

CHAPTER

10

THE SCOPE AND LIMITS OF JUDICIAL POWER

IN *FEDERALIST* NO. 78, ALEXANDER HAMILTON DEFENDED JUDICIAL INDEPENDENCE by arguing that federal courts are “the least dangerous branch.” In response to anti-Federalists (who defended states’ rights and feared an expansive federal government), Hamilton reasoned that courts were less powerful than the executive or legislative institutions because the judiciary has “neither force nor will, but merely judgment.”¹ Courts were institutionally different from the political branches because they lacked the authority to create or administer law—thus their policymaking and enforcement capacity was limited. Hamilton concluded that **judicial discretion** was relatively harmless because its exercise was constrained by democratic politics and the judicial obligation to uphold the rule of law. In light of those checks, courts would, arguably, remain independent to strike an appropriate balance between the competing demands of respecting majority will and protecting minority rights.

Federal and state judges are nonetheless routinely attacked for “legislating from the bench.” The Roberts Court’s striking down campaign finance regulations and expanding religious freedoms generate as much partisan criticism as its endorsement of corporate rights or upholding mandatory health care insurance. In the states, political opposition has led to reform proposals and new legislation seeking to diminish judicial influence over public policies preventing same-sex marriage, reforming funding for public schools, limiting gun rights, or stopping natural gas exploration through hydraulic fracking (see Table 10.1).

Not surprisingly, perhaps, there are repeated calls to increase legislative oversight over courts and judges. For example, congressional representatives argue for the creation of an inspector general’s office as a watchdog to keep judges in check and accountable. Other legislative solutions include diminishing court funding; stripping the courts of jurisdiction over abortion, health care, or death penalty cases; and, in addition to impeachment or altering the size of a court, expediting the removal of judges who are deemed to not exhibit “good behavior.”²

This chapter considers the scope and limitations of judicial power by examining the political struggles over judicial policymaking. The first section provides an overview of judicial policymaking and whether judges engage in so-called “judicial activism” or “judicial restraint.” It then illustrates how courts may become agents of political change in, for example, creating rulings on public school funding, abortion, and affirmative action. Next, the impact of judicial policymaking is considered in light of the implementation of school desegregation policies and the corresponding struggle to recognize same-sex marriages. The chapter concludes by considering the internal and external restraints on judicial power and whether courts are institutionally capable of forging major social change.

TABLE 10.1

Federal and State Court Policymaking

Federal Judicial Policymaking	Legal Policy Effect
<i>Burwell v. Hobby Lobby</i> (2014)	Supreme Court ruled that closely held, for-profit corporations can claim an exemption from providing employee health insurance coverage for contraceptives based on religious freedom objections under the First Amendment
<i>Riley v. California</i> (2014)	Supreme Court ruled that police must obtain a search warrant to investigate contents of cell phones based on privacy interests in the Fourth Amendment
<i>McCutcheon v. FEC</i> (2014) and <i>Citizens United v. FEC</i> (2010)	Supreme Court ruled that campaign finance laws restricting certain types of spending and contributions in political elections are unconstitutional under the First Amendment
<i>National Federation of Independent Business v. Sebelius</i> (2012)	Supreme Court ruled that Congress has authority under its Article I taxing power to impose a penalty on those who do not buy health insurance under a federal health care law
<i>McDonald v. Chicago</i> (2010) and <i>District of Columbia v. Heller</i> (2008)	Supreme Court ruled that personal right of gun possession for self-protection in home must be applied in all the states
State Judicial Policymaking	Legal Policy Effect
<i>In re Marriage Cases</i> (2008)	California Supreme Court ruled that banning same-sex marriage violates equality principles under state constitution
<i>Gannon v. State</i> (2014) and <i>Montoy v. State</i> (2005)	Kansas Supreme Court ruled that public school financing formula creates wealth-based disparities and violates equality under state constitution
<i>People of the State of Illinois v. Aguilar</i> (2013)	Illinois Supreme Court ruled that the Second Amendment prohibits imposing flat ban on gun possession by minors
<i>Wallach v. Town of Dryden</i> (2014)	New York Court of Appeals ruled that two home-rule towns lying on Marcellus shale can use local zoning regulations to ban “hydraulic fracking” (natural gas exploration)
<i>State v. Long</i> (2014)	Ohio Supreme Court ruled that a trial court must consider the youth of a juvenile offender as a mitigating factor (which may lessen punishment) before it sentences a juvenile to life in prison without parole

JUDICIAL POLICYMAKING

Although Justice Benjamin Cardozo acknowledged that judges have discretion to make law, he nonetheless admonished that a judge “is not to innovate at pleasure” as “a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness.”³ Yet beauty is in the eye

of the beholder. And critics often attack courts and their exercise of judicial review for the following inter-related reasons: (1) for making “unprincipled” decisions (those not based on established rules of law); (2) for making social policy decisions exceeding judicial capacity or competence; and (3) for “legislating from the bench” and functioning as **counter majoritarian** institutions that are not directly accountable to the people.⁴ Each of these issues is discussed after considering the concepts of “judicial activism” and “judicial restraint.”

“Judicial Activism” and “Judicial Restraint”

Courts are often attacked for forging legal policy over a wide range of areas of law—from school desegregation to the rights of the accused, abortion, freedom of speech and religion, and same-sex marriages. They are typically accused of engaging in judicial activism or judicial restraint. Yet, the meaning of these terms fluctuates with the prevailing political climate and the proverbial “whose oxen is gored.”

Generally speaking, an activist court is typically linked to rulings that deviate or overturn precedents or legislation that result in major political controversy. Judges are said to “legislate from the bench” or engage in “result-oriented jurisprudence.”⁵ By contrast, a judicially self-restrained court is typically thought of as adhering to precedent, deferring to Congress or state legislatures, and not in the forefront of social policymaking.

Often, but mistakenly, “conservative” courts are viewed as exemplifying judicial self-restraint whereas “liberal” courts are branded as “activist.” But history and contemporary examples show such labels are misleading. The liberal Roosevelt–New Deal Court of the 1930s–1940s favored judicial self-restraint in upholding progressive federal and state legislation. Indeed, the term *judicial self-restraint* was coined in the 1930s by liberal critics of the then-conservative majority on the Supreme Court, which was striking down progressive legislation dealing with child labor, women’s rights, and minimum wage/maximum hours laws. Yet, thirty years later, conservatives attacked the liberal Warren Court (1953–1969) for forging a “**due process** revolution” that expanded protections for the right of the accused, and “the reapportionment revolution” that reinforced the democratic process and equal voting rights. Today, a bare majority of the Roberts Court (2005–present) is frequently criticized for its conservative activism in extending protection for gun rights and corporate business interests, along with striking down campaign finance laws.⁶

Judicial activism and self-restraint, in other words, are “notoriously slippery” terms that both liberals and conservatives have invoked in attacking rulings and constitutional interpretations with which they disagree. Yet “the majestic generalities” of constitutional provisions, as Justice Cardozo put it, are inexorably ambiguous and virtually “empty vessels into which [a justice or judge] can pour nearly anything he [or she] will.”⁷

With these caveats in mind, political scientist Bradley Canon created a useful framework for understanding “judicial activism” by assigning it certain “dimensions” (see Table 10.2). Canon’s analysis is similar to the other research that concludes “activist” judicial behavior is invariably multidimensional and complex.⁸

The debate over whether courts are “activist” or not is exemplified by two controversial topics of legal and social policy: state school-funding cases and federal court rulings on abortion and affirmative action. (In addition, it bears noting that criticisms of judicial activism are not confined to the United States. The expanding powers of courts elsewhere in the world, such as the European Court of Justice, are increasingly criticized as well. See “In Comparative Perspective: The European Court of Justice and the Globalization of Judicial Power.”)

TABLE 10.2 The Dimensions of Judicial Activism

Dimensions	Standards Used to Define Activist Dimension
Majoritarianism	The degree to which policies adopted through democratic processes are judicially negated
Interpretive Stability	The degree to which earlier court decisions, doctrines, or interpretations are altered
Interpretative Fidelity	The degree to which constitutional provisions are interpreted contrary to the clear intentions of their drafters or the clear implications of the language used
Substance/Democratic Process Distinction	The degree to which judicial decisions make substantive policy rather than affect the preservation of democratic political processes
Specificity of Policy	The degree to which a judicial decision establishes policy itself as opposed to leaving discretion to other agencies or individuals
Availability of an Alternate Policymaker	The degree to which a judicial decision supersedes serious consideration of the same problem by other governmental agencies

Source: Based on Bradley C. Canon, "Defining the Dimensions of Judicial Activism," *Judicature* (December/January 1983), 236, 239.

IN COMPARATIVE PERSPECTIVE

THE EUROPEAN COURT OF JUSTICE AND THE GLOBALIZATION OF JUDICIAL POWER

The European Court of Justice (ECJ) was created in 1952. Along with the Council of Ministers, the European Commission, the European Parliament, and later the Court of Auditors, the ECJ was established to promote economic integration in Western Europe. The ECJ's role is to create a uniform system of law—referred to once as European Community (EC) law and now as European Union (EU) law. Originally, only six countries—Belgium, France, West Germany, Italy, Luxembourg, and the Netherlands—participated, but other countries subsequently joined. In 1973, Denmark, Ireland, and Britain became members, followed by Greece in 1981, and Portugal and Spain in 1986. In 1995, Austria, Finland, and Sweden joined, bringing the total number in the EU to fifteen. The largest expansion occurred in 2004 with the addition of ten other Central and East European countries—Cyprus (Greek part), the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia—followed by Bulgaria and Romania in 2007, and Croatia in 2013—bringing the current membership to twenty-eight.

The ECJ, located in Luxembourg, is composed of twenty-eight justices—one justice appointed from each country with the unanimous approval of all member states. The justices serve six-year staggered terms, and generally hear cases in panels of three, five, or thirteen, and occasionally as a whole court. They also vow not to consider national interests in rendering decisions. All decisions are unanimous, no dissenting opinions are issued, and even opinions announcing the decisions are not signed by individual justices.

Cases may be filed before the ECJ by other EU institutions, member states, or "directly affected" EU citizens. Most of the ECJ's caseload comes as reference (Article 177) cases from member states' national courts that ask for preliminary rulings on EU law that the ECJ has not yet determined. Since its inception, the ECJ's caseload has grown steadily. As a result, in 1998, a General Court (formerly the Court of First Instance) was created in order to

ease the ECJ's workload and backlog of cases. There are also now a number of specialized courts, such as the Civil Service Tribunal. Still, the ECJ annually hands down about six hundred decisions.

The ECJ has been compared to the U.S. Supreme Court in the early nineteenth century under Chief Justice John Marshall, whose rulings striking down state taxes, trade barriers, and other regulations promoted an economic common market and solidified the Court's power of judicial review. Critics of the ECJ have complained that it has been too activist. Yet EU member states may overturn ECJ decisions, though only by unanimous consent of all member states.

During the 1960s and 1970s, the ECJ laid the groundwork for promoting the value of European integration. From the 1980s to the 2000s, the ECJ solidified not only its power of judicial review but also (1) the supremacy of EU law over that of member states' legislation, in holding that national courts of the EU must always interpret their laws to be in conformity with EU laws, and (2) the competence and superiority of EU institutions over areas, such as environmental protection and human rights, that the treaties were originally silent about; and (3) it expanded the legal policy areas over which it has jurisdiction by expanding standing for private parties to sue on the basis of treaty provisions and acts of EU institutions requiring implementing legislation. The ECJ also ruled that national courts have the power to declare EU acts valid, but not invalid, within their countries. Moreover, the ECJ held that a national court must refuse to enforce a national law or statute that contravenes EU laws while questions concerning the compatibility of the national law and EU law are pending before the ECJ.

In addition, initially, EU law based on treaties contained few provisions for dealing with individual rights. Yet the ECJ's decisions on citizens' standing to sue when "directly affected" by EU law expanded its jurisdiction over member states and its power to strike down legislation contravening EU law. As a result, the ECJ not only promoted an economic common market, but also developed a human rights jurisprudence based on the doctrines of the "direct effect"—the direct effects doctrine—and the supremacy of EU law. For example, in *J. Nord, Kohlen und BaustoffengroBhandlung v. Commission of the European Communities*, the ECJ invoked the European Convention for the Protection of Human Rights, in addition to the constitutions of member states, as sources for its recognition of fundamental rights.

Paralleling the U.S. Supreme Court's incorporation of guarantees of the Bill of Rights into the Fourteenth Amendment and their application to the states, the ECJ also "discovered" fundamental rights in the treaties of member states. The ECJ also requires member states' national courts to always interpret their own laws in conformity with EU laws—the so-called indirect effects doctrine. In addition, the ECJ has enforced human rights principles against not only member states but also corporations and private parties.

Observers and scholars disagree over how to explain the expansion of the ECJ's power of judicial review. Some consider the expansion of the ECJ's power as inevitable given its treatment of EU treaties as though they are a "higher law" constitution. Others argue that the ECJ's role has grown as part of the so-called trend toward the "globalization of judicial power" as a result of pressures for greater economic and legal integration.

More specifically, four competing explanations for the expanding power of the ECJ have been advanced: (1) a legalist explanation, (2) a neorealist explanation, (3) a neofunctionalist explanation, and (4) an intercourt competition explanation.

The legalist explanation for the ECJ's expanding power maintains that EU law, like other countries' constitutional law, has an inherent logic. That creates a kind of internal dynamic built on precedents and expanding the role of the ECJ along with member states' courts' compliance with the ECJ's decisions. In other words, the ECJ's rulings are authoritative because they have transformed the legal and political integration of Europe. Political scientist Martin Shapiro, among others, however, has criticized this legalist explanation as "constitutional law without politics," because the ECJ is presented "as a juristic concept; the written constitution (the treaty) as a sacred text; the professional commentary as a legal truth; the case law as the inevitable working out of the correct implications of the constitutional text; and the constitutional court (the ECJ) as the disembodied voice of right reason and constitutional teleology." In short, critics of the legalist explanation argue that it amounts to legal formalism. It omits the role of politicians, the member states, and other political forces in reinforcing the ECJ's decisions.

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By contrast, neorealists argue that ECJ and national courts' decisions are shaped by EU member states' national self-interests in economic integration. They underscore that courts are subject to external political pressures and reprisals if they go too far and too fast. In the words of political scientists G. Garrett and Barry Weingast:

Embedding a legal system in a broader political structure places direct constraints on the discretion of a court, even one with as much constitutional independence as the United States Supreme Court. . . . The reason is that political actors have a range of avenues through which they may alter or limit the role of courts. . . . The principal conclusion . . . is that the possibility of such a reaction drives a court that wishes to preserve its independence and legitimacy to remain in the arena of acceptable latitude.

Courts, of course, are constrained by external political pressures and their environment. But all political institutions are subject to political and legal constraints and restraints, so it remains unclear whether neorealists explain that much. Critics of the neorealist theory counter that it fails to demonstrate how national self-interests are constituted and influence the ECJ's decisions. Neorealists also have been criticized for neglecting political opposition to the ECJ's decisions promoting integration. In contrast to the legalist theory, the neorealist position appears to amount to "politics without constitutional law."

A third, neofunctionalist, explanation emphasizes the self-interests of litigants, judges on national courts and the ECJ, and other EU institutions promoting integration; and thereby reinforcing the ECJ's role. In other words, the ECJ and its rulings created incentive structures for entrenching its role through economic and legal integration. EU citizens received new rights and the basis for pursuing their interests through litigation and EU integration, national courts enhanced their prestige by referring cases to the ECJ, and lawyers practicing EU law received more business through the continuing expansion of EU law. In short, neofunctionalists, like the legalists, emphasize the role of the rule of law but, unlike the legalists, explain the expansion of the ECJ's power in terms of a process of incremental legal integration that "upgrades common interests" of individuals and institutions in the EU.

Finally, a fourth explanation underscores the ECJ's and national courts' intercourt competition in promoting legal integration, and thereby buttressing the role of the ECJ. A variant of the theory of bureaucratic politics, the intercourt competition theory emphasizes that courts, like other bureaucracies, pursue their own interests within the constraints imposed by other political institutions.

Ultimately, each of these competing explanations is not mutually exclusive. Together, they go a long way toward explaining different aspects of the expansion of the ECJ's power and the EU's legal integration.

For further reading, see Martin Shapiro, "Comparative Law and Comparative Politics," *Southern California Law Review* 53 (1980); G. Garrett and Barry Weingast, "Ideas, Interests, and Institutions: Constructing the ECs Internal Market," in *Ideas and Foreign Policy*, edited by J. Goldstein and R. Keohane (Ithaca, N.Y.: Cornell University Press, 1993), 173; A. M. Burley and W. Mattli, "Europe Before the Court," *International Organization* 47 (1993), 41; Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (New York: Oxford University Press, 2001); Anne-Marie Slaughter, Alex Stone Sweet, and J. H. H. Weiler, eds., *The European Court and National Courts—Doctrine and Jurisprudence* (Oxford, U.K.: Hart, 1998); Gunner Beck, *The Legal Reasoning of the Court of Justice of the European Union* (Oxford, U.K.: Hart, 2013); and Mark Dawson, Bruno DeWitte, and Elise Muir, eds., *Judicial Activism at the European Court of Justice* (Cheltenham, U.K.: Edward Elgar, 2013).

State Judicial Policymaking: "Equal" and "Adequate" Public School Funding

In ruling that separate educational facilities are unconstitutional, *Brown v. Board of Education* (1954) stressed that "education is perhaps the most important function of state and local governments, . . . [because] it is the very foundation of good citizenship." As Chief Justice Earl Warren explained, "It is doubtful that

any child may reasonably be expected to succeed in life if he is denied the opportunity of an education, [and] such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”⁹ By the 1970s, state supreme courts began to test the scope of *Brown’s* equality principle in school financing litigation.

In *Serrano v. Priest* (1971),¹⁰ the Supreme Court of California struck down the state’s system of public school funding because it deprived students of a “fundamental right” of education based on the Fourteenth Amendment’s **Equal Protection Clause**. Specifically, the state overrelied on local property taxes to fund public schools, and that policy created disparities in expenditures that discriminated against the poor living in underfunded school districts. In *Robinson v. Cahill* (1972), the New Jersey Supreme Court likewise nullified the state’s financing scheme. But, unlike *Serrano*, the court reasoned that it did not satisfy the state constitution’s obligation to provide for a “thorough and efficient” system of public education.¹¹

The movement toward reforming state public school funding on the basis of the Fourteenth Amendment Equal Protection Clause was abruptly halted, however, by the Burger Court’s decision in *San Antonio Independent School District v. Rodriguez* (1973).¹² In a 5:4 ruling, the justices rejected the claim of Hispanic students living in urban districts with a low property tax base, who argued they were denied an equal public education compared to schools in wealthier districts. The bare majority of the Court rejected that claim in holding that equally funded education is not a “fundamental right.” In reaching that conclusion, the Court applied the **rational basis test**—that is, whether the state had a rational, or reasonable, basis for funding public schools based on local tax rates and in maintaining local control over educational policy.¹³ In short, the Court exercised judicial self-restraint in deferring to state and local governments’ power to set educational policy, a traditional province of the states.

Ironically, despite its holding, *Rodriguez* led to litigation in state courts. Between 1973 and 2002, forty-four states faced legal challenges to their education finance systems based on provisions in their state constitutions. In several early cases, state courts relied on the equal protection clauses in their state constitutions to invalidate inequitable school funding mechanisms. But they did not specify how to remedy the problem. In other states, some popular assemblies struggled to equalize resources but found it impracticable to do so. As a result, the initially favorable rulings for reforming public school funding systems in the 1970s gave way to a series of defeats in the 1980s. By 1989, fifteen state supreme courts had denied relief, whereas only seven others granted it.¹⁴

Nonetheless, reformers continued to bring litigation aimed at achieving equality in state financing for public schools on state constitutional grounds but by stressing the “adequacy” of educational resources instead of “equity.” Whereas “equity lawsuits” pushed for the elimination of wealth disparities by equalizing the amount of resources distributed to all districts, “adequacy lawsuits” sought school reforms on the basis of demonstrable standards of academic performance. In doing so, state courts interpreted educational clauses in their state constitutions that guarantee a “system of free common schools” or a “thorough and efficient” or “adequate public education” as the basis for reforms. Simply put, the new approach meant all students must have a reasonable chance to get an “adequate” public education, and whether they received one was measured by academic achievement through performance standards.¹⁵

Although the state supreme courts in New Jersey, Washington, and West Virginia nullified state education financing systems on the basis of inadequacy, it was not until the Kentucky Supreme Court’s ruling in *Rose v. Council for Better Education* (1989) that the adequacy reform movement in state courts reached its full potential.¹⁶ After *Rose*, the shift from equity to adequacy challenges produced more victories than in the preceding fifteen years, even though slightly more state courts upheld, rather than struck down, school funding systems. Indeed, a recent study found that there were twenty-two victories in state courts as opposed to eleven defeats in suits for educational reforms.¹⁷

Rose also remains important because it established specific standards for measuring whether students were achieving an “efficient” education: whether, for example, they were taught effective oral and written communication skills or gained a sufficient understanding of government, the arts, or vocational skills. Significantly, the reliance on standards as a measure of adequacy was, in part, developed from the findings by various commissions and studies that were initiated by the federal government and states in the aftermath of *Rodriguez*. Once a trial court determined liability, many of the guidelines originating from *Rose* resulted from public hearings and the input from a select commission (created by the trial court) based on reform plans initially adopted by the Kentucky Supreme Court.¹⁸

In short, *Rose* was the “starting point in what has become a significant dialogue among the public, the courts, and the legislature on standards-based reform.”¹⁹ The focus on adequacy and intergovernmental cooperation has had significant consequences for other jurisdictions. Since *Rose*, an overwhelming majority of states have addressed public school funding issues through litigation, and scholars (and some courts) continue to develop new legal rationales that support public school reforms. Moreover, recently, state courts have begun to fuse the adequacy and equity theories. In *Gannon v. State* (2014), for example, the Kansas Supreme Court reaffirmed the state’s constitutional obligation to “make suitable provision for finance of the educational interests of the state,” based on the convergence of equity and adequacy theories (see Table 10.1).²⁰

In all likelihood, state supreme courts will remain at the forefront of shaping local education financing policy for years to come.²¹ The trend has been fueled, in part, by the No Child Left Behind Act of 2001, requiring states to meet academic performance standards, and Congress’s reauthorization of the Elementary and Secondary Act of 1965 shortly thereafter. Subsequent federal initiatives, such as the Obama administration’s Race to the Top Fund and the American Recovery and Reinvestment Act of 2009, similarly use competitive grants along with standards and assessments to create incentives for states to enact educational reform. In the states, state leaders also launched the Common Core State Standards Initiative, a performance-based reform designed to encourage states to develop a “common core” of knowledge and skills that all high school students should master before going to college or entering into a career.²²

To be sure, new litigation will invariably test the limits of judicial activism in educational policy following the Great Recession of 2008 and the failure of some state and local governments to meet their educational funding obligations under federal and state legislation.²³ A related issue involves the political uncertainty of whether courts may in fact force state legislatures to enact reforms. In Alabama and Ohio, for example, both state supreme courts terminated judicial proceedings in public school funding suits because their legislatures declined to pass laws to remedy the constitutional violations, thus leaving reforms in limbo. These suggest that state supreme courts have an important but, perhaps, diminishing impact on educational reform because the enforcement of their decrees is contingent upon the responses and support of other political institutions.²⁴

Federal Judicial Policymaking: Abortion and Affirmative Action

In two cases, *McCullen v. Coakley* (2014)²⁵ and *Schuette v. Coalition to Defend Affirmative Action* (2014),²⁶ the Supreme Court continued to develop constitutional principles dealing with abortion and affirmative action. In *McCullen*, the Roberts Court upheld the First Amendment free speech rights of protesters at abortion clinics by striking down a Massachusetts law that created a thirty-five-foot “buffer zone” between protesters and women seeking access to clinics. In *Schuette*, the Court upheld a Michigan constitutional amendment barring affirmative action programs in public universities as well as in the hiring of state

employees and awarding of governmental contracts. While neither decision directly addressed the merits of the disputes over abortion and affirmative action, their significance reflects the continuing political controversy over earlier Supreme Court rulings that expanded privacy rights and upheld affirmative action in the 1970s and 1980s.

Abortion. Although courts have long recognized protected privacy interests,²⁷ a constitutional right of privacy was not established until *Griswold v. Connecticut* (1965).²⁸ There, a physician and the director of the Planned Parenthood League of Connecticut were prosecuted for dispensing contraceptives to a married couple in violation of state law. In a 7:2 decision written by Justice William O. Douglas, the Court invalidated the state law and proclaimed a constitutional right to privacy based on the penumbras or shadows of several guarantees in the Bill of Rights. Justice Douglas explained:

Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. . . . The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”²⁹

In dissent, however, Justices Hugo Black and Potter Stewart countered that the Court was acting like “a super-legislature” in proclaiming a right to privacy and exercising “unbounded judicial authority would make of this Court’s members a day-to-day constitutional convention.”³⁰

Griswold had implications for other areas of privacy and reproductive rights as well. *Eisenstadt v. Baird* (1972)³¹ held that *Griswold* and the Fourteenth Amendment justified striking down a Massachusetts law outlawing the use of contraceptives by unmarried persons. According to Justice William J. Brennan, “If the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”³² *Eisenstadt*, then, helped set the stage for the landmark ruling in *Roe v. Wade* (1973)³³ on abortion.³⁴

In *Roe*, the Burger Court struck down Texas’s criminal abortion statute on the grounds that it violated a woman’s constitutional right to privacy. Specifically, it compromised a pregnant mother’s “liberty” interest to have an abortion under the Fourteenth Amendment’s due process clause. In writing for the majority, Justice Harry Blackmun reasoned that government did not have a *compelling interest* in barring access to abortions. Instead, it had the power to regulate abortions more intensively as the pregnancy progressed to term. As a result, under the so-called trimester approach, it was necessary to balance the interests of women and those of states in protecting the unborn. Women and their physicians retained a right to abort, at least in the first three months of the pregnancy. In the second trimester, up to the point of viability (between twenty-four and twenty-eight weeks—the time a fetus may live outside of the womb), states could regulate abortions in order to protect maternal health. After viability, or in the third and last stage of pregnancy, states had a compelling interest to preserve fetal life and could limit access to or even ban abortions, except when necessary to save a woman’s life.

Roe ignited a firestorm of controversy, and a majority of states and the federal government rewrote their abortion laws. Some state jurisdictions tailored their legislation to conform to the Court's ruling, but many others either left their pre-*Roe* laws in place or began to sharply restrict the availability of abortions. Some laws restricted or eliminated public funding for abortions, prohibited abortions in public hospitals, required spousal or parental (for a minor) informed consent before allowing abortions, required fetal lung and maturity tests, imposed mandatory waiting periods, and banned advertisements for abortion clinics.³⁵

Anti-*Roe* sentiments framed the Christian evangelical movement and Republican platforms during the Ronald Reagan presidency as well as the administrations of George H. W. Bush and George W. Bush. In addition, abortion politics fueled battles over federal judicial appointments—most notably, in the Senate's defeat of President Reagan's 1987 nomination of Judge Robert Bork for a seat on the Supreme Court (for further discussion, see the section in Chapter Four titled, "The Battle Over Robert Bork's 1987 Nomination").³⁶ Afterward, President Reagan appointed Anthony Kennedy, a more moderate Ninth Circuit appeals court judge, and he was easily confirmed by the Senate.³⁷ Ironically, Justice Kennedy would come to play a key role in voting to uphold *Roe* in subsequent cases seeking to overturn that precedent.

The changing composition of the bench and the shift to the right since the 1980s has led the Court to revisit *Roe* several times. But thus far a majority of the Court has upheld "the essence of *Roe*." Most significantly, in an unusual joint opinion by Justices O'Connor, Souter, and Kennedy, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992),³⁸ they reaffirmed *Roe*'s "essential holding" that women have the freedom to terminate a pregnancy up to the point of a fetus's viability. The ruling was based on two underlying factors. First, the Court feared its legitimacy would suffer if *Roe* was reversed under political pressure. Second, *Roe* was upheld as a precedent that citizens relied upon as an enduring principle of personal autonomy.

Roe nonetheless has been considerably weakened because the Rehnquist and Roberts Courts have jettisoned its trimester analysis and **strict scrutiny test**, along with introducing a new, less rigorous standard, the undue burden test. Under the undue burden test, restrictive antiabortion laws are upheld if they do not place a substantial obstacle on the availability of abortions. Consequently, although *Roe* remains the law of the land, *Casey* undermined it considerably since its effect is to allow for more and greater restrictions on the availability of abortions.

Moreover, in spite of the ruling in *Casey*, the abortion controversy remains hotly contested and politically explosive. As Yale law professor Jack Balkin observed, the Court's efforts to settle the question of abortion rights "has proved to be little more than wishful thinking."³⁹ A recurring issue, among others,⁴⁰ is the constitutionality of so-called "late-term" or "partial-birth" abortion bans that were enacted immediately after *Casey*.⁴¹ In *Stenberg v. Carhart* (2000), a bare majority of the Rehnquist Court struck down Nebraska's ban on partial-birth abortions because it did not contain a medical exception for the procedure to take place if the pregnant mother's health was in danger. Thereafter, however, Congress passed the Partial-Birth Abortion Act, which also banned late-term abortions, and the Court's composition changed with the appointment of Chief Justice John Roberts and Justice Samuel Alito. Subsequently, in *Gonzales v. Carhart* (2007), a bare majority of the Roberts Court upheld that federal law even though it did not have a medical exception for allowing the procedure if a woman's health is endangered. But, ironically, the majority stopped short of overruling *Stenberg v. Carhart*. As a result, the constitutionality of states' partial-birth abortion bans will remain uncertain—until (and if) the Roberts Court decides to revisit the issue.⁴²

Finally, new reproductive technologies, such as RU486 (the so-called "morning after" pill), cloning, cryogenics, stem cell research, and procedures relating to same-sex procreation, continue to keep the abortion controversy on national political and judicial agendas. Abortion politics is now a central issue in virtually



AP Photo/Susan Walsh

Pro-abortion and anti-abortion protesters rally outside the Supreme Court on January 22, 2014.

every federal judicial nomination and confirmation. The growing politicization of the federal bench will likely persist or intensify as new efforts to restrict or ban abortion rights will continue apace. Over forty years after *Roe*, states continue to enact an array of laws limiting the availability of abortion (see Table 10.3 for a survey of state abortion laws). These new laws prompted an American Civil Liberties Union lawyer to observe that, while this “sort of chipping away at *Roe*” has been going on for decades, the most recent efforts are akin to using a “jackhammer” instead of a “chisel.”⁴³ Consequently, challenges to the constitutionality of such restrictions are certain to continue returning the controversy to the Supreme Court.

Affirmative Action. **Affirmative action** began in the 1960s with executive orders from Democratic presidents John F. Kennedy and Lyndon B. Johnson. These orders specified that federal contractors and agencies must use affirmative action in making governmental contracts and ensuring federal employees were not discriminated against in terms of race, color, religion, sex, or national origin. Adopting racial preferences in government, private sector jobs, and higher education grew across the nation—typically in the form of set-asides, quotas, preferences, or priorities in employment, promotion, and admissions decisions. This growth was accompanied by strident political opposition, especially in the late 1970s.⁴⁴

Opponents argue that using race-based (instead of race-neutral) factors violates the principle of equal protection of law and in fact is reverse discrimination. Proponents counter that affirmative action programs are sound legal and social policy. Not only are they remedies for past discrimination, but they also temper the effects of economic inequalities suffered by politically disadvantaged minorities. Arguably, these reasons explain why affirmative action policies have been adopted in many of the world’s democracies and legal systems, such as India, South Africa, Northern Ireland, and Brazil.⁴⁵

These competing arguments have also long framed the Supreme Court’s jurisprudence on affirmative action. In *DeFunis v. Odegaard* (1974), a white applicant challenged an affirmative action program at the

TABLE 10.3

Abortion Restrictions in the States

Major Provisions	Legal Restrictions
<i>Refusals by Health Care Providers</i>	<p>Laws allowing individual health care providers to refuse to participate in an abortion</p> <ul style="list-style-type: none"> • 43 states allow institutions to refuse to perform abortions • 16 of those states limit refusal to private or religious institutions
<i>Gestational Limits</i>	<p>Laws prohibiting abortions except when necessary to protect the woman's life or health after a specified point in pregnancy (e.g., fetal viability)</p> <ul style="list-style-type: none"> • 42 states have such restrictions
<i>Physician and Hospital Requirements</i>	<p>Laws requiring an abortion to be performed by a licensed physician</p> <ul style="list-style-type: none"> • 20 states require an abortion to be performed in a hospital after a specified point in the pregnancy • 18 states require the involvement of a second physician after a specified point
<i>Parental Involvement in Minor's Decision to Have an Abortion</i>	<p>Laws requiring one or both parents to consent to the procedure</p> <ul style="list-style-type: none"> • 21 states require one or both parents to consent • 12 states require that one or both parents be notified • 5 states require both parental consent and notification
<i>Waiting Periods</i>	<p>Laws requiring a woman to wait a specified period of time, usually 24 hours, between the time she receives counseling and the time the procedure is performed</p> <ul style="list-style-type: none"> • 24 states have such restrictions • 10 of those states have laws compelling the woman to make two separate trips to the clinic to obtain the procedure
<i>State-Mandated Counseling</i>	<p>Laws mandating that women be given counseling before an abortion</p> <ul style="list-style-type: none"> • 17 states have such restrictions that include information on at least one of the following: <ul style="list-style-type: none"> • showing the purported link between abortion and breast cancer (5 states) • showing ability of a fetus to feel pain (12 states) • showing the long-term mental health consequences for the woman (8 states)
<i>Partial-Birth Abortions</i>	<p>Laws prohibiting "partial-birth" abortion</p> <ul style="list-style-type: none"> • 19 states have such restrictions (3 laws apply only to postviability abortions)
<i>Public Funding of Abortions</i>	<p>Laws allowing states to use their own funds to pay for all or most medically necessary abortions for Medicaid enrollees in the state</p> <ul style="list-style-type: none"> • 17 states have such laws • 32 states and the District of Columbia prohibit the use of state funds except in those cases when federal funds are available: where the woman's life is in danger or the pregnancy is the result of rape or incest (contrary to federal requirements, South Dakota limits funding to cases of life endangerment only)

Major Provisions	Legal Restrictions
<i>Private Insurance Coverage</i>	<p>Laws restricting coverage of abortion in private insurance plans (most limit coverage only to when the woman's life would be endangered if the pregnancy were carried to term)</p> <ul style="list-style-type: none"> • 9 states have such laws • Most states allow the purchase of additional abortion coverage at an additional cost

Source: Derived from Alan Guttmacher Institute, "An Overview of Abortion Laws" (as of July 1, 2014), available from www.guttmacher.org/sections/by-type.php?type=spib (last retrieved July 25, 2014).

University of Washington law school after he was denied admission. Yet the Burger Court (1969–1986) dismissed his appeal under *the mootness doctrine* (discussed in Chapter Six) because a state court had ordered his admission while his appeal was pending, and he would graduate before the Court could render a decision. Dissenting liberal Justice Douglas, however, argued that

there is no constitutional right for any race to be preferred. The years of slavery did more than retard the progress of blacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race. There is no superior person by constitutional standards. A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional right to have his application considered on its individual merits in a racially neutral manner.⁴⁶

In advocating racial neutrality, Justice Douglas foreshadowed contemporary arguments claiming that affirmative action creates inequality by stigmatizing minorities and placing those who should be recognized for their individual merits at a competitive disadvantage.

A few years later, *Regents of the University of California v. Bakke* (1978) directly addressed affirmative action in higher education. In *Bakke*, a badly divided Supreme Court ruled that using racial preferences was permissible so long as the affirmative action program did not use racial quotas, and that the program was necessary to promote diversity in the student body. Still, *Bakke* did not resolve much, and the controversy actually intensified after President Reagan's 1980 election. Moreover, attacks on affirmative action increasingly became centered in the courts. Special interest groups, such as the Center for Equal Opportunity, the Center for Individual Rights, the Independent Women's Forum, and the Pacific Legal Foundation, took the lead in bringing lawsuits challenging the constitutionality of affirmative action programs. Opponents also saw an opportunity for success in the Supreme Court because of its changing composition and the appointments made by Republican presidents Richard Nixon, Ronald Reagan, George H. W. Bush, and George W. Bush, which resulted in an increasingly conservative majority on the Court in the post-*Bakke* era.⁴⁷

While a majority of the Rehnquist Court (1986–2005) resisted the pressure to overturn *Bakke*, the justices nonetheless increasingly came to oppose affirmative action. In *Gratz v. Bollinger* (2003), a 6:3 ruling, the Rehnquist Court struck down the University of Michigan's undergraduate admissions program because it awarded a set number of points to applicants solely on the basis of race. But, in a companion case, *Grutter v. Bollinger* (2003), a 5:4 bare majority (with Justice O'Connor joining the four liberals and writing the opinion for the Court) upheld the University of Michigan law school's affirmative action program. Applying the strict

scrutiny test, Justice O'Connor reasoned that achieving educational diversity through race-conscious policies is a compelling government interest, though taking race into account as a remedy for past discrimination is not. The law school's admission program was permissible because it adopted a "holistic" approach (taking into account multiple qualification factors) in order to achieve diversity and a "critical mass" of minority students. By contrast, dissenting Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy sharply disagreed. They countered that the Court misapplied *Bakke* and the strict scrutiny interest test. Chief Justice Rehnquist and Justice Kennedy, in particular, thought that *Bakke* was not followed since the University of Michigan's law school automatically applied racial preferences (akin to an impermissible quota) under the fiction of achieving a "critical mass" of diverse students.⁴⁸

Subsequently, a bare majority of the Roberts Court (2005 to present) further questioned and cut back on affirmative action programs. The Roberts Court reconsidered the effect of *Gratz* and *Grutter* on K–12 school policies using race-based considerations in *Parents Involved in Community Schools v. Seattle School District No. 1* (2006). Writing for the Court, Chief Justice Roberts struck down student assignment plans that used race as a factor in assigning students to high schools that were increasingly racially isolated due to housing patterns, in order to maintain integration in compliance with *Brown v. Board of Education* (1954). Chief Justice Roberts reasoned that such race-based policies are not narrowly tailored and fail to survive strict scrutiny. As he flatly put it: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." Justice Kennedy concurred but argued that the plurality's interpretation of *Brown* was flawed. And he countered that local school boards may "consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition." As for the plurality's interpretation of *Brown*, Kennedy wrote:

Fifty years of experience since *Brown v. Board of Education* (1954) should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown's* objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion. To the extent that the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.

Writing for the dissenters, Justice John Paul Stevens contended that Chief Justice Roberts's interpretation of *Brown* effectively "rewrites the history of one of this Court's most important decisions."⁴⁹

The Roberts Court, then, again considered *Bakke* and *Grutter*—but notably declined to reverse those precedents—in reviewing the University of Texas at Austin's affirmative action plan in *Fisher v. University of Texas at Austin* (2013). Since many Texas high schools were dominated by one specific race or ethnicity, the University of Texas argued that its admissions policy was aimed at diversifying its study body by admitting about 75 percent of all applicants if they were in the top 10 percent of their graduating high school class, and the rest based on considering race and other factors in order to achieve a "critical mass" of African American and Hispanic students. The latter applicants were judged on a "holistic basis," taking into account several individual "plus" factors, along with race, such as leadership skills, work experience, community service, awards, honors, and other special talents or circumstances. Not automatically admitted under the "Top Ten Percent" rule, a white woman denied admission, Abigail Fisher, sued and charged the use of race in admissions was constitutionally impermissible. With only Justice Ruth Ginsburg dissenting (and Justice Elena Kagan recused), Justice Kennedy's opinion for the Court returned the case back to

the lower court for further review, upon concluding that it failed to apply strict scrutiny and the compelling interest test correctly. In doing so, the Roberts Court clearly signaled that affirmative action plans in higher education may consider race in admissions only if other race-neutral factors do not achieve the goal of educational diversity. In concurring opinions, Justices Scalia and Thomas indicated that they would overturn *Grutter*. By contrast, dissenting Justice Ginsburg stressed that in her view the Texas affirmative action policy was constitutionally permissible, but notably also emphasized that “the Court rightly declines to cast off the equal protection framework settled in *Grutter*.”⁵⁰

The Roberts Court is likely to consider the affirmative action controversy in future cases. After remand, for example, in *Fisher v. University of Texas at Austin* (2014),⁵¹ the Court of Appeals for the Fifth Circuit reaffirmed its earlier holding that Texas may continue to use race as a factor in undergraduate admissions. Judge Patrick Higginbotham reasoned that the university’s race-conscious but holistic review of applicants furthered a compelling interest in fostering educational diversity. Dissenting Circuit Judge Emilio Garza countered that the university failed to show that its plan was “narrowly tailored” to achieving the goal of diversity. While some pundits have predicted that Judge Higginbotham’s opinion was “*cert.-proof*” (making it unlikely that the Supreme Court will grant *certiorari* again because it was decisively written), conservative interest groups vowed to continue the fight affirmative action in light of the Roberts Court’s *Schuette* decision (discussed in this chapter’s introduction).⁵²

THE IMPACT OF JUDICIAL DECISIONS

Judicial decisions shape public policy and social relationships. They may not only affect the parties to a lawsuit, but also influence the choices of government officials and private entities who must, in turn, implement the legal rules or policies that their decisions create, affirm, or reverse. So, too, they may broadly affect the public at large and have an impact on whether their rulings invite political opposition or compliance and respect.

The concept of “judicial impact,” however, is multifaceted, fluid, and complex. The “cause and effect” of judicial rulings is largely dependent upon how they are perceived, implemented, and followed. Though courts may dictate social policy, at the end of the day they must rely on other institutional actors to translate their rulings into practice. Courts cannot control whether their rulings will be administered properly or accepted as legitimate, though they may fine noncomplying parties to a lawsuit in contempt of court. As a result, “implementation” and “compliance” are analytically distinct from “judicial impact,” but both underscore not only the practical consequences of judicial decision making, but also their public policy effect.

Although all judicial rulings have some effect on different subpopulations, groups, or citizens,⁵³ the extent to which judicial decisions are properly administered is far from certain and sometimes controversial. The Roberts Court’s decision upholding “Obamacare” (the Patient Protection and Affordable Care Act) in *National Federation of Independent Business v. Sebelius* (2012)⁵⁴ is illustrative. Though the ruling upheld the so-called “individual mandate”—the legal obligation to buy health insurance—the decision’s implications forced the federal government and state governments to create an insurance marketplace through “American Health Benefit Exchanges” (for individuals) and “Small Business Health Options Programs” (for small business owners) in order to comply with the Court’s ruling. Each exchange provides buyers with information and access to the insurance coverage they must buy (or face a tax penalty if they do not). Although governing the exchanges is the responsibility of the states, the federal government must set them up if a state refuses to create them. As of 2014, thirty-six states have relied upon the federal government to run parts or all of their exchanges. Besides these mandates, the legality of the exchanges and how they

operate has been challenged in the federal appeals courts, and the Supreme Court may have to revisit the constitutionality of the law in the future.⁵⁵ Accordingly, the Department of Health and Human Services (the agency responsible for implementing the law), as well as federal judges, state officials, insurance companies, small businesses, and citizens, must adjust their policies, behavior, and actions in a rather uncertain legal and political environment.

National Federation of Independent Business illustrates that a number of interrelated factors influence implementation of and compliance with judicial decisions and hence their impact. Whether an appellate court speaks with one voice, or is fragmented or split by dissents and separate opinions, affects the weight of a decision as a precedent and, therefore, compliance with it. The nature of the dispute may make a difference as well, because controversial decisions are likely to provoke more hostility and opposition. The institutional prestige of the court, along with the dynamics of the prevailing political climate and public opinion, is important too.

These elements and many other intangibles may hinder enforcement and compliance, especially when the Supreme Court is ahead of the prevailing public opinion. Although there are many high-profile examples of the implementation of and compliance with rulings of the Court—ranging from the enforcement of affirmative action policies, to the regulation of political campaign finances, to the display of religious monuments in public spaces, to the imposition of capital punishment—arguably, the best example of the difficulties courts may confront in achieving implementation and compliance with their rulings on major political controversies involves the politics of school desegregation following the Warren Court’s decision in *Brown v. Board of Education* (1954).⁵⁶

Brown v. Board of Education (1954) and School Desegregation Politics

In *Brown*, racial segregation in public schools was prohibited by implicitly ending (but not directly overruling) the so-called “separate but equal principle” of *Plessy v. Ferguson* (1896).⁵⁷ In a companion case, *Bolling v. Sharpe* (1954),⁵⁸ racial segregation in the District of Columbia’s public schools was invalidated on the basis of the Fifth Amendment’s due process clause, a decision holding that the guarantee of equal protection applied against federal action as well as against state governments. The mandate in both cases, however, met with stiff resistance in many local communities, a problem that was compounded by the Court’s failure to issue any remedial orders to implement its decree until a year later in *Brown v. Board of Education* (1955) (*Brown II*).⁵⁹ Even then, the only remedy offered was the justices’ insipid pronouncement that desegregation in schools should commence “with all deliberate speed.”

The Court’s inability to enforce its own rulings transformed *Brown*’s mandate into little more than a “moral appeal and an invitation for delay.”⁶⁰ Although a few states began to move toward desegregation even before the Court’s rulings, *Brown II* invited defiance in the South instead of compliance. Immediately after *Brown*, white supremacist “citizen councils” were organized. Several state legislatures and school boards enacted numerous resolutions disputing *Brown* and condemning the Warren Court for its decision. In Congress, 101 senators and representatives issued the “Southern Manifesto,” denouncing *Brown* as an unconstitutional exercise of judicial power. President Dwight Eisenhower reluctantly accepted *Brown* but refused to enforce it aggressively and defended the federal government’s inaction, saying that “it is difficult through law and through force to change a man’s heart.”⁶¹

Mounting pressures of the civil rights movement and persistent litigation by the National Association for the Advancement of Colored People Legal Defense Fund forced the federal government to act more

decisively in the early 1960s. In 1961, the U.S. Civil Rights Commission recommended that all school districts file desegregation plans with the federal government and to deny 50 percent of federal funds for education from segregated districts. Subsequently, Congress passed the Civil Rights Act of 1964, the landmark civil rights legislation that guaranteed prohibiting segregation in public accommodations and the workplace.⁶² The Department of Justice then began suing school districts and forcing them to desegregate or lose millions of dollars in federal money.

Despite this progress, *Brown's* enforcement remained uneven and piecemeal as the composition of the Supreme Court changed with President Nixon's four appointees and the momentum of the civil rights movement also began to fade in the late 1970s. The Burger Court reacted to lower court rulings authorizing gerrymandered school district lines and compulsory busing of school children by issuing key rulings prohibiting *de jure* (state-sponsored) segregation in public schools, but permitting *de facto* segregation (resulting from demographic changes in housing patterns), unless there was evidence of intentional discrimination.⁶³

Although hundreds of lawsuits were filed in the 1970s and 1980s to press local school boards to integrate fully, courts confronted massive resistance to enforcing *Brown* in local communities, and the Burger Court generally upheld lower courts' micromanaging efforts to achieve integration. Without firm Supreme Court guidance, the desegregation litigation remained controversial and arguably floundered in the lower federal courts. After 1986, when the most conservative member of the Burger Court—Justice William H. Rehnquist—was elevated by President Ronald Reagan to the chief justiceship, the Rehnquist Court began revisiting the controversy over school desegregation. A majority of Rehnquist Court started disengaging the federal judiciary from the task of superintending local school boards in order to achieve integrated, or “unitary,” school districts.

In *Missouri v. Jenkins* (1990),⁶⁴ the Rehnquist Court affirmed the power of federal judges to order a school board to levy taxes to implement desegregation plans. But, subsequently, as the Court's composition further changed and became more conservative, a majority of the Rehnquist Court moved further in the direction of getting lower federal courts out of the business of forcing compliance with *Brown*. In *Board of Education of Oklahoma City Public Schools v. Dowell* (1991),⁶⁵ and later in *Freeman v. Pitts* (1992),⁶⁶ the Rehnquist Court held that judicial supervision of segregated school districts could end if there was evidence that school boards had made reasonable efforts to comply with desegregation plans and, to the extent practicable, eliminated “the vestiges of past discrimination.” As one political scientist observed, *Dowell* and *Freeman* heralded a “new course, not a dramatic reversal, pointing to a new period of litigation—a period not unlike that immediately after *Brown* but one in which lower courts gradually moved to relinquish, rather than assert, control over public schools.”⁶⁷ Arguably, the Roberts Court's *Parents Involved in Community Schools* ruling (discussed earlier) is further evidence of the federal judiciary's retreat from *Brown*.

For critics, *Brown* and its aftermath underscore the inability of courts to force major social change.⁶⁸ The Supreme Court could not fully implement *Brown* without the sustained cooperation of the political branches and, in the end, without full public support. Although total compliance with *Brown* has never been achieved, the Court's policymaking did steer the country in the direction of significant public policy change toward ending racial discrimination in public schools and elsewhere. In this regard, *Brown* “dramatically and undeniably altered the course of American life.”⁶⁹

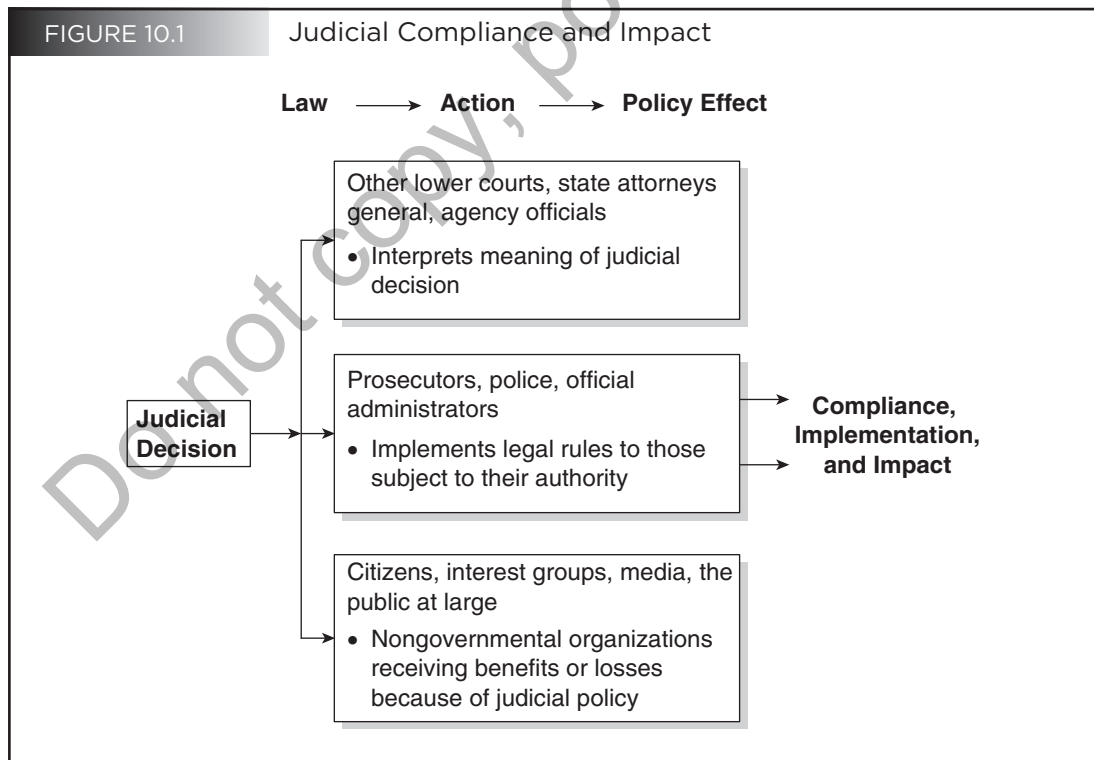
Nor is *Brown* an isolated case. *Lawrence v. Texas* (2003),⁷⁰ the Court's controversial ruling striking down laws criminalizing homosexual sodomy, provoked similar responses and opposition. The reactions are considered in the next section in accordance with a model public law scholars use in evaluating the implementation, compliance, and impact of judicial rulings.

The Politics of LGBT Rights and Same-Sex Marriages

Political scientists Bradley Canon and Charles Johnson have analyzed the scope and application of judicial policymaking in terms of how different populations in the legal culture interpret, implement, and comply with judicial decisions.⁷¹ They emphasize that judicial policies are not self-executing, and appellate courts must rely on other institutional actors—besides lower courts, state attorneys general, for example, and prosecutors, police, key agency officials, and municipal employees—to translate legal principles into public policy.

Judicial impact is a function of **implementation** (how court decisions are implemented by government officials) and **compliance** (whether judicial policies are followed or not by those interpreting or implementing them) (see Figure 10.1). The underlying dynamics of implementation, compliance, and impact are not mutually exclusive or static. Rather, they are fluid and situational. Illustrative of the impact of the Court's watershed rulings is *Lawrence v. Texas* (2003)⁷² and its consequences for the development of the law and gay rights and same-sex marriage.

Before *Lawrence*, in *Bowers v. Hardwick* (1986),⁷³ a bare majority of the Burger Court ruled there was no constitutional right under the Fourteenth Amendment to engage in consensual homosexual sodomy. But, by a 6:3 vote, *Lawrence* struck down Texas's antisodomy law and overturned *Bowers*. Writing for the Court, Justice Anthony Kennedy held that criminalizing homosexual conduct between consenting adults violates the Fourteenth Amendment and the right to privacy. Although *Bowers* emphasized that “for centuries there have been powerful voices to condemn homosexual conduct as immoral,” Justice Kennedy highlighted the



“emerging awareness” over the past fifty years that “liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” This “emerging recognition” is apparent not only in U.S. law, but also in foreign law. In Justice Kennedy’s words, “Other nations . . . have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.” Consequently, Justice Kennedy emphasized, the personal autonomy of homosexuals “has been accepted as an integral part of human freedom in many other countries.”⁷⁴

Although *Lawrence v. Texas* only nullified criminal bans on sodomy, advocates and critics of homosexual rights perceived it as opening the door for judicial recognition of same-sex marriages.⁷⁵ Still, there remained crosscutting movements and countervailing pressures to reaffirm heterosexual marriage, along with recognizing the legality of same-sex relationships. In 1996, President Bill Clinton signed the federal Defense of Marriage Act (DOMA), which defined marriage as a heterosexual relationship. That law prompted a majority of states to enact similar laws, “junior DOMAs.” At the same time, as *Lawrence* recognized, many states were moving in a different direction. In 2000, Vermont became the first state permitting homosexual “civil unions” (allowing same-sex couples to enjoy legal rights given in heterosexual marriages). And by 2001, half of the states had repealed their criminal laws banning consensual sodomy.⁷⁶

Different constituencies responded to *Lawrence* in diverse ways. Their reactions were based on the possibility that the judiciary would continue to play an active role in expanding homosexual rights. Homosexual rights activists saw hope in *Lawrence*, but the decision caused an equally intense backlash, especially among religious and conservative groups. Significantly, *Lawrence* had the unintended effect of changing rights’ discourse: antigay animus was no longer necessarily rooted in moral objections to homosexuality, as it was before *Lawrence*. Rather, arguments for restricting same-sex unions were refashioned to stress that they undermined the traditional institution of marriage and harmed children.⁷⁷ The new parameters of the political debate about gay rights thereby redefined the strategies, responses, and burdens of legislators and well-organized special interest groups for and against same-sex marriages.

Consequently, after *Lawrence*, the primary actors—lower courts, judges, and lawyers—began to adjudicate the basic question of whether the traditional conception of marriage should remain. With the state supreme court’s ruling in *Goodridge v. Department of Health* (2003),⁷⁸ Massachusetts became the first state to validate same-sex marriages. At the time, only four other jurisdictions across the globe—Ontario, British Columbia, Belgium, and the Netherlands—had authorized gay marriages. In the United States, the ruling created a strong backlash among religious leaders and political opponents. In his 2004 State of the Union Address, President George W. Bush declared that a constitutional amendment preserving traditional marriage would be the “only alternative left” if “activist judges” continued to thwart the people’s will. With public opinion polls showing little support for same-sex marriage, several states passed nonbinding resolutions demanding Congress enact such an amendment, but it did not garner enough votes in the House of Representatives to pass.⁷⁹

Local officials, however, began issuing marriage licenses to gay and lesbian couples. Subsequently, the courts voided them in California, New Mexico, New York, and Oregon. In response, opponents of homosexual rights turned to the ballot box and pressured state legislatures to pass laws and constitutional amendments to bar same-sex marriages. By 2004, anti-gay marriage amendments to state constitutions had been enacted in thirteen states. Within five years of *Goodridge*, more than twenty-five states had enacted similar prohibitions; before *Goodridge*, only three states—Alaska, Nebraska, and Nevada—had constitutional bans on homosexual marriages.⁸⁰

In light of these developments, the progress toward judicially sanctioned same-sex marriage remained uneven, though public opposition dramatically increased after 2006.⁸¹ Yet, public opinion polls found increasing

Mike Luckovich Editorial Cartoon used with the permission of Mike Luckovich and Creators Syndicate. All rights reserved.



Political cartoon depicting growing public support for same-sex marriage.

support for gay marriage or civil unions. Also, there was a growing recognition of “relationship equality policies” in a variety of progressive venues—by 2006, several hundred Fortune 500 companies gave their employees health care plans for same-sex domestic partners, and by 2008, fifteen states enacted similar benefits for public employees. Several states enacted enhanced punishments for antigay “hate crimes,” and many others passed antidiscrimination laws applying to sexual orientation. While the different signals emerging from the judiciary may have complicated reform efforts, *Lawrence* and *Goodridge* undeniably encouraged the national lesbian, gay, bisexual, and transsexual (LGBT) community to advance its political agenda.⁸²

By 2009, the Connecticut, California, and Iowa Supreme Courts each interpreted its state constitution to recognize same-sex marriages.⁸³ While the Connecticut ruling was accepted by legislature and a majority of voters, the California and Iowa decisions generated a substantial political backlash that reverberated across the nation. Whereas California voters approved of a constitutional amendment banning same-sex marriage (Proposition 8), Iowa voters removed three justices from the state supreme court in the 2010 retention elections. Also, the remaining four Iowa justices were targeted for impeachment and salary cuts by some Republican legislators, though those efforts failed. These developments were accompanied by a sharp decline in public opinion polls supporting gay marriage and Maine’s ratification of a constitutional amendment banning them. Legislative bills to legalize same-sex marriages also failed in New York and New Jersey.⁸⁴

Subsequently, however, the Supreme Court handed down two rulings that significantly altered the legal and political landscape. *U.S. v. Windsor* (2013)⁸⁵ challenged the constitutionality of the federal DOMA law, and *Hollingsworth v. Perry* (2013)⁸⁶ challenged California’s antigay Proposition 8. In *Windsor*, in a 5:4 ruling with Justice Kennedy joining his four liberal colleagues (Justices Ginsburg, Breyer, Sotomayor, and Kagan), the Court held that DOMA’s Section 3, which defined marriage as only between heterosexuals, violated due process and equal protection because it discriminated against same-sex couples who were legally married in states that recognized those unions. In *Hollingsworth*, another bare majority decision, Chief Justice

Roberts—joined by only one conservative (Justice Scalia) and three liberals (Justices Ginsburg, Breyer, and Kagan)—ruled that supporters of Proposition 8, who intervened in the suit when state officials refused to defend the controversial initiative in the litigation, lacked standing to bring the suit in order to force its implementation. While the Court did not directly address the constitutionality of same-sex marriages, *Hollingsworth* left intact the lower federal court decisions declaring Proposition 8 unconstitutional. For some scholars, *Windsor* “alter[ed] the terms of the debate” over gay rights because same-sex couples could no longer be denied federal rights and benefits.⁸⁷

Nonetheless, the same-sex marriage controversy remains politically volatile and subject to ongoing litigation in state and federal courts. Arguably, public acceptance of nontraditional relationships continues to grow, as by January 2015 some thirty-five states have recognized same-sex marriages based on state laws and judicial decisions. However, in light of *Hollingsworth*, *Windsor*, and other precedents that support the recognition of same-sex marriages, the state bans against them continue to be challenged and ultimately will force the Court to rule on their constitutionality.⁸⁸ In short, the politics of gay rights and the controversy over same-sex marriages underscore that the capacity of courts to forge social change is contingent upon whether its decisions are in line or out of step with prevailing dominant political coalitions and public opinion (for further discussion, see the “Contemporary Controversies Over Courts: Do Courts Forge Major Social Change?” box in this chapter).⁸⁹

THE LIMITATIONS OF JUDICIAL POWER

As the abortion, school desegregation, affirmative action, and same-sex marriage controversies demonstrate, courts are often asked to forge political and social change. They may do so, but with mixed results. As these controversies illustrate, judicial power is subject to a variety of internal and external constraints that limit the impact of judicial policymaking.

Internal Constraints

A number of informal norms and professional constraints limit judicial policymaking. These “internal” constraints stem from the personal values of judges, shared conceptions of collegiality, and informal traditions defining proper judicial behavior. A fundamental maxim, though, is the faithful adherence to the judicial oath. As Chief Justice John Marshall put it, the Constitution was thought of by the Framers as “a rule for the government of courts.”⁹⁰ On assuming office, all judges vow to uphold the Constitution and the rule of law. Hence, they have a duty to follow what the founding document says in discharging their official duties, notwithstanding their personal feelings about a case and its public policy implications.

So, too, ingrained conceptions of judicial philosophy and deference to court-generated norms, procedures, and traditions incline judges not to “yield to spasmodic sentiment, to vague and unregulated benevolence” and compel them to “draw . . . inspiration from consecrated principles.”⁹¹ In other words, judicial norms reinforce basic notions of judicial integrity and deference to duly enacted statutes and institutional rules, as well as promote adherence to precedent.⁹²

Judges understand these restrictions and consider them seriously in judging. “Judges have to look in the mirror at least once a day, just like everyone else,” federal appellate Judge Alex Kozinski observed, and “they have to like what they see.”⁹³ In other words, self-respect is another powerful constraint on judicial behavior because it forces judges to base their decisions on legal reasons that must withstand scrutiny from peers and the test of time. Self-respect thus works in tandem with the fear of being chastised by colleagues, either

internally or by appellate judges who have the power to reverse lower court decisions. Consequently, judges deviating too far from the law or precedent may also damage professional reputations.⁹⁴

External Restraints

Besides internal constraints, the structural politics of constitutionalism and the separation of powers operate as broad “external” limitations on judicial decision making. Courts are subject to an array of checks imposed by legislatures, the executive branch, interest groups, and public opinion. One federal court of appeals judge perceived Congress’s enactment of the Civil Rights Act of 1991 as such a check because it overturned several Supreme Court opinions relating to employment discrimination. Another example is the decision of California voters to oust at least three state supreme court justices in judicial elections, because of their rulings on the death penalty.⁹⁵ In 2005, a group known as the South Dakota Judicial Accountability unsuccessfully pushed for a state constitutional amendment to eliminate immunity for state judges and permit citizens to sue and criminally prosecute judges who were considered to violate the law in their decisions.⁹⁶ These illustrations, and countless others, highlight that federal and state judiciaries are ultimately accountable to politicians and the public for their rulings, especially in controversial areas of public policy.

Restraints Imposed by Legislatures. Legislatures have a variety of options that can be used to curb courts that stray too far. They may (1) amend their constitutions to reverse unpopular judicial decisions, (2) change the court’s size or jurisdiction by legislation, (3) enact legislation that “overturns” unpopular judicial decisions, or (4) simply ignore judicial rulings and not comply with them. They may also use other tactics to pressure courts, such as attempting to influence judicial appointments and reelection, or imposing term limits on judges. They also may reduce funding for courts or refuse to provide salary increases. In extreme instances of political retribution, legislatures may opt to initiate impeachment proceedings or, more commonly, to at least threaten to use them against particular judges.

Still, constitutional amendments remain the most effective court-curbing method, although it is a cumbersome and lengthy process to implement. Amendments have been regularly introduced in order to reverse or revise judicial decisions relating to hot-button topics such as abortion, flag burning, busing, and same-sex marriages; but only a small percentage have been ratified.

Amending the constitution has the symbolic effect of representing the people’s will while also reigning in courts that threaten to go too far ahead of prevailing public opinion in local or national political communities. In the aftermath of *Goodridge*, for instance, one-half of the states put amendments on the ballots that would bar same-sex marriages, and none were rejected by the voters.⁹⁷ On the federal level, constitutional amendments have also overturned judicial rulings (see Table 10.4). Still, out of the tens of thousands of proposed constitutional amendments introduced in Congress, only seven have overridden rulings of the Supreme Court, with the passage of the Eleventh, Thirteenth, Fourteenth, Sixteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.

Besides amending constitutions, legislatures may limit courts by altering their size, changing their jurisdiction, or redrawing jurisdictional boundaries. In the 1970s, for example, the Nixon administration convinced conservatives in Congress to contest the liberal direction of the Court of Appeals for the D.C. Circuit by taking away its authority to act as a de facto “state” supreme court in criminal appeals, principally because the D.C. Circuit was perceived to favor criminal defendants and protection of their constitutional rights.

TABLE 10.4

Amendments Overturning Unpopular U.S. Supreme Court Decisions

Supreme Court Opinion	Opinion's Impact	Constitutional Amendment(s) and Effect
<i>Chisholm v. Georgia</i> , 2 U.S. 419 (1793)	Allowed citizens to sue state governments in federal courts	Eleventh Amendment (1795) provided sovereign immunity for states in lawsuits commenced in federal court by state citizens
<i>Dred Scott v. Sandford</i> , 60 U.S. 693 (1857)	Denied emancipated blacks full citizenship rights	Thirteenth (1865) and Fourteenth Amendments (1868) abolishing slavery and giving blacks full citizenship rights
<i>Pollock v. Farmers' Loan and Trust Company</i> , 157 U.S. 429 (1895)	Disallowed imposition of a federal income tax	Sixteenth Amendment (1913) enacted federal income tax
<i>Minor v. Happersett</i> , 88 U.S. 162 (1875)	Denied women the right to vote under state law	Nineteenth Amendment (1922) allowed women the right to vote in state and federal elections
<i>Breedlove v. Suttles</i> , 302 U.S. 77 (1937)	Permitted use of poll tax in elections under state law	Twenty-Fourth Amendment (1964) barred use of poll tax in state and federal elections
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970)	Allowed Congress to lower the voting age to eighteen for federal, but not state, elections	Twenty-Sixth Amendment (1971) allowed voting age to be lowered to eighteen in state and federal elections

Source: David M. O'Brien, *Storm Center: The Supreme Court in American Politics*, 10th ed. (New York: Norton, 2014), 362.

Under the pretext of court reform, Congress thus enacted the “D.C. Circuit Crime Bill,” legislation that removed criminal appeals from the docket and, in turn, replaced that jurisdiction to hear federal agency appeals.⁹⁸

Likewise, in the 1980s, the Fifth Circuit, which then spanned a number of southern states, was split in two, in part because federal judges in that region were sympathetic to black civil rights. As a result, a new circuit, the Eleventh, was created in an attempt to defuse the old Fifth Circuit’s authority.⁹⁹ Circuit-splitting, or the process of reconfiguring judicial boundaries, remains a popular court-curbing tool in the new millennium as well because conservatives in Congress have reignited legislation to divide the Ninth Circuit in late 2005, the nation’s largest appellate court covering several western states. As in the cases of the D.C. and Fifth Circuits, splitting the Ninth is purportedly justified by claims that the division would streamline judicial operations; but studies have shown that the proposal is driven by potent political constituencies seeking to diminish the power of liberal California judges to decide cases favoring criminal defendants’ rights and

broadening environmental protection, and others that strike down the Pledge of Allegiance on the grounds of religious freedom.¹⁰⁰

Attempts to reign in courts by statutory overrides may not always succeed, especially if they threaten the power of courts to be the final arbiter of constitutional disputes. After the Court's ruling in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990) (*Oregon*),¹⁰¹ which cut back on the free exercise of religion, Congress enacted the Religious Freedom Restoration Act (RFRA), reinstating the pre-existing legal test governing religious freedom in cases prior to *Oregon v. Smith*. But, shortly thereafter, the Rehnquist Court ruled in *City of Boerne v. Flores* (1997)¹⁰² that Congress exceeded its authority in enacting the RFRA under power to "enforce," by "appropriate legislation," the Fourteenth Amendment. The Court justified its ruling on the basis of judicial supremacy and its power to determine the scope and meaning of constitutional law. Thus *Boerne* is an example of the judiciary rebuffing a bold attempt by Congress to override a decision of the Court on constitutional law.

The historic struggles over legislative versus judicial supremacy underscore that courts and legislatures are engaged in an ongoing constitutional dialogue to set legal and public policy.¹⁰³ The Court has struck down an estimated 76 to 186 congressional acts in whole or in part between 1789 and 2013.¹⁰⁴ However, other studies find that Congress has overridden 275 Supreme Court statutory construction decisions between 1967 and 2011.¹⁰⁵ Of course, Congress has overridden the Court's decisions due to pressures of interest groups and political parties in a dynamic, open, and fluid political process.¹⁰⁶

Finally, as already indicated, other political branches may limit judicial power by simply ignoring rulings from the judiciary. As passive institutions, courts have little power to enforce their own decisions. Perhaps the most famous example of this principle is President Andrew Jackson's refusal to abide by *Worcester v. Georgia* (1832),¹⁰⁷ a Supreme Court decision favoring the rights of Cherokee Indians over the sovereign rights of Georgia. President Jackson reportedly rebuked the Court, saying, "John Marshall made his decision—now let him enforce it!"¹⁰⁸ The strain of such interbranch relations continues today, and at all levels of the state and federal courts. In Ohio, for instance, the state supreme court ruled in *DeRolph v. Ohio* (1997)¹⁰⁹ that the method of funding public schools violated the state constitution by creating an unequal disparity between rich and poor school districts. Yet, that decision has never been enforced because of fierce legislative opposition and partisan changes in the court's composition.¹¹⁰

Restraints Imposed by the Executive Branch. While governors and the president, along with their subordinates (attorneys general, agency counsel, and cabinet officials) have limited authority to curb courts, the main method remains judicial recruitment in the states and the federal appointment process (discussed in Chapter Four). The pervasive impact of state judicial elections diminishes executive control over the judiciary, although governors may still influence the composition of the bench by making recess appointments during vacancies or, conversely, by affecting decisions about who serves on judicial nomination commissions. Likewise, with few exceptions, presidents have not been successful in entirely transforming the federal courts. In the beginning of the republic, Presidents George Washington and John Adams were able to entrench the bench with Federalist appointments; and President Franklin D. Roosevelt's long tenure in the Oval Office over four terms in the 1930s and 1940s gave him the unprecedented chance to fill eight vacancies on the Supreme Court.¹¹¹ Still, presidents, especially those serving two terms, have had more success in packing lower federal courts because they have more opportunities to fill vacancies with like-minded judges.

Besides appointments, presidents and governors may undermine judicial policymaking in subtle ways by using litigation to advance their own political agendas or, conversely, to resist certain unpopular rulings.

Political support for the president's agenda may come from the use of a sympathetic judiciary that is allied with the many of the same litigation goals as the prevailing administration.¹¹² Similarly, government lawyers appointed by the president—most notably the solicitor general and the attorney general—have a significant influence on “repeat players” in the judicial and governmental process (as discussed in earlier chapters). It is not an overstatement to say that the president, either directly or indirectly, controls litigation policy in the federal bureaucracy,¹¹³ and thereby influences judicial decision making over vast areas of law, ranging from abortion, affirmative action, the death penalty, and religious freedom, to environmental protection, consumer rights, and antitrust law.

Restraints Imposed by Public Opinion. In addition, the judiciary is always accountable to the people. Scholars have demonstrated that courts are sensitive to public opinion in different ways. Judges are responsive to public views as part of the information they gather in deciding cases and making legal policy.¹¹⁴ Of course, public opinion may generate resistance to judicial policymaking, especially during times of political upheaval, such as partisan realignments, or during critical elections.¹¹⁵ Generally, though, courts tend to follow the election returns and to dispense justice in accordance with the policy preferences of dominant national coalitions. In this sense, courts are simply one element in an ongoing “constitutional dialogue” in American democratic politics.¹¹⁶ Even so, scholars remain divided on the related question of whether courts are institutionally capable of creating major social change. (For further discussion, see “Contemporary Controversies Over Courts: Do Courts Forge Major Social Change?”)

CONTEMPORARY CONTROVERSIES OVER COURTS

DO COURTS FORGE MAJOR SOCIAL CHANGE?

In one of his annual reports on the state of the federal judiciary, Chief Justice William H. Rehnquist focused “on the recently mounting criticism of judges for engaging in what is often referred to as ‘judicial activism,’” though he also emphasized that “criticism of judges and judicial decisions is as old as our republic.” The Marshall Court (1801–1835) was sharply criticized, and as the chief justice noted, it took a generation for the Court’s reputation to recover after its infamous ruling on slavery in *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393 (1857). The Court’s invalidation of early New Deal and other progressive legislation culminated in President Franklin D. Roosevelt’s court-packing plan and the “constitutional crisis” of 1937. Over sixty years ago, the landmark school desegregation decision, *Brown v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954), sparked massive resistance and a long-running controversy over the implementation of its mandate. More recently, cases such as *Goodridge v. Department of Health*, 798 N.E.2d 941 (Mass. 2003), and other decisions, register the role state supreme courts have played in advancing gay rights and same-sex marriage, and also have produced significant political and social backlash.

Along with the issue of same-sex marriage, judicial rulings on abortion, health care, immigration, and religious freedom have intensified contemporary controversies over the role of courts. Sometimes, judicial outcomes even generate sharp disagreements within courts and amongst colleagues. In 2013, Justice Ruth Bader Ginsburg, one of the Court’s leading liberals, said in an interview with a *New York Times* reporter that the Roberts Court is “one of the most activist courts in history.” She explained that she made a “mistake” in joining an earlier opinion that later helped the Court to strike down a key provision of the Voting Rights Act of 1965 in *Shelby County v. Holder*, 570 U.S. 2 (2013). She characterized, *Shelby County* as a ruling that is “stunning in terms of activism.” Such high-profile criticisms fuel the debate about whether the judiciary is an “activist” body that disregards the rule of

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law; an "imperial" institution in overturning federal, state, and local laws; leading a "vital national seminar" that engages the country in a constitutional dialogue within a pluralistic political system; usually "behind the times" and reinforcing the dominant national coalition; or, finally, a "hollow hope" in terms of ensuring minority rights and bringing about major social changes.

"Imperial Judiciary"?

Whereas liberals criticized a conservative Court for invalidating progressive legislation before 1937, afterward conservatives turned the table and attacked courts during the last fifty years for "activist" liberal rulings on individual rights, due process, and the equal protection of the law. In a very influential article in *Public Interest*, "Towards an Imperial Judiciary?," Harvard University sociologist Nathan Glazer argued that "American courts, the most powerful in the world . . . are now far more powerful than ever before. . . . And courts, through interpretation of the Constitution and the laws, now reach into the lives of the people, against the will of the people, deeper than they had in American history."

Subsequently, conservative scholars, jurists, and politicians expanded and advanced Glazer's argument in two different directions. On the one hand, many conservatives contending that we have "an imperial judiciary" follow Judge Robert H. Bork in claiming that courts have forged major social changes with their rulings on desegregation, abortion, affirmative action, school prayer, the rights of the accused, and equal protection for women and homosexuals. In their view, over the last fifty years, unelected judges have increasingly functioned antidemocratically, and their rulings are countermajoritarian in thwarting popular opinion. Moreover, in light of the Court's and federal judiciary's move in more conservative directions since the 1980s, even some liberal scholars agree and have lamented recent conservative "judicial activism" and the judiciary's antidemocratic role.

On the other hand, some conservatives and scholars argue that the judiciary lacks the resources and managerial expertise to forge significant social change in, for example, overseeing the supervision of public school desegregation, improving the conditions of prisons, and reforming law enforcement policies. In short, courts lack not only the legitimacy but also the institutional capacity, expertise, and resources to bring about coherent social change.

A "Vital National Seminar," "Behind the Times," or a "Hollow Hope"?

By contrast, writing in the 1960s at the height of massive resistance to *Brown v. Board of Education*, Yale law school professor Eugene V. Rostow countered conservative criticisms of the judiciary by arguing that the Court engages the country in a "vital national seminar" over constitutional values. In his words, "The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar." Rostow highlighted the fact that

the process of forming public opinion in the United States is a continuous one with many participants—Congress, the President, the press, political parties, scholars, pressure groups, and so on. . . . The reciprocal relation between the Court and the community in the formulation of policy may be a paradox to those who believe that there is something undemocratic in the power of judicial review. But the work of the Court can have, and when wisely exercised does have, the effect not of inhibiting but of releasing and encouraging the dominantly democratic forces of American life.

Other scholars, such as historian Louis Fisher, have further developed the argument that the Court's rulings, along with those of state and federal judiciaries, engage other political branches and the country in a constitutional dialogue over the direction of law and public policy. They underscore the often neglected but important role of state legislatures, Congress, the executive branch, and other political institutions and organizations within a pluralistic political system in determining the direction of law and social change.

Yet, Yale University political scientist Robert Dahl took a different direction in charging that the Supreme Court is generally in tune with the dominant national political coalition, and hence it is not as counter-majoritarian as conservatives claim. "By itself," he concluded, "the Court is almost powerless to affect the course of national policy." On the basis of an examination of the Court's invalidation of congressional legislation, Dahl found that Congress ultimately prevailed 70 percent of the time. Congress was able to do so by reenacting legislation and because of changes in the composition and direction of the Court. In other words, on major issues of public policy, Congress is likely to prevail or at least temper the impact of the Court's rulings.

However, the Court forges public policy not only when invalidating federal legislation but also when overturning state and local laws, and Dahl failed to consider that important fact. The continuing controversies over decisions invalidating state and local laws on abortion, school prayer, and gay rights are a measure of how the Court's striking down state and local laws may elevate issues to the national political agenda.

Nonetheless, a number of scholars have recently followed Dahl in maintaining that, contrary to conservatives who charge that we have an "imperial judiciary," the Court largely reinforces the policy preferences of dominant national political coalitions rather than forging major social change. Put differently, the Court usually only reaches out to bring "outliers" into line with an emerging or the dominant national consensus. Among others, for one, law school professor Michael J. Klarman contends that the Court has not brought about major social changes. Instead of forging "countermajoritarian revolutions" with its rulings on civil rights and liberties, the Court has largely followed social changes in tune with an emerging national consensus. He contends that

the modern Court's individual rights jurisprudence can be usefully distilled into two general categories. First, . . . frequently . . . the [court seizes] upon a dominant national consensus and impos[es] it on resisting local outliers. Cases illustrating this pattern include *Griswold v. Connecticut*, 381 U.S. 479 (1965). . . . Second, . . . the Court intervenes . . . where the nation is narrowly divided—racial segregation in 1954, the death penalty in 1972, abortion in 1973, affirmative action in 1978, and . . . sexual orientation in 1986. On these occasions, the justices seem, whether consciously or not, to be endeavoring to predict the future.

In *From the Closet to the Altar* (2013), Klarman strikes a similar tone in conceding that "gay marriage litigation has undeniably advanced the cause of gay rights," but also that "dramatic social change does not happen until the people begin contemplating and discussing it."

Still other scholars, such as Gerald N. Rosenberg, in his book *The Hollow Hope: Can Courts Bring About Social Change?*, go even further in claiming that "courts can almost never be effective producers of significant social reform." *Brown's* failure to achieve widespread desegregation in the following decades, for instance, remains instructive, Rosenberg contended, in developing a model of judicial policymaking based on two opposing theories of judicial power. On the one hand, a "constrained court" theory posits that three institutional factors limit judicial policymaking: "the limited nature of constitutional rights," "the lack of judicial independence," and "the judiciary's lack of powers of implementation." On the other hand, a "dynamic court theory" emphasizes the judiciary's freedom "from electoral constraints and [other] institutional arrangements that stymie change" and thus enable the courts to take on issues that other political institutions might not or cannot. But neither theory is completely satisfactory, according to Rosenberg, because occasionally the Court does bring about social change. The Court may do so when the three institutional restraints identified with the constrained court theory are absent and at least one of the following conditions exists to support judicial policymaking when other political institutions and actors offer either (1) incentives or (2) costs to induce compliance; (3) "when judicial decisions can be implemented by the market"; or (4) when the Court's ruling serves as "a shield, cover, or excuse, for persons crucial to implementation who are willing to act." On the basis of the resistance to *Brown's* mandate, Rosenberg concluded that "*Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform." Likewise, in regard to the negative

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backlash same-sex marriage litigation generated in the states and across the country, Rosenberg determined that “there is no reason why the constraints and conditions that limit federal courts from producing significant social reform should not apply to state courts as well.” In sum, conservatives’ charges of “an imperial judiciary” are sometimes exaggerated, whereas liberals may be misguided in looking to the courts to bring about major social changes.

For further reading, see Chief Justice William H. Rehnquist, “2004 Year-End Report on the Federal Judiciary” (January 1, 2005), available at www.supremecourt.gov/publicinfo/year-end/2004year-endreport.pdf (last retrieved July 29, 2014); Adam Liptak, “Court Is ‘One of Most Activist,’ Ginsburg Says, Vowing to Stay,” *New York Times* (August 24, 2013), available at www.nytimes.com (last retrieved July 29, 2014); William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995); Nathan Glazer, “Towards an Imperial Judiciary?” *The Public Interest* 104 (1975), 106; Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990); Donald L. Horowitz, *The Courts and Social Policy* (Washington, D.C.: The Brookings Institution, 1977); Eugene V. Rostow, *The Sovereign Prerogative: The Supreme Court and the Quest for Law* (New Haven, Conn.: Yale University Press, 1962), 167; Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton, N.J.: Princeton University Press, 1988); Robert Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,” *Journal of Public Law* 6 (1957), 279, 293; Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (New York: Oxford University Press, 2013); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 2nd ed. (Chicago: University of Chicago Press, 2008), 35–36, 340; and Robert J. Hume, *Courthouse Democracy and Minority Rights: Same-Sex Marriage in the States* (New York: Oxford University Press, 2013).

CHAPTER SUMMARY

Appellate courts are agents of legal and political change. Under the principle of judicial federalism, judicial policy is made by state and federal appellate courts. Judicial policymaking is controversial because critics assert that judges engage in “judicial activism” or “results-oriented” jurisprudence in forging social policy, as with imposing restrictions on public school funding, for example, or ruling on abortion rights, affirmative action programs, and same-sex marriages.

The concept of “judicial impact” is complex. Since courts are not “self-starters,” the enforcement of their rulings depends on the responses of government officials and private entities and, ultimately, public opinion. The impact of major judicial policymaking is exemplified by the controversies over school desegregation in the aftermath of *Brown v. Board of Education* (1954) and the struggle to win legal recognition for same-sex marriages after *Lawrence v. Texas* (2003) and *Goodridge v. Department of Health* (2003). In short, the judiciary cannot fully implement its policies without the sustained cooperation of other political branches and public support.

There are internal constraints and external restraints on judicial power. Internally, judges are mindful of judicial norms, principles of judicial philosophy, and informal traditions of collegiality that define proper judicial behavior and influence judicial decision making. Externally, the judiciary is subject to various checks by legislatures, the executive branch, interest groups, and public opinion.

KEY QUESTIONS FOR REVIEW AND CRITICAL ANALYSIS

1. What are the different constraints and restraints on state versus federal judges?
2. Explain and contrast the concepts of “judicial self-restraint” and “judicial activism.” What contrasting examples would you give, and why?
3. What are the most effective “internal” constraints or “external” restraints on judicial power?
4. Can and should courts attempt to forge social change? In what areas has the judiciary appeared to try to do so?

WEB LINKS

1. Judicial Watch (www.judicialwatch.org)
 - A conservative organization that strives to provide transparency to legal and judicial developments through public outreach, litigation, and educational projects.
2. Justice at Stake (www.justiceatstake.org)
 - A liberal organization that supports litigation, public outreach, and education about progressive issues relating to judicial reform, judicial selection, civil rights and liberties, and special interest group activities.
3. Washington Legal Foundation (www.wlf.org)
 - A conservative public interest law and policy center engaged in litigation, public outreach, and educational activities.
4. American Civil Liberties Union (ACLU) (www.aclu.org)
 - A major liberal organization devoted to individual rights and progressive reforms through litigation, public outreach, and educational activities.

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ENDNOTES

1. Alexander Hamilton, "Federalist No. 78," in *The Federalist Papers*, ed. Clinton Rossiter (New York: Mentor, 1961), 465.
2. In 2011, Congressman Jim Sensenbrenner (R-WI) and Senator Chuck Grassley (R-IA) sponsored legislative proposals to create an Inspector General to monitor "waste, fraud and abuse with the federal judiciary." Jim Sensenbrenner, "Press Release and Statements: Sensenbrenner, Grassley Work to Bring Transparency, Accountability to Federal Judiciary (February 15, 2011)," available at <http://sensenbrenner.house.gov/news/documentsingle.aspx?DocumentID=225193> (last retrieved June 16, 2014); Jay L. Jackson, "The Siege on State Courts," *ABA Journal* 99 (2013), 54–61 (reporting several states use chastisement, salary cuts, and removal from office as measures to retaliate against unpopular state judge opinions). See also Ruth Marcus, "Booting the Bench," *Washington Post* (April 11, 2005), A19. See also Pamela A. MacLean, *The National Journal* (May 5, 2005), available at www.law.com (last retrieved May 27, 2005).
3. Benjamin Cardozo, *The Nature of the Judicial Process* (New Haven, Conn.: Yale University Press, 1921), 141.
4. See, e.g., Herbert Weschler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959), 1–35.
5. See Stephanie A. Lindquist and Frank B. Cross, *Measuring Judicial Activism* (New York: Oxford University Press, 2008), 39; and Wayne Justice, "The Two Faces of Judicial Activism," in *Judges on Judging: Views From the Bench*, 4th ed., edited by David M. O'Brien (Thousand Oaks, Calif.: CQ Press, 2013), 44.
6. Adam Liptak, "Court Under Roberts Is Most Conservative in Decades," *New York Times* (July 24, 2010), available at www.nytimes.com (last retrieved July 25, 2010); Lee Epstein, William M. Landes, and Richard A. Posner, "How Business Fares in the Supreme Court," *Minnesota Law Review* 97 (2013), 1431–72. See also Lindquist and Cross, *Measuring Judicial Activism*, 1–9.
7. Learned Hand, "Sources of Tolerance," *University of Pennsylvania Law Review* 79 (1930), 1, 11–12. See also Keenan D. Kmiec, "The Origin and Current Meanings of 'Judicial Activism,'" *California Law Review* 92 (October 2004), 1441, 1463–77 (analyzing activism and judicial role); and Frank H. Easterbrook, "Do Liberals and Conservatives Differ in Judicial Activism?" *Colorado Law Review* 73 (Fall, 2002), 140 (labeling *activism* as a "notoriously slippery" term).
8. Lindquist and Cross, *Measuring Judicial Activism*, 33 (listing studies in Table 1). Lindquist and Cross also conclude in an empirical study that "judicial activism [is] best viewed as a multidimensional concept." *Ibid.*, 133.
9. *Brown v. Board of Education*, 347 U.S. 483 (1954), 493.
10. *Serrano v. Priest*, 487 P.2d 1241 (1971).
11. *Robinson v. Cabill*, 287 A.2d 187 (1972).
12. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).
13. *San Antonio Independent School District*, 24, 31, 33, 40. Notably, some scholars have challenged this interpretation by asserting there is a recognizable federal right to an adequate education in the U.S. Constitution. See Barry Friedman and Sara Solow, "The Federal Right to an Adequate Education," *George Washington Law Review* 81 (2013), 92–155.
14. Michael A. Rebell, "Educational Adequacy, Democracy, and the Courts," in *Achieving High Educational Standards for All: Conference Summary (2002)*, available at www.schoolfunding.info/resource_center/research/adequacychapter.pdf (last retrieved July 24, 2014), 226–27.

15. Most research characterizes school finance reform in terms of three “waves” of judicial rulings. The first began in the late 1960s in which plaintiffs relied upon the U.S. Constitution’s Equal Protection Clause to argue that funding schemes were discriminatory. After the Supreme Court’s *Rodriguez* (1973) decision, the second wave concentrated on relying upon state equal protection clauses and the inequities caused by property-based funding mechanisms. After *Rose* (1989), plaintiffs in the third wave based their claims on education clauses in state constitutions. Richard Briffault, “Adding Adequacy to Equity,” in *School Money Trials: The Legal Pursuit of Educational Adequacy*, edited by Martin R. West and Paul E. Peterson (Washington, D.C.: Brookings Institution Press, 2007), 25. See also Rebell, “Educational Adequacy, Democracy, and the Courts,” 229–34.
16. Rebell, “Educational Adequacy, Democracy, and the Courts,” 229–34. Other scholars observe that *Rose v. Council for Better Education*, 790 S.W.2d 186 (1989), along with *Helena Elementary School District No. 1 v. State*, 769 P.2d 684 (Mont. 1989), and *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989), made adequacy, instead of equity, the predominant theory underlying plaintiffs’ victories. The “adequacy” case trilogy was a spark to the reform movement because six years had passed after the last plaintiffs’ victory, and the highest courts in several states upheld their state school finance systems. William E. Thro, “Judicial Humility: The Enduring Legacy of *Rose v. Council for Better Education*,” *Kentucky Law Journal* 98 (2009–2010), 717–38.
17. National Education Access Network, “Education Adequacy Liability Decisions Since 1989 (June 2010),” available at www.schoolfunding.info/litigation/litigation.php3 (last retrieved July 24, 2014). See also Thro, “Judicial Humility: The Enduring Legacy of *Rose v. Council for Better Education*,” 720–21. After *Rose*, fifteen states invalidated their state school funding systems, whereas eighteen upheld them. *Ibid.*, 721 n. 18. As a result, scholars generally acknowledge that the shift to adequacy had a significant impact on generating more plaintiff victories than in the past. Briffault, “Adding Adequacy to Equity,” 26.
18. In the underlying litigation of *Rose*, after finding liability, the trial court judge issued a “stay” in order to conduct a thorough investigation about how to devise a remedy. During the six-month stay, the trial judge appointed a select committee to construct a remedy to fix the problem of insufficient school resources. After five highly publicized hearings across the state, the committee recommended standards that constituted an “adequate” education, and many of those were adopted by the Kentucky Supreme Court. Rebell, “Educational Adequacy, Democracy, and the Courts,” 229–30, 235.
19. Rebell, “Educational Adequacy, Democracy, and the Courts,” 235.
20. In *Gannon*, the court declared the adequacy element is met when the funding system for grades K–12 is structurally and reasonably calculated to meet the standards set out in the Kentucky Supreme Court’s *Rose* ruling, as codified in Kansas law; and the equity component is met through Gannon’s creation of a “new test” that obliges the legislature to give “school districts . . . reasonably equal access to substantially similar educational opportunity through similar tax effort.” Gordon L. Self, “Analysis of the Kansas Supreme Court’s Opinion in *Gannon v. State*, Case No. 109, 335 (March 7, 2014),” *Office of Revisor of Statutes, Legislature of the State of Kansas*, available at www.ksrevisor.org/rpts/gannon_v_state_analysis.pdf (last retrieved July 24, 2014). See also Joshua E. Weishart, “Transcending Equality Versus Adequacy,” *Stanford Law Review* 66 (2014), 477–544; Thro, 719 n. 7 (listing nearly forty states addressing school funding issues through litigation); and *Gannon v. State*, 298 *Kansas* 1107 (Kan. 2014).
21. By 2014, twelve states were actively engaged in defending their school funding systems (Kansas, Washington, Texas, California, Florida, New York, Arkansas, South Carolina, Arizona, Connecticut, Rhode Island, and North Carolina). Education Justice, “Many States Face School Funding Litigation: Update,” available at <http://education-justice.org> (last retrieved July 24, 2014). As of June 2010, the National Education Access Network listed thirteen states in the process of litigating the constitutionality of K–12 funding. Only five states, Delaware, Hawaii, Mississippi, Nevada, and Utah, have never had a funding lawsuit. National Education Access Network, “Litigations Challenging Constitutionality of K–12 Funding in the 50 States,” available at www.schoolfunding.info/litigation/litigation.php3 (last retrieved July 24, 2014).
22. See National Conference of State Legislatures, “Common Core State Standards (May 1, 2014),” available at www.ncsl.org/research/education/common-core-state-standards.aspx#1 (last retrieved July 24, 2014). U.S. Department of Education, “Race to the Top Fund,” available at www2.ed.gov/programs/racetothetop/index.html (last retrieved July 24, 2014).

23. Michael A. Rebell, "Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint," *Albany Law Review* 75 (2012), 1855–976. See also National Conference of State Legislatures, "Promises Versus Challenges Related to Implementing the Common Core Standards," available at www.ncsl.org/research/education/common-core-state-standards-promises-vs-challenges.aspx (last retrieved July 24, 2014) (identifying cost, along with the effect of federal legislation and general unknown policy consequences, as a few of the problems that will impede implementing the core standards).
24. Christopher Berry and Charles Wysong, "Making Courts Matter: Politics and the Implementation of State Supreme Court Decisions," *University of Chicago Law Review* 79 (2012), 1–27. The Alabama and Ohio cases are *Ex Parte Governor Fob James*, 836 So.2d 813 (Ala. 2002) and *State v. Lewis*, 789 N.E.2d 195 (Ohio 2003).
25. *McCullen v. Coakely*, 134 S.Ct. 2518 (2014).
26. *Schuette v. Coalition to Defend Affirmative Action*, 134 S.Ct. 1623 (2014).
27. In *Boyd v. United States*, 116 U.S. 616 (1886), the Supreme Court recognized privacy rights in the Fourth and Fifth Amendments in a search and seizure case. Thereafter, state courts began to recognize privacy, and by 1960, the right to privacy was recognized in over thirty states. David M. O'Brien, *Constitutional Law and Politics: Civil Rights and Civil Liberties* (Volume 2), 9th ed. (New York: Norton, 2014), 1312–13. By the mid-twentieth century, the Supreme Court also extended the right under the Fourteenth Amendment's due process clause to protect against governmental interference in areas of child rearing and, later, to reproductive rights and marriage interests. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court struck down a state law requiring parents to send their children to public instead of private schools because it restricted parental freedom to rear and educate offspring. Although *Buck v. Bell*, 274 U.S. 200 (1927), upheld a Virginia law authorizing the compulsory sterilization of mentally challenged individuals, in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court nullified a state law allowing for the sterilization of "habitual criminals." Several years later, interracial marriages were legally sanctioned by the reversal of a state miscegenation law in *Loving v. Virginia*, 388 U.S. 1 (1967).
28. *Griswold v. Connecticut*, 381 U.S. 479 (1963).
29. *Ibid.*, 484.
30. *Ibid.*, 520 (Black, J. dissenting).
31. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
32. *Ibid.*, 453 (Brennan, J.).
33. *Roe v. Wade*, 410 U.S. 113 (1973).
34. The movement to liberalize abortion laws prior to *Roe*, ironically, was a return to earlier pre-Civil War jurisprudence. By the mid-nineteenth century, most states permitted abortions until the first movement of the fetus, or "quickening"; and in jurisdictions criminalizing it, abortions were generally minor offenses. The growing pressure of the medical profession and antiabortionists induced states to ratchet up penalties and enforcement. By 1910, all states except Kentucky made abortions a felony, and a majority authorized them when it was necessary to save the mother's life. Still, in the 1960s and 1970s, the trend had begun to reverse itself as a minority of states condoned abortions in other circumstances, such as when the pregnancy was the result of a rape or incest, or when there was a likelihood of fetal abnormality. Four jurisdictions—Hawaii, Alaska, New York, and Washington—went so far as to abolish criminal penalties for abortions performed in the early stages of pregnancy. Barbara Hinkson Craig and David M. O'Brien, *Abortion and American Politics* (Chatham, N.J.: Chatham House Publishers, 1993), 9–10.
35. O'Brien, *Constitutional Law and Politics: Civil Rights and Civil Liberties*, 1319–20.
36. Bork, who was widely regarded as the new "swing vote" in replacing Justice Lewis Powell, generated intense interest group and media coverage because Bork had not only publicly denounced *Roe* but also intimated that he would vote to overturn it. As a result, Bork and the abortion issue polarized the nation. In the end, the pro-choice groups mobilized faster and better than their conservative counterparts, and they were instrumental in defeating Bork's claim to the bench.
37. Jack M. Balkin, "Roe v. Wade: An Engine of Controversy," in *What Roe v. Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision*, edited by Jack M. Balkin (New York: New York University Press, 2005), 11–13.

38. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
39. Balkin, “*Roe v. Wade*: An Engine of Controversy,” 17.
40. For example, a majority of states compel minors to notify their parents or obtain their consent before having an abortion. Only two states, plus the District of Columbia, permit all minors to consent to abortions. The Alan Guttmacher Institute, “An Overview of Minors’ Consent Law” (as of July 1, 2014), available at www.guttmacher.org/sections/by-type.php?type=spib (last retrieved July 25, 2014). In *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), a unanimous Roberts Court returned the case to the lower courts to reconsider whether New Hampshire’s law, which barred abortions for minors until forty-eight hours after a parent was notified, was appropriate because the law did not have a medical emergency exception to protect the pregnant teen’s health. The Court suggested that the entire law should be invalidated, however, if it did not have a medical exception.
41. The Alan Guttmacher Institute, “Bans on Partial Birth Abortion” (as of July 1, 2014), available at www.guttmacher.org/sections/by-type.php?type=spib (last retrieved July 25, 2014). See also O’Brien, *Constitutional Law and Politics: Civil Rights and Civil Liberties*, 1324–26.
42. As of July 1, 2014, thirty-two states have partial birth abortion bans, but all have some sort of health exception. Of the thirty-two, thirteen have been blocked or not in effect due to state court rulings. Of the remaining nineteen, seven remain unchallenged but are arguably constitutionally suspect under *Stenberg v. Carhart*, 530 U.S. 914 (2000). The Alan Guttmacher Institute, “Bans on Partial Birth Abortion” (as of July 1, 2014), available at www.guttmacher.org/sections/by-type.php?type=spib (last retrieved July 25, 2014). See also *Gonzalez v. Carhart*, 550 U.S. 124 (2007).
43. Tracy A. Thomas, “Back to the Future of Regulating Abortion in the First Term,” *Wisconsin Journal of Law, Gender, and Society* 29 (2014), 47–86. See also Juliet Eilperin, “Abortion Limits at State Level Return Issue to the National Stage,” *Washington Post* (July 5, 2013), available at www.washingtonpost.com (last retrieved July 25, 2014); L. J. Jackson, “A Right-to-Life Movement Reborn Friendlier State Legislatures Lead to a Rise in Anti-Abortion Legislation,” *ABA Journal* 97 (2011), 20; and Anonymous note, “After Ayotte: The Need to Defend Abortion Rights With Renewed Purpose,” *Harvard Law Review* 119 (2006), 2552–73.
44. Dennis Deslippe, *Protesting Affirmative Action: The Struggle Over Equality After the Civil Rights Revolution* (Baltimore: John Hopkins University Press, 2012), 19–32, 66–78, 210–11; Zoya Hasan and Martha C. Nussbaum, “Introduction,” in *Equalizing Access: Affirmative Action in Higher Education in India, United States, and South Africa*, eds. Zoya Hasan and Martha C. Nussbaum (Oxford: Oxford University Press, 2012).
45. Edmund Terence Gomez and Ralph Premdas, “Affirmative Action, Horizontal Inequalities, and Equitable Development,” in *Affirmative Action, Ethnicity, and Conflict*, eds. Mohammed Hazim Shah, A.B. Shamsul, and Terence Gomez (London: Routledge, 2013), 1–2, 5–7; Hasan and Nussbaum, “Introduction,” 4–7.
46. *Defunis v. Odegaard*, 416 U.S. 312, 336–337 (1974) (J. Douglas, dissenting).
47. Deslippe, *Protesting Affirmative Action*, 206–8, 210–17. See also *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
48. *Grutter v. Bollinger*, 539 U.S. 306 (2003). See also *Gratz v. Bollinger*, 539 U.S. 234 (2003).
49. *Parents Involved in the Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 799 (2006) (J. Stevens, dissenting); *ibid.*, 747 (C.J. Roberts Opinion for the Court); *ibid.*, 788 (J. Kennedy, concurring in part and in the judgment). See also *Brown v. Board of Education*, 347 U.S. 483 (1954).
50. *Fisher v. University of Texas at Austin*, 133 S.Ct. 2411, 2415 (2013) (J. Kennedy Opinion for the Court); *ibid.*, 2422 (J. Scalia, concurring); *ibid.*, 2422 (J. Thomas, concurring); and *ibid.*, 2422 (J. Ginsburg, dissenting).
51. *Fisher v. University of Texas at Austin*, 2014 WL 3442449 (July 15, 2014).
52. Veteran Supreme Court reporter Linda Greenhouse predicts that the Texas litigation in *Fisher* will end, but also observes that Edward Blum, a conservative who is “the frontman for a network of conservative foundations that channel money to his Project on Fair Representation,” is seeking “a new Abigail Fisher” to litigate the affirmative action issue again in the Supreme Court. Linda Greenhouse, “With All Due Deference: Ruling Defends Affirmative Action From New Challenges,” *New York Times* (op-ed, July 23, 2014), available at www.nytimes.com (last retrieved July 25, 2014).

53. See Bradley C. Canon and Charles A. Johnson, *Judicial Policies: Implementation and Impact*, 2nd ed. (Washington, D.C.: CQ Press, 1999), 2–3.
54. *Blakely v. Washington*, 542 U.S. 296 (2004). The Court based its holding on the principles first announced in *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
55. Jonathan H. Adler, “Why Did the Court Grant Cert. in *King v. Burwell*?” *Washington Post* (November 7, 2014), available at <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/07/why-did-the-court-grant-cert-in-king-v-burwell/> (last retrieved November 9, 2014).
56. *Brown v. Board of Education*, 347 U.S. 483 (1954).
57. *Plessy v. Ferguson*, 163 U.S. 537 (1896).
58. *Bolling v. Sharpe*, 347 U.S. 497 (1954).
59. *Brown v. Board of Education*, 349 U.S. 294 (1955), (Brown II).
60. O’Brien, *Constitutional Law and Politics: Civil Rights and Civil Liberties*, 1472.
61. As quoted in Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004), 324. See also Klarman, *From Jim Crow to Civil Rights*, 320, 344–45.
62. Klarman, *From Jim Crow to Civil Rights*, 362–63.
63. *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971); *Milliken v. Bradley*, 418 U.S. 717 (1974).
64. *Missouri v. Jenkins*, 495 U.S. 33 (1990).
65. *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991).
66. *Freeman v. Pitts*, 503 U.S. 467 (1992).
67. O’Brien, *Constitutional Law and Politics: Civil Rights and Civil Liberties*, 1477.
68. See, e.g., Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).
69. David M. O’Brien, *Storm Center: The Supreme Court in American Politics*, 10th ed. (New York: Norton, 2014), 336.
70. *Lawrence v. Texas*, 539 U.S. 558 (2003).
71. Bradley C. Canon and Charles A. Johnson, *Judicial Policies: Implementation and Impact*, 2nd ed. (Washington, D.C.: CQ Press, 1998).
72. *Lawrence v. Texas*, 539 U.S. 558 (2003).
73. *Bowers v. Hardwick*, 478 U.S. 186 (1986).
74. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Griswold v. Connecticut*, 381 U.S. 479 (1963); *Pierce v. Society of Sisters*, 268 U.S. 510 (1923).
75. In the words of dissenting Justice Antonin Scalia, *Lawrence* “leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples.” *Lawrence*, 540–41 (Scalia, J. dissenting).
76. See William N. Eskridge, Jr., *Equality Practice: Civil Unions and the Future of Gay Rights* (New York: Routledge, 2002), 16–82. Also, before *Lawrence*, two state appellate courts, in Vermont and Hawaii, and a lower court in Alaska extended some legal protections to homosexual relationships. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Sup.Ct 1998); *Baker v. Vermont*, 744 A.2d 864 (Vermont 1999). In both Hawaii and Alaska, however, the popular assembly subsequently amended their constitutions to limit marriage to opposite-sex couples. Jason Pierceson, *Same-Sex Marriage: The Road to the Supreme Court and Beyond* (Lanham, Md.: Rowman and Littlefield, 2014), 93–103.
77. Frederick Liu and Stephen Macedo, “The Federal Marriage Amendment and the Strange Evolution of the Conservative Case Against Gay Marriage,” *PS: Political Science & Politics* (April 2005), 211–15.
78. *Goodridge v. Department of Health*, 798 N.E.2d 941 (Mass. 2003). Shortly after *Goodridge*, the state senate drafted a “civil unions” bill and forwarded to the court for an advisory opinion about whether those arrangements complied

with *Goodridge*. The justices rejected civil unions because they reduced gays and lesbians to “second-class citizens.” This allowed Massachusetts to begin granting marriage licenses. Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (New York: Oxford University Press, 2013), 91–92. See also *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (2004).

79. Klarman, *From the Closet to the Altar*, 90–105.
80. Klarman, *From the Closet to the Altar*, 105–6. See also Kavan Peterson, “Same-Sex Unions—A Constitutional Race,” available at www.stateline.org (last retrieved August 30, 2005).
81. In 2006–2007, the Georgia, Maryland, New Jersey, New York, and Washington state supreme courts ruled against same-sex marriages under their state constitutions, whereas, in 2008–2009, Connecticut, California, and Iowa state supreme courts ruled in favor of it under their state constitutions. Moreover, though New Jersey’s high court did not find same-sex marriage to be a “fundamental right,” it held that denying same-sex state benefits was an equal protection violation. Pierceson, *Same-Sex Marriage*, 126–31, 151–59; Klarman, *From the Closet to the Altar*, 116 n. 142, 120–32.
82. Patrick J. Egan and Kenneth Sherrill, “Marriage and the Shifting Priorities of a New Generation of Lesbians and Gays,” *PS: Political Science & Politics* (April 2005), 229–32. See also Pierceson, *Same-Sex Marriage*, 151 (noting that “relationship equality policies” increased without help from the courts); Klarman, *From the Closet to the Altar*, 119 (surveying growing trend of public support for, and recognition of, same-sex legal rights and benefits).
83. *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384 (Calif. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).
84. Klarman, *From the Closet to the Altar*, 143–55; Pierceson, *Same-Sex Marriage*, 126–33, 154–60; see also Miranda Blue, “Iowa Republicans Threaten to Cut Salaries of Judges Who Backed Marriage Equality (April 24, 2013),” available at www.rightwingwatch.org (last retrieved July 28, 2014).
85. *U.S. v. Windsor*, 133 S.Ct. 2675 (2013).
86. *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013).
87. Pierceson, *Same-Sex Marriage*, 243.
88. See Robert Barnes, “Appeals Court Upholds Bans on Same-Sex Marriage for First Time,” *Washington Post* (November 6, 2014), available at www.washingtonpost.com (last retrieved November 10, 2014). See also Pierceson, *Same-Sex Marriage*, 248 (observing that the “right to travel,” as part of the Supreme Court’s Fourteenth Amendment privileges or immunities clause, is part of new litigation pressing for interstate recognition of same-sex marriages).
89. See Robert Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-maker,” *Journal of Public Law* 6 (1957), 279, 293.
90. *Marbury v. Madison*, 5 U.S. 137 (1803), 180.
91. Cardozo, *The Nature of the Judicial Process*, 141.
92. Henry J. Abraham, *The Judicial Process*, 7th ed. (New York: Oxford University Press, 1998), 359–60.
93. Alex Kozinski, “What I Ate for Breakfast and Other Mysteries of Judicial Decision-Making,” *Loyola of Los Angeles Law Review* 26 (Summer, 1993), 993, 994.
94. *Ibid.*, 994–95.
95. *Ibid.*, 995–96. Eskridge reports that the Civil Rights Act of 1991 overrode a total of twelve Supreme Court rulings. William N. Eskridge, Jr., “Overriding Supreme Court Statutory Interpretation Decisions,” *Yale Law Journal* 101 (November 1991), 331, 332 n. 4 (listing cases).
96. Associated Press, “Judges in S.D. May Lose Lawsuit Immunity,” *New York Times* (November 14, 2005), available at www.nytimes.com (last retrieved November 15, 2005).
97. See Graziella Romeo, “The Recognition of Same-Sex Couples’ Rights in the US Between Counter-Majoritarian Principle and Ideological Approaches: A State Level Perspective,” in *Same-Sex Couples’ Before National, Supranational and International Jurisdictions*, eds. Daniele Gall, Luca Paladini, and Pietro Pustorino (Berlin/Heidelberg: Springer, 2014), 21. See also Klarman, *From the Closet to the Altar*, 107–9.

98. Christopher P. Banks, *Judicial Politics in the D.C. Circuit Court* (Baltimore: John Hopkins University Press, 1999), 26–32.
99. Deborah J. Barrow and Thomas G. Walker, *A Court Divided: The Fifth Circuit Court of Appeals and the Politics of Judicial Reform* (New Haven, Conn.: Yale University Press, 1988), 68.
100. Christopher P. Banks, “The Politics of Court Reform in the U.S. Courts of Appeals,” *Judicature* 84 (2000), 34–43.
101. *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).
102. *City of Boerne v. Flores*, 521 U.S. 507 (1997).
103. Pablo T. Spiller and Emerson H. Tiller, “Invitations to Override: Congressional Reversals of Supreme Court Decisions,” *International Review of Law and Economics* 16 (1996), 503–21.
104. Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation* (up to Supreme Court cases decided through June 26, 2013), 2277–325 (listing 176 acts of Congress overturned up to 2006), available at <https://beta.congress.gov/constitution-annotated> (last retrieved July 27, 2013); David M. O’Brien, *Constitutional Law and Politics: Struggles for Power and Governmental Accountability* (Volume One), 9th ed. (New York: Norton, 2014), 36 (listing 186 acts of Congress overturned up to and through the Roberts Court).
105. Matthew R. Christiansen and William N. Eskridge, Jr., “Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011,” *Texas Law Review* 92 (2014), 1317–541. See also Eskridge, “Overriding Supreme Court Statutory Interpretation Decisions,” 331–424.
106. See Jeb Barnes, *Overruled? Legislative Overrides, Pluralism, and Contemporary Court-Congress Relations* (Stanford, Calif.: Stanford University Press, 2004).
107. *Worcester v. Georgia*, 31 U.S. 515 (1832).
108. Abraham, *The Judicial Process*, 370.
109. *DeRolph v. Ohio*, 677 N.E.2d 733 (Ohio 1997).
110. The Ohio Supreme Court, in fact, has terminated educational financing review because of the assembly’s repeated failure to act to fix the constitutional violation. *State v. Lewis*, 789 N.E.2d 195 (Ohio 2003).
111. R. Shep Melnick, “The Courts, Jurisprudence, and the Executive Branch,” in *The Executive Branch*, eds. Joel D. Aberbach and Mark A. Peterson (New York: Oxford University Press, 2005), 470.
112. Keith E. Whittington, “‘Interpose Your Friendly Hand’: Political Supports for the Exercise of Judicial Review by the United States Supreme Court,” *American Political Science Review* (November 2005), 583–96.
113. Melnick, “The Courts, Jurisprudence, and the Executive Branch,” 476–79.
114. Kevin T. McGuire and James A. Stimson, “The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences,” *Journal of Politics* (November 2004), 1018–35.
115. Richard Funston, “The Supreme Court and Critical Elections,” *American Political Science Review* (September 1975), 795–811; Dahl, “Decision-Making in a Democracy,” 279.
116. Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton, N.J.: Princeton University Press, 1988).