Saint Louis University Law Journal

Volume 49
Number 3 *Teaching Constitutional Law (Spring 2005)*

Article 3

2005

Constitutional Law Writ Large

Louis Fisher

Follow this and additional works at: https://scholarship.law.slu.edu/lj

Part of the Law Commons

Recommended Citation

Louis Fisher, *Constitutional Law Writ Large*, 49 St. Louis U. L.J. (2005).
Available at: https://scholarship.law.slu.edu/lj/vol49/iss3/3

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Law Journal by an authorized editor of Scholarship Commons. For more information, please contact Susie Lee.

CONSTITUTIONAL LAW WRIT LARGE

LOUIS FISHER*

Classes in Constitutional Law focus largely, if not exclusively, on court cases. The attention falls more on federal courts than state courts, more on the U.S. Supreme Court than lower federal courts. As a result of this ever-narrowing process, constitutional law comes to mean what a majority of five Justices, or perhaps a plurality of four, happen to decide on a given day. Until that majority or plurality changes its mind, students are told that the meaning of the Constitution is fixed and final. Teaching in this manner relegates all other political institutions, all fifty states, all individuals and all public groups to the sidelines. That is not the way the legal system works.

I. A LIMITED CLASSROOM EXPERIENCE

Through this case-bound process, students learn constitutional law not according to what the Constitution provides, nor what the framers intended, nor what actually happens in American society, but by what the Supreme Court says. Cases are analyzed, dissected, and plumbed for meaning. It is as though in this complex, dynamic democratic republic we all wait for the "great issues" to percolate up to the Court, which proceeds to instruct us, private citizen or public official, what the Constitution really means. Some of us read the decisions as best we can. Others hear about them through the media. All of us then go on with our lives.

The Constitution has never functioned in this manner and never should, and yet it has been standard practice for many years for law schools to teach Constitutional Law this way. Political science professors used to offer a richer fare, making students aware of broad historical and political forces, but in recent decades they have fallen into the same bad habit as law schools. Part of the reason given is that many undergraduate students in Con Law classes will attend law school. Thus, if law schools adopt a stilted, unrealistic teaching method, the goal at the undergraduate level is to fully prepare students for the same cramped, artificial, case-only approach. This is not education, and it is

* Senior Specialist in Separation of Powers, Congressional Research Service, the Library of Congress. B.S., 1956, College of William and Mary; Ph.D., 1967, New School for Social Research. The views expressed in this article are those of the author and should not be interpreted as positions of the Congressional Research Service or the Library of Congress.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

certainly not education that allows students to function effectively as citizens or lawyers.

There are obvious advantages to the narrow methodology used in undergraduate classes and law schools. It is far easier to teach Constitutional Law by paying attention to a single branch and even easier to focus solely on the U.S. Supreme Court and ignore important developments that occur in lower federal courts and state courts. Through this single-shot approach, the professor and the students need not be aware of contributions by Congress, the President, executive agencies, the states, or the general public. I know of many law professors, quite distinguished, who are dumbfounded when I tell them that a constitutional decision issued by the U.S. Supreme Court has been (1) trumped by a congressional statute, (2) eviscerated by agreements reached between executive agencies and congressional committees, or (3) entirely tossed to the side by a state supreme court that decides to follow the state constitution rather than the U.S. Supreme Court. How can that be, these professors object, until I show them that it is.

Constitutional Law should not be taught as equivalent to judicial supremacy. The framers, in establishing a republic, did not intend for the U.S. Supreme Court to be the final and only word on constitutional matters. There are no grounds for thinking that Chief Justice John Marshall, the great author of *Marbury* v. *Madison*,[1] ever believed in concentrating such power and authority in the Court.[2] Second, our system of constitutional law has never functioned that way. Elementary examples from U.S. history are available to show how and why. Third, we should not want final authority vested in the Court. Placing such expectations and demands on Justices is unrealistic and unwise. The American political system functions best when a number of constitutional issues are addressed exclusively outside the courts, and even if courts decide the matter it is often the case that the dispute reenters the political stream and is fundamentally reshaped at that level. Judges, aware of this circular and convoluted process, are not offended. They understand that their role is to announce general principles, leaving ample room for political institutions and the public to find practical ways of both applying and shaping the law.

Students who leave school need to understand their civic duties in order to participate actively in a constitutional order. Respect for the law does not mean blind obeisance to judicial rulings. Citizens who objected to slavery or child labor could not look for guidance to such cases as *Dred Scott* v. *Sandford*[3] or *Hammer* v. *Dagenhart*.[4] They had every right to work in concert

1. 5 U.S. (1 Cranch) 137 (1803).
2. *See* LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 33–43 (6th ed. 2005).
3. 60 U.S. 393 (1856).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

with others to make sure that those decisions did not remain the law of the land. There was no reason to expect *Roe* v. *Wade*[5] to be the final word on abortion. It was only a matter of time before the Court, subjected to powerful pressures from the public, would give ground and jettison the trimester framework.[6] Justice Sandra Day O'Connor has written about the "dynamic dialogue between the Court and the American public," remarking that no one considered *Roe* "to have settled the issue for all time."[7] A public that "docilely and unthinkingly approved every Supreme Court decision as infallible and immutable would, I believe, have severely disappointed our founders."[8] The Court's decision in 1972 struck down the death penalty, but only momentarily.[9] The majority of states promptly restored the death penalty with new procedures, and the Court accommodated those public judgments.[10]

When citizens serve as jurors, they must form independent judgments not merely in deciding whether the prosecutors carried their burden but also in applying abstract legal doctrines to a particular case. What is entrapment? Did the government use tactics to manufacture a crime, encouraging someone to violate a law? Judges can explain to the jury the technical grounds for entrapment, but it is the juror who decides whether the government overstepped. A juror, by voting to acquit, can send a powerful message that the government abused its powers.[11] The courts can issue all the guidelines they want about the meaning of pornography and obscenity, but it is the juror who eventually decides whether a book, movie, art exhibit, or musical performance is harmful to their home community. Through this process, citizens sitting as jurors have the final word.

Similarly, attorneys who leave law school must be prepared to navigate inside the courts and outside, operating both at the level of the national government and the states. In an effort to remedy a constitutional error, they might first have to look for relief within an executive agency. If they fail there and later in the courts, resourceful lawyers can turn to Congress or the state legislature to prevail. Those were the steps taken to allow Captain Simcha Goldman of the Air Force to wear his yarmulke indoors on duty. After having his argument for religious freedom rejected by the Air Force and the Supreme

4. 247 U.S. 251 (1918).
5. 410 U.S. 113 (1973).
6. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).
7. SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW 45 (2003).
8. *Id.*
9. Furman v. Georgia, 408 U.S. 238 (1972).
10. FISHER, *supra* note 2, at 680–81.
11. NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 37–40 (2004).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

Court, his attorney worked with Congress to fashion remedial legislation.[12] I have talked with many professors who teach Constitutional Law in political science departments and law schools who are familiar with the Goldman case but know nothing about the congressional legislation.

Did Congress overstep by finding in favor of Goldman after the Court found against him? Not at all. The Court merely decided that Goldman's religious liberty did not outweigh the Air Force's need for military discipline, unity, and order. The decision did not end the matter. Under the Constitution, it is Congress, not the Court, that is empowered "[t]o make Rules for the Government and Regulation of the land and naval Forces."[13] The Justices decided the conflict between Air Force needs and religious freedom one way, and Congress had every right to decide it the opposite way. If someone wants to understand the scope of religious liberty in the military, they need to look not at the Court's decision but at the congressional statute.

II. AH, YES, THE TEXT

How much time is spent in Constitutional Law classes actually *reading* the Constitution? From my experience, it cannot be much. In the late 1980s, I gave a talk at a law school, explaining how the Constitution assigns important powers of war and foreign affairs to Congress, not to the President. I had barely begun when a second-year law student cut me off, his face flushed with anger, asking with annoyance: "Doesn't the Constitution give the President the power to declare war, subject to the advice and consent of the Senate?" I was far more unnerved by this strikingly false understanding than by the interruption. Afterwards, I remained troubled by the thought that this student did not manufacture or invent the misconception. Created elsewhere, it was in the air ready to be picked up and repeated by anyone.

To prevent this kind of error, or at least nip it in the bud, I know professors who tell students to read Articles I and II in preparation for the next class, which will discuss the allocation of power over foreign affairs. Students expect to find in Article II language that gives the power over foreign affairs and national security to the President. To their great surprise, it is not there. The key powers are vested in Congress, or shared between the Senate and the President.

Misconceptions about the war power are not limited to students. Early in 1999, on my way home from work, I listened to a speech that former President George Bush was giving to Senators. In discussing the difficult negotiations in 1990 leading to a congressional statute authorizing military action against Iraq,

12. *See* Goldman v. Weinberger, 475 U.S. 503 (1986); Pub. L. No. 100–180, § 508, 101 Stat. 1086–87 (1987); FISHER, *supra* note 2, at 571–72, 576–80.

13. U.S. CONST. art. I, § 8, cl. 14.

I heard him say there was a difference of opinion as to who had the power to declare war. Had I heard him correctly? How could there be a difference of opinion over something spelled out with precision and clarity in Article I? Did Bush stray from the text of the speech and make a careless error? The next day, I read the speech and his language was unambiguous: "[T]here was a fundamental difference of opinion between the Senate and the White House over the Senate's role in declaring war—one that dated back to the War Powers Act [of 1973]."[14]

How extraordinary. Bush earned a degree in economics from Yale University, served in the House of Representatives from 1967 to 1971, became ambassador to the United Nations, chairman of the Republican National Committee, ambassador to China, Director of Central Intelligence, Vice President for eight years, and President for four. Throughout all that time in public service, and after taking the oath to support and defend the Constitution on so many occasions, he did not know which branch had the power to declare war.

The "difference of opinion" between the Senate and the White House over declaring war did not "date back" to the War Powers Act of 1973. It dates back to the Constitutional Convention of 1787 and the ratification debates that placed the power to declare war in Congress. There was never a dispute about "the Senate" declaring war. That power rests with both Houses of Congress. Ignorance by a law school student is disquieting, but much more disturbing is to learn that a President, after long public service, is unaware of a fundamental constitutional principle that he was called upon to exercise.

III. THE ILLUSION OF JUDICIAL SUPREMACY

For the past four decades I have made it my practice, whenever possible, to enter into a dialogue with political science and law professors who believe that the U.S. Supreme Court is, and should be, the final voice on constitutional matters. As my examples mount up, particularly on the many issues that are handled almost exclusively by the executive and legislative branches, the professors will reluctantly concede that disputes over separation of powers and federalism are indeed profoundly influenced by the elected branches, and in some cases decisively so. But here they firmly draw a line. Congress and the President may have the dominant say on *structural* issues between the two branches, or between the national government and the states, but surely only the courts have the ultimate authority to decide matters of *individual rights*. It stands to reason, they say, that the majoritarian process followed by the political branches can never be trusted to protect minority rights.

14. 145 CONG. REC. S957-01 (1999).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

I then explain why even this fallback position cannot survive scrutiny. In numerous areas, the political branches do a much better job of protecting individual rights and minority rights than the courts. Eyebrows dance in disbelief at this wild claim, but if my friend, or someone who had been my friend, will hear me out, I will identify many situations over the past two centuries where the regular political process has done exceedingly well in protecting individual rights, often better than the courts, and federal and state judges are often quite happy to see a vexatious matter resolved by other parties. Citizens and lawyers should not look automatically and unflinchingly to the courts for final answers to constitutional controversies.

Toward the end of the Clinton administration, I was invited by a friend in the Justice Department to give a luncheon talk to attorneys in the Office of Legal Counsel (OLC). In the room sat the cream of the crop: skilled governmental lawyers with the most refined grasp of constitutional issues. About two dozen people attended, most of them career attorneys, but several of those present were political appointees who regularly circulate in and out of OLC. They understood that I would be talking about constitutional law in its broader sense, particularly the legitimate and authoritative actors that are outside the courts. After joining the Congressional Research Service in September 1970, I immediately became involved in a number of constitutional disputes and was often invited to testify before congressional committees, write committee reports, and prepare floor statements on constitutional analysis. At times, I was detailed to a committee for long stretches, such as the House Iran-Contra Committee. Although I am a political scientist and not an attorney, I had nonetheless participated actively on a host of issues over a period of decades and could speak about personal experiences with constitutional disputes.

I knew that as a congressional staffer, and particularly as a non-attorney, I was walking into a lion's den. I thus started with an example that I thought would easily find common ground, and we could disagree on other matters. Wrong. My "modest proposal" provoked unrelieved and unwavering opposition from everyone in the room except one attorney who, perhaps out of mercy or friendship, took my side. The disagreement lasted about fifteen minutes until we let the matter drop and turned to other topics. On the disagreement over the initial issue there was never any confusion or misconception over terms or concepts. The issue was clear. We differed fundamentally over judicial finality.

The example I started with concerned the independent counsel. Even though the Supreme Court in *Morrison* v. *Olson* upheld the constitutionality of the independent counsel,[15] I said that if the statute lapsed and Congress decided

15. 487 U.S. 654 (1988).

to reauthorize it, the President could veto the bill not merely on policy grounds, but on reasons of constitutionality. The veto message could draw attention to the Court's reasoning, which held that whatever intrusion the independent counsel made on presidential power, it did not "interfere impermissibly" with the President's "constitutional obligation to ensure the faithful execution of the laws."[16] The President could then argue that over the decade following the Court's decision there had been ample evidence that the intrusion was more than minimal. Besides, he could argue persuasively that it was his responsibility, not the Court's, to protect his office. It was his nondelegable duty to make sure that presidential powers were not impaired by another branch. This type of veto message would be a basic statement of the system of checks and balances, giving life to the framers' expectation that each branch had an institutional right and need to fight off encroachments.

The OLC attorneys would not hear of it. They could envision a presidential veto based on policy grounds but surely not on constitutional grounds. To their mind, the constitutionality of the independent counsel had already been decided, and no other branch could countermand a constitutional decision of the Court, except of course by constitutional amendment. Short of that, the decision must stand as superior law unless the Court decided to reverse or modify its ruling. According to this framework, Congress and the President were compelled to accept the Court's supremacy. Otherwise, settled law would yield to disorder and confusion and would undermine judicial authority.

I found this reasoning unimpressive. I said that when the independent counsel statute expired at the end of a four- or five-year life, members of Congress would hold hearings to review the operation of the office and decide whether it merited reauthorization. During this period, the lawmakers could conclude that there were too many instances of constitutional abuse by an overzealous independent counsel restrained by few checks from Congress, the Justice Department, or the judiciary. Consequently, regardless of what the Court had held in *Morrison*, Congress had every right to vote against reauthorization on the basis of the record of constitutional problems that had emerged. If Congress decided not to renew the independent counsel, the final voice belonged to lawmakers, not to the Justices in *Morrison*. If there was no reauthorization bill, there was nothing for the President to do but accept the congressional judgment. Congress would have the last word unless a future Congress decided to revisit the issue.

Taking the matter a step further, if members decided that on balance it was appropriate to reauthorize the independent statute, the President had every right to veto it as an unconstitutional intrusion on the powers of his office. Unless

16. *Id.* at 693.

Congress overrode the veto, the final voice belonged to the President, not to Congress or the Court. I asked the OLC attorneys what remedy would be available if the President vetoed the bill on constitutional grounds and Congress failed to override? Could a plaintiff bring the matter into court and ask a judge to strike down the veto as an interference with judicial authority? It seemed to me too far-fetched to take seriously.

I reminded the OLC attorneys about the parallel case of President Andrew Jackson, who vetoed the U.S. Bank on constitutional grounds after several Congresses, several Presidents, and the Supreme Court in *McCulloch* v. *Maryland* had found the Bank to be constitutional.[17] Jackson refused to bow to those precedents. Every public officer, he said in his veto message in 1832, took an oath to support the Constitution "as he understands it, and not as it is understood by others."[18] The opinion of judges "has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both."[19]

I found it curious that OLC attorneys, working within the Justice Department, would defend judicial finality rather than presidential power. Normally you would expect them to find arguments to protect and defend the President's power, and nothing could be more central than the President's duty to protect the prerogatives of his office and exercise the veto power vigorously. At times the OLC has rejected efforts to expand presidential power when it finds insufficient or unpersuasive constitutional grounds,[20] but the President's right to veto on constitutional grounds has been exercised from the beginning.[21] As I looked around the room and saw faces of OLC attorneys who were still in their twenties or early thirties, I realized that their entire professional lives had been shaped either by law school or by clerking for federal judges and Justices of the Supreme Court, where the dogma of judicial finality had been drummed into them. With such training, they automatically subordinated the President's veto power if it conflicted with a court's ruling.

IV. WHEN THE COURTS FIND CONSTITUTIONALITY

What the Court held in *Morrison* was this: *If* Congress and the President wanted to create an independent counsel, the Court found no constitutional violation. It follows that if Congress decided that the office was

17. 17 U.S. 316 (1819).

18. FISHER, *supra* note 2, at 26. For excerpts of President Jackson's veto and the Senate's debate over his veto message, see *id*. at 25–27.

19. *Id*. at 26.

20. *See* 12 Op. Off. Legal Counsel 128, 170 (1988) (rejecting the idea of an inherent item veto for the President).

21. *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 119–24 (4th ed. 1997).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

constitutionally flawed, it did not have to pass it in the first place or reauthorize it later. If the President decided the office encroached upon his executive powers, he could veto the bill on constitutional grounds. None of those actions by Congress or the President would show disrespect for the Court. *Morrison* had given a green light and nothing more. The two elected branches were at liberty to rethink and revisit the statute at any time and reach independent judgments on the constitutionality of the office. A green light did not mean go. It was merely a sign of permission. The two branches had full freedom to debate the constitutionality of the independent counsel. In 1999, Congress decided to let the office expire.

This kind of situation is seen elsewhere. After the Court finds that a statute or procedure has no constitutional problems, Congress and the President can decide whether, from their separate institutional perspectives, it is constitutionally wise to proceed. An example is the handling of recess appointments to the federal courts. The Constitution empowers the President "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[22] The power to make recess appointments is general. It applies to both judicial and nonjudicial positions. Challenges have been made in court, arguing that a judge with a recess appointment lacks the independence of an Article III judge, especially the quality of a lifetime appointment. Litigants thus have to argue before a part-time judge. Also, the process circumvents the advice and consent role of the Senate. Nonetheless, the constitutionality of federal recess judges has been upheld by the lower courts.[23]

Like *Morrison*, these cases simply stand for the proposition that if the President makes a recess appointment to a federal court, the judge has a constitutional right to sit and decide cases. If a President decides that such appointments create constitutional problems, he need not make them. If the Senate wants to retaliate, it can. It could state that any individual who receives a recess appointment to the federal courts will not be considered for a lifetime appointment. If the President chooses to submit the nomination of a recess judge for a lifetime position, the Senate could ignore it or vote it down 100 to zero without holding hearings. These independent judgments by the elected branches are entirely appropriate, and there is no check against them. Just because the courts have thus far found no constitutional problems with federal recess judges does not mean that the practice must be constitutionally acceptable to the President or to the Senate.

22. U.S. CONST. art. II, § 2, cl. 3.

23. *See* Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004); United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986); United States v. Allocco, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963).

In 1972, agents from the Treasury Department's Alcohol, Tobacco, and Firearms Bureau presented grand jury subpoenas to two banks where a suspect maintained accounts. Without advising the depositor that subpoenas had been served, the banks supplied the government with microfilms of checks, deposit slips, and other records. In *United States* v. *Miller*, the Supreme Court held that a Fourth Amendment interest could not be vindicated in court by challenging such a subpoena.[24] The Court treated the materials as business records of a bank, not private papers of a person.[25] End of story? Not quite.

Congress responded by passing the Right to Financial Privacy Act of 1978.[26] Congressman Charles Whalen explained that the primary purpose of the statute was to prevent warrantless government searches of bank and credit records that reveal the nature of one's private affairs.[27] The government should not have access "except with the knowledge of the subject individual or else with the supervision of the courts."[28] The fact that the Court was satisfied did not mean that Congress had to be satisfied. Congressman John Rousselot remarked about the responsibility of Congress to redress the shortcomings of the Court's decision: "Automatic standing to challenge the release of information in a court of law is provided for in section 1110, which, as a practical matter, reverses the holding in the Miller case."[29] In essence, certain safeguards to Fourth Amendment rights that were unavailable because of a Supreme Court decision were now secured by congressional action.

V. FINDING UNCONSTITUTIONALITY

These examples illustrate that when the judiciary decides that an office such as the independent counsel is constitutional, the elected branches have ample room to reach separate and independent judgments. What happens when a court finds that something is *un*constitutional? Are the elected branches then prohibited from engaging in that practice? That is not our history or practice. In *Dred Scott*, the Court held that Congress could not prohibit slavery in the territories and that blacks were not citizens.[30] The decision was eventually overturned by the Thirteenth, Fourteenth, and Fifteenth Amendments, but before that time, Congress and the executive branch had taken steps to eviscerate the Court's ruling. President Abraham Lincoln set the stage for those challenges when he insisted, in his 1861

24. 425 U.S. 435 (1976).
25. *Id*. at 438.
26. Pub. L. No. 95–630, 92 Stat. 3697 (1978) (codified as amended at 12 U.S.C. §§ 3401–3422).
27. 124 CONG. REC. 33,310 (1978).
28. *Id*.
29. *Id.* at 33,836.
30. Dred Scott v. Sandford, 60 U.S. 393 (1856).

inaugural address, that the Court was a coequal, not superior, branch of government. He rejected the idea that constitutional questions could be settled solely by the Court. If government policy on "vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."[31]

In 1862, Congress passed legislation that prohibited slavery in the territories.[32] If the Court was considered the superior branch of government when deciding constitutional matters, one would think that someone during the legislative debate would have objected that Congress could not, by statute, reverse the Court's ruling. No one even mentioned the decision.[33] Members of Congress never doubted their constitutional authority to prohibit slavery in the territories and reach independent interpretations, with or without the Court.

In 1862, another part of *Dred Scott* went by the boards. Attorney General Edward Bates issued a legal opinion, holding that neither color nor race could deny American blacks their right of citizenship. He noted that "freemen of all colors" had voted in some of the states, and that the idea of denying citizenship on the ground of color was met by other nations "with incredulity, if not disgust."[34] The Constitution is "silent about *race* as it is about *color*."[35] Turning to *Dred Scott*, Bates said that the case, "as it stands of record, does not determine, nor purport to determine," the question of blacks to be citizens.[36] He regarded what Chief Justice Taney said about citizenship as pure dicta and "of no authority as a judicial decision."[37] Bates concluded: "the *free man of color* . . . if born in the United States, is a citizen of the United States."[38]

The child-labor cases also demonstrate that the Court's "finality" depends on the mood of the country and the determination of private citizens and members of Congress to successively, and successfully, challenge the judiciary. A 1916 statute, relying on the commerce power to regulate child labor, was struck down by the Court within two years.[39] In 1919, Congress tried again, this time by invoking the taxing power. When the constitutionality

31. 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 9 (James D. Richardson ed., 1897).

32. 12 Stat. 432 (1862).

33. CONG. GLOBE, 37th Cong., 2d Sess. 2030, 2041–54, 2061–64, 2066–69, 2618, 2624, 2769 (1862).

34. 10 Op. Att'y Gen. 382, 387, 397 (1862).

35. *Id*. at 398.

36. *Id*. at 409.

37. *Id*. at 412.

38. *Id*. at 413.

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

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

of this statute was challenged, Solicitor General James Beck advised the Court to invalidate congressional statutes only when absolutely necessary: "The impression is general—and I believe that it is a mischievous one—that the judiciary has an unlimited power to nullify a law if its incidental effect is in excess of the governmental sphere of the enacting body."[40] He said it was an "erroneous idea" that the Court is the "sole guardian and protector of our constitutional form of government," for that belief would lead to an impairment with Congress and the people of "what may be called the constitutional conscience."[41]

The Court paid no heed, striking down the second statute as unconstitutional.[42] Congress responded by drafting a constitutional amendment to give it the power to regulate child labor, but by 1937 only twenty-eight of the necessary thirty-six states had ratified the amendment. After the ill-fated court-packing plan of 1937, Congress included a child-labor provision in the Fair Labor Standards Act of 1938, returning to the commerce power as its constitutional source of authority. With the replacement of several conservative Justices by more liberal Justices, the dispute returned to the Court in 1941, where the child-labor provision was upheld unanimously.[43]

This struggle between Congress and the Court was exceptionally long, stretching from 1916 to 1941, but no one should have doubted that if Congress persisted, it would prevail. The Court later admitted in 1946 that "the history of judicial limitation of congressional power over commerce, when exercised affirmatively, has been more largely one of retreat than of ultimate victory."[44] Justice Owen Roberts, after retiring from the Court, reconsidered his position on the Commerce Clause and came to understand why the legislative branch eventually triumphed: "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy."[45]

A more nuanced confrontation between the Court and the elected branches takes the form of the legislative veto. Ever since 1932, Congress had used a one-House, two-House, or even committee/subcommittee veto to control executive actions. Presidents and agencies would submit to Congress certain proposals for congressional review during a specific period of days, allowing either the House, the Senate, committees, or subcommittees to disapprove. Obviously this form of congressional control fell short of the regular legislative

40. 21 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 59 (Philip B. Kurland & Gerhard Casper eds., 1975).

41. *Id.*

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

43. United States v. Darby, 312 U.S. 100 (1941).

44. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 415 (1946).

45. OWEN J. ROBERTS, THE COURT AND THE CONSTITUTION 61 (1951).

process: action by both Houses and presentation of a bill to the President. Soon the courts began reviewing the constitutionality of this mechanism.

When the dispute reached the Supreme Court and was argued there, I wrote a lengthy article for a newspaper, predicting that however the Court ruled, the legislative veto would survive because it satisfied basic needs of the legislative and executive branches.[46] The agencies wanted broad delegations of authority; Congress insisted on some means of control without having to pass a new law. I concluded that "with or without the legislative veto, Congress will remain knee-deep in administrative decisions, and it is inconceivable that any court or any president can prevent this. Call it supervision, intervention, interference or plain meddling, Congress will find a way."[47]

The next year, in *INS* v. *Chadha*, the Court struck down the legislative veto as an unconstitutional technique used by Congress to oversee the executive branch.[48] It held that future legislative efforts to control the President or executive agencies would have to satisfy two tests: bicameralism and presentment.[49] Congressional action would have to pass both Houses of Congress and be submitted to the President for his signature or veto.[50] Yet, as I predicted, Congress continued to use committee and subcommittee vetoes to approve or disapprove agency actions.[51] These statutory provisions typically require agencies to obtain the prior approval of the Appropriations Committees (actually, the subcommittees).[52] In the more than two decades after *Chadha*, hundreds of these statutory provisions have been enacted into law.[53] Upon learning that the legislative veto remains in force after it was declared unconstitutional, professors of Constitutional Law express genuine amazement. The Court, they find, did not have the last word.

By misreading history, congressional procedures, and executive-legislative relations, the Court tried to command the elected branches to follow a lawmaking process that was impractical and unworkable for both sides. Neither executive agencies nor Congress wanted the static and formalistic model fashioned by the Court. Finding the *Chadha* doctrine at odds with effective government, the elected branches simply continued understandings

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

47. *Id*. at D5.

48. 462 U.S. 919 (1983).

49. *Id*. at 952–58.

50. Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 274 (1993).

51. *Id*. at 273.

52. *Id*. at 289–90.

53. *Id*. at 273.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

and procedures that had been in place before 1983. By and large, these executive-legislative accommodations—and not the Court's ruling—describe how things work in Washington, D.C.

VI. PROTECTING INDIVIDUAL RIGHTS

Students are taught that courts are uniquely reliable guardians of individual rights and that without close judicial supervision the freedoms enshrined in the Bill of Rights would have little chance of survival. This attitude is fairly new. Federal courts for the first century and a half handled few cases involving free speech, free press, religious liberty, or even criminal procedures, and when they did intervene to adjudicate questions of individual rights they usually defended—up to the 1930s—government or corporations.

Henry W. Edgerton, who later became a federal district judge, wrote an article in 1937 that examined the thesis that judicial supremacy is necessary to restrain Congress from infringing upon individual liberty.[54] He studied the Court's record from 1789 to the mid-1930s and found little evidence that the Court was the great protector of individual and minority rights.[55] With few exceptions, the Court consistently favored governmental power over individual rights, lent support to harmful business activities, deprived blacks of protection, upheld business interests over labor interests, and defended private wealth against taxation.[56] Of course, federal courts have been much more active since then in protecting personal freedoms, but their record in safeguarding minority and individual rights has never been that attractive or reliable.

The work I have done in religious liberty illustrates how frequently the regular political process is a more dependable protector of individual rights than the courts. Many principles of personal freedom come not from the judicial or legislative branches but from the community at large. A good example is conscientious objection. The courts and Congress have been active in this area, but fundamentally the right comes from the public at large, accepting from an early date that some individuals have a religious or moral commitment not to kill and that their right to be exempt from military service, or at least combat duty, is entitled to protection.[57]

An incident during the Civil War shows how the regular political process, and not the courts, can protect minority rights. In 1861, a congressional statute

---

54. *See* Henry W. Edgerton, *The Incidence of Judicial Control Over Congress*, 22 CORNELL L. Q. 299 (1937).

55. *See id.*

56. *See id.*

57. LOUIS FISHER, RELIGIOUS LIBERTY IN AMERICA: POLITICAL SAFEGUARDS 82–104 (2002).

required military chaplains to be regular ordained ministers of a "Christian denomination."[58] A largely Jewish regiment in Pennsylvania decided that the statute needed to be changed and broadened. They turned not to the courts but to President Lincoln and Congress. Through quiet lobbying and persuasion, the statute was amended to delete "Christian denomination" and insert "some religious denomination."[59] No one at that time thought it necessary or appropriate to "take the matter to court."

The rights of women to pursue their professional careers were protected initially not in the courts but in legislatures, and all-male bodies at that. In 1872, the Supreme Court denied that the rejection of Myra Bradwell to practice law in Illinois (solely because she was a woman) represented a violation of the privileges and immunities of the Fourteenth Amendment.[60] At that time, a rule adopted by the Court also prohibited women from practicing there. In 1879, Congress passed legislation to authorize a woman who had been a member of the bar for three years, and who qualified on moral character, to practice before the U.S. Supreme Court.[61] A few members of Congress thought that it was inappropriate to interfere with the Court's internal rules, but the great majority insisted that what was at stake was national policy and that Congress was the body to decide it. In the words of Senator Aaron Sargent:

> No man has a right to put a limit to the exertions or the sphere of woman. That is a right which only can be possessed by that sex itself. . . . The enjoyment of liberty, the pursuit of happiness in her own way, is as much a birthright of woman as of man. In this land man has ceased to dominate over his fellow—let him cease to dominate over his sister; for he has no higher right to do that latter than the former.[62]

The Supreme Court did not wake up to the rights of women until almost a century later. In 1971, for the first time, the Court acted to strike down sex discrimination.[63] The judicial record up to that time was so deplorable that one study, published in a law review, remarked: "Our conclusion, independently reached, but completely shared, is that by and large the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable."[64] Much of the drive for an Equal Rights Amendment was to shake the courts into consciousness. During a House debate in 1971, Rep. Martha Griffiths explained that what the amendment

58. Ch. 9, § 9, 12 Stat. 270 (1861); ch. 42, § 7, 12 Stat. 288 (1861).

59. Ch. 200, § 8, 12 Stat. 595 (1862); *see* FISHER, *supra* note 57, at 51.

60. Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872).

61. 20 Stat. 292 (1879).

62. 8 CONG. REC. 1084 (1879); FISHER, *supra* note 2, at 829 (6th ed. 2005).

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

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

sought to do, "and all it seeks to do, is to say to the Supreme Court of the United States, 'Wake up! This is the 20th century. Before it is over, judge women as individual human beings.'"[65]

Many contemporary examples underscore the effectiveness of the political process. Although the Supreme Court received much credit for its desegregation ruling in *Brown* v. *Board of Education*, the decision produced little change, in part because of the weak implementation decision issued the following year.[66] What moved the country forward was not additional judicial rulings, but action by the elected branches: the Civil Rights Act of 1964,[67] the Voting Rights Act of 1965,[68] and the Fair Housing Act of 1968.[69] Through this statutory action, the legislative and executive branches, operating through presidential statements, committee hearings, and congressional debate, were able to educate the country and create a bipartisan consensus that was far stronger and more effective than anything that could come from a court.

What is true with regard to individual rights and civil rights is true also with respect to criminal procedures. In 1978, the Supreme Court reviewed the constitutionality of a police search of a student newspaper that had taken photographs of a clash between demonstrators and police.[70] The government issued a search warrant to obtain the photos in an effort to discover the identities of those who fought with police officers.[71] The Court held that search warrants are not prevented simply because the owner of a place is not reasonably suspected of criminal involvement.[72] The newspaper was not suspected; it was a third party. Nevertheless, the Court decided that law-enforcement officials could seek a warrant and enter the premises of a newspaper to conduct a search for evidence against another party.[73]

The Court's decision triggered nationwide protests and congressional hearings. Newspapers denounced the ruling as "'a first step toward a police state,' an assault that 'stands on its head the history of both the [F]irst and the [F]ourth [A]mendments,'" and a threat to the "'privacy rights of the law-abiding.'"[74] The Court had invited Congress to legislate if it considered the Court's decision too restrictive on free press rights, but the Court limited

65. FISHER, *supra* note 2, at 1025.

66. Brown v. Bd. of Educ., 347 U.S. 483 (1954); Brown v. Bd. of Educ, 349 U.S. 294 (1955).

67. 42 U.S.C. §§ 2000a–2000h-6 (2000).

68. 42 U.S.C. §§ 1973–1973p (2000).

69. 42 U.S.C. §§ 3601–3619 (2000); *see* FISHER, *supra* note 2, at 773, 970, 789.

70. Zurcher v. Stanford Daily, 436 U.S. 547, 550–52 (1978).

71. *Id*. at 551.

72. *Id*. at 560.

73. *Id*.

74. FISHER, *supra* note 2, at 701.

Congress to providing "nonconstitutional protections against possible abuses of the search warrant procedure."[75] The word "nonconstitutional" was the Court's way of pretending that it possessed a monopoly over constitutional questions, but Congress was being asked to do precisely what the Court had done: balance the interests of law enforcement against a free press. Congress passed legislation to protect newsrooms from searches by requiring, with certain exceptions, a subpoena instead of the more intrusive warrant.[76]

Another remarkable example of the capacity of the legislative process to protect minority rights occurred in 1980.[77] Adult members of the Klamath tribe in Oregon twice voted to surrender the special trust status of Indian lands in return for cash.[78] Edison Chiloquin, a member of the tribe, voted both times against the transfer.[79] As an act of protest, he built a tepee in the forest, became a squatter, and kept a sacred fire lit.[80] He would have had no chance in court, but in 1980 Congress passed a private bill to set land aside for Chiloquin with the condition that its use "shall not be inconsistent with its cultural, historical, and archeological character."[81] The "majoritarian" Congress not only protected the interests of a minority, but a minority within a minority.

VII. THERE ARE FIFTY-ONE CONSTITUTIONS

How often do professors in political science departments and law schools remind their students that the United States has fifty–one constitutions, not one? I suspect rarely. By relying on their own constitutions and statutes, states can reach constitutional decisions that are not only markedly different from Supreme Court rulings but also are more protective of individual rights and more restrictive of what the government can do. The U.S. Constitution provides only a minimum, or floor, for the protection of individual rights and liberties. As the Court noted in 1980, each state has the "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[82]

Students are apt to believe that major innovations to safeguard defendants come from rulings by the U.S. Supreme Court, such as the famous *Gideon* decision in 1963 that granted indigent defendants the right to counsel provided

75. *Zurcher*, 436 U.S. at 567.

76. Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (1980) (codified at 42 U.S.C. § 2000aa).

77. *See* Priv. L. No. 96–68, 94 Stat. 3613 (1980); FISHER, *supra* note 57, at 171–72; Louis Fisher, *Indian Religious Freedom: To Litigate or Legislate?*, 26 AM. INDIAN L. REV. 1 (2002).

78. FISHER, *supra* note 57, at 171–72.

79. *Id*. at 172.

80. *Id*.

81. Priv. L. No. 96–68, 94 Stat. 3613 (1980).

82. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980).

by the government.[83] However, states had figured that out more than a century before. In 1854, the Supreme Court of Indiana stated that a "civilized community" could not prosecute a poor person and withhold counsel.[84] Five years later, the Wisconsin Supreme Court called it a "mockery" to promise a pauper a fair trial but tell him he must employ his own counsel.[85] Congress passed legislation in 1892 to provide counsel to represent poor persons.[86] "Landmark" rulings by the Supreme Court are usually staged efforts that give blessing to spadework and heavy lifting already done by the states and Congress.

In the *Everson* and *Allen* rulings, the Supreme Court held that states may use public funds to assist religious and sectarian schools for such expenses as transportation and textbooks.[87] Like the *Morrison* ruling on independent counsels, judicial support for a practice does not mandate it. States are at liberty to interpret their own constitutions and conclude that the use of public funds to assist religious schools in any manner is prohibited.[88] The Court justified this financial assistance to sectarian schools on the basis of the "child-benefit" theory: the funds benefited the children, not the school. Many state courts dismissed that theory as wholly untenable and unpersuasive.[89]

When students reach the end of a Supreme Court decision they are likely to read magisterial language, stating that the lower court decision "is reversed, and the case is remanded for further proceedings consistent with this opinion." Is that evidence that the Court, at least in this decision, has the last word? No, it is not. It means only that the case is going back down, and unless you follow the trail to the bottom, you will not know how things turned out. It could well be that the lower court triumphs over the Supreme Court. A constitutional absurdity? Not at all.

Consider a case out of the state of Washington. In 1980, the Supreme Court of Washington held that a university police officer had exceeded his authority by seizing incriminating evidence from a student's room.[90] It thus barred the state from introducing the evidence at trial. The U.S. Supreme Court reversed, holding that its "plain view" doctrine permits a law enforcement officer to seize incriminating evidence when the officer is in a

83. Gideon v. Wainright, 372 U.S. 335 (1963).

84. Webb v. Baird, 6 Ind. 13 (1854).

85. Carpenter v. Dane, 9 Wis. 249, 251 (1859).

86. 27 Stat. 252 (1892).

87. Everson v. Bd. of Educ., 330 U.S. 1 (1947); Bd. of Educ. v. Allen, 392 U.S. 236 (1968).

88. *See* FISHER, *supra* note 2, at 602.

89. *See* Cal. Teachers Ass'n v. Riles, 632 P.2d 953, 962 (Cal. 1981); Matthews v. Quinton, 362 P.2d 932, 936 (Alaska 1961).

90. State v. Chrisman, 619 P.2d 971 (Wash. 1980).

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

place where the officer has a right to be.[91] Now comes the magic language. The Court remanded the case to Washington "for further proceedings not inconsistent with this opinion."[92] I know a Justice who was on the Supreme Court of Washington at that time, and I asked whether he and his colleagues knew what to do when the case came back. He said, regarding the U.S. Supreme Court: "We are going to stick it in its ear." Determined to exercise the independent, sovereign powers available to the state, they rejected the Court's "plain view" doctrine and excluded the evidence.[93] Who had the final word? The state.

VIII. CONCLUSION

The type of dialogue discussed thus far concerns the cases that courts accept and agree to adjudicate. A significant number of constitutional issues are resolved entirely through the political process because no answer is forthcoming from the courts. For example, the Constitution provides that a "regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[94] Despite this constitutional admonition to inform the public how government funds are spent, the Central Intelligence Agency and the rest of the Intelligence Community are funded in secret. Efforts to obtain a decision on the merits from the Supreme Court have been turned aside on the ground that the plaintiff lacked standing.[95]

The meaning of the Statement and Account Clause is therefore left entirely to the judgment of Congress and the President. Through the use of a variety of threshold requirements—standing, mootness, ripeness, political questions, and other tests—plaintiffs who seek answers on constitutional questions and individual rights are frequently turned away by the courts.[96] The matter then returns to the political arena to be disposed of there. Many separation of power disputes are decided, constitutionally, totally outside the courts.[97]

Justice Robert H. Jackson once remarked: "We are not final because we are infallible, but we are infallible only because we are final."[98] Typical of his writing, the phrase is masterful, elegant, and almost compelling. But who familiar with American history could say that the Court is either infallible or final? The cleverness of Jackson's remark does not save it. The lack of

91. Wash v. Chrisman, 455 U.S. 1, 9 (1982).

92. *Id*. at 10.

93. FISHER, *supra* note 2, at 21.

94. U.S. CONST. art. I, § 9, cl. 6.

95. United States v. Richardson, 418 U.S. 166, 175 (1974).

96. FISHER, *supra* note 2, at 75–114.

97. Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 PEPP. L. REV. 57, 57 (1990).

98. Brown v. Allen, 344 U.S. 443, 540 (1953).

finality in Court rulings is evident to anyone who studies the independent roles exerted by states, Congress, the President, and the political process. If a Court ruling does not sit well with the general public, it will not stand for long.

On occasion, there is a need for a binding decision by the Court to dispose of such matters as the Little Rock desegregation crisis of 1958[99] or the standoff between the judiciary and President Richard Nixon over the Watergate tapes.[100] The country looked appreciatively to the Court's capacity to speak the final word. This type of case is the exception, however. For the most part, when courts decide a case it is Katy bar the door.

There is no reason for elected officials or the public to defer automatically to the judiciary because of its supposed technical skills and political independence. Much of constitutional law depends on fact-finding and the balancing of competing values, areas in which the legislative branch at both the national and state level can claim substantial expertise. What is "final" at one stage of national debate is always open to revision, fresh interpretation, and reversals or modifications of court doctrines. Elected officials have the authority and competence to participate constructively in constitutional interpretation. Through this political process, the public has an opportunity to add legitimacy and meaning to what might otherwise be an alien and short-lived document. In the search for a harmony between constitutional law and self-government, all citizens have a right and a need to participate. This open process is in the interest of a democratic republic and is very much in the interest of preserving an independent and resilient judiciary.

99. Cooper v. Aaron, 358 U.S. 1 (1958).
100. United States v. Nixon, 418 U.S. 683 (1974).