

分权与制衡：司法

美国不存在“司法专制”的原因

案例

Dred Scott VS. Sanford (1857) , 最终Scott败诉, 成为美国南北战争的导火索

Brown VS. Board of Education (1954) , 虽然最高法院推翻了种族隔离原则, 但距离真正实行仍需很长时间, 并引发了黑人平权运动

其它权力机构的制约

"The data illustrate that, even after controlling for the influence of social forces, public mood has both a significant short- and long-run influence on the Court's decisions. The significant short-term effect suggests that as prevailing public sentiment shifts in a liberal direction, the Court responds by issuing a greater proportion of liberal judgment ... The significant long-run impact of mood on the Court suggests that public opinion also has an effect that is distributed over future time periods the Court will exhibit roughly a 1% increase in the proportion of liberal reversals for every 1% shift of public mood in the liberal direction." — Casillas/Enns/Wohlforth, 2011 "How Public Opinion Constrains the U.S. Supreme Court"

民意制约

案例: 里根总统想提名 Robert Bork 作为新的大法官, 而各界都反对

提名与任命问题

"Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers, and artists could be censored at the whim of the Government, and the doors of the Federal courts would be shut on the fingers of millions of citizens for whom the judiciary is — and is often the only-protector of the individual rights that are the heart of our democracy ... No justice would be better than this injustice." — Ted Kennedy

判决的“政党”倾向

自由派与保守派人数几乎持平, 在很多重大判决上出现了5: 4的情况

最高法院中的政治斗争

宪法解释的不同流派

文本主义

originalism / textual / textualism / judicial minimalism / judicial restraint

"Those who made and endorsed our Constitution knew man's nature, and it is to their ideas, rather than to the temptations of utopia, that we must ask that our judges adhere." "once the justices depart, as most of them have, from the original understanding of the principles of the Constitution, they lack any guidance other than their own attempts at moral philosophy, a task for which they have not even minimal skills. Yet when it rules in the name of the Constitution, whether it rules truly or not, the Court is the most powerful branch of government in domestic policy. The combination of absolute power, disdain for the historic Constitution, and philosophical incompetence is lethal." — Bork大法官关于“Originalism”的解读

意图主义

intentionalism / living constitution / judicial activism / purpose approach

"The judge should try to find and 'honestly say what was the underlying purpose expressed' in a statute. The judge should read constitutional language 'as the revelation of the great purposes which were intended to be achieved by the constitution' itself, a framework for and a continuing instrument of government. The judge should recognize that the constitution will apply to new subject matter ... with which the framers were not familiar." — Breyer 大法官关于“purpose approach”的解读