

Making Our Democracy Work by Justice Stephen Breyer

Part I: People's Trust

How the court has acquired the people's trust and grown over time

1 Judicial Review

- Constitutional distribution of responsibility
 - Congress has the purse and the ability to legislate
 - The President has the power and agencies to implement the law
 - The Supreme Court interprets the law
- To interpret the law the court must be somewhat beyond the reach of public opinion; therefore long terms and unelected office
- The Court is the final arbiter for the rights of the minority
- The question whether the legislative or executive branches can ignore a Supreme Court decision was not finally decided until the mid-twentieth century

2 Establishing Judicial Review: Marbury v Madison

This case set the precedent for judicial review without requiring the president (Jefferson) to do something he clearly was not prepared to do.

3 The Cherokees

An example of a case where the nation ignored the Court findings (Jackson) and suffered problems because of the precedent he set.

4 Dred Scott

Lessons:

- An example that the language a judge uses to set forth their reasoning matters (judicial rhetoric)
- When a judge writes an opinion the reasoning can make all the difference. A strong opinion is principled, reasoned, transparent, and informative. A good opinion is persuasive.
- The Court needs to keep the distance between its decisions and politics as wide as practical.
- The Court must keep in mind that the Constitution created a central government, not a treaty that linked separate states.
- The Court must be mindful that its duty is not independent of the other branches of government or the people.

5 Little Rock

- Where the president (Eisenhower) enforced an unpopular Court decision on a state – clarifying the Court's ability to define the Constitution.
- The Court came full circle from the Cherokee decision in chapter 3 (the grave of the wife of Cherokee Chief Ross is only one mile from Central High School in Little Rock).

6 Present-Day Example

- Bush v Gore: That the public willingly followed the law enunciated by the Court is one of the most remarkable features of the case.
- The cases in this section, taken together, show how the public has come to accept the legitimacy of the Court's decisions. The Court must always work to maintain the public's trust.

Part II: Decisions that Work

Legal tools used to interpret the law

7 The Basic Approach

Maintaining public acceptance can be achieved in two ways

- i Avoid approaches to interpretation that consider the scope and application as being fixed at the moment of framing. The Constitution should be viewed as containing unwavering values that must be applied flexibly to ever-changing circumstances.
 - ii The Court must take into account the roles of other government institutions and the relationships among them.
- There are two ways of looking at any interpretation of the constitution

- i Originalism: The judge looks to history to find both basic values and the underlying law and practices present at the time of framing. This builds public support by adhering, as much as possible, to the framer's intentions.
- ii Pragmatic: The judge must encompass efforts that consider and evaluate consequences.

Judges must not only decide, they must issue opinions that reason the way they reached their conclusions. A good judicial opinion is transparent and informative, as well as being persuasive.

8 Congress, Statutes, and Purposes

- A text-oriented interpretation relies on wording (good or bad) and attempts to follow text, history, tradition, and precedent.
- A purposes and consequences approach to interpretation attempts to determine how the Article(s) were intended.
 - Allows the interpretation of statutes so as to avoid declaring the statute unconstitutional.
 - Criticisms are...
 - Bills can be institutional, not individual
 - Allows judges to interpret statutes subjectively. However a judge is responsible to offer an opinion explaining their reasoning.

9 The Executive Branch, Administrative Action, and Comparative Expertise

- The executive branch executes and administers laws.
- The Court primarily applies principles from the administrative law section of our laws.
- The Court relies on comparative expertise when reviewing administrative decisions.
- In determining how much authority congress delegated, the court...
 - Must not recognize more authority than that intended by Congress, because that limits ballot box control of the government
 - Must not recognize less authority than that intended by Congress, because that prevents citizens from obtaining basic objectives they voted for.
- An example is the 2007 review of the Clean Air Act to include greenhouse gases.
- If an agency is better able to solve the problem, then the Court normally defers to their comparative expertise, but they do not defer where the courts are more able to solve the problem with a ruling.

10 The States and Federalism: Decentralization and Subsidiarity

- Maintaining a strong working relationship between the Court and the states, there are four guidelines to take into account...
 - i When government seeks solution to economic or social matters, empirical matters are often highly relevant.
 - ii Comparatively speaking, judges are not well equipped to find remedies for economic or social problems.
 - iii Legislatures are better suited to investigating and uncovering facts, understanding their relevance, and finding solutions to economic and social problems.
 - iv The Constitution embodies a democratic preference for legislated solutions.
- Madison's view: The Constitution is a charter of power granted by liberty, not the other way around.
- Subsidiarity: Governmental power to deal with a particular kind of problem should rest in the hands of the smallest unit of government capable of dealing successfully with that kind of problem.
 - This concept of power flowing from the bottom allows a state to be a laboratory for a possible solution, while other states may try other solutions.
 - It is one thing to favor decision making at a more local level; it is quite another to estimate the comparative effectiveness of local vs national authority in a factually interconnected world.
 - The vast bulk of American law is state law, not federal law.

- The Court is tasked with protecting the national market; regulating interstate and international markets/commerce.
 - State laws cannot interfere with the operation of national or international markets
 - Laws to protect citizens may be valid, while laws protecting local businesses may not be valid.
- When dealing with federal laws apparently preempting state or local laws, the Court should look for ways for states to play a role – particularly where states have special experience.

11 Other Federal Courts: Specialization

- Trial courts are at the base, appeals courts, then the Supreme Court
 - Trial courts focus on individual disputes, gather the facts, and perform the great majority of the judicial work
 - Appeals courts only handle cases where there is a question about a mistake of law or facts contrary to the evidence presented to the trial court.
 - There is a claimed error of law to be corrected
 - There is a textural interpretation about what the law means
 - Supreme Court
 - Almost exclusively deals with textural interpretation, largely constitutional interpretation.
- The appellate court is severely limited in its consideration of factual matters as that is the trial court's specialty.
- The Supreme Court rarely engages in case management or second-guessing related trial court decisions.
- Except in constitutionally defined circumstances, the Supreme Court primarily takes cases to resolve conflicts among lower courts.

12 Past Court Decisions: Stability (Stare Decisis)

- Part of the Court's responsibility is to maintain the stability of the law and respect prior decisions. All decisions are accompanied by opinions laying out the reasoning behind the decision, or the reasoning behind the dissent.
- When stability must give way...
 - When the passage of time makes clear the case was wrongly decided – *Brown v The Board of Education*
- Factors that help the Court decide...
 - The principle of stare decisis applies more rigorously when a statute, rather than a constitutional provision is at issue. Congress can more easily change a statutory decision.
 - The public's reliance on a decision (i.e. existing contracts) argues strongly, but not determinatively, against overruling an earlier case.
 - The more recently the earlier case has been decided the less forcefully the stare decisis anti-overruling principle should be applied.
 - The Court can, and often should, overrule an earlier decision that has created a set of unworkable legal rules.
 - If case B has overruled case A, then it is easier to overrule case B, restoring case A.
 - The Court should exercise particular caution before overturning a case that has become well embedded in national culture (i.e. *Miranda v Arizona* or the 2010 campaign contribution restrictions).

Part III: Protecting Individuals

Good and bad case examples showing how the Court has erred and grown

13 Individual Liberty: Permanent Values and Proportionality

- Important rights and interests can be in conflict
- Values are the constitutional analogue of statutory purposes.
- Proportionality is useful when a statute restricts one constitutionally protected interest to further another comparably important interest.
 - Proportionality involves balancing, which the Court would prefer to minimize.
- Arguments surrounding the Second Amendment frequently involve disagreements between Values and Proportionality and are discussed at length in this chapter.

14 The President, National Security, and Accountability: *Korematsu*

- An extended discussion of the cases surrounding the relocation of Japanese Americans during WWII, how and why the Court reacted as it did, the ultimate impact on the Court and society, and what we can learn from these cases.

15 Presidential Power: Guantanamo and Accountability

- Another detailed discussion of the four cases involved in this dispute and how the court has to walk a fine line, both to apply the Constitution and to retain public acceptance of the Court's right of judicial review.