

THE YALE LAW JOURNAL

STEPHEN BREYER

Making Our Democracy Work: The Yale Lectures

This is a time when many Americans distrust our governmental institutions. Perhaps that is a good reason to discuss the institution I know best, the Supreme Court, and to ask why the public trusts that institution. When I first was appointed to the Court, Justice Blackmun, my immediate predecessor, told me about two interesting features of the job. First, he said, you will find this “an unusual assignment.” Second, he said, ordinary Americans have “an unquenchable thirst” for knowledge about the Supreme Court. He told me, whenever I have an opportunity to explain to others what I do, particularly those who are not judges or lawyers, to take that opportunity. And that is what I shall try to do in these lectures.

My reason for doing so is Justice Blackmun’s reason. Unless the public understands the institution, it is unlikely to support it. And in a democracy public support for any public institution is necessary. Without it the institution may wither, perhaps die. Part of my job, then, is to explain what we do and why it is valuable for ordinary Americans. By doing so, perhaps I can help the public at least put in perspective their questions about the value to our democracy of an independent judiciary.

I have organized my discussion through the use of two questions. The first, which I shall discuss this afternoon, focuses upon judicial review—the fact that the Court has the power to set aside as unconstitutional an act of Congress. Where did it come from? Why does the Court have it? These are very old questions, which have spawned a voluminous literature. But I shall rephrase these questions, emphasizing one aspect of the general problem: Why does the public do what the Court says? How has the Court earned the public’s trust?

AUTHOR. Associate Justice, United States Supreme Court. These lectures were delivered at the Yale Law School on February 15 and 16, 2010, and draw from *Making Our Democracy Work: A Judge’s View*, published in 2010 by Alfred A. Knopf.

I hear these latter questions asked frequently by judges from other countries, particularly those from Asia, Africa, and Latin America. What is the secret? they ask. Where does the Court's enforcement authority come from? Why does it work? This afternoon I shall tell you what I tell them. I shall illustrate what I think of as a matter of public trust. Tomorrow afternoon, I shall consider a second matter: what can the Court do to help maintain that public confidence?

I. MAKING THE CONSTITUTION WORK: A SUPREME COURT JUSTICE'S VIEW

When I try to answer the foreign judges' questions, I show them the Constitution itself, a brief document phrased in general terms. And I tell them that most who read it will find in it a coherent effort at its heart to create a democracy, a certain kind of democracy. Its seven articles (and a few later amendments) create basically democratic political institutions, so that the people themselves can decide for themselves (through elected representatives) what kind of nation they want, how public policy problems should be solved, and what laws they should enact. At the same time, the Constitution, mostly through amendments, protects basic individual liberties, assures a degree of equality, divides power both vertically (state/federal) and horizontally (legislative/executive/judicial) so that no single group of officials will become too powerful, and guarantees a rule of law. The Constitution sets boundaries within which the institutions of government must act. And the Court's constitutional job is primarily that of a boundary patrol. It typically decides difficult close questions, such as whether, say, abortion, prayer in schools, or assisted suicide falls on one side or another of the boundary lines that the Constitution sets.

This explanation, however, does not offer the foreign judges much help. They still want to know why Americans follow what the Court says. There is no secret answer, I reply. The answers lie in history, in judicial and public practices, in the development of customs and understandings among the public. And I use several cases to illustrate what I mean.

A. Marbury

Who gave the Court the power of judicial review—the power to set aside a federal statute as unconstitutional? The Constitution itself says nothing about it. Yet most of the Framers thought that the Court would possess that power.

Alexander Hamilton in *Federalist No. 78* best explained why.¹ To paraphrase his thought, I would initially ask you what would happen if no government body had this power. In that case, what would happen to the Constitution, to its guarantees? One might hang the document in a museum, calling it a great work of art, but it would have little practical effect. If someone, or some group, must have the review power, then which person, which group should have it? Hamilton considered lodging the power in the presidency. But he feared the President was so powerful already that to give him the power to validate as constitutional whatever he decided to do would risk tyranny. Next, Hamilton considered lodging the power in Congress. But the members of Congress, as elected officials, know about, and are highly sensitive to, popularity. At the same time, the Constitution gives the same rights to everyone, popular or not. And it is expecting too much to expect Congress, having just enacted a popular law, to turn around and hold that very law unconstitutional—when it is unpopular to do so.

That leaves the judicial branch. The judges are comparatively nonpolitical. They are, in a sense, technocrats. They lack the power of the purse and the sword. And the review job is primarily a legal one. They have the technical training necessary to perform it well, and they are unlikely to interfere with the other branches too often.

Perfect. Hamilton thought the judges should have the power of judicial review, and most of the other Founders agreed. But they failed to ask one further question. In Shakespeare's *Henry IV*, Owen Glendower, a mystical Welshman, announces, "I can call spirits from the vasty deep," to which Hotspur, a practical Englishman, replies, "Why, so can I, or so can any man; But will they come when you do call for them?"² If the judicial branch is so weak, why will Americans pay attention when judges hold a statute unconstitutional? Why will Americans do what they say? That is precisely my first organizing question.

*Marbury v. Madison*³ was the first case in which the Supreme Court itself assumed the power of judicial review. And it is a case that raised Hotspur's question. Soon after Thomas Jefferson was elected President in 1800, but before he could be sworn in, President John Adams appointed Marbury to the federal bench, along with many other "midnight judges." In the press of time, however, Adams's Secretary of State (who happened to be John Marshall)

1. THE FEDERALIST NO. 78 (Alexander Hamilton).

2. WILLIAM SHAKESPEARE, THE FIRST PART OF KING HENRY THE FOURTH act 3, sc. 1, at 58 (Samuel B. Hemingway ed., Yale Univ. Press 1917) (1598).

3. 5 U.S. (1 Cranch) 137 (1803).

failed to deliver to Marbury the presidential commission witnessing his appointment. And when Jefferson took office, he instructed his new Secretary of State, James Madison, not to deliver the commission.

Marbury thought that he had already been appointed; delivery of the commission was a mere formality, a minor, nondiscretionary act; and he decided to sue Madison to obtain a court order requiring Madison to perform that ministerial act. He noticed that a statute gave the Supreme Court the power to issue “writs of *mandamus*” in cases “warranted by the principles and usages of law” to “any . . . persons holding office, under the authority of the United States.”⁴ And these words seemed to fit his case like a glove. He consequently brought his case in the Supreme Court; and the Court, in an opinion written by John Marshall (who by then had taken office as Chief Justice), wrote the following.

First, Madison (and Jefferson) are acting unlawfully in withholding Marbury’s commission. The duty to deliver it is like the duty of a record bureau clerk to deliver a marriage certificate after the marriage has taken place.

Second, the law normally provides a remedy for one injured by an unlawful action. That principle applies here.

Third, the proper remedy is a writ of *mandamus*. That writ issues to compel officers to carry out minor, nondiscretionary legal duties, like those at issue here.

Fourth, we must concede that a statute says that the Supreme Court can hear a case just like this one and issue a writ of *mandamus* as a remedy.

But, fifth, Marbury brought his case directly in the Supreme Court (he did not go to a lower court first), and the Constitution says that the Supreme Court has original jurisdiction only over cases in which various foreign officials are parties (e.g., ambassadors) or in which a state is a party. It says nothing about (or which encompasses) issuing writs of *mandamus* to American cabinet officials. So how are we to reconcile what the statute says with what the Constitution says?

Thus Marshall’s opinion finally arrives at the great question. What should the Court do when statute and Constitution conflict? The answer, says Marshall, is not so difficult. Our Constitution is written; the people intended it as basic; we must hold that the greater, more basic, written law made by the people trumps the less important statutory law made by Congress. The Constitution must prevail.

The brilliance of the opinion does not lie simply in its arguments supporting judicial review. Hamilton and the other Founders had long made

4. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 81.

such arguments. Rather, it also lies in Marshall's ability, like Houdini, to escape from a practical trap—a trap that President Thomas Jefferson was ready to spring.

Jefferson was not a friend of judicial review, nor of the federal judiciary (populated by Federalists), nor of John Marshall. He wanted to demonstrate the Court's comparative weakness when it tried to set aside a President's determination. He ordered James Madison not even to appear in the Supreme Court. He in effect put Marshall in a dilemma. If the Court holds Madison need not deliver the commission, then the Court has demonstrated it lacks the power to interfere with the executive branch in even the most minor of ways. On the other hand, if the Court holds that Madison must deliver the commission, then Jefferson will tell him not to do so. They will defy the Court and thereby demonstrate how weak that institution is in practice. In terms of Hotspur's question: the spirits will not come.

At the least, Chief Justice Marshall was worried about the Hotspur problem. And Chief Justice Marshall called in Chief Houdini Marshall to solve the problem. He then solved it. Marshall wrote in his opinion that Jefferson (or Madison) had acted illegally. He asserted the power to remedy the unlawfulness. He asserted the power to set aside an act of Congress on the ground that it was unconstitutional. But Marshall decided that Jefferson, not Marbury, won the case. The Court dismissed Marbury's application for a writ of mandamus.

In light of this result, Jefferson could not defy the Court, for he had won. The practical problem—Hotspur's problem—simply disappeared. Nor did the Court hold another act of Congress unconstitutional until it decided *Dred Scott*⁵—perhaps the Court's worst decision—in 1857.

Hotspur's problem reappeared, however, long before 1857. And I shall provide some examples of how the Court, or the nation, tried to resolve it.

B. The Cherokees

We shall first consider *Worcester v. Georgia*,⁶ a case that the Supreme Court decided in the early 1830s. The case concerned the lawfulness of Georgia's efforts to annex lands belonging to the Cherokee Indians. Many years before, the United States had entered into treaties guaranteeing the Cherokees land that is now northern Georgia. The Indian tribe had given up their hunting and

5. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

6. 31 U.S. (6 Pet.) 515 (1832).

fishing life and had become a nation of farmers. They had a written language, books, a constitution and were indistinguishable from their Georgian neighbors. But in 1829 gold was found in their territory, and Georgia, which had long coveted their land, seized it. The State extended Georgia law over the Cherokee territory, invalidated Cherokee laws, and required that many of those living there sign loyalty oaths to Georgia.

The great Cherokee Chief John Ross, responding in a most civilized way, decided to bring a lawsuit against Georgia. He hired William Wirt, a former attorney general, and one of the greatest lawyers of his day. Wirt had no doubt about the strength of the legal claim, but he feared practical obstacles. A neighboring tribe, the Creeks, had earlier prevailed legally in similar circumstances; but Georgia passed a law saying it would execute anyone who tried to enforce the judgment. A Cherokee named Corn Tassel, convicted of violating a Georgia criminal statute, appealed and won on the ground that Georgia could not apply its law in Cherokee territory; but Georgia hanged Corn Tassel before the Court's order arrived.⁷ And, when Wirt filed his case, *Cherokee Nation v. Georgia*,⁸ in the U.S. Supreme Court, the Court dismissed the suit on highly technical grounds.

Wirt then found the case he was looking for. A New England missionary, Samuel A. Worcester, living in Cherokee territory had refused to sign Georgia's loyalty oath, and Georgia had jailed him. He could bring Worcester's case to the Supreme Court by way of appeal, and it was unlikely that Georgia would execute Worcester—a citizen of Vermont⁹—before the Court could decide it. He did appeal. He pointed to the treaties and to Article VI of the Constitution, which makes treaties (along with the Constitution and federal laws) the “supreme Law of the Land.”¹⁰ And, not surprisingly, he won the case—despite the unpopularity of the Indian tribes and the popularity of Georgia's position. The Court decided that the Cherokees owned the land; that Georgia had no right to make laws there; and that Worcester must be freed.¹¹

After the decision, Justice Joseph Story wrote to his wife: “Thanks be to God, the Court can wash their hands clean of the iniquity of oppressing the

7. See Annie Heloise Abel, *The History of Events Resulting in Indian Consolidation West of the Mississippi*, in 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1906, at 233, 387 n.a (1908); Ulrich Bonnell Phillips, *Georgia and State Rights*, in 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1901, at 3, 75-77 (1902).

8. 30 U.S. (5 Pet.) 1 (1831).

9. See *Worcester*, 31 U.S. at 536.

10. U.S. CONST. art. VI, cl. 2.

11. *Worcester*, 31 U.S. at 595.

Indians and disregarding their rights.”¹² A few days later, he wrote to another correspondent: “The Court has done its duty. Let the Nation now do theirs.”¹³ Story added: “Georgia is full of anger and violence. . . . Probably she will resist . . . , and if she does, I do not believe the President will interfere”¹⁴

And that is just what happened. Georgia said it would resist the decision as a “usurpation” of power. And this is the case about which President Andrew Jackson supposedly said, “John Marshall has made his decision, now let him enforce it.”¹⁵ The President considered he had as good a right as the Court to decide what the Constitution meant and how it should be enforced. Worcester stayed in jail. John Marshall wrote to Story: “I yield slowly and reluctantly to the conviction that our Constitution cannot last.”¹⁶

What was wrong with Jackson’s position? The President soon found out. South Carolina, noticing what Georgia could do, decided it would follow suit—but in respect to federal taxes. It passed a law prohibiting the payment of federal customs duties. And Jackson then began to realize the threat to the Union inherent in the principle. He quickly obtained a “force bill” from Congress, authorizing him to send troops to South Carolina. And South Carolina withdrew its law. The press began to write about Georgia and the Cherokees: how did Georgia and Worcester differ from South Carolina and taxes? And Georgia began to back down. It reached an agreement with Worcester, releasing him from jail. And so the Court’s order was ultimately enforced. Or was it?

There is no happy ending here. Jackson sent troops to Georgia, but not to enforce the Court’s decision or to secure the Indians their lands. To the contrary, he sent federal troops to evict the Indians. He found a handful of Cherokees willing to sign a treaty requiring departure; he ignored 17,000 other Cherokees who protested that they would die rather than agree to go; and he forced the tribe to move to Oklahoma, walking there along the Trail of Tears, so-called because so many Cherokees died along the way. Their descendants live in Oklahoma to this day.

This episode suggests a negative answer to Hotspur’s question. The Court may follow the law—even in an unpopular matter. But that does not matter very much. Force, not law, will prevail. The summoned “spirits” will not come.

12. 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY, 1821-1855*, at 216 (1922).

13. *Id.* at 217.

14. *Id.*

15. *Id.* at 219.

16. *Id.* at 229.

C. Little Rock

I now want to roll the camera forward to the 1950s. (I must skip *Dred Scott*, which I shall discuss elsewhere.) I will take you to the period just after the Court decided *Brown v. Board of Education*,¹⁷ one of its greatest decisions. In effect the Court in that case held that the Constitution means what it says. The Fourteenth Amendment states every person is entitled to “equal protection of the laws.”¹⁸ But prior to *Brown* all anyone had to do was open one’s eyes, and he or she would see in the South racial segregation in an unrelenting form mandated by law.

The victims were African-American. What the segregated states provided for them was the exact opposite of “equal protection.” Then in *Brown* the Court overturned the “separate but equal” doctrine of *Plessy v. Ferguson*¹⁹ and announced that racially segregated public schools were inherently unequal. The opinion was unanimous, and the result was clear. The law could not require racial segregation.

The decision was intensely unpopular in the South. Recognizing that compliance might take time, the Court held in *Brown II* that desegregation must proceed “with all deliberate speed.”²⁰ But whatever the merits of this remedial rule, it is clear what happened next. Virtually nothing happened next. The District of Columbia and a handful of cities started to desegregate. But for the most part the status quo remained unchanged. In Texas, Governor Shivers ignored a court desegregation order. How was the Court’s *Brown* decision to be enforced?

With this background, let us turn to Little Rock, Arkansas. By 1957 a politically moderate Little Rock school board had decided to begin desegregation. Their idea was to proceed slowly. In September 1957 they would begin to desegregate high schools. Then they would work their way down to the lower grades. The NAACP, opposed to this stretched-out time scale, opposed the board’s plan in federal district court. But that court thought it sufficient. And the court ordered that desegregation begin in September 1957 with the admission of nine black students into all-white Central High School.

The board had paid particular attention to the selection of those nine students—the Little Rock Nine. They were good students; they lived near the school; and they were brave. They needed their courage. The Southern

17. 347 U.S. 483 (1954).

18. U.S. CONST. amend. XIV, § 1.

19. 163 U.S. 537 (1896), *abrogated by* *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

20. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

opposition to desegregation was strong. Southern members of Congress had joined a Southern Manifesto stating that the Supreme Court's *Brown* decision was itself illegal. White Citizens' Councils, ignoring the lessons of the Civil War, argued that the Southern states could invalidate the decision by "interposing" their sovereign selves between the decision and its enforcement. Threats of violence were everywhere; and the lynching of Emmett Till in Mississippi showed what determined segregationists might do.

During the summer of 1957, the Governor of Arkansas, Orval Faubus, despite his election as a "middle-of-the-road" moderate, decided that segregation was the better path to follow—at least politically. And on August 29, he obtained a state court order forbidding the school board to integrate Central High. The NAACP immediately went to federal court, which set the state court order aside. The federal court then told the board to go ahead with integration, planned for the next week.

Within a few days' time, crowds, hostile to integration, began to show up outside Central High. The NAACP tried to coordinate the black students' entry, postponing it for a day. But one student, Elizabeth Eckford, did not get word of the postponement. She showed up at Central High. And a photographer took a picture—of Elizabeth Eckford looking calm and dignified while behind her a white woman stands with her face contorted with rage. That picture went around the world. The Governor sent the National Guard to the school—but to prevent, not to enforce, court-ordered integration. The federal judge ordered the FBI and the Department of Justice to appear in court to help the court determine whether the Governor was hindering enforcement of the court's order.

At this point Little Rock's Congressman, Brooks Hays, a well-known moderate, asked President Eisenhower to meet with Governor Faubus. And he agreed to do so. Governor Faubus flew to the summer White House at Newport, Rhode Island. He later said that the President had dressed him down "like a general tells a lieutenant," telling him that the National Guard must protect the black students, not bar their way into the school.²¹ He gave the President the impression he would not stand in the way of integrating the school; but he later gave the press the opposite impression. He added that he would withdraw the National Guard if ordered to do so. But that would leave a mob of several hundred White Citizens' Council members surrounding the school. No black child could enter.

21. DAVID A. NICHOLS, *A MATTER OF JUSTICE: EISENHOWER AND THE BEGINNING OF THE CIVIL RIGHTS REVOLUTION* 180 (2007).

What was Eisenhower to do? Should he send federal troops to Arkansas? On the one hand, Jimmy Byrnes, Governor of South Carolina, confidante of President Truman, former Justice of the Supreme Court, head of our World War II economic mobilization efforts, and not a racist, told Eisenhower that, if he sent troops, there could well be violence, he might have to occupy much of the South, he would have a second Reconstruction on his hands, and, at the very least, state authorities would close the schools, leaving every child without education. On the other hand, Herbert Brownell, Attorney General and long Eisenhower's wise counselor, told Eisenhower that he had to intervene—the rule of law itself was at stake.

Eisenhower himself had grown up in a segregated society, but experience in World War II, particularly with brave black units fighting at the Battle of the Bulge, convinced him that segregation was an absurdity. He led through example. Before he was President, he had desegregated much of the armed forces. After he became President, he desegregated the District of Columbia. At the same time, he knew that the position that would gain him the public's strongest support was a position that turned, not on the moral force of integration, but upon the practical necessity of following the "rule of law."

Eisenhower decided to send federal troops to Little Rock. He deliberately chose the 101st Airborne Division. Those of my own generation still can remember that this Division was special; it was composed of heroes. These were the men who had parachuted into Normandy during the invasion, some of whom (and I can remember the pictures) found themselves, parachutes entangled in the church steeples, sitting targets for enemy machine gunfire. This was the Division that fought with valor at the Bulge. In 1957, Americans knew this. And they instinctively supported those troops.

On September 23, President Eisenhower read the following order: "I, Dwight D. Eisenhower, President of the United States, under and by virtue of the authority vested in me by the Constitution . . . , do command all persons engaged in such obstruction of justice to cease and desist therefrom, and to disperse forthwith."²² He was speaking over the radio to the nation, but particularly to those who were surrounding Central High School. And he sent fifty-two aircraft, carrying about one thousand troops, from Fort Campbell, Kentucky, to Little Rock.

The next day the photographers took a new picture—that of the paratroopers escorting the Little Rock Nine into Central High. And that picture, too, went around the world. It was a great day for the "rule of law." Indeed, it was a great day for America.

22. Proclamation No. 3204, 3 C.F.R. 46 (Supp. 1957).

I wish I could end the story here, but I cannot. What happened next? The troops stayed for a while, but eventually they went home. A new, more segregationist school board was elected in Little Rock. It returned to federal court, asking for a postponement of integration. It told the federal court that troops could not stay forever; that violence was still possible; that it was difficult to teach in an environment where some, such as the Governor, were still trying to stop integration; and that they needed more time. In the summer of 1958, the Supreme Court considered the case; and it decided against postponement.

The Court did its best to show that postponement was out of the question. Its opinion was unanimous with all nine Justices taking the unusual step of signing it individually. It held that integration must proceed forward as ordered. The opinion unanimously reaffirmed the legal validity and importance of *Brown*. And the Court added that “the federal judiciary is *supreme* in the exposition of the law of the Constitution.”²³

This last statement has drawn criticism. *Marbury* did not use the word “supreme.” It said that the Constitution trumps a statute in cases before the Court; but it said nothing about similar cases not before the Court. Why then use the word “supreme”? The answer likely lies in the Court’s perceived need to help make *Brown* enforceable. That word “supreme” makes clear that the South is under a constitutional obligation to follow *Brown*—to desegregate—in the vast number of instances that were not the direct subject of litigation. It is an appeal to law-abiding citizens to follow *Brown*’s law voluntarily.

But how much of a difference could nine judicial signatures, or ninety, or nine thousand, make in a South determined to resist? No sooner did the Court’s decision appear than school authorities closed Central High School. And it stayed closed the rest of the school year. Children of every race lost a year of education; many never fully recovered.

Still, the die was cast, in integration’s favor. Eventually Little Rock’s citizens elected a more moderate school board; and the board reopened the school on an integrated basis. Eventually, as we all know, Rosa Parks, the bus boycott, Martin Luther King, the civil rights marches, and much else besides, helped tear down the racial barriers that Southern law had erected. And the day eventually came when Elizabeth Eckford, one of the Little Rock Nine, and the woman whose face was photographed so enraged, began to tour the county speaking together about the virtue of repentance.

In my view, despite the school closing, Little Rock and *Cooper v. Aaron* played an important role in this lengthy process. Central High became a

23. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (emphasis added).

symbol. The paratroopers proved that a majority of the country would support the rule of law. Perhaps it shows—as I once said to a Russian paratroop general visiting the Court—that the judges and the paratroopers must be friends. At the least it shows the complication, the complexity, the difficulty of enforcing a truly unpopular Court decision. It provides an example of why it is important to find a liberty-protecting answer to Hotspur's question. Still, when compared with the Cherokee case, it suggests that the country was moving in the right direction. And ultimately it may help to vindicate Hamilton's decision to put the power to interpret the Constitution in the courts rather than in the legislature.

D. A Final Example

I could choose as a final example any one of several fairly recent, highly controversial Supreme Court decisions. Think of the Court's abortion decisions or those involving prayer in public schools. The legal questions are close ones; they evoke strong public emotions, and a large portion of the public strongly believes the Court decided incorrectly.

Or consider *Bush v. Gore*.²⁴ The election of 2000 turned on a knife edge. Vice President Gore won more popular votes, but Governor Bush would win more electoral votes if, but only if, he won a majority of the popular vote in Florida. And only a few hundred votes (of several million) separated the two candidates there.

Eventually, as you know, the Supreme Court considered the matter. Some members of the Court thought that, in ordering a recount, the Florida Supreme Court had departed so radically from state statutory requirements that it had violated the Federal Constitution's requirement that the state legislature decide how to pick the state's electors. Others thought that, by ordering a recount without setting uniform counting standards, it had violated other federal constitutional requirements. But the key Supreme Court decision was its decision to order Florida to stop its recount at that point (a point where Governor Bush was ahead).

Five members of the Court supported this decision; four members (of which I was one) opposed it. I was strongly against it, writing that the Court should not have heard the case, that it should have dismissed the case without deciding it, and, failing that, that it should have decided it the opposite way. Much of the country, particularly those supporting Vice President Gore,

²⁴ 531 U.S. 98 (2000).

probably agreed with me that the majority was wrong. And they felt very strongly about the matter.

There has been no shortage of comment about the decision. Yet one of the most interesting comments was one made by Senator Harry Reid, who later became the Democratic majority leader. I heard him say that the most remarkable feature of the decision is one rarely remarked. It is this: despite the strong opposition to the decision, and despite the fact that it might well have been wrong, Americans did not riot in the streets, they did not resort to violence, they reacted peacefully and then followed the Court. Indeed, the losing candidate, Vice President Gore, when he told his staff, “Don’t trash the Court,” in effect told the American people to do just that.

That statement describes a national treasure. I know that ten percent or more of this audience is secretly thinking, “It’s too bad there weren’t more protests including some violence.” But if that is what you think, I would ask you if you are sure of that. I would ask you to turn on the television and look at what happens in countries that solve their problems through violence. Three hundred million Americans have decided to resolve their differences under law instead—even though courts can decide in ways that are unpopular and even though courts may be wrong when they do so. That attitude, it seems to me, is what constitutes the treasure.

These examples, I hope, will help show my visiting judges from Asia, Africa, or Latin America the distance we have traveled from the Cherokees to *Bush v. Gore*. They help show how complicated and difficult the task has been—of creating a society where following the rule of law, in even the most controversial matters, is a natural and normal thing to do. They suggest that it has taken us a long time to develop that attitude; that it has involved a highly imperfect history that has included a civil war and eighty years of racial segregation mandated by law; and that the habits or customs that constitute the rule of law can never be taken for granted but must be continuously renewed.

As with the development and maintenance of most public attitudes and habits, families and educational institutions must take the laboring oar. But judges too may have a role to play. And that is the subject of my second lecture.

II. THE FUTURE: WILL THE PEOPLE FOLLOW THE COURT?

Yesterday I focused your attention on Hotspur’s question: why will the public do what the courts say? I gave examples suggesting that the public’s willingness to follow what the courts decide (about major disputes) is a national treasure. It is a treasure that rests upon custom and habit, developed gradually and haltingly over time.

Today I want to discuss what judges—particularly those who serve on the Supreme Court—can do to help maintain those customs and habits. Judges cannot bear the laboring oar, for that is the job of parents and educators, whose basic work is the training of future generations. Judges, such as Justice O'Connor, urge, but they cannot require, communities to teach high school civics, so that our citizens will continue to understand how their democratic government works and why they must participate in public community life.

Still, judges can do something more than that. In their professional capacities, judges, including Justices of our Court, work with law. And approaches to that subject matter that bring about decisions that work better for Americans will also help build confidence in the courts themselves, thereby sustaining that custom and habit of support. This second lecture is about the Court's contribution to this effort.

A. *Competing Approaches*

Before turning to the general decisionmaking approaches that I favor, I shall briefly sketch the major contemporary competing approaches. The first of these, at least in the popular mind, is simply "politics." Many Americans—too many—believe that Supreme Court Justices act like junior varsity politicians, at least when they decide important cases.

But that cannot be right. To decide cases via politics would undermine the very objective of judicial review. If that is how judges are to decide, then Hamilton should have given the constitutional review power to Congress, not to the judiciary; and our experiment with *judicial* review is a failure.

Remember, too, that judges are not very good politicians. If you want confirmation, consider *Dred Scott*.²⁵ The decision, perhaps the Court's worst, held Congress powerless to stop the spread of slavery in the territories; it struck down as unconstitutional statutes designed to compromise on the issue; it found that even a free descendant of an African slave could not become a citizen of the United States. And the only affirmative claim I have heard said about the case is that its author, Chief Justice Taney, thought it might prevent the Civil War. But, if that is what he thought, he was certainly wrong. The decision fed Northern outrage. Abraham Lincoln used Justice Benjamin Curtis's strong dissent as the basis for his Cooper Union speech. It helped Lincoln become leader of the Republican Party and eventually President of the United States. And the Civil War followed. Most historians would agree today

25. *Scott v. Sandford (Dred Scott)*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

that, if *Dred Scott* had any effect on the Civil War, it tended to cause that war, not to prevent it.

There are good reasons here why judges should not hold their fingers up to political winds to see which way they blow. And, in my experience, the Justices do not do so. They do not base their decisions on politics—in any ordinary sense of that word.

Still, you might agree that the Court's decisions do not rest upon "politics" in its ordinary sense: Democrats or Republicans? Who is popular? Where are the votes? Yet you might still claim that those decisions rest upon something that is similarly extralegal, namely the judge's idea of what is good. And many do believe that the Justices simply decide to write into the law whatever they think in general is good.

But a system based upon a general subjective idea of the "good" will not work much better than a system based upon "politics." Nine judges, nine hundred judges, might well have nine, nine hundred, different views of what is good. A legal system resting on those subjective views, among many other failings, would lack stability. The law would change with each new appointment; the system would prove unworkable; and the public would lose confidence.

What, then, about "originalism"? Originalists believe they can find the answers to most constitutional questions simply by looking to historical circumstances—at the time of the Framing—and applying the Constitution now as the Framers would have thought it applied in detail then. They believe this approach provides an objective way to reach legal decisions, thereby holding the judge's subjective impulses in check. For similar reasons, originalists often try to find the answers to difficult statutory questions in the statute's literal language.

I am not an originalist, and I do not believe that method of interpretation can live up to its billing. For one thing, legal questions that reach the Supreme Court are difficult, uncertain, and close ones. Typically the relevant history is itself uncertain and a matter of considerable debate. In one typical case, for example, the historical approach would have had us decide how the Ex Post Facto Clause applied to a modern circumstance by examining a late eighteenth-century American judge's views about what a mid-eighteenth-century English treatise writer (Blackstone) thought about a seventeenth-century parliamentary trial of an English bishop. The truth of the matter is, in my opinion, that none of us could be certain how to answer this historical question. If history is determinative, the Court should be made up of nine historians, not nine judges—though I suspect that even nine historians would have disagreed in the Ex Post Facto Clause case.

For another thing, the Framers intended many constitutional clauses, for example, the Commerce Clause, to apply in light of *changing* circumstances. The Framers would have wanted and expected the Court to apply the Clause to later commercial developments, such as automobiles and airplanes. To take a more controversial example, consider the Fourteenth Amendment's insistence upon "equal protection of the laws."²⁶ That phrase, applied consistently with its basic purpose, forbids racially segregated schools. Nor does it matter that, at the time it was enacted, the District of Columbia practiced that pernicious segregation. It does not matter because, by the mid-twentieth century, racial segregation had proved its incompatibility with equal treatment. And the Amendment's more general, basic purpose—equal treatment—trumped its authors' much earlier, empirically incorrect beliefs that segregation and that basic equal treatment objective could peacefully coexist.

Finally, even if we could know all relevant history in detail, why should the public continue to accept a Constitution that freezes eighteenth-century detail and then imports it wholesale into modern society? Severe flogging was used as a criminal punishment until well into the nineteenth century. Yet would we not now hold it a "cruel and unusual punishment[]" forbidden by the Eighth Amendment²⁷—irrespective of what the Framers thought about flogging?

Arguments along these lines, even when elaborated and reinforced by other arguments (as in my book), will not convince the originalists. And one reason that is so is well expressed in a joke I have heard Justice Scalia tell:

A hunter, camping, sees a companion putting on running shoes. "Why are you doing that?" he asks.

"Because a bear is running toward us pretty fast."

"But you can't outrun a bear."

"Yes, but I can outrun you."

The point of the joke is that "politics" cannot and should not provide the answers to difficult constitutional questions; nor can an appeal to the judge's subjective notion of "the good." So it is "originalism" or nothing. What is the alternative to originalism?

That is the question that Parts II and III of my book try to answer. They make clear that there is an alternative, an alternative with well-established, traditionally American roots. Gordon Wood, the eminent historian, writes that

26. U.S. CONST. amend. XIV, § 1.

27. *Id.* amend. VIII.

late eighteenth-century judges took an “unusually instrumental attitude toward law,” offering “prudent and pragmatic regulations” and justifying them by what Connecticut jurist Jesse Root called the “reasonableness and utility of their operation.”²⁸ Judges whom we all admire, such as Hand, Holmes, Brandeis, and Cardozo, all follow that tradition.

B. Pragmatism

Let me be more specific. For one thing, the alternative approach is based upon *common values*. Those values are themselves found in the Constitution. Embodied in the document’s provisions, they do not change. But circumstances do change. And the constitutional job of the Supreme Court judge is to apply those permanent values to ever-changing circumstances. The Framers intended to protect free expression; but they knew nothing of the Internet. The contemporary judge must decide how well-established First Amendment protections apply to changing, modern Internet circumstances.

For another thing, the alternative places great weight upon *purposes*—of those who wrote a statute or the Constitution. It looks for Congress’s intent where statutes are at issue and for basic underlying values where the interpretation concerns the Constitution.

Further, the alternative looks to *subsidiary approaches or attitudes* that can help the Court work *cooperatively and productively* with other governmental institutions. By applying several different judicial attitudes in different areas of the law, the Court can cooperate effectively with other parts of government, helping both government and the law itself work better for ordinary Americans—not in every case, but by and large, in general, over time.

Elsewhere (i.e., in my book) I describe the set of subsidiary attitudes that I believe will help the courts work more cooperatively with Congress (in respect to statutory interpretation); with the executive branch (in respect to the work of administrative agencies); with the states (in respect to principles of federalism); with lower courts (in respect, e.g., to case management); with prior courts (in respect to *stare decisis*); and with the President (in respect, e.g., to matters of national security).²⁹

Finally, the alternative is *pragmatic*. It recognizes that many difficult cases involve a weighing, not of good against evil, but of one good against another. How, for example, are we to resolve cases where privacy interests conflict with

28. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 457 (2009).

29. See STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 88-214 (2010).

those of free expression? How do we resolve cases where the protection of traditional civil liberties and serious national security needs find themselves in conflict?

A pragmatic approach does not leave the judge free to do whatever he or she thinks is good. The judge must write an opinion. And a good opinion contains the true reasons that led to the judge's decision. The decision must be reasoned. It must be principled. It must be transparent. It must be informative. And it must be consistent with the vast set of legal rules and practices that make up the judicial craft. That is what Judge Learned Hand meant when, speaking of the constraints under which he decided a case, he pointed to the shelves behind his desk and said, "those books."³⁰

C. *Examples*

To show you more concretely what I mean, I shall provide examples. Time is too limited to illustrate each subsidiary approach or attitude. But I can nonetheless sketch a few examples that will give you a rough idea of what I have in mind.

1. *Congress*

Consider that major portion of the Court's work that most directly affects Congress, namely the interpretation of statutes. In the difficult statutory cases that reach our Court the statutory provision is unclear about how it applies to particular circumstances. When I speak to high school students, I like to illustrate this point by describing the French biology professor who was traveling by train to Paris with a basket containing twenty live snails for use in his biology class. The train conductor asked him to buy a half-fare ticket for the snails. When he protested, the conductor showed him the fare manual, which said passengers could bring "animals" on the train, but only in a basket, and they also had to pay half fare for each "animal." Does the manual's word "animals" include snails; or is it limited to dogs and cats? How many tickets should the professor have to buy? These are problems of statutory interpretation.

Judges have six traditional tools for use in solving problems of this type. They look to text, to history, to tradition, to precedent, to statutory purposes, and to the effects (of deciding one way or another) viewed in light of those

30. KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 46 (1997).

purposes. I have found the most useful of these tools to be the last two: purposes and related consequences.

How might one use these two tools? In one case³¹ we had to interpret a statute that exempted from a general rule (making the federal government liable for torts committed by its employees) certain claims that sought compensation for a misuse of the plaintiff's property. The exempted claims were those in which the government employee at fault was (and here are the statutory words) "any officer of customs or excise or any other law enforcement officer."³² What do these last five words ("any other law enforcement officer") mean? How do they apply? Do they exempt from liability nearly every law enforcement officer, including, for example, a prison guard? Or are they restricted to law enforcement officers whose duties involve primarily customs and excise work?

The text does not provide an answer. I do not need a dictionary to know what the words mean. Nor in the actual case was there any general history or tradition that cast much light. There was no precedent directly on point. But I could try to find out *why* Congress had inserted those words. I could ask what those who wrote the statute were trying to achieve. What was their *purpose*?

I found the origin of the words in a Justice Department document, sent to Congress, and written by a famous expert on procedure, Alexander Holtzoff. That document made clear that Congress sought to limit the exemption to instances involving customs and excise work, where, given the number of property seizures, the government might have had a special need for immunity.³³ I consequently wrote that the Court should adopt the more limited interpretation.³⁴

Why should courts follow a purpose-based approach? For one thing, doing so will help Congress work more effectively. The members of Congress need not think in advance of every possible application of a statute. They can write simpler statutes, using more general language, for they can take comfort in the fact the courts will try to understand what they are trying to do and will try to apply that language with an eye toward helping them do it. A purposive approach will also permit committee staffs to write further, more lengthy explanations in reports; and, in doing so, they can more easily explain to courts and to others just what Congress had in mind and in particular what it was

31. *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008).

32. Federal Tort Claims Act, 28 U.S.C. § 2680(c) (2006).

33. ALEXANDER HOLTZOFF, SPECIAL ASSISTANT TO THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, REPORT ON PROPOSED FEDERAL TORT CLAIMS BILL 16 (1931).

34. *Ali*, 552 U.S. at 243 (Breyer, J., dissenting).

trying to achieve. At the same time, by keeping their members informed, the staff can make certain that a report's elucidating discussion remains consistent with the members' intentions.

For another thing, by taking a purpose-based approach the courts can facilitate the work of our democratic processes. While a citizen is unlikely to understand statutory details, that citizen is likely to understand general statutory objectives and purposes, say, a cleaner environment or, by way of contrast, low-cost energy. When the courts interpret statutes in ways that further their purposes, the citizen, at least generally aware of the statute's consequences, can judge the legislator who voted for, or against, that statute accordingly. When the courts interpret statutes contrary to their purposes, the citizen does not know whom to blame for the results. It is easier for the legislator to deny responsibility for the statute's consequences—say, by blaming the courts. Other things being equal, the former, purpose-based, approach thereby facilitates democratic responsibility.

Those who oppose the use of purpose (e.g., originalists) fear that it will lead judges to make subjective decisions, substituting their own ideas of good and bad for the law. Elsewhere I explain why I do not believe that is so. I also elaborate these, and other, arguments.³⁵ But my object here is simply to sketch a description so that you can understand what I mean by a "purpose-based" approach and why I believe it an important cooperation-facilitating attitude for courts to take in interpreting statutes.

2. *The President*

I shall turn to a second set of examples that also illustrate the need for approaches that facilitate cooperative relationships when the Court deals with other government institutions. The examples are drawn from a particularly difficult constitutional area—that of court review of presidential action that curtails the scope of traditional civil liberties when taken during time of war (or the equivalent). The courts should not simply abdicate authority to the President, but neither can they remain oblivious to the fact that the Constitution grants to the President and to Congress, not to the courts, the power and the duty to protect the nation's security. Here I believe the courts should require *accountability* while *pragmatically balancing* the important competing constitutional interests at stake.

Two sets of national security cases will help illustrate how the Court has done so.

35. See BREYER, *supra* note 29, at 88-105.

a. Korematsu

In 1942, soon after Pearl Harbor, the executive branch, acting with congressional authority, moved more than 100,000 persons of Japanese origin—of whom more than 70,000 were American citizens—from the West Coast to inland internment camps, where they were kept throughout most of World War II. In early 1942, Americans, particularly those who lived on the West Coast, feared a Japanese invasion. And General John L. DeWitt, the commander of the Western Defense Command, headquartered in the Presidio of San Francisco, feared a potential fifth column. The press reinforced the public's concern; California agricultural interests (perhaps fearing the competition of low-paid Japanese farmers) supported relocation; and even such libertarians as Earl Warren, then California's Attorney General, argued that the lack of any sabotage so far simply showed "a studied effort" to commit sabotage in the future.³⁶ (Warren later apologized.) The upshot was a statute, followed by a presidential order, followed by a military decree, requiring those persons of Japanese descent to obey a curfew, then to report to relocation centers, then to suffer removal to camps—wooden huts surrounded by barbed wire—in eastern California and the intermountain region.

For the most part, the Japanese families, not wanting to rock the boat, avoided legal protest. But a handful protested the orders, refused to follow them, and argued in court that the orders violated the Constitution. How, they asked, could the executive branch order American citizens from their homes and intern them in camps—all without any individualized hearings or other form of legal process?

The most famous case was that of Fred Korematsu.³⁷ Korematsu (whom I once met and liked) was born in Oakland, California, attended Los Angeles City College, almost joined the U.S. Navy (but was turned down for medical reasons), became a welder, and then decided to mount a legal battle against the relocation. Why, he asked, has the U.S. Army treated "the Japanese" differently than "Germans and Italians"? Why has it not given "Loyal Citizens" at least a "fair trial" so that they "can prove their loyalty to America"?³⁸

By 1944 Korematsu's case had made its way to the Supreme Court. The government was prepared to argue that military necessity outweighed all competing legal interests when two Justice Department lawyers made an

36. JACOBUS TENBROEK, EDWARD N. BARNHART & FLOYD W. MATSON, *PREJUDICE, WAR AND THE CONSTITUTION* 84 (1954).

37. *Korematsu v. United States*, 323 U.S. 214 (1944).

38. PETER IRONS, *JUSTICE AT WAR* 99 (1983).

interesting discovery. They knew that General DeWitt's removal decision rested in part upon his claim that, just after Pearl Harbor, there had been 760 instances of suspicious signaling from shore to offshore Japanese submarines; and there had been five instances of sabotage. After reading an article published by a former naval intelligence officer in *Harper's Magazine*, they became suspicious. They asked Federal Communications Commission (FCC) officials to check the signaling claim, and they asked the FBI to check the claim of sabotage.

A few weeks later FCC employees came to their Justice Department offices with a stack of reports. The reports showed that there had been no signaling. The claims of signaling simply reflected lack of training by the buck privates who had just taken over the equipment monitoring job. When asked how they had discovered this so quickly, the FCC staff said that the reports were not new; they had been written in early 1942; and they had been shown to DeWitt at that time. He must have known that the claims of signaling were false. The Justice Department lawyers received similar sabotage-related information from the FBI, whose director, J. Edgar Hoover, had strongly opposed the Japanese removal.

The two lawyers then wrote what they had learned into a footnote that appeared in the Justice Department's brief. And, even though it ended up written in almost unintelligible language, at oral argument Charles Horsky, lawyer for the American Civil Liberties Union, made certain that the Court knew what the Justice Department was saying, namely that there simply was no good evidence of Japanese disloyalty.³⁹

All the more wonder then that the Supreme Court, to its discredit, upheld the constitutionality of Korematsu's removal, by a vote of six to three. The three dissenters wrote separately. Justice Jackson argued that no special constitutional standard should apply in wartime. Rather, he said, the armed forces and the President will take unconstitutional action where needed to save the country. Cases challenging the lawfulness of their decision are unlikely to reach the Court until much later. By that time the emergency will likely be over. And the Court can decide that what they did violated the Constitution. The President, he thought, will save the country, and the Court will uphold the Constitution.⁴⁰

Tempting as this superrealist approach may seem, I believe it too risky to adopt. Suppose the executive branch does feel itself constrained by the law and fails to act. The Constitution, as Justice Jackson also said, is not "a suicide

39. See *id.* at 280-315.

40. *Korematsu*, 323 U.S. at 242 (Jackson, J., dissenting).

pact.”⁴¹ Or suppose the executive gets into the habit of acting unconstitutionally, whenever it thinks it should. Can we then protect the habit of obedience to law that we have found so precious? It is far better, in my view, if the Constitution and emergency need find legal accommodation.

Justice Murphy wrote what, in my view, is a better dissent. He traced the history of the removal. He examined the justifications presented. And, in light of the constitutional importance of the rights that the government had ignored, along with the racial nature of the criteria used, he said the removal was unconstitutional. Why, he asked, should the government, at an absolute minimum, not have provided for some kind of individualized loyalty-related hearing?⁴²

The majority rejected these views, however, and upheld the removal.⁴³ Its members included such strong civil libertarians as Justices Black and Douglas, along with, for example, Justice Frankfurter, who strongly supported *Brown*. What were they thinking?

I suspect that they were thinking that, despite the one-sided nature of the evidence in *Korematsu* itself, a decision in *Korematsu*’s favor meant that other, more closely balanced cases would arise challenging military action. And the Court was not prepared to second-guess the President or the military on serious matters of national security. They might have thought that either President Roosevelt must run the war or we must run it. And we know that we cannot run it. The result: judicial abnegation. No protection for a very serious invasion of a citizen’s basic personal liberty in time of war.

b. Guantánamo

Four more recent cases required the Court to consider the rights of enemy combatants, most of whom the government detained at Guantánamo Bay, Cuba. The underlying question was similar: how can the Court hold the President accountable for the enforcement of the Constitution’s protections of individual liberty during wartime or emergencies where serious threats to national security are at issue? On the one hand, to interpret the Constitution’s protections too restrictively could threaten to deprive the President of authority he needs and which the Constitution gives him to save lives. On the other hand, simply to ignore these protections makes them a wartime dead letter, when perhaps their disappearance is less necessary than the executive claims.

41. *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

42. *Korematsu*, 323 U.S. at 241-42 (Murphy, J., dissenting).

43. *Id.* at 219 (majority opinion).

In deciding these cases, the Court tried to avoid *Korematsu's* mistake. It held that the President was accountable, even in time of war or national emergency. But it tried to do so in a way that would not significantly interfere with the President's ability to protect the nation.

In the first case, *Rasul*,⁴⁴ the Court focused upon the federal habeas corpus statute. That statute protects basic liberty by giving any person imprisoned within the "jurisdiction[]" of a federal judge the right to seek a writ of habeas corpus, i.e., a writ ordering the prisoner's release if the prisoner is being held in violation of the laws or Constitution of the United States.⁴⁵ The question was whether a Guantánamo prisoner, seized on the battlefield of Afghanistan, could petition for this writ.

Was Guantánamo within the jurisdiction of the federal judges of the United States? The Court said yes; Guantánamo is part of the United States; the prisoner can seek the writ; and then the Court said no more. It did not consider battlefield habeas corpus applications. It did not consider whether, or the conditions under which, the writ should issue. It simply said that the habeas corpus statute applied to Guantánamo Naval Base in Cuba; the detainees could have their day in court; and it left it at that.⁴⁶

The second case, *Hamdi*,⁴⁷ concerned an American citizen, held in a military prison in South Carolina as an enemy combatant. The military had picked up Hamdi in Afghanistan, where, it said, Hamdi was fighting for the Taliban. Hamdi claimed he was not fighting but was simply acting as a relief worker. How should this factual dispute be resolved? What procedural rights did the Constitution guarantee Hamdi? The Court decided that the Constitution gave Hamdi the right to the "core elements" of a fair hearing, including the right to "receive notice of the factual basis for his [enemy combatant] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."⁴⁸ It did not spell out these rights in any greater detail.

The third case, *Hamdan*,⁴⁹ concerned another Guantánamo detainee, a detainee who had once been Osama bin Laden's driver. The government intended to bring Hamdan to trial before a special military tribunal. The Court, after interpreting the relevant statutes, held that they did not authorize the military to create a special tribunal for that purpose. The government

44. *Rasul v. Bush*, 542 U.S. 466 (2004).

45. 28 U.S.C. § 2241 (2006).

46. *Rasul*, 542 U.S. at 485.

47. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

48. *Id.* at 533 (plurality opinion).

49. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

would have to use ordinary, statutorily authorized procedures such as court-martial procedures or civilian court proceedings if it wished to try Hamdan. But the Court did not specify whether or how those more ordinary proceedings might be modified to serve any special security needs that the military claimed were present.

The fourth case, *Boumediene*,⁵⁰ concerned a Guantánamo prisoner who, like Rasul, sought to bring a petition for habeas corpus. The legal problem arose because Congress had subsequently passed a new statute, which both provided for special military tribunals and specifically stated that courts, at least the Supreme Court, could not issue a writ of habeas corpus on behalf of a Guantánamo detainee.⁵¹ Once the Court decided that other provisions in the statute did not provide a habeas corpus equivalent, it had to decide whether Congress could suspend that writ. The Constitution says that Congress cannot “suspend[]” the writ of habeas corpus “unless . . . in Cases of Rebellion or Invasion the public Safety may require it.”⁵² And the Court, concluding, as in *Rasul*, that Guantánamo detainees were ordinarily entitled to petition for the writ, held that, there being neither a “rebellion,” nor an “invasion,” Congress could not suspend it.⁵³

The Court did not answer the dissent’s claim that its views would give military personnel the right to file a habeas petition from the battlefield, thereby interfering with necessary military operations. It did not define the precise scope of the petition’s reach. But it did use the word “practical” many times,⁵⁴ in effect stating that the judgment about the scope of the writ in time of war or security emergency is a pragmatic judgment.

* * *

It is possible that the Court’s holdings in these cases pleased almost no one. Strong civil libertarians would have preferred the Court to describe procedural rules in greater detail, granting detainees more protection, and entitling them to more generous rights to release. Those focusing upon national security concerns may have feared that the Court had gone too far in authorizing nonexpert civilian judges to interfere with the work of the military. History

50. *Boumediene v. Bush*, 553 U.S. 723 (2008).

51. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635 (codified at 28 U.S.C. § 2241(e) (2006)), *invalidated by Boumediene*, 553 U.S. 723.

52. U.S. CONST. art. I, § 9, cl. 2.

53. *Boumediene*, 553 U.S. 723.

54. *Id. passim*.

may one day conclude that the Court, or that one or the other of these groups, was right.

But in the meantime I can point to what I see as three important features of these cases. First, in each case the prisoner won; members of the least popular groups of individuals in America had sued one of the most powerful individuals in America, the President of the United States, and the President had lost.

Second, the Court tried to proceed carefully, pragmatically balancing the conflicting constitutional interests in security (delegated to the President and Congress) and individual liberty (written into the Bill of Rights). And it decided as little as possible in each case.

Third, the Court ultimately held the President accountable. It sought to overcome what it considered *Korematsu's* error. And the law held. President Bush, having lost the cases, said that he would "abide by the court's decision," adding "that doesn't mean I have to agree with it."⁵⁵ Like Vice President Gore's similar statement, it shows a major change of attitude since President Jackson and the Cherokees. Those modern statements resonate with the two hundred years of American history that support them.

D. Other Areas of Law

The areas of law that I have illustrated through example are not the only areas where key subsidiary attitudes or approaches can help courts work cooperatively with other institutions and, in the process, produce more workable law. When the Court considers the lawfulness of *executive branch administrative action*, it will often be helped by turning to the notion of "comparative institutional expertise," considered in light of the statute that delegates power to the administrators. When the Court takes account of *federalism*, it can be helped by a European notion (which summarizes many American ideas), namely "subsidiarity" – the idea of placing authority to carry out a particular public task in the hands of the smallest unit able effectively to perform it. When the Court reviews lower courts' case-management decisions, it should keep in mind that *specialization*, not *hierarchy*, differentiates the different judicial "layers." When the Court considers the work of past Courts, the key concept is *stare decisis* while the key attitude recognizes the importance of *reliance*.

55. Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantánamo*, N.Y. TIMES, June 13, 2008, at A1.

Limitations of time prevent me from discussing each of these areas in detail here, but I do so in the book from which I have drawn these lectures.⁵⁶ Taken together, these approaches do not constitute a detailed general theory of how to decide cases. But they do illustrate an approach to law that is based on constitutional values, that is purposive in nature, that seeks cooperation among governmental institutions, and that is pragmatic in overall approach. It falls within a well-known American legal tradition. And it is that tradition—not politics, not subjective efforts to do the good, not originalism—that will serve the public well, thereby helping to maintain the public’s respect for the judicial system.

E. Sustaining Support

The task of maintaining the public’s respect for the courts is obviously not easy. After all, the public must support a judicial institution the very job of which is to decide according to the Constitution when it is highly unpopular to do so. And, since judges are human beings, not angels, they can and do err. Why would the public support an institution that can decide in ways that most do not like and which may be wrong about the law when it does so?

Each day in Court I see the answer. I see men and women of every race, every religion, every possible point of view, who have decided to resolve their differences peacefully under law rather than through violence in the streets. But neither I nor any other judge can easily sustain this attitude through decisions alone, particularly when they often lack popularity (as they must) and when the questions are often so close that one cannot say for certain which side is correct.

That is why I say that the primary job of sustaining support, that of transmitting our values to future generations, belongs to teachers and families. When I speak to students, I can repeat the basic constitutional lesson I believe they must learn: Know your history. Understand your institutions. Participate in your communities. But it is in the classroom, at home, and elsewhere in the community that those students will receive the education that can bring these generalities to life.

Still, as I also have said, the judges have a role to play, too. They, like the bar, the law faculties, the law students too, can try to explain to others what their jobs are like; how they perform them; what courts are for; what judges do; what law is about; how the law can affect the average citizen; why independent judges are necessary; in a word, why Hamilton was right. They

56. See BREYER, *supra* note 29, at 106-56.

can appear in high schools on Law Day; they can bring student classes to observe in court; they can help teach government and civics classes; they can talk to newspaper editorial boards; they can participate in community life; they can create models for those younger than they to emulate. And, last, though I hope not least, they can try to write books and articles seeking to explain to others what the job, say, of a judge, is like, as seen through the eyes of a judge. That, of course, in these lectures and in my book is what I have tried to do.

