CHAPTER 1

Constitutional Politics

The complex and pervasive interactions among the branches of government in making constitutional law are largely unknown to students. They are taught that the courts are the dominant if not exclusive interpreters of the Constitution. Beginning with *Marbury v. Madison* (1803), students learn that judges are the "final arbiters" of the meaning of the Constitution, that all issues of constitutional moment percolate upwards to the Court for resolution, and that nonjudicial actors sit passively awaiting the Court's judgment.

This picture is highly simplistic. Even a general understanding of American legal history does not support the view that courts are the predominant force in shaping the Constitution. Many constitutional issues are addressed and resolved outside the judiciary. When courts do decide a case, their judgments are regularly overturned by constitutional amendments, congressional statutes, state actions, and shifting social and political attitudes. Judges are merely one of many authoritative actors in the complicated process of constitutional change.

To be effective in this complex environment, the student of law needs to understand the various arenas that affect constitutional values. A defeat in the courts does not necessarily end the struggle for constitutional rights and liberties. It may mark only a momentary setback, stimulating the attorney and client to pursue their interests in the legislature, an executive agency, in the states and in the public media. When the courts close one door, others remain open. To this

extent, it can be said that a court ruling is "final" only when society accepts it as well-reasoned and persuasive. Otherwise, the search for constitutional values continues.

I. PARTICIPANTS AND PROCESSES

Constitutions draw their life from a variety of forces that operate outside the courts: ideas, customs, social pressures, and the constant dialogue that takes place among political institutions. Just as the judiciary leaves its mark on society, so does society drive the agenda and decisions of the courts. Justice Cardozo reminded us that the "great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by." Benjamin N. Cardozo, The Nature of the Judicial Process 168 (1921). To safeguard their institutional position, courts must reach accommodations with social pressures and public opinion. At times they take the lead, but the historical record demonstrates that the judiciary often accepts the political boundaries of its times. Attempts to defy those boundaries and invalidate the policies of elected leaders create substantial risks for the legitimacy and effectiveness of the judicial system. Abstract legal analysis is tempered by a sense of pragmatism and statesmanship among judges. Courts are independent but they are also part of the political system.

Constitutional interpretations by the courts are not simply mirror images of contemporary values. If that were true, there would be no need for a constitution or for courts to decide constitutional decisions. Constitutional questions could be left with legislative bodies, as is the case in such countries as England and Holland. By contrast, federal courts in the United States play an important function in deliberating on constitutional questions and deciding the powers of Congress, the President, executive agencies, and the states. But courts are not the sole participants in the process of shaping and declaring constitutional values. They share that task with other political institutions at both the national and the state level.

A. Congress

Congress performs a crucial role in constitutional analysis at many stages: enacting laws that balance various constitutional values, confirming Supreme Court Justices and other presidential nominations, investigating constitutional violations by executive officials, and participating in court cases. Bills are subjected to constitutional analysis by members, committee staff, and such legislative agencies as the Congressional Research Service of the Library of Congress. Outside experts are invited to testify at congressional hearings on constitutional questions. Those questions are regularly analyzed in committee reports and during floor debate.

Throughout the legislative process, Congress invokes its powers to decide constitutional issues. It uses its power of the purse to add restrictive riders and provisos to appropriations bills, thereby controlling the executive branch on constitutional issues and announcing to private citizens the limits of their constitutional rights (such as access to public funds to finance abortions). Legislation is introduced to strip the federal courts (including the Supreme Court) of jurisdiction to hear a case. Legislation may also be introduced to reverse a court ruling that interprets a statute. Through this process, called statutory reversal, Congress may overturn judicial decisions on issues of constitutional moment, including racial and gender discrimination. In 1991, Congress passed a civil rights bill that overturned or modified nine Supreme Court rulings, five of them from 1989, two from 1991, and one each from 1986 and 1987. Moreover, Congress passes constitutional amendments and sends them to the states for ratification, all part of a process that may result in nullifying Supreme Court decisions.

Congress may respond to a Supreme Court decision by reenacting a statute that the Court struck down. For example, Congress strongly disagreed with the Court's 1918 ruling that the commerce power could not be used to regulate child labor. Hammer v. Dagenhart, 247 U.S. 251 (1918). Twenty years later, after the Court's composition had

changed, Congress again based child labor legislation on the commerce clause—legislation that a unanimous Court upheld! United States v. Darby, 312 U.S. 100 (1941). This issue is further analyzed in Chapter 3. Another way Congress expresses its disapproval of a Supreme Court decision is to protect rights that the Court is unwilling to protect. For example, Congress passed legislation in 1980 to prohibit third-party searches of newspapers despite the Court's approval of such searches two years before. Zurcher v. Stanford Daily, 436 U.S. 547 (1978). For Congress, this legislation was necessary because the Supreme Court's decision had "thrown into doubt" "a longstanding principle of constitutional jurisprudence." 126 Cong. Rec. 26562 (1980) (statement of Rep. Kastenmeier).

Congressional responses to Supreme Court decisions are not always hostile. Sometimes Congress affirmatively assists in the implementation of a Court decision. For example, in response to Southern resistance to the school segregation decision, Congress took steps to make *Brown v. Board of Education* (1954) a reality. In 1964, it prohibited segregated systems from receiving federal aid and authorized the Department of Justice to file desegregation lawsuits. These federal efforts proved critical in ending dual school systems. More actual desegregation took place the year after these legislative programs took effect than in the decade following *Brown*.

The appointment of federal judges offers Congress another opportunity to exert its influence on constitutional law. The Senate, during the confirmation process, not only examines the judicial temperament and competence of nominees but inquires into their judicial philosophy as well. If Senators are uncomfortable about the legal doctrines of a nominee, they may reject the person and require the President to send forth another name. Senators also have an important role on who is nominated to be a judge, particularly for the lower courts.

The Senate also determines the procedural rules governing the confirmation of judicial nominees. In 2013, Senate Democrats

repudiated the filibuster so that the Senate could more easily confirm President Obama's lower court nominees. In 2016, Senate Republicans refused to hold confirmation hearings on Obama Supreme Court pick Merrick Garland in the hopes that a Republican would win the White House in 2016. In 2017, Senate Republicans rejected the filibuster in order to confirm Neil Gorsuch.

Congress may present its constitutional viewpoints directly to the judiciary. Although Congress initially relied on the Attorney General and the Justice Department to defend congressional interests in court, Congress always retained the prerogative to represent itself directly. In *Myers v. United States*, 272 U.S. 52 (1926), which concerned the President's power to remove executive officials, the Supreme Court invited Senator George Wharton Pepper (R-Pa.) to present an amicus curiae (friend of the court) brief and participate in oral argument. Other courts have invited the House of Representatives and the Senate to submit briefs on pending cases.

Individual members of Congress may take constitutional issues directly to the courts for resolution. When President Nixon used the "pocket veto" during a brief Christmas recess in 1972, Senator Edward M. Kennedy (D-Mass.) went to court as a litigant and successfully argued that Nixon's action violated the Constitution. Kennedy v. Sampson, 364 F.Supp. 1075 (D.D.C. 1973), aff'd, Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974).

On most occasions, members of Congress who take constitutional issues to the courts are told by judges that they lack standing to sue, that the issue is not ripe for adjudication, or that the matter is a "political question" to be resolved by Congress and the President. Judges conclude that few of these cases are genuine cases or controversies between Congress and the President. Instead, they generally represent the failure of one faction of legislators to convince a majority to work its will against the President. Judges basically advise the faction to return to the legislative branch and build a majority. Raines v. Byrd, 521 U.S. 811 (1997).

In recent decades, members of Congress have created legislative institutions to defend congressional interests in court. The Justice Department sometimes refused to defend the constitutionality of certain statutes, either because they threatened presidential powers or because they invaded constitutional rights. In the legislative veto and Gramm-Rudman cases, lawyers for Congress and the Department of Justice battled over alleged infringements of presidential power. INS v. Chadha, 462 U.S. 919 (1983); Bowsher v. Synar, 478 U.S. 714 (1986). In *United States v. Windsor*, the House of Representatives took over defense of the Defense of Marriage Act after the Obama administration concluded that the statute violated the constitutional rights of same-sex couples. 133 S. Ct. 275 (2013).

To safeguard its institutional prerogatives, the Senate established an Office of Senate Legal Counsel in 1978 to defend the Senate or a committee, subcommittee, member, office, or employee of the Senate. The Senate Legal Counsel may also intervene or appear as amicus curiae in cases involving legislative powers and responsibilities. The House General Counsel handles litigation that involves members, House officers, and staff. Senate and House counsel frequently file briefs and participate in oral argument before the courts.

B. The Executive Branch

Executive power in constitutional decision-making is extraordinarily broad. The President nominates Supreme Court Justices, recommends legislation and constitutional amendments, exercises the veto power, promulgates regulations, and delivers speeches. In each of these ways, the executive interprets the Constitution and shapes constitutional values. The Constitution guarantees the executive a large role in legislative decision-making, requiring the President to recommend measures judged necessary and expedient. The executive has made frequent use of this power, sending proposals to Congress on busing, flag burning, school prayer, the USA Patriot Act, homeland security, immigration, and health care.

Presidents wield the veto power in part to protect the prerogatives of their office and to prevent Congress from passing laws they consider unconstitutional. For example, President George H. W. Bush helped maintain strict abortion funding restrictions by successfully vetoing five bills that allowed some federal funding of abortion. Even the threat of a veto is often sufficient reason for Congress to revise or remove contested language in a bill. In cases where the Supreme Court upholds the constitutionality of a federal statute and that statute is later revived or reauthorized by Congress, the President may exercise his own independent judgment and veto the bill on constitutional grounds.

The power of the President to nominate federal judges is a potent tool for redirecting judicial doctrines. Presidents seek out nominees who will advance the president's ideological goals. This is especially since the rise of political polarization in the 1980s. Of course an individual, once on the bench, has lifetime tenure and can decide cases antagonistic to the President who originally made the nomination. Presidents are known to express deep disappointment in the conduct of their selections. Nevertheless, the power of appointment can transform the judiciary. President Franklin D. Roosevelt was able, over time, to convert the Supreme Court from a conservative institution to one that was more liberally inclined.

Similarly, successive appointments by Presidents Nixon, Reagan, and Bush helped convert the liberal Supreme Court of the Earl Warren era into the conservative Rehnquist Court. Appointments by President Bill Clinton (Ruth Bader Ginsburg and Stephen Breyer) moved the Court in a more moderate direction. Appointments by President George W. Bush (John Roberts and Samuel Alito) solidified the Court's conservative base. President Barack Obama's selections of Sonia Sotomayor to replace David Souter and Elena Kagan to replace John Paul Stevens did not to change the Court's direction significantly. Likewise, President Donald Trump's nomination of Neil Gorsuch to replace Antonin Scalia is not expected to noticeably impact the Court's ideological balance. Trump's nomination of conservative Brett Kavanaugh to replace moderate Anthony Kennedy, however, is

expected to move the Court in a more conservative direction; Kennedy had stood at the Court's ideological center and the center will now move to the right.

Starting in 2010, there has been a partisan divide on the Supreme Court. There no longer are liberal Republicans or conservative Democrats on the Supreme Court. This pattern will likely continue: Donald Trump, for example, made use of a list of potential Supreme Court nominees that was assembled by the Federalist Society and other conservative groups. Consequently, presidential elections are now seen as a referendum on the future direction of the Supreme Court. Lawrence Baum & Neal Devins, *Split Definitive*, SLATE, Nov. 11, 2011.

Executive agencies wield enormous power through the process of issuing rules and regulations. Although rulemaking is supposed to implement congressional intent, there is sufficient ambiguity in many statutes for executive officials to push in one direction or another depending on their constitutional beliefs. Congress can challenge these agency interpretations by adopting restrictive riders. Agency rules may also be contested in court, although Supreme Court decisions limit such challenges. For example, in *Rust v. Sullivan* the Court refused to overturn Reagan administration regulations prohibiting federally funded abortion counseling, ruling that substantial deference is owed to executive interpretations. 500 U.S. 173 (1991). Because of the deference given to executive interpretations, however, pro-choice President Clinton was able to order a rewriting of Reagan's regulation.

The Judiciary Act of 1789 established an Attorney General to prosecute and conduct all suits in the Supreme Court concerning the federal government. He represented the interests of Congress as well as the President. The Attorney General functioned as a part-time official for many years. It was not until 1870 that Congress established the Department of Justice. The Attorney General and the Office of Legal Counsel issue important opinions on constitutional matters and also testify before Congress on constitutional questions.

The Solicitor General, created in 1870 to assist the Attorney General, is now primarily responsible for representing the federal government in court. The Solicitor General conducts (or assigns and supervises) Supreme Court cases, including appeals, petitions for certiorari, and the preparation of briefs and arguments. She authorizes or declines to authorize appeals by the federal government to appellate courts, thus controlling the appellate ambitions of federal agencies. The Solicitor General also authorizes the filing of amicus briefs by the government in all appellate courts.

In 1978, Congress created a mechanism for the appointment of a Special Prosecutor (later called Independent Counsel) to investigate high-level officials in the executive branch. In the wake of the Watergate affair, Congress concluded that the executive branch lacked the necessary independence to investigate allegations of crime and wrongdoing in the high echelons of the administration. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court upheld the constitutionality of the independent counsel. Legislation in 1994 reauthorized the independent counsel, but in 1999 Congress decided not to renew it. Today, the Attorney General can appoint and remove a special counsel pursuant to Department of Justice guidelines

C. Group Lobbying

Private organizations sometimes pursue their interests through the regular legislative process, the executive branch, or the courts. When one arena is blocked, they test another. The political branches were largely unreceptive to civil rights during the first half of the twentieth century, forcing such organizations as the National Association for the Advancement of Colored People (NAACP) to turn to the judiciary to redress their grievances. As the Court has acknowledged, litigation is not merely a technique for resolving private differences. It is a form of political expression and association. In re Primus, 436 U.S. 412, 428 (1978); NAACP v. Button, 371 U.S. 415, 429–30 (1963).

The heavy resort to litigation by private organizations in the 1940s and 1950s produced fundamental changes in the amicus curiae brief. Previously these briefs permitted third parties, without a direct interest in a case, to bring certain facts to the attention of judges and thereby minimize error in the courts. Eventually the amicus brief became a sharp instrument for advancing the special interests of private groups. The amicus brief progressed "from neutrality to partisanship, from friendship to advocacy." Samuel Krislov, "The Amicus Brief: From Friendship to Advocacy," 72 Yale L. J. 694 (1963).

Although many private organizations thought that their liberal agenda would be better served through the courts in the 1950s and 1960s, they began to alter their strategy as the judiciary became more conservative. These organizations now often turn to Congress, the Executive, and the States for the protection of their interests. The American Civil Liberties Union (ACLU), which had used litigation heavily to advance its interests, said in 1991: "Congress is increasingly asked to look at these [constitutional] issues because there is nobody else. It is now the court of last resort." W. John Moore, "In Whose Court?," Nat'l J., Oct. 5, 1991, at 2400.

D. Jurors

Generally overlooked as shapers of constitutional law are the individuals who sit on grand juries and regular juries. In deciding to indict or convict their fellow citizens, they follow the law as explained by prosecutors and judges, but also rely on their own conscience and values to decide what is constitutional and proper. In their own way, jurors sense and articulate what is due process, equal protection, free speech, obscenity, unreasonable searches and seizures, and cruel and unusual punishment.

In 1793, President George Washington issued his neutrality proclamation to prevent Americans from siding militarily in the war between France and England. When his administration began to prosecute citizens for violating the proclamation, jurors would acquit

because they refused to convict someone for a crime established only by a proclamation. With no statutory authority to cite, the government dropped efforts to prosecute and Washington went to Congress to obtain the necessary statutory backing (the Neutrality Act of 1794). Ordinary jurors knew that criminal law was within the province of Congress and the legislative process. They would not allow the President to fix criminality by executive decree. Neal Devins and Louis Fisher, The Democratic Constitution 47–48 (2d ed. 2015).

During the nineteenth century, jurors objected to legislation that mandated the death penalty not only for murder and other major crimes but also for less serious offenses. Without the opportunity to vote for a lesser penalty, many jurors voted to acquit. As a result, legislatures were forced to change the law to permit a range of penalties short of execution. Community attitudes compelled lawmakers to adjust criminal law to fit social values. A similar pattern surfaced with the efforts of government to prosecute individuals for violating laws regarding hunting, gambling and liquor (during the Prohibition Era). Id. at 48.

If jurors decide that the government has used heavy-handed tactics to entrap an individual and helped manufacture a crime that would not have happened without the government's manipulation, acquittal may be a signal to prosecutors that they have overstepped and violated basic constitutional rights. Jurors help draw a line around permissible governmental behavior, no matter what legislators enact, prosecutors bring, or judges decide.

Independent juror judgments are evident in cases involving pornography and obscenity. The Supreme Court has issued general, if not incomprehensible, guidelines. Such words as "prurient," "lust," "lewd," "wanton," and "lascivious" often run in a circle. Jurors necessarily decide for themselves whether a book, movie, art exhibit, or music performance is harmful to their home community. The constitutionality of obscenity depends more on the conscience,

intuition, taste, and judgment of individual jurors than on Supreme Court doctrines.

E. Independent State Action

So much attention is directed to decisions of the federal courts that we forget that the states, through their constitutions and statutes, can make constitutional determinations that are wholly at variance with rulings from the U.S. Supreme Court. Instead of a hierarchical system, with each legal issue percolating up to the Supreme Court for a decision that will be applied uniformly across the country, the process is much more pluralistic and decentralized.

The Federal Constitution provides only a minimum, or a floor, for the protection of individual rights. State governments remain free to grant greater rights to their citizens. As noted by the U.S. Supreme Court, each state has the "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980). State courts frequently exercise this authority, playing a leadership role on the exclusionary rule, freedom of speech, freedom of religion, equal educational opportunity, and privacy.

State courts must make clear that their rulings rest exclusively on the constitution and laws of the state. If state courts base their decisions on "bona fide separate, adequate and independent grounds," the U.S. Supreme Court will not undertake a review. Michigan v. Long, 463 U.S. 1032 (1983). Under those conditions, the "final word" on state constitutional law rests with the states, not the U.S. Supreme Court.

Exemplifying the many ways state constitutions provide broader protection than the federal Constitution are state court rulings on abortion. State court involvement here is not surprising: ten state constitutions contain explicit privacy provisions and several others contain clauses that have been interpreted to protect the right to privacy. Before *Roe v. Wade*, many state courts struck down abortion prohibitions. State courts have remained active. Following the Supreme

Court's 1980 approval of federal abortion funding bans, state courts in Massachusetts, California, New Jersey, Oregon, Connecticut, and Michigan ruled that indigent women were nevertheless guaranteed the right to a state-funded abortion. For example, the New Jersey Supreme Court proclaimed that "[a]lthough the state constitution may encompass a smaller universe than the federal constitution, our constellation of rights may be more complete." Right to Choose v. Byrne, 450 A.2d 925, 931 (N.J. 1982). Similarly, the California Court of Appeals declared its state constitution a "document of *independent* force" providing privacy protections "broader" than the federal Constitution. American Academy of Pediatrics v. Van de Kamp, 263 Cal. Rptr. 46, 49, 51 (1989) (original emphasis).

Over the past thirty years, state courts have eclipsed the U.S. Supreme Court in shaping the meaning of constitutional values. State Supreme Courts issue roughly 2,000 decisions each year which involve state constitutional issues; the U.S. Supreme Court now issues around 75 decisions a year, forty percent of which involve constitutional issues. Beyond the staggering disparity in the volume of constitutional law decisions, state Supreme Courts have rejected U.S. Supreme Court rulings on school finance, disparate impact proofs of discrimination, voter registration, abortion funding, religious liberty protections, takings, same-sex sodomy, and a host of criminal procedure protections. State supreme courts have also been path-breakers, paving the way for Supreme Court decisions expanding constitutional protections. Examples include the exclusionary rule, anti-miscegenation, same-sex sodomy, same-sex marriage, and racially motivated preemptory challenges.

F. Conclusion

The view that constitutional truth derives solely from nine individuals (or a majority of them) sitting on the Supreme Court is overly parochial and ultimately shortsighted. Congress, the White House, government agencies, interest groups, the general public, and the states all play critical roles in shaping constitutional values. As noted

by Ruth Bader Ginsburg a year before her appointment to the Supreme Court, judges "play an interdependent part in our democracy. They do not alone shape legal doctrine but . . . they participate in a dialogue with other organs of government, and with the people as well." Ruth Bader Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L. Rev. 1185, 1198 (1992).

II. THREE-BRANCH INTERPRETATION

Pointing to Chief Justice Marshall's declaration in *Marbury v. Madison* that it is "emphatically the province and duty of the judicial department to say what the law is," the Supreme Court regularly insists that it alone delivers the "final word" on the meaning of the Constitution. Nothing in that sentence affirms judicial supremacy. Pare it down to its essentials, it says that "the duty of courts is to say what the law is," or, even more focused, "courts decide cases."

According to a 1958 decision, however, *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution." Cooper v. Aaron, 358 U.S. 1, 18. The Court reasserted this principle in 1962: "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." Baker v. Carr, 369 U.S. 186, 211 (1962). The notion that the Court is the ultimate interpreter of the Constitution was repeated in *Powell v. McCormack*, 395 U.S. 486, 549 (1969).

In a memorable aphorism, Justice Jackson claimed that decisions by the Supreme Court "are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953). Yet the historical record provides overwhelming evidence that the Court is neither final nor infallible. The Court is the ultimate

interpreter in a particular case, but not always the larger issue of which that case is a part.

Vesting final authority in the Supreme Court is unwise because it has a lengthy record of errors and misconceptions. Chief Justice Rehnquist in 1993 wrote bluntly that "our judicial system, like the human beings who administer it, is fallible." Herrera v. Collins, 506 U.S. 390, 415 (1993).

Under the doctrine of "coordinate construction," the elected branches have both the authority and the competence to engage in constitutional interpretation. They participate before the courts decide and they participate afterwards as well. The process is circular, turning back on itself again and again until society is satisfied with the outcome.

All public officers—executive, legislative, and judicial—are required by Article VI, Clause 3 of the U.S. Constitution "to support this Constitution." That obligation is supplemented by federal law, under which executive and legislative officials "solemnly swear (or affirm) . . . [to] support and defend the Constitution of the United States against all enemies, foreign and domestic; . . . bear true faith and allegiance to the same; . . . take this obligation freely, without any mental reservation or purpose of evasion; and . . . will well and faithfully discharge the duties [of their office]." 5 U.S.C. § 3331 (2012).

A. Establishing Precedents

In the early decades of our Republic, constitutional analysis was by necessity dominated by Congress and the President. The Supreme Court had handed down few decisions on constitutional law, giving practically no guidance for the many complex constitutional issues that perplexed legislators and executive officials. In 1789, Congress had to decide whether the President possessed an implied power to remove executive officials. Some members of Congress suggested that the issue might be better handled by the courts. James Madison disagreed, seeing no need to defer to the judiciary. There was no reason why Congress should not "expound the Constitution, so far as it relates to the division

of power between the President and the Senate." 1 Annals of Cong. 439. It was just as important to Congress "that the Constitution should be preserved entire. It is our duty, so far as it depends upon us, to take care that the powers of the Constitution be preserved entire to every department of Government." Id.

Passage of the Alien and Sedition Acts in 1798 sparked a fierce debate about constitutional values. Opponents focused particularly on the sedition law, which prohibited citizens from criticizing their own government. The dominant agencies in this battle were Congress and the President. When Thomas Jefferson took office as President in 1801, he considered the Sedition Act a "nullity" and pardoned every person prosecuted under it (document 1). Congress used its power of the purse to reimburse anyone fined under the Act, expressing its own views about the unconstitutionality of the statute (document 2). Neither the President nor Congress regarded the Supreme Court as the ultimate interpreter. Over a century later the Supreme Court acknowledged that the Sedition Act had been struck down not by a court of law but by "the court of history." New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

Jefferson believed that the three branches must be "co-ordinate, and independent of each other." Decisions by one branch, including judicial interpretations of constitutional issues, were to be given "no control to another branch." 11 Writings of Thomas Jefferson 213–14 (Albert Ellery Bergh ed. 1904). Each branch of government "has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal." 15 Writings of Thomas Jefferson 214 (Bergh ed. 1904).

In 1832, President Andrew Jackson announced his own theory of coordinate construction when he vetoed a bill that would have rechartered the Bank of the United States. Many urged Jackson to sign the bill, advising him that the issue was "settled" because the Bank had already been upheld by the Supreme Court in *McCulloch v. Maryland*

(1819) and previous Congresses and Presidents had accepted the constitutionality of the Bank. Jackson rejected those arguments. Regardless of what others had decided in the past, even on the precise question now before him, Jackson felt totally free to reach and announce his own independent judgment (document 3).

Another insight into three-branch interpretation comes from the bitter struggle over slavery. Opposition to slavery came from the public, not from judicial, legislative, or executive actions. Individual Americans, although untutored in the fine points of constitutional law, viewed slavery as repugnant to fundamental political and ethical principles, especially those embedded in the Declaration of Independence. The pivotal antislavery documents were private writings and speeches, not court decisions or legislative statutes.

For decades, Congress tried to maintain a balance between free states and slave states. The Missouri Compromise Act of 1820 admitted Missouri as a slave state but prohibited slavery in future states north of the 36° 30' line. With the Compromise Act of 1850 and the Kansas-Nebraska Act of 1854, the political branches seemed unable to resolve the issue and were willing to punt the question to the courts. James Buchanan, elected President in 1856, wanted to mention the subject of slavery in his inaugural address, but was uncertain of the Court's plans to decide a pending case. Justices Catron and Grier wrote to him that the Court was indeed ready to decide the matter, and that Buchanan should say that in his address (document 4). Buchanan then assured the country that the divisive issue of slavery was before the Court where it would be "speedily and finally settled" (document 5). Two days later the Court issued *Dred Scott v. Sandford*, propelling the nation toward civil war. The Court's decision was speedy but hardly final.

Throughout 1858, Stephen Douglas and Abraham Lincoln debated the finality of *Dred Scott*. Douglas insisted that the decision was the law of the land and should be obeyed. Lincoln agreed that he would not disturb the case as it related to the particular litigants, but refused to accept the Court's major holding that blacks could not be citizens

and that Congress could not prohibit slavery in the territories. Lincoln regarded the Court as a coequal, not a superior, branch of government (document 6). In his inaugural address of 1861, Lincoln denied that constitutional questions could be settled solely by the Supreme Court. If public policy on "vital questions affecting the whole people is to be irrevocably fixed" by the Court, "the people will have ceased to be their own rulers." 7 A Compilation of the Messages and Papers of the Presidents 3210–11 (James D. Richardson ed. 1897–1925).

Dred Scott was eventually overturned by the Civil War Amendments (ratified from 1865 to 1870), but long before that time it was effectively eviscerated by legislative and executive actions. Acting through the regular legislative process, Congress passed a bill to prohibit slavery in the territories. 12 Stat. 432, c.111 (1862). In that same year, Attorney General Bates issued an opinion in which he concluded (contrary to *Dred Scott*) that blacks had been citizens in the past and could be in the future. 10 Op. Att'y Gen. 382 (1862).

B. Contemporary Debates

In 1986, Attorney General Edwin Meese III sent shock waves across the country by challenging the last-word dogma. In a speech delivered at Tulane University, he distinguished between the Constitution and constitutional law. He referred to the first as fundamental law, capable of change solely by constitutional amendment, while the second represents only the body of law developed by the Supreme Court. He quoted from constitutional historian Charles Warren that "however the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law, not the decisions of the Court" (document 7).

Meese was careful in explaining that Warren did not mean that Supreme Court decisions lack the character of law. Decisions bind the parties to the case and require the executive branch to enforce the rulings. However, the decisions do not "establish a 'supreme Law of the Land' that is binding on all persons and parts of government,

henceforth and forevermore." Obviously that is so, for otherwise the Court could never reverse itself, which it does with some regularity.

Although Meese had added these qualifiers to his general thesis, the speech triggered a firestorm of criticism. A journalist accused Meese of dropping a "jurisprudential stink bomb" that showed disrespect for the Court. Michael Kinsley, Meese's Stink Bomb, Wash. Post, Oct. 29, 1986, at A19. Constitutional scholars predicted "enormous chaos" if Meese's view ever prevailed. Howard Kurtz, Meese's View on Court Rulings Assailed, Defended, Wash. Post, Oct. 24, 1986, at. A12. Professor Laurence Tribe of the Harvard Law School warned that Meese's position "represents a grave threat to the rule of law." Stuart Taylor, Liberties Union Denounces Meese, N.Y. Times, Oct. 24, 1986, at A17. Anthony Lewis of *The New York Times* concluded that the speech invited anarchy (document 8).

In response to this criticism, Meese offered clarifications. He said again that Supreme Court decisions have general applicability and that they bind the parties in the case at hand. A Court decision provides precedent on lower federal courts as well as state courts. He agreed with Lincoln that such decisions are "entitled to very high respect and consideration in all parallel cases" by the other departments of government, both federal and state. Arguments from prudence, the need for stability in the law, and respect for the judiciary "will and should persuade officials of these other institutions to abide by a decision of the Court." However, Meese continued to hold to the view that "only the Constitution is our paramount law, not what the three branches say about it." Edwin Meese, III, The Tulane Speech: What I Meant, 61 Tulane L. Rev. 1003–07 (1987).

This controversy over Meese seemed to prompt Senators to use the nomination of Supreme Court Justices as a forum for defending judicial supremacy. The question of whether the Court has the "last word" on constitutional issues added spice to three confirmation hearings for Supreme Court Justices in 1986 and 1987.

In 1986, when Justice William Rehnquist appeared before the Senate Judiciary Committee as nominee for Chief Justice, Senator Arlen Specter inquired about the "binding precedent" of *Marbury*. He asked Rehnquist whether the Court "is the final arbiter, the final decision-maker of what the Constitution means." Rehnquist replied disarmingly: "Unquestionably." Specter pursued the point. If the Court ruled on a legal issue, would the President and Congress "have a responsibility to observe the decisions of the Supreme Court of the United States on a constitutional matter?" Rehnquist replied: "Yes, I think they do." Nomination of Justice William Hubbs Rehnquist: Hearings Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 186 (1986).

A different impression emerged later in 1986 when Judge Antonin Scalia appeared before the Senate Judiciary Committee as nominee for Associate Justice. Unlike Rehnquist, Scalia refused to endorse the sweep of *Marbury*. Chairman Strom Thurmond put this question: "Do you agree that *Marbury* requires the President and Congress to always adhere to the Court's interpretation of the Constitution?" Acknowledging that the case was one of the "great pillars of American law," Scalia stopped short of saying that "in no instance can either of the other branches call into question the action of the Supreme Court." He declined to make the Court the exclusive, final authority on constitutional questions. Nomination of Judge Antonin Scalia: Hearings Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 187 (1986).

Also significant were the nomination hearings for Judge Anthony Kennedy in 1987. Senator Specter expressed concern about a speech Kennedy had given in 1982 while serving as a federal appellate judge for the Ninth Circuit. Kennedy stated in that speech: "As I have pointed out, the Constitution, in some of its most critical aspects, is what the political branches of the government have made it, whether the judiciary approves or not." Kennedy told Specter that in such areas as separation of powers, the office of the presidency, the commerce clause, and federalism, the meaning of the Constitution depends largely

on the judgments of the executive and legislative branches, not the Court. Although Kennedy agreed that Supreme Court decisions are the law of the land and must be obeyed, he was "somewhat reluctant to say that in all circumstances each legislator is immediately bound by the full circumstances of a Supreme Court decree." Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 222 (1987). Kennedy insisted that the political branches should not defer to every Court decision (document 9). During her confirmation hearings in 1993 to be an Associate Justice of the Supreme Court, Ruth Bader Ginsburg also spoke about the delicate and interdependent relationship of the Court to the elected branches and to the public (document 10). Elena Kagan too embraced judicial restraint at her confirmation hearings. Pointing to her experiences working "in the other branches of government," Kagan spoke of the need for the Court to be "properly deferential to the American people and their elected representatives." The democratic process, she added, "is often messy and frustrating, but the people of this country have great wisdom, and their representatives work hard to protect their interests. The Supreme Court, of course, has the responsibility of ensuring that our government never oversteps its proper bounds or violates the rights of individuals. But the court must also recognize the limits on itself and respect the choices made by the American people."

C. Conclusion

"Judicial supremacy" is a useful rallying cry at certain junctures of our constitutional history, including the Little Rock confrontation in 1958 and the Watergate crisis in 1974. Governor Orval Faubus of Arkansas defied three court orders calling for the integration of the Little Rock Central High School. President Nixon threatened to ignore any court order requiring him to release documents related to the Watergate scandal. Unanimous decisions by the Supreme Court contributed to political stability in Little Rock and the surrender by President Nixon of incriminating tapes. Nevertheless, the importance

of those decisions lay more in political reality than in legal doctrines. The two cases by themselves failed to advance either the cause of desegregation or the definition of executive privilege. Clarifications in both areas have had to come through the regular political process.

Judicial review implies legislative policymaking by the courts. Justices of the Supreme Court regularly caution their colleagues about the dangers of judicial activism. Justice Stone observed that courts "are not the only agency of government that must be assumed to have capacity to govern." United States v. Butler, 297 U.S. 1, 87 (1936) (dissenting opinion). Court decisions are always subject to scrutiny by the elected branches and the people. Chief Justice Taney once noted that an opinion by the Supreme Court "upon the construction of the Constitution is always open to discussion when it is supposed to have been founded on error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." The Passenger Cases, 48 U.S. 283, 470 (1849) (dissenting opinion).

Just because the Court issues its judgment does not mean that we must suspend ours. The courts are an important element, but not the only element, in maintaining a constitutional order. That task is necessarily shared with Congress, the President, the states, and the general public. The specific case studies in this book underscore the political dynamics that accompany the development of constitutional law.

DOCUMENTS

1. JEFFERSON'S RESPONSE TO SEDITION ACT

Source: 11 The Writings of Thomas Jefferson 43–44, 50–51 (Bergh ed. 1904)

[Letter to Mrs. Adams, July 22, 1804]:

. . . I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image; and that it was as much my duty to arrest its execution in every stage, as it would have been to have rescued from the fiery furnace those who should have been cast into it for refusing to worship the image. It was accordingly done in every instance, without asking what the offenders had done, or against whom they had offended, but whether the pains they were suffering were inflicted under the pretended sedition law. . . .

[Letter to Mrs. Adams, September 11, 1804]:

You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power has been confided to them by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the

legislature and executive also, in their spheres, would make the judiciary a despotic branch.

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2. CONGRESS REIMBURSES PERSONS FINED FOR VIOLATING THE SEDITION ACT

Source: H.R. Rep. No. 86, 26th Cong., 1st Sess. (1840)

That in the month of October, 1798, the late Matthew Lyon, the father of the petitioners, at the circuit court held at Rutland, in the State of Vermont, was indicted and found guilty of having printed and published what was alleged to be a libel against Mr. John Adams, the then President of the United States. . . .

Upon this indictment Matthew Lyon was convicted, and sentenced by the court to be imprisoned for four months; to pay a fine of one thousand dollars, and the costs of the prosecution, taxed at sixty dollars and ninety-six cents; and to stand committed until the fine and costs were paid: which were paid, as appears by the exemplification of the record of the said trial and proceedings, now in the archives of this House.

The committee are of opinion that the law above recited was unconstitutional, null, and void, passed under a mistaken exercise of undelegated power, and that the mistake ought to be corrected by returning the fine so obtained, with interest thereon, to the legal representatives of Matthew Lyon. . . .

[The statute reimbursing the legal heirs and representatives of Matthew Lyon appears at 6 Stat. 802 (1840).]

3. JACKSON'S VETO OF U.S. BANK

Source: 3 A Compilation of the Messages and Papers of the Presidents 1144–45 (Richardson ed. 1897–1925)

It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled. So far from this being the case on this subject, an argument against the bank might be based on precedent. One Congress, in 1791, decided in favor of a bank; another, in 1811, decided against it. One Congress, in 1815, decided against a bank; another, in 1816, decided in its favor. Prior to the present Congress, therefore, the precedents drawn from that source were equal. . . .

If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative

capacities, but to have only such influence as the force of their reasoning may deserve.

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4. SUPREME COURT JUSTICES ADVISE PRESIDENT BUCHANAN ON INAUGURAL ADDRESS

Source: 10 John Basset Moore, The Works of James Buchanan 106–08 (1910)

Thursday, Feb. 19th [1857].

MY DEAR SIR:

The Dred Scott case has been before the Judges several times since last Saturday, and I think you may safely say in your Inaugural,

"That the question involving the constitutionality of the Missouri Compromise line is presented to the appropriate tribunal to decide; to wit, to the Supreme Court of the United States. It is due to its high and independent character to suppose that it will decide & settle a controversy which has so long and seriously agitated the country, and which *must* ultimately be decided by the Supreme Court of the United States. . . ."

J. CATRON.

Washington, Feb. 23d 1857.

MY DEAR SIR:

Your letter came to hand this morning. I have taken the liberty to shew it in confidence to our mutual friends Judge Wayne and the Chief Justice. . . .

. . . There will therefore be six if not *seven* (perhaps Nelson will remain neutral) who will decide the compromise law of 1820 to be of *non-effect*. But the opinions will not be delivered before Friday the 6th of March. We will not let any others of our brethren know anything about *the cause of our anxiety* to produce this result, and though contrary

to our usual practice, we have thought due to you to state to you in candor & confidence the real state of the matter.

Very Truly Yours

D. GRIER.

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5. BUCHANAN'S INAUGURAL ADDRESS

Source: 7 A Compilation of the Messages and Papers of the Presidents 2962 (Richardson ed. 1897–1925)

We have recently passed through a Presidential contest in which the passions of our fellow-citizens were excited to the highest degree by questions of deep and vital importance; but when the people proclaimed their will the tempest at once subsided and all was calm.

The voice of the majority, speaking in the manner prescribed by the Constitution, was heard, and instant submission followed. Our own country could alone have exhibited so grand and striking a spectacle of the capacity of man for self-government.

What a happy conception, then, was it for Congress to apply this simple rule that the will of the majority shall govern, to the settlement of the question of domestic slavery in the Territories! Congress is neither "to legislate slavery into any Territory or State nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States." . . .

This is, happily, a matter of but little practical importance. Besides, it is a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be. . . .

6. LINCOLN'S CRITIQUE OF *DRED SCOTT*

Source: 2 The Collected Works of Abraham Lincoln
516, 518, 519–20 (Basler ed. 1953)

Now, as to the Dred Scott decision; for upon that [Stephen Douglas] makes his last point at me. He boldly takes ground in favor of that decision.

. . . I am opposed to that decision in a certain sense, but not in the sense which he puts on it. I say that in so far as it decided in favor of Dred Scott's master and against Dred Scott and his family, I do not propose to disturb or resist the decision.

. . . He would have the citizen conform his vote to that decision; the Member of Congress, his; the President, his use of the veto power. He would make it a rule of political action for the people and all the departments of the government. I would not. By resisting it as a political rule, I disturb no right of property, create no disorder, excite no mobs. . . .

He says this Dred Scott case is a very small matter at most—that it has no practical effect; that at best, or rather, I suppose, at worst, it is but an abstraction. I submit that the proposition that the thing which determines whether a man is free or a slave, is rather concrete than abstract. I think you would conclude that it was, if your liberty depended upon it, and so would Judge Douglas if his liberty depended upon it. . . .

7. MEESE'S TULANE SPEECH

Source: Edwin Meese, III, The Law of the Constitution, 61 Tulane L. Rev. 981–83, 985–86 (1987)

Since becoming Attorney General, I have had the pleasure to speak about the Constitution on several occasions. . . . Tonight I would like . . . to consider a distinction that is essential to maintaining our limited form of government. This is the necessary distinction between the Constitution and constitutional law. The two are not synonymous. What, then, is this distinction?

The Constitution is—to put it simply but one hopes not simplistically—the Constitution. It is a document of our most fundamental law. It begins "We the People of the United States, in Order to form a more perfect Union. . ." and ends up, some 6,000 words later, with the twenty-sixth amendment. It creates the institutions of our government, it enumerates the powers those institutions may wield, and it cordons off certain areas into which government may not enter. . . .

Constitutional law, on the other hand, is that body of law that has resulted from the Supreme Court's adjudications involving disputes over constitutional provisions or doctrines. To put it a bit more simply, constitutional law is what the Supreme Court says about the Constitution in its decisions resolving the cases and controversies that come before it.

. . . The answers the Court gives are very important to the stability of the law so necessary for good government. Yet as constitutional historian Charles Warren once noted, what's most important to remember is that "[h]owever the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court."

By this, of course, Charles Warren did not mean that a constitutional decision by the Supreme Court lacks the character of law. Obviously it does have binding quality; it binds the parties in a case and also the executive branch for whatever enforcement is necessary. But such a decision does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore. . . .

[Meese summarizes the Lincoln-Douglas debates over *Dred Scott* and the support it lends to the freedom of citizens and the political branches to express opposition to court decisions.]

Once we understand the distinction between constitutional law and the Constitution, once we see that constitutional decisions need not be seen as the last words in constitutional construction, once we comprehend that these decisions do not necessarily determine future public policy, once we see all of this, we can grasp a correlative point: constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.

The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions. In fact, every official takes an oath precisely to that effect. . . .

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8. ANTHONY LEWIS RESPONDS TO TULANE SPEECH

Source: Law or Power?, N.Y. Times, Oct. 27, 1986, at A23

In speech after speech Attorney General Meese has been calling for radical changes in our view of the Constitution. . . . He is making a calculated assault on the idea of law in this country: on the role of

judges as the balance wheel in the American system. And that has to be taken extremely seriously.

The far-reaching character of Mr. Meese's campaign was made evident by the case he chose to illustrate his argument that Supreme Court decisions are not the supreme law of the land. That was the Court's 1958 decision in the Little Rock school case, *Cooper v. Aaron*.

Remember what happened in Little Rock. Central High School, under a court order to desegregate, agreed to admit nine black children. But the Governor of Arkansas, Orval Faubus, posted National Guard units at the school and declared it "off limits" to the black children. He asserted that he was not bound by the Supreme Court's school segregation decision.

. . . The Supreme Court rejected the idea that a state could stir up violence and then use it as an excuse to escape constitutional obligations. . . . It said that ever since *Marbury v. Madison* in 1803 Americans had accepted the principle that the judiciary was "supreme in its exposition of the law of the Constitution."

Of course it is true that Presidents and the rest of us can criticize the Supreme Court. We can urge the Court to overrule its own constitutional decisions, as it has often done.

But unless and until a decision is overruled, it is the law. To argue otherwise—to argue that no one owes respect to a Supreme Court decision unless he was actually a party to the case—is to invite anarchy. That was the argument made by Governor Faubus in the Little Rock case. And that was the case on which Attorney General Meese relied.

9. JUDGE ANTHONY KENNEDY TESTIFIES ON THREE-BRANCH INTERPRETATION

Source: Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 222–23 (1987)

Senator [Arlen] SPECTER [R-Pa.]. Well, this is a very important subject. And I want to refer you to a comment which was made by Attorney General Meese in a speech last year at Tulane, and ask for your reaction to it.

He said this: But as constitutional historian Charles Warren once noted, what is most important to remember is that, however the Court may interpret the provisions of the Constitution, it is still the Constitution which is the law, not the decisions of the Court.

Do you agree with that?

Judge [Anthony M.] KENNEDY. Well, I am not sure—I am not sure I read that entire speech. But if we can just take it as a question, whether or not I agree that the decisions of the Supreme Court are or are not the law of the land. They are the law of the land, and they must be obeyed.

I am somewhat reluctant to say that in all circumstances each legislator is immediately bound by the full consequences of a Supreme Court decree.

Senator SPECTER. Why not?

Judge KENNEDY. Well, as I have indicated before, the Constitution doesn't work very well if there is not a high degree of voluntary compliance, and, in the school desegregation cases, I think, it was not permissible for any school board to refuse to implement *Brown v. Board of Education* immediately.

On the other hand, without specifying what the situations are, I can think of instances, or I can accept the proposition that a chief executive or a Congress might not accept as doctrine the law of the Supreme Court.

Senator SPECTER. Well, how can that be if the Supreme Court is to have the final word?

Judge KENNEDY. Well, suppose that the Supreme Court of the United States tomorrow morning in a sudden, unexpected development were to overrule in *New York Times v. Sullivan*. Newspapers no longer have protection under the libel laws. Could you, as a legislator, say I think that decision is constitutionally wrong and I want to have legislation to change it? I think you could. And I think you should.

Senator SPECTER. Well, there could be legislation—

Judge KENNEDY. And I think you could make that judgment as a constitutional matter.

Senator SPECTER. Well, there could be legislation in the hypothetical you suggest which would give the newspapers immunity for certain categories of writings.

Judge KENNEDY. But I think you could stand up on the floor of the U.S. Senate and say I am introducing this legislation because in my view the Supreme Court of the United States is 180 degrees wrong under the Constitution. And I think you would be fulfilling your duty if you said that Senator SPECTER. Well, you can always say it, but the issue is whether or not I would comply with it.

Judge KENNEDY. Well, I am just indicating that it doesn't seem to me that just because the Supreme Court has said it legislators cannot attempt to affect its decision in legitimate ways.