and related consequences, to help make the law effective. In this way, the Court can help maintain the public's confidence in the legitimacy of its interpretive role.

The various approaches that I discuss in Parts II and III fit together. They constitute a set of pragmatic approaches to interpreting the law. They provide a general perspective of how a pragmatically oriented judge might go about deciding the kinds of cases that make up the work of the Supreme Court. I do not argue that judges should decide all legal cases pragmatically. But I also suggest that by understanding that its actions have real-world consequences and taking those consequences into account, the Court can help make the law work more effectively. It can thereby better achieve the Constitution's basic objective of creating a workable democratic government. In this way the Court can help maintain the public's confidence in the legitimacy of its interpretive role. This point, which returns full circle to Part I, is critical.

At the end of the day, the public's confidence is what permits the Court to ensure a Constitution that is more than words on paper. It is what enables the Court to ensure that the Constitution functions democratically, that it protects individual liberty, and that it works in practice for the benefit of all Americans. This book explores ways in which I believe the Court can maintain that confidence and thereby carry out its responsibility to help ensure a Constitution that endures.

PART I

THE PEOPLE'S TRUST

PART I ADDRESSES THE ISSUE OF DEMOCRATIC LEGITIMACY—how the Supreme Court has come to gain public trust even when its decisions are highly unpopular. The Constitution's efforts to ensure a *workable* constitutional democracy mean little if the public freely ignores interpretations of the Constitution that it dislikes. We simply assume today that when the Court rules, the public will obey its rulings. But at various moments in our history, the Supreme Court's decisions were contested, disobeyed, or ignored by the public and even by the president and Congress.

This part describes the important power of judicial review—how the Supreme Court first came to assume the powers it now has to interpret the Constitution authoritatively and to strike down as unconstitutional laws enacted by Congress. Subsequent chapters present historical snapshots of how, in fits and starts, the Supreme Court came to be accepted and trusted as a guardian of the Constitution. The cases presented include an example in which the president and the State of Georgia refused to implement a Court decision protecting the Cherokee Indians; the example of *Dred Scott*, where the Court itself, misunderstanding the law, its own authority, and the likely public reaction, refused justice to an individual because of his race; and an example in which the president had to send troops to Little Rock, Arkansas, because so many people there, including the governor, refused to com-

ply with the Court's decision, in *Brown v. Board of Education*, holding segregated schools unconstitutional. These examples help us understand the importance and the value, the uncertainty and the pitfalls, that predate today's widespread acceptance of Court decisions as legitimate. They help demonstrate that public acceptance is not automatic, and that the Court and the public must work together in a partnership of sorts, with mutual respect and understanding.

Chapter One

Judicial Review: The Democratic Anomaly

THE SUPREME COURT can strike down statutes that violate the Constitution as the Court understands it. Where did the Court find this power of judicial review? The Constitution itself says nothing about it. One can easily imagine a Supreme Court without the power to patrol constitutional boundaries.

Canada's Supreme Court, for example, can strike a statute down as unconstitutional, but it does not necessarily have the final word on the matter. The legislature, without amending the constitution, may in certain instances overturn the result and restore the statute. Similarly, the courts in Britain and New Zealand are charged with interpreting parliamentary statutes so as to ensure their compatibility with their nations' constitutional traditions and, more recently, bills of rights (in Britain's case, the European Convention on Human Rights). If a court in either country is unable to interpret legislation consistently with the bill of rights, the court can make a "declaration of incompatibility." But doing so does not invalidate the legislation. After a court makes a declaration of incompatibility, it is up to Parliament to decide whether to amend or repeal the legislation that the court found violated citizens' rights. Parliament could choose to leave the legislation in place, notwithstanding the court's ruling.[1]

Many commentators, scholars, and ordinary citizens have viewed the U.S. Supreme Court's power of judicial review as out of place in a

democracy. Why should a democracy, a political system based on representation and accountability, entrust the final or near-final making of such highly significant decisions to judges who are unelected, independent, and insulated from the direct impact of public opinion?

There are several partial answers to these questions. Some decisions *must* be made undemocratically—for example, the criminal trial of an unpopular defendant. The defendant's rights are rights the defendant can assert against the majority's will, and other constitutional rights also have this characteristic. Our system of democratic government is not pure majoritarian democracy, but majoritarian democracy with boundaries set by our constitutional structure and by rights that the Constitution ensures to individuals and minorities against the majority's desires. Moreover, most people understand that democratic governments, like all governments, need stability; and stability is inconsistent with a legal system whose content varies daily and directly with changes in popular opinion. Modern government also requires delegation of decision-making power, which means that the content of treaties, administrative rulings, even statutes, will not always mirror the views of the whole electorate or even a significant part of it. Instead, they mirror the more expert knowledge that the delegation of power has allowed. Thus most of us are aware that any actual democracy contains a host of institutions and procedures that are not purely democratic.

People also understand that the power to interpret a statute will sometimes resemble the power to interpret the Constitution. Delay, lack of legislative time, lack of public interest, and public hesitance to change a judicial result all mean that legislatures are not often able to overturn judicial interpretations of statutes as a practical matter, even though they may have the power to do so. This legislative reluctance, along with the unpopularity of overturning decisions that are intended to protect human rights, has meant that legislatures in Canada, for example, have overturned few, if any, of their courts' constitutional decisions, despite their legal power to do so.[2]

These answers are not completely satisfactory, however. The point remains that the Court's power to give binding effect to a constitutional interpretation is virtually ironclad. This power often concerns matters of great importance to the nation, and it can well place the

Court and other governmental institutions at loggerheads. Consider the Court's reapportionment decisions, which radically changed previous methods for drawing election district boundaries and consequently changed election results in many states; or its "affirmative action" decisions, which limited the use of race as a criterion for, say, assigning students to a secondary school to increase racial diversity there; not to mention its abortion decisions, which struck down laws that prevented women from obtaining abortions. Consider the Court's decisions finding prayer in public schools unconstitutional—decisions that have shaped the public debate about the relation of government and religion. Consider how its "search and seizure" decisions changed the way in which many police departments operate. Consider how its desegregation decisions changed what previously amounted to a caste system in the South.

In a word, the Court's application of judicial review has brought about important and often long-lasting changes. Judicial review has resulted in significant limits on the actions of other government bodies, on the terms of public debate, and on the ways in which Americans lead their lives. Hence, it still makes sense to ask why the judiciary does, or should, possess this power, a far stronger power than the power to interpret a statute.

Some have found an answer in the need to ensure a workable *democratic* system. Free speech helps the voters exercise an informed democratic choice, for example, by helping citizens obtain access even to extreme and highly unusual points of view. Equal protection of the laws helps ensure that government will not improperly weigh one citizen's voice more heavily than another's. Thus, to exercise a power that seeks to ensure a well-functioning democracy is not anomalously undemocratic.

Others find answers in the Constitution's dispersion of power among so many different government bodies. This dispersion, they believe, calls for a referee. Still others find justification in the need to protect minority rights. Democracy, they argue, refers to the will of a majority that may or may not act consistently with equal respect for minorities. Given the history of a twentieth century during which democratically elected governments mistreated minorities and then abandoned democracy altogether, one might see judicial review, here

and abroad, as a kind of institutional ballast, helping to stabilize the kind of democracy that respects minority rights and helps to prevent the "people drunk" from undoing the will of the "people sober."[3]

These answers may help explain the anomaly, but they cannot fully explain why the Court has the power to find, say in the Constitution's word "liberty," certain rights that have little to do with the preservation of democracy or even the protection of minorities. We may still ask why the framers wrote a document that gave the Court the last word as to the constitutionality of virtually any congressional statute. Why did that document let the Court assume the power to strike down a statute as contrary to the Constitution?

THE FRAMERS' RESPONSE

MANY FRAMERS, FEDERALISTS and even some Republicans, expected the undemocratically selected Court, at least on occasion, to strike down statutes it believed were in conflict with the Constitution. James Madison, for example, pointed out that the Bill of Rights would protect individuals from abuse by a majority. And he immediately added:

> Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.[4]

Alexander Hamilton wrote the same in *The Federalist Papers*—a series of newspaper articles in which he, James Madison, and John Jay advocated adoption of the Constitution. Hamilton said that the Constitution's limitations

> can be preserved in practice in no other way than through the medium of courts of justice, whose duty it must be to declare all

> acts contrary to the manifest tenor of the constitution void. . . . [Otherwise] all the reservations of particular rights or privileges would amount to nothing.[5]

The Constitutional Convention and ratification process resounded with similar language. Among those who expressed support for the power of judicial review were Elbridge Gerry of Massachusetts ("[The judiciary possesses] a power of deciding . . . [on a law's] constitutionality"); Rufus King, another delegate from Massachusetts ("[The judiciary needs no veto power, for] they will no doubt stop the operation of such [laws] as shall appear repugnant to the constitution"); and James Wilson, speaking at Pennsylvania's Ratification Convention ("[When the judges] consider [a law's] principles, and find it to be incompatible with the superior power of the Constitution,—it is their duty to pronounce it void"). One present-day scholar reports that "apparently no delegate" to the Constitutional Convention "questioned the repeated references to the power of the judiciary to ignore unconstitutional laws." Nor was anyone "surprised by the repeated references to judicial review—precisely the opposite reaction one would expect if judicial review had not yet been generally embraced."[6]

How did the framers explain this expectation of judicial review? Hamilton, in *The Federalist* numbers 78 and 81, argued that the Constitution must trump any ordinary federal law. The Constitution is fundamental, it represents the will of the people, and it is the source of lawmaking authority. A statute, by contrast, represents the exercise of constitutionally delegated authority and reflects the will of the people only indirectly, through their legislators. Thus, says Hamilton, "where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges . . . ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."[7]

Hamilton, then, assumed that conflicts between statutes and the Constitution could not be resolved by leaving the matter to the public. Some members of that public would recognize the need to strike down a statute that violates the Constitution. After all, those whom unconstitutional laws help today may be hurt tomorrow. But others might well

favor immediate self-interest over constitutional principle. Indeed, public instability in the 1780s such as Shays's Rebellion pointed directly to that risk.

Hamilton argued against placing final authority to interpret the Constitution in the hands of the president, because the president could then become too powerful. After all, the "executive not only dispenses the honors but holds the sword of the community." He also argued against placing final authority to interpret the Constitution in the hands of the legislature, because the legislature would too rarely enforce the Constitution if this invalidated a law it had recently passed. How, he asked, can it "be expected that men who had infringed the Constitution in the character of legislators, would be disposed to repair the breach in the character of judges?"[8]

That left the judiciary. The "interpretation of the laws," said Hamilton, "is the proper and peculiar province of the courts." Judges enjoy comparative expertise in the matter. They frequently reconcile apparently conflicting statutes; they study precedents; they are "skill[ed] in the laws," whereas legislators are "rarely . . . chosen with a view to those qualifications which fit men for the stations of judges." Indeed, "there is no liberty" unless the "power of judging" be "separated from the legislative and executive powers."[9]

Moreover, to place the power to resolve constitutional/statutory conflicts in the judiciary's hands would not threaten the public. That is because the judiciary, lacking both "purse" and "sword," is the "weakest of the three departments of power." Hamilton said the "nature" of the judicial power, how it is exercised, the comparative weakness of the judges, and their inability to "support" any "usurpation[] by force," reduced the "supposed danger of judiciary encroachments on the legislative authority" to a "phantom."[10]

Hamilton saw a greater risk in the opposite tendency, namely, that judges would fail to faithfully guard the Constitution when "legislative invasions of it had been instigated by the major voice of the community." To stand up against the force of public opinion would require an "uncommon portion of fortitude." It would require that judges be appointed for lengthy terms and receive constitutional guarantees as to their compensation. For all these reasons, the judiciary was the safest as well as the most natural place to lodge the power of judicial review.[11]

Another member of the founding generation, the Supreme Court justice James Iredell, elaborated on Hamilton's argument. In a concurring opinion written in a 1798 case, *Calder v. Bull,* Iredell assumed the need for an institution that would have the power to strike down an unconstitutional law. Otherwise the legislature could simply ignore the Constitution.[12]

Iredell must have recognized that the people themselves might help to keep the legislature within constitutional bounds. They could elect new members, petition for repeal of an unconstitutional law, and refuse to carry out such a law. But even if we ignore the instability inherent in such a system, these methods could at most "secure the views of a majority." What if the legislature enacts a law that is unconstitutional but popular? As Iredell explained in a letter he wrote in the 1780s, every citizen

> should have a surer pledge for his constitutional rights than the wisdom and activity of any occasional majority of his fellow-citizens, who, if their own rights are in fact unmolested, may care very little for his.[13]

Thus, as between court and legislature, it is the court that must have the last word. Individual liberty "is a matter of the utmost moment." If there be

> no check upon the public passions, it is in the greatest danger. The majority having the rule in their own hands, may take care of themselves; but in what condition are the minority, if the power of the other is without limit?[14]

Iredell concluded that the courts must have the power of judicial review. They may abuse that power, but one can find safeguards against abuse in the transparency of the judicial process, which allows the public to assess the merits of a judicial decision, and in the judges' own desire to maintain a strong judicial reputation.[15]

Still, what if the Court abuses that power? Or what if the Court simply gets it wrong? The Court certainly got it wrong in *Dred Scott* (see Chapter Four). Franklin Roosevelt believed the Court abused its power

when it invalidated New Deal legislation he thought essential to the nation's recovery from the Great Depression. And many believe that a wide variety of individual decisions are very wrong indeed.

When the Court proceeds down a wrong track too long, as the pre–New Deal Court did in the early twentieth century, the public can become aware and react. The reaction can take the form of legislation, say if the Court has misread a statute. Or voters can elect a president and senators who will appoint and confirm judges who have different basic attitudes from the judges with whom they disagree. In President Roosevelt's case, he pushed for legislation that allowed him to "pack" the Court, a battle he lost. But he ultimately won by virtue of being in office long enough to appoint eight of the nine justices on the Court.

And although judges are guaranteed life tenure in order to withstand the force of public opinion, they cannot help but be aware of the public mood. Criticism of judges and judicial decisions traces back to our founding. It is a healthy thing in a democracy. Judges read the newspaper, they read academic critiques of their decisions, and they read briefs urging them to decide a case one way or the other. They realize they can be wrong. That is why they sometimes reconsider earlier decisions and in rare cases overrule them.

Nonetheless, we Americans have, over the past two hundred plus years, absorbed the notion that in order to be protected by the rule of law, we must follow the law even when we disagree with it. And many, perhaps most, Americans would now likely agree with Hamilton that it is better to give independent judges, rather than the executive or legislative branches, the power of judicial review.

The arguments for judicial review, as Hamilton and Iredell set them out, come down to saying that some power of review is necessary, particularly to protect unpopular minorities; judges are reasonably well qualified to undertake review, which is basically a legal job; and the review power is less dangerous and more effective if lodged in the judicial branch than if lodged elsewhere. One can find widespread support for this view among the founding generation. But questions remain.

For one thing, what exactly does "judicial review" mean? The term refers generally to the fact that the Court has the power to strike down a statute as incompatible with the Constitution in a particular case. But

does that mean that Congress or the president must agree with the Court in later, similar instances? Do other institutions have an independent obligation to determine whether a statute is consistent with the Constitution? Can they ignore a Supreme Court decision to the contrary? These matters remained ambiguous for many years, not resolved until the mid-twentieth century.

More important, the arguments for judicial review do not answer the puzzling question of why the public would accept as legitimate and follow the decisions made by the inoffensive, technical, and comparatively powerless body that Hamilton and Iredell described. Where political emotions run high, few accept a technician's choice as clearly valid. Where public feelings are strong, a technician lacking "purse" and "sword" may find it difficult to assuage them. Why doesn't the public just ignore a constitutional decision that a majority believes is both important and wrong? And if they do ignore the Court's decisions, has the whole objective of Hamilton's argument not been rejected? None of the framers answers that question. Yet it is a question that, during our nation's history, has cried out for an answer.

IN SHAKESPEARE'S *HENRY IV,* Hotspur listens to Owen Glendower boast, "I can call spirits from the vasty deep." Hotspur then replies, "Why, so can I, or so can any man, *but will they come when you do call for them?*"

This basic question unites and underlies this book's discussion.

Chapter Two

Establishing Judicial Review: Marbury v. Madison

In 1803 in *Marbury v. Madison,* Chief Justice John Marshall established the Court's authority to invalidate laws that conflict with the Constitution through a judicial tour de force. Marshall wrote the Hamiltonian theory of judicial review into law. And in doing so, he overcame major institutional and political obstacles.[1]

The federal judiciary was a weak institution, and the number of lower-court federal judges was small. State courts enforced federal law, but there was no guarantee they would follow federal court interpretations of that law. Nor was there any guarantee that local officials would carry out federal court orders. The Supreme Court itself had little to do. Its caseload was unimportant, and its judges badly paid, and they had to spend considerable time "riding circuit"—traveling over bad roads to hear cases arising throughout the new nation. The first chief justice, John Jay, resigned in 1795 to become governor of New York; he later refused reappointment because the position lacked "energy, weight and dignity." A major newspaper referred to the position as a "sinecure." Lacking its own courtroom, the Court met in the Senate clerk's office.[2]

The position of the judiciary also became an important and controversial issue between mobilized political parties. The Republicans, led by Thomas Jefferson, had beaten the Federalists in elections, winning the presidency (in 1801) and taking control of Congress. Party rivalry

was fierce. The Federalists feared Jefferson as a dangerous radical "visionary" intent on undoing Federalist efforts to create a strong federal government. The Republicans thought the Federalists were seeking a central government so strong as to threaten ordinary citizens' liberties. And the Republicans particularly disliked the judicial branch, with its judges, appointed by presidents of the opposition party, who had enforced unpopular laws forbidding seditious libel; had found ways to prosecute popular rebels such as the leaders of Pennsylvania's Whiskey Rebellion; and had, from time to time, spoken out against the Republican Party and in favor of the Federalists. As far as Jefferson was concerned, the less powerful the Supreme Court, the better for the country.[3]

Furthermore, Jefferson was less willing than was Hamilton to give judges ultimate power to resolve constitutional/statutory conflicts. As he later wrote,

> each of the three departments has equally the right to decide for itself what is its duty under the constitution, *without any regard to what the others may have decided for themselves under a similar question.*

Other Republicans went further, denying that the Court had any power to overturn an act of Congress as contrary to the Constitution.[4]

Moreover, the Republicans correctly understood that the judiciary was the only branch of government that after 1801 would remain in Federalist hands. And they feared that the Federalists would make use of their control of the presidency and Congress during the 1801 lame-duck period between the elections and the March swearing in to reinforce their judicial power. Their fears proved justified when the Federalist Congress passed the new Judiciary Act, which cut the number of Supreme Court justices from six to five on the next resignation (thereby putting off the evil day when Jefferson might be able to make a Court appointment). The act extended federal court jurisdiction, making it easier for litigants to bring cases in federal court as opposed to state court; abolished the requirement that justices ride circuit; and created new judgeships, including sixteen new lower-court judgeships,

thereby permitting John Adams, the lame-duck president, to make new appointments.[5]

Once in office, the Republicans began a legislative counterattack. They repealed the 1801 Judiciary Act, thus withdrawing new federal court powers to hear more cases and abolishing the new circuit courts of appeals. Once again the Supreme Court justices had to travel across the country to hear cases. Eventually, the Republicans tried to use the power that the Constitution gave Congress to impeach federal officials to rid the government of Federalist-appointed judges—for example, John Pickering, a New Hampshire federal judge (who had a drinking problem and was convicted), and Samuel Chase, a Supreme Court justice (whom the Republicans opposed primarily on philosophical grounds and who was acquitted by a narrow vote). Congress also postponed the Supreme Court's next meeting time until 1803—thereby delaying the Court's consideration of the constitutionality of their actions.[6]

But had the counterattack come too late? To what extent did the Constitution protect the actions of an earlier Federalist-controlled Congress from later legislative change? President John Adams, a Federalist, sent that question on the road to resolution before leaving office. Acting almost immediately after the Federalist Congress (in mid-February 1801) passed its judiciary-strengthening laws, he began filling the new judicial vacancies by appointing the "midnight judges."

In most instances, Adams successfully nominated and secured Senate confirmation of his new appointees before March, when his term expired. But he did not act quickly enough in the case of William Marbury, nominee for justice of the peace in the District of Columbia. On the evening of March 3, 1801, the day before Jefferson's inauguration, Adams signed Marbury's commission. He gave the commission to John Marshall, who had recently been appointed chief justice of the United States but had remained as secretary of state for a last few days. Marshall affixed the great seal to the commission. But in the last-minute hubbub, the commission was not actually delivered to Marbury. When Jefferson took office, he found the commission and refused to deliver it.[7]

That is how the great case of *Marbury v. Madison* began. Marbury

initially wrote to the new secretary of state, James Madison, asking what had happened to his commission. Madison ignored him. Marbury then considered suing Madison to force him to deliver the commission. But where should he bring that lawsuit? A state court might well have had reservations about getting involved in a dispute about a federal commission, and the Republicans had begun to "purge" state judges with Federalist sympathies. If he sued in a District of Columbia court, he would have to face a Republican chief judge (and, in any event, Congress had given lower federal courts like this authority to hear only a narrow category of cases that might not have included Marbury's case, and Congress might have abolished the lower court in which he brought suit).

Marbury then found a federal statutory provision that apparently provided an answer. The statute said that the Supreme Court could "issue . . . *writs of mandamus,* in cases warranted by the principles and usages of law, *to any* courts appointed, or *persons holding office,* under the authority of the United States." Perfect—perhaps. A writ of mandamus was a legal order that compelled an officeholder to perform a routine task. James Madison was a person holding office under the authority of the United States. The delivery of a piece of paper, namely, the commission, was just such a routine task. And so Marbury filed a lawsuit directly in the Supreme Court, asking it to issue a writ of mandamus compelling the secretary of state to deliver his commission.[8]

The court case highlighted the political, legal, and constitutional controversies of the day. Jefferson feared that his bitter political enemies, who included John Marshall, would force him to accept one of their Federalist appointees. He doubted that the Court could review the constitutionality of statutes; he hoped it lacked the power to review the validity of presidential actions as well. And he consequently told James Madison simply to ignore all the Court's proceedings, not even to file a response.[9]

As a result, Jefferson forced John Marshall and the Court onto the horns of a critical dilemma: On the one hand, if the Court held that the law did *not* entitle Marbury to his commission, it would radiate institutional weakness. It would fail to force an executive branch official to perform a purely routine act, thereby making clear that courts, and

perhaps the law itself, could not stand in the way of a determined president. On the other hand, if the Court held that the law *did* entitle Marbury to his commission, then Jefferson (who saw the judges as enemies and thought his own conduct exemplary) might continue to ignore the Court. By ignoring the Court's decision, Jefferson would answer Hotspur's question in the worst possible way. When the Court called, the president would not come. Whatever the Court might say, it would have failed to act effectively.

As it happened, Marshall, writing for a unanimous Court, brilliantly escaped the dilemma. The Court held that the law *did* entitle Marbury to his commission. And the opinion also adopted Hamilton's theory of judicial review. Yet at the same time, the Court held that *Jefferson won the case* on constitutional grounds. Jefferson had no problem enforcing this decision—he simply continued to withhold Marbury's commission. Thus the Court avoided the practical problem of enforceability.

HOW DID THE COURT accomplish this legal feat—worthy of the Great Houdini? It began by posing the case's ultimate question as follows: Should the Court issue a writ of mandamus directing the secretary of state to deliver to Marbury his commission? It then pointed out that Marbury had a legal right to a copy of the commission. A statute made clear that once appointed as justice of the peace, Marbury had a legal right to the position for a term of five years. And once the president signed Marbury's commission, he was legally "appointed." The acts of affixing a seal to the commission and recording it were routine, that is, "ministerial act[s]," which another statute specifically required the secretary of state to undertake. And, once Marbury showed he had satisfied these legal obligations, the secretary could no more refuse to give Marbury a copy of the commission than a recording officer today could refuse to give a copy of a public document to someone who requests it and pays the copying fee.

But the fact that Marbury has a legal right to the commission is not enough. Does the law give him the power to enforce that right, that is, does Marbury have a legal *remedy*? Again the Court answered yes,

and for reasons that are not entirely technical. The United States is a "government of laws, and not of men." Under such a government, "where there is a legal right, there is also a legal remedy." Indeed, the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[10]

The Court noted some exceptions to this rule, and they are important. In particular, a "*political act*" of the president (or one of his "political or confidential" executive branch "agents") was not "examinable in a court." But whether such an act escaped judicial review "must always depend on the nature of that act." The political acts that a court could not examine were at the least acts where "the executive possesses a constitutional or legal discretion." Here neither president nor secretary possessed discretion. Indeed, "the law in precise terms directs the performance of an act, in which an individual is interested." If a specific duty was assigned by law and individual rights depended on the performance of that duty, then the person who considered himself injured must be able to "resort to the laws of his country for a remedy."[11]

Still, not even the fact that Marbury had both a legal right and a legal remedy was sufficient. The Court still had to ask whether it had the power to grant Marbury that legal remedy. That is, did the law entitle Marbury to have the *Supreme Court* issue a writ of mandamus, that is, an order that would require a government official, namely, Madison, to deliver the commission to Marbury? Chief Justice Marshall quickly answered that the federal jurisdictional *statute* to which Marbury pointed—a statute that defined the kinds of cases the Court could hear and that seemed to offer the "perfect" jurisdictional solution—answered this question yes. The statute said that the Supreme Court may "issue . . . *writs of mandamus,* in cases warranted by the principles and usages of law, to . . . persons holding office, under the authority of the United States." Thus, Marshall concluded, the statute gave the Court jurisdiction to issue the writ that Marbury sought (mandamus) to the person responsible for giving the commission (Madison), as long as the issuance was "warranted by the principles and usages of law." And the issuance arguably was warranted because courts have tra-

ditionally issued writs of mandamus to compel government officers to carry out legally required ministerial duties such as delivering a document like the commission.[12]

But the Court was still not finished. It went on to ask whether the Constitution allowed Congress to enact a statute like this, which grants the power to issue a writ of mandamus in Marbury's favor. The Court's answer made the case famous.

Recall that Marbury did not originally file his case in a lower court and then appeal the case to the Supreme Court. Rather, he originally filed the case in the Supreme Court itself. Now, here is Marshall's tour de force: whatever that "perfect" statute might say, the Constitution itself says that

> in all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, *the supreme Court shall have original Jurisdiction.* In *all* the other Cases before mentioned, the supreme Court shall have *appellate* Jurisdiction.

But this case did not affect ambassadors, public ministers (that is, representatives of foreign governments), or consuls. It was not a case in which a state was a party. Nor did it invoke the Court's *appellate* jurisdiction. Hence, if the statute gave the Court the power to hear Marbury's case as an *original* matter, the statute conflicted with the Constitution. Thus, the Court had to decide "*whether an act repugnant to the constitution can become the law of the land.*"[13]

Chief Justice Marshall said this question was "deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest." For one thing, the American Constitution, unlike the English constitution, was a *written* constitution. And an "act of the legislature repugnant" to that written Constitution must be "void." Otherwise, the Constitution's provisions would not be "fundamental," "supreme," and "permanent." Otherwise, the Constitution would create a federal government of unlimited, not limited, power. By enforcing a law that is "entirely void," the Court would grant the legislature legal and practical "omnipotence."[14]

The opinion next pointed out that resolving conflicts among different laws by determining, for example, which law prevailed was "the very essence of judicial duty." Here is the heart of the matter: an invalid law could not bind the courts because it "is emphatically the province and duty of the judicial department to say what the law is."[15] The Constitution is law and is our country's supreme law, so the Court must follow the Constitution and override a conflicting statute if a case presents that conflict.

Finally, various provisions of the Constitution itself seemed to foresee that courts would have the power to authoritatively interpret and enforce the Constitution. Article III says that the "judicial Power" of the United States includes the power to decide cases "arising under" the "Constitution." It also says that the government may not convict a person of treason on the testimony of only one witness. Article I says that states may not impose an export tax. And Article VI says that the Constitution "shall be the supreme Law of the Land" and provides that "all . . . judicial Officers . . . shall be bound by Oath . . . to support this Constitution." (Congress had added that judges must promise to "discharge" all their duties "agreeably to the Constitution.") Surely this meant that if a state (violating what the Constitution said) tried to prosecute someone who had failed to pay an export tax, a court ought not "close [its] eyes on the constitution, and only see" the tax. Nor, if the legislature should "declare one witness . . . sufficient for conviction" of treason, could a court be expected to allow "the constitutional principle [to] yield to the legislative act." No, "this is too extravagant to be maintained." In these instances and elsewhere, "the language of the constitution is addressed especially to the courts," and, therefore, "it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature." Thus, Marshall reasoned, when an ordinary law conflicts with the Constitution, it is the Court's duty to apply the Constitution, not the ordinary law.[16]

The Court's conclusion: The statutory provision that granted the Court the power to hear Marbury's case as an original matter was unconstitutional, and so the Court could not give it effect. Therefore the Court could not hear the case (and it never did). As a result, it obvi-

ously could not issue a writ of mandamus. Marbury lost. And Madison, in effect representing Jefferson, won.

MARSHALL'S LEGAL REASONING was strong, although it is open to criticism, as are all opinions. A judicial opinion cannot logically prove that its result is correct; it can only explain the judge's own reasons for having reached a particular conclusion, often in a case where much can be said on both sides. Still, one criticism is particularly striking. Numerous critics, including Thomas Jefferson, have pointed out that a court that lacks the legal power (that is, jurisdiction) to decide a case should not then go on to decide the merits of that case. How could Marshall, having ultimately found that the Court lacked the power to hear Marbury's case, also have decided the merits of the case (that is, that Marbury was entitled to the mandamus even if the Court did not have jurisdiction to give it to him)?[17]

One possible modern answer to the criticisms is this: Had Marshall simply followed the ordinary jurisdictional rule, jumping directly to, and exclusively discussing, the constitutional issues, critics at the time might have wondered whether he really had to decide the great constitutional question of judicial review. They could reasonably have asked whether Marshall had reached out *unnecessarily,* that is, for political reasons, to claim that power for the Court.

To show that the Court had acted not from political expediency but out of judicial necessity, Marshall had to make clear that Marbury's claim satisfied each and every one of the statute's requirements. Only then would it be *necessary* to move on to the great constitutional question of judicial review in order to avoid a legally incorrect decision (that is, a decision in Marbury's favor). Marshall could not both show that he *had* to reach the constitutional questions and decide *nothing but* the constitutional questions. He could not follow what has become one canon of judicial decision making, namely, "try to avoid making constitutional decisions by deciding nonconstitutional matters first," without ignoring a different canon of judicial decision making, namely, "where a court lacks jurisdiction, do not decide the merits of the case."

In a political world suspicious of Marshall's efforts to expand the

Court's power, a world where the Court's basic judicial review power was itself yet undetermined, Marshall's choice is understandable. By explaining why he could not rest his decision on nonconstitutional grounds, he would diminish the public's concern that courts, armed with the power to decide constitutional questions, would reach out and decide them unnecessarily, thereby needlessly limiting the power of the legislature. They would decide constitutional questions only when they had to.

IN A SENSE, both the criticisms and response are beside the point, for consider what Marshall did. He made clear that courts will ordinarily protect the legal rights of individuals, will ordinarily review the lawfulness of executive branch activity, and will themselves determine whether the "political" nature of an executive branch decision precludes court review and, above all, that a federal statute contrary to the Constitution cannot bind the courts. He supported these conclusions with strong legal arguments, including considerations similar to those set forth by Hamilton and Iredell, namely (1) the Constitution's "fundamental" and "superior" legal role, (2) the nature of judicial expertise, and (3) the need to avoid an all-powerful legislature. *And because Jefferson won the case, Marshall did not have to worry whether the government would enforce his decision.*[18]

For present purposes, the last-mentioned fact is particularly important. Faced with circumstances that threatened to demonstrate, and would thereby reinforce, the Court's institutional weakness, Marshall avoided the enforcement issue while holding that the Court had the power to declare an act of Congress unconstitutional and refuse to apply it.

Consider too what Marshall did not do. He did not decide that the Court had an *exclusive* power to interpret the Constitution or a power superior to that of other branches. Indeed, he wrote that the "courts, *as well as other departments,* are bound by" the Constitution. Nor did the case of *Marbury v. Madison* answer Hotspur's question: Would the public follow an unpopular Court decision with which it strongly disagrees? Marshall feared a negative answer; and the next case shows how right he was to worry.[19]

Chapter Three

The Cherokees

Although *Marbury* gave the Court the power to refuse to apply an act of Congress on the ground that it violated the Constitution, the Court did not again exercise that power until its decision in the *Dred Scott* case more than fifty years later. This hesitancy to find a federal statute unconstitutional, like Marshall's strategic view of *Marbury,* suggests a Court deeply uncertain as to whether the president, the Congress, or the public itself would accept the Court's views about the Constitution—at least when they strongly disagreed with those views. And without assurance that other government officials and the public would follow the law, how could the Court successfully exercise its review power? How could it help to protect, say, an unpopular minority? How could it help make the Constitution more than words on paper?

Today judges from all over the world ask similar questions. A chief justice of an African nation struggling to maintain an independent judiciary recently asked me directly, "Why do Americans do what the courts say?" What in the Constitution makes this likely? What is the institutional device that makes court decisions effective? What, she wondered, is the secret? I answered that there is no secret; there are no magic words on paper. Following the law is a matter of custom, of habit, of widely shared understandings as to how those in government and members of the public should, and will, act when faced with a court decision they strongly dislike.

My short answer to the chief justice's question was to say that history, not legal doctrine, tells us how Americans came to follow the

Supreme Court's rulings. My longer answer consists of several examples that illustrate different challenges the Court and the nation faced as gradually, over time, the American public developed those customs and habits.

The Cherokee Indian cases of the 1830s provide an early example of enforceability put to the test. The Cherokee tribe sued to protect its legal rights to its ancestral lands in northern Georgia. The U.S. Supreme Court held in its favor. What happened next is an unhappy story.[1]

In the first part of the nineteenth century, a dispute developed between the Cherokee Indians and their neighbors, settlers in the state of Georgia. The dispute was simple. The Indians owned land, rocks, and minerals that the white Georgia settlers wanted, and the Indians did not want to give them up. The Georgians had tried hard for two decades to convince three presidents (James Monroe, John Quincy Adams, and Andrew Jackson) to remove the Indian tribes from Georgia and send them to the West. But they got nowhere. Monroe, for example, told the Georgians that he would use only reasonable, peaceful means to convince the tribe to move.[2]

The Cherokees, who had lived in northern Georgia far longer than the Georgians, had moved on from their purely hunting/fishing life to become farmers and landowners. They had developed an alphabet, established a printing press, and built a capital called New Echota. Under the leadership of their great chief John Ross, they had also adopted a constitution. They had no reason to leave their own land. And they told President Monroe that "it is the fixed and unalterable determination of this nation never again to cede one foot more of our land." They added that they were not foreigners but the original inhabitants of America, who "now stand on the soil of their own territory" and who will not "recognize the sovereignty of any State within the limits of their territory." And they would later tell President Andrew Jackson that when they moved, they would not go west but, instead, would only go "by the course of nature to sleep under *this* ground which the Great Spirit gave our ancestors."[3]

Then, in 1829, gold was found on the Cherokee lands, and the Geor-

gians decided to break the stalemate. They entered the Cherokee territory and began to work the gold mines. They passed laws that nullified all Cherokee laws, prohibited the Cherokee legislature from meeting, and ordered the arrest of any Cherokee who argued against moving to the West. Furthermore, the Georgians found an ally in a new president, Andrew Jackson, who announced his support for Georgia, refused to keep federal troops in the mining area to enforce the Indians' rights, and urged the Indians to move west.[4]

Some in the federal Congress opposed removing the Indians from their homes, churches, and schools to send them to a "wilderness." That minority pointed out that the "evil . . . is enormous; the violence is extreme; the breach of public faith deplorable; the inevitable suffering incalculable." But a congressional majority felt differently. And Congress enacted a removal bill that was intended to enforce the president's position.[5]

Lacking sufficient support in the elected branches of the federal government, where could the Cherokees turn for help? Could they look to the law? After supporting the British during the Revolution, the tribe had signed treaties with the new United States in which the United States promised to protect the Cherokees' land and guarantee its boundaries. The Constitution specifically says that not only the Constitution and laws made thereunder but also "*all Treaties* made . . . under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the . . . Laws of any State to the Contrary notwithstanding."[6]

Although the Cherokees' legal case seemed ironclad, the same political circumstances that led them to put their hopes in the law made it difficult to get that law enforced. The Georgians would not protect them. A majority in Congress apparently did not care. And Andrew Jackson had refused the Indians' request to enforce their treaty. Hence, the Cherokees could look only to the courts for protection.

But the tribe's unpopularity and political weakness made bringing a lawsuit more difficult than one might think. The tribe found a lawyer, William Wirt, a former attorney general of the United States and one of the greatest lawyers of his day. Wirt thought that "the Supreme Court would protect" the tribe. But Wirt could not be certain that Georgia

would follow the law, even if embodied in a Supreme Court decision. After all, some years earlier, when John Quincy Adams was president, the Georgians had seized land belonging to the Creek tribe, passed resolutions declaring they owned it, sent surveyors to map the territory, and said they would "resist to the utmost" any federal effort, including any Supreme Court effort, to stop them. After all this, the Creeks just gave up.[7]

Moreover, how was Wirt to get his case to the Supreme Court? He hesitated to bring a case in Georgia's own courts—for example, by suing Georgians for trespass. He feared that Georgia state judges might indefinitely delay matters by raising problems of state property law. He thought for a time that he might represent a Cherokee Indian—Corn Tassel—whom the Georgians had arrested for committing a serious crime in Cherokee territory. Wirt would appeal Corn Tassel's case to the Supreme Court, arguing that Georgia did not have the power to enforce its laws in the Cherokees' territory. But Georgia's governor and legislature announced that they would pay no attention to the Court's decision and would resist with force any effort to enforce a Supreme Court order. To make certain a Court order would have no effect, Georgia executed Corn Tassel before the Supreme Court could hear the case.[8]

Wirt next tried suing Georgia directly in the Supreme Court, in the case of *Cherokee Nation v. Georgia.* He thought the Court would hear and decide the case. After all, the Constitution said that the Supreme Court had "original Jurisdiction" over cases "in which a State shall be Party." And as to enforcement, he told the Court that it should not assume that the president or a state would not do its "duty." There was a "moral force in the public sentiment," he said, that would "constrain obedience."[9]

The Court, however, apparently decided not to place its faith in "public sentiment." In an opinion written by Chief Justice Marshall, a divided Court (4 to 2) set forth a highly dubious interpretation of the Constitution, as allowing the Court "original Jurisdiction" only in those cases where a state is a party *and* the case involves another state, a citizen of a different state, or a foreign state. Because the Cherokee tribe was none of these but, rather, a "domestic dependent nation[]," the

Court dismissed the case on technical, jurisdictional grounds. The Georgians were delighted. Georgia's governor wrote that the state "must put an end to even the semblance" that the Indians could constitute "a distinct political society."[10]

After this setback, Wirt finally found the case he had been looking for. Georgia law required "all white persons residing within the limits of the Cherokee Nation" to take an oath to support Georgia's laws. A New England missionary, Samuel A. Worcester, refused. (He sent the governor a hymnbook instead.) The governor ordered Worcester arrested, and a Georgia court convicted him of violating the law and sentenced him to four years of hard labor. Georgia would not free Worcester, but it was unlikely to execute him. Furthermore, the Judiciary Act of 1789 gave the Supreme Court the authority to hear cases in which a state court had rejected a party's claim that a state's criminal law violated federal law, which the Constitution made "supreme." Thus the law made clear that Wirt could appeal Worcester's case to the Supreme Court, making the argument that application of Georgia's criminal law in Cherokee territory violated treaties made by the United States, treaties that the Constitution made "supreme."[11]

The Court heard the case, *Worcester v. Georgia,* and by a vote of 5 to 1 found in Worcester's favor. Again Chief Justice Marshall wrote the Court's opinion. He pointed out that a federal statute empowers the Court to review a final state court judgment that upholds a state statute and that also rejects a claim that the statute is repugnant to the Constitution, treaties, or laws of the United States. Furthermore, another federal statute requires the Court to hear such an appeal. In Marshall's words, the Court therefore has "the duty, . . . however unpleasant," to hear the case.[12]

Moreover, the Court held that Worcester was clearly right about the merits of his case. Neither Britain nor the colonies nor the United States ever extinguished the Cherokees' independence. All had treated the Indian tribes as "nations capable of maintaining the relations of peace and war." The United States specifically promised that it would guarantee the Cherokees all lands "not . . . ceded" and would regulate trade for their "benefit and comfort." Congress too had recognized that Indian tribes are "distinct political communities" with a right to all the

lands within their boundaries. Thus Georgians could not enter the Cherokee lands without the Cherokees' consent, and Georgia could not apply its state law there.[13]

Because the state statute used to prosecute Worcester "is consequently void," Georgia had to release him. After all, if Georgia had taken property under the authority of an invalid law, it would have to return the property to its owner; the same principle applied when the state invalidly deprived Worcester of his "personal liberty."[14]

In a well-aimed aside, the Court referred to the enforceability problem. It pointed out that Georgia had "seized" Worcester and "carried [him] away" while he was under the "guardianship of treaties" of the United States, indeed while he was "performing, *under the sanction of the chief magistrate of the union,* those duties which the humane policy adopted by congress had recommended." Perhaps President Jackson would get this hint. Perhaps he would understand that his own authority and the authority of the entire federal government were at stake.[15]

Justice Joseph Story, Marshall's colleague, felt relief. He wrote to his wife, "Thanks be to God, the Court can wash their hands clean of the iniquity of oppressing the Indians and disregarding their rights." A few days later, he wrote to another correspondent: "The Court has done its duty. Let the Nation now do theirs." But he added, "Georgia is full of anger and violence. . . . Probably she will resist . . . and if she does, I do not believe the President will interfere."[16]

Story was correct. On March 5, 1832, the Court issued an order requiring Georgia to release Worcester. Shortly thereafter, when Worcester's lawyers asked the state judge to release him, the judge refused. The governor then told the state legislature that he would meet the Supreme Court's "usurpation of Federal power with the most prompt and determined resistance."[17]

The president also refused to help enforce the Supreme Court's decision. On the contrary, Jackson's secretary of war stated that the president, "on mature consideration," believed that state legislatures have the "power to extend their laws over all persons [that is, Indian tribes included] living within their boundaries." Consequently, the president, he said, has "no authority to interfere" in Georgia's dealings with Samuel Worcester. Furthermore, in Jackson's view the president

and the Congress had as much authority "to decide upon the constitutionality" of statutes as do "the supreme judges," who, he added, "must not . . . be permitted to control the Congress, or the Executive, when acting in their legislative capacities." The *New York Daily Advertiser* told its readers that the president "has said . . . that he ha[s] as good a right to order the Supreme Court as the Court ha[s] to require him to execute its decisions." And popular wisdom attributed to Jackson the famous phrase "Well, John Marshall has made his decision, now let him enforce it." As Worcester languished in jail, John Marshall wrote to Joseph Story, "I yield slowly and reluctantly to the conviction that our Constitution cannot last."[18]

Marshall obviously feared the power of example. If the states could ignore the Court's decision favoring the Indians, why could they not similarly ignore others they did not like? Why should states or their citizens follow federal law at all? Why pay federal taxes? Why enforce federal customs law? Indeed, only a few months after the *Worcester* decision, South Carolina published a "Nullification Ordinance." This ordinance made it unlawful to pay (within South Carolina) any duties imposed by certain federal statutes. It required all state courts to follow state, not federal, law in these matters; it forbade taking an appeal to the Supreme Court and punished with contempt of court anyone who tried to do so.[19]

Suddenly Jackson understood the political power of Georgia's example. Many in the South had long thought that states need not follow federal laws with which they disagreed. But Jackson as president now saw the threat to the Constitution posed by such a theory. If states could nullify federal law willy-nilly, then the Union might well become not the federation that the Constitution foresaw but a voluntary, and perhaps temporary, association of independent states.

Seeing the folly of his earlier position, Jackson reversed course. On December 10, 1832, he issued a statement: "I consider . . . the power to annul a law of the United States, assumed by one State, incompatible with the existence of the Union." Then he acted. Allying himself with Daniel Webster, a strong opponent of the nullification principle, he secured enactment of the Force Bill. This new federal statute explicitly gave the president the legal authority to use federal troops to enforce

federal law. Its sponsors had South Carolina in mind. And South Carolina, understanding this, gave in to the threat of force. It repealed its Nullification Ordinance.[20]

Just as Georgia's example affected South Carolina, so the South Carolina example affected Worcester. The general public understood the need for similar treatment of similar instances as a universal tenet of the rule of law. The newspapers wrote that "no person but a Jackson or Van Buren man can see any essential difference between the case of Georgia and South Carolina." Wirt filed papers to take Worcester's case back to the Supreme Court for a further order, and Jackson, hinting at the use of troops, said he would enforce that order. Georgia saw what had happened in South Carolina and began to look for a settlement. The governor offered a pardon. The Board of Foreign Missions, Worcester's employer, urged Worcester to accept the pardon and withdraw the motion pending before the Supreme Court. Worcester did so, and in January 1833 he was released from prison. Thus, the Court's order ultimately was enforced. Or was it?[21]

Wasn't the original point of Wirt's judicial effort to secure legal protection for the Cherokee tribe? Didn't the Court's decision explicitly state that Georgia could not seize the Cherokees' land, that the land belonged to the tribe, not to Georgia? What happened to the Cherokees' effort to keep their land?

That effort failed. President Jackson sent federal troops to Georgia, not to enforce the Court's decision, but to evict the Indians. In early 1835, without the authorization of Chief Ross and the Cherokee government, federal representatives arranged for a handful of the tribe's members to meet in Washington to negotiate a treaty. There they reached an agreement providing for the removal of the tribe to the West. Jackson proclaimed victory.[22]

Horrified, the remaining seventeen thousand members of the tribe—including Chief Ross and the Cherokee government—immediately protested, but it was too late. Jackson submitted the "treaty" to the Senate, which ratified it by a one-vote margin. The secretary of war then informed Chief Ross that the "President had ceased to recognize" his government. And Jackson's federal troops ensured the Cherokees' removal. General John Ellis Wool, in command of the federal troops,

wrote to his superiors in Washington that the Cherokees were "almost universally opposed to the Treaty." He reported that the great majority of the tribe were "so determined . . . in their opposition" that they had refused to "receive either rations or clothing from the United States lest they might compromise themselves in regard to the treaty," they "preferred living upon the roots and sap of trees rather than receive provisions" from the federal government, "thousands . . . had no other food for weeks," and many "said they will die before they leave the country."[23]

But Jackson ordered Wool to enforce the treaty. Jackson forbade the Cherokees to assemble to discuss the treaty, and he ordered Wool to show his letter to Chief Ross, after which he was to have no further written or oral communication with Ross on the subject.[24]

Wool obeyed. He described the subsequent scene as "heartrending," adding that, were it up to him, he "would remove every Indian tomorrow beyond the reach of the white men who, like vultures, are watching, ready to pounce upon their prey and strip them of everything they have." "Yes sir," he later said, "ninety-nine out of every hundred" of the Cherokees "will go penniless to the West." And that they did. Their route, called the Trail of Tears because so many died, led them to Oklahoma, where descendants of the survivors live to this day.[25]

This sad story has a few positive aspects. Despite the tragic outcome, it helped establish a principle—namely, that like cases need to be treated alike. The perceived unfairness of treating similar cases differently led to press articles demanding Worcester's release. The case also underlined the importance of the Supreme Court's power to strike down state laws that are inconsistent with the Constitution or treaties or federal statutes. South Carolina's ordinance made clear, even to President Jackson, the threat that "nullification" posed to national union.

Still, the predominant lesson the story tells us is not a happy one. A president used his power to undermine a Court decision and to drive the Cherokees from their native land. Moreover, Story's and Marshall's concerns about injury to the Court were well-founded. As far as the Court was concerned, the popular account of Jackson's attitude revealed the Court's weakness. The chief justice "has made his decision, now let him enforce it." Georgia was prepared to hang anyone who

entered that state to enforce the Supreme Court decision. The president of the United States saw no problem with Georgia's attitude—at least not initially—and he ended up subverting the Court's basic holding. Would the president, the Congress, the states, and the public enforce, support, and follow a truly unpopular Court decision? The case suggests a strong likelihood that they would not.

IN ANY EVENT, during the next half century the Court, perhaps aware of its limitations, did not meaningfully test its power of judicial review. The next great constitutional confrontation after *Marbury* took place in 1857, when the Court decided the infamous *Dred Scott* case, to which we now turn.

Chapter Four

Dred Scott

In the *Dred Scott* decision, the Court held that a former slave *was not* a citizen entitled to sue in federal court, and it held that a slave could *not become* free simply because his owner took him into a free state or territory. In the process the Court also held, for the first time since *Marbury,* that a federal statute (in this case the Missouri Compromise) was unconstitutional. When the Court decided the case in 1857, the country was deeply divided over slavery and on the brink of civil war. Given the timing and political circumstances, one could wonder whether the country would have implemented the *Dred Scott* decision had war not broken out.[1]

We should be aware that the *Dred Scott* decision has long been considered one of the Court's worst. It may well have helped to bring about a war, which was the very political result it hoped to avoid. As an example of judicial review, it is the opposite of the kind of Constitution-protecting review that Hamilton hoped the Court would undertake. What went wrong? The decision was unworkable and unenforceable because the Court itself made a legal and practical mistake. In other words, in this case the Court, not the president, Congress, or the general public, deterred Americans from following the law.

Background

Dred Scott was born a slave on a Virginia plantation around 1800. His first owner, Peter Blow, took him to St. Louis, Missouri, where he

sold him to an army doctor, John Emerson. Emerson took Scott with him from base to base, including Fort Armstrong in the free state of Illinois and Fort Snelling in the free territory of Wisconsin (now in the state of Minnesota). During his two-year stay at Fort Snelling, Scott married Harriet, a slave who also lived there. Emerson then returned to St. Louis with Scott, Harriet, and their newly born child, Eliza. After Emerson died, Scott and his family became the property of Emerson's wife and, eventually, of his wife's brother, John Sanford. Scott, or perhaps Harriet, was not satisfied with this arrangement, so the couple brought a lawsuit, first in state court, then in federal court. They argued that their lengthy stay in free territory had made Scott legally a free man.[2]

Roger Taney, chief justice of the United States, wrote the majority opinion in the *Dred Scott* case. Taney was born in Maryland in 1777 to a family of tobacco farmers. A longtime supporter of Andrew Jackson, he became attorney general in the Jackson administration and was appointed chief justice in 1836. He was an excellent lawyer, possessing what William Wirt (who had represented the Cherokees) called a "moonlight mind," a mind that gave "all the light of day without its glare." Taney had argued for a gradual end to slavery, an institution he viewed as "evil" and a "blot on our national character." He had represented abolitionists and had freed most of his own slaves. On the other hand, as attorney general, Taney had advised the secretary of state that the "African race . . . even when free . . . hold whatever rights they enjoy" at the "mercy" of the "white population."[3]

Benjamin Curtis wrote the main dissent in *Dred Scott.* Curtis was a native of Massachusetts whom President Millard Fillmore had appointed to the Supreme Court in 1851 partly because of his reputation as a "moderate" on the slavery issue. He served on the Court only six years, resigning after the *Dred Scott* decision, saying that he doubted his usefulness on the Court in its "present state" (and perhaps for financial reasons as well).[4]

In *Scott,* the Court was faced with an issue that the Constitution's framers had postponed and that was reaching an explosive state. Aware that the South would not join a Union that prohibited slavery, the framers in effect postponed the question of slavery's continued existence by writing into the Constitution a series of compromises. They

included language that said Congress, prior to 1808, could not prohibit the "Migration or Importation" of slaves into the United States. They prohibited any amendment affecting that bar. And they apportioned legislators (in the lower house of Congress) among the states according to population as determined by "adding to the whole Number of free Persons . . . three fifths of all other Persons," that is, slaves. This method of counting (allowing the South additional representatives based on its slaves while understanding that the South would forbid its slaves to vote) meant that the South was overrepresented in the lower house of Congress and in the vote count for president. That overrepresentation initially gave the South sufficient political power to block abolitionist efforts.[5]

During the first half of the nineteenth century, however, population grew more rapidly in the newly acquired territories of the Northwest, rather than in the Southwest as the South had expected. That fact cost the South the political advantage it had been relying on to resist abolitionist legislation. Nonetheless, the North continued to fear that the South would use every political and legal device within reach to extend slavery into the new territories, thereby helping the South to maintain its political power once those territories became full states.[6]

In this atmosphere Congress had to decide how to treat new territories. In 1820, Congress had enacted the Missouri Compromise, forbidding slavery in territories north and west of Missouri. In 1845 it admitted Texas as a slave state, and in 1850 it admitted California as a free state. In 1854 it departed from the principles of the Missouri Compromise by permitting two territories north and west of Missouri—namely, Kansas and Nebraska—to choose for themselves whether to become slave states or free states.

In 1854, the year Dred Scott's appeal reached the Supreme Court, the legal status of slaves in the territories was of enormous political importance. The South feared that new states, if free, would soon produce a Congress that abolished slavery. It wanted the Supreme Court to hold that individuals had a constitutional right to own slaves, even in the territories. The North, of course, wanted the Supreme Court to hold that Congress could prevent the spread of the South's evil institution throughout the nation. The *Dred Scott* case would give the Court the

opportunity to justify the legal hopes of one region or the other by clarifying the legal status of slaves brought by their owners into free territory.

The Legal Issues

Once back in St. Louis, Dred Scott initially brought his case against his then owner, Mrs. Emerson, in a Missouri state court. He pointed to earlier Missouri cases holding that a slave who resided for a time in free territory became a free man. The Missouri Supreme Court, however, rejected his claim, noting that "times are not now as they were when the former decisions on this subject were made." Before the Missouri court's decision was final, Scott brought the same suit (now against Sanford, his new owner and Mrs. Emerson's brother) in a lower federal court. That court, stating that it must accept Missouri's decision, rejected Scott's claim. Scott then appealed to the U.S. Supreme Court.[7]

The case attracted considerable attention. A prominent attorney, later a member of President Lincoln's cabinet, represented Scott. So did Benjamin Curtis's brother. Two prominent lawyers, both U.S. senators, represented Sanford. The case presented two issues: First, a jurisdictional question concerning the Court's authority to hear the case. The lawsuit was properly in federal court only if a "citizen" of one state was suing a "citizen" of another state. Sanford was a citizen of New York. Was Scott a citizen of a different state, namely, Missouri? Second, if Scott was a "citizen" and jurisdiction was proper, did the law make Scott a free man?[8]

The lawyers argued the case over the course of four days in February 1856. On May 12 the Court asked for reargument on the jurisdictional question. Court notes reveal that a majority had agreed to a compromise: Justice Samuel Nelson would write a short opinion rejecting Scott's claim that he was free simply on the narrow ground that the Court, as a matter of comity, would follow the state courts. When two justices said they would write a dissent, however, that compromise unraveled. Chief Justice Taney reassigned the opinion to himself. On March 6, 1857, Taney read his lengthy opinion from the bench. The

next day Curtis read, and then released, his dissent. Taney then took the unusual step of rewriting his opinion, releasing his final version in May.[9]

The Decision

The Court initially considered the first issue: Does the Court have the power to decide a case of this kind? If not—that is, if it lacks "jurisdiction"—then in principle Dred Scott must lose even if he is right about his other legal contentions, for the Court lacks the authority to help him. The chief justice, writing for the Court, described the jurisdictional question as whether "a negro, whose ancestors were imported into this country, and sold as slaves," is "entitled to sue as a citizen in a court of the United States." The chief justice, and the majority, held that the answer to this question was no. Even if Dred Scott was a free man, he was not a "citizen."[10]

The Court's reasoning was highly legalistic: The Constitution allows the suit only if the case arises "between Citizens of different States." The word "citizens" was limited to "citizens of the several States when the Constitution was adopted." And that group, said Taney, could not possibly have included freed slaves because public opinion would not have allowed it. Writing in language that has since become infamous, Taney explained that public opinion at that time considered Africans "so far inferior" to the "white race" that they had "no rights which the white man was bound to respect." Even northern states where abolitionist sentiment was strong and slavery had been outlawed forbade slaves to serve in the state militia, limited their educational opportunities, and forbade interracial marriage. Moreover, many of the founders, themselves slaveholders, could not have intended the "equality" they preached to extend to slaves or former slaves. Furthermore, some contemporaneous federal statutes distinguished between "citizens" and "persons of color," showing that the latter were not included among the former. Indeed, some attorneys general of the United States had expressed that view.[11]

Finally, Taney wrote that the Constitution guarantees to "citizens of

each State . . . all privileges and immunities of citizens in the several States." In 1789, no one could have thought that the South would have granted "privileges and immunities" to former slaves whom the North considered free. The Court, Taney concluded, must not "give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted. . . . [I]t must be construed now as it was understood" then.[12]

Curtis issued a powerful dissent. "[E]very free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States," and consequently can sue a citizen of a different state in federal court. One reason Curtis thought this way was that at the time of the Constitution's ratification, five states—New Hampshire, Massachusetts, New York, New Jersey, and North Carolina—included freed slaves among their citizens. Granted, these states may have imposed some disabilities on those freed slaves, but their laws permitted freed slaves to vote. Indeed, the North Carolina Supreme Court had explicitly held that slaves who were freed in North Carolina became North Carolina citizens if they had been born in the state. How can one understand the Constitution, which did not then define "citizen," as excluding some of the very people who as citizens were allowed (in those states) to vote on the Constitution's ratification? Moreover, the very purpose of allowing federal courts to hear "diversity of state citizenship" cases was to extend federal jurisdiction to cases where local feelings or interests might cloud the issues and "disturb the course of justice." That purpose was the same whether a party to the case was of "white" or "African descent."[13]

Saying that he would not "enter into an examination of the existing opinions of that period respecting the African race," Curtis wrote that a "calm comparison" of the assertion in the Declaration of Independence that "all men are created equal" with the "individual opinions and acts" of its authors "would not leave these men under any reproach of inconsistency." This comparison would show that the authors wanted to make the "great natural rights" asserted in the Declaration of Independence effectual wherever possible.[14]

Curtis also mercilessly destroyed the majority's remaining arguments. Its statutory claim proved nothing, for, if the language of some

old federal statutes suggested that freed slaves were not "citizens," the language of other old federal statutes suggested the precise opposite. Nor was its "privileges and immunities" argument convincing once one learned that that constitutional provision simply repeated an older guarantee in the Articles of Confederation that entitled "free inhabitants of each of these States . . . to all privileges and immunities of free citizens in the several States." This language did not suggest that a freed slave was not a citizen. To the contrary, the drafters of the articles explicitly rejected by a vote of eight states to two (with one state divided) a South Carolina amendment that would have inserted the word "white" between the words "free" and "inhabitants." This strongly suggested that the privileges and immunities clause protected *all* free citizens, not just white citizens.[15]

The Court, however, rejecting Curtis's views, held that it had no power to hear the case or decide the merits of Scott's claim (because Scott was not a citizen). Nonetheless, it went on to do just that. The Court majority held that Dred Scott's three-year sojourn in the free territory of Wisconsin and in the free state of Illinois did not emancipate him. The majority might have reached this conclusion by simply relying on the fact that Missouri state courts had reached it and that federal courts should follow state courts on matters of state law. But in the 1850s that was not always so; federal courts often second-guessed state courts on state law matters, particularly where the matter concerned judge-made common law, not statutory law.[16]

In respect to slavery, both the common law and foreign law were uniform and clear. As Curtis pointed out in his dissent, when a master took a slave into free territory and lived there indefinitely, participating in the territory's "civil or military affairs," the slave became free. This was certainly the case when the slave married and had children in a free territory. Indeed, important federal statutes—the Missouri Compromise, for example—made this clear, by insisting that the law of the Wisconsin Territory, the jurisdiction in which Fort Snelling was located, did not permit slavery. It therefore gave Dred Scott his freedom.[17]

The Court majority countered that the laws of Congress, such as the Missouri Compromise, did not apply because, in its view, Congress lacked the power to make those laws. The Court had to concede that

the Constitution's territories clause says that Congress "shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." But, the majority said, the language, history, and structure of the Constitution made clear that this clause applied only to those territories that existed as territories in 1789, namely, certain land belonging then to Virginia, North Carolina, and a few other states, which those states intended to cede to the federal government. Congress, the majority conceded, had an implied power to hold territory for the sole purpose of turning it into new states. But it could not interfere with the rights of citizens entering or living within that territory—any more than if they were citizens of states. And were they such citizens, the Constitution would forbid the federal government to interfere with their rights to own slaves. This (and here lies the heart of the majority's pro-slavery position) is because the Constitution forbids Congress to deprive a person of property without due process of law. The Constitution, wrote the majority, recognizes the "right of property of the master in a slave." And nothing gives Congress "a greater power over slave property . . . than property of any other description." The opposite is true: The fugitive-slave clause requires that slaves who escape into other states be returned to their owners. This clause, read together with the due process clause's prohibition on the deprivation of property without due process of law, the majority reasoned, meant that the Constitution insisted that the federal government "guard" and "protect" the "[slave] owner in his rights."[18]

Thus, the Court's conclusion: "The act of Congress which prohibited a citizen from holding and owning property of this kind . . . is not warranted by the Constitution and is therefore void; and . . . neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident."[19]

Curtis replied to the majority's argument as follows: First, the territories clause certainly gave Congress the authority to hold territory acquired from a foreign nation, to make all necessary rules for governing that territory, and to include among those rules a prohibition against slavery. Congress had acted on that assumption since the nation was founded, enacting ordinances and laws excluding slavery

from various of the territories (for example, the Missouri Compromise). Curtis counted eight distinct instances, "beginning with the first Congress, and coming down to the year 1848," where Congress had explicitly excluded slavery from the territory of the United States. The acts by which Congress had regulated slavery in the territories "were severally signed by seven Presidents of the United States, beginning with General Washington, and coming regularly down as far as Mr. John Quincy Adams, thus including all who were in public life when the Constitution was adopted." And when one interprets the Constitution, Curtis wrote, a "practical construction, nearly contemporaneous with the adoption of the Constitution, and continued by repeated instances through a long series of years, may always influence, and in doubtful cases should determine, the judicial mind."[20]

Curtis replied to the Fifth Amendment due process argument by pointing out that a slave is not ordinary "property." Rather, slavery is a "right existing by [virtue of] positive law [for example, statutes]." It is "without foundation in the law of nature or the unwritten common law." Nor could "due process of law" mean that a slave remained a slave when his master moves from, say, slave state A to live permanently in free state B. What law would then govern the slave, the slave's wife, his house, his children, his grandchildren? State B has no laws governing slavery. Its judges could not manage a proliferating legal system under which each slave, coming into free state B, brought with him his own law, whether from A or from C or from whatever other slave state he happened to be from.[21]

More important, said Curtis, the phrase "due process of law" comes from the Magna Carta. When Congress passed the Northwest Ordinance in 1787, it did not think that law violated the Magna Carta. Moreover, numerous states, including Virginia, had passed laws prohibiting the importation of new slaves. Under these laws, any slaves imported in violation of the prohibition would be set free. And, Curtis wrote, "I am not aware that such laws, though they exist in many States, were ever supposed to be in conflict with the principle of Magna Charta incorporated into the State Constitutions." If those laws did not violate the Magna Carta, then Congress's prohibition of slavery in territories could hardly violate the due process clause of the federal Constitution.[22]

Despite the strength of Curtis's arguments, however, the majority still held: (1) Scott could not bring his case in federal court because freed slaves are not citizens of the United States; (2) many congressional anti-slavery-spreading statutes, including the Missouri Compromise, were unconstitutional; and (3) the Fifth Amendment's due process clause protected the ownership rights of slaveholders even when they took their slaves into free territories and free states to live for extended periods.

The Aftermath

The Court issued its decision in early March 1857, and the chief justice issued his written opinion later in the spring. The South and southern sympathizers reacted favorably. President Buchanan (perhaps forewarned) favorably referred to the opinion in his March inaugural address and again in his December State of the Union address. But the northern reaction was vehemently negative. Horace Greeley's *New York Tribune* described the holding as "wicked" and "atrocious." "If epithets and denunciation could sink a judicial body," another observer wrote, "the Supreme Court . . . would never be heard of again."[23]

A joint committee of the New York legislature reported that the decision had "destroyed the confidence of the people in the Court," predicted that it would be overruled, and described Taney's statement that people of African descent had no rights as "*inhuman, unchristian, atrocious,*—disgraceful to the judge who uttered it and to the tribunal which sanctioned it." The committee said the opinion paved the way for slavery's spread to free states. If "a master may take his slave into a Free State without dissolving the relation of master and slave," then "some future decision of the Pro-Slavery majority of the Supreme Court will authorize a slave-driver . . . to call the roll of his manacled gang at the foot of the monument on Bunker Hill, reared and consecrated to freedom."[24]

The case had increasing reverberation. The abolitionist Frederick Douglass offered a slightly different analysis. In a New York lecture he remarked that despite this "devilish decision" produced by "the slaveholding wing of the Supreme Court," the Court could not make "evil

good" or "good evil." The decision, he concluded, "is a means of keeping the nation awake on the subject. . . . [M]y hopes were never brighter than now."[25]

Indeed, the decision did keep the nation awake. Northern supporters widely circulated the Curtis dissent in pamphlet form. Abraham Lincoln, then a Republican candidate for Senate, spoke often about the decision, describing it as an "astonisher in legal history" while arguing that Taney's "whites only" views had turned "our once glorious Declaration" of Independence into a "wreck" and "mangled ruin." In February 1860, Lincoln based his Cooper Union speech—a speech that helped make him a national political figure—on Curtis's dissent. Lincoln fed the North's fear of spreading slavery by asking, what "is necessary for the nationalization of slavery? It is simply the next *Dred Scott* decision. It is merely for the Supreme Court to decide that no State under the Constitution can exclude it, just as they have already decided that under the Constitution neither Congress nor the Territorial legislature can do it."[26]

Although historians debate the precise role of *Dred Scott* in bringing on the Civil War, the decision at least energized the anti-slavery North. It became the Republican Party's rallying cry and contributed to Lincoln's nomination and election as president. These circumstances together with others helped bring about that most fierce War Between the States. After the war, the nation added the Thirteenth, Fourteenth, and Fifteenth amendments to the Constitution, ending slavery while guaranteeing equal treatment, voting rights, and basic civil rights for the newly freed slaves.

On a more personal level: Benjamin Curtis resigned from the Court immediately after the *Dred Scott* decision. Chief Justice Taney remained on the bench until his death. Dred Scott and his family were bought by a son of his original owner, Peter Blow, who set them all free. Within little more than a year, however, Scott died of tuberculosis.[27]

LESSONS

MODERN CRITICS DESCRIBE the *Dred Scott* case as "infamous," "notorious," "an abomination," "odious," a "ghastly error," and "judicial

review at its worst." Chief Justice Charles Evans Hughes said the decision was a "self-inflicted wound" that almost destroyed the Supreme Court. *The Oxford Companion to the Supreme Court of the United States* says that "American legal and constitutional scholars consider the *Dred Scott* decision to be the worst ever rendered by the Supreme Court." These judgments reflect the immorality of the decision. What can people today learn from it? By reading with care, we can draw certain lessons about the Court that remain relevant. I suggest five.[28]

The first lesson concerns judicial rhetoric. Today, as in 1857, the language a judge uses to set forth his or her reasoning matters. Taney's words about Americans of African descent having "no rights which the white man was bound to respect" are lurid and offensive, more so than can be found in other Supreme Court opinions, including other opinions that Taney wrote. An experienced Supreme Court justice would not write such a phrase without being aware of the fact that others will repeat it and emphasize its judicial origin in order to make the sentiment appear legitimate. Taney's effort to attribute his words to others, such as political officials or citizens, does not help. The public simply ignores the attempt to put moral distance between the sentiment and the author. Taney could not have thought otherwise, for the language was morally repugnant even then, as Curtis seemed to acknowledge when he refused to "enter into an examination of the existing opinions of that period respecting the African race," calling instead for a "calm comparison."[29]

The second lesson reinforces the optimistic judicial view that when a judge writes an opinion, even in a highly visible, politically controversial case with public feeling running high, the opinion's reasoning—not simply the author's conclusion—can make all the difference. A strong opinion is principled, reasoned, transparent, and informative. And a strong opinion should prove persuasive, make a lasting impression on the minds of those who read it, and (if a dissent) eventually influence the law to move in the direction it proposes.

Curtis's opinion was one of two dissents. Its language is not the most colorful, but its reasoning is by far the strongest. Indeed, it paints the Taney majority into a logical corner from which it has never emerged. For example, what is the answer to Curtis's claim that five states treated slaves as citizens (hence they were American citizens) at

the time the Constitution was written? He supported the claim by pointing to a state supreme court decision (explicit on the point) and to the fact that five states allowed freed slaves to vote. Taney, in reply, referred only to racially discriminatory marriage and military service laws, but these laws are actually consistent with citizenship and hence do not significantly undercut Curtis's argument.

What is the answer to Curtis's jurisdictional argument? If Dred Scott was not a "citizen," then the Court lacked jurisdiction to hear the case. If it lacked jurisdiction, it had no business deciding the merits of the case, holding the Missouri Compromise unconstitutional, and depriving Congress of the power to maintain slavery-free territories in the process. In *Marbury* itself one could find a countervailing legal principle—the need to explain why the law did not permit the Court to avoid constitutional questions—and this principle helped to explain, if not excuse, Marshall's decision to address the merits. Here there is no such excuse. The Court reached out, without legal justification, to decide the constitutional question itself.

And what sound response can the majority make to Curtis's explanation of the scope of the Constitution's due process and territories clauses? That explanation was the only one that proved workable going forward, taking account of a nation that was continuously changing. How could judges of a single free state or territory, say Wisconsin, administer a legal system under which different slave state laws (for example, Alabama law, Georgia law, or Virginia law) would have to govern well into the future the relationships of different slave families brought permanently to live in that single free state?

Given the strength of Curtis's reasoning, it is not surprising that those opposed to slavery circulated his dissent in pamphlet form throughout the nation or that Lincoln's speeches, abolitionist lectures, and informed northern reaction reflected Curtis's analysis.

A third lesson concerns the relation between Court decisions and politics. The kindest view of the majority's opinion is that it had a political objective. Many in Congress had asked the Court to "umpire" the great political issue dividing the nation. Taney and his majority might have thought that by reaching out unnecessarily to decide a politically sensitive legal question—that is, by settling the constitutional status of slavery in the territories—the Court would promote a peaceful resolution of the slavery question (perhaps even through eventual abolition).

If that is what Taney believed, he was wrong. The Court's decision did not heal the nation. Rather, it reinforced the North's fears of southern dominance, solidified the case for abolition, and promoted the political standing of the anti-slavery Republican Party. The Court was more an instigator of the Civil War—or at least a contributing factor—than a mediating force. Moreover, as a purely legal matter the anti-slavery constitutional amendments resulting from the Civil War effectively reversed the *Dred Scott* decision.

There are, of course, strong institutional, jurisprudential, and ethical arguments against judges of a constitutional court holding their fingers up to the political winds. A court that acts "politically" plays with fire. For one thing, at a minimum, it undermines the confidence of that portion of the political public that favors the opposite result. More important, Hamilton's writings make clear that the very point of granting such a Court the power of judicial review was to offer constitutional security where doing so is politically unpopular. To such reasons *Dred Scott* adds another, purely practical consideration. Judges are not necessarily good politicians. Their view about what is politically expedient could well turn out to be completely wrong. Such, as history shows us, was the case in *Dred Scott*.

The fourth lesson concerns the Court and the Constitution. The Court's *Dred Scott* opinion can find its justification only by viewing the Constitution in a particular way—as requiring a consensus among slave states before the nation could embark on a course that would lead to abolition. Thus, Taney's decision essentially treats the Constitution as no more than a political compact among independent states, with its central focus on compromise about slavery in particular.

Yet the Constitution's language does not support such an interpretation. The protection it provided the slave trade expired in 1808. The constitutional guarantees of equal state representation in the Senate and the census-related supermajority status of slave states in the House of Representatives were written in terms that permitted the political destruction of the protection they offered the South. The preamble

says that "We the People of the United States . . . ordain and establish this Constitution," language broad enough to cover Dred Scott.

One cannot easily reconcile Taney's vision with the expressed abolitionist hopes of, for example, Benjamin Franklin and many other framers. Nor, most important, can one reconcile this vision with the Constitution's most basic objective, the creation of a single nation. The Constitution does so by creating political institutions strong enough to permit the "people" to govern themselves, determining policies and resolving problems ranging in subject from defense to territorial expansion to commerce, while protecting basic personal liberties across (the framers hoped) the centuries. The concept of a political treaty among sovereign and independent states focusing primarily on slavery is not compatible with this more basic constitutional objective. (And, of course, if the *Dred Scott* majority doubted that fact in 1857, the post–Civil War amendments to the Constitution ending slavery, guaranteeing voting rights, defining citizenship, assuring individuals equal protection of the laws, and protecting basic individual liberty from state interference overturned the legal precedent they created.) Taney's vision was not of a Constitution that created a central government but of a treaty that linked states.

A fifth lesson concerns the harm the Court worked upon the Hamiltonian cause. The Court placed those who saw the need to follow the law in a dilemma that Lincoln himself expressed well in his first inaugural address:

> I do not forget the position . . . that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.[30]

That is to say, the other departments of government, while bound to carry out the Court's decision in a *particular* case, owe that Court only "high respect and consideration" in respect to its interpretation of the Constitution. And sometimes the "people" rightly can themselves decide "vital" interpretive "questions" irrespective of the Court's views. If Abraham Lincoln has begun to sound like Andrew Jackson, is the *Dred Scott* Court itself not to blame?

Finally, *Dred Scott* tells us something about morality's relation to law. When discussing *Dred Scott* at a law school conference, I asked the audience to consider a hypothetical question. Suppose you are Benjamin Curtis. Imagine that Chief Justice Taney comes to your chambers and proposes a narrow ground for deciding the case. He asks if you will agree to a single-paragraph unsigned opinion for the entire Court, in which the Court upholds the lower court on the ground that the matter is one of Missouri law in respect to which the Missouri Supreme Court must have the last word. He will agree to this approach provided there is no dissent.[31]

Should you agree? If you do, the majority will say nothing about citizenship, nothing about the Missouri Compromise, nothing about slavery in the territories and the due process clause. As a result, the Court will create no significant new law; it will not diminish its own position in the eyes of much of the nation; it will not issue an opinion that increases the likelihood of civil war; and because no one knows who would win such a war (after all, the North almost lost), the prospects for an eventual abolition of slavery will be unaffected, perhaps increased.

Not a bad bargain, but the audience was uncertain. Then a small voice came from the back of the room. "Say no." And the audience

broke into applause. That applause made clear the moral nature of the judge's legal obligation in that case.

A close examination of the *Dred Scott* opinion, the Court's "worst case," can teach us through negative example about the important relation between the way the Court fulfills its obligation to maintain a workable Constitution and the way the public carries out theirs. It also can help us understand the importance of solid reasoning, the dangers of reliance on rhetoric, the need for practical constitutional interpretation consistent with our nation's underlying values; and it teaches us the important role that morality and values play—or should play—at the intersection of law and politics.

Chapter Five

Little Rock

IN 1957, PRESIDENT Dwight Eisenhower had to answer difficult and historically important questions about how to enforce the Supreme Court ruling in *Brown v. Board of Education* requiring racial integration of the public schools. In the face of fierce public opposition, he had to decide whether (and how) to send troops to Little Rock, Arkansas, in order to enforce lower-court orders designed to provide racial minorities with the protection offered by the equal protection clause of the Constitution's Fourteenth Amendment. The Little Rock cases directly raise the enforcement question—Hotspur's question—that Hamilton had not answered. The Court succeeded in enforcing its decisions, as did the lower courts their orders, but only with key support from the president. This illustrates the often-necessary link between effective enforcement and executive cooperation. The Little Rock cases eventually helped to produce victory for the cause of racial integration, a victory that helped secure the rule of law in America.

BACKGROUND

BEFORE 1954 THE South administered a comprehensive set of rules that legally required racial segregation throughout southern society. These rules forced African-Americans to suffer inferior schooling, inadequate public facilities, and countless other harms and indignities.

In *Brown v. Board of Education of Topeka, Kansas* (and four other cities), the Supreme Court was asked to decide whether "segregation of children in public schools solely on the basis of race," even if the "physical facilities and other 'tangible' factors" were "equal," nonetheless would "deprive[] children of the minority group of equal educational opportunities." On May 17, 1954, *Brown* answered this question with the words "We believe that it does." In its most famous sentences, the unanimous Court said: "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." The Court thus held that the South's legal system of segregation violated the Constitution's guarantee that "no State shall . . . deprive any person of . . . equal protection of the laws."[1]

The legal answer to the question was not difficult. The Court held that the Constitution's words meant what they said. State-imposed racial segregation was directly contrary to the purposes and demands of the Fourteenth Amendment. Racial segregation reflected an effort to wall off African-Americans as an inferior race and produced a segregated society that was unequal.

In deciding *Brown*, the Supreme Court fulfilled its most fundamental role in our democracy, that of guardian of our Constitution. The *Brown* decision was momentous. America at last would try to become the single nation that its Constitution intended. *Brown* led to a large number of subsequent cases and court decisions that sought to implement the constitutional principle that *Brown* reaffirmed.

From the moment it was decided, *Brown* was more than just a legal decision. It validated the moral principle of racial equality that was pressing for recognition in other arenas of American life. It gave new legal legitimacy to the political efforts of the civil rights movement, and thus helped to energize the movement. *Brown* made it possible for Dr. Martin Luther King, Jr., to say, in one of his most memorable phrases as a civil rights leader, "If we are wrong, the Constitution of the United States is wrong." *Brown* became a symbol for the nation—of a new era in race relations in the United States, of what the Supreme Court could contribute to American life, of how law could advance justice. Today, long after it was decided, *Brown* remains one of the most important Supreme Court decisions in our country's history, and one that

demonstrates how, at crucial moments, the Supreme Court can summon the country to adhere to its fundamental principles.[2]

Brown did not come out of nowhere. Its groundwork was laid not only by the suffering endured by black people during generations of slavery, inequality, and subordination but also by the efforts of civil rights lawyers to persuade the Supreme Court over many years that its 1896 decision in *Plessy v. Ferguson* (permitting "separate but equal" facilities) was wrong. These lawyers undertook a step-by-step litigation campaign to advance the evolution of constitutional law. The incremental steps taken by the Supreme Court itself, along with measures such as President Truman's desegregation of the armed forces in 1948, helped prepare the country for the ruling in *Brown*. Still, in *Brown* the Supreme Court knew that it was doing something highly significant, and despite its acceptance by much of the American public the Court knew that the decision would meet with resistance in many places.[3]

The Court, understanding the enforcement difficulties, said it would consider "appropriate relief" in a later opinion, and issued a second opinion, *Brown II*, a year later, on May 31, 1955.[4] The National Association for the Advancement of Colored People (NAACP), whose lawyers (including Thurgood Marshall) represented *Brown*'s plaintiffs, had asked the Court to specify that lower courts throughout the South must immediately hold segregation unconstitutional, to require the courts to issue periodic progress reports, and to insist on integration of all public schools no later than September 1956. The attorney general, Herbert Brownell, Jr., one of President Eisenhower's closest associates, echoed the executive branch viewpoint that an integrated education was "a fundamental human right, supported by considerations of morality as well as law." Brownell asked the Court to require school districts to submit desegregation plans to the district courts, tell those courts to supervise the implementation of those plans closely, have the courts submit periodic reports to the Supreme Court itself, and require integration after a one-year transition period (though possibly with reasonable extensions). Brownell's brief concluded that "there can be no justification anywhere for failure to make an immediate and substantial start toward desegregation, in a good-faith effort to end segregation as soon as feasible."[5]

The Court accepted these recommendations, but only in part. It

delegated primary enforcement powers to local federal district courts and said that local school authorities must "make a prompt and reasonable start toward full compliance." But it added that "the courts may find that additional time is necessary," because of issues of "administration" related to "physical condition of school plant, the school transportation system, personnel, revision of school district and attendance areas," and "revision of local laws and regulations." It told the lower federal courts that they should consider "whether the action of school authorities constitutes good faith implementation of the governing constitutional principles, [b]ecause of their proximity to local conditions and the possible need for further hearings." The Court summarized its desegregation instructions to the lower courts in the words "with all deliberate speed."[6]

But even with that approach, the Court faced outright opposition to carrying out its order at all. According to NAACP estimates, *no* public schools in the eight southern states were actually desegregated in 1955. At the same time, a large majority of the South's congressional representatives signed the Southern Manifesto declaring their belief that *Brown* was wrongly decided, that it was an "abuse of judicial power," and that it provided an example of the "Federal judiciary undertaking to legislate." The manifesto called for "all lawful" resistance against *Brown* and the Supreme Court.[7]

More ominously, the White Citizens' Council began to organize chapters throughout the South. They claimed that the *Brown* decision itself was unconstitutional. They adopted a form of the "nullification" argument—a constitutional argument used by the South before the Civil War: The state could lawfully ignore *Brown* by *interposing* its own legal authority to prevent integration. In any event, the councils would "never" permit integration. They argued for popular resistance, predicting that there would not be "enough jails to punish all resisters."[8]

Throughout the South these and other integration opponents took punitive actions against those attempting integration. They threatened integration's supporters with loss of jobs or credit. Southern voting registrars increased their efforts to keep black citizens from the polls. The worst forms of racial violence increased. In early 1955, in Mississippi, after several years of relative racial peace, three lynchings took

place. These included the lynching of Emmett Till, a fourteen-year-old African-American boy from Chicago who, reportedly, had spoken too informally to a white woman. An all-white jury acquitted those charged with his murder just as all-white juries had recently acquitted thirteen out of fourteen defendants in cases involving serious civil rights violations.[9]

Congress did not help. The Senate refused to enact key provisions of President Eisenhower's Civil Rights Bill, including permission for the attorney general to sue to prevent interference with the constitutional rights of any American. The Senate insisted on jury trials, meaning likely acquittals given local prejudice and exclusion of black citizens from juries. And Congress rejected legislation that would give federal financial aid to local school systems to prevent courts from using that law to advance integration, say by forbidding school districts that received aid from maintaining segregated schools. At the same time, the House passed a bill that stripped civil rights jurisdiction from the federal courts, failing to obtain full consideration in the Senate by only one vote.[10]

Yet there were favorable signs. The District of Columbia, a defendant in the *Brown* case, began to integrate its schools. The other four cities that were defendants in *Brown* prepared to comply. In addition, school officials in a handful of other cities—such as Houston, Texas; Nashville, Tennessee; Greensboro, North Carolina; Charlotte, North Carolina; and Arlington, Virginia—issued statements saying that they too would seek to comply, regardless of how they felt about the merits of *Brown*. In Alabama that same year, 1955, Rosa Parks refused to sit in the back of a public bus. The Montgomery bus boycott had begun. In Little Rock, the school board, pledging to carry out the law, advanced a plan to begin to integrate the public schools.[11]

THE PRESIDENT'S ROLE

THE EVENTS THAT unfolded in Little Rock in 1957 and 1958 highlight differences between the president's role and that of the Court. In 1954, Little Rock was a segregated city with a segregated school system. Yet

the city had a reputation for racial moderation, and in 1952 the school board had considered the possibility of racial integration. In late May 1954, just after *Brown,* the board met, declared that it disagreed with *Brown,* and refused to integrate immediately. But it also recognized its own "responsibility to comply with Federal Constitutional Requirements," and promised to comply after the Supreme Court specified what method to follow. Arkansas filed a brief in *Brown II,* informing the Court that its own remedial policy recognized the Supreme Court's decision and would implement it properly.[12]

In May 1955, just before the Supreme Court issued *Brown II,* the Little Rock School Board announced an integration plan. Its "Phase Program" would begin two years later in September 1957. It would admit a handful of screened black students to Central High School, with a junior high school phase beginning in 1960 and an elementary school phase starting in 1963. A transfer option would assure all white students that they need not attend any high school that was predominantly black.[13]

The NAACP thought the Little Rock Phase Program inadequate and brought a lawsuit, but the federal district court upheld the plan. And in April 1957, the Eighth Circuit rejected the NAACP appeal. However, the NAACP lawsuit was not brought entirely in vain: Even though the district court did not order a speedier integration of Little Rock's schools, it did retain jurisdiction over the case to ensure the school board would follow the integration plan that the board had proposed. Accordingly, during the summer of 1957 the school board picked nine black students for transfer to Central High the coming September. These were the "Little Rock Nine," all of whom had excellent academic records, were intellectually ambitious, and lived near Central High.[14]

During that same summer, however, opposing political forces began to gather. Arkansas voters had approved an amendment to the state constitution requiring the state to oppose "in every constitutional manner the un-constitutional decisions of... the United States Supreme Court." The legislature enacted a statute saying that no child need attend a racially mixed school (implicitly threatening to close the public schools). Members of Citizens' Council chapters attended school board meetings where they repeated their claims that the law

did not require integration, that the governor could "interpose" the state between the Court and *Brown*'s implementation, and that, no matter what, they would "shed blood if necessary" to stop integration. They gathered support by pointing out that only Central High would be integrated and not Hall High, a school in a higher-income neighborhood.[15]

The Citizens' Council also contacted Arkansas's governor, Orval Faubus, an economic liberal elected as a racially moderate alternative to the segregationists' candidate, Jim Johnson. The council nonetheless tried to convince him to resist integration. They argued that segregation was politically popular, that he was immune from federal court orders, that the board's alternative would bring violence to Little Rock, and that he must stop integration in order to "preserve tranquility." Under this kind of pressure, Faubus began to change his views.[16]

Central High was to open on Tuesday, September 3, 1957, with the nine black students in attendance. As the day approached, political pressure to keep the school segregated increased. In mid-August, Georgia's governor spoke in Arkansas and poured fuel on the flames. Georgia's schools had not yet been forced to integrate. Why, he asked, did Arkansas families have to accept integration when Georgia's families did not? That same night someone threw a stone through the window of the home of the local NAACP president, Daisy Bates. "Stone this time," a note read, "dynamite next."[17]

Governor Faubus sought a state court order to stop Central High's integration. On August 29 that court issued an order complying with the governor's request. The school board immediately asked the federal court to set aside the state court order. The federal court did so the next day, reasoning that the state court injunction would "paralyze the decree of this court entered under Federal law, which is supreme under the provisions of Article 6 of the Constitution of the United States."[18]

On the evening of Monday, September 2, the day before school would begin, Governor Faubus made a televised address to the state. He said he had heard armed caravans were approaching Little Rock, and moreover he, like much of the public, doubted the lawfulness of "forcing integration" on "the people" against their will. For these reasons, at least for "the time being," the schools "must be operated on the

same basis as they have before." He announced that he had sent National Guard units to Central High. The audience understood that the guard would prevent integration.[19]

That same night the school board held an emergency meeting. The board asked the black students not to go to Central High until the issue was legally resolved. On Tuesday, September 3, the nine students stayed home, and Central High opened with an all-white student body. Yet that same day the school board returned to federal court to ask for guidance. The judge, finding no evidence of any potential disorder, said that integration should proceed "forthwith."[20]

The board again told the students not to try to attend the school. On Wednesday morning several of the students nevertheless coordinated an attempt to enter Central High, but were turned away by the National Guard. No one, however, could coordinate the entry effort with Elizabeth Eckford, who had no phone, so she arrived at Central High alone.[21]

A large hostile crowd had gathered at the school. Some in the crowd seemingly mistook a black photographer for a student and beat him severely. When Elizabeth Eckford arrived, the National Guard stopped her from entering the school. As she was leaving, a journalist photographed her near a white woman whose face was distorted with rage. The picture quickly became famous around the world.[22]

On Thursday the federal court asked the FBI and the Department of Justice to investigate whether the governor had told the National Guard to prevent enforcement of the court's integration order. The court scheduled a hearing for September 20. The governor agreed to appear. As the world watched, integration at Central High was on hold.[23]

Then, at the request of Brooks Hays, Little Rock's respected member of Congress, President Eisenhower and Governor Faubus agreed to a meeting. On Saturday morning, September 14, Faubus went to Eisenhower's "summer White House" in Newport, Rhode Island, where they first met privately. Eisenhower, Faubus recounted, dressed him down, telling him "like a general tells a lieutenant" that no one would benefit from "a trial of strength between the President and a Governor," and instructing him to have the National Guard protect the black students, not bar their entry into the school.[24]

Although Governor Faubus gave the president the impression that he would permit integration, he did not take that position in front of the press, acting noncommittal instead. Faubus waited for Friday's federal court hearing, where he reported to the judge that he had acted to prevent violence. But when the judge ordered him to stop barring students from entering the school, the governor, along with his lawyers, walked out of the courtroom. Later that day the governor announced that he would withdraw the guard from the school.[25]

On Monday morning, September 23, the Little Rock Nine arrived at Central High. The governor's hostility and the attendant publicity, however, had done their work, and a mob of fifteen hundred waited outside. Some broke through police barricades. Eight of the nine black students managed to slip past the mob and enter the school through a side door. But the chaos was such that by noon police and school officials agreed that the students should go home. The Little Rock mayor blamed the governor, suspecting that his aides and his friends had been present in the crowd urging on the mob. The mayor then sent a telegram to President Eisenhower appealing for help.[26]

SENDING THE TROOPS

AT THIS POINT, Eisenhower, like Andrew Jackson at the time of the Cherokees, had to consider whether to send federal troops into a state to enforce a federal court order. Eisenhower debated the merits of the decision. What would happen to integration plans if the troops met physical resistance and ended up killing, say, women supporting segregation? Suppose other southern cities copied Little Rock? Would sending troops require some form of military occupation, as in the days of Reconstruction?

Moreover, what would happen to the public schools? Jimmy Byrnes, the former governor of South Carolina, a trusted friend of presidents Roosevelt and Truman, and a former Supreme Court justice, had earlier warned Eisenhower that *Brown* would lead the South to abolish those schools. Would precipitating federal action end up depriving both blacks and poor whites of any public education at all?[27]

Furthermore, Eisenhower thought that public education was a local

matter for which the states must remain primarily responsible. He had to consider whether the presence of federal troops would play into the hands of segregationists gathered under the popular banner of "state sovereignty" and "no federal interference." An aide wrote privately that the president "is loath to use troops—thinks movement might spread—violence would come."[28]

Yet Eisenhower found the countervailing considerations more compelling. First, the federal court's orders, including an order prohibiting state interference with a local school board's integration plan, made clear that the key issue was whether federal law or state law was supreme. The nation had fought a civil war over the question. By the 1950s the need to maintain federal supremacy was well accepted in both North and South, even among those who hesitated to embrace racial integration.[29]

Second, recent history suggested that without enforcement the court's order would become a dead letter. Governor Allan Shivers of Texas had recently faced a similar order, and his refusal to help with enforcement resulted in no integration.[30]

Finally, there is much indicating that Eisenhower favored racial integration on principle, although historians debate the strength of his commitment. Eisenhower had grown up in a segregated society, but he had witnessed the bravery of World War II's black battalions in action at the Battle of the Bulge. (Indeed, some said, perhaps with only slight overstatement, that the black 332nd Fighter Group had never lost a bomber.) Eisenhower also had begun to understand the injustice of segregation and the need to bring it to a speedy end. In addition, he liked to lead by example. He had already desegregated military bases throughout the South, he had desegregated much federal contracting, and he had desegregated both schools and public accommodations in the District of Columbia.[31]

Herbert Brownell, Eisenhower's friend, ally, counselor, and attorney general, urged the president to take action. On Monday, September 23, Eisenhower made his decision. Unlike President Jackson 120 years earlier, he would use federal troops to support federal law.[32]

In a public statement issued that evening, Eisenhower said, "The Federal law and orders of a United States District Court implementing

that law cannot be flouted with impunity by an individual or any mob of extremists." He pledged to use "whatever force may be necessary to prevent any obstruction of the law and to carry out the orders of the Federal Court." He then issued an order: As "President of the United States, under and by virtue of the authority vested in me by the Constitution," I "do command all persons engaged in such obstruction of justice to cease and desist therefrom, and to disperse forthwith."[33]

In 1957, Americans remembered the 101st Airborne Division as the heroes of World War II. They had fought in the Battle of the Bulge and had parachuted into Normandy, many dying when the winds left them dangling from church steeples. Eisenhower told his army chief of staff, General Maxwell Taylor, to send this famous division to Little Rock.[34]

On Tuesday afternoon, September 24, fifty-two aircraft carrying about one thousand troops left Fort Campbell, Kentucky. That evening Eisenhower spoke to the nation about the importance of the orders of the Little Rock federal court being "executed without unlawful interference." By then, the soldiers had deployed around Central High School. That evening Melba Pattillo, one of the Little Rock Nine, wrote in her diary, "I don't know how to go to school with soldiers. . . . Please show me. P.S. Please help the soldiers to keep the mobs away from me."[35]

The next morning a crowd again gathered outside the school, some taunting the soldiers. The soldiers lowered their bayonets, but they injured only a small number. One man was pricked by a bayonet, another hit on the head with a rifle butt. Army jeeps picked up the nine black students. Another black student, Minnijean Brown, said, "For the first time in my life, I feel like an American citizen." At 9:25 a.m., the jeeps delivered the black students to Central High. As reporters and television crews broadcast pictures around the world, soldiers accompanied the students up the steps and into the school. Despite a false bomb scare around noon, the students successfully completed their first day.[36]

The next morning the crowd was gone. The students continued to attend Central High without serious incident. A poll showed that 68.4 percent of Americans approved the president's decision to send the troops (the numbers reflected 77.5 percent who approved in the North and 62.6 percent who disapproved in the South).[37]

Yet the battle was far from over. Governor Faubus announced, "We are now an occupied territory." Senator James Eastland of Mississippi stated at a White Citizens' Council meeting that Eisenhower had "lit the fires of hate between the races." "The use of an army will not win," he added, "because the soldiers cannot stay in Little Rock all the time." Nor can Eisenhower occupy every southern school. After about two months in Arkansas the troops withdrew. The nine black students remained at Central High, finding the atmosphere difficult (many white classmates were silently hostile), though a few white students and many teachers offered comfort and support.[38]

The Supreme Court

Litigation again became the center of attention. Governor Faubus and his allies urged the school board to suspend its integration effort. And in February 1958 the school board returned to federal court.[39]

The board told the court that it was difficult to operate a school system given the hostility from the governor, the state legislators, and the community. They pointed to incidents of segregationist intimidation. Furthermore, the state legislature had recently enacted laws that substituted all-white private academies (operating with state support) for integrated public schools. The board asked the court to suspend integration for thirty months, after which time it expected the courts to have determined whether the private academy scheme was lawful.[40]

On June 21, 1958, the district court granted the board's request for a thirty-month delay, but on August 18 the Eighth Circuit reversed the district court. It then ordered a thirty-day stay, temporarily leaving in effect the district court's order to delay integration. To prevent Little Rock's schools from abandoning integration and instead reopening the school year on a segregated basis, the Supreme Court agreed to hear the case immediately.[41]

The Court held a special oral argument session on August 28 and then again on September 11 in the case of *Cooper v. Aaron.* (William Cooper was a member of the school board, and John Aaron was the parent of a black student.) The NAACP asked the Court to put the

Eighth Circuit's order into effect immediately, that is, to order the lower courts to proceed with integration. The school board registered strong opposition because of the state's efforts to interfere, the "chaotic" educational conditions at Central High, the possibility of the new private academy system, and the need for a thirty-month delay. The executive branch supported the NAACP. With the troops clearly in mind, the solicitor general told the Court that the moment you "bow to force and violence," you "give up law and order." The "country cannot exist without a recognition that the Supreme Court of the United States, when it speaks on a legal matter, is the law." Furthermore, Americans were entitled to a definitive statement from the Court on whether force and violence and opposition to the Court's decision were reasons to delay integration.[42]

Two weeks later the Court issued a brief statement unequivocally denying the school board's request for a thirty-month delay and requiring integration to proceed as originally planned. The Court's unanimous opinion followed on September 29.[43]

In its opinion the Court decided and clarified four important matters. The first concerned the constitutional duty of obedience to the Court's own decisions. The Court highlighted Governor Faubus's claim that "there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution." The Court replied with five sentences:

> *Sentence One:* "Article VI of the Constitution makes the Constitution the 'supreme Law of the Land.' "
>
> *Sentence Two:* "In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as 'the fundamental and paramount law of the nation,' declared in the notable case of *Marbury v. Madison,* . . . that 'It is emphatically the province and duty of the judicial department to say what the law is.' "
>
> *Sentence Three:* "This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law

of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

Sentence Four: "It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' "

Sentence Five: "Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶ 3, 'to support this Constitution.' "[44]

Sentences One and Two are unexceptionable. Sentence Three, when closely examined, is particularly interesting, and Sentences Four and Five flow directly from it. Sentence Three does not quote *Marbury*'s actual language; rather, it summarizes *Marbury*'s holding. But in reality *Marbury* did not explicitly say (in the words of Sentence Three) that "the federal judiciary [compared to other branches of government] is supreme in the exposition of the law of the Constitution." Rather, *Marbury* said more ambiguously that "courts, *as well as other departments*, are bound by" the Constitution. Nor, as we have seen, had the cases after *Marbury* clearly demonstrated that either the Court or the country viewed judicial supremacy as "a permanent and indispensable feature of our constitutional system." Thus, the Court in *Cooper* actually decided that the Constitution obligated other governmental institutions to follow the Court's interpretations, not just in the particular case announcing those interpretations, but in similar cases as well—a matter that both Hamilton and Marshall had left open.[45]

Sentence Three reveals that the Court had reached a crossroads. To have used more ambiguous language would have been to hedge or to vacillate, thereby handing a powerful legal and public relations weapon to those who, like Governor Faubus, were trying to convince the South that it need not follow *Brown*. If the Court was to make clear its power

to issue highly unpopular constitutional decisions, it had to assume that other officials and the public at large would follow its key interpretations, and not just in the single case before the Court but in similar cases as well. Hamiltonian judicial review demanded Sentence Three.

The second matter concerned the South's claim that the Court's *Brown* decision was legally incorrect. To counter this, the Court emphasized that *Brown* was unanimous and then "unanimously reaffirmed" the decision. It made clear that the three new justices who had joined the Court since *Brown* agreed with the original authors. Furthermore, in a highly unusual step, all nine justices personally signed the opinion (rather than joining an opinion written by one of their number), thereby suggesting that all nine agreed with all of it and stood together in issuing it.[46]

The third matter concerned the board's reasons for requesting postponement, which were the practical obstacles the board faced: the "state government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements vilifying federal law and federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace." Thus, as the district court's factual findings had revealed, Arkansas had essentially brought the difficulties on itself. The Court refused to accept this as a basis for resisting the desegregation order. As the Court in *Brown II* had held, the Fourteenth Amendment's "equal protection" requirements "cannot be allowed to yield simply because of disagreement with them."[47]

The fourth matter involved the question of remedies, and the Court was divided about the proper approach. Some, such as Justice Hugo Black, believed the South would delay desegregation until the Court set firm, definite, and speedy timetables. Others, such as Justice Felix Frankfurter, thought the Court should continue to follow *Brown II*'s "all deliberate speed" approach, leaving remedial matters primarily up to the district courts, which could shape, or approve, orders reflecting local conditions.[48]

The Court patched together a compromise. On the one hand, it instructed the school boards to "make a prompt and reasonable start toward full compliance." It further specified that "only a prompt start,

diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance." It also addressed the legality of state-supported private segregated academies, remarking and then reiterating that the "Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property." On the other hand, the Court repeated *Brown II*'s key language: "all deliberate speed." And it added that courts must consider local conditions, physical plant, transportation, and the other matters that *Brown II* had permitted or required lower courts to take into account. Justice Frankfurter later filed a separate concurring opinion in which he too emphasized both the legal need to follow *Brown* and the practical need to take account of local problems and difficulties.[49]

In its concluding paragraph the unanimous opinion invoked the four words carved above the Supreme Court portico: "Equal Justice Under Law." Those words, it said, set forth an "ideal" to which the Constitution is "dedicated" and which the Fourteenth Amendment "embodie[s]." The amendment, as *Brown* made clear, protects a student's "fundamental and pervasive" right not to be racially segregated. *Brown*'s basic principles, "*and the obedience of the States to them,* . . . are indispensable for the protection of the freedoms" that the Constitution guarantees. *Brown*'s principles, *if obeyed,* make equal justice under law "a living truth."[50]

The last phrase eloquently recognizes the ultimate challenge of the Supreme Court's role in American life. The Court aspires—it must aspire—not only to declare the "truth" about the Constitution's meaning but also to make law "a *living* truth," obeyed by the country and animating its social practices. But its ability to do so is not guaranteed.

Despite the Court's opinion, it seemed that the State of Arkansas and the Little Rock School Board would continue to look for ways to oppose the Court's insistence upon school integration. On September 27, 1958, two days before the Supreme Court released its full opinion, but almost two weeks after it had announced its ruling, Little Rock's citizens voted, by a margin of 19,470 to 7,561, to close Little Rock's public high schools. On September 29, the very day the Supreme Court released its opinion, Governor Faubus closed the schools. And during the next nine months Little Rock's high school students were without public education.[51]

Nonetheless, the Court's opinions, taken together with the determination that the executive branch showed in sending troops, gradually took effect. Matters slowly improved. Federal courts began to hold unlawful many of the state's alternative educational systems, including the leasing of public school buildings to private state-funded academies. With business support, Little Rock elected three moderate members to its school board—thus achieving numerical equality with segregationist members. A local poll of Chamber of Commerce members showed support for reopening the schools. The chamber's board of directors issued a resolution stating that the "decision of the Supreme Court of the United States, however much we dislike it, is the declared law and is binding upon us. . . . [B]ecause the Supreme Court is the Court of last resort in this country, what it has said must stand until there is a correcting constitutional amendment or until the Court corrects its own error." Public opinion was beginning to shift.[52]

Although the board's segregationists continued to press their cause, they were largely unsuccessful. When they sought to deny contract renewal to forty teachers who had tried to help the black students, the moderate members walked out. In the recall election the moderates won a close but clear victory. The newly constituted board then voted to reopen the schools. In 1959, one year after the Court decided *Cooper v. Aaron,* integrated schools returned to Little Rock.[53]

The turmoil and the school closings imposed a high personal cost on many students. Students of both races suffered, some suffering permanent harm. The Little Rock Nine displayed much bravery and dignity in dealing with the hatred around them. Some students (including members of the Little Rock Nine) attended schools in other districts or out of state. Others took correspondence courses from the University of Arkansas. Some followed their teachers' presentations on local television stations. But for many these alternatives did not work. Central High's all-state football team fell apart, and many members never received high school diplomas. And what was true of the team was true of the entire class. Many of Central High's "Lost Class of '59" were

unable to qualify for admission to college. Many found their lives changed permanently and for the worse.[54]

In addition to losing their education, their high school activities, perhaps their chance of college, many later came to regret their behavior at the time. They did not know how to explain their refusal to help their new black classmates. Some in later life worked to improve race relations. And in 1999, over forty years after troops appeared at Central High, Hazel Bryan, the woman photographed with her face contorted in rage, appeared publicly with one of the Nine, Elizabeth Eckford, to explain how they had achieved reconciliation.[55]

Others suffered setbacks. Brooks Hays, the congressman who arranged for Governor Faubus to meet with President Eisenhower, became known as a "moderate." He lost the next election, while Governor Faubus remained in office until 1967.[56]

What happened in Little Rock did not produce speedy integration throughout the South. The civil rights movement was just beginning. Judges had not yet tried school busing as a remedy. But the Little Rock case did help prevent further violent community confrontations. It helped begin a process of integration that, in practice, is not complete. But today Central High is integrated. Fifty-two percent of its twenty-five hundred students are black; 42 percent are white. It has become one of the best public high schools in America, with 867 students taking at least one Advanced Placement course.[57]

For present purposes, the Little Rock story represents a hard-earned victory for the rule of law. The Court's determination to enforce *Brown* was not solely responsible. The arrival of 101st Airborne paratroopers made a critical difference, as did the juxtaposition of two photographs, the first showing a white woman's enraged face, the second showing federal troops surrounding and protecting the black children. So did the decision of a district judge ordering a governor to stop his interference, a decision that the president later enforced by sending troops. But the Court's assertion of judicial supremacy—similar to that made earlier by the president, repeated by the Little Rock Chamber of Commerce, and used by others who sought integration (and an end to racial violence) in the South—was a critical ingredient.

Today, only a mile away from Central High, one can find the grave

of the wife of the Cherokee chief Ross. That grave marks the spot where she died on the Trail of Tears on her way to Oklahoma—after the government evicted her and her fellow Cherokees from their Georgian lands. The grave and the school together tell a story about acceptance of the rule of law in America. Although the distance between the grave and the school is small, the nation had come a long way in the time between the two decisions that they symbolize. It was moving in the right direction.

Chapter Six

A Present-Day Example

In recent decades any number of Court decisions have closely divided the justices and proved highly unpopular with large numbers of Americans. Consider, for example, the decisions protecting a woman's decision to have an abortion in the early months of pregnancy. Or consider the decisions forbidding prayer in public schools. In such cases the constitutional questions are difficult; not surprisingly, the judges, who patrol the Constitution's boundaries, have reached different conclusions. As the issues divide judges, they divide communities. Supporters and opponents have marshaled strong arguments as to why the other side is wrong. Some feel strongly that the life of an embryo must be protected or that young students who attend public schools should be exposed to religion. Others feel strongly to the contrary. Nonetheless, despite the disagreement and related emotions, despite protests, Americans by and large have adhered to the Court's decisions. And most opponents, even, for example, opponents of the abortion decisions, look for lawful methods to change unwanted decisions (for example, through constitutional amendment, the president's appointment power, and consequent erosion of, or change in, current law made by the Court itself).[1]

Focus for a moment on *Bush v. Gore*. The 2000 presidential election was close. The Democratic Party candidate, Albert Gore, won the popular vote nationwide. But the Republican Party candidate, George Bush, after litigation that ultimately reached the Supreme Court, secured Florida's disputed electoral votes, won a majority of the votes in the Electoral College, and became president of the United States.[2]

That result turned on technical but important constitutional matters. The Constitution provides that the "Person having the greatest Number" of (currently 538) electoral votes for president, "shall be the President, if such Number be a Majority of . . . Electors appointed." The Constitution entitles each state to a number of electors equal to the "Number of Senators and Representatives" from that state. Furthermore, it requires each state to select its electors "in such Manner as the Legislature thereof may direct." Florida's legislature, like that in almost every state, directed that the presidential candidate who receives the highest popular vote would receive all the state's electoral votes.[3]

Initially, Bush led Gore in Florida by fewer than two thousand votes out of the roughly six million votes cast. After an automatic recount diminished Bush's margin of victory but still showed him coming out ahead, Gore challenged the results and sought recounts in four congressional districts that traditionally voted Democrat. On December 8, after a series of lower-court decisions, the Florida Supreme Court agreed to order a recount of the entire state. Bush immediately claimed that the Florida court's decision ordering these recounts violated the federal Constitution. On December 9, the Supreme Court agreed to hear the case. And three days later it held in favor of Bush by a vote of 5 to 4.[4]

Three members of the Court majority believed the Florida court's decision strayed so far from what Florida statutes required that it violated the federal constitutional provision empowering the state's legislature (not its courts) to direct how the state should choose its electors. Other members of the Court found a fundamental unfairness in the fact that the Florida court had permitted its statewide recount to proceed with different counties judging the validity of ballots according to different standards, including standards that might favor the candidate of one party over the other. For a combination of these reasons (along with the fact that the Electoral College was soon due to meet) the Court majority ordered Florida to stop its recount—at a point when Bush still held a narrow majority of the popular vote.[5]

Four members of the Court (including me) dissented on the critical point of continuing the vote count. Pointing to statutes that permitted Congress to eventually resolve electoral disputes of this kind, they argued that political institutions and state courts, not the U.S. Supreme

Court, should decide the questions at issue. They concluded that Florida should be allowed to continue to its statewide recount as it wished. I agreed with the dissent. Because I believed that Congress and other political institutions were fully capable of resolving this intensely political dispute, I thought the Court should not have decided to hear the case. I thought the Court, having decided to hear the case, should have decided it differently. I could find no good reason for ordering the Florida Supreme Court to stop its recount, and I would have allowed the recount to continue. Because I believed that the public would consider the Court's decision to be based on political preferences rather than law, I wrote that the decision was a "self-inflicted wound." By stopping the recount, perhaps calling the election, the Court had hurt itself.[6]

Whether the decision was right or wrong is not the point here. If I and three other members of the Court thought the decision was very wrong, so did millions of other Americans. For present purposes, however, what is important is what happened next. Gore, the losing candidate, told his followers not to attack the legitimacy of the Court's decision. And despite the great importance of the decision, the strong disagreement about its merits, and the strong feelings about the Court's intervention, the public, Democrats as well as Republicans, followed the decision. They did so peacefully, with no need for troops as in Little Rock, without rocks hurled in the street, without violent massive protest. The leader of the U.S. Senate, Harry Reid, a Democrat, later said that the public's willingness to follow the law as enunciated by the Court constitutes a little-remarked, but the most remarkable, feature of the case. I agree.[7]

THE CHEROKEE CASE, *Dred Scott,* Little Rock, and *Bush v. Gore* are all different. In the Cherokee case the president sent troops not to enforce the Court's decision but, on the contrary, to evict the Cherokees and send them to Oklahoma. In *Dred Scott* the Court's own faulty decision helped bring about a war that the Court had sought to avoid. In Little Rock a president and the Court together enforced a decision that was highly unpopular in the South and together helped to eventually make

the Constitution's protection of racial minorities effective. In *Bush v. Gore* the public simply assumed, as it does today, that it should peacefully follow an important controversial decision.

The cases show that public opposition to a Court decision can take many forms. Like Georgia's governor and his fellow Georgians in the Cherokee case, a public official or the public itself might refuse to follow a Court order. Like Andrew Jackson, opponents might find a way to avoid violating the order in an individual case but still refuse to apply the Court's legal principle to other instances. Like Abraham Lincoln after *Dred Scott,* opponents might express uncertainty about whether the Court has more right to interpret the Constitution than do the states or the people. Or, like much of the South after *Brown,* opponents might simply delay, trying to wait out or outmaneuver attempts at enforcement.

The examples taken together nonetheless make a simple point: America's public officials and the American public have come to accept as legitimate not only the Court's decisions but also its interpretations of the Constitution. The public has developed a habit of following the Court's constitutional interpretations, even those with which it strongly disagrees. Today we find it as normal to respect the Court's decisions as to breathe the air around us.

This public habit has obvious advantages. An effective judiciary, capable of enforcing contracts honestly without corruption, helps, as much as any other institution, to encourage economic investment, and thus growth and prosperity. An increasingly diverse American population has come to realize the importance of resolving serious differences through law, hence following a court's conclusion even when it is unpopular. Furthermore, experience abroad, say in pre–World War II Europe, makes clear that majorities can become tyrants, and it thereby underlines the importance of making effective the Constitution's efforts to protect minorities and to protect individual liberty—even when their enforcement is unpopular.

But that is not the end of the matter. The examples also show that the public's trust cannot be taken for granted. Public trust does not follow automatically from the existence of a written constitution. It must be built, and once built, it must be maintained. To maintain the neces-

sary public confidence in the Court's decisions, each new generation has certain obligations. It must learn how our constitutional government works, become aware of its history, be encouraged to participate in the democratic process, and observe the preceding generation as it builds on those public customs.

This must happen primarily through civic education. But the Court too has responsibilities. Abraham Lincoln, after reading the *Dred Scott* decision, said he doubted that the public was always obligated to follow the Court's "last word." To help maintain the public's confidence, the Court must exercise its power of judicial review in a manner that honors the lessons of the past. Part II will examine some of the ways in which I believe the Court itself can help accomplish this difficult but critical task.

PART II

DECISIONS THAT WORK

THE COURT HAS A SPECIAL RESPONSIBILITY TO ENSURE THAT the Constitution works in practice. While education, including the transmission of our civic values from one generation to the next, must play the major role in maintaining public confidence in the Court's decisions, the Court too must help maintain public acceptance of its own legitimacy. It can do this best by helping ensure that the Constitution remains "workable" in a broad sense of that term. Specifically, it can and should interpret the Constitution in a way that works for the people of America today. Here I explain why and how it can do so.

Part II discusses what the Court must do to deserve and to maintain the public trust it has earned. I argue that the Court can best fulfill this obligation through rulings and interpretations that help the Constitution work in practice. This requires applying constant constitutional principles to changing circumstances. I argue that in making difficult decisions, the Court should recognize and respect the roles of other governmental institutions—Congress, the president, executive branch administrators, the states, other courts—and it should take account of the experience and expertise of each. I describe several distinct approaches, each specific to a particular institution, that I believe will help the Court build productive governmental relationships—but without the Court's abdicating its own role as constitutional guardian.

In addition, I argue that the Court should interpret written words,