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Special Orders

***Interpreting the Constitution:
More than What the Supreme Court Says***

Louis Fisher, Library of Congress

In a democratic republic, questions of constitutional law require a political dialogue that involves all three branches of the national government, all fifty states, and the general public. Yet those who teach constitutional law (political scientists, law professors, historians) tend to focus on Supreme Court opinions and what the academic community says about them. No doubt that simplifies a class presentation. Professors and their students are relieved of the need to discuss how constitutional values and doctrines actually emerge, and how often it is the case that the Court does not have the final word or even any word at all.

William Howard Taft, who served as a federal appellate judge before becoming president, understood the crucial link between judicial rulings and the public. Nothing made judges more “careful in their decisions and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subjected to the intelligent scrutiny of their fellow-men, and to their candid criticism.”¹ Some critiques came from specialists within the legal community, but Taft placed great weight on evaluations by the general public: “If the law is but the essence of common sense, the protest of many average men may evidence a defect in a judicial conclusion though based on the nicest legal reasoning and profoundest learning.”²

It is a misconception to think that the protection of individual rights depends exclusively or even primarily on the courts. The struggle for rights generally comes from individuals who decide to oppose government abuse or challenge conventional legal doctrines, often at great cost to themselves.³ Opposition to slavery came from the public, not from the judicial, executive, or legislative branches. Individual Americans, untutored in the fine points of law, viewed slavery as repugnant to fundamental constitutional principles, including those embedded in the Declaration of Independence. Citizens felt no obligation to defer to courts or legislatures. Americans in the decades before the Civil War “were not inclined to leave to private lawyers any more than to public men the conception, execution, and interpretation of public law. The conviction was general that no aristocracy existed with respect to the Constitution. Like politics, with which it was inextricably joined, the Constitution was everyone’s business.”⁴

Alexander Bickel broke ranks with colleagues in law schools who looked to judicial decisions alone for the meaning of the Constitution. Bickel insisted that courts are engaged in a “continuing colloquy” with political institutions and society at large, a process in which constitutional principle is “evolved

conversationally not perfected unilaterally.”⁵ Justice Brandeis described a series of rules under which the Supreme Court avoids “passing upon a large part of all the constitutional questions pressed upon it for decision.”⁶ This principle of avoidance allows the courts to transfer many constitutional issues to the political sector to be resolved either at the state level or by the executive and legislative branches.

In the 1930s and 1940s, federal courts publicly signaled their willingness to reconsider previous decisions. In referring to its judgments on the taxing power, the Supreme Court in 1943 invited Congress to pass legislation to challenge judicial rulings: “There is no reason to doubt that this Court may fall into error as may other branches of the Government. Nothing in the history or attitude of this Court should give rise to legislative embarrassment if in the performance of its duty a legislative body feels impelled to enact laws which may require the Court to reexamine its previous judgment or doctrine.”⁷ The Court pointed out that it was less able than other branches “to extricate itself from error. It can reconsider a matter only when it is again properly brought before it as a case or controversy.”⁸ Without those opportunities, the judiciary cannot rethink what it had decided.

In 1950, Justice Robert Jackson explained why it is important to part company from rulings that, upon reflection, have lost their persuasive quality. Looking back on an opinion he wrote in 1940 when he was attorney general, he described it “as foggy as the statute the Attorney General was asked to interpret.” He found no obligation to accept its legal reasoning, even if it was his own. Precedents deserve respect when they merit it. He cited one judge who announced: “The matter does not appear to me now as it appears to have appeared to me then.” Justice Joseph Story once urged his colleagues not to follow one of his earlier opinions: “My own error . . . can furnish no ground for its being adopted by this Court.” When a barrister relied on one of Lord Westbury’s rulings, he responded: “I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.”⁹

That level of judicial modesty is rarely heard today. Federal courts, members of Congress, and legal scholars have fallen into the habit of accepting Supreme Court as the “last word” on the meaning of the Constitution. Former federal judge (and Supreme Court nominee) Robert H. Bork wrote in 1990 that the Constitution “is the trump card in American politics, and judges decide what the Constitution means. When the Supreme Court invokes the Constitution, whether legitimately or not, as to that issue the democratic process is at an end.”¹⁰ Even a cursory understanding of American history refutes that position.

Writing in the *Harvard Law Review* in 1997, Larry Alexander and Frederick Schauer championed judicial supremacy as a necessary method of settling legal disputes, assuring doctrinal coherence, and promoting judicial stability.¹¹ There is precious little in America’s history to suggest that placing complete interpretative authority in the Court would settle political controversies, yield doctrinal coherence, or assure judicial stability. One sees a much more circumscribed role for the judiciary in deciding such issues as public accommodations, child labor, compulsory flag-salutes, and abortion. An effort by Congress in 1875 to enact a public accommodations provision for newly freed slaves was struck down by the Court in the *Civil Rights Cases*, requiring a second legislative effort in 1964, this time gaining judicial support. Child labor legislation was invalidated twice by the Court until, in 1941, it found unanimously in favor of federal regulation.¹² The Court, after upholding a compulsory flag-salute in 1940, quickly reversed itself three years later under heavy public pressure.¹³ The trimester framework of *Roe v. Wade* came under such withering criticism that the Court abandoned it in 1992.

Over the past few decades, scholars have begun to rethink the doctrine of judicial supremacy, questioning not only its existence but its legitimacy as a constitutional model. In the 1980s, several political scientists rejected judicial finality and urged an understanding of the shared nature of constitutional interpretation.¹⁴ In the 1990s, Neal Devins, Mark Tushnet, and other law professors published works that explained how elected officials and federal judges interact to shape constitutional doctrines.¹⁵ Three books published from 2004 to 2008 focused on the role of Congress in constitutional interpretation.¹⁶

The overriding value promoted by the framers was not judicial supremacy but popular sovereignty and a system of checks and balances, with each branch and the public weighing in to shape a final resolution. Political stability is possible when judicial rulings meet with public acceptance. For Justice Holmes, law is what society will agree to: “The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.”¹⁷ Thomas Corcoran, who clerked for Holmes, recalled that the justice warned his colleagues to avoid decisions that require great social changes unless citizens are ready and willing to comply. There was “no use talking about a law that will not be willingly obeyed by at least 90 percent of the population.”¹⁸

When judicial decisions are not accepted by the public, as with slavery, public accommodations, child labor, and the compulsory flag-salute, debate will continue until a satisfactory result is worked out in the political arena. Without popular support, judicial decisions settle nothing. Justice Robert Jackson advised us that “the practical play of the forces of politics is such that judicial power has often delayed but never permanently defeated the persistent will of a substantial majority.”¹⁹ When a decision fails to persuade or proves to be unworkable, elected officials, the general public, interest groups, and other participants will develop new policy.

It is sometimes argued that courts operate on principle while the rest of government is satisfied with compromises. Chief Justice Earl Warren once claimed that progress in politics “could be made and most often was made by compromising and taking half a loaf where a whole loaf could not be obtained. The opposite is true so far as the judicial process was concerned.”²⁰ The opposite is not true. Courts, like the rest of government and society, settle for half-loaves and incremental, ad hoc steps. Frequently they seek some type of intermediate position, hoping to discover a temporary and perhaps acceptable remedy. Justice Potter Stewart, reflecting on judicial rulings regarding what evidence may be introduced in a courtroom, said that decisions on the exclusionary rule were “a bit jerry-built — like a roller coaster track constructed while the roller coaster sped along.” Justices did not search for the whole loaf. “Each new piece of track was attached hastily and imperfectly to the one before it, just in time to prevent the roller coaster from crashing, but without the opportunity to measure the curves and dips preceding it or to contemplate the twists and turns that inevitably lay ahead.”²¹

“No good society,” Alexander Bickel wrote, “can be unprincipled; and no viable society can be principle-ridden.”²² Justices will press their personal views and principles until they find enough common ground to build a majority. Lawyers who appear before the Court are unlikely to present a rigorously principled argument. They will offer a position that has the best chance of attracting a majority, including at least four justices and a swing vote.

Members of Congress have encouraged the belief that the Supreme Court is the ultimate word on the meaning of the Constitution. In 1984, Senator Mack Mattingly offered an amendment to give the president item-veto authority over appropriations bills. He proposed a congressional override vote of a majority of each chamber rather than the two-thirds required by the Constitution. When the constitutionality of this amendment was questioned, Senator Alan Dixon admitted that he, as a lawyer, had difficulty “about the constitutional viability of this approach,” but concluded that constitutional issues are left “for the courts, not the Senate.”²³ Yet each member of Congress takes an oath to defend the Constitution, not the courts. Lawmakers are expected to make independent judgments about the constitutionality of bills under consideration. On the Mattingly amendment, Senator Lawton Chiles raised a point of order that it was unconstitutional and the Senate, voting 56 to 34, sustained his challenge.²⁴

In 1997, Senator Arlen Specter called the Supreme Court “the ultimate arbiter of determining what the law will be.”²⁵ It is ultimate within the judiciary, but not necessarily within the federal government or in the country. Specter continued: “[W]e know since the decision of the Supreme Court of the United States in *Marbury versus Madison*, the Supreme Court of the United States has been the preeminent institution,

because the Supreme Court of the United States has the last word.”²⁶ That position overstates what Chief Justice Marshall said and intended in the Marbury case, and fails to acknowledge that many “final” decisions of the Court have either been reversed by the elected branches (both by constitutional amendments and regular legislation) or have been abandoned or substantially modified by the Court.²⁷

Members of Congress frequently argue that if an issue is “legislative” in nature they can handle it but if it is “constitutional” they cannot. Nothing in the Constitution or American history supports this cramped and artificial separation of duties. In recent decades, members of Congress sidestep constitutional issues by resorting to an “expedited procedure” that authorizes quick challenges in the courts. Typically Congress will grant someone standing to challenge the constitutionality of a dubious provision in a bill. It then places the litigation on a “fast track,” such as having the case heard before a three-judge court and from there directly to the Supreme Court. Four times from 1985 to 1996 Congress resorted to this procedure, and on all four occasions the Supreme Court declared the offending provision to be unconstitutional.²⁸ These congressional efforts are damaging to a constitutional democracy for two reasons. They invite lawmakers to violate the oath of office they took to defend and protect the Constitution. These procedural devices also send the unfortunate message that constitutional issues are reserved exclusively to the courts.

Contemporary presidents have helped spread the myth of judicial supremacy. The veto power remains available to them to block unconstitutional legislation, but they often prefer to let legal disputes slide to the courts and find resolution there.²⁹ Presidents are loath to revive the precedent of Andrew Jackson, who did not hesitate to veto legislation for a U.S. Bank even though it had been previously blessed by presidents, Congresses, and the Supreme Court. During the Reagan and Clinton administrations, a number of constitutional concerns were raised about the constitutionality of an independent counsel exercising prosecutorial powers, but presidents regularly chose to sign reauthorization bills in 1983, 1987, and 1994 rather than defend their prerogatives.³⁰

Journalists and reporters play a key role in promoting judicial supremacy. When the Supreme Court hands down a decision, newspapers typically treat it as final and definitive. Writing for the *Washington Post* in 1996, Joan Biskupic said that the importance of the Supreme Court is not in the number of its cases but rather “in the court having the last word. The justices are the final arbiter of what is in the Constitution.”³¹ It is true that the Court is the final “arbiter,” but that voice is final only *within the judiciary*. It is not the final voice on constitutional law, as is evident throughout U.S. history.

Biskupic offered a number of prominent cases decided by the Court, but they do not support the judiciary as the last word. Here is the list: *Dred Scott* (overridden initially by statute and attorney general opinion and later by constitutional amendment), cases striking down much of the New Deal (followed by the Court reversing itself), the desegregation case of 1954 (of limited impact), and *Roe v. Wade* (from which the Court conducted a partial retreat with the *Casey* decision in 1992).

In 1998, in discussing how justices deliberate on a case, Biskupic concluded that “whatever a majority decides does indeed become *the answer*.”³² What the Court decides becomes *an answer*, to be tested by other branches and the society at large. There should be no question that if the Court interprets a statute, Congress is always free to rewrite the statute and reject the Court’s understanding. “Statutory reversals” occur with great frequency.³³ Many “statutory” issues are in fact major interpretations of constitutional rights, such as the Civil Rights Act of 1964. Even when the Court clearly decides a constitutional issue, Congress can reenter the field by passing legislation that rejects the Court’s interpretation. In *Goldman v. Weinberger* (1986), the Supreme Court upheld an Air Force regulation that prohibited an Orthodox Jew from wearing his yarmulke indoors and on duty. Within a year Congress passed legislation telling the Defense Department to rewrite the regulation to permit the wearing of religious apparel so long as it does not interfere with military duties.³⁴

Some contemporary justices understand that the popular image of a Supreme Court with final say over constitutional meaning is beyond the legitimacy of the judiciary and is not in the Court's institutional interest. Writing in 2003, Justice Sandra Day O'Connor concluded that "if one looks at the history of the Court, the country, and the Constitution over a very long period, the relationship appears to be more of a dialogue than a series of commands."³⁵ She recognized that courts shape elected branches just as elected branches shape the judiciary. A "dynamic dialogue" exists between the Supreme Court and the American people. No one, she said, should have assumed that the Supreme Court's decision in *Roe v. Wade* would have settled the abortion issue "for all time." The intense public debate that followed the Court's ruling was "as it should be." A nation that "docilely and unthinkingly approved every Supreme Court decision as infallible and immutable would, I believe, have severely disappointed our founders."³⁶ The U.S. Constitution "is not — and could never be — defended only by a group of judges." She recalled the words of Judge Learned Hand: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no court, no law can even do much to help it. While it lies there it needs no constitution, no law, no court to save it."³⁷

The two newest members of the Supreme Court, Chief Justice John Roberts and Justice Samuel Alito, have talked about the Court's limited role. To Roberts, the "great gift of the founding generation was the right of self-government. We shouldn't give it up so easily to think that all the important issues are going to be decided by the Supreme Court." Alito encouraged other sectors of society to shape constitutional law. All public servants, not just state and federal judges, "play a role in shaping our law, interpreting our Constitution." It was an error for public officials, including members of Congress, "to ignore questions about the bounds of their authority in our constitutional system and simply say that the courts will sort that out for them."³⁸

The fact that the Supreme Court has upheld the constitutionality of a measure, such as the U.S. Bank in *McCulloch*, places no obligation on the other branches to embrace that interpretation. President Jackson was well within his rights to veto legislation that renewed the Bank, and Congress was always entitled to decide that the Bank was so suspect in constitutionality that it would not introduce legislation to extend it. If the Court concludes that an action has no constitutional protection in the federal courts, the fifty states may protect those actions under their own constitution. The Court generally announces broad guidelines: "undue burden" for abortion, "all deliberate speed" for desegregation, "prurient" for obscene materials, and other general principles, including "compelling governmental interest" and "narrowly tailored." It then becomes necessary for elected officials and juries to apply those principles to particular cases. The Court defines the outer edges; nonjudicial actors fill in the important middle.

No single institution, including the judiciary, has the final say on the meaning of the Constitution. A complex process of give and take and mutual respect among the branches permits the unelected Court to function safely and effectively in a democratic society. An open process enables political institutions and citizens to expose deficiencies, hold excesses in check, and build a consensus that can command public support. An open process leads to public participation and respect for the Constitution, giving it a legitimacy and vitality that could not be achieved under a system of judicial supremacy.

In 2008, Linda Greenhouse summed up 30 years of legal reporting for the *New York Times*. What she observed over that period was not a Supreme Court occupying a dominant position in deciding constitutional law, but rather a process in which justices engaged "in the ceaseless American dialogue about constitutional values." Judicial rulings were not accepted as the "final voice" about a dispute. Elected leaders at the national and state level responded by trying to do indirectly what the Court had just said could not be done directly. The result was a "constitutional Ping-Pong match." The Court, she cautioned, "can only do so much. It can lead, but the country does not necessarily follow." The Court often found itself

following nonjudicial decisions. It “ratifies or consolidates changes rather than propelling it.” As a result, justices “live in constant dialogue with other institutions, formal and informal.” Judicial rulings can collide with policies adopted by legitimate participants outside the Court. On those occasions “it is often the court that eventually retreats when it finds itself out of sync with the prevailing mood.”³⁹

Notes

1. William Howard Taft, “Criticisms of the Federal Judiciary,” *American Law Review* 29: 641, 642 (1895).
2. *Ibid.*, 643.
3. Louis Fisher, *The Constitution and 9/11: Recurring Threats to America’s Freedoms* (Lawrence: University Press of Kansas, 2008), 1-28.
4. Howard M. Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (Boston: Houghton Mifflin, 1975), 6.
5. Alexander M. Bickel, *The Least Dangerous Branch* (New York: Bobbs-Merrill, 1962), 240, 244.
6. *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).
7. *Helvering v. Griffiths*, 318 U.S. 371, 400-01 (1943).
8. *Ibid.*, 401.
9. All of these quotes appear in *McGrath v. Kristensen*, 340 U.S. 162, 176-78 (1950) (concurring opinion).
10. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990), 3.
11. Larry Alexander and Frederick Schauer, “On Extrajudicial Constitutional Interpretation,” *Harvard Law Review* 110: 1359 (1997). For a rebuttal to Alexander and Schauer, see Neal Devins and Louis Fisher, “Judicial Exclusivity and Political Instability,” *Virginia Law Review* 84: 83 (1998).
12. Louis Fisher and Katy J. Harriger, *American Constitutional Law* (Durham, NC: Carolina Academic Press, 8th ed. (2009), 324-25.
13. Louis Fisher, *Religious Liberty in America: Political Safeguards* (Lawrence: University Press of Kansas, 2002), 105-14.
14. John Agresto, *The Supreme Court and Constitutional Democracy* (Ithaca, NY: Cornell University Press, 1984); Louis Fisher, “Constitutional Interpretation by Members of Congress,” *North Carolina Law Review* 63: 707 (1985); Walter Murphy, “Who Shall Interpret? The Quest for Ultimate Constitutional Interpreter,” *Review of Politics* 48: 401 (1986); Louis Fisher, “Social Influences on Constitutional Law,” *Journal of Political Science* 15:7 (1987); Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton, NJ: Princeton University Press, 1988);
15. Neal Devins, *Shaping Constitutional Values: Elected Government, the Supreme Court, and the Abortion Debate* (Baltimore, MD: Johns Hopkins University Press, 1996); Mark Tushnet, *Taking the Constitution Away From the Courts* (Princeton, NJ: Princeton University Press, 1999). See also, during this period, the work of political scientist Susan R. Burgess, *Contest for Constitutional Authority: The Abortion and War Powers Debates* (Lawrence: University Press of Kansas, 1992). For text and documents on three-branch interpretation, see Louis Fisher and Neal Devins, *Political Dynamics of Constitutional Law*, 4th ed. (St. Paul, MN: Thomson/West, 2006).
16. J. Mitchell Pickering, *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System* (Durham, NC: Duke University Press, 2004); Neal Devins and Keith E. Whittington, eds., *Congress and the Constitution* (Durham, NC: Duke University Press, 2005); William J. Quirk, *Courts and Congress: America’s Unwritten Constitution* (Edison, NJ: Transaction Publishers, 2008).
17. Oliver Wendell Holmes, *The Common Law* (Cambridge, MA: Harvard University Press, 1963), 36.
18. R. Gordon Hoxie, ed., *The White House: Organization and Operations* (New York: Center for the Study of the Presidency, 1971), 94.
19. Robert H. Jackson, “Maintaining Our Freedoms: The Role of the Judiciary,” *Vital Speeches* 19: 759, 761 (1953).
20. Earl Warren, *The Memoirs of Earl Warren* (Garden City, NY: Doubleday, 1977), 6.

21. Potter Stewart, "The Road to *Mapp v. Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases," *Columbia Law Review* 83: 1365, 1366 (1983).
22. Alexander M. Bickel, "The Supreme Court, 1960 Term — Foreword: The Passive Virtues," *Harvard Law Review* 75: 40, 49 (1961).
23. *Congressional Record* 130: 10844, 10851-52.
24. Louis Fisher, *Congressional Abdication on War and Spending* (College Station: Texas A&M University Press, 2000), 137-38.
25. *Congressional Record* 143: 24962 (1997).
26. *Ibid.*
27. Fisher and Harriger, *American Constitutional Law*, 8th ed. (2009), 33-43.
28. The Gramm-Rudman-Hollings Deficit Control Act of 1985, the Flag Protection Act of 1989, the Line Item Veto Act of 1996, and the Communications Decency Act of 1996.
29. Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton, NJ: Princeton University Press, 2007.)
30. Katy J. Harriger, *The Special Prosecutor in American Politics*, 2d ed. (Lawrence: University Press of Kansas, 2000).
31. Joan Biskupic, "The Shrinking Docket," *Washington Post*, March 18, 1996, A15.
32. Joan Biskupic, "In June, Rulings Move with Supreme Speed," *Washington Post*, May 26, 1998, A15 (emphasis in original).
33. Neal Devins and Louis Fisher, *The Democratic Constitution* (New York: Oxford University Press, 2004), 204-05.
34. *Goldman v. Weinberger*, 475 U.S. 503 (1986); 101 Stat. 1086-87, sec. 508 (1987); Fisher, *Religious Liberty in America*, 114-22.
35. Sandra Day O'Connor, *The Majesty of Law: Reflections of a Supreme Court Justice* (New York: Random House, 2003), 44.
36. *Ibid.*, 45.
37. *Ibid.*, 47.
38. Robert Barnes, "New Justices Take the Podium, Putting Personalities on Display," *Washington Post*, November 20, 2006, A15.
39. Linda Greenhouse, "2,691 Decisions," *New York Times*, July 13, 2008, WK 1,4.



Louis Fisher is Specialist in Constitutional Law at the Law Library of the Library of Congress. Previously he worked with the Congressional Research Service. His most recent books include *The Constitution and 9/11: Recurring Threats to America's Freedoms* (University of Kansas Press, 2008) and *The Supreme Court and Congress: Rival Interpretations* (CQ Press, 2008). He testifies frequently before Congress on constitutional issues. Dr. Fisher can be contacted by email at lfisher@loc.gov.