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Chapter 16
The Supremely Political Court

Article III, Section I of the U.S. Constitution reads: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Supreme Court justices and all other federal judges are nominated by the president and subject to confirmation by the Senate. Federal judges have life tenure and can be removed from office only for misconduct and only through impeachment by the Senate.[1]

All three branches of government are sworn to uphold the Constitution, but the Supreme Court alone reviews the constitutionality of actions by the other two branches, at least in those cases brought before it. Nothing in the Constitution gives the Court this power *of judicial review,* but the proceedings of the Constitutional Convention of 1787 reveal that many delegates expected the judiciary to overturn laws it deemed inconsistent with the Constitution.[2] Of even greater significance is the Courts power *of judicial interpretation* to decide the intent and scope of laws as they are applied in actual situations. Our main concern here is with trying to understand the political role the Court has played in the struggle for and against democracy.

Who Judges?

Some Americans think of the Constitution as a vital force, having an animation of its own. At the same time they expect Supreme Court justices to be above the normal prejudices of other persons. Thus, they envision "a living Constitution" and an insentient Court. But a moment's reflection should remind us that it is the other way around. If the Constitution is, as they say, an "elastic instrument," then much of the stretching has been done by the nine persons on the Court, and the directions in which they pull are largely determined by their own ideological predilections. As Chief Justice Hughes pointedly remarked, "We are under a Constitution but the Constitution is what the judges say it is."[3]

By its nature, the Supreme Court is something of an aristocratic branch: its members are appointed rather than elected; they enjoy life tenure and are formally accountable to no one once in office; and they have the final word on constitutional matters. As intended by the framers, the Courts mandate is to act as a check on the democratic majority and as a protector of private contract, credit, and property. Generally speaking, in class background and political proclivity, the justices have more commonly identified with the landed interests than with the landless, the slave owners rather than the slaves, the industrialists rather than the workers, the exponents of Herbert Spencer rather than of Karl Marx. Over a century ago Justice Miller, a Lincoln appointee to the Court, made note of the judiciary's class biases: "It is vain to contend with judges who have been at the bar, the advocates for forty years of railroad companies, and all the forms of associated capital. . . All their training, all their feelings are from the start in favor of those who need no such influence."[4]

Through most of its history "the Court's personnel were recruited mainly from the class of corporate lawyers, so there was no shortage of empathy with the desires of expanding capitalism."[5] The process of legal education and professional training makes it unlikely that dissidents will be picked for the bench—and very few have been. The bar associations and law schools, and the foundations that finance the law journals, endowed chairs, and research grants in jurisprudence, are dedicated to fortifying not modifying the existing system of ownership and wealth. One study finds that the American Bar Associations quasi-official Federal Judiciary Committee, whose task is to pass on the qualifications of prospective judges at all federal levels, favors those whose orientation is conservative and supportive of corporate interests.[6] Generally, the acceptable range of politico-economic opinion for Supreme Court justices has been from ultraconservative to

mainstream liberal. In most cases relating to major economic issues, there are well-articulated rationales supporting either a conservative or liberal viewpoint. How a justice or any other federal judge decides has less to do with objective inquiry than with his or her ideological preference. Both conservative and liberal ideologies, of course, accept the existing economic system as an unchallengeable given.

Occasionally a president will select someone for the Court whose behavior goes contrary to his expectations, but generally presidents have been successful in matching court appointments with their own ideological preferences. President Reagan was second to none in this endeavor, stocking more than half of the 744 federal judgeships with ideologically committed conservatives, mostly in their thirties and forties, who will be handing down decisions and shaping the law of the land into the second and third decades of the next century. As compared to his predecessor, Jimmy Carter, Reagan appointed very few Blacks, Latinos, or women. He also picked many more upper-class persons: 81 percent of his appointees had incomes of over $200,000 and 23 percent admitted to being millionaires.[7]

Reagan's successor, George Bush, appointed an additional 195 federal judges, usually youngish conservatives, including Clarence Thomas, a 43-year-old undistinguished archconservative to replace the great Thurgood Marshall on the Supreme Court. When Bill Clinton, a Democrat, became president, he had the opportunity to appoint more than one hundred vacancies and introduce some ideological diversity in the courts. As of February 1994, he had yet to fill most of these vacancies and seemed not likely to leave a strong liberal impress on the judiciary. His one Supreme Court appointee in 1993, Ruth Bader Ginsburg, when serving on a lower federal court, had voted more often with the conservatives than the liberals and continued to do so once on the Supreme Court.

Conservative Judicial Activism

It is said that the devil himself can quote the Bible for his own purposes. The Constitution is not unlike the Bible in this respect, and over the generations, Supreme Court justices have shown an infernal agility in finding constitutional justifications for the continuation of almost every inequity and iniquity, be it slavery or segregation, child labor or the sixteen-hour workday, state sedition laws or assaults on the First Amendment.

In its early days under Chief Justice John Marshall, the Court emerged as a guardian of property, declaring that a corporation was to be considered a "person" entitled to all the rights accorded persons under the Constitution.[8] The Marshall Court supported the supremacy of federal powers over the states. In *McCulloch v. Maryland* (1819) the Court forbade Maryland from taxing a federal bank and affirmed Congress's right to create a bank (a power not mentioned in the Constitution). Marshall argued that Article 1, Section 8, gave Congress the right "to make all laws necessary and proper" for carrying out its delegated powers. So was the groundwork laid for the expansion of federal power and the protection of corporate interests by conservative judicial activists like Marshall.

Much of the debate about the Supreme Court today centers on whether (a) the Bench should act "politically" and "ideologically" by exercising a liberal "judicial activism," vigorously supporting individual rights and social needs, or (b) employ a conservative "judicial restraint" by deferring to the other two branches of government and cleaving close to the traditional intent of the Constitution.[9] In practice, however, conservative justices are just as ideologically activist as liberal ones—if not more so. Only during a relatively few periods—most notably the 1960s—did the High Court become an active supporter of individual rights and economic reform on behalf of the poor. Through most of its history the Court has engaged in a *conservative* judicial activism in defense of wealthy and propertied interests.

Whether the Court judged the government to be improperly interfering with the economy depended on which social class benefited. When the federal government wanted to establish national banks, or give away half the country to private speculators, or subsidize industries, or set up commissions that fixed prices and interest rates for manufacturers and banks, or send Marines

to secure corporate investments in Central America, or imprison people who spoke out against war and capitalism, or deport immigrant radicals without a trial, or use the United States Army to shoot workers and break strikes, the Court inventively found constitutional pegs that made such actions acceptable.

But if the federal or state governments sought to limit workday hours, set minimum wage or occupational safety standards, ensure the safety of consumer products, guarantee the right of collective bargaining, or in other ways offer protections against the powers of business, then the Court ruled that ours was a limited form of government that could not tamper with property rights and the "free market" by depriving owner and worker of "substantive due process" and "freedom of contract"—concepts elevated to supreme status even though the limitations claimed on their behalf exist nowhere in the Constitution.[10]

When Congress outlawed child labor, the Court's conservative majority found it to be an unconstitutional usurpation of the reserved powers of the states under the Tenth Amendment.[11] But when the states passed social-welfare legislation, the Court found it in violation of "substantive due process" under the Fourteenth Amendment.[12] Thus the justices used the Tenth Amendment to stop federal reforms initiated under the Fourteenth Amendment, and the Fourteenth to stop state reforms initiated under the Tenth. Juridically speaking, it's hard to get more inventive and activist than that.

The Fourteenth Amendment, adopted in 1868 ostensibly to establish full citizenship for Blacks, says, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Once again the Court decided that "person" included corporations and that tie Fourteenth Amendment was intended to protect business conglomerations from the "vexatious regulations" of the states.

The Court's conservative majority handed down a series of decisions in the latter half of the nineteenth century and the early twentieth, most notably *Plessy* v. *Ferguson* (1896), which gave an inventive reading to the Fourteenth Amendment's equal protection clause. The *Plessy* decision enunciated the "separate but equal" doctrine, which said that the forced separation of Blacks from Whites in public facilities did not impute inferiority as long as facilities were more or less equal (which they rarely were). The doctrine gave constitutional legitimation to the racist practice of segregation.

Convinced that they too were persons despite the treatment accorded them by a male-dominated society, women began to argue that the Fourteenth and Fifth Amendments applied to them and that the voting restrictions imposed on them by state and federal governments should be abolished. A test case reached the Supreme Court in 1875, and the justices unanimously decided that women were citizens but citizenship did not necessarily confer the right of suffrage.[13] The Court seemingly had made up its mind that "privileges and immunities of citizens," "due process," and "equal protection of the laws" applied to such "persons" as business corporations but not to women and persons of African descent.

Well into the New Deal era, the Supreme Court was the activist bastion of laissez-faire capitalism, striking down—often by slim five-to-four majorities—reforms produced by the state legislatures and Congress. The Great Depression of the 1930s made clear to many liberal policymakers that the federal government needed to revive a stagnant economy and initiate some modest measure of social justice. Justice Brandeis expressed this position clearly: "There will come a revolt of the people against die capitalists, unless the aspirations of the people are given some adequate legal expression. . . . we shall inevitably be swept farther toward socialism unless we can curb the excesses of our financial magnates."[14] From 1937 onward, under pressure from the public and the White House, and with the switch of one conservative justice to the side of the liberals, the Supreme Court began to accept the constitutionality of New Deal legislation.

Circumventing the First Amendment

While opposing restrictions on capitalist economic power, the Court supported restrictions on the civil liberties of persons who agitated against that power. The First Amendment says, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[15] Yet, ever since the Alien and Sedition Acts of 1798, Congress and the state legislatures have passed numerous laws to penalize die expression of politically heretical ideas as "subversive" or "seditious." During the First World War almost two thousand prosecutions were carried out, mostly against anticapitalists who expressed opposition to the war, including the U.S. socialist leader Eugene Victor Debs.[16]

The High Courts attitude toward the First Amendment was best expressed by Justice Oliver Wendell Holmes in the famous case of *Schenck v. United States* (1919). Schenck was charged with attempting to cause insubordination among United States military forces and obstructing recruitment, both violations of the Espionage Act of 1917. Actually, he had distributed a leaflet that urged repeal of the draft and condemned the war as a wrong perpetrated by Wall Street. In ordinary times, Holmes reasoned, such speech is protected by the First Amendment, but when a nation is at war, statements like Schencks create "a clear and present danger" of bringing about "evils that Congress has a right to prevent." Free speech, Holmes argued, "does not protect a man in falsely shouting fire in a crowded theater and causing a panic." The analogy is farfetched: Schenck was not in a theater but was seeking a forum to voice his opposition to policies that the Court treated as beyond challenge. Holmes was summoning the same argument paraded by every ruler who has sought to abrogate a peoples freedom: these are not normal times; there is a grave menace within or just outside our gates; national security necessitates a suspension of democratic rights.[17]

More than once the Court treated the allegedly pernicious quality of a radical idea as certain evidence of its lethal efficacy and as justification for its suppression/When the top leadership of the Communist Party was convicted in 1951 under the Smith Act, which made it a felony to teach or advocate the violent overthrow of the government, the Court upheld the act and the convictions, arguing in *Dennis et al v. United States* that there was no freedom under the Constitution for those who conspired to propagate revolutionary movements. Free speech was not an absolute value but one of many competing ones. Justices Black and Douglas dissented, arguing that the defendants had not been charged with any acts or even with saying anything about violent revolution, but were intending to publish the classic writings of Marx, Engels, and Lenin. In any case, the First Amendment was designed to protect the very heretical views we might find offensive and fearsome. Safely orthodox ideas rarely needed constitutional protection.

Six years later, fourteen more communist leaders were convicted under the Smith Act. This time, however, some of the hysteria of the McCarthy era had subsided and the Courts political make-up had shifted. So the justices virtually reversed themselves, ruling that the Smith Act prohibited only incitement to unlawful actions and not "advocacy of abstract doctrine." The convictions were overthrown. Justice Black added the opinion that the Smith Act itself should be declared unconstitutional because "the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal."[18]

Freedom for Revolutionaries?

Opposed to Black's view are those who argue that revolutionaries violate the democratic rules of the game and should not be allowed "to take advantage of the very liberties they seek to destroy"; in order to preserve our freedom, we may find it necessary to deprive some people of theirs.[19] Several rejoinders might be offered.

First, as a point of historical fact, the threat of revolution in the United States has never been as real or harmful to our liberties as the measures taken to "protect" us from revolutionary ideas. History repeatedly demonstrates the expansive quality of repression. In the name of national security, revolutionary advocacy is suppressed, then "inciting" words, then unpopular doctrines,

then "irresponsible" news reports, then any kind of criticism that those in power find intolerable. Americans were never "given" their freedoms; they had to organize, agitate, and struggle fiercely for whatever rights they won. As with our bodily health, so with the health of our body politic: we best preserve our faculties and liberties against decay by vigorously exercising them.

Second, the suppression is conducted by political elites who, in protecting us from "harmful" thoughts, are in effect making up our minds for us by depriving us of the opportunity of hearing and debating ideas with revolutionary advocates. An exchange is forbidden because the advocate has been silenced—which in effect silences us too.

Third, it is not true that anticapitalists are dedicated to the destruction of freedom. Much of the ferment in United States history instigated by socialists, anarchists, and communists actually augmented our democratic rights. The working-class agitations of the early nineteenth century widened the areas of dissent and helped extend the franchise to propertyless working people. The organized demonstrations against repressive local ordinances in the early twentieth century by the revolutionary-minded Industrial Workers of the World (the "Wobblies" free-speech fights") fortified the First Amendment against attacks by the guardians of wealth. The crucial role communists played in organizing industrial unions in the 1930s and struggling for social reforms, peace, and civil rights strengthened rather than undermined democratic forces. The antiwar protests against the Vietnam War challenged an immoral, illegal military action and tried to broaden the spectrum of critical opinion and information regarding U.S. foreign policy. It also inadvertently led to the enfranchisement of eighteen-year olds.

Fourth, progressive critics would argue that instead of worrying about some future menace, we should realize that freedom is in short supply in the present society. The construction of new socioeconomic alternatives would bring an increase in freedom, including freedom from poverty and hunger, freedom to share in the making of decisions that govern one's work and community, and freedom to experiment with new forms of production and ownership. Admittedly some freedoms enjoyed today would be lost in a revolutionary society, such as the freedom to exploit other people and get rich from their labor, the freedom to squander natural resources and treat the environment as a septic tank, the freedom to monopolize information and exercise unaccountable power.

In many countries, social revolutionary movements brought a net increase in the freedom of individuals, revolutionaries argue, by advancing the conditions necessary for health and human life; by providing jobs for the unemployed and education for the illiterate; by using economic resources for social development rather than corporate profit; and by overthrowing reactionary semifeudal regimes, ending foreign exploitation, and involving large sectors of the populace in the task of economic reconstruction. Revolutions can extend a number of real freedoms without destroying those that never existed for the people of those countries.

The argument can be debated, but not if it is suppressed. In any case, the real danger to freedom in the United States is from the undemocratic control exercised by those in government, the media, academia, business, and other institutions who would insulate us from "unacceptable" viewpoints. No idea is as dangerous as the force that would seek to repress it.

As the Court Turns

The Supreme Court's record in the area of personal liberties, while gravely wanting, is not totally devoid of merit. Over die years the Court has extended portions of the Bill of Rights to cover not only the federal government but state government (via the Fourteenth Amendment). Attempts by the states to censor publications, deny individuals the right to peaceful assembly, and weaken the separation between church and state were overturned.[20]

The direction the Supreme Court takes depends (a) on the pressures exerted by various advocacy groups and the political climate of the times, and (b) the political composition of the Courts majority. In the 1960s, fortified by the social activism of the wider society and a liberal majority of justices, the Court under Chief Justice Earl Warren took a liberal activist role. It ruled that a poor person had the right to counsel in state criminal trials and an arrested person had the

right to a lawyer at the onset of police interrogation.[21] The Warren Court decided that malapportioned state legislative districts had to be redrawn in accordance with population distribution, so that voters in the overpopulated districts were not denied equal protection under the law.[22]

The Warren Court also handed down a number of landmark decisions aimed at abolishing racial segregation. The most widely celebrated, *Brown v. Board of Education* (1954), unanimously ruled that "separate educational facilities are inherently unequal" because of the inescapable imputation of inferiority cast upon the segregated minority group, made all the worse when sanctioned by law. This decision overruled the "separate but equal" doctrine enunciated in 1896 in the *Plessy* case.[23]

The law has always treated public assistance for the poor and the disabled as "privileges" which could be cut off at will. The Warren Court rejected the distinction between "rights" and "privileges" and held that persons who qualified for benefits had a protected "property" interest that could not be taken away without due process of law. "For the first time in the nation's history, the Court majority began to exercise initiative on behalf of the poor."[24]

While opening up new opportunities for democratic gains in civil liberties, civil rights, and protections for the poor, the Warren Court did not stray very far from the basic capitalist ideology shared by both liberal and conservative jurists, to wit: (a) firms may invest or disinvest at will and move elsewhere regardless of the hardship wreaked upon the surrounding community and work force; (b) workers have no legal say in the direction of their company or the products of their labor—they must obey employer directives, even ones that violate the labor contract, pending completion of an often inadequate grievance process; and (c) most forms of worker self-protection, including wildcat strikes (work-stoppages that occur during the terms of a contract) and secondary boycotts are outlawed or heavily restricted.[23]

Packed with Nixon, Ford, Reagan, and Bush appointees, the Court has taken a decidedly rightward turn on a variety of crucial issues over the last two decades:[26]

Labor and business. In decisions involving disputes between workers and owners, the Burger and Rehnquist Courts almost always have sided with the owners, weakening labor's ability to organize and bargain collectively.[27] The conservative Court ruled that workers do not have the right to strike over safety issues if their contract provides a grievance procedure. This decision denied miners the right to walk off the job in the face of serious and immediate safety violations that management refused to remedy.[28] The Court decided that employers can in effect penalize workers for unionizing by closing down operations and denying them jobs. Companies could now unilaterally terminate a labor contract and drastically cut employees' wages by filing for "reorganization" under the bankruptcy law. And unions were denied the right to prevent members from quitting the union and crossing picket lines during a strike or when a strike seemed imminent.[29] College faculty unions were declared not covered by federal laws because teachers exercised a "managerial" function when recruiting for new faculty personnel.[30] The Court's conservative majority upheld state laws denying unemployment benefits to striking workers and a federal law denying them food stamps.[31] Management was given more power to change worker benefit standards and deny health benefits.[32] Companies could give preferential hiring to scabs who crossed picket lines, thereby further undermining organized labor's right to strike.[33]

Despite a law limiting water subsidies to farms of 160 acres or less and to farmers who "live on or near the land," the Court held that large commercial farms, including ones owned by Southern Pacific and Standard Oil, were entitled to the subsidies. In seeming violation of the Clean Air Act, the Court said industries could expand in regions with the dirtiest air even if it results in worsening pollution.[34] The Court upheld a lower federal court ruling that allows employers to slash health insurance for workers who develop costly illnesses. In effect, workers will have coverage only as long as they don't use it for any serious illness—which undermines the whole purpose of insurance.[35]

Economic inequality. The conservative majority on the High Court give more consideration to the preferences of the rich than the needs of the poor. By upholding laws that reduce welfare assistance, the conservative jurists rejected the idea that aid to the poor was protected by due

process.[36] In seeming violation of the equal-protection clause of the Fourteenth Amendment, the justices decided that a state may vary the quality of education in accordance with the amount of taxable wealth located in its school districts, thus allowing just about any degree of inequality short of absolute deprivation.[37] California's Proposition 13 limited tax increases on property bought before 1975, so that persons with newly purchased homes carry tax burdens almost 400 percent heavier than longtime owners. The Supreme Court decided that the existence of a privileged class of property holders did not violate equal protection under the law.[38]

Civil liberties. In First Amendment cases the conservative majority usually has favored government authority over dissent.[39] The Bench allowed the U.S. Army to spy secretly on lawful civilian political activity, but prohibited civilians from openly bringing political literature and demonstrations to military posts.[40] The Court said that bans on political signs in public places were not a restriction on free speech.[41] The justices upheld a law requiring male college students to register with the Selective Service System if they want federal financial aid—a requirement that can be more successfully evaded by students who do not need aid.[42] In *Thornburgh* v. *Abbott* (1989), prison officials were granted almost a free hand in deciding what publications prisoners could receive, a censorship applied mostly against politically dissident literature. Students fared not much better when the Court ruled that high-school administrators had the authority to censor student publications.[43]

Red-baiting repression was given a boost when the Bench ruled that a Michigan state worker, who was denied a promotion because the police Red squad had a file on his politically active brother, could not collect damages. The Court decided that the worker could not sue the state because it was not a person, a decision that placed government's repressive acts above legal challenge by its citizens.[44]

Separation of church and state. The First Amendment reads in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." On the disestablishment clause, the Court has a mixed record. In *support* of the separation of church and state, it has ruled that (a) government has no business sponsoring prayer in the public schools, (b) states may tax the sale of religious books and artifacts by religious organizations, and (c) states have no right to require public schools teaching evolution to also teach Christian views of "creationism" (which argues that evolution never occurred and the world was made by God in six days).[45] In *violation* of the separation of church and state, the Court has long held that religious organizations can enjoy various exemptions from taxation—which narrows the tax base and increases everyone else's tax burden, forcing laypersons to indirectly subsidize religious bodies.[46] Even when religious groups have engaged overtly and actively in political issues, as has the Roman Catholic Church and some Protestant fundamentalist bodies on the abortion issue, the IRS allows them to retain their tax-exempt status.[47] In a five-to-four decision, the Court ruled that federal funds given to religious groups to promote chastity did not violate separation of church and state. In another five-to-four decision, the Court decided that the tuition, textbook, and transportation costs for private schools (including religious ones) were tax deductible.[48]

Criminal justice. In this area, the conservative Court of the last two decades has done little for individual rights. The *Miranda* rule, which forbade the use of police torture in obtaining confessions, was greatly weakened.[49] The Court ruled that persons who murder at the age of sixteen or seventeen can be executed for the crime and so can mentally retarded persons.[50] The justices decided that sentencing a mentally retarded thirteen-year-old to life was not a violation of the Eighth Amendment's prohibition against "cruel and unusual punishment,"[51] nor was a life sentence given to a man for three minor frauds totaling $230,[52] nor a life sentence without parole for a first-time conviction of cocaine possession.[53] The prohibition against cruel and unusual punishment, the Court said in *Ingraham v. Wright* (1977), does not protect school children from corporal punishment even if the children have been severely injured by school officials. And the due process clause does not impose an obligation on die government to protect an individual from abuse from another individual, specifically a child from a parent.[54]

The Fourth Amendment protection against unreasonable searches and seizures was nearly obliterated when the Court upheld the polices power to conduct sweeping searches in private

homes and on buses and to arrest individuals without a warrant and hold them without a court hearing.[55] By unilaterally rewriting specific rules set down by Congress, the conservative activists on the Court severely limited the ability of state prisoners to go to federal court with claims that their constitutional rights were violated. Prisoners who filed lawsuits to fight inhumane conditions now had to show that prison officials exhibited "deliberate indifference" to their rights. The justices did not explain how one could demonstrate such intent if the inhumane prison conditions themselves did not.[56] The Court denied a hearing to a man on death row because his appeal was founded not on a procedural flaw but on errors of fact, specifically additional evidence proving his innocence. In a dissent, Justice Blackmun bemoaned "this Courts obvious eagerness to do away with any restriction on the States' power to execute whomever and however they please" and called the ruling "perilously close to simple murder."[57]

Executive power. The executive is the home of the CIA, the Pentagon, and other national security agencies that are instrumental in maintaining the domestic and global status quo. It is the branch most closely integrated with the military-industrial complex. Not surprisingly, the conservative-dominated Court has repeatedly affirmed the authority of die executive over the other branches and over individual rights. The Court ruled that the State Department could deny a passport to a former CIA employee who had written books exposing illegal CIA covert operations. Neither Congress nor the Constitution granted this power to the executive, but the Bench declared that in matters of "foreign policy and national security" the absence of an empowering law is not to be taken as a sign of congressional disapproval. By judicial fiat, the president now could do whatever he wanted in the absence of specific legislative prohibition.[58]

As part of a continuing pattern of deferring to presidential power in military and foreign affairs, the federal courts refused to hear cases challenging the president on such things as the undeclared war in Vietnam, the unprovoked U.S. invasion of Grenada, the imposition of embargoes on Nicaragua, the U.S. invasion of Panama, and the deportation of Haitian, Guatemalan, and Salvadoran refugees.[59] In a landmark decision die Supreme Court overturned the "legislative veto," a device used in over 200 laws in which Congress authorized the president to do something while retaining the right to negate his action by a simple majority decision. The Court ruled this was an infringement on the separation of powers, thus dealing Congress a serious blow in its attempts to hold the federal bureaucracy accountable.[60]

The electoral system. While unable to contravene earlier reapportionment cases, the conservative Court issued several decisions that nibbled away at the "one-person, one-vote" rule and allowed for greater population disparities among state and congressional legislative districts.[61] The Bench also decided that districts designed in an unusual shape to give North Carolina its first African American members in Congress since Reconstruction were a form of gerrymandering that violated the constitutional rights of White voters.[62] The Court decided that states could not prohibit corporations from independently spending unlimited amounts of their funds to influence the outcome of public referenda or other elections because campaign expenditures were a part of "speech" and the Constitution guarantees freedom of speech to business firms, which are to be considered "persons." Nor could limits be imposed on the amount that rich candidates spend on their campaigns or the amounts that "independent" PACs spend in presidential elections.[63] Thus the poor candidate and the rich candidate can both freely compete, one in a whisper and the other in a roar.

Abortion and gender discrimination. Cases that do not directly challenge corporate power or executive authority, including such issues as abortion and sex discrimination, have received mixed treatment by conservatives on the Supreme Court. Sometimes the moderate conservatives sided with the one or two remaining liberals to defeat the ultraconservatives.[64] Occasionally, even the ultraconservatives join in a liberal decision, as when the Court ruled unanimously that (a) sexual harassment on the job violated a person's civil rights, (b) a divorced woman cannot be denied custody of her children because of her remarriage to a man of another race, and (c) victims of sexual harassment can obtain monetary damages from the institution in which the harassment occurred.[65] The Court declared unconstitutional a requirement that women seeking abortions notify their husbands, but it ruled that underage women must obtain parental consent for an abortion.[66]

And it upheld a Reagan-Bush administration rule prohibiting family-planning clinics that receive federal funds from providing abortion information to clients.[67]

The Supreme Court declared that federal courts have absolutely no power to stop antiabortion extremists from their campaigns of trespass, intimidation, and obstruction against abortion clinics.[68] In 1994, however, the Court did concede that abortion clinics could invoke the federal racketeering law to sue violent antiabortion protest groups for damages. This decision leaves abortion clinics with the task of proving that specific individuals and organizations are conducting a nationwide campaign of intimidation, bombings, and other violent acts. One would think the local police and the federal government itself would take responsibility for moving against such violence without the clinics having to take on the task themselves.[69]

Affirmative action and civil rights. Justice Harry Blackmun explained in *University of California* v. *Bakke* that special measures had to be taken to correct the inequities of race relations in the United States: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot... let the equal protection clause perpetuate racial supremacy." In 1987, the Court upheld affirmative action to redress a conspicuous imbalance in traditionally segregated job categories; employers could promote women and minorities ahead of White males, without evidence of prior discrimination.[70] Not long after, however, the justices began to retreat, making it more difficult to establish discrimination claims against employers, giving White males increased opportunity to challenge affirmative action, and sharply limiting the ability of state and local governments to reserve a fixed percentage of contracts for minority businesses.[71]

A five-to-four majority decided that if an employer asserts "business necessity" to justify a racist or sexist practice, the burden is on the worker to prove intent and show that the practice is not job related.[72] Likewise, an African American on death row had to prove—in his own specific case—that racism was the cause of his conviction and sentence (something not easy to do). He could not claim discrimination just because people of color are consistently treated more harshly than Whites by the criminal justice system.[73]

The justices upheld the denial of tax-exempt treatment for schools that discriminate racially, but they also supported a Minnesota statute providing state income-tax relief for private schools, thus supporting a public subsidy to the "White flight" to private institutions.[74]

In a county in Alabama, for the first time in recent memory, two African Americans were elected to the board of supervisors. The board responded by abolishing the power of individual supervisors to make decisions regarding their own districts and gave that power to the White-dominated board as a whole. The Supreme Court overruled the Justice Department and decided that this subterfuge did not constitute unfair treatment and did not violate the voting rights laws.[75]

The Supreme Courts right-wing ideological bias is reflected not only in the decisions it hands down but in the cases it selects or refuses to review. Federal district courts decide almost 300,000 cases a year. Appeals are made to the twelve U.S. Courts of Appeal, which annually handle some 30,000 cases. The Supreme Court, in contrast, hands down about 170 decisions a year. During the last two decades of conservative domination of the Court, review access has been sharply curtailed for plaintiffs representing labor, minorities, consumers, and individual rights. Powerless and pauperized individuals have had a diminishing chance of getting their cases reviewed, unlike powerful and prestigious petitioners such as the government and the giant corporations. State and federal prosecutors were able to gain a hearing by the High Court at a rate fifty times greater than defendants. Criminal defendants who could afford the legal filing fee were twice as likely to be granted review as were indigent defendants.[76] In choosing cases the way it does, the Court sends out a clear message to appeals courts about which convictions to uphold and which to overrule.

It has been argued that because its work load has so increased, the Supreme Court must perforce turn down greater numbers of cases. The truth is, while the number of lower-court appeals have indeed multiplied, the amount of time the Reagan-Bush appointees on the Court spent on deliberations and the number of cases they heard diminished by one-fourth as compared to the Warren Court.[77] It is hard to argue that the Court is increasingly overworked when in fact its conservative majority has been reducing the time spent on cases. Even if it were true that the

Court is overburdened, this does not explain the evident class bias as to which cases are granted certiorari.

Influence of the Court

A few generalizations can be drawn about the Supreme Court's political influence. More often than not, the Court has been a conservative force. For over half a century it wielded a pro-business minority veto on the kind of reform legislation that European countries had implemented decades earlier. It prevented Congress from instituting progressive income taxes, a decision that took eighteen years and a constitutional amendment to circumvent. It accepted racist segregation for almost a century after the Civil War and delayed female suffrage for forty-eight years. And it has prevented Congress from placing limitations on personal campaign spending by the rich.

By playing a crucial role in defining what is constitutional, the Court gives encouraging cues to large sectors of the public, including the Congress itself. Unable to pass a civil-rights act for seventy years, Congress enacted three in the decade after *Brown v. Board of Education.* With the law on their side, civil-rights advocates throughout the nation stepped up the pressure to make desegregation a reality. Likewise, the Warren Courts decisions protecting the rights of the poor opened a whole new field of welfare-reform litigation and was an inducement to various poor people s movements.

Since the Court can neither legislate nor enforce its decisions, it has been deemed the "least dangerous branch." But the Reagan and Bush years demonstrated that a militantly conservative Court bolstered by a conservative executive can exercise quite an activistic influence. Again and again the Court imposed its own tortured logic to cases, blatantly violating the clear language of a law and the intent of Congress. Or it upheld administrative regulations designed to negate a statute. When Congress tried to undo the Courts right-wing activism and reinstate the law as it was intended, President Reagan or President Bush would veto or threaten to veto the new measure. Unable to muster the two-thirds vote needed to override the veto, Congress would be thwarted. Thus, a conservative president, assisted by five or more right-wing activistic justices and one-third-plus-one of either the House or the Senate, could rewrite the law of the land and govern as it wanted.[78]

In reaction to the liberal activism of the Warren Court, conservatives have argued that the Court must cease its intrusive role and defer to the policymaking branches of government. But "judicial restraint" has been applied in selective ways. When conservatives in Congress, the White House, and certain state and local governments launched attacks against freedom to travel, labor rights, the right to counsel, and free speech, the conservative Court was a model of restraint and deferred to these agencies of government. But when it came to advancing a right-wing agenda, the Court's conservative majority has been downright adventuristic, showing no hesitation to rewrite much of the Constitution, rig the rules of the game, invent concepts and arguments out of thin air, eviscerate laws, treat congressional intent and precedence as irrelevant, bolster an authoritarian executive power, block economic and campaign reforms, roll back substantive political and economic gains, and undermine civil liberties, civil rights, and the democratic process itself (such as it is).

Like the Courts of earlier times, the present conservative-activist Court has played federal power against state power and vice versa to defend corporate-class interests. Thus it limited the federal governments ability to protect work conditions of employees, claiming an infringement of states rights under the Tenth Amendment, and then restricted the ability of states to limit business s spending power in referenda, claiming federal prerogatives under the First Amendment. In such cases, one hears little complaint from conservatives about the Court s activist usurpation of policy-making powers. A consistent double standard obtains. Judicial activism that strengthens authoritarian statism and corporate-class interests is acceptable. Judicial activism that supports democratic working-class rights and socioeconomic equality invites attack.[79]

One way to trim judicial adventurism is to end life tenure for federal judges, including the justices who sit on the Supreme Court. It would take a constitutional amendment, but it would be

worth it. Today only three states provide life tenure for state judges; the other forty-seven set term limits ranging from four to twelve years.[80] Life tenure was supposed to shield the federal judiciary from outside influences and place it above partisan politics. Experience shows that judges are as political and ideological as anyone else. Their independence leaves them unchecked by anything but their own sense of propriety. A seven-year or ten-year term limit would still give a jurist significant independence, but would not allow him or her to remain unaccountable for life. Judges who exhibited a hostile view toward constitutional rights could be replaced. No ideologically partisan group could pack the courts for decades ahead. There would be more turnover and a greater possibility of more responsiveness to popular needs.

This is not to say that jurists are impervious to social realities. New social movements can affect the Court. The justices not only read the Constitution but also the newspapers. They not only talk to each other but to friends and acquaintances. Few jurists remain untouched by the great tides of public opinion and by the subtler shifts in values and perceptions.[81] The Court is always operating in a climate of opinion shaped by political forces larger than itself. Popular pressure and term limitations may be our most immediate hope in restraining the powers of an oligarchic, elitist judiciary.

Endnotes

1. The size of the Supreme Court is determined by statute, fluctuating over the years from six to ten members, and being fixed at nine since 1877.

2. Max Farrand, *The Framing of the Constitution of the United States* (New Haven, Conn.: Yale University Press, 1913), pp. 156-157. See Chief Justice John Marshall's argument for judicial review in the landmark case of *Marbury v. Madison* (1803).

3. Dexter Perkins, *Charles Evans Hughes* (Boston: Little, Brown, 1956), p. 16.

4. Quoted in Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* (New York: Atheneum, 1965), p. 54. Various justices, including Chief Justice Marshall, were slaveholders. They repeatedly protected the primacy of property rights in slaves, rejecting all slave petitions for freedom. In *Dred Scott v. Sandford* (1857), the Court concluded that, be they slave or free, Blacks were a "subordinate and inferior class of beings" without constitutional rights and that Congress had no power to exclude slaveholders and their chattel from the territories.

5. Russell Galloway, *The Rich and the Poor in Supreme Court History, 1790-1982* (Greenbrae, Calif.: Paradigm Press, 1982), pp. 163, and 180-181.

6. Joel Grossman, *Lawyers and Judges: The ABA and the Politics of Judicial Selection* (New York: Wiley, 1965). Whether appointed by Democratic or Republican presidents, judges are drawn preponderantly from highly privileged backgrounds: Sheldon Goldman, "Johnson and Nixon Appointees to the Lower Federal Courts: Some Socio-Political Perspectives," *Journal of Politics,* 34, August 1972, pp. 934-942.

7. Herman Schwartz, *Packing the Courts* (New York: Charles Scribner's Sons, 1988); Sheldon Goldman, "Reaganizing the Judiciary," *Judicature,* 68, April-May 1985, pp. 313-329. For some candidates, a conservative ideology seemed to have been the only qualification. Thus, the extremely conservative Daniel Manion, age forty-four, appointed to a lifetime position as federal appellate judge, was declared completely unqualified and lacking in a commitment to the Constitution by the deans of more than forty law schools: *New York Times,* July 25,1986. For federal district court, Reagan picked an admitted admirer of the Ku Klux Klan, Jefferson Beauregard Sessions III. But the Senate refused to confirm him. In 1986 Reagan picked Justice William Rehnquist, the most conservative member of the Court, to be chief justice. During his confirmation hearings, Rehnquist was confronted with a segregationist memorandum he wrote as a law clerk. He claimed it was the opinion of the late Justice Robert Jackson (who had opposed segregation). Rehnquist was unable to refute eyewitness testimony that he harassed Black and Hispanic voters in Phoenix in the 1960s. Nor did he explain why he signed an anti-Semitic covenant for one of his homes. In 1972, he cast the deciding vote in *Laird v. Tatum* to dismiss a probe of Army intelligence—even though he had been directly involved in the case while serving in the Nixon administration. Thus, he protected himself from damage claims. Questioned about this violation of judicial ethics, he said he could not remember: *New fork Times,* September 11 and 17, 1986.

8. *Trustees of Dartmouth College* v. *Woodward* (1819). Here Marshall described the corporation as "an artificial being, invisible, intangible, and existing only in the contemplation of law"—but still a "person."

9. For example, see Justice William Brennan, "The Constitution of the United States," text of an address at Georgetown University, Washington, D.C., October 12, 1985 and Raoul Berger's response *Washington Post,* October 28, 1985; and the editorial in *Washington Post,* September 14, 1990.

10. "Substantive due process" was a judicial invention that allowed the Court to declare laws unconstitutional because they interfered with the liberty of corporations and individuals to wield their economic power as they saw fit. On this and the sanctity of contract, see *Allegeyer v. Louisiana* (1897), *Lochner* v. *New York* (1905), *Adair v. United States* (1908).

11. *Hammer v. Dagenhart* (1918). The Tenth Amendment reads: "The Powers not delegated to the United States by this Constitution, nor prohibited by it to the states, are reserved to the States respectively or to the people." See also *Carter* v. *Carter Coal Co.* (1936).

12. *Morehead v. New fork* (1936).

13. *Minor v. Happersett* (1875). The Fifth Amendment says, among other things, that no person shall be denied "due process of law." It applies to the federal government as the Fourteenth Amendment applies to the states. The Supreme Court also declared that women had no right to practice law: *Bradwell* v. *State* (1872).

14. Louis D. Brandeis, *Business: A Profession* (Boston: Small, Maynard, 1933), p. 330.

15. Proponents of free speech allow that libel and slander might be restricted by law, although even defamatory speech—when directed against public figures—has been treated as protected under the First Amendment: *New York Times Co. v. Sullivan* (1964) and *Time Inc. v. Hill* (1967).

16. One individual, who in private conversation in a relative's home opined that it was a rich man's war, was fined $5,000 and sentenced to twenty years in prison: Hearings before a Subcommittee of the Senate Judiciary Committee, *Amnesty and Pardon for Political Prisoners* (Washington, D.C.: Government Printing Office, 1927), p. 54. See also Charles Goodell, *Political Prisoners in America* (New York: Random House, 1973) and the more recent incidents in chapter 9 of this book.

17. Holmes made a similar argument in *Debs v. United States* (1919). Yet he was considered one of the more liberal justices of his day because in subsequent cases he placed himself against the Court's majority and on the side of the First Amendment: *Abrams v. United States* (1919), *Gitlow v. New York* (1925); also Richard Polenberg, *Fighting Faiths, The Abrams Case, the Supreme Court and Free Speech* (New York: Viking, 1987).

18. *Yates et al. v. United States* (1957). Congress repealed the Smith Act in 1977.

19. For samples of this thinking, see the Vinson and Jackson opinions in the *Dennis* case; and Carl Auerbach, "The Communist Control Act of 1954," in Samuel Hendel (ed.), *Basic Issues of American Democracy,* 8th ed. (Englewood Cliffs, N.J.: Prentice-Hall, 1976), pp. 59-63.

20. See *Near v. Minnesota* (1931), *Dejonge* v. *Oregon* (1937), *McCollum v. Board of Education* (1948).

21. See *Gideon v. Wainwright* (1963); *Escobedo v. Illinois* (1964) and *Miranda* v. *Arizona* (1966).

22. In some states less than a third of the population elected more than half the legislators: *Baker* v. *Carr* (1962) and *Reynolds* v. *Sims* (1964). A similar decision was made in regard to congressional districts in *Wesberry* v. *Sanders* (1964).

23. See also the decision nullifying state prohibitions against interracial marriage: *Loving v. Virginia* (1967). Loving was the plaintiffs name.

24. Galloway, *The Rich and The Poor,* p. 163; *King v. Smith* (1968); *Sniadich* v. *Family Finance Corporation* (1969); *Shapiro* v. *Thompson* (1969); *Hunter* v. *Erickson* (1969).

25. Karl Klare, "Critical Theory and Labor Relations Law," in David Kairys (ed.), *The Politics of Law* (New York: Pantheon, 1982), pp. 65-88.

26. For general critiques, see Schwartz, *Packing the Courts;* David Kairys, *With Liberty and Justice for Some: A Critique of the Conservative Supreme Court* (New York: New Press, 1993); Herman Schwartz (ed.), *The Burger* Years (New York: Penguin, 1988).

27. For example, *Allied Structural Steel Co.* v. *Spannaus* (1978); *Lechmere v. National Labor Relations Board* (1992).

28. *Gateway Coal Co.* v. *United Mine Workers* (1974).

29. *First National Maintenance Corp. v. NLRB* (1981); *Pattern Makers' League of North America, AFL-CIO* v. *NLRB* (1985). In another blow to organized labor, it was decided that nonunion members who were required by labor contracts to pay fees equivalent to union dues could demand that none of their money be used for political activity: *Communications Workers of America* v. *Beck* (1988); *Lehnert v. Ferns Faculty Association* (1991).

30. *NLRB* v. *Yeshiva University* (1980). In fact, faculty spend almost all their time on their teaching and scholarship. By designating them "managers," the Court provided yet another example of judicial fabrication.

31. *Lying v. International Union* (1988). In his dissent, Justice Thurgood Marshall noted that the true purpose of the law was to help management break strikes.

32. *Public Employees Retirement System of Ohio* v. *Betts* (1989); *Pauley* v. *Bethenergy Mines* (1991).

33. *Trans World Airlines v. Independent Federation of Flight Attendants* (1989).

34. Eric Nadler, "Supreme Court Backs Agribusiness," *Guardian,* July 2, 1980; *Chevron USA Inc.* v. *National Resources Defense Council Inc. et al* (1984).

35. *Frank Greenberg Executor* v. *H &* H Music *Company* (1992).

36. *Dandridge* v. *Williams* (1970); *Rosado* v. *Wyman* (1970). On the failure of federal and state courts to fulfill the promise of equality, see Charles Haar and Daniel Fessler, *The Wrong Side of the Tracks* (New York: Simon & Schuster, 1986).

37. San *Antonio Independent School District* v. *Rodriguez* (1973). In *Kadrmas* v. *Dickenson Public Schools* (1988), the Court ruled that low-income families that could not afford school-bus fees for their children were not entitled to free service because education was not a fundamental right. In a dissent, Justice Thurgood Marshall accused the majority of sanctioning discrimination against the poor.

38. *Nordlinger* v. *Hahn* (1992). This case offers another instance of judicial fabrication; the Court decided the case on something neither side had argued, the stability of neighborhoods. In a lone dissent, Justice Stevens called Proposition 13 a windfall for people who invested in California real estate in the 1970s. It "establishes a privilege of a medieval character: Two families with equal needs and equal resources are treated differently. . .."

39. For example, reporters were denied a right to confidential news sources: *United States* v. *Caldwell* (1972); *Zurcher* v. *Stanford Daily* (1978). The conservative majority did uphold the right to criticize public figures even in objectionable ways: *Hustler Magazine* v. *Falwell* (1988); and the right to sue writers who fabricate quotations or significantly alter them in damaging ways: *Masson* v. *New Yorker Magazine* (1991).

40. See respectively *Laird* v. *Tatum* (1972) and *Greer* v. *Spock* (1976).

41. *Members of the City Council of Los Angeles et al.* v. *Taxpayers for Vincent et al.* (1984). The Court also repeatedly has restricted demonstrations and leafleting at shopping malls, for instance: *Clark v. Community for Creative Non-Violence* (1984).

42. *Selective Service* v. *Minnesota Public Interest Research Group* (1984). In order to apply for aid, any nonregistrant would be forced to incriminate himself.

43. *Hazelwood School District* v. *Kuhlmeir* (1988). The censored articles dealt with teenage pregnancy and with problems of children in divorced families. The conservative majority disregarded the precedent established by *Tinker v. Des Moines Independent School District* (1969), in which the Court had declared that school officials did not possess absolute authority over students and could not deny them their constitutional rights by confining their speech only to officially approved expression. In *Smith* v. *UC Regents* (1993), the Supreme Court of California took a big step toward suppressing political expression on college campuses by declaring that mandatory student fees are unconstitutional if they go toward supporting campus groups with political or ideological agendas.

44. *Will* v. *Michigan Department of State Police* (1989). On the Courts collusion with state repression, see Alexander Charns, *Cloak and Gavel: FBI Wiretaps, Bugs, Informers, and the Supreme Court* (Champaign, 111.: University of Illinois Press, 1992). But by five-to-four majorities, the Court twice ruled that laws prohibiting flag desecration and flag burning violated the First Amendment, since such acts were a form of protest expression: *Texas* v. *Johnson* (1989) and *U.S.* v. *Eichman* (1990).

45. On public school prayer: *Engels* v. *Vitale* (1962); *School District of Abington v. Schempp* (1963); and *Wallace v.Jaffree* (1985). On sales tax: *Texas Monthly* v. *Bullock* (1989); *Swaggart Ministries v. California* (1990). On creationism: *Edwards* v. *Aguillard* (1987).

46. *Murray* v. *Curlett* (1963); *Lemon* v. *Kurtzman* (1971); *Walz* v. *Tax Commission* (1970).

47. David Burnham, "Alter the Catholic Church's Tax Status?" *New fork Times,* July 29, 1988.

48. On chastity: *Bowen v. Kendrick* (1988). On tax deductions: *Mueller v. Allen* (1983).

49. In *Arizona v. Fulminante* (1991), the Court ruled that "the prosecutor's use of a coerced confession—no matter how vicious the police conduct may have been—may now constitute harmless error."

50. On executing teenagers: *Wilkins v. Missouri* (1989) and *Standford* v. *Kentucky* (1989). On executing the mentally retarded: *Penry v. Lynaugh* (1989).

51. *Massey v. Washington* (1991). The youth's older codefendent testified that Massey "was just there" and had not killed anyone.

52. *Rummel v. Estelle* (1980), a five-to-four decision. Here, Rehnquist argued that cruel and unusual punishment might be when someone is given a life sentence for "overtime parking." Such an example leaves room for nearly any kind of unjust sentence and reduces the Eighth Amendment protection to nothing. In *Solem v. Helm* (1983), a new five-to-four majority overturned *Rummel* and concluded that a life sentence for

a series of minor crimes does constitute cruel and unusual punishment. On some of the Supreme Courts worst decisions, see Joel Joseph, *Black Mondays* (Bethesda, Md.: National Press, 1987).

53. *Harmelin v. Michigan* (1991).

54. *De Shaney v. Winnebago County Department of Social Services* (1989). The Court seems to think minors can fend for themselves. A law permitting children to testify behind a screen in sexual abuse cases—to make it less traumatic for them to appear in the same venue with their molesters—was declared unconstitutional: *Coy v. Iowa* (1988).

55. *Maryland* v. *Blue* (1990); *Florida v. Bostick* (1991); *County of Riverside v. McLaughlin* (1991).

56. On right to appeal: *McCleskey* v. *Zant* (1991) and *Keeney v. Tamayo-Reyes* (1992). On inhumane conditions: *Wilson v. Setter* (1991). The Court reasoned that bad conditions that had accumulated through years of mismanagement, underfunding, and overcrowding were not litigable, since deliberate neglect could not be ascribed to a specific official.

57. *Hen-era v. Calling* (1993). In *McNally v. United States* (1987), the Court did rein in the prosecutory power, making it more difficult to bring mail fraud charges against corrupt persons in government, the judiciary, and private business. Justice Stevens dissented, wondering "why a Court that has not been particularly receptive to the rights of criminal defendants" now protects "the elite class of powerful individuals who will benefit from this decision."

58. *Haig v. Agee* (1981) and *Regan v. Wold* (1984).

59. For instance, *John Conyers et al. v. Ronald Reagan,* denied January 20, 1984; *INS* v. *Elias Zacarias* (1992); also *Washington Post,* January 23 and February 1, 1992.

60. *Immigration and Naturalization Service v. Chadha* (1983). The so-called "legislative veto" enabled Congress to delegate authority to an executive agency and take it back if the agency did things that Congress had not intended. Some of us would argue that this is not a usurpation of power but a constitutional exercise of congressional oversight. Conservatives on the Supreme Court seem to think that "separation of powers" means that the executive is totally independent and accountable to no one.

61. *Mahan* v. *Howett* (1973) and *Davis* v. *Bandemer* (1986).

62. *Shaw v. Reno* (1993). The special design to ensure some Black representation in Congress did not deprive Whites from dominating almost all of North Carolina's congressional delegation.

63. *First National Bank of Boston v. Bellotti* (1978); *Citizens Against Rent Control et al.* v. *City of Berkeley et al.* (1981). Rich individuals also are allowed to spend any amount in an "independent" effort to elect or defeat any candidate: *Buckley v. Valeo* (1976).

64. For instance, two positive decisions on women's rights: *California Federal Savings and Loan Association v. Guerra* (1987) and *Roberts v. U.S. Jaycees* (1984).

65. See respectively, *Mentor Savings Bank, FSB v. Vinson* (1986)- *Palmore v. Sidoti* (1984); *Franklin* v. *Gwinnett County Public Schools* (1992).

66. See respectively, *Planned Parenthood v. Casey* (1992) and *Hodgson* v. *Minnesota* (1990). The reasoning in the latter case seems to be that a young woman is not old enough to decide to get an abortion but she is old enough to become a mother; see also *Ohio v. Akron Center for Reproductive Health* (1990). In *Webster v. Reproductive Health Services* (1989), the Court gave states broad powers to impose restrictions on abortions, such as barring the use of public money, medical personnel, and facilities.

67. *Rust v. Sullivan* (1991). In 1993, Congress passed a law overruling the administrative rule and the Court's decision.

68. *]ane Bray* v. *Alexandria Women's Clinic* (1993).

69. *National Organization for Women* v. *Scheidler* (1994).

70. *Johnson v. Transportation Agency, Santa Clara County* (1987).

71. *Lorance* v. *AT&T Technologies* (1989); *City of Richmond v. J.A. Crosson Co.* (1989); *Martin v. Wilks* (1989); *City of Richmond v.].A. Crosson Co.* (1988).

72. *Ward's Cove Packing Co.* v. *Atonio* (1989). It is often impossible to demonstrate intent. We can see the effects of an action but usually can only divine the motive. This case overturned *Criggs v. Duke Power* (1971) in which the Court unanimously had ruled that job discrimination need not be intentional.

73. *McClesky v. Kemp* (1992). On the history of constitutionally sanctioned racism, see Mary Frances Berry, *Black Resistance, White Law,* updated (New York: Alien Lane/Penguin, 1994).

74. On denial of tax exemption: *Bob Jones University v. United States* (1983), but also the subsequent narrowing decision in *Alien* v. *Wright* (1984). On granting tax relief: *Mueller* v. *Alien* (1983).

75. *Presley v. Etowah County Commission* (1992). This decision departed from earlier cases in which the Court was willing to apply the Voting Rights Act to various electoral subterfuges that worked with racist effect.

76. Janis Judson, *The Hidden Agenda: Non-Decision-Making on the U. S. Supreme Court* (University of Maryland, Ph.D. dissertation, 1986); *Los Angeles Times,* November 9, 1989; *Washington Post,* October 21, 1984. Among recent nondecisions, the Court refused to hear an appeal by pro-choice groups challenging the Catholic Church's tax-exempt status; it refused to challenge a U.S. Court of Appeals panel that overturned Oliver North's conviction for his role in the Iran-contra conspiracy.

77. *Washington Post,* October 1, 1990.

78. Herman Schwartz, "Second Opinion," *Nation,* June 17, 1991, p. 801. For specific examples, see the various cases cited in the previous section of this chapter.

79. For critical discussions, see Stephen Halpem and Charles Lamb (eds.), *Supreme Court Activism and Restraint* (Lexington, Mass.: D. C. Heath, 1982).

80. Doug Bandow, "End Life Tenure for Judges," *New York Times,* September 6, 1986.

81. Even Chief Justice William Rehnquist admits as much. See his *The Supreme Court: How It Was, How It Is* (New York: Morrow, 1987).