supreme Court's complex standing jurisprudence arose out of Michael Newdow's highly publicized First Amendment challenge of a local school board's requirement that the Pledge of Allegiance, with its reference to "one nation under God," be conducted at the beginning of each school day. Newdow was the noncustodial parent of a child who attended one of the schools covered by this policy. Sandra Banning, the child's mother, intervened in the lawsuit, contending that, as her daughter's sole legal custodian, she felt "that it was not in the child's interest to be a party to Newdow's lawsuit." In a 2004 decision the Supreme Court, in an opinion by Justice John Paul Stevens, denied standing to Mr. Newdow, concluding that it would be "improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when the prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing."

The issue of standing is far more than a mere technical aspect of the judicial process. The doctrine of standing determines who may challenge government policies and, to some extent, what types of policies may be challenged. Arguments over standing reflect different conceptions of the role of the federal courts in the political system.

Dissenting in *Warth v. Seldin* (1975), Justice William O. Douglas observed that "standing has become a barrier to access to the federal courts." Douglas insisted that "the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed." He concluded that the "technical barriers" should

be lowered so that the courts could "serve that ancient need." A sharply contrasting position is offered by Justice Lewis Powell, concurring in *United States v. Richardson* (1975):

> Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me that allowing unrestricted… standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government.

Mootness

A case is moot if the issues that gave rise to it have been resolved or have otherwise disappeared. Such a case is apt to be dismissed because a court decision would have no practical effect. An excellent example of a constitutional case being dismissed for **mootness** is *School District 241 v. Harris* (1995). In 1991, a group of students and parents, backed by the American Civil Liberties Union, filed suit to challenge two prayers and a hymn that were part of a graduation ceremony at an Idaho public high school.

The federal district court in Idaho rejected the challenge, but the Ninth Circuit Court of Appeals declared the practice unconstitutional under the Establishment Clause of the First Amendment. The Supreme Court remanded the case, instructing the Court of Appeals to dismiss it as moot because the students who filed the suit had graduated. This illustrates how the Court can use the mootness doctrine to avoid consideration of a controversial constitutional question.

If the federal courts strictly adhered to the mootness rule, certain inherently time bound questions would never be addressed. Such issues are, in the Supreme Court's words, "capable of repetition, yet evading review." *Roe v. Wade* (1973), the landmark

abortion case, provides a good illustration. The gestation period of the human fetus is nine months; the gestation period for constitutional litigation tends to be much longer! Thus, by the time the *Roe* case reached the Supreme Court, Jane Roe had given birth to her child. Explaining the Court's refusal to dismiss the case as moot, Justice Harry R. Blackmun's majority opinion stated:

> The usual rule… is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation will seldom survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness.

In *Roe,* the Court chose to relax the mootness rule to address an important issue. Had the Court been disinclined to deal with the divisive abortion question, however, the mootness doctrine would have provided a convenient "out."

Ripeness

A case that comes to court too late, like *School District 241 v. Harris,* may be dismissed as moot; one that comes to court too soon may be dismissed as "not ripe for review." The purpose of the **ripeness doctrine** is to prevent the courts from getting prematurely involved in issues that may ultimately be resolved through other means.

Like the doctrines of standing and mootness, the ripeness doctrine is not merely a means of conserving judicial power, but can be used flexibly as part of the judicial agenda-setting process.

A classic example of the use of the ripeness doctrine to avoid an important constitutional issue occurred in *Poe v. Ullman* (1961). In this case, the Supreme Court dismissed a challenge to a nineteenth century Connecticut law that prohibited practicing birth control through artificial means. The Court said that since the law had not yet been enforced against the plaintiffs, the case was not ripe for judicial review. Eventually, the Court reviewed and struck down the Connecticut statute, but only after an individual was convicted and fined for violating the law (see *Griswold v. Connecticut* [1965], discussed and reprinted in Chapter 6, Volume II).

Exhaustion of Remedies

A close cousin of the ripeness doctrine is the **exhaustion of remedies** requirement. For a case to be ripe for judicial consideration, the parties must first have exhausted all nonjudicial remedies. This doctrine applies primarily to cases that involve decisions by administrative or regulatory agencies. Thus, for example, a corporation that has been denied a broadcasting license by the Federal Communications Commission must first exhaust all means of appeal within the FCC before taking the case to federal court. The exhaustion of remedies doctrine is designed to avoid unnecessary litigation and allows the courts to defer to agency "experts" in the resolution of what can be complex and technical issues.

In *Natural Gas Pipeline Company v. Slattery* (1937), the Supreme Court said that the exhaustion requirement had "especial force" when the case involved a state, as distinct from a federal, agency. In such cases the Court's customary deference to the

executive branch is compounded with its traditional deference to state governments. Judicial intervention into state or federal agency decision making may be justified, however, in order to prevent "irreparable injury" from being inflicted on a citizen or company (see *Oklahoma Natural Gas Company v. Russell* [1923]).

The Doctrine of Abstention

Closely akin to exhaustion of remedies is the **doctrine of abstention.** Whereas the principal application of the exhaustion of remedies doctrine is to bureaucratic decision making, the primary application of abstention is to the state court systems. Essentially, the abstention doctrine prohibits the federal courts from intervening in state court proceedings until they have been finalized. Thus a person convicted of a crime in a state court normally must exhaust all means of appeal in the state judiciary before petitioning the U.S. Supreme Court for a writ of certiorari or a federal district court for a writ of habeas corpus.

Under the doctrine of abstention, federal judges normally abstain from issuing injunctions to prevent persons from being prosecuted under unconstitutional state statutes. For example, in *Younger v. Harris* (1971), the Supreme Court said it was improper for a federal court to enjoin a state prosecutor from trying a man under a state law virtually identical to one that had recently been declared unconstitutional. Writing for the Court, Justice Hugo Black stressed the notion of "comity," which entails mutual respect between the state and federal governments.

The Political Questions Doctrine

Even though a case may meet the formal prerequisites of jurisdiction, standing, ripeness, and exhaustion of remedies, the federal courts may still refuse to consider

the merits of the dispute. Under the **political questions doctrine,** cases may be dismissed as nonjusticiable if the issues they present are regarded as extremely "political" and thus inappropriate for judicial resolution. Of course, in a broad sense, all constitutional cases that make their way into the federal courts are political in nature. The political questions doctrine really refers to those issues that are likely to draw the courts into a political battle with the executive or legislative branch, or that are simply more amenable to executive or legislative decision making.

A classic discussion and application of the political questions doctrine appears in *Luther v. Borden* (1849). In this case, the Supreme Court refused to take sides in a dispute between two rival governments in Rhode Island, one based on a popular referendum, the other based on an old royal charter. Writing for the Court, Chief Justice Roger B. Taney observed that the argument in the case "turned on political rights and political questions." Not insignificantly, President John Tyler had agreed to send in troops to support the charter government before the case ever went to the Supreme Court.

The best-established application of the political questions doctrine is the federal courts' unwillingness to enter the fields of international relations, military affairs, and foreign policy making. This was demonstrated in *Massachusetts v. Laird* (1970), in which the Supreme Court dismissed a suit challenging the constitutionality of the Vietnam War. This position was reaffirmed in *Goldwater v. Carter* (1979), in which the Court refused to entertain a lawsuit brought by a U.S. senator challenging President Carter's unilateral termination of a defense treaty with Taiwan. The Court, however, did not regard the political questions doctrine as a basis for limiting its review of constitutional questions arising from President George W. Bush's confinement of "enemy combatants" at Guantanamo Bay, Cuba.

For many years, the federal courts used the political questions doctrine to stay out of controversies involving the apportionment of legislative districts. In *Colegrove v. Green* (1946), Justice Felix Frankfurter warned of the dangers of entering the "political thicket" of reapportionment. But in *Baker v. Carr* (1962), the Supreme Court, in a lengthy opinion by Justice William Brennan, held that legislative malapportionment (that is, gross disparities in population among districts) was a justiciable question in federal court. This decision signaled a veritable revolution, in which federal courts directed the reapportionment of legislative districts at all levels of government, from the U.S. House of Representatives to local school boards, on the basis of "one person, one vote." In *Nixon v. United States* (1993) the Justices voted 9 to 0 to dismiss a suit challenging the Senate's current method for holding impeachment trials. Under this shortcut procedure, a committee of twelve senators hears testimony, reviews the evidence, and prepares a summary report to the full Senate. After hearing oral arguments from the accused and the "impeachment managers" from the House of Representatives, the full Senate votes on whether the accused should be removed from office. Former federal district judge Walter L. Nixon, who had been removed from office after being impeached, argued that the shortcut procedure violated Article I, Section 3, clause 6, which provides that the "Senate shall have the sole Power to try all Impeachments." The Supreme Court found the Senate's choice of the means for fulfilling its obligation under the Impeachment Trial Clause to be a nonjusticiable political question.

TO SUMMARIZE:

- Federal courts are not in the business of rendering advisory opinions on the meaning of the Constitution. Rather, their decisions are limited to real

controversies between adverse parties.

- The Supreme Court has articulated several doctrines that limit access to judicial review. Chief among them are standing, ripeness, mootness, exhaustion of remedies, abstention, and the political questions doctrine.

THE SUPREME COURT'S DECISION MAKING PROCESS

The exclamation "I'll fight it all the way to the Supreme Court if I have to!" is a stock phrase in American political rhetoric. Yet it is extremely difficult to get one's case before the High Court. The Supreme Court uses its limited resources to address the most important questions in American law. The rectification of injustices in individual cases is usually accorded much lower priority.

Case Selection

There are three mechanisms by which the Supreme Court reviews lower court decisions. By far the rarest is **certification,** in which a federal appeals court formally asks the Supreme Court to certify or "make certain" a point of law. The second is on appeal by right in which, at least theoretically, the Court must rule on the merits of the appeal. As noted earlier, however, Congress has restricted such appeals to a few narrow categories of cases. By far the most common means by which the Court grants review is through the writ of certiorari.

One who loses an appeal in a state court of last resort or a federal court of appeals may file a petition for certiorari in the Supreme Court. The filing fee is currently $300, which may be waived for indigent litigants on the filing of a motion to proceed ***in forma pauperis.*** About two-thirds of the cert petitions the Supreme Court receives are filed *in forma pauperis;* most of these come from prisoners seeking further review

of their convictions or sentences.

The chances of the Supreme Court granting review in a given case are very slim. The odds are somewhat improved if the case originated in a federal court. The odds are much better still if the petitioner is the federal government, the most frequent litigator in the federal courts. Of the approximately 10,000 petitions for certiorari coming to it each year, the Court will normally grant review in only about a hundred, and even some of these cases will be dismissed later without a decision on the merits. Others will be disposed of through brief **memorandum decisions,** in which the Court does not provide its reasoning through the issuance of opinions. Over the last decade the Supreme Court has averaged about 85 full opinion decisions annually, in contrast to a yearly average of about 150 in the early 1980s. In the October 2008 term, ending on June 29, 2009, the Court handed down 83 such decisions.

The process of case selection actually begins with the justices' **law clerks** (staff attorneys) reading the numerous petitions for certiorari and preparing summary memoranda. With the assistance of clerks, the chief justice, who bears primary responsibility for Court administration, prepares a **discuss list** of cases to be considered for certiorari. The associate justices may add cases to the list. Unless at least one justice indicates that a petition should be discussed, review is automatically denied, which disposes of more than 70 percent of the petitions for certiorari.

The Court considers petitions on the discuss list in private conferences. A conference, usually lasting the better part of a week, is held immediately before the commencement of the Court's term in October. This **preterm conference** is devoted entirely to consideration of cert petitions. Regular conferences are held throughout the term, both for the purpose of reviewing cert petitions and for discussing and deciding the cases in which the Court has granted review.

At least four justices must vote to grant certiorari in order for the Court to accept a case from the discuss list. The **rule of four** permits a minority of justices to set the Court's agenda. There is evidence that this happens fairly routinely. In such situations, it would be possible for the five justices who voted against cert to vote subsequently to dismiss the case without reaching the merits. Yet institutional norms militate against this strategy, suggesting the collegiality of the Court as a decision making body.

Nearly 99 percent of the petitions for certiorari coming to the Supreme Court are denied. A denial of certiorari, just like the dismissal of an appeal, has the effect of sustaining the lower court decision under challenge. An important distinction is made, however, between denials of certiorari and dismissals of appeal. According to the Supreme Court's decision in *Hopfman v. Connolly* (1985), a denial of cert carries no weight as **precedent**, whereas dismissal of an appeal "for want of a substantial federal question" has binding precedential effect on lower courts. The fact that the Court has decided not to review a lower court decision does not mean that the Court necessarily approves of the way it was decided. There is nothing to prevent the Court from reaching the same issue in a future case and deciding it differently. Denial of certiorari thus may be as much a function of scarce judicial resources as it is an expression of approval of the lower court decision. Because it entails the authoritative allocation of values by government, the Court's case selection process must be viewed as inescapably political.

Summary Decisions

As noted previously, not all cases accepted by the Supreme Court are afforded **plenary review,** or "full-dress treatment." Some cases are decided summarily—that

is, quickly, without the benefit of full argumentation before the Court. These decisions are rendered in the form of a memorandum or *per curiam* (unsigned) opinion, usually with little discussion or justification. Although memorandum decisions are fully binding on the parties to the case, they are accorded little individual significance as precedents. The major function of **summary decisions** is **error correction;** they have little impact on constitutional lawmaking.

Submission of Briefs

In cases slated for plenary review, lawyers for both parties (the petitioner and the respondent or the appellant and the appellee) are requested to submit **briefs.** Briefs are written documents containing legal arguments in support of a party's position. By Court rule, the parties' briefs are limited to fifty pages. In addition to the briefs submitted by the parties to the litigation, the Court may permit outside parties to file ***amicus curiae*** ("friend of the court") briefs. *Amicus* briefs are often filed on behalf of organized groups that have an interest in the outcome of a case. Examples of interest groups that routinely file *amicus* briefs in the Supreme Court include the American Civil Liberties Union (ACLU), the National Association for the Advancement of Colored People (NAACP), and Americans United for Separation of Church and State.

Oral Argument and Conference

After the briefs of parties and *amici* have been submitted, the case is scheduled for **oral argument** a public hearing where lawyers for both sides appear before the Court to make verbal presentations and, more importantly, answer questions from the bench. The oral argument is the only occasion on which lawyers in a case have any direct contact with the justices.

Oral arguments are normally held on Mondays, Tuesdays, and Wednesdays beginning on the first Monday in October and ending in late April. Oral argument on a given case is usually limited to one hour. Four cases will be argued before the Court on any given oral argument day. "Court watchers" (including representatives of interest groups, the media, and academia) often attend oral arguments hoping to learn something about the Court's predisposition with respect to the case under consideration or something about the general proclivities of the justices, especially the most recent appointees.

Within days after a case is orally argued, it is discussed in private **conference** among the justices. Conferences are usually held on Wednesdays, Thursdays, and Fridays. At conference, the chief justice opens the discussion by reviewing the essential facts of the case at hand, summarizing the history of the case in the lower courts, and stating his view as to the correct decision. This provides the chief with a chance to influence his colleagues, an opportunity that only a few occupants of the office have been able to exploit. It is well known, however, that Chief Justice Charles Evans Hughes was on occasion able to overwhelm other members of the Court by a photographic memory that gave him command of legal and factual details.

After the chief justice has presented the case, associate justices, speaking in order of seniority, present their views of the case and indicate their "votes" as to the proper judgment. This original vote on the merits is not binding, however, and justices have been known to change their votes prior to the announcement of the decision. The final vote is not recorded until the decision is formally announced.

Judgment and Opinion Assignment

In deciding a case that has been fully argued, the Court has several options. First, the

Court may decide that it should not have granted review in the first place, whereupon the petition is dismissed as having been "improvidently granted." This occurs infrequently. Alternatively, the Court may instruct the parties to reargue the case, focusing on somewhat different issues. The case is then likely to be carried over to the Court's next term and not decided with finality until more than a year after the original argument. This is precisely what happened in two of the most significant cases of the twentieth century: *Brown v. Board of Education* (1954), the school desegregation case, and *Roe v. Wade* (1973), the abortion case. It is interesting to note that in the *Brown* case, the Court not only called for reargument of the issues, but, under the leadership of the newly appointed Chief Justice Earl Warren, delayed its decision until unanimity could be achieved.

If the Court decides to render judgment, it will **affirm** (uphold), **reverse** (overturn), or **vacate** (cancel or nullify) the decision of the lower court. Alternatively, it may modify the lower court's decision in some respect. Reversal or modification of a lower court decision requires a majority vote, a quorum being six justices. A tie vote (in cases where one or more justices do not participate) always results in the affirmance of the decision under review.

Once a judgment has been reached, it remains for the decision to be explained and justified in one or more written opinions. In the early days of the Court, opinions were issued *seriatim*—that is, each justice would produce an opinion reflecting his views of the case. John Marshall, who became chief justice in 1801, is generally credited with instituting the practice of issuing an Opinion of the Court, which reflects the views of at least a majority of the justices. It appears that this practice was actually begun a few years earlier by Marshall's immediate predecessor, Chief Justice Oliver Ellsworth. The **Opinion of the Court,** referred to as the **majority opinion** when the Court is not

unanimous, has the great advantage of providing a coherent statement of the Court's position to the parties, the lower courts, and the larger legal and political communities.

It must be understood, however, that even a unanimous vote in support of a particular judgment does not guarantee that there will be an Opinion of the Court. Justices can and do differ on the rationales they adopt for voting a particular way. Every justice retains the right to produce an opinion in every case, either for or against the judgment of the Court. A **concurring opinion** is one written in support of the Court's decision; a **dissenting opinion** is one that disagrees with the decision. An **opinion concurring in the judgment** is one that supports the Court's decision, but disagrees with the rationale expressed in the majority opinion.

Dissenting opinions, indicative of intellectual conflict on the Court, are very important in the development of American constitutional law. It is often said that "yesterday's dissent is tomorrow's majority opinion." Usually, the time lag is much longer, but there are a number of examples of dissents being vindicated by later Court decisions. Nevertheless, it is more frequently the case that a dissenting vote is merely a defense of a dying position.

Since the 1930s the number of concurring and dissenting opinions has dramatically increased, reflecting both the growing complexity of the law and the demise of consensual norms in the Court itself. The modern Court appears to be less collegial in its decision making and to operate more like "nine separate law firms." When the Court fails to produce a majority opinion, typically one opinion announces the judgment of the Court and states the views of those justices who endorse that opinion. This is referred to as the plurality opinion if it garners the most signatures among those justices who support the Court's decision. Note that, because it does not

express the views of a majority of justices, the plurality opinion has no official weight as precedent.

Alternatively, the judgment of the Court may be expressed in a ***per curiam*** opinion, which is not attributed to any particular justice. Thus, the maximum number of opinions that may be produced in one decision is ten: one *per curiam* opinion announcing the decision of the Court followed by nine individual concurring or dissenting opinions. This occurred in the famous Pentagon papers case of 1971. The Court voted 6 to 3 to permit the *New York Times* and the *Washington Post* to publish the Pentagon papers despite an attempt by the Nixon administration to prevent the newspapers from doing so. The decision was announced in a three-paragraph *per curiam* opinion. Six justices (namely, Black, Douglas, Brennan, Stewart, Marshall, and White) authored concurring opinions. Three of their colleagues (Chief Justice Burger and Justices Blackmun and Harlan) wrote dissenting opinions (see *New York Times Company v. United States* [1971], discussed and reprinted in Chapter 3, Volume II).

Persistent criticism of the Court's failure to produce majority opinions in a number of important constitutional cases, especially in the 1970s and 1980s, may have contributed to a moderate reversal of this trend in the 1990s. It is understandable that judicial scholars as well as lower court judges and others responsible for implementing Supreme Court decisions would attach great value to the Opinion of the Court. Of course, the agreement of at least five justices on a coherent rationale in support of virtually any constitutional decision is not easily achieved. It requires both a high degree of collegiality among the justices and leadership from the chief justice. The many complex issues coming before the Court allow for a wide range of responses from individual justices, compounding the difficulty of forging a majority

opinion.

In an effort to obtain this level of agreement, the chief justice, assuming he is in the majority, will either prepare a draft opinion himself or assign the task to one of his colleagues in the majority. If the chief is in dissent, the responsibility of opinion assignment falls on the senior associate justice in the majority. Sometimes, in a 5-to-4 decision, a majority opinion may be "rescued" by assigning it to the swing voter—that is, the justice who was most likely to dissent. On the modern Court, the task of writing majority opinions is more or less evenly distributed among the nine justices. However, majority opinions in important decisions are more apt to be authored by the chief justice or a senior member of the Court.

After the opinion has been assigned to one of the justices, work begins on a rough draft. At this stage the law clerks play an important role by performing legal research and assisting the justice in the writing of the opinion. When a draft is ready, it is circulated among those justices in the majority for their suggestions and, ultimately, their signatures. A draft opinion that fails to receive the approval of a majority of justices participating in a given decision cannot be characterized as the Opinion of the Court. Accordingly, a draft may be subject to considerable revision before it attains the status of majority opinion.

The Supreme Court announces most of its plenary decisions in open court, often late in the term. A decision is announced by the author of the majority or plurality opinion, who may even read excerpts from that opinion. In important and controversial cases, concurring and dissenting justices will read excerpts from their opinions as well. When several decisions are to be announced, the justices making the announcements will speak in reverse order of their seniority on the Court. After decisions are announced, summaries are released to the media by the Court's public

information office. Today, the nation is informed of an important Supreme Court decision within minutes of its being handed down.

Publication of Supreme Court Decisions

The decisions of the Supreme Court, indeed of all appellate courts in this country, are published in books known as **case reporters.** The official reporter, published by the U.S. Government Printing Office, is titled the *United States Reports* (abbreviated U.S. in legal citations). West Publishing Company publishes a commercial edition entitled *Supreme Court Reporter* (abbreviated S.Ct.). Finally, the LexisNexis publishes the *United States Supreme Court Reports, Lawyers' Edition* (abbreviated L.Ed. or, for volumes since the mid-1950s, L.Ed. 2d). Lawyers, judges, academics, and students wishing to read the decisions of the Supreme Court may utilize any of these reporters, and references to the Court's decisions usually cite all three.

For example, the Pentagon papers case, *New York Times v. United States,* is cited as 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed. 2d 822 (1971). This indicates that the case can be located in Volume 403 of the *United States Reports,* beginning on page 713, or Volume 91, page 2140, and Volume 29, page 822, of the *Supreme Court Reporter* and *Lawyers' Edition,* respectively.

In the last several years, the Court has made its decisions available to the public on the Internet, a boon to students and scholars. One of the easiest ways to access these decisions is to go to www.findlaw.com, which is a very comprehensive legal resources Web site. The Supreme Court's official Web site, located at www.supremecourtus.gov, not only provides the Court's opinions, but also its docket, calendar for oral arguments, briefs of counsel, and the Court's rules of procedure.

TO SUMMARIZE:

- The Supreme Court hands down both plenary and summary decisions. Summary dispositions are made without the benefit of full argumentation before the Court. The major function of summary decisions is error correction, as opposed to legal policy making.
- Plenary decisions are characterized by the submission of briefs by the parties, oral argument, and the issuance of full opinions from the Court.
- The justices reach their decisions in private conferences in which votes are taken and opinion assignments are made.
- Decisions and their accompanying opinions are published in the *United States Reports,* the *Supreme Court Reporter,* and the *Lawyers' Edition*. The Court also makes electronic versions of its decisions available to the public via the Internet.

THE DEVELOPMENT OF JUDICIAL REVIEW

As we have noted, judicial review is the cornerstone of American constitutional law. In American constitutional law, judicial review denotes the power of a court of law to review a policy of government (usually a legislative act) and to invalidate that policy if it is found to be contrary to constitutional principles. In effect, a court of law has the power to nullify an action of the people's elected representatives, if what they have done is determined to be unconstitutional.

Judicial review is a uniquely American invention. Although **English common law** courts exercised the power to make law in some instances, no English court claimed the authority to nullify an act of Parliament. However, in *Dr. Bonham's Case* (1610), the great English jurist Sir Edward Coke recognized that parliamentary enactments were subordinate to the fundamental principles of the common law. Although this was

not an outright endorsement of judicial review as we know it today, Coke's holding was important in recognizing that legislative acts must conform to some higher law.

While judicial review is normally associated with the U.S. Supreme Court, it is a power possessed by most courts of law in this country. In fact, a nascent form of judicial review had already been exercised by a few state courts prior to the adoption of the U.S. Constitution (see, for example, *Trevett v. Wheeden,* Rhode Island [1786]). The Framers of the Constitution, however, did not explicitly resolve the question of whether the newly created federal courts should have this power. Article III is silent on the subject. It remained for the Supreme Court, in a bold stroke of legal and political genius, to assert this power.

Marbury v. Madison

The Supreme Court assumed the power to review legislation as early as 1796, when it upheld a federal tax on carriages as a valid exercise of the congressional taxing power (see *Hylton v. United States*). It is interesting to note that Alexander Hamilton, who, as a co-author of the *Federalist Papers,* had strongly endorsed judicial review, argued this case before the Supreme Court on behalf of the government. Although the *Hylton* decision approving congressional action implied the power of judicial review, it did not establish it; to do that the Court would have to strike down an act of Congress. The opportunity to do so came in 1803. The decision in *Marbury v. Madison* became the single most important ruling in Supreme Court history.

The *Marbury* case arose out of what may be fairly described as a bizarre set of circumstances. After the national election of 1800, in which the Federalists lost the presidency and both houses of Congress to the Jeffersonian Republicans, the Federalists sought to preserve their influence within the national government by

enlarging their control over the federal courts. The lame duck Congress, in which the Federalists held a majority, quickly passed the Judiciary Act of 1801, which was signed into law by the lame duck president, John Adams. This Act reorganized the federal judiciary by creating six new federal circuits to be presided over by sixteen newly appointed judges, which under the Constitution President Adams would be able to fill with good Federalists, of course. This innovative Act formally abolished the burdensome duties of circuit-riding, a major source of complaint among Supreme Court justices. The incoming Jefferson Administration regarded this reform as a blatant political power play and engineered the repeal of the Act in 1802. Circuit-riding duties were reinstituted and, as previously noted, were not fully terminated until 1891.

The lame duck Federalist Congress also adopted legislation creating a number of minor judicial positions for the newly established District of Columbia. Here again, the power to fill these posts lay primarily with the president. William Marbury was one of the many Federalist politicians appointed to judicial office in the waning days of the Adams administration. Marbury's commission as justice of the peace for the District of Columbia had been signed by the president following Senate confirmation on March 3, 1801, President Adams's last full day in office. Everything was in order, and after Secretary of State John Marshall placed the seal of the United States on the letter of commission, it was ready to be delivered to Mr. Marbury. But for some reason, yet to be fully explained, the delivery, which was entrusted to John Marshall's brother James, never took place. Marbury's commission was returned to John Marshall's office on the evening of March 3 or the morning of March 4, along with several other justice of the peace commissions that James Marshall also failed to deliver. These commissions simply disappeared in the last-minute confusion of

moving records and other papers from the office of the outgoing secretary of state, who was moving from the cabinet to his new post—chief justice of the United States.

Thomas Jefferson was sworn in as the nation's third president on March 4, 1801. The new secretary of state, James Madison, fully supported by the president, declined to deliver copies of the commissions to Marbury and the other Federalists who had failed to get their judgeships. After Marbury and others began to press the issue, Jefferson mounted an effort to repeal the Judiciary Act of 1801. A willing Congress, now dominated by Jeffersonian Republicans, was happy to oblige. Not only did Congress repeal the Judiciary Act, but it abolished the Supreme Court term of 1802! (Whether Congress could take such a bold step today is highly unlikely, since the annual Supreme Court term has become an institution in itself.)

Although having to wait until 1803 for a decision, Marbury and three other frustrated appointees filed suit against James Madison in the Supreme Court, invoking the Court's original jurisdiction. Marbury asked the Court to issue a writ of mandamus, an order directing Madison to deliver the disputed judicial commission to him. The stage was now set for a head-on collision between the Court, staffed entirely by Federalists, and the Jefferson administration.

It seems not to have occurred to the new chief justice that he should have recused himself (abstained) in the *Marbury* case. By today's standards of professional responsibility, Marshall's impartiality would have been doubted, to say the least. At the time of Marbury's appointment, John Marshall was a leader in the Federalist Party. He was central to the planning of the Judiciary Act of 1801 that had so enraged the Jeffersonians. Moreover, it was Marshall's failure as secretary of state to deliver Marbury's commission that necessitated the lawsuit!

John Marshall and his Federalist brethren on the Supreme Court found themselves

in a dilemma. On the one hand they could issue the writ of mandamus and risk the very real possibility that the Jefferson administration would refuse to obey the Court, in which case the Court would suffer a serious blow to its prestige. To make matters worse, President Jefferson had strongly intimated that if the Court were to issue the mandamus, he would seek to have several members of the Court, including his distant cousin John Marshall, brought before Congress on articles of impeachment! On the other hand, if the Court were to deny Marbury his commission, it would have been widely perceived as an admission of weakness and would have damaged the prestige of the Court, not to mention that of the Federalist Party. While Chief Justice Marshall, a longtime opponent of Thomas Jefferson, did not back away from an opportunity to confront the new administration, neither of the aforementioned alternatives seemed palatable.

Marshall was an imposing figure—a man of great intellect and forceful personality who dominated the Court during his thirty-four-year tenure as chief justice. He spoke for an undivided Court in solving the *Marbury* puzzle. His solution, announced in an 11,000-word opinion that required four hours for him to read from the bench on February 24, 1803, emphasized the following conclusions: William Marbury had a legal right to his commission; by implication, the Jefferson administration was legally and morally wrong to deny it to him. The writ of mandamus afforded an appropriate remedy. However, the Court would not issue the writ of mandamus. The reason it would not do so, said John Marshall, was that the Court had no authority to issue the writ.

The Supreme Court's presumed authority to issue the writ of mandamus had been based on Section 13 of the Judiciary Act of 1789. Section 13 granted the Court the authority to "issue… writs of mandamus, in cases warranted by the principles and

usages of law." According to John Marshall's opinion in *Marbury,* however, the Court could not issue the writ because the relevant provision of Section 13 was unconstitutional. It was invalid, according to Marshall, because it expanded the Court's original jurisdiction.

Article III, Section 2, of the Constitution expressly provides that Congress has authority to regulate the appellate jurisdiction of the Supreme Court. The implication is that Congress has no such authority with respect to the Court's original jurisdiction. In Marshall's view, Section 13 was invalid insofar as it permitted the Court to issue a writ of mandamus in a case under the Court's original jurisdiction. The Court had held for the first time that an act of Congress was null and void.

Many legal scholars have questioned John Marshall's reasoning. One can argue that all that Congress had done in crafting Section 13 of the Judiciary Act was to recognize the Court's power to issue certain kinds of writs in cases appropriately before it. In other words, Congress had not expanded the Court's jurisdiction at all, but merely recognized a legal remedy that the Court might have possessed even in the absence of the statute! More recent research conducted by legal historian Thomas Y. Davies seriously questions whether the distinction between original and appellate jurisdiction was even applicable to the "prerogative writ" of mandamus. Rather, in 1803, mandamus power was still regarded as an inherent feature of the superintending authority of a supreme court. Thus, mandamus was implicit in the mandate for "one supreme Court" at the beginning of Article III of the Constitution. At that time, however, Marshall's reasoning on this issue was not seriously challenged.

A much larger question is posed in *Marbury v. Madison* than the validity of Section 13 of the Judiciary Act of 1789. Even assuming the invalidity of the act, where does the Supreme Court get the power to strike down the law? After all, the

Constitution does not explicitly recognize judicial review. In support of this assumption of power, John Marshall reasoned that, because the Constitution is the "supreme law of the land," and it is the duty of the judiciary to interpret the law, judicial review is both necessary and inevitable. Perhaps because the Supremacy Clause of Article VI focuses on the subordinate relationship of state to federal law, Marshall relied more heavily on Article III, which established and broadly defined federal judicial power. It was in this context that Marshall made his frequently quoted assertion that "[i]t is emphatically the province and duty of the judicial department, to say what the law is." In reaching this conclusion, Marshall stressed the fact that judges take an oath to support and defend the Constitution. Marshall ended his landmark opinion with the question: "Why does a judge swear to discharge the duties agreeable to the Constitution of the United States, if that Constitution forms no rule for his government?"

Rejoinder to John Marshall

One of the most effective refutations of Marshall's position was offered by Justice John B. Gibson of the Pennsylvania Supreme Court. In a dissenting opinion in an otherwise unremarkable decision, *Eakin v. Raub* (1825), Gibson contended that the courts had no more authority to strike down legislative acts than the legislatures had to strike down judicial decisions. In Gibson's view, each branch of the government is ultimately responsible to the people for the constitutionality of its own acts. In support of this argument, Gibson noted that "[t]he oath to support the Constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government." Although Justice Gibson's position might still have some appeal in theory, judicial review has long been accepted as an essential power of American

courts and an important feature of the system of checks and balances. Indeed, one can argue that without judicial review the system of checks and balances is incomplete, since judicial review is the only significant check that the courts have on the actions of the legislative and executive branches.

Early Development of Judicial Review

The Supreme Court's assertion of judicial review in *Marbury v. Madison* went largely unchallenged for two reasons. First, although claiming the right to review legislation, the Court avoided a confrontation with the president and Congress. Second, the provision invalidated by the Court was not a major element of public policy. Rather it was a minor provision of a law dealing with the judicial process itself, an area in which the Supreme Court might be presumed to have greater expertise and hence a greater claim to exercise judicial review. Some scholars have contended that the significance of *Marbury* as a precedent for the broad exercise of judicial review was not fully recognized until roughly the end of the nineteenth century. However, according to research by the authors, American courts cited *Marbury v. Madison* more than one hundred times prior to 1850.

Marbury v. Madison was the only instance in which the Supreme Court under John Marshall struck down an act of Congress. The Marshall Court did, however, use its power of judicial review to strike down a number of state laws in some very important cases. The Court's first clear exercise of this power came in 1810, in the highly politicized case of *Fletcher v. Peck,* in which the Court invalidated a Georgia law interfering with private property rights (see Chapter 2, Volume II).

Perhaps the most important of these state cases was *M'Culloch v. Maryland* (1819), in which the Court declared unconstitutional an attempt by a state to tax a

branch of the Bank of the United States (see Chapter 2). Nearly as important was *Gibbons v. Ogden* (1824), in which the Court invalidated a New York law granting a monopoly to a steamboat company in contravention of a federal law granting a license to another company (see Chapter 2). Not only were the decisions in *M'Culloch v. Maryland* and *Gibbons v. Ogden* important as assertions of power by the Supreme Court, they were instrumental in enlarging the powers of Congress vis-à-vis the states.

In addition to asserting the power to invalidate state laws, the Marshall Court established its authority to overrule decisions of the highest state appellate courts on questions of federal law, both constitutional and statutory. Article VI provides that the Constitution, laws, and treaties of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Section 25 of the Judiciary Act of 1789 provided that appeals could be brought to the Supreme Court from certain decisions of the highest state courts. Against the strenuous objections of states' rights advocates, led by Judge Spencer Roane of Virginia, the Marshall Court successfully asserted federal judicial authority over the states with respect to the interpretation of federal law. Judge Roane conceded that state judges were bound by federal law, but asserted that state court decisions ought to be final in regard to the interpretation of federal law, including the U.S. Constitution.

When the Supreme Court invalidated Virginia's alien-inheritance and confiscation laws in 1813, the Virginia Supreme Court responded with an opinion by Chief Judge Roane declaring Section 25 of the Judiciary Act of 1789 unconstitutional. This action brought the case back to the U.S. Supreme Court. In a detailed opinion by Justice Joseph Story (John Marshall having recused himself due to earlier participation in this litigation, which had begun in the 1780s), the Supreme Court affirmed its power to

review state court decisions on matters of federal law (*Martin v. Hunter's Lessee* [1816]).

States' rights advocates continued to assail Supreme Court authority to review the decisions of state courts on matters of federal law. The issue reached the Supreme Court once again in *Cohens v. Virginia* (1821). P. J. and M. J. Cohen had been convicted in a Virginia court of violating that state's law prohibiting the sale of lottery tickets. The Cohens had been selling tickets in Norfolk for the Washington, D.C. lottery, which had been authorized by Congress to finance civic improvements in the capital.

The Cohens challenged their convictions in the Supreme Court, arguing that the federal law authorizing the lottery took precedence over the Virginia law criminalizing the sale of lottery tickets. On this point the Cohens ultimately lost, the Supreme Court concluding that Congress had not authorized the sale of lottery tickets outside the District of Columbia. From a technical standpoint this was a minor criminal case involving a fine of only $100. However, the competing forces of states' rights and national supremacy converted it into a major constitutional battle. Responding to Virginia's denial of the Supreme Court's authority to hear the Cohens' appeal, Chief Justice Marshall forcefully asserted the Supreme Court's jurisdiction over state court decisions "which may contravene the Constitution or the laws of the United States."

The *Dred Scott Case*

Although the Supreme Court under John Marshall succeeded in establishing and expanding the scope of judicial review, under Marshall's successor the Court damaged its credibility and prestige by an impolitic use of this power. The case was

Scott v. Sandford (1857), the first Supreme Court decision after *Marbury v. Madison* to declare an act of Congress unconstitutional.

Slavery had been a divisive political issue as early as the Constitutional Convention of 1787. By the early nineteenth century it was clear that slavery threatened to disunite the United States. Congress responded by adopting a series of compromises on the issue. Perhaps the most important of these was the Missouri Compromise of 1820. Under this act of Congress, Missouri was admitted to the Union as a slave state—that is, one in which slavery would be legal. However, slavery would be prohibited in the remaining western territories north of 36 degrees 30 minutes latitude, a line corresponding to the southern boundary of Missouri.

The *Scott* case began when Dred Scott, a slave backed by Abolitionist forces, brought suit seeking emancipation from his owner, John Sandford. Scott was formerly owned by a Dr. Emerson, a surgeon in the U.S. Army. In 1834 Emerson had taken Scott from Missouri, where he had long resided, into the free state of Illinois and from there to Fort Snelling in the Wisconsin territory, which was also free under the Missouri Compromise. After several years Emerson and Dred Scott returned to Missouri. Within a short time, Emerson died, and title to Scott ultimately passed to John Sandford, a New Yorker. In 1846 Scott brought suit against Sandford in the Missouri courts to obtain his freedom, arguing that his several-year residency on free soil had nullified his status as a slave.

After a favorable decision for Scott at the lower court level, the Missouri Supreme Court rejected his claim. Dred Scott then initiated a federal lawsuit on the jurisdictional ground that he and Sandford were citizens of different states. In response to Scott's claim, Sandford contended that since Scott was a Negro, he was not a citizen of Missouri and that, accordingly, the federal courts had no jurisdiction

in his case. Scott filed a demurrer in answer to this plea, arguing that Sandford's contention had no legal effect. Although the federal trial court sustained Scott's demurrer, thus possibly conceding his citizenship, it ruled against Scott's claim that his residency in a free territory entitled him to freedom. Scott appealed to the Supreme Court, and the case soon became the focal point of the intensifying conflict over slavery.

Both sides in the slavery controversy looked to the Court for a constitutional ruling vindicating their divergent views on the legal status of blacks and the power of Congress to regulate slavery in the territories. In 1857 five members of the Court, Chief Justice Roger B. Taney and four southern colleagues (Justices Campbell, Catron, Daniel, and Wayne) supported the institution of slavery without reservation. Two of the four northerners on the Court, Justices Nelson and Grier, if not supporters of slavery, were at least anti-Abolitionist in their sentiments. These seven justices comprised the majority in the *Dred Scott* decision. Justices Curtis and McLean wrote strong dissenting opinions.

The *Dred Scott* decision was rendered in an atmosphere of intense emotion and political partisanship. Chief Justice Taney's impassioned majority opinion went far beyond the jurisdictional question presented in the case. The opinion held that blacks, not just slaves but free blacks as well, were not citizens of the United States and could "therefore claim none of the rights and privileges which [the Constitution] provides." Indeed, in Taney's view, blacks "had no rights or privileges except such as those who held the power and the Government might choose to grant them." The Court further ruled that the Missouri Compromise was an arbitrary deprivation of the property rights of slaveholders and, as such, offended the provision of the Fifth Amendment that prohibits government from depriving persons of property without "due process of

law." The *Dred Scott* opinion embraces the doctrine of **substantive due process,** under which courts examine the *reasonableness* of governmental policies. The more conventional interpretation of the Due Process Clause is that government must follow certain procedures before taking a person's life, liberty, or property. In *Dred Scott* the Court used the Due Process Clause not to scrutinize government procedures, but to condemn the very substance of a government policy. This controversial doctrine would later be used by the Supreme Court in very different contexts from slavery.

The *Dred Scott* decision is also an extreme form of **judicial activism.** The decision was activist in the sense that the Court invalidated an act of Congress by invoking a novel, some would say dubious, constitutional doctrine. More fundamentally, it was activist in that the Court inserted itself into the slavery controversy, a deeply divisive issue that it could well have avoided. Far from resolving the slavery issue, the Court's decision greatly intensified the sectional conflict. A large and growing segment of the public simply rejected the legitimacy of the Court's constitutional theorizing on the slavery question. The *Dred Scott* decision and Chief Justice Taney soon became objects of ridicule in Abolitionist circles. The Court's intemperate decision thus not only hastened the arrival of the Civil War, but severely damaged the Court's prestige and credibility.

The *Dred Scott* decision itself was eventually nullified by the ratification of the Thirteenth Amendment, which outlawed slavery, and the Fourteenth Amendment, which provides that "[a]ll persons born or naturalized in the United States… are citizens of the United States and of the State wherein they reside."

Judicial Review in the Latter Part of the Nineteenth Century

In light of the furor produced by the *Dred Scott* decision, it is significant that the

institution of judicial review survived the Civil War intact. While the Supreme Court conspicuously avoided conflict with Congress and the president during the Civil War era (see, in particular, the later discussion of *Ex parte McCardle*), the Court soon reasserted its authority to invalidate acts of Congress. In the decades to follow, it would exercise the power of judicial review much more frequently than it did in the early nineteenth century. Yet it managed to avoid the great issues of public debate, and, accordingly, avoided the conflict that had characterized the *Dred Scott* decision. The period from 1865 to 1890 was thus one in which the Court quietly went about the task of rebuilding its prestige and credibility.

Judicial review again became a subject of political controversy near the end of the nineteenth century as the Supreme Court exercised its power to limit government activity in the economic realm (see Chapter 2). A tendency to insulate laissez-faire capitalism from government intervention brought the Court, and its power of judicial review, under an increasing barrage of criticism from Populists and Progressives.

The Income Tax Case In *Pollock v. Farmer's Loan and Trust Company* (1895), the Court invalidated a federal law that imposed a 2 percent tax on incomes of more than $4,000 a year. Fourteen years earlier, in *Springer v. United States* (1881), the Court had upheld an income tax measure adopted by Congress during the Civil War. Article I of the Constitution requires that "direct Taxes shall be apportioned among the several States… according to their respective Numbers." In *Springer,* the Court had concluded that the income tax was an indirect tax not subject to the apportionment requirement. But in *Pollock* the Court, by a 5-to-4 margin, changed direction. The Court held that the new income tax was a direct tax insofar as it was based on incomes derived from land and, as such, had to be apportioned among the states. Since the law did not provide for apportionment, it was unconstitutional.

Nationally prominent corporate attorneys, including Joseph H. Choate, submitted elaborate briefs in opposition to the income tax. They branded the income tax as a populist assault on the institutions of capitalism. Choate condemned the tax as part of the "Communist march," which if not blocked would lead to further incursions on private property, "the very keystone of the arch upon which all civilized government rests." The Court majority was heavily influenced by this point of view, as evidenced by the following passage from a concurring opinion by Justice Stephen J. Field:

> The present assault upon capital is but the beginning. It will be a stepping stone to others larger and more sweeping till our political contests will become a war of the poor against the rich, a war constantly growing in intensity and bitterness.

The *Pollock* decision was assailed by numerous critics as proof that the Court was aligning itself with business interests and in opposition to a moderate tax broadly supported by the American people. The Court itself had exhibited deep internal division in reaching final disposition of the case. With Justice Howell Jackson not participating due to illness, the Court was evenly split when the case was first argued. Prior to reargument before a full Court later in the year, one of the justices changed his position, underscoring the shakiness of the majority. Consequently, *Pollock* was regarded as a dubious precedent.

Some observers believed that if Congress enacted another income tax measure, the Court would return to the *Springer* rationale and uphold the tax. This view was furthered by the replacement of several members of the *Pollock* majority in the late 1890s, Justice Field among them. In 1900 the Court upheld a graduated inheritance tax in *Knowlton v. Moore*. Then, in *Flint v. Stone Tracy Company* (1911), the Court sustained a tax levied on corporations as an excise tax on the privilege of doing

business, even though the tax was measured by income. Before this ruling, however, Congress had proposed the Sixteenth Amendment, specifically authorizing taxation of income from any source without the requirement of apportionment among the states. By early 1913 the requisite three-fourths of the states had ratified the amendment, thus formally overruling the *Pollock* decision. As in the case of *Dred Scott v. Sandford,* a controversial Supreme Court decision had been nullified through constitutional amendment.

Judicial Review in the Twentieth Century

One of the most controversial decisions of the early twentieth century was *Lochner v. New York* (1905), in which the Supreme Court struck down a state law regulating working hours in bakeries. In the Court's view, the law was an unjustified interference with "the right to labor, and with the 'liberty of contract' on the part of the individual, either as employer or employee." In an oft-quoted dissent, Justice Oliver Wendell Holmes, Jr., argued for judicial restraint:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question of whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.

In Justice Holmes's view, the Court in *Lochner* had transcended the proper judicial role and usurped the function of the legislature. *Lochner,* like *Dred Scott,* is an example of judicial activism in support of a politically conservative result. It is important to recognize that the term *activism* alone carries no ideological connotation.

It may be applied to liberal and conservative decisions alike.

Throughout the early twentieth century the Supreme Court continued to use its power of judicial review to frustrate state and federal attempts at economic regulation. In *Hammer v. Dagenhart* (1918), for example, the Court struck down an act of Congress that sought to discourage the industrial exploitation of child labor. Relying on its earlier decision in *United States v. E. C. Knight* (1895), the Court found that the federal law went beyond the regulation of interstate commerce and invaded the legislative realm reserved to the states under the Tenth Amendment.

The Constitutional Battle over the New Deal The age of laissez-faire activism entered its final phase in a constitutional showdown between the Supreme Court and President Franklin D. Roosevelt. In 1932, in the depths of the Great Depression, Roosevelt was elected in a landslide over the Republican incumbent, Herbert Hoover. FDR promised the American people a "New Deal." A bold departure from the traditional theory of laissez-faire capitalism, the New Deal greatly expanded the role of the federal government in the economic life of the nation. Inevitably, the New Deal would face a serious challenge in the Supreme Court, which in the 1930s was still dominated by justices with conservative views on economic matters.

The first New Deal program to be struck down was the National Recovery Administration (NRA). In *Schechter Poultry Corporation v. United States* (1935), the Supreme Court held that Congress had exceeded its authority under the Commerce Clause and had gone too far in delegating legislative power to the executive branch (see Chapter 4). In 1935 and 1936 a host of New Deal programs were declared unconstitutional by the Supreme Court (see Table 1.1).

President Roosevelt responded to the adverse judicial decisions by trying to

enlarge the Court and change its direction through new appointments. Although the infamous Court-packing plan ultimately failed to win approval in Congress, the Supreme Court may have gotten the message. In an abrupt turnabout, the Court approved two key New Deal measures, the National Labor Relations Act and the Social Security Act, as well as a state minimum wage law (see Chapter 2).

The Constitutional Revolution of 1937

The Court's sudden turnabout signaled the beginning of a constitutional revolution. For decades to come, the Court would cease to interpret the Constitution as a barrier to social and economic legislation. After 1937 the Court consistently upheld even more sweeping federal legislation affecting labor relations, agricultural production, and social welfare. The Court exercised similar restraint with respect to state laws regulating economic activity.

The Supreme Court's post-1937 restraint in the area of economic regulation was counterbalanced by a heightened concern for civil rights and liberties. This concern was foreshadowed in a footnote in Justice Harlan Fiske Stone's majority opinion in *United States v. Carolene Products* (1938), upholding a federal regulation of the content of milk sold to the public. In footnote 4, Justice Stone maintained that "[t]here may be a narrower scope for the… presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." In essence, Justice Stone was suggesting that the traditional **presumption of validity** accorded to legislation ought to be reversed when that legislation touches on freedoms protected by the Bill of Rights. Stone's footnote also expressed the Court's willingness to be especially solicitous to the claims of minorities, saying that "prejudice against ***discrete and insular minorities*** [emphasis

added] may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities and… may call for a more searching judicial scrutiny."

[Start Table 1.1 here]

TABLE 1.1 SUPREME COURT DECISIONS INVALIDATING NEW DEAL PROGRAMS

Case	Year	Law Invalidated
Schechter Corp. v. United States	1935	National Industrial Recovery Act of 1933 (48 Stat. 195)
Hopkins Savings Assoc. v. Cleary	1935	Provision, Home Owners' Loan Act of 1933 (48 Stat. 646, Sec. 6)
Railroad Retirement Board v. Alton	1935	Railroad Retirement Act of 1934 (48 Stat. 1283)
Louisville Bank v. Radford	1935	Frazier-Lemke Act of 1934, Amending the Bankruptcy Act (48 Stat. 1289, Ch. 869)
United States v. Butler	1936	Agricultural Adjustment Act of 1933 (48 Stat. 31)
Rickert Rice Mills v. Fontenot	1936	1935 Amendments to the Agricultural Adjustment Act of 1933 (49 Stat. 750)
Carter v. Carter Coal Company	1936	Bituminous Coal Act of 1935 (49 Stat. 991)
Ashton v. Cameron County District	1936	Act of May 24, 1934, Amending Bankruptcy Act (48 Stat. 798)

Notes: 1. Other federal statutes were invalidated by the Court during the period 1935 to 1937, but these laws were enacted prior to the New Deal. 2. Stat. refers to U.S. Statutes-at-Large.

[End Table 1.1 here]

The Impact of the Warren Court

Supreme Court activity in the modern era, at least up until the 1980s, tended to follow the philosophy stated in *Carolene Products*. This was especially the case under the leadership of Chief Justice Earl Warren from 1953 to 1969. The Warren Court had an enormous impact on civil rights and liberties. Its most notable decision was *Brown v. Board of Education* (1954), where the Court declared racially segregated public schools unconstitutional. In *Brown* and numerous other decisions, the Warren Court expressed its commitment to ending discrimination against African Americans.

The Warren Court used its power of judicial review liberally to expand the rights not only of racial minorities but of persons accused of crimes, members of unpopular political groups, and the poor. Moreover, the Court revolutionized American politics by entering the "political thicket" of legislative reapportionment in *Baker v. Carr* (1962) and subsequent cases. Without question, the Warren era represents the most significant period of liberal judicial activism in Supreme Court history. The Warren Court was praised as heroic and idealistic; it was also denounced as lawless and accused of "moral imperialism."

The Burger and Rehnquist Courts

President Richard Nixon's appointment of Chief Justice Warren E. Burger and three associate justices (Harry Blackmun, Lewis Powell, and William Rehnquist) had the effect of tempering somewhat the liberal activism of the Warren Court. Yet it was the Burger Court that handed down the blockbuster decision in *Roe v. Wade* (1973), effectively legalizing abortion throughout the United States.

In the 1980s the Supreme Court became increasingly conservative as older

members retired and were replaced with appointments made by Presidents Ronald Reagan and George H. W. Bush. In 1986, Associate Justice William Rehnquist was elevated to chief justice when Warren Burger resigned to work on the national celebration of the bicentennial of the Constitution. The Rehnquist Court continued the Burger Court's movement to the right, although it did not dismantle most of what was accomplished by the Warren Court in the realm of civil rights and liberties. Indeed, the Court's 5-to-4 decision in *Texas v. Johnson* (1989), invalidating a state law making it a crime to desecrate the American flag, was surprisingly reminiscent of the Warren Era.

Two of President Ronald Reagan's three Supreme Court appointees, Justices Sandra Day O'Connor and Anthony Kennedy, emerged as leading moderates on the Rehnquist Court. President George H. W. Bush's first Supreme Court appointee, David Souter, came to occupy a position slightly left of the Court's center, while Clarence Thomas, Bush's second appointee, joined Chief Justice Rehnquist and Reagan appointee Antonin Scalia to form the Court's conservative bloc. President Bill Clinton's appointments of Ruth Bader Ginsburg in 1993 and Stephen Breyer in 1994 had the general effect of preventing the conservative bloc from gaining a position of dominance. The votes of O'Connor and Kennedy came to be more critical in determining the Court's response to major constitutional questions in the 1990s. These two justices sided with the conservatives to place outer limits on the congressional power under the Commerce Clause (see *United States v. Lopez* [1995] and *United States v. Morrison* [2000]) and in striking down a provision of the Brady Gun Control Act in 1997 (see Chapter 2). The same five-member majority expanded the scope of state sovereign immunity under the Eleventh Amendment, striking down significant federal legislation including provisions of the Age Discrimination in

Employment Act and the Americans with Disabilities Act (see *Kimel v. Florida* [2000] and *Board of Trustees of the University of Alabama v. Garrett* [2001], both of which are discussed in Chapter 5). On the other hand, Justice O'Connor joined the more liberal justices, Stevens, Souter, Ginsburg, and Breyer, in holding that a private individual can successfully sue a state under Title II of the Americans with Disabilities Act for violation of the right of access to courts. The majority ruled that this right is protected by the Due Process Clause of the Fourteenth Amendment (see *Tennessee v. Lane* [2004], discussed and reprinted in Chapter 5). Further illustrating the critical role of the moderates on the Rehnquist Court, Justice Kennedy cast a key vote siding with the more liberal wing in blocking the effort to impose term limits on members of the U.S. House of Representatives (see *U.S. Term Limits, Inc. v. Thornton* [1995], discussed and reprinted in Chapter 2).

In *Bush v. Gore* (2000), Justices Kennedy and O'Connor joined with the conservatives in ruling in favor of candidate George W. Bush in a sensational case stemming from the disputed presidential election of 2000. Yet in several important cases involving social issues, Kennedy and/or O'Connor joined with the Court's liberal bloc, thus producing a majority. Most notably, in *Lawrence v. Texas* (2003), both Kennedy and O'Connor joined with the liberals as the Court split 6–3 in striking down a Texas law criminalizing homosexual conduct. In *Roper v. Simmons* (2005), Kennedy sided with the liberals as the Court split 5–4 in striking down the death penalty for juvenile offenders. And in *McCreary County v. ACLU* (2005), O'Connor sided with the liberal bloc in a 5–4 decision invalidating a public display of the Ten Commandments inside a Kentucky courthouse. These and similar decisions produced outrage among social conservatives and demonstrated that, contrary to the hyperbolic claims of some liberal commentators, the Rehnquist Court was, on the whole,

anything but reactionary.

The Roberts Court

The membership of the Supreme Court did not change for eleven years after the appointment of Justice Stephen Breyer. Then, in the fall of 2005, the Court changed dramatically as the result of one death and one retirement, neither of which was unexpected. In July 2005, Justice Sandra Day O'Connor announced that she would step down as soon as a successor could be confirmed. To succeed her, President George W. Bush nominated Judge John G. Roberts, Jr., of the U.S. Court of Appeals for the D.C. Circuit. But shortly before the Roberts confirmation hearing was to begin, Chief Justice Rehnquist died in office on September 3, 2005. President Bush decided to nominate Roberts for the vacant chief justiceship. Widely praised for his legal acumen and judicial temperament, Roberts was easily confirmed by the Senate on September 29, 2005. To replace Justice O'Connor, President Bush first nominated White House counsel Harriet Myers, but the nomination was withdrawn after a barrage of criticism focusing on, among other things, her relative lack of qualifications for the position. Instead, Bush nominated Judge Samuel Alito of the third federal circuit. Judge Alito's nomination proved to be far more contentious than that of John Roberts. Despite opposition by most Democrats, who were concerned above all about Alito's propensities with respect to the abortion issue, the newest justice was confirmed by a 58–42 vote.

Under the new chief justice the Supreme Court continued to move, with notable exceptions, in a conservative direction. The most conscpicuous change from the Rehnquist Court occurred in April 2007 when the justices, by a five-four vote upheld a "partial birth" abortion law that Congress enacted in 2003 in response to the Court's

decision in 2000 invalidating a Nebraska partial birth abortion statute. The federal and state statutes at issue in these cases were almost identical, and commentators recognized the abrupt change in direction as a reflection of ideological or philosophical differences between Justice Sandra Day O'Connor, who had cast the pivotal vote striking down the Nebraska law, and her successor, Justice Samuel Alito, who supported the new federal legislation.

In 2007 the Roberts Court, again by a five-four vote, virtually removed affirmative action considerations in public school desegregation cases by striking down race-based pupil reassignment programs in Louisville, Kentucky and Seattle, Washington. In 2008 the Court, again by a five-four vote, with Chief Justice Roberts dissenting and Justice Kennedy casting the pivotal vote, invalidated a provision of the Military Commissions Act that Congress had passed in response to the Court's *Hamdan* decision of 2006. In this decision, *Boumediene v. Bush*, the Court concluded that the Military Commissions Act violated the right to habeas corpus guaranteed in Article I, Section 9 of the federal Constitution. Also in 2008, the Supreme Court recognized for the first time, that the Second Amendment granted an individual, as distinguished from a "collective" right to bear arms. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). Writing for a five member majority, Justice Scalia, emphasized that this individual right is far from absolute and is subject to a number of regulatory exceptions designed to ensure public safety. In still another 2008 decision, the Supreme Court held unconstitutional a Louisiana law permitting the imposition of the death penalty for child rape where the victim did not die. Justice Kennedy wrote for the majority, while Justice Scalia and Chief Justice Roberts filed sharp dissenting opinions. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

One of the most important of the Court's 2009 decisions was Caperton v. Massey

Coal. Here the Court held that the Chief Justice of the West Virginia Supreme Court had violated the due process clause of the 14th Amendment by refusing to recuse himself in the case involving a litigant who contributed over three million dollars to the Chief Justice's judicial election campaign. It can be seen from this incomplete summary of major constitutional decisions that the record of the Roberts Court is mixed and that the Chief Justice has been unable to bring greater consensus to the high bench.

In the late spring of 2009, Justice David Souter retired, providing President Barak Obama his first opportunity to fill a vacancy on the Court. President Obama then used this opportunity to nominate the first Latino woman to the Court, then-Judge Sonia Sotomayor. The confirmation process was filled with some controversy focused on a comment she had made in an previous speech, suggesting that a Latino woman would be able to decide issues brought to the Supreme Court better than a white male based upon experience and perspective. While the Republican opposition attempted to make this a defining issue, Sotomayor was overwhelmingly confirmed by the Senate by a vote of 68-31 on August 6, 2009.

TO SUMMARIZE:

- Judicial review is the power of a court of law to invalidate governmental policies that are contrary to constitutional principles.
- The Framers of the Constitution did not explicitly provide for the power of judicial review. The Supreme Court asserted this authority in *Marbury v. Madison* (1803), although the full reach of the power of judicial review was not realized until the twentieth century.
- In *Scott v. Sandford* (1857), the Court damaged its credibility and prestige by invalidating a legislative compromise on the divisive issue of slavery.

- Judicial review again became a subject of political controversy in the late nineteenth and early twentieth centuries as the Supreme Court exercised its power to limit government activity in the economic realm. This age of laissez-faire activism entered its final phase in a showdown between the Supreme Court and President Franklin D. Roosevelt over the constitutionality of the New Deal.
- From 1937 until the mid-1990s, the Court consistently upheld sweeping federal legislation affecting commerce. The Court exercised similar restraint with respect to state laws regulating economic activity.
- The modern Court has shown heightened concern for civil rights and liberties. This concern was especially pronounced during the Warren era (1953–1969). The Burger Court (1969–1986) and the Rehnquist Court (1986–2005) attenuated somewhat the scope of civil rights and liberties. The Roberts Court (2005-) has demonstrated a continued move in a more conservative direction and has been unable to build a consensus with regard to numerous issues.

THE ART OF CONSTITUTIONAL INTERPRETATION

As the foregoing historical sketch indicates, the Supreme Court's power of judicial review may be used boldly or with caution. To some extent, the approach the Court adopts in a given case depends on the nature of the issue and the complexion of political forces surrounding the case. It also depends, however, on the philosophies of the justices who happen to be on the Court at a given time. The justices have varying views about the role of the Court in the political system and the conditions under which judicial review ought to be exercised. They also differ in their understandings of the Constitution and their theories as to how the Constitution should be interpreted.

Interpretivism and Originalism

The most orthodox judicial philosophy is known as **interpretivism,** so called because of its insistence that the proper judicial function is interpretation, as opposed to lawmaking. Interpretivism holds that judicial review is legitimate only insofar as judges base their decisions squarely on the Constitution. Interpretivists argue that judges must be guided by the plain meaning of the constitutional text when it is clear. In the absence of plain textual meaning, judges should attempt to determine the original meaning of the language of the Framers. This element of the interpretivist perspective is often referred to as **originalism** or the **doctrine of original intent.**

In a letter to Wilson Nicholas, President Thomas Jefferson wrote in 1803, "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction." Similarly, in an 1824 letter to Henry Lee, James Madison appeared to endorse the doctrine of original intent by arguing that if "the sense in which the Constitution was accepted and ratified by the Nation… be not the guide in expounding it, there can be no security for a consistent and stable government, [nor] for a faithful exercise of its powers." Likewise, Chief Justice John Marshall, in *Marbury v. Madison* and other opinions, stressed the need for judicial fidelity to the original understanding of the Constitution. It should be noted, however, that Marshall often disagreed with Jefferson and Madison as to the intentions of the Framers, just as judges, legislators, presidents and scholars have often disagreed on original intent in the more than two centuries since the Constitution was framed.

The doctrine of original intent took on a distinctly political aspect during the 1980s. It was very much a part of the Reagan administration's judicial philosophy. Attorney General Edwin Meese made a series of public speeches in 1985 in which he castigated the modern Court for allegedly ignoring original intent. In a highly

publicized speech at Georgetown University, Justice William Brennan rebutted Meese, saying, "It is arrogant to pretend that from our vantage point we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions." Brennan argued that judges must "read the Constitution the only way we can: as twentieth century Americans" (*Newsweek*, October 28, 1985, pp. 97–98).

The doctrine of original intent also played an important role in the Reagan administration's attempt to reshape the federal judiciary. It was in large measure due to his adherence to this doctrine that Robert Bork was nominated to the Supreme Court when Justice Powell retired in 1987. Bork's defense of strict originalism was one of several factors contributing to his rejection by the Senate following a heated confirmation battle.

In recent years, however, the emphasis has shifted from "original intent" to "original meaning," influenced most significantly by the views of Justice Antonin Scalia. In addition to its emphasis on original meaning, interpretivism stresses the need for judges to respect history and tradition and, in particular, legal precedent. Essentially, interpretivism calls for judges to maintain as best they can the original Constitution, with a minimum of judicial modification.

Noninterpretivism

Many judges and constitutional scholars do not accept the interpretivist view. They raise serious questions about the practicability and desirability of interpretivism, especially on the issue of original intent. It is often argued that the "intent of the Framers" is impossible to discern on many issues. Justice Scalia's reliance on original meaning underscores acknowledgment of the perceived shortcomings of the search

for original intent. Many would argue that original intent, even if knowable, should not control contemporary constitutional decision making. These commentators tend to view the Constitution as a living document, the meaning of which evolves according to what Justice Oliver Wendell Holmes called the "felt necessities" of the times.

Numerous noninterpretive theories have been developed, drawing on a number of schools of legal thought. Some have suggested that the Court should strive to reflect societal consensus. Others have urged that the Court adopt an explicit position of moral leadership, striving to elevate and enlighten society rather than merely reflect prevailing norms. Noninterpretivists, whatever their particular philosophies, are united in their rejection of the idea that the meaning of the Constitution is rigid and static. A contemporary example of this dynamic view of the Constitution is provided by Justice Stephen G. Breyer in his book *Active Liberty: Interpreting Our Democratic Constitution* (2005).

Natural Law

Another perspective, not easily identified with either interpretivism or noninterpretivism, is one that argues for judicial reliance on **natural law.** Natural law is a complex term with many connotations, but it generally refers to a set of principles transcending human authority that may be discovered through reason. Natural law is often associated with religion and, in particular, the moral and ethical values of the Judeo-Christian tradition. Although occasionally invoked by individual justices, the natural law perspective has, for the most part, been eschewed by the modern Supreme Court. Students should recall, however, that natural law and the related concept of natural rights, with its emphasis on inalienable freedoms, contributed significantly to the intellectual foundations of the American republic.

An Ongoing Dialogue

The Supreme Court has never wed itself to any one judicial philosophy or theory of constitutional interpretation. Rather, the Court's numerous constitutional decisions reflect an ongoing philosophical and theoretical dialogue, both from within and without the Court. The Court's opinions are rife with arguments about fidelity to the "intent of the Framers" or the "original meaning" of the Constitution versus the need to keep the Constitution "in tune with the times." These debates are fundamentally about the proper role of a powerful, life-tenured, black-robed elite within a democratic polity, and about the duty of that elite to ensure that our eighteenth century Constitution is both meaningful and relevant in the twenty-first century.

TO SUMMARIZE:

- Interpretivism holds that in interpreting the Constitution, judges must be guided by the plain meaning of the text when it is clear. In the absence of plain textual meaning, judges should attempt to determine the original intentions of the Framers or the original meaning of constitutional language. Interpretivism also stresses history and tradition and, in particular, legal precedent. Essentially, interpretivism calls for judges to maintain as best they can the original Constitution, with a minimum of judicial modification.
- Noninterpretivists argue that original intent, even if knowable, should not control contemporary constitutional decision making. They view the Constitution as a living document, the meaning of which evolves according to what Justice Oliver Wendell Holmes called the "felt necessities" of the times.
- The Supreme Court has never adhered to any one judicial philosophy or theory of constitutional interpretation. Rather, the Court's numerous constitutional decisions

reflect an ongoing philosophical and theoretical dialogue, both from within and without the Court.

JUDICIAL ACTIVISM AND RESTRAINT

Scholarly commentary on the Supreme Court often uses the terms *activism* and *restraint*—sometimes referred to as *maximalism* and *minimalism*—to describe particular decisions, doctrines, or justices' approaches. These terms denote opposing philosophies regarding the exercise of judicial power. Under the philosophy of **judicial restraint,** federal courts are viewed as performing a circumscribed role in the political system. Judges are not seen as Platonic Guardians or "philosopher kings." They are not the primary custodians of the general welfare, since that role belongs to Congress and the state legislatures. Doctrines like standing, mootness, ripeness, and the like are reflections of judicial restraint in that they serve to limit judicial inquiry into constitutional matters.

The countervailing philosophy to judicial restraint is judicial activism. Activist judges tend to see the courts as coequal participants, along with the legislative and executive branches, in the process of public policy making. Activists are thus impatient with self-imposed limitations on judicial review, and tend to brush aside doctrinal restraints. A jurist of activist views, Justice William O. Douglas once remarked that "[i]t is far more important to be respectful to the Constitution than to a coordinate branch of government" (*Massachusetts v. Laird* [1970], dissenting opinion). Dissenting in *Paul v. Davis* (1976), Justice Brennan expressed similar sentiments regarding the role of the Supreme Court:

> I had always thought that one of this court's most important roles was to provide a bulwark against governmental violation of the constitutional safeguards securing

in our free society the legitimate expectations of every person to innate human dignity and a sense of worth.

One should remember that judicial power can be used for liberal or conservative policy goals. The debate over judicial activism is a long-standing one, and can be traced to decisions like *Scott v. Sandford* (1857), in which a conservative Supreme Court actively defended the institution of slavery on dubious constitutional grounds. Along the same lines, in *Lochner v. New York* (1905), a conservative Court used its power without restraint to frustrate the implementation of progressive economic legislation.

Much of American constitutional law can be seen as an ongoing debate between judicial activism and judicial restraint. In a system committed both to representative democracy and avoidance of the tyranny of the majority, it is inevitable that the courts will wrestle with the problem of defining the proper judicial role. This dynamic tension is most visible in the Supreme Court's exercise of the power of judicial review.

The *Ashwander* Rules

The philosophy of judicial restraint counsels judges to avoid broad or dramatic constitutional pronouncements. Accordingly, various doctrines limit the exercise of judicial review, even after a federal court has reached the merits of a case. Some of these rules are codified in Justice Louis Brandeis's oft-cited concurring opinion in *Ashwander v. Tennessee Valley Authority* (1936). In *Ashwander,* the Supreme Court upheld the federal government's program of building dams to generate electrical power in the Tennessee Valley region. Justice Brandeis's concurring opinion has

become a classic statement of the principles of judicial restraint. The *Ashwander* rules, as they have come to be known, seek to protect judicial power not only by deflecting constitutional questions but by making narrow rulings when constitutional issues are considered.

[Start "Sidebar: The Ashwander Rules" box here]

Sidebar: The *Ashwander* Rules

- The court will not pass upon the constitutionality of legislation in a friendly, nonadversary proceeding, declining because to decide such questions is legitimate only in the last resort, and as a necessity in the determination of a real, earnest, and vital controversy between individuals.
- The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it.
- It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.
- The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.
- The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.
- The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.
- The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.
- When the validity of an act of the Congress is drawn in question, and even if a

serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

[End "Sidebar: The Ashwander Rules" box here]

The Doctrine of Strict Necessity

Under the **doctrine of strict necessity,** federal courts will attempt to avoid a constitutional question if a case can be decided on nonconstitutional grounds. For example, in *Communist Party of the United States v. Subversive Activities Control Board* (1956), the Supreme Court remanded a case to a government agency for further proceedings rather than reach the sensitive political issue of whether the Communist Party enjoyed constitutional protection. Similarly, in *Hurd v. Hodge* (1948), the Court addressed the issue of "restrictive covenants," private agreements prohibiting the sale and rental of housing to blacks and other minorities. The Court held that enforcement of restrictive covenants by federal courts in the District of Columbia would violate national public policy, but it did not reach the question of whether such enforcement would violate the Constitution. The Court said: "It is a well settled principle that this court will not decide constitutional questions where other grounds are available and dispositive of the issues of the case." The Court chose not to avoid this constitutional issue in a similar case arising in a state court, however, ruling that state judicial enforcement violates the Equal Protection Clause of the Fourteenth Amendment (see *Shelley v. Kraemer* [1948], discussed in Chapter 7, Volume II).

The Doctrine of Saving Construction

Before a court can determine the constitutionality of a statute, it must first determine

its exact meaning. This is known as **statutory construction.** In construing statutes, courts often look beyond the language of the law to the intent of the legislature. Sometimes, the intent is clearly revealed in the legislative debate surrounding the adoption of the law. Often, however, legislative intent is not clear, and courts must exercise discretion in deciding what the law means. Sometimes, the judicial interpretation of the statute may determine its constitutionality. Where a challenged law is subject to different interpretations, judicial restraint demands that a court choose an interpretation that preserves the constitutionality of the law. This is known as the **doctrine of saving construction.** In *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (1937), the Supreme Court upheld the Wagner Act of 1935, a controversial federal statute regulating labor management relations in major industries (see Chapter 2). The Jones & Laughlin Steel Corporation argued that the act was a thinly disguised attempt to regulate all industries, rather than merely those that affected interstate commerce. This point was crucial, because Congress's power in this field is limited to the regulation of interstate commerce. Given the choice between two interpretations of the act, the Court chose the narrower one, leading to a conclusion that the act was valid. Writing for the majority, Chief Justice Charles Evans Hughes observed:

> The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996. One of the provisions of this statute curtails

second habeas corpus petitions by state prisoners who have already filed such petitions in federal court. Under the new statute, any second or subsequent habeas petition must meet a particularly high standard and must pass through a gatekeeping function exercised by the U.S. Courts of Appeals. A circuit court must grant a motion giving the inmate permission to file the petition in a district court; denial of this motion is not appealable to the Supreme Court. A prisoner on death row in Georgia challenged the constitutionality of this provision, posing two constitutional objections: (1) that the new law amounted to an unconstitutional suspension of the writ of habeas corpus; and (2) that the prohibition against Supreme Court review of a circuit court's denial of permission to file a subsequent habeas petition is an unconstitutional interference with the Supreme Court's jurisdiction as defined in Article III of the Constitution. In *Felker v. Turpin* (1996), the Supreme Court unanimously rejected these challenges to the statute. In a saving construction, the Court interpreted the statute in such a way as to preserve the right of state prisoners to file habeas petitions directly in the Supreme Court. The Court stated, however, that it would exercise this jurisdiction only in "exceptional circumstances."

The Presumption of Constitutionality

Perhaps the most fundamental self-imposed limitation on the exercise of judicial review is the **presumption of constitutionality.** Under this doctrine, courts will presume a challenged statute is valid until it is demonstrated otherwise. In other words, the party attacking the validity of the law carries the burden of persuasion. This doctrine is based on an appreciation for the countermajoritarian character of judicial review and a fundamental respect for the legislative bodies in a democratic system.

The modern Supreme Court has modified the doctrine of presumptive constitutionality with respect to laws discriminating against citizens on grounds such as race, religion, and national origin. Such laws are now seen as inherently suspect and are subjected to **strict scrutiny.** Similarly, laws abridging **fundamental rights** are not afforded the traditional presumption of validity.

The Narrowness Doctrine

When a federal court invalidates a statute, it usually does so on fairly narrow grounds. The **narrowness doctrine** counsels courts to avoid broad pronouncements that might carry unforeseen implications for future cases. A narrowly grounded decision accomplishes the desired result, striking down an unconstitutional statute, while preserving future judicial and legislative options.

In *Bowsher v. Synar* (1986), the Supreme Court struck down a provision of the Gramm-Rudman-Hollings Act, a law designed to reduce the federal deficit through automatic spending cuts. The plaintiff, Congressman Mike Synar, asked the Court to invalidate the statute on the grounds that it unconstitutionally delegated Congress's lawmaking power to the comptroller general, an appointed official. Instead, the Court held that Congress could not exercise removal powers over the comptroller general since he performed executive functions under the act. Thus the Court avoided the issue of congressional delegation of legislative power altogether. The delegation issue is potentially explosive because so many of the regulations promulgated by the federal bureaucracy are based on authority delegated by Congress to the executive branch (see Chapter 4).

Avoiding the Creation of New Principles

A variation on the narrowness doctrine is that courts should not create a new principle if a case may be decided on the basis of an existing one. Thus, in *Stanley v. Georgia* (1969), the Supreme Court struck down a state law making it a crime to possess obscene material in the home. Stretching the boundaries of the First Amendment, the Court held that this law was a violation of the freedom of expression. Alternatively, the Court could have created a right of privacy to engage in certain activities in the home that might be subject to arrest outside the home. This, however, would have required the Court to consider the constitutionality of numerous criminal prohibitions, including laws governing possession and use of "recreational" drugs.

The federal appellate courts are not bound to address constitutional issues precisely as they have been framed by the litigants. In its grant of certiorari, the Supreme Court may direct the parties to address certain issues, and then refuse to decide these issues. For example, in *Illinois v. Gates* (1983), the Supreme Court directed the parties to argue the so-called "good faith exception" to the Fourth Amendment exclusionary rule (see Chapter 5, Volume II). In its final decision in *Gates,* the Court did not address the highly controversial good faith exception, but decided the case on other grounds, thus postponing for one year the creation of a new principle of constitutional law.

Stare Decisis

The term ***stare decisis*** ("stand by decided matters") refers to the doctrine of precedent. It is axiomatic that American courts of law should follow precedent whenever possible, thus maintaining stability and continuity in the law. As Justice Louis Brandeis once remarked, "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be

settled right" (*Burnett v. Coronado Oil Company* [1932], dissenting opinion).

Devotion to precedent is considered a hallmark of judicial restraint. Obviously, following precedent limits a judge's ability to determine the outcome of a case in a way that he or she might choose if it were a matter of first impression. The decision in *Roe v. Wade* poses an interesting problem for new Supreme Court justices who believe the decision legalizing abortion was incorrect. Should a new justice who believes *Roe* was wrongly decided vote to overrule it, or should *stare decisis* be observed?

Although the doctrine of *stare decisis* applies to American constitutional law, it is not uncommon for the Court to depart from precedent. Perhaps the most famous reversal is *Brown v. Board of Education* (1954), in which the Supreme Court repudiated the separate but equal doctrine of *Plessy v. Ferguson* (1896). The separate but equal doctrine had legitimized racial segregation in this country for nearly six decades. Beginning with the *Brown* decision, official segregation was invalidated as a denial of the equal protection of the laws.

The Severability Doctrine

Under the doctrine of **severability,** federal courts will generally attempt to excise the unconstitutional elements of a statute while leaving the rest of the law intact. In *Champlin Refining Company v. Corporation Commission of Oklahoma* (1932), the Supreme Court said that invalid provisions of a law are to be severed "unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." The severability doctrine is consistent with the philosophy of judicial restraint, in that judicial review is employed with a minimum of "damage" to the work of the legislature.

In *Immigration and Naturalization Service v. Chadha* (1983), for example, the Supreme Court invalidated Section 244(c)(2) of the Immigration and Nationality Act. This specific provision permitted one house of Congress to veto decisions of the executive branch regarding deportation of aliens. The Court found this "legislative veto" to be an unconstitutional exercise of power by Congress (see Chapter 4). The remainder of the Immigration and Nationality Act, a very important statute from the standpoint of immigration policy, was left intact.

Frequently Congress will attach a severability clause to a piece of legislation, indicating its desire that any unconstitutional provisions be severed from the rest of the statute. Absent a severability clause, federal courts may presume an enactment was intended to be judged as a whole.

Related to the concept of severability is the inclusion of a "saving" clause in many statutes. In attempting to keep pace with social change and current demands on government, Congress routinely enacts legislation repealing earlier statutes. Logically, a repeal would set aside or bring to an end all pending matters governed by the repealed statute. The saving clause simply indicates that repeal of the earlier statute is subject to certain exceptions. For example, in repealing criminal statutes, Congress often provides that prosecutions initiated prior to repeal may be pursued under repealed provisions.

Although serious constitutional questions may be raised with respect to such clauses, the Supreme Court generally recognizes their validity. The point is well illustrated by the decision in *Bradley v. United States* (1973). Bradley was convicted in 1971 of conspiring to sell cocaine in violation of a federal statute that imposed a mandatory five-year prison term on offenders. The statute under which he was prosecuted was repealed five days before his conviction and sentencing. The new law

contained less punitive sentencing requirements. Nevertheless, Bradley was sentenced to the mandatory five-year term under the original statute. The Supreme Court affirmed his conviction and sentence, upholding the validity of the saving clause contained in the act of repeal.

"Unconstitutional as Applied"

The severability clause from the Immigration and Nationality Act just discussed distinguishes between judicial invalidation of a law as inherently unconstitutional and invalidation of a law as applied to particular persons or circumstances. The philosophy of judicial restraint suggests that, if possible, courts refrain from making declarations that a challenged statute is invalid "on its face." Whether a federal court will invalidate a statute on its face or as applied depends on the language of the law and the facts of the case in which the law is challenged.

By way of illustration, consider the Supreme Court's decision in *Cohen v. California* (1971). There, the Supreme Court held that a state "offensive conduct" law was **unconstitutional as applied** to a case where a man was prosecuted for wearing a jacket bearing the slogan "Fuck the Draft." The Court held that to punish Cohen's "immature antic" as offensive conduct would be to deny his right of free speech guaranteed by the First Amendment. On the other hand, in *Brandenburg v. Ohio* (1969), the Court struck down a state criminal syndicalism law as inherently unconstitutional under the First Amendment, because the law prohibited the "mere advocacy" of violence. (Both *Cohen and Brandenburg* are discussed in Chapter 3, Volume II.)

It must be noted that all of the **limiting doctrines** are subject to a degree of manipulation to achieve desired outcomes. The doctrines are sufficiently complex and

imprecise to permit two judges to reach opposite conclusions about their application to a given case. Nevertheless, the creation and continuance of these doctrines suggest sensitivity on the part of the federal judiciary to the inherent tensions surrounding the exercise of judicial review in a democratic polity.

TO SUMMARIZE:

- Constitutional lawmaking involves an ongoing debate between judicial activism and judicial restraint. Today, these perspectives are sometimes labeled *maximalism* and *minimalism*.
- Under the philosophy of judicial restraint, federal courts are viewed as performing a circumscribed role in the political system. Activist judges tend to see the courts as coequal participants, along with the legislative and executive branches, in the process of public policy making.
- The philosophy of judicial restraint counsels judges to avoid broad or dramatic constitutional pronouncements. Accordingly, various doctrines limit the exercise of judicial review, even after a federal court has reached the merits of a case. Some of these rules are codified in Justice Brandeis's concurring opinion in *Ashwander v. Tennessee Valley Authority* (1936).
- The most important principles of judicial restraint are the doctrine of strict necessity, the doctrine of saving construction, the narrowness doctrine, the presumption of constitutionality, the severability doctrine, and *stare decisis*.

EXTERNAL CONSTRAINTS ON JUDICIAL POWER

Although the federal courts, and the Supreme Court in particular, are often characterized as guardians of the Constitution, the judicial branch is by no means

immune to the abuse of power. Accordingly, the federal judiciary is subject to constraints imposed by Congress and the president. In a constitutional system that seeks to prevent any agency of government from exercising unchecked power, even the Supreme Court is subject to checks and balances.

Judicial Dependency on Congress

Article III of the Constitution recognizes the judiciary as a separate branch of government, but it also requires the courts to depend on Congress in a number of ways. The federal courts, including the Supreme Court, depend on Congress for their budgets, although Congress is prohibited from reducing the salaries of federal judges. The organization and jurisdiction, indeed the very existence, of the lower federal courts are left entirely to Congress by Article III. It is quite conceivable that Congress might have chosen not to create a system of lower federal courts at all. It could have granted existing state tribunals original jurisdiction in federal cases, although it certainly would have been required to provide some degree of appellate review by the U.S. Supreme Court, the one federal tribunal recognized by the Constitution. Rather quickly, however, Congress passed the Judiciary Act of 1789, which provided the basis for the contemporary system of lower federal courts.

Restriction of the Supreme Court's Jurisdiction

The Supreme Court's original jurisdiction is fixed by Article III of the Constitution. *Marbury v. Madison* made clear that Congress may not alter the Court's original jurisdiction. Congress may, however, authorize lower federal courts to share this jurisdiction. The Supreme Court's appellate jurisdiction is another matter. Article III indicates that the Court "shall have appellate Jurisdiction, both as to Law and Fact,

with such Exceptions, and under such Regulations as the Congress shall make." On only one occasion since 1789 has Congress significantly limited the appellate jurisdiction of the Supreme Court. It happened during the turbulent Reconstruction period. After the Civil War, Congress passed the Reconstruction Acts, which, among other things, imposed military rule on most of the southern states formerly comprising the Confederacy. As part of this program, military tribunals were authorized to try civilians who interfered with Reconstruction. William H. McCardle, editor of the *Vicksburg Times,* published a series of editorials highly critical of Reconstruction. Consequently, he was arrested by the military and held for trial by a military tribunal. McCardle sought release from custody through a petition for habeas corpus in federal court. Congress in 1867 had extended federal habeas corpus jurisdiction to cover state prisoners. Since McCardle was in the custody of the military government of Mississippi, the 1867 act applied to him. It also provided a right of appeal to the Supreme Court. Having lost his bid for relief in the lower court, McCardle exercised his right to appeal.

After *Ex parte McCardle* was argued in the Supreme Court, Congress enacted legislation, over President Andrew Johnson's veto, withdrawing the Supreme Court's appellate jurisdiction in habeas corpus cases. The legislation went so far as to deny the Court's authority to decide a case already argued. The obvious motive was to prevent the Court from ruling on the constitutionality of the Reconstruction Acts, which McCardle had challenged in his appeal. The Court could have invalidated this blatant attempt to prevent it from exercising its power of judicial review. But the Court chose to capitulate. By acquiescing in the withdrawal of its jurisdiction in *McCardle,* the Court avoided a direct confrontation with Congress at a time when that institution was dominant in the national government. Shortly before *McCardle* was

decided, the House of Representatives had impeached President Andrew Johnson, and he escaped conviction in the Senate by only one vote. It is likely that the Court's decision to back down was somewhat influenced by the Johnson impeachment.

Does *Ex parte McCardle* imply that Congress could completely abolish the Court's appellate jurisdiction? Whatever the answer might have been at the time, the answer today would certainly be no. It is highly unlikely that Congress would ever undertake such a radical measure, but if it did the Supreme Court would almost certainly declare the act invalid. Since the Court's major decision making role is a function of its appellate jurisdiction, any serious curtailment of that jurisdiction would in effect deny the Court the ability to perform its essential function in the constitutional system.

There is even doubt that the *McCardle* decision would be reaffirmed if the contemporary Supreme Court were faced with a similar question. In *Glidden v. Zdanok* (1962), Justice William O. Douglas mused that "there is a serious question whether the *McCardle* case could command a majority today." One can argue that the Court would not, and should not, permit Congress to restrict its appellate jurisdiction if by so doing Congress would curtail the Court's ability to enforce constitutional principles or protect citizens' fundamental rights. In his dissenting opinion in *Hamdan v. Rumsfeld* (2006), Justice Scalia quoted approvingly from the *McCardle* case in asserting that Congress had removed the Supreme Court's jurisdiction in all pending habeas corpus cases involving detainees. The majority, however, speaking through Justice Stevens, rejected Scalia's attempt to revive the McCardle precedent.

Congress has, on many occasions, debated limitations on the Supreme Court's appellate jurisdiction. In the late 1950s, there was a movement in Congress to deny the Supreme Court appellate jurisdiction in cases involving national security, a

reaction to Warren Court decisions protecting the rights of suspected Communists. Although the major legislative proposals were narrowly defeated, the Court retreated from the most controversial decisions of 1956 and 1957. In this regard, it is instructive to compare *Pennsylvania v. Nelson* (1956) and *Watkins v. United States* (1957) with *Uphaus v. Wyman* (1959) and *Barenblatt v. United States* (1959).

In the early 1980s, a flurry of activity in Congress was aimed at restricting Supreme Court jurisdiction to hear appeals in cases dealing with abortion and school prayer. A number of proposals surfaced, but none was adopted. The constitutionality of such proposals is open to question, in that they might be construed as undermining the Court's ability to protect fundamental constitutional rights. The question remains academic, however, because Congress has not enacted such a restriction on the Court.

Denial of jurisdiction as a limiting strategy depends greatly on the substantive issue area involved, what the Court has done in the area thus far, and what it is likely to do in the future. As retaliation against the Court for one controversial decision, the curtailment of appellate jurisdiction is not likely to be an effective strategy.

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Case in Point

Can Congress Override Constitutional Interpretation via Statute?

***City of Boerne v. Flores* (1997)**

Although it is generally conceded that the Supreme Court has final authority to interpret the Constitution, Congress persists in occasionally attempting to substitute its own collective judgment on controversial questions for that of the justices. This legislative revision of judicial interpretation is well illustrated by Congress's passage of the Religious Freedom Restoration Act of 1993 (RFRA). This statute was enacted

in direct response to the Supreme Court's 1990 decision in *Employment Division v. Smith*.

In *Smith,* the Court upheld Oregon's prohibition on the use of peyote, even as applied to sacramental use by members of the Native American Church. In determining that Oregon had not violated the Free Exercise Clause, the Court departed from precedent in refusing to consider whether the challenged state policy "substantially burdened" religious practices and, if so, whether the burden could be justified by a "compelling governmental interest." Under *Smith,* no one can claim a religion-based exemption from a generally applicable criminal law.

Negative reaction to *Smith* convinced a majority in Congress to vote in favor of a law designed to reinstate the **compelling government interest** standard. In thus enacting RFRA, Congress challenged Justice Scalia's interpretation of constitutional history and of the requirements of the Free Exercise Clause of the First Amendment, as applied to the states by the Fourteenth Amendment.

In *City of Boerne v. Flores* (1997) (excerpted in Chapter 2), the Supreme Court, dividing 6 to 3, declared RFRA unconstitutional. While conceding that Congress has broad power to enforce the provisions of the Fourteenth Amendment, Justice Kennedy, writing for the majority, concluded that "RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance." In this decision the Court stressed the primacy of its role as interpreter of the Constitution. It was firm and unequivocal in rejecting, on broad institutional grounds, a direct congressional challenge of final judicial authority on a question of constitutional interpretation.

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Constitutional Amendment

Without question, the only conclusive means of overruling a Supreme Court or any federal court decision is through adoption of a constitutional amendment. If Congress disapproves of a particular judicial decision, it may be able to override that decision through a simple statute, but only if the decision was based on statutory interpretation.

It is much more difficult to override a federal court decision that is based on the U.S. Constitution. Congress alone cannot do so. Our system of government concedes to the courts the power to interpret authoritatively the nation's charter. A Supreme Court decision interpreting the Constitution is therefore final unless and until one of two things occurs. First, the Court may overrule itself in a later case. This has happened numerous times historically. The only other way to overturn a constitutional decision of the Supreme Court is through constitutional amendment. This is not easily done, because Article V of the Constitution prescribes a two-thirds majority in both houses of Congress followed by ratification by three-fourths of the states.

Yet on several occasions in our history, specific Supreme Court decisions have been overturned in this manner.

The Eleventh Amendment The first ten amendments to the Constitution were proposed simultaneously in 1789 (ratified in 1791) and are known collectively as the Bill of Rights. These amendments were not responses to judicial decisions, but rather to a perception that the original Constitution was incomplete. The Eleventh Amendment, however, was added to the Constitution in the aftermath of the Supreme Court's first major decision—*Chisholm v. Georgia* (1793).

Alexander Chisholm brought suit against the state of Georgia in the Supreme Court to recover a sum of money owed to an estate of which he was executor. Chisholm was a citizen of South Carolina, and since he was suing the state of

Georgia, he maintained that the Supreme Court had original jurisdiction under Article III of the Constitution. The state of Georgia denied that the Supreme Court had jurisdiction, claiming sovereign immunity. The state relied on statements made by James Madison, John Marshall, and Alexander Hamilton during the debates over ratification of the Constitution that states could not be made parties to federal cases against their consent. Indeed, Georgia failed to send a legal representative to defend its position when *Chisholm v. Georgia* came up for oral argument in the Supreme Court. Dividing 4 to 1, the Supreme Court decided that the state of Georgia was subject to the lawsuit, sovereign immunity notwithstanding. This decision precipitated considerable outrage in the state legislatures, which feared an explosion of federal litigation at their expense. One newspaper, the *Independent Chronicle,* predicted that "refugees, Tories, etc… will introduce such a series of litigations as will throw every State in the Union into the greatest confusion." Five years later, in 1798, the Eleventh Amendment was ratified. It reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign States."

The adoption of the Eleventh Amendment assuaged widespread fears of the new national government, and of the federal courts in particular. The amendment also demonstrated that an unpopular Supreme Court decision was reversible, given sufficient political consensus. (For a discussion of the Eleventh Amendment, see Chapter 5).

The Civil War Amendments As previously noted, the *Dred Scott* decision was effectively overruled by adoption of the Thirteenth Amendment, abolishing slavery,

and the Fourteenth Amendment, granting citizenship to all persons born or naturalized in the United States.

The Sixteenth Amendment Recall also that the Sixteenth Amendment, granting Congress the power to "lay and collect" income taxes, overruled the *Pollock* decision of 1895 in which the Court had declared a federal income tax law unconstitutional.

The Twenty-sixth Amendment In 1970 Congress enacted a statute lowering the voting age to 18 in both state and federal elections. The states of Oregon and Texas filed suit under the original jurisdiction of the Supreme Court seeking an injunction preventing the attorney general from enforcing the statute with respect to the states. In *Oregon v. Mitchell* (1970), the Supreme Court ruled that Congress had no power to regulate the voting age in state elections. The Twenty-sixth amendment, ratified in 1971, accomplished what Congress was not permitted to do through statute. The amendment provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

Other Proposed Constitutional Amendments Over the years numerous unsuccessful attempts have been made to overrule Supreme Court decisions through constitutional amendments. In 1983, an amendment providing that "[t]he right to an abortion is not secured by this Constitution," obviously aimed at *Roe v. Wade,* failed to pass the Senate by only one vote. In November 1971, a proposal designed to overrule the Supreme Court's school prayer decisions (see, for example, *Abington Township v. Schempp* [1963]) fell twenty-eight votes short of the necessary two-thirds majority in the House of Representatives. In his 1980 presidential campaign, Ronald

Reagan called on Congress to resurrect the school prayer amendment, but Congress proved unwilling to give the measure serious consideration. In the mid-1960s, a widely publicized effort to overrule the Supreme Court's reapportionment decisions (for example, *Reynolds v. Sims,* [1964]) was spearheaded by Senate minority leader Everett Dirksen (R–Ill.). Despite auspicious beginnings, the Dirksen amendment ultimately proved to be a flash in the pan.

The most recent example of a proposed constitutional amendment aimed at a Supreme Court decision dealt with the emotional public issue of flag burning. In *Texas v. Johnson* (1989), the Court held that burning the American flag as part of a public protest was a form of symbolic speech protected by the First Amendment. Many, including President Bush, called on Congress to overrule the Court. Congress considered an amendment that read: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." Votes were taken in both houses, but neither achieved the necessary two-thirds majority. In the wake of the failed constitutional amendment, Congress adopted a statute making flag desecration a federal offense. Like the state law struck down in *Texas v. Johnson,* this measure was declared unconstitutional by the Supreme Court (see *United States v. Eichman,* 1990). As recently as July 2005, the U.S. House of Representatives passed another proposed constitutional amendment designed to overrule the Court's flag burning decisions. The Senate has not yet approved such an Amendment, although it fell only one vote short of doing so in June 2006.

The Appointment Power

All federal judges (including justices of the Supreme Court) are appointed by the president subject to the consent of the Senate. Normally, the Senate consents to

presidential judicial appointments with a minimum of controversy. However, senatorial approval is by no means pro forma, especially when the opposing political party controls the Senate. In fact, historically the Senate has rejected about 20 percent of presidential nominations to the Supreme Court.

Article III, Section 1, of the Constitution states that "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour." This grant of life tenure to federal judges was intended to make the federal courts independent of partisan forces and transitory public passions so that they could dispense justice impartially, according to the law. In *The Federalist,* No. 78, Alexander Hamilton argued that:

> The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the laws.

Hamilton's views on the need for a life-tenured, appointed federal judiciary were not universally accepted in 1788 nor are they today. In a democratic nation that extols the "will of the people," such sentiments are apt to be viewed as elitist, even aristocratic.

While the states vary widely in their mechanisms for judicial selection, only in Rhode Island are judges given life tenure. From time to time proposals have surfaced to impose limitations on the terms of federal judges, but no such effort has ever

gained serious political momentum. Life tenure for federal judges, like most of the elements of our eighteenth century Constitution, remains a firmly established principle of the political order.

The shared presidential–senatorial power of appointing federal judges is an important means of influencing the judiciary. For example, President Richard Nixon made a significant impact on the Supreme Court and on American constitutional law through his appointment of four justices. During the 1968 presidential campaign, Nixon criticized the Warren Court's decisions, especially in the criminal law area, and promised to appoint "strict constructionists" (widely interpreted to mean "conservatives") to the bench. President Nixon's first appointment came in 1969, when Warren Earl Burger was selected to succeed Earl Warren as chief justice. In 1970, after the abortive nominations of Clement Haynsworth and G. Harold Carswell, Harry Blackmun was appointed to succeed Justice Abe Fortas, who had resigned from the Court amid scandal in 1969. Then, in 1972, President Nixon appointed Lewis Powell to fill the vacancy left by Hugo Black's retirement and William Rehnquist to succeed John M. Harlan, who had also retired. The four Nixon appointments had a definite impact on the Supreme Court, although the resulting swing to the right was less dramatic than many observers had predicted.

FDR's Court-Packing Plan Unquestionably, the most dramatic attempt by a president to control the Supreme Court through the appointment power was launched by Franklin D. Roosevelt in 1937. The Court, as previously mentioned, had invalidated a number of key elements of FDR's New Deal program, beginning in 1935 with the National Industrial Recovery Act. FDR criticized the Court for being out of touch with the realities of an industrialized economy and holding to a "horse-

and-buggy definition of interstate commerce." Privately, FDR, who referred to the justices as the "nine old men," began to plan a strategy to curb the Court. His resolve was strengthened by his landslide reelection in 1936 and by the Court's continuing willingness to invalidate New Deal legislation. Finally, in early 1937 Roosevelt unveiled his court-packing plan, which called for Congress to increase the number of justices by allowing the president to nominate a new justice for each incumbent beyond the age of 70 who refused to retire. This could have given Roosevelt the opportunity to appoint as many as six additional justices, raising the membership of the Court to fifteen.

FDR initially attempted to sell his plan to Congress and the American people by portraying it merely as a measure to enhance the efficiency of the Supreme Court. He suggested that some of the incumbent justices were too old or infirm to stay abreast of their caseloads. Roosevelt soon admitted in one of his famous "fireside chats" that his motivation was to produce a Supreme Court that would "not undertake to override the judgment of Congress on legislative policy." Responding to the president's assault on the Court, Chief Justice Charles Evans Hughes sent a carefully timed letter to Senator Burton K. Wheeler, chairman of the Senate Judiciary Committee, stating that the Court was fully abreast of its docket and implying that the court-packing plan might be unconstitutional. Senator Wheeler read this letter aloud at a session of the Judiciary Committee that was being broadcast by radio into millions of homes around the country.

FDR's court-packing plan was denounced by the Senate Judiciary Committee as "needless, futile and utterly dangerous." The plan failed to win approval by Congress. In the meantime, however, the Supreme Court manifested a dramatic about-face in the spring of 1937 when it upheld the National Labor Relations Act, another important

element of New Deal policy (see *National Labor Relations Board v. Jones & Laughlin Steel Corporation*). The Court's famous "switch in time that saved nine" obviated the need for FDR to pack the Court. Within five years, seven of the "nine old men" had retired or died in office, and Roosevelt was able to "pack" the Court through normal procedures. The Roosevelt Court, as it came to be known, brought about a revolution in American constitutional law.

Without question, the shared presidential–senatorial power to appoint judges and justices is the most effective means of controlling the federal judiciary. Congress and the president may not be able to achieve immediate results using the appointment power, but they can bring about long-term changes in the Court's direction. The appointment power ensures that the Supreme Court and the other federal courts may not continue for very long to defy a clear national consensus.

Impeachment

The only means of removing a federal judge or Supreme Court justice is through the **impeachment** process provided in the Constitution. First, the House of Representatives must approve one or more articles of impeachment by at least a majority vote. Then, a trial is held in the Senate. To be removed from office, a judge must be convicted by a vote of at least two-thirds of the Senate.

Since 1789 the House of Representatives has impeached fewer than twenty federal judges, and fewer than ten of these were convicted in the Senate. Only once has a Supreme Court Justice been impeached by the House. In 1804, Justice Samuel Chase fell victim to President Jefferson's attempt to control a federal judiciary largely comprised of Washington and Adams appointees. Justice Chase had irritated the Jeffersonians by his haughty and arrogant personality and his extreme partisanship.

Nevertheless, there was no evidence that he was guilty of any crime. Consequently, Chase narrowly escaped conviction in the Senate.

The Chase affair set an important precedent: A federal judge may not be removed simply for reasons of partisanship, ideology, or personality. Thus, despite strong support in ultraconservative quarters for the impeachment of Chief Justice Earl Warren during the 1960s, there was never any real prospect of Warren's removal. Barring criminal conduct or serious breaches of judicial ethics, federal judges do not have to worry that their decisions might cost them their jobs.

Enforcement of Judicial Decisions

Courts generally have adequate means of enforcing their decisions on the parties directly involved in litigation. Any party who fails to comply with a court order, such as a **subpoena** or an injunction, may be held in **contempt.** The Supreme Court's decisions interpreting the federal Constitution are typically nationwide in scope. As such they automatically elicit the compliance of state and federal judges. Occasionally one hears of a recalcitrant judge who, for one reason or another, defies a Supreme Court decision, but this phenomenon, while not uncommon in the early days of the republic, is an eccentric curiosity today.

On the other hand, courts have greater difficulty enlisting the compliance of the general public, especially when they render unpopular decisions. Despite the Supreme Court's repeated rulings against officially sponsored prayer in the public schools, such activities continue at the present time in some parts of the country. The school prayer decisions, even after more than four decades, have failed to generate public acceptance (see Chapter 4, Volume II). Without the assistance of local school officials, there is little the Court can do to effect compliance with its mandates

regarding school prayer unless and until an unhappy parent files a lawsuit.

Sometimes the Supreme Court must depend on congressional and/or presidential cooperation to secure compliance with its decisions. This is particularly true when such decisions are actively resisted by state and local officials. For example, the efforts of Arkansas governor Orval Faubus to block the court-ordered desegregation of Central High School in Little Rock in 1957 resulted in President Dwight D. Eisenhower's commitment of federal troops to enforce the court order. A year later, in *Cooper v. Aaron* (1958), the Supreme Court issued a stern rebuke to Governor Faubus, reminding him of his duty to uphold the Constitution of the United States. Would the Court have been able to take the constitutional high ground if Eisenhower, who had reservations about court-ordered desegregation, had decided not to send the troops to Little Rock? In using military force to implement a Supreme Court decision about which he had doubts, Eisenhower was recognizing the authority of the Court to speak with finality on matters of constitutional interpretation. However, the ultimate decision to enforce the Court's authority belonged to the president. Accordingly, *Cooper v. Aaron* is more a testament to judicial dependency on the executive than an assertion of judicial power.

Unlike the president, Congress is seldom in a position to enforce a decision of the Supreme Court. On the other hand, Congress has often enacted legislation without which the broad objectives of the Court's decisions could not have been fully realized. This was certainly true during the 1960s in the field of civil rights. The Supreme Court in a series of decisions had stated the general policy objective of eradicating racial discrimination. It remained for Congress to adopt sweeping legislation in pursuit of this goal—namely, the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968.

The Supreme Court often depends on the president to enforce and the Congress to "flesh out" its decisions. But the Court cannot force either of the coordinate branches of the national government to do anything. This limitation is perhaps best encapsulated in a famous comment attributed to President Andrew Jackson: "Well, John Marshall has made his decision. Now let him enforce it." In *Worcester v. Georgia* (1832), the Court had held that the state of Georgia's attempt to regulate the Cherokee Indian nation violated the Constitution and certain treaties. The decision required Georgia to release missionaries whom it had prosecuted for ministering to the Cherokees in violation of state law. Georgia's refusal to comply with the decision of the Supreme Court led to President Jackson's alleged remark.

The Supreme Court's lack of enforcement power is an inherent limitation on the power of the Court, but one that makes sense in terms of the principle of separation of powers. Law enforcement, after all, is an aspect of executive power. To permit a court of law to mobilize law enforcement authorities *without the consent of the chief executive* would be to concentrate governmental powers in a manner flatly inconsistent with the Framers' plan. As James Madison observed in *The Federalist,* No. 47, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands… may justly be pronounced the very definition of tyranny."

TO SUMMARIZE:

- Like the other branches, the judiciary is subject to checks and balances. The organization and jurisdiction of the lower federal courts are left entirely to Congress by Article III. Congress may regulate the appellate jurisdiction of the Supreme Court, but it is unclear how far Congress may go in this regard.
- Supreme Court decisions based on statutory interpretation may be overridden by

Congress through the ordinary legislative process. Court decisions based on constitutional interpretation may be overridden only by the Court itself, or by constitutional amendment. Historically, at least four Supreme Court decisions have been overturned by constitutional amendments.

- Because impeachment of federal judges is limited to cases of criminal misconduct, the most significant control over the personnel on the Supreme Court is the appointment power shared by the president and the Senate. Presidents have used the appointment power to change the direction of the Court.
- The Court often depends on the other branches of government to enforce and implement its decisions. Ultimately, the Court relies on the public's willingness to comply.

EXPLAINING THE COURT'S BEHAVIOR

Since *Marbury v. Madison* (1803), commentators have sought to explain and predict, as well as evaluate, Supreme Court decision making. Traditional legal commentary relied almost exclusively on legal factors—principles, provisions, procedures, and precedents. Modern analysis tends to look beyond the law to explain judicial decision making. Political scientists in particular are interested in the political factors that influence **judicial behavior.** Indeed, the study of judicial behavior is a subfield of the public law field of contemporary political science.

[Insert Figure 1.4 here]

The law is complex, rich, and subtle. Judicial decision making, especially at the level of the Supreme Court, is hardly a mechanical process. Legal reasoning is certainly important, but it is inevitably colored by extralegal factors as well (see

Figure 1.4). It is not unlikely that two judges, equally well trained and capable in legal research, will reach different conclusions about what the law requires in a given case.

The fluidity of judicial choice is most apparent when the Supreme Court is called on to interpret the many open-ended clauses of the Constitution. Although the Court's constitutional decisions are rendered in a legal context, they cannot be fully explained by legalistic analysis. To believe otherwise is to subscribe to the **myth of legality,** the idea that judicial decisions are wholly a function of legal rules, procedures, and precedents.

Ideologies of the Justices

Political scientists who have studied Supreme Court decision making have amassed considerable evidence that the Court's decisions are influenced by the ideologies of the justices. To a great extent, this is inferred from regularities in the voting behavior of the justices, mainly the tendency of certain groups of justices to form **voting blocs.** During the period 1994–2005, for example, Chief Justice Rehnquist and Justices Scalia and Thomas comprised a conservative bloc, often opposed by a liberal bloc consisting of Justices Stevens, Souter, Ginsburg, and Breyer. Justices O'Connor and Kennedy occupied a commanding position in the middle, sometimes joining Rehnquist, Scalia, and Thomas to form a conservative majority, and sometimes, either individually or in tandem, joining the other four justices in support of a more liberal result. Following Justice O'Connor's retirement in January 2006, and the appointment of Justice Samuel Alito as her successor, Justice Kennedy alone held a key position between the liberal and conservative blocs on the Court. His vote was critical in determining the outcomes of several important decisions during the remainder of the 2005–2006 Term.

Although many observers characterize Supreme Court decisions and voting patterns in simplistic liberal–conservative terms, judicial ideology may well include more than general political attitudes or views on specific issues of public policy (for example, school prayer or abortion). It may also embrace philosophies regarding the proper role of courts in a democratic society. There is reason to believe that, at least for some justices, considerations of judicial activism versus restraint ("maximalism" versus "minimalism") weigh as heavily as policy preferences in determining how the vote will be cast in a given case. Justices inclined toward activism, or maximalism, are more likely to support expansion of the Court's jurisdiction and powers and more likely to embrace innovative constitutional doctrines and policy choices. These justices are less likely than restraintists, or minimalists, to follow precedent or defer to the judgment of elected officials.

The Political Environment

In addition to the ideologies of the justices, research has pointed to a number of political factors that appear to influence Supreme Court decision making. While the Court is often characterized as a counter-majoritarian institution, there is reason to believe that public opinion does influence the Court. Extensive evidence indicates that the actions, or threatened actions, of Congress and the president can have an impact on its decisions. And in a constitutional system emphasizing checks and balances, one should not expect that it would be otherwise! The political environment, in short, strongly influences Supreme Court decision making.

The Internal Politics of the Court

Finally, the Court's decision making is intensely political in the sense that the internal

dynamics of the Court are characterized by conflict, bargaining, and compromise—the very essence of politics. Such activities are difficult to observe because they occur behind the "purple curtain" that separates the Court from its attentive public.

Conferences are held in private, votes on certiorari are not routinely made public, and the justices tend to be tight-lipped about what goes on behind the scenes in the "marble temple." Yet from time to time evidence of the Court's internal politics appears—in the form of memoirs, autobiographies, posthumously opened papers, other writings of the justices, and in the occasional interviews the justices and their clerks give to journalists and academicians. Some may be offended at the attempt of journalists and scholars to penetrate the purple curtain, to examine the political realities lurking behind the veil of law and mythology in which the Supreme Court is shrouded. However, in a democratic society it is the right, and arguably the duty, of citizens to have a realistic understanding of the institutions of their government. Armed with such an understanding of the Supreme Court, one can begin to make reasonable judgments about its decisions. Realism does not lead inexorably to cynicism.

Some observers believe that the Supreme Court is nothing more than a miniature legislature and that the justices are nothing more than "politicians in black robes." The Court's enormously controversial decision in *Bush v. Gore* (2000) may be cited in support of this perspective. However, it is important to bear in mind that the Supreme Court is at once a legal and a political institution, which makes it unique in the scheme of American government. As a legal entity, the Court's decisions are usually characterized by reason and principle, characteristics not regarded as essential to the legislative process. This distinctive character may also account for the reverence with which the American people (even the most jaded political scientists) tend to regard

the Court.

TO SUMMARIZE:

- The Supreme Court is at once a legal and a political institution. Therefore its decisions are affected both by legal and political factors.
- The political factors include the justices' own philosophical orientations and policy preferences, the internal politics of the Court, and the external political environment.
- The relative privacy in which the Court's key business is conducted makes it more difficult to observe the interplay of political factors.

CONCLUSION

The Supreme Court has evolved considerably over two centuries. It began as a vaguely conceived tribunal, with no cases to decide, and no permanent home. Over the years, the Court's caseload increased, as did its prominence in national affairs. The Court assumed increasing power and managed to hold its own against the legislative and executive branches of government. Eventually, the Court found a home in the Capitol, although its chambers were less than spectacular. In 1935 the Court moved into its own building. The majestic "marble temple" across the street from the Capitol houses not only a coequal branch of the national government, but the most powerful and prestigious judicial body in the world.

The tremendous growth in the power and prestige of the Supreme Court was the inevitable consequence of the constitutional design that created the judiciary as a separate branch of the federal government. It is also a function of the Court's institutional development, which was accomplished through numerous assertions of

power and equally numerous instances of prudent self-restraint. Throughout American history, moreover, the elected branches of government have found it useful to permit the life-tenured Court to decide difficult and controversial issues. Perhaps most fundamentally, the growth in the Court's power and prestige can be attributed to the degree to which the American people and their elected representatives have accepted the political role that the Court has established for itself.

Students of American government must consider whether the power of judicial review is compatible, not only with the intentions of the Framers of the Constitution, but with our modern notions of democracy. Is judicial review an arrogation of power by the courts? Is it a vestige of aristocracy? Or is it a necessary and desirable element of constitutional democracy? Before reaching conclusions on these questions, one should examine the ways in which judicial review has been applied over the years since *Marbury v. Madison*. It is also important to take into account the constraints, both external and self-imposed, under which judicial review is exercised.

The concept of checks and balances is one of the fundamental principles of the American Constitution. Each branch of the national government is provided specific means of limiting the exercise of power by the other branches. For example, the president may veto acts of Congress, which will not become law unless the veto is overridden by a two-thirds vote in both Houses. Although the federal courts, and the Supreme Court in particular, are often characterized as guardians of the Constitution, the judicial branch is by no means immune to the abuse of power. Accordingly, the federal judiciary is subject to checks and balances imposed by Congress and the president. In a constitutional system that seeks to prevent any agency of government from exercising unchecked power, even the Supreme Court is subject to external limitations.

In *The Federalist,* No. 78, Alexander Hamilton sought to persuade his countrymen that the Supreme Court would be the "least dangerous" branch of the national government under the new Constitution, which had yet to be ratified. Hamilton observed that:

> [T]he judiciary… has no influence over either the sword or the purse; no direction of the strength or of the wealth of a society; and can take no active resolution whatever. It may be truly said to have neither force nor will, but merely judgment.

It is true that the Supreme Court's power of enforcement is limited; it is also true that the Court does not determine taxing and spending policies. Yet the almost hallowed character of the Court's "mere judgment" makes the Court as likely to secure compliance with its policy pronouncements as institutions having direct control over appropriations or law enforcement agencies. Clearly, the power of the federal courts, and of the Supreme Court in particular, to secure compliance goes far beyond the issuance of orders and decrees and the availability of a few federal marshals to enforce them.

The power and prestige of the Supreme Court, indeed of the entire federal judiciary, have grown tremendously during the past two centuries. Nevertheless, the Court works within a constitutional and political system that imposes significant constraints on its power.

The Supreme Court can, and occasionally does, speak with finality on important questions of constitutional law and public policy. But it must consider the probable responses of Congress, the president, and, ultimately, the American people. More than 200 years after the ratification of the Constitution, Alexander Hamilton's characterization of the federal judiciary as the "least dangerous" branch of the national government remains credible.

KEY TERMS

judicial review

trial courts

appellate courts

federal courts

jurisdiction

court of last resort

U.S. District Courts

U.S. Courts of Appeals

U.S. Supreme Court

Judiciary Act of 1789

federal question jurisdiction

diversity of citizenship jurisdiction

appeals by right

writ of certiorari

original jurisdiction

concurrent jurisdiction

appellate jurisdiction

rules of procedure

civil suits

criminal prosecutions

plaintiff

defendant

class action

respondent

sovereign immunity

actual damages

punitive damages

specific performance

declaratory judgment

injunction

demurrer

indictment

pretrial motion

writ of habeas corpus

standing

taxpayer suits

mootness

ripeness doctrine

exhaustion of remedies

doctrine of abstention

political questions doctrine

certification

in forma pauperis

memorandum decisions

law clerks

discuss list

preterm conference

rule of four

precedent

plenary review

summary decisions

error correction

briefs

amicus curiae

oral argument

conference

affirm

reverse

vacate

Opinion of the Court

majority opinion

concurring opinion

dissenting opinion

opinion concurring in the judgment

per curiam

case reporters

English common law

substantive due process

judicial activism

presumption of validity

discrete and insular minorities

interpretivism

originalism

doctrine of original intent

natural law

judicial restraint

doctrine of strict necessity

statutory construction

doctrine of saving construction

presumption of constitutionality

strict scrutiny

fundamental rights

narrowness doctrine

stare decisis

severability

unconstitutional as applied

limiting doctrines

compelling government interest

impeachment

subpoena

contempt

judicial behavior

myth of legality

voting blocs

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[Start A Note On Briefing Cases Box here]

A NOTE ON BRIEFING CASES

Each chapter in this book includes a number of excerpts from Supreme Court decisions. These excerpts have been chosen to illustrate some of the important

concepts and principles described in the chapters. Some instructors may wish to have their students "brief" some or all of these cases. Whether or not the instructor requires case briefs, students may find briefing cases useful for learning material and preparing for examinations.

A case brief is simply a summary of a court decision, usually in outline format. Typically, a case brief contains the following elements:

- The name of the case and the date of the decision
- The essential facts of the case
- The key issue(s) of law involved
- The holding of the Court
- A brief summary of the Court's opinion, especially as it relates to the key issue(s) in the case
- Summaries of concurring and dissenting opinions, if any
- A statement commenting on the significance of the decision and/or stating the student's view as to the correctness of the decision.

Here is a sample case brief:

***PLESSY V. FERGUSON* (1896)**

Issue: Is a state law requiring "equal but separate" facilities for whites and blacks a violation of the Thirteenth or Fourteenth Amendment?

Facts: Homer Plessy, who was seven-eighths white and one-eighth black, was arrested after refusing to vacate a seat in a railroad car reserved for whites. He was convicted under a Louisiana statute mandating "equal but separate" accommodations on railroads. After unsuccessfully attacking the statute in the Louisiana state courts, Plessy appealed to the U.S. Supreme Court.

Supreme Court Decision: Judgment of state court affirmed; conviction and statute upheld. Vote: 7–1 (Justice Brewer not participating).

Opinions:

Majority (Brown): Segregation is a reasonable exercise of the state's police power in that it is conducive to the maintenance of public order and peace. Segregation is not per se a "badge of slavery" and is therefore not a violation of the Thirteenth Amendment. The compulsory segregation of the races is permissible under the Equal Protection Clause of the Fourteenth Amendment as long as equal accommodations are provided. The Fourteenth Amendment was not intended to abolish all distinctions based on color, nor was it intended to enforce social as distinct from political equality.

Dissenting (Harlan): Compulsory segregation is an infringement on the personal liberties of persons of African descent. The Constitution is color-blind; therefore, government is prohibited from treating people differently merely on account of their race. Forcible segregation is a badge of inferiority, a vestige of slavery, and therefore a violation of the Thirteenth Amendment.

Comment:

The "separate but equal" doctrine propounded in *Plessy* provided a justification for the entire regime of Jim Crow laws enacted in the late nineteenth century. The Supreme Court eventually repudiated this doctrine, beginning with *Brown v. Board of Education* (1954).

[End A Note On Briefing Cases Box here]

Case

MARBURY V. MADISON

1 Cranch (5 U.S.) 137; 2 L.Ed. 60 (1803)

Vote: 4–0

In this, the most significant opinion in American constitutional law, Chief Justice John Marshall asserts the power of the federal judiciary to invalidate acts of Congress that are determined to be unconstitutional. The facts of the case are discussed in some detail on pages 36–38. It is interesting to note that, in order to accommodate Justice Samuel Chase, who was ill at the time, Chief Justice Marshall read the Opinion of the Court not in the Court's chamber located in the Capitol but before an attentive audience in the living room of Stelle's Hotel, located on the present site of the Library of Congress. For a fascinating account of the details surrounding Marbury v. Madison, *see Jean Edward Smith,* John Marshall: Definer of a Nation, *New York: Henry Holt, 1996, chapter 13.*

Mr. Chief Justice Marshall delivered the opinion of the Court.

It is… the opinion of the Court that by signing the commission of Mr. Marbury, the President… appointed him a justice of peace… in the District of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

…[H]aving this legal title to the office, [Marbury] has a consequent right to the commission; a refusal to deliver which is a plain violation of the right, for which the laws of his country afford him a remedy.

…It remains to be inquired whether, [Marbury] is entitled to the remedy for which he applies. This depends on 1st. The nature of the writ applied for; and, 2d. The power of this court.

[After a lengthy discussion of the nature of the writ of mandamus and its historical basis, Marshall continues:]

…The act [the Judiciary Act of 1789] to establish the judicial courts of the United States authorizes the Supreme Court, "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States" [Section 13].

The Secretary of State, being a person holding an office under the authority of the United States, is precisely within the letter of this description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional and, therefore, absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The Constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power, it is declared that "the Supreme Court shall have original jurisdiction, in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction."…

To enable this Court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction; or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar, that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer, for the delivery of a paper, is, in effect, the same as to sustain an original action for that paper, and therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the Supreme Court by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire, whether a jurisdiction so conferred can be exercised.

The question, whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the Constitution by an ordinary act.

Between these alternatives, there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act, contrary to the Constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.

Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void.

This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this Court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it

notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the Constitution; or conformable to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then, the courts are to regard the Constitution, and the constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be given to

the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure…

The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power, to say, that in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided, without examining the instrument under which it arises? This is too extravagant to be maintained.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?…

…[I]t is apparent, that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

…Why does a judge swear to discharge his duties agreeable to the Constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in 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, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

[***Justice Cushing*** and ***Justice Moore*** did not participate in this decision.]

Case

EAKIN V. RAUB

12 Sergeant & Rawle (Pennsylvania Supreme Court) 330 (1825)

Although the specific issue before the Pennsylvania Supreme Court is of little interest today, Justice Gibson's dissenting opinion is still considered to be the most effective rejoinder to Chief Justice Marshall's argument in support of judicial review.

Gibson, J. [dissenting].

…I am aware, that a right to declare all unconstitutional acts void… is generally held as a professional dogma; but, I apprehend rather as a matter of faith than of reason. I admit that I once embraced the same doctrine, but without examination, and I shall therefore state the arguments that impelled me to abandon it, with great respect for those by whom it is still maintained…

…The Constitution and the right of the legislature to pass the act, may be in collision. But is that a legitimate subject for judicial determination? If it be, the judiciary must be a peculiar organ, to revise the proceedings of the legislature, and to correct its mistakes; and in what part of the Constitution are we to look for this proud preeminence? Viewing the matter in the opposite direction, what would be thought of an act of assembly in which it should be declared that the Supreme Court had, in a

particular case, put a wrong construction on the Constitution of the *United States,* and that the judgment should therefore be reversed? It would doubtless be thought a usurpation of judicial power. But it is by no means clear, that to declare a law void which has been enacted according to the forms prescribed in the Constitution, is not a usurpation of legislative power…

…But it has been said to be emphatically the business of the judiciary, to ascertain and pronounce what the law is; and that this necessarily involves a consideration of the Constitution. It does so: but how far? If the judiciary will inquire into any thing beside the form of enactment, where shall it stop? There must be some point of limitation to such an inquiry; for no one will pretend that a judge would be justifiable in calling for the election returns, or scrutinizing the qualifications of those who composed the legislature…

But the judges are sworn to support the Constitution, and are they not bound by it as the law of the land? In some respects they are. In the very few cases in which the judiciary, and not the legislature, is the immediate organ to execute its provisions, they are bound by it in preference to any act of assembly to the contrary. In such cases, the Constitution is a rule to the courts. But what I have in view in this inquiry, is the supposed right of the judiciary, to interfere, in cases where the Constitution is to be carried into effect through the instrumentality of the legislature, and where that organ must necessarily first decide on the constitutionality of its own act. The oath to support the Constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government, and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty; otherwise it were difficult to determine what operation it is to have in the case of a recorder of deeds, for instance, who, in the execution of his office, has nothing to do with the

Constitution. But granting it to relate to the official conduct of the judge, as well as every other officer, and not to his political principles, still it must be understood in reference to supporting the Constitution, *only as far as that may be involved in his official duty;* and consequently, if his official duty does not comprehend an inquiry into the authority of the legislature, neither does his oath…

But do not the judges do *a positive act* in violation of the Constitution, when they give effect to an unconstitutional law? Not if the law has been passed according to the forms established in the Constitution. The fallacy of the question is in supposing that the judiciary adopts the acts of the legislature as its own; whereas the enactment of a law and the interpretation of it are not concurrent acts, and as the judiciary is not required to concur in the enactment, neither is it in the breach of the Constitution which may be the consequence of the enactment; the fault is imputable to the legislature, and on it the responsibility exclusively rests. In this respect, the judges are in the predicament of jurors who are bound to serve in capital cases, although unable, under any circumstance, to reconcile it to their duty to deprive a human being of life. To one of these, who applied to be discharged from the panel, I once heard it remarked, by an eminent and humane judge, "You do not deprive a prisoner of life by finding him guilty of a capital crime; you but pronounce his case to be within the law, and it is, therefore, those who declare the law, and not you, who deprive him of life."

…But it has been said that this construction would deprive the citizen of the advantages which are peculiar to written constitution, by at once declaring the power of the legislature, in practice, to be illimitable. I ask, what are those advantages? The principles of a written constitution are more fixed and certain, and more apparent to the apprehension of the people, than principles which depend on tradition and the vague comprehension of the individuals who compose the nation, and who cannot all

be expected to receive the same impressions or entertain the same notions on any given subject. But there is no magic or inherent power in parchment and ink, to command respect and protect principles from violation. In the business of government, a recurrence to first principles answers the end of an observation at sea with a view to correct the dead reckoning; and, for this purpose, a written constitution is an instrument of inestimable value. It is of inestimable value, also, in rendering its principles familiar to the mass of the people; for, after all, there is no effectual guard against legislative usurpation but public opinion, the force of which, in this country, is inconceivably great. Happily this is proved, by experience, to be a sufficient guard against palpable infractions. The Constitution of this state has withstood the shocks of strong party excitement for thirty years, during which no act of the legislature has been declared unconstitutional, although the judiciary has constantly asserted a right to do so in clear cases. But it would be absurd to say, that this remarkable observance of the Constitution has been produced, not by the responsibility of the legislature to the people, but by an apprehension of control by the judiciary. Once let public opinion be so corrupt as to sanction every misconstruction of the Constitution and abuse of power which the temptation of the moment may dictate, and the party which may happen to be predominant, will laugh at the puny effort of a dependent power to arrest it in its course.

For these reasons, I am of the opinion that it rests with the people, in whom full and absolute sovereign power resides to correct abuses in legislation, by instructing their representatives to repeal the obnoxious act. What is wanting to plenary power in the government, is reserved by the people for their own immediate use; and to redress an infringement of their rights in this respect, would seem to be an accessory of the power thus reserved. It might, perhaps, have been better to vest the power in the

judiciary; as it might be expected that its habits of deliberation, and the aid derived from the arguments of counsel, would more frequently lead to accurate conclusions. On the other hand, the judiciary is not infallible; and an error by it would admit of no remedy but a more distinct expression of the public will, through the extraordinary medium of a convention; whereas, an error by the legislature admits of a remedy by an exertion of the same will, in the ordinary exercise of the right of suffrage—a mode better calculated to attain the end, without popular excitement. It may be said, the people would probably not notice an error of their representatives. But they would as probably do so, as notice an error of the judiciary; and, beside, it is a postulate in the theory of our government, and the very basis of the superstructure, that the people are wise, virtuous, and competent to manage their own affairs; and if they are not so, in fact, still every question of this sort must be determined according to the principles of the Constitution, as it came from the hands of its framers, and the existence of a defect which was not foreseen, would not justify those who administer the government, in applying a corrective in practice, which can be provided only by a convention…

Case

SCOTT V. SANDFORD

(THE DRED SCOTT CASE)

19 Howard (60 U.S.) 393; 15 L.Ed. 691 (1857)

Vote: 7–2

Dred Scott was a slave belonging to a surgeon in the U.S. Army. He was taken by his master into territories in which slavery was forbidden by the Missouri Compromise of 1820. Several years after his return to Missouri, Dred Scott brought suit to obtain his freedom, arguing that his temporary residence in a "free" territory had abolished his

servitude. After an adverse ruling in the U.S. Circuit Court, Scott took the case to the Supreme Court on a writ of error.

The U.S. Supreme Court first heard oral arguments in Scott v. Sandford *in February 1856. By this time, the case had achieved notoriety in the stormy sectional controversy over slavery. Reluctant to announce its decision during what promised to be a bitterly fought presidential election campaign, the Court ordered that the case be reargued at the beginning of its next term, in December 1856. One of the most controversial questions addressed on reargument was whether Congress had acted constitutionally in passing the Missouri Compromise of 1820, thereby asserting the power to regulate slavery in the territories.*

President-Elect James Buchanan, whose position on the territorial issue had been equivocal, stated that the "great object" of his administration would be "to destroy the dangerous slavery agitation and thus restore peace to our distracted country." He ardently hoped that through its anticipated decision in the Dred Scott case, the Supreme Court would help him achieve this objective.

*Acting on this hope, Buchanan wrote his old friend, Justice John Catron, on February 3, 1857, wanting to know whether the Court would deliver its decision before March 4, Inauguration Day, so that he could take it into account in preparing his inaugural address. In responding to this highly unusual inquiry, Catron said that the Court had not yet taken action on the case, but that he would try to obtain this information, since he believed Buchanan was entitled to it. Professor Don E. Fehrenbacher, in his authoritative study of the Dred Scott case (*The Dred Scott Case: Its Significance in American Law and Politics*), has argued convincingly that only a decision on the constitutionality of the Missouri Compromise would have been important to Buchanan in preparing his inauguration speech.*

On February 10, Catron wrote Buchanan, advising him that the case would be decided in conference on February 14 but that the justices probably would not rule on the power of Congress over slavery in the territories. This prediction seemed to be confirmed when the majority opinion was assigned to Justice Samuel Nelson, a northern centrist on the Taney Court. In his narrowly focused draft opinion, Nelson maintained that there was no need to consider the constitutionality of the Missouri Compromise's restriction on slavery in the territories. In a sudden about-face, a Court majority decided to take on the territorial issue as well as all other constitutional questions raised in the case. The formidable task of writing a new majority opinion was assigned to Chief Justice Taney. On February 19, Catron again wrote to Buchanan, informing him of the dramatic change in the Court's plans and suggesting that Buchanan's inaugural address might include a passage leaving the territorial matter with the "appropriate tribunal" and declining to "express any opinion on the subject." In the same letter, Catron urged Buchanan to help persuade his fellow Pennsylvanian, Justice Robert C. Grier, to support the broad approach taken by Taney and his four southern colleagues. Buchanan immediately wrote to Grier urging him to fall into line. Grier then conferred with Taney and wrote to Buchanan on February 23, indicating that he would support Taney's opinion, which would hold the Missouri Compromise "to be of non-effect." He and his colleague Justice James M. Wayne would try "to get Brothers Daniel and Campbell and Catron to do the same." After informing Buchanan that the decision would not be delivered before March 6, Grier concluded his lengthy letter with the following revealing comments: "We will not let any others of our brethren know anything about the cause of our anxiety to produce this result [a majority opinion supported by six or possibly seven justices], and though contrary to our usual practice, we have thought due to

you to state to you in candor and confidence the real state of the matter." It is clear from this selective summary of events leading up to Buchanan's inauguration that the president-elect was fully informed by two members of the Supreme Court—each initially unaware of the other's actions—of the substance of the forthcoming Dred Scott decision.

On March 4, 1857, Chief Justice Taney administered the oath of office to President-Elect Buchanan. During a pause in the ceremonies, the two men had a brief conversation, a fact accorded grave significance by some of Buchanan's critics as they listened to his inaugural address. He noted with approval that Congress, through the Kansas-Nebraska Act, had left the people free to deal with the institution of slavery as they saw fit, subject only to the Constitution. Admittedly, a minor problem remained unresolved: "A difference of opinion has arisen in regard to the point of time when the people of a territory shall decide this question for themselves. This is, happily, a matter of but little practical importance. Besides, it is a judicial question which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be." A more disingenuous statement has seldom appeared in an inaugural address. Buchanan not only knew what the Court was about to decide in the Dred Scott case, but it is fair to say that he had a hand in forging the Court majority that endorsed that decision.

Mr. Chief Justice Taney delivered the opinion of the Court.

…The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such

become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution…

We think… [that Negroes]… are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted…

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterwards be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endow him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately

clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court thinks the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts…

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument…

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion…

The only two provisions [of the Constitution] which point to them [slaves] and include them [Article I, Section 9, and Article IV, Section 2], treat them as property, and make it the duty of the Government to protect it; no other power, in relation to

this race, is to be found in the Constitution; and as it is a Government of special, delegated, powers, no authority beyond these two provisions can be constitutionally exercised. The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society, require. The States evidently intended to reserve this power exclusively to themselves.

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. Such an argument would be altogether inadmissible in any tribunal called on to interpret it. If any of its provisions are deemed unjust, there is a mode prescribed in the instrument itself by which it may be amended; but while it remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and reserves and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion of the day…

What the construction was at that time, we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of

Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since, the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word "citizen" and the word "People."…

The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the… inquiry is, whether Congress was authorized to pass this law under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the laws of any one of the States.

The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," but, in the judgment of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by the United States, and was within their boundaries as settled by the treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and

particular territory, and to meet a present emergency, and nothing more.

…The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. And when the Territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizen strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a Territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes them under the provisions of the Constitution. The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property, beyond what that instrument confers, nor lawfully deny any right which it has reserved…

…[A]n Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law.

The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under Territorial Government, as well as that

covered by States. It is a total absence of power everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States and guards them as firmly and plainly against any inroads which the General Government might attempt, under the plea of implied or incidental powers. And if Congress itself cannot do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that it could not authorize a Territorial Government to exercise them. It would confer no power on any local Government, established by its authority, to violate provisions of the Constitution…

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident…

Mr. Justice Curtis, joined by ***Mr. Justice McLean,*** dissenting.

I dissent from the opinion pronounced by the Chief Justice, and from the judgment which the majority of the court think it proper to render in this case…

To determine whether any free persons, descended from Africans held in slavery, were citizens of the United States under the Confederation, and consequently at the time of the adoption of the Constitution of the United States, it is only necessary to know whether any such persons were citizens of either of the States under the Confederation, at the time of the adoption of the Constitution.

Of this there can be no doubt. At the time of the ratification of the Articles of

Confederation, all free native-born inhabitants of the States of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, though descended from African slaves, were not only citizens of those States, but such of them as had the other necessary qualifications possessed the franchise of electors, on equal terms with other citizens…

I dissent, therefore, from that part of the opinion of the majority of the court, in which it is held that a person of African descent cannot be a citizen of the United States; and I regret I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri Compromise act, and the grounds and conclusions announced in their opinion.

Having first decided that they were bound to consider the sufficiency of the plea to the jurisdiction of the Circuit Court, and having decided that this plea showed that the Circuit Court had no jurisdiction, and consequently that this is a case to which the judicial power of the United States does not extend, they have gone on to examine the merits of the case as they appear on the trial before the court and jury, on the issues joined on the pleas in bar, and so have reached the question of the power of Congress to pass the act of 1820. On so grave a subject as this, I feel obliged to say that, in my opinion, such an exertion of judicial power transcends the limits of the authority of the court…

Case

EX PARTE MCCARDLE

7 Wall. (74 U.S.) 506; 19 L.Ed. 264 (1869)

Vote: 8–0

In the wake of the Civil War, Congress chose to rely on military rule as the most effective means to "reconstruct" the South. As part of this regime, the Reconstruction Acts authorized military commissions to try civilians who interfered with the program. William H. McCardle, editor of the Vicksburg Times, published a series of editorials that was highly critical of Reconstruction and of the military government that ruled Mississippi. He was subsequently arrested and held for trial by a military commission on the charge of sedition. McCardle sought release by filing a habeas corpus petition in federal circuit court. Shortly before McCardle's case arose, the Congress had authorized the circuit courts to hear habeas corpus cases involving anyone held by state authorities in violation of the U.S. Constitution or federal statutes. The act included the right to appeal a circuit court denial of habeas corpus to the Supreme Court. McCardle lost his bid for release in the circuit court and exercised his option to appeal. After the case was argued in the Supreme Court, but before a decision on the constitutionality of the Reconstruction Acts was reached, the Congress amended the law to remove the Supreme Court's appellate jurisdiction in habeas corpus cases. Quite obviously, Congress was attempting to prevent the Supreme Court from ruling on the constitutionality of the Reconstruction Acts.

Mr. Chief Justice Chase delivered the opinion of the Court.

This cause came here by appeal from the Circuit Court for the Southern District of Mississippi. A Petition for the writ of habeas corpus was preferred in that court by [McCardle], alleging unlawful restraint by military force.

The writ was issued and a return was made by the military commander, admitting the restraint, but denying that it was unlawful.

It appeared that the petitioner was not in the military service of the United States, but was held in custody by military authority, for trial before a military commission,

upon charges founded upon the publication of articles alleged to be incendiary and libelous, in a newspaper of which he was editor.

Upon the hearing, [McCardle] was remanded to military custody; but upon his prayer, an appeal was allowed him to this court, and upon filing the usual appeal bond for costs, he was admitted to bail…

Subsequently… the case was argued very thoroughly and ably upon the merits, and was taken under advisement. While it was held, and before conference in regard to the decision proper to be made, an act was passed by Congress,… returned, with objections by the President, and repassed by the constitutional majority, which, it is insisted, takes from this court jurisdiction of the appeal.

The second section of this act was as follows: "And be it further enacted, that so much of the Act approved February 5, 1867,… as authorized an appeal from the judgment of the circuit court to the Supreme Court of the United States,… is hereby repealed."

The attention of the court was directed to this statute at the last term, but counsel having expressed a desire to be heard in argument upon its effect, and the Chief Justice being detained from his place here by his duties in the Court of Impeachment, the cause was continued under advisement.

At this term we have heard arguments upon the effect of the repealing act, and will now dispose of the case.

The first question necessarily is that of jurisdiction; for, if the act… takes away the jurisdiction defined by the Act of February, 1867, it is useless, if not improper, to enter into any discussion of other questions.

It is quite true, as was argued by the counsel for [McCardle], that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking,

conferred by the Constitution. But it is conferred "with such exceptions and under such regulations as Congress shall make."…

The exception to appellate jurisdiction in the case before us… is not an inference from the affirmation of other appellate jurisdiction. It is made in terms. The provision of the act of 1867, affirming the appellate jurisdiction of this court in cases of habeas corpus is expressly repealed. It is hardly possible to imagine a plainer instance of positive exception.

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle.

Several cases were cited by the counsel for [McCardle] in support of the position that jurisdiction of this case is not affected by the repealing act. But none of them, in our judgment, afford any support to it. They are all cases of the exercise of judicial power by the legislature, or of legislative interference with courts in the exercising of continuing jurisdiction…

On the other hand, the general rule, supported by the best elementary writers… is, that "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing acts upon suits under acts repealed, has been determined by the adjudications of this court…

It is quite clear, therefore, that this court cannot proceed to pronounce judgment in this case, for it has no longer jurisdiction of the appeal; and judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised…

The appeal of [McCardle] must be dismissed for want of jurisdiction.

Case

COOPER V. AARON

358 U.S. 1; 78 S.Ct. 1401; 3 L.Ed. 2d 5 (1958)

Vote: 9–0

In this case the Supreme Court responds to the efforts of state officials to block the court-ordered desegregation of Central High School in Little Rock, Arkansas, in 1957.

Opinion of the Court by ***The Chief Justice, Mr. Justice Black, Mr. Justice Frankfurter, Mr. Justice Douglas, Mr. Justice Burton, Mr. Justice Clark, Mr. Justice Harlan, Mr. Justice Brennan,*** and ***Mr. Justice Whittaker.***

As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United

States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education* [1954]… That holding was that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management funds or property. We are urged to uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding in *Brown v. Board of Education* have been further challenged and tested in the courts. We reject these contentions…

While the School Board was… going forward with its preparation for desegregating the Little Rock school system, other state authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this Court had held violated the Fourteenth Amendment…

The School Board and the Superintendent of Schools nevertheless continued with preparations to carry out the first stage of the desegregation program. Nine Negro children were scheduled for admission in September 1957 to Central High School…

On September 2, 1957, the day before these Negro students were to enter Central High, the school authorities were met with drastic opposing action on the part of the Governor of Arkansas who dispatched units of the Arkansas National Guard to the Central High school grounds and placed the school "off limits" to colored students. As found by the District Court in subsequent proceedings, the Governor's action had not been requested by the school authorities, and was entirely unheralded…

The Governor's action caused the School Board to request the Negro students on September 2 not to attend the high school "until the legal dilemma was solved." The

next day, September 3, 1957, the Board petitioned the District Court for instructions, and the court, after a hearing, found that the Board's request of the Negro students to stay away from the high school had been made because of the stationing of the military guards by the state authorities. The court determined that this was not a reason for departing from the approved plan, and ordered the School Board and Superintendent to proceed with it.

On the morning of the next day, September 4, 1957, the Negro children attempted to enter the high school but… [the] National Guard "acting pursuant to the Governor's order, stood shoulder to shoulder at the school grounds and thereby forcibly prevented the 9 Negro students… from entering," as they continued to do every school day during the following three weeks…

…After hearings,… the District Court found that the School Board's plan had been obstructed by the Governor through the use of National Guard troops, and granted a preliminary injunction… enjoining the Governor and the officers of the Guard from preventing the attendance of Negro children at Central High School, and from otherwise obstructing or interfering with the orders of the court in connection with the plan… The National Guard was then withdrawn from the school.

The next school day was Monday, September 23, 1957. The Negro children entered the high school that morning under the protection of the Little Rock Police Department and members of the Arkansas State Police. But the officers caused the children to be removed from the school during the morning because they had difficulty controlling a large and demonstrating crowd which had gathered at the high school… On September 25, however, the President of the United States dispatched federal troops to Central High School and admission of the Negro students to the school was thereby effected…

We come now to the aspect of the proceedings presently before us… [T]he School Board and the Superintendent of Schools filed a petition in the District Court seeking a postponement of their program for desegregation. Their position in essence was that because of extreme public hostility, which they stated had been engendered largely by the official attitudes and actions of the Governor and the Legislature, the maintenance of a sound educational program at Central High School, with the Negro students in attendance, would be impossible. The Board therefore proposed that the Negro students already admitted to the school be withdrawn and sent to segregated schools, and that all further steps to carry out the Board's desegregation program be postponed for a period later suggested by the Board to be two and one half years…

One may well sympathize with the position of the Board in the face of the frustrating conditions which have confronted it, but, regardless of the Board's good faith, the actions of the other state agencies responsible for those conditions compel us to reject the Board's legal position. Had Central High School been under the direct management of the State itself, it could hardly be suggested that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of these respondents, when vindication of those rights were rendered difficult or impossible by the actions of other state officials. The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State.

The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature… Thus law and order are not here to be preserved by depriving the Negro

children of their constitutional rights. The record before us clearly established that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action…

The controlling legal principles are plain. The command of the Fourteenth Amendment is that no "State" shall deny to any person within its jurisdiction the equal protection of the laws… [T]he prohibitions of the Fourteenth Amendment extend to all actions of the State denying equal protection of the laws; whatever the agency of the State taking the action… In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."…

What has been said, in the light of the facts developed, is enough to dispose of the case. However, we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the Brown case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

Article VI of the Constitution makes the Constitution the "supreme Law of the Land."… Chief Justice Marshall… declared in *Marbury v. Madison:*… "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* Case is the supreme law of the

land, and Art VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art VI, cl 3, "to support this Constitution."…

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery…"… A Governor who asserts a power to nullify a federal court order is similarly restrained…

It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action… State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws… The basic decision in *Brown* was unanimously reached by this Court… Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.

Mr. Justice Frankfurter, concurring…

Case

BAKER V. CARR

369 U.S. 186; 82 S.Ct. 691; 7 L.Ed. 2d 663 (1962)

Vote: 6–2

The term "apportionment" refers to the way in which legislative districts are drawn. Malapportionment exists to the extent that numbers of voters are unequal across legislative districts. In a malapportioned system, voters in the more populous districts are underrepresented, while voters in the less populous districts are overrepresented in the legislature (see Chapter 8, Volume II for a discussion of the apportionment issue). In the middle of the twentieth century, critics of malapportionment turned to the courts for relief. In Colegrove v. Green (1946) the Supreme Court dismissed a lawsuit directed against the malapportionment of congressional districts in Illinois. In his plurality opinion, Justice Felix Frankfurter argued that "due regard for the Constitution as a viable system precludes judicial correction" of the problem. In Frankfurter's view, "[t]he remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress." In what became the most frequently quoted language from the opinion, Frankfurter admonished courts not to enter the "political thicket" of reapportionment.

Sixteen years after Colegrove v. Green, *the Supreme Court reconsidered Justice Frankfurter's admonition in the landmark case of* Baker v. Carr. *The case began when voters residing in Chattanooga, Knoxville, Memphis, and Nashville brought a federal class action challenging the apportionment of the Tennessee General Assembly. The general assembly had not been reapportioned since 1901 and, as a result of population growth in the cities, had become badly malapportioned. Plaintiffs*

argued that they were being "denied the equal protection of the laws accorded them by the Fourteenth Amendment… by virtue of the debasement of their votes." As expected, the federal district court dismissed the case on the authority of Colegrove v. Green. The plaintiffs appealed.

Mr. Justice Brennan delivered the opinion of the Court.

…[Baker et al.] seek relief in order to protect or vindicate an interest of their own, and of those similarly situated. Their constitutional claim is, in substance, that the 1901 [Tennessee apportionment] statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-à-vis voters in irrationally favored counties…

In holding that the subject matter of this suit was not justiciable, the District Court relied on *Colegrove v. Green…* We understand the District Court to have read the… case as compelling the conclusion that since [Baker] sought to have a legislative apportionment held unconstitutional, [his] suit presented a "political question" and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable "political question."…

We have said that "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations."…The nonjusticiability of a political question is primarily a function of the separation of

powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. To demonstrate this requires no less than to analyze representative cases and to infer from them the analytical threads that make up the political question doctrine. We shall then show that none of those threads catches this case.

[Justice Brennan discusses several categories of cases in which the Court has labeled particular controversies as "political." He concludes:]

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar there should be no dismissal for nonjusticiability on the ground of a political question's presence.

The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloging…

We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a nonjusticiable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government coequal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need [Baker], in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.

This case does, in one sense, involve the allocation of political power within a State, and [Baker] might conceivably have added a claim under the Guaranty Clause. Of course, as we have seen, any reliance on that clause would be futile. But because my reliance on the Guaranty Clause could not have succeeded it does not follow that

[Baker] may not be heard on the equal protection claim which in fact [he tenders]. True, it must be clear that the Fourteenth Amendment claim is not so enmeshed with those political question elements which render Guaranty Clause claims nonjusticiable as actually to present a political question itself. But we have found that not to be the case here…

…[I]n *Gomillion v. Lightfoot* [1960]… we applied the Fifteenth Amendment to strike down a redrafting of municipal boundaries which effected a discriminatory impairment of voting rights, in face of what a majority of the Court of Appeals thought to be a sweeping commitment to state legislatures of the power to draw and redraw such boundaries…

…[To the argument] that *Colegrove v. Green*... was a barrier to hearing the merits of the case, the Court responded that *Gomillion* was lifted "out of the so-called 'political' arena and into the conventional sphere of constitutional litigation" because here was discriminatory treatment of a racial minority violating the Fifteenth Amendment…

We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which [Baker is] entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.

The judgment of the District Court is reversed and the Cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice Whittaker did not participate in the decision of this case.

Mr. Justice Douglas, concurring…

Mr. Justice Clark, concurring…

Mr. Justice Stewart, concurring…

Mr. Justice Frankfurter, whom ***Mr. Justice Harlan*** joins, dissenting.

The Court today reverses a uniform course of decision established by a dozen cases… The impressive body of rulings thus cast aside reflected the equally uniform course of our political history regarding the relationship between population and legislative representation—a wholly different matter from denial of the franchise to individuals because of race, color, religion, or sex. Such a massive repudiation of the experience of our whole past in asserting destructively novel judicial power demands a detailed analysis of the role of this Court in our constitutional scheme. Disregard of inherent limits in the effective exercise of the Court's "judicial Power" not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of "the supreme Law of the Land" in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce.

Dissenting opinion of ***Mr. Justice Harlan,*** whom ***Mr. Justice Frankfurter*** joins…

Case

RASUL V. BUSH

542 U.S. 466; 124 S.Ct. 2686; 159 L.Ed. 2d 548 (2004)

Vote: 6–3

On November 13, 2001, President George W. Bush signed an executive order authorizing the creation of military tribunals for the detention and trial of foreign nationals apprehended in the "war against terrorism." The government subsequently incarcerated more than seven hundred "enemy aliens" captured in Afghanistan and elsewhere at the American Naval Base at Guantanamo Bay, Cuba. Most were held in solitary confinement, restricted to 6 by 8 foot cells for more than twenty-three hours a day. Inmates were not permitted to have contact with anyone outside the camp, including lawyers and family members, nor were they afforded any sort of judicial or administrative process to review their status.

In 2002, relatives of twelve Kuwaiti nationals detained at Guantanamo Bay filed petitions for habeas corpus in the federal district court for the District of Columbia. Their petitions asserted that these detainees were not enemy combatants and that they were being detained without due process of law. Plaintiffs sought an injunction ordering that these detainees be informed of any charges against them and requiring that they be permitted to consult with counsel and meet with their families. The federal district court dismissed the case, ruling that it did not have jurisdiction to issue writs of habeas corpus for aliens detained outside the sovereign territory of the United States. The U.S. Court of Appeals for the D.C. Circuit affirmed. It based its decision primarily on Eisentrager v. United States (1950), in which the Supreme Court held that nonresident enemy aliens have no access to American courts during wartime.

Justice Stevens delivered the opinion of the Court.

These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the

Guantanamo Bay Naval Base, Cuba…

Congress has granted federal district courts, "within their respective jurisdictions," the authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." The statute traces its ancestry to the first grant of federal court jurisdiction: Section 14 of the Judiciary Act of 1789 authorized federal courts to issue the writ of habeas corpus to prisoners "in custody, under or by colour of the authority of the United States, or committed for trial before some court of the same." In 1867, Congress extended the protections of the writ to "all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States."…

Consistent with the historic purpose of the writ, this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace. The Court has, for example, entertained the habeas petitions of an American citizen who plotted an attack on military installations during the Civil War, *Ex parte Milligan* (1866), and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States, *Ex parte Quirin* (1942), and its insular possessions, *In re Yamashita* (1946).

The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."…

Respondents' primary submission is that the answer to the jurisdictional question is controlled by our decision in *Eisentrager.* In that case, we held that a Federal

District Court lacked authority to issue a writ of habeas corpus to 21 German citizens who had been captured by U.S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in the Landsberg Prison in occupied Germany…

Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control…

In *Braden v. 30th Judicial Circuit Court of Ky.* (1973), this Court held… that the prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of… as long as "the custodian can be reached by service of process."…

…[R]espondents contend that… congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested. Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States. By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. Respondents themselves concede that the habeas

statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority…

Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm as well as the claims of persons detained in the so-called "exempt jurisdictions," where ordinary writs did not run, and all other dominions under the sovereign's control. As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown." Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown."

In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court's jurisdiction over petitioners' custodians. [The habeas corpus statute] by its terms, requires nothing more. We therefore hold that [it] confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base…

Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not

address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand for the District Court to consider in the first instance the merits of petitioners' claims…

Justice Kennedy, concurring in the judgment.

The Court is correct, in my view, to conclude that federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals held at the Guantanamo Bay Naval Base in Cuba. While I reach the same conclusion, my analysis follows a different course… In my view, the correct course is to follow the framework of *Eisentrager*...

The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs. A faithful application of *Eisentrager,* then, requires an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented. A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated.

The facts here are distinguishable from those in *Eisentrager* in two critical ways, leading to the conclusion that a federal court may entertain the petitions. First,

Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities.

The opinion of the Court well explains the history of its possession by the United States. In a formal sense, the United States leases the Bay; the 1903 lease agreement states that Cuba retains "ultimate sovereignty" over it. At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.

The second critical set of facts is that the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status. In *Eisentrager,* the prisoners were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms. Having already been subject to procedures establishing their status, they could not justify "a limited opening of our courts" to show that they were "of friendly personal disposition" and not enemy aliens. Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.

In light of the status of Guantanamo Bay and the indefinite pretrial detention of

the detainees, I would hold that federal court jurisdiction is permitted in these cases. This approach would avoid creating automatic statutory authority to adjudicate the claims of persons located outside the United States, and remains true to the reasoning of *Eisentrager*…

Justice Scalia, with whom the ***Chief Justice*** and ***Justice Thomas*** join, dissenting.

The Court today holds that the habeas [corpus] statute extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts. This is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied. The Court's contention that *Eisentrager* was somehow negated by *Braden*—a decision that dealt with a different issue and did not so much as mention *Eisentrager*—is implausible in the extreme. This is an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field. I would leave it to Congress to change [the law], and dissent from the Court's unprecedented holding…

…Today's opinion, and today's opinion alone, overrules *Eisentrager;* today's opinion, and today's opinion alone, extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts. No reasons are given for this result; no acknowledgment of its consequences made. By spurious reliance on *Braden* the Court evades explaining why *stare decisis* can be disregarded, and why *Eisentrager* was wrong. Normally, we consider the interests of those who have relied on our decisions. Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be

within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees…

Departure from our rule of *stare decisis* in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation's conduct of a war. The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs.