

The Constitution Under Siege

The Constitution Under Siege

Presidential Power versus the Rule of Law

Christopher H. Pyle

Richard M. Pious

CAROLINA ACADEMIC PRESS

Durham, North Carolina

Copyright © 2010
Christopher H. Pyle
All Rights Reserved

The first edition of this book was published by the Free Press in 1984 as *The President, Congress, and the Constitution*.

Library of Congress Cataloging-in-Publication Data

Pyle, Christopher H.

The constitution under siege : presidential power versus the rule of law / Christopher H. Pyle and Richard M. Pious.

p. cm.

Includes bibliographical references and index.

ISBN 978-1-59460-877-3 (alk. paper)

1. Separation of powers--United States. 2. War and emergency powers--United States. 3. Terrorism--Prevention--Law and legislation--United States. 4. Executive power--United States. 5. Constitutional law--United States. I. Pious, Richard M., 1944- II. Title.

KF4565.P95 2010

342.73'044--dc22

2010015174

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Contents

Preface	ix
Acknowledgments	xi
Permissions	xiii
Introduction	xv
A. Focus: The Legitimacy of Claims to Power	xv
B. The Justification of Power	xvi
C. A Note on Studying Cases	xx
Chapter One · First Principles	3
A. Introduction	3
B. The Ancient Rights of Englishmen	4
Magna Carta	4
Petition of Right	6
English Declaration of Rights	6
C. The British Theory of Separation of Powers	7
John Locke, The Separation of Powers	7
William Blackstone, The Balanced Constitution	10
D. From Separation of Powers to Checks and Balances	11
James Otis, Checks and Balances	11
Thomas Paine, A Criticism of Mixed Government	14
The Declaration of Independence and the Idea of Tyranny	17
Separation of Powers in the Early State Constitutions	17
James Madison, The Partial Separation of Powers	18
Louis Fisher, The Principle of Separated Powers	22
Arthur F. Bentley, Separated Institutions and the Routes to Power	29
E. The Rise of Positive Government and Presidential Initiative	31
Woodrow Wilson, The Constitution Contains No Theories	31
Arthur S. Miller, The Rise of the Positive State	34
Edward S. Corwin, Total War and the Constitution	39
Richard E. Neustadt, The Power to Persuade	43
Arthur M. Schlesinger, Jr., The Imperial Presidency	44
Chapter Two · Emergency Powers	47
A. Introduction	47
B. Early Thinking about Executive Power	49
John Locke, Of Prerogative	49
Prerogative Powers in the Seventeenth and Eighteenth Centuries	52
C. The Debate in the Political Arena	54
The Neutrality Debate of 1793	54
Alexander Hamilton, Pacificus, Letter No. 1	54

James Madison, Helvidius, Letter No. 1	57
Thomas Jefferson, The Constitutionality of the Louisiana Purchase	60
Thomas Jefferson, The Higher Law of Necessity	62
Abraham Lincoln, The Preservation of the Union	64
Abraham Lincoln, On Suspension of the Writ of Habeas Corpus	66
Theodore Roosevelt, The Stewardship Theory	67
William Howard Taft, Our Chief Magistrate and His Powers	69
Franklin D. Roosevelt, “Stewardship Theory” in World War II	71
Richard M. Nixon, The National Security Power	73
D. Claims to Inherent Executive Power and the Supreme Court	77
<i>Ex parte Milligan</i>	78
<i>In re Neagle</i>	86
<i>In re Debs</i>	92
<i>United States v. Midwest Oil Co.</i>	97
Military Control of Civilian Populations	101
<i>Ex parte Quirin</i>	103
<i>Hirabayashi v. United States</i>	109
<i>Korematsu v. United States</i>	114
<i>Duncan v. Kahanamoku, Sheriff</i>	119
<i>Youngstown Sheet & Tube Co. v. Sawyer</i>	122
E. Emergency Powers: Can Standards Be Specified?	135
Academic Efforts at Specification	136
Clinton Rossiter, Constitutional Dictatorship	136
Arthur M. Schlesinger, Jr., The Imperial Presidency	139
Richard M. Pious, The American Presidency	139
Legislative Efforts at Specification	140
The Emergency Detention Act of 1950	140
Ronald Goldfarb, The Permanent State of Emergency	143
Chapter Three · Foreign Affairs Powers	147
A. Introduction	147
B. The President as “Sole Organ”?	149
<i>United States v. Curtiss-Wright Export Corp.</i>	149
C. The Treaty Power	156
<i>Missouri v. Holland</i>	156
D. The Abrogation of Treaties	162
Barry Goldwater, Treaty Termination Is a Shared Power	163
Edward M. Kennedy, Treaty Termination Is Not a Shared Power	166
<i>Goldwater v. Carter</i>	168
E. Executive Agreements	177
<i>United States v. Belmont</i>	177
<i>Dames & Moore v. Regan</i>	185
F. Projecting Power	190
Chapter Four · Military Force, Paramilitary Force, and Covert Action	193
A. Introduction	193
B. Authority for Imperfect Wars	197
The Quasi-War with France	197
The Barbary Pirates	198
Avenging the <i>Chesapeake</i>	200

Andrew Jackson in Florida	201
The Monroe Doctrine	203
Jackson's Request for Reprisal Power	203
Contingent Authority to Defend the Maine Border	204
Tyler Protects Texas	204
Polk Provokes War with Mexico	204
Inherent Limitations on the Purposes for Which War May Be Fought?	206
C. Protection of American Lives and Property	207
The Koszta Affair	208
Greytown	208
D. Military Action to Achieve Diplomatic and Economic Objectives	210
The Falkland Islands	211
The Opening of Japan to American Trade	212
The Hawaiian Islands	213
The Shimonoseki Affair	214
The Boxer Rebellion	214
Panama	214
The Roosevelt Corollary to the Monroe Doctrine	216
Nicaragua	217
Haiti	217
The Dominican Republic	218
Veracruz	218
The Pershing Expedition	219
Nicaragua	220
The "Police Power" Reviewed	220
The "Act of War" Doctrine	221
Interposition and Intervention	221
The Dominican Republic	222
Grenada	223
Persian Gulf War	224
Missile Attacks on Baghdad	225
Relevance of Framers' Intent	226
Relevance of Congressional Attitudes	226
Dignity	227
E. Authority to Wage and Risk Modern Warfare	227
Presidential Recognition That a "State of War" Exists	228
<i>The Prize Cases</i>	229
Weighted Neutrality in the North Atlantic	233
Collective Security, International Obligations, and Korea	236
Provocative or Entangling Force Deployments	238
Deliberate Violations of the Neutrality of Other Nations	240
Contingent Authority	243
Treaties as a Source of War-Making Authority	246
The Antidelegation Doctrine and the War Powers	248
F. Inferred Ratification	249
The Mutual Participation Test	250
<i>Massachusetts v. Laird</i>	250
<i>Mitchell v. Laird</i>	254
G. Denials of Authority	255
The Selective Service Act of 1940	255

Limits on the Use of Appropriated Funds	256
The Cooper-Church Amendment	256
The Mansfield Amendment	257
The Eagleton “End-the-War” Amendment	258
<i>Holtzman v. Schlesinger</i>	258
H. Extradition Authority	262
To Win a “Just Peace”	263
<i>Mitchell v. Laird</i>	263
I. The War Powers Resolution	264
<i>Crockett v. Reagan</i>	272
J. Political Questions?	277
K. “Peacekeeping” and “Mission Creep”	278
Somalia and Famine Relief	278
Kosovo and Ethnic Cleansing	279
Haiti and the Restoration of Social Order	280
L. New Forms of Military Action	281
Panama: Extradition by Invasion	281
The War on Terrorism: When the Enemy Is Not a State	282
Preventive War against Iraq	283
M. Paramilitary and Covert Action	288
Covert Action: An Inventory	288
Covert War against Iraq	295
Legal Justifications	295
Chapter Five · Secret Government Versus the Rule of Law	303
A. Introduction	303
B. Torture as U.S. Policy	304
Amnesty for War Crimes	306
Legalizing Torture and Cruelty	307
C. Presidential Detention of Citizens	308
<i>Hamdi v. Rumsfeld</i>	309
Non-Battlefield Detainees: Citizen Padilla	318
D. Do Aliens Have Constitutional Rights?	320
<i>In re Yamashita</i>	321
<i>Rasul v. Bush</i>	324
<i>Johnson v. Eisentrager</i>	328
E. Military Tribunals Revisited	331
<i>Hamdan v. Rumsfeld</i>	331
F. Habeas as a Constitutional Right of Aliens	335
<i>Boumediene v. Bush</i>	335
The Constitution of the United States of America	343
Index of Cases	357
General Index	361
Photo Credits	373

Preface

For most teachers of American politics and constitutional law, this is a new kind of book, not radically new, but sufficiently different to warrant an explanation of its purposes and format.

Political scientists should find it a useful addition to courses on the presidency, Congress, and the courts. By focusing on the legitimacy of power as well as the conditions of its exercise, these materials should counterbalance a literature that currently emphasizes amoral aspects of political behavior and the policy-making process. This volume can be used either as a core or supplementary text in courses that focus on the Constitution, the presidency, Congress, or American political thought.

This book will also introduce students of politics to the intellectual challenges of the Socratic method of teaching as it is practiced in American law schools. It is not a “reader” of illustrative articles poised in sham debate; it is a collection of cases, materials, notes, questions, and original essays designed to force students to join issue and take sides on some of the most profound controversies of our times.

Teachers of constitutional law at both the undergraduate and graduate levels will find that this book differs in several respects from most casebooks currently in use. First, it abjures the “illustrative case” method of many undergraduate casebooks, in which a single court opinion is put forth as if to represent all that is worth knowing about a constitutional theory of power. Second, unlike many law school casebooks, it does not let the vagaries of litigation determine the classroom agenda. What the courts have said about the Constitution is important and is covered, but it is not always the starting point for analysis. Constitutional interpretation should be more than the matching of cases, the making of deductions, or the connection of intellectual dots into doctrines. It should be an adventure in rethinking the basic premises of our political order. We should study constitutional doctrines not just to bring predictability to what judges do in courtrooms, but to refine the operative political thought of the Republic. Over this enterprise, judges and lawyers can have no monopoly.

Accordingly, this book contains not only the opinions of judges, but the ideas of philosophers, historians, political scientists, and law professors. These are juxtaposed to the assertions of politicians and the pleadings of their legal counsel. The materials span the entire course of American political development, from Magna Carta to the Bush and Obama administrations, but the issues are timeless. By viewing contemporary claims to power in historical perspective, students should come to discover something of their future in the nation’s past. They should also come to understand history as more than a story to be appreciated for its own sake. They should see it as a weapon of analysis and persuasion that can be used, and is now being used, for both good and evil ends. So armed, students might even come in time to improve the intellectual and moral quality of American political debate.

Acknowledgments

Christopher Pyle gratefully acknowledges the assistance of Julie Arons Auster, Willa Perlmutter, and Denise Vingiello, who helped with the initial research for this book, and Miriam Musgrave, Katherine Kozub, Anne Chisholm, and Sarah James, who brought the first edition to fruition. He also appreciates the assistance of Ralitsa Donkova, Mickey Rathbun, Joan Davis, and James Gehrt in preparing the second edition.

Richard Pious extends his special thanks to Rose Ho, Miriam Feldblum, Sharon Epstein, and Patricia Dooley for their labors in the labyrinths of the Columbia University libraries.

Both authors thank Professor Jeffrey Tulis, now of the University of Texas, for his excellent suggestions regarding the first edition of this book, and Louis Fisher of the Library of Congress for his outstanding contributions, both scholarly and practically, to the field. The authors are also grateful to their students at Mount Holyoke College, Barnard College, and the Graduate Faculties of Columbia University, on whom these materials were first inflicted.

Finally, the authors acknowledge Charles Livingston Bull, artist of the World War I recruiting poster that was adapted for the cover with the help of Maureen Scanlon.

Permissions

The authors gratefully acknowledge permission to reprint the following materials:

Excerpts from Louis Fisher, *President and Congress*, The Free Press, 1972. Copyright © 1972 by The Free Press, A Division of Macmillan Publishing Co., Inc.

Excerpts from Arthur S. Miller, “The Constitutional Revolution Consolidated: The Rise of the Positive State,” *George Washington Law Review* 35:2, December 1966, 172–184. Reprinted with permission of the author.

Edward S. Corwin, “Our Constitutional Revolution,” *Pennsylvania Bar Association Quarterly* 19, April 1948, 261–284.

Richard M. Nixon, “The National Security Power,” *The New York Times*, May 20, 1977, p. B10. Copyright © 1977 by The New York Times Company.

Excerpts from Clinton L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*. Copyright 1948, © renewed by Princeton University Press.

Ronald Goldfarb, “The Permanent State of Emergency,” *The Washington Post*, January 6, 1974, p. B1. Reprinted with permission of the author.

Excerpts from Barry Goldwater, “Treaty Termination Is a Shared Power,” *American Bar Association Journal* 65, February 1979, 198–200.

Excerpts from Edward Kennedy, “Normal Relations with China: Good Law, Good Policy,” *Policy Review*, Spring 1979, 126–131.

Introduction

The United States is, as G. K. Chesterton said, “a nation with the soul of a church.” . . . The Declaration and the Constitution constitute the holy scripture of the American civil religion.

—Samuel P. Huntington,
American Politics (1981)

It is ironic that a culture which has experienced a centuries-long “melancholy, long-withdrawing roar” from religious faith can believe so blithely in the continuing reality of citizens organized around a constitutional faith. The “death of constitutionalism” may be the central event of our time just as the “death of God” was that of the past century.

—Sanford Levinson,
“The Constitution in American Civil Religion,”
Supreme Court Review (1979)

A. Focus: The Legitimacy of Claims to Power

This is a book about principles, politics, and power—constitutional principles and how they affect the power of the president, Congress, and the courts to decide some of the most momentous issues of our time.

The cases and materials examined here address fundamental questions about the authority of presidents, the armed forces, and intelligence agencies to wage clandestine wars, detain people without trial, operate secret prisons, suspend habeas corpus, torture prisoners, and assassinate citizens as well as foreigners, in secret and without accountability. At stake is nothing less than who we are, or wish to be, as a nation.

Contrary to the dominant thrust of most writing about American politics since the 1930s, this book focuses not on the short-term acquisition and exercise of political power, but on the *legitimacy* of claims to power that would fundamentally alter the constitutional distribution of policy-making authority. It is based on the pedagogically useful, but increasingly questionable assumption that the United States still has a Constitution of Limitations as well as a Constitution of Powers despite contrary evidence from the Watergate, Iran-Contra, and Torture scandals.

The book starts with “first principles”—limited government, guaranteed liberties, separation of powers, checks and balances, popular sovereignty, representative government, and the rule of law—and explores how these principles have fared in the constitutional confrontations among the branches of government since the Puritan Revolution.

The book attempts to show how these principles often clash with one another and how accommodations have evolved among them and between the different branches. The objective is to give students the ability to see the long-term implications of particular distributions of power and authority, discern the tactical uses to which constitutional arguments are often put, and appreciate how easily the politics of fear can debase American government when the rule of law is disregarded.

B. The Justification of Power

The chief business of political science, from Woodrow Wilson's time to our own, has been to *describe* and *explain* the distribution of political power and to answer the question "Who gets (and doesn't get) what, when, why, and how?" In this behavioral analysis of politics there has often been an implicit judgment that the existing allocation is good or bad, usually in terms of some immediate policy objective the political scientist has in mind.

The chief business of political theory, from Plato's time to our own, has been to *justify* and *prescribe* particular allocations of power, usually in terms of some long-term conception of the right and the good. However, since the rise of behavioral political science, the study of political theory has been reduced to the study of a few great thinkers, rather than the analysis of the long-term implications of particular changes in the allocation of power in existing political systems.

Thus, the business of justifying and prescribing changes in the long-term allocation of power has been left chiefly to politicians, lawyers, and judges—professionals poorly trained to do it. Trained or not, these professionals practice political theory, day in and day out. Often the theoretical implications of their arguments and actions are not immediately appreciated. Even when they are, their significance maybe denied for the sake of short-term gains.

Acknowledged or not, there are theoretical dimensions to structural changes in the allocation of power. These dimensions become apparent each time someone contends that a particular allocation is not only useful, but legitimate. Then the proponent is no longer talking just about power; he is talking about authority.

The distinction between raw power and legitimate authority marks the line between most behavioral scientists and constitutional lawyers, between most lawyers and the philosophers of law, and between most politicians and statesmen. However, to talk about legitimate authority presupposes that there are ways to allocate and limit political power that will be conducive, in the long term, to some fundamental values, such as liberty, equality, or justice. It also presupposes that a consensus can be reached regarding these fundamental values. Where people take little interest in history, the comparative study of governments, political theory, or philosophy, finding such a consensus can be difficult.

In the American political system, however, something very much like a consensus regarding the proper allocation of power is continually being formed and re-formed. We refer, of course, to constitutional law. Unlike the public law of most regimes, American constitutional law does not depend upon a consensus of contemporary officials or public opinion. The process by which it is made and the obstacles that prevent its easy alteration require a consensus within the major political coalitions that span decades, if not centuries. To achieve this consensus, the living must not only speak to the living; they must commune with the dead.

The language of this debate is not simply the language of interests; it is also the language of principles. It is the language of justification. The entire system of means and ends cannot be altered overnight, so the debate is rarely between one comprehensive philosophy and another. Rather, it is many smaller debates among many partial philosophies, most of which have been debated before under historical circumstances that were both similar and different. The records of those debates are much more than the writings of interesting thinkers; they are often law. As such, they are difficult to ignore.

Most difficult to ignore is an unambiguous provision of the Constitution, the supreme law of the land. But unambiguous provisions in that document are relatively rare. Most of the constitutional provisions purporting to grant, allocate, or limit authority are open to interpretation. Thus it becomes important to decide which methods of reading the Constitution are legitimate. When the provisions are ambiguous, some resort to the underlying rationale—the political theory of the Constitution—becomes both necessary and proper. This can be done in a variety of ways, running the gamut from the strictest to the loosest mode of construction. What follows is a brief inventory of the principal modes of constitutional interpretation—modes which can be separated for analytical purposes but which, in “real life,” almost always appear in combination.¹

1. *Textual analysis.* Textual analysis focuses on the meaning of the Constitution’s words and phrases. Chief Justice Marshall was a master of this technique, using “commonsense” synonyms to transform ambiguous passages into great doctrines of law. If “common sense” fails to produce the “plain meaning” of a clause, resort may be made to dictionaries or other writings (especially law treatises) to determine what the words “must” have meant to the ratifiers or to educated men of their day. Thus, to understand the powers of the president as “commander in chief,” a textualist might seek to determine how the British and colonial forces used that term in the seventeenth and eighteenth centuries.

When a document is young, textual analysis can be used as Marshall used it, to greatly expand its scope and force. However, as interpretations accumulate, this technique is more likely to be employed, particularly by legal positivists and the proponents of judicial self-restraint, to produce a narrow, restrictive meaning, or to divert attention away from other provisions of the Constitution that might undermine the interpretation sought.

2. *Contextual analysis.* Textual analysis, therefore, is usually answered with, or supplemented by, a contextual analysis that reads particular clauses in the context of the larger document, the theories alleged to be implicit in it, or the objectives its framers “must” have sought to achieve. Thus, a contextualist would insist that the president’s powers as “commander in chief” cannot be understood without reference to the Constitution’s larger scheme for allocating power over the declaration and making of war, the arming of forces, and the control of expenditures.

3. *Framers’ intent.* Another, related form of analysis is to attempt to plumb the meaning of a clause by a search for the “intent” of those who drafted, voted for, or ratified the provision. This is commonly done by searching the records of the Constitutional Convention, the state ratifying conventions, and contemporary expositions, such as *The Federalist Papers*. Intent can also be inferred from the evils the framers (or the preceding generation of revolutionaries) sought to remedy or the values and theories they inherited or espoused. A practitioner of this approach to constitutional analysis would interpret the commander-in-chief clause in light of the founders’ revulsion against the English

1. For an extended and still classic exposition on how to read a constitution, see Joseph Story, *Commentaries on the Constitution of the United States* (5th ed., 1905), Chap. 5, 304–49.

system of executive warmaking, particularly as expressed by Hamilton's assertion in *The Federalist Papers* that the commander in chief was not intended to be anything more than "first general" and "first admiral."

Determination of the collective intent of fifty-five delegates to the Constitutional Convention (or hundreds of delegates to the state ratifying conventions) rarely can be done with anything approaching statistical certainty. Evidence of framers' intent, therefore, has its greatest force when it demonstrates which ideas the founders rejected and why, or when it reveals persuasive arguments for reading an idea into the document or keeping it there.

4. *Precedent and synthesis.* Because the Constitution is part of a legal system in which consistency is achieved by following the doctrine of *stare decisis* (adhering to the rationale of previous decisions), prior judicial interpretations of the document have great force. Lower court judges, in particular, are under a powerful obligation to carry out the reasoning of the Supreme Court, even when they consider it mistaken. Supreme Court justices, on the other hand, are not so strictly bound. The cases they get are the ones for which no hard-and-fast precedent exists, or in which a choice can be made between several conflicting lines of cases. In these situations, the justices are often forced to look behind the language of prior opinions for the unarticulated premises and, by examining them, come up with a rearticulation of the governing principle. Constitutional interpretation is therefore not simply an exercise in making deductions from major premises; it is a continual effort to refine those premises and the political theory they contain.

This effort can focus narrowly, and rather mechanically, on a few clear-cut precedents and the factual situations they contain, or it can range more broadly in search of a "neutral principle" that will "solve" all past, current, and imaginable cognate cases. Proponents of the "neutral principle" approach argue that it is the only "legitimate" one, on the grounds that the doctrines it produces are likely to offer the most intellectual satisfaction, be the most intellectually defensible, and therefore be the most lasting.

5. *Constitutional policy making.* Finally, for lack of a better term, there is an approach—or a range of approaches—that can be called constitutional policy making, not because the foregoing techniques do not involve policy making, but because they are further removed from the standard techniques of non-constitutional legal analysis. They are less closely tied to text, dictionaries, treatises, and precedent, and hence are more obviously innovative. They start from Chief Justice John Marshall's premise that "it is a *constitution* we are expounding."² Constitutions, particularly short ones like ours, are not meant to be so narrowly construed that they become frozen in time, susceptible to change only through the difficult amendment process. The framers themselves, it is frequently said, intended and invited broad judicial interpretation by using such ambiguous language in the first place. Faced with imprecise terms like "commander in chief," "executive power," and "war," judges have no choice—unless they abstain from decision—but to go beyond the document for help.

Whether their interpretations are deemed legitimate, therefore, often depends on judgments regarding the scope of this search for outside assistance. Despite protestations to the contrary, most constitutional interpreters concede that the Constitution should be read with a view toward "making the venture succeed." Their disagreement, which can be substantial, is over the nature and objectives of that constitutional venture. Proponents of "natural rights," for example, argue that the nature of the venture is best stated

2. *McCulloch v. Maryland*, 170 U.S. (4 Wheat) 316, 407 (1819).

in the Declaration of Independence and the priority it places on liberty. Others stress the importance of a “common defense,” on the theory that “the Constitution is not a suicide pact” and that all governments have a “natural right” of self-preservation. Accordingly, where some find “inherent rights” and “inherent limitations” on government, others find “inherent powers” to act in ways that may limit liberty.

There is also controversy over the way in which judges attempt to make the venture succeed. To some “minimalists,” like Justice Ruth Bader Ginsberg, it is important for judges to go slowly, deciding difficult questions on a case-by-case basis, and resisting the temptation to announce broad principles. Critics have called this “ad hoc” utilitarianism, full of expediency and devoid of principle. Others have attempted, in the manner of Immanuel Kant, to articulate certain “categorical imperatives”—unchanging universal principles against which all governmental conduct can be measured with great certainty. Practitioners of this approach are often called absolutists and are accused of elevating a few moral principles (such as freedom of expression) over all other values, including national survival. Finally, there is a wide variety of policy-oriented balancers who seek to find a middle ground by rearticulating doctrines over and over again. For lack of a better term, most of these adaptors can be characterized as rule utilitarians.

There is also great controversy over which values the judges should keep uppermost in their minds. Many people believe that legal systems must be judged, like political systems, by the policies and practices produced. They are likely to take an activist approach to constitutional interpretation. Others see the court’s role primarily as procedural, and judge the legitimacy of what it does primarily in terms of how well it protects guaranteed liberties, particularly those of underrepresented people, while allowing most issues, including issues of economics, war, and diplomacy, to be worked out largely through the normal processes of partisan politics. Still others try, in different ways, to judge the legitimacy of constitutional interpretations in terms of both the ends of government and the means of adjudication.

6. *Abstention.* Finally, judges have one other way to affect the struggle for political power, and that is by deciding not to decide. Judges have many ways to duck constitutional cases. They can find that the party raising the claim lacks legal “standing” to do so, that the case is not ripe for adjudication, or has been rendered moot by the passage of time or the concessions of officials. Or judges can declare the issue non-justiciable on the ground that it raises a “political question” that is not for judges to decide.

Decisions not to decide are not without political consequence. Technically, they do not alter legal doctrine; as a practical matter, they give a green light to public officials to go on doing what they have been doing, even if they violate obvious principles of law and justice. The legitimacy of these abstentions is thus also part of the legitimacy debate.

Each of the foregoing approaches to giving meaning to the Constitution, and hence to defining the operative political theory of the Republic, has been used extensively, usually in combination with others. Enthusiasm for certain approaches over others often has less to do with their intrinsic merits than with the substantive outcomes they are likely to produce.

No abstract formula has ever been devised that will predict which line of justification is most likely to produce the most “legitimate” constitutional interpretation. The very concept of legitimacy is itself ambiguous. To philosophers and jurists (the philosophers of law), legitimacy connotes a form of intellectual respectability. To most lawyers and judges, however, it is enough that an interpretation is consistent with precedent and with the forms and processes of law. To most political scientists (for whom democracy,

judicial independence, or social stability are supreme values), the important thing is that the interpretation (and the interpreters) are politically acceptable (or tolerable) to the dominant political groups in the society.

However, persons with a strong sense of justice and decency are likely to demand more. Indeed, they may care less for intellectual respectability, form, and process, or popularity, than they care that a particular outcome will actually enhance the enjoyment of a particular value they prize, such as liberty, equality, political participation, or the accountability of officials.

Each concept of legitimacy has merit. Most judgments about the legitimacy of a particular constitutional interpretation are amalgams of several. Consistent application of these tests of legitimacy is rare, and in the long run probably impossible. In nearly everyone's calculus, some values outweigh others and some ends are important enough to justify less than perfect means. Also, what may be a legitimate form of constitutional exigesis for working out the powers of contending branches of government, between which political power continually ebbs and flows, may be inappropriate to the task of defining a fundamental right of individuals.

Thus, to decide what constitutes a legitimate exercise of power by any branch of government is not an easy task. However, it is an obligation of citizenship that we evade at our peril. What John Marshall said of judges applies equally to us all: "With whatever doubts, with whatever difficulties. . . we must decide. . . Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty."³

C. A Note on Studying Cases

This book, like most casebooks, is designed for Socratic-method teaching. This method, derived from dialogues attributed to the ancient Greek philosopher Socrates, presupposes that one mark of a truly intelligent person is the ability to ask incisive questions. Accordingly, Socratic-method teachers do little lecturing and much questioning. Often, students' questions are answered with still more questions, because the primary objective of the classroom dialogue is not to produce the "right" answer but to develop defensible modes of inquiry. The questions are based on cases and materials that have been selected and arranged so as to bring out the clash of ideas, interests, and values and to encourage students to find their own answers and their own modes of inquiry by continually questioning not only the logic of the writings, but the assumptions implicit in those writings.

The "case method" of teaching issues of law and politics relies heavily on collections of judicial opinions—usually by appellate courts. There is no one best way to get the most out of cases, but the following advice may help. It involves three steps: briefing, syndicating, and synthesizing.

Briefing. "Briefing" is the process of preparing summaries of specific cases. (The term "brief" also refers to the written argument that a lawyer submits to a court, usually prior to oral argument.) Student briefs can be extensive or short, depending on the nature of the case involved and the depth of classroom and course analysis. A comprehensive stu-

3. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

dent brief should contain the following elements: (1) title, (2) facts, (3) issues, (4) decisions, (5) reasoning, (6) separate opinions, (7) analysis.

The title of the case tells who is opposing whom. The name of the party who started the litigation in that particular court usually appears first. Since the losers often take their cases to a higher court, this can get confusing. A few definitions may help: *Plaintiffs* sue *defendants* in civil suits in trial courts. The *state* (or the United States) prosecutes *defendants* in criminal cases in trial courts. The losing party may ask a higher (appellate) court to review his case on the ground that the trial court judge made a mistake in interpreting or applying the law. If the law gives the loser a right to higher court review, his lawyers will *appeal*. If not, they may ask the higher court to issue a writ of *certiorari* (literally “call up the record” from the court below). Under the *certiorari* procedure, the appellate courts have discretion to pick and choose which requests for review they will grant. These two procedures, *appeals* and *petitions for certiorari*, are sometimes loosely referred to as “appeals” because they both involve review by an appellate court.

A person who seeks a writ of *certiorari* is known as a *petitioner*. The person who must respond to that petition (the winner of the case below), is called the *respondent*.

A person who files a formal appeal because the jurisdictional statute gives persons in his situation a right to appeal is known as an *appellant*. His opponent is an *appellee*.

Next to, or right below, the title of a case is the citation that tells you where to find the case in the reports of each court. For example, the decisions of the U.S. Supreme Court are published in a series of volumes known as the *United States Reports*. The abbreviation for this set of reports is “U.S.” The volume number is listed before the abbreviation; the page on which the report begins follows and is, in turn, followed by the date on which the opinion was handed down by the court. Ancient sets of Supreme Court reports are named after the court reporters who compiled them. Thus the famous case of *Marbury v. Madison* is often cited as 1 Cranch 137 (1803).

A good brief will contain a *fact* section, which summarizes both the facts and the law involved in the case. It will tell the nature of the litigation, who sued whom, based on what occurrences, and what happened in the courts below. Often the facts are conveniently summarized at the beginning of the court’s opinion. In other instances, they will be scattered throughout the opinion. Sometimes the best recital of the facts will be found in a dissenting or concurring opinion. Note: judges are not beyond seeing only those facts they want to see. This becomes critically important when students try to reconcile apparently inconsistent cases, because how a judge chooses to characterize and “edit” the facts will often determine which way he will vote and, as a result, which rule of law he will choose to apply.

The *issues* or questions of law raised by the peculiar facts of each case are often stated explicitly by the court. However, students should be alert for the occasional judge who misstates the questions raised in the court below or by the parties on appeal. Misstating the issues is a common strategy of judges who do not wish to make a certain decision, or who wish to make a decision they do not have to make.

Constitutional cases frequently involve multiple issues, some of interest only to litigants and lawyers, others of broader significance to citizens and officials. Very often the issues of law will turn on the meaning of a provision of the Constitution, a law, or a judicial doctrine. That provision or phrase must be captured verbatim in the student’s re-statement of the issue. It should be set off with quotation marks and underlined. Key words should be capitalized as well. This will help when the time comes to try to reconcile a string of apparently conflicting cases. When noting the issues, the student should

try to phrase them in terms of questions that can be answered with a precise yes or no. The quickest way for a student to appear “stupid” in the eyes of a Socratic-method class is to tell the professor that “the issue in the case was whether the official’s conduct was unconstitutional.” The intelligent response is to say, “The issue was whether the official’s conduct [describe it] or the enactment of a specific provision of a law [quote it] violated a specific clause of the Constitution [quote it].” If the issue is phrased precisely, the *decision* will be a succinct yes or no.

The *holding* of a case is the issue answered in a declarative sentence. There are narrow procedural holdings (“case reversed and remanded to the court below”) and broader substantive holdings that deal with the application or interpretation of the Constitution, laws, or judicial doctrines. Holdings should be distinguished from *dicta*, which are statements of what the judge thinks the law is but which are not legally binding on other courts under the doctrine of *stare decisis* because they are not logically necessary to justify the decision reached.

The *reasoning* of a judicial opinion is the chain of major and minor premises that led to the decision. Grossly simplified, it will consist of a statement of what the applicable law is, followed by a characterization of what the official did or failed to do, followed by a conclusion that the law was, or was not, violated. This is often the least interesting aspect of the opinion. The most interesting aspect is often how the judge came to the conclusion that the law is what he or she says it is. Much of the reasoning in constitutional law consists of reshaping the major premises by interpretations that manipulate constitutional text, framers’ intent, history, and the opinions of experts in light of perceived exigencies.

Concurring and dissenting opinions should be subjected to the same sort of searching analysis. Awareness of how individual justices have voted and reasoned also is essential to understanding the larger philosophical debates of the court and to anticipating how individual judges will vote in future cases.

The analysis section of a brief should evaluate the significance of the case, its relationship to other cases, its place in history, its impact on litigants, government, or society, what it illustrates about the court, its members, its decision-making processes, and anything else that seems pertinent given the objectives of the course. It should also include attempts to answer the note questions that follow the case in the casebook. Here the implicit assumptions and values of the justices should be probed, the “rightness” of the decision debated, and its logic reconsidered. The appropriate frame of mind for a student of judicial opinions is disputatiousness.

Syndicating. Students who content themselves with briefing cases soon get lost in the forest. One way out is to form a “syndicate” or study group to discuss the cases, to puzzle out the note questions, and to try to anticipate the line of questioning the professor will pursue in class. Meeting after class to go over what was discussed (and hinted at by the professor) can often be more valuable than meeting before class, but meeting times should be kept short to prevent extraneous discussion.

Synthesizing. The law is not always a seamless web of syllogisms, but treating it as if it were is often the surest way to find its flaws and to expose the “politics” that went into its making. A “synthesis” is a summary of related cases that captures the key elements of each case, shows how they relate to other cases, and shows how those relationships may contribute to a better picture of what the prevailing legal doctrine is, or, at least, what the debate over the law is, at any given moment.

The process of synthesizing (or attempting to synthesize) the legal principles employed to decide like cases in order to produce a reliable statement of ruling law is the most im-

portant process in legal reasoning. Cases are classified, categorized, compared, contrasted, and distinguished for many reasons. Sometimes the objective is to enhance precision in the interpretation of a specific provision of law. Other times the purpose is to highlight inconsistencies, to uncover implicit assumptions about facts or values, or to predict how judges will rule in the future. Still other times it is to reveal how politics and law influence each other and how culture and language influence both.