4 Original Intent or Evolving Constitution? Two Competing Views on Interpretation
What were the framers’ intentions and are they relevant today? In the opening essay, Barbara Perry discusses the debate among jurists regarding whether the Constitution should be interpreted based upon the original intent of the framers or changing perspectives and mores.

7 The Supreme Court Encounters the New Deal
Did the Supreme Court “reinterpret” the Constitution during the 1930s? Barry Cushman shows how economic crises, presidential elections, and resulting changes in the Court’s composition paved the way for Congress to regulate virtually all forms of economic activity.

11 Is the Rehnquist Court an Activist Court?
What exactly is “judicial activism”? Thomas Keck suggests several definitions as he explores how both liberal and conservative justices on the current Supreme Court have become judicial activists more willing to strike down acts of Congress and expand the Court’s own power.

14 Perspectives: What Kinds of Judges Should Be Appointed to the Federal Courts? Nan Aron of the Alliance for Justice and constitutional scholar John Eastman offer different viewpoints on what kinds of judges the president should appoint and why judicial appointments have become so contentious.

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Director’s Note

We Americans celebrate the Constitution as one of the cornerstones of our democracy. This treasured national document sets out broad aspirations and some details for a government and political system forged by our relations with England and by the Revolutionary War. But how do we “interpret” the Constitution in light of so many crises and situations not anticipated or mentioned by the framers? Should we search for the framers’ intent or for new constitutional standards prompted by changing social conditions and mores?

This issue of *Insights* sheds light on some of the hotly debated questions of constitutional interpretation. Political scientist Barbara Perry begins with a broad overview of the debate. She examines the writings of Alexander Hamilton and James Madison but concludes that they offer few definitive clues for determining the Constitution’s meaning. She also points to the disastrous consequences of *Dred Scott*, where Chief Justice Roger Taney justified the Court’s opinion by refusing to give to the Constitution’s words “a more liberal construction … than they were intended to bear.”

Legal historian Barry Cushman focuses on constitutional interpretation during the New Deal era. He tells two important stories—one about how the Supreme Court responded to the social safety net established by Congress, and another about the Court’s growing acceptance of Congress’s efforts to regulate virtually all aspects of the economy. Cushman also points to the importance of the ideology of individual justices in shaping, and eventually changing, Court doctrines.

The Rehnquist Court is the focus of an essay by political scientist Thomas Keck, who explores the complex and changing meanings of “judicial activism” and “judicial restraint.” Keck examines the philosophies that divide current justices on the Court. He also identifies an expansive view of judicial power shared by all members of the Court, resulting in both conservative and liberal forms of judicial activism.

The implications of judicial activism and restraint are the subject of the “Perspectives” section, where Nan Aron, Executive Director of the Alliance for Justice, and John Eastman, Director of the Claremont Institute Center for Constitutional Jurisprudence, offer contrasting viewpoints on the kinds of judges that presidents should appoint, and have appointed, to the federal bench.

A variety of lessons, teaching activities, and classroom resources are woven throughout the issue. Check out “Learning Gateways” for a lesson from Rebecca Fanning of the Administrative Office of the U.S. Courts on the writ of habeas corpus. In “Teaching with the News,” *Insights* reprints a recent article on the history and use of “recess” appointments to the federal courts, accompanied by discussion questions and resources for your social studies classroom.

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In the mid-1980s an otherwise academic debate over constitutional interpretation broke into the popular press. The controversy surrounding whether federal judges should read the United States Constitution according to the original intent of those who established it, or by evolving contemporary principles, even prompted political cartoonists to enter the fray. In one cartoon Attorney General Edwin Meese proclaimed, “The Constitution was meant to be interpreted only as the founding fathers intended.” The artist then flashbacked to the dawn of the new nation, with Benjamin Franklin commenting to his fellow founders, “Of course, you can’t prevent some yo-yo 200 years from now from misinterpreting us” (Ohman, *The Oregonian*).

A vigorous clash between liberal and conservative views on how federal jurists should apply the Constitution forced this esoteric discussion to prominence on the political agenda during President Ronald Reagan’s tenure in the White House from 1981 to 1989. Through its appointments to the federal judiciary, the Reagan administration hoped to counter “activist” rulings of the Warren and Burger Courts. For conservatives, landmark decisions from *Brown* to *Miranda* to *Roe* illustrated particularly egregious examples of the Supreme Court’s departure from the intentions of those who drafted the Constitution and its amendments.

In 1985 Reagan’s attorney general, Ed Meese, delivered an address to the American Bar Association in which he described the “intended role of the judiciary … and the Supreme Court … to serve as the ‘bulwarks’ of a limited Constitution.” He argued that the founding fathers believed that “[t]he text of the document and the original intention of those who framed it would be the judicial standard giving effect to the Constitution” (Lasser, 1996: p. 443). Original intent thus signifies con-

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Institutional interpretation that attempts to determine the initial meaning of the text as revealed by the intentions of those who produced it (Hall, 1992: p. 613).

Meese used his lecture on original intent theory to excoriate the U.S. Supreme Court for imposing what he labeled a “jurisprudence of idiosyncrasy” through its decisions. Citing cases on federalism, criminal law, and religion from the Court’s 1984–85 term, Meese declared that “far too many of the Court’s opinions were, on the whole, more policy choices than articulations of constitutional principles.” Because the Constitution embodies “the fundamental will of the people,” Meese observed, it is “the fundamental law.” To the extent that judges base their rulings on what they view as “fair and decent” by contemporary standards, they depart from the very essence of a constitution. He distilled the application of original intent to the following succinct exercise: “Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was” (Lasser, 1996: pp. 447–448).

Justice William Brennan, the U.S. Supreme Court’s avatar of the position that Meese denounced in his 1985 attack on judicial activism, took up the gauntlet in a speech he delivered at Georgetown University just three months after the attorney general fired his salvo. Brennan’s premise was the antithesis of Meese’s. The jurist’s role, according to Justice Brennan, is to interpret the inevitable ambiguities in the Constitution, which “embodies the aspiration to social justice, brotherhood, and human dignity that brought this nation into being.” Brennan viewed the governing document’s text as less than “crystalline. The phrasing is broad and the limitations of its provisions are not clearly marked. Its majestic generalities and ennobling pronouncements are both luminous and obscure” (Lasser, 1996: pp. 448–449).

Justice Brennan specifically refuted original intent theory’s validity: “It is arrogant to pretend that from our vantage we can gauge accurately the intent of the framers on application of principle to specific, contemporary questions. … Typically, all that can be gleaned is that the framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality.” Brennan even wondered, “[W]hose intention is relevant—that of the drafters [of the Constitution], the congressional disputants, or the ratifiers in the states?” Instead, “the ultimate question,” in Brennan’s view, “must be, What do the words of the text mean in our time?” (Lasser, 1996: pp. 451–452, emphasis added).

The very next year after Meese and Brennan publicly dueled over how to interpret the Constitution, the Reagan administration had an opportunity to appoint two members of the U.S. Supreme Court. When Chief Justice Warren Burger retired in 1986, taking his cue from Attorney General Meese, President Reagan promoted Associate Justice William Rehnquist to chief justice and filled his vacant associate’s seat with Antonin Scalia. A self-proclaimed “textualist” and “originalist,” Scalia believes that his role is to rely solely on the literal denotations of the Constitution’s wording within the context surrounding its construction. He is fond of saying, “I do not believe in a living Constitution, this document that morphs from generation to generation. I favor what some might call the dead Constitution, but I prefer to call it the enduring Constitution” (Perry, 2001: p. 61).

Rehnquist is slightly more nuanced in his discussion of a “living Constitution.” He accepts as a truism that the nation’s governing document contains some “general language” that can provide interpretive latitude when applied to subjects “that the framers might not have foreseen.” But the chief justice utterly rejects the authority of judges to substitute “some other set of values for...
those which may be derived from the language and intent of the framers ...” (Murphy and Pritchett, 1979: pp. 738–739)

What Were the Framers’ Intentions?
The Constitution itself is wholly silent on methods of interpreting it. Article III, which established the federal judiciary, is the shortest of the three articles creating the branches of government. While instituting the Supreme Court, and delineating its original jurisdiction, Article III offers no guidance on how justices should interpret the governing document. Indeed, the power of judicial review, that is, the authority to determine the validity of legislative and executive actions vis-à-vis constitutional mandates, is nowhere explicitly granted in the Constitution. Yet Alexander Hamilton, in his Federalist Paper # 78, justified the power of judges to declare void legislative acts contrary to the Constitution. He unequivocally declared, “The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body” (Hamilton, Madison, and Jay, 1961: p. 467). Yet, Hamilton did not provide the criteria for determining the Constitution’s meaning.

Nevertheless, originalists steadfastly rely on the framers for historical authority in promoting a jurisprudence of original intent. James Madison, often referred to as the Father of the Constitution for his leading role in drafting it and the Bill of Rights, wrote, “[I]f the sense in which the Constitution was accepted and ratified by the Nation ... be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers” (Berger, 1977: p. 3, fn. 7).

Where might that “sense” be found? The Federalist Papers, drafted by Madison, Alexander Hamilton, and John Jay to promote ratification of the Constitution, do not provide definitive explanations of the founders’ intentions. Jay had not attended the 1787 Constitutional Convention; Hamilton was present at only about half of its sessions. Madison himself warned that the papers “might be influenced by the zeal of advocates [who wrote them].” He did not publish his convention notes for nearly a half-century, and scholars believe that his written record represents only about 7 percent of the Philadelphia debates. Madison cautioned against using his notes as gospel: “[I]n expounding and applying the provisions of the Constitution, the debates and incidental decisions of the Convention can have no authoritative character” (Murphy, Fleming, and Harris, 1986: pp. 304–305).

The Enduring Debate
Throughout American constitutional history, the dispute over using the framers’ intent as an interpretive touchstone continued and often created judicial watersheds—for good or ill. Chief Justice Roger Taney wrote in his disastrous 1857 Dred Scott opinion, “No one, we pre-

For Further Reading

FOR DISCUSSION
What are the best arguments to support the view that the Constitution’s meaning is fixed by the original intent of the framers? What are the best arguments in favor of a “living” or “evolving” Constitution?
Why did the Constitution make no provision for the power of judicial review? In what Supreme Court decision was judicial review firmly established?
Do constitutional amendments offer an adequate method for updating the Constitution and adapting it to contemporary controversies? Why (not)?

continued on page 30
The economic crisis gripping the United States in the early 1930s inspired both a watershed political realignment and a dramatic upsurge in governmental activity at the federal and state levels. The New Deal Congress, ushered in on the coattails of Franklin Roosevelt’s victory over Herbert Hoover in the 1932 presidential election, quickly enacted a series of ambitious programs for relief, recovery, and reform. State governments similarly sought to stabilize business and employment through initiatives such as wage and price regulation. While proponents of this profuse legislative output defended it as necessary to meet the exigencies of the Great Depression, critics claimed that many of these new statutes transcended constitutional limitations on federal and state power to regulate economic activity. The battle between these conflicting constitutional visions would be joined in a series of landmark cases argued before the Supreme Court of the United States.

The 1930s were a period of transition and transformation on the Court. In 1930 the institution was composed of the conservative “Four Horsemen”—Willis Van Devanter, James Clark McReynolds, George Sutherland, and Pierce Butler; three constitutional liberals—Louis D. Brandeis, Harlan Fiske Stone, and Oliver Wendell Holmes (replaced in 1932 by the similarly minded Benjamin Cardozo); and by two constitutional moderates, Owen Roberts and Chief Justice Charles Evans Hughes. Of these, only Stone and Roberts would remain when the United States entered World War II in December of 1941. Yet not a single justice died or retired during President Franklin Roosevelt’s first term in office, a period during which the Court invalidated a number of statutes central to the New Deal program of legislative triumphs of the New Deal did not occur without controversy or judicial review. In this article Barry Cushman explores how the Supreme Court responded to a variety of New Deal initiatives and assesses some of the resulting changes in constitutional doctrine. Adapted from Encyclopedia of the Great Depression, 1st. Edition, by Barry Cushman, ©2004, Macmillan Reference USA. Reprinted by permission of The Gale Group.

By the 1940s, the Court sustained a dramatic increase in the federal government’s power to regulate the economy.”
recovery and reform. Frustrated by his lack of appointments to the Court in his first term, Roosevelt tried unsuccessfully to “pack” the Court early in his second. In February of 1937, the president proposed that Congress enact legislation that would have permitted him to appoint six additional justices to the Court immediately, enlarging its personnel from nine to fifteen. Though Congress rejected Roosevelt’s request, the ordinary course of death and retirement would soon accomplish much the same result. Between 1937 and 1941 Roosevelt would fill seven vacancies with justices sympathetic to the New Deal: Hugo Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, James Byrnes, and Robert Jackson. Just as Roosevelt changed the face of American constitutional law.

The central issues concerned the scope of the congressional powers to spend for the general welfare and to regulate interstate commerce, and the extent to which the provisions of the Fifth and Fourteenth Amendments, most notably the due process clauses, limited state and federal regulatory authority. Many initiatives, particularly those involving spending, were comfortably accommodated by existing constitutional doctrine. Other programs were invalidated in their first incarnations, but survived challenge when reformulated to comply with constitutional requirements. Still other programs withstood challenge only due to transformations in constitutional doctrine brought about by changes in Court personnel.

The Supreme Court and the Welfare State

The Roosevelt administration created the modern welfare state, dramatically increasing both the number of federal programs designed to alleviate conditions of want and the amount of federal revenue devoted to that purpose. Yet no significant transformation of constitutional doctrine was necessary to accommodate this development. It had long been recognized that congressional exercises of the spending power could be immunized from judicial review by designing them in light of the taxpayer standing doctrine. Frothingham v. Mellon (1923) had confirmed that, so long as Congress appropriated the funds to be spent from general revenue rather than from a specified or “earmarked” tax, no one would have the right to question the constitutionality of the expenditure. The Supreme Court and the lower federal courts repeatedly invoked this doctrine, for example, in upholding grants and loans made by the Public Works Administration, one of the New Deal’s most important and popular relief agencies. Furthermore, the formidable obstacle raised by the taxpayer standing doctrine appears to have successfully deterred any constitutional challenge to a wide variety of New Deal spending programs financed from general revenue. These included the Civilian Conservation Corps, the Farm Credit Act, the Reconstruction Finance Corporation, the Rural Electrification Administration, and the Emergency Relief Appropriation Act of 1936. Established constitutional doctrine assured the safety of the safety net.

The Supreme Court Scrutinizes New Regulatory Programs

The justices were less receptive to a number of federal regulatory programs enacted by Congress in the early New Deal. Yet it would be a mistake to conclude that the decisions invalidating these congressional statutes were motivated simply by hostility to their objectives. The opinions in a number of these cases offered implicit or explicit suggestions on how the statute might be reformulated so as to achieve its aim in a constitutional manner. In several instances Congress took the hint and redrafted the statute, this time paying greater attention to the constraints imposed by contemporary constitutional doctrine. The justices uniformly upheld this second generation of statutes, just as the earlier opinions had suggested they would. Three examples from the areas of debtor-creditor relations, pensions for railroad workers, and farm policy effectively illustrate this point.

President Roosevelt stands while children symbolizing the New Deal programs Roosevelt has created dance around him.
In May of 1935 Justice Brandeis wrote the unanimous opinion in *Louisville Joint Stock Land Bank v. Radford*, which invalidated the Frazier-Lemke Farm Debt Relief Act of 1934 on the ground that it took the property of creditors without due process of law in violation of the Fifth Amendment. His opinion painstakingly identified the statute’s constitutional deficiencies, enabling Congress quickly to eliminate those flaws in a reformulated statute enacted that summer. The Court unanimously upheld the revised statute in *Wright v. Vinton Branch Bank* in 1937.

In 1935 the Court held that the Railroad Retirement Act of 1934 was unconstitutional [by a 5-4 vote] on two grounds: (1) a number of its provisions violated the due process clause of the Fifth Amendment, and (2) the creation of a pension system for railroad workers lay beyond the power of Congress to regulate interstate commerce. Many observers, including Chief Justice Hughes, believed that this latter objection meant that no comparable pension legislation, even if revised to rectify the due process problems, could be sustained. Yet some in Congress recognized that a pension system financed out of general revenue rather than from a specific source would be insulated from constitutional challenge under the taxpayer standing doctrine. The revenue necessary to finance the payments could be raised by a separate tax on interstate carriers, with the proceeds of the tax paid into the treasury rather than earmarked for pension payments. At the urging of President Roosevelt, representatives of the major railroads and railway unions negotiated the terms of such a system, and by the summer of 1937 it had been embodied in the Carrier Taxing Act and the Railroad Retirement Act. Representatives of the railroads and the unions, moreover, honored their pledges not to contest the constitutionality of the legislation, and the pension system they negotiated survives in modified form today.

A similar story of congressional adaptation unfolded in the domain of agricultural policy. The Agricultural Adjustment Act of 1933 sought to lift farm commodity prices by reducing output. The mechanism for doing so was the acreage reduction contract, under which a farmer would agree to reduce production in exchange for a payment from the Secretary of Agriculture. These payments were to be financed by a special excise tax on food processors rather than from general revenue, which enabled a taxpayer challenging the validity of the excise to question the constitutionality of expenditures underwritten by his tax payments. In *United States v. Butler* (1936), the Court invalidated the tax, holding that it was a step in a plan to regulate agricultural production in violation of the Tenth Amendment. Though *Butler* held that the excise tax could no longer be collected, the Administration continued to pay farmers holding acreage reduction contracts out of general revenue. Congress effectively reenacted the program two months after the *Butler* decision with the Soil Conservation and Domestic Allotment Act of 1936, which paid farmers to shift acreage from “soil-depleting” to “soil-conserving” crops. This time the payments were to be made from general revenue, effectively immunizing them from constitutional challenge. A comparable dynamic of adaptive congressional response would be observable in other features of the agriculture program, as well as in federal initiatives to regulate the oil and coal industries.

Changes in Constitutional Doctrine

Yet the fact that many of the objectives of the New Deal could be, and ultimately were, accommodated within the framework of existing constitutional doctrine should not obscure the real and significant changes in constitutional law that occurred between the onset of the Depression and the early years of World War II. Many of these changes were attributable to President Hoover’s appointments of Justices Hughes and Roberts in 1930. For example, up through the 1920s the Court had insisted that regulation of wages and prices was limited to a small category of businesses “affected with a public interest,” such as...
railroads and stockyards. In the 1934 case of *Nebbia v. New York*, however, Roberts wrote for a narrowly divided Court upholding price regulation of the milk industry and abandoning the “affected with a public interest” limitation on government power. This opened the way for the Court’s 1937 decision in *West Coast Hotel v. Parrish* upholding a minimum wage law for women workers. Yet *Nebbia* and *Parrish* did not signal a retreat from all due process limitations on government regulation. Hughes and Roberts continued to insist that regulations be “reasonable,” and to vote to invalidate those that failed this test. By the end of the decade, however, a series of Roosevelt appointments to the Court had consigned their position to the minority.

*Nebbia* also had significant ramifications for the scope of federal power under the commerce clause. Throughout the late nineteenth and early twentieth centuries, the Court had permitted federal regulatory power to reach “local,” intrastate activities only under very limited circumstances. Congress could reach local enterprises such as stockyards if they were situated in a “stream” of interstate commerce, and the *Shreveport* doctrine permitted regulation of local railroad activities having a “close and substantial” relation to interstate commerce. In each instance, however, the local activity could be regulated only if it were a business affected with a public interest. By abolishing this due process limitation, *Nebbia* dramatically expanded the reach of each of these commerce clause doctrines. Steel plants, automobile factories, and clothing manufacturers located in a stream of interstate commerce could now be regulated under the National Labor Relations Act. Local sales of coal and agricultural products were now within the reach of federal authority under the *Shreveport* doctrine. The Second New Deal could thus be sustained without any significant independent change in commerce clause jurisprudence.

Significant doctrinal change would come, however, once the Roosevelt appointees dominated the Court. In the 1942 case of *Wickard v. Filburn*, for example, the Court upheld a penalty imposed on a farmer for planting more wheat than he was allotted under the Agricultural Adjustment Act. Roscoe Filburn objected that he did not intend to sell the wheat, but only to keep it for use and consumption on his own farm. Justice Jackson’s opinion responded that if many farmers emulated Filburn, they would affect the price at which wheat was sold in interstate commerce by reducing the demand. Because such “local” activities could affect the interstate price of wheat, Congress could regulate them. Internal Court records show that not all of the justices were comfortable with such an expansive interpretation of federal power, one that suggested there was no economic activity beyond congressional authority.

**Conclusion**

The Court’s acceptance of a dramatic increase in the federal government’s power to regulate the economy is often attributed to the pressure of Roosevelt’s Court-packing plan and to the impression made by FDR’s landslide victory in the 1936 election. The impact of the Court-packing plan has, at the very least, been greatly exaggerated; it quite probably had no significant effect on doctrinal development. By contrast, Roosevelt’s reelection was critical, but not, as has been suggested, because it persuaded the “Nine Old Men” to ratify the New Deal. It was critical because the electoral victory enabled the President, by exercising his power of judicial appointment, to refashion the Court in his own image.

**FOR DISCUSSION**

On what constitutional grounds did the Supreme Court strike down such New Deal legislation as the Railroad Retirement Act, the Farm Debt Relief Act, and the Agricultural Adjustment Act? Which amendment or clause of the Constitution did these acts violate?

In some opinions, the Supreme Court suggested to Congress how the particular act might be modified to meet constitutional standards. In your opinion, does this violate the principle of “separation of powers” or simply indicate a willingness to recognize and address national crises?

What does this story suggest about the importance of individual justices? the importance of presidential appointments to the Supreme Court? Can you identify other examples of changes in Court doctrines that were prompted by changes in the composition of the Supreme Court?

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**For Further Reading**


Is the Rehnquist Court an Activist Court?

The Rehnquist Court reaffirms rights but curbs the power of Congress.

by Thomas M. Keck

Judicial activism and judicial restraint are popular but sometimes misleading ways to characterize Supreme Court decisions or the tendencies of individual justices. In this article, Thomas Keck shows how the terms “liberal” and “conservative” are quite different from judicial activism and judicial restraint. He suggests that the Rehnquist Court is an “activist” Court, because it has a broad vision of judicial power.

Once upon a time, lawyers, pundits, and politicians could engage in a coherent conversation about judicial activism and restraint on the Supreme Court. During the heyday of the Warren Court in the 1960s, there were two clear sides to any debate about the Court’s role: Liberals urged the justices to actively enforce those fundamental rights that they saw as guaranteed, either explicitly or implicitly, by the Constitution, while conservatives urged them to exercise their power with much greater caution and restraint.

Forty years later, this conversation persists among many scholars and journalists—and even sometimes among the justices themselves—but it no longer accurately reflects what the Court has been doing. Over the past generation, conservatives have taken control of the Supreme Court, but it has not become any more restrained. This fact became particularly clear when the Court decided the outcome of the 2000 presidential election. The *Bush v. Gore* (2000) decision is symptomatic of the current justices’ broad vision of their own power, a development that requires some explanation.

From the Warren Court to the Rehnquist Court

When the Republican Party recaptured the presidency in 1968, Richard Nixon launched a long string of conservative judicial appointments intended to reverse the legacy of the Warren Court. When Nixon appointed Warren Burger, Harry Blackmun, William Rehnquist, and Lewis Powell, most Court-watchers assumed that the new Burger Court would be more restrained than its predecessor. When the Nixon appointments were followed by six more from Republican presidents—with Gerald Ford appointing John Paul Stevens; Ronald Reagan appointing Sandra

“*The justices of the Rehnquist Court agree on a broad vision of judicial power; but they disagree over how to use it.*”

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Day O'Connor, Antonin Scalia, and Anthony Kennedy, as well as elevating Rehnquist to Chief Justice; and George H.W. Bush appointing David Souter and Clarence Thomas—liberal legal scholars worried that this new Rehnquist Court would abandon the protection of constitutional rights altogether.

In 1989, for example, constitutional scholar Erwin Chemerinsky used a widely noted article in the Harvard Law Review to complain that the conservative Court was carrying the principle of judicial restraint so far as to threaten “a vanishing Constitution.” Chemerinsky was writing very early in the Rehnquist era, however, and his judgment was premature. On a wide variety of constitutional issues, it turns out, the conservative justices have proven willing to exercise their own power quite actively.

While it has curtailed some of the Warren Court’s liberal activist precedents at the margins, the Rehnquist Court has generally reaffirmed and often even extended these landmark holdings on individual liberty and minority rights. Consider, in this regard, the current Court’s two pathbreaking decisions on gay rights, *Romer v. Evans* (1996) and *Lawrence v. Texas* (2003).

At the same time, the Rehnquist Court has also developed a distinctive new style of conservative judicial activism. In the area of federalism, for example, the conservative justices of the Rehnquist Court have revived an active role for the Court in enforcing constitutional limits on congressional regulatory authority. While the Warren Court had been content to allow Congress to legislate in areas that had traditionally been under state control (e.g., education or criminal law), the Rehnquist Court has repeatedly struck down federal laws like the Gun Free School Zones Act on precisely these grounds. Largely on the basis of such “states’ rights” concerns, in fact, the current Court has struck down congressional statutes more frequently than at any previous point in American history.

The conservative justices of the Rehnquist Court have also taken some constitutional provisions that the Warren Court did actively enforce and have redefined them to serve new purposes. In the first amendment context, for example, the Warren Court often defended the free speech rights of unpopular political groups, whether civil rights demonstrators or members of the KKK. The Rehnquist Court still enforces the first amendment in such contexts, but the conservative justices have shown even more interest in extending it to protect the free speech rights of electoral campaign contributors, commercial advertisers, and religious organizations.

Despite ten consecutive Republican appointments, the current Court appears to be no more restrained than its predecessors. Some scholars, in fact, have gone so far as to insist that the Rehnquist Court has been more activist than the Warren Court. This latter claim is controversial, and to think clearly about it, we need to define our terms more carefully.

**What is Judicial Activism?**

The term “judicial activism” is often used rather loosely as an epithet for any court decision with which the speaker disagrees. As such, Court critics have used it to object to what is, in fact, a wide variety of different features of judicial power. Critics sometimes describe a judicial decision as “activist” when it:

- thwarts the democratic will (e.g., striking down a state antiabortion law);
- alters an existing precedent (e.g., reversing an established decision simply because the Court’s membership has changed);

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**For Further Reading**


■ departs from the original meaning of the Constitution (e.g., “making up” a new constitutional right simply because the justices would prefer such a right to exist);

■ details a specific policy outcome with a degree of specificity that looks uncomfortably like legislation (e.g., drafting a detailed set of “Miranda rights” which police officers must read to all suspects under interrogation); or

■ usurps executive authority by directly administering public institutions (e.g., micromanaging a prison or public school system).

These are all reasonable grounds on which to criticize a judicial decision, so if “activism” is just an epithet, it is perfectly reasonable to use it to refer to any of these allegedly illegitimate judicial actions.

If it’s possible to distill a coherent core of meaning from these multiple usages, however, that core would emphasize a court’s relative willingness to assert its own power and authority over and against other government institutions. After all, when pundits or politicians criticize judicial activism, their key demand is generally “to reduce the power of [the] court system relative to that of other branches of government.” As Richard Posner has noted, they want federal judges “to pay greater deference to decisions of Congress, of the federal administrative agencies, of the executive branch, and of all branches and levels of state government” (1983: pp. 10–12).

Liberal and Conservative Activism on the Rehnquist Court

Under this definition, some may be surprised to discover, conservative justices are no more restrained than their liberal colleagues, and the Rehnquist Court is arguably the most activist in American history. This does not mean the Court’s decisions are wrong. There are many circumstances in which it is right and proper for the Court to actively enforce a constitutional limit on some other unit of government. The trick, of course, is to decide when and where such circumstances exist, but that is a question regarding how to interpret the Constitution, not a question of how powerful the courts should be.

Through most of the twentieth century, there were some justices who believed that the Court should generally—that is, with only rare exceptions—refer to the decisions of the democratically accountable branches of government. There are no longer any such justices on the Supreme Court. While some of the current justices still use the rhetoric of restraint, they all believe that there are certain contexts that call for the Court to exercise its power quite actively.

So while it was once possible to describe constitutional debate as a battle between liberal activism and conservative restraint, it now more often pits liberal activism against conservative activism. In other words, the justices of the Rehnquist Court agree on a broad vision of judicial power; they just disagree on the constitutional ends to which that power should be put to use. When the Court’s four most liberal justices—Stevens, Souter, Ruth Bader Ginsburg, and Stephen Breyer—vote to strike down a law, it is most often to defend some constitutional principle that fits broadly within the liberal tradition of the Warren Court (e.g., abortion rights). When the three most conservative justices—Rehnquist, Scalia, and Thomas—do so, it is most often to defend some constitutional principle that conservatives would generally support (e.g., states’ rights). This division generally leaves O’Connor and Kennedy with the deciding votes, and with surprising regularity, they join the more “activist” side of each case. For example, they have repeatedly joined their more liberal colleagues to strike down laws infringing on abortion rights, and they have repeatedly joined their more conservative colleagues to strike down laws infringing on states’ rights.

In a wide variety of contexts, in support of both liberal and conservative ends, the justices who control the Rehnquist Court have proven willing to invalidate democratically enacted statutes, to insert themselves into divisive political conflicts, and to expand the Court’s own power.

FOR DISCUSSION

What are some of the possible definitions of an “activist” Supreme Court? Is an “activist” Court good or bad? Why?

In earlier times, the Supreme Court more frequently deferred to “democratically accountable branches of government”—the Congress or the president. Why do you think the Court now defers less often to these other branches?

Which acts of Congress has the Rehnquist Court struck down? On what grounds?

Recent U.S. presidents have often campaigned for office on the promise to appoint justices to the Supreme Court who will “apply” the Constitution, rather than “interpret” or expand the meaning of the Constitution. Do you think it’s possible to resolve new controversies without “interpreting” the Constitution? Why (not)?
The U.S. Constitution grants to the president the power to appoint Supreme Court justices and lower federal court judges “by and with the advice and consent of the Senate” [Article 2, Section 2.2]. Obtaining the consent of the Senate has not always been an easy matter. In all, 12 nominations to the Supreme Court have been rejected by a Senate vote, the most recent being President Reagan’s nomination of Robert H. Bork in 1987, then a court of appeals judge and fiery conservative legal scholar. Over the years, dozens of nominations to the U.S. District Courts and the U.S. Courts of Appeal have stalled in the Senate, been withdrawn, or rejected by a Senate vote.

Judicial nominations tend to be particularly contentious during times when one political party controls the presidency and the other party controls the Senate. But even when the president and the Senate majority belong to the same party, as we have had for most of the period from 2000–04, skirmishes over appointments may occur when the Senate majority is a narrow one, such as the current 51-48 Republican majority. [For information and resources on the 2004 controversy over judges between Senate Democrats and President George W. Bush, see “Teaching with the News” on pp. 28–29.]

The increasingly sharp divisions over judicial appointments reflect not only a partisan debate between Republicans and Democrats, however. The debate is also an ideological skirmish about whether judges should be “activists” or exercise “judicial restraint” and about whether judges should employ a “strict” interpretation of the Constitution (i.e., relying upon the framers’ intent) or one that is based upon changing social conditions and mores. In the wake of conflicts between liberals and conservatives over such issues as abortion and affirmative action, interest groups have become better organized and funded and generally more influential in judicial appointments.
We Need to Appoint Judges Who Will Protect Our Rights  
by Nan Aron

The federal judiciary plays a crucial role in the American system of government and directly affects the lives of all Americans. Whether the case involves censorship, religious freedom, civil rights, privacy, or a power struggle between the branches of government, the courts constantly address society’s most difficult questions. And in resolving them, the judiciary can be a catalyst in the social and legal progress of the nation.

Under the Constitution, the president and the Senate share power to select judges to sit on the federal courts—the Supreme Court, the Circuit Courts of Appeals, and District Courts. Framers of the Constitution designed this system to protect the balance of powers and ensure the appointment of fair, independent judges. Since federal judges have life tenure, it is imperative that they are chosen with the utmost care and scrutiny. When the system works effectively, Americans can trust that their judges are impartial and will exercise the appropriate balance in interpreting the laws passed by Congress.

Ronald Reagan became president in 1980 with a plan to change policy in this country through the courts. He sought the appointment of judges and justices whose viewpoints mirrored his own. He named those who were anti-choice and anti-civil rights, and favored lowering the wall of separation between church and state. The Reagan White House was methodical in selecting judges who met its litmus test. It also reduced the role of the American Bar Association, an organization that had traditionally helped presidents select fair-minded and qualified candidates for the federal bench. Instead, the White House appointed a committee to choose candidates who were sympathetic to conservative views. George H.W. Bush continued the Reagan crusade of court packing and, as a result, by 1992 all 13 courts of appeals tilted toward the right.

President Bill Clinton came into office pledging to appoint well-qualified and diverse judges. In order to expedite the confirmation process, he cooperated and consulted with the Republican Senate. The hallmark of his judicial picks was their diversity, which transformed the face of the federal judiciary.

However, since George W. Bush has become president, court packing has accelerated. He has picked up where Presidents Reagan and Bush left off, and chosen judges sympathetic to his antichoice and anti-civil rights views. These individuals, with views far from the mainstream, are a sharp contrast to the judges selected by the Clinton administration.

President Bush has demonstrated contempt for the Senate, ignoring long-established customs, such as seeking input from home state senators. Typically, if a nominee does not garner his home senators’ support, the Senate will respect their colleague’s prerogative and not move the nomination. However, when both Michigan Senators Carl Levin and Debbie Stabenow opposed three Michigan nominees (Henry Saad, David McKeague, and Richard Griffin), they were nonetheless passed through the Senate Judiciary Committee.

Conservatives claim that liberal judges practice “judicial activism,” arguing that these judges decide cases based on their personal views rather than written law. Unfortunately, politicians mainly use the term “judicial activism” to attack decisions they dislike rather than decisions with no legal basis. And occasionally, activist decisions are necessary to correct injustices done to persons without access to the courts. Most scholars agree that the people who wrote the post-Civil War amendments guaranteeing equality to African Americans did not intend to require schools to be desegregated. State legislatures wrote laws requiring schools to be segregated, and Congress refused to intervene.
William Pryor, who was nominated to and are more than willing to strike little respect for Congressional intent rather than protect them. They have to roll back our rights and freedoms existing law, using their judicial power results they’d like to see rather than ideological stances. Americans do not have to sit idly by and watch their rights and freedoms disappear. By contacting their senators, organizing grassroots efforts, and staying informed, Americans can protect their rights and fight for a fair and independent judiciary.

Honoring the Oath of Office: Ideology in Judicial Confirmation
by John C. Eastman

Article II of the Constitution provides that the president “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the Supreme Court [and such inferior courts as the Congress may from time to time ordain and establish].” As the text of the provision makes explicitly clear, the power to choose nominees—to “nominate”—is vested solely in the president, and the president also has the primary role to “appoint,” albeit with the advice and consent of the Senate. The text of the clause itself thus demonstrates that the role envisioned for the Senate was a much more limited one than is currently being claimed by some senators.

Despite the original understanding of the Senate’s limited role in the confirmation process, a minority in the Senate today have been using their power, via the filibuster, to impose ideological litmus tests on presidential nominees and even to force the president to nominate judges preferred by individual senators, thus arrogating to themselves the nomination as well as the confirmation power.

The Senate’s expanded use of its confirmation power should perhaps come as no surprise. As a result of the growing role of the judiciary—and of government in general—in the lives of Americans today, the Senate’s part in the nomination process has become a powerful political tool, and, like all powerful political tools, it is the subject of a strenuous competition among interest groups every time the president seeks to fill a judicial vacancy. Nevertheless, it is a tool that poses grave dangers to our constitutional system of government. In its current manifestation, the Senate’s ideological use of the confirmation power threatens the separation of powers by undermining the responsibility for appointments given to the president, by demanding of judicial nominees a commitment to a role not appropriate to the courts, and, perhaps most importantly, by threatening the independence of the judiciary itself.

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The reason that some senators are so intent on delving into the judicial philosophy of nominees is deeply connected to their view of the proper role of the judiciary in American government. Viewing the Constitution as a “living document,” modern-day liberals see the Court as a place where the Constitution is stretched, shaped, cut, and rewritten in order to put in place so-called “progressive” policies that could never emerge from the legislative process. Of course, the Constitution is based on a profoundly different notion of law than is modern liberalism, and it is no wonder, therefore, that President Franklin D. Roosevelt, the godfather of the Welfare State that lies at the center of modern liberalism, found it necessary to resort to the highly questionable “Court-packing plan” of 1936 in order to enforce his “vision” of a new political order. The Constitution simply was not designed to accommodate such things as the massive redistributions of wealth or bureaucratic restrictions on individual liberty that Roosevelt was proposing—in fact, it was designed precisely to prevent such things. As Rexford Tugwell, one of the principal architects of the New Deal, once admitted: “To the extent that [the New Deal policies] developed, they were tortured interpretations of a document intended to prevent them.” So the Constitution was essentially rewritten by interpretation, culminating in the great “Switch in Time That Saved Nine,” in which a century and a half of precedent was reversed and the Constitution stretched and torn out of shape to accommodate the New Deal programs.

Judicial ideology is therefore critically important to modern-day liberals, because any honest reading of the Constitution reveals that it is incompatible with their scheme of government. New York Senator Charles Schumer, for example, has been quite candid in acknowledging that his opposition to President Bush’s judicial nominees is based on the fact that they respect and will enforce the Constitution’s limitations on the power of Congress. “Elected officials,” Senator Schumer told the press on May 9, 2002, “should get the benefit of the doubt with respect to policy judgments, and courts should not reach out to impose their will over that of elected legislatures…. Many of us on our side of the aisle are acutely concerned with the new limits that are now developing on our power to address the problems of those who elect us to serve.”

“The Senate’s ideological use of its power to confirm judges threatens the separations of powers.”

This is not to say that ideology should never play a role in the confirmation process. Some ideologically based views render it impossible for a nominee who holds them to fulfill his or her oath of office. Consider, for instance, Judge Harry Pregerson, who, when he was nominated to the U.S. Court of Appeals for the 9th Circuit by President Carter, was asked whether he would follow his conscience or the law, if the two came into conflict. “I would follow my conscience,” he replied. That statement, grounded in Pregerson’s own ideology, should easily have been grounds for disqualification, yet Pregerson was not only confirmed to the bench, but roundly praised for this statement, despite the fact that it threatens to undermine the very essence of constitutionalism and the rule of law. Contrast this with Justice Antonin Scalia, who in a recent speech said that he was glad the Pope had not declared the Catholic Church’s opposition to the death penalty a matter of infallible Church doctrine, because if the Pope had done so, Justice Scalia would, as a practicing and committed Catholic, feel compelled to resign, unable to abide by his oath to enforce the law.

Ideology understood in this light is, of course, relevant in selecting a judicial nominee. A nominee who for ideological reasons cannot “support and defend the Constitution of the United States” would be unfit for office because he or she would be unable to take (or at least to honor) the oath of office required for the position. In fact, although we tend to take the concept of an oath lightly today, James Madison wrote that under the Constitution, “the concurrence of the Senate chosen by the State Legislatures, in appointing the Judges, and the oaths and official tenures of these, with the surveillance of public Opinion, [would be] relied on as guarantying their impartiality…. But insisting that a nominee demonstrate a commitment to honor the oath of office is very different than the ideological litmus tests being imposed on some nominees today, which essentially demand that a nominee be willing to break one’s oath “to support the Constitution” and instead toe the line of leftist jurisprudence.

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On many occasions the Supreme Court is asked to review acts of Congress by individuals and interest groups challenging the constitutionality of the laws. When the Court reviews laws enacted by Congress, it treads upon the delicate waters of our constitutional system of “separation of powers” among the three branches of government. The Court’s power of judicial review is firmly established (see Marbury v. Madison). Indeed, the Court has found unconstitutional more than 150 acts of Congress enacted since 1789. (The Court sometimes strikes down the entire act; more often, it strikes down selected provisions). Nevertheless, recent concerns about judicial activism led Representative Ron Lewis (R-KY) to introduce legislation in 2004 that would allow Congress to overturn (by a two-thirds vote of the House and Senate) Supreme Court decisions that invalidate acts of Congress.

Using the Web site of the U.S. Government Printing Office, which lists and briefly describes the congressional legislation invalidated by the Supreme Court (see: www.gpoaccess.gov/constitution/html/acts.html), I uncovered several patterns and some interesting stories to share.

Narratives of Conflict
The federal laws struck down by Congress provide a wonderful mirror to the great controversies in our nation’s history. This is particularly true from the time of the Civil War on (only parts of three acts of Congress enacted before 1862—including Section 13 of the Judiciary Act of 1789 and the Missouri Compromise of 1820—were invalidated by the Supreme Court). Table one (page 19) shows how many acts of Congress the Supreme Court struck down in various periods (e.g., the 1987–2004 era is the Rehnquist Court).

More than a dozen acts of Congress enacted after the Civil War were invalidated. Almost half of these represented efforts by Congress to implement the program of Reconstruction, and these laws were typically invalidated by the Court within just a few years of their initial passage. Federal legislation to protect voting rights, the right to make and enforce contracts, and access to public accommodations for nonwhite citizens were all struck down by the Court between 1876 (U.S. v. Reese) and 1883 (Civil Rights Cases). According to legal historian Robert Cottrol, “Few decisions better illustrate the Supreme Court’s early inclination to interpret narrowly the Civil War Amendments [13th–15th] than the Civil Rights Cases.” Dissenting was Justice John Marshall Harlan, who was often a lone voice on the Court during this era, typically voting to uphold Congress’s efforts to secure equality for African Americans and foreshadowing his dissent in Plessy v. Ferguson in 1896.

The years after Reconstruction and before the New Deal were ones in which conflicts about immigration, Native Americans, labor and working conditions, and the criminal justice system were at the forefront of constitutional disputes between the Court and Congress, mirroring their significance in American society. For example, in 1896 the Court struck down a provision of the Chinese Exclusion Act of 1892, in which Congress permitted Chinese persons not lawfully entitled to be in the United States to be imprisoned at hard labor for one year and then deported (Wong Wing v. U.S.). The Court ruled that such actions violated both the 5th and 6th Amendments. And in 1918, the Court struck down the Keating-Owen Child Labor Act of 1916, holding that new regulations to limit how many hours per day, or days per week, that children could work were not within the power of Congress to regulate, but rather, within the province of the states (Hammer v. Dagenhart).

The Great Depression and the New Deal that followed brought before the Court a whole range of questions about Congress’s power to regulate the economy, as Barry Cushman ably discusses in his article, “The Supreme Court Encounters the New Deal” (see pp. 7–10). One of Cushman’s most important themes is that the Court and Congress were not as combative as has typically

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been portrayed. Court members frequently shared the broad policy objectives of Congress (e.g., economic relief and the creation of a social safety net), but they were determined to require Congress to enact laws that conformed to constitutional standards and jurisprudential doctrines. As a result, in a number of cases Court opinions suggested ways that Congress could revise statutes initially held unconstitutional, and shortly thereafter, the Court upheld such revised statutes.

World War II and the ensuing Cold War led a conservative Congress to enact laws that treaded quite heavily on civil liberties. But it was not until the 1960s that a more liberal Court struck down some of these laws. In three separate cases, various provisions of the 1950 Internal Security Act (“McCarran Act”), passed by Congress over the veto of President Truman, were invalidated. These included the barring of members of a communist organization from working in a defense plant (U.S. v. Robel, 1967—protected by the 1st Amendment right of association), barring communists from obtaining or using a passport (Aptheker v. Secretary of State, 1964—protected by the 5th Amendment), and the requiring of individual communist party members to register (Albertson v. Subversive Activities Control Board, 1965). Gutted by the Court, the McCarran Act died in 1973. The rights of servicemen were also protected, when the Court struck down a provision of the Uniform Code of Military Justice that subjected civilian ex-servicemen to court martial for crimes committed while in the military service (Toth v. Quarles, 1955).

Since 1969, the Supreme Court has struck down congressional statutes at a higher rate than ever before (67 in all). These cases often involved social and welfare issues. For example, the Court struck down several provisions of the Food Stamp Act enacted by Congress in 1971, including disqualification for households containing members not related by birth, marriage, or adoption (Department of Agriculture v. Moreno, 1973). The Court also quickly invalidated the Flag Protection Act of 1989, which criminalized burning and other forms of flag desecration, on the grounds that the prohibited actions intended to communicate and express opinions, however unpopular (U.S. v. Eichman, 1990). And most recently, as we grapple with undesired elements of our online world, congressional statutes seeking to protect children on the Internet have also been struck down on the grounds that they violate the 1st Amendment rights of adults (see e.g., Ashcroft v. A.C.L.U., 2004).

Values Change across Eras
Further examination of the federal laws reveals a few instances where the Supreme Court invalidated acts of Congress generations after they were initially passed. Two examples are instructive. An 1862 District of Columbia law requiring racial separation in the schools was struck down ninety years later, in 1954, as part of the Brown v. Board of Education cases (Bolling v. Sharpe). And a provision of the Comstock Act passed in 1873, which barred from the mail unsolicited advertisements for contraceptives, was struck down on 1st Amendment grounds more than a century later—in 1983 (Bolger v. Youngs Drug Product Corp.). These are instances where “American values” long supported acts of Congress judged to be unconstitutional only in a much later era.

Conclusion
Congress makes laws to provide for the general welfare, sometimes in moments of great national passion. The Supreme Court, when asked, reviews these acts of Congress to ensure that they conform to the Constitution, the Bill of Rights, and subsequent amendments. In 151 instances to date, and surely more to come, the Court has invalidated part or all of congressional statutes, usually providing greater protection for individual rights against an overly intrusive government. These court decisions, controversial though they have been, embody the core constitutional principles of separation of powers and the protection of a minority from the majority.

For Further Reading
Students in Action

Australia’s National Youth Roundtable

by Katie Fraser

Australia is a big place. If you want to fly from Sydney to Perth, it will take you as long as a trip from New York to Los Angeles; if you want to drive, you’ll have to plan for a five- or six-day trip through the desert. There are young people in every far-flung corner of Australia, in big cities like Sydney and Melbourne, in rural communities, and in small towns in isolated regions (See sidebar, “Quick Facts about Australia” on p. 21). But despite their different backgrounds and experiences, young people in Australia share many concerns. How can Australians protect the environment? How can they make sure that young people are treated well in the workplace, especially when starting an apprenticeship or a new job? How can young people work together to improve the health and welfare of Australia’s indigenous people?

In 1999, the Australian government chose fifty young people from all over the nation to get together and talk about these issues and more. The very first National Youth Roundtable was held in the capital city, Canberra, and young people came from every state and territory to talk about the issues that were important to them and their community. David Kemp, the Minister for Education, Training, and Youth Affairs said at the time that the aim of the Roundtable was to “provide Australia’s young people with a direct voice to Government.”

Every year since then, fifty young people between the ages of 15 and 24 have been chosen to participate in the National Youth Roundtable. The members bring together a wide range of experiences and viewpoints. Some are studying at high school, some are at college, and others are looking for work or working. All applicants chosen to take part have demonstrated a strong involvement with their local communities.

Participants are divided into six teams, to consider issues relating to communities, cultural diversity, health, leadership and enterprise development, participation, and the environment. They work together to identify issues that are important to them and those of their generation, talk to young people in their communities to gather ideas and input, conduct research, and draft reports and recommendations that go to politicians in every state and territory. They have the chance to interact with politicians and resource people from government departments and with people in nongovernmental organizations. Between Roundtable meetings, members talk to their local communities and government ministers to develop their ideas. Young people across the country can also contact Roundtable members to have their say on important issues. The aim of Roundtable members is to complete a project by the end of one year.

Over the last five years, the big ideas of participants in the National Youth Roundtable have led to real initiatives, like the establishment of a code of practice for young people starting apprenticeships to learn a trade, and the formation of a National Indigenous Youth Leadership Group that gives better access to government for young indigenous Australians. And past participants continued to affect the political process in Australia by getting involved in other national and international forums so that they can continue to have their say.

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Quick Facts about Australia

- The area of Australia is 7,686,850 sq. km—which makes it slightly smaller than the contiguous 48 states of the United States.
- In July 2004, the estimated population of Australia was approximately 20 million. The population of the United States is huge in comparison—at approximately 290 million.
- Like the United States, Australia is a federation of states. The six states in Australia are New South Wales, Victoria, Queensland, South Australia, Western Australia, and Tasmania. There are also two territories: the Northern Territory and the Australian Capital Territory (home of the capital city, Canberra).
- Australia is one of the world’s most urbanized countries—about 70 percent of the population lives in the ten largest cities.
- Aboriginal and Torres Strait Islander people make up nearly 1.5 percent of the population. It is generally thought that Aboriginal people began living on the continent 50,000 to 60,000 years before the first Europeans arrived in the eighteenth century.
- Australia is a multicultural society, which has been enriched by nearly five million migrants from almost 200 nations. Four out of ten Australians are migrants or the first-generation children of migrants, and half of them are from non-English speaking backgrounds.
- Australia is a democracy, and it has a constitution. You can check it out and compare it to the U.S. Constitution at: http://www.aph.gov.au/senate/general/constitution/

Student Quiz
Ask your students to take a short quiz about Australia. Are the following statements about Australia’s form of government “true” or “false”?
1. Australia has a parliamentary system of government.
   *True or False?*
2. The head of the executive branch of government in Australia is the Queen of England.
   *True or False?*
3. Australia has a Bill of Rights included in its Constitution.
   *True or False?*
4. In Australia, it is compulsory to vote in state and federal elections.
   *True or False?*
5. Each state in Australia has twelve senators in the federal parliament.
   *True or False?*

In Her Words: One Participant’s View

“Roundtable… doesn’t actually have a big round table where we all sit around—although I definitely wish it did… It’s a group of fifty people aged between 15 and 24 who can come and speak about the issues they’re passionate about in the youth community and maybe, just maybe, implement some positive change on the Australian society to do with youth.”

Learning Gateways

by Rebecca Fanning and Matthew Durkin

Lesson Overview

This teaching strategy introduces students to the Great Writ—the writ of habeas corpus, which colonial Americans adopted from the British legal system and incorporated into the Constitution. Rebecca Fanning, from the Administrative Office of the U.S. Courts, provides teachers with background, resources, and an interactive lesson on the writ, focusing on the role of the federal courts in our nation's continuing struggle to balance public safety with individual liberty. This lesson meets a variety of national and state social studies standards. Go to www.insights-magazine.org for a listing of relevant standards addressed by this issue of Insights.

The Constitution's Great Writ: Balancing Liberties and Safety

High school teachers are asking how to teach effectively about the court system's role in balancing liberties and safety in times of national emergencies. Their students have shown particular interest in the terrorism cases that are making their way through the federal courts. The materials published here are a sample of the resources provided by the Administrative Office of the U.S. Courts to address teacher and student interest in the issues raised in these cases. The materials provide teachers with background about the issue that is common to many of these cases—habeas corpus—so that when students raise questions about terrorism cases reported by the media, teachers are prepared to help students understand and discuss them.

In addition to the background and teaching activity offered here, the Administrative Office complements these resources with additional classroom and courtroom components on its Web site at www.uscourts.gov@Educational Outreach. The materials posted on the Web include:

- A one-paragraph summary of each of 11 landmark cases in which federal courts have had to weigh the competing interests of individual liberty and public safety during times of national emergency.
- Discussion-starter questions.
- A case study of Johnson v. Eisentrager, the 1950 Supreme Court case often cited as precedent in today's terrorism cases.
- Summaries, background, and discussion starters for the following cases decided by the Supreme Court on June 28, 2004: Hamdi v. Rumsfeld; Rasul v. Bush; and Rumsfeld v. Padilla.
- A list of supplemental reading, case citations, and pertinent Web sites.

About Habeas Corpus

During times of uncertainty and national crisis, often there is a conflict between liberties and safety. Sometimes, liberties must yield to safety; other times, safety must yield to liberties. The goal of the law is to find the appropriate balance between liberty and safety.

One of the most important means for ensuring this balance, and for protecting individual liberty in general, is the writ of habeas corpus. A writ of habeas corpus allows persons who believe that they have been wrongfully imprisoned to challenge the legality of their confinement. To do so, a person must petition a court to issue the writ. If the writ is issued, the court directs the person who is holding the petitioner in confinement (usually the government) to bring the prisoner into court and to explain the grounds for the petitioner's detention. After hearing both sides, if the court finds that the grounds for the confinement are illegal, the petitioner is released.

The writ of habeas corpus comes from the English Habeas Corpus Act of 1679, 31 Car. 2, c. 2 (to download a
copy, go to the Modern History Sourcebook of Fordham University at www.fordham.edu/halsall/mod/1679habeascorp.html). By the time of the American Revolution, the writ was cherished to such an extent by American colonists that it was the only British judicial writ (legal command) to be specifically mentioned in the U.S. Constitution (Article I, Section 9). Due to its role in protecting liberty, the writ of habeas corpus is known as the Great Writ.

Although hailed as the Great Writ, the framers of the Constitution also realized that there may be times when its application is inappropriate—i.e., during times of national crisis. In pertinent part, Article I, Section 9 of the Constitution deals with this situation by saying that “The privilege of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion or Invasion the public Safety may require it.”

Despite the fact that, on rare occasions throughout United States history, this writ has been suspended (most notably by President Lincoln during the Civil War), it has served its purpose and, even during times of war and national crisis, provided a means for those who felt that they were unjustly imprisoned to challenge the legality of their confinements. The Administrative Office of the U.S. Courts provides examples of real cases, in which courts have had the difficult task of weighing the rights of individuals with the right of the state to protect itself during times of national emergency [go to: www.uscourts.gov]. Whether the issue is unjust imprisonment, restrictions on free speech, or the loss of property rights, each of the cases examined in the materials offered demonstrates how the courts weigh these competing interests, so that they may understand how the law seeks to protect liberties without sacrificing public safety.

**Oxford-Style Debate at the Local Federal Courthouse**

After the stage is set in the classroom and the foundation is in place for a discussion of habeas corpus, the interactive component of the lesson—an Oxford-style debate—is conducted by the students at the local federal courthouse. A federal judge presides over the debate. The format is described briefly below. After the debate, the host judge facilitates a debriefing session with the students. The topic for the debate is “Should the Rights and Liberties in the Constitution Follow the U.S. Military Presence Wherever It Is?”

**The Structure of the Debate**

*The following debate structure is a modified/simplified adaptation of the Rules for Debate in Oxford Style from the South African National Debating Council (for the full version of these rules, see: www.debating.org.za/rulesox.shtml).*

1. **Section 1:** First argument in support, 5 minutes
   First argument in opposition, 5 minutes

2. **Section 2:** Second argument in support, 5 minutes
   Second argument in opposition, 5 minutes

3. **Section 3:** Speakers from the floor, 30 minutes

4. **Section 4:** Third argument in support, 5 minutes
   Third argument in opposition, 5 minutes
   Total Time: One hour

5. **Section 5:** All members of the audience may speak from the floor during the designated time. Audience members may direct questions and comments to one or more panelists or to an audience member.

   The objective of the Affirmative Team is to set out convincing arguments and materials that support a “Yes” response to all questions related to this question and supports its position, and the Negative Team responds “No” and supports its position.

6. **Section 6:** Three members serve on each of the two teams. Each member shall volunteer in advance to serve as a first speaker, second speaker, or third speaker.
to the questions raised; the objective of the Negative Team is to refute the points made by the Affirmative Team through the use of convincing arguments and materials.

The members of the audience shall serve as the judges. At the end of the debate, the chairperson shall ask the audience, by means of a simple hand count, which side won the debate. The audience members should base their decision upon which team has put forth the more convincing arguments and supporting materials. The chairperson will declare the winner based on the majority vote.

Federal Courts Reach Out to Schools

The Judiciary’s outreach programs connect courts to their communities throughout the country. Educational initiatives bring teachers, students, parents, lawyers, community leaders, and the media into the courts to interact with judges and the justice system. The following are examples of national and local initiatives conducted by judges and court staff.

National Programs Create Real-Life Learning Situations at Courthouses

The flagship program of the federal courts’ national outreach program is the annual Open Doors to Federal Courts initiative and the Teachers Institutes that support it. More than 350 judges, from all circuits, reached more than 40,000 high school students and their teachers in the first five years of the initiative. The programs center on true-to-life role-playing related to jury service, judicial independence, and the Bill of Rights.

Local Judges Take the Lead in Reaching Out to Communities

More than 150 courts are at the forefront of outreach efforts nationwide. In addition to the flagship program, judges have activated more than 20 original, local initiatives ranging from producing educational videotapes to hosting law schools for citizens. Partnerships with the academic community are a central piece of local court outreach. The hallmark of these programs is bringing teachers and students into the courts to experience the judicial process firsthand.

Court Literacy Initiatives Win Recognition

Federal courts’ learning experiences for high school students are endorsed by teachers, students, and judges. Programs are launched after testing and evaluation by these groups. The American Bar Association has given a national award of excellence to the federal courts for judicial independence programming.

Educational Web Site Offers Original, Interactive Curriculum

The Federal Judiciary’s Web site at www.uscourts.gov@Educational Outreach, Courts to Classes offers classroom-ready and courtroom-ready materials, available on the Lesson Plans page. The lesson plans support a 52-page overview, Understanding the Federal Courts, also posted on the site. The lesson plans meet social studies standards and link to popular textbooks. They can be accomplished in one class period and have assessment tools with answer keys.

Educational Resources Reach More than 6,000 Social Studies Teachers Each Year

More than 6,000 middle school and high school teachers across the nation benefit from the federal courts’ educational outreach annually. They see the courts’ outreach exhibit at national and regional social studies conferences, where they offer input and receive samples of educational materials, including classroom-tested lesson plans. Federal court lesson plans and resources also are part of the core curriculum at court-sponsored Teachers Institutes that prepare educators for programs at local courthouses.
On March 23, 2004, the Supreme Court heard arguments in a seemingly uncontroversial sentencing case. Confessed kidnapper Ralph Howard Blakely, Jr., complained that his sentence was too severe. Blakely had abducted his estranged wife Yolanda from their home in Grant County, Washington. He then bound her with duct tape and forced her at knifepoint into a wooden box in the bed of his pickup truck. According to later trial testimony, Blakely apparently thought this would be a good way to get Yolanda to drop her divorce suit against him. When the couple’s 13-year-old son Ralphy returned home from school, Blakely ordered him to follow in another car and threatened to shoot his mother unless he complied. Ralphy escaped and sought help when they stopped at a gas station. Blakely continued with Yolanda to a friend’s house in Montana, where he was finally arrested.

Blakely pled guilty to one count of second-degree domestic violence kidnapping of his wife with enhancement for use of a deadly weapon and one count of second-degree domestic violence assault of his son. The charging information that accompanied this plea agreement informed him that the maximum penalty for his offense of second-degree kidnapping with a firearm is 10 years (120 months) imprisonment, but he was also told that the “standard range” under Washington’s Sentencing Guidelines is 49 to 53 months, which in fact the state recommended to the judge.

An Exceptional Sentence
Like the Federal Sentencing Guidelines, however, Washington State’s Sentencing Guidelines provide that a judge may nevertheless impose a sentence above the standard range, if he or she finds “substantial and compelling reasons justifying an exceptional sentence.” After hearing Yolanda’s description of the kidnapping (including how Blakely had held a knife to her throat and forced his minor son to witness his own mother’s kidnapping), the trial judge believed he had found such compelling reasons—he concluded that Blakely had acted with “deliberate cruelty.” He therefore rejected the state’s proposed sentence and instead imposed an “exceptional sentence” of 90 months—37 months above the standard range but well within the 120-month statutory maximum for second-degree kidnapping with a gun.

Blakely demanded an evidentiary hearing on whether the facts supported the judge’s upward departure from the standard sentencing range. He also filed a motion, in which he argued that an earlier Supreme Court case, Apprendi v. New Jersey, 530 U.S. 466 (2000), prohibited the court from imposing an exceptional sentence upward without submitting the factual bases for the longer sentence to a jury and requiring these facts to be proven beyond a reasonable doubt. The trial court rejected the Apprendi argument and proceeded with the evidentiary bench hearing.

After a three-day hearing that included numerous witnesses and medical experts, the trial court found that Blakely’s personality disorders “did not significantly impair his capacity to act with deliberate cruelty” and imposed the 90-month sentence. Blakely appealed to the Washington Court of Appeals, which affirmed. That court disposed of the Apprendi argument by noting that the Washington Supreme Court had previously held that the Apprendi rule regarding the need for jury findings does not apply to factual determinations that support exceptional sentences.
upward. Blakely then appealed to the Washington Supreme Court, which declined to review the case. But his last resort, the U.S. Supreme Court, voted to grant certiorari to review a single question: “Whether a fact (other than a prior conviction) necessary for an upward departure from a statutory standard sentencing range must be proved according to the procedures mandated by Apprendi v. New Jersey, 530 U.S. 466 (2000).”

It is safe to say that most observers thought the answer was clearly “no.” After all, the venerable Federal Sentencing Guidelines themselves were predicated on the assumption that there is no constitutional problem in asking a judge to find and weigh the aggravating factors necessary to lengthen a defendant’s sentence, so long as the sentence does not exceed the statutory maximum.

The Court Strikes Down the State’s Sentencing Guidelines

The press and most Supreme Court watchers barely noticed the arguments that took place March 23, focusing instead on the “big” cases being argued that month—cases like Elk Grove Unified School District v. Newdow (challenging the phrase “Under God” in the Pledge of Allegiance) and Hibbel v. Sixth Judicial District Court (challenging a police officer’s right to require an individual to identify himself). Then, on June 24, 2004, amongst a flurry of other opinions, the Court released its decision in Blakely. By a narrow 5-4 margin, the justices sided with the defendant. Blakely’s enhanced sentence violated his Sixth Amendment right to trial by jury, Justice Scalia wrote for the majority, because a judge rather than a jury had found the “deliberate cruelty” aggravating factor. Justice Scalia (joined by Justices Stevens, Souter, Thomas, and Ginsburg) wrote:

Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed on the basis of a disputed finding that he had acted with “deliberate cruelty.” The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to “the unanimous suffrage of twelve of his equals and neighbours,” 4 Blackstone, Commentaries, at 343, rather than a lone employee of the State. Blakely v. Washington, No. 02–1632 (2004), Slip Opinion at 18.

In dissent, Justice O’Connor warned that the practical consequences of Scalia’s opinion would be “disastrous” for sentencing reform. “How,” she asked, “are courts to mete out guidelines sentences? Do courts apply the guidelines to mitigating factors, but not to aggravating factors? Do they jettison the guidelines altogether?” (Also dissenting were Chief Justice Rehnquist, and Justices Breyer and Kennedy).

Sure enough, pandemonium ensued in courthouses and prosecutor’s offices across the country, as it sunk in that of submitting its accusation to “the unanimous suffrage of twelve of his equals and neighbours,” 4 Blackstone, Commentaries, at 343, rather than a lone employee of the State. Blakely v. Washington, No. 02–1632 (2004), Slip Opinion at 18.

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Booker and Fanfan cases, consolidated them into one case for review, and ordered expedited briefing so that oral arguments could be held on the government’s two questions on the very first day of the new term, October 4th.

In its brief filed with the Court in September, the United States argued that Blakely does not apply to the Federal Sentencing Guidelines. True, the government says, both the federal guidelines and the state guidelines at issue in Blakely require a judge rather than a jury to decide whether there are sufficient aggravating factors to increase a sentence. But the federal guidelines are different, the government says, because unlike the state guidelines, they do not create legislative, statutory maximum sentences and then permit judges to exceed them if they find aggravating factors. Instead, the Federal Sentencing Guidelines simply impose judicial limitations on what a sentencing judge could otherwise do. But, the government goes on to say, if it turns out that this is a distinction without a constitutional difference, then the federal guidelines should be struck down in their entirety, because Congress never would have enacted the guidelines had it known they would require jury-trial procedures.

In the end, it may be that broader jurisprudential views of sentencing guided this result. Ohio State University Law Professor Douglas Berman noted the unusual 5-4 alignment that found the “conservative” Scalia in the defendant’s corner, while the “liberal” Breyer was amplifying prosecutors’ objections to extending Sixth Amendment rights at sentencing. Berman’s explanation is intriguing:

I think I finally have Blakely figured out. Blakely is really a battle between five justices who champion an adversarial model of sentencing in which sentence-enhancing facts must be proved to a jury beyond a reasonable doubt, and four justices [who champion an] administrative model of sentencing where, in Justice Scalia’s words, “a lone employee of the State” makes all critical findings and determinations.

In small groups, ask students to research the sentencing laws and guidelines of the thirteen states that commentators believe most likely will be affected by Blakely (Alaska, Arizona, California, Colorado, Indiana, Kansas, Minnesota, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Tennessee). If your home state does not appear on the list, ask one group of students to research your state. Have all groups address the following questions:

■ When were the sentencing guidelines created in the state? by what body?
■ What are the key categories in the state’s sentencing laws and/or guidelines that help determine the sentence that an offender will receive?
■ How much, if any, sentencing discretion does the trial judge have under the guidelines? Is there a range within which the judge must sentence an individual? How large or small is that range?
■ How has the Blakely decision affected sentencing proceedings in the state?

Ask students to share their research. After the sentencing information has been presented for each state, ask students if they believe these guidelines can be amended to comply with the Blakely decision. Do they agree with Justice O’Connor’s assessment in her dissenting opinion in Blakely that “over twenty years of sentencing reform are all but lost,” or do they believe that constitutional sentencing systems can be devised? Ask students to support their positions.

Resources: Check out the Vera Institute of Justice at www.vera.org/gto “Sentencing & Corrections/Links” to find the Web sites of sentencing commissions in many of the states cited above. For a bibliography of books and articles on sentencing guidelines in the states, go to the National Center for State Courts at www.ncsconline.org.

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The Bear River Band had never taken a stand on a U.S. judicial nomination, not until William Myers—who once approved mining on lands deemed sacred to another Native American tribe—was nominated for a lifetime appointment to the federal bench.

“There are some things done to some tribes [to which] the rest of us just say, ‘Oh no!’” says tribal vice-chairwoman Janice McGinnis in Loleta, California.

So, knowing nothing more about Mr. Myers, she signed off on a protest letter to the Senate Judiciary Committee. Some 175 groups have signed similar letters to derail President Bush’s nomination of the former Interior Department solicitor general to the 9th Circuit Court of Appeals—a sign of how deeply outside groups are engaging in Senate confirmations.

Although the Myers nomination cleared the Senate Judiciary Committee on a party-line vote last week, it will run into a full-court filibuster when it hits the floor of the Senate, as early as this week. In fact, Senate Democrats say all Bush nominations will be blocked, unless the White House agrees to stop making “recess appointments,” done during congressional breaks to bypass Senate confirmation.

The season of gridlock came early to Capitol Hill this spring. In a normal political cycle, presidents usually have until the summer to get judicial nominations through the Senate. The window is closing early this year due to the intense politicization of the process, and the perception that courts are, if anything, an increasingly important branch of government.

“The future of the federal judiciary is the single most important domestic issue facing America, and the next eight months could determine what the law of the land will be for 20 or 30 years,” says Ralph Neas, president of People for the American Way, which has taken a lead in organizing opposition to Bush judicial nominations. “That’s why we take it so seriously.”

Indeed, while the partisan logic of obstruction is present on other issues from welfare reform to the budget, courts are the big flash point. “The Democrats are trying to rev up their base by turning [judicial nominations] into a mano a mano confrontation,” says Sheldon Goldman, a political scientist at the University of Massachusetts at Amherst.

The Senate has confirmed 173 of the president’s judicial nominees, but three have been rejected by Democrats who said they were “outside the mainstream” and “had troubling records of judicial activism in service to extreme ideology.”

In response, Bush invoked his constitutional power to make recess appointments to put two of these nominees on the federal bench: Charles Pickering to the 5th U.S. Circuit Court of Appeals and William Pryor to the 11th Circuit. Unlike nominees confirmed by the Senate, recess appointees hold their positions only until a new Senate session begins.

Democrats say the move is unprecedented: “At no point has a president ever used a recess appointment to install a rejected nominee on to the federal bench. And there are intimations that there will be even more recess appointments in the coming months,” said Senate Democrat leader Tom Daschle. Unless the White House agrees not to make more recess appointments, he said there will be no cooperation on nominations.

The current dispute over recess appointments reopens a longstanding tension in the Constitution between the Senate’s responsibility to advise and consent on judicial nominations and the provision for flexibility on appointments when the Senate is not in session.

In fact, the use of recess appointments for judicial nominations was widely practiced up until the twentieth century. “There have been some 300 recess appointments to the federal bench since George Washington’s time,” says Louis Fisher of the Congressional Research Service. After President Eisenhower used recess appointments to seat three Supreme Court justices, the Senate passed a nonbinding resolution urging...
the president to not do so again. This held until President Carter proposed Walter Heen for a district judgeship in Hawaii on a recess appointment in 1980. The Carter Justice Department argued that recess appointments to the federal bench were an “accepted practice.”

The practice revived again in the closing days of the Clinton administration, when the president named Roger Gregory on a recess appointment to the 4th Circuit. “President Clinton opened the door,” says Mr. Fisher. “Now, it’s up to the two branches to find accommodation.”

Now, that struggle could bring judicial nominations to an early halt in the U.S. Senate, as outside groups promise to continue the epic battle over the issue.

In the Classroom...

Use these discussion questions, research activities, Web resources, and books to help students extend their understanding of the article and spur classroom discussion.

Discussion Questions
1. Under what authority do presidents make recess appointments to the federal courts?

2. Why did President Bush use recess appointments? What groups in the U.S. Senate were opposed to these nominees? Why?

3. Do you think that past actions by judicial nominees should be used to disqualify them from serving on the federal bench? What kinds of past actions?

4. How and why have “interest groups” become increasingly important in the confirmation or rejection of nominees to the federal courts?

5. Since the 1960s, there have been only a handful of recess appointments, after hundreds made by earlier presidents. Why has this practice become so uncommon?

Research Activities
1. What was the aftermath of this “impasse” between President Bush and the Senate over judicial nominations? How was the impasse resolved? What kind of agreement did the two sides reach? Do you think future presidents will make recess appointments?

2. Which president first used recess appointments to the federal courts? Under what circumstances? What was the response of the opposing political party?

3. Examine recess appointments for a period of time—e.g., the twentieth century, or 1850–1900 [see Web resources below]. What patterns can you find? Which political party’s presidents were more likely to use recess appointments? Were such appointments more common when the Senate was controlled by the opposing political party?

Web Resources
The Federalist Society [www.fed-soc.org/pdf/recapp.pdf] provides a complete listing of all recess appointments to the federal courts from George Washington to the present day.


For the aftermath of the gridlock between President Bush and the U.S. Senate, including the agreement reached between the two sides, see The Washington Post at: http://www.washingtonpost.com/wpdynd/articles/A37694-2004May18.html

For more information about recess appointee William Myers, see CivilRights.org at: http://www.civilrights.org/issues/nominations/details.cfm?id=24291

For Further Reading


sum, supposes that any change in public opinion or feeling, in relation to this unfortunate race [of blacks], in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. ... [Constitutional language] must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning. ...” (Fisher, 2001: p. 67).

During the fight between President Franklin Roosevelt and the Supreme Court over the New Deal, FDR accused the justices of applying outmoded judicial theories, while Justice George Sutherland declared: “A provision of the Constitution … does not admit of two distinctly opposite interpretations. It does not mean one thing at one time and an entirely different thing at another time.” In contrast, Chief Justice Earl Warren previewed the contemporary debate over constitutional meaning when he announced in 1954 that the Court sometimes looks to “the evolving standards of decency that mark the progress of a maturing society” (Murphy, Fleming, and Harris, 1986: p. 290). No less a judicial authority than John Marshall, the “Great Chief Justice,” and a member of the founding generation, observed in McCulloch v. Maryland (1819) that “a constitution [is] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs” (Fisher, 2001: p. 67).

Thus, both sides of the interpretation debate believe in an enduring constitution. Whether that endurance results from adherence to the framers’ “original intent” or the evolution of constitutional standards remains for each side to expound and each American to ponder.

Resources on Constitutional Interpretation

Primary Documents

The Constitution [Annotated]
www.gpoaccess.gov/constitution/index.html

The most authoritative and comprehensive annotation to the United States Constitution —its preamble, articles, and amendments. Provided by the U.S. Government Printing Office.

Books


Barnett provides an assessment of constitutional change based upon libertarian theory, arguing that the courts have been re-interpretng the original Constitution and its amendments to eliminate those parts that protect liberty from the power of government.


Bloomfield uses literary, political, and cultural sources to support the idea that even radical changes can be achieved through constitutional interpretation.


Kramer provides a detailed historical and populist argument that constitutional interpretation belonged to ordinary people during the colonial era and early years of the Republic, rather than to the courts, lawyers, and judges.


Lipkin analyzes changes in constitutional jurisprudence, arguing that judicial review plays a critical role in American democracy by reflecting cultural and political values.


Tushnet uses an analysis of politics and judicial decisions to argue that our nation has moved into a new (post-New Deal) constitutional era, one in which there are reduced aspirations for using law and the Constitution to achieve broader social justice.


Whittington discusses how the judiciary should interpret the Constitution, using arguments from American history and political philosophy. He argues that “original intent” provides a valuable method of constitutional interpretation.

Web Sites

Alliance for Justice
www.afj.org

The Alliance for Justice is a national association of public interest organizations working in such areas as the environment, civil rights, consumer rights, and women’s and children’s issues.

The Claremont Institute/Center for Constitutional Jurisprudence
www.claremont.org/projects/jurisprudence

The Claremont Institute seeks to restore the principles of the American Founding to their rightful, preeminent authority in our national life. The Institute’s Center for Constitutional Jurisprudence is a public interest law firm that uses litigation, amicus briefs, and education.
Here are some of the features you will find at the Web site for *Insights on Law & Society* at www.insightsmagazine.org

**Use** teaching and research activities focusing on judicial activism, judicial restraint, FDR’s Court-packing plan, and much more.

**Find** links to short biographies of Supreme Court justices who have exemplified judicial activism and judicial restraint.


**Check out** some of the best Web sites that provide annotations to every section of the Constitution and to the 27 amendments.

**Download** a free copy (pdf file) of a bulletin on *Marbury v. Madison*, which provides background on judicial review, teaching activities, and resources.

**Find** some of the best lessons online that complement this issue’s key themes and topics.

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The Jury, Civic Participation, and Equality

Read about the origins of the American jury and the eventual inclusion of people from all backgrounds as jurors. Learn about current jury issues and controversies. Use teaching activities and resources.