Constitutional Rights: Civil Rights and Civil Liberties

VOLUME 2 OF

American Constitutional Law

SECOND EDITION

Louis Fisher

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Second Edition

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About the Author

LOUIS FISHER received his B.S. from the College of William and Mary and his Ph.D. from the New School for Social Research. After teaching political science at Queens College, he joined the Congressional Research Service of the Library of Congress in 1970, where he is Senior Specialist in Separation of Powers. He has testified before congressional committees on such issues as executive privilege, impoundment of funds, legislative vetoes, the item veto, the pocket veto, presidential reorganization authority, executive spending discretion, the congressional budget process, the balanced budget amendment, and covert spending. During 1987 he served as Research Director for the House Iran-Contra Committee.

His books include *President and Congress* (1972), *Presidential Spending Power* (1975), *The Constitution between Friends* (1978), *The Politics of Shared Power* (3d ed., 1993), *Constitutional Conflicts between Congress and the President* (3d ed., 1991), *Constitutional Dialogues* (1988), *Political Dynamics of Constitutional Law* (with Neal Devins, 1992), and the four-volume *Encyclopedia of the American Presidency* (with Leonard W. Levy, 1994).

His articles have appeared in the following law journals and law periodicals: *Administrative Law Review, American Journal of International Law, Buffalo Law Review, California Law Review, Catholic University Law Review, Constitution, Cumberland Law Review, George Mason University Law Review, George Washington Law Review, Georgetown Law Journal, Georgia Law Review, Harvard Journal on Legislation, Journal of Law & Politics, Journal of Public Law, Law and Contemporary Problems, Law and Politics Book Review, Law and Social Inquiry, Legal Studies Forum, Legal Times, National Law Journal, North Carolina Law Review, Pepperdine Law Review, Public Interest Law Review, Suffolk University Law Review, University of Pennsylvania Law Review,* and *Washington University Law Quarterly.*

His articles have been published in a number of journals of political science and public administration: *Administrative Science Quarterly, Annals, Canadian Parliamentary Review, Congress & the Presidency, Congressional Studies, Corruption and*

Reform, Government Information Quarterly, Journal of American Studies, Journal of Political Science, Journal of Politics, Political Science Quarterly, Political Science Reviewer, Presidential Studies Quarterly, Public Administration Review, Public Budgeting & Finance, Public Manager, Review of Politics, State Legislatures, and *Western Political Quarterly.* His articles appear frequently in encyclopedias, magazines, newspapers, and edited books.

Dr. Fisher has been active with CEELI (Central and East European Law Initiative) of the American Bar Association. He traveled twice to Bulgaria, twice to Albania, and to Hungary to lend assistance to constitution writers. In addition to these trips abroad, he participated in CEELI conferences in Washington, D.C., involving delegations from Lithuania, Romania, and Russia, and has served on CEELI "working groups" on Armenia and Belarus. He traveled to Russia in 1992 as part of a CRS delegation to assist on questions of separation of powers and federalism and to Ukraine in 1993 to participate in an election law conference.

Dr. Fisher's specialities include constitutional law, war powers, budget policy, executive-legislative relations, and judicial-congressional relations. He is the author of more than 150 articles in law reviews, political science journals, encyclopedias, books, magazines, and newspapers. He has been invited to speak in Albania, Australia, Bulgaria, Canada, England, Greece, Israel, Macedonia, Malaysia, Mexico, the Netherlands, the Philippines, Romania, Russia, Slovenia, Taiwan, and Ukraine.

TO THE
NEW SCHOOL FOR SOCIAL RESEARCH

INTRODUCTION

To accommodate the leading cases on constitutional law, textbooks concentrate on court decisions and overlook the political, historical, and social framework in which these decisions are handed down. Constitutional law is thus reduced to the judicial exercise of divining the meaning of textual provisions. The larger process, including judicial as well as nonjudicial actors, is ignored. The consequence, as noted recently by a law professor, is the absence of a "comprehensive course on constitutional law in any meaningful sense in American law schools."[1]

The political process must be understood because it establishes the boundaries for judicial activity and influences the substance of specific decisions, if not immediately then within a few years. This book keeps legal issues in a broad political context. Cases should not be torn from their environment. A purely legalistic approach to constitutional law misses the constant, creative interplay between the judiciary and the political branches. The Supreme Court is not the exclusive source of constitutional law. It is not the sole or even dominant agency in deciding constitutional questions. The Constitution is interpreted initially by a private citizen, legislator, or executive official. Someone from the private or public sector decides that an action violates the Constitution; political pressures build in ways to reshape fundamental constitutional doctrines.

These developments affect the entire public. Justice Blackmun, in a 1982 interview, emphasized that the Court "doesn't belong to me, or to the nine of us, or to the Chief Justice. It's an instrument of government. And I try to preach the gospel that lay people, as well as lawyers, should take an interest in the Court and what it's doing."[2] Constitutional law, pared to its essentials, expresses how we want to live as

[1]W. Michael Reisman, "International Incidents: Introduction to a New Genre in the Study of International Law," 10 Yale J. Int'l L. 1, 8 n.13 (1984).

[2]"A Justice Speaks Out: A Conversation with Harry A. Blackmun," Cable News Network, Inc., conducted November 25, 1982, at 20.

individuals within a society. What powers shall government exercise? What rights and liberties remain with us? Basic questions of political philosophy and conscience are at stake.

Constitutional questions are considered when Congress debates legislation and when Presidents decide to sign or veto bills presented to them. The Attorney General and the Comptroller General analyze (and resolve) many constitutional questions, as do general counsels in the agencies. Actions by the political branches, over the course of years, help determine the direction and result of a Supreme Court decision. Constitutional issues are often hammered out without the need for litigation.

Charles Evans Hughes, in a widely quoted epigram, said that "We are under the Constitution, but the Constitution is what the judges say it is."[3] The Supreme Court nevertheless recognizes that each branch of government, in the performance of its duties, must initially interpret the Constitution.[4] Those interpretations are given great weight by the Court; sometimes they are the controlling factor.[5] A number of issues never reach the courts because of self-limiting conditions imposed by judges: the doctrines of ripeness, mootness, standing, political questions, and prudential considerations.

When the Supreme Court decides a question, the ruling must be translated into action by lower courts, executive agencies, Congress, and local government. Ambiguities and generalities in a ruling produce broad choices of interpretation and implementation. Decisions usually provide only a broad framework for public officials and citizens. As Justice Frankfurter once noted, the Court "can only hope to set limits and point the way."[6] If Congress, the President, and the public oppose a decision, it is often only a matter of time before the issue is back in the political stream to test and usually alter what the Court has announced.

Books on constitutional law sometimes focus exclusively on Supreme Court decisions and stress its doctrines, as though lower courts and governmental officials are unimportant. Other studies describe constitutional decision making as lacking in legal principle, based on low-level political haggling by various actors. I see an open and vigorous system struggling to produce principled constitutional law. Principles are important. Constitutional interpretations are not idiosyncratic events or the result of a political free-for-all. If they were, our devotion to the rule of law would be either absurd or a matter of whimsy.

It is traditional to focus on constitutional rather than statutory interpretation, and yet the boundaries between these categories are unclear. Issues of constitutional dimension usually form a backdrop to "statutory" questions. Preoccupation with the Supreme Court as the principal or final arbiter of constitutional questions fosters a misleading impression. A dominant business of the Court is statutory construction, and through that function it interacts with other branches of government in a process that refines the meaning of the Constitution. The judicial branch has fashioned guidelines to avoid many of the constitutional issues pressed upon it. If a

[3]Charles Evans Hughes, Addresses and Papers 139 (1908).

[4]United States v. Nixon, 418 U.S. 683, 703 (1974).

[5]Rostker v. Goldberg, 453 U.S. 57 (1981), concerning male-only registration for military service.

[6]Niemotko v. Maryland, 340 U.S. 268, 275 (1951) (concurring opinion).

case can be decided either on constitutional grounds or as a question of statutory construction, the courts prefer to deal only with the latter.[7]

This study treats the Supreme Court and lower courts as one branch of a political system with a difficult but necessary task to perform. They often share with the legislature and the executive the responsibility for defining political values, resolving political conflict, and protecting the political process. Through commentary and reading selections, I try to bridge the artificial gap in the literature that presently separates law from politics. Lord Radcliffe advised that "we cannot learn law by learning law." Law must be "a part of history, a part of economics and sociology, a part of ethics and a philosophy of life. It is not strong enough in itself to be a philosophy in itself."[8]

A Note on Citations. The introductory essays to each chapter contain many citations to court cases, public laws, congressional reports, and floor debates. The number of these citations may seem confusing and even overwhelming. I want to encourage the reader to consult these documents and develop a richer appreciation for the complex process that shapes constitutional law. Repeated citations to federal statutes help underscore the ongoing role of Congress and the executive branch in constitutional interpretation. To permit deeper exploration of certain issues, either for a term paper or scholarly research, footnotes contain leads to supplementary cases. Bibliographies are provided for each chapter. The appendices include a glossary of legal terms and a primer on researching the law.

If the coverage is too detailed, the instructor may always advise students to skip some of the material. Another option is to ask the student to understand two or three departures from a general doctrine, such as the famous *Miranda* warning developed by the Warren Court but whittled away by the Burger and Rehnquist Courts. Even if a student is initially stunned by the complexity of constitutional law, it is better to be aware of the delicate shadings that exist than to believe that the Court paints with bold, permanent strokes.

At various points in the chapters, I give examples where state courts, refusing to follow the lead of the Supreme Court, conferred greater constitutional rights than available at the federal level. These are examples only. They could have been multiplied many times over. No one should assume that rulings from the Supreme Court represent the last word on constitutional law, even for lower courts.

Compared to other texts written by political scientists, this book offers much more in the way of citations to earlier decisions. I do this for several reasons. The citations allow the reader to research areas in greater depth. They also highlight the process of trial and error used by the Court to clarify constitutional principles. Concentration on contemporary cases would obscure the Court's record of veering down side roads, backtracking, and reversing direction. Focusing on landmark cases prevents the reader from understanding the *development* of constitutional law: the dizzying exceptions to "settled" doctrines, the laborious manner in which the Court struggles to fix the meaning of the Constitution, the twists and turns, the detours and dead ends. Describing major cases without these tangled patterns would presume an orderly and static system that mocks the dy-

[7]Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). See also Rescue Army v. Municipal Court, 331 U.S. 549, 568–572 (1947).

[8]Lord Radcliffe, The Law & Its Compass 92–93 (1960).

namic, fitful, creative, and consensus-building process that exists. No one branch of government prevails. The process is polyarchal, not hierarchical. The latter, perhaps attractive for architectural structures, is inconsistent with our aspiration for self-government.

In all court cases and other documents included as readings, footnotes have been deleted. For footnotes in the introductory essays, standard reference works are abbreviated as follows:

Comp. Gen.	Decisions of the Comptroller General.
Elliot	Jonathan Elliot, ed., The Debates in the Several State Conventions, on the Adoption of the Federal Constitution (5 vols., Washington, D.C., 1836–1845).
Farrand	Max Farrand, ed., The Records of the Federal Convention of 1787 (4 vols., New Haven: Yale University Press, 1937).
Landmark Briefs	Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law. Philip B. Kurland and Gerhart Casper, eds. University Publications of America.
O.L.C.	Office of Legal Counsel Opinions, U.S. Department of Justice.
Op. Att'y Gen.	Opinions of the Attorney General.
Richardson	James D. Richardson, ed., A Compilation of the Messages and Papers of the Presidents (20 vols., New York: Bureau of National Literature, 1897–1925).
Wkly Comp. Pres. Doc.	Weekly Compilation of Presidential Documents, published each week by the Government Printing Office since 1965.

CHANGES TO SECOND EDITION

The first edition had about 160 court cases. In response to outside reviews, I have added about 35 more. Many of the readings for the first edition were trimmed, and sometimes eliminated, to make room for these additional cases. The second edition also makes much greater use of boxes to summarize and highlight important points. Finally, instead of having an essay at the beginning of each chapter to cover the entire chapter, the chapters are now subdivided. An essay runs until it completes a subject and is then followed by relevant readings.

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This book, in gestation for years, has many contributors and abettors. Morton Rosenberg of the Congressional Research Service lent a guiding hand, giving encouragement when I needed it and offering importunings I sometimes ignored. I needed both signals. In reviewing the manuscript and selections for readings, he was my major source of counsel and enlightenment. Other friends and colleagues who offered important advice and comments include Phillip J. Cooper, Neal Devins, Jerry Goldman, Jacob Landynski, Leonard W. Levy, Robert Meltz, Christopher Pyle, Harold Relyea, and Stephen Wasby.

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Bertrand W. Lummus suggested that I write this book for McGraw-Hill. His place as political science editor has been taken by Peter M. Labella, who helped guide the changes necessary for the second edition. Stephen J. Wayne of Georgetown University served as advisory editor. Fred Burns of McGraw-Hill supervised production, and Pamela Nugent, as copy editor, made a number of excellent suggestions for clarifying the text.

Some of the material in this book originally appeared as articles in the following journals: *American Journal of International Law, California Law Review, Cumberland Law Review, Georgia Law Review, Journal of Political Science, Legal Times, North Carolina Law Review, Public Administration Review, State Legislatures,* and the *University of Pennsylvania Law Review.* I also presented papers and addresses at conferences sponsored by the American Enterprise Institute, the American Political Science Association, the Army War College, Claremont Institute, Cumberland Law School, Dickinson College, George Mason University, Harvard University, John Jay College, Kennesaw College, the National War College, Northwestern University, Princeton University, State University of New York, Southern Methodist University, Suffolk University Law School, the University of Cincinnati, the University of Dallas, the University of Delaware, the U.S. District Court for the Northern District of California, Wake Forest University, the Law School at Melbourne University in Australia, the National Autonomous University of Mexico in Mexico City, the Philippine Bar Association in Manila, the Hebrew University in Jerusalem, and law schools in Athens, Greece; Sofia, Bulgaria; Tirana, Albania; Ljubljana, Slovenia; Skopje, Macedonia; and Cluj and Sibiu, Romania.

This is my eleventh book since graduating from the New School for Social Research in 1967. I had received a bachelor's degree in chemistry, completed some graduate work in physical chemistry, and did technical writing for a few years before taking undergraduate classes in the social sciences at the New School. In 1963, after a conference with Joseph Greenbaum, Dean of the Graduate Faculty of Political and Social Science at the New School, I was accepted into the graduate program. As I walked down the hall, exhilarated by my new venture, he stuck his head out of his office and shouted: "Don't take any more chemistry." I haven't. Grateful for four stimulating years of graduate work at an institution that urges interdisciplinary research, I am happy to dedicate this book to the New School.

LOUIS FISHER

PREFACE TO VOLUME TWO

For those who teach constitutional law, the relationship between the judiciary and politics remains an awkward subject. Technical details of a decision have a way of driving out the political events that generate a case and influence its disposition. To infuse law with dignity, majesty, and perhaps a touch of mystery, it is tempting to separate the courts from the rest of government and make unrealistic claims of judicial independence. Similarly, studies exaggerate the extent to which the Supreme Court supplies the "last word" on constitutional law. The elected branches and the general public necessarily share in that complex, sensitive task.

Legal scholars who explored the law-politics relationship early in the twentieth century were discouraged by traditional leaders of the legal profession. To speak the truth, or even search for it, threatened judicial symbols and concepts of long standing. In 1914, when legal philosopher Morris Raphael Cohen began describing how judges make law, he met opposition from his colleagues. The deans of major law schools advised him that his findings, although unquestionably correct, might invite even greater recourse to "judicial legislation."

Undeterred by these warnings, Cohen had "an abiding conviction that to recognize the truth and adjust oneself to it is in the end the easiest and most advisable course." He denied that the law is a "closed, independent system having nothing to do with economic, political, social, or philosophical science." If courts were in fact constantly making and remaking the law, it became "of the utmost social importance that the law should be made in accordance with the best available information, which it is the object of science to supply." Morris R. Cohen, Law and the Social Order 380–381 n.86 (1933).

For more than a century, the legal profession claimed that judges "found" the law rather than made it. This doctrine of mechanical jurisprudence, joined with the supposed nonpolitical nature of the judiciary, provided convenient reasons for separating courts from the rest of government. A perceptive essay by political scientist C. Herman Pritchett noted that the disciplines of law and political science

drifted apart for semantic, philosophical, and practical reasons: "Law is a prestigious symbol, whereas politics tends to be a dirty word. Law is stability; politics is chaos. Law is impersonal; politics is personal. Law is given; politics is free choice. Law is reason; politics is prejudice and self-interest. Law is justice; politics is who gets there first with the most." Joel B. Grossman and Joseph Tanenhaus, eds., Frontiers of Judicial Research 31 (1969).

Chief Justice Warren believed that law could be distinguished from politics. Progress in politics "could be made and most often was made by compromising and taking half a loaf where a whole loaf could not be obtained." He insisted that the "opposite is true so far as the judicial process was concerned." Through the judicial process, "and particularly in the Supreme Court, the basic ingredient of decision is principle, and it should not be compromised and parceled out a little in one case, a little more in another, until eventually someone receives the full benefit." The Memoirs of Earl Warren 6 (1977).

Yet the piecemeal approach applies quite well to the judicial process. The Supreme Court prefers to avoid general rules that exceed the necessities of a particular case. Especially in the realm of constitutional law, it recognizes the "embarrassment" that may result from formulating rules or deciding questions "beyond the necessities of the immediate issue." Euclid v. Ambler Co., 272 U.S. 365, 397 (1926). Compromise, expediency, and ad hoc action are no less a part of the process by which a multimember court gropes incrementally toward a consensus and decision. The desegregation case, *Brown v. Board of Education* (1954), was preceded by two decades of halting progress toward the eventual abandonment of the "separate but equal" doctrine enunciated in 1896. After he left the Court, Potter Stewart reflected on the decision to exclude from the courtroom evidence that had been illegally obtained: "Looking back, the exclusionary rule seems a bit jerry-built—like a roller coaster track constructed while the roller coaster sped along. Each new piece of track was attached hastily and imperfectly to the one before it, just in time to prevent the roller coaster from crashing, but without an opportunity to measure the curves and dips preceding it or to contemplate the twists and turns that inevitably lay ahead." 83 Colum. L. Rev. 1365, 1366 (1983).

Especially in the twentieth century, the cases decided by federal courts embody issues that are of vital importance to individual citizens, corporations and trade unions, and the elected branches of government. The Court moved from narrow nineteenth-century questions of private law (estates, trusts, admiralty, real property, contracts, and commercial law) to contemporary issues of public law (federal regulation, criminal law, immigration, equal protection, and federal taxation). The period after World War II is generally considered a high-water mark in judicial policymaking. Decisions with nationwide impact were issued that affected desegregation in 1954, reapportionment and school prayers in 1962, criminal justice in the 1960s, and abortion from 1973 onward.

Justices of the Supreme Court sometimes encourage the belief that a gulf separates law from politics. Chief Justice John Marshall insisted that "Questions in their nature political . . . can never be made in this court." Marbury v. Madison, 5 U.S. 137, 170 (1803). In that very same decision, however, he established a precedent of far-reaching political importance: the right of the judiciary to review and overturn the actions of Congress and the executive. As noted by one scholar, Marshall "more closely associated the art of judging with the positive qualities of impartiality and disinterestedness, and yet he had made his office a vehicle for the expression of his

views about the proper foundations of American government." G. Edward White, The American Judicial Tradition 35 (1976).

Judicial review in America survives a number of nagging, unanswered questions. By what right do life-tenured judges invalidate policies adopted by popularly elected officials? If judicial review is of such crucial importance for a written constitution, why did the framers omit it? Why is it based on implied, rather than explicit, power? If judicial review is essential to protect constitutional freedoms, how do other democratic nations function without it?

At some point, judicial review assumes the characteristics of lawmaking. Constitutional interpretation is more than a technical exercise or display of judicial erudition. The power to interpret the law is the power to make the law. Judicial review can be another name for judicial legislation. As Bishop Hoadley announced in 1717: "Whosoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them." James Bradley Thayer, 7 Harv. L. Rev. 129, 152 (1893).

Judicial review includes many activities. Courts may overturn a government action, find support for it, or refuse to rule at all. Judicial review applies to Congress, the chief executive, administrative agencies, state legislatures, and rulings of state courts. Although the holding of the Supreme Court is of utmost importance, it often serves as but one stage of an ongoing constitutional process shared with lower courts, the executive branch, and the legislature.

By the time of the convention, some of the framers expected judicial review to be part of the new government. In reading their statements at the convention and during the ratification debates, it is important to keep their thoughts in context and recognize conflicting statements. The framers did not have a clear or fully developed theory of judicial review.

The framers wanted to replace the Articles of Confederation to make the central government more effective, resolve disputes among the states over legal and monetary systems, and limit legislative abuses. Each goal depended on the structure and power of the federal judiciary. Instead of the legislative supremacy that prevailed under the Articles of Confederation, the new Congress would be only one of three coordinate and coequal branches. Both the Virginia Plan, presented by Edmund Randolph, and the New Jersey Plan, advocated by William Paterson, called for the creation of an independent judiciary headed by a Supreme Court. Although the new judicial article left undecided such questions as whether to create lower federal courts or rely solely on state courts, it did grant broad authority to the Supreme Court.

The framers were worried that thirteen sets of state courts would announce contradictory rulings on matters of national concern. In Federalist No. 80, Alexander Hamilton said that thirteen independent courts of final jurisdiction "over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed." The convention resolved that problem by adopting the Supremacy Clause. Judicial review over presidential and congressional actions, however, was a subject of much greater delicacy. By 1787 the framers had become alarmed about legislative overreaching. In Federalist No. 48, James Madison wrote that the "legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." Several delegates to the Philadelphia Convention expressed the same concern. 1 Farrand

254 (Wilson) and 2 Farrand 35 (Madison), 110 (Madison), and 288 (Mercer). However, giving the courts the final say over congressional acts was an extremely radical notion.

After debating a congressional veto over proposed state legislation, that idea was rejected for two reasons. The addition of the Supremacy Clause would presumably handle any conflicts between national law and state legislation. Moreover, the state courts could exercise judicial review to control legislative excesses. They "would not consider as valid any law contravening the Authority of the Union," and if such laws were not set aside by the judiciary they "may be repealed by a National law." 2 Farrand 27–28 (Sherman and Morris). Madison later said that a law "violating a constitution established by the people themselves, would be considered by the Judges as null & void." Id. at 93. These statements were clearly limited to judicial review at the *state,* not the national, level. A year later, writing to Thomas Jefferson, Madison denied that the Constitution empowered the Court to strike down acts of Congress, for that would have made the judiciary "paramount in fact to the Legislature, which was never intended and can never be proper." 5 Writings of James Madison 294 (Hunt ed. 1904).

Marshall's options in *Marbury* v. *Madison* were circumscribed by one overpowering fact: whatever technical ground he used to rule against the administration, any order directing Madison to deliver the commissions was sure to be ignored. If the Court's order could be dismissed with impunity, the judiciary's power and prestige would suffer greatly. As Chief Justice Burger has noted: "The Court could stand hard blows, but not ridicule, and the ale house would rock with hilarious laughter" had Marshall issued a mandamus ignored by Jefferson.[1]

Marbury v. *Madison* is the most famous case for the proposition that the Court is supreme on constitutional questions, but it stands for a much more modest claim. Chief Justice Marshall stated that it is "emphatically the province and duty of the judicial department to say what the law is." So it is, but the same can be said for Congress. Surely it is the province and duty of Congress to say what the law is. Moreover, the Court was not sufficiently powerful in 1803 to dictate to Congress or to the President. If Marshall had upheld the constitutionality of Section 13 of the Judiciary Act of 1789, he could not have forced Secretary of State Madison to deliver the commissions. Marshall's order would have been ignored, and he knew that.

Did Marshall believe that the Court was supreme on questions of constitutionality? Probably not. His behavior during the impeachment hearings of Judge Pickering and Justice Chase suggests that he was quite willing to share constitutional interpretations with the coequal branches. *Marbury* was issued on February 24, 1803. The House impeached Pickering on March 2, 1803, and the Senate convicted him on March 12, 1804. As soon as the House had impeached Pickering, it turned its guns on Chase. Under these precarious circumstances, Marshall wrote to Chase on January 23, 1804, suggesting that members of Congress did not have to impeach judges whenever they objected to their judicial opinions. Instead, Congress could simply review and reverse objectionable decisions through the legislative process. Marshall's letter to Chase is somewhat ambiguous. He could have been referring to

[1]Warren E. Burger, "The Doctrine of Judicial Review: Mr. Marshall, Mr. Jefferson, and Mr. Marbury," in Mark W. Cannon and David M. O'Brien, eds., Views From the Bench 14 (1985).

reversals of statutory interpretation, not constitutional interpretation, but given the temper of the times the latter seems more likely.

Some critics of contemporary courts argue that the main objection to judicial review is that it runs counter to American democratic values. One study advised judges to limit their work to supporting broad participation in the democratic process and protecting minority rights. John Hart Ely, Democracy and Distrust (1980). Another study endorsed judicial review for protecting individual rights but proposed that the courts withdraw from almost all areas of federalism and separation of powers. Jesse H. Choper, Judicial Review and the National Political Process (1980).

It is tempting, but misleading, to call judicial review antidemocratic. The Constitution establishes a limited republic, not a direct or pure democracy. Popular sentiment is filtered through a system of representation. Majority vote is limited by various restrictions in the Constitution: candidates must be a certain age, Presidents may not serve a third term—regardless of what the people want. Although states range in population from less than a million to more than twenty million, each state receives the same number of Senators. Filibusters conducted by a minority of Senators can prevent the Senate from acting. Majority rule is further constrained by checks and balances, separation of powers, federalism, a bicameral legislature, and the Bill of Rights.

To the extent that the judiciary protects constitutional principles, including minority rights, it upholds the values of the people who drafted and ratified the Constitution. Throughout much of its history, however, the judiciary gave little support to civil liberties or civil rights. The record does not support the assertion that judicial review has been a force for protecting individual liberties. Henry W. Edgerton, 22 Corn. L. Q. 299 (1937). However, in a number of decisions over the past few decades affecting reapportionment, the right of association, and the "white primary" cases, the Supreme Court opened the door to broader public participation in the political process. In many ways the contemporary judiciary has helped strengthen democracy. Through its decisions, it performs an informing function previously associated with legislative bodies.

The judiciary performs other positive, legitimizing functions. Actions by executive and legislative officials are contested and brought before the courts for review. When upheld, citizens can see some standard at work other than the power of majorities and the raw force of politics. Alexander Bickel wrote: "The Court's prestige, the spell it casts as a symbol, enable it to entrench and solidify measures that may have been tentative in the conception or that are on the verge of abandonment in the execution." 75 Harv. L. Rev. 40, 48 (1961). But what happens when the Court faces a repressive executive or legislative action? If judges lend their support, as in the curfew and imprisonment of Japanese-Americans during World War II, the reputation of the judiciary as the guarantor of constitutional liberties is tarnished. Yet if courts refuse to take such a case, they risk communicating the message that might is right and no independent judicial check exists.

If the judiciary behaves in ways intolerable to the public, there are many methods available to legislators and executives to invoke court-curbing pressures. Presidential appointments and Senate confirmations supply a steady stream of influence by popularly elected public officials. Court decisions can be overturned by constitutional amendment, a process that is directly controlled by national and