judges. And making the proper deductions for the ordinary depravity of human ure, the number must be still smaller, of those who unite the requisite integrity h the requisite knowledge. . . .

From *Federalist 78* students can observe that the intent of the framers of the Constitution, at least as expressed and represented by Hamilton, was to give to the courts the power of judicial review over legislative acts. Students should note that this concept was not explicitly written into the Constitution. Although the cause of this omission is not known, it is reasonable to assume that the framers felt that judicial power implied judicial review. Further, it is possible that the framers did not expressly mention judicial review because they had to rely on the states for adoption of the Constitution; judicial power would extend to the states as well as to the coordinate departments of the national government.

The power of the Supreme Court to invalidate an act of Congress was stated by John Marshall in *Marbury v. Madison,* 1 Cranch 137 (1803). At issue was a provision in the Judiciary Act of 1789 which extended the *original jurisdiction* of the Supreme Court by authorizing it to issue writs of mandamus in cases involving public officers of the United States and private persons, a power not conferred upon the Court in the Constitution. Marbury had been appointed a justice of the peace by President John Adams under the Judiciary Act of 1801, passed by the Federalists after Jefferson and the Republican party won the elections in the fall of 1800 so that President Adams could fill various newly created judicial posts with Federalists before he left office in March 1801. Marbury was scheduled to receive one of these commissions, but when Jefferson took office on March 4, with Madison as his secretary of state, it had not been delivered. Marbury filed a suit with the Supreme Court requesting it to exercise its original jurisdiction and issue a writ of mandamus (a writ to compel an official to perform his or her duty) to force Madison to deliver the commission, an act which both Jefferson and Madison were opposed to doing. In his decision, Marshall, a prominent Federalist, stated that although Marbury had a legal right to his commission, and although mandamus was the proper remedy, the Supreme Court could not extend its original jurisdiction beyond the limits specified in the Constitution; therefore, that section of the Judiciary Act of 1789 permitting the court to issue such writs to public officers was unconstitutional. Incidentally, the Republicans were so outraged at Adams's last-minute appointments that there were threats that Marshall would be impeached if he issued a writ of mandamus directing Madison to deliver the commission. This is not to suggest that Marshall let such considerations influence him; however, politically his decision was thought to be a masterpiece of reconciling his position as a Federalist with the political tenor of the times.

CHAPTER 16 QU12

MARBURY V. MADISON

1 Cranch 137 (1803)

Mr. Chief Justice Marshall delivered the opinion of the Court, saying in part:

. . . The authority, therefore, given to the Supreme Court, by the [Judiciary Act of 1789] . . . establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution [because it adds to the original jurisdiction of the Court delineated by the framers of the Constitution in Article III; had they wished this power to be conferred upon the Court it would be so stated, in the same manner that the other parts of the Court's original jurisdiction are stated]; . . . 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 interests. 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 powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

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

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

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

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

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

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

So if the 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 conformably to the law, disregarding the Constitution, or conformably 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 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?

The Constitution declares "that no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

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 this 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!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as ————, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

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

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

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

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

The rule must be discharged.

Marbury v. Madison unequivocally established the Supreme Court's supremacy over Congress. But the history of the Supreme Court is not one of activism in overruling congressional laws. Judicial review has been most significant and controversial in overturning state actions.

While the Court rarely tangled with Congress over its first two hundred years, Chief Justice Rehnquist's Court took on Congress in a series of important cases as the twentieth century ended and the twenty-first century began. It resurrected a dormant commerce clause to limit congressional power to enact gun control legislation (*Lopez,* 1995) and the regulation of violence against women (*Morrison,* 2000). It overturned the Religious Freedom Restoration Act of 1993 in which Congress attempted to overrule a Supreme Court decision (*City of Boerne,* 1997). The Supreme Court also limited congressional authority to enact affirmative action programs (*Adarand,* 1995).[1]

In the following case the Supreme Court continued its activism over Congress and overturned yet another law that overturned the landmark *Miranda* opinion. That opinion required what became widely known as the Miranda warning before the police could take statements or confessions from criminal suspects.

[1]Chapter 2 discusses the *Lopez* case and has an excerpt from *United States v. Morrison* (Reading 10). Chapter 3 discusses the Boerne case and has an excerpt from *Adarand Constructors v. Pena* (Reading 25).

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Dickerson v. United States

United States Supreme Court (2000)

Chief Justice Rehnquist delivered the opinion of the Court.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), we held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence. In the wake of that decision, Congress enacted 18 U.S.C. §3501, which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts. . . .

The law in this area is clear. This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals. . . . However, the power to judicially create and enforce nonconstitutional "rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." . . . Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.

But Congress may not legislatively supersede our decisions interpreting and applying the Constitution. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 517–521 (1997). This case therefore turns on whether the Miranda Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction. Recognizing this point, the Court of Appeals surveyed *Miranda* and its progeny to determine the constitutional status of the *Miranda* decision. . . . Relying on the fact that we have created several exceptions to *Miranda's* warnings requirement and that we have repeatedly referred to the *Miranda* warnings as "prophylactic," . . . and "not themselves rights protected by the Constitution," the Court of Appeals concluded that the protections announced in Miranda are not constitutionally required. . . .

We disagree with the Court of Appeals' conclusion, although we concede that there is language in some of our opinions that supports the view taken by that court. But first and foremost of the factors on the other side—that *Miranda* is a constitutional decision—is that both *Miranda* and two of its companion cases applied the rule to proceedings in state courts—to wit, Arizona, California, and New York. . . . Since that time, we have consistently applied *Miranda's* rule to

for complex social and institutional reasons, there are few issues in the United States on which cohesive majorities exist. The guerrilla warfare which usually rages between Congress and the President, as well as the internal civil wars which are endemic in both the legislature and the administration, give the judiciary considerable room for maneuver. If, for example, the Court strikes down a controversial decision of the Federal Power Commission, it will be supported by a substantial bloc of congressmen; if it supports the FPC's decision, it will also receive considerable congressional support. But the important point is that either way it decides the case, there is no possibility that Congress will exact any vengeance on the Court for its action. A disciplined majority would be necessary to clip the judicial wings, and such a majority does not exist on this issue.

On the other hand, when monolithic majorities do exist on issues, the Court is likely to resort to judicial self-restraint. A good case here is the current tidal wave of anti-communist legislation and administrative action, the latter particularly with regard to aliens, which the Court has treated most gingerly. About the only issues on which there can be found cohesive majorities are those relating to national defense, and the Court has, as Clinton Rossiter demonstrated in an incisive analysis [*The Supreme Court and the Commander-in-Chief*, Ithaca, 1951], traditionally avoided problems arising in this area irrespective of their constitutional merits. Like the slave who accompanied a Roman consul on his triumph whispering "You too are mortal," the shade of Thad Stevens haunts the Supreme Court chamber to remind the justices what an angry Congress can do.

To state the proposition in this brief compass is to oversimplify it considerably. I have, for instance, ignored the crucial question of how the Court knows when a majority *does* exist, and I recognize that certain aspects of judicial behavior cannot be jammed into my hypothesis without creating essentially spurious epicycles. However, I am not trying to establish a monistic theory of judicial action; group action, like that of individuals, is motivated by many factors, some often contradictory, and my objective is to elucidate what seems to be one tradition of judicial motivation. In short, judicial self-restraint and judicial power seem to be opposite sides of the same coin: it has been by judicious application of the former that the latter has been maintained. A tradition beginning with Marshall's *coup* in *Marbury v. Madison* and running through *Mississippi v. Johnson* and *Ex Parte Vallandigham* to *Dennis v. United States* suggests that the Court's power has been maintained by a wise refusal to employ it in unequal combat.

Judicial Decision Making

Judicial decision making is not quasi-scientific, always based clearly upon legal principles and precedent, with the judges set apart from the political process. The interpretation of law, whether constitutional or statutory, involves a large amount of discretion. The majority of the Court can always read its opinion into law if it so chooses.

Justice William J. Brennan, Jr., a former member of the Supreme Court, discusses below the general role of the Court and the procedures it follows in decision making.

How the Supreme Court Arrives at Decisions

William J. Brennan, Jr.

Throughout its history the Supreme Court has been called upon to face many of the dominant social, political, economic and even philosophical issues that confront the nation. But Solicitor General Cox only recently reminded us that this does not mean that the Court is charged with making social, political, economic or philosophical decisions.

Quite the contrary, the Court is not a council of Platonic guardians for deciding our most difficult and emotional questions according to the Justices' own notions of what is just or wise or politic. To the extent that this is a government function at all, it is the function of the people's elected representatives.

The Justices are charged with deciding according to law. Because the issues arise in the framework of concrete litigation they must be decided on facts embalmed in a record made by some lower court or administrative agency. And while the Justices may and do consult history and the other disciplines as aids to constitutional decisions, the text of the Constitution and relevant precedents dealing with that text are their primary tools.

It is indeed true, as Judge Learned Hand once said, that the judge's authority

> depends upon the assumption that he speaks with the mouth of others: the momentum of his utterances must be greater than any which his personal reputation and character can command; if it is to do the work assigned to it—if it is to stand against the passionate resentments arising out of the interests he must frustrate—he must preserve his authority by cloaking himself in the majesty of an over-shadowing past, but he must discover some composition with the dominant trends of his times.

Answers Unclear

However, we must keep in mind that, while the words of the Constitution are binding, their application to specific problems is not often easy. The Founding Fathers knew better than to pin down their descendants too closely.

Enduring principles rather than petty details were what they sought.

Thus the Constitution does not take the form of a litany of specifics. There are, therefore, very few cases where the constitutional answers are clear, all one way or all the other, and this is also true of the current cases raising conflicts between the individual and governmental power—an area increasingly requiring the Court's attention.

Ultimately, of course, the Court must resolve the conflicts of competing interests in these cases, but all Americans should keep in mind how intense and troubling these conflicts can be.

Where one man claims a right to speak and the other man claims the right to be protected from abusive or dangerously provocative remarks the conflict is inescapable.

Where the police have ample external evidence of a man's guilt, but to be sure of their case put into evidence a confession obtained through coercion, the conflict arises between his right to a fair prosecution and society's right to protection against his depravity.

Where the orthodox Jew wishes to open his shop and do business on the day which non-Jews have chosen, and the Legislature has sanctioned, as a day of rest, the Court cannot escape a difficult problem of reconciling opposed interests.

Finally, the claims of the Negro citizen, to borrow Solicitor General Cox's words, present a "conflict between the ideal of liberty and equality expressed in the Declaration of Independence, on the one hand, and, on the other hand, a way of life rooted in the customs of many of our people."

Society Is Disturbed

If all segments of our society can be made to appreciate that there are such conflicts, and that cases which involve constitutional rights often require difficult choices, if this alone is accomplished, we will have immeasurably enriched our common understanding of the meaning and significance of our freedoms. And we will have a better appreciation of the Court's function and its difficulties.

How conflicts such as these ought to be resolved constantly troubles our whole society. There should be no surprise, then, that how properly to resolve them often produces sharp division within the Court itself. When problems are so fundamental, the claims of the competing interests are often nicely balanced, and close divisions are almost inevitable.

Supreme Court cases are usually one of three kinds: the "original" action brought directly in the Court by one state against another state or states, or between a state or states and the federal government. Only a handful of such cases arise each year, but they are an important handful.

A recent example was the contest between Arizona and California over the waters of the lower basin of the Colorado River. Another was the contest between the federal government and the newest state of Hawaii over the ownership of lands in Hawaii.

The second kind of case seeks review of the decisions of a federal Court of Appeals—there are eleven such courts—or of a decision of a federal District Court—there is a federal District Court in each of the fifty states.

The third kind of case comes from a state court—the Court may review a state court judgment by the highest court of any of the fifty states, if the judgment rests on the decision of a federal question.

When I came to the Court seven years ago the aggregate of the cases in the three classes was 1,600. In the term just completed there were 2,800, an increase of 75 percent in seven years. Obviously, the volume will have doubled before I complete ten years of service.

How is it possible to manage such a huge volume of cases? The answer is that we have the authority to screen them and select for argument and decision only those which, in our judgment, guided by pertinent criteria, raise the most important and far-reaching questions. By that device we select annually around 6 percent—between 150 and 170 cases—for decision.

Petition and Response

That screening process works like this: when nine Justices sit, it takes five to decide a case on the merits. But it takes only the votes of four of the nine to put a case on the argument calendar for argument and decision. Those four voters are hard to come by—only an exceptional case raising a significant federal question commands them.

Each application for review is usually in the form of a short petition, attached to which are any opinions of the lower courts in the case. The adversary may file a response—also, in practice usually short. Both the petition and response identify the federal questions allegedly involved, argue their substantiality, and whether they were properly raised in the lower courts.

Each Justice receives copies of the petition and response and such parts of the record as the parties may submit. Each Justice then, without any consultation at this stage with the others, reaches his own tentative conclusion whether the application should be granted or denied.

The first consultation about the case comes at the Court conference at which the case is listed on the agenda for discussion. We sit in conference almost every Friday during the term. Conferences begin at ten in the morning and often continue until six, except for a half-hour recess for lunch.

Only the Justices are present. There are no law clerks, no stenographers, no secretaries, no pages—just the nine of us. The junior Justice acts as guardian of the door, receiving and delivering any messages that come in or go from the conference.

Order of Seating

The conference room is a beautifully oak-paneled chamber with one side lined with books from floor to ceiling. Over the mantel of the exquisite marble fireplace at one

end hangs the only adornment in the chamber—a portrait of Chief Justice John Marshall. In the middle of the room stands a rectangular table, not too large but large enough for the nine of us comfortably to gather around it.

The Chief Justice sits at the south end and Mr. Justice Black, the senior Associate Justice, at the north end. Along the side to the left of the Chief Justice sit Justices Stewart, Goldberg, White and Harlan. On the right side sit Justice Clark, myself and Justice Douglas in that order.

We are summoned to conference by a buzzer which rings in our several chambers five minutes before the hour. Upon entering the conference room each of us shakes hands with his colleagues. The handshake tradition originated when Chief Justice Fuller presided many decades ago. It is a symbol that harmony of aims if not of views is the Court's guiding principle.

Each of us has his copy of the agenda of the day's cases before him. The agenda lists the cases applying for review. Each of us before coming to the conference has noted on his copy his tentative view whether or not review should be granted in each case.

The Chief Justice begins the discussion of each case. He then yields to the senior Associate Justice and discussion proceeds down the line in order of seniority until each Justice has spoken.

Voting goes the other way. The junior Justice votes first and voting then proceeds up the line to the Chief Justice, who votes last.

Each of us has a docket containing a sheet for each case with appropriate places for recording the votes. When any case receives four votes for review, that case is transferred to the oral argument list. Applications in which none of us sees merits may be passed over without discussion.

Now how do we process the decisions we agree to review?

There are rare occasions when the question is so clearly controlled by an earlier decision of the Court that a reversal of the lower court judgment is inevitable. In these rare instances we may summarily reverse without oral argument.

Each Side Gets Hour

The case must very clearly justify summary disposition, however, because our ordinary practice is not to reverse a decision without oral argument. Indeed, oral argument of cases taken for review, whether from the state or federal courts, is the usual practice. We rarely accept submissions of cases on briefs.

Oral argument ordinarily occurs about four months after the application for review is granted. Each party is usually allowed one hour, but in recent years we have limited oral argument to a half-hour in cases thought to involve issues not requiring longer arguments.

Counsel submit their briefs and record in sufficient time for the distribution of one set to each Justice two or three weeks before the oral argument. Most of the members of the present Court follow the practice of reading the briefs before the argument. Some of us often have a bench memorandum prepared before the argument. This memorandum digests the facts and the arguments of both sides, highlighting the matters about which we may want to question counsel at the argument.

Often I have independent research done in advance of argument and incorporate the results in the bench memorandum.

We follow a schedule of two weeks of argument from Monday through Thursday, followed by two weeks of recess for opinion writing and the study of petitions for review. The argued cases are listed on the conference agenda on the Friday following argument. Conference discussions follow the same procedure I have described for the discussions of certiorari petitions.

Opinion Assigned

Of course, it is much more extended. Not infrequently discussion of particular cases may be spread over two or more conferences.

Not until the discussion is completed and a vote taken is the opinion assigned. The assignment is not made at the conference but formally in writing some few days after the conference.

The Chief Justice assigns the opinions in those cases in which he has voted with the majority. The senior Associate Justice voting with the majority assigns the opinion in the other cases. The dissenters agree among themselves who shall write the dissenting opinion. Of course, each Justice is free to write his own opinion, concurring or dissenting.

The writing of an opinion always takes weeks and sometimes months. The most painstaking research and care are involved.

Research, of course, concentrates on relevant legal materials—precedents particularly. But Supreme Court cases often require some familiarity with history, economics, the social and other sciences, and authorities in these areas, too, are consulted when necessary.

When the author of an opinion feels he has an unanswerable document he sends it to a print shop, which we maintain in our building. The printed draft may be revised several times before his proposed opinion is circulated among the other Justices. Copies are sent to each member of the Court, those in the dissent as well as those in the majority.

Some Change Minds

Now the author often discovers that his work has only begun. He receives a return, ordinarily in writing, from each Justice who voted with him and sometimes also from the Justices who voted the other way. He learns who will write the dissent if one is to be written. But his particular concern is whether those who voted with him are still of his view and what they have to say about his proposed opinion.

Often some who voted with him at conference will advise that they reserve final judgment pending the circulation of the dissent. It is a common experience that dissents change votes, even enough votes to become the majority.

I have had to convert more than one of my proposed majority opinions into a dissent before the final decision was announced. I have also, however, had the more satisfying experience of rewriting a dissent as a majority opinion for the Court.

Before everyone has finally made up his mind a constant interchange by memoranda, by telephone, at the lunch table continues while we hammer out the final form of the opinion. I had one case during the past term in which I circulated ten printed drafts before one was approved as the Court opinion.

Uniform Rule

The point of this procedure is that each Justice, unless he disqualifies himself in a particular case, passes on every piece of business coming to the Court. The Court does not function by means of committees or panels. Each Justice passes on each petition, each time, no matter how drawn, in long hand, by typewriter, or on a press. Our Constitution vests the judicial power in only one Supreme Court. This does not permit Supreme Court action by committees, panels, or sections.

The method that the Justices use in meeting an enormous caseload varies. There is one uniform rule: Judging is not delegated. Each Justice studies each case in sufficient detail to resolve the question for himself. In a very real sense, each decision is an individual decision of every Justice.

The process can be a lonely, troubling experience for fallible human beings conscious that their best may not be adequate to the challenge.

"We are not unaware," the late Justice Jackson said, "that we are not final because we are infallible; we know that we are infallible only because we are final."

One does not forget how much may depend on his decision. He knows that usually more than the litigants may be affected, that the course of vital social, economic and political currents may be directed.

This then is the decisional process in the Supreme Court. It is not without its tensions, of course—indeed, quite agonizing tensions at times.

I would particularly emphasize that, unlike the case of a Congressional or White House decision, Americans demand of their Supreme Court judges that they produce a written opinion, the collective expression of the judges subscribing to it, setting forth the reason which led them to the decision.

These opinions are the exposition, not just to lawyers, legal scholars and other judges, but to our whole society, of the bases upon which a particular result rests—why a problem, looked at as disinterestedly and dispassionately as nine human beings trained in a tradition of the disinterested and dispassionate approach can look at it, is answered as it is.

It is inevitable, however, that Supreme Court decisions—and the Justices themselves—should be caught up in public debate and be the subjects of bitter controversy.

An editorial in *The Washington Post* did not miss the mark by much in saying that this was so because

> one of the primary functions of the Supreme Court is to keep the people of the country from doing what they would like to do—at times when what they would like to do runs counter to the Constitution. . . . The function of the Supreme Court is not to count constituents; it is to interpret a fundamental charter which imposes restraints on constituents. Independence and integrity, not popularity, must be its standards.

Freund's View

Certainly controversy over its work has attended the Court throughout its history. As Professor Paul A. Freund of Harvard remarked, this has been true almost since the Court's first decision:

> When the Court held, in 1793, that the state of Georgia could be sued on a contract in the federal courts, the outraged Assembly of that state passed a bill declaring that any federal marshal who should try to collect the judgment would be guilty of a felony and would suffer death, without benefit of clergy, by being hanged. When the Court decided that state criminal convictions could be reviewed in the Supreme Court, Chief Justice Roane of Virginia exploded, calling it a "most monstrous and unexampled decision. It can only be accounted for by that love of power which history informs us infects and corrupts all who possess it, and from which even the eminent and upright judges are not exempt."

But public understanding has not always been lacking in the past. Perhaps it exists today. But surely a more informed knowledge of the decisional process should aid a better understanding.

It is not agreement with the court's decisions that I urge. Our law is the richer and the wiser because academic and informed lay criticism is part of the stream of development.

Consensus Needed

It is only a greater awareness of the nature and limits of the Supreme Court's function that I seek.

The ultimate resolution of questions fundamental to the whole community must be based on a common consensus of understanding of the unique responsibility assigned to the Supreme Court in our society.

The lack of that understanding led Mr. Justice Holmes to say fifty years ago:

> We are very quiet there, but it is the quiet of a storm center, as we all know. Science has taught the world skepticism and has made it legitimate to put everything to the test of proof. Many beautiful and noble reverences are impaired, but in these days no one can complain if any institution, system, or belief is called on to justify its continuance in life. Of course we are not excepted and have not escaped.

Painful Accusation

> Doubts are expressed that go to our very being. Not only are we told that when Marshall pronounced an Act of Congress unconstitutional he usurped a power that the Constitution did not give, but we are told that we are the representatives of a class—a tool of the money power.
>
> I get letters, not always anonymous, intimating that we are corrupt. Well, gentlemen, I admit that it makes my heart ache. It is very painful, when one spends all the energies of one's soul in trying to do good work, with no thought but that of

solving a problem according to the rules by which one is bound, to know that many see sinister motives and would be glad of evidence that one was consciously bad.

But we must take such things philosophically and try to see what we can learn from hatred and distrust and whether behind them there may not be a germ of inarticulate truth. The attacks upon the Court are merely an expression of the unrest that seems to wonder vaguely whether law and order pay. When the ignorant are taught to doubt they do not know what they safely may believe. And it seems to me that at this time we need education in the obvious more than investigation of the obscure.

Interpreting the Constitution

Justice William J. Brennan, Jr., in his discussion of how the Supreme Court arrives at decisions in the preceding selection, points out that inevitably Supreme Court decisions and the justices are the subjects of public debate and often bitter controversy. It is not surprising that when Supreme Court justices and lower-court judges as well follow the early dictum of Chief Justice John Marshall, which he stated in *Marbury v. Madison* in 1803, that "It is emphatically the province and duty of the judicial department to say what the law is," they will become the center of political storms stirred up by those who feel the Court has overstepped its bounds.

While the Supreme Court may not enter unequal political combat, as John Roche contends in selection 71, it has made many highly controversial decisions since Roche wrote his article in 1955. (For example, see selections 22–27.) One conservative law scholar has gone so far as to state, "In the years since *Brown v. Board of Education* (1954) nearly every fundamental change in domestic social policy has been brought about not by the decentralized democratic (or, more accurately, republican) process contemplated by the Constitution, but simply by the Court's decree."[1]

Conservatives, clearly unhappy with the trend in Supreme Court decision making not only during the Warren era (1953–1969) but under the chief justiceship of Warren Burger (1969–1986), charged that the Court's "loose" constitutional interpretations have been contrary to the wishes of the majority of the people and have made a mockery of the Constitution itself. Responding to their conservative constituencies, Republican presidential candidates Richard M. Nixon in 1968 and Ronald Reagan in 1980 promised to take action to reverse the Supreme Court's alleged liberalism by appointing conservative justices.

Ironically, one of Nixon's appointees, Harry Blackmun, authored the Court's controversial abortion decision in 1973 (see selection 24). Another Nixon appointee, Lewis Powell, joined the more liberal justices in the *Bakke* case to allow universities and the colleges to take race into account in their admissions processes, a tacit although far from direct support for the affirmative action programs conservatives so strongly opposed. Nixon found, as had Dwight D. Eisenhower who appointed Earl Warren to be chief justice in 1953, that presidents have no control over their appointees once they are on the Court.

[1]Lino A. Graglia, "How the Constitution Disappeared," Commentary, February 1986, p. 19.

For his part in the conservative cause, President Ronald Reagan, while choosing Sandra Day O'Connor as the first woman Supreme Court justice, tried to make certain beforehand that she would support conservative positions on such issues as abortion. Reagan added three conservative Supreme Court justices and had an even greater impact upon the lower federal judiciary, which he "stacked" with conservative judges.

Debate over the role of the Supreme Court intensified during Reagan's second term. His attorney general, Edwin Meese, in a speech given before the American Bar Association, attacked the Supreme Court for interpreting the Constitution according to its own values rather than the intent of the Founding Fathers. In response, Associate Justice William J. Brennan, speaking to a Georgetown University audience, called the attorney general "arrogant" and "doctrinaire," stating that it is impossible to "gauge accurately the intent of the framers on the application of principle to specific, contemporary questions." Another Supreme Court justice, John Paul Stevens, joined the attack on Meese.

The arguments in the 1980s over the proper role of the Supreme Court recalled the debate in the early days of the Republic between proponents of "strict" construction of the Constitution on the one hand and "loose" construction on the other. No less an intellectual and political giant than Thomas Jefferson favored the former approach, arguing that judges should not interpret the Constitution to reflect their own political values. He particularly opposed Chief Justice John Marshall's "loose" construction of congressional authority under Article I and the implied powers clause, which supported an expansion of national power over the states. Prior to Marshall's historic decisions in *McCulloch v. Maryland* (1819) and *Gibbons v. Ogden* that flexibly interpreted the Constitution to support broad congressional powers over the states (see selection 9), Alexander Hamilton had provided the rationale for loose construction in *The Federalist*. He suggested that Congress should be able to carry out its enumerated powers by whatever means it considered to be necessary and proper.

An old adage states that where one stands on political issues depends upon whose ox is being gored. Liberal supporters of Franklin D. Roosevelt attacked the conservative Supreme Court during the early New Deal when it was systematically declaring the core of FDR's program to be unconstitutional. After his overwhelming 1936 electoral victory Roosevelt attempted to "pack" the Court by seeking congressional approval of legislation that would give him the authority to appoint one new justice for each justice over 70 years of age. The legislation would have given him at the time the authority to appoint a Supreme Court majority because there were seven septuagenarian justices on the Court. Conservatives attacked Roosevelt's plan, charging that it was an unconstitutional and even un-American attempt to undermine the Supreme Court's independence. They wanted the Court to continue acting as a superlegislature as long as it advocated conservative views. However, when the tables were turned, and the Court became the advocate of "liberal" views during the Warren era, conservatives were quick to attack it for acting as a superlegislature against the will of the majority, which was the same argument liberals had used against the Court in the 1930s.

The Contemporary Debate over Constitutional Interpretation

Debate over constitutional interpretation arises because the Constitution itself is, in the words of Chief Justice John Marshall in McCulloch v. Maryland, one of enumerated, not defined, powers. "A Constitution," Marshall wrote, "to contain an accurate detail of all the