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From Marbury v. Madison to Bush v. Gore: 200 Years of Judicial Review in the United States

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LECTURE

FROM *MARBURY v. MADISON* TO *BUSH v. GORE*: 200 YEARS OF JUDICIAL REVIEW IN THE UNITED STATES

Delivered by Stephen R. Alton[†]

Judicial Review is the foundation of the rule of law in the United States. In this Lecture, the author examines the history and theory of judicial review in the United States as well as certain aspects of the development of the doctrine by the United States Supreme Court. The author uses the case of Bush v. Gore *as a recent illustration of the practice of judicial review, and he concludes with some general observations about judicial review and the rule of law in the United States.*

The author delivered this Lecture in April 2001 at People's University Law School and at Peking University Law School, both in Beijing, China. This Lecture was designed to give the author's Chinese audiences an introduction to judicial review in the United States. China's legal system does not include an institution that is comparable to American judicial review, and the Chinese audiences found the institution interesting. The Chinese translation of this Lecture is scheduled to be published by the Wuhan University Law Review *during 2002.*[‡]

Judicial review is the power of the United States federal courts to invalidate governmental actions, including statutes enacted by the legislative branch, on the ground that they are inconsistent with the United States Constitution. In a larger sense, the topic of this Lecture is the rule of law, for which judicial review forms the basis in the United States.

This Lecture consists of three parts. In the first part, I will lay out the background behind judicial review in the United States—the history, the theory, and the constitutional structure. In the second part of this Lecture, I will discuss some of the major United States Supreme Court cases that established and developed the doctrine of judicial review. In the third, and final, part, I will present the recent case of *Bush v. Gore*[1] as an example of the major points that have

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1. 121 S. Ct. 525 (2000).

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been developed earlier. Finally, I will conclude with some general observations about judicial review and the rule of law in the United States.

I.

Before we speak of the power of judicial review itself, some historical and theoretical background is in order. The founders of the American Republic, particularly the framers (drafters) of the United States Constitution, mistrusted governmental power. They had in mind the example of the English government. They believed that the King and the Parliament had become too powerful and had sought to deprive them of their natural rights. Because of this, they had declared their independence from England in 1776.

Thomas Jefferson's Declaration of Independence drew heavily on the natural rights philosophy of the English political philosopher John Locke. According to Locke, all people possess certain basic or natural rights that include the right to life, liberty, and property. Locke believed that the purpose of government is to protect these natural rights. When the government fails in this purpose—when it breaches the social contract from which it draws its legitimacy—the governed have the right to withdraw their consent and to form a new government that will fulfill its part of the social contract and protect the people's basic rights.[2]

For John Locke in the 17th Century, the ideas of natural rights and the social contract were only theoretical. But for Thomas Jefferson and the generation who declared American independence from England in the 18th Century, these ideas were reality. In Jefferson's words of 1776, Locke's "natural rights" to "life, liberty, and property" became the "unalienable rights" to "Life, Liberty and the pursuit of Happiness."[3] Because the English government had become destructive of these rights, the Americans were withdrawing their consent to be governed by England and were forming their own government—the government of a new nation. For the first time in recorded political history, John Locke's social contract theory was being put into practice.

The key question that the American people had to answer in the years immediately following their Declaration of Independence was this: What type of new government should they devise to govern them? This was an exceedingly difficult issue in the years between 1776, when they declared their independence, and 1788, when they ratified their constitution establishing the new form of government. The founders of the American Republic wanted to ensure that the

2. *See generally* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT chs. IX, XIX (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690).

3. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

new national government would be powerful enough to deal with the nation's problems. But, keeping in mind their experience with the English government, they did not want their national government to be so powerful that it would threaten the American people's natural rights.

In 1787, a number of these men met in Philadelphia, then the nation's capital, and drafted the United States Constitution. The Constitution created a new and ingenious system of governing what was, by Western European standards, a geographically large nation. The Constitution established a federal system of government whereby the states retained their sovereignty, including all powers not delegated in the Constitution to the new national government. The national government, though supreme, was one of limited powers. It possessed only those powers listed or enumerated in the Constitution—those powers delegated to it by the people. This federal system, with the national (federal) government exercising only the enumerated powers delegated to it, was one means that the Constitution's framers used to ensure that the national government would not become so strong that it would threaten the rights of the governed.

The other means used by the Constitution's framers to ensure that the national government would not violate the natural rights of the people was the structure of the national government that was established under the Constitution. Drawing heavily from the philosophy of the 18th Century French political philosopher Baron de Montesquieu, the framers divided or separated the powers of the national government among three branches of government. The legislative branch—the Congress—would make the laws. The executive branch—led by the President—would execute the laws. And the judicial branch—the courts—would interpret the laws. This separation of powers among the three branches of the federal government was, in the words of James Madison, "essential to the preservation of liberty."[4] Madison was the primary drafter of the United States Constitution and is known as "the father of the Constitution." To Madison and the other framers, Montesquieu's separation of powers theory was the best means of keeping any one branch of the federal government from accumulating so much power that it would overwhelm the other branches—and overwhelm the people's freedoms.[5]

But Madison and the other authors of the United States Constitution went beyond Montesquieu's separation of powers theory. Not only should the powers of government be separated or divided among the three branches of their national government, but each branch should have certain powers that would balance and check the powers of the other two branches. Said Madison, "the great security against a

4. THE FEDERALIST NO. 51, at 261 (James Madison) (Garry Wills, ed., Bantam Books 1982).

5. *See generally* THE FEDERALIST NO. 47 (James Madison).

gradual concentration of the several powers in the same department, [i.e., branch] consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others . . . . Ambition must be made to counteract ambition."[6]

So, the powers of the federal government would be separated and distributed among its three branches. To the extent practicable, each branch would be given roughly equal governmental power as compared with the power of the other two branches. And each branch would possess certain unique powers that checked the powers of the other two branches. This elaborate governmental structure created by the Constitution would help to guarantee the rights of the governed by preventing undue concentration of governmental power in any one branch. As Madison observed,

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself.[7]

What were these "controuls" about which Madison wrote? What were these checks that he and the other framers of the Constitution built into the national government's three branches? I would like briefly to discuss some of the most important of each branch's checks on the others.

Article I creates the United States Congress[8] and endows it with its famous enumerated powers.[9] However, Congress's power to legislate is checked by the President's power to veto legislation.[10] If the President vetoes a bill passed by both houses of Congress after it is presented to him, the bill will not become law, unless the Congress exercises its counter-check on the President's veto power.[11] That is, if at least two-thirds of the members of each house of Congress vote to enact the bill over the President's veto, the veto is said to be overridden, and the bill becomes law despite the prior veto.[12] In the legislative realm, the presidential veto power, coupled with the Congress's power to override a veto, is the most important pair of checks between the legislative and executive branches of the federal government.

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6. THE FEDERALIST NO. 51, *supra* note 4, at 262.
7. *Id.*
8. U.S. CONST. art. I, § 1.
9. U.S. CONST. art. I, § 8.
10. U.S. CONST. art. I, § 7, cl. 2.
11. *Id.*
12. *Id.*

The legislative branch—the Congress—possesses another important check against, not only the executive branch, but also the judicial branch of the government. Article II gives the Congress the power to remove the President, the Vice President, and all civil officers of the United States by means of the impeachment and removal process set out in Article I.[13] This impeachment and removal power includes the power to remove federal judges from their benches. If a majority of the House of Representatives votes to impeach one of these officers[14] and two-thirds of the Senate votes to remove the officer,[15] he or she is removed from office.[16] This power is the ultimate legislative check against the other two branches of the federal government.

Article II creates the United States President[17] and endows him with certain powers,[18] including the power to make certain appointments.[19] According to Article II, the President appoints the ambassadors to foreign nations, the executive officers of the federal government, and the federal judges.[20] But this appointment power of the President is checked by the United States Senate's power to confirm—or refuse to confirm—the President's appointments to these posts.[21] Article II gives the Senate another important check over the President's powers, this in the area of foreign affairs. While the President has the power to make treaties with other nations, these treaties will become valid as United States law only if and when two-thirds of the Senate votes to ratify them.[22]

Now, let us turn to the checks involving the federal judiciary. Article III of the Constitution creates the judicial branch of the federal government.[23] Article III, Section 2 gives the federal courts broad, though limited, jurisdiction to decide certain "cases and controversies."[24] Section 1 of Article III specifies a federal judge's term in office; judges "shall hold their Offices during good Behavior."[25] So, unlike the President and the members of Congress, United States judges do not serve for a given term of years nor do the judges stand for periodic election to their positions. Instead, as Article II makes

13. U.S. CONST. art. II, § 4 (referencing U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6–7).
14. U.S. CONST. art. I, § 2, cl. 5.
15. U.S. CONST. art. I, § 3, cl. 6.
16. U.S. CONST. art. II, § 4.
17. U.S. CONST. art. II, § 1, cl. 1.
18. U.S. CONST. art. II, § 2.
19. U.S. CONST. art. II, § 2, cl. 2.
20. *Id.*
21. *Id.*
22. *Id.*
23. U.S. CONST. art. III, § 1. Article III, Section 1 expressly creates only the United States Supreme Court, but it gives Congress the power to create "such inferior Courts as the Congress may from time to time ordain and establish." *Id.*
24. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) (interpreting U.S. CONST. art. III, § 2).
25. U.S. CONST. art. III, § 1.

clear, federal judges are appointed by the President, subject to confirmation by the United States Senate.[26] Moreover, these judges serve until either they decide to retire, they die, or they are removed from office through the Congress's Article I impeachment and removal process. The presidential appointment process and the Congressional removal process are the only two constitutional checks possessed by these two branches against the federal judiciary. Because the federal judiciary is the only branch of the three that is not subject to election, it is essentially an undemocratic branch of a democratic government. One might call it an unrepresentative branch in a representative government.

The framers of the United States Constitution debated as to how federal judges should be selected. Ultimately, the framers decided against the election of judges and in favor of the judges' appointment for life, which is what "during good Behavior"[27] has come to mean. The framers believed that there was a pressing need for judicial independence from the other two branches of the federal government. An independent judiciary would be better able to exercise its own check over the two elected branches of government. Drawing on the words of the framer Alexander Hamilton, the judges' lifetime tenure was "essential to the faithful performance"[28] of their "arduous duty"[29] as the "bulwarks of a limited constitution."[30] Lifetime judicial tenure gives the federal judges the independence necessary to review and check the actions of the other two branches of the federal government and the actions of the state governments as well.

But what of judicial review—this check that the federal courts possess over the legislative and executive branches of the federal government? Unlike the Congress's impeachment and removal power, the President's appointment power, or the President's veto power coupled with the Congress's power to override the veto, the power of judicial review is not specified in the Constitution. Nowhere in this document does it say, in so many words, that the federal courts have the power to review the actions of the other two branches for their consistency with the Constitution and to invalidate those governmental actions that the courts find to be unconstitutional. Article III, Section 1 creates the United States Supreme Court and gives Congress the authority to create lower federal courts.[31] Article III, Section 2 enumerates federal court jurisdiction[32] and apportions it between the Supreme Court and any lower federal courts that the Congress may choose to

26. U.S. CONST. art. II, § 2, cl. 2.
27. U.S. CONST. art. III, § 1.
28. THE FEDERALIST No. 78, at 397 (Alexander Hamilton) (Garry Wills, ed., Bantam Books 1982).
29. *Id.*
30. *Id.*
31. U.S. CONST. art. III, § 1.
32. U.S. CONST. art. III, § 2, cl. 1, *amended by* U.S. CONST. amend. XI.

create.[33] But nowhere in Article III—or anywhere else in the Constitution—does it expressly grant to the federal courts the power of judicial review. Instead, this most important check possessed by the judiciary has come to be exercised only because the United States Supreme Court itself has decided that the federal judiciary indeed possesses this power. The Supreme Court has established this power through its interpretation of the Constitution. I will spend the rest of my time today discussing how the Supreme Court came to interpret the Constitution in this way, and I will give some later examples of the problems and consequences surrounding judicial review.

II.

As I have said earlier, Article III, Section 2 provides for broad—but limited—jurisdiction of the federal courts. According to Section 2, United States courts have jurisdiction over nine categories of cases and controversies.[34] The three most important of these categories in everyday practice are the following: (1) the power to decide controversies between citizens of different states; (2) the power to decide controversies in which the United States itself is a party; and (3) the power to decide cases "arising under this Constitution, the laws of the United States,"[35] and United States treaties. For our purposes today, it is this third category—particularly, the power to decide cases arising under the Constitution—that is the most important, for the Supreme Court has found this to be the basis for judicial review.

Before talking more about judicial review itself, I would like to continue talking for a few minutes about federal jurisdiction under Article III—that is, the power of the federal judges to decide certain types of cases and controversies that are properly before the courts. If a case does not fit within one of the nine categories set out in Section 2 of Article III (as modified by the 11th Amendment), a federal court is said to lack "subject matter jurisdiction" and cannot consider the matter.[36] Under these circumstances—where a federal court lacks subject matter jurisdiction in the case—no federal judicial review could take place because the court cannot consider the matter.

But even if a case falls within one of Article III, Section 2's nine categories, a federal court might nevertheless lack the power to decide it. Why? Because the Supreme Court has interpreted Article III, Section 2 to contain certain implied prerequisites that must be met in order for a federal court to decide the case. Without meeting these implied prerequisites, the case is said to be "non-justiciable" and must be dismissed. So, what are these additional prerequisites to a federal

33. U.S. CONST. art. III, § 2, cl. 2.
34. U.S. CONST. art. III, § 2, cl. 1, *amended by* U.S. CONST. amend. XI.
35. *Id.*
36. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 247–51 (2d ed. 1994).

court decision in a case—for the matter to be "justiciable?" There are a number of these, and I will briefly discuss several of the most important ones.

Article III, Section 2 limits federal court jurisdiction to actual cases or controversies.[37] In the United States, with our adversarial system of justice, the Supreme Court has interpreted this constitutional language to mean that there must be an actual case or controversy between two parties with truly adverse interests. Without a live case or controversy between two such parties, a federal court must dismiss the case for lack of justiciability. For example, a federal court may not decide a case where the complaining party, the plaintiff, has not suffered any harm or injury. Where the party bringing suit has not been harmed, however slightly, by the defendant's actions, the plaintiff is said to lack "standing" to bring the suit, and a federal court may not consider the merits of the case.[38]

A second set of these prerequisites for justiciability involves the timing of the lawsuit. If the harm to the plaintiff has not yet occurred and may or may not occur in the future, the case is said to be "unripe." A federal court may not decide unripe cases.[39] On the other end of the time spectrum, a federal court lacks the authority to decide a case where the plaintiff's harm has already been remedied. Such cases are said to be "moot."[40] All of this is simply to say that a federal court must decide an actual, live case or controversy—not one that may or may not occur in the future, nor one that has occurred in the past but in which the plaintiff's harm has already been remedied.

A third prerequisite for a federal court to decide a case involves the so-called "political question" doctrine. If the text or the structure of the United States Constitution commits determination of the controversy to one of the other two branches of the federal government, then the federal judge may not hear the case and must dismiss it. The Supreme Court has developed a number of tests for determining whether the federal courts must dismiss a case because it involves a non-justiciable political question.[41] Most of these tests more or less

37. U.S. CONST. art. III, § 2, cl. 1, *amended by* U.S. CONST. amend. XI.

38. Warth v. Seldin, 422 U.S. 490 (1975). "As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Id.* at 498–99.

39. Int'l Longshoremen's & Warehousemen's Union, Local 37 v. Boyd, 347 U.S. 222 (1954). "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." *Id.* at 224.

40. DeFunis v. Odegaard, 416 U.S. 312 (1974). "'[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.'" *Id.* at 316 (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971)).

41. *See* Baker v. Carr, 369 U.S. 186 (1962). According to the *Baker* Court, there is a six-factor test for political questions:

come down to whether the issue is one that either the constitutional text or the constitutional structure of our government suggests should be decided by one of the two elected branches of the federal government. I will have more to say about the political question doctrine when I discuss *Bush v. Gore*[42] later in this presentation.

These justiciability doctrines—these additional prerequisites for a federal court to hear and to decide the merits of a case—work with Article III, Section 2's subject matter jurisdiction requirements to limit the role of an unelected federal judiciary in a democratic government. As we have seen, this matter was a subject of some debate among the Constitution's framers. And it has been the subject of some concern for the federal courts as well. As the United States Supreme Court said in 1869 in the case of *Ex parte McCardle*,[43] "judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."[44]

Armed with this knowledge of some of the most important constitutional limitations on a federal court's power to decide cases, let us turn to judicial review itself. Suppose there is a case properly filed in federal court over which the court has jurisdiction and which is justiciable. For example, let us suppose that the defendant is an agency of the federal government that is charged with enforcing a federal statute regulating plaintiff's conduct. Plaintiff is harmed in some way by the agency's enforcement of this statute and claims that both the statute and the agency's actions to enforce it are unconstitutional. After due consideration of the case, our hypothetical federal judge decides that the plaintiff is correct; the federal statute in question and its enforcement by the agency are unconstitutional and therefore invalid. What gives our federal judge the power to engage in this exercise, judicial review?

As I have said, the power of judicial review is found nowhere in the Constitution—at least, not expressly. However, writing in support of ratification of the Constitution, Alexander Hamilton argued that cer-

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> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

42. 121 S. Ct. 525 (2000).

43. 74 U.S. (7 Wall.) 506 (1868).

44. *Id.* at 515.

tainly the federal courts would possess this authority. Quoting Hamilton:

> 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. If there should happen to be an irreconcileable [sic] variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute . . . .[45]

Hamilton concluded that "[n]o legislative act therefore contrary to the constitution can be valid."[46] In the process of making his arguments about judicial review, Hamilton rejected the claim made by some political leaders that each branch of the federal government would have the power to decide for itself the constitutionality of its actions without the interference of the other two branches of government.[47]

Fifteen years later, in 1803, the United States Supreme Court was presented with a live case that allowed it to decide this issue. In the celebrated case of *Marbury v. Madison*,[48] the great chief justice, John Marshall, reached the same conclusion as Hamilton about the federal courts' power of judicial review, using Hamilton's reasoning. *Marbury v. Madison* is among a handful of the most important decisions ever issued by the United States Supreme Court. The case established once and for all the principle of judicial review as a matter of constitutional law.[49] In the process, the decision made the judiciary a co-equal branch of the federal government by confirming the judiciary's sole important check on the powers of the other two branches.

Simplified, Marshall's reasoning proceeded along the following lines. The federal government is one of limited or enumerated powers set out in a written constitution. Marshall asked, "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"[50] Answering his own rhetorical question, Marshall stated that "[i]t is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it."[51] And if the Constitution is a "superior, paramount law,"[52] then "a legislative act contrary to the Constitution is not law."[53] Because, "[i]t is

45. THE FEDERALIST NO. 78, *supra* note 28, at 395.
46. *Id.*
47. *Id.*
48. 5 U.S. (1 Cranch) 137 (1803).
49. *Id.* at 177–78.
50. *Id.* at 176.
51. *Id.* at 177.
52. *Id.*
53. *Id.*

emphatically the province and duty of the judicial department to say what the law is,"[54] Marshall concluded that it is up to the federal courts to adjudicate conflicts between federal statutes and the United States Constitution and to reject the validity—the constitutionality—of statutes that conflict with the Constitution.

Marshall's reasoning and his conclusion in *Marbury* have been criticized over the years by some observers. Some say that Marshall—like Hamilton before him—simply assumed the truth of the very proposition to be proven. As we know, the United States Constitution is silent on the power of judicial review. Still, as we have seen, Article III, Section 2 does provide that the judicial power of the United States extends to all cases arising under the Constitution. And likely, Marshall and Hamilton were correct: that the framers intended the federal courts to have this power was clear from the structure of the federal government established under the written Constitution and the judiciary's role in that governmental structure.

It is indeed ironic that Marshall firmly established the power of judicial review in a case whose defendant was the United States Secretary of State, James Madison, the father of the Constitution. It is a further irony that Madison was doing the bidding of the man who appointed him, his friend, President Thomas Jefferson, who strongly opposed judicial review. Jefferson held to the belief that each branch of the federal government was free to interpret for itself the limits placed on it by the Constitution. To Jefferson, judicial review was nothing less than constitutionally unauthorized supremacy of the judicial branch over the two other elected branches of the federal government.[55] But, John Marshall's view on this issue prevailed over that of Jefferson, who was Marshall's fellow Virginian, political rival, and distant cousin. By his opinion for a unanimous Supreme Court in *Marbury*, Marshall had irrevocably established the principle of judicial review in American constitutional law. And with *Marbury*, Marshall established the foundations both for the federal judiciary as a co-equal branch of government and for the prestige of the United States Supreme Court as a governmental institution. Henceforth, it would be the Supreme Court that was the final arbiter of what the Constitution meant.

Now that the principle of judicial review was settled, there remained the following question: Over which governmental actions did the federal courts possess the power of judicial review? In the next quarter-century after the decision in *Marbury v. Madison*, under Chief Justice John Marshall's leadership, the United States Supreme Court provided the answer to this question. In *Marbury*, the Court had de-

54. *Id.*

55. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 26 (1997) (quoting letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 310 (Paul Leicester Ford ed., 1897)).

clared that it had the power to hold the acts of the Congress unconstitutional.[56] In the case of *Fletcher v. Peck*,[57] the Court struck down a state statute, thus establishing the Court's power to hold unconstitutional laws made by the state legislatures. In *Martin v. Hunter's Lessee*,[58] the Supreme Court established the principle that it had the constitutional authority to review the actions of the states for consistency not only with the federal Constitution but with federal laws and treaties, as provided in Article III, Section 2. Petitions for review of adverse decisions by state supreme courts on these matters could be made directly to the United States Supreme Court. In *Cohens v. Virginia*,[59] the Supreme Court held that its power of judicial review included the power to review state criminal court proceedings for their consistency with the United States Constitution.[60]

So, today, it is firmly established that the power of federal judicial review means the following. First, the federal courts are the final arbiters of the constitutionality of the actions of the other two branches of the federal government—the acts of the Congress and the actions of the President and his subordinates. Second, the federal courts are the final arbiters of the constitutionality of the acts of the state legislatures and the actions of the state governors and their subordinates. The Supreme Court forcefully reiterated this rule as recently as 1958 in the case of *Cooper v. Aaron*,[61] in the face of massive Southern resistance to its 1954 and 1955 opinions in *Brown v. Board of Education*,[62] desegregating America's public schools. Third, the federal courts—particularly the Supreme Court—have the power to review state court proceedings, both criminal and civil, in order to determine whether these proceedings are within the requirements of the federal constitution.

The power of federal judicial review over the actions of the branches of the state governments was bitterly debated in the early period of American constitutional government. However, with hindsight, this power is not very remarkable if we remember two things. First, the principle of judicial review of *federal* legislative acts was firmly established as a foundation in 1803 by the opinion in *Marbury v. Madison*.[63] Second, Article VI of the Constitution contains the so-called Supremacy Clause. This clause makes the Constitution, laws, and treaties of the United States the supreme law of the land, notwith-

56. *Marbury*, 5 U.S. at 137.
57. 10 U.S. (6 Cranch) 87 (1810).
58. 14 U.S. (1 Wheat.) 304 (1816).
59. 19 U.S. (6 Wheat.) 264 (1821).
60. For a general discussion of *Fletcher v. Peck*, *Martin v. Hunter's Lessee*, and *Cohens v. Virgina*, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 14–16 (6th ed. 2000).
61. 358 U.S. 1 (1958).
62. 347 U.S. 483 (1954); 349 U.S. 294 (1955).
63. 5 U.S. (1 Cranch) 137, 177 (1803).

standing any contrary provisions in the laws or the constitutions of the states.[64] Therefore, if the federal courts are indeed the final arbiters of what the United States Constitution means and have the power to declare unconstitutional all governmental actions that exceed constitutional limitations, then surely this power of judicial review must include the power to review the constitutionality of the actions of government at *every* level.[65]

At this point, we would do well to remind ourselves of the checks that exist in favor of the other two branches of the federal government against this awesome power of judicial review. As we have seen, these checks are rather limited. They are two in number: first, the presidential power of appointment of federal judges, subject to Senate confirmation; and second, the congressional power to impeach and remove a federal judge (as other federal officers) for "Treason, Bribery, or other high Crimes and Misdemeanors."[66] These are the only two checks against the judiciary that are possessed by the other two branches—the elected branches of the federal government.

The only other check against the federal courts' power of judicial review is *internal*—review of lower federal court decisions by the United States Supreme Court, and ultimately, a sense of judicial self-restraint among the justices of that high court. As we are about to see, there have been times when this sense of judicial self-restraint seems all but to have disappeared. Such times raise the real possibility of a constitutional crisis, as the delicate balance of power among the three branches of the federal government is upset. Before discussing the case of *Bush v. Gore* as a possible example of this phenomenon, I would like to examine the most famous—and most serious—example of this phenomenon in United States constitutional history, the fight over substantive, economic due process.

The 5th[67] and 14th[68] Amendments to the United States Constitution contain the two "due process" clauses. The 5th Amendment prohibits the federal government from depriving any person of "life, liberty, or property without due process of law."[69] (Note how these words echo those of Locke and Jefferson.) The 14th Amendment contains the same prohibition against the state governments.[70] But what are the people's liberties that cannot be denied by the federal or state governments? Certainly there are express limitations on state and federal governments that are contained in the United States Constitution, particularly the Bill of Rights. Included among these rights of

64. U.S. CONST. art. VI, cl. 2.
65. NOWAK & ROTUNDA, *supra* note 60, at 16–21.
66. U.S. CONST. art. II, § 4.
67. U.S. CONST. amend. V.
68. U.S. CONST. amend. XIV.
69. U.S. CONST. amend. V.
70. U.S. CONST. amend. XIV.

the people protected by the Bill of Rights are freedom of speech, freedom of religion, and freedom of the press found in the Constitution's 1st Amendment.[71] Also among these are the rights of persons who are under investigation for, or who are charged with, commission of a crime. These guarantees are found in the 4th,[72] 5th,[73] 6th,[74] and 8th[75] Amendments to the Constitution. Thus, some of the express "liberty" interests protected by the two due process clauses are procedural in nature and some are substantive.

Might there be some substantive liberty interests protected by the two due process clauses that are not expressed in the Constitution but, rather, are merely implied? After all, the 9th Amendment[76] seems to indicate just that: there are rights retained by the people other than those enumerated in the Constitution. Beginning in the last quarter of the nineteenth century, the United States Supreme Court began the process of discovering one of these rights retained by the people and protected by the due process clauses but not enumerated in the Constitution. The Court inferred that there was an implied liberty interest freely to enter into a contract, particularly involving one's labor. In a long series of cases, handed down over six decades, the Supreme Court developed this doctrine, using it to invalidate, as unconstitutional, numerous federal and state laws regulating economic matters. So, using its power of judicial review, the Court struck down, for example, many state (and a few federal) laws seeking to protect employees against overlong work hours[77] and substandard wages.[78]

This era, when the Court-created "liberty" of substantive, economic due process was in the ascendancy, is often called the "*Lochner* Era," after the most famous Supreme Court decision of the period, *Lochner v. New York*.[79] The *Lochner* case was decided in 1905. In its opinion, the Supreme Court held that a New York law protecting bakery employees from having to work more than six, ten-hour days each week violated the freedom to purchase or sell one's labor in any way that the employee and the employer found mutually acceptable.[80] Effectively, the Court was saying that economic regulation by the federal or state governments could not go too far. If such regulation did go too far, it violated this freedom of contract that the Court somehow inferred existed in the due process clauses in the 5th and 14th Amendments. Using its power of judicial review, the Court had set itself up

71. U.S. CONST. amend. I.
72. U.S. CONST. amend. IV.
73. U.S. CONST. amend. V.
74. U.S. CONST. amend. VI.
75. U.S. CONST. amend. VIII.
76. U.S. CONST. amend. IX.
77. Lochner v. New York, 198 U.S. 45 (1905).
78. Adkins v. Children's Hosp., 261 U.S. 525 (1923).
79. *Lochner*, 198 U.S. at 45.
80. *Id.* at 64.

in the business of determining when governmental regulation of economic affairs crossed the invisible line separating permissible from impermissible—the constitutional from the unconstitutional.

In a bitter dissent in *Lochner*, Justice Oliver Wendell Holmes criticized the majority's opinion. In Holmes's view, the majority of the Court was using the Constitution to enshrine a particular economic theory—one that the majority of the nation did not agree with. Holmes believed that the will of the majority, as expressed in law by the people's legislative representatives, should prevail unless the challenged statute infringes "fundamental principles as they have been understood by the traditions of our people and our law."[81] Most economic regulation did not infringe these fundamental principles and, therefore, was perfectly constitutional according to Holmes.

As the *Lochner* Era of substantive, economic due process and freedom of contract marched forward, an increasing number of observers came to believe that the federal judiciary—especially the Supreme Court—had overstepped the boundaries separating judicial from legislative power. To these observers, the Court was abusing its power of judicial review. No longer was it merely reviewing economic regulation for constitutionality; instead, it was reviewing the wisdom of such laws. This was a job for the legislative branch of government, state and federal, not one for the federal judiciary.

This constitutional controversy reached its climax in the 1930s as the United States was mired in the worst economic depression in the nation's history. Governments—both state and federal—tried to engage in regulation of business, labor, and agriculture in an effort to alleviate human misery and to speed the nation's economic recovery. On numerous occasions, the Supreme Court frustrated these efforts by using the economic due process doctrine to strike down these laws. Exasperated, the United States President, Franklin Roosevelt, asked the Congress to enact legislation to increase the size of the Supreme Court from nine justices to fifteen. This legislation would have allowed Roosevelt to appoint six new justices to the Court. Presumably, these new justices would agree with his views and would reject the doctrine of substantive due process as a basis for invalidating state and federal economic regulation.

Roosevelt had hit upon an interesting—and perfectly constitutional—idea. The Constitution does not specify the number of justices who must serve on the United States Supreme Court. Indeed, in the nation's first century, Congress had by statute varied that number from as few as six to as many as ten justices. But, since 1869, the number of justices had remained unchanged at nine—the very same number that serve today.

81. *Id.* at 76 (Holmes, J., dissenting).

The constitutional crisis—the showdown—over judicial review had come. On the one side, the United States Supreme Court had assumed virtually the role of a legislature, second-guessing the wisdom of governmental regulation of business and the economy. On the other side, the executive branch had asked the legislative branch to check the power of the Court to use judicial review in this way. The method of this check was not prohibited by the Constitution; it was to "pack" the Court with additional justices appointed by the President and confirmed by the Senate. For the Court to continue unchanged in its ways would mean that the balance of power would continue to tilt too far in favor of the unelected judiciary as against the other two elected branches of the federal government. But for Roosevelt to prevail in his plan to add justices to the Supreme Court might mean that the balance of power would tilt too far away from the federal courts as the ultimate guardians of the people's rights.

The resolution came in 1937 when the Congress refused to pass the bill to increase the size of the Supreme Court. At precisely the same time, the Court began a rapid retreat from the use of the substantive, economic due process doctrine as a ground for invalidating federal or state legislation. In fact, in the years since 1937, never again has the Supreme Court expressly relied upon substantive, economic due process as the basis for holding legislation unconstitutional. By the time it decided *Ferguson v. Skrupa*,[82] in 1963, the Court had made clear its repudiation of this doctrine as the foundation for judicial review of governmental economic regulation. There was no doubt that the *Lochner* Era had long since passed away.

During this same period, beginning in the late 1930s, the Supreme Court began to infer or discover a number of fundamental *personal* rights that it believed the due process clauses protected from governmental interference. At the same time it was rejecting a fundamental right to freedom of contract, the Court was starting to recognize a fundamental personal right to privacy. As a result, the Court held unconstitutional certain federal and state laws regulating such matters as family planning,[83] familial relations,[84] and medical procedures and care.[85] Thus, at least sometimes, the Court continues to protect from governmental regulation some fundamental rights that it finds are implied by the Constitution, even though liberty of contract is no longer among these protected rights.

Of course, the Supreme Court still protects personal rights—liberty interests—that are expressed in the Constitution. Among these rights is the right to equal protection of the laws. This right is expressly guaranteed by the 14th Amendment as against the states, and the

82. 372 U.S. 726 (1963).
83. Griswold v. Connecticut, 381 U.S. 479 (1965).
84. Moore v. City of East Cleveland, 431 U.S. 494 (1977).
85. Roe v. Wade, 410 U.S. 113 (1973).

Court has held that it is implicitly guaranteed by the 5th Amendment as against the federal government.[86] It is important to understand that equal protection does not mean that the government must always treat all persons the same way. What it means is that when the government draws lines distinguishing categories of people, as most lawmaking does, it must do so in a rational manner. When government classifies, it must not act arbitrarily or capriciously. If the government has a rational basis for drawing a particular line in a particular way, it may do so, and the federal courts may not disturb the governmental action.[87] However, there is an important exception to this deferential standard for judicial review of governmental line-drawing. The federal courts will more closely examine, or strictly scrutinize, governmental classifications that are based on such characteristics as race, ethnicity, or gender.[88] The federal courts will also strictly scrutinize governmental classifications that infringe express constitutional rights, such as freedom of religion, speech, or press.[89] In these instances, in order to prevent invidious discrimination by the majority against the minority, the government must demonstrate that there was a particularly compelling reason to draw the line the way it did and that this line was drawn in the least intrusive possible way.[90]

III.

I come now to *Bush v. Gore*,[91] the case that put an end to our recent, disputed presidential election. The Supreme Court's decision in this case, based on equal protection grounds, effectively decided the election in favor of George W. Bush. I want to spend the rest of my allotted time speaking about this case and some of the reaction to it. There are many ways that one can approach this case, but I do not want to become too heavily bogged down in the minute details of the facts of the case. These involve specific interpretation of federal and state election statutes, which is beyond the scope of my presentation. Instead, I want to focus on the case as an excellent example of many of the matters I have discussed here today.

Many of the facts in *Bush v. Gore* are not obscure but are well known to the general public. In the United States, we select our President by means of a system called the "electoral college." Article II, Section 1 of the Constitution—as amended by the 12th Amendment[92] and supplemented by the federal election laws—establishes this mech-

86. Bolling v. Sharpe, 347 U.S. 497 (1954).

87. *See generally* NOWAK & ROTUNDA, *supra* note 60, at 638–44.

88. *Id.* Classifications based on gender are subject to so-called "intermediate" judicial scrutiny, as opposed to the "strict" judicial scrutiny that is applied to racial and ethnic classifications. *Id.*

89. *Id.*

90. *Id.*

91. 121 S. Ct. 525 (2000).

92. U.S. CONST. art. II, § 1, *amended by* U.S. CONST. amend. XII.

anism for choosing the President. Under this process, each state is allotted a certain number of electors, who officially elect the President and the Vice President of the United States. The number of electors for each state is equal to the total number of United States senators and representatives assigned to that state. Article II, Section 1 leaves it to the state legislatures to determine the manner of choosing the state's electors for President and Vice President.[93]

As everyone knows, our 2000 presidential election was very close—in terms of both the total national popular vote (which does not count in electing the President) and the electoral college vote (which is the only vote that does count in electing the President). When the final, official electoral vote was announced, Bush had 271 votes to Gore's 267. The minimum number necessary to elect the President is 270 electoral votes, and no state has fewer than three votes in the electoral college. Thus, if any state's electoral college votes were switched from Bush to Gore, Gore would have been elected President of the United States, and Bush would still be the governor of my home state, Texas. The disputed state of Florida has twenty-five electoral votes, enough to have given Gore a relatively comfortable victory, had he won those votes.

As I have said, each state has the constitutional authority—and duty—to determine by law the method of choosing its electors. And, for over 100 years, the law of every state has provided that the state's electors will be chosen by the vote of its people. So, when I go to the polls in my home state of Texas and mark my ballot for Al Gore or for George Bush, what I am really doing is casting my vote for a slate of electors who are committed to vote for the candidate of my choice. Whichever presidential candidate wins the state's popular vote would see his slate of electors chosen by the people of that state, and those electors would almost certainly vote for him on December 18, when the electoral college physically meets and casts the decisive, official vote for President and Vice President.

Florida is no different from Texas or any other state as to this general process. However, the popular vote in Florida was so close that the state's election laws provided for an automatic, machine recount of the vote. Bush was ahead of Gore in Florida's popular vote before the recount, and after the first recount Bush remained ahead, although his lead was diminished. Ultimately, the results of this first recount effectively were controlling; Bush won Florida's twenty-five electoral votes, and with them the United States presidency.

But, not surprisingly, Gore was unhappy with the results of the first recount. The initial vote totals showed that Bush led Gore by less than 2,000 votes out of almost 6 million votes cast statewide. After the first recount of votes, Bush's lead was cut to less than 1,000 votes.

93. U.S. CONST. art. II, § 1, cl. 2, *amended by* U.S. CONST. amend. XII.

Gore believed that there were many irregularities in the voting process throughout the state of Florida. He filed suit in state court seeking to have a second recount, this one by hand, of many of the ballots cast by the people of Florida. An extremely complex series of judicial cases and appeals followed, with the Florida Supreme Court ultimately giving Gore most of the relief he requested and ordering the hand recounts to proceed. Bush asked the United States Supreme Court to intervene and to order the Florida Supreme Court to stop the manual recount. The case of *Bush v. Gore*[94] involved United States Supreme Court judicial review of: (1) the interpretation of federal and state election laws; (2) the election process for the United States President; (3) state executive action in certifying an election with a federal impact; and (4) state judicial action taken in connection with the contested election. In other words, the case involved review of all categories of governmental action at the state and federal levels that the Supreme Court had long held to be subject to federal judicial review.

In its decision in *Bush v. Gore*, the United States Supreme Court, by a 5-4 vote, gave George Bush exactly the relief he sought—an order to stop the second, manual recount of the Florida ballots. Simplified, the Supreme Court's reasoning went this way: (1) once state law gives state residents the right to vote for presidential electors, this right to vote becomes a fundamental constitutional right; (2) when state actions draw lines in ways that have a negative impact on fundamental rights, they are subject to strict judicial scrutiny; (3) in this case, neither Florida law nor the Florida courts had articulated a clear standard for conducting the second (manual) recount that would ensure that every vote was fairly and properly counted in an equal manner; (4) therefore, the second recount, the manual recount, violated the 14th Amendment's requirement of equal protection and fundamental fairness of treatment—due process—for every voter in the state.[95] The United States Supreme Court could have sent the case back to the Florida Supreme Court to fashion an order that would ensure that the manual recount would meet equal protection and due process standards. There was only one problem with this solution: in effect, time had all but run out, as the December 18 deadline and an earlier December 12 deadline, both set by federal law, had arrived. Therefore, the second recount, the manual recount, was invalid, and there was not sufficient time to start it again and still comply with the

94. *Bush*, 121 S. Ct. at 525.

95. *Id.* at 529–32. Admittedly, this is an over-simplification of the Court's reasoning in this case. For present purposes, however, it suffices. For a more thorough review of the 2000 presidential election, see Lynn H. Rambo, *The Lawyer's Role in Selecting the President: A Complete Legal History of the 2000 Election*, 8 TEX. WESLEYAN L. REV. (forthcoming Spring 2002).

equal protection and due process requirements of the United States Constitution.

For our purposes today, I would like to focus on one particular opinion written in this case. This case spawned a number of opinions: the Court's majority opinion, one concurrence, and four dissents—one from each of the four dissenters. I would like to focus for a few minutes on the dissent written by Justice Stephen Breyer because much of what he says is most relevant to my topic today. Breyer believed that *Bush v. Gore* presented a non-justiciable political question. He believed, therefore, that the Court should have dismissed the case without reaching its merits.

According to Breyer, both the United States Constitution and federal law make clear that it is the role of the Congress—not the federal courts—to decide disputed presidential elections. I would like to quote him at some length:

> Of course, the selection of the President is of fundamental national importance. But that importance is political, not legal. And this Court should resist the temptation unnecessarily to resolve tangential legal disputes, where doing so threatens to determine the outcome of the election.
>
> . . . .
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> . . . However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about.[96]

Breyer believes that the issue is something rather like a non-justiciable political question and should be resolved by the people's elected representatives, not the unelected judiciary.[97] Recall that one of the major disputes about judicial review centered around the proper role of an unelected judiciary in a democracy.

Breyer concludes by saying, "I fear that in order to bring this agonizingly long election process to a definitive conclusion, we have not adequately attended to that necessary 'check upon our own exercise of power,' 'our own sense of self-restraint.'"[98] Justice Brandeis once said of the Court, "[t]he most important thing we do . . . is not doing."[99] "What it does today, the Court should have left undone."[100] Breyer makes another important point here: the main check on the

96. *Id.* at 555–56 (Breyer, J., dissenting).

97. Breyer posits that to decide this case the Court risks becoming involved "in partisan conflict, thereby undermining respect for the judicial process." *Id.* at 557 (Breyer, J., dissenting).

98. *Id.* (Breyer, J., dissenting) (quoting United States v. Butler, 297 U.S. 1, 79 (1936) (Stone, J., dissenting)).

99. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 71 (1962) (quoting Justice Brandeis).

100. *Bush*, 121 S. Ct. at 558 (Breyer, J., dissenting).

unelected federal judiciary exercising its power of judicial review is the judges' own sense of self-restraint. Because Breyer believes that this case presents a non-justiciable political question, he thinks the Supreme Court should have exercised that self-restraint and dismissed the case without deciding the merits. Recall the words of the Court in *Ex parte McCardle*, quoted earlier: "judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer."[101] Or, in the words of Justice Louis D. Brandeis, as quoted by Justice Breyer, often, the most important thing the United States Supreme Court can do is "not doing."[102] I agree with Breyer's general observations and with his legal conclusion. Had I been a member of the Supreme Court, I would have joined his dissent.

Our discussion of *Bush v. Gore* brings us back not only to the doctrine of judicial review but also to the larger matter of the rule of law in the United States. Many legal scholars, political scientists, journalists, and other observers thought that the Supreme Court's 5-4 decision in *Bush v. Gore* was essentially a political decision. Many agreed with Justice Breyer that the Court should have stayed out of this matter. Some observers have said that only time will tell whether the Supreme Court did the right thing to decide the case as it did. Maybe the Court will be applauded at some future date for *not* avoiding a difficult case and for making a decision that averted a larger constitutional crisis. Alternatively, maybe the Court's prestige will suffer because many people believe that it improperly used its power of judicial review in deciding this case, as it once did when it created the doctrine of substantive, economic due process during the long *Lochner* Era, many years ago. But, like it or not, Al Gore, the loser in the United States Supreme Court, accepted the Court's decision as the final word in the matter. This, he must do under the American system of the rule of law.

Among the millions of words written about the disputed presidential election and the too numerous lawsuits that it generated, the most thoughtful article I read was a column written by the journalist Thomas Friedman and published in the *New York Times* on December 15, 2000.[103] Friedman agreed that the Supreme Court's decision in *Bush v. Gore* appeared to be political. Nevertheless, regardless of the Court's decision in this case or in any other case, Friedman stated that the key to America's strength is our nation's adherence to the rule of

101. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 515 (1868).

102. *Bush*, 121 S. Ct. at 558 (Breyer, J., dissenting) (quoting ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 71 (1962) (quoting Justice Brandeis)).

103. Thomas L. Friedman, *Foreign Affairs; Medal of Honor*, N.Y. TIMES, Dec. 15, 2000, at A39.

law, "when . . . the recipient of the judgment accepts it, and the system behind it, as final and legitimate."[104] Continued Friedman:

> Only in that way—only when we reaffirm our fidelity to the legal system, even though it rules against us—can the system endure, improve and learn from its mistakes. And that was exactly what Mr. Gore understood, bowing out with grace because, as he put it, "This is America, and we put country before party."[105]

According to Friedman, the real secret to America's success is to be found in its rule of law. As he put it in his column:

> That secret is not Wall Street, and it's not Silicon Valley, it's not the Air Force and it's not the Navy, it's not the free press and it's not the free market—it is the enduring rule of law and institutions that underlie them all, and that allows each to flourish no matter who is in power.[106]

The real strength of the United States comes from what Friedman calls its "remarkable system of laws and institutions we have inherited—a system, they say, that was designed by geniuses so it could be run by idiots."[107]

Perhaps it is best to end here, with Tom Friedman's insightful observations fresh in our minds. Judicial review is the foundation for the central role of the federal judiciary in the American system of government. And the role of the judiciary—and respect for its decisions, even though we might disagree with the results—is the foundation for the rule of law in the United States. Friedman expressed his hope that one day all nations would follow Al Gore's example and pledge their allegiance to the principle of the rule of law.

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104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*