CHAPTER

2

The Second Challenge

The Imperial Judiciary

The 2000 presidential election resulted in one of the most controversial decisions ever from the U.S. Supreme Court. *Bush v. Gore* ended several weeks of intense legal maneuvering by lawyers representing the presidential contenders. At issue were the twenty-five electoral votes of the state of Florida, which would give one of the candidates the Electoral College majority needed to win the election. The lawyers were arguing over how and whether disputed votes cast in the very close Florida election should be recounted. Since the close of the polls on election night, the Bush camp had sought to halt any recounting of disputed ballots because its candidate held a razor-thin lead of a few hundred votes in the unofficial results. But Gore's lawyers were pressing for hand recounts of ballots in several counties where a variety of imperfections in the ballots suggested that the initial vote tallies were flawed. On the evening of December 12, 2000, after a month of wrangling in both state and federal courts, the Supreme Court announced its final decision. In a 5–4 ruling, the Court's majority, all conservative Republicans, overturned a decision of the Florida Supreme Court and mandated an end to vote counting in Florida, effectively handing that state's electoral votes to Republican candidate George W. Bush. As a result, Bush became the first president in over a century to assume the presidency with a bare majority in the Electoral College but without having earned more popular votes than his opponent. He was also the first president ever to gain office by means of a decision by the Supreme Court.

In the months that followed this unique event in American history, political scientists and legal scholars commented on it in numerous books and articles. Political scientists tended to be critical of the Court's intervention, and legal scholars, in the main, found the majority's reasoning justifying the intervention weak.[1] In contrast to the reaction among scholars, however, the public at large and most of the popular media seemed to accept the Court's resolution of the election dispute with equanimity. Why, after all, be surprised about the Supreme Court deciding a presidential election? Doesn't the

Opposite: *A protest in front of the Supreme Court building of Brett Kavanaugh's appointment to the Supreme Court shows the increasing partisanship surrounding the Court.*

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Supreme Court make authoritative decisions in nearly all areas of American life? On many of the most important issues of interest to the public? The political scientists and legal scholars critical of the election outcome should not be surprised that most Americans would respond to these questions in the affirmative. In recent decades, Americans have seen the Court intervene decisively on a host of controversial issues, including abortion, school prayer, affirmative action, school vouchers, flag burning as symbolic speech, campaign finance reform, the death penalty, and so on. The Court's intervention to settle a disputed presidential election thus seemed not so unusual, given the many other issues that the Court decides.

This easy acceptance of the Supreme Court's role in the 2000 election reflects the propensity of modern Americans to look to the judiciary, particularly to the Supreme Court, to decide controversial political issues. Even as early as the 1830s, Alexis de Tocqueville noted the propensity of Americans to turn nearly all political issues into judicial questions, so looking to the courts to resolve public conflicts is an old American habit.[2] Nevertheless, we now seem to be even more addicted to it than when Tocqueville visited America in the 1830s. In the nineteenth century, for example, Americans did not expect the courts to decide presidential elections. In the election of 1876, a somewhat similar dispute over the allocation of electoral votes was resolved not by recourse to a lawsuit in federal court but by a special, congressionally appointed commission.[3] Accordingly, many of the scholarly critics of the *Bush v. Gore* decision argued that Congress, not the Court, should have been the ultimate arbiter of this electoral dispute as well. But in our time, the judicial branch of government has become a more active policy maker, using the power of judicial review—the power to judge whether laws or actions of government officials are consistent with the Constitution—to rule authoritatively on political conflicts. Even when the constitutionality of governmental actions is not at stake, the courts are frequently the arena in which parties to political conflict seek to advance their policy goals. It seems that much of American politics has become *judicialized.* The courts, not the legislatures, are the arena in which important policy questions are resolved. This chapter examines whether this judicialization of American politics is consistent with democratic values. Is the judicial resolution of important political matters democratic? Does the expansion of judicial power in American politics constitute a challenge to our democracy?

For people who (as I did) grew up in the 1950s and 1960s and consider themselves political progressives or liberals, the notion that the judiciary—particularly the Supreme Court—might be considered an undemocratic force seems like heresy. The Court, led during most of those years by Chief Justice Earl Warren, seemed to be our government system's best defender of democratic values. In 1954 when the power of southern Democrats in Congress effectively blocked national legislation to protect the civil rights of American Blacks, the Court, in the historic *Brown v. Board of Education of*

Topeka, Kansas, decision, declared the segregation of public schools to be unconstitutional. Many regard that decision as a key inspiration to the civil rights movement of the next decade, which tore down the edifice of Jim Crow segregation and secured greater political rights for Blacks and, eventually, other minorities. The Warren Court also promoted enhanced recognition of key democratic rights in decisions that expanded free speech, mandated regular reapportionment of state legislatures according to the principle of "one person, one vote," protected freedom of the press, and provided new protections to those accused of crimes. For many political liberals, Court decisions promoting individual reproductive rights—first, in *Griswold v. Connecticut* in 1965 (striking down a state law that prohibited the sale of contraceptives) and then, in perhaps the most controversial decision of the era, *Roe v. Wade* in 1973 (guaranteeing women the individual right to decide whether to have an abortion)—seemed to be significant expansions of democratic rights. Liberals praised the decisions of that era and came to see an activist judiciary as the prime defender and promoter of democratic values.[4]

Not all Americans agreed. Political conservatives denounced the Court's activism, arguing that it was usurping the legitimate power of elected representatives to determine public policy.[5] Disagreement over the substance of Supreme Court decisions drove much of the conservative rhetoric; opposition to desegregation motivated the "Impeach Earl Warren" signs scattered along southern roadsides in the 1960s. But many thoughtful conservatives raised principled objections, arguing that the judiciary was mandating policies that would be more suitably settled through deliberation in representative legislatures. During that era, *judicial activism*—the theory that judges should not be afraid to overturn legislative enactments in the pursuit of just outcomes—became the conventional liberal position, and *judicial restraint*—the belief that judges should defer to elected representatives in their decisions—became associated with political conservatism.

Liberals also came to see the courts as an arena for defending the politically weak from powerful interests and for promoting the public interest in opposition to predatory private interests. In the 1960s and 1970s, activists in environmental protection, consumer protection, civil rights and liberties, and other liberal causes routinely sought to promote their policy objectives by suing powerful interests in court rather than fighting them in Congress or state legislatures. Many activists saw legislatures as under the thumb of influential special interests, while the insulation of judges from political pressure made them more receptive to liberal claims regarding individual rights and their definition of the public interest. By the 1980s, conservative opponents of such liberal activism began to advocate tort reform, or limiting the ability to seek the redress of a wrong (a tort) in the courts. The judiciary seemed to be the liberal-friendly arena of American politics, while electoral institutions were under the sway of reactionary

forces. Most liberals at the time did not reflect on the fundamental distrust of democratic politics that such a view implied, nor did they imagine that the judiciary might not remain supportive of their goals.

The ideological tenor of the American judiciary has altered significantly since the early 1970s. In response to the perceived liberal activism of the Warren Court, Republican conservatives made appointment of politically conservative judges a major political objective. They demanded judges who would show judicial restraint, who would be strict constructionists (merely applying the law, not making it), and who would interpret the Constitution according to the original intent of the framers. Republican presidents have appointed most of the federal judiciary over the past forty years, including five of the nine current members of the Supreme Court. Yet this Republican domination of the appointment power, while it has produced a more ideologically conservative judiciary, has not led to a necessarily more restrained one.[6] In fact, as is more fully documented later in this chapter, current Supreme Court justices, as well as many of the judges on lower federal courts, have been as activist in promoting their conservative ideological preferences as an earlier generation was in promoting liberal ones. In fact, the conservative political activism of the current Supreme Court, as reflected in *Bush v. Gore,* is more typical of the Court's history than was the short period of its mid-twentieth-century liberal activism.[7]

This chapter evaluates the judiciary's role according to democratic values, not the ideological bias of its decisions at a particular time. Viewed in this light, the power of the courts over public policy in contemporary America is a significant challenge to our democracy. The federal judiciary's insulation from political control and democratic accountability, although justified when it performs its adjudicatory responsibilities, becomes a danger when it moves into the policy-making arena. I examine this challenge to democracy in a review of how the Supreme Court has used its power of *judicial review,* the legal doctrine that is the source of its influence over public policy, to usurp the democratic policy-making function. The next section begins with an examination of why the judiciary is inherently the least democratic branch in its structure and its decision-making processes and in the antimajoritarian—hence, democratically problematic—character of judicial review.

The Least Democratic Branch

The people rule in modern democracies, as pointed out in the introduction, through representatives elected in free and open elections. Representative democracy assumes that over time, through the process of democratic elections, the will of the majority of the people will be expressed in the policies

that those representatives enact. In the United States, both the presidency and Congress reflect this democratic logic. The president obtains his position by means of a democratic electoral process, even though the majority's will is then translated through a democratically flawed Electoral College system (as we explore in chapter 5). And members of both the House of Representatives and the Senate, at least since the passage of the Seventeenth Amendment (providing for the direct election of senators), also gain their positions by public election. Although one may question whether these democratic electoral processes ultimately result in decisions that express the people's will—indeed, the previous chapter did so in claiming that the separation of powers frustrates popular rule—the process of election is at least intended to create such a linkage. There is, however, nothing democratic about the process of selecting Supreme Court justices and other federal judges. Nor is that process intended to subject judges to democratic control; on the contrary, the mode of their selection is intended to insulate them from majority will.

The president has the power to appoint federal judges, including members of the Supreme Court, with the advice and consent of the Senate. Article III of the Constitution provides that, once appointed, judges have life tenure and cannot be removed from the bench except by impeachment, nor can their salaries be reduced. Life tenure and security of compensation are intended to insulate judges from political pressures, allowing them to make unpopular decisions without fear of retribution either from those who appointed them or from the public at large.[8] In the previous chapter, separation of powers is faulted for impeding the people's ability to make elected representatives responsive and hold them accountable. The federal judiciary, by design, is expected to be neither responsive nor accountable to the people. Why in a democracy would one want such a nondemocratic institution?

The standard answer to this question is the need for judicial impartiality, given the fundamental functions of a court system. The primary job of the courts is to adjudicate disputes—whether between the government and a defendant in a criminal case about someone's guilt or innocence or between two parties to a civil lawsuit. In our adversarial system, judges referee the legal conflicts brought to their courts by hearing the facts of a dispute, applying relevant laws, and rendering a decision. Insulating judges from political pressure is intended to ensure their impartiality in adjudicating such conflicts. Parties to a civil suit can feel more confident that their dispute will be resolved fairly if neither can use access to the political system to pressure the judge. The defendant in a criminal case would have cause to worry if the judge had to fear that his or her decision in a case might draw retribution from the very government officials conducting the prosecution. Insulation of judges from political, even democratic, pressures makes sense when it comes to their adjudicatory role.

The democratic problem arises because the process of adjudication—applying laws to particular cases—inevitably involves a legislative aspect. When applying the law, a judge must resolve any ambiguities that exist in the relevant legal statute and decide what it means in the context of a particular case. For example, Congress has passed legislation forbidding colleges and universities from revealing student grades to third parties without the student's permission. Does this statutory protection of student privacy mean that a professor cannot require students to grade each other's quizzes as part of a peer-learning exercise? If a student objecting to such peer learning sued a professor under the statute, a court would have to determine whether peer grading constituted a violation of student privacy.[9] In the process, the judge would make law, in effect, determining whether the public policy protecting student privacy encompassed peer grading.

When public policy is shaped in such a manner, a judge's accountability to the democratic process becomes an issue. Is the judge's policy choice consistent with the people's will? How, without the controlling power of an election, can the people hold a judge accountable? When a judge interprets a statute in the ordinary course of determining whether it applies to the situation raised in a particular case, as in the student privacy example, the solution is simple: If the judge's interpretation of the statute is contrary to the will of elected legislators, the judge's policy choice can be corrected by amending that particular statute to clarify the legislative intent. The problem becomes more complex, however, when federal judges exercise the power of judicial review.

The United States is one of only a few countries in the world in which the federal judiciary has the power to invalidate a law or official action by declaring it inconsistent with a basic law—in the United States, our Constitution.[10] Such judicial review applies to both federal and state-level laws and officials. In many democracies, the policy decisions of elected legislatures and the executive officials responsible either to them or to the electorate are inviolate. Legislatures, because of their more democratic character, are usually seen as the most appropriate arbiters of constitutional intent. In the United States, however, judicial review gives to unelected judges—the federal judiciary in general, and ultimately the Supreme Court—the ability to overrule the people's elected representatives by declaring legislation or executive acts to be unconstitutional. The courts are thus empowered to do more than just determine how a law applies to a particular case; they are authorized even to declare that the statute itself should not be allowed—in effect repealing it. Elected representatives who disagree with such a ruling by the judiciary cannot respond by simply amending the statute in question, as they can when a simple difference of interpretation of the meaning or legislative intent of a statute is at issue. Once the court system has determined that a statute (or portion of a statute) is unconstitutional, the only recourse available to the people and their representatives to overrule

the judiciary is to undertake some extraordinary action, such as amending the Constitution itself. One constitutional scholar defines the situation this way:

> The central function, and it is at the same time the central problem, of judicial review [is that] a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like.[11]

The question for democrats is this: Can judicial review—the substitution of the will of unelected judges for that of elected representatives—be justified, and if so, on what basis? Before we examine the arguments relevant to this question, the next section offers a brief historical review of the origins of judicial review and the Supreme Court's record of judicial activism in using this power.

A Brief History of Judicial Review

Many textbook treatments of the Supreme Court's power of judicial review describe two alternative philosophies for its exercise: *judicial restraint* versus *judicial activism.*[12] Justices are said to exercise judicial restraint when their decisions do not reflect their personal values and policy preferences but adhere closely to the law and to precedent. When using restraint, they also are careful to defer to the choices of elected representative bodies on policy questions. Judicial activists, by contrast, are said "to promote their preferred social and political goals."[13] Activist judges are not afraid to overturn laws enacted by elected representatives in order to advance their preferred policies. When the history of the judiciary is viewed according to these definitions, it is clear that the Supreme Court has always been more activist than restrained. It has not hesitated to intervene in some of the country's most crucial political conflicts, such as slavery and the structure of industrial society, often overturning the will of the people's elected representatives. Nor, in most cases, has the Court acted to promote democratic values through its decisions; instead, its activism has more often been intended as a means of reining in democracy. We can see evidence of this propensity in the very origins of the practice of judicial review.

The text of the Constitution makes no mention of judicial review and assigns no such power to the judiciary. Unlike Article I's lengthy enumeration of specific legislative powers assigned to Congress, Article III vests the "judicial power" in the "supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," but it does not explain what is contained in that judicial power. In the first legislation

passed under the new Constitution, the Judiciary Act of 1789, Congress provided for the required "inferior Courts" but again offered no directive assigning to the courts the power to review the constitutionality of laws. There is, however, evidence that many of the delegates to the Constitutional Convention assumed that the Supreme Court would have this power. In state ratification debates, several Constitution proponents argued that it would, and Alexander Hamilton affirmed this notion in *Federalist* No. 78.[14] Yet many at that time, including Thomas Jefferson, feared that with such a power the Court would usurp the legitimate authority of the other branches.[15] Without any explicit grant of power in the Constitution itself, judicial review therefore had to be, in the words of constitutional scholar Alexander Bickel, "summoned up out of the constitutional vapors" by Chief Justice John Marshall in the 1803 decision *Marbury v. Madison*.[16]

Marshall's decision was the first and perhaps the most brilliant example of the Supreme Court's judicial activism. As a partisan Federalist and political opponent of President Jefferson, Marshall was anxious to use the Court as a restraint on the president and Congress. The Federalists had lost control of both those branches in the 1800 election, and they feared that Jefferson might use his political power to enact radical legislation. The judiciary, however, was firmly in Federalist hands as a consequence both of judicial appointments made prior to 1800 and of many lame-duck appointments, including Marshall's, by President John Adams prior to Jefferson's inauguration in 1801. Fortunately, as it turned out for Marshall, not all those whom Adams had appointed received their official, written commissions before the inauguration. Once in power, Jefferson instructed his secretary of state, James Madison, not to deliver the commissions to these unfortunates. One, Mr. Marbury, brought suit before the Supreme Court, demanding that Madison send him his letter of commission. Marshall seized upon this case as the perfect vehicle for asserting the power of judicial review, thereby establishing the Federalist judiciary as a safeguard against Jefferson's government, with the certainty that the Court would be obeyed.

In his decision, Marshall agreed that Madison was wrong to deny Marbury his commission but decided against Marbury on a technicality: Marbury's mistake was going directly to the Supreme Court to seek redress of his grievance. The Judiciary Act of 1789 had given the Supreme Court original jurisdiction, the right to hear a case directly, when citizens sued to force a federal official to do his duty. But in thus attempting to add to the Court's original jurisdiction beyond what had been explicitly assigned in the Constitution, Marshall declared, Congress had violated the Constitution, and therefore that portion of the Judiciary Act was overturned. The Court, Marshall said, had no power to order Madison to send Marbury his commission, but at the same time, he was asserting the Court's more significant power to overturn an act of Congress. This assertion of judicial

review infuriated Jefferson and Madison, but because the substantive decision had affirmed their action, they did not—as Marshall knew they would not—defy the Court.[17] Marshall had achieved his aim of establishing the judiciary as a check on the potential "evils" of democracy.

Marshall's motives in asserting the power of judicial review were not purely partisan. Judicial review, he argued, derived from the logic of constitutional government and the nature of judicial power.[18] In enacting a constitution, the American people had opted that government be limited by the principles in that document. If any ordinary law conflicted with the Constitution, judges were obliged to rule in favor of constitutional principle, necessitating overturning the law. Marshall wrote the following in *Marbury v. Madison*:

> Those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation. . . . [A]n act of the legislature, repugnant of the constitution is void. . . . It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret the rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[19]

Although Marshall's decision never explicitly makes the assertion, it implies that the Supreme Court is the final arbiter in interpreting the Constitution. In the words of a later chief justice, Charles Evans Hughes, "The Constitution is what the judges say it is."[20] This claim of judicial supremacy would not go uncontested in American political life, but the power of judicial review and the power of the Supreme Court to determine the constitutionality of the decisions of other political decision-makers would be a fundamental reality of American politics over the next two hundred years.

Once the principle of judicial review was established, the Supreme Court was slow to exercise it again in a federal matter. Although Marshall had acted decisively to assert the power of judicial review, never again under his leadership did the Court overturn an act of Congress (see Table 2.1). Marshall did exercise judicial review in overturning state laws; many of those decisions affirmed the supremacy of the federal government over the states and offered expansive interpretations of congressional powers.[21]

The next time the Supreme Court overturned congressional legislation was in the infamous 1857 *Dred Scott v. Sandford* decision, perhaps the worst

Table 2.1 Supreme Court's Exercise of the Power of Judicial Review, 1789–2016

Years	Supreme Court Decisions Overruled	Acts of Congress Overturned	State Laws Overturned	Ordinances Overturned
1789–1800, Pre-Marshall	0	0	0	0
1801–1835, Marshall Court	3	1	18	0
1836–1864, Taney Court	4	1	21	0
1865–1873, Chase Court	7	8	33	0
1874–1888, Waite Court	11	7	7	0
1889–1910, Fuller Court	4	14	73	15
1910–1921, White Court	5	9	107	18
1921–1930, Taft Court	5	12	131	12
1930–1940, Hughes Court	14	14	78	5
1941–1946, Stone Court	12	2	25	7
1947–1952, Vinson Court	12	1	38	7
1953–1969, Warren Court	56	23	150	16
1969–1986, Burger Court	55	30	192	15
1986–2005, Rehnquist Court	42	42	97	21
2005–2016, Roberts Court	13	16	27	5

Source: Data from David O'Brien, *Storm Center: The Supreme Court in American Politics,* 11th ed. (New York: Norton, 2017), 29.

and clearly the most politically disastrous Supreme Court decision ever.[22] In the majority opinion, Chief Justice Roger B. Taney (Marshall's successor) rejected the attempt of a Black slave, Dred Scott, to obtain his freedom. Scott's owner had taken him to live in part of what is now Minnesota, then a federal territory in which slavery had been prohibited by the Missouri Compromise of 1820. Now back in Missouri, a slave state, Scott claimed that his prolonged sojourn in a free territory should make him permanently free. With the support of his fellow southerners on the Court, Taney saw the case as an opportunity to place a constitutional barrier against any congressional attempt to limit slavery. His opinion declared that the Missouri Compromise legislation's attempt to divide western territories equally into slave and free zones was unconstitutional because Congress had no power to forbid slavery anywhere. Slaves, in the Taney Court's eyes, were property, not persons; any law forbidding slavery violated the right of property. In the process, the Taney Court also declared that Black people, whether slave or free, could never be American citizens. This unequivocal prohibition of congressional action on the central issue of the time and the preemptive exclusion of Blacks from any future citizenship rights inflamed opponents of slavery in the North and, historians agree, contributed to the coming of the Civil War.

Sobered by this example of the disastrous potential of judicial activism, the post–Civil War courts might justifiably have been reluctant to use judicial review to overturn congressional legislation thereafter, but instead, they became more assertive in exercising their power in the second half of the nineteenth century. In the 1883 *Civil Rights Cases,* the Supreme Court overturned the Civil Rights Act of 1875, which had forbidden racial discrimination in public accommodations, such as hotels, theaters, and restaurants. The 1875 act was one of several civil rights laws that Congress had passed to implement the Thirteenth, Fourteenth, and Fifteenth Amendments, which were meant to protect the rights of the newly freed slaves and integrate them into American society as full-fledged citizens.[23] In the *Civil Rights Cases,* the Court imposed a very narrow interpretation of the Fourteenth Amendment, saying that it only applied to discrimination by state governments and not discrimination by private individuals or corporations. In this and other decisions restricting the application of the post–Civil War constitutional amendments, the Court gave a green light to the South's Jim Crow laws consigning Blacks to political and social inferiority. In 1896, the Court endorsed the then-widespread practice of legally mandated segregation with its "separate but equal" doctrine in *Plessy v. Ferguson.* With these decisions, the Supreme Court destroyed the promise of full citizenship for Black Americans expressed in the Thirteenth through Fifteenth Amendments—and the promise would remain unfulfilled until the 1960s. In sharp contrast to the mid-twentieth-century Court, revered by liberals for protecting civil rights, the nineteenth-century Court, from

Dred Scott through *Plessy,* was a major force for actively denying African Americans their civil liberties.

At the same time that the Supreme Court was interpreting the Fourteenth Amendment narrowly as it applied to Black civil rights, it gave the amendment an expansive interpretation as a tool to protect the economic rights of corporations. From the 1890s until the 1930s, the Court would use the Fourteenth Amendment's guarantee that no state could "deprive any person of life, liberty, or property, without due process of law" as grounds to strike down numerous state and federal laws that regulated business power and provided protection to workers. The first step came in *Santa Clara County v. Southern Pacific Railroad* (1886) when Chief Justice Morrison Waite, with the support of other former corporate lawyers on the Court, declared corporations to be "legal persons" entitled to protection under the Fourteenth Amendment.[24] Thirty years earlier, to protect slavery, the Taney Court had argued that human beings in slavery were property, not persons; now, the Waite Court, to protect business power, found corporations to be not merely a type of property, but persons.[25] In the 1905 *Lochner v. New York* decision, the Court would explicitly enunciate the doctrine that a substantive "right of contract" implicit in the Fourteenth Amendment's due-process clause limited states' ability to regulate business. In this case, the Court struck down a New York state law intended to limit the number of hours that bakers could be required to work. In a famous dissenting opinion, Justice Oliver Wendell Holmes Jr. castigated his majority colleagues for imposing their laissez-faire and social Darwinist economic philosophy through their decision.

In the "*Lochner* era" that followed this and lasted into the 1930s, the Court would strike down many state and federal economic regulations, including protections of the right to form labor unions, child labor laws, minimum-wage laws, and other measures to protect workers and the public from the consequences of industrial capitalism. While its inventive interpretation of the Fourteenth Amendment allowed the Court to constrain state governmental efforts to mitigate those consequences, the laissez-faire justices used a narrow interpretation of the Constitution's commerce clause (which gives Congress the power to regulate interstate commerce) to undermine congressional attempts to regulate business. For example, in *U.S. v. E. C. Knight Co.* (1895), the Court ruled that the Sherman Antitrust Act could not be used to break up the American Sugar Refining Company, even though the company controlled the refining of 98 percent of the sugar sold in the United States.[26] The Court's majority claimed that "commerce succeeds to manufacture, and is not a part of it," thereby preventing Congress from regulating any aspect of the production of goods, even if they later were to be sold across state lines. In making this artificial distinction between commerce and production, the Court had "at a stroke . . . immunized from congressional regulations major elements of

the national economy, including manufacturing, oil production, agriculture, and mining."[27] Ironically, in view of its restrictions on state governments in *Lochner,* this narrow construction of Congress's commerce power was portrayed as a defense of state governments from congressional interference in economic regulation. The laissez-faire Supreme Court justices of the 1880s to the 1930s were determined that neither the state nor federal legislatures would be allowed to interfere with business.

Franklin Roosevelt's New Deal legislation, enacted to bring the country out of the Great Depression of the 1930s, came in direct conflict with the laissez-faire philosophy of the Supreme Court. Between 1934 and 1936, the Hughes Court in twelve decisions struck down a total of eleven New Deal policies, rendering the government nearly helpless to alleviate the economic distress of the country.[28] In desperation, Roosevelt proposed to Congress a controversial "court packing" plan to expand the size of the Court, allowing him to appoint new justices. That measure became unnecessary when Justice Owen Roberts changed his position on the commerce power in the 1937 case *National Labor Relations Board v. Jones & Laughlin Steel Corporation,* creating a new liberal majority by voting to endorse the federal government's power to protect workers' right to join labor unions. This pivotal switch marked a turning point in the Court's interpretation of the commerce power, giving Congress expansive powers to legislate on economic matters for the next fifty years. Over the next five decades, the focus of judicial activism would shift from economic concerns to civil rights and civil liberties. (Only recently has the Court returned to a more narrow construction of the commerce power, as I discuss later.)

Political conservatives of the 1960s portrayed judicial activism as an invention of the Warren Court (1953–1969) under Chief Justice Earl Warren, even though, as we have seen, activism has been a recurrent tendency throughout Supreme Court history. The Warren Court, however, drew new attention to its role as a significant policy-making institution by its willingness to use its power to expand civil rights for Black Americans, as in the landmark *Brown v. Board of Education* (1954) decision; to provide new protections for the rights of criminal defendants (*Gideon v. Wainwright,* 1963, and *Miranda v. Arizona,* 1966); to ensure equal electoral representation (*Baker v. Carr,* 1962); to restrict prayer in schools (*Engel v. Vitale,* 1962); and to protect controversial political speech (*Brandenburg v. Ohio,* 1969). The Warren Court was, in fact, activist, as Table 2.1 shows, in terms of the number of state and federal laws it overturned—although hardly more so than the Courts that have ruled in the years since Earl Warren left the bench in 1969. Because the Warren Court's decisions were perceived as favoring a liberal ideology, however, liberals as well as conservatives of that era came to regard both the Supreme Court as an institution and the practice of judicial activism itself as inherently liberal. This perception continued into the 1980s, as justices appointed during the Warren era continued to serve

on the Court. Many of the decisions most associated with liberal activism were actually made by the Court led in those later years by the conservative Chief Justice Warren Burger. Among those cases, the controversial 1973 *Roe v. Wade* decision striking down state laws restricting abortion seemed to be the most influential in mobilizing political conservatives against liberal judicial activism.

Although political conservatives had begun demanding the appointment of politically conservative judges in the 1960s—such appointments had been a campaign promise of Republican President Richard Nixon in 1968—conservatives began to focus more intently on influencing Court appointments after *Roe v. Wade*. Much of the rhetoric that conservatives adopted to advocate change on the Court was couched in terms of judicial philosophy, rather than political ideology: They demanded the selection of judges who would be committed to judicial restraint and to "strict constructionism"—that is, to interpreting the Constitution according to its literal meaning, or the "original intention" of the framers, rather than "legislating" from the bench. In reality, however, conservative Republican presidents sought to appoint justices who were ideologically acceptable to the party's right wing.

To support reshaping the ideological orientation of the judiciary, Republican conservatives mobilized to cultivate a generation of judges and legal scholars who Republican presidents could draw upon in making judicial appointments.[29] The creation of the Federalist Society in 1982 marked a key moment in this effort. This society established a network of conservative law students and professors at several elite law schools that promoted conservative legal ideas and each other to faculty appointments and, eventually, court seats. By the early 1990s, the Federalist Society was making its mark in the legal world, including placing two of its supporters on the Supreme Court. Both Justices Antonin Scalia, who joined the Court in 1986, and Clarence Thomas, appointed in 1991, had close ties to the Federalist Society, often speaking at its events. (Scalia had been faculty advisor to the chapter founded at the University of Chicago.) Scalia, and Thomas, along with Chief Justice William Rehnquist, were committed, along with many in the Federalist Society, to substantially diminishing the latitude the Court had extended to Congress since 1937 to legislate on any matter it deems of national concern.[30] Scalia and Thomas, especially, seemed sympathetic to the "Constitution in Exile" movement of certain legal activists who believe that the "true" Constitution was banished from American politics when the Court abandoned strict limitations on state and federal power after 1937, allowing the expansion of federal power in the post–New Deal era.[31]

With the appointment, by Democratic president Bill Clinton, of Associate Justice Steven Breyer in 1994, the Court was split 5–4 along ideological lines, with five Republican conservatives in the majority, a pattern

that continued into the Trump presidency. In fact, membership on the Supreme Court remained unchanged until 2005. Joining Scalia, Thomas, and Rehnquist in the majority were two less ideological but still conservative justices, Sandra Day O'Connor and Anthony Kennedy, the five conservative justices who would form the majority in *Bush v. Gore*. The liberal minority consisted of Justices Breyer, Ruth Bader Ginsberg, John Paul Stevens, and David Souter. While Kennedy and O'Connor would sometimes join with the liberals to form a majority on certain social issues, such as abortion, affirmative action, and gay rights, they were willing to use the undemocratic power of judicial review actively to advance conservative political goals, particularly on issues of federal power over business and the economy. Despite the familiar conservative mantra of judicial restraint and respect for precedent, the Rehnquist Court did not hesitate to limit Congress's ability to legislate in the areas of environmental protection, civil rights, health care, and education. The ideological complexion of the Supreme Court may have changed by the 1990s, but there was little sign that it was becoming any more "restrained." As indicated in Table 2.1, the rate at which the Court overturns federal, state, and local legislation has not abated since the days of the Warren Court.

Conservative activism began to accelerate after George W. Bush appointed John Roberts to replace Chief Justice Rehnquist upon the latter's death in 2005 and Samuel Alito to replace Justice O'Connor when she retired in 2006. The Roberts and Alito appointments moved the Court significantly to the right because as longtime members of the Federalist Society, they held much more conservative views than the justices they replaced. President Obama's appointments of Sonia Sotomayor and Elena Kagan replaced two of the justices on the Court's liberal wing—Justice David Souter and Justice John Paul Stevens, respectively. As a result of these appointments, the Roberts Court through 2016 retained a conservative majority but one with a stronger ideological flavor and more prone to conservative judicial activism.[32]

The activist majority on the Roberts Court has not hesitated to overturn long-held precedent and congressional and state statutes in support of a conservative ideological agenda. In *District of Columbia v. Heller* (2008), the Court overturned a local ordinance prohibiting the ownership of guns in Washington, D.C., asserting for the first time, in Justice Scalia's majority opinion, an individual right to own firearms based on the Second Amendment. This decision overturned well-established Court precedents that the "right of the people to keep and bear arms" was a collective right to form state militias and not an individual right. Justice Stevens's scathing dissent documented Scalia's selective use of historical evidence and loose interpretation of the constitutional text in the interest of an ideologically determined outcome—precisely the charge conservatives have leveled at "liberal activists" for decades.[33] In *Citizens United v. Federal Election Commission*

(2010), the Court overturned a prohibition of corporate campaign advertisements in the 2002 Bipartisan Campaign Reform Act (BCRA) and previous legislation and precedents going back to the 1907 Tilman Act, citing a violation of corporate first amendment rights.[34] (The implications of this decision for democratic elections will be examined in detail in chapter 5.) In *Shelby County, Alabama v. Holder* (2013), the Court found unconstitutional the formula used to identify those states with a history of racial discrimination, required under Section 5 of the 1965 Voting Rights Act, to receive Justice Department approval in making any changes in their voting laws. In overturning this "preclearance provision," the Court opened the door to voter suppression through new restrictive voting laws and in states previously subject to Justice Department review, as we will examine in detail in chapter 5. In *National Federation of Independent Business v. Sibelius* (2012), Chief Justice Robert's opinion upheld the constitutionality of the individual mandate to own health insurance under Obama's Affordable Care Act as a tax but ruled that Congress's rationale for the mandate as an exercise of its power under the commerce clause was unconstitutional. He also overturned the Act's required extension of Medicare in all states, undermining Congress's intent to greatly expand health insurance coverage to millions of low-income Americans.[35]

The sudden death of Justice Scalia in February 2016 resulted in a further step toward increased partisanship around the selection of Supreme Court justices.[36] When President Obama, as the Constitution requires, nominated Judge Merrick Garlad to fill Scalia's seat, Republican Senate Majority Leader Mitch McConnell declared, in violation of well-established norms, that he would not allow consideration of the nomination because of the upcoming presidential election, leaving the seat to be filled by the next president. Capitalizing on this situation, Republican presidential candidate Donald Trump made appointment of a conservative justice to replace Scalia a centerpiece of his campaign, particularly in his appeals to evangelical Christians. He promised to appoint justices from a list of potential nominees provided by the Federalist Society. True to his word, once elected, he drew from the list to appoint Neil Gorsuch and then, upon the retirement of Justice Kennedy, drew again to appoint Brett Kavanaugh. The Supreme Court now has shifted decisively to the right as shown already in the pattern of recent Court decisions.[37] As of 2019, conservative Republican activists had a solid 5–4 majority and, with two of the members of the liberal minority in their 80s (Justices Ginsberg and Breyer), the prospect, if one or more of these justices were to retire soon, of expanding control and dominating judicial policy making for decades to come.

This brief historical review indicates that the Supreme Court has been, in the main, an activist presence in American political life. Over time, as Table 2.1 shows, its activist presence—as represented by the number of legislative actions overturned—has grown. The mere volume of such

interventions by an unelected judiciary should be worrisome to democrats. Even more alarming is the willingness of justices from both ends of the political spectrum to substitute their own value and policy judgments for those of elected legislatures. In any political system, policy making involves trade-offs between alternative policy goals and often profound moral choices. Democracy is meant to lodge the difficult responsibility for weighing these trade-offs with the people, usually through their elected representatives. It rejects the notion that any group of "philosopher-kings" can do a better job of making those choices. Yet as this brief historical review shows, the Court often sets itself up as a panel of philosopher-kings who are willing to substitute their policy judgments for those of elected representatives. In the next section, I examine in more detail two specific cases in which I believe the justices acted as philosopher-kings when the more democratic decision would have been to defer to the policy judgments of elected legislators.

Two Cases of Judicial Usurpation

My two examples, *Roe v. Wade* and *United States v. Morrison,* demonstrate judicial usurpation from opposite ends of the ideological spectrum. Conservatives view the Supreme Court's 1973 decision in *Roe v. Wade* as the worst example of liberal judicial activism, as it struck down state laws prohibiting abortion in the first trimester of pregnancy. In this case, the justices articulated a policy that substituted their judgment regarding a morally complex issue for that of legislatures in the various states. The other example, *U.S. v. Morrison,* shows how justices with a conservative political agenda that favors limiting the power of the federal government substituted their judgment for that of Congress itself by limiting congressional authority under the commerce clause. In this 2000 decision, as in other so-called Federalism cases, the conservative majority on the Rehnquist Court signaled the beginning of a new era of conservative judicial activism that has all the signs of the judicial "usurpation" that conservatives have long denounced in decisions such as *Roe*.

The 1973 abortion decision arose from a case brought by a Texas woman, identified as "Jane Roe" in the court documents, who had been prevented from obtaining an abortion under Texas law. That law, dating from 1854, resembled statutes passed by many states in that era to prohibit abortion except when performed to save the life of the mother.[38] Earlier, most states either had placed no restrictions on abortion or had proscribed the procedure only after "quickening"—the time of the fetus's first movement in the womb—but by the early twentieth century, many had adopted restrictive abortion statutes similar to the Texas one. By the 1960s, however, about half the states—not including Texas—had again

liberalized their abortion laws to allow abortion when pregnancy risked the physical or mental health of the mother, when the child was likely to be born with grave mental or physical defects, and in cases of rape or incest. By 1972, four states—Hawaii, New York, Washington, and Alaska—had enacted laws that allowed largely unrestricted abortion in the first trimester of pregnancy. In sum, the legal status of abortion at the time of *Roe* was very much in flux, as states considered various ways to resolve the complex moral issues involved.

The *Roe* decision effectively halted this state legislative activity by imposing a common federal policy. Under the Court's mandate, state law could not interfere with a woman's decision to have an abortion in the first trimester of pregnancy, although the states could impose restrictions designed to preserve maternal health in the second trimester and could prohibit abortions in the third.[39] The Court majority argued that state laws regulating first trimester abortions violated a women's right to privacy. As in *Griswold v. Connecticut* (which in 1965 had overturned laws restricting the sale of contraceptives), the Court found that a right to privacy regarding matters of reproduction and sexual intimacy was implicit in the Constitution and that this was a substantive right guaranteed to persons through the Fourteenth Amendment's due-process clause. One difference between *Roe* and *Griswold,* however, was that in the case of abortion, exercising this right to privacy involved destruction of a fetus, which raised further questions. Should the fetus also be regarded as a "person" under the Fourteenth Amendment and thus invested with guaranteed rights? And, if so, how should these fetal rights be weighed against the privacy rights of the mother?

In defending the Texas statute, the state's lawyers argued that life begins at conception and that the fetus is a person whose life the state is compelled to protect. In its decision, the Court acknowledged the state's interest in the potential life of the fetus but did not agree that that interest could be based on a definition of the fetus as a person. Opting to be agnostic on the question of when life begins, the Court held that since there was no consensus on the matter among doctors, philosophers, and theologians, it "need not resolve the difficult question." In effect, the Court acknowledged that the legality of abortion hinged on balancing a woman's privacy right against the state's legitimate interest in fetal life, but it ruled that the Texas legislature could not assert that right from conception. According to the Court majority, "By adopting one theory of life, Texas may [not] override the rights of the pregnant woman." The Court's answer to these questions in *Roe v. Wade* so provoked the ire of abortion opponents that abortion has continued to be one of the most contentious national policy issues into the twenty-first century.

As *Roe*'s critics charge, the problem with the decision was that, while acknowledging uncertainty about when life begins, the justices gave no constitutional rationale why Texas should not be allowed to assume that

it begins at conception and to regulate abortion in accordance with that assumption. Given the theological, scientific, and philosophical uncertainties, the Texas legislature's understanding was as reasonable as an assumption that life does not begin at conception. One constitutional scholar put it this way:

> Why wasn't Texas free—free as a constitutional matter, free under the Fourteenth Amendment—to proceed on the basis of the assumption that a pre-viable unborn child is no less a subject of justice than a post-viable unborn child or a born child?[40]

One does not have to agree with the Texas legislature's theory about the beginning of life to acknowledge that it should have the power to strike a balance, based on that theory, between fetal rights and those of women. For democrats, striking the proper balance between competing rights and moral values under conditions of uncertainty is the job of democratically elected representatives deliberating in legislatures—not that of unelected judges. Viewed in this light, the Court in *Roe* simply substituted its judgment about how the potential life of a fetus should be weighed for that of the Texas legislators. From a democratic perspective, this seems a clear case of judicial usurpation of legislative power.

From the perspective of the larger political system, moreover, the impact of *Roe* has been destructive to the ongoing democratic deliberation about abortion. With its decision, the Court effectively arrested the deliberation and legislative activity in the states regarding abortion; instead, it nationalized and constitutionalized the issue. Rather than arguing with one another about how the complex moral issues surrounding abortion should be resolved in law, abortion opponents and proponents have since focused all their energies on either denouncing or defending *Roe*. What had been in the late 1960s a constructive period of accommodation and compromise among contending ideological and moral interests became, by the late 1970s, a rancorous fight over absolutist positions, pitting the constitutional "rights" of the unborn against those of women. Even defenders of *Roe* acknowledge this point—as Justice Ruth Bader Ginsburg wrote in a 1985 article: "Majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."[41] Eventually *Roe* had the effect of heightening partisan rancor over the Court itself, as pro-choice and pro-life forces mobilized to evaluate nominees to the bench based on their perceived positions on *Roe* and fostered a realignment between the parties on the issue. Prior to *Roe*, there was little to distinguish Republicans and Democrats on the abortion issue; pro- and anti-abortion views existed in both parties. Since *Roe*, abortion has become a major point of cleavage between the parties, with Republicans taking the "pro-life" position and Democrats "pro-choice."

AP Photo/J. Scott Applewhite

Formal group portrait at the Supreme Court in Washington, D.C. Seated, from left, are Associate Justices Stephen Breyer and Clarence Thomas, Chief Justice John Roberts, and Associate Justices Ruth Bader Ginsburg and Samulel Alito Jr. Associate Justices standing, from left, are Associate Justices Neil Gorsuch, Sonia Sotomayor, Elena Kagan, and Brett Kavanaugh.

That views on abortion have become central to partisan identity itself has undermined the possibility of constructive policy discussion about the issue. Furthermore, the abortion issue has become a major factor in the partisan polarization around of the Court itself, turning every judicial nomination into a partisan battle. In the past, judicial nominations never produced highly visible or such partisan conflicts. Now abortion concerns and their connection to judicial appointments have become a standard element of electoral politics. Looking back over the past forty plus years, it seems clear that *Roe*'s impact on the democratic political process has not been a positive one.

Although the abortion issue has driven much of the politics around judicial appointments, it has not been a central concern of the conservatives actually serving on the bench. More important to them have been questions about the proper role and power of the federal government. This was the case with my second example of judicial usurpation—a decision reining in Congress's power under the commerce clause: *United States v. Morrison* (2000). The stage had been set for *Morrison* in 1995 in *United States v. Lopez,* in which the Rehnquist Court struck down the Gun-Free Schools Act of 1990, ruling that Congress had not proved in the legislation how the commerce clause allowed it to prohibit the presence of firearms

within one thousand feet of schools. Thus, for the first time since 1936, the Court cited a too-broad claim of the power to regulate commerce as grounds for overturning an act of Congress.[42] In the wake of *Lopez,* some Court observers thought that the decision was merely a warning to Congress to legislate more carefully and to make more explicit in legislation the links to its power to regulate commerce.[43] In *Morrison,* however, the Court's conservative majority demonstrated that its goals were more ambitious, as it directly called into question the extent of Congress's power under the commerce clause, not simply—as seemed to be the case in *Lopez*—seeking to monitor how Congress implemented its power.

Morrison involved a case arising under the Violence Against Women Act of 1994, which authorized victims of rape and other gender-motivated crimes to sue their attackers in federal court. In crafting this legislation, unlike the Gun-Free Schools Act, the lawmakers had gone to great lengths to document the impact on the economy of violence against women, making explicit Congress's judgment that its legislation was justified under the commerce clause.[44] In the same year that the legislation passed, two members of the Virginia Polytechnic Institute football team, Antonio J. Morrison and James Crawford, raped Christy Brzonkala, a freshman at the college. After the university permitted Morrison to return to school, even though its disciplinary system had found him guilty, Brzonkala sued Morrison and Virginia Tech in federal court. On May 16, 2000, in a 5–4 decision, the Court rejected Brzonkala's suit on the grounds that neither the commerce clause nor Section 5 of the Fourteenth Amendment gave Congress the power to authorize rape victims to sue their attackers in federal court.

In his discussion of the commerce clause in the majority opinion, Chief Justice Rehnquist resurrected the distinctions between economic and noneconomic power that the Court had deployed so effectively to restrain federal power in the first part of the twentieth century. Congress had no power to allow victims to seek compensation in federal court because, in his words, "gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[45] What about the congressional findings showing the impact of gender-related violence on the economy? Although Congress believed that the evidence indicated a substantial link between such violence and interstate commerce, Rehnquist simply dismissed this evidence as "not sufficient, by itself, to sustain the constitutionality of commerce clause legislation."[46] Later in the opinion, the chief justice indicated that Congress cannot be allowed to justify its legislation under the commerce clause with such evidence. To do so, he writes, "would allow Congress to regulate any crime as long as the nation-wide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption."[47] Rehnquist's opinion makes clear that the Supreme Court, not Congress, will henceforth determine and possibly limit Congress's

authority under the commerce clause—a clear reversal of the Court's practice since 1937.

As in *Roe*—but this time on behalf of a conservative objective—the Court majority in *Morrison* was asserting its power to substitute its own judgment for that of elected representatives. In his dissent, Justice David Souter took the majority to task for that substitution, arguing for a more restrained interpretation of judicial power:

> The fact of such a substantial effect is not an issue for the courts in the first instance, but for the Congress, whose institutional capacity for gathering evidence and taking testimony far exceeds ours. By passing legislation, Congress indicates its conclusion, whether explicitly or not, that facts support its exercise of the commerce power. The business of the courts is to review the congressional assessment not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact.[48]

In sum, Souter points out, elected representatives in Congress are better judges of what the commerce power requires than are the appointed members of the judiciary. Even if Rehnquist were correct in warning that nearly any action might be regulated under the commerce clause as long as Congress could show some economic impact, from a democratic point of view, the need for such action must be a political judgment made by representatives accountable to the people and not by unelected judges.[49] This recognition of legislative authority has been the tacit interpretation by both the Court and Congress since the New Deal. The Roberts Court's conservative majority rolled back this interpretation further in 2012 in ruling that the individual mandate imposed by the Affordable Care Act was constitutional under the commerce clause (although the Court found the mandate to be constitutional under Congress's taxing power). The current Court's attempts to block congressional action can only undermine the capacity of democratic majorities to address genuine national needs.

So as not to leave any doubt about the Court's intention to limit congressional power, Rehnquist included in the *Morrison* opinion one of the strongest assertions ever of the Court's supremacy in interpreting the Constitution. Referencing a similar assertion in a 1958 Warren Court decision (*Cooper v. Aaron*), Rehnquist describes the Court as "the ultimate expositor of the Constitution," which will not defer to Congress's judgment as to the extent of congressional power. The Rehnquist Court's willingness to assert its superiority over the other branches of the federal government marked an extension of judicial authority beyond that claimed by the Warren and Burger Courts, which generally employed such rhetoric in asserting the Court's power over the states.[49] *Morrison* was but one example of the Rehnquist Court's determination not to defer to Congress. As one

legal scholar put it, "The current [Rehnquist] Court increasingly displaces Congress's view with its own without much more than a passing nod to Congress's factual findings or policy judgments."[51] As a former clerk and admirer of Rehnquist, Chief Justice Roberts shows every sign of continuing the trend of reining in Congress, as shown in his opinion in the Affordable Care Act decision. The Supreme Court's willingness to override the judgments of an elected legislature seems rooted in a fundamental distrust of democracy and democratic institutions.[52] The addition of Justices Gorsuch and Kavanaugh to the conservative majority, both sympathetic to narrow definitions of the commerce clause, raises the real possibility that, if Democrats eventually gain control of Congress and the presidency, the Court may overturn any progressive legislation grounded in the commerce clause, creating a confrontation between branches of government comparable to Roosevelt's conflict with the Court in the 1930s.

Despite their many differences, decisions such as *Roe* and *Morrison* pose a similar challenge to democracy. In both cases, the Supreme Court assumes a policy-making role in defiance of the preferences of elected legislatures, even though the constitutional justification for doing so is extremely weak. Justices sensitive to democratic governance should have been willing to defer to the judgment of elected legislators in these instances rather than take on the policy-making responsibility themselves. Even if one believes that the Court made the "correct" decision in either of these cases—that the Court's policy was preferable to that of the legislatures—a democrat has to be concerned when unelected judges usurp the power of elected representatives. These two cases, as well as the historical review in the previous section, point out the inherently countermajoritarian character of judicial review. As the Court has become increasingly activist over the past few decades, the overall impact of its exercise of power on American governance has become more threatening to representative democracy. From John Marshall to the Roberts Court, those who fear democracy have promoted judicial review as a bulwark against popular majorities.

This brings us back to the question raised earlier in the chapter: Can the exercise of judicial review—the substitution of the will of unelected judges for that of elected representatives—be justified, and if so, on what basis? In the next section, we enter into the realm of constitutional theory to see if there is a satisfactory answer to that question.

Can Judicial Review Be Made Consistent With Democracy?

Constitutional scholars offer two alternative theoretical approaches to how the judiciary should go about exercising its power of judicial review so that the exercise might be consistent with democratic governance.

The first holds that judges should decide the cases before them solely through application of principles derived from the written text of the Constitution. Adherents of this view refer to themselves as "strict constructionists," and as we shall see, they often make the additional claim that when any interpretation of constitutional language is needed beyond the "plain meaning" of the text, such interpretation should be based on the "original intent" of the framers. The second approach argues the necessity of going beyond the text to identify constitutional principles that have evolved over time, as Americans come to understand how those original principles apply to new situations and changing historical circumstances. This latter approach portrays the Constitution as a living document, whose basic principles must be understood with reference to changes in social mores and values.

Although political conservatives are often identified with the strict constructionist approach and political liberals with the living Constitution one, neither approach is necessarily linked with a particular ideology. As described earlier in this chapter, the *Lochner* era Court's artful use of the Fourteenth Amendment places the conservative justices of that time firmly in the living Constitution camp.[53] Nor is either approach related, in practice, to judicial activism or judicial restraint, as the active reversal of laws and previous court decisions based on judges' own social goals has been characteristic of judges advocating both approaches.

Strict constructionists believe that adherence to the constitutional text provides the best protection against judicial policy making and offers the best assurance that Court decisions will be democratic. If decisions are based solely on the constitutional text, they argue, judges cannot be applying their own preferences in their decisions, but only requiring what the Constitution itself requires. Moreover, because the Constitution and its amendments were ratified by the people in democratic processes, their application in overturning subsequent statutes involves merely implementing the people's more profound democratic will as expressed in the fundamental law. According to one defender of this approach, "When a court strikes down a popular statute or practice as unconstitutional, it may also reply to the resulting public outcry: 'We didn't do it—you did.'"[54] So when the Supreme Court strikes down a local ordinance prohibiting a march by neo-Nazis or a state law preventing flag burning or a federal law limiting how much money candidates can spend on their campaigns, it is only applying the clear text of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech."

The previous sentence points, as many readers may have realized, to a basic flaw in the strict constructionist approach. If, as this approach suggests, constitutional interpretation requires merely an application of the literal text of the Constitution, there is a problem: Applying constitutional language always requires a judgment regarding what the language means

as related to a particular situation. In the three examples of free speech provided in the previous paragraph (all taken from actual Court decisions), the crucial step in applying the First Amendment is determining whether an action constitutes "free speech"—a decision the words alone cannot define. In each, one can see that making such a determination is neither obvious nor uncontroversial. In the flag-burning case, for example, the Court's finding that burning the flag is a form of symbolic political speech has been quite controversial, although it is a reasonable understanding of how political views are sometimes conveyed. To say that interpreting the Constitution requires only applying its text thus ignores the ambiguity inherent in even seemingly simple concepts, such as free speech, when they are applied to the real world. The nature of most constitutional language compounds this problem, as it consists largely of very general terms and concepts that are susceptible to multiple interpretations. Phrases such as "due process of law," "equal protection of the laws," "unreasonable search and seizure," and "cruel and unusual punishment" do not lend themselves to precise or totally noncontroversial interpretation.

To get around this difficulty of ambiguous language, strict constructionists usually seek to derive meanings with reference to the "original intent" of the framers. By determining what the words meant to those who chose them and then applying those meanings to the particular issues at hand, judges can avoid any accusation that their decisions impose their own values or policy preferences. Such interpreters of original intent claim to be merely applying the will of the framers, presumably codified democratically through the process that ratified the Constitution, rather than their own will. According to Edwin Meese III, attorney general under President Ronald Reagan, combining the constitutional text with attention to original intent provides a judicial standard that prevents the Court from imposing what it thinks is "sound public policy" rather than "deference to what the Constitution—its text and intention—demands."[55] If Meese's view is correct, judicial review in the strict constructionist/original intent mode cannot be undemocratic because it involves no subjective interpretation by judges, but merely the objective application of constitutional principle.

There are two serious problems with the idea of original intent as a democratic standard of interpretation. First, determining original intent itself is a highly subjective process fraught with opportunities for judges to slip in their own policy preferences. Nowhere did the framers provide a clear commentary on what their intentions were in coming up with the language of the Constitution. The authors of the initial constitutional document conducted their work in Philadelphia in secret and without an official transcript. Several participants—most notably James Madison—published their own notes and recollections of the proceedings, often long after the events, but all of those offer incomplete and fragmentary records of the debates. Often the *Federalist Papers* are cited as evidence of the framers'

David Furst/Getty Images

What constitutes free speech, such as burning a flag as a form of symbolic speech, will always be open to interpretation and controversy.

intent, but the collected articles record only the opinions of their three authors (Madison, Alexander Hamilton, and John Jay) and, rather than dispassionate expositions of textual meaning, are polemical essays intended to influence votes in the New York Constitutional Convention.

In interpreting the documentary evidence that does exist, one needs to determine precisely who counts as a framer. Should one count only the delegates to the Philadelphia Convention? But what of the participants in the states' ratifying conventions who gave the Constitution its democratic sanction? Or the members of the various Congresses and state legislatures who wrote and ratified amendments? Compounding this problem is evidence of disagreement among the framers themselves—whether in Philadelphia, at the ratifying conventions, or in Congress or state legislatures—about the meaning of constitutional language. Former justice William J. Brennan argues that much of the ambiguity that befuddles constitutional interpreters today is a logical product of these disagreements among the framers, who, Brennan writes, "hid their differences in cloaks of generality."[56] In sum, applying the original-intent standard requires the same subjective judgment that its proponents decry in much judicial interpretation and that its application is supposed to eliminate.

Second, even if we could unambiguously identify original intent, one might question whether intentions held in the eighteenth and nineteenth centuries can be or should be applicable to contemporary policy issues. A sincere democrat would wonder, first of all, about the legitimacy of

insisting that the democratic intentions of a previous generation prevail over those of the present generation. Judicial review adhering to a standard of original intent gives such precedence to ancestral preferences, yet many democratic theorists have questioned whether prior generations can legitimately bind subsequent ones. Thomas Jefferson, for one, wrote to his friend James Madison, "The earth belongs . . . to the living . . . the dead have neither powers nor rights over it."[57] Indeed, by contemporary standards the majority intent expressed in the Constitution and many of its amendments would hardly seem democratic, given the exclusion of women, Blacks, Native Americans, and even propertyless men from participation in the process of ratification.

Even if one accepted such intergenerational binding as a legitimate component of a constitutional democracy—the amendment process, after all, allows younger generations to alter the work of previous ones—serious questions remain about whether meanings once applied to constitutional concepts continue to be relevant and acceptable in the contemporary culture. For example, at the time the Eighth Amendment first prohibited "cruel and unusual punishments," public flogging and branding were common practice; it is doubtful that the amendment's authors intended it to prohibit such commonly accepted punishments. Nevertheless, were a community to reinstitute such practices in modern America, surely even the most committed partisan of original intent would consider such punishments to be "cruel and unusual."[58] Clearly, changes in society and cultural mores must influence how constitutional provisions are understood over time. In fact, many who praise the framers' work cite their foresight in writing a document composed of general principles that can be adapted to changing times. This adaptability has been key to making the U.S. Constitution the longest-lived such document in the world. An absolute commitment to a standard of original intent in judicial review would be a perfect formula for undermining our Constitution's legitimacy and perhaps for bringing about its demise.

In practice, the strict constructionists, or "originalists," have been as activist in formulating novel constitutional doctrines out of the text as the most ardent advocates of a loosely construed, living Constitution. The Court's conservative majority, most of whom claimed to adhere to the strict constructionist/originalist camp, proved quite adept at promoting conservative policy objectives through artful reinterpretation of constitutional principles. Their advocacy of "dual federalism" in *Morrison* and other decisions mentioned earlier rested not on explication of specific constitutional language, but on creative interpretation of what the federal structure established in the Constitution means.[59] For example, in a series of cases seeking to limit Congress's ability to extend to employees of state governments the same labor law and antidiscrimination protections that are provided to private sector workers, the Court articulated a doctrine of state governments'

"sovereign immunity" from lawsuits brought by their own citizens in either state or federal courts unless the state government gives its consent. This doctrine is derived by combining claims about the nature of sovereignty as articulated in English common law, including the notion of the "sovereign immunity of the King," with the conservative majority's understanding of the "structure and history" of federalism, rather than by citing any explicit constitutional language.[60] At the same time, in a manner reminiscent of the post-*Lochner* Courts of the first half of the twentieth century, Chief Justice Rehnquist cited the commerce clause in striking down state government environmental protections and business regulations that were more stringent than those passed at the federal level. In the eyes of that Court, Congress's power to regulate commerce did not permit it to authorize women to sue their assailants or to prohibit guns near schools, but it was the perfect excuse to prevent the states from rigorously regulating business activities within their boundaries.[61] For these strict constructionists, apparently, the Constitution's language could easily be construed to limit the ability of both the federal and state governments to protect workers or to regulate business.

The claim that judicial review can be democratized through strict adherence to the Constitution's text, informed by the original intent of the framers, thus fails through a combination of the infeasibility of the theory itself and the actual practice of its proponents. What, then, of the opposing theory of drawing fundamental constitutional principles from the Constitution understood as a living document?

This less restrictive approach has the advantage of recognizing the practical necessity of assigning contemporary meanings to constitutional language and concepts. Its starting point is rejecting the fiction that the text, combined with a search for original intent, can provide some objective, unambiguous guidance for Court decisions. Judicial review inevitably requires providing content to vague, open-ended constitutional provisions such as "due process," "freedom of speech," or "equal protection of the laws" in the context of the particular cases brought before the Court. According to this view, the Supreme Court should be guided by what it regards as "fundamental values," which may supersede any aims that Congress, the president, or state governments wish to pursue.[62] For example, a state legislature's desire to honor the American flag and prevent its desecration by banning flag burning must give way to the more fundamental value of protecting symbolic means of open political dissent. The First Amendment text alone—"no law . . . abridging the freedom of speech"—offers no clear guidance in this case. Is flag burning "speech"? No framer ever spoke to the issue because there was no official flag when the Bill of Rights was adopted. Free speech, in this case, is given meaning in terms of the judicially identified value to democracy of not preventing citizens from

expressing their political views, particularly dissenting ones, even through incendiary means.

What is to be the source of the fundamental values that should guide judicial review? Different theorists in the living Constitution camp propose varied means of identifying such values.[63] Some look to historical analysis or social science to inform the search, while others rely on notions of natural law or the findings of moral philosophy. Many advocates of this approach even suggest that the judge's sense of what values are widely shared among the public should guide his or her decisions. Whatever the source, however, a reliance on fundamental values ultimately involves having judges apply their own value choices in making decisions.[64] This approach makes judges the guardians of American values and makes judicial review the means to monitor whether the rest of the political system adheres to those values.

The living-Constitution approach thus rests on the appealing notion that wise judges are watching over the actions of government officials and reviewing laws to make sure they do not result in harm to society. This is an especially attractive idea when the harm happens to be something I want to prevent. To return to the flag-burning example, although I prefer to wave flags myself, I value open political dissent even when obnoxious means are used, and I think it is important to democracy. Therefore, I am happy that the Supreme Court strikes down flag-burning statutes. Nevertheless, we have to recognize that this approach to constitutional interpretation explicitly places in the hands of elite guardians the responsibility for determining which values will be implemented—that is, our governance in regard to these values. Many antidemocratic political philosophers, beginning with Plato, have advocated such an arrangement as the best form of governance, but democrats realize that to rely on elite guardians requires assuming that they will always be wise. Because history and experience have shown that assumption not to be true, democrats choose to rely on the wisdom of the people in the long run, rather than on any group of elite guardians, including unelected judges.[65] The premise of judicial review is that elite judges are better at determining what values are fundamental and at balancing conflicting values than are the elected officials they overrule. Even democrats may be tempted by such a notion when they agree with the judges, but the notion must be understood nevertheless as a profoundly undemocratic one.

Neither strict-constructionist nor living-Constitution approaches succeed in making judicial review democratic, and both permit striking down laws enacted by democratically elected legislatures. The first champions an infeasible standard of keeping true to the framers' intent—a standard that even its adherents cannot meet in practice. The second admits the inevitability of a judge's values being reflected in court decisions, but whatever the

claimed source of the fundamental values informing those decisions, the outcome of judicial action remains elitist and undemocratic.

Of the two approaches, the strict constructionist may be the more dangerous to democracy. The strict constructionist/originalist justices claim not to be imposing their own values in making decisions; they say they are only interpreting what the Constitution's words require. But as shown in the examples cited earlier, in practice their decisions mold those interpretations to be consistent with their ideological preferences. Adherence to the text and the search for the framers' intent become merely a smoke screen to obscure the undemocratic nature of judicial review. In comparison, the advocates of a living Constitution are more honest about the inevitability of judges injecting their own values into their decisions, and the acknowledgment at least clears the way to an open discussion about the sources of those values.

The leading constitutional theories regarding the interpretive role of judges, then, fail to democratize the concept of judicial review. Does this mean that judicial review must remain at odds with democracy? Before reaching that conclusion, we need to consider another possibility that seeks to limit the scope of judicial review to make it consistent with democracy.

In his now-classic work *Democracy and Distrust,* constitutional theorist John Hart Ely seeks to tame judicial review by placing it at the service of democratic processes. While not contesting the undemocratic nature of judicial review, Ely identifies a role that unelected guardians might play in protecting democratic politics. Elaborating on a suggestion made by Justice Harlan Stone in a famous footnote to a 1938 court decision, *United States v. Carolene Products Co.,* Ely argues that judicial review should be limited to two functions: ensuring that the political process remains democratic and preventing a majority from discriminating against the democratic representation of a "discrete and insular minority."[66]

The first function would focus the Supreme Court on processes of elections, representation, and the arenas through which citizens debate and deliberate on public policy. The goal would be to ensure that the widest range of opinions and issues are represented in the political process. Ely's "representation-reinforcing" approach recognizes that a particular majority at a given point in time might try to freeze representative institutions to prevent new majorities from forming. In such cases, judicial review could be a tool to unblock the process to permit continual forming and re-forming of democratic majorities. A historical example might be the apportionment of state legislatures prior to the 1960s. At that time, many state legislatures failed to reapportion seats on a regular basis to reflect population changes. As a result, rural districts were vastly overrepresented in state legislatures in comparison to cities, but the rural majorities refused to authorize reapportionment so as to remain in power. In the *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964) decisions, the Supreme Court mandated regular legislative

reapportionment on the basis of "one person, one vote." Judicial review in cases such as this, according to Ely, does not involve the judiciary's imposing its substantive values on a legislative majority, but instead mandates a process to allow truly democratic majorities to form.[67]

The second function that Ely, following Stone, assigns to judicial review is to facilitate the representation of minorities in the political process.[68] This role would include much of the Warren Court's efforts, beginning with *Brown v. Board,* to champion the civil rights and inclusion of Blacks, other ethnic minorities, and women, who had been systematically discriminated against. An electoral majority may deny to minority groups the fundamental rights of participation, such as the right to vote, to express political opinions, to assemble, or to form political organizations. In such cases, officials elected by the discriminatory majority cannot be relied upon to open the political system to minorities. As happened in the United States in the 1960s, however, the Supreme Court can use judicial review to intervene to require the inclusion of minorities in the political process.

Ely's process-oriented theory narrows the scope of judicial review and, if properly implemented, serves to enhance the democratic system. It makes the Supreme Court a guardian of democratic processes without investing in it the power to overturn the substantive value choices made by elected officials. Under this theory, a Court would not impose its views on abortion, as it did in *Roe,* or its interpretation of Congress's power to regulate commerce, as it did in *Morrison.* It could, however, overturn attempts to limit fundamental rights of political participation for all or legislation targeted at discrete minorities. To the extent that this theory would allow judges to impose their values, they would necessarily be the "fundamental values" required of a democratic process.

Of course, the success of such a judicial review regime would rest on the restraint of judges, who must not sneak in substantive value choices in the name of protecting democratic processes. The history of judicial activism related earlier should alert us to the creative ways in which judges can apply constitutional theories to advance their own preferences. Even Ely's restricted role seems to leave to the Court the power to decide what particular actions threaten democratic processes and when judicial interventions are needed to protect them. What if a Supreme Court chose to overturn environmental regulations that protect the public's health on the grounds that they somehow undermined democratic processes? As long as the power to define what democracy requires rests with unelected judges, who could deny them? Nor does Ely's standard guarantee that the Court will act to make democratic processes more democratic, as it did in *Baker v. Carr* and *Reynolds v. Sims,* but instead push them in a less democratic direction, as it has done in *Bush v. Gore, Citizens United,* and *Shelby.*[69] Constitutional theories of whatever stripe, including Ely's process-oriented one,

cannot prevent determined activist judges or get around the fundamentally undemocratic character of judicial review.

The Judicialization of American Politics as a Challenge to Democracy

If, then, judicial review is inherently undemocratic and cannot be made democratic, the increasing judicial activism of the Supreme Court poses a serious challenge to American democracy. Over the past few decades, as Table 2.1 (on page 80) shows, the Court has been ever more active in using its power of judicial review to overturn acts of Congress and state and local legislation. Moreover, the Court now exercises its power in nearly every aspect of American life—no policy issue is beyond its purview. In just one year (the 2001–2002 term), the Supreme Court decided seventy-five cases, setting policy on a wide variety of significant issues.[70] Among the many authoritative policy choices it made were allowing publicly funded vouchers to be used in private, religious schools; permitting drug testing of students who wish to participate in extracurricular activities; requiring juries, not judges, to impose the death penalty; preventing state governments from being subject to complaints before federal regulatory agencies; limiting protections for people with disabilities guaranteed under the Americans with Disabilities Act; and allowing police to conduct random searches of bus passengers to look for drugs. The fact that unelected judges are making so many policy decisions based on the undemocratic doctrine of judicial review has to be problematic for democracy.

In addition to this undemocratic rule of judges, authoritative Supreme Court decisions tend to stifle ongoing democratic deliberation on important public issues. We saw such a distortion of democratic debate on the abortion issue with *Roe v. Wade*. By turning to the Court for the resolution of contentious issues, the conflicting parties in major policy disputes avoid deliberating with each other to find constructive compromises that might earn majority support. Because Court decisions tend to award total victory to one side or the other, they may impede the work of legislatures in seeking accommodation of contending values and interests for the long run. Democratic citizens need to deliberate with one another in their elective legislative arenas rather than take each other to court to resolve public problems. But as long as activist Courts are available to award decisive policy victories, citizens can avoid doing so.

Judicial power, like the separation of powers discussed in the previous chapter, can impede the responsiveness and accountability of democratically elected representatives to their constituents. On the one hand, as long as there is an expectation that contentious issues will be resolved in court,

elected officials may avoid addressing them. Casting votes on such highly charged issues as abortion, school vouchers, or campaign finance reform is often difficult for representatives because any vote can cost them important electoral support. When Americans come to expect such issues to be resolved in the Supreme Court, however, legislators can escape the need to address them. On the other hand, once the Court removes from legislative control the resolution of significant public issues, as it did with abortion in 1973, candidates for office are free to take strong and decisive positions on issues as a way to attract votes, without any concern about actually doing anything about those issues once in office. Voters will find it difficult to assert democratic accountability over their elected representatives as long as those representatives are not fully responsible for acting on the issues of concern to them.

In the long run, judicial activism can undermine the democratic capacity of citizens themselves. Looking to wise judicial guardians to solve public problems relieves citizens, just as it does their representatives, from taking responsibility for confronting the issues. Over the past forty years, there has been a marked decline in citizen participation in politics—a challenge to democracy that is examined in detail in chapter 4. While many factors, as we shall see, are associated with this dwindling participation, increasing reliance on activist courts may be a contributing factor. The need to pay attention to electoral politics and votes becomes less urgent if the significant policy decisions are being made by unelected judges rather than by representatives who are accountable to voters. More than one hundred years ago, the legal scholar James Bradley Thayer feared that citizen apathy would be the most dangerous consequence of judicial activism. According to Thayer, even if judicial review is employed to overturn bad laws, it takes away from citizens the capacity to correct legislative errors themselves:

> Judicial review is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. . . . The tendency of a common and easy resort to [judicial review], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.[71]

Thayer's comments, expressed in an era when courts were much less active in American political life than they are today, raise a warning that is even more relevant to contemporary judicial activism than it was in his own time.

Political scientist Robert Kagan observes that the increasing judicial activism of recent decades has contributed to a profound change in how political activists seek to influence public policy. Rather than attempting to pursue their policy objectives through electoral politics or legislative lobbying, many individuals and groups have begun to employ a process Kagan calls "adversarial legalism" to achieve their objectives in court.[72] This process involves bringing suit in court to achieve a policy goal instead of seeking enactment of legislation. Whereas the more conventional legislative approach involves promoting the election of representatives who support a particular policy and building a majority coalition behind a policy in a legislature, adversarial legalism sidesteps the need for electoral and legislative coalition building. Instead, advocates find a basis for bringing a court action in a manner that will produce policy change. In this chapter, we have seen how judicial review of the constitutionality of a governmental action or statute, as in *Roe* or *Brown v. Board,* can formulate public policy. But, Kagan argues, this is but one form of policy making through adversarial legalism. Policy can also be changed through a lawsuit seeking a particular interpretation of a statute or forcing adherence to existing regulations. For example, Kagan details how for nearly two decades environmental activists delayed implementation of an economic development project to modernize the Port of Oakland, California, by means of lawsuits requiring satisfaction of federal environmental regulations.[73] These lawsuits had far-reaching impacts on both the economy and the environment of the entire San Francisco Bay Area.

The resort to a resolution through the court system after the failure to enact legislation points to a possible explanation for the increasing judicialization of American politics. Contemporary American democracy is imperiled by the combination of challenges discussed in this book that stifle our ability to resolve public conflicts and address serious policy issues. The previous chapter demonstrates how the separation of powers works to discourage responsiveness and accountability. In subsequent chapters, we will see how other challenges similarly interfere with the smooth and effective functioning of our representative institutions. As these institutions have failed to resolve public issues in a democratic manner, distrust of American democracy has grown. Not surprisingly, policy advocates seeking progress on serious problems have sought to get around these blocked democratic processes through resort to our least democratic institution—the judiciary. Using the power of the judiciary becomes an attractive option when distrust of democratic processes grows and when those processes do not work well. The judicialization of our politics, however, does little to solve the defects in the processes; it serves instead to place democracy in further peril.

Meeting the Challenge: Revitalize American Democracy

One obvious measure to correct the judicialization of American democracy would be to abolish judicial review. Since it is doubtful that some future Court would overturn *Marbury v. Madison,* abolition would require amending the Constitution. Recently, constitutional scholar Mark Tushnet has proposed an End Judicial Review Amendment (EJRA; see the full text in Box 2.1).[74] The EJRA would prevent the judiciary from overruling the will of democratically elected legislatures, but it would save that portion of constitutional enforcement appropriate to the courts. Courts would retain the power to find acts of individual officials in violation of constitutional principle. For example, if a police chief were to order his department to enforce speeding regulations only against Black citizens, under Tushnet's amendment a court could still find such an act in violation of the Fourteenth Amendment's equal protection clause. Nor would the EJRA prevent courts from interpreting statutes in light of their understanding of constitutional principle, but such interpretations, unlike current judicial review of legislation, could be reversed by a legislature. The EJRA would leave intact the court's judiciary functions—adjudicating criminal and civil cases and interpreting statutes—and leave weighing the practical and moral considerations involved in policy making to elected officials. Moreover, with the EJRA, the elective institutions—including Congress, the presidency, and state legislatures—and the people themselves would have to take responsibility for enforcing the Constitution.[75] An amendment to end judicial

Box 2.1 Amending the Constitution to Define Judicial Review

Tushnet's End Judicial Review Amendment

"Except as authorized by Congress, no court of the United States or of any individual state shall have the power to review the constitutionality of statutes enacted by Congress or by state legislatures."

A Possible Representation-Reinforcing Amendment

"Judicial review of the constitutionality of statutes by any federal or state court may occur only when a statute prevents or impedes either the political representation of a discrete and insular minority or the democratic operation of governmental and political processes."

review of legislation would be a way of returning ownership of the Constitution to the people.

Although Tushnet's call for an amendment banning it has appeal for democrats, many might worry that the amendment overlooks the power of judicial review, appropriately tamed, to be an important defender of democracy.[76] If restricted to protecting key democratic rights and processes—"representation-reinforcing," as John Hart Ely recommends—judicial review could be a bulwark to democracy rather than a challenge. Indeed, the democratic aspect of the history of judicial review—only touched on in our focus on its undemocratic practice—demonstrates that the Supreme Court can enhance our democracy. In decisions such as *Brown v. Board* (supporting full citizenship rights for Black Americans), the Pentagon Papers case (protecting freedom of the press), and *Baker v. Carr* (advocating the principle of one person, one vote), as well as numerous decisions protecting free speech, the right to assemble, and so forth, the power of judicial review has been used as a democratic tool. An alternative, representation-reinforcing amendment (which also appears in Box 2.1) might preserve this democratic aspect of judicial review while restricting it from going too far in usurping the legislative function. And, like Tushnet's proposed amendment, such an alternative would make explicit in the constitutional text itself, rather than in Court precedent, the meaning and limits of judicial review.

Nevertheless, the prospect of either abolishing or limiting judicial review by constitutional amendment at this stage in American history seems remote. Although it is a fundamentally undemocratic doctrine that has been established and sustained through judicial activism, after two centuries judicial review is a deeply ingrained tradition, enjoying widespread popular support. Even if restricting it might give the people more direct ownership of their Constitution—especially given the cumbersome process required for amending the Constitution—there is little chance that they would make the democratic choice to take possession. We must consider other ways of limiting the Court's use of judicial review to usurp legislative power.

How might judicial review be constrained to focus solely on democratic rights and processes without a constitutional amendment? Perhaps the best approach would be a renewed movement toward judicial restraint within our political and legal culture. More legal scholars need to speak out, as Ely did, in law schools and within the legal profession, for representation-reinforcing judicial review, and constitutional experts need to work out in detail how such an approach might work. A movement among lawyers, judges, and political scientists could influence Supreme Court appointments by persuading presidents to nominate and senators to confirm candidates sympathetic to the need for judicial restraint. Conservatives' recent success in placing many ideologically similar judges on

the bench provides a model of how a self-conscious movement to mold the judiciary can work. Supreme Court justices themselves can play a role, as Associate Justice Stephen Breyer recently did in calling for more deference to democratically elected representatives.[77] A democratic campaign to urge the selection of judges committed to the use of judicial review only as a tool for protecting the democratic process not only might change judicial decisions but also might create political support for a constitutional amendment to limit judicial review.

Process-oriented, representation-reinforcing judicial review might be the best form of judicial review for a democracy, but it still would not render the practice itself democratic. Leaving judges alone to defend democratic processes means relying on an undemocratic means to achieve a democratic end. By far the best cure for the undemocratic judicialization of American politics would be, as suggested earlier, an overall renewal of our democratic institutions. Because judicialization is itself a reflection of American democracy's current peril, successfully reversing the trend would require meeting the challenges described throughout this book. Americans will cease to turn to the undemocratic institution of the judiciary to resolve public issues when they are confident that our more representative and responsive institutions are addressing them effectively. A rejuvenated democracy would act to restrain judges from intervening in important disputes on which the people's elected representatives should be allowed to deliberate. No matter how personally distrustful they were of democracy, the Rehnquist majority would not so easily have ventured to decide the presidential election of 2000 if they had not sensed a similar unease in the news media and among the American people. In sum, the best way of meeting the challenge presented in this chapter would be to respond decisively to those described elsewhere in this book.

THOUGHT QUESTIONS

1. With its *Roe v. Wade* decision, the Supreme Court effectively short-circuited an ongoing democratic policy-making process in the states. Had that process been allowed to continue, state by state, what do you think would have happened? How would national policy on abortion have been similar or different?
2. Had the Supreme Court not intervened in the 2000 election in *Bush v. Gore,* the dispute over who won Florida's electoral votes might have

continued for many weeks, eventually leaving Congress to sort out the issue. Do you think such a resolution would have been preferable to what occurred? Would it have been more democratic or less so?

3. How would the proponents of the various models of democracy described in the introduction regard judicial review? Which ones would agree that it is a fundamental challenge to democracy? Which ones might be more sympathetic to judicial review in a democracy? Why?

4. Some proponents of judicial review of the substantive merits of public policy argue that it is necessary to protect the country from elected representatives who might choose to enact very bad policies. If, as Ely suggests, the judiciary was confined to monitoring democratic processes and barred from reviewing the content of legislative enactments, there would be no means to prevent a majority constituted by democratic processes from passing even the most outrageously unjust and absurd laws—such as prohibiting houses from being painted in gaudy colors, or, as in one famous hypothetical, prohibiting doctors from removing gall bladders, except to save a patient's life. What do you think of this argument? Are there some things you fear a democratically constituted majority might do that would justify judicial review by elite judges? What would those things be? How might they be addressed without recourse to judicial review?

5. In the wake of the passage of the Affordable Care Act of 2010, several Republican state attorneys general sued in federal court, arguing the legislation violated the commerce clause in its federal mandate that all Americans buy health insurance. How might this action be construed as another example of the judicialization of American politics?

SUGGESTIONS FOR FURTHER READING

*Barnett, Randy E. *Restoring the Lost Constitution: The Presumption of Liberty.* Princeton, NJ: Princeton University Press, 2004. An articulate and well-argued statement of the views of the "Constitution in Exile" movement.

*Breyer, Stephen. *Making Our Democracy Work: A Judge's View.* New York: Knopf, 2010. A Supreme Court justice offers a method for reconciling the living Constitution approach to judicial review with democracy.

Burns, James MacGregor. *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court.* New York: Penguin, 2009. A detailed history of Supreme Court activism, most of which, Burns argues, tilts in a conservative direction.

Chemerinsky, Erwin. *The Case Against the Supreme Court.* New York: Viking Press, 2014. A critique of the Supreme Court's historic failure to protect constitutional rights.

Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review.* Cambridge, MA: Harvard University Press, 1980. A classic critique of both interpretivism and noninterpretivism, offering Ely's now-famous representation-reinforcing theory of judicial review.

Gillman, Howard. *The Votes That Counted: How the Court Decided the 2000 Presidential Election.* Chicago: University of Chicago Press, 2001. A fair, balanced analysis of *Bush v. Gore* that concludes, in the end, that the justices were wrong to intervene in the election.

Noonan, John T. *Narrowing the Nation's Power: The Supreme Court Sides With the States.* Berkeley: University of California Press, 2002. A Reagan appointee to the federal appeals court mounts a witty and erudite attack on Rehnquist's doctrine of state sovereign immunity.

O'Brien, David M. *Constitutional Law and Politics.* 2 vols. New York: Norton, 2008. A thorough, basic constitutional law collection, including texts of the most important cases along with careful analysis. Keep it as a basic reference.

Rosen, Jeffrey. *The Most Democratic Branch: How the Courts Serve America.* New York: Oxford University Press, 2006. Although the title suggests otherwise, much of this book's argument supports the one in this chapter.

*Tribe, Laurence H., and Michael C. Dorf. *On Reading the Constitution.* Cambridge MA: Harvard University Press, 1991. A defense of judges identifying "fundamental values" to justify activist decisions.

Tushnet, Mark. *Taking the Constitution Away From the Courts.* Princeton, NJ: Princeton University Press, 1999. An argument that "We the People" should seize the Constitution and make it a populist document.

*Wellington, Harry H. *Interpreting the Constitution: The Supreme Court and the Process of Adjudication.* New Haven, CT: Yale University Press, 1990. Argues that the Supreme Court has a justifiable role in actively determining the meaning of the Constitution on issues such as abortion.

*Wolfe, Christopher. *Judicial Activism: Bulwark of Freedom or Precarious Security?* Lanham, MD: Rowman & Littlefield, 1997. A critic of judicial activism from an originalist perspective offers, nevertheless, an even-handed, readable summary of the pros and cons.

*Presents a point of view that disagrees with the arguments presented in this chapter.

SELECTED WEBSITES

www.fjc.gov. The Federal Judicial Center provides educational information and research on the federal courts.

www.law.cornell.edu. The Cornell University Legal Information Institute provides a wealth of searchable basic documents related to the Supreme Court, including a comprehensive archive of cases and biographies of the justices.

www.supremecourt.gov. Official website of the U.S. Supreme Court.

www.uscourts.gov. Official website of the Administrative Office of the United States Courts, offering information about the entire federal judiciary, including appeals, district, and specialized federal courts.