

3-20-2018

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The Claim of Judicial Finality: Theory Undercut by Experience

LOUIS FISHER*

ABSTRACT

*Justices of the Supreme Court, legal scholars, and reporters who cover judicial proceedings frequently claim that when the Court issues a constitutional decision it remains final unless the Court changes its mind or the Constitution is amended to reverse the Court. However, the record of more than two centuries offers an entirely different picture. Decisions by the Supreme Court lack finality on constitutional issues partly because the Court makes mistakes and has done so throughout its history. Human institutions, including the judiciary, are prone to miscalculation, including law, history, and political developments. After the Court issues a constitutional decision it does not deprive the elected branches from adopting policies directly contrary to what the Court has announced. This article offers many examples to demonstrate that constitutional interpretation is not centered entirely in the Supreme Court. The process involves all three branches, the states, scholars, and the general public. At times the Court recognizes the deficiency of an earlier decision and overrules it. However, the sole-organ error in *Curtiss-Wright* (1936) was not corrected by the Court until its decision in *Zivotofsky v. Kerry* on June 8, 2015. On other occasions, the regular political process offers constitutional interpretations that override the Court.*

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I. INTRODUCTION

In a 1953 opinion, Justice Robert Jackson remarked, “[w]e are not final because we are infallible, but we are infallible only because we are final.”¹ The sentence is surprising, coming from someone who, over the years, demonstrated unusual sophistication in understanding the Supreme Court’s role in democratic government. Clearly, the Court has never been infallible or final, as Jackson fully understood when he wrote for the Court in 1943 to reverse the Court’s 8-1 flag-salute decision issued three years earlier.² Why advance such a plainly inaccurate claim?

Judicial review does not mean judicial finality or judicial supremacy. It was never the intent of the Framers to vest final or exclusive authority in the Supreme Court on constitutional interpretation. The Court has never functioned in that manner. As with other branches of government, the Court

¹ *Brown v. Allen*, 344 U.S. 443, 540 (1953), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

² *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville Dist. v. Gobitis*, 310 U.S. 586 (1940)).

has its highs and lows, contributing to individual rights and freedoms in some cases while undermining them in others. It is fully capable of making errors. Chief Justice Rehnquist put the matter crisply in 1993: “It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.”³

This article analyzes Supreme Court decisions to underscore the Court’s non-final role in deciding constitutional law. Reasons for the selections vary: helping to trigger the Civil War (*Dred Scott*),⁴ a quick reversal because the Court’s composition changed (the Legal Tender Cases),⁵ a Justice switches his vote and we don’t know who or why (the 1895 Income Tax Cases),⁶ and invoking divine ordinances to prevent women from practicing law (*Bradwell v. State*).⁷ Other cases involve equal accommodation legislation,⁸ the separate-but-equal standard,⁹ “liberty of contract,”¹⁰ mandatory sterilization,¹¹ child-labor legislation,¹² misrepresenting John Marshall’s sole-organ speech (*Curtiss-Wright*),¹³ the flag-salute cases,¹⁴ and the Japanese-American cases.¹⁵ Litigation after World War II includes the state-secrets *Reynolds* case,¹⁶ school busing,¹⁷ the trimester framework for abortion,¹⁸ an unworkable federalism model (*National League of Cities*),¹⁹ legislative vetoes,²⁰ treating corporations as persons,²¹ and campaign finance.²²

The process of constitutional interpretation is not a judicial monopoly but rather a broad and continuing dialogue. In an article published in 1998, Jack

³ *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

⁴ *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amends. XIII, XIV.

⁵ Legal Tender Cases, 79 U.S. (12 Wall.) 570 (1871).

⁶ *Pollock v. Farmers’ Loan & Tr. Co.*, 157 U.S. 583 (1895), *superseded by constitutional amendment*, U.S. CONST. amend XVI.

⁷ *Bradwell v. Illinois*, 83 U.S. 130 (1873).

⁸ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

⁹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁰ *Lochner v. New York*, 198 U.S. 45 (1905).

¹¹ *Buck v. Bell*, 274 U.S. 200 (1927).

¹² *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

¹³ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

¹⁴ *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642–43 (1943) (overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940)).

¹⁵ *Hirabayashi v. United States*, 320 U.S. 81, 83, 63 S. Ct. 1375, 1377, 87 L. Ed. 1774 (1943); *Minoru Yasui v. United States*, 320 U.S. 115, 116 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944);

¹⁶ *United States v. Reynolds*, 345 U.S. 1 (1953).

¹⁷ *Milliken v. Bradley*, 418 U.S. 717 (1974).

¹⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁹ *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976) *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985).

²⁰ *INS v. Chadha*, 462 U.S. 919 (1983).

²¹ *Citizens United v. FEC*, 558 U.S. 310 (2010).

²² *Id.*

Balkin and Sanford Levinson objected that the current study of constitutional law “is too much centered on the opinions of the Supreme Court and lacks comparative and historical perspective.”²³ Faulting the study of constitutional interpretation for its “worship of the Supreme Court and its pronouncements,”²⁴ they selected three decisions for judicial error: *Lochner*,²⁵ *Plessy*,²⁶ and *Korematsu*,²⁷ while referring to *Dred Scott* as “infamous.”²⁸ In an article published in 1998, Richard Primus selected *Dred Scott*, *Plessy*, and *Lochner* as so lacking in support that they rank as anticanon.²⁹ Ian Bartrum’s 2009 study focused largely on *Lochner*.³⁰

Jamal Greene in 2011 prepared an extensive analysis of the anticanon, directing attention to *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu*.³¹ Four other cases he found “particularly poorly reasoned or morally challenged but . . . not, as a descriptive matter, anticanonical.”³² Scholars have identified other decisions as anticanon.³³ Nominees to the Supreme Court are at times asked by Senators to comment on cases that fall within the category of anticanon.³⁴

The principle of judicial finality remains strongly held. In 2012, Jeffrey Toobin remarked that a Supreme Court decision “interpreting the Constitution can be overturned only by a new decision or by a constitutional amendment.”³⁵ Tom Goldstein, who frequently argues cases before the Supreme Court, stated in 2013 that when the Court “interprets the Constitution, that is the final word. The President and Congress can’t overturn its decision. The only option is to

²³ J. M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 964 (1998).

²⁴ *Id.* at 965 n.8.

²⁵ *Lochner v. New York*, 198 U.S. 45 (1905).

²⁶ *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 494–95 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 349 U.S. 294 (1955).

²⁷ *Korematsu v. United States*, 323 U.S. 214 (1944).

²⁸ Balkin & Levinson, *supra* note 23, at 1021.

²⁹ Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243, 248, 256–57 (1998). Primus defines anticanon to mean “highly important but normatively undesirable” court rulings that are “in some senses a mirror image of the constitutional canon.” *Id.* at 244 n.10.

³⁰ Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy*, 18 WM. & MARY BILL RTS. J. 327, 348 (2009).

³¹ Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

³² *Id.* (discussing *Prigg v. Pennsylvania*, 41 U.S. 539 (1842); *Giles v. Harris*, 189 U.S. 475 (1903); *Gong Lum v. Rice*, 275 U.S. 78 (1927); and *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

³³ *Id.* at 388–90 (collecting cases that scholars have described as anticanon)

³⁴ *Id.* at 392–93, 398–99.

³⁵ JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 194 (2012).

amend the Constitution, which is basically impossible.”³⁶ The cases analyzed in this article demonstrate that, contrary to the principal of judicial finality, the process of constitutional interpretation is much more fluid and non-final, and draws guidance from the elected branches and the general public.

II. SELECTIONS BY CHIEF JUSTICE HUGHES

Writing in 1936, Chief Justice Charles Evans Hughes analyzed three cases to illustrate the capacity for judicial error. In generally praising the Supreme Court, he recognized that it “has the inevitable failings of any human institution.”³⁷ He acknowledged that “in three noticeable instances the Court has suffered severely from self-inflicted wounds” by deciding *Dred Scott*, the Legal Tender Cases, and the Income Tax Cases.³⁸

A. *Dred Scott*

In *Dred Scott*, the Supreme Court considered two principal issues: could a black man sue in federal court, and did Congress possess authority to prohibit slavery in the territories? James Buchanan, newly elected President, decided to entrust those constitutional questions exclusively to the Court. His inaugural address of March 4, 1857, regarded slavery as presenting “a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be”³⁹

Buchanan was correct that the decision would be speedy. The Court released its opinion two days later.⁴⁰ Writing for the Court, Chief Justice Roger Taney held that Dred Scott as a black man was not a citizen of Missouri within the meaning of the Constitution and was not entitled to sue in federal court.⁴¹ For Taney, the “only matter in issue before the court, therefore, is whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of

³⁶ Tom Goldstein, *Power*, SCOTUSBLOG (June 20, 2013, 6:49 AM), <http://www.scotusblog.com/2013/06/power> [<https://perma.cc/3YER-DJPZ>].

³⁷ CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 45–46 (1936).

³⁸ *Id.* at 50.

³⁹ *MY FELLOW CITIZENS: THE INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, 1789–2009*, 132 (Arthur M. Schlesinger, Jr. & Fred L. Israel eds., 2010).

⁴⁰ *Scott v. Sandford*, 60 U.S. (19 How.) 393, 403 (1857).

⁴¹ *Id.* at 454.

a State, in the sense in which the word citizen is used in the Constitution of the United States.”⁴²

Taney regarded blacks as “a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”⁴³ Moreover, Congress had no constitutional authority to prohibit slavery in the territories.⁴⁴ To Taney, the Constitution recognized “the right of property of the master in a slave” and made “no distinction between that description of property and other property owned by a citizen.”⁴⁵

Although President Buchanan accurately anticipated the swiftness of the Court’s ruling, he falsely predicted that the Court’s decision would render the slavery issue “finally settled.”⁴⁶ The Court’s decision helped precipitate a civil war that left, out of a population of 30 million, more than 600,000 dead and 400,000 wounded.⁴⁷ To Chief Justice Hughes, even assuming “the sincerity of the judges who took this view, the grave injury that the Court sustained through its decision has been universally recognized. Its action was a public calamity.”⁴⁸

Dred Scott, formally overturned by the Civil War Amendments, faced political repudiation long before.⁴⁹ In his inaugural address in 1861, Abraham Lincoln denied that constitutional questions could be settled solely by the Supreme Court.⁵⁰ If government policy on “vital questions affecting the whole people is to be irrevocably fixed” by the Court, “the people will have ceased to be their own rulers.”⁵¹ In legislation enacted in 1862, Congress asserted its independent constitutional authority by prohibiting slavery in the territories, with or without the Court’s support.⁵² In that same year, Attorney General Edward Bates released a legal opinion that shredded the reasoning of *Dred Scott*.⁵³ He concluded that men of color, if born in America, are citizens of the

⁴² *Id.* at 403.

⁴³ *Id.* at 404–05.

⁴⁴ *Id.* at 447–52.

⁴⁵ *Id.* at 451.

⁴⁶ MY FELLOW CITIZENS: THE INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 1789–2009, *supra* note 39.

⁴⁷ LOUIS FISHER & KATY J. HARRIGER, AMERICAN CONSTITUTIONAL LAW 790 (11th ed., 2016).

⁴⁸ HUGHES, *supra* note 37, at 50.

⁴⁹ U.S. CONST. amends. XII, XIV, XV.

⁵⁰ MY FELLOW CITIZENS: THE INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 1789–2009, *supra* note 39.

⁵¹ *Id.* at 146.

⁵² Abolition of Slavery Act (Territories), ch. 111, 12 Stat. 432 (1862).

⁵³ 10 OP. ATT’Y GEN. 382 (1862).

United States.⁵⁴

B. *Legal Tender Cases*

Chief Justice Hughes explained that in the years following *Dred Scott* the Court “was still suffering from lack of a satisfactory measure of public confidence.”⁵⁵ Yet it chose, with the Legal Tender Cases in 1870–71, to act in a manner that once again “brought the Court into disesteem.”⁵⁶ In 1866, Congress reduced the number of Justices “in order to deprive President [Andrew] Johnson of the opportunity to make appointments.”⁵⁷ After Ulysses S. Grant became President, Congress increased the number of Justices to nine.⁵⁸ There were two vacancies on the Court when it decided the first legal tender case, *Hepburn v. Griswold*.⁵⁹ It involved a statute passed by Congress during the Civil War, treating paper money as legal tender for discharging prior debts.⁶⁰ With a bench of seven Justices and three in dissent, the Court held that the money (“greenbacks”) was unconstitutional.⁶¹ Four Justices in the majority were Democrats; three dissenters were Republicans.⁶² In the lower federal courts, almost every Democratic judge declared the statute unconstitutional; nearly every Republican judge sustained it.⁶³

The retirement of Justice Robert Grier and the congressional authorization the previous year of a new Justice allowed President Grant to appoint two new members.⁶⁴ Grant had reason to believe that both nominees would support the Legal Tender Act.⁶⁵ William Strong, as a member of the Supreme Court of Pennsylvania, had already sustained the statute.⁶⁶ Grant’s second choice, Joseph P. Bradley, appeared to be no less sympathetic.⁶⁷ Fifteen months after the Legal Tender Act had been declared unconstitutional, the Court upheld it 5 to 4.⁶⁸ Strong and Bradley joined the original three dissenters to form the

⁵⁴ *Id.* at 413.

⁵⁵ HUGHES, *supra* note 37, at 51.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 51–52.

⁵⁹ *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870).

⁶⁰ Legal Tender Act, ch. 33, 12 Stat. 345 (1862) (authorizing the issue and redemption of United States notes for funding the floating debt of the United States).

⁶¹ *Hepburn*, 75 U.S. (8 Wall.) at 626.

⁶² Charles Fairman, *Mr. Justice Bradley’s Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 1128, 1131 (1941).

⁶³ *Id.*

⁶⁴ Sidney Ratner, *Was the Supreme Court Packed by President Grant?*, 50 POL. SCI. Q. 343, 352 (1935).

⁶⁵ *Id.* at 351–52.

⁶⁶ Fairman, *supra* note 62, at 1128.

⁶⁷ *Id.*

⁶⁸ *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 570 (1871).

majority.⁶⁹ Chief Justice Hughes concluded: “From the standpoint of the effect on public opinion, there can be no doubt that the reopening of the case was a serious mistake and the overruling in such a short time, and by one vote, of the previous decision shook popular respect for the Court.”⁷⁰ The second decision underscored that a constitutional decision depends not solely on conscientious, careful reasoning by Justices trained in the law, but on political judgments in Congress regarding the size of the Court and new appointments.

C. *Income Tax Cases*

Chief Justice Hughes’s third example of a judicial self-inflicted wound involves two decisions in 1895 on the taxing power. Twenty-five years following the *Legal Tender Cases*, after the Court “had recovered its prestige, its action in the income tax cases gave occasion for a bitter assault.”⁷¹ A unanimous Court in 1881 upheld a federal income tax passed in 1864 to finance the Civil War.⁷² It did so by calling it an indirect tax, concluding that direct taxes (requiring apportionment under Article I, Section 9) “are only capitation taxes . . . and taxes on real estate.”⁷³ Capitation taxes are also called “head taxes” (applied to each person).⁷⁴

In 1895, however, the Supreme Court held that a tax on rents or income of real estate was a direct tax and violated the Constitution by not being apportioned.⁷⁵ On the question whether the income tax was a direct or indirect tax, the Justices were evenly divided, 4 to 4.⁷⁶ Upon rehearing, a 5-4 decision invalidated the income tax, treating it as a direct tax to be apportioned on the basis of population.⁷⁷ Justice Howell Edmunds Jackson, who did not participate in the first decision because of illness, voted in favor of the income tax in the second case.⁷⁸ All things being equal, that should have produced a 5-4 majority *upholding* the income tax. However, another Justice switched his vote to build a majority against the income tax.⁷⁹ Who he was, and why he switched, was not disclosed.⁸⁰ The razor-thin majority and sudden reversal

⁶⁹ *Id.* See generally BRIAN MCGINTY, *LINCOLN AND THE COURT* 278–87 (2008) (discussing the background of the *Legal Tender Cases*).

⁷⁰ HUGHES, *supra* note 37, at 52.

⁷¹ *Id.* at 53.

⁷² *Springer v. United States*, 102 U.S. 586 (1881).

⁷³ *Id.* at 602.

⁷⁴ 1 CRAIG R. DUCAT, *CONSTITUTIONAL INTERPRETATION: POWERS OF GOVERNMENT* 340 (9th ed., 2009).

⁷⁵ *Pollock v. Farmers’ Loan & Tr. Co.*, 157 U.S. 429, 583 (1895).

⁷⁶ *Id.* at 586.

⁷⁷ *Id.* at 637.

⁷⁸ HUGHES, *supra* note 37, at 54.

⁷⁹ *Id.*

⁸⁰ *Id.*

undermined the reputation of the Court. Not until 1913 did Congress and the states pass the Sixteenth Amendment to override the Court.⁸¹

III. EARLY CHECKS ON JUDICIAL FINALITY

It is instructive to review several cases in the nineteenth century that illustrate why Supreme Court decisions on constitutional matters are not necessarily final. Initially, some Justices were astounded to learn that a Court's constitutional decision could be reversed by the elected branches.⁸² But in time, the Court learned it was not the only voice empowered to interpret the Constitution.

A. *McCulloch v. Maryland*

In 1819, the Supreme Court upheld the constitutionality of the U.S. Bank.⁸³ Writing for the majority in *McCulloch*, Chief Justice Marshall seemed to promote the doctrine of judicial supremacy. He said that if a constitutional dispute must be decided, "by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty."⁸⁴

He overstated the Court's role. At issue in *McCulloch* was the decision of the two elected branches to create such an institution.⁸⁵ It was their discretion to create or not. Whether or not the Court blessed their efforts, a future Congress or President could make an independent decision about continuing the Bank. If Congress decided against reauthorization, that decision was closed and final. The Court had no part. If Congress reauthorized the Bank and a President vetoed it, either on policy or constitutional grounds, the Bank was invalidated unless Congress could muster sufficient votes for an override. Those decisions by the elected branches could not be second-guessed or controlled by the Court. *McCulloch* has been described as one of the "fixed stars in our constitutional constellation."⁸⁶ No one doubts its importance, but it did not establish judicial finality or supremacy.

Congress decided in 1832 to reauthorize the Bank. President Andrew Jackson was urged to sign the bill because the Bank had been endorsed by previous Congresses, Presidents, and the Supreme Court.⁸⁷ Supposedly he was duty bound to sign the bill. Instead, he issued a veto, considering "mere

⁸¹ U.S. CONST. amend. XVI.

⁸² See *infra* Section III.B. (discussing the Wheeling Bridge Cases from 1852 to 1856 and the three dissents in the latter case).

⁸³ *McCulloch v. Maryland*, 17 U.S. 316, 436–37 (1819).

⁸⁴ *Id.* at 401.

⁸⁵ *Id.* at 401–02.

⁸⁶ Greene, *supra* note 31, at 385.

⁸⁷ FISHER & HARRIGER, *supra* note 47, at 24.

precedent” a “dangerous source of authority,” and explaining that it “should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled.”⁸⁸ In reviewing the checkered history of the Bank, he noted that the elected branches favored a national bank in 1791, decided against it in 1811 and 1815, and returned their support in 1816.⁸⁹ At the state level, legislative, executive, and judicial opinions on the constitutionality of the Bank were mixed.⁹⁰ Nothing in this record persuaded Jackson to sign the bill. Congress sustained his veto.⁹¹

To Jackson, even if Chief Justice Marshall’s opinion on the Bank in 1819 “covered the whole ground of this act, it ought not to control the coordinate authorities of this Government.”⁹² All three branches, he said, “must each for itself be guided by its own opinion of the Constitution.”⁹³ Each public official takes an oath to support the Constitution “as he understands it, and not as it is understood by others.”⁹⁴ His veto message articulated the theory of coordinate construction. It was as much the duty of the elected branches to decide the constitutionality of legislation as the judiciary. The authority of the Supreme Court “must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.”⁹⁵

The dispute over *McCulloch* applies to contemporary issues. The Supreme Court in 1988 upheld the constitutionality of the independent counsel.⁹⁶ Nothing in that decision prevented Presidents from vetoing reauthorizing bills as an unconstitutional infringement of their control over the executive branch, and nothing prevented Congress from deciding not to reauthorize the independent counsel if it concluded that this office posed substantial concerns, including constitutional. That is what happened in 1999 when Congress declined to reauthorize the independent counsel.⁹⁷

B. *Wheeling Bridge Cases*

Judicial and congressional actions in the 1850s underscore why the Supreme Court need not have the final word on constitutional matters. In

⁸⁸ 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1144–45 (James D. Richardson ed., 1897–1925).

⁸⁹ *Id.* at 1145.

⁹⁰ *Id.*

⁹¹ FISHER & HARRIGER, *supra* note 47, at 25–26.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Morrison v. Olson*, 487 U.S. 654, 696–97 (1998).

⁹⁷ LOUIS FISHER, *DEFENDING CONGRESS AND THE CONSTITUTION* 83–85 (2011).

1852, the Court decided that the height of the Wheeling Bridge over the Ohio River, constructed under Virginia state law, constituted a “nuisance” because the structure was so low it obstructed navigation.⁹⁸ The Court appointed a commissioner to determine the facts about the bridge.⁹⁹ By measuring its height, the water level, and the height of chimneys of approaching boats, the Commissioner decided the bridge represented an obstruction over a navigable stream.¹⁰⁰ Judicial finality on a constitutional issue? Not at all.

The Court released its decision on February 6, 1852, and in amended form in May.¹⁰¹ On August 12, the House of Representatives debated a bill to make the Wheeling Bridge “a lawful structure.”¹⁰² A sponsor of this legislation insisted that the “ultimate right” to decide the issue “was in Congress” pursuant to its power to regulate interstate commerce and preserve the intercourse between states.¹⁰³ Some lawmakers disagreed. Representative Carlton B. Curtis asked: “Should Congress sit as a court of errors and appeals over the decision and adjudication of the Supreme Court of the United States, and consider matters which, without a doubt, properly belonged to that tribunal, and review them in a manner entirely unknown to law?”¹⁰⁴

However, was the dispute one of law or fact? If the latter, the fact-finding capacity of the legislative branch was certainly equal, if not superior, to the judiciary. The Court had shifted the investigation to the Commissioner. Why should his judgment control Congress? Senator George Edmund Badger denied that Congress was seeking “some revising power over the adjudications of the Supreme Court.”¹⁰⁵ Congress was exercising “our legislative functions, as the court discharged its judicial functions.”¹⁰⁶

On this matter, the legislative process proved more informed, perceptive, and insightful than the judicial system. The bill required vessels navigating the Ohio River “to conform the elevation of their chimneys to the height of the bridge, in the exercise of our undoubted right to regulate and control the commerce of the river.”¹⁰⁷ Rather than altering the bridge to accommodate vessels, ships needed to adjust their height to the bridge. The Supreme Court and its commissioner did not consider that option.¹⁰⁸

⁹⁸ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 625 (1852).

⁹⁹ *Id.* at 625.

¹⁰⁰ *Id.* at 568–70.

¹⁰¹ *Id.* at 625.

¹⁰² CONG. GLOBE, 32d Cong., 1st Sess. 2195 (1852).

¹⁰³ *Id.* at 2195–96 (statement of Rep. Woodward).

¹⁰⁴ *Id.* at 2240. Curtis’s full speech appears at 967–68. Other speeches on the Wheeling Bridge appear at 967–68, 972–74, 974–77, 1037–41, 1041–44, 1044–47, 1047–49, 1065–68, 1068–71.

¹⁰⁵ *Id.* at 2310.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

Statutory language adopted on August 31, three months after the Court's amended decision, provided that bridges across the Ohio River "are hereby declared to be lawful structures in their present position and elevation."¹⁰⁹ The statute required vessels navigating the Ohio River to ensure that any pipes and chimneys shall not "interfere with the elevation and construction of said bridges."¹¹⁰ The dispute returned to the Supreme Court, with Pennsylvania insisting that the statute was "unconstitutional and void."¹¹¹ Writing for the majority, Justice Samuel Nelson explained that the Court in 1852 regarded the bridge as inconsistent with the authority of Congress to regulate interstate commerce.¹¹² However, the new statute removed that objection.¹¹³ Because of the new statute, "the bridge is no longer an unlawful obstruction" and "it is quite plain the decree of the court cannot be enforced."¹¹⁴

Three dissenters strongly disagreed. Justice John McLean recalled that Chief Justice Marshall said "that congress could do many things, but that it could not alter a fact. This it has attempted to do in the above act."¹¹⁵ McLean seemed to argue that the Court could alter a fact but Congress could not. He concluded that the new statute, "being the exercise of a judicial and an appellate power," was unconstitutional.¹¹⁶ Yet members of Congress regarded their action as the exercise of legislative, not judicial, power.¹¹⁷ Justice Robert Grier, in a second dissent, protested that the congressional action was unprecedented and "of dangerous example."¹¹⁸ A third dissent came from Justice James Wayne, who regarded the congressional statute as unconstitutional.¹¹⁹

The position of these dissenters has not prevailed. States lacking authority over interstate commerce at one point can have their powers strengthened by an act of Congress. As the Court noted in 1946, "whenever Congress' judgment has been uttered affirmatively to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the commerce clause, this body has accommodated its previous judgment to Congress' expressed approval."¹²⁰ In 1985, the Court said that when Congress "so chooses, state actions which it plainly authorizes are

¹⁰⁹ Act of Aug. 31, 1852, ch. 111, 10 Stat. 112, § 6 (making appropriations for the the Post-Office Department and declaring the bridges at Wheeling lawful).

¹¹⁰ *Id.* § 7.

¹¹¹ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 429 (1856).

¹¹² *Id.* at 430.

¹¹³ *Id.*

¹¹⁴ *Id.* at 432.

¹¹⁵ *Id.* at 439 (McKean, J., dissenting).

¹¹⁶ *Id.* at 443.

¹¹⁷ See *supra* text accompanying note 105.

¹¹⁸ *Wheeling & Belmont Bridge Co.*, 59 U.S. at 449 (Grier, J., dissenting).

¹¹⁹ *Id.* at 450 (Wayne, J., dissenting).

¹²⁰ *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 425 (1946).

invulnerable to constitutional attack under the Commerce Clause.”¹²¹ A concurrence in 1995 by Justices Kennedy and O’Connor conceded that “if we invalidate a state law, Congress can in effect overturn our judgment.”¹²²

C. State Control over Intoxicating Liquors

Another judicial-congressional dialogue occurred in 1890 when the Supreme Court in *Leisy v. Hardin* ruled that Iowa’s prohibition of intoxicating liquors from outside its borders could not apply to original packages or kegs.¹²³ A firm in Illinois transported sealed kegs of beer to Keokuk, Iowa, where a state official seized the property and took it into custody because Iowa prohibited the sale of intoxicating liquors.¹²⁴ The Court held that only after the original package entered Iowa and was broken into smaller packages could the state regulate the product.¹²⁵ However, the Court added a caveat: the power of Congress over interstate commerce necessarily trumped the power of a state “unless placed there by congressional act.”¹²⁶ States could not exclude incoming articles “without congressional permission.”¹²⁷

The final word on this constitutional question therefore belonged to Congress. The Court issued its opinion on April 28, 1890.¹²⁸ By May 14, the Senate reported a bill to grant Iowa authority to regulate incoming intoxicating liquors.¹²⁹ Imaginative entrepreneurs had responded to the Court’s decision by opening up “original-package saloons” to block the state from exercising any control.¹³⁰ Brewers and distillers from outside the state began packaging their goods “even in the shape of a vial containing a single drink.”¹³¹ Congressional debate demonstrated the limitations of abstract Court doctrines (“original package”) that proved unworkable in practice.¹³² Congress was better informed than the Court.

Lawmakers offered irreverent remarks about the Court’s capacity to exclusively decide this constitutional question. Senator George Edmunds described the Court as “an independent and co-ordinate branch of the Government” empowered to decide cases, but “as it regards the Congress of

¹²¹ *Northeast Bancorp v. Bd. of Governors*, FRS, 472 U.S. 159, 174 (1985).

¹²² *United States v. Lopez*, 514 U.S. 549, 580 (1995).

¹²³ *Leisy v. Hardin*, 135 U.S. 100, 125 (1890), *superseded by statute*, Wilson Act, ch. 728, 26 Stat. 313 (1890).

¹²⁴ *Id.* at 126 (Gray, J., dissenting).

¹²⁵ *Id.*

¹²⁶ *Id.* at 108.

¹²⁷ *Id.* at 125.

¹²⁸ *Id.* at 100.

¹²⁹ 21 CONG. REC. 4642 (1890).

¹³⁰ *Id.* at 4642–43.

¹³¹ *Id.* at 4954.

¹³² *Id.* at 4954–66.

the United States, its opinions are of no more value to us than ours are to it. We are just as independent of the Supreme Court of the United States as it is of us, and every judge will admit it.”¹³³ If members of Congress concluded that the Court made an error with its constitutional reasoning, “are we to stop and say that is the end of the law and the mission of civilization in the United States for that reason? I take it not.”¹³⁴

Congress enacted remedial legislation on August 6, 1890, slightly more than three months after the Court’s decision.¹³⁵ The statute made intoxicating liquors, upon their arrival in a state or territory, subject to the police powers of a state “to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.”¹³⁶ When the constitutionality of this statute reached the Supreme Court a year later, it was upheld unanimously.¹³⁷

IV. OTHER NINETEENTH-CENTURY LESSONS

Several decisions by the Supreme Court after the Civil War damaged its reputation as guardian of personal rights. Individuals seeking protection from the courts lost on a regular basis. Gradually they learned, as with women seeking to practice law, that their interests were better defended by legislative bodies at both the state and national level.

A. *Bradwell v. Illinois*

After the Civil War, women began to study medicine and law and pursue other professional activities formerly dominated by men.¹³⁸ As explained in the next Section, repeatedly they found legal support from legislative bodies, not from courts. William Blackstone’s doctrine of “coverture” placed women in a subordinate status, making husband and wife “one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything.”¹³⁹

¹³³ *Id.* at 4964.

¹³⁴ *Id.*

¹³⁵ Wilson Act, ch. 728, 26 Stat. 313 (1890) (limiting the effect of the regulations of commerce between the several States and with foreign countries in certain cases).

¹³⁶ *Id.*

¹³⁷ *In re Rahrer*, 140 U.S. 545 (1891).

¹³⁸ LOUIS FISHER, CONGRESS: PROTECTING INDIVIDUAL RIGHTS 69–70 (2016).

¹³⁹ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (1783) (emphasis in original).

After studying law, Myra Bradwell applied for admission to the Illinois bar in 1869.¹⁴⁰ She needed the approval of an all-male panel of judges to practice in the state.¹⁴¹ They rejected her application solely on the ground that she was a married woman.¹⁴² Her appeal to the Supreme Court of Illinois failed.¹⁴³ Of her qualifications the court said “we have no doubt.”¹⁴⁴ British law and custom weighed heavily in the court’s analysis. Female attorneys “were unknown in England,” and the suggestion that a woman could enter the courts as a barrister would have created “hardly less astonishment” than if she were elected to the House of Commons.¹⁴⁵

The Illinois court identified even higher authority: “That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws, was regarded as an almost axiomatic truth.”¹⁴⁶ The Illinois court advised that if change was needed, “let it be made by that department of the government to which the constitution has entrusted the power of changing the laws.”¹⁴⁷ Bradwell took the judicial hint and sought assistance from the Illinois legislature, which in 1872 passed a bill stating that no person “shall be precluded or debarred from any occupation, profession or employment (except military) on account of sex.”¹⁴⁸

Bradwell brought the issue to the U.S. Supreme Court, hoping to establish a national right for women to practice law under the Privileges and Immunities Clause of the Fourteenth Amendment.¹⁴⁹ In a brief opinion, the Court denied that the right of women to practice law in the courts was a privilege belonging to citizens of the United States.¹⁵⁰ A concurrence by Justice Bradley insisted that man “is, or should be, woman’s protector and defender.”¹⁵¹ The “natural and proper timidity and delicacy” of women made them “unfit” for many occupations.¹⁵² A “divine ordinance” commanded that a woman’s primary mission in life is to the home.¹⁵³ While many women did not marry, a general

¹⁴⁰ Jane M. Friedman, *Myra Bradwell, On Defying the Creator and Becoming a Lawyer*, 28 VAL. U. L. REV. 1287, 1288 (1994).

¹⁴¹ *Id.* at 1289.

¹⁴² *Id.*

¹⁴³ *In re Bradwell*, 55 Ill. 535, 542 (1869).

¹⁴⁴ *Id.* at 536.

¹⁴⁵ *Id.* at 539.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 540.

¹⁴⁸ Act of Mar. 22, 1872, 1871–1872 Ill. Laws 578.

¹⁴⁹ *Bradwell v. Illinois*, 83 U.S. 130 (1883)

¹⁵⁰ *Id.* at 139.

¹⁵¹ *Id.* at 141 (Bradley, J., concurring).

¹⁵² *Id.*

¹⁵³ *Id.*

rule imposed upon females the “paramount destiny and mission” to fulfill the roles of wife and mother.¹⁵⁴ To Bradley: “This is the law of the Creator.”¹⁵⁵

Considering Bradwell’s success with the Illinois legislature, could women turn to Congress for support in their efforts to practice law? Several years after the *Bradwell* case, Belva Lockwood drafted language and worked closely with members of Congress to overturn the Court’s rule prohibiting women from practicing there.¹⁵⁶ Her bill in 1878 provided that when any woman had been admitted to the bar of the highest court of a state, or of the supreme court of the District of Columbia, and was otherwise qualified as set forth in the bill (three years of practice and a person of good moral character, as with male attorneys), she may be admitted to practice before the U.S. Supreme Court.¹⁵⁷ Working in a Congress with all male members, her bill became law within one year.¹⁵⁸

Senator Aaron Sargent of California pushed hard for passage.¹⁵⁹ His appeal looked to future opportunities in America, not to the doctrines of Blackstone and British precedents.¹⁶⁰ Expressing a view that could not be found in state or federal court, he said men do not have the right “in contradiction to the intentions, the wishes, the ambitions, of women, to say that their sphere shall be circumscribed, that bounds shall be set which they cannot pass.”¹⁶¹ The pursuit of happiness “in her own way, is as much the birthright of woman as of man.”¹⁶² It was “mere oppression to say to the bread-seeking woman, you shall labor only in certain narrow ways for your living, we will hedge out by law from profitable employments, and monopolize them for ourselves.”¹⁶³

Judicial attitudes about the rights of women and the law of coverture continued well into the twentieth century.¹⁶⁴ Not until 1971 did the Supreme Court issue an opinion striking down sex discrimination. A unanimous Court declared invalid an Idaho law that preferred men over women in administering estates.¹⁶⁵ A study published that year denounced the failure of courts to defend the rights of women: “Our conclusion, independently reached, but completely shared, is that by and large the performance of American judges in

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ FISHER, CONGRESS: PROTECTING INDIVIDUAL RIGHTS, *supra* note 138, at 73.

¹⁵⁷ 7 CONG. REC. 1235 (1878).

¹⁵⁸ Act of Feb. 15, 1879, ch. 81, 20 Stat. 292 (providing relief to certain legal disabilities of women).

¹⁵⁹ 8 CONG. REC. 1083–84 (1879).

¹⁶⁰ *Id.* at 1084.

¹⁶¹ *Id.* (statement of Sen. Sargent).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See *United States v. Yazell*, 382 U.S. 341 (1966); *Hoyt v. Florida*, 368 U.S. 57, 62 (1961); *Goeseart v. Cleary*, 335 U.S. 464 (1948).

¹⁶⁵ *Reed v. Reed*, 404 U.S. 71 (1971).

the area of sex discrimination can be succinctly described as ranging from poor to abominable.”¹⁶⁶

B. *Civil Rights Cases of 1883*

In the same manner that the Supreme Court blocked the rights of women, so did it obstruct congressional efforts after the Civil War to extend rights to blacks.¹⁶⁷ Although the Civil War amendments formally elevated blacks to the status of citizen, in many states they were denied access to public facilities.¹⁶⁸ Congressional legislation in 1875 entitled all persons in the United States to the “full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances [transportation] on land and water, theaters, and other places of public amusement.”¹⁶⁹

In the House, Chair of the Judiciary Committee Benjamin Butler of Massachusetts rejected the charge that Congress was attempting to impose a national standard of “social equality” among blacks and whites. The issue, he said, was one of law: “The colored men are either American citizens or they are not. . . . and the moment they were clothed with that attribute of citizenship, they stood on a political and legal equality with every other citizen, be he whom he may.”¹⁷⁰ Social equality, he explained, has nothing to do with law.¹⁷¹ Everyone has the right to select friends and associates.¹⁷² Those choices had nothing to do with access to public accommodations or to decide who someone sits next to in a theater, restaurant, or train.¹⁷³ President Ulysses S. Grant signed the bill into law.¹⁷⁴

In the *Civil Rights Cases* (1883), the Court struck down the public accommodations provision as a federal encroachment on the states and an interference with private relationships.¹⁷⁵ Only one Justice dissented, but it is one of the finest dissents ever written. Justice John Marshall Harlan reviewed precedents that covered public conveyances on land and water.¹⁷⁶ States

¹⁶⁶ John D. Johnson, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 676 (1971).

¹⁶⁷ The *Civil Rights Cases*, 109 U.S. 3, 32 (1883) (finding that the Civil Rights Act of 1875 exceeded Congress’s authority to regulate private actors under the Thirteenth and Fourteenth Amendments).

¹⁶⁸ *Id.*

¹⁶⁹ Civil Rights Act of 1875, ch. 114, 18 Stat. 335, 336 (1875) (declared unconstitutional by the *Civil Rights Cases*, 109 U.S. 3 (1883)).

¹⁷⁰ 3 CONG. REC. 939–40 (1875) (statement of Rep. Butler).

¹⁷¹ *Id.* at 940.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Civil Rights Act of 1875, 18 Stat. at 335; Bertram Wyatt-Brown, *The Civil Rights Act of 1875*, 28 WEST. POL. Q. 763, 773 (1965).

¹⁷⁵ The *Civil Rights Cases*, 109 U.S. 3 (1883).

¹⁷⁶ *Id.* at 37–62 (Harlan, J., dissenting).

created railroads as public highways for public use.¹⁷⁷ Even if controlled and owned by private corporations, railroads functioned as public highways “for the convenience of the public.”¹⁷⁸ Railroads acquired new territory because states seized land through the power of eminent domain.¹⁷⁹ States regulated railroads by enacting speed and safety standards.¹⁸⁰

As to inns and taverns, Harlan acknowledged that private owners built them without the state assistance given to railroads.¹⁸¹ But an innkeeper offered lodging to travelers seeking shelter for the night.¹⁸² Under laws existing for centuries, it was an innkeeper’s duty to take all travelers and offer them room and food.¹⁸³ The innkeeper functioned as a public servant.¹⁸⁴ Places of public amusement received no state assistance, as with railroads, and there was no issue of needing shelter or food for the night.¹⁸⁵ However, places of public amusement, including theaters, were not purely private establishments.¹⁸⁶ They were established and licensed by public officials.¹⁸⁷

What Congress attempted to do in 1875 with respect to public accommodations finally prevailed, but not until almost a century later. Congress included in the Civil Rights Act of 1964 a section on public accommodations, relying on both the Fourteenth Amendment and the commerce power.¹⁸⁸ Private groups lobbied for the bill, creating a political base that helped educate citizens and build public support.¹⁸⁹ The rights of blacks were secured through this majoritarian process, not through judicial action. In two unanimous decisions, the Court relied on the commerce power to uphold the public accommodation title.¹⁹⁰ The active, driving, and reliable judgment in protecting constitutional rights of minorities came from the elected branches finally overcoming judicial obstruction.

¹⁷⁷ *Id.* at 37–38.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 38–39.

¹⁸⁰ *Id.* at 39.

¹⁸¹ *Id.* at 40.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 41.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* 41–42.

¹⁸⁷ *Id.* at 41.

¹⁸⁸ S. REP. NO. 88-872, at 12–14 (1964), as reprinted in 1964 U.S.C.C.A.N. 2355, 2366–68; see also H.R. REP. NO. 88-914, 2–3, 20–22, 98–101 (1963), as reprinted in 1964 U.S.C.C.A.N. 2391, 2391–420.

¹⁸⁹ FISHER, CONGRESS: PROTECTING INDIVIDUAL RIGHTS, *supra* note 138, at 65–67.

¹⁹⁰ *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

C. Plessy

From 1865 to the *Civil Rights Cases* of 1883, the Supreme Court issued a number of decisions that weakened the promise and commitment of the Thirteenth, Fourteenth, and Fifteenth Amendments. The *Slaughter-House Cases* of 1873 expressed strong judicial support for independent state powers.¹⁹¹ The majority rejected interpretations of the Civil War Amendments that would “fetter and degrade the State governments by subjecting them to the control of Congress.”¹⁹² In *United States v. Cruikshank* (1876), the Court promoted the doctrine of “dual federalism,” attempting to establish a pure separation between federal and state powers: “The powers which one possesses, the other does not.”¹⁹³ Under that theory, state sovereignty could prevail over national powers exercised through the Civil War Amendments. The protection of due process and equal protection would be left to the states.¹⁹⁴

In the years following the Civil War, there was no clear pattern in the South of segregating blacks and whites in transportation systems.¹⁹⁵ Sometimes blacks and whites traveled in the same railroad car.¹⁹⁶ Southern transportation “was not rigidly segregated in the quarter-century after the Civil War.”¹⁹⁷ By the late 1880s, however, some Southern states began passing Jim Crow transportation laws to separate blacks and whites.¹⁹⁸ The timing here is significant. This movement came after the Supreme Court in the *Civil Rights Cases* invalidated the equal accommodations statute passed by Congress. Through that decisive step the Court opened the door to the “separate but equal” doctrine in public accommodations, which would have been impermissible under the Civil Rights Act of 1875.

In *Plessy*, the Court divided 7 to 1 in upholding a Louisiana statute enacted in 1890.¹⁹⁹ The law required railway companies to provide equal but separate accommodations for white and black passengers, either by having two or more coaches for each train or by using a partition to divide the two races.²⁰⁰ For passengers who insisted on going into a coach or compartment where they did not belong, the state could impose fines or imprisonment.²⁰¹ The statute made

¹⁹¹ *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1873).

¹⁹² *Id.* at 78.

¹⁹³ *United States v. Cruikshank*, 92 U.S. 542, 550 (1875).

¹⁹⁴ *Id.* at 554–55.

¹⁹⁵ CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 9 (1987).

¹⁹⁶ *Id.* at 9–11.

¹⁹⁷ *Id.* at 9, 11–13.

¹⁹⁸ *Id.* at 21.

¹⁹⁹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁰⁰ *Id.* at 540.

²⁰¹ *Id.* at 540–41.

one exception.²⁰² It did not apply “to nurses attending children of the other race.”²⁰³ A conductor ordered Homer Plessy, seven-eighths Caucasian and one-eighth black, to leave the white coach and move to a black coach, and when he refused, a police officer removed him and he was imprisoned.²⁰⁴

Justice Henry Billings Brown wrote for the majority to uphold the Louisiana statute, relying in part on the *Civil Rights Cases* that refused blacks equal accommodation to public facilities, including railroads. Such restrictions, he said, “cannot be justly regarded as imposing any badge of slavery or servitude” under the Thirteenth Amendment.²⁰⁵ As to the Fourteenth Amendment, he sought guidance from the *Slaughter-House Cases*, which greatly undermined national authority provided in the Civil War Amendments and gave added protection to independent state rights.²⁰⁶

Justice Brown said it was a question “whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature.”²⁰⁷ The Court extended no such deference to Congress when it passed the Civil Rights Act of 1875. Brown added, “[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.”²⁰⁸ The case had nothing to do with social equality. The issue was equal access to public facilities.

In his dissent, Justice Harlan pointed out that no one disputed that a railroad “is a public highway” and that the corporation who owns and operates it exercises a public function.²⁰⁹ He predicted that *Plessy* would “prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*.”²¹⁰ *Plessy* remained in force until the Supreme Court decided *Brown v. Board of Education* in 1954.²¹¹

V. TWENTIETH-CENTURY CASES UP TO 1944

Jamal Greene’s 2011 study singled out two twentieth-century decisions that merit being called anticanon: *Lochner* and *Korematsu*.²¹² Other cases cited as poorly reasoned in the twentieth century include the mandatory

²⁰² *Id.* at 541.

²⁰³ *Id.*

²⁰⁴ *Id.* at 541–42.

²⁰⁵ *Id.* at 542–43.

²⁰⁶ *Id.* at 543.

²⁰⁷ *Id.* at 550.

²⁰⁸ *Id.* at 552.

²⁰⁹ *Id.* at 553 (Harlan, J., dissenting).

²¹⁰ *Id.* at 559; see Cheryl I. Harris, *The Story of Plessy v. Ferguson: The Death and Resurrection of Racial Formalism*, in CONSTITUTIONAL LAW STORIES (Michael C. Dorf ed., 2004), and Paul Oberst, *The Strange Career of Plessy v. Ferguson*, 15 ARIZ. L. REV. 389 (1975) for analyses on *Plessy*.

²¹¹ RICHARD KLUGER, *SIMPLE JUSTICE* 702–09, 712–13, 715, 750 (1997).

²¹² Greene, *supra* note 31, at 417–27.

sterilization case of *Buck v. Bell* (1927) and the sodomy case of *Bowers v. Hardwick* (1986).²¹³ This section begins with *Lochner* and turns to *Buck v. Bell*, the child-labor cases, the “sole-organ” doctrine of *Curtiss-Wright*, the flag-salute case of 1940, and the Japanese-American cases. Section V examines Court decisions issued after World War II.

A. *Lochner*

In *Lochner v. New York* (1905), the Court struck down a state law that limited bakery workers to 60 hours per week or ten hours per day.²¹⁴ Justice Peckham, writing for a 5-4 majority, converted the general right to make a contract into laissez-faire doctrine.²¹⁵ He found no “reasonable ground” to interfere with the liberty of an employee to contract for as many hours of work as desired.²¹⁶ The statute seemed to him to serve no purpose in safeguarding public health or the health of the worker.²¹⁷ Such laws he called “mere meddlesome interferences” with the rights of an individual to freely enter into contracts.²¹⁸

In their dissent, Justices Harlan, White, and Day reviewed previous holdings of the Court that interpreted the police power of states to permit government regulation over the economy.²¹⁹ In a separate dissent, Justice Holmes accused the majority of deciding “upon an economic theory which a large part of the country does not entertain.”²²⁰ The Constitution, he said, is “not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*.”²²¹

Subsequent Court rulings did not adhere to judicial finality. They were not entirely wedded to *Lochner* and its so-called “equality of right” for employers and employees to enter into a contract. In 1908, for example, the Court sustained Oregon’s ten-hour day for women.²²² A 5-4 Court in 1917 upheld a congressional statute setting an eight-hour day for railroad workers engaged in interstate commerce.²²³ In that same year, the Court supported the constitutionality of Oregon’s ten-hour day for both men and women.²²⁴ In 1923, a 5-3 Court swung back in the other direction by holding against a

²¹³ *Id.* at 380–89.

²¹⁴ *Lochner v. New York*, 198 U.S. 45, 52, 64 (1905).

²¹⁵ *Id.* at 56–57.

²¹⁶ *Id.* at 57.

²¹⁷ *Id.*

²¹⁸ *Id.* at 61.

²¹⁹ *Id.* at 65–71 (Harlan, J., dissenting).

²²⁰ *Id.* at 65 (Holmes, J., dissenting).

²²¹ *Id.*

²²² *Muller v. Oregon*, 208 U.S. 412, 416–17 (1908).

²²³ *Wilson v. New*, 243 U.S. 332, 340–59 (1917).

²²⁴ *Bunting v. Oregon*, 243 U.S. 426 (1917).

congressional statute that provided for minimum wages for women and children in the District of Columbia.²²⁵

The philosophy of *Lochner* survived as late as 1936 when a 5-4 Court struck down New York's minimum wage law for women and children.²²⁶ "Freedom of contract," said the Court, "is the general rule and restraint the exception."²²⁷ The 1923 *Adkins* decision was finally overruled in 1937, when a 5-4 Court upheld a minimum wage law for women and minors in the state of Washington.²²⁸ For more than three decades, the Court tried to impose a liberty-of-contract theory. By 1941, three conservative Justices (Sutherland, Butler, and Van Devanter) had been replaced by more moderate Justices (Reed, Murphy, and Black).²²⁹ Subsequent decisions made it clear that policies concerning economic and social philosophy would include the elected branches, not decidedly exclusively by the courts.²³⁰

B. *Buck v. Bell*

Highly damaging to the Court's reputation and the rights of individuals is *Buck v. Bell* (1927), upholding mandatory sterilization.²³¹ Earlier decisions by federal and state courts rejected efforts to sterilize prisoners for reasons of eugenics.²³² In 1914, a federal district court struck down a law that required a vasectomy for criminals convicted twice of a felony (even if "felonies" merely consisted of breaking an electric globe or unfastening a strap on a harness).²³³ The court regarded mandatory vasectomy a cruel and unusual punishment that "belongs to the dark ages."²³⁴ A Nevada law on mandatory sterilization was struck down in 1918 because it gave judges too much discretion.²³⁵

A Virginia court in 1925 upheld the state's mandatory sterilization law as a proper use of the police power to prevent the transmission of insanity, idiocy, imbecility, epilepsy, and crime.²³⁶ The case involved Carrie Buck, who had

²²⁵ *Adkins v. Children's Hosp.*, 261 U.S. 525, 539, 561-62 (1923).

²²⁶ *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 603, 618 (1936).

²²⁷ *Id.* at 610-11.

²²⁸ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 386, 400 (1937).

²²⁹ *Justices 1789 to Present*,

https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/DL34-MVVW] (last visited Jan. 17, 2018).

²³⁰ See *Ferguson v. Skrupa*, 372 U.S. 726 (1963); see also Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677 (2005); Greene, *supra* note 31, at 417-22.

²³¹ *Buck v. Bell*, 274 U.S. 200 (1927).

²³² See, e.g., *Davis v. Berry*, 216 F. 413, 416 (S.D. Iowa 1914).

²³³ *Id.* at 417-19.

²³⁴ *Id.* at 416.

²³⁵ *Mickle v. Henrichs*, 262 F. 687 (D. Nev. 1918).

²³⁶ *Buck v. Bell*, 143 Va. 310 (1925).

been placed in a state institution at age 18.²³⁷ Her mother had been committed to the same institution, and Carrie had given birth to an illegitimate child the state claimed to be of “defective mentality.”²³⁸ By an 8-to-1 majority, a three-page opinion by Justice Holmes in *Buck v. Bell* affirmed the state law.²³⁹

The decision is marred in several ways. The case was wholly contrived without any adversarial quality. Irving Whitehead, Carrie’s attorney, was a longtime friend of the state legislators who drafted the sterilization law.²⁴⁰ He served on the board of the institution in which Carrie lived.²⁴¹ While on the board, he helped approve the sterilization of more than two dozen women.²⁴² In that capacity he worked with the institution’s physician who regularly advocated sterilization and made that recommendation for Carrie.²⁴³ As a “friendly suit” brought by two parties agreeing on the same outcome, the Supreme Court lacked the necessary benefit of briefs and oral argument by rival adversaries who could properly inform the Court.²⁴⁴

Had the regular judicial process been followed, the Court would have learned that school records indicated that Carrie was a normal child and that she became pregnant when raped by the nephew of the foster parents Carrie lived with.²⁴⁵ There was no evidence that Carrie’s child was feebleminded.²⁴⁶ Justice Holmes defended the state law by arguing that if the government can send men to war to be injured and even killed, it could order the lesser penalty of mandatory sterilization of the “unfit.”²⁴⁷ It would be difficult to find Court language more poorly reasoned. He closed with: “The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.”²⁴⁸

Buck v. Bell has never been explicitly overruled. In 1942, the Supreme Court struck down an Oklahoma statute that provided for mandatory sterilization of “habitual criminals,” but the law provided an exception for certain offenses, including embezzlement.²⁴⁹ To the Court, permitting the sterilization of someone who had been convicted once for stealing chickens

²³⁷ *Id.* at 315.

²³⁸ *Id.*

²³⁹ *Buck v. Bell*, 274 U.S. 200 (1927).

²⁴⁰ Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. Rev. 30, 32–33 (1985).

²⁴¹ *Id.* at 35–36.

²⁴² *Id.* at 38–39.

²⁴³ *Id.* at 33–39, 45–50.

²⁴⁴ *Id.* at 50–51.

²⁴⁵ *Id.* at 52–54.

²⁴⁶ *Id.* at 53.

²⁴⁷ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

²⁴⁸ *Id.* (citations omitted).

²⁴⁹ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

and twice for robbery violated the equal protection clause of the Fourteenth Amendment.²⁵⁰

Although never formally overruled in the courts, the reasoning and results of *Buck v. Bell* have been thoroughly discredited by the elected branches. In 2002, Virginia Governor Mark Warner formally apologized for the state's policy on eugenics, under which some 8,000 people were involuntarily sterilized from 1927 to 1979.²⁵¹ Reflecting the views of the state legislature in 2002, he said the eugenics movement "was a shameful effort in which state government never should have been involved."²⁵² Nationwide, the practice affected an estimated 65,000 Americans.²⁵³ In 2012, a North Carolina task force investigated the state's record of mandatory sterilization from 1929 to 1974 and proposed financial compensation for each living victim.²⁵⁴

C. Child-Labor Legislation

The reputation of the Court for reliable constitutional interpretation was severely damaged by two decisions that struck down congressional efforts to regulate child labor. By the turn of the twentieth century, private organizations and political parties began to lobby Congress to eliminate the harsh and unhealthy conditions of child labor.²⁵⁵ Initial efforts began at the state level until it became clear that national legislation was needed.²⁵⁶ In 1916, the House Labor Committee concluded that "the entire problem has become an interstate problem rather than a problem of isolated States and is a problem which must be faced and solved only by a power stronger than any State."²⁵⁷ Legislation regulating child labor became law on September 1, 1916.²⁵⁸ It prohibited the shipment in interstate or foreign commerce of any article produced by children within specified age ranges: under the age of 16 for

²⁵⁰ *Id.*; see also VICTORIA F. NOURSE, IN RECKLESS HANDS: SKINNER V. OKLAHOMA AND THE NEAR TRIUMPH OF AMERICAN EUGENICS 24 (2008).

²⁵¹ William Branigin, *Va. Apologizes to the Victims of Sterilizations*, WASH. POST, May 3, 2002, at B1.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ Belle Boggs, *North Carolina's shocking history of sterilization*, SALON (Aug. 11, 2013, 9:46 AM), https://www.salon.com/2013/08/11/north_carolinas_shocking_history_of_sterilization [https://perma.cc/W7BM-92H9].

²⁵⁵ FISHER, CONGRESS: PROTECTING INDIVIDUAL RIGHTS, *supra* note 138, at 92–93.

²⁵⁶ *Id.* at 94–95.

²⁵⁷ H.R. REP. NO. 64-46, at 7 (1916).

²⁵⁸ Keating-Owen Child Labor Law Act, Pub. L. No. 64-249, 39 Stat. 675 (1916), (declared unconstitutional by *Hammer v. Dagenhart*, 247 U.S. 251 (1918)).

products from a mine or quarry, and under the age of 14 from any mill, cannery, workshop, factory, or manufacturing establishment.²⁵⁹

Two years later, a 5-4 Court in *Hammer v. Dagenhart* struck down the statute as unconstitutional.²⁶⁰ The Court ruled that the steps of “production” and “manufacture” of goods were local in origin and therefore not part of “commerce” among the states subject to regulation by Congress.²⁶¹ The Court reasoned that although child labor might be harmful, the goods shipped from their efforts “are of themselves harmless.”²⁶² To the majority, efforts to deal with child labor must be left to the states. The dissenters argued that Congress, not the Court, was the agency of government constitutionally authorized to determine and settle these policy questions. They disagreed that it was permissible to allow regulation “against strong drink but not as against the product of ruined lives.”²⁶³

Members of Congress did not regard the Court’s decision as the final word. Instead, they prepared legislation to regulate child labor through the taxing power. A federal excise tax would be levied on the net profit of persons employing child labor within prohibited ages.²⁶⁴ The bill passed Congress and became law in 1919.²⁶⁵ When the issue reached the Supreme Court, Solicitor General James M. Beck urged the Justices to exercise institutional and political restraint when reviewing legislation supported by the elected branches.²⁶⁶

The Court ignored Beck’s counsel, striking down the new child labor law by a vote of 8 to 1.²⁶⁷ Justice Clarke dissented without providing any reason.²⁶⁸ Congress passed a constitutional amendment in 1924 to empower it to regulate child labor. By 1937, only 28 of the necessary 36 states had ratified it.²⁶⁹ Beginning in 1937, conservative Justices began to retire, giving President Franklin D. Roosevelt his first opportunity to name Justices to the Court.²⁷⁰ With this change in the Court’s composition underway, Congress in 1938

²⁵⁹ *Id.*

²⁶⁰ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

²⁶¹ *Id.* at 272–73.

²⁶² *Id.* at 271–72.

²⁶³ *Id.* at 280 (Holmes, J., dissenting).

²⁶⁴ 56 CONG. REC. 8341, 11560 (1918).

²⁶⁵ Revenue Act of 1918, ch. 18, 40 Stat. 1057, 1138.

²⁶⁶ Brief on Behalf of Appellants and Plaintiff in Error, *Bailey v. George*, 259 U.S. 16 (1922) reprinted in 21 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 45 (PHILIP B. KURLAND & GERHARDT CASPER, eds.) [hereinafter LANDMARK BRIEFS].

²⁶⁷ *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

²⁶⁸ *Id.* at 44.

²⁶⁹ JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789–2002, at 63 (2003).

²⁷⁰ Josiah M. Daniel, III, *Hatton Sumners and the Retirement of Supreme Court Justices*, NOT EVEN PAST (April 24, 2017), <https://notevenpast.org/hatton-sumners-and-the-retirement-of-supreme-court-justices/> [https://perma.cc/SN4Y-NX4L].

passed legislation to regulate child labor, relying on the same power that the Court had earlier invalidated: the Commerce Clause.²⁷¹

In 1941, a thoroughly reconstituted (and chastened) Court not only upheld the new statute but did so unanimously.²⁷² Moreover, it proceeded to publicly apologize for the Court's earlier effort to distinguish between the "production" and "manufacture" of goods (regarded as local in origin) and interstate commerce subject to regulation by Congress.²⁷³ Writing for the Court, Chief Justice Harlan Fiske Stone noted: "While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce."²⁷⁴ Congress may exclude from interstate commerce whatever goods it considers injurious to the public health, morals, or welfare.²⁷⁵ Those constitutional judgments, said the Court, are left to the elected branches, not the judiciary. To Chief Justice Stone, the reasoning offered by the Court in *Hammer v. Dagenhart* "was novel when made and unsupported by any provision of the Constitution."²⁷⁶ No support in the Constitution! That stands as a remarkable and healthy admission of judicial error.

D. *Curtiss-Wright*

In dicta by Justice George Sutherland in *United States v. Curtiss-Wright Export Corp.*, the Court departed from the core issue presented to it—whether Congress could delegate power to the President in the field of international relations—and instead announced an erroneous definition of exclusive and plenary presidential power in foreign affairs.²⁷⁷ The case resulted from legislation passed by Congress in 1934, authorizing the President to prohibit the sale of arms in the Chaco region in South America whenever he found "it may contribute to the reestablishment of peace" between belligerents.²⁷⁸ At issue was legislative, not presidential, power. When President Roosevelt imposed the embargo, he relied solely on statutory authority. His proclamation prohibiting the sale of arms and munitions began: "NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America,

²⁷¹ Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 201–219 (2012)).

²⁷² *United States v. Darby*, 312 U.S. 100, 113 (1941).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 114.

²⁷⁶ *Id.* at 116.

²⁷⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936).

²⁷⁸ Act of May 28, 1934, ch. 365, 48 Stat. 811 (prohibiting the sale of arms or munitions of war in the United States under certain conditions).

acting and by virtue of the authority conferred in me by the said joint resolution of Congress”²⁷⁹

Litigation focused on legislative power because the Court in 1935 twice struck down delegation by Congress of domestic power to the President.²⁸⁰ The issue in *Curtiss-Wright* was therefore whether Congress could delegate this particular legislative power in international affairs.²⁸¹ A district court, holding that the joint resolution impermissibly delegated legislative authority, said nothing about any reservoir of exclusive or plenary presidential power.²⁸²

The case was taken directly to the Supreme Court. None of the briefs on either side discussed the availability of exclusive and plenary powers for the President in foreign affairs.²⁸³ To the Justice Department, the question went to “the very power of Congress to delegate to the Executive authority to investigate and make findings in order to implement a legislative purpose.”²⁸⁴ The source of authority was plainly legislative. The brief for the private company, *Curtiss-Wright*, focused on the delegation of legislative power and did not explore the existence of exclusive and plenary presidential power.²⁸⁵ A separate brief, prepared for other private parties, concentrated on the delegation of legislative power and did not identify any freestanding or freewheeling presidential authority.²⁸⁶

Writing for the Court, Justice Sutherland reversed the district court and upheld the delegation of legislative power to the President to place an arms embargo on the Chaco region.²⁸⁷ That should have marked the end of his

²⁷⁹ *Id.* at 1745.

²⁸⁰ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schechter Corp. v. United States*, 295 U.S. 495 (1935).

²⁸¹ *Curtiss-Wright Export Corp.*, 299 U.S. at 315.

²⁸² *United States v. Curtiss-Wright Export Corp.*, 14 F. Supp. 230 (S.D.N.Y. 1936).

²⁸³ Brief for Appellees *Curtiss-Wright Export Corporation and Curtiss Aeroplane & Motor Company, Inc.* at 3, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), *reprinted in* 32 LANDMARK BRIEFS 937; Brief for Appellees, John S. Allard, Clarence W. Webster and Samuel J. Abelow at 3–5, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), *reprinted in* 32 LANDMARK BRIEFS 979–81.

²⁸⁴ Statement of Jurisdiction at 7, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *reprinted in* 32 LANDMARK BRIEFS 898.

²⁸⁵ Brief for Appellees *Curtiss-Wright Export Corporation and Curtiss Aeroplane & Motor Company, Inc.* at 3, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), *reprinted in* 32 LANDMARK BRIEFS 937.

²⁸⁶ Brief for Appellees, John S. Allard, Clarence W. Webster and Samuel J. Abelow at 3–5, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), *reprinted in* 32 LANDMARK BRIEFS 979–81.

²⁸⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 333 (1936).

decision, but in dicta he began to introduce a number of errors.²⁸⁸ Scholars took Sutherland to task for twisting historical and constitutional precedents.²⁸⁹

Sutherland claimed that the Constitution commits treaty negotiation exclusively to the President: “He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”²⁹⁰ To understand why that is false, one need only refer to Sutherland’s book, published in 1919, which reflects his experience as a U.S. Senator. He acknowledged that his colleagues participated in the negotiation phase and Presidents acceded to this “practical construction.”²⁹¹ Presidents also invited members of the House of Representatives to participate in treaty negotiation as a means of building political support for authorization and appropriation bills needed to implement treaties.²⁹²

Another error is Sutherland’s plain distortion of a speech John Marshall gave in 1800 as a member of the House of Representatives. Sutherland used that speech to create for the President a source of power in foreign affairs that was not grounded in authority delegated by Congress:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an assertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations²⁹³

Marshall’s speech included this sentence: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”²⁹⁴ The phrase “sole organ” is ambiguous. “Sole” means exclusive but what is “organ”? Simply the President’s duty to communicate to other nations U.S. policy decided by the elected branches? Anyone reading the entire speech would understand that Marshall did not advocate exclusive or plenary power for the President in external affairs. Such an interpretation would ignore the plain text of Articles I and II of the Constitution.

²⁸⁸ *Id.* at 319.

²⁸⁹ Louis Fisher, *The Staying Power of Erroneous Dicta: From Curtiss-Wright to Zivotofsky*, 31 CONST. COMMENT. 149, 180–91 (2016).

²⁹⁰ *Curtiss-Wright Corp.*, 299 U.S. at 319 (emphasis in original).

²⁹¹ GEORGE SUTHERLAND, CONSTITUTIONAL POWER AND WORLD AFFAIRS 123 (1919).

²⁹² Louis Fisher, Commentary, *Arms Control Treaty Reinterpretations: Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511, 1517 (1989).

²⁹³ *Curtiss-Wright Corp.*, 299 U.S. at 319–20.

²⁹⁴ *Id.* at 319 (quoting 10 ANNALS OF CONG. 613 (1800)).

The purpose of Marshall's speech was to defend the decision of President John Adams to carry out an extradition provision of the Jay Treaty. Adams was not the sole organ in formulating the treaty. He was the sole organ in *implementing* it.²⁹⁵ In subsequent years, the Supreme Court and lower courts regularly cited the sole-organ doctrine in *Curtiss-Wright* but failed to understand what Marshall actually meant.²⁹⁶ Repeating Sutherland's dicta without reading the speech injured the reputation of the judiciary as constitutional interpreter, improperly inflated presidential power, and weakened the system of checks and balances.²⁹⁷

Because of litigation on the Jerusalem passport case, *Zivotofsky v. Kerry*, the Supreme Court had an opportunity to correct the erroneous dicta added to *Curtiss-Wright*. On July 17, 2014, I filed an amicus brief with the Court identifying the errors and asking the Court to issue corrections.²⁹⁸ While the Court is in session, the *National Law Journal* runs a column called "Brief of the Week." It selected my amicus brief in *Zivotofsky* and chose this title: "Can the Supreme Court Correct Erroneous Dicta?"²⁹⁹ The Court did jettison the sole-organ doctrine in 2015 but retained other errors from *Curtiss-Wright*, including the notion that treaty negotiation is committed exclusively to the President.³⁰⁰

²⁹⁵ For background on Marshall's speech in 1800, see Louis Fisher, *Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRES. STUD. Q. 139, 149-51 (2007); LOUIS FISHER, THE LAW LIBRARY OF CONG., STUDIES ON PRESIDENTIAL POWER IN FOREIGN RELATIONS: THE "SOLE ORGAN" DOCTRINE (2006).

²⁹⁶ Exceptions to this pattern of judicial errors include Justice Jackson's concurrence in 1952 that the most that can be drawn from *Curtiss-Wright* is the intimation that the President "might act in external affairs without congressional authority, but not that he might act contrary to an act of Congress." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 n.2 (1952) (Jackson, J., concurring). Jackson did not comment on Sutherland's misrepresentation of Marshall's sole-organ speech. In 1981, a federal appellate court cautioned against placing undue reliance on "certain dicta" in *Curtiss-Wright*. It rejected the position that the President as "sole organ" in international affairs endorsed plenary presidential power over external affairs. *Am. Int'l. Grp., Inc. v. Islamic Republic of Iran*, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981).

²⁹⁷ Louis Fisher, Opinion, *Getting it Wrong Again and Again—Judicial Error's Compounding Effect*, NAT'L L.J., Nov. 18, 2013, at 31; Louis Fisher, *Judicial Errors Magnify Presidential Power*, Fed. Law., Jan./Feb. 2014 at 66.

²⁹⁸ Brief for Louis Fisher as Amicus Curiae Supporting Petitioner, *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (No. 13-628), <http://www.loufisher.org/docs/pip/Zivotofsky.pdf> [<https://perma.cc/4BAP-YLS3>].

²⁹⁹ Jamie Schuman, *Brief of the Week: Can the Supreme Court Correct Erroneous Dicta?*, NAT'L L.J., Nov. 3, 2014, <http://www.loufisher.org/docs/pip/fisherbrief.pdf> [<https://perma.cc/W9XA-Y7TB>].

³⁰⁰ *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015).

E. *Flag-Salute Case of 1940*

In 1940, a commanding 8-1 majority of the Supreme Court upheld a compulsory flag salute that forced children to violate their religious beliefs.³⁰¹ The parents of two Jehovah's Witness children objected that the flag salute violated their interpretation of the biblical provision not to bow down to any graven image.³⁰² In 1937, a federal district judge declared the statute unconstitutional.³⁰³ School authorities concluded that a refusal to salute the flag constituted an act of insubordination requiring expulsion.³⁰⁴ To the federal judge, the state could not violate religious beliefs unless it could demonstrate that it was necessary for the public safety, health, morals, property, or personal rights.³⁰⁵ The Third Circuit upheld this decision, finding it difficult to see "the essential relationship between infant patriotism and the martial spirit."³⁰⁶

On the last day of the Court's term, June 3, 1940, Justice Frankfurter upheld the compulsory flag salute.³⁰⁷ He relied on a central premise: "National unity is the basis of national security."³⁰⁸ From there he concluded that forcing children to salute the flag against their religious beliefs helps foster national unity. He asserted, "[t]he ultimate foundation of a free society is the binding tie of cohesive sentiment."³⁰⁹ The dissent by Justice Stone rejected Frankfurter's emphasis on national security and national unity: "History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities."³¹⁰

Far from accepting the Court's decision as the exclusive and final word on the meaning of the Constitution, Frankfurter's opinion was assailed by law journals, the press, and religious organizations. The *New Republic*, which Frankfurter helped found, warned that the country was "in great danger of adopting Hitler's philosophy in the effort to oppose Hitler's legions," accusing

³⁰¹ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591, 600-01 (1940).

³⁰² *Id.* at 591-92; *Exodus* 20:4-5.

³⁰³ *Gobitis v. Minersville Sch. Dist.*, 21 F. Supp. 581, 588 (E.D. Pa. 1937).

³⁰⁴ *Id.* at 583.

³⁰⁵ *Id.* at 584.

³⁰⁶ *Minersville Sch. Dist. v. Gobitis*, 108 F.2d 683, 692 (3d Cir.), *rev'd*, 310 U.S. 586 (1940).

³⁰⁷ *Minersville Sch. Dist.*, 310 U.S. at 600-01.

³⁰⁸ *Id.* at 595.

³⁰⁹ *Id.* at 596.

³¹⁰ *Id.* at 604 (Stone, J., dissenting).

the Court of coming “dangerously close to being a victim of [war] hysteria.”³¹¹ Out of 39 law reviews that discussed *Gobitis*, 31 raised objections, while newspapers condemned the Court for violating individual rights and buckling to popular prejudices.³¹² Editorials in 171 newspapers tore apart Frankfurter’s opinion.³¹³

Justices Black, Douglas, and Murphy came to regret their decision to support Frankfurter. In 1942, they publicly announced that *Gobitis* was “wrongly decided,”³¹⁴ leaving Frankfurter with a narrow 5-4 majority.³¹⁵ Chief Justice Hughes retired in 1941 and was succeeded by Stone.³¹⁶ Two Justices who joined with Frankfurter (Byrnes and Roberts) were replaced by Wiley Rutledge and Robert H. Jackson.³¹⁷ Rutledge’s opinions while on the D.C. Circuit suggested he would vote against Frankfurter.³¹⁸

Jackson, writing for a 6-3 majority, overruled *Gobitis*.³¹⁹ He prepared a masterful defense of individual freedom and religious liberty, but credit for the reversal belongs to those who refused to accept Frankfurter’s opinion as the final word. Citizens around the country told the Court it did not understand the Constitution, minority rights, or religious liberty. Their independent voices prompted Black, Douglas, and Murphy to rethink their positions and switch sides.

F. Japanese-American Cases

In *Korematsu v. United States*, the Supreme Court upheld the relocation of Japanese Americans (two-thirds of them U.S. citizens) to detention camps.³²⁰ With no evidence of disloyalty or subversive activity and without benefit of any procedural safeguards, the United States imprisoned Japanese

³¹¹ *Frankfurter v. Stone*, NEW REPUBLIC, June 24, 1940, at 843–44. See also Walton Hamilton & George Braden, *The Supreme Court Today*, NEW REPUBLIC, Aug. 5, 1940, at 180.

³¹² DAVID R. MANWARING, *RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY* 158–60 (1962); Francis H. Heller, *A Turning Point for Religious Liberty*, 29 VA. L. REV. 440, 452–53 (1943).

³¹³ ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 532 (1956).

³¹⁴ *Jones v. Opelika*, 316 U.S. 584, 624 (1942) (5-4 decision) (Murphy, J., dissenting), *vacated by* 319 U.S. 103 (1943).

³¹⁵ *Id.*

³¹⁶ *Justices 1789 to Present*, https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/DL34-MVWV] (last visited Jan. 17, 2018).

³¹⁷ *Id.*

³¹⁸ See, e.g., *Busey v. Dist. of Columbia*, 129 F.2d 24, 38 (D.C. Cir. 1942) (Rutledge J., dissenting).

³¹⁹ *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

³²⁰ *Korematsu v. United States*, 323 U.S. 214, 224 (1944).

Americans solely on grounds of race.³²¹ The previous year, in *Hirabayashi v. United States*, the Court upheld a curfew placed on Japanese Americans on the west coast.³²²

Dissenting in *Korematsu*, Justice Murphy protested that the exclusion was based on an “erroneous assumption of racial guilt” found in General John DeWitt’s report, which referred to all individuals of Japanese descent as “subversives” belonging to “an enemy race” whose “racial strains are undiluted.”³²³ In dissent, Justice Jackson deferred to executive-military judgments.³²⁴ With “no real evidence before it,” the Court had “no choice but to accept General DeWitt’s own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.”³²⁵

Jackson had an opportunity to probe the basis for the exclusion order. He claimed the Court had “no choice.”³²⁶ Justices always have a choice. Certainly they had a choice in analyzing a DeWitt statement that was unsworn, self-serving, and untested by cross-examination. A dissent by Justice Murphy identified an effective and principled way to challenge executive assertions: “justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment.”³²⁷ The Court was not faced with what might be called a “military judgment.” There was no reason to defer to DeWitt’s purely prejudiced and ignorant beliefs about race and sociology.³²⁸

On February 20, 1976, President Gerald Ford publicly apologized for the treatment of Japanese Americans, resolving that “this kind of action shall never again be repeated.”³²⁹ A congressional commission in December 1982 stated that Roosevelt’s executive order “was not justified by military necessity.” The policies of curfew and detention “were not driven by analysis of military conditions.”³³⁰ The factors shaping those decisions were “race prejudice, war hysteria and a failure of political leadership.”³³¹ One could add: abandonment of judicial independence.

³²¹ *Id.* at 218–19.

³²² *Hirabayashi v. United States*, 320 U.S. 81, 105 (1943).

³²³ *Korematsu*, 323 U.S. at 235–36 (Murphy, J., dissenting).

³²⁴ *See id.* at 245 (Jackson, J., dissenting.)

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.* at 237 (Murphy, J., dissenting).

³²⁸ Eugene W. Rostow, *The Japanese American Cases — A Disaster*, 54 YALE L.J. 489 (1945); Nanette Dambitz, *Racial Discrimination and the Military Judgment; The Supreme Court’s Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945).

³²⁹ Proclamation 4417, 41 FED. REG. 7741 (1976).

³³⁰ COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 18 (1982).

³³¹ *Id.*

The wrongs done in *Hirabayashi* and *Korematsu* were later corrected by lower federal courts, not by the Supreme Court.³³² *Hirabayashi* and *Korematsu* returned to court after newly discovered documents revealed that executive officials had deceived the judiciary.³³³ They learned that the executive branch had withheld vital evidence from the courts.³³⁴ The Justice Department had a duty to inform the judiciary about false allegations. Its brief should have clearly identified the errors.³³⁵ Instead, a footnote was so reworked and watered down that the courts could not possibly have understood the extent to which the administration had misled them.³³⁶

After *Korematsu* brought a *coram nobis* case, charging fraud against the Court, a district court in 1984 concluded that the executive branch had “knowingly withheld information from the courts when they were considering the critical question of military necessity in this case.”³³⁷ The record provided “substantial support” that the government “deliberately omitted relevant information and provided misleading information in papers before the court.”³³⁸ The district court vacated *Korematsu*’s conviction and the Justice Department did not appeal.³³⁹

Hirabayashi challenged his conviction for violating the curfew order.³⁴⁰ The Justice Department had argued that the government lacked time to separate loyal Japanese Americans from those who might be subversive.³⁴¹ However, General DeWitt believed that because of racial ties, filial piety, and strong bonds of common tradition, culture, and customs, it was “impossible to establish the identity of the loyal and the disloyal with any degree of safety.”³⁴² For DeWitt, there was no “such a thing as a loyal Japanese.”³⁴³ The initial draft report contained his remarks but the final report, after War Department editing, did not.³⁴⁴ The Justice Department received the final report but not the draft version.³⁴⁵

³³² See *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

³³³ LOUIS FISHER, *SUPREME COURT EXPANSION OF PRESIDENTIAL POWER: UNCONSTITUTIONAL LEANINGS* 99–100 (2017).

³³⁴ *Id.* at 100.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Korematsu*, 584 F. Supp. at 1417.

³³⁸ *Id.* at 1420.

³³⁹ *Id.*

³⁴⁰ *Hirabayashi v. United States*, 627 F. Supp. 1445, 1447 (W.D. Wash. 1986).

³⁴¹ See *id.* at 1453.

³⁴² *Id.* at 1449.

³⁴³ *Id.* at 1452.

³⁴⁴ FISHER, *SUPREME COURT EXPANSION OF PRESIDENTIAL POWER: UNCONSTITUTIONAL LEANINGS*, *supra* note 333, at 100.

³⁴⁵ *Id.*

In 1986, a district court ruled that although the Justice Department “did not knowingly conceal” from Hirabayashi’s counsel and the Supreme Court the racial grounds DeWitt offered for excluding Japanese, it was necessary to charge the executive branch with concealment because the information was known to the War Department, an arm of government.³⁴⁶ The failure by the executive branch to disclose DeWitt’s position “was an error of the most fundamental character.”³⁴⁷ Hirabayashi “was in fact seriously prejudiced by that non-disclosure in his appeal from his conviction for failing to report.”³⁴⁸ The district court vacated that conviction but declined to vacate his conviction for violating the curfew order.³⁴⁹ On appeal, the Ninth Circuit vacated both convictions.³⁵⁰

VI. THE JUDICIAL RECORD AFTER WORLD WAR II

Supreme Court decisions analyzed in this section cover the state secrets case of *United States v. Reynolds*, school busing initiatives by the Supreme Court, the trimester framework of *Roe v. Wade*, the federalism decision of *National League of Cities*, legislative vetoes, designating corporations as persons, and campaign finance.

A. State Secrets Case of 1953

In response to the terrorist attacks of 9/11, the Bush administration invoked the “state secrets privilege” to block efforts by private litigants to gain access to agency documents to challenge constitutional violations, including warrantless surveillance and the policy of “extraordinary rendition” used to transfer individuals to other countries for interrogation and torture.³⁵¹ The Justice Department advised federal courts that the cases could not proceed without jeopardizing national security and foreign policy.³⁵² If courts defer to that argument, the executive branch is at liberty to violate statutes and individual rights without any judicial checks.

The executive branch relied heavily on *United States v. Reynolds* (1953), the first time the Supreme Court recognized the state secrets privilege in its full scope.³⁵³ The case involved a B-29 that exploded over Waycross, Georgia,

³⁴⁶ *Hirabayashi*, 627 F. Supp. at 1454.

³⁴⁷ *Id.* at 1457.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 1457–58.

³⁵⁰ *Hirabayashi v. United States*, 828 F.2d 591, 608 (9th Cir. 1987).

³⁵¹ LOUIS FISHER, *THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA’S FREEDOMS* 248–84, 321–60 (2008).

³⁵² *Id.* at 346.

³⁵³ *United States v. Reynolds*, 345 U.S. 1, 10–12 (1953).

on October 6, 1948.³⁵⁴ The widows of three civilian engineers killed in the crash filed a tort claims action and asked for the official accident report to determine if there had been government negligence.³⁵⁵ Their attorneys submitted a number of interrogatories to the government, asking whether the government had prescribed modifications for the B-29 to prevent overheating of the engines to reduce fire hazards.³⁵⁶ If modifications had been carried out, the interrogatory asked for details.³⁵⁷ In each case the government answered “No.”³⁵⁸ When the three families discovered the declassified accident report in 2000, they realized the government’s answer was false.³⁵⁹

District Judge William Kirkpatrick decided on June 30, 1950, that the accident report on the B-29 crash was not “privileged.”³⁶⁰ He directed the government to give him the accident report to be read in his chambers.³⁶¹ When the government refused, he ruled for the widows.³⁶² On December 11, 1951, a unanimous Third Circuit upheld his decision.³⁶³ If it allowed the privilege, it said it would be a small step “to assert a privilege against the disclosure of records merely because they might prove embarrassing to government officers.”³⁶⁴ To permit the government as a party to “conclusively determine the Government’s claim of privilege is to abdicate the judicial function and permit the executive branch of the Government to infringe the independent province of the judiciary as laid down by the Constitution.”³⁶⁵ Both the district court and the Third Circuit properly defended judicial independence.

The government’s brief to the Supreme Court continued to muddle the basic issue by writing, “to the extent that the report reveals military secrets concerning the structure or performance of the plane that crashed or deals with these factors in relation to projected or suggested secret improvements it falls within the judicially recognized ‘state secret’ privilege.”³⁶⁶ *To the extent? Did*

³⁵⁴ *Id.* at 2–3.

³⁵⁵ *Id.* at 3.

³⁵⁶ LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE* 35 (2006).

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 167.

³⁶⁰ *Brauner v. United States*, 10 F.R.D. 468, 472 (E.D. Pa. 1950), *sub nom.* *United States v. Reynolds*, 345 U.S. 1 (1953).

³⁶¹ FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE*, *supra* note 356, at 56.

³⁶² *Id.* at 58.

³⁶³ *Reynolds v. United States*, 192 F.2d 987, 998 (3d Cir. 1951).

³⁶⁴ *Id.* at 995.

³⁶⁵ *Id.* at 997.

³⁶⁶ Brief for Petitioner at 45, *United States v. Reynolds*, 345 U.S. 1 (1953) (No. 21).

the report contain state secrets or not? That question could be answered only if the Court read the report, which it chose not to do.³⁶⁷

For a 6-3 Court, Chief Justice Fred Vinson announced incoherent principles of judicial responsibility.³⁶⁸ He said the Court “itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.”³⁶⁹ Disclosure to the public is a legitimate concern, but there is no such risk when Justices read an accident report in their chambers. By failing to examine the report, the Court could not possibly determine “whether the circumstances are appropriate for the claim of privilege.”³⁷⁰ The Court accepted at face value a self-serving statement by the executive branch, an assertion that turned out to be false.³⁷¹

Through disjointed reasoning, Vinson placed courts in an inferior institutional position. Without looking at the accident report, the Court could not independently evaluate the merits of a privilege claimed by an executive official. Nor could it protect the rights of the three widows. The Court surrendered to the executive branch fundamental judicial duties in deciding questions of privilege and access to evidence. Refusing to examine the report, the Court took the risk of being hoodwinked by the executive branch. As it turned out, it was.

In 2000, the three widows obtained a copy of the declassified accident report.³⁷² In reading the report, their attorneys realized it contained no state secrets.³⁷³ It did, however, reveal that the government had been negligent by not installing heat shields in the B-29 to avoid overheating of the engines.³⁷⁴ The Air Force committed other negligent acts.³⁷⁵ The executive branch misled the Court in 1953 just as it did with the Japanese-American cases. The families filed a writ of *coram nobis*, charging that the executive branch had misled the judiciary and committed fraud against it.³⁷⁶ They filed the writ first with the

³⁶⁷ FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE, *supra* note 356, at 113.

³⁶⁸ See *United States v. Reynolds*, 345 U.S. 1 (1953).

³⁶⁹ *Id.* at 8.

³⁷⁰ *Id.*

³⁷¹ FISHER, IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE *REYNOLDS* CASE, *supra* note 356, at 177.

³⁷² *Id.* at 167.

³⁷³ See *id.* at 177.

³⁷⁴ *Id.* at 178.

³⁷⁵ *Id.* (stating that the “civilian engineers were not given preflight briefings on the use of parachutes and emergency aircraft evacuation as required by the Air Force. . . [and] the commander, copilot, and engineer had never flown together as a crew before.”).

³⁷⁶ *Id.* at 176. For examples of *coram nobis* lawsuits, see *id.* at 169–76.

Supreme Court, but the Court declined to take it.³⁷⁷ They had to start over in district court.³⁷⁸

The widows lost in district court on September 10, 2004, and their appeal to the Third Circuit failed on September 22, 2005.³⁷⁹ On May 1, 2006, the Supreme Court denied cert.³⁸⁰ The constitutional value given short shrift in this *coram nobis* is the need to protect the integrity, independence, and reputation of the federal judiciary and the rights of private litigants. When courts operate in that manner, citizens lose faith in the judiciary, the rule of law, the adversary legal system, and the constitutional principle of checks and balances.

From 2006 to 2010, I worked with the House and Senate Judiciary Committees on legislation designed to increase judicial independence in state secrets cases. Judges would look at documents *in camera* instead of taking at face value the government's assertions offered in various declarations and affidavits. I presented testimony before both committees in support of the legislation.³⁸¹ The committees marked up their bills and reported them, but there was no floor debate on legislation that would go to the President.

When President Obama took office he objected that the state secrets privilege had been overused by the Bush II administration, including cases involving torture.³⁸² Yet his Justice Department continued to apply the privilege to cases it inherited and invoked it in new litigation, with federal courts generally deferring to executive claims that documents sought in court may not be read by plaintiffs or federal judges.³⁸³ *Reynolds* need not be the last word. The elected branches have both a duty and authority to increase judicial independence in these cases. Leadership is more likely to come from Congress, given the general preference of the executive branch for withholding documents in litigation.

³⁷⁷ *Id.* at 188.

³⁷⁸ *Id.*

³⁷⁹ *Herring v. United States*, 424 F.3d 384, 392 (3d Cir. 2005); *Herring v. United States*, No. 03-CV-5500-LDD, 2004 U.S. Dist. LEXIS 18545, at *37 (E.D. Pa. Sept. 10, 2004). Details on these two decisions are provided in FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE*, *supra* note 356, at 274–77.

³⁸⁰ *Herring v. United States*, 547 U.S. 1123 (2006).

³⁸¹ E.g., *Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability*, 108th Cong. (2008) (statement of Louis Fisher, Specialist, Constitutional Law, Law Library of the Library of Congress).

³⁸² Louis Fisher, *The State Secrets Privilege: From Bush II to Obama*, 46 PRES. STUD. Q. 173, 189 (2016).

³⁸³ *Id.* at 173, 190.

B. School Busing

The Supreme Court's desegregation decision in *Brown v. Board of Education* (1954) did little to integrate public schools. Part of the delay came from vague guidelines issued by the Court the next year, in *Brown v. Board of Education* (1955), directing states to move "with all deliberate speed."³⁸⁴ As late as 1964, the Court complained there "has been entirely too much deliberation and not enough speed" in enforcing *Brown*.³⁸⁵ Two years later a federal appellate court remarked: "A national effort, bringing together Congress, the executive and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. *The courts acting alone have failed.*"³⁸⁶

In 1971, a unanimous Court held that district courts possessed broad power to fashion remedies to desegregate schools.³⁸⁷ To achieve greater racial balance, judges could alter school district lines, reassign teachers, and bus students.³⁸⁸ That same year a unanimous Court struck down state antibusing laws.³⁸⁹ Busing spread to non-southern states, including Denver, Colorado and Michigan.³⁹⁰

Decisions that had been either unanimous or with a 7-1 majority now gave way to split decisions. Two other northern school systems, in Columbus and Dayton, Ohio, came before the Supreme Court.³⁹¹ Because there had been de jure segregation, school officials were required to take steps to desegregate.³⁹² Chief Justice Burger remarked that it "is becoming increasingly doubtful that massive public transportation really accomplishes the desirable objectives sought."³⁹³ Justice Powell, in a dissent, warned that parents resentful of court-ordered integration might withdraw their children from public schools by relocating ("white flight") or enroll them in private schools.³⁹⁴ Either action would lead to resegregation of public schools.³⁹⁵

³⁸⁴ *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

³⁸⁵ *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 229 (1964).

³⁸⁶ *United States v. Jefferson Cty. Bd. of Educ.*, 372 F.2d 836, 847 (5th Cir. 1966) (emphasis in original).

³⁸⁷ See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

³⁸⁸ See *id.*

³⁸⁹ See *N.C. Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

³⁹⁰ See *Milliken v. Bradley*, 433 U.S. 267 (1977); *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973); JOYCE A. BAUGH, *THE DETROIT SCHOOL BUSING CASE OF MILLIKEN V. BRADLEY AND THE CONTROVERSY OVER DESEGREGATION* (2011).

³⁹¹ See *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 455 (1979); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977).

³⁹² See *Columbus Bd. of Educ.*, 443 U.S. at 469 (Burger, C.J., concurring).

³⁹³ *Id.*

³⁹⁴ *Id.* at 484 (Powell, J., dissenting).

³⁹⁵ *Id.*

As described by constitutional scholar Jeffrey Rosen, court-ordered busing “produced a firestorm of resistance from the president and Congress that never abated.”³⁹⁶ A Gallup poll in 1973 found a clear majority backing integration but only 5 percent supporting busing.³⁹⁷ Court-ordered busing reflected “judicial unilateralism of the most aggressive kind.”³⁹⁸ Confronted with congressional and presidential opposition, federal judges “proved unable and ultimately unwilling to impose an unpopular and destabilizing social reform on their own.”³⁹⁹ Eventually, the judiciary abandoned busing as a remedy for desegregation.⁴⁰⁰

C. *Roe v. Wade*

The Supreme Court faced a complex and politically charged issue in *Roe v. Wade* (1973).⁴⁰¹ How could abortions be performed to satisfy the competing values of those who wanted abortion on demand and those who believed in an embryo’s right to life? Various states wrestled with the issue. It became a national controversy when the Court decided to “settle it” for the entire country. The decision represented a serious political and institutional miscalculation. As Linda Greenhouse has noted, the manner in which the Court handled the issue deeply split the nation and gave “rise to the religious Right,”⁴⁰² a political development that continues to this day.

Justice Blackmun wrote for a 7-to-2 Court, with Justices White and Rehnquist in dissent.⁴⁰³ Concurrences by Justices Stewart and Douglas and Chief Justice Burger added to the fragmentation.⁴⁰⁴ The Court struck down a Texas statute that prohibited abortion except on medical advice for the purpose of saving the woman’s life.⁴⁰⁵ It held that a woman’s right to privacy, whether found in the Fourteenth Amendment or the Ninth Amendment, “is broad

³⁹⁶ JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 67 (2006).

³⁹⁷ *Id.* at 68.

³⁹⁸ *Id.* at 69.

³⁹⁹ *Id.*

⁴⁰⁰ See *Riddick v. School Bd. of Norfolk*, 784 F.2d 521 (4th Cir. 1986) (en banc), *cert. denied*, 479 U.S. 938 (1986). For close analysis of the political obstacles to court-ordered busing, see J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978* 131–249 (1979).

⁴⁰¹ *Roe v. Wade*, 410 U.S. 113 (1973).

⁴⁰² LINDA GREENHOUSE, *THE U.S. SUPREME COURT: A VERY SHORT INTRODUCTION* 78 (2012). For the different parties and organizations that publicly debated abortion, see LINDA GREENHOUSE & REVA B. SIEGEL, eds., *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING* (2010).

⁴⁰³ *Roe*, 410 U.S. at 116, 171; *Doe v. Bolton*, 410 U.S. 179, 222 (1973).

⁴⁰⁴ *Roe*, 410 U.S. at 167; *Doe*, 410 U.S. at 207–09.

⁴⁰⁵ *Roe*, 410 U.S. at 116.

enough to encompass a woman's decision whether or not to terminate her pregnancy.⁴⁰⁶ However, it disagreed that a woman "is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses."⁴⁰⁷ It accepted as "reasonable and appropriate" for a state to decide that at some point in time it may legislate to protect the health of the mother and potential human life.⁴⁰⁸

Blackmun placed the state's compelling interest "at viability," which he took to mean the ability of a fetus to survive "outside the mother's womb."⁴⁰⁹ Medical technology was rapidly changing the concept of viability, with the fetus able to survive outside the mother's womb at much earlier stages. Blackmun created a system of three periods (a trimester model) to decide the rights of women and state authorities.⁴¹⁰

In dissent, Rehnquist objected that "the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one."⁴¹¹ White's dissent, printed in a companion case, remarked: "As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court."⁴¹²

An early critique of *Roe* by John Hart Ely identified some principal weaknesses.⁴¹³ Blackmun's opinion consisted of "drawing lines with an apparent precision one generally associates with a commissioner's regulations. On closer examination, however, the precision proves largely illusory."⁴¹⁴ Ely noted that the concept of viability "will become even less clear than it is now as the technology of birth continues to develop."⁴¹⁵ The "problem with *Roe* is not so much that it bungles the question it sets itself, but rather that it sets itself a question the Constitution has not made the Court's business."⁴¹⁶

Support for the trimester framework continued to erode as new Justices, including Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy, joined the Court. The changed composition of the Court was evident in a 1989 decision, which reviewed a Missouri statute that imposed a number of restrictions on a woman's decision to have an abortion.⁴¹⁷ Without overruling

⁴⁰⁶ *Id.* at 153.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at 159.

⁴⁰⁹ *Id.* at 160, 163.

⁴¹⁰ *See id.* at 164–65.

⁴¹¹ *Id.* at 173 (Rehnquist, J., dissenting).

⁴¹² *Doe*, 410 U.S. at 222 (White, J., dissenting).

⁴¹³ *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 922 (1973).

⁴¹⁴ *Id.* at 922.

⁴¹⁵ *Id.* at 924.

⁴¹⁶ *Id.* at 943.

⁴¹⁷ *See Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

Roe, a plurality opinion by Rehnquist, White, and Kennedy rejected the trimester framework.⁴¹⁸ Scalia would have repealed all of *Roe*.⁴¹⁹ In 1992, the Court finally abandoned the trimester framework. An opinion by O'Connor, Kennedy, and Souter specifically rejected it.⁴²⁰ Stevens and Blackmun disagreed with the rejection.⁴²¹ In their separate opinion, Rehnquist, White, Scalia, and Thomas stated that *Roe* “was wrongly decided,” apparently agreeing with the framework’s rejection without expressly saying so.⁴²²

What was learned from *Roe v. Wade*? Writing in 1985 while serving on the D.C. Circuit, Ruth Bader Ginsburg said the decision became “a storm center” and “sparked public opposition and academic criticism,” in part “because the Court ventured too far in the change it ordered and presented an incomplete justification for its action.”⁴²³ In 1992, after the Court rejected the trimester framework and she was confirmed as Associate Justice, Ginsburg explained:

[J]udges play an interdependent part in our democracy. They do not alone shape legal doctrine, but . . . they participate in a dialogue with other organs of government, and with the people as well. . . . Measured motions seem to me right, in the main, for constitutional as well as common law adjudication.⁴²⁴

A “less encompassing” decision, she said, “might have served to reduce rather than to fuel controversy.”⁴²⁵

D. *National League of Cities*

In *National League of Cities v. Usery* (1976), the Supreme Court decided that Congress could not adopt federal minimum-wage and maximum-hour provisions that displaced state powers.⁴²⁶ The Court’s theory of federalism could not be consistently understood and applied in either the lower courts or

⁴¹⁸ See *id.* at 517–50.

⁴¹⁹ *Id.* at 532 (Scalia, J., concurring).

⁴²⁰ *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992).

⁴²¹ *Id.* at 911.

⁴²² *Id.* at 944 (Rehnquist, C.J., concurring in part, dissenting in part, joined by White, J., Scalia, J., and Thomas, J.).

⁴²³ Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 376 (1985).

⁴²⁴ Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992).

⁴²⁵ *Id.* at 1199.

⁴²⁶ 426 U.S. 833 (1976).

by the Court itself. After nine years of confusion and frustration, Justice Blackmun switched sides and pronounced the Court's doctrine unworkable.⁴²⁷

The Fair Labor Standards Act of 1938 expressly exempted all states and their political divisions from federal minimum-wage and overtime provisions.⁴²⁸ In 1966, however, Congress extended federal minimum wages and overtime pay standards to state-operated hospitals and schools.⁴²⁹ Two years later, in *Maryland v. Wirtz*, the Court upheld the statute as rationally based, concluding that Congress had properly taken into account the effect on interstate competition and the promotion of labor peace.⁴³⁰ Building on that policy, the Court in 1975 upheld the short-term power of the President to stabilize the wages and salaries of state employees.⁴³¹

This mutual accord between the Court and the elected branches came to an abrupt halt in 1976. Justice Rehnquist was able to attract four Justices to his position that federal policy had invaded state powers.⁴³² The Court now decided that the independent status of the states needed to be preserved for "traditional government functions" such as fire prevention, police protection, sanitation, public health, and parks and recreation.⁴³³ *National League of Cities* overruled *Wirtz* by holding that a congressional statute in 1974, extending wage-and-hour provisions to almost all state employees, threatened the independent existence of states.⁴³⁴

Justices Brennan, White, Marshall, and Stevens wrote sharply worded dissents. In a tentative concurrence, Blackmun supplied the fifth vote to give Rehnquist a majority.⁴³⁵ Blackmun said he was "not untroubled" by some aspects of the Court's position, but agreed to offer his support.⁴³⁶ Over the next few years, evidence began to mount that Rehnquist's theory of federalism could not be defended or even understood.

The major difficulty lay with Rehnquist's assumption that a clear line could be drawn between traditional and nontraditional government functions. The Supreme Court decided it would not, or could not, draw that line. It delegated that task to the lower courts. A district court, lacking confidence in determining the difference between the two functions, asked the Labor

⁴²⁷ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

⁴²⁸ Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 3(d), 52 Stat. 1060 (codified as amended at 29 U.S.C. § 201-219 (2012)).

⁴²⁹ Fair Labor Standards Act Amendments of 1966, Pub. L. No. 89-601, § 102(b), 80 Stat. 831 (codified as amended at 29 U.S.C. § 203).

⁴³⁰ *Maryland v. Wirtz*, 392 U.S. 183 (1968).

⁴³¹ *Fry v. United States*, 421 U.S. 542, 543-48 (1975).

⁴³² *Nat'l League of Cities v. Usery*, 426 U.S. 833, 855, *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

⁴³³ *Id.* at 852.

⁴³⁴ *Id.* at 855.

⁴³⁵ *Id.* at 856 (Blackmun, J., concurring).

⁴³⁶ *Id.* (Blackmun, J., concurring).

Department to identify nontraditional state functions.⁴³⁷ It did so, supplying a list of traditional functions as well.⁴³⁸

Year after year, lower courts and the Supreme Court tried to figure out what was traditional and nontraditional. Year after year they failed. In 1981, a unanimous Court rejected a district court's argument that land use regulation was a "traditional governmental function" reserved to the states.⁴³⁹ A year later, the Court reviewed a district court's attempt to use *National League of Cities* to prohibit Congress from regulating retail sales of electricity and natural gas.⁴⁴⁰ The district court regarded this area of economic regulation as traditional, but the Court said it was not.⁴⁴¹ Other cases highlighted the inability of courts to understand the difference between traditional and nontraditional state functions.⁴⁴²

By 1985, Blackmun's patience ended. His opinion in a mass transit case nullified Rehnquist's opinion issued nine years earlier.⁴⁴³ Blackmun explained the difficulties that courts experienced trying to determine the difference between traditional and nontraditional functions.⁴⁴⁴ In one example, a district court decided that municipal ownership and operation of a mass-transit system was a traditional governmental function.⁴⁴⁵ Three federal appellate courts and one state appellate court reached the opposite conclusion.⁴⁴⁶ The effect of Blackmun's 5-4 decision was to take this element of federalism away from the judiciary and leave it with the political process of Congress and the states. He rejected "as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'"⁴⁴⁷ To Blackmun, the Court in *National League of Cities* "tried to repair what did not need repair."⁴⁴⁸

E. Legislative Vetoes

"As a way of controlling delegated authority, Congress has long relied on

⁴³⁷ NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 86 (2d ed., 2015).

⁴³⁸ *Id.*

⁴³⁹ *Hodel v. Va. Surface Mining & Recl. Ass'n.*, 452 U.S. 264 (1981).

⁴⁴⁰ *FERC v. Mississippi*, 456 U.S. 742 (1982).

⁴⁴¹ *Id.* at 758.

⁴⁴² See *EEOC v. Wyoming*, 460 U.S. 226, 239 (1983); *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 686 (1982).

⁴⁴³ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985).

⁴⁴⁴ *Id.* at 530.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at 546-47.

⁴⁴⁸ *Id.* at 557.

‘legislative vetoes.’ They do not become public law because they are not submitted to the President. Controls can be exercised by both Houses (a concurrent resolution) by either House (a simple resolution), and even by committees and subcommittees. Legislative vetoes have a complex history and cannot be described simply as congressional encroachments on executive powers. Presidents and Attorneys General did more than tolerate them and acquiesce.⁴⁴⁹ They often invited and encouraged the growth of legislative vetoes because they understood the benefits for the executive branch.⁴⁵⁰

Political accommodations that had supported the legislative veto largely came to an end in 1978 when President Carter issued a broad critique. He objected that this method of congressional control had grown rapidly in recent years to cover many new areas, allowing Congress to control agency regulations, federal salaries, presidential papers, arms sales, war powers, national emergencies, and other areas of government.⁴⁵¹

The case that reached the Supreme Court in *INS v. Chadha* (1983) had been handled circumspectly by the Ninth Circuit.⁴⁵² Acting under statutory authority, the House had disapproved 6 of 340 requests by the Attorney General to suspend the deportation of aliens. The Ninth Circuit held that this legislative veto violated the doctrine of separated powers and intruded impermissibly into executive and judicial powers.⁴⁵³ But it carefully limited the reach of its decision, confining it to legislative vetoes that affected individual, adjudicative determinations.⁴⁵⁴ It specifically avoided commenting on other types of legislative vetoes, such as those over agency regulations.⁴⁵⁵

In the year before the Supreme Court decided *Chadha*, I wrote an article for the *Washington Post* explaining that some types of legislative vetoes would survive no matter how the Court wrote its opinion. I referred to a procedure where agencies had to seek the approval of designated committees and subcommittees before moving appropriated funds from one area to another (called the “reprogramming” process).⁴⁵⁶

⁴⁴⁹ FISHER, SUPREME COURT EXPANSION OF PRESIDENTIAL POWER, *supra* note 333, 182.

⁴⁵⁰ MICHAEL J. BERRY, THE MODERN LEGISLATIVE VETO: MACROPOLITICAL CONFLICT AND THE LEGACY OF *CHADHA* (2016); LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 156–67 (6th ed. 2014).

⁴⁵¹ Message to the Congress on Legislative Vetoes, 1 Pub. Papers 1146 (June 21, 1978); BARBARA HINKSON CRAIG, THE LEGISLATIVE VETO: CONGRESSIONAL CONTROL OF REGULATION 49–50 (1983); Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1371 (1977).

⁴⁵² *INS v. Chadha*, 462 U.S. 919 (1983).

⁴⁵³ *Chadha v. INS*, 634 F.2d 408, 431 (9th Cir. 1980).

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* at 433.

⁴⁵⁶ Louis Fisher, *Congress Can't Lose on Its Veto Power*, WASH. POST, Feb. 21, 1982, at D1.

Writing for the Court, Chief Justice Burger held that whenever congressional action has the “purpose and effect of altering the legal rights, duties, and relations of persons” outside the legislative branch, Congress must act through both Houses in a bill submitted to the President.⁴⁵⁷ The decision effectively invalidated every form of legislative veto. Yet Burger wrote too broadly. As the Justice Department acknowledges, each House of Congress may alter the legal rights and duties of individuals outside the legislative branch without resorting to bicameral action and presentment. The issuance of committee subpoenas is one example.⁴⁵⁸

Neither agency officials nor lawmakers want the static, artificial model developed by the Court. The conditions that spawned the legislative veto in the past did not disappear. Executive officials still want substantial latitude to administer delegated authority. Lawmakers still insist on maintaining control in some areas without having to pass another statute. The elected branches began to develop substitutes that could serve as the functional equivalent of the legislative veto.

Instead of a one-House veto over reorganization proposals, Congress could switch to a joint resolution of approval, which would satisfy both bicameralism and presentment. But now the President would have to gain approval from both Houses within a specific number of days. In previous statutes, the President’s plan to reorganize the government would take effect unless one House disapproved within a fixed number of days. A joint resolution of approval reverses the burden. If one House decides to withhold support, the practical effect is a one-House veto. That reality escaped the Court.

The reprogramming process continues as before. Agency officials seek approval from designated committees and subcommittees before funds can be shifted from one account to another. In a book published in 2015, former Secretary of Defense Robert Gates recalled a problem he faced in 2011, trying to reprogram money from one appropriations account to another.⁴⁵⁹ He needed the support of four committees in the House and Senate.⁴⁶⁰ A compromise was reached to move the funds.⁴⁶¹ In another memoir, Leon Panetta reflected on his years as CIA Director during the Obama administration.⁴⁶² He described how he met with congressional committees and leaders to gain the support of

⁴⁵⁷ *INS*, 462 U.S. at 952, 958.

⁴⁵⁸ Constitutional Separation of Powers between Cong. and the President, 20 Op. O.L.C. 124, 138 (1996).

⁴⁵⁹ ROBERT M. GATES, *DUTY: MEMOIRS OF A SECRETARY AT WAR* 513–14 (2014).

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² LEON PANETTA WITH JIM NEWTON, *WORTHY FIGHTS: A MEMOIR OF LEADERSHIP IN WAR AND PEACE* 193–331 (2015).

a reprogramming request.⁴⁶³ In those meetings, none of the participants in the two branches give a thought about the Court's decision in *Chadha*.

F. Corporations as Persons

In *Buckley v. Valeo* (1976) and *Citizens United* (2010), the Supreme Court held that campaign expenditures by corporations may not be restricted by Congress or the states.⁴⁶⁴ The decisions assert that corporations are persons, money is speech, and corporate expenditures are protected by the First Amendment.⁴⁶⁵ Because these decisions rest on what Justices themselves have referred to as "inventions," with the Court deeply divided in issuing both rulings, there is little reason to believe that the decisions represent the final word on constitutional principles.

In what sense are corporations persons under the Constitution and entitled to rights available to natural persons? In the 1819 *Dartmouth College* case, Chief Justice Marshall described a corporation as "an artificial being, invisible, intangible, and existing only in contemplation of law."⁴⁶⁶ As "the mere creature of law," it possesses only those properties conferred upon it.⁴⁶⁷ Natural persons are not creatures of law. One property conferred by legislatures on corporations, Marshall said, is immortality.⁴⁶⁸ No such property extends to natural persons. On what reasonable grounds could his analysis be turned aside?

The idea that corporations are persons under the Constitution first surfaced in the *Santa Clara* case in 1886 without being briefed, argued, reasoned, *or even decided*.⁴⁶⁹ Does that sound far-fetched? Consider the facts. Before oral argument began, Chief Justice Morrison R. Waite told the parties:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.⁴⁷⁰

His remark appears not in the Court's decision but in the headnote prepared by the clerk.

⁴⁶³ *Id.* at 298–99.

⁴⁶⁴ *Citizens United v. FEC*, 558 U.S. 310 (2010); *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁴⁶⁵ *Citizens United*, 558 U.S. at 365–72; *Buckley*, 424 U.S. at 22, 39–51.

⁴⁶⁶ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Santa Clara Cty. v. S. Pac. R.R.*, 118 U.S. 394, 396 (1886).

⁴⁷⁰ *Id.*

The decision by Justice John Marshall Harlan did not refer to corporations being “persons.” J. C. Bancroft Davis, the court reporter, asked Chief Justice Waite if his remark before oral argument should be included in the headnote.⁴⁷¹ Waite left that decision to Davis.⁴⁷² The headnote begins: “The defendant Corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws.”⁴⁷³ The Fourteenth Amendment does not call a corporation a “person.” Section 1 opens with: “All persons born or naturalized in the United States” Obviously that refers to natural persons, not artificial creations. Corporations are not born or naturalized. Calling a corporation a person is a metaphor, a legal fiction.⁴⁷⁴

Over the years, the Supreme Court has made many false and misleading claims about *Santa Clara*. In 1896, Justice Harlan said it was “now settled that corporations are persons under the Fourteenth Amendment,” citing *Santa Clara*.⁴⁷⁵ In fact, his ruling did not say that. A decade later he corrected his error. Writing for a unanimous Court, he said that the liberty guaranteed by the Fourteenth Amendment “is the liberty of natural, not artificial persons.”⁴⁷⁶ Clear enough, echoing Marshall’s decision in *Dartmouth College*.⁴⁷⁷ A year later, another unanimous decision by Harlan said the Fourteenth Amendment applies to “natural, not artificial, persons.”⁴⁷⁸ Had the Court finally returned to a reasonable, credible position and decided to repudiate the headnote in *Santa Clara*?

The record is clear that when the Supreme Court relies on erroneous dicta, as in *Curtiss-Wright*, or in a misleading headnote, as in *Santa Clara*, those mistakes and misconceptions will continue to influence future holdings. The Court in 1888 cited *Santa Clara* and claimed it “is conceded” that corporations are persons under the Fourteenth Amendment.⁴⁷⁹ Nothing in Harlan’s decision conceded that point. A decision in 1889 claimed it was “so held” in *Santa Clara* that private corporations are persons under the Fourteenth

⁴⁷¹ Copies of the Davis/Waite letters are printed in THOM HARTMANN, *UNEQUAL PROTECTION: HOW CORPORATIONS BECAME “PEOPLE”—AND HOW YOU CAN FIGHT BACK* 37–40 (2d ed., 2010).

⁴⁷² *Id.*

⁴⁷³ *Santa Clara*, 118 U.S. at 394–95. For background on this headnote, see JACK BEATTY, *AGE OF BETRAYAL: THE TRIUMPH OF MONEY IN AMERICA, 1865–1900*, at 110–11, 171–78 (2008 ed.).

⁴⁷⁴ Jess M. Krannich, *The Corporate “Person”: A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 Loy. U. Chi. L. J. 61, 62 (2005).

⁴⁷⁵ *Covington & L. Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 592 (1896).

⁴⁷⁶ *Northwestern Nat’l Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906).

⁴⁷⁷ *Id.*; see also *Trs. of Dartmouth Coll.*, 17 U.S. at 636 (1819).

⁴⁷⁸ *W. Turf Ass’n v. Greenberg*, 204 U.S. 359, 363 (1907).

⁴⁷⁹ *Mo. Pac. Ry. Co. v. Mackey*, 127 U.S. 205, 209 (1888).

Amendment.⁴⁸⁰ There was no such holding. A Court ruling in 1892 also used the words “so held.”⁴⁸¹ The Court in 1897, citing *Santa Clara* carelessly, said it was “well settled” that corporations are persons under the Fourteenth Amendment.⁴⁸² How could it be well settled when *Santa Clara* was not guided by briefs, oral argument, or the Court’s decision?

Judicial misconceptions persisted. A dissent by Justice Black in 1938 added more confusion. After stating he did not believe the word “person” in the Fourteenth Amendment included corporations,⁴⁸³ Black wrote falsely that the Court in *Santa Clara* “decided for the first time that the word ‘person’ in the Fourteenth Amendment did in some instances include corporations.”⁴⁸⁴ Nothing in *Santa Clara* decided that. A dissent by Justices Douglas and Black in 1949 stated it was “so held” in *Santa Clara* that a corporation is a “person” under the Equal Protection Clause of the Fourteenth Amendment.⁴⁸⁵ There was no such holding. Justice Rehnquist, in a dissent in 1978, pointed to Justice Harlan’s opinion for a unanimous Court in 1906 that the liberty under the Fourteenth Amendment is “the liberty of natural, not artificial persons.”⁴⁸⁶ Rehnquist added: “it cannot be disputed that the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons,” pointing out that corporations do not enjoy the privilege against self-incrimination.⁴⁸⁷ An important point, but *Santa Clara* continued to influence the Court.

In the 1978 case, with Rehnquist dissenting, the Court divided 5-4 in striking down a Massachusetts statute that prohibited corporations from making contributions or expenditures to referenda and elections.⁴⁸⁸ Speaking for the Court, Justice Powell said: “If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy”⁴⁸⁹ He then added this footnote: “It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment,” citing *Santa Clara*.⁴⁹⁰ But the Court in *Santa Clara* did not *decide* that question, much less “settle it.” Powell seemed unaware that Justice Harlan later corrected the misconception caused by the clerk’s headnote.

⁴⁸⁰ *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889).

⁴⁸¹ *Charlotte, C. & A. R.R. v. Gibbes*, 142 U.S. 386, 391 (1892).

⁴⁸² *Gulf, C. & S. F. Ry. v. Ellis*, 165 U.S. 150, 154 (1897).

⁴⁸³ *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85 (1938) (Black, J., dissenting).

⁴⁸⁴ *Id.* at 87.

⁴⁸⁵ *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576 (1949) (Douglas and Black, JJ., dissenting).

⁴⁸⁶ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting).

⁴⁸⁷ *Id.* at 824.

⁴⁸⁸ *Bellotti*, 435 U.S. at 822 (Rehnquist, J., dissenting).

⁴⁸⁹ *Id.* at 777.

⁴⁹⁰ *Id.* at 780 n.15.

G. Campaign Finance

In *Buckley v. Valeo* (1976), the Supreme Court reviewed legislation passed by Congress in 1974 to regulate the funding of federal elections.⁴⁹¹ As explained by Judge J. Skelly Wright, the statute responded to political abuses that “culminated in the 1972 presidential campaign and its aftermath, commonly called Watergate. Congress found that those excesses were fueled by money collected for political purposes.”⁴⁹² To Judge Harold Leventhal, who served on the D.C. Circuit that upheld the 1974 legislation, the central question was not whether money is speech but “the need to maintain confidence in self-government, and to prevent the erosion of democracy which comes from a popular view of government as responsive only or mainly to special interests.”⁴⁹³

In *Buckley*, the Court upheld a congressional limit on personal contributions to political campaigns but struck down a limit on expenditures.⁴⁹⁴ The Court accepted the legislative argument that contributions resemble quid pro quos and may invite political corruption. It then reasoned that limits on campaign expenditures “necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”⁴⁹⁵

The ruling is difficult to analyze because it was issued as a *per curiam* for which no Justice took responsibility. As noted by Ruth Bader Ginsburg when she served on the D.C. Circuit, judges generally do not labor over *per curiam* opinions “with the same intensity they devote to signed opinions.”⁴⁹⁶ *Per curiams* are usually brief. The one in *Buckley* runs to 138 pages, followed by 60 pages of remarks by five Justices.⁴⁹⁷ They concurred with some parts while dissenting from others.⁴⁹⁸ Justice Stevens did not participate.⁴⁹⁹

Chief Justice Burger objected that the *per curiam*, by dissecting the congressional statute “bit by bit, casting off vital parts,” left a remainder he

⁴⁹¹ *Buckley v. Valeo*, 424 U.S. 1 (1976), *superseded by statute as recognized in* *McConnell v. FEC*, 540 U.S. 93 (2003).

⁴⁹² J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1003 (1976).

⁴⁹³ Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 362 (1977).

⁴⁹⁴ *Buckley*, 424 U.S. at 143.

⁴⁹⁵ *Id.* at 19.

⁴⁹⁶ Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 139 (1990).

⁴⁹⁷ *See generally* *Buckley*, 424 U.S. at 1.

⁴⁹⁸ For the manner in which the *per curiam* was drafted, see Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241 (2003).

⁴⁹⁹ *Buckley*, 424 U.S. at 144.

doubted was “workable.”⁵⁰⁰ He challenged the effort to distinguish between contributions and expenditures, upholding one but not the other.⁵⁰¹ To him, contributions and expenditures “are two sides of the same First Amendment coin” and the *per curiam*’s analysis “will not wash.”⁵⁰² The statute “as it now stands is unworkable and inequitable.”⁵⁰³ Justices White and Blackmun rejected the Court’s distinction between contributions and expenditures.⁵⁰⁴ Justices Marshall and Rehnquist dissented in part.⁵⁰⁵

Conservative and liberal Justices have been highly critical of *Buckley*. A 1978 decision struck down a Massachusetts statute that prohibited corporations from making contributions or expenditures to referenda and elections.⁵⁰⁶ The Supreme Court split 5-4.⁵⁰⁷ A dissent by White, joined by Brennan and Marshall, rejected the reasoning of *Buckley*.⁵⁰⁸ White observed that in the arena of campaign finance “the expertise of legislators is at its peak and that of judges is at its very lowest.”⁵⁰⁹ Rehnquist’s dissent objected that the Court should have deferred to the judgment of Massachusetts in protecting the integrity of its elections.⁵¹⁰ In 1981, the Court divided 5-4 in deciding how to interpret and apply *Buckley* with regard to corporate and union contributions to a political committee.⁵¹¹

The difficulty of finding judicial agreement on campaign finance cases is evident by reading Court decisions from 1982 forward.⁵¹² Of special interest is a decision in 2000 that produced dissents from Justices Kennedy, Thomas, and Scalia.⁵¹³ Kennedy, who would write for the Court in *Citizens United*, stated: “The plain fact is that the compromise the Court invented in *Buckley* set the stage for a new kind of speech to enter the political system.”⁵¹⁴ He meant that *Buckley* did not reflect thoughtful and informed constitutional

⁵⁰⁰ *Id.* at 235–36 (Burger, C.J., dissenting in part).

⁵⁰¹ *Id.* at 241.

⁵⁰² *Id.* at 241, 244.

⁵⁰³ *Id.* at 252.

⁵⁰⁴ *Id.* at 259 (White, J., dissenting in part), 290 (Blackmun, J., dissenting in part).

⁵⁰⁵ *Id.* at 286, 290.

⁵⁰⁶ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* at 820–21 (White, J., dissenting).

⁵⁰⁹ *Id.* at 804 (White, J., dissenting).

⁵¹⁰ *Id.* at 823 (Rehnquist, J., dissenting).

⁵¹¹ *Cal. Med. Ass’n v. FEC*, 453 U.S. 182 (1981).

⁵¹² *See, e.g., Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986); *FEC v. Nat’l Conservative PAC*, 470 U.S. 480 (1985); *Common Cause v. Schmitt*, 455 U.S. 129 (1982); *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197 (1982).

⁵¹³ *Nixon v. Shrink Mo. PAC*, 528 U.S. 377 (2000).

⁵¹⁴ *Id.* at 406 (Kennedy, J. dissenting).

analysis. Instead, it represented a compromise “invented” by the Court to yield a type of speech that did not previously exist.

To Kennedy, there were sufficient grounds “to reject *Buckley*’s wooden formula.”⁵¹⁵ He warned that the “melancholy history of campaign finance in *Buckley*’s wake shows what can happen when we intervene in the dynamics of speech and expression by inventing an artificial scheme of our own.”⁵¹⁶ Stating that “*Buckley* has not worked,”⁵¹⁷ he added: “I would overrule *Buckley* and then free Congress or state legislatures to attempt some new reform, if, based upon their own considered view of the First Amendment, it is possible to do so.”⁵¹⁸ Yet in deciding *Citizens United* ten years later, Kennedy relied extensively on *Buckley*.⁵¹⁹ In the 2000 case, a dissent by Thomas, joined by Scalia, referred to “the analytic fallacies of our flawed decision in *Buckley v. Valeo*” and said, “our decision in *Buckley* was in error, and I would overrule it.”⁵²⁰ In 2001, the Court divided 5-4 over campaign finance.⁵²¹

A campaign finance decision in 2003 stretched for 272 pages, with seven Justices dissenting in part: Scalia, Thomas, Kennedy, Rehnquist, Stevens, Ginsburg, and Breyer.⁵²² Despite chronic problems with *Buckley*, a plurality of the Court in 2006 relied on it to prevent Vermont from imposing limits on campaign expenditures.⁵²³ Thomas and Scalia rejected the plurality’s approach, pointing to “the continuing inability of the Court (and the plurality here) to apply *Buckley* in a coherent and principled fashion.”⁵²⁴ To Stevens, dissenting, “*Buckley*’s holding on expenditure limits is wrong” and “the time has come to overrule it.”⁵²⁵

A 2007 case found the Court once again divided 5-4, this time in holding unconstitutional a federal statute (the Bipartisan Campaign Reform Act, or BCRA) that made it a crime for any corporation to broadcast shortly before an election any communication that names a federal candidate for elected office and that is targeted for the electorate.⁵²⁶ The Court’s lineup was significant: five conservatives in the majority (Roberts, Scalia, Kennedy, Thomas, Alito) arrayed against four liberals (Souter, Stevens, Ginsburg, Breyer)—the same configuration that decided *Citizens United* three years later.

⁵¹⁵ *Id.* at 407.

⁵¹⁶ *Id.*

⁵¹⁷ *Id.* at 408.

⁵¹⁸ *Id.* at 409–10.

⁵¹⁹ *Citizens United v. FEC*, 558 U.S. 310, 339, 340, 345–46, 349–50, 356–60, 363, 365, 366–67, 369 (2010).

⁵²⁰ *Nixon*, 528 U.S. at 410 (Thomas, J., dissenting, joined by Scalia, J.).

⁵²¹ *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001).

⁵²² *McConnell v. FEC*, 540 U.S. 93 (2003).

⁵²³ *Randall v. Sorrell*, 548 U.S. 230 (2006).

⁵²⁴ *Id.* at 266 (Thomas, J., concurring, joined by Scalia, J.).

⁵²⁵ *Id.* at 274 (Stevens, J., dissenting).

⁵²⁶ *FEC v. Wisc. Right to Life*, 551 U.S. 449 (2007).

The Supreme Court often invalidates congressional legislation when it decides that Congress has provided inadequate justification.⁵²⁷ What about inadequate justification by the Court? In writing for the Court in *Citizens United*, Justice Kennedy made this claim: “[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”⁵²⁸ Based on actual data, experience, and findings, Congress and a number of states have determined that corporate spending in political campaigns not only provides the appearance of corruption but results in actual corruption.⁵²⁹ The Court provided zero evidence to counter elected branch judgments.

Another Kennedy statement lacks corroborating evidence: “The appearance of [corporate] influence or access, furthermore, will not cause the electorate to lose faith in our democracy.”⁵³⁰ Courts need to anchor their decisions on reliable evidence and convincing reasoning. Mere assertions are hollow, especially when Congress and state legislatures have reached different conclusions.

In 2012, the Supreme Court had an opportunity to learn something about the link between corporate expenditures and campaign corruption. Montana experienced a century of “copper kings” and other mining interests largely able to control the state’s politics through financial power.⁵³¹ It enacted legislation to prohibit a corporation from making “an expenditure in connection with a candidate or a political party.”⁵³² The Supreme Court could have taken the case, ordered briefs and oral argument, and had some of its beliefs and assertions tested by actual evidence and experience. Instead, it issued a short per curiam reversing the Supreme Court of Montana.⁵³³ A dissent signed by four Justices (Breyer, Ginsburg, Sotomayor, and Kagan) stated that *Citizens United* “should not bar the Montana Supreme Court’s finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana.”⁵³⁴

Critics of *Citizens United* offer two means of relief: the Court could confess error and reverse itself, or Congress and the states could pass and ratify a constitutional amendment to empower legislative action to regulate

⁵²⁷ See, e.g., *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁵²⁸ *Citizens United v. FEC*, 558 U.S. 310, 357 (2010).

⁵²⁹ FISHER & HARRIGER, *supra* note 47, 1051–53.

⁵³⁰ *Citizens United*, 558 U.S. at 360.

⁵³¹ Robert Barnes & Dan Eggen, *Justices Reject State’s Law, Uphold Citizens United Ruling*, WASH. POST, June 26, 2012, at A7.

⁵³² An Act Eliminating the Prohibition on Corporate Contributions and Expenditures on Ballot Issues; Amending Section 13-35-227, MCA; and Providing an Immediate Effective Date, ch. 59, § 1, 2003 Mont. Laws.

⁵³³ *Am. Tradition P’ship, Inc. v. Bullock*, 567 U.S. 516 (2012).

⁵³⁴ *Id.* at 517 (Breyer, J., dissenting, joined by Ginsburg, J., Sotomayor, J., and Kagan, J.).

campaign expenditures. There is a third and more practical option. In the field of campaign finance, the Court stands on shaky ground by relying on strained and artificial judicial creations and inventions: corporations are persons, money is speech, and the First Amendment protects unlimited corporate expenditures in political campaigns. Congress should hold hearings, invite expert testimony on the influence of money on the electoral process, and produce legislation that is coherent, principled, and evidence-based to protect popular control and self-government.⁵³⁵

Such a bill, if enacted, would be litigated and the Supreme Court could declare the statute contrary to its rulings. However, it would be institutionally risky to strike down the statute merely because it conflicts with evidence-free judicial decisions. Instead, the Court could announce: “Congress has assembled evidence that was not available to us when we decided *Buckley* and *Citizens United*. We now, after due consideration, defer to the legislative judgment and override those two decisions.” If that were to happen, the Court would be under appropriate pressure to adopt a more deferential attitude toward state efforts to control campaign expenditures.

Would it be difficult for the Supreme Court to confess error? It has done so in the past, as with child-labor legislation. In a dissenting opinion in 1932, Justice Brandeis noted that the Supreme Court “bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.”⁵³⁶ The Court is judged on the basis of the quality of its decisions, its respect for the elected branches, and how it values self-government, not on some abstract theory of finality that depends on judicial creations and inventions. An essential test of credibility for all three branches is the capacity to admit error and make corrections.

VII. CONCLUSION

For more than two centuries, the authority of the Supreme Court to interpret the Constitution has encountered various limits. Still, the claim of judicial finality continues to be pressed by courts and legal scholars. In *City of Boerne v. Flores* in 1997, Justice Kennedy offered this perspective: “Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches.”⁵³⁷ He then added: “When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. *Marbury v. Madison*,

⁵³⁵ Louis Fisher, *Saying What the Law Is: On Campaign Finance, It's Not Just for the Court; Congress Has a Co-Equal Say*, NAT'L L.J., Feb. 22, 2010, at 38.

⁵³⁶ *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407–08 (1932).

⁵³⁷ *City of Boerne v. Flores*, 521 U.S. 507, 535–36 (1997).

1 Cranch, at 177.”⁵³⁸ The reference to *Marbury* lacks substance. Obviously it is also the duty of Congress “to say what the law is.” *Marbury* offers no support for judicial supremacy or judicial finality.⁵³⁹

Boerne claimed that when a statute collides with a Supreme Court ruling, the ruling “must control.”⁵⁴⁰ Nothing in the record from 1789 to the present time supports the view that when the Supreme Court decides a constitutional issue, its ruling is binding and final on the elected branches. Court rulings have been more fluid than fixed. Justice Kennedy took no note of *Goldman v. Weinberger* (1986), which considered Captain Goldman’s request that he be allowed to wear his yarmulke indoors while on duty.⁵⁴¹ The case balanced his constitutional right of religious liberty against the position of the Air Force that it requires uniformity and discipline. Divided 5 to 4, the Court deferred to the military.⁵⁴² Within one year, lawmakers passed legislation to permit members of the military to wear religious apparel unless it interferes with military duties.⁵⁴³ Congress had full authority to override the Court’s constitutional decision and extend greater protection to religious liberty in the military services. It did so by exercising its Article I power to “make Rules for the Government and Regulation of the land and naval Forces.”⁵⁴⁴

It is not useful, helpful, or credible for the Court to insist that when it decides a constitutional case the issue is closed unless the Court reverses a decision or its ruling is overturned by constitutional amendment. All three branches make mistakes. All three branches have the capacity to correct them. Some judicial errors, however, persist decade after decade, no matter how many scholars identify the deficiencies. A judicial ruling is not binding for all time simply because it has been issued. It is controlling if sound in substance, offers persuasive reasoning, and is accepted by the elected branches and the public.

⁵³⁸ *Id.* at 536.

⁵³⁹ FISHER, DEFENDING CONGRESS AND THE CONSTITUTION, *supra* note 97, at 22–47.

⁵⁴⁰ 521 U.S. at 536.

⁵⁴¹ *Goldman v. Weinberger*, 475 U.S. 503 (1986).

⁵⁴² *Id.*

⁵⁴³ National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-108, § 508, 101 Stat. 1019, 1086–87 (1987).

⁵⁴⁴ U.S. CONST. art. I, § 8, cl. 14. For further details on *Goldman v. Weinberger* see LOUIS FISHER, RELIGIOUS LIBERTY IN AMERICA: POLITICAL SAFEGUARDS 114–22 (2002).