CHAPTER 1

JUDICIAL POWER

It has become a commonplace that, as then-Governor (later Chief Justice) Charles Evans Hughes put it, “We are under a Constitution, but the Constitution is what the judges say it is. * * *”1 Although this cliché is seriously misleading when it suggests that courts always have the last word on questions of constitutionality and insofar as it implies that judges are free to adopt whatever reading of the Constitution pleases them, it does contain a kernel of truth—even if it is overblown—that courts play an important role in governing America because they play a central role in interpreting the Constitution. This is especially true of the U.S. Supreme Court. The study of constitutional law necessarily begins with an examination of judicial power because the political influence of courts, constitutionally speaking, flows from their power to decide cases.

As Martin Shapiro pointed out many years ago, the study of constitutional law makes both too much and too little of the Supreme Court. Examining the operation of government only through the lens of the Court’s constitutional decisions makes too much of the Court because it appears as the focal point of the American political system and this magnifies its role out of all proportion. Although the Supreme Court has played—and continues to play—a vital role in governing America, studying only what it, as Constitutional Court, has said about itself and other branches and levels of government fosters the distorted impression of a judicial Goliath “marching through American history waving the huge club of judicial review.”2

Although the judiciary is a coordinate branch of government, it is an equal branch only in the formal legal sense. While courts have the power, in Chief Justice John Marshall’s words, “to say what the law is,”3 they cannot make law whenever they please or impose their will when they do. The Supreme Court’s constitutional decisions can be undone by the process of constitutional amendment, its interpretation of federal statutes changed by simple legislation, and its membership colored by the political values of new presidential appointments. In the last analysis, the political power of courts is both subtle and fragile: their principal asset is the capacity to put their seal of approval on things. This power to legitimize the actions of others is the product of

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America’s unique political culture, which is highly legalistic—that is, prone to think a thing is morally all right if it is declared legal. But in terms of raw politics—as distinguished from political symbolism—Alexander Hamilton got it right when he declared in Federalist No. 78:

the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

In terms of sheer political might, it is Congress and the President, not the courts, who are at the center of the political system. It is the legislative and executive branches that exercise the dominant influence over public policy, both foreign and domestic.

To see the Supreme Court as Constitutional Court also makes too little of the Court. To focus on the Supreme Court’s constitutional rulings is to miss the many cases in which it makes policy by interpreting the laws passed by Congress. Constitutional cases have constituted a majority of cases decided by signed opinion in only about a dozen of the Court’s annual Terms (see p. 33) since it acquired control over its docket in 1925. Focusing only on cases in which constitutional issues predominate misses the Court’s more subtle and more frequent role working in the interstices of law—interpreting Congress’s words and thereby giving meaning to environmental law, tax law, immigration law, federal criminal law—in short, regulatory law of all kinds.

Nor have courts been the only agencies of government that have shaped the meaning of the Constitution. What Congress, Presidents, federal and state administrators, scholars, and the media do has also had a significant impact in developing the meaning of the Constitution. And the American people themselves, through elections and protests, have expressed strong preferences that have supported or opposed assertions of power under or in spite of the Constitution. These impacts are naturally greatest where there are significant ambiguities or lacunae (omissions) in the text of the Constitution.

Despite their brilliance, the Framers after all could not possibly have envisioned the technological state of contemporary America. With regard to some matters, they just guessed badly. They failed to provide for political parties because they regarded them as a bane to be avoided (as James Madison contended in Federalist No. 10 and as George Washington admonished in his Farewell Address). Their fear of democracy—reflected in the fact that the people were limited to directly electing only members of the House of Representatives—was overtaken by the inexorable drive to expand popular participation in government, a movement vividly reflected in half a dozen amendments to the Constitution.

Although the Framers intended Congress to be the principal architect of federal policy, this scheme has been badly undercut by events in the twentieth century. Today, we expect the President to do much more than simply execute the laws Congress enacts. Ordinarily, we expect the President to take the initiative—to be a leader, not a clerk. At least since the Great Depression, we have operated on the assumption that the President should propose programs and Congress should respond to them rather than the other way around. Reflecting on the transformation of the Presidency over the course of the last two centuries, Justice Jackson in the Steel Seizure Case “note[d] the gap that exists between the President’s paper powers and his real powers.” He continued, “The Constitution does not disclose the measure of actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not as a blue print of the Government
that is. Vast accretions of federal power, eroded from that reserved by the States, have
magnified the scope of presidential activity. Subtle shifts take place in the centers of real
power that do not show on the face of the Constitution. Once an exercise of power becomes
accepted on the basis of precedent, it can truly be said that such an exercise has become a part
of the constitutional system, although one could argue that technically it is not a part of the
Constitution. The precedent of actions that go uncontested or are allowed to stand is a
powerful argument for legitimation.

The fact remains, however, that the judiciary—particularly the Supreme Court—plays a
leading role in constitutional interpretation, primarily because of the uniquely American
institution of judicial review. Anyone who wants to learn the meaning of the Constitution
must know what the Supreme Court has said about it—as a beginning if not as the final
word. At the outset, then, it is necessary to understand how the Court derived this power of
interpretation as well as what ground rules circumscribe its exercise.

A. THE SUPREME COURT’S JURISDICTION AND
ITS ASSUMPTION OF JUDICIAL REVIEW

Judicial Review

Judicial review is the doctrine according to which courts are entitled to pass upon the
constitutionality of an action taken by a coordinate branch of government. The doctrine
had its origin in England as early as the seventeenth century. Although the practice was
recognized in Dr. Bonham’s Case in 1610, judicial review never became a principle capable
of limiting legislative authority in Britain, largely because the notion of judicial supremacy
inherent in judicial review conflicted with the principle of parliamentary supremacy. In a
parliamentary system, the acts of the legislature share equal legal status with many ancient
documents, such as Magna Carta and the other legal milestones that together comprise
Britain’s “unwritten Constitution.” Parliamentary supremacy entails the logical conse-
quence that the legislature may alter the constitution by simply passing a law.

Although most of the Framers of the Constitution were familiar with the concept of judicial
review and were for it, there is the hard fact that they considered and rejected the idea for a
Council of Revision, which would have permitted the Supreme Court to join with the
President in vetoing acts of Congress. It seems a fair appraisal of what took place in Philadelphia
during that summer of 1787 to suggest that proponents of judicial review, like Hamilton (see
Federalist No. 78), decided that it was a good tactical move not to try to resolve that issue in the
Convention, but rather to leave the Constitution ambiguous. Two factors point up such an
interpretation: First, there were individuals at the Convention who were bitterly opposed to
judicial review. Knowing that including judicial review in the Constitution would make

5. Britain’s constitution is “unwritten” only in the sense that no single document fulfills that function. Taken together,
written constitutional documents (such as Magna Carta, the Petition of Right, and the Bill of Rights), all acts of
Parliament, treaties, and conventions (customary acts that have the force of law but have not been stated formally in a
legal document) comprise what might be called “the British constitutional system.” Even the characterization of judicial
review as not existing in the British system is increasingly open to question, due to recent acts of devolution (formal grants
of legal autonomy by Parliament—what might be called “home rule” in regional matters—to Scotland, Wales, and
Northern Ireland) and limitations on the exercise of national authority imposed through legislation adopted by the
European Union and decisions handed down by the European High Court. As sovereignty becomes increasingly
fragmented because authority has been ceded to governments below and above the national government in London,
some institution will have to umpire disputes among these jurisdictions. In short, judicial review is increasingly likely both
because Britain is becoming more of a federal system at home and because its membership in the European Union makes it
subject to judicially-imposed limitations from abroad. In light of this, the principle of parliamentary supremacy (as
traditionally understood, at least) would itself appear headed for an uneasy future.
ratification more difficult, those who favored the practice decided not to press this controversial issue, which they hoped to achieve in other ways. Second, it was not very difficult to predict who would head the new government and who would have the initiative in interpreting the document at the outset—Washington and those in whom he had trust. That group included his former chief of staff, Hamilton. This is not to suggest a “conspiracy theory”; it is simply to suggest that individuals astute in statecraft very shrewdly calculate the costs and benefits of taking a particular stance in a negotiation and include in their calculations whether or not the written agreement will, in the long run, provide the desired results. There is no gainsaying the capacity of Hamilton and other champions of judicial review for shrewd calculation. And it did not take long for Chief Justice John Marshall to demonstrate how shrewd they had been.

Despite its fame, Marbury v. Madison below was not the first case in which the Supreme Court exercised judicial review. In Hylton v. United States, 3 U.S. (3 Dall.) 171, 1 L.Ed. 556 (1796), the Justices assumed its existence when they upheld the validity of a federal tax on carriages. The Court’s acceptance of the concept even predates Hylton, as evidenced by such decisions as Hayburn’s Case, 2 U.S. (2 Dall.) 408, 1 L.Ed. 436 (1792); United States v. Yale Todd, reported in United States v. Ferreira, 54 U.S. (13 How.) 40, 52–53, 14 L.Ed. 40, 47–48 (1851); and Ware v. Hylton, 3 U.S. (3 Dall.) 199, 1 L.Ed. 568 (1796). Judicial review was a practice that was also in existence at the state level.

Chief Justice Marshall’s opinion in Marbury, however, was the Supreme Court’s first genuine attempt to justify the practice and surely is its most often cited precedent for it. The occasion for such a discussion was a seeming collision between the Constitution and part of a federal statute, section 13 of the Judiciary Act of 1789. According to Chief Justice Marshall, the effect of the provision was to enlarge the original jurisdiction of the Supreme Court. Chief Justice Marshall asserted that the original jurisdiction of the Court was delineated in Article III of the Constitution and could be neither expanded nor limited by Congress. After concluding that the statutory provision contradicted the Constitution, Chief Justice Marshall set about the task of justifying the judiciary’s acquisition of judicial review. In light of the absence of any mention of judicial review in the Constitution, his argument was of historic importance. He endeavored to demonstrate that the power of judicial review is simply a logical extension of the Court’s exercise of judicial power, that is, its power to decide cases: If the duty of a judge is to apply rules to facts in order to decide a case and he encounters a conflict between the rules to be applied, then must he not decide what the law is before he can apply it? Because the Constitution vests the judicial power of the United States “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,” and because judicial review is a logical consequence of the exercise of judicial power, the federal judiciary must have the power of judicial review. Given the air of certitude with which he wrote, it is clear that Chief Justice Marshall was not a man much troubled by doubt.

**Marbury v. Madison**
Supreme Court of the United States, 1803
5 U.S. (1 Cranch) 137, 2 L.Ed. 606

**Background & Facts** The election of 1800 proved to be a disaster for the Federalist party. Their candidate for the Presidency, John Adams, was denied reelection, and control of both Houses of Congress fell to the Jeffersonians. In an effort to retain what political advantage they could—for they would never again gain
a national popular mandate—the Federalists sought to entrench themselves in the federal judiciary.

After the election, but before March 4 of the following year, the date on which the Constitution prescribed that Thomas Jefferson would take the oath of office, Oliver Ellsworth, then Chief Justice, conveniently resigned for reasons of ill health, allowing President Adams to name a new Chief Justice. This he did by appointing his Secretary of State, John Marshall, an arch political enemy of Jefferson’s, though a cousin of the President-Elect. Marshall also retained his post in the Adams administration until it went out of office.

The Federalist-controlled “lame duck” Congress also obliged by passing legislation creating some 58 additional judgeships to be filled by the party faithful. On February 3, 1801, it passed a law creating federal circuit courts designed to relieve Supreme Court Justices from the burdensome task of “riding circuit” in their dual capacity as appellate judges. These 16 vacancies were promptly filled by Adams and commissions for them delivered before March 4. The men named to these vacancies are historically referred to as “the midnight judges” because of the late hour at which their commissions were delivered. Two weeks after it had passed the circuit court legislation, Congress passed an act that provided 42 justices of the peace for the District of Columbia. It was this second piece of legislation that gave rise to the controversy in this case.

President Adams sent his nominations for this second wave of judicial appointments to the Senate, and they were confirmed on March 3. The commissions for these judgeships were signed by the President and the Seal of the United States affixed by Marshall as Secretary of State late the same day, but Adams’s term expired before all the commissions could be delivered by John Marshall’s brother, James, who returned four undelivered certificates to the Secretary of State’s office. Upon entering office, James Madison, the new Secretary of State, under instructions from President Jefferson refused to deliver these four remaining commissions, whereupon William Marbury, one of the four designated but uncertified judges, brought suit to recover his commission. Marbury lodged his suit directly with the Supreme Court, asking that it vindicate his right to the commission under section 13 of the Judiciary Act of 1789 (see footnote, p. 9) by issuing a writ of mandamus (a court order commanding that the occupant of a given office fulfill a particular nondiscretionary act within the purview of that office) directing Secretary of State Madison to deliver the certificate.

With a bare quorum of four of the six Justices participating, the Court handed down the following decision two years later. You may wonder, why the delay? The answer lies in the hostile response of the new Congress to these best-laid plans of the Federalists. Chafing under the repressive propensities of a Federalist judiciary already, as typified by the stern application of the Alien and Sedition Acts, and rankled by these preinaugural maneuverings, the Jeffersonian majority voted to repeal the circuit

Over the following years, the Court’s reports bore the names of Wheaton 1816–1827, Peters 1828–1842, Howard 1843–1860, Black 1861–1862, and Wallace 1863–1874. In each case, the name of the reporter, appropriately abbreviated, was preceded by the volume of his reports in which the decision was to be found and followed by the page number on which the report of the case began. Though this basic format holds today, citation of cases is by series rather than reporter. The official series of the Court’s decisions is known as the United States Reports and is abbreviated “U.S.” There are also two commercially published series of the Court’s decisions. The oldest is the Lawyers’ Edition, published by the Lawyers Cooperative Publishing Company, and is abbreviated “L.Ed.” or “L.Ed.2d,” depending on whether it is in the first or second set of volumes. The third series of the Court’s opinions is the Supreme Court Reporter, a unit of the National Reporter System published by West Publishing Group, and is abbreviated “S.Ct.” A complete citation also includes the year in which the case was decided in parentheses at the end. For a general guide to legal citations, see Appendix E.
court legislation and to cancel the Court’s 1802 Term. Consequently, the Court did not meet to hear this case until its session in 1803.

The following opinion of the court was delivered by the Chief Justice [MARSHALL].

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In the order in which the court has viewed this subject, the following questions have been considered and decided: 1st. Has the applicant a right to the commission he demands? 2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? 3d. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is—Has the applicant a right to the commission he demands? * * *

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Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. * * *

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the presidential signature.

It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and to record it.

* * *

Mr. Marbury, then, since his commission was signed by the president, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country. To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

2. This brings us to the second inquiry; which is: If he has a right, and that right has been violated, do the laws of his country afford him a remedy? The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. * * *

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The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. * * *

* * *

It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act. If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. In some instances, there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases,
their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived, by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president: he is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

If this be the rule, let us inquire, how it applies to the case under the consideration of the court. The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president, according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed, cannot be made never to have existed, the appointment cannot be annihilated; and consequently, if the officer is by law not removable at the will of the president, the rights he has acquired are protected by the law, and are not resumable by the president. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner, as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which, a suit has been instituted against him, in which his defence had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority. So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment. That question has been discussed, and the opinion is, that the latest point of time which can be taken as that of which the appointment was complete, and evidence, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is, then, the opinion of the Court: 1st. That by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, 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. 2d. That, having this legal title to the office, he has a
consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

3. It remains to be inquired whether he 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.

* * *

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; * * * any application to a court * * * would be rejected without hesitation. But where he is directed by law to do a certain act, affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, * * * as, for example, to record a commission or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived, on what ground the courts of the country are * * * excused from the duty of giving judgment that right be done to an injured individual * * *.

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This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired, whether it can issue from this court.

The act 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.” [See footnote, p. 9.] 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.” It has been insisted, at the bar, that as the original grant of jurisdiction to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words, the power remains to the legislature, to assign original jurisdiction to that court; in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature, to apportion the judicial power between the supreme and inferior courts, according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage—is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance. Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them, or they have no operation at all.
It cannot be presumed, that any clause in the constitution is intended to be without effect; and therefore, such a construction is inadmissible, unless the words require it. If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.7

When an instrument organizing, fundamentally, a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court, by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases, its jurisdiction is original, and not appellate; in the other, it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning. 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.

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 giving 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. That it thus reduces to nothing, what we have deemed the greatest improvement on political institutions, a written constitution, would, of itself, be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection. 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?

There are many other parts of the constitution which serve to illustrate this subject. It is declared, that “no tax or duty shall be laid on articles exported from any state.” Suppose, a duty on the export of cotton, of tobacco or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?

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From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of 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!

*** 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.

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The *** [complaint] must be discharged.

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NOTE—WHEN SHOULD JUDGES DISQUALIFY THEMSELVES?

Since he was also the Secretary of State whose responsibility it was to deliver Marbury’s commission, there would appear to be a serious conflict of interest on the part of Chief Justice Marshall. His participation in the Court’s consideration of Marbury v. Madison, not to mention his authorship of the Court’s opinion, violates the expectation we have that judges not sit in cases in which they have either experienced personal involvement or in which they have close personal or professional relationships with the affected parties, witnesses, or counsel. His disregard for this principle concerning the avoidance of impropriety or even the appearance of impropriety is alleviated neither by the fact that a quorum of four Justices was required for the case to be heard (Justices Cushing and Moore were not present for some or all of the proceedings) or by the outcome, which seems at variance with any partisan interests Marshall might be thought to have had.
The customary practice in such circumstances is to postpone hearing the dispute until a fuller complement of judges is available. In view of the absence of any extenuating circumstances, it is difficult to understand why there was any necessity to choose between overlooking Marshall's involvement and not attaining a quorum. It is also difficult to see how the outcome justifies Marshall's participation, since, if that were so, it would imply that a participant in his position should pre-judge the case. Marshall, however, did not participate in several land title cases, notably Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816), where he and his brother were personally involved in the purchase of several large tracts of Virginia real estate.

Since 1792, federal law has required district judges to recuse themselves when they have an interest in a suit or have acted as counsel. In 1911, Congress added recusal for bias in general. The last major revision of the law occurred in 1974, when Congress made the recusal standards applicable to all federal judges, Justices, and magistrates and placed the obligation to identify the existence of circumstances in which his objectivity might reasonably be questioned on the judge himself rather than on one of the parties to the case. The current version of the law, 28 U.S.C.A. § 455, reads as follows:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
(b) He shall also disqualify himself in the following circumstances:
   (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
   (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
   (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
   (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
   (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
      (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
      (ii) Is acting as a lawyer in the proceeding;
      (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
      (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.
(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

By these standards, Chief Justice Marshall's participation in Marbury would have arguably breached (a), (b)(1), (b)(3), and (b)(5)(iv).

Disqualification of Justices Reed, Murphy, and Jackson, who variously held posts as Attorney General or Solicitor General during Franklin Roosevelt's first two administrations, came close to impairing the operation of the Court during the early 1940s. Later, a heated wrangle over Justice Black's participation in Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, 325 U.S. 161, 65 S.Ct. 1063 (1945), a case in which counsel for the union happened to be Black's old law partner, developed when Justice Jackson objected (see his concurring opinion in the Court's denial of the petition for rehearing, 325 U.S. 897, 65 S.Ct. 1950). That disagreement festered in private until Jackson, breaching the secrecy of the conference room, exposed their feud to public view in a rash cable to the House and Senate Judiciary committees in an attempt to blunt what he thought was a move to promote Justice Black in the aftermath of Chief Justice Stone's

Controversy flared again when Justice Rehnquist refused to disqualify himself in Laird v. Tatum, 408 U.S. 1, 92 S.Ct. 2318 (1972). In that case, which involved military surveillance of political activities by civilians, the appellees alleged bias, since Justice Rehnquist, as an Assistant U.S. Attorney General prior to his appointment to the Court, had testified before a subcommittee of the Senate Judiciary Committee and had spoken publicly on other occasions in favor of government data collection activities. Justice Rehnquist defended his participation in the Laird case, 409 U.S. 824, 93 S.Ct. 7 (1972), saying, “My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.” See “Justice Rehnquist’s Decision to Participate in Laird v. Tatum,” 73 Columbia Law Review 106 (1973). Laird v. Tatum, like the Jewel Ridge case, was decided by a 5–4 vote.

In much less controversial circumstances two decades before, Justice Frankfurter excused himself from participating in Public Utilities Commission v. Pollak, 343 U.S. 451, 72 S.Ct. 813 (1952). That case involved a challenge to a District of Columbia transit company policy called “Music as you ride,” according to which Washington’s buses were tuned to a local FM station that broadcast music, news, and weather to passengers as they rode, whether or not they wanted to hear. Certain passengers, alleging that they were a captive audience, protested and challenged the policy as a violation of their right to privacy. Justice Frankfurter, who frequently rode the bus himself, wrote: “My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it.”

Most recently, the issue of recusal surfaced with respect to Justice Scalia. He did not participate in Elk Grove Unified School District v. Newdow, 542 U.S. 1, 124 S.Ct. 2301 (2004), because he had expressed an opinion in a speech on the issue before the Court ruled. In a second instance, however, he declined to disqualify himself from participating in Cheney v. United States District Court for District of Columbia, 542 U.S. 367, 124 S.Ct. 2576 (2004). Controversy over his participation in that case erupted when it was reported that the Justice was among a dozen guests who had gone on a private duck-hunting trip with Vice President Dick Cheney. The Sierra Club and others had brought suit to force public disclosure of records pertaining to the operation of the Energy Task Force chaired by the Vice President. Critics alleged that the committee was loaded with oil industry contributors to the 2000 Bush-Cheney campaign and that, in return for their financial support during the presidential race, they had been at the table crafting the Administration’s energy policy. The plaintiffs sought to force the Vice President to turn over a list of who attended the meetings and the minutes of those meetings. Cheney responded by invoking executive privilege (see p. 218). Justice Scalia saw no reason to step aside, explaining that the Court had voted to grant cert. in the case before the hunting trip had taken place, that he was always in the company of others when he was with the Vice President, and that he had never discussed the case with him. He argued that a policy of requiring a Justice to recuse himself in every instance where he had had social interaction with some member of the Washington community named in a legal proceeding before Court was entirely novel, impractical, and institutionally disabling. Justice Scalia’s memorandum explaining his view appears at 541 U.S. 913, 124 S.Ct. 1391 (2004).

Litigants may be permitted to enforce the terms of the statute quoted earlier by a writ of mandamus, or failure to disqualify oneself under the conditions identified would constitute grounds for reversal on appeal. See “Disqualification of Federal Judges and Justices in the Federal Courts,” 86 Harvard Law Review 736, 738 (1973).

As the Justices themselves recently pointed out, however, there are very real consequences to recusal for less than good reason. “Even one unnecessary recusal impairs the functioning of the Court.

* * * In this Court, where the absence of one Justice cannot be made up by another, needless recusal
deprives litigants of the nine Justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process, requiring the petitioner to obtain (under our current practice) four votes out of eight instead of four out of nine.”

Recusal Policy, 114 S.Ct. 52, 53.

In his dissenting opinion in Eakin v. Raub below, Judge Gibson of the Pennsylvania Supreme Court argued that a constitutional system without judicial review was, indeed, possible. Nor was Judge Gibson alone in his views in the early days of our history. Thomas Jefferson wrote in a letter to Spencer Roane in 1819: “My construction of the Constitution is * * * that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action most especially where it is to act ultimately and without appeal. * * * Each of the three departments has equally the right to decide for itself what is its duty under the Constitution, without any regard to what the others may have decided for themselves under a similar question.”

EAKIN v. RAUB
Supreme Court of Pennsylvania, 1825
12 S. & R. 330

BACKGROUND & FACTS The facts and opinion of the court in this case have been omitted, since they are of no particular importance to a study of constitutional law. Suffice it to say that the case, which was an ejectment proceeding, involved the power of the Pennsylvania Supreme Court to invalidate a state law. Justice Gibson disagreed with his colleagues on the resolution of this dispute and specifically took issue with the right of any court to exercise the power of judicial review. Gibson’s opinion is considered one of the best expositions against the assertion of such judicial power. As a postscript, it is interesting to note that 20 years later Justice Gibson changed his mind and retracted the position he took in the opinion excerpted below. Said Gibson, “I have changed that opinion for two reasons. The late convention [to draft a constitution for the Commonwealth of Pennsylvania], by their silence, sanctioned the pretensions of the courts to deal freely with the Acts of the Legislature; and from experience of the necessity of the case.” Norris v. Clymer, 2 Pa. 277, 281 (1845).

GIBSON, J., dissenting. * * *

* * * I am aware, that a right to declare all unconstitutional acts void * * * is generally held as a professional dogma * * *.

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. * * *

[Although the right in question has all along been claimed by the judiciary, no judge has ventured to discuss it, except Chief Justice MARSHALL * * * and if the argument of a jurist so distinguished for the strength of his ratiocinative powers be found inconclusive, it may fairly be set down to the weakness of the position which he attempts to defend. * * *

* * * Our judiciary is constructed on the principles of the common law * * *. Now, what are the powers of the judiciary, at the common law? They are those that necessar-

8. Letter to Judge Spencer Roane, Sept. 6, 1819, 10 Writings of Thomas Jefferson, p. 140 (Ford, ed. 1899).
ily arise out of its immediate business; and they are, therefore, commensurate only with the judicial execution of the municipal law, or, in other words, with the administration of distributive justice, without extending to anything of a political cast whatever. * * *

The constitution of Pennsylvania contains no express grant of political powers to the judiciary. But to establish a grant by implication, the constitution is said to be a law of superior obligation; and consequently, that if it were to come into collision with an act of the legislature, the latter would have to give way; this is conceded. But it is a fallacy, to suppose, that they can come into collision before the judiciary. What is a constitution? It is an act of extraordinary legislation, by which the people establish the structure and mechanism of their government; and in which they prescribe fundamental rules to regulate the motion of the several parts. What is a statute? It is an act of ordinary legislation, by the appropriate organ of the government; the provisions of which are to be executed by the executive or judiciary, or by officers subordinate to them. The constitution, then, contains no practical rules for the administration of distributive justice, with which alone the judiciary has to do; these being furnished in acts of ordinary legislation, by that organ of the government, which, in this respect, is exclusively the representative of the people; and it is generally true, that the provisions of a constitution are to be carried into effect immediately by the legislature, and only mediately, if at all, by the judiciary. * * *

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. It is an act of sovereignty; and sovereignty and legislative power are said by Sir William Blackstone to be convertible terms. It is the business of the judiciary, to interpret the laws, not scan the authority of the lawgiver; and without the latter, it cannot take cognizance of a collision between a law and the constitution. So that to affirm that the judiciary has a right to judge of the existence of such collision, is to take for granted the very thing to be proved * * *

* * * If the judiciary will inquire into anything 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. * * *

[L]et it be supposed that the power to declare a law unconstitutional has been exercised. What is to be done? The legislature must acquiesce, although it may think the construction of the judiciary wrong. But why must it acquiesce? Only because it is bound to pay that respect to every other organ of the government, which it has a right to exact from each of them in turn. This is the argument. * * * [T]he legislature has an equal right with the judiciary to put a construction on the constitution; * * * neither of them is infallible; * * * neither ought to be required to surrender its judgment to the other. * * *

[I]n theory, all the organs of the government are of equal capacity; or, if not equal, each must be supposed to have superior
capacity only for those things which peculiarly belong to it. [Since] legislation peculiarly involves the consideration of those limitations which are put on the law-making power, and the interpretation of the laws when made, involves only the construction of the laws themselves, it follows, that the construction of the constitution belongs to the legislature, which ought, therefore, to be taken to have superior capacity to judge of the constitutionality of its own acts. Legislation is essentially an act of sovereign power; but the execution of the laws by instruments that are governed by prescribed rules, and exercise no power of volition, is essentially otherwise.

When the entire sovereignty was separated into its elementary parts, and distributed to the appropriate branches, all things incident to the exercise of its powers were committed to each branch exclusively. The negative which each part of the legislature may exercise, in regard to the acts of the other, was thought sufficient to prevent material infractions of the restraints which were put on the power of the whole; for, had it been intended to interpose the judiciary as an additional barrier, the matter would surely not have been left in doubt. [It] would have been placed on the impregnable ground of an express grant.

But [it is argued that] the judges are sworn to support the constitution, and are they not bound by it as the law of the land? 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.

For these reasons, I am of 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. 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 the ordinary exercise of the right of suffrage—a mode better calculated to attain the end, without popular excitement. [In the theory of our government, the people are assumed to be] wise, virtuous, and
In Justice Gibson’s view, then, courts exist only to do distributive justice, that is, to apply the rules contained in statutes to the facts of cases, not to apply the “rules” of the Constitution to judge whether the legislature had the authority to make the statute. This view is consistent with the British experience, which holds that courts need only decide cases on the basis of the statutes passed by Parliament. If there is a problem with the statute, that is for Parliament to correct. If ours were such a system, those who consider a law unconstitutional would be required to battle it out in the political arena. In short, the Constitution would still be the supreme law of the land and the foundation of our system, but its primary interpretation would shift from the Court to the explicitly political branches of government.

Insofar as judicial review is essential to a constitutional system, then, Justice Gibson may be right; insofar as the practice is desirable, there may be much more to argue about. Certainly, judicial review is often defended as a valuable check and balance among governmental institutions. Moreover, Justice Gibson may have done us a favor by at least articulating clearly the burden that rests on those of us who favor judicial review when he asserted that, if there is a collision between the Constitution and a statute, courts “must be a peculiar organ” (p.15) to resolve the conflict. In short, he would appear to assert that those who advocate the desirability of judicial review bear the burden of showing that the judiciary is in fact endowed with a unique capacity to do justice that overrides the deference ordinarily due popularly elected governmental institutions in a democracy. This invites discussion of other justifications for judicial review and is considered further in Chapter 2.

In any event, Chief Justice Marshall’s assertion of judicial review ultimately prevailed. Judicial review has become part and parcel of our constitutional system because it has been read into the Constitution, so to speak. It is too late in our history to change that part of our system by judicial interpretation. It would require nothing short of a constitutional amendment to do away with the institution of judicial review now.

Original Jurisdiction

It is important in the study of constitutional interpretation to understand the difference between “judicial power” and “jurisdiction.” Judicial power, as noted earlier, is the power of a court to decide cases. Jurisdiction is the authority of a court to hear a case and, therefore, to exercise judicial power. Marbury involved an exercise of the Supreme Court’s original jurisdiction. Original jurisdiction is the authority of a court to hear a case in the first instance, that is, to function as a trial court. The Supreme Court’s original jurisdiction, as Chief Justice Marshall pointed out in Marbury, is delineated in Article III, section 2, paragraph 2 of the Constitution and extends to “all Cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be a Party.” Federal law, 28 U.S.C.A. § 1251, provides that the Supreme Court shall have both “original and exclusive jurisdiction of all controversies between two or more States”; it shall have “original but not exclusive jurisdiction” (which means a case could be tried in either the U.S. Supreme Court...
or a federal district court) in “[a]ll actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;” “[a]ll controversies between the United States and a State;” and “[a]ll actions or proceedings by a State against the citizens of another State or against aliens.”

Although the Supreme Court technically acts as a trial court when it exercises its original jurisdiction, cases heard by the Court in the first instance have not been tried to a jury since before 1800. When the parties in a case have stipulated to the facts or where otherwise only questions of law are presented, the Court will hear argument. Where the facts in a case are disputed, the Court’s customary practice has been to appoint a “Special Master,” who functions as a hearing officer. He or she takes testimony, hears argument, sifts evidence, and formulates conclusions as to both the facts and the legal issues involved. The Special Master prepares a report, which is subject to exceptions and objections by the parties. The Court may then order argument on any of the findings or recommendations in dispute. In any case, the Court itself rules on all important motions and directly issues any orders granting or denying the relief sought. Over the last decade, the Court has decided only one or two such cases a Term. Disputes between states over boundary lines and water rights account for practically all of them.

**Supreme Court Review of State Court Decisions**

The Supremacy Clause, Article VI, section 2 of the Constitution, declares, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority 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.” It is followed by a requirement in section 3 that national and state legislators, executives, and “judicial Officers * * * shall be bound by Oath or Affirmation, to support this Constitution * * *” (emphasis supplied). In section 25 of the Judiciary Act of 1789, another provision of the same statute that had been before the Court in *Marbury*, Congress provided the mechanism for implementing the principle of federal constitutional supremacy over conflicting state law. It provided for Supreme Court review of a final judgment or decree by the highest court in a state in three categories of cases: (1) where the validity of a federal law or treaty was “drawn in question,” and the decision was against its validity; (2) where a state statute was challenged as “repugnant to the Constitution, treaties or laws of the United States,” and the decision was in favor of its validity; and (3) where the construction of the federal Constitution, treaty, or statute was drawn in question, and the decision was against the title, right, privilege, or exemption claimed. Although the Supreme Court had declared the doctrine of judicial review and with it the attendant precept of judicial supremacy, it had no occasion there to assert these over state actions. With its ruling in *Martin v. Hunter’s Lessee* (p. 19), the Supreme Court asserted its authority to hear civil cases tried in state courts that presented federal constitutional questions. Five years later, in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821), the Court confirmed its jurisdiction over criminal cases raising federal constitutional issues as well. Chief Justice Marshall, whose opinions in both cases carried the day for the power of the national government in general and that of the U.S. Supreme Court in particular, rested his holding on Article III, section 2, which provides that “[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * *” (emphasis supplied).
**Martin v. Hunter's Lessee**

Supreme Court of the United States, 1816

14 U.S. (1 Wheat.) 304, 4 L.Ed. 97

**Background & Facts** At the time of his death in 1781, Thomas, Lord Fairfax, a citizen of Virginia, owned a 300,000-acre tract known as the Northern Neck of Virginia. In his will, Fairfax gave the land to his nephew, Denny Martin Fairfax, a British subject living in England. Virginia law prohibited inheritance by an enemy alien, and the state passed a special law after Fairfax’s death confiscating the property. In 1789, the state sold some of the land to David Hunter. After nearly two decades of litigation, during which Denny Martin Fairfax died and left the property to his heir, Philip Martin, the Virginia Court of Appeals in 1810 recognized Hunter’s title to the land. On a writ of error three years later, the U.S. Supreme Court reversed the judgment of the Virginia Court of Appeals because the Jay Treaty of 1794 specifically safeguarded the property of British subjects from confiscation. In response to this decision by the Supreme Court, the Virginia Court of Appeals declared unconstitutional section 25 of the Judiciary Act of 1789, upon which the Supreme Court had asserted its jurisdiction, and refused to obey the Supreme Court’s mandate (i.e., a directive that its judgment be executed) in the case. Philip Martin then sought Supreme Court review of this defiant action. Chief Justice Marshall, who, together with his brother James, had contracted with Denny Martin Fairfax to purchase the bulk of the estate, did not participate in the Court’s consideration of this case.

STORY, J., delivered the opinion of the court:

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The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by “the people of the United States.” There can be no doubt that it was competent to the people to invest the general government with all the powers which they might deem proper and necessary; to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. As little doubt can there be that the people had a right to prohibit to the states the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the state governments, in given cases, subordinate to those of the nation, or to reserve to themselves those sovereign authorities which they might not choose to delegate to either. The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

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The third article of the constitution is that which must principally attract our attention. * * *

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* * * [A]ppellate jurisdiction is given by the constitution to the Supreme Court in all cases, where it has not original jurisdiction; subject, however, to such exceptions and regulations as Congress may prescribe. It is, therefore, capable of embracing every case enumerated in the constitution, which is
not exclusively to be decided by way of original jurisdiction. But the exercise of appellate jurisdiction is far from being limited by the terms of the constitution to the Supreme Court. There can be no doubt that Congress may create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction. The judicial power is delegated by the constitution in the most general terms, and may, therefore, be exercised by Congress under every variety of form, of appellate or original jurisdiction. And there is nothing in the constitution which restrains or limits this power.

As, then, by the terms of the constitution, the appellate jurisdiction is not limited as to the Supreme Court, and as to this court it may be exercised in all other cases than those of which it has original cognizance, what is there to restrain its exercise over state tribunals in the enumerated cases? The appellate power is not limited by the terms of the third article to any particular courts. The words are, “the judicial power (which includes appellate power) shall extend to all cases,” etc., and “in all other cases before mentioned the Supreme Court shall have appellate jurisdiction.” It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, or to all cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, but to some, cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the constitution.

It is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that “this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” It is obvious that this obligation is imperative upon the state judges in their official capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—“the supreme law of the land.”

It must, therefore, be conceded that the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws and
treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the state courts, which (as has been already shown) may occur; it must, therefore, extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the constitution.

It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments[* * * that the latter was never designed to act upon state sovereignties, but only upon the people, and that if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts. * * *]

[The constitution * * * is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the constitution does not act upon the states. * * * When, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the states are, in some respects, under the control of Congress, and in every case are, under the constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of state courts is contrary to the genius of our institutions. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. * * *

* * * In respect to the powers granted to the United States, [state judges] are not independent; they are expressly bound to obedience by the letter of the constitution; and if they should unintentionally transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible force than for giving it to the acts of the other coordinate departments of state sovereignty. * * *]

It is further argued that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts * * *. The constitution has presumed [however,] * * * that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of Congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that * * * can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts. * * *

[Another motive[,] * * * perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret statute, or a treaty of the United States, or even the constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize
them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

***

On the whole, the court are of opinion that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one.

***

The next question which has been argued is, whether the case at bar be within the purview of the 25th section of the judiciary act, so that this court may rightfully sustain the present writ of error. This section enacts, in substance, that a final judgment or decree in any suit in the highest court of law or equity of a state, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or of the constitution, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such clause of the said constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, in the same manner as if the judgment or decree complained of had been rendered or passed in a circuit court.

That the present writ of error is founded upon a judgment of the court below, which drew in question and denied the validity of a statute of the United States, is incontrovertible, for it is apparent upon the face of the record.

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It is the opinion of the whole court that the judgment of the Court of Appeals of Virginia, rendered on the mandate in this cause, be reversed, and the judgment of the District Court, held at Winchester, be, and the same is hereby affirmed.

***

It is worth emphasizing that Supreme Court review of state court decisions extends only to federal questions, that is, to controversies involving a claim based on a provision of the U.S. Constitution or a statute passed by Congress. When it comes to construing federal statutes or provisions of the U.S. Constitution, the U.S. Supreme Court is supreme. In the resolution of such matters, the decision of the Supreme Court is final and binding. Where, on the other hand, only a state question is presented, that is, one involving a claim under a provision of a state statute or a state constitution, the decision of the highest court in the state is final, and review by the U.S. Supreme Court is precluded.

The situation becomes a good deal more complex when a case presents both federal and state questions. Although the Supreme Court's rulings in Martin and Cohens leave no doubt whatever that the federal judiciary has the authority to declare a state law unconstitutional if it conflicts with the U.S. Constitution, a treaty, or a statute passed by Congress, the federal courts may refrain from promptly exercising their jurisdiction if the state law or state
constitutional provision is ambiguous. Occasionally, federal courts invoke what is called the “abstention doctrine”—out of respect for state sovereignty—to afford a state supreme court the opportunity to provide a definitive interpretation of the challenged state law that perhaps might obviate the need to decide federal constitutional or statutory questions. In a case where, say, a state criminal prosecution is alleged to infringe the defendant’s First Amendment rights, the choice over which values should prevail—respect for state sovereignty or protection of fundamental civil liberties—can be difficult and controversial.

**Appellate Jurisdiction**

Martin and Cohens were cases that did not start in the Supreme Court and thus did not fall under its original jurisdiction. Since they were cases initially decided elsewhere that came to the Supreme Court from below, they reached the Supreme Court by way of its appellate jurisdiction. Appellate jurisdiction is the authority of a court to hear a case that has first been decided by a lower court. Like original jurisdiction, appellate jurisdiction is something that can never be changed by a court, but is always defined by some authority external to it, either by a statute or by the Constitution.

Article III, section 2 of the Constitution describes the judicial power of the United States as extending to disputes involving foreign diplomats, admiralty and maritime jurisdiction, and various permutations of controversies between states, between a state and the citizens of another state, between citizens of different states, and where a foreign state is a party. The Constitution vests “judicial power” in the courts; Congress cannot enlarge or diminish it. Nor, as Marbury made clear, may Congress expand or contract the original jurisdiction of the Supreme Court. But Congress is granted considerable power with respect to the Court’s appellate jurisdiction. After describing the relatively few cases in which the Supreme Court has original jurisdiction, Article III, section 2, paragraph 2 provides that “in all other Cases before mentioned the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make” (emphasis supplied). There is no question, then, that Congress has the power to enlarge or diminish the Court’s **appellate** jurisdiction. In **Ex parte McCardle**, which follows, Congress withdrew the Court’s appellate jurisdiction over habeas corpus cases after the case had been argued, but before the Court could reach a decision.

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**EX PARTE McCARDLE**  
Supreme Court of the United States, 1869  
74 U.S. (7 Wall.) 506, 19 L.Ed. 264

**BACKGROUND & FACTS** McCardle, a newspaper editor, was under detention by the military government occupying Mississippi for trial before a military commission on charges that he had allowed to be published articles alleged to be “incendiary and libelous.” As a civilian, McCardle asserted that he was being unlawfully restrained and, on appeal, sought a writ of habeas corpus (a court order that is based upon a determination that one in custody is being detained contrary to due process and that commands the custodian of the prisoner to deliver the prisoner up for the court) from the U.S. Supreme Court. The Court heard full arguments in the case, but before it could meet in conference to arrive at a decision, Congress, under the control of the Radical Republicans, passed legislation that repealed the statute of 1867 authorizing the Court to hear appeals in such cases. The repeal, reenacted by the necessary constitutional majorities in both Houses of Congress over President Andrew Johnson’s veto, was typical of the efforts of the Radicals to check
the efforts of both the judicial and the executive branches to mitigate the harshness of post–Civil War reconstruction policy in the South. The usual adversary format is missing in the title to this case; in proceedings such as this where a petition to the court is at the demand and for the benefit of only one party, the action is said to be ex parte, “on the side of” or “on the application of” the party named.

The Chief Justice [CHASE] delivered the opinion of the court.

***

The first question necessarily is that of jurisdiction; for, if the act of March, 1868, 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 the petitioner, 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."

It is unnecessary to consider whether, if Congress had made no exceptions and no regulations, this court might not have exercised general appellate jurisdiction under rules prescribed by itself. For among the earliest acts of the first Congress, at its first session, was the act of September 24th, 1789, to establish the judicial courts of the United States. That act provided for the organization of this court, and prescribed regulations for the exercise of its jurisdiction.

The source of that jurisdiction, and the limitations of it by the Constitution and by statute, have been on several occasions subjects of consideration here. In the case of Du Rousseau v. The United States [10 U.S. (6 Cr.) 312, 3 L.Ed. 232 (1810)] particularly, the whole matter was carefully examined, and the court held, that while "the appellate powers of this court are not given by the judicial act, but are given by the Constitution," they are, nevertheless, "limited and regulated by that act, and by such other acts as have been passed on the subject." The court said, further, that the judicial act was an exercise of the power given by the Constitution to Congress "of making exceptions to the appellate jurisdiction of the Supreme Court." "They have described affirmatively," said the court, "its jurisdiction, and this affirmative description has been understood to imply a negation of the exercise of such appellate power as is not comprehended within it."

The principle that the affirmation of appellate jurisdiction implies the negation of all such jurisdiction not affirmed having been thus established, it was an almost necessary consequence that acts of Congress, providing for the exercise of jurisdiction, should come to be spoken of as acts granting jurisdiction, and not as acts making exceptions to the constitutional grant of it.

The exception to appellate jurisdiction in the case before us, however, 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. ***

***

The appeal of the petitioner in this case must be dismissed for want of jurisdiction.
In periods when Congress is unhappy with the Court’s decisions, efforts are sometimes energized to curtail the appellate jurisdiction of the Court. The decision in McCardle illustrates one such successful effort. There have been others—some successful and some not—like the effort made by Congress in the late 1950s (p. 158) in response to what a coalition of Southern Democrats and conservative Republicans saw as certain provocative rulings by the Warren Court. And throughout the 1970s and 1980s, congressional critics of the Court, notably former North Carolina Senator Jesse Helms, introduced dozens of bills to withdraw the Court’s authority to hear voluntary school prayer, busing, and abortion cases and included in the proposed legislation provisions that also would have denied federal district courts jurisdiction in matters over which the Supreme Court had no appellate jurisdiction. Very few of these proposals ever made it to the floor, and Congress passed none of them.

However much one might agree that such efforts are unwise, it cannot be contended that they are unconstitutional. If the diminution of appellate jurisdiction amounted to putting the Supreme Court out of business, perhaps a case could be made that Congress went too far, for that portion of Article III, section 2 quoted previously (p. 23) does appear to grant some appellate jurisdiction and speaks of Congress making “exceptions” rather than granting it full control.

Today, the Supreme Court’s appellate jurisdiction is not all that different from its description in section 25 of the Judiciary Act of 1789. Cases from the lower federal courts fall within the Supreme Court’s appellate jurisdiction because by definition they involve federal questions. Decisions of state supreme courts are reviewable under 28 U.S.C.A. § 1257 “where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.”

Checking the Court

Reducing the Supreme Court’s appellate jurisdiction, however, is only one of several means that the Constitution provides to Congress to check and balance the Court’s power. If the Court’s decision involves the interpretation of a federal statute and if Congress disagrees with that interpretation, Congress can pass another law achieving its objective, as it does with any legislation. Because the Court’s constitutional rulings are final and binding on all institutions of national and state government, however, they cannot be dislodged by simply passing legislation. Congress can, of course, seek to alter the Court’s interpretation of the Constitution by proposing a constitutional amendment. This entails passing the proposed amendment by a two-thirds majority in the House and Senate and then submitting it to the states for ratification. On four occasions in American history, amendments overturning Supreme Court rulings have been ratified by the required three-quarters of the states: The Eleventh Amendment (1798), protecting states from being sued without their consent, undid the decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793); the Thirteenth Amendment (1865), ending slavery, overturned Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857); the Sixteenth Amendment (1913), permitting the imposition of the progressive income tax, reversed Pollock v. Farmers’ Loan & Trust Co., 158 U.S. 601, 15 S.Ct. 912 (1895); and the Twenty-Sixth Amendment (1971), giving 18-year-olds the vote in state as well as federal elections, cancelled Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260 (1970). Constitutional amendments also have been proposed that would overturn the Court’s decisions in Engel v. Vitale, 370 U.S. 421, 85 S.Ct. 1261 (1965), and Wallace v. Jaffree, 472 U.S. 38, 105 S.Ct. 2479 (1985), to permit voluntary prayer in the public schools, and in Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533 (1989), to permit the punishment of flag desecration.
Congress can also set the number of Justices on the Supreme Court as it pleases. In Chief Justice Marshall’s day, there were six Justices. It reached a high point of ten during the Civil War and has stabilized at nine since 1869. Congress can increase the number of Justices on the Court, more commonly known as “packing the Court,” in the hope that additional appointments from a cooperative President will change the tenor of its decisions. President Franklin Roosevelt attempted this with his proposed Court-packing plan in 1937 after repeated uses of judicial review by a very conservative Court disabled much of his New Deal legislation in the depths of the Great Depression. FDR’s plan to name one additional Justice for every sitting Justice over the age of 70, however, provoked much negative public reaction and never made it out of committee. Congress can also reduce the size of the Court—a sanction aimed at the President, not the Court—if it is at loggerheads with the Chief Executive and wishes to deny him the opportunity to influence the Court. Thus, the Radical Republican Congress by law reduced the Supreme Court from ten to seven Justices in 1866 to thwart any appointments by President Andrew Johnson (although, since sitting Justices could not be forced off the Court by statute, the number never actually fell below eight). Congress then raised the number to nine after Ulysses Grant had been elected in 1868.

Finally, Supreme Court Justices, like any federal officials, can be impeached and removed from office. The Jeffersonians tried this against Justice Samuel Chase in 1804–1805 with the idea that, if they were successful, Chief Justice Marshall would be next. However, it flopped and after a similar effort failed to depose President Andrew Johnson in 1868, enthusiastic use of impeachment for political purposes faded completely.

The Structure of the Judicial System

Before discussing the means by which cases make their way to the Supreme Court under its appellate jurisdiction, it would be useful to understand something of the structure of the federal judicial system and that of the states as well. Exhibit 1.1 on p. 28 presents a simplified diagram of the federal judicial hierarchy and the routes that cases take as they wend their way upward. In the cases that present the vast majority of federal constitutional questions, our focus narrows to three courts: the district courts, the courts of appeals, and the Supreme Court.

The federal district courts, of which there are now 94, are trial courts. As Exhibit 1.2 on p. 29 shows, some states, the District of Columbia, and several U.S. territories comprise single federal districts, and some states have more than one federal district within them, but in no event does the jurisdiction of any federal district court cross a state boundary. There are 11 courts of appeals operating in numbered circuits, one for the District of Columbia, and one for the Federal Circuit. The district courts are single-judge courts, although a single district may be assigned anywhere from 1 judge (Guam) to 28 judges (Southern District of New York). The courts of appeals range in size from 6 judges (1st Circuit) to 28 judges (9th Circuit) per circuit, who normally sit in randomly drawn panels of three to hear cases appealed from the district courts.

9. There have been recurring efforts to expand the number of federal circuits from the current 12 to 14 by splitting the Ninth Circuit in three. The Ninth Circuit has twice as many appellate judges as any other circuit and hears the most appeals by far, over 14,000—more than eight times as many as the First Circuit. The proposed redrawing would leave only California and Hawaii in the new Ninth Circuit, and add a Twelfth Circuit consisting of Arizona, Idaho, Montana, and Nevada, and a Thirteenth Circuit comprised of Alaska, Oregon, and Washington. While there is surface appeal to dividing up a single circuit that now encompasses 20% of the nation’s population, the prospect of a raft of new appellate appointments by a Republican administration inspires deep resistance by Democrats. Critics suspect that the proposal is motivated by the fact that the Ninth has a reputation of being the most liberal of the federal circuits. But opponents of carving up the Ninth Circuit are not limited to Democrats; most of the appeals judges in the circuit, even Republicans, are opposed. New York Times, June 19, 2005, p. 12. The last time, the proposal cleared the House by a close vote (overwhelmingly along party lines) but never came to a vote in the Senate. Congressional Quarterly Weekly Report, Oct. 9, 2004, pp. 2375, 2404. The cost of the proposal was pegged at $131 million and would have added 11 new appellate judges and 47 more district judges.
The jurisdiction of the district courts extends, generally speaking, to cases involving more than $75,000 where the parties are citizens of different states and to cases raising a federal question. The jurisdiction of the courts of appeals extends to reviewing decisions of the district courts and the federal independent regulatory commissions and agencies. The latter responsibility falls particularly heavily on the Court of Appeals for the District of Columbia Circuit, because Washington, D.C. is the headquarters of most of those commissions and agencies.

Although the structure of state judicial systems can be varied and complex, it generally—with the exception of 11 less-populated states—follows a triple-tier conception analogous to the federal hierarchy. Recall from the discussion earlier that for a case to move from a state supreme court to the U.S. Supreme Court, it must present a federal question, that is, a question involving interpretation of a provision of the U.S. Constitution or a federal statute. As noted earlier, in all cases involving the interpretation of a state constitutional or statutory provision, where no federal question is implicated, the decision of the highest-ranking court in the state is supreme and is not reviewable by the U.S. Supreme Court.

**The Writ of Certiorari**

Prior to the passage of legislation (102 Stat. 662) by Congress in 1988, a case reached the Supreme Court by one of three principal mechanisms for the exercise of its appellate jurisdiction: by appeal, by certification, and by certiorari. Although appeal still exists for a very limited class of cases[^10] that need not detain us here, the 1988 statute all but abolished it and converted the Supreme Court into a virtually all-certiorari tribunal. That legislation was the Court's final victory in a century-long struggle to gain complete control over its own docket and to decide for itself what cases it would hear, rather than being governed by Congress's determination of what cases it would hear.

From the earliest days until 1925, in fact, cases falling under its appellate jurisdiction reached the Court only by a writ of error. The writ, which is mentioned in the summary of background and facts for the older cases presented in this book, could be granted only if a case fell within a category of cases prescribed by federal statute for review by the Court. Thus, the decision as to which cases from the lower courts reached the Supreme Court lay entirely with Congress. What moved Congress to pass the Judiciary Act of 1925, creating the writ of certiorari, and allowing the Court control over much of its docket, was the fact that statutory mandates for the Court to hear cases had grown like topsy and the Court was years behind in its workload. In addition to being swamped with cases, many of those Congress identified as must-hear disputes—often in response to the pressure of special interests—could only be described as pretty small potatoes. The 1925 law continued to recognize a route of appellate jurisdiction—known technically as “appeal”—that gave the losing litigant below a statutory right of review by the Supreme Court.[^11] To say that the Court was obliged to hear all “appeals” and that it had no discretion in the matter, however,

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[^10]: In days gone by, federal law required certain kinds of cases to be tried before three-judge federal district courts with the right of direct appeal to the U.S. Supreme Court, bypassing the courts of appeals. These included reapportionment cases and certain cases under the Civil Rights Act of 1964, the Voting Rights Act, and the Presidential Election Campaign Fund Act of 1971. Although the use of three-judge federal district courts has been extinguished by Congress except in these and one or two other instances, the 1988 legislation preserved the right of appeal in such cases.

[^11]: The sorts of cases formerly subject to appeal were (1) those in which a state court declared a provision of a federal statute or treaty unconstitutional or in which it upheld a state law or state constitutional provision alleged to conflict with the U.S. Constitution, a treaty, or a federal statute; and (2) those in which a U.S. court of appeals declared a federal statute or treaty unconstitutional or in which it declared a state law or state constitutional provision unconstitutional because it conflicted with the U.S. Constitution, a treaty, or a federal statute.
EXHIBIT 1.1 THE FLOW OF CASES TO THE U.S. SUPREME COURT

UNITED STATES SUPREME COURT

State Supreme Court
(Court of Appeals in Maryland and New York)

Intermediate Appellate Court

Trial Court

Federal Judicial System

United States Court of Appeals

Court of Appeals for the Armed Forces

Court of Appeals (in D.C. and 11 numbered circuits)

Intermediate Court

District Court

Tax Court

Court of Claims

Court of International Trade

Foreign Intelligence Surveillance Court

Foreign Intelligence Surveillance Court of Review

State Supreme Court

(Some courts and routes used less often have been omitted from this chart.)

* The Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review (FISCR) operate in secret; the dockets, hearings, and decisions of those courts are not open to the public, and declassified opinions have been released only two occasions. See In re All Matters Submitted to the Foreign Intelligence Surveillance Court, 2002 WL 1949262 (F.I.S.Ct. 2002), 2002 WL 1949263 (F.I.S.Ct. 2002). The FISC is comprised of 11 federal district judges, selected by the Chief Justice from seven circuits, who individually hear and rule upon applications for electronic surveillance by the FBI. If the government is dissatisfied with a decision, it may appeal to the FISCR, a three-judge body whose members are selected by the Chief Justice from among federal appeals and district judges, one of whom is designated to preside. See Chapter 9, section D.
EXHIBIT 1.2 UNITED STATES COURTS OF APPEALS AND UNITED STATES DISTRICT COURTS

LEGEND
- Circuit Boundaries
- State Boundaries
- District Boundaries

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
APRIL 1988

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would be somewhat inaccurate, since the Court dismissed frivolous appeals. Appeals rarely, if ever, accounted for more than 10% of the cases argued to the Supreme Court in a given Term. Now they account for just a handful of cases. Today, the Court is required to review only cases decided by three-judge federal district courts and suits between states.

Certification is another infrequently used procedure. A federal appeals court may certify a question to the Supreme Court to request an answer to a question essential to deciding a case pending before it and about which the appeals court is in need of guidance. Occasionally, the Supreme Court itself may certify a question to a state supreme court in order to provide the Justices with the definitive interpretation of a state statute that has been challenged as violating the U.S. Constitution.

Almost all the cases that reach the Supreme Court from below get there by a writ of certiorari ("cert." for short). The factors once identified as triggering an appeal are now simply factors for the Court to consider in granting cert. The writ of certiorari, for which the losing party below must petition, is a Court order directing the lower court to send up the record in a case, and the significance of granting the writ is, of course, that the Supreme Court will hear the case.12 On what basis, then, does the Supreme Court grant certiorari?

The Supreme Court does not exist as a court of personal justice; it does not review cases simply to correct errors made by courts below. The overriding criterion for the Supreme Court’s grant of certiorari is whether a case presents a substantial federal question. Rule 10 (of the rules the Justices have written to govern the operation of the Supreme Court) provides several examples of what constitutes “a substantial federal question.”

**NOTE—RULE 10—CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI**

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court’s discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

12. It is possible, even after a case has been placed on the argument calendar and the Court has heard oral argument by the parties, that the Court will decline to decide it, in which case the writ of certiorari is “dismissed as improvidently granted” (or “dig” as some have called it). The Court uses this method of disposing of a case when oral argument disclosed that there was less to the constitutional or statutory issue than originally met the Justices’ eye, or that upon further examination the controversy was non-justiciable, or that the Court lacked jurisdiction, or that further developments rendered the dispute moot, so that the Court should not have granted certiorari in the first place. Throughout his tenure on the Court, Justice Frankfurter argued fervently that in such instances it was better to “dig” a case than to decide it, lest the Court unwittingly encourage petitioning from parties with flawed or frivolous claims in the future.
Although speaking only for himself, Justice Stevens aptly summed it up when he wrote, “[I]n allocating the Court’s scarce resources, I consider it entirely appropriate to disfavor complicated cases which turn largely on unique facts.” Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 945, 99 S.Ct. 335, 339 (1978).

The reason for Rule 10 is readily understandable when one looks at the Court’s workload. On average over the last decade, petitioners seeking review in about 7,500 cases each Term have come knocking at the Court’s door. The Court conducts full-dress review in about 75 of these annually—that is, it hears oral argument and then decides each by signed opinion. Even adding to this figure the small number of cases it decides summarily (meaning the Court does not hear oral argument, decides each solely on the basis of the briefs submitted, and only announces its judgment), it can be said that certiorari is granted to less than 2% of the cases on the Court’s docket. But this general measure is deceptive, although it certainly suggests that even getting the Court’s attention is a major achievement.

Cases that come to the Court by way of its appellate jurisdiction are divided into two categories—paid cases and in forma pauperis cases. Paid cases are what the label suggests: the litigants have sufficient financial wherewithal to hire counsel; pay the filing fee; and furnish the required printed briefs, petitions, and record. Cases filed in forma pauperis (in the manner of a pauper) are on behalf of individuals too poor to afford the usual paid advocates and amenities. Most of the paupers petitioning the Court for certiorari are federal or state prisoners who are challenging procedures by which they were convicted, arguing that conditions of their confinement violate the Constitution, or seeking to overturn a death sentence. In forma pauperis petitions constitute about two-thirds of the cases on the Court’s docket. The rate of success in obtaining cert. is usually at least ten times greater in paid cases than in forma pauperis cases. While it is undoubtedly true that those with money have a better shot at legal success than those without, it is also true that most of the in forma pauperis petitions for cert. are frivolous and without any legal merit, at least as measured by the standards used to apply Rule 10. After all, insofar as in forma pauperis petitions for cert. are written by individuals already serving time in prison or awaiting execution, the authors have plenty of time to devote to the project and nothing to lose by the attempt.

Notwithstanding the important and controversial issue raised by the different cert. rates in paid and in forma pauperis cases, the avalanche of cases facing the Court makes it clear that the importance of the legal question raised is the only criterion that can be consistently and, therefore, fairly applied. All parties before the Court are entitled to be treated by the same standards. Granting cert. by mastering the facts in each of 7,500 cases so as to correct every injustice would defy all human ability. In the last analysis, correcting misapplications of the law is the job of the federal appeals courts, state supreme courts, or state intermediate appellate courts.

Since applying Rule 10 to the cases that come before it is a matter of judgment about which reasonable individuals can and do disagree, the Court operates on the understanding that four Justices must vote to grant the writ before it can be issued. The decision to grant review is governed, then, by the Court’s self-imposed “rule of four.”

What may we conclude when the Court denies a petition for a writ of certiorari in a given case? Many people think this means that the Supreme Court agreed with the lower court’s treatment of the merits of the case. This is a badly mistaken impression, as Justice Frankfurter forcefully pointed out in the following excerpt from his statement in Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917–919, 70 S.Ct. 252, 254–255 (1950):

[Denial of a petition for writ of certiorari * * * simply means that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter “of sound judicial discretion.” * * * A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially
true of petitions for review on writ of certiorari to a State court. Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of a State court of last resort; the decision may be supportable as a matter of State law, not subject to review by this Court, even though the State court also passed on issues of federal law. A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question, but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

Since there are these conflicting and, to the uninformed, even confusing reasons for denying petitions for certiorari, it has been suggested from time to time that the Court indicate its reasons for denial. * * * If the Court is to do its work it would not be feasible to give reasons, however brief, for refusing to take these cases. The time that would be required is prohibitive, apart from the fact as already indicated that different reasons not infrequently move different members of the Court in concluding that a particular case at a particular time makes review undesirable. * * *

Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court’s views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated. Justice Frankfurter’s observations are only reinforced by current figures. The motivations behind denial of a petition for cert. remain a mystery in any case,13 but the effect of having denied the writ, on the other hand, is clear: The decision of the highest-ranking lower court in the case stands.

At the time Justice Frankfurter made this observation, the Court not only had a slimmer docket (about 1,100–1,200 cases per Term), it decided a different mix of cases than characterized the business of the Burger Court during the 1970s and 1980s. Justice Frankfurter penned his Baltimore Radio Show concurrence in 1950 when the bulk of the Court’s business was statutory, not constitutional. Even throughout the years of the Warren Court, famous for its many important constitutional rulings, statutory cases outnumbered constitutional cases. Only in the later years of Chief Justice Warren’s tenure did constitutional cases regularly constitute 40–45% of the cases decided by signed opinions. As Exhibit 1.3 (p. 33) shows, it was not until the October 1970 Term that constitutional cases came to constitute a majority of the cases. After that, they predominated during most of the remaining Terms of the Burger Court. And the Burger Court was one of the most productive Courts, as well.14 But,

13. As Justice Stevens has noted, unlike Frankfurter’s day, individual Justices now frequently publish dissents from denials of cert. Inveighing against the practice as a waste of time because it was “totally unnecessary,” Justice Stevens argued that dissents from denials of cert. were also “potentially misleading” because: (1) “the dissenter’s arguments in favor of a grant are not answered[,]” “often omit any reference to valid reasons for denying certiorari,” and therefore appear unduly persuasive; and (2) “they tend to imply that the Court has been unfriendly to its responsibilities or has implicitly reached a decision on the merits” of the case. Moreover, he added, “[T]he selected bits of information which they reveal tend to compromise the otherwise secret deliberations in our Conferences” and “confidentiality makes a valuable contribution to the full and frank exchange of views during the decisional process * * *.” Singleton v. Commissioner of Internal Revenue, 439 U.S. 940, 945–946, 99 S.Ct. 338–339 (1978).

14. Those accustomed to thinking of the Warren Court as the ultimate activist Court may find this surprising. But with some thought, it makes a lot of sense. True, the Warren Court did hand down many landmark constitutional rulings—in race relations, reapportionment, criminal procedure, and the First Amendment. But decisions that recognize broad new rights necessarily spawn more cases because the contour of those rights must be fine-tuned more and more if interests with which they conflict are to be taken into account. Add to this the fact that the Burger Court actually expanded some rights recognized by the Warren Court, such as the right of privacy, and it becomes clear not only why constitutional cases soon counted for more than half of the Court’s workload but also why the Court’s total caseload increased.
EXHIBIT 1.3 CONSTITUTIONAL AND NON-CONSTITUTIONAL CASES
OCTOBER 1926–2004 TERMS

<table>
<thead>
<tr>
<th>Term</th>
<th>Number of Cases Decided by Signed Opinions*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taft</td>
<td>200</td>
</tr>
<tr>
<td>Hughes</td>
<td>150</td>
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<tr>
<td>Stone</td>
<td>100</td>
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<tr>
<td>Vinson</td>
<td>75</td>
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<tr>
<td>Warren</td>
<td>50</td>
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<tr>
<td>Burger</td>
<td>25</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>10</td>
</tr>
</tbody>
</table>

*Cases included were generally only those which identified a specific Justice as the author of the Opinion of the Court or a plurality opinion. Per curiam and memorandum opinions were not counted, unless a per curiam case had been through oral argument and the case is cited in this book. Classification of cases as constitutional or non-constitutional was based on consideration of the case as a whole and specific points of law identified in the headnotes of the decision as published in the Supreme Court Reporter. Cases falling under the Court’s original jurisdiction were, with rare exception, counted as non-constitutional cases. This also applies to Exhibit 2.1 on p. 99.
numerically speaking, the preeminence of constitutional cases declined after William H. Rehnquist’s accession to the Chief Justiceship and the Court thereafter steadily reduced its workload and lowered its profile as Constitutional Court to a level not seen since Fred Vinson was Chief Justice a half century earlier. It is too soon to tell whether this pattern will continue under Chief Justice John Roberts.

The Process by Which the Supreme Court Decides Cases

The annual Term of the Supreme Court commences the first Monday in October and runs until October of the following year, although the Court recesses for the summer beginning in late June. From October until the end of April, the Court alternates between two weeks of hearing oral argument and two weeks of recess devoted to reading briefs and cert. petitions, legal research, and opinion writing. Two breaks, that between the December and January cycles of argument and that between the January and February cycles, last a month because, by then, opinion-writing homework has piled up. As noted earlier, the Court now hears oral argument in about 75 cases each Term.

From Monday through Wednesday each week it is in session, the Court hears argument in approximately 12 cases in its courtroom. The Justices emerge from behind the dark-red velour curtain at the front of the courtroom and take their seats on the raised, slightly-angled Bench. As they do, the Marshal calls out: “The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez, oyez, oyez. All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting, God save the United States and this Honorable Court.”

The Chief Justice takes the high-backed chair in the center of the Bench and is flanked first to his right and then to his left by the other Justices, alternating in descending order of their seniority on the Court. Usually one hour is allotted each case to be argued, half to each side. Although the attorneys for the opposing parties may begin by presenting their positions, the bulk of their time for oral argument is usually consumed by answering many specific questions asked by the Justices who may interrupt at any time. The questions are often drawn from a bench memorandum prepared by a Justice’s clerk, which summarizes and analyzes the case. In the words of some expert practitioners before the Court, “Oral argument is...

15. Although the number of cases seeking the Court’s attention has been increasing, the Court’s productivity—at least as measured by those cases decided by signed opinions—decreased appreciably during the Rehnquist Court. Since the Court’s October 1998 Term, the figure has stabilized at about 75. One of the reasons for the decline in the Court’s output, Justice Souter speculated, was the lessening of conflict in lower federal court decisions because of the larger numbers of judicial appointments made by President Reagan and both Presidents Bush who share a common conservative outlook and dominate the federal bench. This dominance was perpetuated during the 1990s because the Republican-controlled Senate Judiciary Committee (after 1994) intentionally dragged its feet in passing on President Clinton’s nominees for federal judgeships and because Republican control of the Senate since 2002 made it much easier for President George W. Bush’s nominees to be confirmed. If conflict among the circuits is generally what flags a question for review by the Supreme Court and there is widespread agreement in values among most federal judges, substantially fewer cases would qualify for review under Rule 10. See David J. Garrow, “The Rehnquist Reins,” New York Times Magazine, Oct. 6, 1996, p. 71.

Judicial scholars have also identified several other possible explanations for the reduced number of Supreme Court decisions: the retirement of more activist Justices who were inclined to grant cert. more frequently and who were inclined to engage in “join-three” voting (providing the necessary fourth vote if three other colleagues indicated a desire to hear a case); and a decline in the number of new statutes passed. See David M. O’Brien, “The Rehnquist Court’s Shrinking Plenary Docket,” 81 Judicature 58–65 (1997).

16. Peter Irons and Stephanie Guitton, eds., May It Please the Court (1993), p. xxi. The text accompanies audiocassettes of oral argument in 23 landmark cases decided by the Court since 1955. Other editions of the book have a more specific focus—on oral arguments in First Amendment cases, reproductive rights cases, and cases dealing with the constitutional rights of students and teachers. The Court makes available on its Web site a complete transcript of oral argument shortly after a case has been heard. See www.supremecourtus.gov.
usually a combination of a speech, conversation, and an inquisition. The proportion of each will not be known until the argument is concluded.17 Although it differs a little today from that described when he was still an Associate Justice, Chief Justice Rehnquist’s summary of the Court’s routine following the conclusion of oral argument on Wednesdays remains accurate:

As soon as we come off the bench Wednesday afternoon around three o’clock, we go into private “conference” in a room adjoining the chambers of the Chief Justice.18 At our Wednesday afternoon meeting we deliberate and vote on the four cases which we heard argued the preceding Monday. The Chief Justice begins the discussion of each case with a summary of the facts, his analysis of the law, and an announcement of his proposed vote (that is, whether to affirm, reverse, modify, etc.). The discussion then passes to the senior Associate Justice * * * who does likewise. It then goes on down the line to the junior Associate Justice. When the discussion of one case is concluded, the discussion of the next one is immediately taken up, until all the argued cases on the agenda for that particular Conference have been disposed of.

On Thursday during a week of oral argument we have neither oral arguments nor Conference scheduled, but on the Friday of that week we begin a Conference at 9:30 in the morning, go until 12:30 in the afternoon, take 45 minutes for lunch, and return to continue our deliberations until the middle or late part of the afternoon. At this Conference we dispose of the eight cases which we heard argued on the preceding Tuesday and Wednesday. We likewise dispose of all of the petitions for certiorari and appeals which are before us that particular week.

At the beginning of the week following the two-week sessions of oral argument, the Chief Justice circulates to the other members of the Court an Assignment List, in which he assigns for the writing of a Court opinion all of the cases in which he voted with the Conference majority. Where the Chief Justice was in the minority, the senior Associate Justice voting with the majority assigns the case.19

In bygone days, voting among the Justices occurred in reverse order from the discussion of cases, with the junior Justice voting first, but there is no separate voting protocol today. Since each Justice’s discussion of the case under consideration normally discloses the direction of his or her vote, the Chief Justice can usually tick off the votes as the discussion proceeds. In their behind-the-scenes look at the Court in operation, Bob Woodward and Scott Armstrong in The Brethren reported that Chief Justice Burger would occasionally “pass” in the course of the conference discussion of a case or change his vote afterward, allegedly so as to be sure of voting on the majority side for the purpose of controlling the opinion assignment.20 Other scholars have characterized Chief Justices Marshall and Hughes as individuals of such dominating intellect and personality that they were able to exert leadership over the Court.

In the conference room, a portrait of Chief Justice Marshall looks down on the conference table, at one end of which sits the Chief Justice and at the opposite end of which sits the senior Associate Justice, with three Justices on one side and four on the other. The only individuals permitted in the room while the Court is in conference are the Justices themselves. By tradition, the junior Associate Justice acts as doorkeeper and messenger when materials must be sent for and messages received. One reason for maintaining such secrecy is to prevent the acquisition of any

18. Ever since the custom was initiated by Chief Justice Melville Fuller around the turn of the nineteenth century, the conference has always begun with a round of handshakes among the Justices, in the words of Fuller’s biographer, “to prevent rifts from forming.” Bernard Schwartz, Decision: How the Supreme Court Decides Cases (1996), p. 125. It is a gesture designed to reinforce the point that any disagreements are professional, not personal.
insider knowledge that might be used to advantage, say, to buy or sell stock in a company that is a party to a pending antitrust or other business regulation case. Another reason for maintaining secrecy is simply that, until the decision is announced in court, it is not final, and members of the Court have been known to modify their positions or change their minds.

It is at the Court’s Friday conferences that most of the petitions for certiorari are disposed of. The Court has long used a time-saving mechanism known as the “discuss list,” prepared by the Chief Justice and circulated well in advance of any action by the Justices. It is a list of those cases believed to be sufficiently important to merit discussion before a vote to grant certiorari is taken. Any Justice can have a case added to the discuss list simply by requesting it. The Justices are responsible for familiarizing themselves with the cases on the Court’s docket, whether by supervising the screening of the cert. petitions by his or her own clerks or by relying on memoranda from the “cert. pool,” which draws on the combined resources of eight of the Justices’ law clerks. A case on the discuss list that receives at least the minimum four votes for certiorari is ordinarily scheduled for oral argument. Cases that do not make the “discuss list” are automatically put on the “dead list” and—together with those that do not garner the necessary four votes for certiorari after conference discussion—are denied review. In some instances, where the Court believes that oral argument is unnecessary, the Court may dispose of the case by summarily affirming, reversing, or vacating the judgment below without stating any reasons for its decision.

The practice of disposing of cases that have been argued by stating reasons in an Opinion of the Court was a practice established by Chief Justice Marshall, who wrote nearly half the Opinions of the Court during his 34-year tenure. Previously, the Justices disposed of argued cases in seriatim opinions, that is, sequential opinions in which each Justice gave his own views on the case. The idea of formulating a collective opinion for the Court not only was aimed at maximizing the Court’s power by speaking with one voice, but also attempted to minimize the potential for misunderstanding that was bound to result from multiple pronouncements.

Usually several months elapse between the time the Opinion of the Court in a case has been assigned and the day on which the decision is announced in open court. Several kinds of opinions may be written. The assignments Chief Justice Rehnquist referred to, of course, pertain to the Opinion of the Court, that is, an opinion subscribed to by at least a majority of the Justices participating. The reasons it gives for the judgment in the case are regarded as definitive statements of law by the Court. As a draft of the Opinion of the Court is circulated by the Justice assigned to write it, the other Justices have several options. A Justice may join the Opinion with little or no change. A Justice may suggest some modifications, possibly insisting on changes substantial enough to jeopardize the assent of other members of the Court. A Justice who agrees with the majority as to which party should prevail in the case, but who prefers to state different or

21. In Justice Frankfurter’s day, the Justices screened the petitions for cert. on their own, making whatever use of their clerks they cared to. In those days, however, the Court’s docket was less than a sixth of what it is now and the number of clerks was substantially fewer. During the 1972 Term, Justice Lewis Powell proposed the idea of the cert. pool in which law clerks would go through the petitions, summarize each case, and make a recommendation as to whether the case was “cert. worthy.” A memorandum containing this information was circulated to each of the Justices who chose to participate. In the beginning, five Justices signed on, with the price of admission being that each participating Justice had to contribute one of his clerks to the enterprise. Justices who were on the Court’s political Left (Douglas, Brennan, and Marshall) decided not to join for fear that the evaluations contained in the memoranda might be influenced by the political views of clerks who had been selected by the Court’s conservative Justices. Today, only Justice Stevens continues to opt out. Although the cert. pool was meant to address the heavy and still escalating workload of the Court, it has long been criticized for the undue influence it may give the clerks (even if the Justices rotate their clerks in and out of the cert. pool). Although the Justices, of course, retain the ultimate authority to decide what cases they will decide, the pressure generated by such a large caseload necessarily gives a good deal of power to those making recommendations about which cases to take. For a critique of the cert. pool idea and a provocative discussion of the role of Supreme Court clerks generally (the so-called Junior Supreme Court), see Schwartz, Decision: How the Supreme Court Decides Cases, pp. 48–55.
additional reasons, writes a concurring opinion. A Justice who believes that the judgment should have gone to the other party in the case may pen a dissenting opinion to voice his or her disagreement with both the majority’s conclusion and its reasons. During Chief Justice Taft’s tenure, the Court operated under an unwritten no-dissent-unless-absolutely-necessary rule largely to avoid the very sorts of problems once associated with seriatim opinions.

Although a Justice is perfectly free to write his or her own concurring or dissenting opinion in a case, the senior Justice in the minority usually assigns or writes the principal dissenting opinion. The Court invariably holds the bulk of its important decisions until June, because these usually occasion lengthy opinions of all sorts and decisions are not handed down until all opinions in the case are finished. Opinions today no longer refer to members of the Court, as they did for most of American history, as “Mr. Justice.” Anticipating the appointment of a female Justice a year before it happened, the Court changed the form of address to simply “Justice” in 1980.

Today, especially in the Court’s civil rights and civil liberties decisions, a unanimous opinion is overwhelmingly the exception, not the rule. Forging an opinion that speaks for a majority of the Court is no easy task and requires considerable adroitness, tact, negotiation, and compromise. Although the portrayal of the Court in The Brethren appears to disparage bargaining among the Justices, it is difficult to see how majorities, which can often be very fragile and yet which are so necessary to the effective operation of the Court, can be secured without political skill.22

Sometimes the Court simply announces its judgment in an unsigned or per curiam opinion. It may do this in cases where the decision appears obvious and seems not to require much explanation. It has also done this in cases such as Furman v. Georgia (see Chapter 8) where the Court was so split over the reasons for its decision that there appeared to be agreement only on the result. In some instances of substantial disagreement among the Justices, the judgment of the Court will be announced in a plurality opinion, that is, an opinion to which fewer than a majority subscribe, with votes crucial to the Court’s decision being supplied by one or more Justices writing separately. Since a plurality opinion is not subscribed to by a majority of the Justices, it does not bind the Court as a statement of policy.

Since all but a very few cases the Court hears come by way of its appellate jurisdiction, the judgment rendered by the Court in a given case is couched in terms of how it compares with that of the highest-ranking court below. Where the Court agrees with the highest-ranking court below as to which of the two parties should win the case, the Supreme Court affirms the judgment. If it believes that the decision should have gone to the other party, the Supreme Court reverses the judgment. If it decides to set aside the determination below, it vacates the judgment. Sometimes the Court may affirm in part and reverse in part. Because some of these actions must often be followed by additional proceedings, the Court will also remand or send

22. As you would expect, since an important factor in selecting cases is the level of disagreement among lower federal and state court judges, the dissent rate of the modern Supreme Court is rather high compared with most other American appellate courts. Before the October 1942 Term, when the proportion of nonunanimous decisions jumped to nearly 43%, in all of the cases decided by the Court—constitutional and statutory combined—disagreement among the Justices rarely crept above 10%, with the notable exception of the 1850s and the 1930s. But the modern debate over judicial self-restraint versus strict scrutiny (see Chapter 2) has generated continuing conflict. It reached an all-time high during the October 1952 Term when there was disagreement over the outcome in nearly 87% of the cases. See Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, The Supreme Court Compendium (1994), pp. 149–153. As the graph in Chapter 2 shows (see p. 99), the dissent rate in constitutional cases decided by signed opinion during the Rehnquist era generally ran 15–20 percentage points higher than in non-constitutional cases. Taking all the cases decided by signed opinion, roughly three cases in five provoked a dissenting vote from at least one member of the Court. Despite the ritual handshakes among the Justices, interpersonal relations can become strained when individuals work closely in such a small group. A clerk’s-eye view of the human dynamics on the Rehnquist Court during the October 1988 Term provides a disturbing account of how the Court’s business gets done. It depicts one battle after another in a never-ending ideological war that is substantially clerk-driven. See Edward Lazarus, Closed Chambers (1988).
the case back to the lower court with instructions to dispose of it in a manner not inconsistent with the Court’s opinion. Speaking generally, the odds are 2-1 that the Justices will vote to reverse or vacate the judgment of the court below rather than to affirm it.

The Court suspends its cycle of oral argument late in April, and cases that have been granted certiorari, but have not yet been argued, are held over for the next Term. During May and June, the Court periodically reconvenes to announce decisions in the cases whose opinions have been finished. Normally, no later than the last week in June the Court recesses until the fall. Although the summer recess leaves the Justices free to write, speak, and travel, it also furnishes time to interview and hire new law clerks and peruse the endless cert. petitions that are always accumulating. Then, on the first Monday in October, the cycle begins again.

In addition to duties as a Supreme Court Justice, each member of the Court functions as Circuit Justice for at least one federal circuit. This second hat that each Justice wears is a relic from the early days when the Supreme Court’s caseload was very light, its terms were short, and the Justices were required by the Judiciary Act of 1789 to “ride circuit,” which means they traveled to far-flung locations to hear appeals as members of circuit courts. In days when transportation was poor, it was punishing work.

As part of the Federalists’ attempt to pack the federal judiciary in the waning days of John Adams’ administration, Congress in 1801 relieved the Justices of riding circuit and provided for the appointment of circuit judges to hear appeals from the district courts. However, the Jeffersonian-controlled Congress so resented this partisan maneuver that a year later it repealed the legislation creating the circuit judgeships. This meant that the Justices were required to get back on their horses and again ride circuit. Circuit judges were not created by Congress until 1869, and the courts of appeals that we have now were not established until 1891. With the creation of the courts of appeals, very little remained of the Justices’ circuit responsibilities.

Today, the role of a Circuit Justice can be fulfilled in chambers. Acting on a petition from a party in a case, a member of the Court, functioning as a Circuit Justice, is empowered to stay the judgment of a lower federal court until the Supreme Court has time to act. Although the petitioner seeking to stay a lower federal court judgment must first go to the Circuit Justice for that circuit, if the stay is denied, the petitioner can request a stay from any Supreme Court Justice. If granted, however, any stay remains in effect only until the Supreme Court has acted.

**Judicial Independence**

An understanding of the “judicial Power of the United States” would be incomplete without some appreciation for the protection of the independence of federal judges from political pressure. In this regard, it is important to point out the difference between courts that derive their jurisdiction from Article III of the Constitution and those that draw their authority from Article I. Article III vests the judicial power “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” The federal district courts and courts of appeals clearly fall within its ambit. The protections afforded judges of tribunals deriving their jurisdiction from Article III include life tenure with removability only for misconduct in office and the guarantee that judicial salaries may not be diminished during tenure in office. Judges vested with the judicial power of the United States are also restricted to deciding only real cases and controversies, a subject considered at length in the next section of this chapter.

But all courts created by Congress do not draw their authority from the judicial article of the Constitution. The United States Tax Court, the Court of Federal Claims, and the United States Court of Appeals for the Armed Forces were established by Congress as “necessary and proper” under an appropriate enumerated power contained in Article I. As contrasted with the “constitutional courts” created pursuant to Article III, courts created by the exercise of Congress’s powers in Article I are known as “legislative courts.” Not bound by the requirements of the
judicial article, Article I courts have judges whose term of office is 15 years. Furthermore, they are not restricted to deciding only real cases and controversies and may render advisory opinions or fulfill other functions permitted or directed by Congress. The principle underlying the distinctive characteristics of constitutional courts is the maintenance of an independent federal judiciary. The President’s power to make recess appointments to the federal bench exists in tension with this principle. See the discussion at the end of Chapter 4, section A.

**B. INSTITUTIONAL CONSTRAINTS ON THE EXERCISE OF JUDICIAL POWER**

An old cartoon from *The New Yorker* magazine pictures the manager of a baseball team who, engaged in a heated argument, repeatedly pokes the umpire in the chest saying, “I’ll take this all the way up to the Supreme Court.” It caricatures a persistent myth of American life that any issue can ultimately be brought to the Supreme Court for resolution. Yet, as the following cases demonstrate, it is not so easy to get a case before the Supreme Court and, once there, to obtain a definitive decision.

Jurisdiction, as already noted, is an indispensable requirement for Supreme Court consideration of any case. No less important a factor is justiciability, a concept that sums up the appropriateness of the subject matter for judicial consideration. While jurisdiction characterizes the authority of a court to hear a case, justiciability characterizes the structure and form of a legal dispute and denotes its suitability for adjudication. Questions about justiciability ask whether a case is in the proper form; questions about jurisdiction ask whether the case is in the proper forum.

**Case and Controversy**

The essence of a justiciable dispute, as the Court’s opinion in *Muskrat v. United States* (p. 41) makes clear, is a real case and controversy. While other elements of justiciability are essentially for the Court itself to define (as contrasted with jurisdiction, which is defined either by the Constitution or by Congress and, therefore, is beyond the Court’s control), the necessity of a real case and controversy is mandated by Article III. The case and controversy requirement focuses on the actuality and adverseness of the interests that are in contention. Exactly what this means as a limitation on the kinds of matters the Supreme Court may hear is succinctly spelled out in the following words of Chief Justice Hughes, speaking for the Court in *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240–242, 57 S.Ct. 461, 464 (1937):

> A "controversy" in this sense must be one that is appropriate for judicial determination. ***A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot.*** ***The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.*** ***It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.*** ***Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.***

This means the Court is barred from rendering advisory opinions (statements that address the legal validity of a law or order in the absence of any real dispute) and dealing with cases where the interests asserted are hypothetical, abstract, moot, or collusive.23

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23. A good example of a collusive suit is *Hylton v. United States* (1796), mentioned earlier. Recall that the suit there challenged the validity of a federal tax on carriages. Because Secretary of the Treasury Alexander Hamilton was intent upon quickly establishing the validity of the new tax, he directed that his department enter into certain agreements with Hylton. In order to give the federal courts jurisdiction, both parties falsely stipulated that Hylton owned not 1 but 125 carriages, that the exaggerated tax of $2,000 on them could be settled by paying $16, and that the government would pay all of Hylton’s legal costs.
A case that is moot is one that no longer presents a live controversy. Suppose a pregnant, unmarried, female minor sued to obtain an abortion over the objection of her parents, who insisted she have the baby. Suppose further that, before the court could determine whether the young plaintiff was sufficiently mature to make the decision on her own, she suffered a miscarriage. The miscarriage would moot the controversy.

Given the pace at which the judicial process usually operates, it might be anticipated that time would moot many cases. The courts, therefore, recognize an exception for controversies that are described as “capable of repetition yet evading review.” Unless an exception of this sort were recognized, it is unlikely that any abortion cases, for example, would ever be heard, since the baby would be born before the case could be heard and all appeals decided.

Iowa’s requirement of a year’s residency as a prerequisite to filing for divorce in that state was challenged in Sosna v. Iowa (p. 45). Although Sosna had established residency by the time the case was heard and thus residency no longer prevented her from beginning proceedings, the suit was not dismissed on grounds of mootness because she had brought a class action. A class action is a form of legal action in which the plaintiff brings suit not only for herself, but also for all those similarly situated. Someone wishing to bring a class action is entitled to do so if the members of a class would have standing to sue in their own right, there are questions of law or fact common to all the members of the class, the claims or defenses of the representative of the class are typical of those of members of the class, and the party representing the class will fairly and adequately protect the interests of the class. The Federal Rules of Civil Procedure also require that the party representing the class give “the best notice practicable” to members of the class on whose behalf the suit is being brought. “[I]ndividual notice to all members of the class who can be identified through reasonable effort” includes advising each member of the class that the court will exclude him or her from the suit if the member requests it, that the judgment will bind all members of the class who do not exclude themselves, and that any member of the class excluded from the suit has the right to be represented separately through an attorney. As Justice White observed in his Sosna dissent, however, if the person bringing the class action no longer has any personal interest in the litigation, it does raise the problem of who will assume responsibility for the suit.

The case and controversy requirement—and the other aspects of justiciability as well—ensures that courts play a passive role. Courts can only decide matters that are brought to them and then, as we will see later, only so much of the matter as is necessary to decide the suit. Unlike legislatures and executives, courts cannot assume the initiative and make policy whenever they think it is necessary or whenever it suits them.

24. Rule 23(c)(2), Federal Rules of Civil Procedure, 28 U.S.C.A. Legislation to rein in class actions by requiring that suits brought by plaintiffs in multiple states be heard in federal, rather than state, court was a long-standing priority of Republicans in Congress and so-called “tort reform” was an issue on which President George W. Bush had campaigned for re-election in 2004. Titled the Class Action Fairness Act of 2005, 119 Stat. 4, the new law moved class actions with more than 100 plaintiffs, with at least one of the plaintiffs and one of the defendants domiciled in different states, and with at least $5 million in total damages at stake, to federal district court. The statute aimed at furthering the goals of making awards among the plaintiffs more equal, giving the successful plaintiffs more meaningful compensation (money, not coupons), eliminating in-state bias by state courts, reducing the economic destabilization of defendant companies, and scaling down attorney fees. But the preeminent motivation behind the law, especially by business interests, was that federal courts were thought to have much higher standards of evidence and were much less generous in their awards than state courts and thus were a venue more favorable to defendant corporations. The legislation passed easily. Congressional Quarterly Weekly Report, Feb. 21, 2005, p. 460; New York Times, Feb. 11, 2005, pp. A1, A16. Previously, the only class actions federal courts could hear were those in which each plaintiff stood to receive a minimum award of $75,000 and in which the defendant and lead-plaintiff were domiciled in different states.
Mr. Justice DAY delivered the opinion of the court:

* * *

The first question in these cases, as in others, involves the jurisdiction of this court to entertain the proceeding, and that depends upon whether the jurisdiction conferred is within the power of Congress, having in view the limitations of the judicial power, as established by the Constitution of the United States.

Section 1 of article 3 of the Constitution provides:

"The 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."

Section 2 of the same article provides:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of the same state claiming lands under grants of different states, and between foreign states, citizens, or subjects."

* * *

[To elucidate the nature and extent of the judicial power conferred by the Constitution,] Justice DAY went on to discuss the facts and holding in Hayburn’s Case, 2 U.S. (2 Dall.) 409, 1 L.Ed. 436 (1792). At issue in that case was an act passed by Congress providing for the payment of pensions to widows and orphans of American soldiers disabled in the Revolutionary War. The law made the federal circuit courts serve also as boards of pension commissioners, determining the amount due each applicant. These determinations were then subject to review and modification by the Secretary of War and Congress. The three-judge panel hearing Hayburn’s Case concluded that the statute improperly assigned non-judicial duties to the circuit courts’ decisions reviewable by an officer of the executive branch and then Congress.

In the note to the report of the case in 2 U.S. (2 Dall.) it appeared that Chief Justice Jay, Mr. Justice Cushing, and District Judge Duane unanimously agreed:
“That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.

“That neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner.

“That the duties assigned to the circuit courts by this act are not of that description * * *; inasmuch as it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary at War, and then to the revision of the legislature; whereas by the Constitution, neither the Secretary at War, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.”

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*** It is therefore apparent that from its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature.

It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and with the aid of appropriate legislation, upon the inferior courts of the United States. “Judicial power,” says Mr. Justice Miller, in his work on the Constitution, “is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.” Miller, Const. 314.

As we have already seen, by the express terms of the Constitution, the exercise of the judicial power is limited to “cases” and “controversies.” Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

What, then, does the Constitution mean in conferring this judicial power with the right to determine “cases” and “controversies.” A “case” was defined by Mr. Chief Justice Marshall as early as the leading case of Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term “controversy”? That question was dealt with by Mr. Justice Field, at the circuit, in the case of Re Pacific R. Commission, 32 Fed. 241, 255. Of these terms that learned justice said:

“The judicial article of the Constitution mentions cases and controversies. * * * By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.”

The power being thus limited to require an application of the judicial power to cases and controversies, is the act which undertook to authorize the present suits to determine the constitutional validity of certain legislation within the constitutional authority of the court. This inquiry in the case before us includes the broader question, When may this court, in the exercise of the judicial power, pass upon the constitutional validity of an act of Congress? That question has been settled from the early history of the court, the leading case on the subject being Marbury v. Madison * * *.

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*** Applying the principles thus long settled by the decisions of this court to the act of
Congress undertaking to confer jurisdiction in this case, we find that William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, and David Muskrat and J. Henry Dick, for themselves and representatives of all Cherokee citizens enrolled as such for allotment as of September 1, 1902, are authorized and empowered to institute suits in the court of claims to determine the validity of acts of Congress passed since the act of July 1, 1902, in so far as the same attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, and provided for in the said act of July 1, 1902.

The jurisdiction was given for that purpose first to the court of claims, and then upon appeal to this court. That is, the object and purpose of the suit is wholly comprised in the determination of the constitutional validity of certain acts of Congress; and furthermore, in the last paragraph of the section, should a judgment be rendered in the court of claims or this court, denying the constitutional validity of such acts, then the amount of compensation to be paid to attorneys employed for the purpose of testing the constitutionality of the law is to be paid out of funds in the Treasury of the United States belonging to the beneficiaries, the act having previously provided that the United States should be made a party, and the Attorney General be charged with the defense of the suits.

It is therefore evident that there is neither more nor less in this procedure than an attempt to provide for a judicial determination, final in this court, of the constitutional validity of an act of Congress. Is such a determination within the judicial power conferred by the Constitution, as the same has been interpreted and defined in the authoritative decisions to which we have referred? We think it is not. That judicial power, as we have seen, is the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction. The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law. The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond, the power delegated to the legislative branch of the government. This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a "case" or "controversy," to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court
within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution.

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The judgments will be reversed and the cases remanded to the Court of Claims, with directions to dismiss the petitions for want of jurisdiction.

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**NOTE—MOOTNESS: THE PADILLA AND SOSNA CASES**

One of the most interesting recent instances in which the Court found a dispute to be moot—that is, the case no longer presented a live issue—came in its denial of cert. in Padilla v. Hanft, 547 U.S. 1062, 126 S.Ct. 1649 (2006). Normally, Justices voting to deny cert. would not find it necessary or appropriate to say why they didn’t want to take a case, but the importance of the question raised presumably triggered the need for some explanation. José Padilla, an American citizen alleged to be implicated in a conspiracy to carry out a terrorist dirty-bomb attack in the United States, was taken into custody at Chicago’s O’Hare Airport in May of 2002 after he stepped off a plane from Pakistan. He was subsequently held as an “enemy combatant” in the Navy brig in Charleston, South Carolina, and sued the Secretary of Defense for a writ of habeas corpus arguing that his continuing incommunicado military detention violated rights guaranteed by the Fourth, Fifth, and Sixth amendments and the clause of the Constitution (Art. I, § 9, cl. 2) governing the suspension of habeas corpus.

The Supreme Court initially declined to hear this case on grounds Padilla had improperly named the Secretary of Defense as the defendant and should have brought his suit instead against the brig’s commander. Rumsfeld v. Padilla, 542 U.S. 426, 124 S.Ct. 2711 (2004). Four members of the Court (Justices Stevens, Souter, Breyer, and Ginsburg) would have decided the question whether an American citizen arrested on American soil could constitutionally be held indefinitely and incommunicado without the filing of legal charges and a trial. Padilla then refiled the suit in federal district court in South Carolina naming Hanft, the brig commander, as the defendant. That court ruled that “[t]he Non Detention Act [see p. 197] expressly forbids the President from holding [Padilla] as an enemy combatant, and *** the AUMF [Authorization for Use of Military Force] does not authorize such detention.” The district court also rejected the argument that the President’s constitutional authority as Commander-in-Chief provided justification. The U.S. Court of Appeals for the Fourth Circuit reversed, and Padilla petitioned the Supreme Court for cert. Before the Supreme Court could act on Padilla’s petition for cert., however, President George W. Bush swiftly ordered that Padilla be released from military custody, transferred to the control of the Attorney General, and then tried in federal district court on charges of providing material aid to terrorists. Critics of the administration saw this quick maneuver as an attempt by the government to evade a possibly adverse ruling by the Supreme Court on the President’s power to detain American citizens in military custody indefinitely. See New York Times, Nov. 23, 2005, pp. A1, A18. (This suspicion was clearly evident when the federal appeals court, having just sustained the President’s power, flatly refused to permit Padilla’s transfer out of military custody until the Supreme Court ruled on Padilla’s cert. petition. Padilla v. Hanft, 432 F.3d 582 (4th Cir. 2005).)

In Padilla v. Hanft, 547 U.S. 1062, 126 S.Ct. 1649 (2006), the Supreme Court denied Padilla’s petition for certiorari. Justices Souter, Breyer, and Ginsburg voted to grant cert. Justices Scalia, Thomas, and Alito voted to deny cert. without comment. Justice Kennedy, joined by Chief Justice Roberts and Justice Stevens, also voted to deny cert. but took care to address the concern of administration critics that there was nothing to prevent the government from changing its mind again and returning Padilla to indefinite military custody. Said Justice Kennedy:
Whatever the ultimate merits of the parties’ mootness arguments, there are strong prudential considerations disfavoring the exercise of the Court’s certiorari power. Even if the Court were to rule in Padilla’s favor, his present custody status would be unaffected. Padilla is scheduled to be tried on criminal charges. Any consideration of what rights he might be able to assert if he were returned to military custody would be hypothetical, and to no effect, at this stage of the proceedings.

In light of the previous changes in his custody status and the fact that nearly four years have passed since he first was detained, Padilla, it must be acknowledged, has a continuing concern that his status might be altered again. That concern, however, can be addressed if the necessity arises. * * * In the course of its supervision over Padilla’s custody and trial the District Court will be obliged to afford him the protection, including the right to a speedy trial, guaranteed to all federal criminal defendants. * * * Were the Government to seek to change the status or conditions of Padilla’s custody, that court would be in a position to rule quickly * * *.

By contrast, in Sosna v. Iowa, 419 U.S. 393, 95 S.Ct. 553 (1975), the Court rejected an argument that a dispute had become moot and went on to uphold the constitutionality of a state statute imposing a one-year residency requirement as a prerequisite to initiating divorce proceedings. After being married to Michael Sosna for eight years and residing in Michigan and then New York, Carol Sosna petitioned an Iowa court to dissolve their marriage after only one month’s residency in that state. Her petition was dismissed. Attacking the Iowa residency requirement as a violation of her constitutional right to interstate movement, Mrs. Sosna brought suit in federal district court both on her behalf and on behalf of all those similarly situated. Although by the time this dispute reached the U.S. Supreme Court Carol Sosna had long since met the state’s residency requirement and in fact had since procured a divorce in New York, the Court held that the case was not moot. Speaking for the Court, Justice Rehnquist wrote:

If appellant had sued only on her own behalf, both the fact that she now satisfies the one-year residency requirement and the fact that she has obtained a divorce elsewhere would make this case moot and require dismissal. * * * But appellant brought this suit as a class action and sought to litigate the constitutionality of the durational residency requirement in a representative capacity. When the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant. We are of the view that this factor significantly affects the mootness determination.

Justice White dissented on the grounds that the case had, indeed, become moot. He wrote: “She retains no real interest whatsoever in this controversy, certainly not an interest that would have entitled her to be a plaintiff in the first place, either alone or representing a class.” Although “[t]he unresolved issue, the attorney, and a class of unnamed litigants remain,” he continued, “[n]one of the anonymous members of the class is present to direct counsel and ensure that class interests are properly being served.” Justices Brennan and Marshall also dissented, but on the grounds that the durational residency requirement was unconstitutional.

Ripeness

A suit, however, may entail conflict between parties with substantial and adverse interests but still fail to be heard on the merits for other reasons. It may be that the dispute is not sufficiently ripe for decision in its present posture. The requirement of ripeness exists to screen out disputes in which the facts have not yet crystalized. In the following case a federal appellate court discusses why adhering to the ripeness doctrine led it not to decide whether Congress’s October Resolution authorized President George W. Bush to
conduct a war against Saddam Hussein’s regime in Iraq. The appeals court opinion identifies the reasons for the ripeness requirement and explains that, although hearing a dispute between Congress and the President over deploying military forces is conceivable, that day had not arrived. Another example of reliance upon the ripeness doctrine, mentioned below by the appeals court, is Justice Powell’s opinion in Goldwater v. Carter (p. 71) in which he argued that, while some day it might be necessary to decide whether President Jimmy Carter had constitutionally terminated diplomatic recognition of Taiwan as the legitimate government of China, it was premature to do so until the Senate actually objected.

**DOE v. BUSH**

United States Court of Appeals, First Circuit, 2003

323 F.3d 133

**BACKGROUND & FACTS** Active-duty members of the armed forces, parents of military personnel, and several members of the U.S. House of Representatives sought to enjoin President George W. Bush and Secretary of Defense Donald Rumsfeld from attacking Iraq. Plaintiffs argued that the resolution Congress adopted in October 2002 authorizing “[t]he President * * * to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to * * * defend the security of the United States against the continuing threat posed by Iraq” (emphasis supplied), was constitutionally inadequate to permit conducting a war. A federal district court dismissed their complaint, and the plaintiffs appealed.

Before LYNCH, Circuit Judge, CYR and STAHL, Senior Circuit Judges.

LYNCH, Circuit Judge.

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[Plaintiffs argue that] * * * only the judiciary * * * has the constitutionally assigned role and the institutional competence to police the boundaries of the constitutional mandates given to the other branches: Congress alone has the authority to declare war and the President alone has the authority to make war.

[Plaintiffs argue that] Congress, the voice of the people, should make this momentous decision, one which will cost lives * * *. They also argue that, absent an attack on this country or our allies, congressional involvement must come prior to war, because once war has started, Congress is in an uncomfortable default position where the use of its appropriations powers to cut short any war is an inadequate remedy.

The defendants are equally eloquent about the impropriety of judicial intrusion into the “extraordinarily delicate foreign affairs and military calculus, one that could be fatally upset by judicial interference.” Such intervention would be all the worse here, defendants say, because Congress and the President are in accord as to the threat to the nation and the legitimacy of a military response to that threat.

***

The lack of a fully developed dispute between the two elected branches, and the consequent lack of a clearly defined issue, is exactly the type of concern which causes courts to find a case unripe. In his concurring opinion in Goldwater v. Carter, 444 U.S. 996, 100 S.Ct. 533 (1979), Justice Powell stated that courts should decline, on ripeness grounds, to decide “issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.” ***
Ripeness doctrine involves more than simply the timing of the case. It mixes various mutually reinforcing constitutional and prudential considerations. One such consideration is the need “to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” Another is to avoid unnecessary constitutional decisions. A third is the recognition that, by waiting until a case is fully developed before deciding it, courts benefit from a focus sharpened by particular facts. The case before us raises all three of these concerns.

Ripeness is dependent on the circumstances of a particular case. Two factors are used to evaluate ripeness: “the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” Ordinarily, both factors must be present.

The hardship prong of this test is most likely satisfied here; the current mobilization already imposes difficulties on the plaintiff soldiers and family members, so that they suffer “present injury from a future contemplated event.” Plaintiffs also lack a realistic opportunity to secure comparable relief by bringing the action at a later time.

The fitness inquiry here presents a greater obstacle. The baseline question is whether allowing more time for development of events would “significantly advance our ability to deal with the legal issues presented [or] aid us in their resolution.” These prudential considerations are particularly strong in this case, which presents a politically-charged controversy involving momentous issues, both substantively (war and peace) and constitutionally (the powers of coequal branches).

[Plaintiffs argue that] the October Resolution only permits actions sanctioned by the Security Council. In plaintiffs’ view, the Resolution’s authorization is so narrow that, even with Security Council approval of military force, Congress would need to pass a new resolution before United States participation in an attack on Iraq would be constitutional. At a minimum, according to plaintiffs, the October Resolution authorizes no military action “outside of a United Nations coalition.”

For various reasons, this issue is not fit now for judicial review.*** Diplomatic negotiations, in particular, fluctuate daily. The President has emphasized repeatedly that hostilities still may be averted if Iraq takes certain actions. The Security Council is now debating the possibility of passing a new resolution that sets a final deadline for Iraqi compliance. United Nations weapons inspectors continue their investigations inside Iraq. Other countries ranging from Canada to Cameroon have reportedly pursued their own proposals to broker a compromise. As events unfold, it may become clear that diplomacy has either succeeded or failed decisively. The Security Council, now divided on the issue, may reach a consensus. To evaluate this claim now, the court would need to pile one hypothesis on top of another. We would need to assume that the Security Council will not authorize war, and that the President will proceed nonetheless.

If courts may ever decide whether military action contravenes congressional authority, they surely cannot do so unless and until the available facts make it possible to define the issues with clarity.

The Constitution explicitly divides the various war powers between the political branches. To the Congress goes the power to “declare war,” to “raise and support armies” through appropriations of up to two years, to “provide and maintain a navy,” and to “make rules for the government and regulation of the land and naval forces.” The President’s role as commander-in-chief is one of the few executive powers enumerated by the Constitution.
Given this “amalgam of powers,” the Constitution overall “envisages the joint participation of the Congress and the executive in determining the scale and duration of hostilities.”

In this zone of shared congressional and presidential responsibility, courts should intervene only when the dispute is clearly framed. An extreme case might arise, for example, if Congress gave absolute discretion to the President to start a war at his or her will. Plaintiffs’ objection to the October Resolution does not, of course, involve any such claim. Nor does it involve a situation where the President acts without any apparent congressional authorization, or against congressional opposition.

Nor is there clear evidence of congressional abandonment of the authority to declare war to the President. To the contrary, Congress has been deeply involved in significant debate, activity, and authorization connected to our relations with Iraq for over a decade, under three different presidents of both major political parties, and during periods when each party has controlled Congress. It has enacted several relevant pieces of legislation expressing support for an aggressive posture toward Iraq, including authorization of the prior war against Iraq and of military assistance for groups that would overthrow Saddam Hussein. It has also accepted continued American participation in military activities in and around Iraq, including flight patrols and missile strikes. Finally, the text of the October Resolution itself spells out justifications for a war and frames itself as an “authorization” of such a war.

The appropriate recourse for those who oppose war with Iraq lies with the political branches. Dismissal of the complaint is affirmed.

Standing

A controversy of seemingly adverse and concrete legal interests may also fail to be entertained by a court because the party bringing the suit lacks standing. Standing is the concept that links the interests being asserted in a suit to the person bringing the suit. Simply put, this means that the plaintiff must be the one directly and personally injured by the acts of the defendant. As explained by Justice O’Connor, speaking for the Court in Allen v. Wright, 468 U.S. 737, 104 S.Ct. 3315 (1984):

Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked. The requirement of standing, however, has a core component derived directly from [Article III of] the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.

Standing doctrine incorporates concepts concededly not susceptible of precise definition. The injury alleged must be “distinct and palpable,” and not “abstract” or “conjectural” or “hypothetical.” The injury must be “fairly” traceable to the challenged action, and relief from the injury must be “likely” to follow from a favorable decision. These terms cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise.

The inquiry [into standing] requires careful judicial examination of a complaint’s allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable
ruling too speculative? These questions must be answered by reference to the Art. III notion that federal courts may exercise power only “in the last resort, and as a necessity,” and only when adjudication is “consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.”

A controversial example of applying the standing requirement is the Supreme Court’s ruling in City of Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660 (1983), because there was considerable disagreement among the Justices as to the rigor with which the concept should be applied and, therefore, the justice of its consequences. In that case, a 24-year-old black motorist who had been subjected to a chokehold by an officer of the Los Angeles Police Department (LAPD) sued to recover damages for his crushed larynx and to enjoin the city from the unjustified application of a chokehold in the future. Lyons had been pulled over for a traffic violation in the early-morning hours because of a burned-out taillight. With revolvers drawn, officers said to get out of the vehicle, told him to clasp his hands on top of his head, and completed a pat-down search. One of the officers then slammed Lyons’ hands onto his head. When Lyons complained that it hurt, the officer applied the chokehold. When Lyons regained consciousness, he was lying face down on the ground, gasping for air, and spitting up dirt and blood. The record showed that during the period 1975–1980, LAPD officers applied chokeholds on 975 occasions, which represented more than three-quarters of the altercations between LAPD officers and the public. It was the most frequent form of physical restraint used by police, and the record showed that department policy permitted the application of chokeholds in circumstances where officers faced no threat. During that five-year period, 16 deaths resulted from chokeholds; in three-quarters of these, the victim was an African-American.

At the outset, the Court rejected the city’s contention that Lyons’ claim for injunctive relief was mooted by the city’s self-imposed moratorium on the use of chokeholds because the city had only temporarily suspended the practice. But with regard to standing, the Court held that, while Lyons could sue for damages, he lacked standing to enjoin the department from the unjustified application of a chokehold in the future. The Court held that Lyons failed “to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.” The Court continued: “The allegation in the complaint that the police in Los Angeles routinely apply chokeholds in situations where they are not threatened by the use of deadly force falls far short of the allegations that would be necessary to establish a case or controversy between these parties. Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens

25. These considerations have been relaxed when the states, as plaintiffs in federal court litigation, seek to protect their citizens from harms originating outside the state, such as pollution and global warming. This is so because the states surrendered some of their powers to the federal government as a condition of joining the Union. Consequently, states “are not normal litigants for the purposes of invoking federal [court] jurisdiction.” In Massachusetts v. Environmental Protection Agency (EPA), 549 U.S. —, 127 S.Ct. 1438 (2007), the Court made it easier for the states to clear these hurdles in a suit to force the EPA to begin regulating the emission of greenhouse gases from new motor vehicles. There was enough persuasive scientific evidence, the Court held, to show that global warming caused “concrete and particularized injury that is either actual or imminent,” that the injury suffered by Massachusetts’ residents is “fairly traceable” to regulatory inaction by the EPA, and that “a favorable decision will redress that injury,” although forcing the agency to act would only partially alleviate the harm of global warming. The Court found that the EPA under President George W. Bush had failed to exercise the regulatory power it had been given by Congress under the Clean Air Act as amended, and that the agency had offered “no reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to global climate change.” The EPA’s behavior, therefore, was “arbitrary, capricious, . . . or otherwise not in accordance with the law.”
who no more than assert that certain practices of law enforcement officers are unconstitutional.”

Speaking for the four dissenters, Justice Thurgood Marshall criticized the majority for “fragmenting a single claim into multiple claims for particular relief and requiring a separate showing of standing for each form of relief.” He continued, “Because [Lyons] has a live claim for damages, he need not rely solely on the threat of future injury to establish his personal stake in the outcome of the controversy.” Marshall wrote, “Our cases uniformly state that the touchstone of the Article III standing requirement is the plaintiff’s personal stake in the underlying dispute, not in the particular types of relief sought.” In the dissenters’ view, Lyons had “easily” made the required showing that the injuries he alleged, if proved at trial, could “be remedied or prevented by some sort of judicial relief”—“monetary relief would plainly provide redress for his past injury, and prospective relief would reduce the likelihood of any future injury.” Objecting that “[t]he Court’s decision remove[d] an entire class of constitutional violations from the equitable powers of a federal court[,]” Justice Marshall argued: “Since no one can show that he will be choked in the near future, no one—not even a person who, like Lyons, has almost been choked to death—has standing to challenge the continuation of the policy. The City is free to continue the policy indefinitely as long as it is willing to pay damages for the injuries and deaths that result.” But the path to all injunctive relief, the majority observed, had not been foreclosed since “the state courts need not impose the same standing requirements that govern federal-court proceedings.” The majority added: “The individual States may permit their courts to oversee the conduct of law enforcement authorities on a continuing basis. But this is not a role of a federal court, absent far more justification than Lyons has proffered in this case.”

As a rule, standing becomes more problematic as the plaintiff’s interest grows more generalized. In other words, the more the interests of the plaintiff become indistinguishable from those shared by all citizens or—as in the following case—all taxpayers, the greater the odds the complaint will be dismissed.

**DAIMLERCHRYSLER CORP. V. CUNO**
Supreme Court of the United States, 2006
547 U.S. —, 126 S.Ct. 1854, 164 L.Ed.2d 589

**BACKGROUND & FACTS** The City of Toledo and State of Ohio sought to encourage DaimlerChrysler, a company making Jeeps, to make new investments in its manufacturing operations by giving the company local and state tax breaks. Charlotte Cuno and other Toledo taxpayers said their local and state taxes were higher because of the tax credits given DaimlerChrysler. They challenged the constitutionality of investment tax credits on grounds they violated the free-trade principle implicit in the Commerce Clause. They argued that the policy of luring business by means of tax breaks was deliberately designed to secure for Ohio an economic advantage over rival states. Although a federal district court dismissed the suit, a federal appellate court agreed with the plaintiff-taxpayers. However, because the appeals court decision squarely contradicted a ruling by the Michigan Supreme Court upholding such tax breaks in a similar case, the Supreme Court granted certiorari to resolve the conflict.

Chief Justice ROBERTS delivered the opinion of the Court.

***We*** begin by addressing plaintiffs’ claims that they have standing as taxpayers to challenge the franchise tax credit.
A

Chief Justice Marshall, in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), grounded the Federal Judiciary’s authority to exercise judicial review and interpret the Constitution on the necessity to do so in the course of carrying out the judicial function of deciding cases. As Marshall explained, “[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule.” * * *

Determining that a matter before the federal courts is a proper case or controversy under Article III therefore assumes particular importance in ensuring that the Federal Judiciary respects “the proper—and properly limited—role of the courts in a democratic society.” Allen v. Wright, 468 U.S. 737, 750, 104 S.Ct. 3315 (1984) * * *. If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.

* * * “A case in law or equity,” Marshall remarked,

“[i]s a term . . . of limited signification. It [i]s a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every question under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every question under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power among the branches of government could exist no longer, and the other departments would be swallowed up by the judiciary.” 4 Papers of John Marshall 95 (C. Cullen ed. 1984).* * *

“Article III standing . . . enforces the Constitution’s case-or-controversy requirement.” Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11, 124 S.Ct. 2301 (2004). The “core component” of the requirement that a litigant have standing to invoke the authority of a federal court “is an essential and unchanging part of the case-or-controversy requirement of Article III.” * * *

The requisite elements of this “core component derived directly from the Constitution” are familiar: “A plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” Allen, 468 U.S., at 751, 104 S.Ct., at 3324. * * * That requires plaintiffs, as the parties now asserting federal jurisdiction, to carry the burden of establishing their standing under Article III.

B

Plaintiffs principally claim standing by virtue of their status as Ohio taxpayers, alleging that the franchise tax credit “depletes the funds of the State of Ohio to which the Plaintiffs contribute through their tax payments” and thus “diminish[es] the total funds available for lawful uses and impose[es] disproportionate burdens on” them. * * * On several occasions, this Court has denied federal taxpayers standing under Article III to object to a particular expenditure of federal funds simply because they are taxpayers. * * *

The animating principle behind these cases was originally announced in Frothingham v. Mellon, * * * 262 U.S. 447, 43 S.Ct. 597 (1923). In rejecting a claim that improper federal appropriations would “increase the burden of future taxation and thereby take [the plaintiff’s] property without due process of law,” the Court observed that a federal taxpayer’s “interest in the moneys of the Treasury . . . is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.” * * *

This logic is equally applicable to taxpayer challenges to expenditures that deplete the treasury, and to taxpayer challenges to so-called “tax expenditures,” which reduce amounts available to the treasury by granting tax credits or exemptions. In either case, the alleged injury is based on the asserted effect of the allegedly illegal activity on public revenues, to which the taxpayer contributes.
Standing has been rejected in such cases because the alleged injury is not "concrete and particularized" but instead a grievance the taxpayer "suffers in some indefinite way in common with people generally." In addition, the injury is not "actual or imminent," but instead "conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S., at 560, 112 S.Ct., at 2136. As an initial matter, it is unclear that tax breaks of the sort at issue here do in fact deplete the treasury: The very point of the tax benefits is to spur economic activity, which in turn increases government revenues.

Plaintiffs' alleged injury is also "conjectural or hypothetical" in that it depends on how legislators respond to a reduction in revenue, if that is the consequence of the credit. Establishing injury requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit; establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions. Neither sort of speculation suffices to support standing.

A taxpayer-plaintiff has no right to insist that the government dispose of any increased revenue it might experience as a result of his suit by decreasing his tax liability or bolstering programs that benefit him. To the contrary, the decision of how to allocate any such savings is the very epitome of a policy judgment committed to the "broad and legitimate discretion" of lawmakers, which "the courts cannot presume either to control or to predict."

The foregoing rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers.

State policymakers, no less than their federal counterparts, retain broad discretion to make "policy decisions" concerning state spending "in different ways ... depending on their perceptions of wise state fiscal policy and myriad other circumstances."

Because state budgets frequently contain an array of tax and spending provisions, any number of which may be challenged on a variety of bases, affording state taxpayers standing to press such challenges simply because their tax burden gives them an interest in the state treasury would interpose the federal courts as "virtually continuing monitors of the wisdom and soundness" of state fiscal administration, contrary to the more modest role Article III envisions for federal courts. See Allen, 468 U.S., at 760–761, 104 S.Ct., at 3329.

[Consequently,] we hold that state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers.
unlike the right not to “contribute three
pence . . . for the support of any one
religious establishment.” * * * 392 U.S.,
at 103, 88 S.Ct., at 1954 (quoting 2
Writings of James Madison 186 (G. Hunt
ed. 1901)). * * * [A] broad application of
Flast’s exception to the general prohibition
on taxpayer standing would be quite at odds
with its narrow application in our precedent
and Flast’s own promise that it would not
transform federal courts into forums for
taxpayers’ “generalized grievances.” * * *

Flast is consistent with the principle,
underlying the Article III prohibition on
taxpayer suits, that a litigant may not
assume a particular disposition of govern-
ment funds in establishing standing. The
Flast Court discerned in the history of the
Establishment Clause “the specific evils
feared by [its drafters] that the taxing and
spending power would be used to favor one
religion over another or to support religion
in general.” * * * The Court therefore
understood the “injury” alleged in Estab-
lishment Clause challenges to federal
spending to be the very “extract[ion] and
spend[ding]” of “tax money” in aid of
religion alleged by a plaintiff. * * * And
an injunction against the spending would
of course redress that injury, regardless of
whether lawmakers would dispose of the
savings in a way that would benefit the
taxpayer-plaintiffs personally. * * *

Plaintiffs thus do not have state taxpayer
standing on the ground that their Com-
merce Clause challenge is just like the
Establishment Clause challenge in Flast.

* * * Because plaintiffs have no standing
to challenge [the tax] credit, the lower courts
erred by considering their claims against it on
the merits. The judgment of the Sixth
Circuit is therefore vacated * * * and the
cases are remanded for dismissal of plaintiffs’
challenge to the franchise tax credit.
It is so ordered.

As DaimlerChrysler makes clear, the number of suits brought by a taxpayer that the
courts will entertain is negligible: the suit must be one in which (1) a taxpayer is
challenging an exercise of the taxing and spending power, and (2) the plaintiff must be
able to point to a specific limitation on the taxing and spending power stated in the
Constitution. Thus, in Schlesinger v. Reservists Committee to Stop the War, 418 U.S.
208, 94 S.Ct. 2925 (1974), which challenged commissions in the military reserves held by
various members of Congress as a violation of the Incompatibility Clause (Art. I, § 6, cl. 2,
which bars federal legislators from simultaneously holding any other office under the
authority of the United States), the suit was dismissed because the law had nothing to do with
the taxing and spending power. In United States v. Richardson, 418 U.S. 166, 94 S.Ct. 2940
(1974), decided the same day, the Court also rejected a suit to force public disclosure of the
specific monies appropriated for the Central Intelligence Agency because the law providing
for CIA secrecy was not an exercise of the taxing and spending power. More controversial,
perhaps, was the Court’s decision eight years later in Valley Forge Christian College v.
Americans United for Separation of Church and State, Inc., 454 U.S. 464, 102 S.Ct. 752
(1982), in which—despite the Establishment Clause—the Court turned aside a taxpayer
challenge to a very generous transfer of a parcel of federal property to a religious educational
institution on grounds that it was an exercise of Congress’s power under the Property Clause,
Art. IV, § 3, cl. 2, rather than the taxing and spending clause of Art. I, § 8.26

26. In the same vein, the Court has ruled that federal taxpayers lack standing to challenge use of federal money to
fund conferences to promote President George W. Bush’s “faith-based initiatives.” The plaintiffs argued that the
White House conferences constituted propaganda vehicles for religion and were funded by money derived from
congressional appropriations (as distinguished from private donations). The Bush Administration argued that a
taxpayer cannot ever have standing unless Congress has earmarked the money for the program that is challenged.
The conferences were funded from discretionary funds appropriated by Congress for use by the White House.
In addition to Article III standing, the Court—somewhat confusingly, perhaps—has also recognized what it calls “prudential standing.” As distinguished from Article III standing, which enforces the Constitution’s case and controversy requirement, “prudential standing” imposes limits on the exercise of federal jurisdiction that are recognized solely as a matter of the Court’s say-so. An example of the limiting effect of the “prudential standing” doctrine is provided by the Court’s recent decision in Elk Grove Unified School District v. Newdow, 542 U.S. 1, 124 S.Ct. 2301 (2004). In that case, Newdow, an atheist, challenged California’s requirement that teachers begin each school day by leading their students in the Pledge of Allegiance. He argued the phrase “one Nation under God” constituted an establishment of religion in violation of the First Amendment. A majority of the Justices did not reach the merits of the Establishment Clause claim, but instead held that Newdow lacked standing to sue. Speaking for the Court, Justice Stevens pointed out that, under California law, although Newdow and his former wife shared custody of their daughter, the mother “makes the final decisions if the two . . . disagree.” The mother did not share Newdow’s religious views and did not support his constitutional challenge. As Justice Stevens explained, Newdow may have the “right to instruct his daughter in his religious views,” but that was a far cry from the “ambitious” claim made here: “He wishes to forestall his daughter’s exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and [his former wife] disagree.” The interests implicated in this case were “not merely Newdow’s interest in inculcating his child with his views on religion, but also the rights of the child’s mother as a parent generally” and “specifically” because of her state-recognized veto power. Moreover, Justice Stevens wrote, this case “implicates the interests of a young child who finds herself at the center of a highly public debate over her custody, the propriety of a widespread national ritual, and the meaning of our Constitution.” In light of these interests and the extensiveness of Newdow’s claim, the Court held that he lacked “prudential standing to bring this suit in federal court.” Prudential standing, Justice Stevens declared, “embodies judicial self-imposed limits on the exercise of federal jurisdiction” and he cited the principles articulated by Justice Brandeis in his Ashwander opinion (see, p. 55). “It is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights,” a thicket of legal relationships exclusively under the control of the states. He concluded, “When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.”

Political Questions

Cases that pose “political questions” necessarily fail to present justiciable issues and also will not be heard by federal courts. By excluding these sorts of questions from adjudication, the Court is referring to applicability of a particular doctrine, the “political questions” doctrine; it is not implying that disputes properly before the federal courts are somehow apolitical. Obviously, since the Supreme Court—like all courts—is a political institution and since it accepts only cases presenting substantial federal issues, the matters it decides are inescapably political. Alexis de Tocqueville was quite right when he wrote in Democracy in America (1838), “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.” By contrast, what the Court has in mind by the term “political questions” is a certain category of cases that federal courts are precluded from hearing. The doctrine is discussed by Justice Brennan in Baker v. Carr (p. 57). His extended discussion concludes that several factors have been associated with previous determinations by the Court that a “political question” is presented (pp. 59–61), although “each has one or more elements which identify it essentially as a function of the separation of powers.”
The characteristics Justice Brennan identified as distinguishing a political question can perhaps be reduced to three general categories: a clear textual commitment of the issue to another branch of government, a lack of judicially manageable standards by which courts could resolve the dispute, or a number of factors that make judicial determination of the matter politically imprudent. The first of these can be illustrated by the dispute presented in Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944 (1969). In that case, Adam Clayton Powell, Jr., a former Congressman, was excluded from the House of Representatives after having been duly reelected. Although he satisfied all three qualifications for office (age, citizenship, and residency) specified in the Constitution (Art. I, § 2, ¶ 2), the House voted not to seat him because of misconduct as a committee chairman involving committee expenditures during his previous term. Powell argued that, while the House had the power to expel him for his behavior, it had no constitutional power to exclude him from office, even though it voted to exclude him by more than the two-thirds majority required for expulsion. This was not quibbling because House precedents appeared to indicate that no member had ever been expelled for misconduct during a previous term of office. The House, of course, had within its discretion power to judge whether Powell met the constitutionally specified qualifications, it could make its own determinations as to whether he had been duly elected, and it could use its own judgment about whether he had engaged in misconduct so serious that he should be expelled—all political judgments beyond the capacity of the Court to review because they presented “political questions” clearly identified by the text of the Constitution as matters for discretionary action by the House. But, in this instance, the House had added to the three qualifications for office stated in the Constitution by implicitly requiring absence of previous misconduct. The question whether Powell had been unlawfully excluded did not present a political question because it was not something the Constitution had committed to the judgment of the House; instead, it presented the question of whether the House had such a power at all.

The Court’s consideration of the reapportionment issue, presented in Baker v. Carr, turned largely on whether it presented a political question of the second type. This kind of political question is marked by the absence of a definable standard by which the facts can be judged. Sometimes the problem is the absence of any consensus about what the standard should be; sometimes the problem is that there is no workable standard that could be applied. Either way, argument in court is frustrated because the parties don’t have a recognized standard to frame their presentation of the facts in the case. Arguments about whether the boundary lines of legislative districts have been drawn fairly is a classic example of this difficulty.

The judicial process operates effectively only when the component issues in a case are presented in the form of a series of clear, discrete questions that can be argued and resolved separately. If a dispute is understood to pose, say, three questions, a court does not go on to address the second question unless the first question posed in the case had been answered affirmatively, and the third question need not be reached unless the first two questions have been answered affirmatively. Question 1, for example, may be whether the Court has jurisdiction, Question 2 may focus on standing, and Question 3 may go to the merits (the heart and substance) of the dispute. Over a half century ago, Justice Brandeis summarized a set of commandments by which judges should be guided in deciding cases, always being sure to decide no more than really had to be decided. In a concurring opinion in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346–348, 56 S.Ct. 466, 482–484 (1937), he wrote:

The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:
1. 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 real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.”

2. The Court will not “anticipate a question of constitutional law in advance of the necessity of deciding it.”

3. 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.”

4. 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. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground.

5. 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. Among the many applications of this rule, none is more striking than the denial of the right of challenge to one who lacks a personal or property right.

6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.

7. “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.”

These guidelines would make very little sense unless it was first assumed that a case could be reduced to a series of clear, discrete and separable questions. The notion that a case should be decided on the narrowest possible ground logically supposes that the Court can stop addressing the questions presented at any point. If the parties are to have a fair hearing, they must have the opportunity to pitch their arguments and evidence to a legal standard a judge can apply.

Until 1962, the Supreme Court adhered to the view that challenges to malapportionment of legislative seats constituted a “political question.” In Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198 (1946), and other cases, the Court rejected the litigants’ contention that unequal representation violated the provision of Article IV, section 4 of the U.S. Constitution guaranteeing “to every State in this Union a Republican Form of Government.” The Court, however, reversed its position with the ruling in Baker. Speaking for the Court in Baker, Justice Brennan held that the federal district court had jurisdiction, the urban plaintiffs had standing, the issue was justiciable, and nothing more.

The Court had previously rejected the claim that malapportionment violated the Guarantee Clause because judging the constitutionality of distributing legislative seats on that basis presupposed a definition of representative government. No consensus exists on the specific definition of that concept, and, therefore, no authoritative standard existed by which deviations from it could be measured. A variation on this difficulty is provided by Justice Brennan’s discussion in Baker of the nineteenth century case, Luther v. Borden.
that case, the Court was asked to decide which of two contending factions constituted the legitimate government of Rhode Island. Simply stated, the problem is that everybody believes representative government means more representation for his or her interests. In the context of legislative apportionment, more representation is what is wanted. Deciding how much representation (how many seats) urban residents (like Baker) deserve depends upon how much representation (how many seats) other groups (farmers, suburbanites, minorities, etc.) should also be given. No standard, agreed to by all of the affected groups, exists that would solve the problem, and asserting that “representative government” is the principle to be applied doesn’t furnish much of a clue. The distribution of representatives is usually accomplished by simultaneous bargaining among legislators as they draw district boundaries on a map, but it presented a problem that defied judicial solution under the Guarantee Clause.

It was the fact that the Court had provided no standard by which the federal district court could judge Tennessee’s legislative apportionment when the case was remanded that so nettled Justice Frankfurter. To Justice Stewart, it was the fact that the distribution of seats in the Tennessee legislature was so outdated that made it irrational. Although Stewart and perhaps others (such as Justice Douglas) had the impression when Baker was decided that the test of whether a legislative apportionment could survive constitutional challenge was whether it was “rational” or “reasonable,” posing the question whether a given legislative apportionment reflected a rational or reasonable accommodation of relevant political interests was simply “a Guarantee Clause claim masquerading under a different label.” And it was the Court’s hesitancy in announcing the “one person, one vote” standard (which it later did because that standard is implicit in “equal protection of the laws”) that evoked an admonition from Frankfurter: If the Court couldn’t stand the heat, it should get out of the kitchen.

**Baker v. Carr**

Supreme Court of the United States, 1962

369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663

**BACKGROUND & FACTS** In 1901, the Tennessee General Assembly enacted legislation apportioning its two houses and provided for subsequent reapportionment every ten years on the basis of the number of qualified voters resident in each of the state’s counties as reported in the census. For more than 60 years, however, proposals to redistribute the legislative seats had failed to pass, while a large share of the state’s population continued to drift into urban areas. Baker and others, citizens and qualified voters of the state, sued under the federal civil rights statutes, charging that as urban residents they were being denied equal protection of the laws contrary to the Fourteenth Amendment by virtue of the fact that their votes had been devalued. In the suit they named Tennessee’s secretary of state, attorney general, and state election officials as respondents and asked the court to declare the 1901 apportionment act unconstitutional and to order state officials to either hold the election of state legislators at large without regard to counties or districts or hold an election at which legislators would be selected from constituencies in accordance with the federal census of 1950. The U.S. District Court for the Middle District of Tennessee dismissed the suit on the ground that, while the abridgment of civil rights was clear, remedy did not lie with the courts.
Mr. Justice BRENNAN delivered the opinion of the Court.

***

We hold today only (a) that the District Court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes. Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial.

JURISDICTION OF THE SUBJECT MATTER

***

* * * The complaint alleges that the 1901 statute effects an apportionment that deprives the appellants of the equal protection of the laws in violation of the Fourteenth Amendment. * * *

Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the federal judicial power defined in Art. III, § 2, and so within the power of Congress to assign to the jurisdiction of the District Courts. * * *

***

STANDING

* * *

These appellants 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 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. A citizen’s right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, * * * or by a refusal to count votes from arbitrarily selected precincts, * * * or by a stuffing of the ballot box * * *.

* * * If such impairment does produce a legally cognizable injury, they are among those who have sustained it. * * * They are entitled to a hearing and to the District Court’s decision on their claims. * * *

JUSTICIABILITY

In holding that the subject matter of this suit was not justiciable, the District Court relied on Colegrove v. Green [328 U.S. 549, 66 S.Ct. 1198 (1946)] and subsequent *per curiam* cases. * * * We understand the District Court to have read the cited cases as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a “political question” and was therefore nonjusticiable. * * *

Of course the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection “is little more than a play upon words.” * * * Rather, it is argued that apportionment cases, whatever the actual wording of the complaint, can involve no federal constitutional right except one resting on the guaranty of a republican form of government, and that complaints based on that clause have been held to present political questions which are nonjusticiable.

We hold that the claim pleaded here neither rests upon nor implicates the Guaranty Clause and that its justiciability is therefore not foreclosed by our decisions of cases involving that clause. The District Court misinterpreted Colegrove v. Green and other decisions of this Court on which it relied. * * * To show why we reject the argument based on the Guaranty Clause, * * * we *** first *** consider the contours of the “political question” doctrine.
That review reveals that in the Guaranty Clause cases and in the other "political question" cases, it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the "political question."

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.

**Foreign relations:** There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question "governmental action * * * must be regarded as of controlling importance," if there has been no conclusive "governmental action" then a court can construe a treaty and may find it provides the answer. * * * Though a court will not undertake to construe a treaty in a manner inconsistent with a subsequent federal statute, no similar hesitancy obtains if the asserted clash is with state law. * * *

While recognition of foreign governments so strongly defies judicial treatment that * * * the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area. Similarly, recognition of belligerency abroad is an executive responsibility, but if the executive proclamations fall short of an explicit answer, a court may construe them seeking, for example, to determine whether the situation is such that statutes designed to assure American neutrality have become operative. * * * Still again, though it is the executive that determines a person's status as representative of a foreign government, * * * the executive's statements will be construed where necessary to determine the court's jurisdiction. * * *

**Dates of duration of hostilities:** Here too analysis reveals insoluble reasons for the presence of political questions, underlying this Court's refusal to review the political departments' determination of when or whether a war has ended. Dominant is the need for finality in the political determination, for emergency's nature demands "A prompt and unhesitating obedience," Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30, 6 L.Ed. 537 (1827) (calling up of militia). Moreover, "the cessation of hostilities does not necessarily end the war power. It was stated in Hamilton v. Kentucky Distilleries & W. Co., 251 U.S. 146, 161, 40 S.Ct. 106, 110 (1919), that the war power includes the power 'to remedy the evils which have arisen from its rise and progress' and continues during that emergency." * * *

But deference rests on reason, not habit. * * * [E]ven in private litigation which directly implicates no feature of separation of powers, lack of judicially discoverable standards and the drive for even-handed application may impel reference to the political departments' determination of dates of hostilities' beginning and ending. * * *

**Validity of enactments:** In Coleman v. Miller * * * [307 U.S. 433, 59 S.Ct. 972
(1939)], this Court held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp. * * *

* * *

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 constitutionally demonstrable 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 cataloguing.

But it is argued that this case shares the characteristics of decisions that constitute a category not yet considered, cases concerning the Constitution's guaranty, in Art. IV, § 4, of a republican form of government. * * * Guaranty Clause claims involve those elements which define a "political question," and for that reason and no other, they are nonjusticiable. In particular, we shall discover that the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization.

Reprieee n form of government: [In] Luther v. Borden, 48 U.S. (7 How.) 1, 12 L.Ed. 581 (1849), * * * [t]he defendants, admitting an otherwise tortious breaking and entering, sought to justify their action on the ground that they were agents of the established lawful government of Rhode Island, which State was then under martial law to defend itself from active insurrection; that the plaintiff was engaged in that insurrection; and that they entered under orders to arrest the plaintiff. The case arose "out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842," * * * and which had resulted in a situation wherein two groups laid competing claims to recognition as the lawful government. The plaintiff's right to recover depended upon which of the two groups was entitled to such recognition; but the lower court's refusal to receive evidence or hear argument on that issue, its charge to the jury that the earlier established or "charter" government was lawful, and the verdict for the defendants, were affirmed upon appeal to this Court.

Chief Justice Taney's opinion for the Court reasoned as follows: (1) If a court were to hold the defendants' acts unjustified because the charter government had no legal existence during the period in question, it would follow that all of that government's actions—laws enacted, taxes collected, salaries paid, accounts settled, sentences passed—were of no effect; and that "the officers who carried their decisions into operation [were] answerable as trespassers, if not in some cases as criminals." * * * A decision for the plaintiff would inevitably have produced * * * [a] measure of chaos * * *. 
No state court had recognized as a judicial responsibility settlement of the issue of the locus of state governmental authority. Indeed, the courts of Rhode Island had in several cases held that “it rested with the political power to decide whether the charter government had been displaced or not,” and that that department had acknowledged no change.

Since “the question relates, altogether, to the constitution and laws of [the] State,” the courts of the United States had to follow the state courts’ decisions unless there was a federal constitutional ground for overturning them.

* * * [There were] textual and practical reasons for concluding that, if any department of the United States was empowered by the Guaranty Clause to resolve the issue, it was not the judiciary. * * * [For example, Art. I, § 5, ¶ 1 of the Constitution explicitly commits to the discretion of the respective Houses of Congress whom to seat as a state’s legitimate representatives and senators. Moreover, a statute passed by Congress in 1795, enacted pursuant to the Guaranty Clause, authorized the President, upon the request of the state legislature or governor, to call out the militia in the event of an insurrection or rebellion. Here, the President had in fact responded to a call from the incumbent governor of the state to call up the militia.]

Clearly, several factors were thought by the Court in Luther to make the question there “political”: the commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive’s decision; and the lack of criteria by which a court could determine which form of government was republican.

But the only significance that Luther could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State’s lawful government. The Court has since refused to resort to the Guaranty Clause—which alone had been invoked for the purpose—as the source of a constitutional standard for invalidating state action. * * *

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 the appellants, 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. * * *

We conclude that the complaint’s allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are 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.

The question is the extent to which a State may weight one person’s vote more heavily than it does another’s.

***

Race, color, or previous condition of servitude is an impermissible standard by reason of the Fifteenth Amendment. * * *

Sex is another impermissible standard by reason of the Nineteenth Amendment.

There is a third barrier to a State’s freedom in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment, the provision invoked here. And so the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another?

The traditional test under the Equal Protection Clause has been whether a State has made “an invidious discrimination,” as it does when it selects “a particular race or nationality for oppressive treatment.” See Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113 (1942). Universal equality is not the test; there is room for weighting. As we stated in Williamson v. Lee Optical Co., 348 U.S. 483, 489, 75 S.Ct. 461, 465 (1955), “The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.”

I agree with my Brother CLARK that if the allegations in the complaint can be sustained a case for relief is established. We are told that a single vote in Moore County, Tennessee, is worth 19 votes in Hamilton County, that one vote in Stewart or in Chester County is worth nearly eight times a single vote in Shelby or Knox County. The opportunity to prove that an “invidious discrimination” exists should therefore be given the appellants.

***

Mr. Justice CLARK, concurring.

***

Although I find the Tennessee apportionment statute offends the Equal Protection Clause, I would not consider intervention by this Court into so delicate a field if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no “practical opportunities for exerting their political weight at the polls” to correct the existing “invidious discrimination.” Tennessee has no initiative and referendum. I have searched diligently for other “practical opportunities” present under the law. I find none other than through the federal courts. The majority of the voters have been caught up in a legislative straight jacket. Tennessee has an “informed, civically militant electorate” and “an aroused popular conscience,” but it does not sear “the conscience of the people’s representatives.” This is because the legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented. The people have been rebuffed at the hands of the Assembly; they have tried the constitutional convention route, but since the call must originate in the Assembly it, too, has been fruitless. They have tried Tennessee courts with the same result and Governors have fought the tide only to flounder. It is said that there is recourse in Congress and perhaps that may be, but from a practical standpoint this is without substance. To date Congress has never undertaken such a task in any State. We therefore must conclude that the people of Tennessee are stymied and without judicial intervention will be saddled with the present discrimination in the affairs of their state government. * * *

***

Mr. Justice STEWART, concurring.

The separate writings of my dissenting and concurring Brothers stray so far from the subject of today’s decision as to convey, I think, a distressingly inaccurate impression of what the Court decides. For that reason, I think it appropriate, in joining the opinion of the Court, to emphasize in a few words what the opinion does and does not say.

The Court today decides three things and no more: “(a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon
which appellants would be entitled to appropriate relief; and (c) *** that the appellants have standing to challenge the Tennessee apportionment statutes.” ***

Mr. Justice FRANKFURTER, whom Mr. Justice HARLAN joins, dissenting.

The Court today reverses a uniform course of decision established by a dozen cases, including one by which the very claim now sustained was unanimously rejected only five years ago. 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. The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

A hypothetical claim resting on abstract assumptions is now for the first time made the basis for affording illusory relief for a particular evil even though it foreshadows deeper and more pervasive difficulties in consequence. The claim is hypothetical and the assumptions are abstract because the Court does not vouchsafe the lower courts—state and federal—guidelines for formulating specific, definite, wholly unprecedented remedies for the inevitable litigations that today’s unbrave dispositions is bound to stimulate in connection with politically motivated reapportionments in so many States. In such a setting, to promulgate jurisdiction in the abstract is meaningless. ***

[I]t conveys no intimation what relief, if any, a District Court is capable of affording that would not invite legislatures to play ducks and drakes with the judiciary. For this Court to direct the District Court to enforce a claim to which the Court has over the years consistently found itself required to deny legal enforcement and at the same time to find it necessary to withhold any guidance to the lower court how to enforce this turnabout, new legal claim, manifests an odd—indeed an esoteric—conception of judicial propriety. * * * Even assuming the indispensable intellectual disinterestedness on the part of judges in such matters, they do not have accepted legal standards or criteria or even reliable analogies to draw upon for making judicial judgments. To charge courts with the task of accommodating the incommensurable factors of policy that underlie these mathematical puzzles is to attribute, however flatteringly, omniscience to judges. * * *

Recent legislation, creating a district appropriately described as “an atrocity of ingenuity,” is not unique. Considering the gross inequality among legislative electoral units within almost every State, the Court naturally shrinks from asserting that in districting at least substantial equality is a constitutional requirement enforceable by courts. Room continues to be allowed for weighting. This of course implies that geography, economics, urban-rural conflict, and all the other non-legal factors which have throughout our history entered into political districting are to some extent not to be ruled out in the undefined vista now opened up by review in the federal courts of state reapportionments. To some extent—aye, there’s the rub. In effect, today’s
decision empowers the courts of the country to devise what should constitute the proper composition of the legislatures of the fifty States. If state courts should for one reason or another find themselves unable to discharge this task, the duty of doing so is put on the federal courts or on this Court, if State views do not satisfy this Court’s notion of what is proper districting.

We were soothingly told at the bar of this Court that we need not worry about the kind of remedy a court could effectively fashion once the abstract constitutional right to have courts pass on a state-wide system of electoral districting is recognized as a matter of judicial rhetoric, because legislatures would heed the Court’s admonition. This is not only a euphoric hope. It implies a sorry confession of judicial impotence in place of a frank acknowledgment that there is not under our Constitution a judicial remedy for every political mischief, for every undesirable exercise of legislative power. The Framers carefully and with deliberate forethought refused so to enthrone the judiciary. In this situation, as in others of like nature, appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people’s representatives. In any event there is nothing judicially more unseemly nor more self-defeating than for this Court to make in terrorem pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope.

The present case involves all of the elements that have made the Guarantee Clause cases non-justiciable. It is, in effect, a Guarantee Clause claim masquerading under a different label. But it cannot make the case more fit for judicial action that appellants invoke the Fourteenth Amendment rather than Art. IV, § 4, where, in fact, the gist of their complaint is the same—unless it can be found that the Fourteenth Amendment speaks with greater particularity to their situation. Where judicial competence is wanting, it cannot be created by invoking one clause of the Constitution rather than another.

***

*** Appellants invoke the right to vote and to have their votes counted. But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state councils. Their complaint is simply that the representatives are not sufficiently numerous or powerful—in short, that Tennessee has adopted a basis of representation with which they are dissatisfied. Talk of “debasement” or “dilution” is circular talk. One cannot speak of “debasement” or “dilution” of the value of a vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court in this case is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate frame of government for the State of Tennessee and thereby for all the States of the Union.

In such a matter, abstract analogies which ignore the facts of history deal in unrealties; they betray reason. This is not a case in which a State has, through a device however oblique and sophisticated, denied Negroes or Jews or redheaded persons a vote, or given them only a third or a sixth of a vote. *** Appellants seek to make equal weight [of] every voter’s vote [the] standard by reference to which the reasonableness of apportionment plans may be judged.

To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the Constitution.
The third kind of political question the Court has sought to avoid involves considerations of what might be called “prudence.” Such controversies present the real prospect of dragging the Court into highly controversial situations, the resolution of which would openly implicate the Justices in calculations of a directly political—and, at worst, partisan—nature. Although the Court chose to resolve the following dispute in Bush v. Gore on the ground that it involved the denial of an important constitutional right, the right to vote and to have one’s vote counted equally, Justice Breyer’s dissent (p. 69) makes it abundantly clear why this controversy might well be considered a classic example of the third type of political question. The political fallout from the Court’s decision, many observers thought, confirmed the wisdom of Justice Frankfurter’s admonition in Baker that the Court avoid propelling itself into “th[e] political thicket.” Acutely conscious that the Court’s power “ultimately rests on sustained public confidence in its moral sanction,” he argued that such esteem “must be nourished by the Court’s complete detachment, in fact and appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.” The Court’s bare-majority decision in the dispute over the disposition of Florida’s electoral votes, which proved decisive in determining the winner of the 2000 presidential election, gave Justice Frankfurter’s warning fresh relevance and led some to say that George W. Bush had not been “elected” but “selected” President.

**Bush v. Gore**

Supreme Court of the United States, 2000

531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388

**BACKGROUND & FACTS** Although Vice President Al Gore out-pollled Governor George Bush by 540,000 popular votes nationally, the presidential election of 2000 was decided by Bush’s majority in the Electoral College of 271 votes to Gore’s 266. Florida’s 25 electoral votes—the decisive factor in Bush’s selection as President—eventually went to the governor by a margin of 537 popular votes. Because Bush’s initial margin of victory was 1,784—less than half a percent of the total vote cast—an automatic machine recount was required under Florida election law. After this recount showed Bush still leading but by a markedly reduced margin, Gore sought a hand-recount in four Florida counties. A dispute then arose about the deadline for local county canvassing boards to submit returns to the Florida Secretary of State so that a winner of Florida’s electoral votes could be certified. After the Secretary of State, a Republican, refused to extend the deadline imposed by statute, the Gore forces won an extension from the Florida Supreme Court. The U.S. Supreme Court vacated the extension in Bush v. Palm Beach County Canvassing Board, 531 U.S. 70, 121 S.Ct. 471 (2000), saying that it did not understand on what grounds it had been granted, and remanded the case. On remand, the state supreme court reinstated the extended deadline. On that day, the Florida Elections Canvassing Commission subsequently certified the results of the election and named Bush the winner of the state’s 25 electoral votes.

The next day, Gore filed a complaint under a provision of Florida election law that specified “receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election” would be grounds for a contest. In the meantime, manual recounts of ballots proceeded in several counties, which showed net gains for Gore. Hand examination of ballots during this recount
unearthed a host of problems with the punch-card ballot system: some ballots showed punches for more than one presidential candidate; some ballots showed a choice of one candidate had been made, but the part to be punched-out (the chad) was still hanging from the card; and still other punch cards showed an indentation, but the punch had not removed the chad at all. In all these instances, the tabulating machines had not recorded any vote for President. The first of these circumstances constituted what were called “overvotes”; the second and third of these situations resulted in what were termed “undervotes.”

A state circuit court denied Gore relief, but this judgment was overturned by a 4–3 vote of the Florida Supreme Court. Although the state supreme court rejected Gore’s challenge to votes from two counties, it upheld his challenge to a decision by election officials in Miami-Dade County refusing to manually count 9,000 votes there on which the machines had failed to detect a vote for President. The supreme court directed that they count every “legal vote,” defined as “one in which there is a ‘clear indication of the intent of the voter.’” The state supreme court went on to so direct all other counties that had not yet manually counted and tabulated “undervotes.” Finally, the court directed that additional votes from manual recounts in two counties be included in the state totals, to the benefit of Gore. Bush then petitioned the U.S. Supreme Court for certiorari.

PER CURIAM.

***

[We find a violation of the Equal Protection Clause.***

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, § 1. ***[T]he state legislature may, if it chooses, select the electors itself *** [or provide that its] citizens themselves vote for Presidential electors. When the state legislature vests the right to vote for President in its people, the right to vote *** is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. ***

*** Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another. ***

*** The question before us *** is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.

Much of the controversy seems to revolve around ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, have not been perforated with sufficient precision for a machine to count them. In some cases a piece of the card—a chad—is hanging, say by two corners. In other cases there is no separation at all, just an indentation.

The Florida Supreme Court has ordered that the intent of the voter be discerned from such ballots. *** The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right. Florida’s basic command for the count of legally cast votes is to consider the “intent of the voter.” *** The problem *** [is] the absence of specific standards to ensure its equal application.***

[The question is *** how to interpret the marks or holes or scratches on *** a piece of cardboard or paper which *** might not have registered as a vote during
the machine count. * * * The search for intent can be confined by specific rules designed to ensure uniform treatment.

The want of those rules here has led to unequal evaluation of ballots in various respects. * * * [T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.

* * *

* * * Broward County used a more forgiving standard than Palm Beach County, and uncovered almost three times as many new votes, a result markedly disproportionate to the difference in population between the counties.

In addition, the recounts in these * * * counties were not limited to so-called under-votes but extended to all of the ballots. The distinction has real consequences. A manual recount of all ballots identifies not only those ballots which show no vote but also those which contain more than one, the so-called overvotes. Neither category will be counted by the machine. This is not a trivial concern. At oral argument, respondents estimated there are as many as 110,000 overvotes statewide. As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernable by the machine, will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court's inclusion of vote counts based on these variant standards exemplifies concerns with the remedial processes that were under way.

* * *

* * * When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.

* * *

* * * It is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption * * * of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise. * * *

The Supreme Court of Florida has said that the legislature intended the State's electors to "participate[ ] fully in the federal electoral process," as provided in 3 U.S.C. § 5. * * * That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12. That date is upon us, and there is no recount procedure in place under the State Supreme Court's order that comports with minimal constitutional standards. Because it is evident that any recount seeking to meet the December 12 date will be unconstitutional for the reasons we have discussed, we reverse the judgment of the Supreme Court of Florida ordering a recount to proceed.

* * *

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice THOMAS join, concurring.

* * *

* * * Article II, § 1, cl. 2, provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct," electors for President and Vice President. (Emphasis added.) Thus, the text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.

* * *

* * * 3 U.S.C. § 5 * * * provides that the State's selection of electors "shall be
conclusive, and shall govern in the counting of the electoral votes if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the electoral college. * * * If we are to respect the legislature’s Article II powers, therefore, we must ensure that postelection state-court actions do not frustrate the legislative desire to attain the “safe harbor” provided by § 5.

** **

This inquiry does not imply a disrespect for state courts but rather a respect for the constitutionally prescribed role of state legislatures. To attach definitive weight to the pronouncement of a state court, when the very question at issue is whether the court has actually departed from the statutory meaning, would be to abdicate our responsibility to enforce the explicit requirements of Article II.

** **

* * * In light of the legislative intent identified by the Florida Supreme Court to bring Florida within the “safe harbor” provision of 3 U.S.C. § 5, the remedy prescribed by the Supreme Court of Florida cannot be deemed an “appropriate” one as of December 8. It significantly departed from the statutory framework in place on November 7, and authorized open-ended further proceedings which could not be completed by December 12, thereby preventing a final determination by that date.

For these reasons, in addition to those given in the per curiam, we would reverse.

Justice STEVENS, with whom Justice GINSBURG and Justice BREYER join, dissenting.

** **

In the interest of finality, * * * the majority effectively orders the disenfranchisement of an unknown number of voters whose ballots reveal their intent—and are therefore legal votes under state law—but were for some reason rejected by ballot-counting machines. It does so on the basis of the deadlines set forth in Title 3 of the United States Code. * * * But * * * those provisions merely provide rules of decision for Congress to follow when selecting among conflicting slates of electors. * * * They do not prohibit a State from counting what the majority concedes to be legal votes until a bona fide winner is determined. Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines. * * *

Thus, nothing prevents the majority, even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted. As the majority notes, “[a] desire for speed is not a general excuse for ignoring equal protection guarantees.” * * *

** **

What must underlie petitioners’ entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today’s decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.

Justice SOUTER, with whom Justice BREYER joins and with whom Justice STEVENS and Justice GINSBURG join with regard to * * * [part], dissenting.

** **

[N]o State is required to conform to § 5 if it cannot do that (for whatever reason); the
sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress.

***

*** I would therefore remand the case to the courts of Florida with instructions to establish uniform standards for evaluating the several types of ballots that have prompted differing treatments, to be applied within and among counties when passing on such identical ballots in any further recounting (or successive recounting) that the courts might order.

Unlike the majority, I see no warrant for this Court to assume that Florida could not possibly comply with this requirement before the date set for the meeting of electors, December 18. *** The statewide total of undervotes is about 60,000. *** To recount these manually would be a tall order, but before this Court stayed the effort to do that the courts of Florida were ready to do their best to get that job done. There is no justification for denying the State the opportunity to try to count all disputed ballots now.

***

Justice BREYER, with whom Justice STEVENS and Justice GINSBURG join *** and with whom Justice SOUTER joins as to Part I, dissenting.

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[II]

Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election.

The Constitution and federal statutes themselves make clear that restraint is appropriate. They set forth a road map of how to resolve disputes about electors, even after an election as close as this one. That road map foresees resolution of electoral disputes by state courts. See 3 U.S.C. § 5 (providing that, where a “State shall have provided, by laws enacted prior to [election day], for its final determination of any controversy or contest concerning the appointment of . . . electors . . . by judicial or other methods,” the subsequently chosen electors enter a safe harbor free from congressional challenge). But it nowhere provides for involvement by the United States Supreme Court.

To the contrary, the Twelfth Amendment commits to Congress the authority and responsibility to count electoral votes. A federal statute, the Electoral Count Act, enacted after the close 1876 Hayes-Tilden Presidential election, specifies that, after States have tried to resolve disputes
(through “judicial” or other means), Congress is the body primarily authorized to resolve remaining disputes. * * *

* * *

[T]here is no reason to believe that federal law either foresees or requires resolution of such a political issue by this Court. * * *

The decision by both the Constitution’s Framers and the 1886 Congress to minimize this Court’s role in resolving close federal presidential elections is as wise as it is clear. However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people’s will far more accurately than does an unelected Court. And the people’s will is what elections are about.

* * * Congress was fully aware of the danger that would arise should it ask judges, unarmed with appropriate legal standards, to resolve a hotly contested Presidential election contest. Just after the 1876 Presidential election, Florida, South Carolina, and Louisiana each sent two slates of electors to Washington. Without these States, Tilden, the Democrat, had 184 electoral votes, one short of the number required to win the Presidency. With those States, Hayes, his Republican opponent, would have had 185. In order to choose between the two slates of electors, Congress decided to appoint an electoral commission composed of five Senators, five Representatives, and five Supreme Court Justices. Initially the Commission was to be evenly divided between Republicans and Democrats, with Justice David Davis, an Independent, to possess the decisive vote. However, when at the last minute the Illinois Legislature elected Justice Davis to the United States Senate, the final position on the Commission was filled by Supreme Court Justice Joseph P. Bradley [a Republican].

The Commission divided along partisan lines, and the responsibility to cast the deciding vote fell to Justice Bradley. He decided to accept the votes by the Republican electors, and thereby awarded the Presidency to Hayes.

Justice Bradley immediately became the subject of vociferous attacks. * * *

For present purposes, the relevance of this history lies in the fact that the participation in the work of the electoral commission by five Justices, including Justice Bradley, did not lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process. And the Congress that later enacted the Electoral Count Act knew it.

This history may help to explain why I think it not only legally wrong, but also most unfortunate, for the Court simply to have terminated the Florida recount. Those who caution judicial restraint in resolving political disputes have described the quintessential case for that restraint as a case marked, among other things, by the “strangeness of the issue,” its “intractability to principled resolution,” its “sheer momentousness, . . . which tends to unbalance judicial judgment,” and “the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.” Bickel, [The Least Dangerous Branch (1962)] at 184. Those characteristics mark this case.

* * *

The perception that a majority of the Justices had engaged in a partisan act resulted in an erosion of public respect for the Court. The New York Times reported that only a slim majority (54%) of the public thought the Court made the right decision. A CBS News Poll released December 17, 2000, reported that only 48% of the public had “a great deal” or “quite a lot” of confidence in the Court, while 52% said they had only “some” or “very little” confidence in it. As for the outcome of the presidential election, the New York Times
reported that 50% of the respondents were satisfied and 45% were not, with Bush and Gore supporters dividing 90% of the time exactly as expected. (New York Times, Dec. 18, 2000, p. A21.)

Another setting in which political prudence counsels judicial avoidance, for reasons the Court identified in *Baker*, is the conduct of foreign affairs. Generally, dominance over this area of policy making (as Chapter 4, section C explains), has been ceded to the Executive for both constitutional and practical reasons. But occasionally challenges to an administration’s foreign policy have been raised because the prerogatives of Congress are implicated, especially those of the Senate. An excellent example is provided in the note on *Goldwater v. Carter*, which follows. That case dealt with a senator’s challenge to the termination of a treaty as a critical aspect of exercising the President’s constitutional power to normalize relations with a foreign country, in this instance the People’s Republic of China.

**NOTE—GOLDWATER V. CARTER**

A precondition to the normalization of diplomatic relations with the People’s Republic of China was the cessation of all diplomatic and official relations with Taiwan and the withdrawal of American military units there. On December 23, 1978, pursuant to a presidential directive, the State Department formally notified Taiwan that its Mutual Defense Treaty with the United States would end on January 1, 1980, under a provision of the pact allowing either of the signatories to terminate the agreement upon one year’s notice to the other party. President Carter acted on his own initiative in this matter and did not submit the notice of termination to either the Senate or Congress for approval. Eight senators, a former senator, and sixteen congressmen brought suit for declaratory and injunctive relief, challenging the President’s unilateral action.

The U.S. District Court for the District of Columbia, at 481 F.Supp. 949 (1979), held that the President acted unconstitutionally. The district court ruled that either of two procedures, absent here, were required—consent of two-thirds of the Senate or approval by a majority of Congress. The court held that unilateral action by the President could not displace some form of legislative concurrence because the termination of a treaty impacts upon the substantial role of Congress in foreign affairs. It rejected the proposition that the conduct of foreign affairs was a plenary power of the executive branch and observed that “[t]he same separation of powers principles that dictate presidential independence and control within the executive establishment preclude the President from exerting an overriding influence in the sphere of constitutional powers that is shared with the legislative branch.” Nor, reasoned the court, could the Executive’s action be regarded as merely ancillary to recognizing a foreign government. Alternatively, the court concluded that termination of the treaty amounted to a repeal of the “law of the land” and might then be thought to implicate congressional, as distinguished from just senatorial, action.

The U.S. Court of Appeals for the District of Columbia, at 617 F.2d 697 (1979), sitting en banc reversed the judgment of the district court and upheld the President’s unilateral action terminating the treaty. The court acknowledged the plaintiff legislators’ standing to sue on the theory that they had been completely disenfranchised by the President’s failure to submit the notice of termination for their approval. The appellate court, however, rejected the conclusions reached by the court below. As to the notion that the Senate’s power to ratify treaties implies a power to consent to their termination, the court pointed out that such an inferred power is clearly absent in other circumstances, as when a President terminates the services of an American ambassador. The court also rejected the proposition that the Supremacy Clause, with its reference to treaties as part of “the supreme Law of the Land,” had any bearing on this case, since the Constitution is silent on the matter of treaty termination and the clause in Article VI is addressed to assuring supremacy over state
law. In support of its ruling upholding the President’s action, the appellate court noted that, while the powers conferred on Congress in Article I are quite specific, those conferred on the President in Article II are general and do not speak to limitations on the conduct of foreign affairs. Observing that the President is the constitutional representative of the United States in foreign affairs, the court pointed out that he is given the constitutional power to enter into a treaty; and even after a treaty has obtained Senate approval, it is up to the President to decide to ratify it and to put it into effect. Article II, the court reasoned, makes it clear that the initiative in the treaty process rests with the President, not Congress. In the court’s view, the President’s authority is at its greatest when the Senate has consented to a treaty that expressly provides that it can be terminated on one year’s notice. The President’s action, concluded the court, gave that notice.

In its disposition of this case, Goldwater v. Carter, 444 U.S. 996, 100 S.Ct. 533 (1979), the Supreme Court vacated the judgment of the court of appeals and remanded the case to the district court with instructions to dismiss the complaint. Justice Rehnquist, speaking for Chief Justice Burger and Justices Stewart and Stevens, explained in an opinion concurring in the judgment that he was of the view that this case presented a “political question,” given that it involved foreign policy decisionmaking, in light of the fact that the Constitution is silent on the termination of treaties and the Senate’s role in the abrogation of treaties and since “different termination procedures may be appropriate for different treaties.”

Justice Powell rejected the proposition that this case presented a “political question,” but instead was of the view that this controversy was not ripe for review since “a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority.” He added, “If Congress, by appropriate formal action, had challenged the President’s authority to terminate the treaty with Taiwan, the resulting uncertainty could have serious consequences for our country. In that situation, it would be the duty of this Court to resolve the issue.” Justice Marshall concurred in the result. Justices White and Blackmun dissented in part, voting to set the case for argument.

Justice Brennan dissented, voting to affirm the judgment of the appellate court. He rejected the idea that the question was “political,” since, as he viewed it, the Court was asked to rule not on a foreign policy decision, but rather on the justiciable question “whether a particular branch has been constitutionally designated as the repository of political decision-making power.” Reaching the merits of the question, he concluded: “Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking government, because the defense treaty was predicated on the now-abandoned view that the Taiwan government was the only legitimate political authority in China. Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes. * * * That mandate being clear, our judicial inquiry into the treaty rupture can go no further.”

In a closely related matter, a federal appeals court, in Made in the USA Foundation v. United States, 242 F.3d 1300 (11th Cir. 2001), cert. denied, 534 U.S. 1039, 122 S.Ct. 613 (2001), refused to decide when an international agreement is a “treaty” within the meaning of the Treaty Clause of the Constitution. Several unions and a nonprofit group promoting the purchase of American-made products brought suit urging that the North American Free Trade Agreement (NAFTA) be declared unconstitutional on the grounds that it was never approved by a two-thirds majority of the United States Senate as required by the constitutional provision (Art. I, § 2, ¶ 2) governing treaty ratification. President Clinton had conducted the negotiations leading up to NAFTA under the so-called “fast-track” authority delegated to him by Congress in the Omnibus Trade and Competitiveness Act of 1988. Congress subsequently approved NAFTA on a majority vote in both houses without amendment and then passed implementing legislation. The reason for passing the trade
agreement as ordinary legislation was that NAFTA supporters could muster majority support, but not super-majority support, for the trade agreement in the Senate. Finding Goldwater “instructive, if not controlling,” the appeals court concluded that “[j]ust as the Treaty Clause fails to outline the Senate’s role in the abrogation of treaties, we find that the Treaty Clause also fails to outline the circumstances, if any, under which its procedures must be adhered to when approving international commercial agreements.” In short, “the constitutional provision at issue does not provide an identifiable textual limit on the authority granted by the Constitution.”

The Debate over Justiciability

The Court’s concern with justiciability may appear dry and technical, but, in fact, it entails a controversy over judicial involvement as important as that surrounding the exercise of judicial review on the merits of constitutional questions. It may appear odd at first glance that the Court should concern itself at all with the form in which suits are cast. But, upon further reflection, the necessity of its insistence on dealing only with justiciable matters becomes apparent. If suits were not in the proper form, the integrity of the judicial process itself would be threatened. Unless the circumstances of a dispute appear in bold relief, the Court will not be able to scrupulously observe the wise canon of adjudication that admonishes it to decide only what it has to in order to dispose of the matter. The more precise the definition of the problem at hand, the greater the Court’s ability to see the law in relation to the dispute. The more remote or conjectural the controversy, the greater the Court’s lack of confidence in speaking about the law; the more likely, too, that it will either overshoot the bounds of its proper holding (thus forcing the Court later to retract an overbroad or misleading ruling) or err entirely in disposing of a case. Indeed—to use Professor Lon Fuller’s words—insofar as the judicial process is defined “by the peculiar form of participation it accords the affected party, that of presenting proofs and arguments for a decision in his favor,” the lack of a sharply defined issue may seriously jeopardize the due process guarantee that the parties shall have their “day in court.”

Restricting the exercise of judicial power to only the most justiciable matters clearly serves the cause of judicial self-restraint, as is apparent in the following excerpt from Chief Justice Burger’s opinion for the Court in Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 222, 94 S.Ct. 2925, 2932–2933 (1974): “To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing ‘government by injunction.’” But tighter definitions of the elements of justiciability shrink—and perhaps close off entirely—the availability of the judicial process to disadvantaged individuals and groups in society. Wealthier plaintiffs can often wait until tangible and costly injury occurs to make their complaints justiciable, but, for plaintiffs of more modest means, the price of admission to the judicial process may be to risk a jail term or the loss of a job. It is the bias of this differential in what one has to put on the line to get to court that moves the judicial activist to loosen up on the requirements of case and controversy, ripeness, and standing.

The dilemma is that there are human costs in tightening the elements that make a case justiciable. The danger is that such costs may go unappreciated because they go unacknowledged. Opposition to the exercise of judicial power on the grounds that a dispute is not justiciable may sometimes mask judicial antipathy to the substantive issues raised and

thus be used—in the words of Justice Brennan—to “slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits.” Barlow v. Collins, 397 U.S. 159, 178, 90 S.Ct. 832, 844 (1970).

Discretionary and Ministerial Acts

Finally, it is important to recall another important constraint on the exercise of judicial power. As Chief Justice Marshall held in Marbury, discretionary acts of government officials are not examinable by the judiciary. Court orders compelling or enjoining the performance of an act by an officer of the government are applicable only to ministerial duties. A ministerial duty is one that does not set policy. Thus, when Congress writes a law that gives Social Security recipients certain benefits, it makes policy, and, in doing so, Congress is entitled to be free of judicial direction. But the Secretary of Health and Human Resources and other employees of that federal department who merely use the formula contained in the statute to cut the checks are engaged in a ministerial duty, and the government can be held liable if it does not pay individuals what Congress says they are entitled to receive. A government employee engaged in the performance of a ministerial duty is one who can say with a straight face, “I don’t make policy, I just work here.”

As defined by the Court in Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 18 L.Ed. 437 (1867), “[a] ministerial duty * * * is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law.” Delivery of a judge’s commission, the issue in Marbury, was, therefore, a ministerial act involving the Secretary of State. However, as the Court held in Mississippi v. Johnson, the President’s execution of a law passed by Congress—in that case, the Reconstruction Acts—was a discretionary act and thus not susceptible to an injunction directed at the Chief Executive. The reason was simply that the constitutional charge that the President “shall take care that the laws be faithfully executed” empowers wide latitude of political judgment, a judgment for which he (or she) is politically accountable either through the electoral process or through the process of impeachment and removal from office. Similarly, other discretionary acts, such as the President’s decision to veto a bill or not to prosecute an alleged violation of law—like Congress’s decision whether to appropriate funds—are beyond review by the courts.
CHAPTER 2

THE MODES OF CONSTITUTIONAL INTERPRETATION

Judicial review is the power of courts to pass upon the constitutionality of actions taken by any of the coordinate branches of government. Constitutional interpretation is concerned with the justification, standards, and methods by which courts exercise the power of judicial review. The exercise of judicial review is said to create a serious dilemma for the American system, which the alternative theories of constitutional interpretation—with varying degrees of success—strive to resolve.

The nature of the apparent dilemma has been succinctly summarized by former federal appellate judge Robert Bork as follows:

The problem for constitutional law always has been and always will be the resolution of what has been called the Madisonian dilemma. The United States was founded as what we now call a Madisonian system, one which allows majorities to rule in wide areas of life simply because they are majorities, but which also holds that individuals have some freedoms that must be exempt from majority control. The dilemma is that neither the majority nor the minority can be trusted to define the proper spheres of democratic authority and individual liberty. The first would court tyranny by the majority; the second, tyranny by the minority.

Over time it has come to be thought that the resolution of the Madisonian problem—the definition of majority power and minority freedom—is primarily the function of the judiciary and, most especially, the function of the Supreme Court. That understanding, which now seems a permanent feature of our political arrangements, creates the need for constitutional theory. The courts must be energetic to protect the rights of individuals, but they must also be scrupulous not to deny the majority’s legitimate right to govern. How can that be done?1


This is a greatly revised and expanded version of my “Constitutional Interpretation” originally published in Encyclopedia of the American Judicial System (1987), Ed. Robert J. Janosik, Vol. 3, pp. 972–986. To read more about the particular cases cited in this chapter, see the Table of Cases at the back of this volume.
This problem is compounded by the fact that federal judges are appointed, not elected, and that they enjoy life tenure. In a nation that emphasizes the responsiveness of officeholders to the wishes of the people as expressed through the ballot box, by what authority, then, do appointed, life-tenured judges sit in judgment on the validity of policies enacted by democratically elected officeholders?

Concern over judicial review’s inconsistency with democratic institutions deepens with the recollection that nowhere does the Constitution explicitly authorize the federal judiciary to engage in any sort of constitutional review. When the Supreme Court laid claim to legitimacy of judicial review in Marbury v. Madison, 5 U.S. (1 Cr.) 137, 2 L.Ed. 60 (1803), the reasons it offered had to go beyond the text of the Constitution. Although British, colonial, and state courts had occasionally asserted the power of judicial review and the Supreme Court itself apparently had assumed such a power to lie within its grasp even before 1803, the Court’s disposition of Marbury is regarded as both its first and its most authoritative statement justifying this seemingly extraconstitutional practice. Because the traditional argument in support of judicial review, as presented in Marbury and as supplemented by the writings of later proponents, has long been thought to be fatally defective in certain important respects, the controversy surrounding judicial review continues unabated.

The various modes of constitutional interpretation are concerned not only with addressing how the practice of judicial review is to be harmonized with democratic institutions, but also with the standard courts should use to determine whether a given legislative, executive, administrative, or judicial action contravenes the Constitution. The debate over constitutional interpretation, in short, is carried on through several alternative modes of judicial review that address the logical interconnection among three elements: the justification for the review power, the standard of constitutionality to be applied by the courts, and the method by which judges support the conclusion that a given governmental action does or does not violate the Constitution.

**The Traditional Theory of Judicial Review:**

**Constitutional Absolutism or Interpretivism**

It makes sense to begin consideration of constitutional interpretation with the theory articulated by Chief Justice Marshall in Marbury, not only because it is the oldest mode of interpretation but also because it is the view many, if not most, Americans hold. In the discussion that follows, strands of arguments advanced by Justice Hugo Black—surely the member of the Court in modern times to embrace most completely all aspects of this approach—are woven together with those of Marshall to lend clarity and coherence to its presentation.

Interpretivism or constitutional absolutism rests on the premise that there is no necessary inconsistency between the practice of judicial review and the principles of democratic government because the American system is a constitutional system, not a parliamentary system. A parliamentary system, such as Great Britain’s, is one in which the acts passed by the national legislature occupy an equal footing with the other documents that comprise Britain’s unwritten constitution. The legal equivalency shared by acts of Parliament and ancient documents like Magna Carta (1215) and the Bill of Rights (1689) make Parliament supreme, since the legislature can change the constitution at will. Judicial review would be out of place in such a system because it would contradict the deference that is constitutionally due Parliament. Ours, however, is a constitutional system, which means that the Constitution, not the legislature, is supreme. The Constitution limits all officers in all branches at all levels of government. The Supremacy Clause (Art. VI, ¶ 2) says so.

The connection between constitutional supremacy and judicial review requires two important arguments and several key assumptions. The first critical assumption is that the Constitution is a

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2. See his collected lectures, A Constitutional Faith (1968); see also Tinsley E. Yarbrough, Mr. Justice Black and His Critics (1988).
collection of rules. The assertion that ours is a constitutional system merely makes the point that the rules contained in the Constitution are to be regarded as supreme. When Congress passes a bill and that bill is duly approved by the President (or his veto of it is overridden), the law that results also contains rules. In a constitutional system, it is imperative that we distinguish between these two sets of rules. The rules contained in the Constitution are superior; the rules embodied in legislation are inferior. In the event that legislation passed by Congress conflicts with the Constitution, the inferior rules must give way to the superior ones. The provisions of the Constitution must prevail over legislation enacted by Congress because “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land * * *.” But this simply establishes that there must be some kind of constitutional review, not that there must be judicial review.

Chief Justice Marshall’s second line of argument in *Marbury* seeks to address why this constitutional determination is the function of courts, particularly the Supreme Court. This argument is drawn from Article III’s vesting of the judicial power of the United States in the federal courts. Judicial power is the power to decide real cases and controversies, which requires that judges apply rules to facts in order to decide cases. Where the facts of a case call into play two contradictory rules, the judge must first decide which is the valid rule before he or she can apply it. Thus, to use Marshall’s words in *Marbury*, “It is emphatically, the province of the judicial department, to say what the law is.” As the Supremacy Clause also makes undeniably clear, when a collision occurs between a constitutional rule and a statutory one, judges are duty-bound to respect the Constitution. Judicial review is, therefore, made to appear simply as the logical consequence of exercising judicial power. This line of argument appears to effectively sidestep the serious problem posed at the outset by adopting the position that the democratic quality of the American system is limited by its constitutional character.

In order for the Constitution itself to be supreme, the traditional theory of constitutional interpretation requires some additional stipulations. The most important of these assumptions characterizes the relationship of judges to the constitutional rule that they are applying. It is the relevant text of the Constitution that provides the standards for evaluating rules laid down by Congress and the President or others. The standard for assessing constitutionality, in other words, must be the text of the Constitution, not what the judges would prefer the Constitution to mean. Constitutional supremacy necessarily assumes that a superior rule is what the Constitution says it is, not what the judges prefer it to be. For constitutional absolutists, judicial review must be something akin to a ministerial, not a discretionary, act.

How, then, can an objective meaning of constitutional provisions be ascertained? The answer lies in two tools of constitutional interpretation: the “plain meaning” rule and the “intention of the Framers.” The former embodies the notion that the words of the Constitution are to be taken at face value and are to be given their “ordinary,” “accepted” meaning; the latter requires fidelity to what those who wrote or adopted the Constitution intended its provisions to mean. By relying upon these two tools, advocates of the traditional theory of constitutional interpretation seek to constrain judges to act only as faithful extensions of the document and thus give effect to constitutional supremacy.

Although Marshall’s decisions largely stressed the broad interpretation of constitutional provisions, the traditional approach to constitutional interpretation is typified by what is commonly called “strict construction.” The term “strict construction” means reading constitutional provisions literally so that government is permitted to do nothing more than what is explicitly stated in the document. Application of constitutional provisions in a literal fashion conveys the impression that constitutional interpretation is essentially a mechanical, uncreative enterprise. During the 1930s, when various Justices employed this mode of constitutional interpretation, critics caricatured it as “mechanical jurisprudence.” It is now immortalized in the following passage from Justice Roberts’s opinion for the Court in United States v. Butler, 297 U.S. 1, 62–63, 56 S.Ct. 312, 318 (1936):
There should be no misunderstanding as to the function of this court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

This posture of judicial detachment conveys a cut-and-dried, black-or-white impression about the existence of legal powers, rights, and duties. Seemingly, judges “don’t make policy”; they “just work here.”

This theory of constitutional interpretation is not without serious flaws. In the first place, the contention that provisions of the Constitution are capable of objective definition is dubious at best. Research by many political scientists (the classic works of Glendon Schubert and Harold Spaeth are illustrative) has amassed overwhelming evidence that demonstrates that the different political attitudes and values of judges are closely related to their voting behavior in cases where they disagree.\(^3\) That judicial decisions are correlated with political attitudes can be readily confirmed by observing as you read the cases in this volume how judicial creation or application of a constitutional doctrine changes with the political composition of the Court. Such evidence clearly supports the conclusion that judges do not decide controversial cases “objectively” and effectively refutes the pretension that adjudication is a mechanical enterprise.

Nor is it very likely that the interpretive tools of absolutism can assure objectivity. The plain meaning rule falls short because many words have more than one meaning, because reading is more than stringing together the standard meanings of words that make up a sentence, because the manner in which something is said may be much more important in conveying its meaning than the substance of what is said, and because the meaning of a word or phrase may only become apparent when considered in light of a paragraph, a whole page, or an entire document.\(^4\)

As a surefire guide, the intention of the Framers does not fare much better.\(^5\) The Framers, of course, were distinct individuals, who doubtless had strong opinions on many things and who quite often were probably forced to settle for less than they wanted. It is, therefore, highly unlikely that any of the products of their constitutional compromises could accurately be attributed to some single-minded purpose. It is also not obvious just

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who should be counted as a Framer. Should the term include everyone involved in the process of adopting the Constitution, just those who actually voted on ratification plus those who proposed the Constitution, or just those actually at the Constitutional Convention? The larger the group defined as Framers, the spottier the body of historical evidence. And what about those who spoke or wrote little? Should we assume they agreed with others who left a more extensive record of their intentions behind?

Relying upon the intention of the Framers also affords scant protection against judges who settle upon a desired result in a case and then rummage through history until they find a Framer who agrees with them. There is, in other words, no insurance against judges who play the game of “pick your Framer.”

The attractiveness of the Framers’ intentions as an interpretive tool is often based on the tacit premise that fashioning a constitution is a truly historic event in the life of any political system—a unique opportunity to achieve justice by adopting rules that have the greatest prospect of being fair to all because they were agreed to before the game began and thus before anyone could know exactly how their interests would ultimately fare in the political process. So, it is argued, the intentions of those who wrote the rules are due special respect. However, since so many groups and interests were omitted from the framing of the Constitution—minorities, women, and the working class come readily to mind—what special claims to fairness do the rules adopted by an all-white, all-male, all-comfortable group of Framers, now long dead, have upon us? These are questions for which answers are sorely needed.

As Ronald Dworkin has shown, the assumption that law is a system of rules—some superior, some inferior—is also inaccurate. The depiction of constitutional provisions as superior rules was critical to the characterization of the judicial process as simply the application of rules to facts in deciding cases. But not all constitutional provisions can be accurately described as rules. While some provisions are rules, such as that specifying that a representative’s term shall be two years, or that each state shall have two senators, or that the President shall be at least 35 years old; other provisions of the Constitution are not, and they are the ones we argue about. The constitutional guarantees—that no person shall be deprived of life, liberty, or property without due process of law, or that no person shall be subjected to cruel or unusual punishment, or that private property shall not be taken for public use without just compensation—are principles, not rules.

The difference between principles and rules, as Dworkin has pointed out, is significant and has important consequences for the arguments of the constitutional absolutists. A rule has one of two conceivable relationships to a set of facts: Either the facts fall within the rule, in which case the consequence specified by the rule must be accepted, or the facts have no relationship to the rule, in which case the rule is irrelevant. Thus, Dworkin concludes, rules have an absolute, black-or-white, either-or quality.

Principles, on the other hand, are distinguished both by their generality and by the fact that they apply on a more-or-less basis, not an either-or basis. This is because principles embody concepts. They are ambiguous with respect to a set of facts unless the concept is more particularly defined. We cannot move from the generality of a concept to its consequences for a set of facts without some intervening standard. This want is supplied by adopting a particular conception of the idea stated by a constitutional principle. To ask whether the death penalty violates the Eighth Amendment’s prohibition on cruel and unusual punishments requires a specific conception of what is meant by cruelty. Does the proscription on inflicting cruelty ban the imposition of certain punishments per se or the manner in which any given punishment is to be carried out (requiring that suffering be

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minimized, perhaps), or does it require that a sense of proportion be maintained between the offense and its legal consequence so that “the punishment should fit the crime”? Does the Eighth Amendment require only one or some combination of these? Likewise, when the Fourteenth Amendment guarantees “equal protection of the laws,” which conception of equality must be adhered to: equality of opportunity, equality of result, or some other version? If due process is defined as the completion of certain procedural steps before a person can be deprived of life, liberty, or property by government, how many and which steps are required? Would all the requisites of a trial-type hearing be required in every instance where a deprivation is imposed: suspension or expulsion from a public school, revocation of a driver’s license, denial of an application for food stamps? If the principle underlying due process is fairness, would the same conception of fairness be appropriate in every instance?

Principles, therefore, are distinguished by the degree of their relevance in a case, and it is the particular conceptions of these principles that judges adopt that are used to measure the facts in a given case. Principles afford judges far greater latitude in interpretation because the question is one of how much process is due or what degree of equality the Constitution requires. The doctrines created by judges embody the specific conceptions that are necessary to give meaning to the principles in constitutional provisions. The clear-and-present-danger test, the original-package rule, the doctrine of separate-but-equal are but a few of the thousands of doctrines that together make up constitutional law. Those doctrines cannot be found in the Constitution; they are created by judges. So, the study of constitutional law is essentially the study of doctrines created by the Court because the Justices must construct doctrines to give specific meaning to the otherwise general principles contained in the Constitution. This is what Chief Justice Hughes was referring to when he declared that “the Constitution is what the judges say it is.” Recognizing that the Constitution contains principles as well as rules, therefore, means that the reality of interpretive freedom must be accepted and addressed. Absolutism does not accept this or appears to accept it only insofar as judges adopt the Framers’ conceptions or those of the common law. But this does little but return us to the difficulties just identified in dealing with the Framers’ intentions.

The cumulative impact of these criticisms is lethal for constitutional absolutism,7 at least in anything like its traditional form, since the cornerstone of the theory is the unstated, but crucial, assumption that judges do not exercise discretion. It was the implicit denial that judges have important matters of choice in interpretation that permitted the absolutists to assert that the Constitution itself was supreme—that the judges are merely a conduit through which the document speaks. But the constitution is an inanimate object and cannot speak, the instruments for divining its “objective” meaning have now largely been discredited, and the most important provisions of the Constitution declare principles, not rules. Although Dworkin would deny that this entitles judges to exercise discretion in applying the principles of the Constitution,8 that is, practically speaking, exactly what empirical research in political science suggests. That principles necessarily require interpretive discretion and that the exercise of discretion is substantially influenced by political values are things Presidents have intuitively understood when they have selected their nominees for seats on the federal courts, particularly the Supreme Court, or else why

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7. A view strongly to the contrary is explained and vigorously defended in Antonin Scalia, A Matter of Interpretation (1997). Justice Scalia mounts a strong defense of textualism (that is, relying on the words of the Constitution) but is very critical of those who invoke the intentions of the Constitution’s Framers. His essay is published together with the reactions of four scholars (two of whom are tough critics) and Justice Scalia’s response.

go to the trouble—as Ronald Reagan and others did—to ask prospective nominees to disclose their position on abortion and other issues?

It is, therefore, quite inaccurate to imply, as Chief Justice Marshall did in Marbury, that the power of judicial review is justified because the judge confronts an immutable collision between an inferior rule and a superior one. In light of these criticisms, the fact is surely otherwise. The collision that Chief Justice Marshall portrayed is by no means inevitable. The truth is that a law is unconstitutional not because it conflicts with the Constitution, but because it conflicts with a doctrine created by the Justices to interpret the Constitution. Collisions between statutes and the Constitution are not inevitable; they are judge-made.

The Balancing of Interests or Judicial Self-Restraint

The failure of constitutional absolutism to recognize and address the reality of judicial discretion makes it highly vulnerable. Rather than evade the dilemma, the other modes of interpretation have attempted to deal with it directly. Although the two remaining frameworks of constitutional interpretation differ significantly in their enthusiasm for judicial review, they share a candid acknowledgment that courts are political institutions—that judges, like other government officials, have a wide range of choice in the decisions they make, and, in making such choices, their values and attitudes have a substantial influence. This concession activates the asserted dilemma, for if the Justices can be said to have the last word on the constitutionality of policy and if that judgment is substantially influenced by their political values, then—to use Justice Gibson’s words—“the judiciary must be a peculiar institution.” To adequately justify the power of constitutional review, appointed, life-tenured judges must be shown to possess a unique quality—one so paramount that it transcends the importance of democratic accountability. Justice is probably the only such value. Insofar, then, as courts actively exercise the power of judicial review, they must be shown to possess a unique capacity to do justice. Failing this, the exercise of constitutional review by judges is defenseless against the simple and devastating retort, “Who elected you?”

It is an undeniable fact of life to interest balancers that courts are political institutions. Although the quaint trappings and peculiar format of the judicial process make it appear unique, in fact the act of judging is really very much like the act of legislating. Every case requires a choice between competing social interests. Even an apparently uncomplicated personal injury case in which a pedestrian sues an automobile driver involves a form of policymaking. While the litigants obviously must have a personal interest in the dispute, they also personify the competing social interests of pedestrians and drivers. To decide, as the judge might, that the defendant must compensate the injured plaintiff is to hold that pedestrians and drivers have respective rights and obligations. When applied as precedent to decide similar cases in the future, such a holding distributes benefits and burdens and, therefore, constitutes public policy. Every case, then, calls upon a judge to weigh conflicting social claims and to allocate gains and losses. This process of balancing competing social interests, influenced as it is by the values of the decision maker, demonstrates the essential similarity between judges and other government officials. In accordance with the basic tenets of democracy, judges should strive to satisfy as many of these claims as is possible, since the happiness of the many is to be preferred over the satisfaction of the few.

This interest-balancing perspective readily translates into judicial self-restraint. When the constitutionality of a law is called into question, judges in a democratic society, it is argued, are duty-bound to respect the balance among interests struck by the statute for the
logical reason that, having been passed by a majority of legislators, it presumably satisfies more rather than fewer interests. It stands to reason, then, that statutes should be assumed to be constitutional.

Does this mean that judges should renounce judicial review? If not, on what basis could judicial review be justified? The uneasy answer is to hold judicial review to the minimum. According to Justice Frankfurter, who was as great an apostle of judicial self-restraint as Justice Black was of absolutism, the Due Process Clauses of the Fifth and Fourteenth Amendments furnished the only possible justification for judicial review and provided the only relevant standard for its use. The guarantee of due process supplied a justification for the exercise of judicial review because due process, by definition, refers to the assurance of procedural fairness. The restraintists’ test of constitutionality follows directly from this, since procedural fairness in this context is a guarantee only that the statute be a rational response to the problem it seeks to address. If a statute is presumed to be constitutional, the burden of proving that a law is unconstitutional rests with the party challenging it, and that burden can be met only by showing the law in question is unreasonable—that it is arbitrary, capricious, or patently discriminatory. This constitutional standard is known as the test of reasonableness.

A judgment of reasonableness is not to be confused with an opinion about the wisdom or desirability of a law. In no sense is it a question of whether the legislative branch enacted the best policy. If one visualizes the enactment of a law as the legislature’s response to a public problem, it is usually the case that the policy selected was just one option among many. In applying the test of reasonableness, the restraintists assert, a judge must focus on the policy selected by the legislature and answer the following straightforward question: Could this policy have been selected as a reasonable response to the problem? Under no circumstances is a judge entitled to compare the policy selected by the legislature with others it might have chosen, for this would be a test not of whether the policy enacted was reasonable, but of whether it was the best policy. In a democracy, the choice as to which is the best policy is reserved for popularly elected officeholders. When the Justices engage in comparative assessments to see whether the legislative branch enacted the best policy, the Court in effect substitutes its judgment about the wisdom of policy for that of the people’s elected representatives and assumes the role of a “super-legislature.”

This description of the method used by restraintists or interest balancers in constitutional cases would not be complete without two additional observations. First, all interests are to be treated equally. Since the Fifth and Fourteenth Amendments place life, liberty, and property on the same footing—that is, none is to be denied without due process of law—the test of reasonableness is to be applied to all statutes regardless of the different kinds of interests they touch. Second, the effect of applying the lenient test of reasonableness will be to sustain the validity of virtually all statutes subjected to constitutional challenge. This result is not surprising, since lessening the mortality rate of statutes was one of the principal aims of this mode of constitutional interpretation in the first place.

Although the perpetual claim of deference to majority rule dominates the case to be made for judicial self-restraint, other grounds contribute to the persuasiveness of this theory of constitutional interpretation. For the sake of clarity, these points can be summarized under three major headings: the functioning of the democratic system, the institutional capacity of the judiciary, and political prudence. The lines of argument that follow are drawn principally, but by no means exclusively, from the writings of two celebrated proponents of self-restraint, Justice Frankfurter and Alexander Bickel, late Yale law professor and former Frankfurter law clerk. Justice Frankfurter penned two famous dissenting opinions that are widely acclaimed as particularly insightful and eloquent statements of judicial self-restraint, those in West Virginia State Board of Education v.

To be sure, the insistence on respect for majority rule—and the assertion that anything less is tantamount to sanctioning minority rule—constitutes the flagship argument of judicial self-restraint. This is bolstered, however, by a related contention about the detrimental impact that the active use of judicial review has on the capacity of the democratic system to function effectively. Large-scale reliance upon the courts for the resolution of public problems, restraintists argue, will lead in the long run to the atrophy of institutions of popular government. Political parties and legislative institutions may not actually fall into disuse and completely fade away, but there is the distinct possibility that minorities, long subjected to discrimination, may—by taking their political demands to the courts rather than to parties and legislatures—consign political parties to perpetual domination by narrow, special interests. This would have the effect of collapsing the broad-based political coalitions and popular accountability that are the lifeblood of the democratic system.9

Advocates of judicial restraint also argue that many issues are simply beyond the institutional capacity of courts to resolve. Because the adversary system limits the sort of information that is presented and because cases are decided through reasoning by analogy from precedents, the institutional attributes of courts limit the kinds of things courts can do well or even do at all. As Bickel put it:

> The judicial process is too principle-prone and principle-bound—it has to be, there is no other justification or explanation for the role it plays. It is also too remote from conditions, and deals, case by case, with too narrow a slice of reality. It is not accessible to all the varied interests that are in play in any decision of great consequence. It is, very properly, independent. It is passive. It has difficulty controlling the stages by which it approaches a problem. It rushes forward too fast, or it lags; its pace hardly ever seems just right. For all these reasons, it is, in a vast, complex, changeable society, a most unsuitable instrument for the formation of policy.10

It may be that the limited problem-solving capacity of courts is best illustrated by their inability to resolve what is called a “polycentric problem”—a tangle of interconnected issues that cannot be separated so the issues can be argued about by the affected parties one at a time within the framework of the adversary system.11 The distinctive feature of polycentric problems is that the questions comprising them can only be dealt with by addressing all of them simultaneously. The parts of our society—and particularly the sectors of our economy—have grown so interdependent that problems have increasingly assumed a polycentric form. This development does not bode well for greater reliance upon courts to solve our problems in the future.12 Furthermore, the institutional limitations of courts make them very unsuited to monitoring and supervising government policy in order to ensure long-run compliance with judicial decisions.13 And the judicial process is notoriously conservative. The most prominent characteristics of its dispute resolution—not deciding something unless it is absolutely necessary, resolving disputes on the narrowest ground,

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closely adhering to precedent—work to minimize change, so that when minorities take their demands for large-scale change to courts, any victory they gain is likely to produce much less change than they could have achieved through the application of pressure in the democratic process. It can be argued that, in the last analysis, racial desegregation came to the Old South not because courts ordered it, but because citizens initiated marches, lunch counter sit-ins, boycotts, demonstrations, and other forms of militant nonviolence.

Even if these arguments can somehow be surmounted, important considerations of political prudence remain. If the judiciary is, to use Alexander Hamilton’s phrase in Federalist No. 78, “the least dangerous” branch, it is because it is the weakest. Strictly speaking, Justice Roberts was right when he described the power of the Supreme Court as “only * * * the power of judgment.” Courts may decide things, but the power to enforce them always lies in the hands of the executive branch. Although it is likely he never actually said it, there is more than a grain of truth about the Court’s vulnerability in the angry retort attributed to Andrew Jackson, an old Indian fighter, after the decision in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832) upholding the land claims of the Cherokees, that “John Marshall has made his decision, now let him enforce it.” It was just such an awareness of the Court’s vulnerability when it comes to compliance with its decisions that moved Justice Frankfurter, during oral argument in the school desegregation cases, to observe, “Nothing could be worse from my point of view than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks.”

Justice Frankfurter’s point is simple, but effective: The Court should select occasions for exercising its power with care because the effectiveness of its decisions depends upon cooperation from the executive branch and whether people will accept its judgment. Above all, the Court should avoid putting itself in the humiliating position of announcing an important ruling and then having its command ignored.

The restraintists also counsel prudence because of the damage to the Court’s power and prestige that can result when Congress engages in political retaliation out of disagreement with the Court’s decisions. The weapons that stock Congress’s arsenal—proposing constitutional amendments, packing the Court, withdrawing some of the Court’s appellate jurisdiction, and initiating impeachment proceedings—ensure that in any war with Congress the Court will surely come out the loser. If so, then due regard for the vulnerability of its political position should lead the Justices to choose their battles wisely and conduct them carefully. Justice Frankfurter summed it up best in Baker when he warned: “The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.”

Despite the strength of these arguments, interest-balancing itself has been weighed and found wanting. A major source of difficulty lies in the restraintists’ misreading of both democratic theory and practice. To begin with, it requires either an astonishing or a willful ignorance of the workings of Congress to contend that it so superbly measures up to the majority rule criterion as to warrant all the deference the restraintists claim in the name of democracy. Many features of Congress, such as the committee system, seniority, the filibuster, plurality election and low voter turnout, and the dominance of the trustee model of representation, regularly frustrate what might uncritically be called “the popular will.”

which—while perhaps justifiable on other grounds—nevertheless flunk the restraintists’ own test of representativeness cold and “prevent the full play of the democratic process”—to use the words of Justice Frankfurter’s Barnette dissent.

But the real fallacy in the restraintists’ indictment of the Court stems from a badly flawed definition of democracy. Characterizing the Court as undemocratic because its members are not elected and, therefore, are not responsive to the popular will assumes that democracy can be defined simply as majority rule, but this is a grossly inadequate definition. Surely any concept of democracy must include recognition of those rights that make it possible for minorities to become majorities. In short, the restraintists have forgotten that minority rights are just as important a component of the democratic equation as majority rule is.16 Whether it is an undemocratic institution depends upon what the Court does. If the Court uses the power of judicial review to guarantee rights fundamental to the democratic process (freedoms of speech, press, and association, and the right to vote, for example) so that citizens can form political coalitions and influence the making of public policy, then why isn’t the Court just as “democratic” as Congress is?

Democracy is a term that describes a process by which citizens compete for the power to turn their preferences into law. It is a game of numbers that makes several important assumptions: that all votes are equal; that citizens have an equal right to participate; that the resources necessary to political competition are relatively evenly spread; and that wins and losses in the political process will be more or less evenly distributed over the populace. Different political majorities, it was expected, would rise and fall from one issue to another. Above all, the Founders supposed this to be a system that would avoid the specter of perpetual winners who make policy at the expense of perpetual losers; that is the definition of tyranny. It is a political truth too obvious to require demonstration here that women and various racial and ethnic minorities have been victimized by such pervasive discrimination that they have not enjoyed “equal” opportunity to participate in the political process. Since judicial self-restraint converts the Court into a virtual rubber stamp of Congress, chronic deference to policymaking by the legislative branch amounts to judicial complicity in exploitation. The fine impartiality with which the restraintists insist that abridgments of free speech, press, and association and other basic constitutional rights be given the same deference as is accorded legislation affecting property rights is likely to do little else than maintain the effective suppression of political grievances.

The institutional and prudential arguments that judicial self-restraint invokes are not beyond criticism either. Portraying the Court rather like a patient in delicate condition, the restraintists, rather in the manner of constitutional physicians, prescribe plenty of bed rest. But is the Court so weak? The fragile state of the Court’s political health may be more imagined than real. Restraintists never tire of asserting that the Court is a weak institution, but their endless repetition of this makes it so. Instead of husbanding judicial resources for a rare exertion, building the Court’s political muscle may depend on a regimen of more frequent exercise.17

And criticizing the Court for failure to deliver on public policy all by itself doesn’t ring true. That the Court should not involve itself with the larger problems of the day because it cannot solve them all alone is defeatist and fatalistic. The Court cannot solve problems all by itself because no institution of American government can. A system founded on principles such as the separation of powers and checks and balances necessarily requires cooperation among governing institutions; it does not permit unilateral policymaking. In such a system, the Court has a useful—indeed, indispensable—role as the legitimator of political rights and as a catalyst for those aggrieved to join together and assert their claims.

in the democratic process. Furthermore, to the extent that the Court forsakes its use of judicial review, it also fails to maintain an essential element in the system of checks and balances.

**Strict Scrutiny or the Preferred Freedoms Approach**

It was especially the problem of permanent minorities that gave rise to the brand of judicial activism with which we are familiar today. In its modern garb of strict scrutiny (known originally as the preferred freedoms approach), the active use of judicial review casts the Court as the institutional defender of the politically disadvantaged. It was not always so with judicial activism. Until the triumph of New Deal liberalism over the staunch conservatism of the Old Court in the late 1930s, the Supreme Court maintained an almost unblemished record throughout American history as the defender of the rich and powerful, something President Franklin Roosevelt's political lieutenants never tired of pointing out. There was complete agreement among FDR's appointees, who soon swarmed onto the Court, about pursuing a restraintist posture when it came to reviewing laws imposing business and economic regulation, but they broke into warring factions over whether similar deference was due legislation that directly infringed the constitutional guarantees of the First Amendment.

Because the wording of the Fifth and Fourteenth Amendments seemed to accord the interests of life, liberty, and property equal weight, as noted earlier, Justice Frankfurter and others asserted that all legislation must be judged by the same due process standard. Justices such as William O. Douglas, Frank Murphy, and Wiley Rutledge, however, argued that all constitutional rights were not equal. Embracing the premise that minority rights were absolutely essential to the democratic enterprise, these modern-day activists enthusiastically carried the implications of the argument to their natural constitutional conclusion: Since First Amendment rights and other freedoms are fundamental to the democratic process, legislation affecting their exercise is entitled to much less deference than that accorded to statutes regulating property rights and economic liberties. A democracy could still function without the vigilant protection of economic rights associated with capitalism but not without those communicative and associational freedoms that make it possible for political coalitions to form. The rights of speech, press, association, assembly, and other liberties necessary to the democratic process, they argued, constituted “preferred freedoms.”

The essential link between protecting these fundamental rights and ending the problem of permanent minorities was first alluded to by Justice Harlan Stone in his now-famous footnote 4 to an otherwise undistinguished opinion disposing of a perfectly anonymous business regulation case, United States v. Carolene Products Corp., 304 U.S. 144, 152–153, 58 S.Ct. 778, 783–784 (1938). Justice Stone mused:

> There may be narrower scope for operation of 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, which are deemed equally specific when held to be embraced within the Fourteenth. * * *

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. * * *

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, * * * or national, * * * or racial minorities * * * whether prejudice against discrete and insular minorities 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 which may call for a correspondingly more searching judicial inquiry. * * *
Although tentatively expressed, the connection is readily apparent. Precisely because the Court is not a majoritarian institution, it has a constitutional responsibility to carefully scrutinize majority-passed legislation that directly limits the exercise of those rights by which minorities could express their political demands. Given the social isolation and prejudice encountered by easily identifiable minorities, without the guarantee of these fundamental rights their participation in the political process would be effectively muted, and conditions of exploitation would be perpetuated.

Although judicial practitioners of strict scrutiny agree with the restraintists that, in the area of economic policy and other laws regulating nonfundamental rights, the standard of mere reasonableness is justified, legislation directly abridging liberties fundamental to a democratic system must clear a higher hurdle. While the Justices employing this mode of constitutional interpretation do not always proceed in this neat and orderly way, it may provide clarity to set out the standard they apply as the following tripartite test (although somewhat different words have been used from time to time):

1. Where legislation directly abridges a preferred freedom, the usual presumption of constitutionality is reversed; that is, the statute or other enactment is assumed to be unconstitutional, and this presumption can be overcome only when the government has successfully discharged its burden of proof.
2. The government must show that the exercise of the fundamental right in question constitutes “a clear and present danger” or advances “a compelling interest.”
3. The legislation must be drawn in such a way as to present a precisely tailored response to the problem and not burden basic liberties by its overbreadth; that means, the policy adopted by the government must constitute the least restrictive alternative.

As compared with the test of reasonableness, this constitutional standard in a sense does demand that governmental policy be the best—not merely a rational—alternative. If the “best” policy is defined as that which is limited to addressing the problem while maximizing the freedom remaining, it is clear that only the “best” policy can be constitutional.

Strict scrutiny also can be contrasted with judicial self-restraint in another important sense. It is readily apparent that problems of conflict between governmental power and civil liberties cannot be resolved by somehow merely maximizing satisfaction of the competing interests. To the extent that strict scrutiny can be said to “maximize” satisfactions, it does so in a much more sophisticated way than does interest-balancing. If some rights occupy a preferred position, it stands to reason that everyone is entitled to those rights before claims to nonfundamental liberties can be granted. In any conflict, then, between persons attempting to have their claims to basic rights satisfied and other citizens seeking to have less important rights extended (for example, a property owner’s right to do with his property as he wishes), the claims of the former must prevail over the claims of the latter, even if the number of individuals in the first group is significantly smaller than that in the second.

The logic of Justice Stone’s Carolene Products footnote, however, carries the activists beyond the concept of preferred freedoms. The problem of permanent minorities requires more than just applying strict scrutiny to legislation directly limiting the means by which citizen demands are conveyed to policy makers; it also sometimes requires similar

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18. Early applications of strict scrutiny refer to the requirement that government demonstrate the existence of a “clear and present danger” rather than a compelling interest. That is because this mode of interpretation got its start in free speech cases during the 1940s where the battle lines were drawn between those who sought to toughen the “clear and present danger” test that had been put forward by Justices Holmes and Brandeis and those who argued that abridgments of free speech should be judged, as limitations on other rights were judged, by the test of reasonableness. See the discussion in Chapter 11, section A.
constitutional scrutiny of the outputs of the political process. All legislation creates categories according to which rights and obligations are distributed. All legislation, therefore, necessarily discriminates. Guaranteeing equal protection of the laws means only that government may not *invidiously* discriminate. This does not mean that government is forbidden to make any distinctions in the way it treats people, but it does require that categories in law not be drawn along lines of social prejudice to the detriment of “discrete and insular minorities”—to use Justice Stone’s phrase. Legal categories drawn on the basis of race or alienage, for example, are said to constitute “suspect classifications.”

The justification for strictly scrutinizing legislation that inflicts deprivations or imposes burdens on individuals on the basis of suspect classifications can be traced directly to the problem of permanent minorities. If “discrete and insular minorities” have been denied fundamental rights and are, therefore, excluded from the democratic process, the chances of their being victimized by “unfriendly” legislation are increased, if not ensured. Until obstacles to equal access have been removed from the political process, the Court owes an equal obligation to permanent minorities to carefully scrutinize legislation that imposes burdens that single them out.

In applying strict scrutiny to legislation containing a suspect classification, the judicial activists use the same three-part constitutional standard used to judge laws infringing a preferred freedom. A statute that explicitly discriminates on the basis of race, for example, is presumed to be unconstitutional. Government bears the burden of demonstrating that it has a compelling interest for distinguishing among citizens on that basis. Finally, it must also show that no other basis for categorization in the law could serve that compelling interest as effectively.

Impressive as these arguments drawn from democratic theory and practice may be, strict scrutiny exhibits several serious shortcomings. Some of these result from the democratic process-based justification offered for judicial review. In the first place, recent judicial activists such as Justices William Brennan and Thurgood Marshall, like original advocates of preferred freedoms such as Justice Douglas, labeled “fundamental” rights that have little connection to the functioning of the democratic process. When freedoms such as the right to interstate travel and the right to privacy are also acclaimed as fundamental, the class of freedoms placed in the preferred position has outstripped the democratic-process criterion. It is, therefore, incumbent upon the activists to reformulate their justification for determining which rights are fundamental and which are not. Without adequate justification, labeling some freedoms as “preferred” smacks of subjectivity and arbitrariness, and the determination of which rights are in and which are out becomes rudderless.

The process-based justification of strict scrutiny rooted in democratic theory is not only insufficient, but also potentially objectionable. For example, to argue that the right to free speech depends upon the importance of speech to the democratic process appears to put the cart before the horse. Human happiness is the end, and democracy is a method for attaining that end, not vice versa. This misconception of democracy as an end in itself, rather than as a means to an end, has important consequences for the exercise of free speech and other important rights. Fundamental rights, after all, are rights possessed by individuals. Justifying a liberty in terms of its contribution to democracy implies that the extent to which it can be exercised depends upon its utility to others. Thus, the Court has said repeatedly that impermissible speech (such as “fighting words,” obscenity, and libel) is distinguishable from permissible speech because the former lacks “redeeming social importance” (Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304 (1957)). This appears to accept the proposition that, to justify its sufferance by the state, what you say must have some utility to the community. The notion that your right to speak depends on whether your neighbors find it useful is repressive in roughly the same sense that majoritarian interest-balancing is thought to be
repressive. It contradicts our belief that a free society is one where individuals are ends in themselves and not merely means to an end. Citizens are entitled to constitutional rights for the simple reason that they are persons, not that they are members of a social group.

Strict scrutiny also does not take account of two important practical difficulties. One of these asks what we are to do when two fundamental liberties collide, as when someone’s free speech conflicts with another’s right to privacy or when freedom of the press seems incompatible with guaranteeing the fair trial of a criminal defendant. Strict scrutiny can guide our judgment when it is a matter of governmental regulatory power versus the exercise of civil liberties, but what are we to do when a dispute pits one preferred freedom against another? Nor is this a difficulty peculiar to strict scrutiny; it is one that also plagues constitutional absolutism, since the collision of two absolute rights also requires some rule of choice—something the text of the Constitution does not provide.

Finally, there remains the fact that the Court is politically vulnerable. Repeatedly invoking strict scrutiny will necessarily turn the Court into the representer of society’s underdogs. This invites efforts by a majoritarian Congress to curb the Court. Even if it is conceded that there are a number of permanent minorities, it does not follow that gathering all of them together will produce a viable political base from which the Court can hope to withstand the attack. The permanent minorities, after all, are “discrete and insular” principally in relationship to white, middle-class society. Permanent minorities often share overlapping characteristics: African-Americans and Hispanics, for example, count very heavily among another minority, the poor. So when one combines minorities, the increment gained by adding another group is offset by the fact that many of those individuals have already been counted. Then, too, there is the obvious point that, even if adding the minorities together does create a majority, they are politically disadvantaged and powerless, which is why the judicial activists involved the Court on their behalf in the first place. And the appearance of showing perpetual favoritism to the permanent minorities may well jeopardize broad-based public respect for the Court as an even-handed and principled institution. Injudicious and unrestrained applications of strict scrutiny invite political campaigns against the Court from politicians anxious to curry favor with the middle of American society.

The Court in American History: Judicial Values and Constitutional Interpretation

Because the modes of constitutional interpretation can only be discerned from the opinions the Justices write, at best they are but frameworks for the justification of decisions. Opinions, of course, cannot explain how a decision was reached, much less account for all the factors that influenced it, such as the interaction with other Justices, the indirect effect of public opinion, the impact of current events, and subtle pressures indirectly exerted by the President and members of Congress. But by far the most important factor in explaining judicial decisions, as political science research has demonstrated over and over again, is a judge’s political attitudes and values. This was what Charles Evans Hughes was implicitly referring to when he asserted that “the Constitution is what the judges say it is.” The modes of interpretation essentially embody statements about the role of a judge, but what role a particular Justice selects depends substantially upon his attitudes and values not only with respect to specific public policies but also certain conceptions of justice. These factors interact to produce decisions at particular points in time, so historical context is relevant to forming any impressions about how Justices as individuals behave and how the Court as an institution operates.
This is not surprising, since many Justices have had previous experience in public office and it would be difficult to hold office without developing opinions on the political issues of the day. The fact that the office seeks the individual, rather than the other way around, underscores the accuracy of Hughes’ characterization. Indeed, appreciating that their appointments to the Court are a legacy that may endure for decades to come, most Presidents take care to choose judges that reflect their values. By and large, most Presidents are reasonably successful in the judicial legacy they intend to leave (and when they fail, it is most conspicuously in their first or only appointment to the Court). Because appointments to the federal judiciary are inescapably a product of politics, it would be naive indeed to expect any Justice to escape the influence of values and attitudes merely by donning a robe.

The invalidation of federal statutes by judicial review has not been a random occurrence in American history. Political forces both cause it and cure it. The negative impact of judicial review rises dramatically when the prevailing majority on the Court is of a different ideology than that controlling the Congress. In American history, this usually, but not always, occurs because there has just been a critical election that has reflected the impact of a major crisis (such as the outbreak of the Civil War or the onset of the Great Depression). In such an election—sometimes referred to as a realigning election—key groups in the electorate have shifted their political allegiance with the effect of handing the reins of government to the leaders of a new political coalition, usually the former minority party. Since members of Congress and the President are elected, the political complexion of those institutions (especially the House of Representatives) will register the change far sooner than will the Court, which lags behind by about a decade. The institutional disharmony between the political values of past and present usually provokes a Court-curbing confrontation leading to threatened or actual deployment of sanctions against the Court and, ultimately, to judicial retreat. This pattern has cycled through American history, creating several clearly recognizable Court eras.

Despite the appearance of Supreme Court Justices as being somehow above it all and the fact that the modes of interpretation deal with the Court’s activism and restraint in the abstract, the role of the Supreme Court in American history is probably best understood when the Court is seen in the context of what Samuel Lubell once called “the sun and moon theory” of American politics. Although the American party system has always been described as two-party-competitive, there is no denying that during long stretches of American history, one of the two major parties has dominated: The majority party, that is the party usually controlling the Congress and the Presidency, has been the center of the political system, setting the agenda and adopting the policies that have governed the Nation. It is within the majority party that the great issues of the day have been fought out. The minority party, occasionally electing a President (often a military hero) and sometimes controlling one house of Congress, has enjoyed only intermittent political influence. The political values that color an era of American history are painted by the majority party. The minority party, basking in the light radiated by the majority coalition, usually reflects a paler hue and normally assumes a me-too posture in campaigns, customarily arguing, not that the values and policies are wrong, but that it could do the job better. Thus, the

19. The best example is Franklin Roosevelt’s appointment of Justice William O. Douglas in 1939. Roosevelt died six years later, but Douglas served for 30 years beyond that.
20. It is reasonable to say that the Supreme Court lags a decade behind the elected branches of the government because the practical effect of giving federal judges life tenure has meant that the average Justice has served 16 years. Presidents average two appointments to the Court during a single four-year term.
Democratic Party dominated the American political system from 1801 to 1861, the Republicans from 1861 to 1933, and the Democrats again from 1933 to 1969. Since 1969, the country has been marked by a remarkable stretch of divided government, and this, like the earlier political watersheds that have marked the American party system, has had an effect on the Supreme Court as an institution and its relationships with the other branches of government.

From Jefferson to the Civil War

As explained in the background to *Marbury v. Madison* in Chapter 1, the election of 1800 was a watershed event. The defeat of John Adams by Thomas Jefferson converted the Federalists into a minority party, a status from which they never recovered (they were gone entirely by the early 1820s). The Democratic-Republicans under Jefferson and his successors held sway until Andrew Jackson emerged as a national political force in the mid-1820s and renamed the party Democratic to distinguish his followers from the National Republicans led by John Quincy Adams and Henry Clay. By 1840, the National Republicans were taken over by the Whigs who constituted the opposition to the majority-party Democrats until the Civil War. The era is usually broken into two separate periods, before and after the Era of Good Feelings that marked the administration of James Monroe. For purposes of discussing the Supreme Court, it makes more sense to break it into the periods of its two Chief Justices: John Marshall (1801–1835) and Roger B. Taney (1835–1864). Nevertheless, throughout the period, political control of the Presidency and both houses of Congress was nearly always in the hands of the Democratic-Republicans or the Democrats. For 52 of the 60 years between 1801 and 1861, unified government prevailed, that is the same party simultaneously controlled the Presidency, the Senate, and the House of Representatives.

Marshall and Taney were Justices with different visions of the country, largely reflecting the respective Presidents who appointed them, John Adams and Andrew Jackson. The constitutional doctrines employed by the Marshall Court reflected a vision of American society most famously articulated, perhaps, by Marshall's fellow Federalist, Alexander Hamilton. America, in their imagination, was to be a commercial republic with a high standard of living that resulted from the sort of economic growth produced by financial and industrial capitalism and a society whose dynamism emanated from its cities. This stood in stark contrast to Jefferson's preference for a rural society comprised mainly and, he thought, virtuously of yeoman farmers. Since the Federalists had permanently lost control of the elected branches of the federal government, advancement of the Federalist agenda fell to the Marshall Court, which devised many constitutional doctrines instrumental to furthering its vision of America.

23. Usually when the Supreme Court is referred to by its Chief Justice, this is done purely as a handy chronological cue and is not meant to connote that the particular Chief Justice exercised political control over the Court's decisions. The Marshall Court, however, was distinctive not only for its outlook on constitutional interpretation, but for the unusual persuasive power possessed by the Chief Justice himself. It was Marshall who originated the notion of an Opinion of the Court, which replaced the existing convention that each of the Justices should write separate opinions (what were called seriatim opinions; that is, opinions delivered "one after another"). Of the nearly 1,100 Opinions of the Court delivered during his 34 years as Chief Justice, Marshall wrote nearly half; during his first decade on the Court, he wrote more than four out of five. Although Federalists ceased to be appointed to the Court after 1801, Marshall converted on-coming Jeffersonian Justices to his views and maintained an intellectual hold over them until his final years. The 15 Justices who served between 1801 and 1835 cast an astonishing total of only 104 dissents; Marshall himself accounted for just eight (the fewest of all in proportion to length of service). And, for the most part, the handful of cases disposed of by seriatim opinions while Marshall was on the Court were cases in which he did not participate.
The intertwined strands in the constitutional fabric woven by the Marshall Court are each discussed elsewhere in this book. The Marshall Court did much to develop and legitimate judicial review in *Marbury v. Madison*, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816), and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 5 L.Ed. 257 (1821), because judges from the bygone Adams Administration were the only Federalists still left in power, and judicial review was the only political means available to achieve their policy goals. Doctrines of the Marshall Court favored the national government over the states because the national government was thought to provide greater stability and uniformity of policy than could the states, and these conditions were essential to the growth of commercial enterprise and economic development (see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819) and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824)). The Marshall Court also vigorously enforced the Contract Clause (see Chapter 7, section A) to vindicate creditors' rights, because investors would not put their money in business enterprises and fuel economic development if debtors could wriggle out of financial obligations. Since anti-elitist forces—politicians more sympathetic to debtor interests—were in control of many state legislatures, this only reinforced the pro-national government bias of the Marshall Court, fueled its antipathy to lenient bankruptcy laws, and led it to expand the application of the Contract Clause to prevent the states from escaping bad business deals they themselves had made with investors.

Andrew Jackson's appointment of Roger B. Taney to succeed Marshall as Chief Justice signaled the dawn of a new era. The Taney Court tended toward a much looser view of the federal system and the Marshall Court's nationalist tone was replaced by a greater tolerance of state interests and local control (see Mayor of City of New York *v.* Miln, 36 U.S. (11 Pet.) 102, 9 L.Ed. 648 (1837)). It also permitted a greater state role in the regulation of interstate commerce (*Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 13 L.Ed. 996 (1852)), a view broadly reflective of the democratic values of the Jacksonian Age: a commitment to greater popular rule and a firm belief that governmental policies should serve the broader interests of the community. A loosening of the joints in the federal system was accompanied by a receptiveness to maintaining competition in a world of small business capitalism, there being no giant corporations yet. The democratic capitalist values evident in Andrew Jackson's hostility to the National Bank, his deep distrust of the concentration of economic power in the hands of an economic elite—typified by the Bank's president, Nicholas Biddle—and his refusal to sign off on rechartering the Bank were paralleled by the Taney Court's decision in *Charles River Bridge Co. v. Warren Bridge Co.*, 36 U.S. (11 Pet.) 420, 9 L.Ed. 773 (1837). In clear disagreement with the defense of vested rights that Marshall would have mounted, the Taney Court ruled that, in the absence of an explicit statement, a contract would not be read so as to give a state-chartered corporation a monopoly.

The same Taney Court that tolerated a good deal of decentralization in the American political system when it came to economics also tolerated slavery. In what probably is still regarded as the most infamous decision in American history, *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857), the Taney Court held that slaves were not "citizens" within the meaning of the Constitution and thus could not claim any of the rights secured to citizens of the United States. Nor could the national government regulate, much less prohibit, slavery in the territories since the right to own slaves was a local property right. The *Dred Scott* decision effectively invalidated the Missouri Compromise, reopened the argument over the expansion of slavery into the territories, fueled the rise of the Republican Party, and lit the fuse that touched off the Civil War.
The Era of Republican Dominance:  
From the Civil War to the Great Depression

The election of Abraham Lincoln as President in the critical election of 1860 began an era of Republican dominance that lasted seven decades. Talking of this time-span as a whole conceals some real differences, however, and the period therefore is best broken in two at the mid-1890s.

What emerged from the war was a renewed sense of nationhood—“an indestructible Union of indestructible States”—rather than a confederation. Both literally and figuratively, reference to “the United States” changed from that of a plural noun to a singular one. People no longer said “the United States are”; instead they said “the United States is.” Unfortunately, during and in the immediate aftermath of the Civil War, the Supreme Court found the political going particularly tough. The time lag that so severely marks the institution had its effect: Holdover Democratic Justices, in combination with some of Lincoln’s moderate appointees, locked horns with the Radical Republicans in Congress. The Radicals were bent on imposing punitive policies on the South and were deaf to many claims about the violation of civil liberties during the war and after. The consequence was a full-blown version of the Court-curbing phenomenon in which Congress sawed off part of the Court’s appellate jurisdiction. The wrath of the Radicals was even more fiercely aimed at Lincoln’s successor, Andrew Johnson. Johnson was impeached for violating the Tenure of Office Act (which required Senate approval of the President’s decision to fire a department head, legislation the Court gratuitously invalidated in Myers v. United States, 272 U.S. 52, 47 S.Ct. 21 (1926)), but the President survived removal from office by a one-vote margin in the Senate. Johnson, never the diplomat and always the moderate, was also stripped of the power to make any appointments to the Court when Congress legislated a reduction in the Court’s size from 10 to eight. This meant that the next two vacancies on the Court would go unfilled. Moderation, although in short supply on Capitol Hill, was much more abundant among the electorate, who showed this at the polls by making control of Congress really competitive.

What emerged in the 1870s and 1880s was a renewed Whig version of Republicanism that promoted expansion of the country across the continent by policies that encouraged settlement and economic development and emphasized internal improvements. Governmental policies, particularly at the state level, constrained the greedier and more destructive aspects of capitalism. The Granger Laws, for example, which sought to prevent gouging by grain elevator operators and other businessmen farmers dealt with, were easily sustained (see Munn v. Illinois, 94 U.S. (4 Otto) 113, 24 L.Ed. 77 (1877); and see also The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (1873)).

The regulation of business, which the Court generally viewed with constitutional approval before the 1890s, provoked increasingly fierce judicial opposition after that because the attitudes and values of a majority of Supreme Court Justices shifted substantially to the political right. In what Mark Twain dubbed “The Gilded Age,” the turn-of-the-century Court came to be dominated by corporation lawyers partial to the interests of business and the wealthy.24 The result was a Court that used judicial review to impose on the country an approach known as Social Darwinism.25 As Chapter 7, section B explains, this vision of society, characterized by such notions as “the survival of the fittest,” embraced the principle of political economy known as laissez faire capitalism according to

which the determination of most matters in life was consigned to the free market. The role
of government was strictly limited to maintaining order, protecting private property, and
preserving the sanctity of economic rights that made possible the accumulation of wealth.

Wielding the club of judicial review wrapped in doctrines such as dual federalism and the
"liberty of contract," the Court between 1895 and 1936 repelled efforts by Congress and
state legislatures to legalize the right to join unions, require safe conditions on the job,
establish a minimum wage, limit the maximum hours employees could be made to work,
and end child labor. It took the adoption of the Sixteenth Amendment in 1913 to trump
the Court’s decision in Pollock v. Farmers’ Loan & Trust Co., 158 U.S. 601, 15 S.Ct. 912
(1895), striking down the most modest of graduated income taxes (2% on all income in
excess of $4,000 a year). In judging regulatory policies adopted by the elected branches of
government, the Court elevated economic liberties and property rights to a forbidding
constitutional plane, demanding that government clearly demonstrate some special interest
to permit their restriction. Blind to the economic exploitation of working people whose
labor made possible the economic development of the country, the Court also turned a deaf
ear both to the ever-increasing segregation of African-Americans and the political,
economic, and social subordination of women.

By the 1930s, Professor (later Judge) Henry Edgerton could write with discomforting
accuracy that the role of the Supreme Court in American history had been marked by an
almost single-minded devotion to defending the interests of the powerful and wealthy.
Speaking of the acts of Congress that the Court had declared unconstitutional up to that
point, Edgerton said: “There is not a case in the entire series which protected the ‘civil
liberties’ of freedom of speech, press, and assembly; * * * not one that protected the right to
vote; * * * not one which protected the vital interests of the working majority of the
population in organizing or in wages * * *.” On the contrary, he found the Court’s record
littered with “the Dred Scott case, which helped to entrench slavery; * * * cases which
protected the oppression of Negroes; the employers and workmen’s compensation cases,
which protected the hiring of women and children at starvation wages; the income tax case,
which prevented the shifting of tax burdens from the poor to the rich; and * * * many * * *
[other] instances in which the Court’s review * * [did] harm to common men.”

Democratic Dominance Returns: From the New Deal to the 1950s

The prolonged and widespread misery of the Great Depression brought a keen appreciation
that legal doctrines could not long survive when they squarely contradicted real-world facts.
Among the many lessons taught by the economic hardship of the 1930s were the reality
of interdependence among the sectors of the modern industrial economy and the error of
leaving people’s welfare exclusively to be determined by the free market. With a quarter of
the workforce unemployed by 1934, President Franklin Roosevelt presented an historic
agenda of recovery and reform policies that carved out for government a new role of
stewardship over the economy. In the realigning election of 1932, the American electorate
handed political control to the Democratic Party. Four years later, by a huge popular
margin, the public registered its emphatic approval of FDR’s policies, which were based on
the acceptance of positive government, that is the concept that government should do for
the people what they could not do for themselves or could not do as well. As in previous
instances where the abrupt coming to power of a new political coalition set the elected
branches at loggerheads with the judiciary, so the New Deal forces controlling
the Presidency and the Congress faced a head-on collision with the Court caught in a

(1937).
time-warp. After the Old Court repeatedly invoked constitutional doctrines now thoroughly out of popular favor to stymie the policies favored by FDR and his political allies, the President launched his controversial campaign to “pack the Court.” Although Roosevelt was unsuccessful in actually adding more Justices, his effort ultimately succeeded when the Court conducted one of its face-saving retreats (see Chapter 5, section B). As more and more vacancies occurred and the President filled them with appointees who shared his values, the Court fell solidly in line behind his economic policies and those of future Democratic administrations.

This “constitutional revolution” put an end to several things: the Court’s role as special protector of the wealthy and powerful, the Court’s use of constitutional doctrines to impose on the country its preferred view of economic policy, and the Justices’ proclivity for justifying decisions in the language of constitutional absolutism (or “mechanical jurisprudence”). When it came to reviewing statutes imposing economic regulation, the Court saw the issues through the lens of judicial self-restraint. But the constitutional revolution of the 1930s also left a legacy of disagreement: Were the Justices bound to apply judicial self-restraint to all legislation, regardless of the interest affected? Was the Court required to apply the same test of constitutionality in judging whether civil liberties were infringed as when there were claims that economic rights were violated? Roosevelt’s appointees (which by 1943 constituted eight of the nine Justices) split (evenly) over the answer.

Since the early 1940s, this controversy has been at the core of the Court’s politics. In terms of the modes of constitutional interpretation, it is reflected in the great debate among the Justices over interest-balancing, on the one hand, and strict scrutiny, on the other. At their cores, these frameworks of judicial review embrace very different concepts of justice and therefore reflect different political values and attitudes about civil rights and liberties. Generally speaking, fairly cohesive control over the Court’s constitutional decisions by advocates of strict scrutiny has been concentrated in two modern periods: 1943–1949, during which the Court did much to lay the foundation for the protection of First Amendment rights; and the years of the Warren Court (1953–1969), which saw the flowering of strict scrutiny in the protection of civil rights and liberties, both generally and in reinvigorating the meaning of “equal protection of the laws.”

The Warren Court

The vision of American society that animated most of the Warren Court’s constitutional decisions had at its center a firm belief that individuals were ends in themselves, not simply means to an end, and therefore were morally and legally entitled to equal dignity and respect. The specific conceptions of constitutional principles that the Warren Court articulated strongly reflected the values of libertarianism and equalitarianism. For the first time in American history, the Court came to see itself as the defender of out-groups in society. The means for the achievement of this liberal vision was the application of strict scrutiny to laws that directly infringed fundamental rights, or unequally distributed fundamental rights, or invidiously discriminated among citizens on the basis of suspect classifications (characteristics such as race over which people had no control, which were a basis for stereotyping, and which historically made individuals targets of prejudice). A Court committed to the protection of fundamental rights and equal treatment necessarily assumes the role of defending the powerless and unpopular because, although all citizens are equally entitled to what the law guarantees, the exercise of constitutional rights means more to powerless individuals. Since people with unpopular views often must resort to confrontational means to voice their message, this makes it more likely they will lock horns with the police or other officials, and therefore that a legal controversy will arise. If the change
in constitutional doctrines in the 1930s from absolutism to interest-balancing amounted to a “constitutional revolution,” the Warren Court’s shift to regularly applying strict scrutiny in civil rights and liberties cases created a “second constitutional revolution” in the 1950s and 1960s.27

There were flickers of this vision during the early Warren Court years (1954–1957), especially in Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954), which abandoned the “separate but equal” doctrine that perpetuated racial segregation, and other decisions in which the Court defended the First Amendment rights of individuals targeted in anti-Communist “witch hunts” of the early 1950s. These rulings provoked an unsuccessful Court-curbing campaign in 1958 by certain elements in Congress (see Chapter 3, section C) and a brief intermission in the Court’s judicial activism resulted. But with the retirement of Justice Frankfurter in 1962, the Warren Court’s commitment to its role as a defender of politically powerless out-groups in American society resumed. Among the many facets of the Warren Court’s constitutional revolution were the vigorous expansion of First Amendment rights, the application of virtually all provisions of the Bill of Rights against state infringement (see Chapter 8, section A), the reapportionment revolution (see Chapter 14, section D), the recognition of the constitutional right of privacy (Chapter 10), and the extensive development of Fourth, Fifth, and Sixth Amendment rights, including the application of adversary system protections to the pretrial stage of the criminal process (see Chapters 8 and 9).

The Justices in the Era of Divided Government:
The Burger and Rehnquist Courts

The Warren Court era ended with the retirement of the Chief Justice and the resignation of Justice Fortas under politically charged circumstances.28 This spelled substantial change for the Court because the new appointments would come from a President with political values noticeably to the right of the out-going Johnson Administration that had appointed liberal Justices such as Abe Fortas and Thurgood Marshall. Moreover, as presidential candidate in the 1968 election, Richard Nixon had made an issue of the Warren Court’s criminal justice decisions, which he characterized as “weakening the peace forces as against the criminal forces in our society.” As a self-described “judicial conservative,” Nixon pledged to nominate individuals to the Court who would “interpret the Constitution, and not * * * [go] outside the Constitution.” Nixon appealed during both his 1968 and 1972 presidential campaigns to “‘Middle America’—that broad segment of average men and women—unblack, unpoor, and unyoung—* * * [who were] h[arassed by minority and youth protest, bewildered by assassinations, frustrated by an aimless war, victimized by mounting crime, and threatened by wide-spread rioting, * * * who thought society was coming apart at its seams and * * * felt powerless to do anything about it.”29 The election of 1968 was unusual in American history because—unlike the realigning elections of 1800, 1860, 1932, and 1936—it brought an era of party dominance to an end but did not replace it with unified control by a new political coalition. In stark contrast to previous periods of American history, nearly two-thirds of the time between 1969 and 2006, political control of the national government was divided between the parties (with one party controlling the Presidency but not Congress or vice versa, or one party controlling the Presidency and one house of Congress but not the

other). Some experts on political parties have called this “dealignment,” but whatever the term used, the primary features of this era of divided government are clearly evident: polarized political party leaders frequently using harsh rhetoric sitting atop parties that are narrowly based; a disaffected electorate that feels alienated from both parties and turns out to vote less and less; a growth in third parties, political independents, and ticket-splitting; government that never starts and elections that never end; politicians preoccupied with symbolic actions rather than solving problems; a thoroughly personalized Presidency less attached than ever to the party in Congress; and televised politics of confrontation instead of informal negotiation and workable compromise. In the case of the Court, where the margin of decision has been close and the stakes high, this was reflected in a long line of bruising, demeaning, and embittering judicial confirmation battles (beginning with the Fortas Affair in 1968 and extending through the rejection of two Nixon nominees to the Court in the early 1970s, the failure to approve the nomination of Robert Bork in 1986, and the paper-thin 52–48 Senate vote to confirm Justice Clarence Thomas in 1990). In the Court’s performance, it was reflected in the proliferation of opinions that run longer and reflect less agreement than ever among the Justices. Polarization in the political system has been matched by polarization on the Court, where like-minded Justices at the extremes vote together more and more and move further and further away from those at the other end.

Beginning with Nixon’s appointment of Warren Burger to succeed Earl Warren as Chief Justice in 1969, every Supreme Court Justice but two (Justices Ginsburg and Breyer) has been named by a Republican President. In 1986, Burger was persuaded to retire and was replaced by President Reagan’s elevation of William Rehnquist to the post (he had been appointed an Associate Justice by Nixon in 1972). The themes that dominated the constitutional rulings of the Burger and Rehnquist Courts were very similar, quite definitely to the right of the Warren Court, and the Justices’ decisions grew more and more conservative. Although landmark decisions of the Warren Court (on school desegregation, reapportionment, Miranda rights, privacy, and freedoms of speech, press and association) were not overturned, they were not expanded. Mostly, they were trimmed, sometimes severely. Because of the preeminence of divided government and an apparent interest of Justices in remaining on the Court as long as humanly possible, nominees did not stream on to the Court in sufficient numbers to jettison strict scrutiny in favor of across-the-board interest-balancing in civil liberties cases. Indeed, despite repeated efforts by Republican Presidents to appoint Justices who would overturn Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, the 1973 Burger Court decision constitutionalizing a woman’s right to choice on abortion, the decision stands, although it has been pared (see Chapter 10). The result has been a redirecting of the Court’s constitutional jurisprudence toward the interests of Middle America and away from the interests of women and minorities. Evidence of this constitutional compromise or moderation is particularly evident in the emergence of what has come to be known as intermediate or middle-tier scrutiny (see Chapter 14, section E), an approach that might be described as half-way between strict scrutiny and interest-balancing. The Burger and Rehnquist Courts applied this constitutional approach to judge statutes distinguishing between individuals on the basis of gender and illegitimacy (Chapter 14, section E) and laws regulating symbolic speech (Chapter 11, section C) and advertising (Chapter 11, section E).

The Burger and Rehnquist Courts increasingly adopted a “dual federalist” view of the federal system, buttressing the decision-making independence of the states against regulatory policies

adopted by the Congress (see Chapter 5, section C). Notably, Justices on the Rehnquist Court for the most part sharpened the teeth of the Takings Clause of the Fifth Amendment by strengthening or expanding the rights of property owners to just compensation in the face of zoning regulation by the states and municipalities (see Chapter 7, section C). The Burger and Rehnquist Courts also showed far greater sensitivity to the interests of corporations and property-owners than could have been imagined by the Warren Court, especially when First Amendment issues were raised: striking down substantial campaign finance regulation on the grounds that the expenditure of money is a form of expression (Chapter 11, section D), protecting the free speech rights of corporations (Chapter 11, section D), recognizing a constitutionally protected right of commercial speech (advertising) (Chapter 11, section E), and negating any free speech right to picket on private property, such as shopping malls (Chapter 11, section B). All of this is hardly surprising, since the interests served by these constitutional developments are those of business and the wealthy, groups usually associated with the Republican Party, which has controlled the White House (and therefore nominations to the Court) for most of the last four decades. Whether these trends of the recent past deepen or are arrested under Rehnquist’s successor, Chief Justice John Roberts, depends on whether the pattern of divided government confirmed by the 2006 election continues or whether, because of the Iraq war and the many scandals that are the legacy of George W. Bush’s administration, a dramatic realignment of the political system may be underway.

**Speaking Up and Speaking More**

Highlighting political trends in the Court’s constitutional decisions of the past necessarily supposes clarity in the Court’s rulings. Regardless of the era, the Court speaks most clearly, and therefore most effectively, when it speaks with a single voice—a principle that Chief Justice Marshall took very much to heart. Even as late as the 1920s, Chief Justice Taft admonished his colleagues to abide by a rule of “No dissent unless absolutely necessary.”

Beginning, however, with the escalating disagreement among Franklin Roosevelt’s appointees over which mode of interpretation should be applied in judging the constitutionality of statutes challenged as violating a “preferred freedom,” the Justices have foregone an institutionally-oriented perspective for one that has been increasingly individualistic. Rather than minimizing the prospect of many voices speaking, the Justices have come to regard it as more important to get on the record with their own views, or to address an audience beyond the conference room, or to rebut every opposing point of view. As Exhibit 2.1 shows, conflict on the Court, as measured by the level of dissent, escalated rapidly during the 1940s and remains high. Except for a dozen of the last 80 Terms, the level of dissent in constitutional cases has been higher than statutory cases and, over the last decade, has run 15–20 percentage points higher.

The readiness to dissent has been accompanied by a shrinking output of cases, greater fragmentation among the Justices, and more frequent and longer opinions. Anyone who reads the Justices’ opinions unedited cannot fail to notice that they frequently contain long, discursive paragraphs and footnotes that have the feel of scoring debater’s points in rebutting and often re-rebutting the arguments of fellow Justices. In short, members of the Court today decide less, speak more often, and take longer to say it than at anytime in history. Exhibit 2.2 presents several measures that support these conclusions. Across the 80 Terms since the Court acquired practical control over its docket, the trend is unmistakable: With each passing Court, the Justices have averaged more opinions per constitutional case, more pages per case in the United States Reports, and—perhaps most alarmingly—more cases decided by plurality opinions. It is likely, of course, that some of the nearly four-fold increase in the average number of pages taken to dispose of a single constitutional case is
EXHIBIT 2.1 DISSENT RATES IN CONSTITUTIONAL AND NON-CONSTITUTIONAL CASES

OCTOBER 1926–2004 TERMS

Dissent Rate (%)
explained by the increasing complexity of legal questions litigated in a mature, industrially-developed nation that recognizes a larger number of individual rights than was true in Taft’s day. A society whose parts have become more and more interdependent, one that has recognized more and more freedoms, and therefore one where considerable fine-tuning is required to harmonize conflicting legal interests would logically require judicial opinions that explain more. But however true this may be, the simultaneous increase in all the measures presented in Exhibit 2.2 more clearly suggests that the Justices, influenced by sharply different values, have become much more outspoken. As with political elites in America, they have become more and more polarized. The tenor of constitutional disputes—like the rhetoric of political disputes in the country generally—has gotten sharper. It is a sobering observation, for example, that on average today more than four constitutional cases each Term will be resolved without an Opinion of the Court, that is to say by a plurality opinion. A plurality opinion is one written by a Justice in the majority that announces the judgment of the Court but whose reasoning is shared by only some, not all, of them. Because a majority of Justices can’t agree on the reasoning, a plurality opinion cannot bind the Court. Such a thing was unheard of in Taft’s day. But during the 1970, 1975, and 1988 Terms, the number of plurality opinions climbed into double digits—accounting at high tide for nearly 30% of all the Court’s nonunanimous constitutional decisions.

In sum, the trends revealed in Exhibit 2.2 present the unsettling prospect of the Justices reverting to something like the delivery of seriatim opinions. It was this practice of each Justice speaking individually that led Marshall to create the Opinion of the Court in the first place. As he well understood, the wagging of many tongues weakens the Court politically and sows confusion about what in fact it has decided. If what has gone before is any guide as to what is yet to come, betting that these trends will be arrested, now that a new Chief Justice has taken the helm, is a longshot.

**The Court and Political Accountability**

This brief tour through the eras of American political history returns us to the central problem that is said to plague constitutional interpretation: the undemocratic nature of the
Supreme Court’s role as the ultimate interpreter of the Constitution. But in this there may be less than first meets the eye. In fact, the dilemma posed at the beginning of this chapter is an embarrassment only when it comes to the justification of judicial review. However, when it comes to explaining the Court’s role in the political system, it is essentially a false dilemma. The real issue is not whether the Supreme Court is undemocratic, but for how long it is undemocratic (if indeed it is undemocratic at all, since that depends on what is meant by democratic).

To be sure, as this historical overview of the Court has shown, there have been critical points in American history where the time lag that inheres in the Court has put it politically at odds with the elected branches. But given the many weapons in Congress’s arsenal to bring the Court to heel, the fact that no one—not even Supreme Court Justices—can live forever, and the inevitability that both the President and the Senate will take into account the political attitudes of any judicial nominee, it is only a matter of time before the Court will fall in line with the popularly elected institutions of the government. Given these limitations on the duration of any disagreement between the Court and Congress, the reality would appear to be a far cry from depicting the Court as a loose cannon, laying down barrage after constitutional barrage, forever staving off the enactment of policies the American public favors. However much constitutional absolutists—such as Justice Black—may have decried it, the political reality is that the rights enunciated by the Supreme Court in the long run can never be other than what the rest of the political system will permit. Checks and balances see to that. The long and short of it, therefore, is that constitutional rights can never have an existence that is independent of politics. At worst, the exercise of judicial review postpones the inevitable.

As Gerald Rosenberg has argued, “U.S. courts can almost never be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government. Problems that are unsolvable in the political context can rarely be solved by courts.” To sum it up, “A court’s contribution * * * is akin to officially recognizing the evolving state of affairs, more like the cutting of a ribbon on a new project than its construction.”

This book is organized around the concepts and doctrines of American constitutional law instead of a chronological narrative because that is what makes the study of law different from the study of history. That the chapters do not continually repeat the central truth that the Court’s work product is largely determined by the political values and attitudes of its members, does not diminish the message that a change in the composition of the Court is usually the best clue to why judicial doctrines change. An understanding of constitutional law more often requires awareness of political facts than it does knowledge of abstractions. Nearly a century and a quarter ago, then-to-be Supreme Court Justice Oliver Wendell Holmes, Jr., wrote:

31. Political science research has not been able to demonstrate much of a relationship in general between how judges decide cases and the method (election vs. appointment) by which judges are selected. See Craig Ducat, Mikel Wyckoff, and Victor Flango, “State Judges and Federal Constitutional Rights,” 4 Research in Law and Policy Studies 155 (1995); Victor Eugene Flango and Craig R. Ducat, “What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort,” 5 The Justice System Journal 25 (1979); Philip L. Dubois, From Bench to Ballot: Judicial Elections and the Quest for Accountability (1980). But there is evidence that having to face the voters in the near future does affect a judge’s willingness to uphold imposition of the death penalty. See Melinda O. Hall, “Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study,” 49 Journal of Politics 1117 (1987). Judicial independence is less likely to provide an across-the-board guarantee of constitutional rights than it is to usefully deflect the impact of the public’s emotional reaction in the decision of individual cases.

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development and it cannot be dealt with as if it contained only axioms and corollaries of a book of mathematics. In order to show what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.

Although he was writing about the evolution of common law doctrines, Holmes could just as easily have been writing about American constitutional law.

THE ESSENCE of judicial power, discussed in Chapter 1, is the application of general rules to individual cases. The power to legislate is the power to write rules of general applicability, to design the legal categories into which courts then sort the individual claims that come before them. Although ours is “a government of separated institutions sharing powers” rather than one marked by a separation of powers,1 Congress’s principal responsibility—the only one shared equally by both of its Houses—is writing general rules. To be sure, the bodies that comprise Congress in a sense exercise judicial power when the House impeaches and the Senate tries the impeachment, and executive power when the Senate advises and consents to a presidential appointment. But the Houses of Congress are barred from exercising the core functions of other branches: Congress may not write a law that punishes a specifically identified individual (bills of attainder are explicitly prohibited by the Constitution); nor may Congress compel the Executive to initiate a criminal prosecution or enforce a law itself. Conversely, the other branches court trouble when they legislate: A Supreme Court that invalidates a law because it does not conform to the Justices’ notion of what constitutes good public policy risks being assailed as a “super-legislature”; when Congress writes a vague statute that leaves the principal design of public policy in the hands of the executive branch, its actions have been contested as an unconstitutional delegation of legislative power. That the bulk of the powers assigned to the national government appears in Article I of the Constitution—the legislative article—is convincing evidence that those who drafted the Constitution saw Congress as the architect of federal policymaking.

Qualifications of Members of Congress

The legislative powers of the national government are jointly exercised by the men and women who comprise the House of Representatives and the Senate. The Constitution specifies that to be elected a Representative an individual shall be at least 25 years of age, a

citizen of the United States for at least seven years, and a resident of the district from which he or she is elected (Art. I, § 2, cl. 2). It prescribes that a Senator must be at least 30 years of age, a citizen of the United States for at least nine years, and also reside in the state from which he or she is elected (Art. I, § 3, cl. 3). Increasingly, however, the many advantages enjoyed by incumbents have often made reelection virtually a foregone conclusion. As a result, turnover in the membership of the House and Senate has been relatively small. As voters sensed that many federal legislators had grown oblivious to their interests and views, a groundswell developed to add term limits to these qualifications by passing voter initiatives (propositions put before the voters at a general election to amend the state constitution that got on the ballot through petitions amassing enough voter signatures). By May 1995, term limits on federal legislators had been approved in nearly two dozen states and, in most of these, voters had also adopted term limits for various state legislative and executive officials.

In U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 115 S.Ct. 1842 (1995), a bare majority of the Supreme Court held that such efforts to impose congressional term limits were unconstitutional because the provisions identified previously stated “exclusive qualifications” for membership in the House and Senate. The Court relied principally on its previous ruling in Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944 (1969). In that case, the House disqualified an otherwise duly elected and eligible Representative on the basis of his prior misconduct as chairman of a House committee. The Court held that the House could not refuse to seat him, although it could expel him from office after he was sworn in. In short, the House had no “authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.” The Court rested its conclusion on both the “relevant historical materials pertaining to debates at the Constitutional Convention and the “fundamental principle of our representative democracy * * * that the people should choose whom they please to govern them.” In U.S. Term Limits, the Court pointed out that, although the Framers were well aware that rotation in office (term limits) was the practice at the time in some state legislatures, they nonetheless rejected it on the ground that it deprived the people of their fundamental right to choose whomever they wanted. Nor could term limits be justified as an exertion of the reserved powers of the states because their authority to regulate the “Times, Places and Manner of Holding Elections” did not exist before the adoption of the Constitution (and thus could not be said to have been a power retained by them). It was also inconsistent with the Framers’ clear intent “to minimize the possibility of state interference with federal elections.” The decision that qualifications for service in Congress should be fixed by the Constitution and uniform throughout the United States, said the Court, “reflects the Framers’ understanding that Members of Congress are chosen by separate constituencies, but that they become, when elected, servants of the people of the United States. They are not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government.” Nor could the states attempt to achieve their objective by ballot-labeling. Some states sought to identify primary and general election candidates who failed to voluntarily respect or support term limits by placing statements on the ballot next to their names such as “Disregarded Voters’ Instructions on Term Limits” or “Declined to Pledge to Support Term Limits.” In Cook v. Gralike, 531 U.S. 510, 121 S.Ct. 1029 (2001), the Court ruled that the use of this “Scarlet Letter,” as it came to be known, was unconstitutional for substantially the same reasons given in U.S. Term Limits. If there are to be federal term limits, then it will take a constitutional amendment to impose them.
A. THE SOURCES AND SCOPE OF CONGRESS’S POWER TO LEGISLATE

Congress’s powers to legislate do not emanate from only one source and, therefore, do not necessarily have identical scope. This section examines four different sources of national legislative power: enumerated and implied powers, amendment-enforcing powers, inherent powers, and the treaty power. Before considering them, however, it is important to note that Congress is not authorized to act simply because its ideas for legislation seem to be good ones. Although the Preamble declares that the national government was created “to promote the general Welfare” and pursue other vital objectives, this statement of broad governmental purposes “walks before” the Constitution, is of no legal effect, and does not constitute a grant of specific power. To the extent that undefined grants of legislative power exist in the American system, they are possessed by the states, not the national government. Broad legislative authority to enact policy in the areas of public health, safety, and welfare—called the “police power”—is in the hands of the states. These residual powers—also known as reserved powers—are discussed at length in Chapter 6. Suffice it to say that Congress must tether its legislation to one of the four sources of power discussed in this section, or it possesses no constitutional authority to act.

Enumerated and Implied Powers

An understanding of the parameters of Congress’s legislative power should logically begin with the 17 powers of the national government listed in Article I, section 8. It is here that Congress is given the authority to conduct the affairs of government—among them powers to print currency, provide for the instruments of national defense, regulate commerce, and tax and spend for the general welfare—without which it would indeed be difficult to think of the United States as a viable nation. These enumerated powers are enhanced by the last clause of section 8—the so-called Elastic or Necessary and Proper Clause—by which Congress is authorized “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *.” Chief Justice Marshall’s opinion in *McCulloch v. Maryland* (p. 106) is the Court’s definitive statement about the posture to be taken in the interpretation of those legislative powers. While the enumerated powers set out the functions or goals of government that the national government is authorized to pursue, the Necessary and Proper Clause authorizes the selection of specific means by which those goals may be achieved.

At issue in *McCulloch* was the power of Congress to charter the second Bank of the United States. As part of the financial plan proposed by Alexander Hamilton, the first Secretary of the Treasury, Congress passed a bill chartering the first Bank of the United States in 1791. When the legislation reached President George Washington, he asked Hamilton and Thomas Jefferson, then Secretary of State, for their written opinions on the constitutionality of the measure. Jefferson maintained that the legislation was unconstitutional because it could not be supported by a strict reading of the powers contained in Article I, section 8. Hamilton argued for the constitutionality of the national bank on the grounds that the national bank was a “necessary and proper” means to fulfill the enumerated functions the national government was authorized to perform. Washington signed the bill, and the first Bank of the United States lasted until 1811 when the Congress, dominated by Democratic-Republicans, refused to recharter it. Five years later, the traditional hostility of the Jeffersonians to the national bank weakened sufficiently in the flush of nationalism following the War of 1812 for Congress to charter the second national bank. It was the constitutional challenge to it that occasioned Chief Justice Marshall’s opinion. In his opinion, Marshall described the nature of the Union and so anchored the
constitutional posture of broad interpretation, discussed the relationship between the implied and the enumerated powers, and upheld the supremacy of the national government’s powers when they collide with the states’ reserved (police) powers. Marshall’s arguments closely paralleled the original defense of the bank mounted by Hamilton.

**McCulloch v. Maryland**

Supreme Court of the United States, 1819

17 U.S. (4 Wheat.) 316, 4 L.Ed. 579

**BACKGROUND & FACTS** In 1816, Congress enacted legislation rechartering a national bank, one branch of which was subsequently located at Baltimore. Two years later the Maryland legislature passed a statute taxing all banks operating in Maryland not chartered by the state. The act levied approximately a 2% tax on the value of all notes issued by the bank or, alternatively, a flat annual fee of $15,000, payable in advance. Provisions of the statute were backed by a $500 penalty for each violation. McCulloch, the cashier of the Baltimore branch of the U.S. bank, issued notes and refused to pay the tax. The Maryland Court of Appeals upheld his conviction under the statute. The U.S. Supreme Court voted to reverse, and Chief Justice Marshall, speaking for the Court, directed the first part of his opinion to a discussion of the scope of Congress’s powers under Article I.

**MARSHALL, Ch. J., delivered the opinion of the court:**

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The first question made in the cause is, has Congress power to incorporate a bank?  

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In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal.  

It was reported to the then existing Congress of the United States, with a request that it might “be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification.” This mode of proceeding was adopted; and by the convention, by Congress, and by the state legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is “ordained and established” in the name of the people; and is declared to be ordained, “in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.” The assent of the states, in their sovereign capacity, is implied
in calling a convention, and thus submitting that instrument to the people. * * * [T]he people were at perfect liberty to accept or reject it; and their act was final. It * * * could not be negatived, by the state governments. The constitution, when thus adopted, was of complete obligation, and bound the state sovereignties.

* * *

The government of the Union, then * * * is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, * * * is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying, “this constitution, and the laws of the United States, which shall be made in pursuance thereof,” “shall be the supreme law of the land,” and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, “anything in the constitution or laws of any state to the contrary notwithstanding.”

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word “expressly,” and declares only that the powers “not delegated to the United States, nor prohibited to the states, are reserved to the states or to the people;” thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of the word ["expressly"] in the articles of confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, * * * could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects.
themselves. * * * [W]e must never forget that it is a constitution we are expounding. Although, among the enumerated powers of government, we do not find the word “bank” or “incorporation,” we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government.

* * * [I]t may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.

* * * The constitution * * * does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed. * * *

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The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

*** The power of creating a corporation * * * is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. * * *

*** The constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning. To its enumeration of powers is added that of making “all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution, in the government of the United States, or in any department thereof.”

The counsel for the State of Maryland have urged various arguments, to prove that this clause * * * is really restrictive of the general right * * * of selecting means for executing the enumerated powers.

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The argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be “necessary and proper” for carrying them into execution. The word “necessary” is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.
Is it true that this is the sense in which the word “necessary” is always used? Does it always import an absolute physical necessity? We think it does not. We find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable.

* * * The subject [of this case] is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

* * *

Take, for example, the power “to establish post-offices and post-roads.” From this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is indeed essential to the beneficial exercise of the power, but not indispensably necessary to its existence.

* * *

[The Necessary and Proper Clause was not intended to limit Congress’s power to legislate] for the following reasons:

1st. The clause is placed among the powers of Congress, not among the limitations on those powers.

2d. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. If the intention of the Framers had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been expressed in terms resembling these. “In carrying into execution the foregoing powers, and all others,” etc., “no laws shall be passed but such as are necessary and proper.” Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

[This clause] cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties
assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

***

After the most deliberate consideration, it is the unanimous and decided opinion of this court that the act to incorporate the bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

Branches [of the national bank wherever they can advantageously be located,] * * * being conducive to the complete accomplishment of the object, are equally constitutional. * * *

It being the opinion of the court that the act incorporating the bank is constitutional, and that the power of establishing a branch in the state of Maryland might be properly exercised by the bank itself, we proceed to inquire:

2. Whether the state of Maryland may, without violating the constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the states * * * [and is to be concurrently exercised by the two governments[,] are truths which have never been denied. But, such is the paramount character of the constitution * * * [that it sometimes withdraws from the states the power to tax, as when] [t]he states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. * * * [T]he same paramount character would seem to restrain * * * a state from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. * * *

***

The constitution and the laws made in pursuance thereof are supreme; * * * they control the constitution and laws of the respective states, and cannot be controlled by them. From this, * * * other propositions are deduced as corollaries * * *. These are, 1st. that a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve. 3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

***

That the power of taxing [the bank] by the states may be exercised so as to destroy it, is too obvious to be denied. * * * [T]he sovereignty of the state * * * [in the exercise of its taxing powers] is subordinate to, and may be controlled by the constitution of the United States. How far it has been controlled by [the constitution] must be a question of construction. In making this construction, no principle not declared can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution.

***

The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution—powers conferred on that body by the people of the United States? * * * [Such] powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be
supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a state, by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the states, and safe for the Union. We are relieved * * * from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. * * *

* * *

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. * * *

* * *

If we apply the principle for which the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states.

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. This did not design to make their government dependent on the states.

* * *

The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.

We are unanimously of opinion that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

* * *

By reading McCulloch, one might easily be misled into believing that all of Congress’s legislative power in the original Constitution is contained in Article I, section 8, but this is not so. In Chapter 1, we saw that under Article III Congress has power with respect to establishing federal courts and defining the appellate jurisdiction of the Supreme Court. And Article I, section 4, to take another example, gives Congress the power to make or alter regulations respecting “[t]he Times, Places, and Manner of holding Elections for Senators and Representatives.”
Amendment-Enforcing Powers

Congress also derives legislative authority from constitutional grants of power by amendment. Beginning with the three Civil War amendments (the Thirteenth, Fourteenth, and Fifteenth Amendments), most amendments to the Constitution adopted thereafter contain a final section that empowers Congress to enforce the provisions of the amendment “by appropriate legislation.” At issue in South Carolina v. Katzenbach, which follows, is the constitutionality of the critical preclearance provisions of the Voting Rights Act of 1965, 79 Stat. 437. Congress enacted the law as appropriate legislation to enforce the Fifteenth Amendment. Chief Justice Warren’s opinion for the Court discusses the statute’s provisions and ascribes them to the failure of litigation and previous legislative efforts at eradicating racial discrimination in voting. In the course of his opinion, Chief Justice Warren also identified the test of constitutionality to be applied to amendment-enforcing legislation.

South Carolina v. Katzenbach
Supreme Court of the United States, 1966
383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769

BACKGROUND & FACTS Under the Supreme Court’s original jurisdiction, South Carolina filed a complaint, seeking a declaration as to the constitutionality of several sections of the Voting Rights Act of 1965 and asking that Nicholas Katzenbach, the U.S. Attorney General, be enjoined from their enforcement. The Act to which South Carolina objected was designed to identify and remedy racial discrimination in voting. The remedial provisions of the Act applied to any state or political subdivision that was found by the U.S. Attorney General to have maintained a "test or device" (e.g., literacy test, constitution interpretation test, requirement that the voter possess “good moral character”) as a prerequisite to voting on November 1, 1964, and that was determined by the Director of the Census to have less than 50% of its voting-age residents registered or voting in the November 1964 election. The Act provided, among other remedies, that such tests and devices be promptly suspended, that federal registrars and poll-watchers be assigned, and that states identified by the Act obtain a declaratory judgment from the U.S. District Court for the District of Columbia approving any new test or device before it could become effective.

South Carolina challenged provisions of the Act principally as a violation of the Tenth Amendment, though it asserted additional arguments that the Act also violated due process and the principle of equal treatment of states. The Attorney General defended on the ground that such legislation was well founded on Congress’s power to legislate pursuant to provisions of the Fifteenth Amendment.

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

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The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century. The Act creates stringent new remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country. Congress assumed the power to prescribe these remedies from § 2 of the Fifteenth Amendment, which authorizes the National
Legislature to effectuate by “appropriate” measures the constitutional prohibition against racial discrimination in voting. We hold that the sections of the Act which are properly before us are an appropriate means for carrying out Congress’ constitutional responsibilities * * *.

* * *

Beginning in 1890, the States of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia enacted tests still in use which were specifically designed to prevent Negroes from voting. Typically, they made the ability to read and write a registration qualification and also required completion of a registration form. These laws were based on the fact that as of 1890 in each of the named States, more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write. At the same time, alternate tests were prescribed in all of the named States to assure that white illiterates would not be deprived of the franchise. These included grandfather clauses, property qualifications, “good character” tests, and the requirement that registrants “understand” or “interpret” certain matter.

The course of subsequent Fifteenth Amendment litigation in this Court demonstrates the variety and persistence of these and similar institutions designed to deprive Negroes of the right to vote. Grandfather clauses were invalidated in Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926 (1915). * * * Procedural hurdles were struck down in Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872 (1939). The white primary was outlawed in Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757 (1944), and Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809 (1953). Improper challenges were nullified in United States v. Thomas, 362 U.S. 58, 80 S.Ct. 612 (1960). Racial gerrymandering was forbidden by Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125 (1960). Finally, discriminatory application of voting tests was condemned in * * * Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817 (1965).

According to the evidence in recent Justice Department voting suits, the latter strategem is now the principal method used to bar Negroes from the polls. Discriminatory administration of voting qualifications has been found in all eight Alabama cases, in all nine Louisiana cases, and in all nine Mississippi cases which have gone to final judgment. Moreover, in almost all of these cases, the courts have held that the discrimination was pursuant to a widespread “pattern or practice.” White applicants for registration have often been excused altogether from the literacy and understanding tests or have been given easy versions, have received extensive help from voting officials, and have been registered despite serious errors in their answers. Negroes, on the other hand, have typically been required to pass difficult versions of all the tests, without any outside assistance and without the slightest error. The good-morals requirement is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials. Negroes obliged to obtain vouchers from registered voters have found it virtually impossible to comply in areas where almost no Negroes are on the rolls.

In recent years, Congress has repeatedly tried to cope with the problem by facilitating case-by-case litigation against voting discrimination. * * *

Despite the earnest efforts of the Justice Department and of many federal judges, these new laws have done little to cure the problem of voting discrimination. * * *

The previous legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 man-hours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the
federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls. The provision of the 1960 law authorizing registration by federal officers has had little impact on local maladministration because of its procedural complexities.

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The Voting Rights Act of 1965 reflects Congress’ firm intention to rid the country of racial discrimination in voting. The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant. Section 4(a)–(d) lays down a formula defining the States and political subdivisions to which these new remedies apply. The first of the remedies, contained in § 4(a), is the suspension of literacy tests and similar voting qualifications for a period of five years from the last occurrence of substantial voting discrimination. Section 5 prescribes a second remedy, the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination. The third remedy, covered in §§ 6(b), 7, 9, and 13(a), is the assignment of federal examiners on certification by the Attorney General to list qualified applicants who are thereafter entitled to vote in all elections.

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Section 8 authorizes the appointment of federal poll-watchers in places to which federal examiners have already been assigned. Section 10(d) excuses those made eligible to vote in sections of the country covered by § 4(b) of the Act from paying accumulated past poll taxes for state and local elections.

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The remaining remedial portions of the Act are aimed at voting discrimination in any area of the country where it may occur. Section 2 broadly prohibits the use of voting rules to abridge exercise of the franchise on racial grounds. Section 4(e) excuses citizens educated in American schools conducted in a foreign language from passing English-language literacy tests. Section 10(a)–(c) facilitates constitutional litigation challenging the imposition of all poll taxes for state and local elections. Sections 11 and 12(a)–(d) authorize civil and criminal sanctions against interference with the exercise of rights guaranteed by the Act.

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Has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?

The ground rules for resolving this question are clear. The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.

Section 1 of the Fifteenth Amendment declares that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” This declaration has always been treated as self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice.

South Carolina contends that the cases cited above are precedents only for the authority of the judiciary to strike down state statutes and procedures—that to allow an exercise of this authority by Congress would be to rob the courts of their rightful constitutional role. On the contrary, § 2 of the Fifteenth Amendment expressly declares that “Congress shall have power to enforce this article by appropriate legislation.” By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. Accordingly, in addition to the courts, Congress has full
remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.

* * *

The basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States. Chief Justice Marshall laid down the classic formulation, 50 years before the Fifteenth Amendment was ratified:

“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”


* * *

We therefore reject South Carolina’s argument that Congress may appropriately do no more than to forbid violations of the Fifteenth Amendment in general terms—that the task of fashioning specific remedies or of applying them to particular localities must necessarily be left entirely to the courts. Congress is not circumscribed by any such artificial rules under § 2 of the Fifteenth Amendment. In the oft-repeated words of Chief Justice Marshall, referring to another specific legislative authorization in the Constitution, “This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.” Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196, 6 L.Ed. 23 (1824).

* * *

After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively. * * * We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment. * * *

The bill of complaint is dismissed. * * *

Mr. Justice BLACK, concurring and dissenting.

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Though * * * I agree with most of the Court’s conclusions, I dissent from its holding * * * [in part] of the Act * * *, Section 5 * * * provide[s] that a State covered by § 4(b) can in no way amend its constitution or laws relating to voting without first trying to persuade the Attorney General of the United States or the Federal District Court for the District of Columbia that the new proposed laws do not have the purpose and will not have the effect of denying the right to vote to citizens on account of their race or color. I think this section is unconstitutional on at least two grounds.

(a) The Constitution gives federal courts jurisdiction over cases and controversies only. * * * It is hard for me to believe that a justiciable controversy can arise in the constitutional sense from a desire by the United States Government or some of its officials to determine in advance what legislative provisions a State may enact or what constitutional amendments it may adopt. [Emphasis supplied.] * * *

* * *

(b) * * * One of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either “to the States respectively, or to the people.” Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them. Moreover, it seems to me that § 5 which gives federal officials power to veto state laws they do not
like is in direct conflict with the clear command of our Constitution that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government.” I cannot help but believe that the inevitable effect of any such law which forces any one of the States to entreat federal authorities in faraway places for approval of local laws before they can become effective is to create the impression that the State or States treated in this way are little more than conquered provinces. ***

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Although the Voting Rights Act is best remembered for its effectiveness in attacking racial discrimination against African-Americans throughout the South, another provision of the law addressed the disenfranchisement of Puerto Ricans living in New York City. Existing New York election law specified that no person would be entitled to vote, however satisfactorily other registration requirements were met, unless the individual could read and write English. In Katzenbach v. Morgan, 384 U.S. 641, 86 S.Ct. 1717 (1966), the Supreme Court upheld section 4(e) of the Voting Rights Act, which provided that no one who had successfully completed the sixth grade in a public or accredited private school in Puerto Rico could be denied the vote because of an inability to speak or write English. Because this provision was not directed at racial discrimination, it could not be justified on the ground that it enforced the Fifteenth Amendment. Congress instead relied on its authority to enforce the Equal Protection Clause of the Fourteenth Amendment. The Court easily sustained section 4(e), using the same test of constitutionality it applied to the preclearance provisions sustained in South Carolina v. Katzenbach. But Justice Brennan, speaking for the Court, went further. In a sentence that evoked stunning possibilities, he wrote, “More specifically, § 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York City nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.” The Court seemed to be saying in no uncertain terms that Congress had ample legislative authority enforcing the Equal Protection Clause to require the states to provide equal public services and benefits to people. In light of the Morgan decision, this requires nothing more than Congress’s say-so; it does not require a previous determination by the Court that an existing state policy denies equal protection. Subsequent Court decisions in the conservative era following the Warren Court quickly backed away from the thrust of the Morgan ruling. Indeed, as the decision in Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531 (1981) demonstrates, the Court has been very reluctant to infer any congressional intent to “impose affirmative obligations on the States to fund certain services” unless Congress says so “unambiguously.”

As noted before, only the constitutional amendments adopted since the Civil War contain an amendment-enforcing section. What if Congress passed a law that imposed its own interpretation of a First Amendment right—say, the right to the free exercise of religious belief—under the guise of enforcing that right as a component of the “liberty” that is guaranteed against state infringement by the Due Process Clause of the Fourteenth Amendment? Congress responded in exactly this manner to the Supreme Court’s decision in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S.Ct. 1595 (1990) (see Chapter 13) when it passed the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488. In Smith, the Court had discarded the use of strict scrutiny (the compelling interest test) by which, until then, it had measured violations of the First Amendment’s Free Exercise Clause. Before the decision in Smith, where a state permitted a citizen to be exempted from a law generally applicable to its citizens, it could not refuse to recognize an exemption claimed on the basis of religious belief unless it could show
there was a compelling reason for not allowing such an exception. For example, if a state denied unemployment benefits to an individual who was capable of working and who was offered suitable work (a general rule applicable to all citizens drawing unemployment benefits) but refused to work because the job he had been offered required him to work on Saturday and his religious belief forbade that, the state would have to show it had a compelling reason for denying him the benefits. Smith held that the state need not accommodate this exercise of religious belief—that neutral laws of general applicability were constitutional according to the test of reasonableness, even if they had the side effect of burdening a person’s religious belief. A politically diverse congressional coalition responded to Smith by enacting the RFRA, which reimposed the compelling-interest test. The RFRA criticized the Smith decision for burdening the exercise of religious belief and reinstated “the compelling interest test as set forth in prior Federal court rulings [as] a workable test for striking sensible balances between religious liberty and competing prior governmental interests.” In City of Boerne v. Flores, which follows, the Court addressed the constitutionality of the legislation as an exercise of Congress’s power under § 5 of the Fourteenth Amendment to enforce the guarantee of “liberty” contained in the Due Process Clause, which has been read to include the religious freedoms contained in the First Amendment.

**City of Boerne v. Flores**

Supreme Court of the United States, 1997

521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624

**Background & Facts** P. F. Flores, the Catholic Archbishop of San Antonio, applied for a building permit to enlarge a church in Boerne, Texas. Local authorities denied the permit, relying on an ordinance governing historic preservation in the locale that included the small church, which had been constructed in the mission style of the region’s early history. The archbishop then challenged the denial of the permit under the Religious Freedom Restoration Act of 1993 (RFRA). A federal district court granted judgment for the city on the grounds that in passing the statute Congress had exceeded the legitimate scope of its amendment-enforcing power under the Fourteenth Amendment. A federal appeals court, upholding the constitutionality of the law, reversed the judgment, and the Supreme Court granted certiorari.

Justice KENNEDY delivered the opinion of the Court.

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RFRA prohibits “[g]overnment from ‘substantially burden[ing]’ a person’s exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden “(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” * * * The Act’s mandate applies to any “branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States,” as well as to any “State, or . . . subdivision of a State.” * * *

The Act’s universal coverage * * * “applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [RFRA’s enactment].” * * *

* * *

* * * In assessing the breadth of §5’s enforcement power, we begin with its text. Congress has been given the power “to enforce” the “provisions of this article.” * * * Congress can enact legislation under §5 enforcing the constitutional right to the free exercise of religion. The “provisions of this article,” to which §5 refers, include the Due Process Clause of the Fourteenth Amendment. Congress’ power to enforce the Free Exercise Clause follows from our holding in Cantwell v. Connecticut, 310
U.S. 296, 303, 60 S.Ct. 900, 903 (1940), that the “fundamental concept of liberty embodied in [the Fourteenth Amendment’s Due Process Clause] embraces the liberties guaranteed by the First Amendment.” ***

Congress’ power under §5, however, extends only to “enforc[ing]” the provisions of the Fourteenth Amendment. The Court has described this power as “remedial.” *** The design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power “to enforce,” not the power to determine what constitutes a constitutional violation. ***

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* * * The power to interpret the Constitution in a case or controversy remains in the Judiciary.

The remedial and preventive nature of Congress’ enforcement power, and the limitation inherent in the power, were confirmed in our earliest cases on the Fourteenth Amendment. ***

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*** In South Carolina v. Katzenbach, *** we emphasized that “[t]he constitutional propriety of legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience . . . it reflects.” *** There we upheld various provisions of the Voting Rights Act of 1965, finding them to be “remedies aimed at areas where voting discrimination has been most flagrant,” *** and necessary to “banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.” *** We noted evidence in the record reflecting the subsisting and pervasive discriminatory—and therefore unconstitutional—use of literacy tests. ***

The Act’s new remedies, which used the administrative resources of the Federal Government, included the suspension of both literacy tests and, pending federal review, all new voting regulations in covered jurisdictions, as well as the assignment of federal examiners to list qualified applicants enabling those listed to vote. The new, unprecedented remedies were deemed necessary given the ineffectiveness of the existing voting rights laws, *** and the slow costly character of case-by-case litigation. ***

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If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be “superior paramount law, unchangeable by ordinary means.” It would be “on a level with ordinary legislative acts, and, like most acts, . . . alterable when the legislature shall please to alter it.” Marbury v. Madison, 5 U.S. (1 Cranch), at 177, 2 L.Ed. 60. Under this approach, it is difficult to conceive of a principle that would limit congressional power. *** Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

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A comparison between RFRA and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA’s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years. *** The absence of more recent episodes stems from the fact that, as one witness testified, “deliberate persecution is not the usual problem in this country.” *** Rather, the emphasis of the hearings was on laws of general applicability which place incidental burdens on religion. Much of the discussion centered upon anecdotal evidence of autopsies performed on Jewish individuals and Hmong immigrants in violation of their religious beliefs, *** and on zoning regulations and historic preservation laws.
(like the one at issue here), which as an incident of their normal operation, have adverse effects on churches and synagogues. * * * It is difficult to maintain that they are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country. * * * 

* * * RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections. Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional. * * *

RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA’s restrictions apply to every agency and official of the Federal, State, and local Governments. * * * RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. * * * RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

The reach and scope of RFRA distinguish it from other measures passed under Congress’ enforcement power, even in the area of voting rights. In South Carolina v. Katzenbach, the challenged provisions were confined to those regions of the country where voting discrimination had been most flagrant, * * * and affected a discrete class of state laws, i.e., state voting laws. Furthermore, to ensure that the reach of the Voting Rights Act was limited to those cases in which constitutional violations were most likely (in order to reduce the possibility of overbreadth), the coverage under the Act would terminate “at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years.” * * * The provisions restricting and banning literacy tests * * * attacked a particular type of voting qualification, one with a long history as a “notorious means to deny and abridge voting rights on racial grounds.” * * * [Another] provision permitted a covered jurisdiction to avoid preclearance requirements under certain conditions and, moreover, lapsed in seven years. This is not to say * * * that §5 legislation requires termination dates, geographic restrictions or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress’ means are proportionate to ends legitimate under §5.

* * * Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law. * * * Laws valid under Smith would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. * * * The statute * * * would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens.

The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in Smith. Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to
which RFRA applies are not ones which will have been motivated by religious bigotry. * * * It is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs. * * *

* * * The judgment of the Court of Appeals sustaining the Act’s constitutionality is reversed.

It is so ordered.

Justice STEVENS, concurring.

In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a “law respecting an establishment of religion” that violates the First Amendment to the Constitution.

If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment. * * *

* * *

Justice O’CONNOR, with whom Justice BREYER joins except as to a portion * * *, dissenting.

I dissent from the Court’s disposition of this case. I agree with the Court that the issue before us is whether the Religious Freedom Restoration Act (RFRA) is a proper exercise of Congress’ power to enforce §5 of the Fourteenth Amendment. But as a yardstick for measuring the constitutionality of RFRA, the Court uses its holding in Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872, 110 S.Ct. 1595 (1990), the decision that prompted Congress to enact RFRA as a means of more rigorously enforcing the Free Exercise Clause. I remain of the view that Smith was wrongly decided, and I would use this case to reexamine the Court’s holding there. Therefore, I would direct the parties to brief the question whether Smith represents the correct understanding of the Free Exercise Clause and set the case for reargument. * * *

* * *

[Justice SOUTER also dissented.]

But the Court subsequently held that the RFRA could constitutionally be applied to limit the intrusion of federal programs, regulations, and laws on the free exercise of religious belief. Congress’s authority over federal policies doesn’t rest on any amendment-enforcing power but its legislative power under Article I. Just as surely as it can enact a criminal law or a program to tax and spend, so Congress can recognize limitations on the reach of its legislative authority. In Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 126 S.Ct. 1211 (2006), the Court sustained an RFRA-based challenge to federal drug laws mounted by adherents of a religious sect that used an hallucinogenic tea in its rite of religious communion. An ingredient in the tea was listed as a controlled substance regulated by federal law.

Also relying upon the Katzenbach cases as the touchstone of analysis when Congress’s use of amendment-enforcing powers is challenged, a closely and sharply divided Court in United States v. Morrison, 529 U.S. 598, 120 S.Ct. 1740 (2000), held that § 5 of the Fourteenth Amendment failed to provide adequate constitutional underpinning for the Violence Against
Women Act (VAWA) of 1994. In that case, a female freshman at Virginia Polytechnic Institute brought suit against three male students for assault and rape under a provision of the law that declared “[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender.” It also afforded an injured party the right to sue for compensatory and punitive damages and for injunctive relief. Unlike the legislation challenged in the two *Katzenbach* cases, however, the Court faulted the VAWA because the law applied to purely private conduct and did not impose any consequences on the state or any of its officials. The majority held that the Fourteenth Amendment prohibited only discriminatory state action. The Court in *Morrison* also concluded that the statute was not appropriately corrective but “applie[d] uniformly throughout the Nation[,]” even though Congress’s findings, upon which the VAWA was based, “indicate[d] that the problem of discrimination against victims of gender-motivated crimes d[id] not exist in all States, or even most States.” The five-Justice majority in *Morrison* also held that Congress could not constitutionally enact the VAWA relying on the Commerce Clause (p. 326).

By contrast, in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 123 S.Ct. 1972 (2003), the Court held that Congress could rely on § 5 of the Fourteenth Amendment to make a state liable for damages if it violated the Family Medical Leave Act of 1993 (FMLA). That law entitles employees of both private businesses and state and local agencies to 12 weeks of unpaid leave annually to deal with a “serious health condition” of a child, parent, or spouse. Although the FMLA would not have abrogated the states’ sovereign immunity from unconsented-to lawsuits (see p. 339) had it been based on the Commerce Clause, the Court held that Congress’s power under § 5 could override this immunity because the Amendment clearly gives Congress constitutional authority to limit state power. The FMLA is explicit about its application to states and their political subdivisions as well as to private businesses, and making the states liable for damages was “appropriate legislation” to further the nondiscriminatory treatment of men and women guaranteed by the Equal Protection Clause. Said the Court: “Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman’s domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.” The family-care leave provision, it concluded, was “congruent and proportional to the targeted violation.”

### Inherent Powers

A third source of Congress’s authority to legislate flows from what are called “inherent powers.” Talk of “inherent powers” seems both contradictory and troublesome in a polity with a written constitution, but it is undeniable that the Court has recognized such a basis for legislative action (and, to an uncertain degree, for policies independently pursued by the President as well). Basically, inherent powers flow from the concept of sovereignty. These are powers, in other words, that pertain to any sovereign nation, and Congress, as the incarnation of national sovereignty, may exercise the powers inhering in and characteristic of a nation-state. Addressing the legitimacy of Congress’s power to govern territory that the nation acquires either by conquest or by treaty, not derivable from any specific grant of authority in the Constitution, Chief Justice Marshall, speaking for the Court in *American
Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 7 L.Ed. 242 (1828), wrote: “Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States. The right to govern, may be the inevitable consequence of the right to acquire territory. Whichever may be the source, whence the power is derived, the possession of it is unquestioned” (emphasis supplied). Whether in an exact constitutional sense it results—in peaceful circumstances—from the confluence of the treaty power with Congress’s power to dispose of federal territory or property (Art. IV, § 3, ¶ 2), or—in more violent times—constitutes an implied consequence of the war power, the power to govern acquired territory is implicit in the concept of the modern nation-state.

Nearly 60 years later, in United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109 (1886), the Court validated Congress’s paternalistic authority over American Indians whose “weakness and helplessness,” it found, made them “dependent” and “wards of the nation.” Explicitly linking legislative power to national sovereignty, the Court said, “But this power of Congress to organize territorial governments and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government and can be found nowhere else” (emphasis supplied). By the same token, in Fong Yue Ting v. United States, 149 U.S. 698, 13 S.Ct. 1016 (1893), the Court upheld Congress’s right “to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [as] being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare.” Congress in 1892 had enacted legislation continuing its exclusion of Chinese people from entry into the United States and requiring Chinese resident aliens to obtain certificates of residence under penalty of law. In a pointed dissent, Justice Brewer objected that “[t]his doctrine of powers inherent in sovereignty is one both indefinite and dangerous” and more fitted to a “despotism” than a nation with powers “fixed and bounded by a written constitution.”

Supreme Court decisions over the past two and a half decades extending the guarantees of due process and equal protection to resident aliens (see Chapter 14) would appear to have made decisions like Fong Yue Ting a relic of the past, but the arbitrary and often abusive treatment of aliens entering this country and of those resident here during World War II and much of the Cold War make it a relic of the not-too-distant past.2 Recently, in fact, the Supreme Court, in Zadvydas v. Davis, 533 U.S. 678, 121 S.Ct. 2491 (2001), had reaffirmed that “once an alien enters the country *** the Due Process Clause applies to all persons within the United States, whether their presence is lawful, unlawful, temporary, or permanent.” Thus, the Constitution “does not permit indefinite detention” of aliens to be deported, but limits such civil “detention to a period reasonably necessary to bring about that alien’s removal from the United States.” The Court observed, “The distinction between an alien who has effected entry into the United States and one who has never entered runs throughout immigration law. *** It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”

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Due process is essential when it comes to the detention and deportation of aliens. However, concerns about the nation's vulnerability after the tragic events of September 11, 2001, and national discontent over the large number of illegal aliens in the United States—now estimated at 12 million—intensify the difficulty in striking a constitutional balance between the competing interests of national security and individual fairness. Thus, in Demore v. Kim, 538 U.S. 510, 123 S.Ct. 1708 (2003), the Court upheld the mandatory (and renewable) detention of aliens convicted of committing a “crime of violence” until they could be deported without permitting bail or requiring the government to demonstrate individual dangerousness. The Court noted that deportable criminal aliens constituted a significant proportion of federal prison inmates (25% and rising) and that they frequently failed to show up for their removal hearings.

The aftermath of 9/11 provoked a more sweeping response. Well over 1,000 people were arrested and jailed in the course of the government’s massive effort to investigate and apprehend those connected with the attacks or who posed a possible threat. The government refused to disclose the number of individuals held, their names, the reasons for their detention, and information relating to their whereabouts. The individuals detained fell into three categories: those apprehended for immigration violations, those detained on criminal charges, and those held on material-witness warrants. In Center for National Security Studies v. U.S. Department of Justice, 331 F.3d 918 (D.C. Cir. 2003), cert. denied, 540 U.S. 1104, 124 S.Ct. 1041 (2004), a federal appeals court held that the government was not required to make any disclosures, either by the Freedom of Information Act or the First Amendment.

Amid louder calls that illegal aliens need to be sent back, recent revelations about the malfunctioning of our immigration courts are a special cause for concern. Particularly disturbing has been the sharp increase in immigration cases that have crowded the dockets of federal appeals courts. In 2001, immigration cases accounted for 3% of all the cases heard by federal courts of appeals; by 2004, the proportion had climbed to 17%. Two out of every five federal appeals in New York and California were immigration cases. In most of the federal court cases, the affected individual was seeking asylum. The cause of much of this need for federal judicial oversight has been the hasty, slipshod, and often abusive hearing of cases by many of the 215 immigration judges and by the 11-member Board of Immigration Appeals (BIA) which is supposed to review and correct erroneous and intemperate decisions by individual immigration judges. The losing party in a case before the BIA can appeal the Board’s decision to a federal appeals court. But the BIA was severely downsized in 2002 and the poor quality of its review has led to a rising chorus of criticism by federal appeals judges for the lack of fairness, impartiality, civility, and even comprehensibility in the administration of immigration law. See New York Times, Dec. 26, 2005, pp. Al, A22; Jan. 1, 2006, p. A9. See also Wang v. Attorney General of the U.S., 423 F.3d 260 (3rd Cir. 2005); Benslimane v. Gonzales, 430 F.3d 828 (7th Cir. 2005). Due process is an important check on the arbitrary exercise of inherent power, especially when such power gives rise to the attitude that a sovereign can simply do as it likes.

Although the next chapter considers several claims of inherent power to act, surely the one with the greatest constitutional vitality is the President’s claim that he has inherent power to conduct foreign policy. In United States v. Curtiss-Wright Export Corp. (p. 234), a controversy that ostensibly revolved around the legitimacy of Congress’s delegation of power to President Franklin Roosevelt to impose an arms embargo, Justice Sutherland, speaking for the Court, embroidered a theory that went beyond sustaining the embargo to justify not simply presidential dominance over foreign policy, but also the constitutional entitlement of the Executive to act alone (and even contrary to Congress). Sutherland’s expansive rhetoric in Curtiss-Wright had consequences: The postures of presidential
aggressiveness and congressional submission reflected in our Vietnam and Iraq involvements are part and parcel of the legacy of inherent power bequeathed by the Court’s dicta.

The Treaty Power
A fourth and final source of Congress’s legislative authority is the treaty power. Article VI, paragraph 2 of the Constitution provides: “This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land * * *.” The possibility that arises is whether the national government can obtain by treaty powers that which it otherwise does not possess. This is a matter of particular anxiety to defenders of states’ rights who fear the use of the treaty power as a vehicle for doing an end run around the procedure of constitutional amendment. The decision in Missouri v. Holland below fueled their concern. In that case, Congress passed a statute protecting migratory birds in order to enforce certain treaty provisions. Missouri objected on the grounds that control over such birds within that state’s boundaries fell under its jurisdiction. While the Court’s decision certainly does appear to suggest that treaties that contradict an explicit provision of the Constitution would be null and void, Justice Holmes’s treatment of the much more ambiguous issue in this case leaves the concern of states’ rightsers unresolved. Holmes puts a good deal of emphasis on a feature peculiar to this case—the migratory quality of the birds and the consequent lack of a substantial state claim. Fears were further heightened by the decision in United States v. Belmont (p. 229), which presented the specter of a state’s public policy being thwarted by a simple executive agreement. The proliferation of executive agreements and the decline in the United States of the formalities of the treaty power magnified what seemed to some observers to be the dangers of this loophole in the federal relationship.

One of the sharpest manifestations of this concern surfaced in the proposed Bricker Amendment (p. 126), which was aimed at terminating both the self-executing quality of treaties and the possibility that the treaty power could be used to outflank the process of constitutional amendment. The proposed amendment drew support from an alliance of isolationists and segregationists who intended to prevent the United States from signing the U.N. Human Rights Accord, which, in the days before the Court’s ruling in Brown v. Board of Education, would have empowered Congress to enact civil rights laws. The original version of the amendment quite obviously targeted both Missouri v. Holland (see section 2) and Belmont (see section 3) and would have effectively cut off any prospect that the national government could do by treaty or executive agreement what it could not do through existing constitutional provisions. The revised version, which substantially blunted the thrust of the amendment as originally proposed and which was made necessary in order to secure the additional votes necessary to pass it, took aim only at Belmont (see section 2). In the end, the proposed amendment failed, thanks in large part to the vigorous opposition of President Dwight Eisenhower, who saw it as a throwback to the isolationism of the past.

Missouri v. Holland
Supreme Court of the United States, 1920
252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641

BACKGROUND & FACTS After a federal statute dealing with the problem had been declared unconstitutional three years earlier, Great Britain and the United States signed a treaty in 1916 to save from extinction various species of birds that migrated through both the United States and Canada. In addition to provisions for protecting the birds, the treaty stipulated that both countries would attempt to
institute measures necessary to fulfill the purposes of the agreement. In 1918, Congress passed the Migratory Bird Treaty Act, which authorized the Secretary of Agriculture to issue regulations concerning the killing, capturing, and selling of those birds named in the treaty. The State of Missouri brought a complaint in federal district court to prevent Ray Holland, a game warden, from enforcing the Act and the Secretary’s regulations. Among other objections, Missouri claimed that the statute was unconstitutional by virtue of the Tenth Amendment and that its sovereign right as a state had been violated. The district court held the Migratory Bird Treaty Act constitutional, and Missouri appealed.

Mr. Justice HOLMES delivered the opinion of the court.

* * *

[T]he question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. * * * Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like Geer v. Connecticut, 161 U.S. 519, 16 S.Ct. 600 (1896), this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, “a power which must belong to and somewhere reside in every civilized government” is not to be found. Andrews v. Andrews, 188 U.S. 14, 33, 23 S.Ct. 237 (1903). What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not
have been foreseen completely by the most
gifted of its begetters. It was enough for them to
realize or to hope that they had created an
organism; it has taken a century and has cost
their successors much sweat and blood to prove
that they created a nation. The case before us
must be considered in the light of our whole
experience and not merely in that of what was
said a hundred years ago. The treaty in question
does not contravene any prohibitory words to
be found in the Constitution. The only
question is whether it is forbidden by some
invisible radiation from the general terms of the
Tenth Amendment. We must consider what
this country has become in deciding what that
Amendment has reserved.

The State as we have intimated founds its
claim of exclusive authority upon an assertion
of title to migratory birds, an assertion that is
embodied in statute. No doubt it is true that as
between a State and its inhabitants the State
may regulate the killing and sale of such birds,
but it does not follow that its authority is
exclusive of paramount powers. To put the
claim of the State upon title is to lean upon a
slender reed. Wild birds are not in the
possession of anyone; and possession is the
beginning of ownership. The whole foundation
of the State’s rights is the presence within their
jurisdiction of birds that yesterday had not
arrived, tomorrow may be in another State and
in a week a thousand miles away. If we are to be
accurate we cannot put the case of the State
upon higher ground than that the treaty deals
with creatures that for the moment are within
the state borders, that it must be carried out by
officers of the United States within the same
territory, and that but for the treaty the State
would be free to regulate this subject itself.

* * *

Here a national interest of very nearly
the first magnitude is involved. It can be
protected only by national action in concert
with that of another power. The subject-
matter is only transitorily within the State
and has no permanent habitat therein. But
for the treaty and the statute there soon
might be no birds for any powers to deal
with. We see nothing in the Constitution
that compels the Government to sit by
while a food supply is cut off and the
protectors of our forests and our crops are
destroyed. It is not sufficient to rely upon
the States. The reliance is vain, and were it
otherwise, the question is whether the
United States is forbidden to act. We are
of opinion that the treaty and statute must
be upheld.

Decree affirmed.
Mr. Justice VAN DEVANTER and
Mr. Justice PITNEY dissent.

NOTE—THE PROPOSED BRICKER AMENDMENT

Late in January 1954, the U.S. Senate began debate on a proposed constitutional amendment
introduced by Senator John W. Bricker (R–Ohio) and cosponsored by more than 60 other senators.
S.J. Res. 1, known as the Bricker Amendment, was a response to the perceived threat of
international agreements to the American constitutional structure. Given the Supreme Court’s
holding in Missouri v. Holland, its sponsors feared that provisions of treaties that the United States
had signed, particularly recently signed U.N. treaties on human rights, might be applied to
significantly alter protections guaranteed by the Constitution (e.g., property rights, rights reserved to
the states). Their fears were not entirely unfounded. See Fujii v. State, 217 P.2d 481 (Cal. App.
1950), but see also the decision on appeal to the California Supreme Court, 38 Cal.2d 718, 242 P.2d
617 (1952). The proposed amendment also reflected irritation with the possible impact of executive
agreements. Many of the senators, still critical of President Franklin Roosevelt’s Yalta Accords,
sought to constrain the internal application of this type of agreement.

The Bricker Amendment was reported out of the Senate Judiciary Committee by a 9–5 vote in
the following form:
B. Delegation of Legislative Power

Article I, section 1 prescribes, “All legislative powers herein granted shall be vested in a Congress of the United States * * *” (emphasis supplied). However jealously Congress may prize its power to make laws, the tempo and complexity of contemporary life make it necessary for Congress to delegate some lawmaking power to officers and agencies of the executive branch. For example, setting rates and making rules for airlines and railroads require a capacity to make changes on a day-to-day basis, something that would be difficult to accomplish by the legislative process. Establishing such rates and rules also requires special knowledge and information more easily acquired and retained by executive agencies and personnel. Furthermore, ambiguity in a statute authorizing such regulation may have been the product of legislative compromise essential to passage of the law in the first place. Nonetheless, setting rates and making rules are, strictly speaking, lawmaking acts.
Legal and political theory, as well as the words of the Constitution, have also created problems with respect to the delegation of power. We have long celebrated an ancient maxim of Roman law, {\textit{potestas delegata non potest delegari}}. In translation this means that a delegated power must not be redelegated. Where our political theory regards the lawmaking power of Congress as a delegation of power to it by the people, it follows that delegation by the Congress is redelegation. John Locke, who provided much of the theory upon which our institutions were built, categorically asserted that “[t]he Legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have.” One may well question the importance of both the legal and the political theory. Why the concern about delegation? In a word, the principal reason is accountability. In human affairs, it is at times important to have it clear where authority and responsibility rest. Suppose a school principal gives a certain teacher the duty to maintain order during recess, and the teacher redelegates the duty to a groundskeeper who happens to be in the area who, in turn, redelegates the duty to an older student. Who is responsible legally and otherwise if a student is injured during the recess because of inadequate supervision? In short, whatever the practical need for delegation, it would seem that there must also be some limitations.

For a time, the Supreme Court struggled with the issue. In 1928, in deciding \textit{Hampton & Co. v. United States}, the Court held that “if Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix * * * rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.” While the legislation at issue in \textit{Hampton} passed constitutional muster, the National Industrial Recovery Act, under attack in the \textit{Panama Refining} and \textit{Schechter} cases (p. 130) seven years later, did not. In these two decisions, the Court held that Congress had gone too far in delegating its lawmaking power. Said the Court in \textit{Schechter}, “We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. We pointed out in the \textit{Panama Company} case that the Constitution has never been regarded as denying Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and determination of facts to which the policy as declared by the Legislature is to apply.” However, the Court ruled that here Congress had in effect set down no policy at all.

\textbf{J. W. Hampton, Jr., & Co. v. United States}  
Supreme Court of the United States, 1928  
276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624  

\textbf{Background & Facts}  Section 315(a) of Title III of the Tariff Act of 1922 empowered the President to increase or decrease duties imposed by the Act in order to equalize the differences in production cost of articles produced in the United States and in foreign countries. In 1924, after hearings by the United States Tariff Commission, the President issued a proclamation raising the four cents per pound duty on barium dioxide to six cents per pound. J. W. Hampton, Jr., and Company, subject to the duty, challenged the constitutionality of section 315 as an invalid delegation of legislative power to the President. The Customs Court and the Court of Customs Appeals upheld the delegation of power. It was from the latter that the Hampton Company appealed.
Mr. Chief Justice TAFT delivered the opinion of the Court.

***

The issue here is as to the constitutionality of § 315, upon which depends the authority for the proclamation of the President and for two of the six cents per pound duty collected from the petitioner. The contention of the taxpayers is *** that the section is invalid in that it is a delegation to the President of the legislative power *** [under] Article I, *** to lay and collect taxes, duties, imposts and excises. ***

*** Congress intended *** § 315 *** to secure *** the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States *** [This would] enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States. *** Congress adopted in § 315 the method of describing with clearness what its policy and plan was and then authorizing a member of the executive branch to carry out this policy and plan, and to find the changing difference from time to time, and to make the adjustments necessary to conform the duties to the standard underlying that policy and plan. As it was a matter of great importance, it concluded to give by statute to the President, the chief of the executive branch, the function of determining the difference as it might vary. He was provided with a body of investigators who were to assist him in obtaining needed data and ascertaining the facts justifying readjustments. ***

The Tariff Commission does not itself fix duties, but before the President reaches a conclusion on the subject of investigation, the Tariff Commission must make an investigation and in doing so must give notice to all parties interested and an opportunity to adduce evidence and to be heard.

The well-known maxim "Delega potestas non potest delegari," [an agent cannot redelegate his powers] applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private law. The Federal Constitution and State Constitutions of this country divide the governmental power into three branches. The first is the legislative, the second is the executive, and the third is the judicial, and the rule is that in the actual administration of the government Congress *** should exercise the legislative power, the President *** the executive power, and the Courts or the judiciary the judicial power *** [It is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not coordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.

The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations. ***

Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should
become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be effected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district. * * * [O]ne of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a Commission, as it does, called the Interstate Commerce Commission, to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down, that rates shall be just and reasonable considering the service given, and not discriminatory. As said by this Court in Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 214, 32 S.Ct. 436, 441 (1912), "The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."

* * *

[The same principle that permits Congress to exercise its rate-making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise. If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under Congressional authority. * * *

* * *

* * * Section 315 and its provisions are within the power of Congress. The judgment of the Court of Customs Appeals is affirmed. Affirmed.

NOTE—THE PANAMA REFINING AND SCHECHTER CASES

The constitutional controversy over the delegation of legislative power reached its zenith during the 1930s. With nearly a quarter of the work force unemployed, wage levels cut in half, prices down a third, and mounting bank failures and bankruptcies, the Great Depression was an economic dislocation unparalleled in American history. Following Franklin Roosevelt’s inauguration as President, Congress reacted to the emergency by quickly passing the National Industrial Recovery Act (NIRA) in 1933. The legislation and the agency created by it, the National Recovery Administration, aimed at bringing stability and order to the marketplace by controlling the unbridled, destructive competition that was multiplying business collapses. In a pair of decisions that it handed down two years later, the Supreme Court declared the essence as well as a particular section of the NIRA unconstitutional.
B. Delegation of Legislative Power

In Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241 (1935), more popularly known as the Hot Oil Case, the Court invalidated section 9(c) of the Act. That portion of the NIRA sought to prevent a glut of oil and oil products on the market by prohibiting the transportation of petroleum and petroleum products in interstate and foreign commerce in excess of the amount permitted by state authorities. Pursuant to the Act, President Roosevelt issued an executive order making the prohibition in section 9(c) operable and authorizing the Secretary of the Interior to administer and enforce it. To equalize supply with demand, the Secretary allocated ceilings on crude oil production among the several states with the President’s approval. Each state receiving a quota subdivided it and thus determined the level of crude oil production for each private enterprise. Speaking for eight of the nine members of the Court (Justice Cardozo dissented), Chief Justice Hughes explained:

* * * Section 9(c) does not state whether, or in what circumstances or under what conditions, the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state’s permission. It establishes no criterion to govern the President’s course. It does not require any finding by the President as a condition of his action. The Congress in § 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment.

Noting that the Act was prefaced by such goals as removing obstructions that tended to diminish the flow of foreign and domestic commerce, promoting the organization of industry, eliminating unfair competitive practices, and promoting the fullest possible use of present productive capacity, the Court determined that articulation of these broad policies did not furnish a helpful guide to limit the Act’s broad grant of authority in section 9(c). Although the Chief Justice agreed that the Constitution was never intended to deny Congress “the necessary resources of flexibility and practicality” essential to the legislation of policies and standards, he pointed out that, as written, the Act failed to prescribe limits to guide the Chief Executive’s determinations of fact. The Chief Justice added, “If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown.”

The second of the Court’s decisions, Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837 (1935), struck at the essence of the NIRA. Under attack in Schechter were the promulgation and enforcement of NIRA-authorized “codes of fair competition.” Drawn up by trade associations “representative” of businesses of all sizes in the various industries, the codes established standards touching on such matters as wages, hours, working conditions, and employment and business practices. These codes were subject to the approval of the President, and violation of a code provision was a punishable offense. In addition to attacking the Live Poultry Code as an unconstitutional delegation of legislative power, the Schechters also argued that it violated the Commerce Clause. (More specific details of the Schechter case and the Court’s invalidation of the NIRA, also on Commerce Clause grounds, appear at p. 302.)

Addressing the delegation-of-power question and speaking for a unanimous Court in Schechter, Chief Justice Hughes held that, by generally authorizing “codes of fair competition,” the NIRA failed to provide any adequate definition of the things the codes would cover. “Fair competition” was far too vague, and, as the Court had already noted in Panama Refining, the broad policy purposes declared at the outset of the NIRA were unhelpful as guidelines. Indeed, the Court was of the view that the delegation of legislative power in Schechter was worse than that in Panama Refining, since, at least in the latter case, “the subject of the statutory prohibition was defined.” Compounding the difficulty in Schechter was the fact that the statute identified no procedures for actually creating the codes. And probably most questionable of all was the fact that the code writing was done by private parties. In other words, the legislative power was actually being exercised by people who were entirely outside the government.

The delegation-of-power deficiencies highlighted by the Court in Panama Refining and Schechter are generally regarded as unique to a time when significant governmental regulation of the economy...
was a relative novelty. The decisions in these two cases still stand and have not been explicitly overruled.

Since 1935, Congress has been careful to prescribe some kind of standard when it has delegated power, but standards such as “rates shall be fair and responsible” or directions to the Federal Communications Commission, for example, to license radio and television stations “in the public interest, convenience, and necessity” afford dubious guidance. The fact is that the “intelligible principle” test—itself pretty vague—is not a very useful tool to keep power from slipping through Congress’s fingers. As the Court put it in Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 121 S.Ct. 903 (2001), “Even in sweeping regulatory schemes we have never demanded *** that statutes provide a ‘determinate criterion’ for saying ‘how much [of the regulated harm] is too much.’” In Whitman, a trucking-industry trade group attacked, as an unconstitutional delegation of power, the language in the Clean Air Act of 1970 that authorized the Environmental Protection Agency (EPA) to establish pollutant levels that would be “requisite to protect the public health” with “an adequate margin of safety.” Declaring that the law need not specify how hazardous is hazardous, the Court said that the provision “requiring the EPA to set air quality standards at the level that is ‘requisite’—that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety, fits comfortably within the scope of discretion permitted by our precedent.” The federal courts have not struck down a congressional act as an unconstitutional delegation of power since the mid-1930s. As a result, many eminent legal authorities have concluded that Congress may now delegate power as it chooses.

A measure of what a non-issue the delegation of legislative power has become is reflected in the judicial stamp of approval given Congress’s enactment of legislation in 1970 authorizing a variety of presidential responses to deal with runaway inflation. All told, it amounted to the most comprehensive peacetime set of economic controls in American history. The Economic Stabilization Act of 1970, 84 Stat. 799, as amended by 85 Stat. 743, authorized the President to take effective measures that would “stabilize the economy, reduce inflation, minimize unemployment, improve the Nation’s competitive position in world trade, and protect the purchasing power of the dollar” by “stabilizi[ing] prices, rents, wages, salaries, dividends, and interest.” The executive branch was authorized to impose wage and price controls that were “fair and equitable” and necessary to “prevent gross inequities, hardships, serious market disruptions, domestic shortages of raw materials,” and “windfall profits.” Although existing contractual agreements were grandfathered in, wage and price caps under the President’s guidelines were to “call for generally comparable sacrifices by business and labor as well as other segments of the economy.” The legislation allowed the President to “delegate the performance of any function under [the statute] to such officers, departments, and agencies of the United States as he deems appropriate, or to boards, commissions, and similar entities composed in whole or in part of members appointed to represent different sectors of the economy and the general public.” Worth noting is the fact that, prior to its amendment in December 1971, the Act contained even less detail than this. It provided merely that “[t]he President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970,” and that “[s]uch orders and regulations may provide for the making of such adjustments as may be necessary to prevent gross inequity.” The constitutionality of the original delegation of power to the President was upheld in Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Connolly, 337 F.Supp. 737 (D.D.C. 1971), and the constitutionality of the statute was

Doubtless, some of the Court’s concern over delegation in the 1930s was inspired by the opposition of some of the more conservative Justices to the economic programs of the New Deal. Concern about the delegation of power per se often is difficult to separate from disagreement with the substance of the legislation at issue, but there is another reason why delegation, such a seemingly quaint constitutional preoccupation of the thirties, has become a virtual dead letter in federal constitutional law today. As we noted earlier, the major reason for constraining the delegation of power is to preserve accountability. If Congress delegated its policymaking authority to unelected officers or employees of agencies in the executive branch, how could the voting public make government responsive to their wishes on matters of public policy? In other words, implicit in the concern about delegation is not only the value of accountability, but also the concept of legislative supremacy. The major reason for its demise was that, since delegation of power is a measure of the political balance between the legislative and executive branches, the conditions that were largely responsible for the creation of New Deal economic policies were simultaneously responsible for the rise of the modern Presidency and the transference of policymaking power and initiative to the executive branch. To the extent that Congress legislates ambiguously, it relinquishes its capacity to direct officeholders of the executive branch, and so the real policymaking power falls to them. Many of the same factors that made it increasingly difficult for Congress to write precise legislation were factors that turned Congress from an institution of policymaking leadership into a usually reactive, frequently passive body.

Although its enactment of the economic stabilization legislation reflects the fact that Congress apparently has resigned itself to the inevitability of surrendering enormous policymaking discretion to the executive branch, especially in crisis times, Congress has nevertheless attempted to retain dominance in policymaking by writing into innumerable pieces of legislation a device through which it could veto subsequent policymaking decisions by the President or other executive officers when it disagreed with them. This mechanism, known as “the legislative veto,” was declared unconstitutional by the Court in Immigration & Naturalization Service v. Chadha, which follows. The omnipresence and apparent necessity of the legislative veto are matters well traversed in Justice White’s dissenting opinion. However, as the Court ruled, such considerations of utility were insufficient to overcome what the majority saw as clear rules to the contrary contained in Article I. Although the validity of the legislative veto presents an important constitutional question, was it necessary for the Court to consider the question in its largest dimensions? Justice Powell saw the form of the legislative veto presented in Chadha as a kind of bill of attainder and opted to decide the case on much narrower grounds.

**Immigration & Naturalization Service v. Chadha**

Supreme Court of the United States, 1983

462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317

**Background & Facts** Nearly 200 statutes passed by Congress since 1932 provide for a legislative veto, which means that Congress has delegated broad authority to persons or agencies of the executive branch, subject to potential disapproval of any specific policy by a vote of either or both the House and the
Senate. For example, under the War Powers Resolution (p. 240), Congress could, by a concurrent resolution, force a President to remove American military forces engaged in hostilities in another nation. Under the Congressional Budget and Impoundment Control Act of 1974, either House could vote to disapprove presidential impoundment of funds already appropriated and thereby compel the expenditure of money earmarked for a particular program. According to an analogous provision of the International Security Assistance and Arms Control Act of 1976, Congress could override a decision by the President concerning the sale of military equipment to another country. So, too, through provisions contained in pieces of legislation governing numerous federal agencies, Congress has retained the power to reject particular regulations adopted by various federal commissions, bureaus, and boards.

Section 244(c)(2) of the Immigration and Nationality Act permits either the House or the Senate to disapprove a decision made by the Attorney General under his grant of authority within the Act to allow a specific deportable alien to remain in this country. Chadha, an East Indian born in Kenya and holding a British passport, overstayed his immigrant student visa. When ordered to show cause why he should not be deported for having remained in the United States longer than the time permitted, Chadha argued that he met the standard for exemption set out in section 244(a)(1) of the Act; that is, he had continuously resided in the United States for seven years, was of good moral character, and would suffer “extreme hardship” if required to leave. The Attorney General’s recommendation that Chadha’s deportation be suspended was transmitted to Congress pursuant to the Act; however, within the period of time allowed by the law, the House of Representatives voted to disapprove the Attorney General’s recommendation to cancel the deportation proceedings against Chadha and five other aliens. Chadha then filed a petition for review of the deportation order with the U.S. Court of Appeals for the Ninth Circuit, attacking the legislative veto employed by the House as unconstitutional. The federal appeals court so ruled, and the government appealed.

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari * * * [to consider] a challenge to the constitutionality of the provision in § 244(c)(2) of the Immigration and Nationality Act * * * authorizing * * * [a legislative veto of the Attorney General’s decision].

***

[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies * * *

Justice WHITE undertakes to make a case for the proposition that the one-House veto is a useful “political invention,” * * * and we need not challenge that assertion. We can even concede this utilitarian argument although the long range political wisdom of this “invention” is arguable. * * * But policy arguments supporting even useful “political inventions” are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised.

Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process. Since the precise terms of those familiar provisions
are critical to the resolution of this case, we set them out verbatim. Art. I provides:

“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.” Art. I, § 1. (Emphasis added).

“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; * * *” Art. I, § 7, cl. 2. (Emphasis added).

“Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill,” Art. I, § 7, cl. 3. (Emphasis added).

These provisions of Art. I are integral parts of the constitutional design for the separation of powers. * * * [W]e find that the purposes underlying the Presentment Clauses, Art. I, § 7, cl. 2, 3, and the bicameral requirement of Art. I, § 1, and § 7, cl. 2, guide our resolution of the important question presented in this case. * * *

The records of the Constitutional Convention reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers. Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. * * *

The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President. * * *

The President’s role in the lawmaking process also reflects the Framers’ careful efforts to check whatever propensity a particular Congress might have to enact oppressive, improvident, or ill-considered measures. * * *

* * *

The bicameral requirement of Art. I, §§ 1, 7 was of scarcely less concern to the Framers than was the Presidential veto and indeed the two concepts are interdependent. By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief, already remarked upon in connection with the Presentment Clauses, that legislation should not be enacted unless it has been carefully and fully considered by the Nation’s elected officials. * * *

* * *

[The Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President’s participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws. The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings. The President’s unilateral veto power, in turn, was limited by the power of two thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person. * * * It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers’ decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.]

The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legisla-
tive, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

***

*** In purporting to exercise power defined in Art. I, § 8, cl. 4 to “establish a uniform Rule of Naturalization,” the House took action that had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch. Section 244(c)(2) purports to authorize one House of Congress to require the Attorney General to deport an individual alien whose deportation otherwise would be cancelled under § 244. The one-House veto operated in this case to overrule the Attorney General and mandate Chadha’s deportation; absent the House action, Chadha would remain in the United States. Congress had acted and its action has altered Chadha’s status.

The legislative character of the one-House veto in this case is confirmed by the character of the Congressional action it supplants. Neither the House of Representatives nor the Senate contends that, absent the veto provision in § 244(c)(2), either of them, or both of them acting together, could effectively require the Attorney General to deport an alien once the Attorney General, in the exercise of legislatively delegated authority, had determined the alien should remain in the United States. Without the challenged provision in § 244(c)(2), this could have been achieved, if at all, only by legislation requiring deportation. ***

*** After long experience with the clumsy, time consuming private bill procedure, Congress made a deliberate choice to delegate to the Executive Branch, and specifically to the Attorney General, the authority to allow deportable aliens to remain in this country in certain specified circumstances. It is not disputed that this choice to delegate authority is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General’s decision on Chadha’s deportation—that is, Congress’ decision to deport Chadha—no less than Congress’ original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President. Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked.

*** There are but four provisions in the Constitution, explicit and unambiguous, by which one House may act alone with the unreviewable force of law, not subject to the President’s veto:

(a) The House of Representatives alone was given the power to initiate impeachments. Art. I, § 2, cl. 6;

(b) The Senate alone was given the power to conduct trials following impeachment on charges initiated by the House and to convict following trial. Art. I, § 3, cl. 5;

(c) The Senate alone was given final unreviewable power to approve or to disapprove presidential appointments. Art. II, § 2, cl. 2;

(d) The Senate alone was given unreviewable power to ratify treaties negotiated by the President. Art. II, § 2, cl. 2.

Clearly, when the Draftsmen sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms. These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution. These exceptions are narrow, explicit, and
separately justified; none of them authorize the action challenged here. On the contrary, they provide further support for the conclusion that Congressional authority is not to be implied and for the conclusion that the veto provided for in § 244(c)(2) is not authorized by the constitutional design of the powers of the Legislative Branch.

Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Article I. * * *

We hold that the Congressional veto provision in § 244(c)(2) is severable from the Act and that it is unconstitutional. Accordingly, the judgment of the Court of Appeals is Affirmed.

Justice POWELL, concurring in the judgment.

* * * In my view, the case may be decided on a narrower ground. When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers. Accordingly, I concur in the judgment.

* * *

On its face, the House’s action appears clearly adjudicatory. The House did not enact a general rule; rather it made its own determination that six specific persons did not comply with certain statutory criteria. It thus undertook the type of decision that traditionally has been left to other branches. * * *

The impropriety of the House’s assumption of this function is confirmed by the fact that its action raises the very danger the Framers sought to avoid—the exercise of unchecked power. In deciding whether Chadha deserves to be deported, Congress is not subject to any internal constraints that prevent it from arbitrarily depriving him of the right to remain in this country.

Unlike the judiciary or an administrative agency, Congress is not * * * subject to the procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights. The only effective constraint on Congress’ power is political, but Congress is most accountable politically when it prescribes rules of general applicability. When it decides rights of specific persons, those rights are subject to “the tyranny of a shifting majority.”

Chief Justice Marshall observed: “It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules would seem to be the duty of other departments.” Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136, 3 L.Ed. 162 (1810). In my view, when Congress undertook to apply its rules to Chadha, it exceeded the scope of its constitutionally prescribed authority. I would not reach the broader question whether legislative vetoes are invalid under the Presentment Clauses.

Justice WHITE, dissenting.

Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a “legislative veto.” For this reason, the Court’s decision is of surpassing importance. * * *

The prominence of the legislative veto mechanism in our contemporary political system and its importance to Congress can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies. Without the legislative veto, Congress is faced with a Hobson’s choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the executive branch.
and independent agencies. To choose the former leaves major national problems unresolved; to opt for the latter risks unaccountable policymaking by those not elected to fill that role. ***

***

The legislative veto is more than "efficient, convenient, and useful." *** It is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress’ control over policymaking. Perhaps there are other means of accommodation and accountability, but the increasing reliance of Congress upon the legislative veto suggests that the alternatives to which Congress must now turn are not entirely satisfactory.

The history of the legislative veto also makes clear that it has not been a sword with which Congress has struck out to aggrandize itself at the expense of the other branches ***. Rather, the veto has been a means of defense, a reservation of ultimate authority necessary if Congress is to fulfill its designated role under Article I as the nation’s lawmaker. *** [T]he Executive has *** often agreed to legislative review as the price for a broad delegation of authority. To be sure, the President may have preferred unrestricted power, but that could be precisely why Congress thought it essential to retain a check on the exercise of delegated authority.

[T]he apparent sweep of the Court’s decision today is regrettable. The Court’s Article I analysis appears to invalidate all legislative vetoes irrespective of form or subject. Because the legislative veto is commonly found as a check upon rulemaking by administrative agencies and upon broad-based policy decisions of the Executive Branch, it is particularly unfortunate that the Court reaches its decisions in a case involving the exercise of a veto over deportation decisions regarding particular individuals. Courts should always be wary of striking statutes as unconstitutional; to strike an entire class of statutes based on consideration of a somewhat atypical and more-readily indictable exemplar of the class is irresponsible. ***

If the legislative veto were as plainly unconstitutional as the Court strives to suggest, its broad ruling today would be more comprehensible. ***

*** The Constitution does not directly authorize or prohibit the legislative veto, *** and I would not infer disapproval of the mechanism from its absence. *** Only within the last half century has the complexity and size of the Federal Government’s responsibility grown so greatly that the Congress must rely on the legislative veto as the most effective if not the only means to insure their role as the nation’s lawmakers. *** [O]ur Federal Government was intentionally chartered with the flexibility to respond to contemporary needs without losing sight of fundamental democratic principles. ***

***

*** The power to exercise a legislative veto is not the power to write new law without bicameral approval or presidential consideration. The veto must be authorized by statute and may only negative what an Executive department or independent agency has proposed. On its face, the legislative veto no more allows one House of Congress to make law than does the presidential veto confer such power upon the President. ***

***

*** The Court’s holding today that all legislative-type action must be enacted through the lawmaking process ignores that legislative authority is routinely delegated to the Executive branch, to the independent regulatory agencies, and to private individuals and groups. ***

This Court’s decisions sanctioning such delegations make clear that Article I does
not require all action with the effect of legislation to be passed as a law.

Theoretically, agencies and officials were asked only to “fill up the details.” In practice, however, restrictions on the scope of the power that could be delegated diminished and all but disappeared. The “intelligible principle” [see Hampton & Co. v. United States, 276 U.S. 394, 48 S.Ct. 348 (1928)] through which agencies have attained enormous control over the economic affairs of the country was held to include such formulations as “just and reasonable,” “public interest,” “public convenience, interest, or necessity,” and “unfair methods of competition.”

By virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments without the passage of new legislation.

If Congress may delegate lawmaking power to independent and executive agencies, it is most difficult to understand Article I as forbidding Congress from also reserving a check on legislative power for itself. It is enough that the initial statutory authorizations comply with the Article I requirements.

Nor does § 244 infringe on the judicial power, as Justice POWELL would hold. Section 244 makes clear that Congress has reserved its own judgment as part of the statutory process. Congressional action does not substitute for judicial review of the Attorney General’s decisions. The courts have not been given the authority to review whether an alien should be given permanent status. There is no constitutional obligation to provide any judicial review whatever for a failure to suspend deportation. “The power of Congress, therefore, to expel, like the power to exclude aliens, or any specified class of aliens, from the country, may be exercised entirely through executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien’s right to be in the country has been made by Congress to depend.” Fong Yue Ting v. United States, 149 U.S. 698, 713–714, 13 S.Ct. 1016, 1022 (1893). I do not suggest that all legislative vetoes are necessarily consistent with separation of powers principles. A legislative check on an inherently executive function, for example that of initiating prosecutions, poses an entirely different question. But the legislative veto device here—and in many other settings—is far from an instance of legislative tyranny over the Executive. It is a necessary check on the unavoidably expanding power of the agencies, both executive and independent, as they engage in exercising authority delegated by Congress.

[Justice REHNQUIST also dissented].

At first glance, Chadha may convey the impression that meaningful congressional oversight of executive branch agencies has been frustrated. This is not so. If it is true that “[w]hen Congress controls, it legislates the particulars; when Congress withdraws, it legislates in general terms[,]” plenty of room remains for Congress to fiddle with the details because it retains several important instruments for reining in agency policies with which it disagrees. One possibility is to keep the object of its suspicion on a very short leash by appropriating funds for only short periods, thus forcing the agency to come back again and again. Other possibilities are writing specific provisions in appropriations bills that limit the use of funds by an agency or require an agency to secure the approval of the appropriations committees before it can exceed certain spending limitations or transfer funds between accounts. Congress, too, can make use of the joint resolution of approval (as it does in executive branch

reorganization) that shifts the burden to the President by requiring him to obtain the approval of both Houses within a certain number of days. This is tantamount to a one-House veto but has the bonus of not requiring any action on Congress’s part to be effective. 4 A milder form of oversight is Congress’s use of the report-and-wait procedure “in which the enabling statute simply requires that proposed decisions or actions lie before Congress or its committees for a specified number of days before taking effect. * * * [F]ormal congressional action to veto or negate the proposed decision or action has to take the form of a regular bill and, if passed by both houses, be submitted to the President for his approval.” 5 This convenient tool flags policies for Congress’s possible attention before agencies can implement them.

It has been argued that the sort of legislative veto invalidated in Chadha was more of a symbolic display of Congress’s authority than a practical means of assuring congressional control and that it was a little-used instrument, favored mainly by junior members of Congress. Veteran legislators, simply by virtue of their committee assignments achieved under the seniority system, occupy vantage points from which they can exert considerable leverage over federal agencies. Such informal means of congressional oversight continue to be vital mechanisms for maintaining congressional surveillance and control. 6 Knowledge is power, and the explosion in the size of committee staffs has made possible the unearthing and mastery of administrative details that would have been unimaginable in a bygone era when agencies could more easily play a game of information-control in which congressional committees were often captives of the facts agencies chose to share with them. In an era of chronically divided government, sharp and sustained partisanship, and scandals that have sapped the moral strength of presidential leadership, some political professionals have argued that, since the 1970s, the pendulum of power has swung against the Executive so that arguably Congress now has the upper hand. 7

The parade of ever-larger budget deficits that were a legacy of the 1980s also occasioned legislative responses that generated delegation-of-power controversies. At first, Congress tried to deal with the mushrooming deficits by passing the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman-Hollings Act, which aimed to eliminate the federal deficit in six years. To achieve that objective, the statute set maximum permissible amounts of the federal deficit for each of the fiscal years between 1986 and 1991, progressively reducing it to zero. Should the deficit in any year exceed the maximum allowable, the law required across-the-board spending cuts equally in defense and non-defense programs to reach the target level. These spending reductions were to be achieved through a complicated set of procedures: The Office of Management and Budget and the Congressional Budget Office were to independently estimate the size of the deficit and calculate necessary program-by-program spending cuts to reach the target. These reports were then to be sent to the Comptroller General, who was to forward recommendations based on them to the President. The President was then obligated to implement the spending reductions automatically if Congress did not act to trim the budget.

In Bowsher v. Synar, 478 U.S. 714, 106 S.Ct. 3181 (1986), the Supreme Court held that assignment of such budget-cutting decisions to the Comptroller General violated the separation of powers. It was clear from the Budget and Accounting Act of 1921 which created the office, the Court reasoned, that the Comptroller General, although nominated by the President and confirmed by the Senate, was removable only at Congress’s initiative and for any number of reasons (such as “inefficiency,” “neglect of duty,” and “malfeasance”) that, in effect, made him vulnerable to removal at any “actual or perceived transgressions of the legislative will.” Although Congress had never acted to remove a Comptroller General for political reasons, this was no guarantee of future independence, so the Comptroller General remained, in effect, Congress’s agent. Since the Comptroller General’s participation was indispensable to the implementation of budget cuts under Gramm-Rudman-Hollings, the law gave him executive powers. As Chief Justice Burger concluded, speaking for the Court: “To permit an officer controlled by Congress to execute the laws could be, in essence, to permit a congressional veto. Congress could simply remove, or threaten to remove, an officer for executing the laws in a fashion found not to be satisfactory to Congress. This kind of congressional control over the execution of the laws, Chadha makes clear, is unconstitutional”—“once Congress makes its choice in enacting legislation, its participation ends.” In dissent, Justice White protested: “[T]he Court overlooks or deliberately ignores the decisive difference between the congressional removal provision and the legislative veto struck down in Chadha: under the Budget and Accounting Act, Congress may remove the Comptroller only through a joint resolution, which by definition must be passed by both Houses of Congress and signed by the President. * * * In other words, a removal of the Comptroller under the statute satisfies the requirements of bicameralism and presentment laid down in Chadha.”

With the demise of Gramm-Rudman-Hollings, Congress sought to attack “pork barrel” provisions—long thought to be a significant cause of federal overspending—by giving the President a line-item veto to eliminate from bills individual pet projects and special tax breaks put there by legislators anxious to curry favor with important constituency interests. Invoking much the same sort of textual analysis it employed in Chadha, the Court struck down the line-item veto in Clinton v. City of New York below. As we shall see in the next chapter, Morrison v. Olson (p. 176) raises a similar issue from the point of view of the executive branch—whether assignment of prosecutorial powers to a special prosecutor, functioning independently of the Justice Department, breaches the constitutional commitment of law enforcement functions to the executive branch. In Chadha, Bowsher, Clinton, and Morrison, the exchanges between the majority and the dissenters return us to the essential tension posed at the beginning of this chapter—that between maintaining separation of the core governmental functions of the three coordinate branches, on the one hand, and the practical workability of such institutions sharing powers, on the other hand.

**CLINTON v. CITY OF NEW YORK**

Supreme Court of the United States, 1998

524 U.S. 417, 118 S.Ct. 2091, 141 L.Ed.2d 393

**BACKGROUND & FACTS** Congress passed the Line Item Veto Act in April 1996 and it became effective January 1, 1997. Two months later, President Clinton used the line item veto to cancel a provision of the Balanced Budget Act of 1997 and two provisions of the Taxpayer Relief Act of 1997. In the first instance, he
struck a provision that waived the federal government’s right to recoup as much as $2.6 billion in taxes that New York State had levied against Medicaid providers, and in the second instance he deleted a provision that permitted the owners of certain food refineries and processors to defer recognition of capital gains if they sold their stock to eligible farmers’ cooperatives, such as Snake River Potato Growers, Inc. A federal district court consolidated the suits growing out of these two exercises of the President’s power and held that the line item veto violated the Presentment Clause, Art. I, § 7, cl. 2, of the Constitution. The federal government appealed and the Supreme Court expedited consideration of this case as provided for in the Line Item Veto Act.

Justice STEVENS delivered the opinion of the Court.

***

[New York] State now has a multibillion dollar contingent liability that had been eliminated by § 4722(c) of the Balanced Budget Act of 1997. The District Court correctly concluded that the State *** “suffered an immediate, concrete injury the moment that the President used the Line Item Veto to cancel section 4722(c) and deprived them of the benefits of that law.” ***

***

The Snake River farmers’ cooperative also suffered an immediate injury when the President canceled the limited tax benefit that Congress had enacted to facilitate the acquisition of processing plants. ***

***

The Line Item Veto Act gives the President the power to “cancel in whole” three types of provisions that have been signed into law: “(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit.” *** It is undisputed that the New York case involves an “item of new direct spending” and that the Snake River case involves a “limited tax benefit” as those terms are defined in the Act. It is also undisputed that each of those provisions had been signed into law pursuant to Article I, § 7, of the Constitution before it was canceled.

The Act requires the President to adhere to precise procedures whenever he exercises his cancellation authority. In identifying items for cancellation he must consider the legislative history, the purposes, and other relevant information about the items. *** He must determine, with respect to each cancellation, that it will “(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest.” ***

Moreover, he must transmit a special message to Congress notifying it of each cancellation within five calendar days (excluding Sundays) after the enactment of the canceled provision. *** It is undisputed that the President meticulously followed these procedures in these cases.

A cancellation takes effect upon receipt by Congress of the special message from the President. *** If, however, a “disapproval bill” pertaining to a special message is enacted into law, the cancellations set forth in that message become “null and void.” *** The Act sets forth a detailed expedited procedure for the consideration of a “disapproval bill,” *** but no such bill was passed for either of the cancellations involved in these cases. A majority vote of both Houses is sufficient to enact a disapproval bill. The Act does not grant the President the authority to cancel a disapproval bill, *** but he does, of course, retain his constitutional authority to veto such a bill.

*** Under the plain text of the statute, the two actions of the President that are challenged in these cases prevented one section of the Balanced Budget Act of 1997 and one section of the Taxpayer Relief Act of 1997 “from having legal force or effect.”
The remaining provisions of those statutes, with the exception of the second canceled item in the latter, continue to have the same force and effect as they had when signed into law.

After a bill has passed both Houses of Congress, but "before it become[s] a Law," it must be presented to the President. If he approves it, "he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." Art. I, § 7, cl. 2. His "return" of a bill, which is usually described as a "veto," is subject to being overridden by a two-thirds vote in each House.

There are important differences between the President's "return" of a bill pursuant to Article I, § 7, and the exercise of the President's cancellation authority pursuant to the Line Item Veto Act. The constitutional return takes place before the bill becomes law; the statutory cancellation occurs after the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes. There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition. What has emerged in these cases from the President's exercise of his statutory cancellation powers are truncated versions of two bills that passed both Houses of Congress.

The Government advances two related arguments to support its position that despite the unambiguous provisions of the Act, cancellations do not amend or repeal properly enacted statutes in violation of the Presentment Clause. First, relying primarily on Field v. Clark, 143 U.S. 649, 12 S.Ct. 495 (1892), the Government contends that the cancellations were merely exercises of discretionary authority granted to the President by the Balanced Budget Act and the Taxpayer Relief Act read in light of the previously enacted Line Item Veto Act. Second, the Government submits that the substance of the authority to cancel tax and spending items "is, in practical effect, no more and no less than the power to 'decline to spend' specified sums of money, or to 'decline to implement' specified tax measures." Neither argument is persuasive.

The Government's reliance upon tariff and import statutes containing similar provisions is unavailing. This Court has recognized that in the foreign affairs arena, the President has "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320, 57 S.Ct. 216 (1936). Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries.

More important, [in the case of those statutes] Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and it left only the determination of whether such events occurred up to the President. The Line Item Veto Act authorizes the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7. The fact that Congress intended such a result is of no moment.

Neither are we persuaded by the Government's contention that the President's authority to cancel new direct spending and tax benefit items is no greater than his traditional authority to decline to spend appropriated funds. For example, the First Congress appropriated "sum[s] not exceeding" specified amounts to be spent on various Government operations.
The President was given wide discretion with respect to both the amounts to be spent and how the money would be allocated among different functions. It is argued that the Line Item Veto Act merely confers comparable discretionary authority over the expenditure of appropriated funds. The critical difference between this statute and all of its predecessors, however, is that unlike any of them, this Act gives the President the unilateral power to change the text of duly enacted statutes. None of the Act’s predecessors could even arguably have been construed to authorize such a change.

***

Because we conclude that the Act’s cancellation provisions violate Article I, § 7, of the Constitution, we find it unnecessary to consider the District Court’s alternative holding that the Act “impermissibly disrupts the balance of powers among the three branches of government.” ***

*** The Balanced Budget Act of 1997 is a 500-page document that became “Public Law 105–33” after three procedural steps were taken: (1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may “become a law.” Art. I, § 7. If one paragraph of that text had been omitted at any one of those three stages, Public Law 105–33 would not have been validly enacted. If the Line Item Veto Act were valid, it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature. Something that might be known as “Public Law 105–33 as modified by the President” may or may not be desirable, but it is surely not a document that may “become a law” pursuant to the procedures designed by the Framers of Article I, § 7, of the Constitution.

If there is to be a new procedure in which the President will play a different role in determining the final text of what may “become a law,” such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution. ***

The judgment of the District Court is affirmed.

It is so ordered.

Justice KENNEDY, concurring.

***

The principal object of the statute was not to enhance the President’s power to reward one group and punish another, to help one set of taxpayers and hurt another, to favor one State and ignore another. Yet these are its undeniable effects. The law establishes a new mechanism which gives the President the sole ability to hurt a group that is a visible target, in order to disfavor the group or to extract further concessions from Congress. The law is the functional equivalent of a line-item veto and enhances the President’s powers beyond what the Framers would have endorsed.

*** By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.

***

Justice SCALIA, with whom Justice O’CONNOR and Justice BREYER join[n] ** concurring in part and dissenting in part.

*** [T]he Court’s problem with the Act is not that it authorizes the President to veto parts of a bill and sign others into law, but rather that it authorizes him to “cancel”—prevent from “having legal force or effect”—certain parts of duly enacted statutes.

Article I, § 7 of the Constitution obviously prevents the President from cancelling a law that Congress has not authorized him to cancel. *** But that is not this case. ***
Insofar as the degree of political “law-making” power conferred upon the Executive is concerned, there is not a dime’s worth of difference between Congress’s authorizing the President to cancel a spending item, and Congress’s authorizing money to be spent on a particular item at the President’s discretion. **Examples of appropriations committed to the discretion of the President abound in our history.**

Had the Line Item Veto Act authorized the President to “decline to spend” any item of spending contained in the Balanced Budget Act of 1997, there is not the slightest doubt that authorization would have been constitutional. **The title of the Line Item Veto Act, which was perhaps designed to simplify for public comprehension, or perhaps merely to comply with the terms of a campaign pledge, has succeeded in faking out the Supreme Court.** The President’s action it authorizes in fact is not a line-item veto and thus does not offend Art. I, § 7; and insofar as the substance of that action is concerned, it is no different from what Congress has permitted the President to do since the formation of the Union.

Justice BREYER, with whom Justice O’CONNOR and Justice SCALIA join as to [part *** dissenting.

To understand why one cannot say, literally speaking, that the President has repealed or amended any law, imagine how the provisions of law before us might have been, but were not, written. Imagine that the canceled New York health care tax provision at issue here had instead said the following:

**Section One. Taxes . . . that were collected by the State of New York from a health care provider before June 1, 1997 and for which a waiver of provisions requiring payment have been sought . . . are deemed to be permissible health care related taxes . . . provided however that the President may prevent the just-mentioned provision from having legal force or effect if he determines x, y and z. (Assume x, y and z to be the same determinations required by the Line Item Veto Act).**

Whatever a person might say, or think, about the constitutionality of this imaginary law, there is one thing the English language would prevent one from saying. One could not say that a President who “prevent[s]” the deeming language from “having legal force or effect,” **has either repealed or amended** this particular hypothetical statute. Rather, the President has followed that law to the letter. He has exercised the power it explicitly delegates to him. He has executed the law, not repealed it.

It could make no significant difference to this linguistic point were the italicized proviso to appear, not as part of what I have called Section One, but, instead, at the bottom of the statute page, say referenced by an asterisk, with a statement that it applies to every spending provision in the act next to which a similar asterisk appears. And that being so, it could make no difference if that proviso appeared, instead, in a different, earlier-enacted law, along with legal language that makes it applicable to every future spending provision picked out according to a specified formula. **But, of course, this last-mentioned possibility is this very case.***

Because I disagree with the Court’s holding of literal violation, I must consider whether the Act nonetheless violates Separation of Powers principles—principles that arise out of the Constitution’s vesting of the “executive Power” in “a President,” U.S. Const., Art. II, § 1, and “[a]ll legislative Powers” in “a Congress,” Art. I, § 1. There are three relevant Separation of Powers questions here: (1) Has Congress given the President the wrong kind of power, i.e., “non-Executive” power? (2) Has Congress given the President the power to “encroach” upon Congress’ own constitutionally reserved territory? (3) Has Congress given
the President too much power, violating the doctrine of “nondelegation?” * * * [W]ith respect to this Act, the answer to all these questions is “no.”

[T]he power the Act conveys is the right kind of power. It is “executive.” As explained above, an exercise of that power “executes” the Act. Conceptually speaking, it closely resembles the kind of delegated authority—to spend or not to spend appropriations, to change or not to change tariff rates—that Congress has frequently granted the President, any differences being differences in degree, not kind. * * *

* * *

One cannot say that the Act “encroaches” upon Congress’ power, when Congress retained the power to insert, by simple majority, into any future appropriations bill, into any section of any such bill, or into any phrase of any section, a provision that says the Act will not apply. * * * Indeed, the President acts only in response to, and on the terms set by, the Congress.

Not can one say that the Act’s basic substantive objective is constitutionally improper, for the earliest Congresses could have, * * * and often did, confer on the President this sort of discretionary authority over spending * * *

* * *

In Chief Justice Taft’s * * * words, the Constitution permits only those delegations where Congress “shall lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.” J. W. Hampton & Co. v. United States, 276 U.S., at 409, 48 S.Ct., at 352 (emphasis added).

Notwithstanding the Supreme Court’s decision in Clinton v. City of New York, the push for a line-item veto goes on, fueled by further escalation of the federal deficit and the belief that congressional pork-barrel projects substantially increase the red ink. In June 2006, the House of Representatives passed legislation to give President George W. Bush a line-item veto, although a less-hefty one than that challenged in Clinton. It would have allowed the President to return to Congress those items in a tax or spending bill that he thought were wasteful and unnecessary. Congress would then have been required to vote again on those provisions; a simple majority in both the House and Senate could have overridden his
objections. Although the House passed the line-item veto by a margin of 247–172, largely along party lines (Republicans voting in favor and Democrats against), the legislation never made it to a vote in the Senate. Its passage was complicated by the number of legislators who thought a line-item veto would only further weaken Congress’s power in dealing with an administration that had all-too-frequently shown it liked nothing better than setting policy by itself. Bush’s use of presidential “signing statements” (see p. 264), nullifying the enforcement of specific provisions of a law with which the President disagreed, can be seen as a unilateral executive response to this impasse. After all, a presidential signing statement that refuses to enforce certain provisions of a law passed by Congress is just another form of a line-item veto.

C. THE POWER TO INVESTIGATE

From examinations of military mishaps during army campaigns against Indian tribes on the frontier in the 1790s and early 1800s, to exposés of political corruption during the second half of the nineteenth century, to surveys of social and economic ills in the 1930s, to probes of organized crime and labor racketeering during the fifties, to inquiries into presidential wrongdoing and campaign hanky-panky of the Watergate era, right down to Iran-Contra, the Whitewater Affair, and the recent firings of nine U.S. Attorneys, congressional investigations have always been with us. Although there has been a great deal of criticism over the years of how particular investigations have been conducted and about the extent of the power to investigate, there are few who would maintain that Congress does not (or should not) constitutionally have the power at all. First, Congress must be able to gather facts if it is to legislate wisely. As the Court put it in *McGrain v. Daugherty*, 273 U.S. 135, 47 S.Ct. 319 (1927), “[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.” The power to investigate is, therefore, implied in the power to legislate. In *McGrain*, the Court explained:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.

Second, it is generally agreed that legislative oversight of the executive branch is also implicit in legislative power. After all, Congress establishes the various departments, agencies, and commissions of the executive branch; defines their functions; provides the funds to run them; and fashions programs and policies for them to administer. Logic requires that Congress see to it that these offices and agencies perform as intended. Woodrow Wilson, long before he became President, espoused this rationale for the informing function:

It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody
the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and disposition of the administrative agents of the government, the country must remain in embarrassing crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be preferred even to its legislative function.\(^8\)

Third, it might be argued that a legislature in a democratic society has an obligation to educate the public as to the need for legislation or to point up the abuses of the executive branch. Generally, this is best accomplished by debate in the legislature, but sometimes an investigation can better serve to dramatize the issues and capture the public’s attention. As McGrain v. Daugherty made clear, however, any informing function Congress has is only ancillary to its legislative function. Although an investigation conducted just for the purpose of educating the public might be a worthwhile experience, in the hands of ignoble inquisitors it could also be conducted solely to make an example out of somebody, or simply to enhance the reputations of the investigators, and thus amount to little more than “exposure for the sake of exposure.” A potent criticism leveled at congressional investigations, even when they have been conducted ostensibly for legislative purposes, has been that they have been used to punish people rather than to develop the facts pertaining to a problem requiring legislative attention. When legislative committees have intentionally sought to mete out punishment by investigation, they have been doing what the Constitution intended to prevent by its specific provision against bills of attainder, that is, legislative acts that inflict punishment on specific individuals without trial. Although an investigation is not a legislative “act” in a strict legal sense, surely the Framers’ abhorrence would logically extend to all such legislative actions, except in those rare instances where the legislators occupy a quasi-judicial role in impeachment and removal proceedings.

Since the purpose of an investigation is not to punish, but to find facts, the usual adversarial safeguards that apply at trials are absent. To the extent, however, that congressional committees would be required to adhere to extensive procedural requirements, an investigation would likely be deflected from its central information-gathering function and be turned into a mini-trial. Therefore, although congressional or committee rules may accord to witnesses who are called to testify certain privileges such as reading prepared statements or having the aid of counsel, the only right that a witness constitutionally possesses is the Fifth Amendment right against compelled self-incrimination. Unfortunately, committee members seeking to make a witness look bad, especially when hearings are televised, have often asked questions solely to goad the hapless witness into repeatedly responding, “I decline to answer on the grounds that my answer would tend to incriminate me.” Especially in controversial matters, then, it frequently seems that we are forced to choose between an effective investigation and a fair one.

Exactly how uncomfortable the witness chair is when it is occupied by someone with a controversial past is handsomely illustrated by the testimony of professional baseball players summoned to answer questions about the use of steroids in baseball. The dilemma that confronts a witness appearing under a cloud is aptly summarized by Mark McGwire’s initial statement in the note that follows. Self-protection and self-respect, however, can be construed as evasiveness, especially if he has been named by another witness—in this instance, Jose Canseco. And even if all or some of the behavior was legal at the time, the dilemma of whether to answer persists because past behavior is likely to be viewed through a contemporary lens. At what point does inquiry about someone’s past behavior become punishment by public exposure? Yet, as the committee members point out, Congress’s

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oversight function and its power to write laws that effectively govern future behavior could not be exercised if legislators could not draw upon the experience of the individuals directly involved and therefore, presumably, the most knowledgeable. The awkward position in which the baseball players found themselves in 2005 was really no different than the dilemma faced by former members and alleged-to-have-been members of the American Communist Party who were summoned to appear before the House Committee on Un-American Activities in the late 1940s and 1950s. Like Mark McGwire’s former use of androstenedione, membership in the Communist Party during the desperate days of the Great Depression was perfectly legal and not particularly controversial. The brow-beating and bullying of vulnerable witnesses by HUAC in the heyday of the anti-communist hysteria at the height of the Cold War ultimately embarrassed the House into adopting the current version of Rule 11, which is referred to in the transcript of the steroids-in-baseball investigation.

You may wonder why it is any of Congress’s business that baseball players used steroids. The inquiry is relevant on two grounds, both of which are mentioned in the colloquies between the committee members and the player-witnesses. First, Congress has authority under the Commerce Clause to control the interstate distribution of harmful substances, a power it exercised when it banned steroids in 1990. The Supreme Court has consistently upheld a broad reading of this power, most recently when the Justices rejected a constitutional challenge to the federal government’s prohibition on marijuana use, even for medical purposes (see p. 331). Second, baseball enjoys a privilege unique in professional sports: unlike football, basketball, or hockey, it is exempt from the anti-trust laws. Although there is a lively dispute about whether this exemption applies only to the “reserve clause” or whether it applies to all aspects of professional baseball, the Supreme Court on half-a-dozen occasions has recognized and reaffirmed this special status. Although the Court’s conclusion that “giving exhibitions of baseball” did not involve interstate commerce is probably more attributable to the quaint view of economics entertained by a majority of the Justices during the 1920s than to baseball’s special niche as “the national pastime,” Congress has maintained a steadfast silence about the Court’s ruling, although it could have removed this special privilege any time by simple legislation. (For the original decision, see Federal Baseball v. National League, 259 U.S. 200, 42 S.Ct. 465 (1922); the Court most recently reaffirmed baseball’s exemption in Flood v. Kuhn, 407 U.S. 258, 92 S.Ct. 2099 (1972).) As the committee strongly hinted, however, if professional baseball remained unwilling to comply effectively with Congress’s anti-drug policy, Congress could readily end the exemption.

NOTE—BALLPLAYERS TESTIFY ABOUT THE USE OF STEROIDS IN MAJOR LEAGUE BASEBALL

On March 17, 2005, the Committee on Government Reform of the U.S. House of Representatives held a hearing on the ineffectual efforts of professional baseball to deal with players’ use of steroids. Among those called to testify were parents of children who used steroids while playing high school or college ball with tragic consequences, medical professionals who addressed the health risks of using steroids, the baseball commissioner and others responsible for monitoring and deterring the use of steroids in the major leagues, and current and former ballplayers, some of whom were admitted or

alleged steroid users. The following excerpts from the hearing focus on the testimony of several players summoned to appear: Jose Canseco, Mark McGwire, Rafael Palmeiro, Curt Schilling, and Sammy Sosa. The scandal of steroid use in baseball—every bit as notorious as the 1919 Black Sox scandal—was inflamed by Jose Canseco’s book, *Juiced: Wild Times, Rampant ’Roids, Smash Hits and How Baseball Got Big*, published in February 2005. In it, he admitted using the stuff and also named other players as users.

In *Juicing the Game*, Howard Bryant assessed the impact of Canseco’s book as “devastating.” Bryant wrote: “Canseco is a zealot, weary of baseball’s hypocrisy, vindictive in his candor. He says that, during his seventeen-year career, steroids were a known fact from the commissioner all the way down to the batboys. He says he personally injected some of the game’s biggest names, from Rafael Palmeiro * * * to Mark McGwire. * * * In making his points, he violates the tenet of clubhouse secrecy that for years maintained the steroid era. He violates the trust of the players with whom he won and lost games, with whom he caroused, drank, and laughed. Canseco returns years of ridicule with a withering indictment of the sport, its racism, its double standards, and its tacit and blatant condoning of the steroids that to a large degree fueled the sport’s comeback [after the players’ strike that wiped out the 1994 World Series].” Small wonder, then, that the other players summoned to testify put plenty of distance between themselves and Canseco. Asking the questions in these excerpts are committee members Tom Davis (chairman), Henry Waxman (ranking minority member), Elijah Cummings, Patrick McHenry, Mark Souder, Paul Kanjorski, William Clay, and Christopher Shays.

Mr. McGWIRE. Mr. Chairman, members of the committee * * *. My name is Mark McGwire. I played the game of baseball since I was 9 years old. I was privileged to be able to play 15 years in the Major Leagues. * * * I love and respect our national pastime. * * *

* * * I admire the parents who had the courage to appear before the committee and warn of the dangers of steroid use.

I applaud the work of the committee in exposing this problem so that the dangers are clearly understood. There has been a problem with steroids in baseball, like any sport where there is pressure to perform at the highest level, and there has been no testing to control performance-enhancing drugs if problems develop.

* * * I will use whatever influence and popularity that I have to discourage young athletes from taking any drug that is not recommended by a doctor. What I will not do, however, is participate in naming names, in implicating my friends and teammates.

I retired from baseball 4 years ago. I live a quiet life with my wife and children. I have always been a team player. I have never been a person who spread rumors or say things about teammates that could hurt them. I do not sit in judgment of other players, whether it deals with sexual preference, their marital problems or other personal habits, including whether or not they use chemical substances. That has never been my style, and I do not intend to change this just because the cameras are turned on, nor do I intend to dignify Mr. Canseco’s book.

* * * I have been advised that my testimony here could be used to harm friends and respected teammates, or that some ambitious prosecutor can use convicted criminals who would do and say anything to solve their own problems, and create jeopardy for my friends.

Asking me or any other player to answer questions about who took steroids in front of television cameras will not solve the problem. If a player answers no, he simply will not be believed. If he answers yes, he risks public scorn and endless government investigations.

My lawyers have advised me that I cannot answer these questions without jeopardizing my friends, my family and myself. I intend to follow their advice.

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It is my understanding that Major League Baseball and the Players’ Union have taken steps to address the steroid issue. If these policies need to be strengthened, I would support that.

* * * I am also offering to be a spokesman for Major League Baseball to convince young athletes to avoid dangerous drugs of all sorts.

* * *

Mr. PALMEIRO. * * * Mr. Chairman and members of the committee. My name is Ralph Palmeiro, and I’m a professional baseball player. * * *

* * * I have never used steroids, period. I do not know how to say it any more clearly than that. Never. The reference to me in Mr. Canseco’s book is absolutely false. I am against the use of steroids. I don’t think athletes should use steroids, and I don’t think our kids should use them. The point of view is one, unfortunately, that is not shared by our former colleague Jose Canseco. Mr. Canseco is an unashamed advocate for increased steroid use by all athletes.

* * *

* * * Congress should work with the league and the Players Association to make sure that the new policy being put in place achieves the goal of stamping steroids out of the sport. To the degree an individual player can be helpful, perhaps as an advocate to young people about the dangers of steroids, I hope you will call on us. * * *

* * *

Mr. SCHILLING. * * * I understand from the invitation I received to appear before this committee that my presence has been requested because I have been outspoken on this issue. I’m honored to be cochairman on an advisory committee, tasked with putting together recommendations on how to prevent steroid usage among young people. I recognize that professional athletes are role models for many of the youth in this country. * * *

While I don’t profess to have the medical expertise to adequately describe the dangers of steroid use, I do believe I have the expertise to comment on whether steroids are necessary to excel in athletics. I think it is critical to convey to the youth who desire to excel in sports that steroids are not necessary in order to excel in any athletic event. * * *

[Jose Canseco’s] book which devotes hundreds of pages to glorifying steroid usage, and which contends that steroid use is justified and will be the norm in the country in several years is a disgrace, was written irresponsibly, and sends exactly the opposite message that needs to be sent to kids. The allegations made in that book, the attempt to smear the names of players, both past and present, having been made by one who for years vehemently denied steroid use should be seen for what they are, an attempt to make money at the expense of others. * * *

* * *

[Do I believe steroids are being used by Major League Baseball players? Yes. Past and present testing says as much. Do I believe we should continue to test and monitor steroid usage in Major League Baseball? Absolutely. I believe the message has been heard by players, and that serious, positive, forward-thinking steps have been taken on the issue.]

* * * Everywhere you look, we are bombarded by advertising of supplements and feel-good medications. I urge you to evaluate the way in which these products are manufactured and the way in which they are marketed. If we are going to send a message to the young athlete that steroid use is bad and steroids are not necessary to achieve success, you cannot allow that message to be drowned out by the manufacturers’ advertising to the contrary. If the government thought enough of American youth to rally against the tobacco industry and its advertising to our youth, why should the supplement industry be any different?

* * *

Chairman Tom Davis. * * * Mr. Schilling * * * and * * * Mr. Palmeiro, as I read the Major League policy, it says if the player tests positive for a steroid, a 10-day suspension or up to a $10,000 fine. So under the policy, a suspension is optional, and you could do a fine up to $10,000. It could be less than that. Our feeling is it ought to be a suspension because a suspension carries with it a
public acknowledgement. Under the rules as we read them, a fine does not. Do you have any thoughts on that? * * *

Mr. SCHILLING. I don't think for a second there is any question about making names public upon of failed test. * * * I'm under the impression, there will be no chance for a failed test to not be made public.

Chairman TOM DAVIS. It is not what it says, just to let you understand. Your position, you think it ought to be made public?

Mr. SCHILLING. I think that's the position of players as a whole.

Mr. PALMEIRO. I believe the players should be suspended. * * *

Chairman TOM DAVIS. That is one of the major concerns, and it was huge surprise to us * * *. Mr. Canseco, * * *][It is your position that Major League Baseball knew that there was steroid use going on and for years didn't do anything to stop it?]

Mr. CANSECO. Absolutely, yes. * * *

Chairman TOM DAVIS. And why do you think baseball didn't do anything about this?

Mr. CANSECO. I guess in baseball at the time there was a saying, if it's not broke, don't fix it. And baseball was coming back to life. Steroids were part of the game. And I don't think anyone really wanted to take a stance on it.

* * *

Mr. WAXMAN. * * * I don't know which of you to ask, what I want to know is you have seen steroid use in baseball. You have seen it from inside the clubhouse. Mr. Palmeiro, maybe it would be best to ask you, is it something that most of the baseball players knew about?

Mr. PALMEIRO. I have never seen the use of steroids in the clubhouse.

Mr. WAXMAN. How about the fact that players were using steroids; is that something that other players knew?

Mr. PALMEIRO. I'm sure players knew about it. I really didn't pay much attention to it. I was focused on what I had to do as part of my job.

Mr. WAXMAN. Did players know? You have spoken out about this. Did you know that other players were using steroids?

Mr. SCHILLING. I think there was suspicion. I don't think any of us knew, contrary to the claim of former players. * * *

* * *

Mr. WAXMAN. Does it stop with ballplayers? Steroid use has grown. Do you think that the team trainers, the managers and general managers, and even the owners might have been aware that some players were using steroids?

Mr. CANSECO. No doubt in my mind, absolutely.

Mr. WAXMAN. It's not a secret that stayed with the players; others knew it in the baseball community?

Mr. CANSECO. Absolutely.

Mr. WAXMAN. Do any of you disagree with that?

* * *

Mr. SCHILLING. * * * Unless you were Jose and you were actually using it, I don't think you had firsthand knowledge of who knew.

* * *

Mr. CANSECO. * * *[T]he most effective thing * * * would be for us to admit there's a major problem. * * * From what I'm hearing, * * * I was the only individual in Major League Baseball that used steroids. That's hard to believe.

Mr. WAXMAN. Mr. Sosa, do you think we ought to have the gold standard of the Olympic program, zero tolerance? [If] [y]ou got caught using steroids for whatever the sport is, that you are suspended for 2 years, and after that second offense, you're out. Do you think that would be effective with baseball and other sports as well?
Mr. Sosa. * * * I don’t have too much to tell you.

Mr. Waxman. * * * How about you, Mr. McGwire?

Mr. McGwire. I don’t know, but I think we should find the right standard.

Mr. Waxman. Do you think that the standard the baseball commission is using right now is the right standard?

Mr. McGwire. I don’t know. I’m not a current player.

* * *

Mr. Palmeiro. I wouldn’t have a problem of playing under any type of standard. Like I said, I have never taken it, so if you want to play under the rules of the Olympics, I welcome it.

* * *

Mr. Cummings. * * * Mr. Canseco, * * * [y]ou said in your book, * * * “I’m tired of hearing such short-sighted crap from people who have no idea what they are talking about. Steroids are here to stay. That’s a fact, I guarantee. Steroids are the future. By the time my 8-year-old daughter Josie has graduated from high school, a majority of all professional athletes in all sports will be taking steroids, and believe it or not, that’s good news.” * * * You sit here one moment talking about how * * * to prevent it in the future, but * * * you are saying * * * almost the opposite * * * in your book.

Mr. Canseco. * * * [I]f Congress does nothing about this issue, it will go on forever. That I guarantee you. And basically, steroids are only good for certain individuals, not good for everyone. I think I specify that, in previous chapters, if you medically need it, if it is prescribed to you. I think those are the things I spoke about.

Mr. Cummings. You realize it is a Federal crime to abuse steroids?

Mr. Canseco. Yes.

Mr. Cummings. Are you now for a zero tolerance policy?

Mr. Canseco. Absolutely.

Mr. Cummings. You made some allegations, and as I understand it, Mr. Schilling, Mr. Thomas, Mr. Sosa and Mr. Palmeiro said they never used the substances. Is that right, Mr. Sosa?

Mr. Sosa. Yes.

Mr. Cummings. Mr. McGwire, would you like to comment on that? I didn’t hear you say anything about it. You don’t have to. I just ask. You don’t want to comment. Are you taking the fifth?

Mr. McGwire. I’m not here to discuss the past. I’m here to be positive about this subject.

* * *

Mr. Souder. The simple way to solve this is the way that Mr. Sosa and Mr. Palmeiro and Mr. Schilling and Mr. Thomas have said. I’m clean, I have been clean, I’ve taken the test, and I have passed the test. This is pretty simple, and the American people are figuring out who is willing to say that and who isn’t.

And as far as this being about the past, that’s what we do. This is an oversight committee. If the Enron people come in here and say, we don’t want to talk about the past, do you think Congress is going to let them get away with that? When we were doing investigations on the travel office, on Whitewater, if President Nixon had said about Watergate when Congress was investigating Watergate, we don’t talk about the past, how in the world are we supposed to pass legislation? When you are a protected monopoly, and all of your salaries are paid because you are a protected monopoly, how are we supposed to figure out what our obligations are to the taxpayers if you say you won’t want to talk about the past?

* * *

Mr. McHenry. * * * I have a simple question, and you can answer yes or no or choose to not answer. That is certainly your right. Is using steroids * * * cheating?

Mr. Schilling. Yes.

Mr. Palmeiro. I believe it is.

Mr. McGwire. Not for me to determine.

* * *

Mr. Sosa. I think so.
Mr. Canseco. I think so. * * * It also cheats the individual who uses it because eventually if found out * * * they have to go through this. * * *

Mr. McNerney. My follow-up question is to Mr. McGwire. You said you would like to be a spokesman on this issue. What is your message?

Mr. McGwire. My message is that steroids is bad. Don’t do them. * * * And I want to tell everybody that I will do everything I can, if you allow me, to turn this into a positive. There is so much negativity said out here. We need to start talking about positive things here.

Mr. McNerney. How do you know they’re bad?

Mr. McGwire. Pardon me?

Mr. McNerney. * * * Would you say that perhaps you have known people that have taken steroids, and you have seen ill effects on that, or would your message be that you have seen the direct effects of steroids?

Chairman Tom Davis. Let me just note here that House Rule 11 protects witnesses and the public from the disclosure of defamatory, degrading or incriminating testimony in open session. House rules at this point are both clear and strict. I think if the testimony tends to defame, the committee can’t proceed in open session, and we want to proceed in open session today. So with that in mind, you can choose to answer that, Mr. McGwire.

Mr. McNerney. Respectfully, my question is just about the message he would carry to the people.

Mr. McGwire. I have accepted, by my attorney’s advice, not to comment on this issue.

Mr. Kanjorski. * * * Mr. Canseco, * * * in your book * * * you confessed to taking steroids; is that correct?

Mr. Canseco. Yes. In the past I have, yes.

Mr. Kanjorski. * * * Why did you use steroids?

Mr. Canseco. Well, there are many reasons. There’s a chapter in my book, where my mom passed away, and I was called in from California. I was playing “A” ball that year, and when I flew home she was in the hospital and she was brain-dead from an aneurysm. She never had seen me play Minor League in general, and I promised her I was going to be the best athlete in the world, no matter what it took. * * *

Mr. Kanjorski. Would it be fair to say that you did it because the motivation was to build your body to be more competitive, and ultimately make more money?

Mr. Canseco. I don’t even think the money was an issue there. I think just becoming, you know, the best athlete I could possibly become.

Mr. Clay. Mr. McGwire, you have already acknowledged that you used certain supplements, including andro, as part of your training routine. In addition to andro, which was legal at the time[,] * * * what other supplements did you use?

Mr. McGwire. I am not here to talk about the past.

Mr. Clay. * * * Mr. Canseco, how did steroids enhance your effort to hit the home run or your ability to hit the ball?

Mr. Canseco. [S]ince I was a child, I have * * * been diagnosed with degenerative disk disease, scoliosis, arthritis. I have had four major back surgeries, elbow surgery. * * * I was a * * * different case than anyone else * * *. [Steroids] helped my physical stature and my muscle density, helped me stand up straight. But I had so many other physical problems, that’s why I said if you are completely healthy, I would never, ever, have touched the stuff. Never.

Mr. Clay. Would you have been able to perform at that level that you did achieve without steroids?

Mr. Canseco. I am an exception to the rule, because I had all these ailments. And I truly believe that * * * it helped me because of my * * * problems.
Mr. Clay. Thank you for your honesty.
Mr. McGwire, let me go back and ask you, would you have been able to perform at that level without using andros?
Mr. McGwire. I am not going to talk about the past.

***

Mr. Shays. Some of your testimony has been very helpful. I want you to know that this committee had requested a Major League Baseball joint drug prevention and treatment program. We wanted a copy of it. We asked for it, we wrote a letter, and then we had to subpoena it.

Now, I would like to ask the three who are active baseball players, I would like to have you tell me what you think, or thought until today, the policy was. And let me first say, we thought that it was—the first positive test, 10-day suspension; second positive test, 30-day suspension; third positive test, 60-day suspension; fourth positive test, 1-year suspension; and then any subsequent positive test, you are out for life. That’s what we thought it was.

I want to ask the three active players, starting with you, Mr. Sosa, if you thought that was the policy, or did you think that it was what we have now learned: that you could also be fined up to $10,000 on the first offense; fined up to $25,000 on the second offense; fined up to $50,000 on the third offense; fined up to $100,000 on the fourth offense.
Were you aware that you could be given a fine instead of suspension?
Mr. Sosa. No.
Mr. Palmeiro. I wasn’t aware of it.
***

Mr. Schilling. No, I wasn’t aware of it.
Mr. Shays. What does that tell you about Major League Baseball and the management if we couldn’t get this information voluntarily, we couldn’t get it through a request by letter after asking for it, we had to subpoena this? Why would this document, and why should this document have been prevented from coming to us? Would anyone care to answer that question?

Let me ask you another question. I hear the concept of team player. And trust me, I don’t care at this hearing, I don’t care to get into the issue of cheating or records. I don’t care to know if you took drugs or not. I don’t care to have you name names. But what piqued my interest was the concept that as a team player, I am not going to name names.

I would like to know the obligation that each of you think you have for your team to make sure you don’t have drugs being used by teammates.
***

Mr. Palmeiro. I am not sure how I would handle that. I have never had that problem. You know, if it became a problem, I guess I would confront the player.
Mr. McGwire. I agree. I have never had that problem. And being retired and out of the game, I couldn’t even think about that.
Mr. Shays. Never had the problem of seeing your colleagues use drugs?
Mr. McGwire. Pardon me!
Mr. Shays. Never had a problem of seeing your colleagues use drugs, steroids; is that what you mean? I don’t know what you mean by you never had that problem.
Mr. McGwire. I am not going to get into the past.
Mr. Shays. OK, I am not really asking about the past.
Mr. Sosa, what obligation do you think that you have to your team if you are aware that someone is using drugs on your team?
Mr. Sosa. I am a private person, I don’t really go, you know, ask people whether they—
Mr. Shays. I will just conclude by saying I think I know your answer, sir.

It just seems to me that one of the messages you may be telling young people is that a team player—it’s an interesting concept of a team player, it seems to me. It seems to me you do have an obligation.
***
Mark McGwire’s opening statement (p. 150), however, did not detail all the risks associated with testifying at a congressional investigation. Identifying another possible mishap fell to Rafael Palmeiro. On August 1, 2005, major league baseball announced that he had failed a drug test; the steroid stanozolol was found in his system. He was then suspended for 10 days. But as the transcript of the hearing shows, Palmeiro said that he had never taken steroids, and he made the denial several times. He later said his best guess was that the positive test result was due to liquid B-12 tainted with stanozolol. The B-12, he said, had been supplied by a teammate, Miguel Tejada, but Tejada tested negative for steroid use twice during the 2005 season and other B-12 samples supplied by him tested negative, as well. After looking into whether Palmeiro had committed perjury at the March 17 hearing, the committee decided not to recommend that the Justice Department file charges. Observing that a “referral for perjury is a serious step that requires convincing evidence,” the committee found confusing and contradictory evidence in its investigation. Moreover, a positive steroid test result after March 17—the day on which Palmeiro repeatedly made the denials under oath—would not necessarily prove that he had used steroids before that.

Investigations and the First Amendment

Throughout the late 1940s and the 1950s, while the Cold War raged, Congress devoted seemingly inexhaustible attention to what it saw as the threat posed by Communist infiltration of numerous domestic organizations and activities. Fueled in the beginning by testimony from former American Communists who were pressured to expose others they once knew in the party or whom they thought were subversive, the naming of names took a fearsome toll on the private lives, reputations, and employability of the accurately- and inaccurately-identified alike. The glare of publicity that accompanied what critics characterized as politically-inspired “witch hunts” affected virtually every area of American life: labor unions, government employment, education, even Hollywood. Spearheading this effort was the House Committee on Un-American Activities (HUAC), a standing committee of the U.S. Congress until—after a name change in 1969—it was eventually abolished in 1975. In two especially noteworthy cases, Watkins v. United States, 354 U.S. 178, 77 S.Ct. 1173 (1957), and Barenblatt v. United States, 360 U.S. 109, 79 S.Ct. 1081 (1959), witnesses called before HUAC refused to answer some of the questions on First Amendment grounds. Although no one can be punished for invoking the Fifth Amendment, witnesses who later have been judged to have incorrectly relied on the First Amendment can be punished for contempt of Congress. The critical issue, then, is deciding when someone is within his or her First Amendment rights in refusing to answer. Because the judiciary has never regarded an inquiry into unconstitutional motives on the part of legislators as a valid basis for nullifying an otherwise legitimate legislative act, a witness will not be heard to complain that the purpose of the inquiry was to punish.

Consequently, the Court devised a less subjective approach to determine when a witness is obliged to answer. Reconstructed from Justice Harlan’s opinion in Barenblatt, this appears to consist of a three-part test: (1) Is Congress engaged in a valid legislative function? (2) Has the committee been duly authorized to conduct the inquiry? (3) Is the question asked pertinent to the authorized subject of the inquiry? If the answer to all three questions is “yes,” the First Amendment cannot legitimately be invoked as the basis for refusing to answer.

To begin with, Congress may not investigate activities over which it has no legislative authority. To do so would amount to exposure for the sake of exposure. But is membership in a political organization something Congress can legislate about? In Barenblatt, the Justices disagreed. Speaking for a bare majority of the Court, Justice Harlan concluded that, in
accordance with Congress’s previous findings, the Communist Party—at least in post-World War II America—was a criminal conspiracy whose members were dedicated to overthrowing the government by means of force and violence. Balancing Barenblatt’s right to silence (about the individuals with whom he had associated) under the First Amendment against the government’s interest in self-preservation, the government’s interest outweighed Barenblatt’s. Speaking for the dissenters, Justice Black argued that the Communist Party was a political party (whose members, like those of any other political party, may occasionally commit illegal acts). Barenblatt’s freedom to associate, as an essential part of freedom of speech, was absolutely protected by the very wording of the First Amendment (“Congress shall make no law * * * abridging the freedom of speech”). Thus, if Congress could not legislate about party membership, it had no constitutional authority to inquire about it.

Second, Justice Harlan concluded that the House of Representatives had duly authorized the inquiry. Rule XI, adopted in 1938 when HUAC was created as a special committee, provided: “The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.” Although the authorizing resolution was open-ended, Harlan pointed out that the committee’s operation had unquestionably been endorsed by subsequent Congresses which had elevated HUAC from a standing to a permanent committee of the House and repeatedly funded its operation.

Citing the Court’s previous decision in Watkins, Justice Black disagreed. In Watkins, decided just two years earlier, Chief Justice Warren, speaking for a majority of the Justices that included Harlan, held that the House rule purporting to authorize HUAC’s investigations was unconstitutionally vague. Warren had written, “It would be difficult to imagine a less explicit authorizing resolution. Who can define the meaning of ‘un-American?’ What is that single, solitary ‘principle of the form of government as guaranteed by our Constitution’?” He continued, “No one could reasonably deduce from [its] charter the kind of investigation that the Committee was directed to make.” With so little to guide the witness in deciding whether the committee was operating within its authorized jurisdiction and, therefore, whether someone was obligated to answer, invoking the First Amendment became little more than a high-stakes guessing game. That denied Watkins due process. The only sure path lay in always complying with the committee’s requests, which meant the witness automatically forfeited his First Amendment rights. Since the committee’s authorizing resolution remained exactly as it was in Watkins, Black argued, Barenblatt need not answer.

The last component of the three-part test asked whether the questions asked were pertinent to the subject which the committee was authorized to investigate. Harlan distinguished Watkins’ experience, in which he had only the committee’s name to go on, from that of Barenblatt. Barenblatt had many more clues: the committee chairman had identified the specific nature of the inquiry—Communism in education; Barenblatt had been present to hear the questions asked of preceding witnesses; and the questions asked pertained to Barenblatt’s own membership, not that of others. Moreover, unlike Watkins, who answered questions about his own membership but declined to name others, Barenblatt had indicated to the committee only that he might decline to answer some of the committee’s questions. As Harlan pointed out, Barenblatt’s was, at best, a contemplated objection; failure to explicitly object deprived the committee of the opportunity to make it clear why the questions put to him were pertinent and, therefore, why he was obliged to
answer. Justice Black’s response to Harlan’s argument was short and simple: If Congress had done nothing to change the resolution authorizing HUAC so that it remained as unconstitutionally vague as it was in Watkins, then no question could be pertinent.

However, when investigating a committee of the Florida legislature subpoenaed the president of the Miami branch of the N.A.A.C.P. in the mid-1950s to turn over the organization’s membership lists, the Court, four years later, drew a sharp line between investigating that group and inquiring about membership in the Communist Party. Speaking for the Court in Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 83 S.Ct. 889 (1963), Justice Goldberg began from the premise that “It is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association, and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.” While Barenblatt had held that could be demonstrated with respect to Communist affiliation, “it is not alleged Communists who are the witnesses before the [state investigation] committee and it is not discovery of their membership in that party which is the object of the challenged inquiries. Rather, it is the N.A.A.C.P. itself which is the subject of the investigation * * * [and] there is no suggestion that the Miami branch of the N.A.A.C.P. or the national organization with which it is affiliated was, or is, itself a subversive organization.” The state had failed to produce any evidence “to demonstrate any substantial relationship between the N.A.A.C.P. and subversive activities * * *.” In the absence of such a showing, investigating membership

11. Except for this difference, critics of the Court’s performance in Barenblatt argued that Harlan’s distinctions between the facts of the two cases were specious. That HUAC had become a standing committee and had been funded continuously were facts also true in 1957 when Watkins was decided and therefore could not be cited as factors distinguishing the cases. In the critics’ view, Harlan’s majority opinion served as little more than camouflage for the real aim in Barenblatt, which was to signal the conservative coalition of Republicans and Southern Democrats then controlling Congress that the Justices intended to retreat from a string of controversial rulings that had provoked legislation designed to curb the Court. According to their interpretation, Barenblatt was simply the closing act of a recurring political drama known as “Court-curbing,” a phenomenon triggered whenever the values of a majority of Justices are seriously out of step with those of the prevailing majority in Congress. This historical pattern is marked by three stages: (1) judicial provocation, (2) congressional threat, and (3) judicial retreat.

In the mid-1950s, the first step—judicial provocation—was illustrated by a spate of rulings that vigorously defended the constitutional rights of witnesses subpoenaed by investigating committees, government employees accused of disloyalty, criminal defendants, and segregated African-Americans. Congress then retaliated by attempting to pass legislation to overturn the Court’s statutory rulings and to rein in its constitutional rulings by stripping the Court of some of its appellate jurisdiction. (At other times in American history, Congress threatened to impeach and remove Justices, enlarge the number of Justices on the Court, pass a constitutional amendment, or cancel an upcoming Term of the Court.) In 1958, the threat took the specific form of the Jenner-Butler bill and an even more extreme measure, HR 3. In the third, final, and inevitable stage, the Court—always overmatched in any pitched battle with Congress—gave in, its retreat accomplished either by reaching a different result in cases currently before it whose facts were virtually identical to those of the offending cases or by overruling the offensive precedents outright. The confrontation of the 1950s repeated a pattern that had been evident in 1801, in 1867, and in 1937. (The denouement of the conflict between Congress and the Court during the Great Depression is illustrated, for example, by the Court’s opinions in National Labor Relations Board v. Jones & Laughlin Steel Corp. (see Chapter 5) and West Coast Hotel Co. v. Parrish (see Chapter 7).) For a discussion of this repeating model of Court-curbing in American history, see Stuart S. Nagel, “Curbing the Court: The Politics of Congressional Reaction,” in The Legal Process from a Behavioral Perspective (1969), pp. 260–279. For discussion of curbing the Court in the 1950s, see “Court-Curb Proposals Stimulated by Controversial Decisions,” Congress and the Nation, vol. 1 (1965), p. 1442; see also Walter F. Murphy, Congress and the Court (1962). For an itemized list of the cases provoking the confrontation of the 1950s and those registering the Court’s retreat, see earlier editions of this casebook.
in “a concededly legitimate and nonsubversive organization” amounted to nothing more
than the exposure of vulnerable individuals. And, quoting from an earlier decision, the Court
noted, “We cannot close our eyes to the fact that the militant Negro civil rights movement
has engendered intense resentment and opposition of the politically dominant white
community.” Unlike many of the witnesses called before HUAC, the Court would not
leave the N.A.A.C.P. members to be unmasked under the spotlight of a public hearing and
then left to face retribution in the shadows—whether firing or blacklisting by employers or
threats or violence from vengeful individuals. Nowadays, as the steroids-in-baseball
transcript shows, witnesses are protected, not only by court rulings, but also by congressional
rules. In contrast to the quite calculated sensationalism of HUAC’s exposés, the House’s
current Rule 11 provides that a witness’s defamatory, degrading, or incriminating testimony
is to be vetted in closed—rather than open—session.

Immunity
The advantage of invoking the First Amendment is not having to recite a constitutional
claim in which you acknowledge that you may have committed a crime; the peril of
invoking it is that, if the claim is incorrectly made, you can be punished for contempt.
Invoking the Fifth Amendment besmirches your reputation simply by claiming the right,
but you can never be punished for doing so. All in all, as we have shown, people forced
to make the choice are caught between a rock and a hard place. Suppose, however, that you
are willing to take the heat for invoking the Fifth Amendment; can you still be made to
testify?

The answer is “yes,” if you have been given immunity. Immunity is government’s
assurance that what you say cannot be used to punish you. You may have to admit that you
participated in criminal activity, but your admission cannot be used against you in a
criminal prosecution.

How much immunity is enough immunity? Supreme Court decisions have made it clear
that individuals to whom immunity has been given cannot refuse to testify. The Court
has also held that immunity encompasses several senses in which the witness’s statements
may be used: (1) use immunity, in which the statements made by the witness may not be
used against him or her in a criminal prosecution; (2) derivative use immunity, in which
leads obtained from the witness’s statements cannot be used to procure other incriminating
evidence; and (3) transactional immunity, in which the witness cannot be subjected to any
punishment for the criminal act committed regardless of what other evidence may be
obtained.

Although the Court has held that when immunity is granted, it need not be
transactional immunity, it must at least amount to use and derivative use immunity. If
evidence of the crime is obtained from sources entirely independent of the witness’s
statements—an unlikely prospect perhaps—then there is no constitutional impediment
to convicting him or her of the crime. The principle articulated by the Court is that the
scope of the immunity granted must be congruent with—but is not required to be broader
than—the protection conferred by the Fifth Amendment’s guarantee against self-
incrimination. Constitutionally speaking, the witness is entitled to be no worse off with
a grant of immunity than would be the case if he or she had invoked the Fifth
Amendment.

United States v. North, which follows, raises the issue of using immunized statements in preparing witnesses who testified against the defendant in his multicount federal trial on charges related to the Iran-Contra Affair. Given the Court's interpretation of what is constitutionally forbidden to prosecutors when a witness is given immunity, is it possible for a witness called to testify before a congressional investigating committee to be successfully prosecuted on criminal charges afterward?

UNITED STATES v. NORTH
United States Court of Appeals, District of Columbia Circuit, 1990
910 F.2d 843

BACKGROUND & FACTS
Following the appearance of a story in a Lebanese newspaper in November 1986 that agents of the Reagan administration had secretly sold weapons to Iran, the House and Senate established committees to investigate this and the additional allegation that proceeds from the sale had gone to fund the rebels or “Contras” fighting in Nicaragua at a time when Congress had legislated to bar aid to these resistance forces. In July 1987, Lieutenant Colonel Oliver North, a former staff member of the National Security Council (NSC), was called to testify before a joint meeting of the Iran-Contra committees. Invoking his right against self-incrimination guaranteed by the Fifth Amendment, he declined to testify; but Congress compelled his testimony by a grant of use immunity under 18 U.S.C.A. § 6002. His testimony, which lasted for six days, was carried live on national television and radio and was rebroadcast numerous times on news programs.

At the same time these hearings were being conducted, a Special Division of the U.S. Court of Appeals for the District of Columbia Circuit authorized the appointment of an independent counsel (IC), Lawrence E. Walsh, to investigate and prosecute criminal wrongdoing arising out of the Iran-Contra Affair. The IC secured indictments against North and other operatives of the Reagan administration, including Admiral John Poindexter and General Richard Secord. North himself was indicted on a dozen criminal counts and convicted on three. These included lying to Congress and altering, destroying, and removing official NSC documents. North appealed, and his convictions were reversed. The Supreme Court later denied certiorari, 500 U.S. 941, 111 S.Ct. 2235 (1991).

The appeals court in this case addressed the problems created when an individual who has made incriminating statements under a grant of immunity is subsequently prosecuted. As both the per curiam and dissenting opinions suggest, it may be impossible to have a successful criminal prosecution if Congress insists on investigating that criminal activity first and compels testimony by grants of immunity.

Before WALD, Chief Judge, SILBERMAN and SENTELLE, Circuit Judges.

PER CURIAM:

***

* * * Because the privilege against self-incrimination "reflects many of our fundamental values and most noble aspirations," Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, 84 S.Ct. 1594, 1596 (1964), and because it is "the essential mainstay of our adversary system," the Constitution requires "that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Miranda v. Arizona, 384 U.S. 436, 460, 86 S.Ct. 1602, 1620 (1966).

The prohibition against compelled testimony is not absolute, however. Under the
rule of Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653 (1972), a grant of use immunity under 18 U.S.C. § 600213 enables the government to compel a witness’s self-incriminating testimony. This is so because the statute prohibits the government both from using the immunized testimony itself and also from using any evidence derived directly or indirectly therefrom. **

When the government proceeds to prosecute a previously immunized witness, it has “the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.” Kastigar, 406 U.S. at 461–62, 92 S.Ct. at 1665. **

A trial court must normally hold a hearing (a “Kastigar hearing”) for the purpose of allowing the government to demonstrate that it obtained all of the evidence it proposes to use from sources independent of the compelled testimony.***

[The failure of the government to meet its burden can have most drastic consequences.***

North’s primary Kastigar complaint is that the District Court failed to require the IC to demonstrate an independent source for each item of evidence or testimony presented to the grand jury and the petit jury **. North also claims that the IC made an improper nonevidentiary use of the immunized testimony (as by employing it for purposes of trial strategy) **. North also protests that his immunized testimony was improperly used to refresh the recollection of witnesses before the grand jury and at trial, that this refreshment caused them to alter their testimony **.

*** The use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements, constitutes evidentiary use rather than nonevidentiary use. **

*** Prosecutorial knowledge of the immunized testimony may help explicate evidence theretofore unintelligible, and it may expose as significant facts once thought irrelevant (or vice versa). Compelled testimony could indicate which witnesses to call, and in what order. Compelled testimony may be helpful in developing opening and closing arguments. **

Kastigar *** [the] Court *** held that immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. **

The Court pointed out that “[t]he statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom. ** This total prohibition on
use provides a comprehensive safeguard, barring the use of compelled testimony as an ‘investigatory lead,’ and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures.” Kastigar, 406 U.S. at 460, 92 S.Ct. at 1665 (emphasis supplied). Section 6002 * * *, the Court concluded, * * * “leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege.” * * *

* * * In our view, the use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements, [however], constitutes indirect evidentiary not nonevidentiary use. This observation also applies to witnesses who studied, reviewed, or were exposed to the immunized testimony in order to prepare themselves or others as witnesses.

* * * When the government puts on witnesses who refresh, supplement, or modify that evidence with compelled testimony, the government uses that testimony to indict and convict. The fact that the government violates the Fifth Amendment in a circuitous or haphazard fashion is cold comfort to the citizen who has been forced to incriminate himself by threat of imprisonment for contempt. * * * [It] cannot be dismissed as merely nonevidentiary. * * *

* * * The fact that a sizable number of grand jury witnesses, trial witnesses, and their aides apparently immersed themselves in North’s immunized testimony leads us to doubt whether what is in question here is simply “stimulation” of memory by “a bit” of compelled testimony. * * * Kastigar does not prohibit simply “a whole lot of use,” or “excessive use,” or “primary use” of compelled testimony. It prohibits “any use,” direct or indirect. From a prosecutor’s standpoint, an unhappy byproduct of the Fifth Amendment is that Kastigar may very well require a trial within a trial * * * if such a proceeding is necessary for the court to determine whether or not the government has in any fashion used compelled testimony to indict or convict a defendant.

* * * It may be that it is possible in the present case to separate the wheat of the witnesses’ unspoiled memory from the chaff of North’s immunized testimony, but it may not. There at least should be a Kastigar hearing and specific findings on that question. If it proves impossible to make such a separation, then it may well be the case that the prosecution cannot proceed. Certainly this danger is a real one in a case such as this where the immunized testimony is so broadly disseminated that interested parties study it and even casual observers have some notion of its content. Nevertheless, the Fifth Amendment requires that the government establish priorities before making the immunization decision. The government must occasionally decide which it values more; immunization (perhaps to discharge institutional duties, such as congressional fact-finding and information-dissemination) or prosecution. If the government chooses immunization, then it must understand that the Fifth Amendment and Kastigar mean that it is taking a great chance that the witness cannot constitutionally be indicted or prosecuted.

* * *

The convictions are vacated and the case is remanded to the District Court. On remand, if the prosecution is to continue, the District Court must hold a full Kastigar hearing that will inquire into the content as well as the sources of the grand jury and trial witnesses’ testimony. That inquiry must proceed witness-by-witness; if necessary, it will proceed line-by-line and item-by-item. For each grand jury and trial witness, the prosecution must show by a preponderance of the evidence that no use whatsoever was made of any of the immunized testimony either by the witness or by the Office of Independent Counsel in questioning the witness. This burden may be met by estab-
lishing that the witness was never exposed to North’s immunized testimony, or that the allegedly tainted testimony contains no evidence not “canned” by the prosecution before such exposure occurred. ***

** If the government has in fact introduced trial evidence that fails the Kastigar analysis, then the defendant is entitled to a new trial. If the same is true as to grand jury evidence, then the indictment must be dismissed. ***

** WALD, Chief Judge, dissenting ***

Oliver North’s was a case of epic proportions, massively publicized, for many weeks engaging the rapt attention and emotions of the nation. The panel today reverses his convictions ** [and] remand[s] for an “item-by-item, line-by-line" hearing on whether any bit of evidence, as yet unidentified, may have reflected exposure to North’s immunized testimony before Congress.

After studying for months the thousands of pages of transcripts and hundreds of documents produced for the grand jury and trial, I, on the other hand, am satisfied that North received a fair trial—not a perfect one, but a competently managed and a fair one. ** I do not find ** any ** reversible error. I am convinced that the essentials of a fair trial were accorded North, and that his conviction on the three Counts of which the jury found him guilty should be affirmed.

***

While national television coverage should not be allowed to impinge on North’s statutory and constitutional rights, neither does it entitle North to escape a fair trial. Kastigar’s strictures must be applied in a manner that protects a defendant’s constitutional rights, but also preserves the public’s interest in conducting prosecutions of officials whose crimes have far-flung implications for national policy. We require trial judges to conduct fair trials, not perfect ones. **

North has failed to identify a single suspected Kastigar violation in the thousands of pages of grand jury and trial testimony, other than the misguided efforts of in-house Justice Department officials to use his immunized testimony to brief witnesses who essentially corroborated his own version of events, and who swore under oath that their ultimate testimony was derived from personal recollection only. When an “ex parte review in appellate chambers,” ** yields a clear result that is entirely consistent with the trial court’s own findings, a remand for further lengthy hearings is unjustified. **

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D. THE SPEECH OR DEBATE CLAUSE (CONGRESSIONAL IMMUNITY)

The Constitution specifies that members of Congress “shall not be questioned in any other Place” for “any Speech or Debate in either House.” Art. 1, § 6, ¶ 1. The purpose of this grant of immunity was to secure the independence of the legislative branch, especially against interference by the Executive. English history, particularly during the reign of the Stuarts, was littered with attempts by the monarch—frequently successful and often by force—to intimidate members of the House of Commons. In what is perhaps the most notorious example, Charles I, accompanied by a detachment of soldiers, invaded the floor of the House of Commons in January 1642 to arrest five members for treason. However, they had been warned in advance and fled. When the King demanded to know where the fugitives were hiding, the Speaker—in an heroic defense of the integrity of the House of Commons—refused to say. Indeed, several Speakers of the Commons lost their heads when they refused to submit to royal bullying or officially reported to the King that the House of
Commons had taken actions the monarch bitterly opposed. Grounded in this historical experience, the Speech or Debate Clause confers absolute immunity on federal lawmakers during their participation in the legislative process.

Yet any grant of absolute immunity carries the potential for mischief. If a representative or senator makes defamatory statements outside the halls of Congress, he is as subject to suit by the injured party as anyone else. But if those statements are made on the floor or in committee rooms, such statements—no matter how irresponsible or damaging—cannot legally be held against him. The tension between maintaining the integrity of Congress and preserving an immunity that frequently appears to place the legislator above the law pervades all decisions interpreting the Speech and Debate Clause. The Supreme Court has endeavored to walk this constitutional tightrope by distinguishing conduct that is part of the legislative process from that which is not.

Reviewing the most important principles that define Speech or Debate protection, the Court noted, in Gravel v. United States, 408 U.S. 606, 92 S.Ct. 2614 (1972), that the clause provides no defense to a member of Congress against arrest, trial, conviction, or punishment on criminal charges, although a federal legislator is immune from being served with civil process while Congress is in session. While there is no immunity from criminal sanctions, evidence against a congressman or senator cannot be drawn from speeches, votes, or any other act done in the course of the legislative process. Not only are legislators immunized with respect to any actions they perform in the legislative process, so are their aides, provided these assistants are acting on behalf of the legislator.

In *Gravel*, a United States senator and his aide were subpoenaed to answer questions before a federal grand jury about their handling of classified government documents, specifically “The Pentagon Papers,” a 47-volume Defense Department study that detailed the unfolding of American involvement in Vietnam. After Gravel convened a midnight meeting of his obscure Senate subcommittee and read excerpts aloud, he had the entire study entered into the record. The grand jury subpoenaed Gravel and his legislative assistant to answer questions about their involvement in arrangements with a commercial publisher to make the study available to the public. The Court held that, although reading excerpts and entering the volumes into the record at the subcommittee hearing were within the bounds of Speech or Debate Clause immunity, Gravel’s involvement in making arrangements for the public dissemination of the study were not. The subcommittee meeting was part of the legislative process, since Congress was informing itself. Informing the public, on the other hand, was held to be outside the legislative process, so neither Gravel nor his assistant were immune from a grand jury inquiry about arrangements for commercial publication.

This bit of line-drawing proved to be too much for Justice Brennan, who found it embodied “a far too narrow view of the legislative function.” In dissent, he protested: “[T]he Court excludes from the sphere of protected legislative activity a function that I had supposed lay at the heart of our democratic system[,] * * * the legislator’s duty to inform the public about matters affecting the administration of government. That this ‘informing function’ falls into the class of things ‘generally done in a session of the House by one of its members in relation to the business before it[,] * * * was explicitly acknowledged by the Court in *Watkins v. United States*. In speaking of the ‘power of the Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of the Government,’ the Court noted that ‘[f]rom the earliest times in its history, the Congress has assiduously performed an “informing function” of this nature.’ ” Justice Brennan found additional support for this broad view in statements by Jefferson and Madison that “reflected[ed] a deep conviction of the Framers that self-government can succeed only when the people are informed by their representatives, without interference from the Executive or Judiciary, concerning the conduct of their agents in government.”
A year later, the Court repeated this application of the clause in Doe v. McMillan, 412 U.S. 306, 93 S.Ct. 2018 (1973). In that case, the House Committee on the District of Columbia had undertaken an investigation of Washington’s public school system and presented its devastating findings in a committee report. As an appendix to the report, the committee included sample truancy reports, disciplinary accounts, test papers, and other evidence used to support its conclusions that the city’s public educational system was plagued by severe problems of skipping school, disruption and violence, and underachievement. The exhibits in the appendix identified particular students by name. When copies of the committee report containing these exhibits were made available for purchase by the public, parents of the students who had been named sued the Superintendent of Documents and Public Printer for damages. The Court concluded that, since a committee report distributed to members of the House informed Congress, public officials charged with printing and distributing the report were immune from suit. However, since public sale of the report amounted to Congress informing the public and thus was not part of the legislative process, plaintiffs could sue for damages on that part of their complaint.

In Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675 (1979), the Court affirmed the general proposition that the Speech or Debate Clause provides no immunity when a slanderous or libelous statement is repeated outside the legislative process. That case involved Senator William Proxmire’s liability for certain statements made in connection with his Golden Fleece Award, a publicity stunt he created to highlight what he thought were egregious examples of government’s wasteful spending. One of these “awards” went jointly to the National Aeronautics and Space Administration and the Navy for funding research by a behavioral scientist into forms of aggression triggered when someone is confined in close quarters for prolonged periods of time. Dr. Hutchinson had conducted government-funded research on aggression in monkeys, which Proxmire ridiculed on the Senate floor as studying why monkeys “grind their teeth.” Proxmire went on to complain that funding this research put the bite on the taxpayer and urged the government “to get out of this ‘monkey business.’” Proxmire then repeated much of this in a news release, a newsletter to his constituents, and a television interview. Hutchinson sued, contending that the senator’s statements humiliated him, held him up to public scorn and ridicule, damaged his professional and scholarly reputation, and impaired his income.

Consistent with its previous decisions, the Court held that the clause immunized the senator against any damages arising from the speech because the Senate was informing itself. However, since informing the public was unprotected activity within the meaning of the Speech or Debate Clause, Hutchinson’s suit could proceed on damages resulting from the other three venues in which Proxmire had republished his libel. Although the decisions in Gravel, McMillan, and Proxmire all speak to a lawmaker’s liability for repeating a libel outside the legislative process, now that C-SPAN broadcasts speeches and debates as they actually occur on the floor of each chamber and in the committee rooms, one may well ask whether the distinction between conduct within and outside the legislative process still remains viable.

Although representatives and senators can surely be prosecuted for crimes, nothing said or done in the legislative process can be introduced as evidence against them, nor can there be any inquiry into the motives for their legislative acts. See United States v. Johnson, 383 U.S. 169, 86 S.Ct. 749 (1966); United States v. Helstoski, 442 U.S. 477, 99 S.Ct. 2432 (1970). Increasingly, however, the duties of members of Congress have focused less on legislating and more on running errands for constituents. If, as the late Speaker of the House Tip O’Neill used to say, “All politics is local,” even the least astute representative or senator soon comes to appreciate that the surest route to re-election is constituency service. In this there is a disparity between the scope of congressional immunity and the realities of...
the member's job. As the Court said in United States v. Brewster, 408 U.S. 501, 92 S.Ct. 2531 (1972):

Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called "news letters" to constituents, news releases, and speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. * * *

Constitutionally speaking, then, a representative or senator does things outside the legislative process at his or her own risk, no matter how politically necessary it may be to do them.

In response to a criminal prosecution for having taken money for his vote and support of a bill dealing with postage rates, Senator Brewster unsuccessfully argued that the Speech or Debate Clause barred any use of his vote as evidence and any examination into the motivation behind it. Bribery, the Court held, was certainly not part of the legislative process, and inquiry into corruption was not barred because what was bought was a legislative act. As the Court explained: "There is no need for the Government to show that [Brewster] fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise. * * * When a bribe is taken, it does not matter whether the promise * * * was for the performance of a legislative act as here or, as in Johnson, for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." 408 U.S., at 526, 92 S.Ct., at 2544.

The most recent go-around over congressional bribery, however, raised a different angle on Speech or Debate Clause protection. The constitutional dispute sprang from a Saturday-night raid by FBI agents in May 2006 on the Capitol Hill office of Representative William Jefferson. It was the first search of a legislator's office in the 219-year history of Congress. The agents obtained the search warrant for his office after they found some $90,000 stashed in a freezer at Jefferson's home. The search of the congressman's home had been based on viewing a videotape which showed him taking a $100,000 bribe. In their Capitol Hill raid, the agents seized computer and other documents. Representative Jefferson argued that this search and seizure violated the separation of powers, specifically the guarantee of autonomy afforded by the Speech and Debate Clause against intrusion and intimidation by agents of the executive branch. In particular, Jefferson objected that finding documents essential to the government's case would entail rummaging through all the computer files and other documents in search of the incriminating ones. This sorting process, he contended, would necessarily involve the examination of sensitive and confidential documents related to the legislative process in order to identify any related to criminal activity. The search for documents would therefore intrude upon the legislative process and violate the immunity all members of Congress share as participants in that process.

Department of Justice officials replied that they were going to employ independent specialists to “filter” the documents so that the sensitivity of certain files would not be compromised. But, unlike the editing process employed as a result of the Supreme Court’s decision in United States v. Nixon (see p. 211), in which the interest in law enforcement was harmonized with the President’s claim of executive privilege by having a federal judge inspect all of the material in camera and separate the incriminating conversations from ones that were not relevant, examination of the files in this case would not be done by a judge but personnel hired by the executive branch. From the standpoint of Capitol Hill, this intrusion by the Department of Justice was seen as yet another example of an overbearing executive branch expanding its powers at the expense of Congress. The congressional leadership of both parties called for a halt to any examination of the seized documents and demanded their speedy return.

In In re Search of the Rayburn House Office Building Room Number 2113, 432 F.Supp.2d 100 (D.D.C. 2006), Judge Thomas F. Hogan held there was probable cause to search Jefferson’s office and, first-of-its-kind though the search may have been, there was no violation of the separation of powers or the Speech or Debate Clause because the search did not interfere with any legislative act by the congressman. Judge Hogan wrote, “It is well established * * * that a member of Congress is generally bound to the operation of the criminal law as are ordinary persons.” More pointedly, he continued, “Congressman Jefferson’s interpretation of the speech or debate privilege would have the effect of converting every Congressional office into a taxpayer-subsidized sanctuary for crime.” Nor did the separation of powers argument provide much of a defense. Said Judge Hogan, “Rather, the principle of the separation of powers is threatened by the position that the legislative branch enjoys unilateral and unreviewable power to invoke absolute privilege, thus making it immune from the ordinary criminal process of a validly issued search warrant.” On appeal, the three-judge circuit panel subsequently held that, although the Speech or Debate Clause absolutely guaranteed Jefferson the right to review the materials first and to shield any legislative documents from inspection by federal agents, it was enough here that protected materials be returned to him. Materials not protected by the privilege were to be retained by the FBI and could be used to prove any criminal charges against him.15

Probably the most comprehensive examination of legislative immunity is provided in Josh Chafetz’s book, Democracy’s Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions (2007). It discusses the following topics in depth: jurisdictional conflicts between courts and legislative houses, legislators’ freedom of speech, legislators’ freedom from civil suit, the resolution of contested elections, and the disciplinary powers of legislative bodies.