JUDICIAL REVIEW

From *Constitutional Analysis in a Nutshell* by James Baker and Jerre Williams

1. Origins of Judicial Review

The Supreme Court of the United States is the most powerful judicial body in the world. The manifestation of this power is the doctrine of "judicial review." The phrase "judicial review" is but a shorthand expression for the role the Court plays as the final authority on most, although not all, issues of the constitutionality of governmental acts. It "reviews" these acts to see that they conform to the Constitution. The Court engages not only in judicial review of the constitutionality of legislation, both state and federal, but also of the actions of the executive branch, state and federal, as well as decisions of other courts, both state and federal. The Court exercises its constitutional authority when it validates as well as when it invalidates what some governmental actor has done.

The institution of judicial review is so deeply engrained in the American system that it is difficult for us to conceive of our legal system without it. Our federal and state governmental powers are limited by the Constitution for the purpose of preserving individual liberty, and federal powers are further limited to preserve the powers of state governments. The Supreme Court exercises the ultimate authority in enforcing these limitations. Yet the concept of judicial review is a unique American invention. It is fair to say we developed the principle of judicial review out of the common law of England. Although England has a similar history, governmental philosophy, and governmental institutions, it never has developed a concept of judicial review. Indeed, most other Western democracies still do not have American-style judicial review, although there is a modern trend abroad toward greater judicial authority and independence.

The Constitution does not provide explicitly for the exercise of judicial review by the Supreme Court. Whether or not the power is implied by the language of the Constitution is in some dispute among constitutional historians. But the doctrine did not spring suddenly and spontaneously from the forehead of John Marshall, like Pallas Athena from the forehead of Zeus. Judicial review has a respectable intellectual lineage.

The concept of judicial review coalesced from three themes found in the common law in England and the formative law of the United States. The first theme is the concept of "divine law," which later became "natural law" to those who did not demand divinity in the law.

This concept of law—that there is divinely-ordained law higher than man-made law—was and is familiar enough. It is manifested in the Ten Commandments and other basic rules of human conduct found in other religions and ethical systems in all times and in all societies, what C.S. Lewis called the "Tao." The Framers believed that there was a body of ethical imperatives that were inherent in human nature and discoverable by human reason. These fundamental tenets, whether "divine" or "natural," have been viewed in our history as "higher law," higher than the temporal or secular law which governs everyday life. There are some eternal truths, self-evident and discoverable by the application of right reason, some propositions that are valid for all persons for all time, Truths with a capital "T."

The second fundamental theme is the principle of "due process of law," which has its beginnings in *Magna Carta* in 1215. The majestic generality "due process of law," widely used in modern constitutional law as a shorthand description for various procedural and substantive aspects of liberty, developed from the phrase "law of the land," found in Section 39 of *Magna Carta.* The phrase in *Magna Carta* expressed the then-radical principle that even the king was bound by the "law of the land." To the present day, we continue to boast that ours is "a government of laws, not of men."

The third coalescing theme was the 18th-century insistence that the fundamental law which controls the organization of government should be in writing. The British Parliament, in 1689, enacted the British "Bill of Rights." At the same time, Thomas Hobbes and John Locke were advancing the philosophical concept of the social compact. In their theories the natural law was converted to the concept of natural rights. Men and women existed in a state of nature and then they organized governments only for the purpose of protecting their rights and property. Thus, government was limited; and it was limited by the social compact, the agreement between the citizens and their government. While the social compact was not originally envisioned as necessarily having to be in writing, the idea that basic liberties must be formally stated for purposes of solemnity and protection became self-evident.

A more explicit fruition of this third theme was occurring simultaneously in the separate colonies. The acceptance of the need for a written constitution was a natural development from the colonial charters. The charters were the organic written principles of government of the charter colonies. They were detailed, and they were readily viewed as statements of the fundamental law controlling the operation of the colonies. These charters of government evolved into state constitutions between the *Declaration of Independence* (1776) and the drafting and ratification of the *Constitution of the United States* (1787). Some of these state constitutions notably contained specific provisions for judicial review of the acts of state legislative bodies.

These three themes were invoked as the basis for the creation of our nation by Thomas Jefferson in the immortal words of the *Declaration of Independence:*

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed * * *.

However, there remained the issue: Who in our governmental structure would define and enforce our fundamental rights? During the Constitutional Convention the concept of judicial review was discussed, but the Constitution itself contains no words which could be taken as stating clearly and unequivocally that this power to declare laws unconstitutional would exist in the newly created Supreme Court of the United States. *See* U.S. Const. art. III, § 1.

Yet there was one important formative constitutional document which did clearly recognize the power of judicial review before the principle was established by the Supreme Court. This was *Federalist Paper No. 78,* written by Alexander Hamilton as part of the series of newspaper articles urging the ratification of the newly-drafted Constitution. Hamilton set forth the principle of judicial review in determined and measured terms. In his discussion, he even presented some of the reasoning which Chief Justice John Marshall would borrow to write the Supreme Court opinion that would claim the power of judicial review for the Supreme Court in the name of the Constitution.

All of these developments came together in the great case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). This is the most important case in all of constitutional law because it established the doctrine of judicial review as a fundamental principle of American constitutionalism. The Supreme Court, in the famous opinion by Chief Justice Marshall, held unconstitutional a provision of the Judiciary Act of 1789 on the ground that the statute attempted to give original jurisdiction to the United States Supreme Court in a case in which the Constitution limited the Supreme Court's power to appellate jurisdiction only. The remarkable irony of this decision was that the Court established its great power of judicial review by holding unconstitutional a statute of Congress which attempted to give the Court more power—power to hear certain kinds of cases which the Court held the Constitution would not allow.

Actually, there was nothing controversial about the Judiciary Act. It had been written by Senator Oliver Ellsworth of Connecticut, a distinguished constitutional lawyer who was Marshall's immediate predecessor as Chief Justice. The statute's wording was somewhat ambiguous, but if the same issue were presented today, we would confidently expect the Court to interpret the statutory words to avoid a conflict with the Constitution. Chief Justice Marshall's organization and logic thus were strained and convoluted.

But the argumentation in his opinion was meticulous and detailed and even brilliant. He found the 59authority for the concept of judicial review lodged largely in two constitutional provisions. Article III sets up the judicial structure of the federal government, and the second clause of Article VI establishes the principle of the supremacy of the United States Constitution. The key words relied upon by the Court were the words of Article III, Section 2: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, * * *." The case of *Marbury v. Madison* was a "Case * * * arising under the Constitution," and the Constitution provides that "all" such cases are within the judicial power of the federal government.

The Constitution is law and "it is emphatically the province and duty of the judicial department to say what the law is." The "very essence of the judicial duty" is to follow the higher law of the Constitution—the written law ratified by the sovereign people—over a mere statute—enacted by the people's representatives in Congress. The Constitution is the law for the government. The Constitution trumps a statute so judges must prefer and enforce the Constitution over a statute. William Marbury lost his case and did not get to be a justice of the peace, but John Marshall went down in history as the greatest chief justice. The judicial branch was the real winner.

Shortly after this landmark decision, other decisions served to complete the dominance of the Supreme Court in constitutional matters. Acts of state legislatures were declared unconstitutional, *Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810); state criminal proceedings were made subject to Supreme Court review, *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264 (1821); and final decisions of the highest courts of the states were deemed reviewable in the Supreme Court under the Constitution, *Martin v. Hunter's Lessee,* 14 U.S. (1 Wheat.) 304 (1816).

It also is important to remember that the law of the Constitution applies to judges on lower federal courts and on state courts, so
consequently judges on those courts wield the power of judicial review to strike down acts of government as being unconstitutional,

although their decision-making is subject to the hierarchy of appellate review and the limitations of *stare decisis.*

The experience of the Court in dealing with the determined defiance and wholesale evasion by state officials of court orders concerning racial desegregation in the public schools proved to be the occasion for one of the most heroic invocations of the power of judicial review, in the critical case of *Cooper v. Aaron,* 358 U.S. 1 (1958). The decision grew out of the lawless defiance by the Governor of Arkansas of the federal court order to desegregate the public schools in Little Rock. In a symbolic act without precedent, the unanimous opinion of the Supreme Court was signed by each of the nine justices by name, and emphatically reaffirmed the historic decision in *Brown v. Board of Education,* 347 U.S. 483 (1954) declaring "separate but equal" schools to be a *per se* denial of the Equal Protection Clause. The *per curiam* opinion formally invoked Chief Justice Marshall's great opinion to say: "This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system." 358 U.S. at 18.

But the doctrine of judicial review—and the Supreme Court as an institution—both have their share of critics and defenders. They disagree whether the Justices do exercise judicial self-restraint or whether judicial review has devolved into a kind of judicial supremacy that Chief Justice Marshall could not have imagined. Conservative constitutional scholars on the political right and liberal constitutional scholars on the political left have tried to make the case that the country would be better off without judicial review, given the boundless hubris of the Supreme Court, although they cite different lines of cases as examples of the Court's villainy. These commentators go so far as to advocate that the Constitution be amended to relocate the ultimate final authority to interpret the Constitution in the Congress. There is no question that particular exercises of judicial review in particular decisions have been and will continue to be highly controversial, even historically so, but even those decisions have their supporters. Perhaps there is no better exemplar of the potential for controversy than the decision that determined the outcome of the presidential election of 2000, *Bush v. Gore,* 531 U.S. 98 (2000). Thus, the debate over the proper exercise of the awesome power of judicial review continues. Indeed, the academic debate over judicial review and the interpretation of the Constitution continues to rage in the law reviews without any sign of lessening.

2. Case or Controversy Requirement

This brief historical account of the development of the doctrine of judicial review leads us to consideration of the circumstances under which constitutional questions can be brought to the Supreme Court of the United States and decided there.

The first and critical requirement is that there must be a "case" *or "controversy"* in the vernacular of Article III. The case must be one that is appropriate for judicial determination. The Court does not decide academic questions of constitutionality in abstract or hypothetical situations. The dispute must be genuine and real between the parties. It must involve someone who will be actually harmed by the law or by some other governmental action that is being challenged as being unconstitutional.

The Court has generally defined a justiciable case or controversy to be a court proceeding which is a *bona fide* adversarial dispute in which important legal rights are being threatened by the governmental action in issue, the threatened harm will be directly caused by the governmental action, and the Court has the authority and power to redress the threatened harm and thus resolve the dispute. Feigned cases or friendly and collusive lawsuits are not the appropriate occasion for exercising judicial review. The parties must be genuinely adversarial; this provides the deciding court with the necessary perspective for decision. Someone must suffer some real, genuine harm from the governmental action being challenged, not some generalized grievance or fanciful complaint. It is by this means that the constitutional issues are developed and presented in a form appropriate for judicial review.

This requirement that there actually be a flesh-and-blood controversy involving real people caught in a real, live dispute is critical to understanding the function the Court is being called upon to perform. In so many words, Chief Justice Marshall's original justification for claiming the power of judicial review was based upon the constitutional responsibility to decide cases or controversies. It is not so much the Court's power in the abstract as it is the Court's proper role to provide a judicial remedy for individual harms from constitutional violations: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163 (1803). Judicial review is bottomed on the protection of the rights of the individual against the government.

Constitutional decisions necessarily depend upon the specific facts and circumstances presented in each case or controversy. Consider some straightforward examples of the need for actual cases to allow the Court to perform its judicial review

function. In determining the scope of power of the national government to control matters in interstate commerce, the Court has held that the federal power extends to all of those matters which "substantially affect" interstate commerce. A determination whether something affects interstate commerce necessarily depends upon the actual factual situation and relevant market facts.

Similarly, actual cases are necessary to the effective constitutional evaluation of statutes controlling subversive speech. It would be totally unrealistic to try to decide the constitutionality of a statute in the abstract without having before the Court the actual words uttered by the person accused of subversive speech or without knowing the context and setting. The Court must determine whether the words were prohibited by the statute and whether they were of such a clear and present danger to our governmental system that the government has the power to prohibit them in spite of the protection of free speech in the First Amendment.

A third example might involve the matter of controlling meetings in a public park through the issuance of permits. Such events, of course, involve issues of free speech and assembly. Suppose that the public authorities refuse to issue a permit for a particular event. What is the nature of the event? Are other similar organizations allowed to hold similar events in the park? Is there any substantial danger that the event will erupt into violence? Are there serious problems for noise or traffic control or littering or damage to public property in the park? All of these questions and more are critical to the determination of the constitutionality of denying the right to hold a particular meeting in a public park. Such issues cannot be resolved in the abstract.

The Justices perform as judges deciding cases or controversies, not as lawyers giving legal advice. The Supreme Court is not competent to deliver advisory opinions and to do so would violate the separation of powers. The Supreme Court, like all federal courts, is a court of limited jurisdiction. The judicial power of the United States is limited by the Constitution to decide only cases or controversies. U.S. Const. art. III, § 1.

The power to declare a law unconstitutional arises only when the act of Congress conflicts with the higher, fundamental law of the Constitution. In a case refusing to issue an advisory opinion, despite the express invitation of Congress, the Supreme Court explained:

> The exercise of this, the most important and delicate duty of this court, is not given to it as a body with revisory power over the action of Congress, but because the rights of the litigants in justiciable controversies require the court to

> choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government.

Muskrat v. United States, 219 U.S. 346, 361 (1911).

The requirement, then, is that to challenge the constitutionality of some governmental policy you must become involved in a lawsuit. You must sue someone or you must be the subject of someone else's lawsuit. The lawsuit can originate either in a state or federal court, and can be either a criminal case or a civil suit between private parties. One of the common and best known ways to challenge the constitutionality of regulatory legislation is to violate it for the purpose of creating a constitutional test. The fact that it is a test case does not in any sense lessen its genuineness, however. The individual making the challenge will suffer the consequences if his or her challenge is unsuccessful. In these more modern days of effective procedures, constitutionality is often challenged by a suit for declaratory and injunctive relief to halt enforcement of a regulatory statute.

3. Standing, Ripeness, and Mootness

The Supreme Court has undertaken to insure that the cases which it decides involve real parties and actual cases or controversies by developing the doctrines of "standing," "ripeness," and "mootness." Standing is the most important conceptually and practically.

The doctrine of standing in the party raising the constitutional issue basically requires that the party himself or herself have an actual stake in the outcome of the case. Return again to the simple situation of a requirement in a municipal ordinance that 67a permit must be obtained to hold a meeting in a public park. Suppose we have a well-meaning citizen who believes that meetings should be allowed in public parks without restriction. But this citizen is not planning a meeting in the public park, has never attended a meeting in the public park, and indeed never has used or intends to use that public park for any purpose whatsoever. This citizen is simply someone who believes that the ordinance is unconstitutional. The citizen has no "standing" to raise the constitutional issue concerning the granting of permits for meetings in that public park. The citizen has shown no reason why he or she should be allowed to raise this question. It is simply an abstract question to this particular person, a kind of generalized grievance shared by everyone; by comparison, the issue would not be an abstraction to someone who had been denied a permit for a meeting and was seeking a remedy in court.

The essence of standing is the determination that the person making the constitutional argument is the right person to present the issue to the court. First, the person must have sustained some injury in fact, not merely a fanciful, abstract, generalized, or hypothetical worry or concern that everyone has in common. Second, the injury must be fairly traceable to what the other party to the lawsuit did or did not do, *i.e.,* the other party has caused the injury. Third, the injury must be one that the court can remedy, *i.e.,* the injury is judicially redressable. The underlying constitutional principle is that the federal courts are reserved for resolving real live 68disputes that matter to someone and the Judicial Branch should not invade the policy-making province of coordinate branches. In the garden-variety tort lawsuit, the plaintiff sues the defendant who ran into the plaintiff's car asking for money damages; the injury, causation, and redressability are apparent and there is no guesswork about who should bring suit. In so-called public law cases that allege constitutional injuries arising from governmental policies and programs, standing can become rather metaphysical.

A troublesome question involving the right of the individual to raise constitutional issues is whether a taxpayer has the right to challenge how tax money is spent by the government. Does the fact that the taxpayer contributed to the Treasury from which the money for the spending emanates give standing to challenge the spending?

In *Frothingham v. Mellon,* 262 U.S. 447 (1923), the Supreme Court held that generally a taxpayer may not challenge spending from the U. S. Treasury. The interest of a single taxpayer is too small and too generalized to give standing to challenge federal expenditures. If this decision had gone the other way, theoretically every taxpayer would have been entitled to raise the constitutional issue of every instance of federal spending because every cent that the federal government spends must have constitutional authorization. Otherwise, the Judicial Branch—ultimately the Supreme Court—would have to sign-off on every expenditure of every federal program. That would prove too much, for the Court and for the Constitution.

But this holding did raise the specter of widespread, unconstitutional governmental spending which could never be stopped because no one could be found who would have standing to raise the constitutional issues in court. The Supreme Court made a distinction to allow taxpayer standing if the federal program being challenged is an exercise of the congressional spending power and if the federal action allegedly exceeds a specific constitutional limit on that power. So it was that when the federal Elementary and Secondary Education Act of 1965 provided for some federal financial aid to private religious schools, a taxpayer was afforded standing to challenge

the measure as being a violation of the First Amendment prohibition of the establishment of religion. *Flast v. Cohen*, 392 U.S. 83 (1968).

This is an important but a narrow exception to the general rule against taxpayer standing. A later Court distinguished *Flast* to hold that an organization dedicated to the separation of church and state could not bring suit to challenge the decision of a federal agency (not Congress) to give away federal land (not the spending of federal tax money) to a religious education institution. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). The law of standing is characterized by such distinctions.

In addition to the requirement that there be standing to raise the constitutional issue, the Court insists that the issue be "ripe" for judicial decision. Ripeness, as the metaphor suggests, is a matter of timing. The doctrine serves to avoid premature adjudication and the entanglement of the courts in abstract disagreements that may or may not mature into a genuine case or controversy. It further defines a posture of judicial deference vis-à-vis the other branches and other agencies of government. Potentially important constitutional cases usually present nettlesome legal issues that are best decided in the context of a fully-developed factual record without having to speculate what might happen and without having to fill in gaps with judicial guesswork. The Court will wait and see what happens and then decide the issue with the benefit of hindsight.

A good example of how the doctrine of ripeness works is *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). The case involved a constitutional challenge against the Hatch Act ban on partisan political activities by federal employees. The Court held that federal employees who claimed only that they planned to engage in various types of political activity sometime in the future did not present an issue that was ripe for constitutional decision. They had not yet undertaken to do these things but were simply thinking about doing them, so they had not yet been injured by the statute.

The political employees involved were the ones who ultimately were going to be harmed by the statute, and they were planning the kind of activities that would bring them into direct violation of the statute. It can be said, therefore, that they were proper persons to have standing because their legal rights were threatened. But they had not gone far enough in their planning or activities to make the issue one that should be decided now. So the constitutional issues had not matured; the issues were not yet ripe. Fortunately for the purpose of resolving the issues involved in the constitutionality of the Hatch Act, one of the government employees bringing the suit had in fact actually engaged in some of the kind of conduct that violated the statute. So, as to that particular

employee, the case clearly was ripe, and the Supreme Court did reach and decide the constitutional merits of the statute as it applied to this government employee.

If the ripeness doctrine is about a lawsuit brought too early, the mootness doctrine is about a lawsuit brought too late. The case or controversy limitation on federal courts permits them to decide only on-going disputes between parties with a live personal stake in the outcome. If events subsequent to the filing of a lawsuit in effect resolve the dispute, the case must be dismissed as moot, whether at the trial level or on appeal, and even in the Supreme Court itself. Various subsequent events might moot a case. If the parties settle the matter, the controversy is no longer alive. If the challenged statute or regulation expires or is repealed, the controversy is over. Any change in circumstances that has the practical effect of ending the dispute is grounds for declaring the lawsuit moot.

DeFunis v. Odegaard, 416 U.S. 312 (1974) is a dramatic example. The case presented the important issue whether affirmative action policies in state university admissions programs violated the Fourteenth Amendment. By the time the case was fully-briefed and orally argued in the Supreme Court, however, the plaintiff bringing the challenge was enrolled in his last quarter of law school and the university represented to the Court that he would not be prevented from completing his degree program. The Supreme Court dismissed the case as moot and did not reach the merits of this important issue, an issue that roiled in the courts for three decades.

Contrast that case with *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115 (1974), decided the same day. The labor strike the plaintiffs had held was over by the time their case challenging restrictive state regulations finally reached the Supreme Court. The Court had no trouble reaching and deciding the merits, however, because those same plaintiffs might go out on strike again and so the issue of the constitutionality of the state regulations was deemed "capable of repetition but evading review" and therefore not moot.

A simple mnemonic for the requirements of standing and ripeness/mootness is found in the words of Justice Stone in the case of *Nashville, Chattanooga & St. Louis Railway v. Wallace,* 288 73U.S. 249, 262 (1933). In that opinion, he referred to "valuable legal rights" that were being "threatened with imminent invasion." The valuable legal rights constitute the standing and the threat of *imminent* invasion constitutes the ripeness/mootness.

The various doctrines originating in the case or controversy requirement have the effect of opening or closing the door to the federal courts for litigants and their

constitutional questions. How an individual Justice applies these doctrines has a lot to do with the Justice's vision of the proper role of the Third Branch.

4. Jurisdiction and Procedures

Great constitutional cases often begin in humble circumstances, in the every-day life of regular people who demonstrate the courage of their convictions. For example, one of the greatest cases in the history of the Supreme Court involved the decision by an 11–year-old African–American school girl named Linda Brown in Topeka, Kansas, who, with her parents, brought suit challenging the legal requirement that she had to attend a separate public school for blacks. This, of course, was the famous case of *Brown v. Board of Education,* 347 U.S. 483 (1954) & 349 U.S. 294 (1955), which struck down *de jure* segregation in the public schools and eventually led to the dismantling of the racial apartheid in the South known euphemistically as "Jim Crow."

Constitutional issues arise in the interrelations between the government and the individual. A police officer breaks up a demonstration. A city official refuses a parade permit. A public school teacher is fired. A fire fighter is passed over for a promotion. A prisoner challenges the procedures that were followed at the criminal trial. Such are the beginnings of constitutional cases or controversies.

Like all the other federal courts, the Supreme Court is a court of limited subject matter jurisdiction. A case must fall within "the judicial Power of the United States," as defined in Article III of the Constitution. Congress has enacted jurisdictional statutes for the Supreme Court. Under the Constitution and these statutes, the Supreme Court has original jurisdiction and appellate jurisdiction.

Cases can be filed directly in the Supreme Court's original jurisdiction only in the most limited circumstances. In theory the original jurisdiction of the Supreme Court is self-executing and needs no statutory implementation, but because there has always been a statute on the subject the theory has never been tested. U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251. The most common type of case filed in the Supreme Court's original jurisdiction involves a dispute between two states, for example, a boundary dispute or a suit over water rights in an interstate river. Here the Court's jurisdiction is original and exclusive. The Court itself does not hold a trial, instead the matter usually is referred to a special master who conducts a hearing and then makes recommendations how to resolve the dispute. In some other classes of cases, the Court's jurisdiction is original and not exclusive so that the Court can and normally will stand by and allow for the matter to be resolved in the first instance in a lower federal court. Consequently, the

original jurisdiction cases do not amount to a large or an important part of the Court's docket today.

Under Article III, Section 2, Clause 2, Congress has the power to make exceptions to the appellate jurisdiction of the Supreme Court, unlike the original jurisdiction. The Supreme Court understands this power to mean that a statute that grants specified appellate jurisdiction necessarily implies an exception of any and all jurisdiction not specified. By explicitly providing for certain types of appeals, the Congress impliedly negates all other types. Congress can go so far as to repeal an appellate jurisdiction after a case has been briefed and argued but before it has been decided, and the Court can only dismiss the case for want of subject matter jurisdiction. *Ex parte McCardle,* 74 U.S. (7 Wall.) 506 (1869). Congress's power does not go so far, however, as to reopen and redetermine cases that have been fully and finally resolved by the courts. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

Constitutional issues arise in cases in federal and state trial courts throughout the country. Once a case involving a constitutional issue begins, it follows the established procedures of that court system for all cases. Typically, there is trial and a final judgment followed by one appeal as of right. There is no guarantee, however, that the constitutional issue will be decided by the Supreme Court of the United States. Our highest Court has a limited jurisdiction and in most instances the discretion whether to hear and decide a case.

Cases arrive at the United States Supreme Court from either a lower federal court or the highest court of the state, usually called a supreme court, but occasionally called a court of appeal. If, under state procedures, the case is not within the jurisdiction of the highest state court but contains a constitutional issue, it can go directly to the Supreme Court from the lower state court that has the final authority to rule on the issue. *See* 28 U.S.C. § 1257(a). There are three procedures under which a case may move from a lower federal court or a state's highest court to the Supreme Court of the United States.

The first of these three procedures is "certification"—a technically-possible though highly-improbable procedure under which the United States Court of Appeals, one of the regional courts which hear appeals as-of-right in the federal system, can state a particular legal issue and ask the Supreme Court for a binding decision on the issue. The Supreme Court can then either answer the question or call the entire case up for review. Although this procedure is still "on the books" it is almost never used. *See* 28 U.S.C. § 1254 (2). The same statute does provide, however, for the extraordinary procedure of the Supreme Court taking a case up for review before the United States Court of Appeals has ruled, a procedure the Supreme Court follows in rare and historic

cases when an expeditious and final decision is a matter of imperative public importance and an intermediate appeal would serve no judicial purpose. *See* 28 U.S.C. § 1254 (1); Sup. Ct. R. 11. The Supreme Court bypassed the Court of Appeals to bring up *United States v. Nixon,* 418 U.S. 683 (1974), and then ruled that President Nixon had to obey a district court subpoena of tape recordings of his White House conversations, a ruling that directly led to his resignation under threat of impeachment by the House of Representatives.

Earlier jurisdictional statutes elaborately distinguished between the two other procedures for achieving Supreme Court review. First, some cases were heard by "appeal"—using the word in a narrow technical sense to mean a statutory right to have the merits decided. Second, some cases were heard by the Court "granting a writ of *certiorari"—by* which the losing litigant asks and the Court exercises its discretion to grant review. Some of the older cases in your casebook will sometimes make this distinction. One other distinction under the former statutory scheme was that every affirmance and reversal of an appeal was a decision on the merits and carried some precedential effect. Even so, the Justices managed to avoid deciding a considerable proportion of appeals on jurisdictional grounds, such as dismissals for want of a substantial federal question.

In 1988, responding to this reality and to the Justices' entreaties for more formal control over their docket, Congress all but did away with Supreme Court appeals. *See* Act of June 27, 1988, Pub. L. No. 100–352, 102 Stat. 662. Appeals are still technically a matter of right only in cases decided by a three-judge district court, which is nearly an extinct creature of the federal court system now limited by statute to trying challenges to the constitutionality of the apportionment of congressional districts and statewide legislative districts. 28 U.S.C. § 2284(a). Consequently, appeals arise in few cases and now show up on the Supreme Court's docket on the ten-year census-and redistricting cycle.

Today, most all of the cases the Supreme Court hears and decides, whether from lower federal courts or the highest court of the state, are there only because the Court in its discretion has granted a petition for a writ of *certiorari.* 28 U.S.C. §§ 1254 & 1257. The Justices' discretion over their docket is virtually complete and they have delegated considerable responsibility to their law clerks, the best and the brightest of recent law school graduates who serve a one year apprenticeship usually after having spent a year in the chambers of a federal appeals court judge. The petition and a response are filed with the Court, then a law clerk in the "cert pool" writes a short memorandum to recommend whether or not the case is "certworthy." Any individual Justice can place a petition on the "discuss list" for

a vote at their Conference but most cases do not even make it to the discuss list. Under the Court's rules, only compelling cases which present an important issue of federal law or a conflict in the way lower courts have ruled have a viable claim on the Justices' discretion. Sup. Ct. R. 10. But 99 out of 100 cases are denied review by the Skinnerian black-box of *certiorari.*

Thus, the clichéd threat, "I will take this case all the way to the Supreme Court!" may be literally possible, but the odds are greatly against obtaining a Supreme Court ruling on the merits of any case. In the vast majority of cases brought before them, the only thing the Justices officially conclude and formally announce is that they will not hear or decide the issues. "The petition for a writ of *certiorari* to the court below is denied" is the lawyers' parlance. "Certiorari" was the name the common law gave a writ from a higher court to a lower court ordering that the record in a case be sent up for review. This is why newspapers can be very misleading when they report that the Supreme Court "approved" of some ruling by some lower court, when all that the Justices have done is to deny review. By tradition, it takes four Justices to agree to hear a case. Thus, a minority sets the agenda.

The Supreme Court sits *en banc,* that is, all the Justices participate and decide every case. Its annual Term begins the first Monday in October and continues usually through the end of June. Its annual docket consists of more than 8,000 cases. Each October Term, the Court hears oral arguments (usually 30 minutes per side) and reads briefs (something of a misnomer for book-length written arguments filed by lawyers) in fewer than 80,100 cases—in recent Terms right around 80 cases. For these argued cases, the Justices write detailed, scholarly opinions, like the ones excerpted in your casebook but much longer. More often than not, some of the Justices will write concurring opinions, explaining why they agree with the outcome but for different reasons, and others will file dissenting opinions, explaining why they think the majority is wholly mistaken. The Chief Justice—or the most senior Justice in the majority when the Chief Justice is in the minority—assigns the responsibility of preparing a draft opinion for the Court. Individual Justices, however, are free to write separate opinions, and frequently do so, expressing their own views in a case. A full set of opinions in a major decision can run well over a hundred pages.

All documents and briefs are matters of public record. Oral arguments are conducted in public. The decisions are announced in open court and then published. The only secret procedures are the Justices' conference—when the nine meet without any others present to discuss and vote on cases—and their confidential individual work in chambers. The Justices are aided by their law clerks in the arduous task of preparing opinions: researching the law, checking the lower court record, studying briefs and

legal authorities, and exchanging memoranda with each other to argue points of law and to suggest changes in drafts. Not infrequently, this secret back-and-forth can result in one or more of the Justices rethinking an earlier vote thus shifting the ultimate outcome 180° in a closely-decided case.

In the 2000 October Term, the Court resolved 85 cases fully on the merits—only about 1.3% of the total petitions—and reversed or vacated 56 (66%) of them. The nine Justices wrote 85 majority opinions, 49 concurring opinions, and 64 dissenting opinions. There were 36 (42.4%) unanimous decisions. There were 26 (33%) decisions by a five to four vote. Volume 531 of UNITED STATES REPORTS, the official reporter for the Supreme Court, contains 1205 pages of opinions on the Term's decisions. Thus, each year another ponderous Talmudic volume is added to the shelves of published interpretations of our great charter.

One thing is certain, whether the Court denies review or grants review and decides the merits: there is no further appeal. Justice Robert H. Jackson once aptly described the High Court's place atop the judicial hierarchy: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

5. Avoiding the Merits

The requirements for subject matter jurisdiction may be satisfied, but there are still some possible procedural obstacles to an authoritative constitutional decision of the merits of the case. Sometimes the Supreme Court will change its mind about the "cert-worthiness" of a case after further study, even after briefing and oral argument, and enter an order to dismiss as improvidently granted or "DIG" the case in insider terminology.

The Supreme Court has frequently admitted an institutional reluctance to pass on the constitutionality of a duly-enacted statute even when the case technically falls within the counter-majoritarian doctrine of judicial review. Neither the convenience of the parties nor the importance to the public nor the policy preferences of the Justices are controlling. In his famous concurring opinion in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936), Justice Brandeis codified a series of prudential rules under which the Supreme Court has avoided making an unnecessary or inappropriate constitutional ruling. He identified several categories of avoidance: a friendly or collusive suit, advisory opinions, issues not yet ripe for decision, the party bringing suit lacks standing from some injury in fact suffered resulting from the unconstitutional law which will be redressed by a judgment, an interlocutory appeal without a full and

final judgment, and moot cases. These categories are familiar from the discussion earlier in this Chapter. Three other rules of judicial self-restraint deserve further amplification here.

First, there is an appellate procedural requirement that the Supreme Court has in common with all other appellate courts which applies to constitutional issues as well as to other issues on appeal, namely, the contemporaneous objection rule of procedure. Constitutional law issues must be formally preserved as error to be appealable. A timely and proper objection must be made at trial to afford the trial court an immediate opportunity to avoid the alleged error and to signal the importance the party attaches to the question. Likewise, the issue must be presented on the first appeal as of right, again to offer that court the opportunity to remedy the error. This practice systematically reduces the need and demand for constitutional decisions by the Supreme Court and is a matter of deference towards the lower courts in the judicial hierarchy, as well. The writ of *certiorari* affords the Supreme Court complete control to select which of the issues presented in the petition will be granted review even so far as when the Court actually redrafts and restates the issue or issues to be briefed and argued by the parties.

Second, the Court will not consider a constitutional issue if the case has been disposed of in the lower court on some other non-constitutional ground which is sufficient to justify the final decision. The non-constitutional ground can be procedural or substantive. The non-constitutional ground must be independent and adequate. It must be independent of the federal constitutional ground and not be entwined with it either explicitly or implicitly. It must be adequate in the sense of being *bona fide* and broad enough to sustain the judgment and dispose of the case, *i.e.*, of sufficient legal significance to decide the case and to justify the Supreme Court's declination to reach the federal constitutional issue.

In cases from the highest court of a state, the independent and adequate state ground doctrine demonstrates due respect for the state court and 84avoids the risk of rendering unnecessary or advisory opinions in matters of federal constitutional law. Consequently, in *Michigan v. Long*, 463 U.S. 1032 (1983), the Supreme Court announced the prudential rule that a state supreme court must clearly state in its opinion that it is deciding the case on the independent and adequate state law ground and then the United States Supreme Court will not hear or decide the case. Otherwise, without the plain statement, the federal constitutional issue will be deemed still in play and subject to judicial review by the Supreme Court. In close and difficult cases, the Supreme Court still may remand the case to the state supreme court for a clarification of the basis of its decision.

The independent and adequate state ground doctrine highlights the importance of the Supremacy Clause and the structure of federalism. The interpretations of the United States Constitution by the United States Supreme Court establish the floor below which the state courts cannot go in protecting individual rights; state supreme courts can raise the ceiling and afford greater protections by interpreting state rights under the state constitution. For example, once the United States Supreme Court determined that commercial speech was protected by the First Amendment, a state supreme court could not reinterpret the First Amendment or some provision of the state constitution to say it somehow was not protected. That is the floor. However, once the United States Supreme Court ruled that obscene material was not protected by the First Amendment, a state supreme court could still interpret its state constitutional rights of conscience to protect obscene material. That would be raising the ceiling.

Third, one of the most significant of the prudential rules of self-restraint in the exercise of judicial review obliges the Supreme Court, in effect, to interpret any congressional statute being challenged in a way that makes it constitutional and valid. Faced with a statute that is ambiguous, as is often the case, the deciding court must chose between a broader interpretation that would make it unconstitutional and invalid versus a narrower interpretation that would render it constitutional and valid. It is obviously better for the administration of justice to chose the narrower interpretation when it is reasonable and appropriate. The Court should not go out of its way to declare statutes unconstitutional. It should not assume that the Congress intended to pass a statute that would be unconstitutional rather than one that would pass constitutional muster. Indeed, the assumption is just the opposite: whenever an otherwise acceptable construction of a statute would raise serious constitutional problems, the Supreme Court will interpret the statute and give it a reading that avoids such problems unless that reading is contrary to the plain intent of Congress. *Solid Waste Agency v. United States Army Corps of Engineers,* 531 U.S. 159, 173 (2001). This mechanism of interpreting statutes in a constitutional manner is a matter of deference to the Legislative Branch that is commonly used by the federal courts with regard to federal statutes and by the high courts of the states concerning their own state statutes.

There is, however, one quite important limitation on this judicial technique: the inexorable principle that the Supreme Court of the United States may use this technique only with respect to *federal* statutes. It cannot interpret state and local statutes to render them constitutional. Rather, the Supreme Court must accept the state statute as it has been duly interpreted by the state court. The Supreme Court has no authority to narrow a state statute to make it constitutional. This principle necessarily results in some decisions by the Supreme Court declaring state statutes and city ordinances

unconstitutional in situations in which, if the statute were federal, the laws would not be declared unconstitutional but would simply be given a narrower interpretation.

This may be part of the reason that in the 200–plus years the Supreme Court has been reviewing statutes it has struck down an order of magnitude more local and state laws (approximately 1000) than federal statutes (approximately 150) as being unconstitutional. Recall that Justice Holmes once observed that he did not believe the United States would come to an end if the Supreme Court lost its power to strike down acts of Congress, but he did believe that the Union would be imperiled if the Supreme Court did not take seriously its responsibility to strike down unconstitutional state laws.

Federalism and the concept of state sovereignty oblige this approach to state and local laws on the part of federal courts. The state court is the final authority on the meaning of its own state laws. No provision in the Constitution authorizes any part of the federal government to determine for a state what its law is. So too the Supreme Court of the United States has no authority whatsoever to change the definitive interpretation of state law by a state high court. It may and must, however, evaluate its constitutionality based on how the state law has been interpreted by the state court.

This is in some ways a peculiar and radical doctrine—the highest court of the state is *the final authority* on the interpretation and application of state laws. One important manifestation of this principle may be found in the so-called *Erie* Doctrine which is often the bane of first year Civil Procedure. *See Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938). As a matter of constitutional law, state law, not general federal common law, is the rule for decision in a diversity suit in federal district court between parties from different states. *See* 28 U.S.C. § 1332. A federal court must follow the lead of the state's highest court and must go so far as to follow the lead of lower state courts when there is no decisional law from the state's highest court; the federal judge must imagine how a state court would rule even if no state court has ever actually ruled on the question of state law at issue. However, the rule of state law that the federal court discerns, even if the federal court is the Supreme Court, is not at all 88binding precedent on the state courts in subsequent cases. Our federalism is a complicated system of government.

6. Nonjusticiable Political Questions

The power of judicial review is the power to interpret the Constitution in deciding cases and controversies. There is a category of cases, however, in which the Supreme Court interprets the Constitution to conclude that the issues presented are not proper issues for a court to decide in a case or controversy. Rather, political questions

are to be resolved fully and finally by the coordinate political branches, the elected branches of the federal government, namely, the Congress or the President. This is an aspect of separation of powers in the federal government, particularly regarding the relationship and role of the Judicial Branch vis-à-vis the other two branches.

The Judicial Branch is constitutionally compromised from dealing with certain themes of government, for example, the procedures for amending the Constitution in Article V, the clause that guarantees to each state a republican form of government in Article IV, and the whole field of foreign relations, which is not addressed in so many words in the Constitution but which is understood to be an inherent aspect of external sovereignty under the primary control and responsibility of the President. See *United States v. Curtiss–Wright Export Corp.,* 299 U.S. 304 (1936); *Luther v. Borden,* 48 U.S. (7 How.) 1 (1849).

The "political question" doctrine—which the Justices also refer to as the "nonjusticiability doctrine"—does not place off limits all issues or all cases that are somehow related to politics. Quite the contrary is the case. *See Bush v. Gore,* 531 U.S. 98 (2000) (resolving the Presidential election). The modern case that redefined the doctrine held that an Equal Protection challenge to the malapportionment of a state legislature was justiciable. *Baker v. Carr,* 369 U.S. 186 (1962). The holding was predictable once it was understood that the separation of powers was not in play. The case was about the Fourteenth Amendmentand the state legislature and had nothing to do with the Congress or the President. There are several formulations of the political question doctrine, each one being a reason for the court to dismiss the case: (1) a constitutional commitment of the issue to a coordinate branch; (2) a lack of judicially-manageable standards; (3) an initial policy determination calling for nonjudicial discretion; (4) the impossibility of deciding the case without disrespecting the other branches; (5) an unusual need to adhere to the political decision already made; and (6) the potential for embarrassment from multiple conflicting pronouncements by the different branches. These factors are rather abstract and the modern Supreme Court seems quite reluctant to apply them to find an issue is a political question and nonjusticiable.

The judicial corollary to the political question doctrine, which preserves the power of judicial review, is that whether one of these formulations applies to commit the issue to a coordinate branch and the scope of that commitment are matters for the courts to hear and decide. The Supreme Court thus remains the ultimate interpreter of the Constitution. *Powell v. McCormack,* 395 U.S. 486 (1969).

If the Supreme Court determines that a case presents a nonjusticiable political question, that determination has the ultimate effect of leaving in place the decision of the coordinate political branch and that branch's underlying interpretation of its own constitutional powers. For example, the Supreme Court held that the procedures the Senate hadfollowed in an impeachment trial of a federal judge, including a Senate rule by which a committee heard evidence and reported to the full Senate, were within the constitutional commitment of Article I, Section 3, Clause 6 that "The Senate shall have the sole Power to try all Impeachments." Thus, the Supreme Court's refusal to decide the merits allowed the Senate to determine its own procedures without being subject to judicial review. *Nixon v. United States,* 506 U.S. 224 (1993).

7. Conclusion

It is a solemn moment, full of drama and importance, when the Marshall of the Supreme Court intones:

> *Oyez, oyez, oyez!* All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court.

But each and every case has followed a prescribed jurisdictional and procedural path to that moment. Each and every case tells a story about real flesh-and-blood people, a genuine case or controversy over the wrongs they have suffered and the rights they seek to remedy. What the Supreme Court decides will determine the rule in their particular case and settle the general rule of law that is the Constitution for the entire nation.