CHAPTER 8

Limitations on Judicial Power

Dissenting in *United States v. Butler* (1936) against a decision that invalidated one of the more important policies of the New Deal, Harlan F. Stone warned his colleagues: "The only check upon our own exercise of power is our own sense of self-restraint." Within months the Court had surrendered to the New Deal in the famous "switch in time that saved nine," but it had not been Stone's legal learning or his colleagues' sense of self-restraint alone that had persuaded the Court of the error of its ways. Earlier chapters noted some of the political limitations on judicial power, such as those inherent in the appointing process or in limiting access to courts. This chapter seeks to identify more explicitly the limitations imposed on judges by their political and institutional settings.

INTERNAL CHECKS

We should begin by recognizing the relevance of what Stone called "self-restraint" as an operative force in judicial decision making. Robert A. Dahl has stressed the importance of beliefs in democratic processes among political elites in preserving stability in America. These political professionals, Dahl says, accept a certain political culture, including rules of the game that sometimes restrict their own power in the short run, such as respecting the results of elections or allowing opponents to speak.[1] American judges are also products of a democratic culture, though, if sophisticated, they temper that culture with constitutionalism. They rarely believe themselves entitled to impose their personal values and views on the country. Rather, they are aware that they are officials of a constitutional democracy and internalize certain norms to govern their own behavior.

Other chapters reprint essays that are relevant to such a discussion, including material on historical institutionalism, a line of scholarship arguing that judges, deeply concerned with sustaining the legitimacy of their institution,

[1] Robert A. Dahl, *Who Governs?* (New Haven: Yale University Press, 1961).

follow a prescribed set of internal norms rather than their own political values.[2] Here we want only to underline the potential importance of such self-limiting concepts. We know, for example, that Stone himself found much of the New Deal politically distasteful; yet, because he could not find any constitutional prohibitions against these policies, he voted to sustain them. In much the same fashion Oliver Wendell Holmes dissented against rulings that read laissez faire into the constitutional system. Still, he distrusted governmental intervention in economic processes—the Sherman Act he characterized as "humbug." But, as he noted in one of his most biting dissents, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." Harry Blackmun's opinion in the capital punishment case of *Furman v. Georgia* (1972)—in which the Court voted that the death penalty, as then applied in the United States, was unconstitutional—runs along the same lines: "Although personally I may rejoice in the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped. It has sought and has achieved an end." In 1994, Blackmun had a change of heart, claiming that "From this day forward, I no longer shall tinker with the machinery of death."[3] But his vote had been critical in *Gregg v. Georgia*, decided just four years after *Furman*, in which the Court held that the death penalty was not per se unconstitutional.

Blackmun's dissent in *Furman*, though at odds with the Court's decision, was gentle in tone. Not so Justice Antonin Scalia's response to Justice Sandra Day O'Connor in *Webster v. Reproductive Health Services* (1989). (Reading 8.1.) In the name of judicial restraint, O'Connor argued against overturning *Roe v. Wade* (1973). This "assertion," Scalia, sometimes an eloquent apostle of self-restraint, replied, "cannot be taken seriously." This exchange raises one of the more serious problems of self-restraint: Which is more restrained, to overrule a decision or merely cripple it?

We must be careful here, for calls for "judicial self-restraint" are often no more than anguished cries from people (sometimes including judges) disappointed at the course of constitutional interpretation. In fact, there is a faint line between judicial restraint and judicial abdication; and judges, like scholars, often disagree about where to draw that line. It is one thing for a judge to defer to Congress or the president where the constitutional text is ambiguous and the reasons on both sides pretty much equally strong. It is quite another to defer to the judgment of others where "the constitution," whether conceived as merely the document or as the document plus established traditions and/or underlying political theories of democracy and constitutionalism, are quite clear. On such

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[2] See Ronald Kahn, "Institutional Norms and Supreme Court Decision-Making: The Rehnquist Court on Privacy and Religion," in *Supreme Court Decision-Making*, ed. Cornell W. Clayton and Howard Gillman, (University of Chicago Press, 1999); Howard Gillman and Cornell W. Clayton, eds., *The Supreme Court in American Politics: New Institutionalist Interpretations* (Lawrence: University Press of Kansas, 1999).

[3] *Callins v. Collins* (1994).

occasions, the question becomes should the Court defer to Congress and the president or to the constitution. And that query can be extraordinarily difficult to answer. In 1937, Justice George Sutherland dissented against the Court's validating a New Deal statute that he thought unconstitutional. He conceded that a justice must give "due weight" to the constitutional views of colleagues, Congress, and the president, but:

> in passing upon the validity of a statute, he discharges a duty imposed upon him, which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so important he thus surrenders his deliberate judgment, he stands forsworn.[4]

As Justice Felix Frankfurter, another self-anointed prophet of self-restraint,[5] once commented: "In the end, judgment cannot be escaped, the judgment of this Court."

INSTITUTIONAL CHECKS

The judicial system imposes certain institutional as well as moral restrictions on judges. Some of these limits are internal to courts. Perhaps most obvious is the judicial practice of writing opinions to justify decisions. This requirement—and it is a requirement for federal trial judges and a hallowed practice on appellate courts—limits the range of judicial choice. These reasons are publicly given and thus can be publicly analyzed, praised, criticized, or even ridiculed. Although legislators can justify their votes by saying a bill will bring money and jobs to their constituents, judges must offer reasons grounded in legal principles. Few jurists have the temerity (or the stupidity) to expose themselves to the scorn of fellow judges, scholars, and journalists by announcing decisions for which they cannot give good, even if controversial, reasons.

Judges of trial courts face other restrictions. In all important criminal cases as well as in many civil suits, litigants have a right to trial by jury. Although a judge may shield the jurors from some untrustworthy evidence and give them detailed explanations of "the law," the final decision is theirs. Moreover, under existing legal rules, a judge is not supposed to overturn a jury's verdict unless it appears that reasonable people could not have reasonably arrived at such a conclusion.

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[4] *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

[5] In many Supreme Court opinions, Frankfurter declared his adherence to the doctrine of judicial restraint. But analyses of his voting behavior, at least according to some scholars, suggest that he was "a staunch economic conservative" who was willing to strike down laws that impinged on his policy preferences. See, e.g., Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002), 409-417

Appellate judges also operate within a network of internal restraints. Probably the most effective limitation is that all appellate courts are multijudge tribunals. Judges on lower appellate courts typically sit in panels of three; to give a ruling the weight of precedent, a majority must agree on an opinion as well as a decision. The same holds for courts of last resort. In the U.S. Supreme Court, a justice who wishes to have his or her jurisprudence translated into public law must marshal at least four other colleagues behind his or her reasoning. Because this mustering involves creating consensus, it also thereby often requires crafting opinions that may not exactly reflect the preferences of the writers or of others who join in those opinions. Collective responsibility thus acts as a powerful constraint on appellate judges. (Reading 8.2; see also Chapter 13.)

Other institutional restrictions are functions of the hierarchical structures in which both federal and state judges operate. A potentially serious limit on trial judges, for example, is the right of a losing litigant (except, of course, the prosecution in a criminal case) to appeal a decision. Although appellate judges give a certain presumption to the judgment of a colleague who presided over the actual combat, reversals of lower courts' rulings do occur. By the same token, tribunals of last resort may have the opportunity to review decisions made by intermediate appellate courts; and they, too, have not hesitated to reverse their colleagues on lower courts. William H. Rehnquist once explained why the U.S. Supreme Court had, in the early 1980s, reversed twenty-seven of twenty-eight rulings by the Court of Appeals for the Ninth Circuit: "When all is said and done, some panels of the Ninth Circuit have a hard time saying no to any litigant with a hard luck story."[6] Such extensive monitoring of one particular circuit may be exceptional; but, for the reasons suggested by Jeffrey A. Segal and his colleagues, the mere threat of review by the Supreme Court may restrain judges of intermediate appellate courts. (Reading 8.3.)

In these examples, the hierarchical structure imposes limits on lower courts from tribunals above them. But it can also work the other way: Lower-court judges can hamper the commands of higher courts by avoiding, limiting or even defying them—as many lower courts did with the U.S. Supreme Court's desegregation decisions. Indeed, one Alabama jurist not only declined to follow the Court's decisions in this field but declared the Fourteenth Amendment unconstitutional as well.[7]

That judges of lower courts occasionally frustrate the efforts of judges of higher courts should not be surprising; bureaucratic resistance in administrative hierarchies is a heavily documented fact of life in governmental, ecclesiastical, and commercial organizations. Moreover, the Supreme Court usually does not issue a final order when it decides a case but only remands it—sends it back—to a lower court for "proceedings consistent with this opinion." Not

[6] Quoted in *Los Angeles Times*, August 16, 1984.

[7] Bradley C. Canon and Charles A. Johnson, *Judicial Policies: Implementation and Impact* (Washington, DC: CQ Press), 38 (1999); see, more generally, Walter F. Murphy, "Lower Court Checks on Supreme Court Power," 53 *American Political Science Review* 1017 (1959).

infrequently, a party who wins on appeal to the Supreme Court still winds up the loser on remand. Ernesto Miranda—the defendant whose name has since 1966 been attached to the famous warning about rights to silence and to free counsel that the Court has required police to give people whom they arrest—was convicted again when he was retried.[8]

Apart from evasion or even attacks on a higher court, there is ample room for conflict when a trial judge senses a shift in the Supreme Court's policy. "It is a little difficult," Charles Curtis once observed, "for the lower court to have to follow the Supreme Court of the next succeeding year." Two schools of thought tell lower courts how to handle such problems. One, represented by Jerome Frank, thinks that "when a lower court perceives a pronounced new doctrinal trend in Supreme Court decisions, it is its duty, cautiously to be sure, to follow not to resist it." Frank added: "To use mouthfilling words, cautious extrapolation is in order."[9]

But prediction and extrapolation are risky enterprises. Guesses, no matter how well intentioned and well informed, can be wrong. This risk has led other judges to assert that inferior courts should follow doubtful precedents until the higher court specifically overturns them. As Chief Judge Calvert Magruder of the First Circuit said: "We should always express a respectful deference to controlling decisions of the Supreme Court, and do our best to follow them. We should leave it to the Supreme Court to overrule its own cases."[10] When, in *Hopwood v. Texas* (1996) (Reading 7.1), a panel of judges on the U.S. Court of Appeals for the Fifth Circuit refused to apply the U.S. Supreme Court's decision (actually Justice Powell's opinion for a "fractured" court) in *Bakke*, the affirmative action ruling, they seemed to agree with Jerome Frank. As we noted in Chapter 7, the dissenters asserted that *Bakke* was still good law and should have been followed. And, seven years later, in *Grutter v. Bollinger* (2003) the Supreme Court seemed to agree. In upholding the University of Michigan Law School's affirmative action program, the Court wrote: "In the wake of our fractured decision in *Bakke*, courts have struggled to discern whether Justice Powell's diversity rationale, set forth in part of the opinion joined by no other Justice, is nonetheless binding precedent. . . [T]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."

If confronted with systematic evasion, the Supreme Court can, as a last resort, invoke its inherent power to punish for contempt in order to coerce either state or federal judges. But this power is almost as unlikely to be used as is the impeachment power of Congress. More probably, the Court would do as John

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[8] Alternatively, when the justices remand cases, losers in the Supreme Court can become winners in lower tribunals. See Richard L. Pacelle and Lawrence Baum, "Supreme Court Authority in the Judiciary: A Study of Remands," 20 *American Politics Quarterly* 169–191 (1992).

[9] *Perkins v. Endicott Johnson Corp.* (1942).

[10] Calvert Magruder, "The Trials and Tribulations of an Intermediate Appellate Court," 44 *Cornell Law Quarterly*. 1, 4 (1958).

Marshall did in *McCulloch v. Maryland* (1819) when faced with militant state resistance: bring the full weight of its statutory and constitutional authority to bear on the substantive issues in dispute and make the final determination of the problems itself. In such a fashion, this aspect of judicial decision making comes full circle. The Supreme Court must take into account the reaction of inferior judges, and lower courts must attempt to divine the counter reaction of the Supreme Court. Meanwhile, both must keep a wary eye on public opinion and maneuverings within the other branches of government to ascertain how these will affect the policy concerned as well as their own authority.

CHECKS IMPOSED BY THE AMERICAN SYSTEM OF SEPARATED INSTITUTIONS

If judges hope to generate enduring policy, they must also be attentive to the preferences of legislative and executive officials.[11] Under the constitutional design of the federal and the state political systems, separate institutions compete for shared powers.[12] "I am a part of the legislative process," President Dwight D. Eisenhower said; and, like every other modern president, he learned that senators and representatives often have more knowledge of and control over executive officials than do presidents. So, too, in choosing judges, establishing rules for judicial procedure, and carrying out (or not carrying out) judicial decisions, both these branches play roles in the operations of the other branch of government. That complex institutional design, along with the informal rules (such as judicial review) that have evolved over time, endows each branch of government with significant authority over the spheres of the other branches as well as over its own. This mingling of powers is coupled with checks on other institutions so that each branch can impose limits on the primary functions of the others. For example, the judiciary may interpret statutes and executive orders; judges can even strike down laws or orders as violating constitutional provisions, but legislatures can pass fresh laws, which the executive may sign or veto; and, if he signs, can then interpret or even refuse to enforce. Moreover, the threat of impeachment, even though it is usually hollow, always stands like a shotgun behind the door.

The checks and balances inherent in systems of shared powers force every political actor to come to grips with the fact that *almost all public policy, whether state or federal, emanates not from the separate actions of the branches of government but from interactions among them.* For any set of actors to make authoritative policy, be they justices, legislators, or executives, they must be sensitive to the desires and likely actions of other relevant actors. Judges may be especially vulnerable here.

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[11] For a detailed discussion, see Lee Epstein and Jack Knight, *The Choices Justices Make* (Washington, DC: CQ Press, 1998); and Walter F. Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964).

[12] Charles Jones, The Separated Presidency," in The New American Political System, ed. Anthony King, 2nd ed. (Washington, DC: American Enterprise Institute, 1990), 3.

Controlling neither "the sword or the purse," as Alexander Hamilton put it in *Federalist* No. 78, they directly depend on legislators and executives for the money and means to enforce their decisions. Indirectly, judges also depend on "public confidence" (see later in this chapter) to pressure the other branches of government. To ignore the wishes of legislators and executives and to lose public confidence might spell disaster for judges hoping to see their rulings implemented. On the other hand, to be no more than lackeys of the other branches or automatons reacting to transient public moods would destroy the very purpose of the judiciary, bring judges into disrepute, and end their moral, and probably political, influence.

Political Checks by Executives

In their experiences with presidents who refused to execute judicial decrees, Chief Justices John Marshall and Roger Brooke Taney reacted differently, Marshall with more political adroitness than his successor in office. With good reason, Marshall thought that Thomas Jefferson was ready to defy the expected decision in *Marbury v. Madison* (1803) that Marbury should have his commission. The chief justice shrewdly avoided this clash. (Reading 2.2.) But in 1807 he and Jefferson had a second confrontation when, as part of his circuit-riding duties, Marshall presided over the trial of Aaron Burr for treason. At the request of Burr's counsel, the chief justice ordered Jefferson to produce some highly relevant correspondence between the president and one of the witnesses for the prosecution. Subsequent events are somewhat unclear, and some historians have contended that Jefferson successfully defied the subpoena. Although he did not personally appear, as the subpoena commanded, he did submit some, but not all, of the subpoenaed correspondence—only as a matter of grace, he said, not because he recognized any judicial authority to compel him to do anything whatever. Marshall ignored repeated requests of Burr's counsel to hold Jefferson in contempt, and the jury's return of a verdict of not guilty mooted the issue, much, one would guess, to the chief justice's relief.

Taney had a more direct clash with executive power and handled it more like a bulldog than a fox. After Lincoln had suspended the writ of habeas corpus and substituted military tribunals for civilian courts in Maryland, the army arrested John Merryman, a notorious secessionist, and confined him in Fort McHenry. After Taney's effort to serve a writ of habeas corpus on the commander of the fort had been rebuffed, the chief justice attempted to have the commanding general arrested for contempt; but the marshal was refused admission to the fort. Taney could only lecture the president in a blistering opinion charging him with violating his oath to support the Constitution.

These were, of course, exceptional cases, but the thread connecting judicial decisions with executive enforcement has often been thin. Andrew Jackson refused to carry out one of the decisions of the Marshall Court protecting the treaty rights of Indians against violation by the state of Georgia. Franklin D. Roosevelt had prepared a radio address to explain why he was not going to comply with an expected decision by the Supreme Court declaring unconstitutional the

statute taking the United States off the gold standard. Because, by a vote of five to four, the judges refused to rule against the government's action, FDR did not give the speech. In 1957 when Governor Orval Faubus of Arkansas called out the National Guard to prevent execution of a federal court order to integrate the schools, President Eisenhower was more than willing to compromise and for some days took no action to assist the district court. If he had not eventually concluded that Faubus was negotiating in bad faith, *Brown v. Board of Education* (1954) might have become a monument to judicial futility.

Earlier, President Eisenhower had apparently made a clumsy effort to influence the ruling in *Brown*. Shortly before the decision came down, Earl Warren reports in his memoirs, he was invited to a White House dinner. John W. Davis, counsel for the school board in South Carolina, was also present. During the dinner, the president went to great lengths to tell Warren what a "great man" Davis was. He also said that white southerners were not "bad people. All they are concerned about is to see that their sweet little girls are not required to sit in school alongside some big overgrown Negroes." Not long afterward the Court announced the decision in *Brown* and, Warren added, "with it went our cordial relations."[13]

During oral argument before the Supreme Court in *United States v. Nixon* (1974), the president's counsel refused to assure the justices that Nixon would surrender the Watergate tapes if ordered to do so. Had the president in fact not done so, the mood in Congress, the press, and the country ensured that his impeachment would have quickly followed. It is less clear, however, that other popular presidents—John F. Kennedy, Ronald Reagan, or either Roosevelt, for instance—would have paid a high political price for defying the Court. And, of course, both Andrew Jackson and Abraham Lincoln did defy the justices.

Aside from refusing to execute decisions (and, of course, nominating new justices), perhaps the most effective pressure the president can exert on the Court is to throw his prestige onto the policy-making scales and openly attack individual decisions or an entire line of judicial rulings, as did not only Jackson and Lincoln but also both Roosevelts, Reagan, and, most recently, George W. Bush. All six of them tried to reverse judicial policies, whether pronounced by the Supreme Court or other judicial bodies, by arousing public opposition. (Readings 8.4, 8.5, 8.6, 8.7.)

Still, these public attacks in the United States, especially recent ones, are mild compared to many launched by executives elsewhere. In newly developing constitutional democracies in Eastern Europe, presidents have sometimes failed to comply with the decisions of their courts, threatened impeachment, or taken other steps to punish justices or render their decisions ineffective. An extreme example came in 1993 when Russian President Boris Yeltsin, angry at its ability to check his power, suspended his nation's constitutional court. The justices were not able to resume their work until nearly two years later, when Russia adopted a new constitutional text.

[13] *The Memoirs of Chief Justice Earl Warren* (New York: Doubleday & Co., 1977), 291–292.

Legislative Restrictions

In the United States, legislative checks on judicial power are potentially far more sweeping than those of the executive acting alone. On the other hand, because a successful attack requires consensus between both houses of Congress and between Congress and the White House, the chances of the two fully cooperating are small. The first legislative control is that over the purse strings. Although the U.S. constitutional text explicitly says that judges' salaries shall not be reduced during their terms of office, under President Jefferson's leadership, Congress in 1802 simply abolished a whole tier of federal courts and refused to appropriate money to pay the (now idle) judges' salaries. In 1937, in an effort to end the war between the Court and the New Deal, Congress employed a reverse tactic, enacting a statute that offered more favorable retirement benefits to encourage older justices, particular Justice Willis Van Devanter, to retire. Individual representatives or senators sometimes try to persuade Congress to refuse to appropriate funds to carry out particular decisions. Congress actually took this tack in 1980, when it attached a rider to an appropriations bill prohibiting the Department of Justice to use money to support school busing. Had it not been for President Jimmy Carter's veto, this bill would have handcuffed implementation of several desegregation rulings.

Additionally, Congress (or a state legislature against its own courts) can invoke its own lawmaking powers to erase judicial interpretations of statutes. And Congress has not been shy about invoking this power. In a comprehensive study, William Eskridge found that Congress overrode or modified the Supreme Court's interpretation of federal statutes 121 times between 1967 and 1990.[14]

Congress can also propose amendments to overturn judicial decisions grounded in constitutional interpretation, either by repudiating the Court's doctrine or striking at judicial power itself. These sorts of efforts have succeeded four times in response to decisions of the U.S. Supreme Court, producing the Eleventh, which removed a portion of federal jurisdiction, and Fourteenth, Sixteenth, and Twenty-fourth Amendments, which proclaimed new constitutional law directly contradicting what the Supreme Court had said. Such amendments are much more frequent at the state level. For example, after an Hawaiian court held that the denial of marriage licenses to same-sex couples constituted gender discrimination under the state's Equal Rights Amendment, various legislators proposed several amendments to the Hawaiian constitutional text to overturn the court's interpretation. One, giving the state legislature the power to define marriage, received support from more than 70 percent of the voters in the state and so became part of Hawaii's constitutional document. The U.S. Congress also reacted to the Hawaiian court's decision by passing the Defense of Marriage Act, which relieved states of any obligation to recognize the validity of same-sex marriages performed in other states. (see also Reading 8.7.)

[14] William N. Eskridge, Jr., "Overriding Supreme Court Statutory Interpretation Decisions," 101 *Yale Law Journal* 331 (1991).

The Defense of Marriage Act shores up an important point: Even when courts interpret the constitution, legislatures have occasionally attempted to overturn or undermine their rulings through simple legislation rather than the more cumbersome (and typically unsuccessful) amending route. An example, at the federal level, was the Religious Freedom Restoration Act (RFRA) of 1993. In this statute, Congress attempted to supplant the doctrine the justices had developed in *Employment Division v. Smith* (1990), upholding a state's authority to fire Native American employees who used Peyote in their religious ceremonies. In place of the Court's approval of broad state control over this aspect of the freedom of religion, Congress enacted rules more respectful of the First Amendment's command of "no law" restricting free exercise of religion.

So far, Congress's attack on Smith has failed. In *Boerne v. City of Flores* (1997), not only did the Court strike down the RFRA, but it also took the opportunity to give Congress a self-serving lecture on the justices' version of civics:

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison.* When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including stare decisis, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

The Court reiterated this message in *Dickerson v. United States* (2000), involving provisions of the Crime Control and Safe Streets Act. Passed by Congress in 1968, this law was specifically aimed at undoing the effects of three of the Warren Court's decisions strengthening the procedural rights of criminal defendants. The statute lay moribund for some years because successive presidents, including Richard Nixon, refused to enforce it. Then, unexpectedly, in 1999 a federal appellate court relied on this law to hold admissible a suspect's voluntary statement about a crime made before he was advised of his rights to silence and an attorney. As had Congress, the judges read the Supreme Court's opinion in *Miranda v. Arizona* (1966), to invite Congress to formulate new rules that would protect defendants' rights and held Congress had done so in the Act of 1968.

The Supreme Court disagreed. In an opinion written by Chief Justice Rehnquist, no great fan of *Miranda*, the majority admitted that, although there was some language in the various opinions to support the court of appeals, *Miranda* had announced a "constitutional rule." And, although "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution," it "may not legislatively supersede our decisions interpreting and applying the Constitution. See, e.g., *City of Boerne v. Flores* (1997)."

Despite these words, it seems inevitable that Congress will try again to modify constitutional decisions and, under different circumstances, may succeed. What is important to know for now is that legislative power to change (or attempt to change) judicial interpretations of statutes and constitutional clauses is not the only weak spot in judges' armor. At the federal level, as we noted earlier, Article III of the constitutional text gives Congress control over the appellate jurisdiction of the Supreme Court. As we have seen, in the nineteenth century, Congress exercised that power to punish the Court; and, in the *McCardle* case, the justices meekly accepted the rebuke. (Reading 8.8.) More recently, some senators and representatives have tried to remove the Court's authority to hear many kinds of controversial cases, such as abortion and prayers in public schools.

Those threats, just as have occasional calls for the impeachment of federal judges who disagree with particular legislators on constitutional interpretation, have failed. But congressional power over the number of judgeships and the organization and jurisdiction of the federal courts is a reality. Beginning with the last Federalist Congress in 1801, legislators have regularly attempted to pack the federal courts, especially at times when they and the president have shared the same general political philosophy. Such agreement enables presidents to make many appointments at one time and "relieves Congress of the need to monitor and discipline the judiciary as such judges would be expected to share a common sense of justice with the legislators."[15] On the flip side, Congress has occasionally sought to reduce the number of judges to punish either presidents or judges. To deny Thomas Jefferson a nomination for the Supreme Court, the Judiciary Act of 1801 provided that, when the next vacancy occurred on the Court, the number of justices should be reduced from six to five. When Jefferson's party came to power, Congress enacted the Judiciary Act of 1802, which abolished a tier of federal courts; and in 1869, to deny Andrew Johnson a nomination, Congress eliminated an unfilled seat on the U.S. Supreme Court.

Do these and other attempts at curbing the courts have any effect on the judiciary? Scholars are divided. On one side are those who argue that judges must take into account the preferences of Congress if they hope to see their decisions followed and their institutions remain serious players in the governmental process. In support of this position, some scholars point to specific judicial about-faces, such as the "switch in time that saved nine" in 1937 and the Supreme Court's backing down in the late 1950s after fiery reactions against its rulings on loyalty-security, and the reach of congressional investigations. These scholars also provide data showing that presumably "conservative" courts occasionally reach "liberal" rulings when liberals control the various elected institutions of government.[16]

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[15] John M. Figuierdo and Emerson H. Tiller, "Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary," 39 *Journal of Law and Economics* 435 (1996).

[16] See, e.g., Pablo T. Spiller and Rafael Gely, "Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions," 23 *RAND Journal of Economics* 463 (1992).

On the other side are two camps, both of which argue that congressional restraints do not seriously deter judges. These scholars base their claims on different assumptions about judicial motivations. Some, the "attitudinalists," suggest that, for federal judges and some of their state counterparts, absence of an electoral connection enables them to act in accord with their own political values: Because legislators do not control their jobs, judges can attempt to maximize their own policy preferences. This camp has mustered substantial evidence in support of its position; Jeffrey A. Segal's work is illustrative. In a series of systematic examinations of the voting patterns of justices of the Supreme Court, he finds that they do not change in response to changes in the partisan political environment. Because "the federal courts were designed to be independent," Segal concludes, "we should not be surprised that they are capable of actually being independent."[17] Scholars falling into the historical institutional school would not necessarily disagree with Segal's conclusion; they too believe that judges are "autonomous from direct and indirect political pressure." But they would certainly take issue with his assumption that judges seek (or should seek) to etch their own values into law. On their account, as noted earlier, judges attempt to maximize the legitimacy of their institution by adhering to precedent and other norms—a goal they cannot necessarily achieve by following personal policy desires[18]. (see Chapter 10.)

CHECKS FROM THE STATES

Although state executives or legislators have no direct means of limiting federal judicial power, they can utilize their access to Congress or the White House to try to deploy the weapons these institutions have. The Civil War buried nullification, a venerable means of direct state resistance. This doctrine, which justified a state's "interposing" itself against federal power, dates back to the Kentucky Resolutions of 1798 and 1799, drafted by Thomas Jefferson. Despite James Madison's authorship of the somewhat less assertive Virginia Resolutions of 1798 and his deep respect for Jefferson, he later denounced nullification as a "colossal heresy," a "poison," and a "preposterous and anarchical pretension." In 1955 the attorney general of Mississippi commented that his state's effort to nullify the school segregation decisions was based on "legal poppycock"; earlier the governor of Alabama had characterized his legislators who were proposing nullification as "just a bunch of hound dawgs, bayin' at the moon." A more recent Alabama governor, Fob James, apparently did not share this view. Although he did not call for nullification, he did suggest that state officials do not have to follow rulings they consider unconstitutional.

[17] Jeffrey A. Segal, "Supreme Court Deference to Congress: An Examination of the Markist Model," in *Supreme Court Decision-Making*, ed. Cornell W. Clayton and Howard Gillman (University of Chicago Press, 1999).

[18] Kahn, "Institutional Norms and Supreme Court Decision-Making."

When a federal district court in 1996 issued a ruling against voluntary public school prayer, James promised to "resist [the] order by every legal and political means, with every ounce of strength I possess." Surely these words were constituted hyperbole, but it is also true that state officials have often attempted, and sometimes successfully so, to check federal judicial power. School prayer, the subject prompting James's remark, provides but one example. After the U.S. Supreme Court, in *School District of Abington Township v. Schempp* (1963), prohibited schools from prescribing readings from the Bible, Tennessee's state commissioner of education said that, despite *Schempp*, local officials could retain Bible readings in their schools if they so desired.[19] Perhaps not so surprisingly, most took up the commissioner's invitation.

State judges, too, as we have suggested, may attempt to thwart implementation of federal rulings and, in so doing, may have tactical advantages over their colleagues in the legislative and executive branches, at least with regard to decisions of the U.S. Supreme Court. Because the Supreme Court will review only those cases from state courts in which the decision was based on a substantial federal question, matters pertaining strictly to state law do not come under federal authority. Thus, state judges can sometimes conceal the real bases of decisions from overworked justices and so avoid review and reversal. And, even when state judges are more candid, they can still prevail, for there are nearly 30,000 of them, a number far beyond the capacity of nine justices on the U.S. Supreme Court to supervise closely. Losing litigants have an incentive to help, but as one man said after losing his case when Utah's supreme court refused to apply the U.S. Supreme Court's interpretations of the Fourteenth Amendment: "The fine will cost me a thousand dollars. It will cost me several hundred thousand dollars to appeal and win. I'd rather lose."

The differences between state and national interests and outlooks and the perennial friction between trial and appellate judges create a substantial reservoir of potential conflict within the judicial system. In 1958, for instance, when attacks on the liberal decisions of the Warren Court had almost produced a constitutional crisis, the Conference of State Chief Justices issued an unprecedented report on federal-state relationships, accusing the Supreme Court of usurping state powers. By the 1970s, in an interesting reversal, the Court had become rather too conservative for tribunals of last resort in such states as California, New Jersey, and Hawaii. Judges in those states declined to follow the Burger (and now Rehnquist) Court's jurisprudence and relied instead on provisions of their own state constitutions to which they are free to give independent meanings. (see Chapter 3, especially Reading 3.9.) For example, the Burger Court ruled in *San Antonio School District v. Rodriguez* (1973) that the Fourteenth Amendment does not require states to ensure that all public school children receive an equally financed education. But two years earlier the California Supreme Court had come to the opposite conclusion in *Serrano v. Priest* (1971)

[19] See Robert H. Birkby, "The Supreme Court and the Bible Belt: Tennessee Reaction to the *Schempp* Decision," 10 *Midwest Journal of Political Science* 305–319 (1966).

on the basis of the state constitution. In spite of *Rodriguez*, the state's policy was subsequently confirmed when the Supreme Court refused to review in *Clowes v. Serrano* (1977). Other states followed California's lead in enforcing stricter standards than those approved by *Rodriguez*. New Jersey's supreme court, for example, imposed an equal-financing requirement on that state by interpreting the state constitutional clause mandating "a thorough and efficient system of free public schools" to mean "equally financed" public schools.[20]

CHECKS FROM THE PEOPLE

The public may also play a role in limiting judicial power—one that is most obvious in the many states that elect their judges. Through their votes, citizens can unseat jurists who consistently rule in ways that they dislike. (Reading 4.9.) Even the mere threat of electoral punishment may be sufficient to keep judges in line. Melinda Gann Hall and Paul Brace show that judges who must face the electorate are more likely to uphold sentences of death than are their nonelected counterparts.[21] And work by James Kuklinski and John E. Stanga indicates that even those state judges who rarely face electoral competition bend to public sentiment. (Reading 8.9.)

The role public opinion plays in constraining federal judges is less obvious and, thus, much more subject to dispute. Some commentators argue that because these judges have life tenure there is no reason for them to take account of public opinion when reaching decisions. Others beg to differ, asserting that particular rulings do not deviate significantly from the views of the citizenry. Thomas Marshall claims that "When a clear-cut poll majority or plurality exists, over three-fifths of the [Supreme] Court's decisions reflect the polls. By all arguable evidence the modern Supreme Court appears to reflect public opinion about as accurately as other policy makers."[22] Moreover, some scholars argue that the Court's decisions also may reflect more general societal trends. Two researchers claim a correspondence between decisions and public moods: the justices "are broadly aware of fundamental trends in the ideological tenor of public opinion, and that at least some justices, consciously or not, may adjust their decisions at the margins to accommodate such fundamental trends."[23]

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[20] *Robinson v. Cahill* (1976).

[21] Melinda Gann Hall and Paul Brace, "The Vicissitudes of Death by Decree: Forces Influencing Capital Punishment in State Supreme Courts," 75 *Social Science Quarterly* 136 (1994). See also Melinda Gann Hall, "Electoral Politics and Strategic Voting in State Supreme Courts," 54 *Journal of Politics* 427 (1992), and Reading 13.3

[22] Thomas Marshall, *Public Opinion and the Supreme Court* (New York: Unwin Hyman, 1989), 97.

[23] William Mishler and Reginald S. Sheehan, "The Supreme Court as a Counter-Majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions," 87 *American Political Science Review* 89 (1993).

The direction in which influence travels is, however, often unclear. Without doubt, the justices sometimes lag far behind public opinion, as in the battle with the New Deal over governmental regulation of the economy, and have had to beat a hasty retreat back toward public consensus. At other times, the Court has been ahead of public opinion, as it was in its decisions on gerrymandering, racial discrimination, and capital punishment. On the first two issues the Warren Court led the country into a world that was politically, legally, and morally different from that which had existed. On the other hand, the American public continued to support killing convicted murderers, and most state legislatures reenacted laws authorizing the death penalty, albeit with greater procedural protections for the accused. And a majority of the justices who have come to the Court since *Furman* (1972) have shared the public's approval of executions.

Research showing a link between public opinion and judicial decisions, of course, raises many interesting questions: Not least is why would judges who do not depend on voters to retain their jobs would bother to take public opinion into account when they reach their decisions. One response is that courts require legitimacy—in the form of public support for their mission—to ensure the implementation of their decisions and to help them fend off attacks from elected officials.

But public attitudes toward courts and their doctrines are not likely to be static. In a series of studies of national samples conducted in 1964, 1966, and 1967, during the heyday of the Warren Court, Murphy and Tanenhaus found that the most powerful factor explaining support for the Court was political liberalism. In 1975, six years into the more conservative Burger Court, re-interviews of the most knowledgeable third of the sample of 1966 showed that many political liberals and conservatives had switched sides, with the latter now providing the bulk of the Court's support.[24]

Public attitudes are also likely to be complex. Murphy and Tanenhaus's studies demonstrated that, although citizens were more apt to remember specific decisions of the Warren Court of which they disapproved than they approved, they still thought highly of the Court as an institution. Nevertheless, in each of these national surveys a larger proportion of people said they trusted Congress more than the Supreme Court.[25] Two decades later, in 1995, James L. Gibson and his colleagues found that nearly two-thirds of all Americans still trusted the Supreme Court to "reach decisions that are right for country as a whole". (Reading 8.10.) And, interestingly enough, the Court's decision in *Bush v. Gore* (2000), despite scholarly predictions to the contrary, had virtually no affect on public support for the Court. Indeed, if anything, Americans grew even more trusting perhaps because, as Gibson and his colleagues write: "the effect

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[24] Because of Tanenhaus's sudden death, the only published report of these re-interviews is Joseph Tanenhaus and Walter F. Murphy, "Patterns of Public Support for the Supreme Court: A Panel Study," 43 *Journal of Politics* 24 (1976)

[25] Citations to six of Murphy and Tanenhaus's articles reporting the data and analyses of their studies can be found in their "Publicity, Public Opinion, and the Supreme Court," *84 Northwestern University Law Review* 985 (1990).

of pre-existing legitimacy on evaluations of the decision was stronger than the effect of evaluations on institutional loyalty, and institutional loyalty predisposed most Americans to view the decision as based on law and therefore legitimate" (see the update to Reading 8.10).

Americans are not alone in trusting courts and judges. Gibson's data suggest that citizens living in constitutional democracies throughout the world tend to support their national courts of last resort. What remains unclear is the extent to which these new citizens would translate their verbal expressions into political action were judicial institutions threatened.

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