



The Supreme Court of the United States: Power and Counter-Power

Stephen Breyer

IN **RED 2021/1 N° 2**, PAGES 80 TO 87

PUBLISHER **GROUPE D'ÉTUDES GÉOPOLITIQUES**

DOI 10.3917/red.002.0082

Article available online at

<https://shs.cairn.info/journal-red-2021-1-page-80?lang=en>



Discover the contents of this issue, follow the journal by email, subscribe...
Scan this QR code to access the page for this issue on Cairn.info.



Electronic distribution Cairn.info for Groupe d'études géopolitiques.

You are authorized to reproduce this article within the limits of the terms of use of Cairn.info or, where applicable, the terms and conditions of the license subscribed to by your institution. Details and conditions can be found at cairn.info/copyright.

Unless otherwise provided by law, the digital use of these resources for educational purposes is subject to authorization by the Publisher or, where applicable, by the collective management organization authorized for this purpose. This is particularly the case in France with the CFC, which is the approved organization in this area.



Stephen Breyer • Associate Justice
of the Supreme Court of the United
States

The Supreme Court of the United States: Power and Counter-Power

80

Some years ago, the Chief Justice of the Supreme Court of Ghana came to visit our Court¹. She wanted to learn how the Court had advanced and protected civil rights in America. She seemed particularly interested in this question: Why does the American public do what the Supreme Court says? Implicitly she also wanted to know why, or how, the Court could act as a check upon others in Government, even Presidents, where there is serious disagreement. That question remains important.

Put abstractly, the Court's power, like that of any tribunal, must depend upon the public's willingness to respect its decisions, even those with which they disagree and even when they believe a decision seriously mistaken. The importance of this respect matters most when a decision of the Court strongly conflicts with the views of those in other Branches, most notably, the President.

This article will expand on the importance of public acceptance in safeguarding the role of the judiciary. The first part, to provide context, will set forth several examples illustrating the increase in the public's acceptance of the Court's decisions, and hence an increase in the Court's power. The second and third parts will discuss more directly the Court's related power to act as a check upon other parts of the government. I shall illustrate the kinds of checks that I have in mind. I shall also illustrate how the Court's power to check has grown over time. And I shall describe certain related, potential difficulties that may arise in the future. I will then propose a few steps the Court and public could take to help overcome these problems.

1. The Court's Power: In General

Why is it that some people will follow the suggestions, thoughts, even the orders of others? Long ago Cicero described an answer to this central question about power.

1. A revised version of this article will be published by Harvard University Press next fall.

He thought there were three possible ways to assure the obedience of those who live in a State: 1) the fear of punishment; 2) the hope of rewards or particular benefits; and 3) justice. This last way, justice, would convince people that those who govern deserve obedience. Whether Cicero's view does or does not apply in general to government, it does apply to the U.S. Supreme Court. The Court's power to punish or to provide rewards (or benefits) is limited. Its power to act justly, at least in my view, does play a major role in obtaining the public's respect and consequent obedience. The Court's history illustrates how that is so. A few examples will help support this point of view.

In considering those examples, it is important to keep in mind how the law provides the Court with, at least, legal power. That power finds its major source in the U.S. Constitution as well as in the views of those who wrote it. The Constitution is a brief document. It has seven articles and twenty-seven amendments. It creates a representative federal democracy, a separation of governmental powers both horizontally (legislative, executive, judicial) and vertically (state/federal), equal respect before the law, protection of fundamental rights, and a guarantee of the rule of law. The Constitution's Framers had every right to admire their creation. But, as Hamilton pointed out in *The Federalist No. 78*, one Branch of government must have authority to assure that the other Branches act within the limits set by the Constitution. Otherwise, the document will have little effect; the Framers might as well have hung it on the walls of a museum.

Which Branch will have the authority to determine what limits the Constitution sets forth and when other Branches exceed them? The Executive Branch, namely the President? Is there not a risk that the President would simply decide that whatever action he takes is consistent with the Constitution? What about Congress? Its members are elected; they likely understand popularity. But what will happen when say, a criminal defendant or others benefiting from constitutional protections, are not popular? The Constitution, indeed law in general, applies to those who are not popular just as it applies to those who are popular. Can Congress be trusted to protect the latter, unpopular, group?

The Third Branch, the Judiciary, remains. Perfect, Hamilton might have thought. The judges understand law. They are unlikely to become too powerful, for they lack the power of purse and of sword. Hence the Judicial Branch and the Supreme Court in particular should have the last word. The majority of the other Framers agreed with Hamilton. And his view was essentially that which John Marshall and the Supreme Court adopted in the famous case, *Marbury v. Madison*, 5 U.S. 137 (1803).

However, the letter of the Constitution and the intentions of the founders are only partly the source of the Supreme Court's power, only partly because neither Hamilton nor the others could answer the critical question posed

by Hotspur in Shakespeare's *Henry IV*. Owen Glendower, a commander of Wales and a mystic, says: "I can call the demons from the depths of the sea. "I can call the demons from the depths of the sea," replies Hotspur, "and indeed anyone can, but do they come when you call them?"

1.A. Lack of Power

Indeed, on one of the first occasions when the Court and the President found themselves in conflict on an important matter, the President prevailed. Early in the history of the Republic a tribe of Indians, the Cherokees, lived in Northern Georgia on land that treaties guaranteed them. In 1829 gold was found on that land. The Georgians wanted the gold. And they took control of the Cherokees' land. The Cherokees and their supporters found an excellent lawyer, Willard Wirt. Wirt filed complaints in court. Eventually, the issue of territorial control found its way to the Supreme Court. And the Court decided the question.

The Court decided that the Cherokees had the legal right to control their territory and that Georgia lacked legal authority to do so. The State of Georgia, however, simply ignored the Court's decision. What did Andrew Jackson, the President of the United States, do? Nothing. He is supposed to have said, "John Marshall has made his decision; now let him enforce it." Jackson (and his successor) then sent federal troops to Georgia but not to enforce the Court's judgment. Rather, he sent troops to remove the Cherokees, forcing many of them to travel on the "trail of tears" to Oklahoma, where their descendants live to this day.

Will Presidents respect decisions of the Supreme Court when they strongly hold contrary views? The case was not a happy omen.

Supreme Court Justices long remained uncertain whether the Court could effectively enter a judgment that others strongly opposed. In 1903 Justice Oliver Wendell Holmes, Jr., summed up the problem in a decision that in effect refused to enforce the Fifteenth Amendment's guarantee that former slaves could vote. How could Holmes have done this? He wrote that the Court has "little practical power to deal with the people of the state in a body." He added, it is said that "the great mass of the white population intends to keep the blacks from voting." If that is so, a Court decision ordering the contrary would be "an empty form." The power to redress that evil must lie in the hands of the legislature and the Executive.

How far-reaching then is the power of the Supreme Court?

1.B. The Growth of the Court's Power

Let us now jump to 1954. In that year the Court held that racial segregation, practiced widely throughout the South, violated the Fourteenth Amendment's guaranty that the law must provide every "person . . . equal protection." Its decision, *Brown v. Board of Education*, sounds fine. But what actually happened next, in, say 1955? Virtu-

ally nothing. And in 1956? Almost nothing again. Congress did nothing. The President did little. And the South complied only minimally with the Court's ruling.

In 1957, however, a federal trial court judge in Little Rock, Arkansas, ordered the State to enroll nine black students at Central High, an all-white school. At the time of the school's September opening date a large hostile crowd surrounded the school. The Governor, Orval Faubus, announced his opposition to integration and sent state police to prevent the nine black students from entering the school. A standoff lasted several days. Journalists from across the world came to cover the event. The question on everyone's mind was: What would the President of the United States do?

James Byrnes, Governor of South Carolina, former Supreme Court Justice, wartime economic administrator, and a "moderate" on race, advised President Eisenhower, to do nothing. He told the President that if he sent troops to Arkansas, there could well be violence. He might have to occupy the South, and he would have a second Reconstruction on his hands. At best, the South would close all its schools. Herbert Brownell, the Attorney General, took the opposite position. He told the President he must send troops, at the least to protect the "rule of law." In the end, the President decided to send 1 000 parachutists, members of the 101st Airborne Division. At the time, nearly all Americans recognized that Division as heroes of World War II's invasion of Normandy and the Battle of the Bulge. The parachutists took nine brave black students by the hand, and they walked together into the white school. So, the Court won this confrontation, did it not? It did, but it won *with* the cooperation of the President of the United States.

Moreover, the story does not end here. The soldiers could not stay at the school forever. After several months they withdrew. Local authorities then tried to re-segregate the school. The Supreme Court in the case of *Cooper v. Aaron* rejected their attempt. It ordered immediate integration. But local authorities would not comply. To the contrary, they moved in the opposite direction. They closed Little Rock's high school. That year no student, neither white nor black, received an education.

The situation could not last. This was the time of Martin Luther King Jr., of bus boycotts, of freedom riders. The Nation had awakened to the injustice of racial segregation. And after quite a few years, racial segregation imposed by law ended in the South of the United States.

I once asked Vernon Jordan, a great civil rights leader, whether the Court had actually played a major role in ending segregation. After all, even in the Court's absence would there not have been enormous pressure to end that system, from civil rights leaders, from the rest of the country, indeed from the entire world? He answered that, of course, the Court had been critically important. Congress, after all, had done nothing. At the very least, the Court had provided a catalyst. With the help of others, it

had succeeded in dismantling a significant pillar of, if not racism, at least racism's legal face. The Court had played, not the only role, but an essential role in ending legal segregation. With the help of the President, civil rights leaders, and a great number of ordinary citizens, it had won a major victory for constitutional law, for equality, and above all for justice itself. Justice itself, the justice of the Court's integration decisions, helped to draw respect for, and increased the authority of, the Court. I cannot prove this statement. But I believe it.

1.C. Example: An Atmosphere of Respect

A further example to which I call attention is the Court's Year 2000 decision, *Bush v. Gore*, 531 U.S. 98 (2000). It is debatable whether that decision determined who would be President of the United States. But many thought that it did. At the least, the decision was a highly important one, potentially affecting vast numbers of Americans. The Court divided 5-4. I did not agree with the Majority. And, I wrote a dissenting opinion.

But Harry Reid (the Senate leader, a Democrat who likely also thought the decision wrong) later said that the most remarkable feature of the decision may have been a feature on which few had remarked. Despite its importance, despite the belief (held by half the country) that it was misguided, the Nation followed the decision without violent riots, without the throwing of stones in the streets. And the losing candidate, Al Gore, told his supporters, "Don't trash the Supreme Court".

These facts suggest that obedience to the Court's decisions, respecting those decisions even when they are wrong, has become close to habitual. Americans find it a normal attitude to take. Indeed, they find it normal to the point where they rarely realize that it is simply a custom, a habit. As the air around us, unnoticed, allows us to breathe, so this habit allows the rule of law itself to flourish.

Now that you have an overview of the power of the Court, let's move on to the Court's role as a counter-power.

2. The Court as a Check

By "counter-power," I mean the Court's relations with the other two political branches, Congress and the President. I would focus in particular on the President and his ministers. In order to better understand this subject and to realize the potential tensions between these three branches, one must remember the matters that are submitted to the Court.

2.A The Interpretation of Words in a Federal Statute

For one thing, most of the cases the Court decides concern the interpretation of words in a federal statute. Does the word "costs," for example, in a statute requiring a losing party to pay an education-related lawsuit's "costs," include the cost of experts that the winning party hired? Members of the Court sometimes disagree about the proper interpretation of these statutes. But normally

those disagreements reflect differences in methods of interpretation that are not political in nature. Different jurisprudential views lead to differences in result.

Nearly all judges use the same basic interpretive tools. They will consider the statute's text, its history, relevant legal tradition, precedents, the statute's purposes (or the values that underlie it) and the relevant consequences. Different judges may tend to give different weight to one, or another, of these tools. Some judges, for example, place predominant weight upon text and precedent; others place greater weight on purposes and consequences. Judges may also differ about, for example, just what a statute's purpose is or just what consequences will likely flow from a particular interpretation.

These differences will only rarely have a major effect in the political realm or on the relation between Court and President. For, even if a President very much disagrees with the Court about the interpretation of a statute, he can ask Congress for a new law that will take his position. That fact often transfers disagreement from the judicial to the political arena.

I cannot say "always" because some statutes may be difficult, if not impossible, for the political branches to change (those forbidding discrimination, for example). But still, disagreements about the meaning of words in a statute *often* become (after the Court's decision) a political matter for the political branches (and not the Court) to resolve.

2.B. The Review of Regulations Promulgated by the Executive Branch

For another thing, many cases that involve the Executive Branch concern the meaning and legality of regulations that the Executive Branch has promulgated. Some of those cases may raise important questions about the President's power. But far more often they will require the Court to determine, for example, whether the Executive has followed proper administrative procedures, whether the Executive has properly taken account of the views of interested citizens, or whether the justifications the Executive has given for its course of action are sufficiently reasonable. A Court determination that a President's regulatory or administrative decision is unlawful will only rarely lead to serious conflict between the Court and the President, for normally the decision does not prevent the President from redoing the action, this time following proper procedures.

The Court, for example, recently found unlawful two Executive Branch decisions. One concerned the Executive's desire to place a question about citizenship on the decennial census form. The other revoked an earlier Executive Branch program that allowed certain young undocumented persons to remain in this country. The Executive lost both cases in the Supreme Court. It nonetheless remained open to the Executive once again to decide whether it should take these, or similar, administrative actions,

this time lawfully following requisite administrative procedures. Thus, serious disagreement between Court and President is muted.

2.C. The Constitutional decisions

A serious conflict between Court and President is more likely to occur when the Court makes a constitutional decision, for example, when it applies to presidential actions the constitutional limitations that accompany the Constitution's highly general words, such as "freedom of speech" or "freedom of the press," or simply "liberty."

When different Branches interpret these constitutional words differently, the Court will normally have the last word. Neither the President nor Congress can lawfully change the Court's constitutional interpretations. Two features of constitutional interpretation nonetheless reduce (though they certainly do not eliminate) the risk of overt conflict. The Constitution does not tell citizens what they can, or cannot, do. It mostly tells *governments* what they can or cannot do. It thereby sets limits confining government action. And most actions that citizens want governments to take (or not to take) fall within those limits. The Court, policing the limits, is a kind of "border patrol." Given the wide scope of decision-making that the Constitution leaves to democratic political processes, only a comparatively few (though important) decisions will have the kind of major public "ballot box" effect that leads elected officials to react strongly.

Despite the decision-related features that limit the risk of serious overt conflicts, major important conflicts between Court and President can and do arise. Take as an important example constitutional questions about the scope of protecting basic liberties in time of war.

Again, consider Cicero. He once said, "*inter arma enim silent leges*," "In times of war, the laws fall silent." President Franklin Roosevelt's Attorney General, Francis Biddle, brought this statement up to date during World War II. He said, "The Constitution has not greatly bothered any wartime President" (at least not at the time). These words imply serious limitations upon the Court's wartime protective power.

During World War II, for example, the Court considered the constitutionality of a Presidential order deporting 70,000 American citizens of Japanese origin from the West Coast to camps, rather like prison camps, in intermountain regions. The Court upheld the order by a vote of 6-3. Today most of us would believe that the majority was clearly wrong and committed a serious injustice. Why did it reach its decision? Justice Black apparently said to the others at their Conference, "Somebody must run this war. It is either Roosevelt or us. And we cannot."

Today, however, the Court's refusal to become involved in highly important war-related or security-related matters, has significantly declined. Several years after World War II ended, the United States was again at war,

this time in Korea. President Truman, in order to assure the continued production of a wartime necessity, namely steel, tried to take over privately owned steel mills. The Court considered the matter, and it held that the President, in the circumstances, was acting unconstitutionally. The President accepted and followed the Court's decision.

One might downplay the significance of the case. President Truman was far less popular than President Roosevelt had been. The Korean War was not World War II. But one cannot deny the fact that the Court's action does not fit Cicero's description. The Court showed that it could impose a constitutional check upon the President, even in time of war.

The Court further abandoned Cicero in four cases arising out of prisoners of war held at Guantanamo Bay in Cuba. The plaintiffs, detained after their capture in Afghanistan, were not very popular in the United States. The defendants, such as the President and the Secretary of Defense, were considerably more popular and certainly far more powerful. Those circumstances did not prevent the Court from deciding each of the four cases in the plaintiffs' favor. They included a case in which the Court held unconstitutional a congressional statute denying the prisoners access to the courts. The Executive Branch, in each case, accepted the Court's decision. The President, George W. Bush, said, "We'll abide by the Court's decision. That doesn't mean I have to agree with it."

These, along with the earlier examples, help to illustrate an evolution in the views of Presidents, branches of government, judges, and public opinion. The public now expects Presidents to accept decisions of the Court, including those that are politically controversial. The Court has become able to impose a significant check - a legal check - upon the Executive's actions in cases where the Executive strongly believes it is right.

3. The "Check" and the Future

Suppose that I could stop my account here. Were that so, I would have described a history in which the American people gradually adopted customs and habits that led them to respect the rule of law even when the "law" included judicial decisions with which they strongly disagreed. The history would also be that of a Court that gradually expanded its authority to protect an individual's basic constitutional rights, even during times of war. I would certainly not claim that this history's theme has always been one of progress, for the United States, including its judicial system, has had many ups and downs, including slavery, a civil war, segregation (and Court decisions such as *Dred Scott v. Sandford*, 60 U.S. 393 (1857), *superseded* (1868)) to name only a few. Still, the public has accepted a rule of law. And, so far the public seems to have maintained its confidence in the Court. A Pew Research poll showed, for example, that in 2019 62% of Americans held a favorable opinion of the Court (about the same percentage as in 1985).

However much I might like to tell this story, I cannot, for matters are not that simple. Nor is the future ever certain. We cannot now know what future historians will write about the public's acceptance of the Court, let alone the rule of law.

Are there significant features of American society that threaten acceptance of a rule of law, at least in so far as judicial decisions embody, and explicate, that law? There are, at least, two, which to my mind provide cause for concern. For one thing, we see a growing public suspicion and distrust of all government institutions. The Pew Research Center reports that in 1958, 73% of all Americans trusted the federal government's decisions most of the time. By 2019 that percentage had fallen to just 19%.

At the same time, we have seen a gradual change in the way the press (along with other institutions that comment upon judicial work) understand the judicial institution. Their understanding is important, for it is only through their writing that the vast majority of Americans learns just what courts, including the Supreme Court, do. Several decades ago, for example, few if any of these commentators, when reporting a decision, would have mentioned the name or political party of the President who nominated a judge to office. Today the press does so as a matter of course. Going further, it systematically labels a judge as "conservative" or "liberal." And, Senate Senators, divided along party lines, describe a nominee as too "liberal" or too "conservative." What they say, reported by the press to their constituents, reinforces the view that politics, not legal merits, drives Supreme Court decisions.

These are more than straws in the wind. They reinforce the thought, likely already present in the reader's mind, that Supreme Court judges are primarily political officials or 'junior league' politicians themselves rather than jurists. The judges tend to believe that differences among judges mostly reflect not politics but jurisprudential differences. That is not what the public thinks.

And if the public believes to the contrary, we should not be surprised if political parties, too, see in the nomination of a judge an opportunity to extend their political influence. Nor should we be surprised if proposals for structural change of the Court become a topic of general public concern. If the public sees judges as "politicians in robes," its confidence in the courts, and in the rule of law itself, can only diminish, diminishing the Court's power, including its power to act as a "check" on the other Branches.

If so, what can we do to stop the attrition? Let me sketch a few thoughts about what judges themselves might do inside the Court as well as what I believe others might do outside it, in our broader society.

3.A. Internally

What can we do, we judges of the Supreme Court, to help maintain the confidence and respect (of both others in government and the public in general) that the Court

has gradually obtained over the course of time?

As Hamilton pointed out, we have neither purse nor sword. We cannot easily reward nor frighten our fellow citizens. To obtain their respect we must rely upon decisions that reflect both practical wisdom and justice. I would emphasize five features of our work that reflect this aspiration and which judges normally try to keep in mind.

1. *Do your job.* I would add that, in doing so, do not look for or expect popularity. The job of constitutional judges like ourselves is to interpret or to apply the legal phrases that we find either in a statute or in the Constitution itself. Because the cases that we hear normally concern instances in which different lower court judges have decided a legal question differently, the scope of the words, their ordinary meaning and their application, is normally uncertain.

As I have said, judges have several tools available to help them with this interpretive work: the ordinary sense of words, history, tradition, precedents, purposes (or values that underlie a constitutional provision), and related consequences related to those objectives. Judges vary in the emphasis they give some of these tools compared with others, but virtually every judge will use each of these tools on one or another occasion.

An appellate judge's work then consists of: reading briefs (and other papers); listening to oral arguments; attentively following the discussion between judges and lawyers; discussing a case with colleagues; writing a draft opinion; submitting that opinion to colleagues for views and criticisms; and releasing the opinion to the public along with any concurring or dissenting views of other colleagues. The decision-making process does not, and should not, consider popularity, support, criticism, or the future opinions of trade groups, labor groups, or media. The most these groups can do to influence the result of a case is to present their arguments directly to the Court, usually in the form of *amicus curiae* briefs. Thus their views are relevant insofar as they translate into legal arguments. My experience of more than thirty years as a judge has shown me that, once men and women take the judicial oath, they take the oath to heart. They are loyal to the rule of law, not to the political party that helped to secure their appointment.

2. *Clarity.* For a Supreme Court Justice, more than good manners is at issue. Clarity in writing is a professional necessity. It shows a clarity of thought. Clarity helps convince the reader that the judge has decided the case according to reason and the law, not according to politics or caprice.

At the same time we must keep in mind the nature of the audience that will take particular interest in a decision. A bankruptcy decision, for example, will have a more technical readership than an opinion about freedom of expression. An opinion that will have a broad public audience requires writing that is simpler and more direct than does an opinion about bankruptcy.

3. *Deliberation.* Deliberation, as others have said, is not conversation (which does not seek to produce a decision), gossip, praise, or indignation. For a group of judges, such as our Court's Justices, "deliberation" has a goal. It involves weighing the arguments for and against different possible interpretations (or applications) of a phrase with the goal of arriving at a decision.

It is tempting to believe that there is a difference in the kind of deliberation undertaken by political officials (or by the people) and that of judges. The first concerns an action to be undertaken; the second concerns the justice of an action that already has been undertaken. A judge, Aristotle thought, "evaluates the justice of past actions."

This distinction often helps to characterize the work of appellate judges. Judicial opinions typically place importance upon characteristics of actions that took place in the past. But, it is less helpful as applied to the Supreme Court, particularly to its decisions that help determine the confidence that the public has, or will maintain, in the judicial institution itself. Decisions about the lawfulness of abortions or of a homosexual's right to work without discrimination rest upon analysis of prior fact and law, but they nonetheless have more to do with the future than with the past. Reconsider the problems of implementing integration along with the legal need to make the phrase "equal protection of the laws" meaningful. How could the Court have done the latter without taking account of the consequences of its decisions, along with the importance of successful implementation? Yet this kind of problem, infrequent though it may be, helps explain the legal need to consider consequences; and the resulting fact that, because the Court must in part look to the future, opponents of its decision may argue that it is acting like a legislature, not a court.

When deciding this kind of question, as is true of other legal decisions, judges draw upon their own jurisprudential views of proper interpretation and perhaps of the nature of law or of the Court itself. Different basic views can lead to differences of opinion among judges as to proper outcome. But the future is nonetheless at issue.

How does deliberation work in this kind of case? The oral arguments can help a Justice make up his or her mind. Moreover, the questions a Justice asks at oral argument will sometimes help other Justices understand his or her approach to the case as well as the problems he or she may have with particular proposed solutions. Ordinarily, however, deliberation among the Justices begins at Conference, held once or twice each week. There, the Justices will discuss the cases more formally, and they will try to arrive at preliminary conclusions.

The Conferences are confidential. Only the Justices participate. Each Justice, in turn, presents his or her point of view; and then there may be responses and more general discussion. The discussion is rarely completely open or far-ranging. Normally a Justice's point of view rests upon use of the tools I previously mentioned (text,

history, tradition, precedents, purposes or values, and consequences). Normally, each judge arrives at the Conference with a point of view while remaining open to the possibility that it will change.

Perhaps the most difficult part of a deliberation for a Justice is not formulating a point of view as much as it is demonstrating a capacity to change that point of view when faced with the views of others. The success of a deliberation may depend upon a cliché: "Listen to others." When I worked in the Senate, on Senator Kennedy's staff, I learned one method, often successful, that helps bring together those who deliberate. When someone sets forth a point of view, you can ask him to explain it in more detail. When he does so, often he will say a few things, perhaps only details, with which you agree. You can then suggest that you work with that agreement and see if it will provide a basis for greater agreement. And often it does. (The Senator used to add, in speaking to his staff: "Do not worry about who gets the credit. Credit is a weapon. If you reach agreement, there will be enough credit to go around; and, if you fail, who wants the credit?") Certainly, the Court is not the Senate; nor is it a political institution. Nonetheless, this advice remains relevant.

4. *Compromise.* Because a judge's decision rests upon principle, it is often difficult for a judge to compromise. In many foreign courts, the court issues a single opinion in a case, without published dissent; compromise, being necessary, may, through force of habit, become easier to reach. But the American system finds its origins in that of England, where each judge would present his own opinion, giving his own reasons for reaching a particular result. We have taken something of a middle course.

I doubt that an unanimity requirement would work well in this country. At least it would not tend to make the public believe that the Court was always unanimous. Rather, many would think that disagreements remain but are hidden. And that attitude would decrease trust in the Court. Regardless, our system allows published dissents. And a draft dissent will sometimes (but not often) lead a tentative majority to change its mind and change the outcome. More often, a dissent leads a judge writing a majority opinion to improve that opinion in light of the criticisms that a draft dissenting opinion makes.

Although members of our Court can write dissenting and concurring opinions, they still must try to find at least five judges who will join a single opinion. There must be one opinion "for the Court," to guide the public. And that fact often means that compromise is necessary. There are different ways to reach a compromise.

The first one consists of deciding a case on narrow grounds (when broader grounds were available), deciding a case with less emphasis upon the basic jurisprudential principles that underlie it. Imagine a hypothetical example in which a Department issues a decree, and the decree is challenged on the basis that it is constitutionally

prohibited. If the decree is also inconsistent with ordinary law, one way to compromise would be to decide on that basis, instead of deciding the big constitutional question, where there may be major divisions. We should ask the question: decide the narrower issue but where there is more agreement, instead of the larger issue where there will be great divisions.

A narrow decision is not the only form of compromise. A Justice can “swallow” a dissenting view. He or she might decide, for example, to join a Majority opinion with which he disagrees (occasionally noting that he is doing so only to create a majority opinion needed for guidance in the particular case). He can write a dissenting opinion or memorandum and not publish it. He can decide not to have a view about granting a certiorari petition revealed to the public. He can refrain from writing a concurring opinion that would otherwise set out just where and how he agrees or disagrees with the majority’s view. In most of these instances, the decision not to dissent gives a public impression of greater unanimity than actually exists.

When should a judge prove willing to compromise? Each judge must turn to his or to her own conscience to find an answer to that question. But, in doing so, a judge must take two general factors into consideration. For one thing, the judge should ask who is the primary audience for the decision: other judges, lawyers, the general public? Is that audience more likely to need to know the position of the Court, or is it interested in the personal opinion of different judges?

Moreover, there is only one Constitution of the United States. There is not a “Constitution according to Justice Scalia,” or a “Constitution according to Justice O’Connor” or according to any other individual judge. It is what the Court decides, not what individual Justices think, that typically has the greater importance. Too many dissenting opinions risk diminishing the public’s confidence in Court decisions. Many European courts do not issue dissenting opinions, primarily for that reason.

There is no treatise that tells a judge when, or how much, to compromise. Too little compromise risks substitution of an individual judge’s views for the views of (and law made by) a court. On the other hand where there never (or only rarely) a dissenting opinion, the public (or at least the informed public), aware of the jurisprudential differences among different judges, would begin to doubt the sincerity of decisions that do not reflect that judicial diversity.

In either circumstance, the public’s confidence in the Court itself, as a legitimate interpreter of laws, is threatened. Where do we find the happy medium? That is a conscience-based decision that each judge has to make. But I can say that I believe the more different are the jurisprudential views among a single court’s judges, the more important compromise among them becomes.

5. *Broader Perspective.* Consider the minority of cases that concern important and deeply held social or political beliefs, such as abortion or freedom of religion. These cases often concern far more than technical legal issues. They also touch upon widely held beliefs, customs, habits, and practices. Thus, a large part of the general American public takes a greater than ordinary interest in what the Court decides. How should the Court decide that kind of case?

Justices in such a case begin with the gathering of raw material - textual analysis, history, tradition, precedents, and so forth - and they transform those raw materials into a judgment. That judgment is only to a minor extent a judgment about what has happened in the past. Rather, it is more an instruction (in respect to law and judicial action) aimed at the future. And, more than much of the Justices’ work, it does not simply concern the actions or means for bringing about an agreed-upon ultimate end. It often brings into question the nature of the ultimate end that the judge or Justice must seek.

Where are Justices and judges to find those “ends,” those ultimate objectives, which must guide them as they transform that raw material? They find them in the Constitution itself. In particular, they find them in the values that underlie that document and its provisions. That is what those who speak of the Constitution’s “spirit” normally mean. The racial integration that the Court demanded in *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955), for example, is not simply a logical conclusion drawn from the constitutional provision that insists upon “equal protection of the laws.” It is also an affirmation of the value that underlies that provision; it is an affirmation of justice itself.

We can take other examples of the way in which underlying constitutional purposes can inform ultimate interpretive ends. Unlike some nations, the United States does not maintain an absolute commitment to secularism. Rather two provisions of the Constitution govern the relation of religion and public life. One of them forbids prohibition of “the free exercise” of religion. The other prohibits the enactment of laws “respecting the establishment of religion.” These provisions, for example, allow Congress to open its sessions with a prayer, but they forbid government from subsidizing religious training. It is far from obvious how they apply to religious monuments placed on public property, say the government’s placing the Tablets of the Law (i.e., the Ten Commandments) on the grounds of the Texas State Capitol or on the walls of a Kentucky state court. The Court had to decide this last mentioned question. And, in my view, doing so required the Court to look to the primary objectives of the Religious Clauses.

Take another example, one related to the constitutional guarantee of free speech. That guarantee is necessary in a representative democracy, for it allows the public to develop and to transmit to those whom they elect different thoughts, ideas, criticisms, and points of view. It guarantees “a marketplace of ideas” and a “transmission belt” that

carries expression from a person to his or her community and, eventually, to her elected representatives. Reference to both these basic purposes can help resolve difficult legal questions. Why, for example, does the Court interpret the constitutional term “free speech” more strictly 1) when a government rule or regulation limits the scope of the “market place of ideas” or the “transmission belt” than 2) when a government rule or regulation limits the scope of speech as part of, say ordinary economic or commercial regulation? In the first instance, “free speech” protects necessary elements of a workable democracy; in the second, it considers the rule or regulation that democratic processes have helped to bring about. That is a good reason for interpreting the First Amendment as applying more strictly to the first kind of restriction than to the second.

I could say more about the examples. They are controversial in their details. But I use them only to suggest that reference to basic underlying constitutional purposes can help answer difficult interpretive questions. Because the Constitution itself seeks to establish a workable democracy and to protect basic human rights, reference to those purposes also moves Court decisions in the direction of Justice (with a capital “J”). In this way, not in seeking popularity with one group or another, the Court can preserve, perhaps augment, public confidence in its authority.

3.B. Outside the Court

What can people outside the Court do to help maintain the public’s confidence in the Court’s and the law’s authority? As I said in response to the Ghanaian Chief Justice’s questions, a nation’s willingness to follow the law and to respect the courts is a matter of custom and habit. Those habits include a willingness to follow judicial decisions with which you disagree, that may affect you adversely, and which may be wrong (after all, in a 5 to 4 decision, some judges must be wrong).

Every month I see illustrated Americans’ willingness to respect the Court’s authority and how that willingness helps keep our nation together. I keep in mind the fact that we are a nation of nearly 330 million people of every race, every religion, many different national origins, and holding virtually every possible point of view. I regularly see from the Bench these highly diverse groups of people trying to work out their differences through law, rather than in more brutal ways. I then understand the Founders’ hope that the Constitution would last and become a national treasure.

What can we do to maintain this habit, this custom, this treasure? Judges and lawyers alone cannot succeed. Rather, the 329 million Americans who are not lawyers or judges must understand the need to maintain that habit, and they must accept it. We need to explain it to our children and to our grandchildren, hoping that they too will understand its importance.

When I describe to students what I believe we can do, I emphasize three general directions our efforts might take.

The first, and most obvious, concerns *education*. Those future generations must understand how our government works. They need to know that they are, and will be, part of that Government. They need to know what the rule of law is and how (from the time of King John and the Magna Charta) the rule of law offers protection against government action that is arbitrary, capricious, autocratic, or tyrannical.

The second concerns *participation* in the public life of a Nation with a highly diverse population and that rests upon a rule of law. There are many different ways to participate in public life. One can serve on a school board, a library committee, an arts council. One can participate in a neighborhood improvement project, help teach children to read, work for the improvement of parks and playgrounds. One can vote, campaign, run for office. The possibilities are endless.

The third concerns *practice*. The Constitution creates methods for resolving differences through participation, through argument and debate, through free speech, through a free press, and through compromise. Students and adults alike, however, must practice the skills of cooperation and compromise to learn them and to keep them.

Education, participation, practice in cooperation and compromise aim to build public trust in the working of our democratic institutions. Albert Camus in *The Plague* helps us understand why that trust, as well as why a rule of law, is so important.

At the end of that book the narrator explains why he has recounted the history of the plague that ravaged Oran (perhaps an allegory of the Nazis in France). Because, he says, I want readers to know how the people of Oran reacted, for better or for worse, to that plague. Because I want them to know what a doctor is, a person who, without discussion or theorizing, directly and simply brings help to those who need it. Above all, because the plague germ never dies. It goes into remission, lurking in the attics, the file cabinets, the closets, only to re-emerge and again send its rats, for the learning or the misfortune, of man, into a once-happy city.

The rule of law is an important weapon, though not the only weapon in our continuous efforts to fight that plague germ.

I am an optimist. I believe we can rebuild trust in institutions. The rule of law is sturdy. I hope and believe that the Court will retain its authority. But to maintain that trust, authority and the rule that supports the use of law itself, requires work. As I hope my stories have shown, it requires that judges, lawyers, teachers, citizens, alike work long and hard on that project, and that they work together.