

Judicial control of other powers: ten good and bad examples of the american experience*

Controle judicial dos demais poderes – dez bons e maus exemplos da experiência norte-americana

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Abstract:

This study analyzes the role of the US Supreme Court in exercising judicial control over the other powers of the Union and those of the Member States. Ten cases were selected (nine cases and a set of cases gathered by thematic identity) and judged by the Supreme Court throughout its history, starting with the emblematic case *Marbury v. Madison*, 1803, and concluding in 2008, with the judgment in the case of *Boumediene v. Bush*. The analysis of the historical context and content of the judgments will make it possible to assess whether or not the Court was in tune with the values held by American society in that historical period. It will be concluded that, at times, the Supreme Court's decisions were criticized for being at odds with the social feelings and values prevailing when the judgment took place. On other occasions, however, the Court has taken decisive steps to improve democracy and control powers, and define the limits of its actions, in favor of citizens' rights and freedoms. In any case, the US Supreme Court, the longest-running Supreme Court in uninterrupted operation, knew how to conquer its place in the institutional architecture of the United States, becoming truly supreme more under its jurisprudence than by express constitutional provision. The primary research methodology was used regarding the purpose, descriptive regarding the objectives, qualitative regarding the approach, and bibliographical regarding the procedure.

Keywords: Supreme Court. United States. Judicial control. Separation of Powers.

Resumo:

*O presente estudo analisa a atuação da Suprema Corte norte-americana ao exercer o controle judicial dos demais poderes da União e também os dos Estados-membros. Foram selecionados dez casos (nove casos e um conjunto de casos reunidos pela identidade temática) julgados pela Suprema Corte ao longo de sua história, iniciando no emblemático caso *Marbury v. Madison*, de 1803, e concluindo em 2008, com o julgamento do caso *Boumediene v. Bush*. A análise do contexto histórico e do teor dos julgamentos permitirá avaliar se a Corte estava ou não em sintonia com os valores sustentados pela sociedade americana naquele período histórico. Conclui-se que por vezes as decisões da Suprema Corte foram criticadas por estarem em desacordo com os sentimentos e valores sociais vigentes na época em que o julgamento ocorreu. Em outras ocasiões, porém, a Corte teve atuações decisivas para o aperfeiçoamento da democracia e para o controle dos poderes e definição dos limites de suas atuações, em proveito dos direitos e liberdades dos cidadãos. De qualquer sorte, a Suprema Corte norte-americana, a mais longeva Corte Suprema em ininterrupto funcionamento, soube conquistar seu lugar na arquitetura institucional dos Estados Unidos, tornando-se verdadeiramente suprema, mais por força de sua jurisprudência do que por expressa previsão constitucional. Utilizou-se metodologia de pesquisa básica quanto à finalidade, descritiva quanto aos objetivos, qualitativa quanto à abordagem, e bibliográfica quanto ao procedimento.*

Palavras-chave: Suprema Corte. Estados Unidos. Controle judicial. Separação de Poderes.

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1 Introduction

The separation of powers is a basic concept in the American constitutional architecture. But it is not so much a matter of guaranteeing each of the powers a space free from interference from the others – as the French conception of the *separation des pouvoirs* seems to indicate – but of providing for a set of mechanisms that allow each of the powers to examine the activity of the others and, if necessary, to limit or paralyze it. It is intended, with this, to ensure that each of the powers remains within the constitutional framework, not exceeding its functions. The underlying concept is that, by limiting the exercise of power, the space of freedom of the citizen is expanded. This is the essence of the American conception of *checks and balances*. In the constitutional experiment of 1787, this division of powers took place not only at the horizontal level – Executive, Legislative and Judiciary – but also at the vertical level, with the division of powers between the Union and member states. The first kind of division originated from European doctrinal conceptions. The second, with the creation of federalism, was a typical American institutional innovation¹.

In the case of the Judiciary, it controls the exercise of other powers especially through the mechanism of *judicial review*, a power that the Supreme Court of the United States (formerly USSC) attributed itself, in 1803, in the case of *Marbury v. Madison*, as something inherent to the system of *checks and balances*. It was through judgments like this that the USSC contributed to defining the limits of the attributions of each branch.

From time to time, the USSC recalls its institutional mission, as occurred in 1926, when judging the case of *Myers v. United States*,² when Louis Brandeis stated that "the doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency, but to prevent the arbitrary exercise of power. The objective was not to avoid friction, but, through the inevitable friction inherent in the distribution of competences between three powers, to save the people from autocracy" (free translation).

Sixty years later, in judging the case of *Bowsher v. Synar* (1986), Warren Burger stated "that this system of division and separation of powers, producing conflicts, confusion and, at times, discords, is a fact inherent in it, but this was deliberately structured in such a way as to guarantee a full, vigorous and open debate on the great questions that concern the people of making operative the brakes on the exercise of the powers of government".

¹ On the North American conception of the principle of separation of powers, see Patrick (2006, p. 319/320).

² Available in <https://supreme.justia.com/cases/federal/us/272/52/>. Accessed on 04/10/2022.

The USSC began very early to assume the role of eventual controller of the activities of the other branches, as occurred in 1803, when judging the case of *Marbury v. Madison*. In addition to this seminal case, nine other cases (or sets of cases) were selected, involving the theme of judicial control of the other branches. Obviously, countless other emblematic cases could have been selected, because they involve some form of judicial control, but they are usually analyzed, in the North American literature, as representative of other themes (or *clauses*, as they are called there), such as freedom of expression (e.g. *New York Times Co. v. United States [The Pentagon papers]* - 1971), right to privacy (e.g. *Roe v. Wade* - 1973), freedom of religion (e.g. *Engel v. Vitale* - 1962, and *Wisconsin v. Yoder* - 1972), *civil rights* (e.g. *Scott v. Sandford [Dred Scott case]* - 1857; *Plessy v. Ferguson* - 1896; *Brown v. Board of Education of Topeka* - 1954); or procedural rights (e.g. *Mapp v. Ohio* - 1961; *Miranda v. Arizona* - 1966).

In each of the topics below, countless other cases could have been remembered. Due to the imperative need for selection, cases studied in the United States were chosen as examples of judicial control of the exercise of other powers. The cases will be analyzed substantially in the chronological order in which they were judged by the U.S. Supreme Court, from 1803 to 2008. In addition, a basic research methodology was used as to the purpose, descriptive as to the objectives, qualitative as to the approach, and bibliographic as to the procedure.

2 *Marbury v. Madison* (1803), or how to make lemonade out of a lemon

It is the most famous case judged by the USSC. It was through this judgment that that Court truly became "supreme", attributing itself to the power to invalidate legislative norms³.

The facts that gave rise to the demand are extraordinary – and not at all complimentary. John Marshall was Secretary of State under President John Adams, both of whom were members of the then Federalist Party. Adams ran for reelection in 1800, but lost to Thomas Jefferson of the then Democratic-Republican Party. Between the result of the elections and the inauguration of his successor in the Presidency, on 03.04.1801, Adams and his allies decided to appoint their coreligionists to all available vacant positions. As for John Marshall himself, Adams nominated him for the presidency of the Supreme Court.

³ It is worth mentioning the comparison made by Carré de Malberg (*apud* Gambaro and Sacco, 2008, p. 138), between the North American and French conception on the subject, saying that in the United States only the Constitution was considered to be the work of the "*volonté générale*", while in France the idea that the Legislature was capable of permanently express such "popular will".

At the same time, the ruling party quickly passed two laws: the *Circuit Court Bill* of February 12, 1801 and the *District of Columbia Organic Act* of February 27, 1801. The first created 16 new positions of federal judges, immediately appointed with approval by the Senate on 02/03/1801. The second of these laws involved the creation of about 200 new positions (Patrick, 2006, p. 209), of which 42 were positions of justices of the peace.

According to the rules in force at the time, it was a complex administrative act: the President appointed the justices of the peace (which was done on March 2), Congress approved it (which was done on March 3, the eve of the inauguration of the new government), the President signed each of the acts of appointment and the Secretary of State (Marshall, who, despite having already been appointed President of the Supreme Court, continued to hold the position of Secretary of State on an interim basis) affixed the presidential seal and arranged for the letter of appointment to be delivered to the appointed judge, so that he could take office. There was not enough time to deliver the letters of appointment to seventeen of the appointed judges.

That was the situation when there was a change of government. The new President, Thomas Jefferson, appointed James Madison as his Secretary of State. Faced with the political effrontery revealed by the Federalist Party, Jefferson directed Madison not to deliver the missing letters of appointment to the justices of the peace.⁴

One of them, named Marbury, then filed a *writ of mandamus*⁵ before the USSC, based on the *Judiciary Act* of 1789, which attributed original jurisdiction to that Court to judge *mandamus* filed against secretaries of state.

The prevailing political tension was enormous. The new administration gave signs that it did not intend to comply with any order for the delivery of the letters of appointment, for budgetary reasons and administrative morality. Marshall found himself in the paradoxical situation of having been the Secretary of State in whose administration he had started the imbroglio. And now, as Chief Justice of the Supreme Court, he had to hear the case. The judgment could be a disaster for the Supreme Court, if Marshall agreed with Marbury and issued an order to the Executive, because if it was not carried out, he would be demoralized and the Court weakened. On the other hand, if Marshall rejected the *mandamus*, it would give the

⁴ On this framework, see White (2012, p. 210s) and Rehnquist (2015, p. 38).

⁵ *Writ of mandamus* is the name of a judicial procedure typical of Anglo-American law, through which a court of justice orders a public official to correctly perform his duties or to correct some act performed with abuse or excess of powers. It was one of the inspirations for our writ of *mandamus*.

impression of having given in to pressure from the Executive, in addition to confirming the immorality practiced by the previous administration.

In this context, in which there were practically no solutions, Marshall's political and legal genius revealed itself for the first time, writing himself, in the name of a unanimous court, his most famous judicial decision. Marshall divided his vote into three parts⁶. In the first two, Marshall demonstrated that Marbury had a material and procedural right to the delivery of the letter of appointment. But it was in the third part of his vote that he built the solution that would allow him to get out of the political impasse mentioned above. He devoted this part of the vote to answering the question if the procedural route was the one chosen by Marbury – a *mandamus* filed before the USSC, as provided for in the Judicial Act of 1789. Marshall's answer, this time, was negative, because the Constitution did not provide for this hypothesis of original jurisdiction of the Supreme Court. Marshall then stated that in the face of an ordinary law conflicting with the constitutional text, any court of justice should apply this and not the law. This is because either the Constitution should be considered supreme (*Paramount law*), and consequently any inferior legislation that clashed with it would be considered invalid and ineffective (*null and void*), or else the law would be obeyed, despite being contrary to the Constitution. If this second option were accepted, one would have to conclude that the Constitution would be nothing more than a "useless attempt to limit a power (the Legislative) that would be illimitable". He also stated that it was of the "essence of the judicial function to say what the law is" ("*it is emphatically the province and duty of the judicial department to say what the law is*"), and that it should follow the Constitution and disapply inferior laws contrary to it.

With this brilliant solution, Marshall got out of the impasse: he did not accept the claim, but upheld the right of his coreligionist, criticized the administration and affirmed the significant power of the Judiciary to declare the unconstitutionality of ordinary laws⁷.

⁶ An excellent analysis of the case can be found in Fletcher and Sheppard (2005, p. 132/149).

⁷ Regarding the *Marbury v. Madison* case, the literature in the English language is endless, citing Johnson (2002, p. 521/523), Chemerinsky (2016, p. 12/19, 224/226), Chemerinsky (1998, p. 338/345), Patrick (2006, p. 209/210), HALL and Patrick (2006, p. 15/24), Prakash and Yoo (2003, p. 915s), BILDER (2006-2007, p. 504), among others. In other languages, we cite Gambaro and Sacco (2008, p. 136-140), Gambaro, Sacco and Vogel (2011, p. 151s), Campos and Carnota (2001, p. 119 s), Buttà (1998). In our language, in the original or in translations, see Barroso (2010), Marshall (1997), Cicconetti and Teixeira (2010), Rego (2017), Barroso (2018, p. 129s), among others.

In fact, there were already English precedents (*Dr. Bonham's case*⁸, judged in 1610, by Edward Coke) and American colonial precedents, as well as the famous passage from *The Federalist*⁹ (n. 78 – "If men were angels"), in which Hamilton defended the idea of the possibility of the Judiciary recognizing the unconstitutionality of laws contrary to the Constitution, as well as other precedents of the Supreme Court¹⁰ itself, in which the issue had been touched upon, although not with the vehemence and clarity of the *Marbury case*.

Thus, the USSC would not recognize the unconstitutionality of another federal law until 1857 (*Dred Scott v. Sandford*). From 1868 onwards, however, a phase of numerous decisions of unconstitutionality of federal and state laws (especially these) began, under the logic of the principle of *substantive due process of law*. This precedent defined the USSC as the highest instance with regard to the final interpretation of the Constitution and in the definition of the competences of the other branches. The federalism experiment also had the potential to create friction between the federal and state governments. And that also ended up in the USSC, as seen in the case of *Martin v. Hunter's Lessee*.

3 *Martin v. Hunter's Lessee* (1816) – defining judicial competences in a Federal Republic

The importance of this judgment is related to the fact that it was the first time that the Supreme Court affirmed its power to review decisions of the courts of the member states (Chemerinsky, 2016, p. 702), something that is considered elementary in modern times, but which at the time was quite controversial, given the peculiarities of North American colonial history. This is one of those cases in which the factual issue discussed in the case file had little importance, in relation to the legal principle affirmed, which has been consolidated since then.

Denny Martin was the heir of Lord Fairfax, who had left extensive estates in Virginia/USA. The lands were confiscated by the State of Virginia during the War of Independence, since the British Fairfax was loyal to the King of England. These lands were later sold to David Hunter, who leased them. Invoking two treaties between the United States

⁸ In the famous *Dr. Bonham's Case*, Edward Coke had stated: "And it appears in our books that in many cases the *common law* will control Acts of Parliament, and sometimes judge them altogether invalid; because when an Act of Parliament contravenes a common law or reason, or is repugnant, or is impossible to be executed, the *common law* will control it and judge such Law to be invalid" – On this case, its evolution in England and its repercussion in the United States, see Douglas (2008, p. 53s), Cappelletti (1984, p. 57/63) and Stein (1987, p. 115).

⁹ Hamilton, Madison and JAY (2003, p. 471-479).

¹⁰ Cases *United States v. Yale Todd* (1794), *Van Horne's Lessee v. Dorrance* (1795), and *Cooper v. Telfair* (1800) (Abraham, 1998, p. 339).

and England (the Treaty of Paris of 1783 and the Treaty of Jay of 1794), in which he stated that the properties of British subjects would be respected, Martin took back his property. Hunter's tenant then filed a lawsuit to reclaim the land. The Virginia state court won the case, but Martin managed to reverse the decision with the USSC (*Fairfax's Devisee v. Hunter's Lessee* – 1813). However, the justice of the State of Virginia had refused to comply with the USSC decision, claiming that Virginia's confiscatory law predated the treaties and that the judiciary of that State was sovereign when it came to applying state legislation¹¹.

The case therefore involved the claim of unconstitutionality of section 25 of the *Judiciary Act of 1789*, which gave the USSC the power to review decisions rendered by the supreme courts of the states, when they affirmed the validity of a state law in conflict with the Federal Constitution or international treaties.

In the judgment of this case, the principle was established according to which the Supreme Court has the power to review decisions of the supreme courts of the States, when it involves the interpretation of federal legislation (Fletcher; Sheppard, 2005, p. 150).

Thus, Joseph Story¹² wrote the vote, rejecting Virginia's claim that her sovereignty was equal to that of the United States. He clarified that the U.S. Constitution was not created by the member states, but "*by the people of the United States*," as its preamble states. Therefore, the people were sovereign, not the member states. He stated that the Constitution had granted the federal Judiciary the mission of protecting the Magna Carta. Thus, in carrying out this mission, the USSC would have the last word. In addition, Article VI of the Constitution had established that the Constitution and federal treaties as *supreme law of the land*, to which the state supreme courts would also be subject.

The *Martin v. Hunter's Lessee* case is considered one of the most important in the USSC, as it affirmed the supremacy of the federal judiciary and the preeminence of the Court itself. It also deserves mention for having, for the first time, analyzed the normative character of the preamble of the Federal Constitution¹³. It should be remembered that it has been said that the preamble does not confer any specific governmental power, but is a source of legal *direction* (Carp; Stidham; Manning, 2014, p. 425).

¹¹ On the factual context of the case, meaning and consequences of the decision, see Hartman, Mersky and Tate (2004, p. 468/470), Newmyer (2000, p. 100) and White (2012, p. 233s).

¹² Story was appointed to the Supreme Court at the age of 32 – a record that has never been broken – and was extraordinarily productive both on the Court, where he stayed for 34 years, and at Harvard Law School (Grossman, 2000, p. 102/103; Patrick, 2006, 217; Schwartz, 1993, p. 60).

¹³ "*We, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.*"

In the case *of Cohens v. Virginia*, judged in 1821, the USSC went further, stating that when a member state convicted a citizen based on state law, dismissing a defense argument based on the Constitution or federal laws, the USSC could also review the judgment¹⁴. In fact, the jurisprudential orientation of the Supreme Court was almost always in the direction of the affirmation of the powers of the Union to the detriment of the States, as can be seen from the case analyzed below.

4 *McCulloch v. Maryland* (1819) – Dividing Competences in a Federation: The Creation of the Theory of Implicit Powers

"Once the principle of the supremacy of the Judiciary was established, it was necessary to complete it with that of the affirmation of national supremacy" (Rodrigues, 1992, p. 42). The propitious occasion gave rise to the case *of McCulloch v. Maryland*, in which Marshall established a rule of liberal and expansive interpretation of the powers of the federal government, which became famous under the name of *the theory of implied powers*.

In this regard, this is considered the most classic case on the implicit powers of the federal government and on the legal relationship between the Union and member states. The case involved the interpretation of the *Necessary and Proper Clause* of the U.S. Constitution (Art. I, section 8), definitively establishing its meaning, with the definition of the form of distribution of powers between the Union and the States. The specific situation involved the competence of the Union to create the Second Bank of the United States and the power of the States to collect taxes from a federal entity. There has always been controversy about the competence of the Union to create banks. This is because Article I of the Constitution lists the normative competences that would be exclusive to the Union, stating that the other competences belong to the Member States. However, Section 8 of the same Article also clarifies that Congress may create "all such rules as are necessary and appropriate to implement the execution" of matters within its competence. The controversy, therefore, lay in whether the power to create banks was included in the implicit powers of Congress or whether, on the contrary, it belonged to the member states¹⁵.

The controversy had begun in 1791, when Congress passed a law authorizing the creation of the First Bank of the U.S. President Washington was in doubt whether to enact the

¹⁴ In these terms, Vile (2014, p. 110) and Patrick (2006, p. 86/87).

¹⁵ On the controversies existing at that time, see White (2012, p. 235s) and Patrick (2006, p. 217/219).

law or veto it, since the Constitution was silent on the matter. He then sought advice from two of his most eminent ministers, Alexander Hamilton and Thomas Jefferson. The opposite answers formulated placed the discussion not only in 1791 but also in 1819, when the question of the creation of the Second Bank of the U.S. was placed. Jefferson vehemently opposed the creation of the bank, as he defended a narrow interpretation of the Constitution. Hamilton, on the other hand, advised the President to enact the law, invoking arguments that were later used by Marshall in his vote. Hamilton held that all power vested in a government is sovereign by its nature, and includes the right to employ all means necessary for the accomplishment of the ends for which such power was intended. Washington enacted the law, issuing a *charter* for the operation of the bank for 20 years. At the end of the term, the *charter* was not renewed and the bank was extinguished in 1811.

In 1816, the debate on the legal possibility of creating the Second Bank was renewed, which was again authorized under protest from several states. One of these, Maryland, enacted a law authorizing the taxation of the bank at very high levels, with the clear purpose of making the operation of the bank's branch in that state unfeasible. The first and second instances of the Maryland courts validated the state law, and there was an appeal to the USSC¹⁶.

It is understandable, then, that this was Marshall's second most important judgment (Thayer; Frankfurter, 1956, p. 8), due to his broad statesmanlike vision of the needs of a national government. His vote was more like a libel of political theory, since in the 37 pages of his vote, Marshall did not cite any judicial precedent¹⁷. His only references were passages from *The Federalist*, quotations from parliamentary debates, excerpts from the *Articles of Confederation* and the Constitution itself (Hall; Wiecek; Finkelman, 1996, p. 131/132).

Marshall split his vote into two parts. The first was aimed at demonstrating that the Union had the competence to create a bank. To this end, he developed a "theory of the Constitution", demonstrating that it had been ratified by conventions specially elected for this purpose and that, therefore, the powers of the Union originate directly from the people, not being simple delegations or concessions from state governments. Thus, according to Marshall, the federal government is "the government of all; its powers were delegated by all; it represents everyone and acts for the benefit of all".

¹⁶ On these circumstances, see Hall and Patrick (2006, p. 27/28).

¹⁷ In fact, it is known that Marshall did not have great legal erudition, although he had a prodigious intelligence, as well as endowed with charisma and statesmanship. It has been said that Joseph Story supplied, in the Court, the only thing that Marshall lacked: legal erudition (Schwartz, 1985, p. 89).

In other iconic passages of his vote, Marshall mentions that "a Constitution must last for a long time and, consequently, must be able to adapt to the various crises that affect society". Marshall, when he stated that "we can never forget that it is a Constitution that we are interpreting", was certainly the first jurist to draw attention to the particularities of constitutional interpretation¹⁸, which requires the use of particular hermeneutical instruments that are different from the interpretation of an ordinary law (Dorf; Morrison, 2010, p. 41; Stites, 2001, p. 481; Chemerinsky, 2016, p. 296). And that, while admitting that the powers of the Union are limited by the Constitution, they are "supreme, within its sphere of action".

He also stated that "when the end is legitimate, within the scope provided for in the Constitution, all appropriate means, clearly capable of leading to such an end, are considered constitutional, provided that they are not prohibited and are consistent with the letter and spirit of the Constitution" (t.n.¹⁹). Marshall explained that a Constitution could not indicate in detail the powers and means for its execution, under penalty of appearing to be a code. Thus, he concluded, "its nature requires that only its broad outlines be delineated and its important goals indicated, for the secondary ingredients that make up those goals will be deduced from the nature of the goals themselves" (t.n.).

Although there was no constitutional provision for the creation of a bank, there was also no express prohibition. Thus, he defended the existence of *incidental or implied powers*. Since the Union had the power to create and collect taxes, hire and pay for services and employees, etc., Congress should have the power to fulfill its purposes. Because the Constitution had given Congress the power to "make all laws necessary and proper to implement and execute the foregoing powers listed," the creation of a bank of the United States would be constitutional. The essence of the controversy lay in the correct interpretation of the expression *necessary and proper*. For Marshall, *necessary* should be understood as *convenient* and *useful*. Therefore, Congress could choose from a variety of options for action, with discretionary power (Cohen, 1989, p. 50/52; Buttà, 1998, P. 84).

In the second part of his vote, Marshall analyzes whether the State of Maryland had the power to tax a federal entity, concluding that it did not. "*The power to tax involves the power*

¹⁸ Bickel (1985, p. 14/15) even mentioned that *Marbury v. Madison* may have been a "historical accident", due to the context of the case. But Marshall's assertion in this case, about the peculiarities of constitutional interpretation and the mention of its ability to adapt to future crises, open to change, and capable of developing, was no accident, but rather expressed insight and wisdom.

¹⁹ Whenever "t.n." appears, read it as "our translation."

to destroy", ²⁰that is, the state power to tax could make the activities of the federal entity unviable, which would be unsustainable, given the *supremacy clause*. Thus, the decision caused enormous controversy and reactions²¹ and the *bank's charter* was not renewed when it expired, twenty years later, at the time of Andrew Jackson's presidency²². But the essence of the *McCulloch v. Maryland case*, in the sense of broadly interpreting the powers of the Union, to the detriment of those of the member states, remained uncontroversial (Grossman, 2000, p. 369/370; Amar, 1998, p. 37)²³; for if decisions such as *McCulloch v. Maryland* divided public opinion, others, such as those of the so-called *Lochner Era*, garnered widespread criticism and very few supporters.

5 *Lochner v. New York* (1905) – the case that defined an era of counter-majoritarian malperformance

This was one of the most detestable decisions of the USSC, handed down at a time when its composition was markedly conservative and sensitive to the interests of the economic elite. When having to analyze issues involving the nascent social legislation, that Court adopted a reactionary stance, declaring its unconstitutionality.

The U.S. Constitution reserved broad powers to member states to legislate on issues such as health and safety (encompassingly called *police power*). However, there was a lack of definition about the limits of the action of the States, in view of the deep-rooted tradition of broad freedom of action of economic agents, with minimal government intervention.

In the last decade of the nineteenth century, a movement began seeking legislative reforms to ensure greater protection for workers – especially women, children, and workers in unhealthy or dangerous activities. One of these state laws – the *Bakeshop Act* of 1895 – sought to protect New York bakers, who used to work more than 100 hours a week, usually in unsanitary conditions. The law sought to guarantee minimum sanitary conditions for work in bakeries, in addition to prohibiting the work of bakers for periods longer than 60 days a week.

²⁰ Commenting on this famous passage from Marshall's vote, NELSON (1997, p. 266) states that the power to impose taxes is so potentially destructive that, if there were no limits to such power, the government would not need powers to confiscate property: the possibility of imposing confiscatory taxes would suffice.

²¹ Marshall was the only *Chief Justice* to write articles in newspapers, in defense of his reputation and of the court itself, when he perceived criticism of the decisions made by the Court, as occurred in this case, with an article published on 07/03/1819 (Hall; Patrick, 2006, p. 32/33). Also on these articles, see Clinton (2002, p. 550).

²² The Jacksonian ideology of strong states, to the detriment of the federal government, lasted until the Civil War (1861-1865) (Ellis, 2009, p. 214/217).

²³ For a critical reading of the *McCulloch case*, see Ely (1980, p. 85/86).

On this fact, small bakery owners felt especially harmed by the new legislation. One of them, Joseph Lochner, was fined for violating the law. He appealed to the New York state courts, arguing that the legislation was unconstitutional, but lost in all state courts. He appealed to the USSC, alleging violation of the 14th Amendment Constitution, for having been deprived of his contractual liberty without due process of law.

Historically, the idea of due process of law was related to procedural guarantees – litigants should be given ample defense, with observance of the adversarial procedure. And, from the last decades of the century. However, the conception of a substantive due process of law was developed, with judges arrogating to themselves the right to analyze the aims and the results achieved by the legislation. That is, could judges evaluate the content – the substance – of the legislation, especially its economic implications, to decide whether it was reasonable or not? The *Lochner case* consolidated this idea.

Thus, judging the case in 1905, a narrow majority of five to four held that the *Bakeshop Act* violated freedom of contract. Such a right had not been provided for in the Constitution, but was being "constructed" jurisprudentially from an expansive reading of the 14th Amendment to the Federal Constitution. It was held that liberty protected by the *due process clause* included the right to enter into contractual relationships free from any unreasonable government interference. The USSC, however, had only applied this understanding once, in the case of *Allgeyer v. Louisiana* (1897). It was then stated that the New York legislation interfered with the contractual freedom between employers and employees, and was therefore invalid, as there were no special and relevant circumstances, such as the need to protect public morals and order, health, or safety.

Very important were the unsuccessful votes of John Marshall Harlan and Oliver Wendell Holmes. Harlan argued that the majority had based their argument on a mistaken assumption that when the validity of a law was questioned in terms of its constitutional compatibility, one should start from the presumption of its constitutionality, a doctrine that later became hegemonic. He mentioned that positions taken by the Legislature should be honored, "unless the violation of the fundamental norms of the Constitution was clear and manifest" (t.n.).

Also according to Harlan, most had disregarded the evidence of the sub-human working conditions to which the bakers were subjected, with damage to their health (Friedman, 1998, p.

217). Oliver Wendell Holmes took the same position²⁴. Holmes also bitterly criticized the winning majority, stating that the doctrine she accepted did nothing more than reflect theories of social Darwinism and *laissez-faire economics*²⁵. In his famous words: "a Constitution does not seek to incorporate a particular economic theory. It is made for people of fundamentally diverse points of view."²⁶ Thus, the three grounds espoused in the *Lochner* case and that underpinned the USSC jurisprudence during that period are as follows: freedom of contract was a right protected by the *due process clauses* of the Fifth and Fourteenth Amendments; the government could interfere in freedom of contract only to ensure a valid public policy objective, such as the protection of health, public security or morals; the Judiciary should carefully scrutinize the legislation to verify whether the objective sought by the rule was valid and whether the means proposed to achieve it were adequate (Chemmerinsky, 2015, p. 644).

Thus, despite the vehement criticism made not only by the defeated minority, but also by a good part of jurists, politicians and society in general, the ideas accepted by the majority in the *Lochner* case continued to exert a strong influence on all American jurisprudence during the following three decades, called the *Lochner Era*. And between 1905 and 1937, when the Court, with the change in its composition, finally changed its position in the case of *West Coast Hotel v. Parrish*, about two hundred (Chemmerinsky, 2015, p. 644) state (and some federal) laws were overturned based on the *Lochner case*²⁷.

One such case was *Adair v. United States* (1908). At the turn of the century, it was common for employers to require their employees to sign the so-called "yellow dog contracts" – "yellow dog contract" translated into Portuguese – by which the employee promised not to join a union. As a result, a congressional act (*Erdman Act*) of 1898 prohibited railroad companies from discriminating against employees because they were unionized or not. Adair, an agent with the *Louisville and Nashville Railroad*, was accused of firing a train driver for unionizing. The case reached the USSC, which considered the federal law unconstitutional, for

²⁴ Through his positions in numerous cases, especially *Northern Securities Company v. United States* (1903), *Lochner v. New York* (1905), *Patterson v. Colorado* (1907), *Moyer v. Peabody* (1909), *Baily v. Alabama* (1910), *Fox v. Washington* (1915), and *Hammer v. Dagenhart* (1917), it can be seen that Holmes was faithful to what he had already expressed doctrinally, that is, the importance of predictability in the legal sphere, which is why the Judiciary should act within narrow limits (Cohen, 1989, p. 69 to 82).

²⁵ In Holmes' words: "*The Fourteenth Amendment had not enacted Mr. Herbert Spencer's Social Statics*". Spencer was a British sociological and philosopher, very famous in that historical period, who argued that the human race progressed most effectively through a process of natural selection, by which the rich and powerful naturally dominated the poor and weak.

²⁶ According to Roscoe Pound, Holmes' dissenting opinion was "*perhaps the best exposition of the sociological movement in jurisprudence to have emerged in the United States to that date*" – *apud* Duxbury (1995, p. 56).

²⁷ On the historical context of this case and its developments, see Kens (2001, p. 460) and Shugerman (2012, p. 159 s).

abusing its regulatory power²⁸. And on more than one occasion, it also considered unconstitutional state laws that set a minimum wage for women, on the grounds that it violated the parties' freedom of contract (cases *Adkins v. Children's Hospital* [1923] and *Morehead v. New York ex rel. Tipaldo* [1936]).

In addition, he also considered unconstitutional a good part of the economic measures adopted by President Roosevelt, in the execution of his economic program (*New Deal*), with interventions in the national economy, to take the country out of recession and reduce unemployment. Re-elected by an overwhelming majority in 1937, Roosevelt wanted to change the composition of the USSC to allow him to appoint more liberal members – the famous *Packing Plan*. It was in this context that the *Parrish case* was judged.

6 *West Coast Hotel Co. v. Parrish* (1937) – the turn of the Supreme Court: from activism to moderate self-restraint

While Congress was hotly discussing the *Packing Plan*, the USSC, in the *Parrish* case, changed its position on social and economic issues (an episode that was ironically called "the switch in time that saved nine")²⁹ and never again judged such cases from the perspective of the *substantive due process of law*. Thus, the protection of economic rights, since 1937, has been discussed under two other foundations: the *contract clause* of Article I, §10, of the Constitution, and the so-called *takings clause*, of the Fifth Amendment.³⁰

In the case in question, Elsie Parrish had filed a lawsuit by which she intended to collect the difference between the salary that had been paid to her for years by the Cascadian Hotel (belonging to the West Coast Hotel Company), and the minimum wage in force in the State of Washington; succeeding in the state instances.

²⁸ On this case, see Friedman (2002, p. 18), and Hartman, Mersky and Tate (2004, p. 263/265).

²⁹ In fact, it is now known that it was not out of "fear" of the *Packing Plan* that the USSC changed its orientation. The change occurred for two reasons. Owen Roberts, who had previously always voted against the social laws, had already expressed his intention to alter his position in December 1936, when the *Parrish case* was discussed among the justices, well before Roosevelt had unveiled his *Packing Plan*. In addition, there was the retirement of a *conservative Justice*, replaced by a liberal one, Hugo Black, which made him faithful to the scales, from 1937 onwards, lean in favor of a more liberal jurisprudence – BURNS (2009, p. 148/149), UROFSKY (2001, p. 836), and May, Ides and Grossi (2016, p. 48/50).

³⁰ This is the lesson of Chemerinsky (2015, p. 657). A *contract clause* (Art. I, §10, of the Constitution) establishes that "*On State shall ... pass any ... law impairing the obligation of contracts*". The so-called *takings clause* is provided for in Amendment V, which provides that both the federal government and local governments have the right to expropriate private property, upon fair compensation. According to jurisprudence, a taking is configured in two ways: when the government confiscates or seizes someone else's property; or when government regulation practically empties the economic content of property – *op. cit.*, p. 667/668.

In the USSC, a narrow majority (5x4) began to adopt the understanding that contractual freedom did not constitute a constitutional right. The Constitution protects freedom, but it can be regulated in the interest of society, especially when it comes to protecting women's work. According to the leading vote, "the Constitution does not speak of contractual freedom. It speaks of freedom and prohibits the deprivation of liberty without due process. By prohibiting this deprivation, the Constitution did not recognize an absolute and uncontrollable freedom" (...), because it "can and should be regulated so that citizenship is protected against the evils that threaten the health, safety, morals and well-being of people" (t.n.). Therefore, a posture of deference to the legislator was adopted, suggesting that, even when the reasonableness of a public policy was controversial, the Legislature could adopt it, except when it was evidently arbitrary or capricious³¹.

This trial represented the end of the *Lochner Era*. Since then, the USSC has shown itself to be more deferential to the Legislature in matters of economic regulation, turning its attention to issues of fundamental rights or to control legislative discretion in matters of great political impact, such as the composition of electoral districts. This is what happened with the cases of *Baker v. Carr* and *Reynolds v. Sims*, analyzed below.

7 *Baker v. Carr* (1962) – Protecting Democracy: Putting an End to Electoral District Manipulations

Since the beginning of the twentieth century, the demographic change of American society was noticeable, with the majority of the population living in cities and no longer in rural areas. This change, however, did not find an echo in the modification of electoral districts, leading to a growing inequality in the importance of the urban voter compared to the rural voter. In the state of Tennessee, for example, in the middle of the twentieth century, only 11% of the population lived in rural areas, and more than 60% of its representatives were elected by such voters. With this, Charles Baker, mayor of Millington, Tennessee, realized the need to change the composition of the Legislature, so that it mirrored the real composition of the state population. Feeling that there would be no solution through political means, he decided to file a lawsuit seeking to change the situation. In the initial instances, however, his claim was

³¹ A good summary of the case, its importance and its consequences can be found in Vile (2014, p. 12/13); Patrick (2006, p. 376/377), Grossman (2000, p. 262s), Dudziak (1992), Trachtman (2016, p. 128s) And May, Ides, and Grossi (2016, p. 48/49).

rejected, without analysis of the merits, on the grounds that the issue was political, and not legal, and could not be considered by the Judiciary.

Before the USSC, three questions were posed: whether the Judiciary had *jurisdiction* (authority/competence to decide issues involving popular representation), whether the plaintiff had standing (a kind of legitimacy to act) and whether the case was *justiciable* (whether it could be the object of a judicial decision, not being a political issue). The Court, by a 6-2 majority, answered affirmatively to each of these questions and determined that the case be retried in light of its guidance. Brennan, writing for the majority, in *obiter dictum*, made a point of advancing his position on the merits, stating that the way the State of Tennessee divided its electoral districts was clearly unconstitutional, as it violated the clause of equal protection of the law, guaranteed by the Fourteenth Amendment.

This was the first of a series of cases that led to a widespread change in the structures of electoral districts, culminating in *Reynolds v. Sims* (1964).

8 *Reynolds v. Sims* (1964) – judicial control of electoral proportionality: the affirmation of the "one man, one vote" thesis

Encouraged by the decision, a year after the case *Baker*, there were 36 lawsuits in the various U.S. states, questioning the constitutionality of the structure of the respective electoral districts, in the face of evidence that the weight of urban voters was lower than that of rural voters. In the state of Alabama, where the case *Sims* emerged, the population of the districts ranged from 6,700 voters to 104,000 voters; and, despite this variation, each district elected a representative, as the district electoral system was adopted. Thus, a group of voters filed a lawsuit in which they argued that the unequal representation of Alabama citizens was unconstitutional, and with only one unsuccessful vote, the USSC asserted that the Fourteenth Amendment required states to organize their electoral districts with respect for equality among voters. It was clarified that, in the electoral field, discrimination based on race or wealth was as prohibited as discrimination based on the location of the voter's residence (whether in the countryside or in the city), and that the basic principle applicable was "*one man, one vote*".

The case *Reynolds* it had a tremendous impact on the American nation, as all states had to reorganize their electoral districts to adapt to the orientation set by the USSC. This ended up changing the composition of the political forces, reducing the weight of the conservatives (Patrick, 2006, p. 293/294). Thus, this action of the USSC had important impacts

on the Legislature, and ten years later, by decision of the Court, it shook the Presidency of the United States. The case was tried in 1974 and went down in history as *United States v. Nixon*.

9 *United States v. Nixon* (1974) – when the holder of the most powerful office in the world had to bow to the Supreme Court

In the early hours of June 17, 1972, five burglars were arrested in the act, inside the Watergate complex, when they were rummaging through documents at the headquarters of the Democratic Party Election Committee in Washington, D.C. The investigations quickly ruled out the hypothesis of a simple theft attempt and began to point to an action coordinated by the Republican Party. Gradually, certain arrests, plea bargains, and journalistic information ended up implicating seven of the Nixon administration's top aides. Doubts existed, however, the President himself was aware of and participated in the episode (Garment, 2002, p. 828/830; Patrick, 2006, p. 359/360).

A *Special Prosecutor*, Archibald Cox, had been appointed to investigate the facts independently. Faced with the information obtained that all the conversations that took place in the Oval Office of the White House were recorded, Cox requested the recordings. Nixon ordered him to drop the request. Cox insisted. Unsuccessful in his attempt to challenge the order in court, Nixon announced that he would send redacted transcripts of some tapes, to be checked privately by Senator Stennis, declaring that he would not send any other tapes. On October 20, 1973, Cox stated that such conduct was inadmissible and that he should turn over his own tapes, not transcripts, for his examination.

Nixon then ordered Eliot Richardson, his *Attorney General*³², to fire Cox. But instead of complying with the request, Richardson and his deputy resigned from office. Nixon then ordered the *Solicitor General*, the third authority in the hierarchy of the *Department of Justice*, to fire Cox, which he did in October 1973. And, in the face of social backlash, a new *Special Prosecutor* was appointed – Leon Jaworski. He insisted on the request for the delivery of the tapes determined by Federal Judge John Sirica, in April 1974, through a *subpoena* (coercive court order).

Again Nixon sent some edited transcripts, refusing to hand over others, alleging *executive immunity and privilege*. Judge Sirica rejected the immunity claim and ordered the

³² A position that, in the United States, in addition to the head of the Federal Public Prosecutor's Office, substantially performs functions that in Brazil are attributed to our Minister of Justice.

delivery of the tapes. Nixon then appealed directly to the USSC, which admitted to hearing the case, given its relevance and urgency, even before it was analyzed by the Federal Court of Appeals (Graetz; Greenhouse, 2016, p. 326s; Chemerinsky, 2015, p. 372/374).

In a unanimous judgment³³, President Nixon's thesis was rejected, in the sense that it would be up to him alone to decide what could or could not be delivered, due to the presidential immunity and privilege clause; and that, in the event of litigation in this regard, it was stated, it will always be up to the USSC to interpret the Constitution and set the limits of the other powers.

The Court recognized that executive *privilege*, although not formally provided for, stemmed from the inherent powers of the President, but that the privilege and immunity of the Executive were not absolute and the President of the United States "was not above the law" (Friedman, 2002, p. 601), and had to yield to the judicial determination that requires the presentation of evidence necessary for a criminal proceeding (Chemerinsky, 2015, p. 354), and the "privilege must be considered in the light of our historical commitment to the affirmation of the '*rule of law*', (...) according to which the guilty should not escape nor the innocent suffer" (Greenbaum, 1992, p. 307/308).

Thus, between the generic interest of the immunity invoked and the specific interest of criminal prosecution, the latter must prevail, which is why the Court ordered the President to comply with the order to hand over the tapes.

Nixon turned over the tapes on August 6, which proved that he had obstructed a police investigation by ordering the FBI (Federal Bureau of Investigation) not to investigate the *Watergate case*. And because of this, Nixon quickly lost all political support and on August 9 resigned from the presidency.

This is a judgment that could only have taken place in consolidated democracies, which devote a deep commitment to the principle that all political agents are subject to the law and that the law also represents limits to politics; in this case, the fate of the occupant of the most powerful office in the world is substantially defined by a judicial decision. Thus, a decade later, the USSC's gaze turned again to the limits of Congressional powers.

³³ It is known that there was a disagreement between the *Justices*, during the internal discussion of the case, but they decided to put their differences aside and seek a unanimous decision (Trachtman, 2016, p. 160/163). On the importance that judges attach to a unanimous judgment, see Atiyah and Summers (1996, p. 288).

10 *Bowsher v. Synar* (1986) – the case that defined the scope of the powers of Congress as an organ of control of the Executive

This was an important case on the scope of the principle of separation of powers, seeking to define the limits of the National Congress in the function of controller of the Executive Branch.

In 1985, the U.S. Congress passed the *Balanced Budget and Emergency Deficit Control Act*, an attempt to eliminate the federal budget deficit. The law provided for a maximum deficit for each of the fiscal years 1986 to 1991 and that the *Comptroller General* would have the power to review budgets presented by the various state agencies and order the President to order such entities to reduce expenses and bring them into compliance with the legislation.

Congressman Mike Synar then postulated the declaration of unconstitutionality of the aforementioned law, for violating the principle of separation of powers, being successful in the first instance.

The USSC agreed to hear the case before the Federal Court of Appeals and, by a 7-2 majority, declared the law unconstitutional. It was recognized that it is inherent in the system of separation of powers "that it produces conflicts, confusion and sometimes discord, but this has been deliberately structured in such a way as to ensure a full, vigorous and open debate on the great questions that concern the people and make operative the brakes on the exercise of the powers of government".

Moving on to the specific case, it was stated that since the Constitution did not give Congress any active role in supervising the execution of laws, a public agent – the *Comptroller General* – *could not* be responsible to Congress and have the power to supervise the execution of laws, since Congress could not delegate to someone powers that it does not have (Sargentich, 2009, p. 34; Hartman; Mersky; Tate, 2004, p. 480/481; Chemerinsky, 2015, p. 348 and 368/369).

From this, in times of extreme crises, how should the Judiciary behave? This is what will be seen with the cases dealt with in this last section, judged in times of war.

11 *Korematsu v. United States* (1944), *Hamdi v. Rumsfeld* (2004); *Rasul v. Bush* (2004); *Handan v. Rumsfeld* (2006); *Boumediene v. Bush* (2008) – when the drums of war are beating, should the Judiciary withdraw?

The U.S. Constitution establishes the President as the Commander-in-Chief of the Armed Forces and gives Congress powers to fund war efforts, keeping silent about the role of the judiciary in times of war. From this point on, the Judiciary sometimes opted for a more deferential posture to the actions of the political powers, as occurred in the *Korematsu case* (1944). On other occasions, the Judiciary has taken more incisive positions, as in the cases of *Hamdi v. Rumsfeld* (2004), *Boumediene v. Bush* and *Al Odah v. U.S.* (2008).

One of the most controversial decisions of the USSC belongs to the period of the Second World War, the case of *Korematsu v. United States* (1944), in which the Court, by six votes to three, *did not* recognize the illegality of the internment in concentration camps of 112 thousand Japanese and descendants of Japanese (Abraham, 1998, p. 104) – the overwhelming majority born in the U.S. and with U.S. citizenship, including children and the elderly. No formal accusation or suspicion of disloyalty was necessary – the fact that he was of Japanese descent was enough. This was the only time that the Supreme Court validated a patent of discrimination based exclusively on race, to the detriment of a minority, because the government was acting to ensure the security of the country (Chemerinsky, 2015, p. 727/728).

Four cases arising from this internment ended up in the USSC: *Hirabayashi v. United States* and *Yasui v. United States*, tried jointly in 1943, and *Korematsu v. United States* and *Endo v. United States*, tried in 1944 (Urofsky, 2015, p. 246/251; Hartman; Mersky; Tate, 2004, p. 82/83).

Fred Korematsu was an American citizen, Japanese descendant, born and raised in California who had never visited Japan, being perfectly integrated into the *American way of life*. In 1941, before the attack on Pearl Harbor, he tried to enlist in the U.S. Navy, but was refused for health reasons. He then went to work in a shipyard, as a welder. When war broke out, he lost his job because of his ethnic background. When, on 05/09/1942, the segregation of all Japanese descendants in internment camps was determined, Korematsu understood that this order did not involve him, and did not present himself. He was discovered, arrested and convicted of violating military orders (Patrick, 2006, p. 197).

Examining the case, the USSC found that the arrest did not violate due process, stating that in time of war violations of civil liberties are inevitable. Still admitting that "all legal

restrictions that limit civil rights should immediately be taken as suspect", it was maintained that "this does not mean that all restrictions are unconstitutional", as "reasons of public necessity can sometimes justify such restrictions". It was understood that the war against Japan and the fear of the military authorities regarding the presence of spies justified the extreme measures then taken. It was also admitted that the order of internment of Japanese descendants was very severe, but that "adversity is part of war, and war is an aggregate of adversities".

Three *Justices* dissented, arguing that internment should be decided through investigations to separate the loyal Japanese from those suspects (White, 1988, p. 224, Tarchi, 1999, p. 272/277; Finkelman, 2001, p. 424). And although the precedent of the *Korematsu* case has never been *overruled*, history has shown that the measures were exaggerated in relation to almost all of those involved, loyal American citizens; so much so that, in the eighties, Congress reopened investigations into the treatment of Japanese Americans during the war and officially recognized the "grave injustice" of the compulsory internment of that population. offering compensation of 20 thousand dollars for each Japanese descendant hospitalized and who was still alive (Patrick, 2006, p. 198/199).

Fifty years later, when judging the case *Adarant v. Pena* (1995), the Supreme Court recognized that the *Hirabayashi* and *Korematsu* cases were decided erroneously (Weiner, 2002, p. 432). However, this debate does not occur only in times of "traditional" war, of one army against another; and, after the attacks of September 11, 2001, the U.S. Congress passed a Resolution (*War on Terror*) authorizing the President to use military force against countries, organizations, or individuals responsible for the attack and to take the necessary measures to prevent future attacks.

Based on this resolution, the Bush administration has embarked on global efforts to arrest those suspected of involvement in terrorist acts. The problem is that in the war on terror, the identification of the enemy is not always simple, and it is also difficult to distinguish a terrorist from a simple sympathizer of the cause. The Geneva Convention provides that enemy combatants can be considered prisoners of war, but also provides that those who claim not to be combatants should have the right to due process of law.

Many of the people who were arrested in the name of *War on Terror* did not assert themselves as combatants. The Bush administration maintained that anyone who was not a U.S. citizen could not access U.S. justice, especially if they were imprisoned outside the United States, which is why it built a special prison for terrorists at the U.S. base at Guantanamo, Cuba.

According to this reasoning, it was intended that what happens in Guantánamo stays in Guantánamo.

In Afghanistan, in 2001 Yasir Hamdi was captured, born in the United States, although of Saudi descent and having moved with his family to Saudi Arabia at an early age. In 2002 he was transferred to the prison at Guantánamo. Months later, when his American citizenship was confirmed, he was transferred to a military prison on American soil. It was alleged, in *habeas corpus*, that, as a U.S. citizen, he could not be held indefinitely, without the opportunity to defend himself against the charges, vehemently denying that he was a combatant.

The USSC then stated that Hamdi had the right to due process of law, and should be informed of the grounds of the accusation, ensuring that he had the opportunity to rebut them. It has been argued that although the President is the Commander-in-Chief of the armed forces, the war does not give him a blank check for infringing on the rights of American citizens. It has been stated that while the government's interest in detaining those who pose an immediate threat to national security during war conflict is relevant, history teaches that an unchecked detention system has the potential to become a means of oppressing and abusing others who do not pose such a threat: "It is during our most challenging and uncertain times that our nation's commitment to due process is most severely tested; and it is in these moments that we must preserve at home our commitment to the principles for which we fight abroad."³⁴

Thus, after the Supreme Court's decision, the U.S. government and Hamdi reached an agreement: in exchange for his release, Hamdi agreed to leave the country and renounce his citizenship (Chemerinsky, 2015, p. 396/397).

Along with the *Hamdi case*, the case of *Rasul v. Bush (542 U.S. 466 [2004])* was also judged³⁵, in which it was stated that the Federal Courts of Justice have jurisdiction to review *habeas corpus* challenging the legality of the imprisonment of enemy combatants³⁶. These cases established that when political powers infringe on personal freedoms in the name of security, the constitutional theory of *checks and balances* imposes that an important role be preserved for the Judiciary in defending them (Dorf; Morrison, 2010, p. 122).

³⁴ Case Hamdi v. Rumsfeld, Justice O'Connor's vote. Available em <https://www.supremecourt.gov/opinions/03pdf/03-6696.pdf>, p. 27. Accessed on 04/10/2022.

³⁵ The case of *Rasul v. Bush (2004)* involved two Australian citizens and 12 Kuwaitis who had been captured in Afenagnisan and taken to the Guantánamo naval base, having filed *habeas corpus* due to their indefinite detention, without formal charges (VILE, 2014, p. 97 and Chemerinsky, 2015, p. 398).

³⁶ On the legal challenges of the *U.S.A. Patriot Act of 2001*, see Hay (2010, p. 321/323).

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In response to these cases, the Bush administration secured passage of the *Detainee Treatment Act*, creating the *Combatant Status Review Tribunals (CSRTs)*, a kind of special military tribunal to privately handle cases of claims from detainees on suspicion of terrorism.

In *Hamdan v. Rumsfeld* (2006), a 5-3 majority invoked the *Uniform Code of Military Justice*, which required that military courts, such as the CSRT, should provide real opportunity for defense to the accused. As this had not occurred, it was determined that Hamdan should be put on regular trial.

Also reacting to the *Hamdan* trial, Bush pushed through Congress a new law – the *Military Commissions Act* – adding a little more procedural formalities to the military courts, but substantially maintaining the previous situation. In response to this strategy, new lawsuits have emerged, involving 37 Guantánamo detainees, filing the lawsuits on behalf of two of them, Lakhdar Boumediene (*Boumediene v. Bush*), an Algerian imprisoned in Bosnia, and Fawzi al Odah (*Al Odah v. U.S.*), a Kuwaiti captured in Afghanistan; both with the arrests that took place in 2001 and that requested access to ordinary justice to prove their innocence (Chemerinsky, 2015, p. 159 and 399).

In a narrow 5-4 majority, the USSC maintained that the reach of the Constitution is limited neither by geography nor by war. It does not allow the government to incarcerate any person, citizen or not, in war or peace, on U.S. soil or abroad, without observing the basic *due process of law*. As the military courts did not observe such a guarantee, the accused had the right to the *writ of habeas corpus* so that the ordinary courts could examine the legality of their arrests. In the words of the leading vote, "*the laws and Constitution are designed to survive, and remain in force, in extraordinary times*", and no branch of government can "*switch the Constitution on or off at will*".³⁷

Paradoxically, however, the judicial tide has changed again over time, considering the set of judicial decisions; and between 2008 and 2010, 56% of the *habeas corpus* petitions filed in favor of the inmates were successful. As of July 2010, however, the success rate has dropped to a mere 8%. In 2012, the Supreme Court declined to hear appeals from seven Guantánamo detainees. As a result, the orientation of the lower courts was maintained, which made it more difficult for the detainees to defend themselves³⁸.

³⁷ On this arm wrestling between the political branches and the Judiciary involving the prisoners in Guantánamo, see Chemerinsky (2016, p. 944/946).

³⁸ According to information obtained from Trachtman (2016, p. 172). Also good information about the cases of *Rasul v. Bush*, *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, and *Boumediene v. Bush*, can be found in BURNS (2009, p. 244/246) and Chemerinsky (2015, p. 395/400).

It's time to wrap it up.

12 Final considerations

The Supreme Court of the United States really is a supreme court. He began to build his role in the architecture of the powers of the great American nation more than two hundred years ago, when he judged the case *Marbury v. Madison*. In this case, it attributed to itself the power to invalidate laws emanating from the National Congress, on the grounds that they were contrary to the Constitution. From then on, in a series of other important cases, it established itself as the final interpreter of the Constitution, a power that allowed it to define the scope and limits not only of the other powers of the Union, but also of the state governments. His work helped to shape and consolidate the experiments of rigid constitutionalism, presidentialism and federalism, peculiar institutions created by the political genius of the *founding fathers*.

In other areas, not dealt with here, the Supreme Court has also contributed substantially to establishing the contours of fundamental rights and freedoms (there called *civil rights*), the procedural rights of criminal defendants, the scope of religious freedom, and countless other aspects essential to citizenship in general.

At times, its actions were reactionary, neutralizing the more liberal actions of the other powers and preventing social advances, as occurred in the case *Lochner*, and also in other cases not dealt with here, such as the questionable decisions rendered in the cases *Dred Scott v. Sandford* (1857), *Civil Rights cases* (1883), *Plessy v. Ferguson* (1896). But after the end of the call *Lochner was*, the decisions of the Supreme Court tended to be more liberal and protective of the rights of citizens and of democracy itself, as occurred with the cases *Baker v. Carr*, *Reynolds v. Sims*, *United States v. Nixon* among others.

The composition of the Court, in the various historical periods, markedly influenced its orientation, more liberal or more conservative. The Anglo-Saxon pragmatic spirit, also present in the American homeland, accepts this naturally, understanding that, in the long history of a nation, the alternation between conservative and progressive courts ends up resulting in an acceptable balance.

The fact is that, criticized or praised, conservative or liberal, the Supreme Court has conquered a central place among the American institutions, fulfilling the role designed by the founders of that nation, which is that of controller of the other powers, delimiting its attributions, in order to better protect the rights of citizens, making it truly supreme.

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