在宪政舞台上

——美国最高法院的历史轨迹

On the Constituitonal Stage: A History of American Supreme Court

任东来 胡晓进 等 / 著

中国法制出版社
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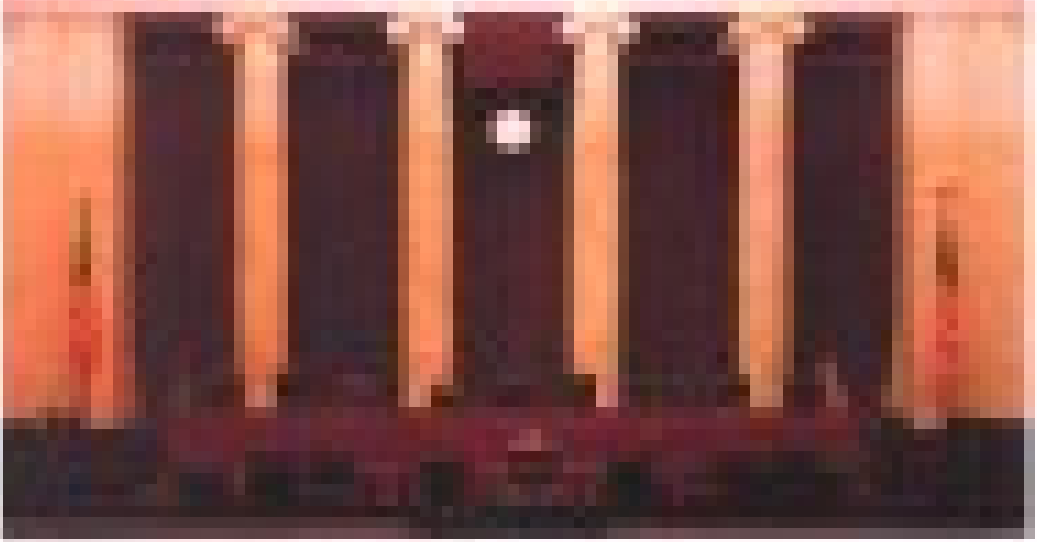

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美国联邦最高法院大楼

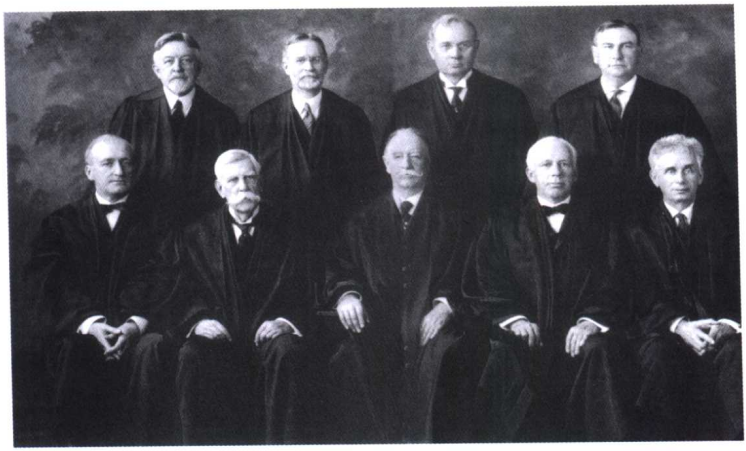
最高法院大厦里的审判庭及法官席

大法官的工作室。每个大法官都有一个由三个房间和独立卫生间组成的工作室。1935年以前，大法官们没有工作室，均在家办公。

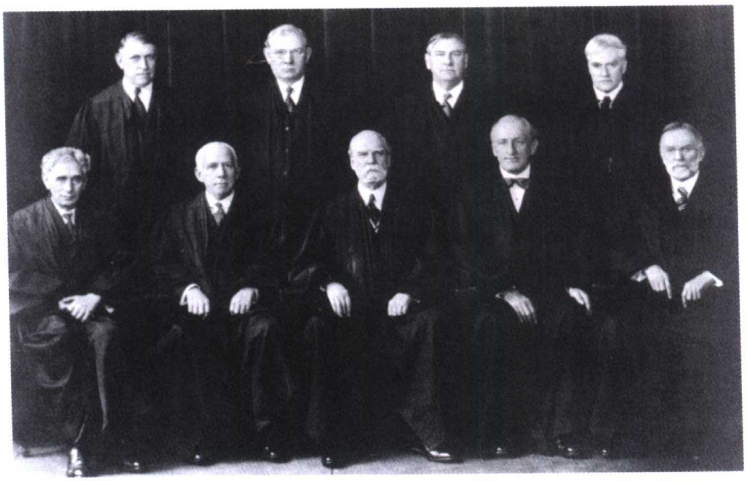
大法官会议室。在法院的正常开庭期（10月至次年6月），大法官们每周两次在这里开会讨论和表决是否下达调卷令、如何裁决已结束了庭辩的案件。

最高法院的图书馆。该馆1935年建立，目前收藏了五十万册法律书刊、判例报告和其他法律文献。

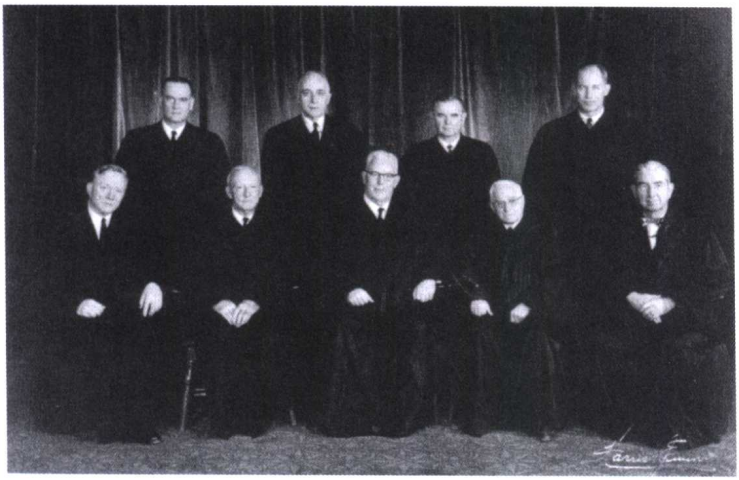
最高法院大厦二楼约翰·马歇尔餐厅中悬挂的马伯里和麦迪逊肖像。



塔夫脱法院全家福：后排左起依次为桑福德、萨瑟兰、巴特勒、斯通；前排左起麦克雷诺兹、霍姆斯、塔夫脱、范德文特、布兰代斯。



休斯法院（1932–1937）全家福：后排左起依次为罗伯茨、巴特勒、斯通、卡多佐；前排左起布兰代斯、范德文特、休斯、麦克雷诺兹、萨瑟兰。



沃伦法院全家福（1962）：后排左起为斯图尔特、哈兰、布伦南、怀特；前排左起为道格拉斯、布莱克、沃伦、法兰克福特、克拉克。

伦奎斯特法院（1986–2005）全家福。后排左起：金斯伯格、苏特、托马斯、布雷耶；前排左起：斯卡利亚、斯蒂文斯、伦奎斯特、奥康纳、肯尼迪。

序

Mark S. Kende*

在其经典著述《论美国的民主》中，阿列克西·德·托克维尔写到，美国最高法院权力巨大，尤其是，最高法院拥有宣布法律和政府行为违宪的重要权力，而且，其裁决有着约束力。但是，“这是一种舆论的权力，如果人民忽视或蔑视法律，[大法官]** 则无能为力”。① 没有民众的支持，最高法院便无能为力，其原因正如亚历山大·汉密尔顿在《联邦派文集》第78篇所指出的，它既没有“剑”，也不掌握着“钱袋子”，考虑到美国宪法并没有明确最高法院的作用，最高法院的权力就显得尤为突出。任东来教授的这本重要著作《在宪政舞台上：美国最高法院的历史轨迹》，概述了美国最高法院的历史，有助于解释最高法院的权威和正当性。

作为一个长期观察最高法院事务的美国学者，我想提请读者注意以下几点，它们可以说明最高法院为什么能够得到民众的支持。

首先，最高法院要对自己的判决提出法律上的理由。大法官个人和政治偏好被假定为不起作用。最高法院的判决意见书基于美国宪法的文本，制宪者的意图，最高法院在以前类似问题上的判决（先例），宪法的结构，公共政策的考虑，道德上的推理。所以，最

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** 凡“[ ]”部分，系本书作者为方便读者阅读而在引文中增加的内容。

① *Marbury v. Madison*, 5 U. S. 137 (1803).

高法院的宪法决定看起来要超越日常的政治，包含着值得尊崇的更高级的理性。[①] 这也就是法治（rule of law）。一个鲜明的对比是，最高法院那些受到质疑最多的决定，也是那些看上去最政治化的决定，诸如“罗伊诉韦德案”[②] 和“布什诉戈尔案”[③]，这绝非偶然。

其次，最高法院的决定通常与民意恰好重合。[④] 这样，大法官虽非民选，但是，正如马丁·杜利指出的那样，他们也关注选举的结果。比如，在1930年代的大萧条时期，全美国饱受广泛失业和其他众多经济困难之苦。富兰克林·罗斯福总统提出了“新政”联邦立法，旨在帮助穷人和饥饿者。最初，最高法院裁定，这些法律违宪地行使了联邦的权力。[⑤] 它们干涉了各州，干预了自由市场的经济制度。但是，当萧条继续，罗斯福连任总统成功，最高法院便转向认可了这些新政项目。[⑥] 在最近的“劳伦斯诉得克萨斯案”中[⑦]，最高法院认可了男同性恋的权利，反映了社会态度的变化，因为在此之前众多的州已经取消了它们反对男同性恋性行为的法律。[⑧]

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① 不过，也有不少的法律学者论述说，最高法院的宪法判决反映出的是，包裹在华丽法律语言里面的政治偏好。Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard Univ. Press 1990).

② *Roe v. Wade*, 410 U. S. 113 (1973)（裁定限制堕胎违宪）。

③ *Bush v. Gore*, 531 U. S. 98 (2000)（解决总统选举争议）。

④ Jeffrey Rosen, *The Most Democratic Branch* (New York: Oxford Univ. Press 2006) p. 4.（“不论最高法院中庸的大法官是否自觉地关注民意测验的结果，中立地解释宪法，还是试图平衡美国政治制度中的其它部门，在过去两个世纪的大部分时间里，他们那些引人注目的决定一直以不多的优势赢得了美国公众的人心，或者说至少过半数。”）

⑤ *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936)（否决保护煤矿工人的法律）。

⑥ *United State v. Darby*, 312 U. S. 100 (1941)（认可了规定劳工工资和劳动时间标准的法律）。罗斯福还提出了名声欠佳的“最高法院填塞”计划，据此，他企图增加大法官的人数，指望他们能够在新政立法案件中支持自己的立场。国会拒绝了罗斯福增加新法官的图谋，但最高法院最终还是转变了立场。William E. Leuchtenberg, “The Origins of Franklin D. Roosevelt's 'Court Packing' Plan,” 1966 *Supreme Court Review* 347.

⑦ *Lawrence v. Texas*, 539 U. S. 558 (2003).

⑧ 在这个判决做出时，50%的公众认为同性性关系应该合法。Karlyn Bowman, Attitudes about Homosexuality and Gay Marriage, A. E. I. *Studies in Public Opinion* (May 20, 2005).

而且，为了不过多地搅乱民众的期望，在最重要的权利案件中，最高法院的裁决经常包含了最低行动论的成份。[①]在裁定公立学校种族隔离违法之后，最高法院在司法救济上非常谨小慎微，因为它担心社会骚乱。[②] 还有，即便这样的一个决定蕴含了社会改革的寓意，最高法院也还是反对以下看法：美国宪法包含了默示的社会经济权利。[③]

再次，最高法院得到了民众的支持，因为它的司法意见看起来很有权威，甚至卓尔不群。这些意见的发布深不可测，就好像来源于某种神谕，传递出神圣羊皮书——美国宪法——的天意。最高法院大厦庄严的罗马柱让人联想到古代罗马和穿着黑色长袍的大法官。最高法院内部的辩论是秘密的，而不像由 C－Span 电视台转播的国

① 在 *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard Univ. Press 1999) 中，Cass Sunstein 提出了宪法解释的最低行动论 (minimalist theory)，并因此而著名。最高法院大法官布雷耶最近也写了一本书，支持最低行动论的一种观点，也就是设法确保立法部门，而非法院，做出社会上大部分重要的决定。*Active Liberty, Interpreting Our Democratic Constitution* (New York: Alfred A. Knopf 2005)。不过，最高法院的批评家已经说过，最高法院的最低行动论保护了公司和富人的既定利益，根本不可能带来有意义的社会变化。Ran Hirsch, *Towards Juristocracy* (Cambridge: Harvard Univ. Press 2004); Gerald Rosenberg, *The Hollow Hope* (Chicago: Univ. Chicago Press 1991).

② *Brown v. Board of Education*, 349 U. S. 294 (1955) (Brown II) (联邦地区法院应该以“最稳重的步伐”行事)。Morton Horwitz, *The Warren Court and the Pursuit of Justice* (New York: Hill and Wang 1999) pp. 29－30 (“最高法院在‘布朗案 II’的决定反映了大法官的认识：他们正在引发一场社会革命”) 不过，最高法院不愿意下令立即采取救济措施的做法受到了猛烈的批评。Paul Gewirtz, “Remedies and Resistance,” 92 *Yale L. J.* 585, 613 (1983) (他引用了前大法官瑟古德·马歇尔的看法，指出只是在事关黑人案件时，权益的保护才会被推迟)。

③ *Dandridge v. Williams*, 397 U. S. 471 (1970). 相反，在“斯科特案”中，由于用了不必要的宽泛判决来否决涉及奴隶制的《密苏里妥协案》，最高法院让自己和整个国家陷入了麻烦。*Dred Scott v. Sandford*, 60 U. S. 393 (1856).

会立法辩论。[①] 最高法院甚至不允许电视台转播其法庭的庭辩。由于不是民选的，且终身任职，非严重行为不端不得免职，最高法院的大法官似乎可以超越政治的纷争。尽管由总统任命并经国会参议院批准，但他们独立于其他政府部门。下面的事实进一步加深了最高法院的深不可测：大法官不大到处演讲，也绝少出头露面。[②]

第四，最高法院很幸运地拥有一些政治机敏的舵手。在最高法院成立初期，首席大法官马歇尔发挥了至关重要的作用，他所撰写的意见书确立了法院的角色，但却没有把政治对手逼得太甚。[③] 他从前曾经是约翰·亚当斯总统的国务卿。在20世纪，首席大法官沃伦构建了一个全体一致宣布种族隔离违宪的大法官同盟，而在沃伦入主最高法院之前，他们在这个问题上四分五裂。[④] 沃伦曾经做过加利福尼亚州的州长。

最后，其他政府部门向最高法院让与了决策权。这种权力委代的一个原因是，相对来说，对立的两大政党势均力敌，他们之间无休止的冲突导致国会不能尽遂人愿。而且，许多政客担心自己的连任前景，如果他们采取了一些极有争议立场的话。最高法院的独立

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① 最高法院的相对低调以及本文中提到的其他因素，可能是最高法院在受欢迎程度上不同与其他政府部门的原因。2006年1月，CBS新闻网的民意调查显示，86%的民众至少对最高法院有某种信任，更具体地说，22%的人表示他们“非常”信任，27%的人“颇为”信任，37%的人“有些”信任，13%的人“有点儿”信任。CBS News Poll: Americans 'Undecided' on Alito, Jan. 9, 2006 http://www.cbsnews.com/stories/2006/01/09/opinion/polls/main1192317.shtml（最新一次访问，2006年9月7日）。相对照的是，同一时间，只有27%的民众认可国会，57%的人则不认可。CBS News Poll, Congress, Ethics, and Jack Abramoff, Jan. 5-8, 2006 http://www.cbsnews.com/htdocs/CBSNews_polls/JANA-CON.pdf（最新一次访问，2006年9月7日）。最高法院与国会之间的这一差距，在民众眼里的一向如此。

② 的确，在最高法院看起来颇通人情世故时，诸如做出一项意见不一的裁决，有着令人困扰的多种司法意见时，最高法院便会遇到最多的批评。大法官提名的确认听证也是一项难题，因为只有在这时，未来大法官的缺点才暴露在光天化日之下，供人们评头论足。

③ *Marbury*, supra n. 1（联邦党人首席大法官马歇尔所撰写的意见书，让他的政治对手托马斯·杰斐逊总统免于法律程序）。

④ *Brown v. Board of Education*, 347 U. S. 483 (1954) (Brown I).

独行和精干构成允许它发出道德和理性的声音，而不是政治上的权宜之计。此外，其他的政府部门通常也配合协作。当阿肯色州州长拒绝执行最高法院的裁定，让黑人学校的孩子去从前清一色白人的学校上学时，艾森豪威尔总统便召集了美国执法官来强制执行法院的决定。①

总之，最高法院对法治的执着，对舆论的敏感，其制度的高洁，一些首席大法官的勇气和智慧，以及其他政府部门不愿意决定某些事务，所有这些都有助于最高法院的权威和正当性。最后的结果是，通过不时地遏制过度的民主，最高法院起到了民主制中一个重要基石的作用。这并非偶然，众多其他国家现在也拥有了强大的法院，来对宪法问题做出具有约束力的决定。②

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① *Cooper v. Aaron*, 358 U. S. 1 (1958). 一个著名的例外是 *Worcester v. Georgia*, (1832) 案，当时最高法院裁定，佐治亚州的说辞——拥有对切诺基印第安人部落管辖权——非法。对此，据说安德鲁·杰克逊总统说过这样的话："约翰·马歇尔做出了他的决定，那就让他自个儿去执行吧。" Charles Hobson, "The Marshall Court," in Christopher Tomlins, ed., *The United States Supreme Court* (New York: Houghton Mifflin Co. 2005) p. 63.

② Vicki Jackson, Mark Tushnet, *Comparative Constitutional Law* (New York: Foundation Press 1999) p. v; Barry Friedman, "Taking Law Seriously," *Perspectives on Politics*, Vol. 4 No. 2 (June 2006) p. 261 ("在保护基本人权方面，越来越多的国家转向让法院和司法审查发挥重要作用。")

PREFACE

by Mark S. Kende[①]

In his classic work Democracy in America, Alexis de Toqueville wrote that the United States Supreme Court has enormous power but that "it is the power of public opinion. [The justices] would be impotent against popular neglect or contempt of the law." Specifically, the Court has the significant power to declare laws or actions unconstitutional and its decisions are binding.[②] Without popular support, the Court would be impotent because it lacks the "power of the purse" or "the sword" as Alexander Hamilton stated in The Federalist Papers No. 78. The Court's power is especially impressive considering that the U. S. Constitution does not make its role clear.[③] Thus, how has the Court obtained public support? This important book by Professor Ren Donglai chronicles the Court's history and helps provide explanations for the Court's authority and legitimacy. As a longtime American observer of the Court, let me suggest that the answer regarding public support depends on several factors.

First, the Court provides legal reasons for its decisions. The justices' personal or political preferences are not supposed to matter. The Court's

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① Mark S. Kende is a Professor of Law, the James Madison Chair in Constitutional Law, and the Director of the Drake University Constitutional Law Center.

② Marbury v. Madison, 5 U. S. 137 (1803).

③ Article III of the U. S. Constitution states that, "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." But Article III does not specify the significance of the Supreme Court's rulings regarding cases falling within this judicial power.

opinions rely on the text of the U. S. Constitution, the intent of the framers of the Constitution, previous Supreme Court decisions on similar issues (precedents), the structure of the Constitution, public policy considerations, and moral reasoning. Supreme Court constitutional decisions therefore seem to rise above ordinary politics and embrace a higher reason that deserves respect.① This is the rule of law. It is no accident that the Court's most frequently questioned decisions are those that, by contrast, appear the most political such as Roe v. Wade② and Bush v. Gore.③

Second, the Court's results usually coincide with public opinion.④ Thus, though Supreme Court Justices are unelected, they read the election returns, as Martin Dooley stated. For example, during the Great Depression in the 1930's, the United States suffered huge unemployment and other massive economic problems. President Franklin Delano Roosevelt (FDR) proposed a "New Deal" of federal laws that were designed to help the poor and the hungry. Initially, the U. S. Supreme Court ruled these laws were unconstitutional exercises of federal power.⑤ These laws interfered with the states and with the free market economic system. But as the Depression continued and FDR was reelected, the

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① Numerous legal scholars, however, have argued that the Court's constitutional decisions reflect political preferences dressed up in fancy legalistic language. Mark Kelman, A Guide to Critical Legal Studies (Cambridge: Harvard Univ. Press 1990).

② 410 U. S. 113 (1973) (abortion restrictions ruled unconstitutional).

③ 531 U. S. 98 (2000) (resolving Presidential election).

④ Jeffrey Rosen, The Most Democratic Branch (New York: Oxford Univ. Press 2006) p. 4 ("Whether the moderate justices on the Supreme Court are self – consciously reading the polls, neutrally interpreting the Constitution, or trying to compensate for other polarities in the system, their high profile decisions, for much of the past two centuries, have been consistently popular with narrow majorities (or at least pluralities) of the American public.")

⑤ Carter v. Carter Coal Co., 298 U. S. 238 (1936) (striking down laws protecting coal workers).

Court reversed course and upheld these New Deal programs. ① The Court's recent decision affirming gay rights, Lawrence v. Texas, ② only came after numerous other states had repealed their laws against gay sex, reflecting a change in public attitudes. ③

Moreover, in order not to disturb popular expectations more than necessary, the Court's most significant rights decisions often have a minimalist component. ④ After the Court ruled that racial segregation in public schools was illegal, the Court was cautious in its remedy because it feared social chaos. ⑤ Also, the Court has rejected arguments that the U.

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① United State v. Darby, 312 U. S. 100 (1941) (upholding laws that prohibit sub-standard wages and hours requirements for workers). FDR also engaged in the notorious "Court Packing" plan in which he tried to add justices to the Court who would support his position regarding the New Deal legislation. Though Congress rejected his effort to add new justices, the Court did shift positions eventually as indicated in the text. William E. Leuchtenberg, "The Origins of Franklin D. Roosevelt's 'Court Packing' Plan," 1966 Sup. Ct. Rev. 347.

② 539 U. S. 558 (2003).

③ At the time of the decision, 50% of the public believed homosexual relations should be legal. Karlyn Bowman, Attitudes About Homosexuality and Gay Marriage, A. E. I. Studies in Public Opinion (May 20, 2005).

④ Cass Sunstein is known for his minimalist theory of constitutional interpretation developed in the book, One Case at a Time: Judicial Minimalism on the Supreme Court (Cambridge: Harvard Univ. Press 1999). U. S. Supreme Court Justice Stephen Breyer has recently authored a book that supports a version of minimalism that seeks to ensure that the legislature makes most of society's important decisions, not the courts. Active Liberty, Interpreting Our Democratic Constitution (New York: Alfred A. Knopf 2005). Critics of the Court, however, have said that its minimalism protects the vested interests of corporations, and the wealthy, and can never bring about meaningful social change. Ran Hirsch, Towards Juristocracy (Cambridge: Harvard Univ. Press 2004); Gerald Rosenberg, The Hollow Hope (Chicago: Univ. Chicago Press 1991).

⑤ Brown v. Board of Education, 349 U. S. 294 (1955) (Brown II) (the federal district courts should act "with all deliberate speed"). Morton Horwitz, The Warren Court and the Pursuit of Justice (New York: Hill and Wang 1999) p. 29 – 30 ("The Supreme Court's decision in Brown II reflected the justices' understanding that they were initiating a social revolution.") The Court's unwillingness to order an immediate remedy has, however, been harshly criticized. Paul Gewirtz, "Remedies and Resistance," 92 Yale L. J. 585, 613 (1983) (quoting former U. S. Supreme Court Justice Thurgood Marshall as stating that postponement of enforcing rights only occurs when Negroes are involved).

S. Constitution contains implied socio – economic rights given the transformative implications of such a decision. ①

Third, the Court has garnered public support because its judicial opinions appear to be authoritative and even transcendent. They are issued mysteriously, as if from an oracle rendering divine pronouncements regarding a holy parchment, namely the U. S. Constitution. The majestic columns of the Supreme Court building suggest ancient Rome, and the justices wear long black robes. The Court's internal debates are secret, unlike when Congress debates legislation on the television station C – Span. ② The Court will not even televise its formal oral arguments. The Court's members seem above the political fray as they are unelected, serve for life, and cannot be removed unless they commit a terrible misdeed. They are independent from the other branches even though they are appointed by the President and confirmed by the Senate. The Court's mystique is heightened by the fact that the justices do not give many

① Dandridge v. Williams, 397 U. S. 471 (1970). The Court, by contrast, got itself and the nation into trouble with its unnecessarily broad decision striking down the Missouri Compromise regarding slavery in Dred Scott v. Sandford, 60 U. S. 393 (1856).

② The Court's relative privacy, and the other factors mentioned in this Preface, may make a difference in the popularity of the various branches. A January, 2006 poll by CBS news revealed that 86% of the public had at least some confidence in the U. S. Supreme Court. More specifically, 22% said they had a "great deal" of confidence, 27% said they had "quite a lot," 37% said they had "some," and 13% said "very little." CBS News Poll: Americans 'Undecided' on Alito, Jan. 9, 2006 http: //www. cbsnews. com/stories/2006/01/09/opinion/polls/main1192317. shtml (last visited Sep. 7, 2006). By contrast, only 27% of the public approved of Congress around that time while 57% disapproved. CBS News Poll, Congress, Ethics, and Jack Abramoff, Jan. 5 – 8, 2006 http: //www. cbsnews. com/htdocs/CBSNews_ polls/JANA – CON. pdf (last visited Sep. 7, 2006). The gap between the Supreme Court and Congress in the public eye is longstanding.