Mason & Stephenson: Chapter II

Judicial Review

At the time of the Founding there was a very serious question concerning who would be the ultimate interpreter of the Constitution. Some believed that each state would be able to decide for itself which laws were constitutional and which were not. Some believed that in our system, as in the British, the national legislature would decide. Still others argued that each branch should decide for itself within its own sphere what embodied constitutional action.

Many of the national leaders felt that the national judiciary and the Supreme Court should determine the proper constitutional restraint on government. There seemed to be something of a consensus at the Constitutional Convention of 1787, and during the ratification debates that followed, that the national judiciary would be charged with this task. Although there was some disagreement on exactly how the judiciary would exercise the power of judicial review, both supporters and detractors of the Constitution assumed the existence of some form of judicial review.

THE UNSTAGED DEBATE

Robert Yates, *Letters of Brutus*

Brutus is the pen name of Robert Yates, an anti-federalist, opponent of the constitution, and an opponent of a powerful central government (especially in the judiciary). He recognizes that the Supreme Court opinions will have the force of law, and is concerned that the judicial power is greater than the legislative power. He states:

> There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself

Brutus explicitly recognizes that the Supreme Court is *the* interpreter of the Constitution. He is fully aware that the power of judicial review exists (largely by implication of the Constitution), and he greatly fears that power because the Supreme Court is to be totally independent of the people and the legislature.

Alexander Hamilton's Reply to Brutus: *The Federalist*, No. 78

Publius is the pen name of Alexander Hamilton in his response to Brutus. He believes that the power of authoritative interpreting of the Constitution must be lodged somewhere in the central government, and the judiciary is the "least dangerous branch," because it will have neither force nor will, but merely judgement.

Like Brutus, Publius assumes the existence of judicial review under the Constitution. However, this right is necessary, for any act contrary to the Constitution is invalid, and to deny this would suggest that the representatives are superior to the people. The legislative body itself cannot be the constitutional judge of their own powers. Thus the courts were designed to be the intermediate body between the people and the legislature in order to keep the latter within the limits assigned to their authority.

This does not suppose the superiority of the judicial to the legislative power; it only supposes that the power of the people is superior to both. Furthermore, Publius foresees the role of the Supreme Court as the protector of the rights of minorities, as well as the political rights of the Constitution.

Although the founders assumed judicial review, and some state courts actually experimented with it, the federal judiciary was hesitant to do much more than talk about it during their first fifteen years of existence.

Sherbert v. Verner (1963)

FACTS: Adell Sherbert was a member of the Seventh-Day Adventist Church who lost her job in South Carolina because she would not work on Saturday, the sabbath of her faith. After looking for other work and finding none because of her strictures against Saturday work, she filed a claim for unemployment compensation under South Carolina law. Her claim was denied because she failed to accept "suitable work when offered...by the employment office or the employer." The ruling of the Employment Security Commission was affirmed by the South Carolina Supreme Court.

QUESTION: Did the denial of unemployment compensation violate the First and Fourteenth Amendments?

ANSWER: Yes.

OPINION: Justice Brennan delivers for a 7-2 decision. The Court held that the state's eligibility restrictions for unemployment compensation imposed a significant burden on Sherbert's ability to freely exercise her faith. Furthermore, there was no compelling state interest which justified such a substantial burden on this basic First Amendment right.

DISSENT: Justice Harlan argues that the Employment Security Commission denied Sherbet unemployment benefits based on the same reason they might any secular claimant, that she was "not available for work." The Free Exercise Clause only requires neutrality toward religion in this case, which would not include exempting Sherbert (though the Constitution would permit a legislature to create such an exemption).

Employment Division v. Smith (1990)

FACTS: Alfred Smith and Galen Black were fired from their jobs with a private drug rehabilitation clinic because they ingested peyote (which was prohibited under Oregon's controlled substance law) as part of a ritual Native American Church. When they applied for unemployment compensation, the Employment Division of Oregon's Department of Human Resources ruled them ineligible because they had been dismissed for work-related misconduct. The state Court of Appeals reversed, holding that the denial of benefits violated their rights under the free exercise clause of the First Amendment. The Supreme Court of Oregon affirmed. The U.S. Supreme Court remanded the case for a determination whether the religious use of peyote was a violation of state law.

QUESTION: Can a state deny unemployment benefits to a worker fired for using prohibited drugs for religious purposes?

In *Hylton v. United States* (1796), the Court affirmed congressional power to levy a carriage tax, and implicitly asserted the Court's power to nullify acts of congress as well. (If the court may judge positively, may it not judge negatively as well?)

Later, in *Ware v. Hylton* (1796), the Court upheld the provisions of a federal treaty over state law. Thus if it can judge a treaty provision to be valid, doesn't that imply that it can also judge it to be invalid?

CALDER V. BULL (1798)

BACKGROUND: *Calder v. Bull* comes to the court on a "write of error." This is a common law process issued from an appellate court to a lower court ordering it to send up a case for review of a limited question of law. It is still used in some state courts, but has not been available in federal courts since 1928. Today such a case would have been brought up on a petition for a writ of certiorari. This case is not important for its ruling, but because of the opinions of Justices Chase and Iredell, not only for their definition of *ex post facto* laws, but also for the views expressed about natural law and the limits of judicial review.

FACTS: The legislature of Connecticut passed a law granting a new hearing to Caleb and Abigail Bull, after their right to appeal a probate court decree had expired. At the second hearing, the Bulls were successful, and John and Jennet Calder, the other claimants, after appealing unsuccessfully to the highest Connecticut Court, brought their case to the Supreme Court on a writ of error. Calder challenges the statute creating the new hearings as being an *ex post facto* law.

ISSUE(S): Was the Connecticut legislature in violation of Article I Section 10 of the Constitution, which prohibits *ex post facto* laws?

HOLDING: No.

REASONING: The court rules that it is not an ex post facto law. Justice Chase draws a distinction between *ex post facto* laws and retrospective laws, arguing that while all *ex post facto* laws are retrospective, not all retrospective laws are *ex post facto*. He does not consider any law *ex post facto* that reduces the rigor of criminal law, but only those that have the purpose of conviction. As such, the restraint against making any *ex post facto* laws was not considered, by the framers, to protect citizens' contract rights. Even "vested" property rights are subject to retroactive laws.

IMPORTANCE: We read this case primarily to see Justices Chase and Iredell debate the conditions under which a court could strike down a legislative act.

Justice Chase contends that a law which is unjust cannot be given effect by the judges. He would throw out laws which were not unconstitutional, but were against the laws of nature and the social compact, for even if there were not constitutional provision, an unjust law would be unconstitutional.

> An act of the legislature (for I cannot call it a law), contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority...It is against all reason and justice for people to intrust a legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit of such acts of legislation; and the general principles of law and reason forbid them.

Furthermore, he says that the legislature in a free society is not omnipotent:

> I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the constitution, or fundamental law of the state...

Although this case deals with an act of the state legislature, Chase makes it clear that his remarks would include an act of Congress as well.

DISSENT REASONING: Justice Iredell agrees with the ruling that the act of the legislature is not an *ex post facto* law, for the true construction of the prohibition extends to criminal, not civil, issues.

Justice Iredell does not believe that any justice should possess the power to void a legislative act based on natural justice. The ideas of natural justice are not regulated by fixed standards; thus many of the "purest men" will differ in their interpretation. As a result, any act of Congress passed within the general scope of constitutional power cannot be pronounced void based on the principles of natural justice.

If any act of congress violates the constitution, it is unquestionably void. However, Iredell admits that the authority to declare it void is "of a delicate and awful nature," and the court should not resort to that authority but on clear and urgent cases. Thus Iredell concedes a power of judicial review, but severely limits it.

Iredell presents practical and theoretical reasons for his position. In form, Iredell won the debate, but in fact and practice Chase has won (based on almost 200 years of constitutional history, especially the last 100 years).

MARBURY V. MADISON (1803)

BACKGROUND: In the election of 1800 there was a fierce political struggle between the Federalists, who were in power, and the Jeffersonian Republicans, who wanted to be. The Federalists had been in control for twelve years, and Jefferson and his followers found their policies to be unbearable. In the election, the Republicans won decisive victories in both houses of Congress and also won the presidency for Jefferson. In an effort to keep some control in government, John Adams and the lame duck federal Congress created many new judicial posts, and Adams filled them with loyal Federalists.

Although Marshall had been Secretary of State at the time of the appointments, he was now Chief Justice of the Supreme Court, a last minute appointee himself. Marshall did not disqualify himself from considering the matter (as most judges would today). In fact, Marshall wrote the opinion of the Court in the case.

FACTS: Several weeks before the end of his term, President John Adams nominated William Marbury and others to be justices of the peace in the District of Columbia. Their nominations were confirmed and commissions signed by the president, but the secretary of state, John Marshall, had not delivered them by the time Thomas Jefferson became president. Jefferson's new secretary of state, James Madison, refused to deliver the commissions of Marbury and three others, claiming that delivery was necessary to complete the appointments. The four men asked the Supreme Court to issue a writ of mandamus ordering delivery under its original jurisdiction as authorized by Section 13 of the Judiciary Act of 1789. Mandamus was not sought from lower federal courts. (a writ of mandamus is an order by a court to a public official directing performance of a ministerial, or nondiscretionary, duty)

ISSUES: Has Marbury a right to the commission? If he has a right and it has been violated, do the laws afford him a remedy? Is he entitled to the remedy for which he applies?

HOLDING & REASONING:

1) Yes. Marbury has a right to the commission.

The order of granting the commission takes effect when the president's constitutional power of appointment has been exercised, and the power has been exercised when the last act required from the person possessing the power has been performed. The last act is the signature of the commission.

2) Yes. The law grants Marbury a remedy.

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of the government is to afford that protection.

The President, by signing the commission, appointed Marbury a justice of the peace in the District of Columbia. The seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and the completion of the appointment. Having this legal right to the office, he has a consequent right to the commission, a refusal to deliver which is a plain violation of that right for which the laws of the country afford him a remedy.

3) Is he is entitled to the remedy for which he applies? Does the Supreme court have original jurisdiction to issue writs of mandamus

Marshall says the writ of mandamus is appropriate. A writ of mandamus is an order from a court to a lower tribunal or other government official to do his (non-discretionary) duty in a particular matter.

But can the Supreme Court issue a writ of mandamus in the exercise in its original jurisdiction of this matter? Under the Federal Judiciary Act of 1789, the answer is yes, for it authorized the Supreme Court "to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

In addition, the Constitution places the whole judicial power in one Supreme Court, and such inferior courts as Congress shall establish, and this judicial power extends to all cases arising under the laws of the United States. Hence, some relief is available in the United States judiciary, since the right arises under the laws of the United States. However, the Constitution also distributes some of this judicial power, stating "the Supreme Court shall have original jurisdiction, in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction." This case involves original jurisdiction, and Marshall says that the legislative authority (under the Federal Judiciary Act of 1789) for the court to hear the case is at odds with the language of the Constitution.

It is one of the first principles of American government that the people have the right to establish the government as they see fit and make it permanent, and the American people not only provided a framework of government in the Constitution, but also spelled out the limits of legislative action. If these limits could be breached by mere legislative action, they would serve no purpose whatsoever.

The Framers dictated that the Constitution and the laws pursuant to it would be the supreme law of the land, as purported by the Supremacy Clause. Where the Constitution and the law conflict in court, the Constitution must prevail since it is the superior law. Thus any act of the legislature that violates the Constitution is void; it is the duty of the judicial department to say what the law is; to expound and interpret the law.

However, Marshall notes that the argument might be made that the Constitution is a set of guidelines for the legislature and not the judiciary, and that it is for the legislature to interpret the Constitution. However, Marshall observes that a number of provisions in the Constitution are directly addressed to the judiciary (e.g. *ex post facto* laws, grounds for treason, et cetera). The Framers obviously meant for the judges to read the Constitution, and even made them take an oath to support the Constitution. If a judge cannot be guided by the Constitution in the performance of his duties, then it is a mockery to swear such an oath. If a judge is bound to give force to unconstitutional acts of Congress, the oath is worse than a mockery.

Marshall concludes that no relief may be granted to Marbury by way of a writ of mandamus from the Supreme Court. The statue empowering the court to issue such writs violated the Constitution and was void (in that provision). Jefferson and Madison won the battle to keep Marbury and the others from receiving their commissions, but Marshall won the war by asserting the right of the Supreme Court to interpret and apply the Constitution (rather than the legislature or the president).

Marshall's assertion of judicial review was not universally applauded. He was even attacked by other judges. Perhaps the best counterpoint was offered by Justice Gibson of the Pennsylvania Supreme Court in 1825

EAKIN V. RAUB **(1825)**

The dissenting opinion by Justice Gibson of the Pennsylvania Supreme Court in this otherwise unimportant case is generally recognized as the most effective answer to Marshall's argument supporting judicial review. Gibson believes that the branches are equal, at least in the sense that each is superior in its own realm and function. Accordingly, the legislator is the proper judge of legislative functions.

He claims that the framers provided for legislative checks without the doctrine of judicial review, for if they had intended an additional check through judicial review, they would have explicitly placed such a power in the courts, and would not have left it in doubt. Thus the judiciary does not have the right to interfere in cases where the constitution is to be carried into effect through the instrumentality of the legislature, for the legislature must first decide on the constitutionality of its own act.

Gibson addresses the oath argument, noting that all government officials take an oath. The oath requires the government official to support the Constitution only as far as that may be involved in his official duty. Thus, if his official duty does not entail an inquiry to the authority of the legislature, neither does his oath. In addition, Gibson notes that judges would not be doing any positive acts in violation of their oaths when they give effect to laws that they feel violate the constitution, because, assuming the judiciary adopts the acts of the legislature as its own, it is the legislature's fault and responsibility.

With regard to Marshall's statement about the absence of judicial review meaning the end of constitutional government, Gibson remains unconvinced. Paper does not assure the non-violation of principles. For these reasons, Gibson agrees that it rests with the people, in whom full and absolute sovereign power resides, to correct abuses in legislation, by instructing their representatives to repeal the obnoxious act.

What about state laws?
The Supreme Court did not strike down a state statute until *United States v. Peters* (1809), and that involved a special statute which purported to invalidate the orders of federal courts and prevent their enforcement in Pennsylvania. The first important declaration that a state statute was unconstitutional came in *Fletcher v. Peck* (1810), in which Marshall declared an act of the Georgia legislature, which purported to annul contracts entered into by an earlier legislature, void as a violation of the obligation of contracts clause. This was another one of Marshall's landmark opinions.

However, Marshall would never again join in an opinion declaring an act of Congress unconstitutional. In fact, the Court would invalidate more than thirty additional state statutes before it would again declare an act of Congress unconstitutional. In 1857, the Court's second invalidation of an act of Congress would come in the case of *Scott v. Sandford*.

SCOTT V. SANDFORD **(1857)**

FACTS: in 1834, Dr. John Emerson took his slave Dred Scott from Missouri to Illinois, where slavery was forbidden. In 1836 Emerson took Scott to Fort Snelling in present-day Minnesota, where slavery had been banned by the Missouri Compromise of 1820. In 1838, Emerson returned to Missouri with Scott. After Emerson died, a suit was brought in the Missouri courts against his widow, claiming that Scott's residence in free territory had made him a free person. The lower court held for Scott, but the state

supreme court reversed in 1852. The suit was filed again in the U.S. Circuit Court of Missouri, and appealed to the Supreme Court on a writ of error from an adverse judgement.

ISSUE(S): Did the Circuit Court have the jurisdiction to hear the case? Is the Missouri Compromise Constitutional?

HOLDING: No. The court did not have the jurisdiction to hear the case.

REASONING: According to Article II, Section 2 of the Constitution, "the judicial power shall extend...to controversies...between citizens of different states." When the Constitution was ratified, African Americans were recognized as being of a subordinate class, and therefore cannot claim the rights and privileges of citizens. Whether emancipated or not, African Americans remain subject to their authority, and have no rights or privileges but those that are granted to them by their owner or by the government. Dred Scott, nor any of his family, were made free by being carried into this territory, even if they had been carried there by the owner, with the intention of becoming a permanent resident. The plaintiff in error could not be a citizen of Missouri, and thus is not entitled to sue in its courts.

Is the Missouri Compromise Constitutional?

The powers of the government and the rights and privileges of the citizens are regulated and defined by the Constitution itself. When a territory becomes a part of the United States, the federal **government enters into possession of it with powers over the citizens strictly defined and limited by the Constitution**. The Constitution states that the federal government can exercise no power over the person or property of a citizen, nor can it lawfully deny any right which it has reserved.

An act of Congress which deprives a citizen of his liberty or property, merely because he came himself or brought his property into a particular territory, can not be dignified with the name of due process of law. Thus, any act of Congress which prohibits a citizen from holding and owning African Americans as property in the region affected by the Missouri Compromise is void.

Upholding the decision decided in *Strader v. Graham* (1851), it is the court's belief that Scott is a slave. When taken into Illinois, held there, and then brought back to Missouri, his status as a free man or a slave would be dependent on the laws of Missouri, not Illinois. The plaintiff in error is not a citizen of Missouri, and the Circuit Court thus had no jurisdiction in the case, and could give no judgement in it. Furthermore, the Court held that the provisions of the Missouri Compromise declaring it to be a free territory were beyond Congress's power to enact, thus making the Missouri Compromise unconstitutional.

DISSENT REASONING: At the time of the adoption of the Constitution, all free native-born inhabitants of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina were citizens of the United States. But regardless, since the court decided that the plea to the jurisdiction of the Circuit Court had no jurisdiction because blacks are not citizens, the Court's judgement on the power of Congress to pass the Missouri Compromise of 1820 transcends the limits of the authority of the court.

POLITICAL QUESTIONS

The political question doctrine is a final way the Court has of avoiding issues. This doctrine was hinted at by Marshall's opinion in *Marbury v. Madison* (1803): "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."

The doctrine emerged in practice under Chief Justice Taney in the case of *Luther v. Borden* (1849). In that case, the Court declared that the decision of whether a state has a republican form of government is a decision to be made by Congress and not by the courts. The case arose in Rhode Island during Dorr's

Rebellion. Taney writes: "No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every state reside in the people of the state, and they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abolishing an old government, and establishing a new one in its place, is a question to be settled by political power. And when that power has decided, the courts are bound to take notice of its decision, and follow it."

In 1946, the USSC, in an opinion by Justice Frankfurter, used the political questions doctrine to avoid ruling on the malapportionment of the Illinois congressional districts in *Colegrove v. Green.* Other areas identified as raising political questions are catalogued in *Baker v. Carr* (1962).

In the 1960 case of *Gomillion v. Lightfoot* (aka the Tuskegee case), the Court held that where malapportionment was purposely done in order to exclude a racial minority from the political process that the court could hear the case and it was not a political question. In that case the city limits of Tuskegee had been redrawn so as to exclude all but a few blacks from the city voting area. (One factor in distinguishing *Colegrove* was that the solicitor general had filed an *amicus curiae* brief which told the Court that if they ordered reapportionment, the Justice Department would see that it was enforced. The ruling in *Gomillion* did not upset the *Colegrove* precedent because the facts (of deliberate gerrymandering) could easily be used to distinguish it. Also, the challenge here was based on the Fifteenth Amendment right to vote.

***BAKER V. CARR* (1962)**

FACTS: Appellants brought suit in U.S. District Court in Tennessee, objecting to a 1901 Tennessee statute that apportioned seats for the state's 95 counties in the General Assembly. They claimed that the legislature's failure subsequently to redistrict the seats to take account of substantial growth and redistribution of the state's population debased their votes and thus denied them equal protection of the laws guaranteed by the Fourteenth Amendment. The district court ruled that it lacked jurisdiction of the subject matter.

ISSUE(S): Do federal courts have jurisdiction to hear a constitutional challenge to a legislative apportionment?

HOLDING: Yes. Federal courts have jurisdiction to hear a constitutional challenge to a legislative apportionment.

REASONING: The Court reverses its earlier stand that apportionment was a political question (see *Colegrove*). The problems in this case were created by urbanization, and the failure to redistrict in light of population shifts over a sixty year period. Because the case did not involve deliberate gerrymandering, *Colegrove*, not *Gomillion*, would seem be the precedent.

To solve the problem here, the equal protection clause of the Fourteenth Amendment was invoked. Had the plaintiffs invoked the Guaranty Clause, it would not have helped them (*Luther v. Borden* would still control).

Claims pressed on the basis of political rights (i.e. voting or running for office) do not necessarily raise political questions which the Court cannot address. Justice Brennan states: "The mere fact that the suit seeks protection of a political right does not mean it presents a political question." The Court holds that since the plaintiffs invoke the equal protection clause rather than the guaranty clause, the case is distinguishable from other cases. (*Colegrove* was distinguished, not overruled; although it was really overruled in the sense that it said any challenge to apportionment is a political question, a position which Brennan says is a misunderstanding of *Colegrove*). The Court does not order Tennessee to reapportion, but remands the case to the District Court for it to decide the matter.

Ultimately, Brennan's opinion does not explain why the Court changed its mind here, In *Baker*, as in *Gomillion*, the Justice Department had filed an *amicus curiae* assuring the Court that its order would be enforced if it found justiciability.

Justice Clark writes a concurring opinion. But what is his point? Although it is unclear here, Clark writes urging the Court to decide the case now, and not to send it back to the lower court. Most of the people of Tennessee are not represented, and this Court is their last resort. He seems to want the Court to decide the case and not send it back to lower courts.

DISSENT REASONING: Frankfurter and Harlan write the dissent. Frankfurter, who wrote the *Colegrove* opinion, dissents out of a fear that the Court will lose its support. He was one of the last great advocates of judicial restraint to serve on the Court.

His argument is that the decision of the court reverses the precedent of nearly a dozen previous cases. There is not, under the Constitution, a judicial remedy for every undesirable exercise of legislative power. In this situation, appeal for relief does not belong here. Relief in this situation must be through an aroused popular conscience that affects their representatives, forcing them to change policy.

Furthermore, one cannot speak of the diluted value of their vote until there is defined a standard reference as to what a vote should be worth. Tennessee is illustrating an alternative method of representation--by local geographical division--in preference to that by apportionment of population. To find such a political conception legally enforceable in the broad and unspecific guarantee of equal protection is to rewrite the constitution.

Recent Status of Judicial Review

Mason and Stephenson move to an example of the recent status of judicial review, referencing the case of *Missouri v. Jenkins* (1990). In that case the USSC held that it was beyond the scope of authority of a federal district court to raise property taxes beyond state constitutional limits in a local school district to fund court mandated programs designed to desegregate the school system. The majority in that case held that the district court could order the school district to raise taxes, if necessary to fund its mandated programs, but could not raise the taxes itself.

CITY OF BOERNE V. FLORES (1997)

BACKGROUND: Congress enacted the Religious Freedom Restoration Act (RFRA) of 1993 in response to the Supreme Court's decision in *Employment Division v. Smith* (1990). In *Smith*, the Court had upheld the denial of unemployment benefits to two drug counselors who had lost their jobs because of their ritual use of peyote (as part of their practices in the Native American Church) in violation of a general statute in Oregon banning the use of illegal drugs, including peyote. Congress passed RFRA in an effort to impose on all governmental official a more "religion friendly" standard to be applied to all cases arising under the free exercise clause of the First Amendment.

FACTS: The Catholic Archbishop of San Antonio applied for a building permit to enlarge a church in Boerne, Texas. When local officials denied the permit under a historic preservation ordinance, the Archbishop challenged the rejection as a violation of RFRA. The U.S. District Court for the Western District of Texas concluded that by enacting RFRA, Congress exceeded the scope of its enforcement powers under the Fourteenth Amendment, but the Court of Appeals on the Fifth Circuit reversed.

ISSUE: Did Congress exceed its Fourteenth Amendment enforcement powers by enacting the RFRA?

HOLDING: Yes. The RFRA is an unconstitutional effort by Congress to "decree the substance of the Fourteenth Amendment's restrictions" on government.

REASON: Congress claimed that the RFRA was merely an exercise of its authority under section five of the Fourteenth Amendment to enforce the provisions of that Amendment, being the constitutional right to the free exercise of religion. However, the court held that Congress's power under section five extends only to enforcing the provisions of the Fourteenth Amendment. Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause; Congress does not enforce a constitutional right by changing the substantive meaning of the right in question.

Quoting extensively from *Marbury v. Madison*, Justice Kennedy purports that if Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be the "superior paramount law, unchangeable by ordinary means," but rather it would be "on level with ordinary legislative acts...alterable when the legislature shall please to alter it." Board as the power of Congress sis under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.

UNSTAGED DEBATES

President Jackson Vetoes the Bank Act
When Congress voted to recharter the Bank of the United States in 1832, President Jackson vetoed the bill in part because he thought it was unconstitutional. The Supreme Court in *McCulloch v. Maryland* already upheld the constitutionality of the bank. President Jackson expresses extreme reservations about the binding nature of judicial review on the other branches.

President Lincoln Delivers His First Inaugural Address
Lincoln has reservations with regard to certain issues being settled by the judiciary, and the precedent that follows their decisions among all the branches. These remarks are in reference the the Dred Scott decision.

Cooper v. Aaron
Grew out of official resistance in Little Rock, Arkansas to the Supreme Court's school desegregation decision. All nine justices signed the opinion. Both the supremacy clause and *Marbury v. Madison* are quoted in the decision, which reasserts the Court's position as expositor of the Constitution. By disobeying the Court's order to desegregate the schools, the Governor and Legislature are violating their oath to support the Constitution.