

***Does the  
Supreme  
Court Have  
the  
Final  
Word?***



LOUIS FISHER

**T**he Supreme Court and legal scholars frequently promote the doctrine that when the Court decides a constitutional issue, it speaks with finality. In a 1953 decision, Justice Robert H. Jackson offered this explanation: “We are not final because we are infallible, but we are infallible only because we are final.”<sup>1</sup> Cleverly written perhaps, but nothing in the Court’s record over more than two centuries points to either judicial finality or infallibility. Jackson was too good a student of constitutional history to believe his own words.

Consider the Court’s decision in *Minersville School District v. Gobitis* (1940) when it upheld, 8 to 1, a compulsory flag salute for public school children. Despite the top-heavy majority, the ruling provoked intense criticism from the press, religious organizations, law reviews, and the general public. In 1942, three members of the majority—Hugo Black, William Douglas, and Frank Murphy—announced in *Jones v. Opelika* that the 1940 decision was “wrongly decided,” reducing the 8-1 majority to 5-4. Two justices who had joined the 8-1 opinion (James Byrnes and Owen Roberts) were replaced by Wiley Rutledge and Robert Jackson. On June 14, 1943, in *West Virginia State Board of Education v. Barnette*, a 6-3 majority reversed the 1940 ruling. The person who authored this decision: Robert Jackson.

As with other branches of government, the Supreme Court has its highs and lows, contributing to individual rights and freedoms in some cases while undermining them in others. It has demonstrated full capacity to commit errors. Chief Justice William Rehnquist spoke quite bluntly on this point in 1993: “It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.”<sup>2</sup> Yet contemporary scholars and reporters hew tightly to the doctrine of judicial finality. Writing in 2012, Jeffrey Toobin said that a Supreme Court decision “interpreting the Constitution can be overturned only by a new decision or by a constitutional amendment.”<sup>3</sup> Adam Liptak, writing for *The New York Times* on Aug. 21, 2012, noted that “only a constitutional amendment can change things after the justices have acted in a constitutional case.”<sup>4</sup>

### Early Rejections of Judicial Finality

In 1819’s *McCulloch v. Maryland*, the Supreme Court upheld the constitutionality of the Second Bank of the United States. In authoring the decision, Chief Justice John Marshall appeared to promote the doctrine of judicial finality and 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.”

He greatly overstated the Court’s role. At issue was the decision of the two elected branches to create the national bank. It was their discretion to create or not. Regardless of what the Court decided, a future Congress or President could make an independent judgment about continuing the bank. If Congress decided not to reauthorize, that issue 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 attract sufficient votes for an override. Those decisions by the elected branches could not be second-guessed or reversed by the Court.

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. In the face of that advice, he vetoed the bill, considering “mere precedent” a “dangerous source of authority, and 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.” 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. At the state level, legislative, executive, and judicial opinions on the constitutionality of the bank were mixed. Nothing in this record persuaded Jackson that there was any obligation to sign the bill. Congress sustained his veto.

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.” All three branches, he said, “must each for itself be guided by its own opinion of the Constitution.” Each public official takes an oath to support the Constitution “as he understands it, and not as it is understood by others.” 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.

Judicial and congressional actions in the 1850s underscored once again why the Supreme Court need not have the final word on constitutional matters. In 1852, the Court decided that the height of the Wheeling Bridge over the Ohio River, constructed under Virginia law, constituted a “nuisance” because the structure was so low it obstructed navigation.<sup>5</sup> The Court released its decision on Feb. 6, 1852, and in amended form in May. On Aug. 12, the House of Representatives debated a bill to make the Wheeling Bridge “a lawful structure.”<sup>6</sup> Rep. Joseph Addison Woodward, a sponsor of the 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. Rep. Carlton B. Curtis disagreed, objecting that Congress should not sit “as a court of errors and appeals over the decision and adjudication of the Supreme Court.”

But 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 its investigation to a commissioner. Why should his judgment control Congress? 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.” 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.

The dispute returned to the Supreme Court, with Pennsylvania insisting that the statute was “unconstitutional and void.”<sup>7</sup> 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. However, the new statute removed that objection. Because of congressional action, “the bridge is no longer an unlawful obstruction” and “it is quite plain the decree of the court cannot be enforced.”

Three dissenters were astonished that a constitutional issue decided by the Court could be so easily reversed by Congress. 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.” 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. Yet members of Congress regarded their action as the exercise of legislative, not judicial, power.

The position of the three dissenters has not prevailed. States lacking authority over interstate commerce at one point can have their powers strengthened by an act of Congress. An example comes from a decision by the Supreme Court in 1890 when it ruled that Iowa’s prohibition of intoxicating liquors from outside its borders could not apply to original packages or kegs. It held that only after the original package had entered Iowa and was broken into smaller packages could it regulate the product. 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.”<sup>8</sup> States could not exclude incoming articles “without congressional permission.”

The final word on this constitutional question therefore belonged to Congress. The Court issued its opinion on April 28, 1890. By May 14, the Senate reported a bill to grant Iowa authority to regulate incoming intoxicating liquors.<sup>9</sup> The legislation was enacted on Aug. 6, 1890. 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.”<sup>10</sup> When the constitutionality of this statute reached the Supreme Court a year later, it was upheld unanimously.<sup>11</sup>

Accompanying the doctrine of judicial finality is the belief that the Supreme Court is especially reliable in protecting the constitutional rights of individuals, especially minorities. Yet when one examines the record closely, the evidence demonstrates that women, blacks, children, and other groups were more successful when they sought protection not from the courts but from Congress. On many occasions, Supreme Court decisions against minorities were turned back by congressional legislation.

## The Rights of Women

In the 19th century, individuals seeking protection from the courts lost on a regular basis. Gradually they learned that their interests were better defended by legislative bodies at both the state and national level. Following the Civil War, women began to study medicine, law, and pursue other professional activities formerly dominated by men. After studying law, Myra Bradwell applied for admission to the Illinois bar in 1869. She needed the approval of an all-male panel of judges to practice in the state. They rejected her application solely on the ground that she was a woman. Her appeal to the Supreme Court of Illinois failed.<sup>12</sup> Of her qualifications the court said “we have no doubt.” 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.” 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.”<sup>13</sup>

Bradwell then took 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. 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.<sup>14</sup> In a concurrence, Justice Joseph Bradley advised that the “natural and proper timidity and delicacy” of women made them “unfit” for many occupations. A “divine ordinance,” he said, commanded that a woman’s primary mission in life is to the home. While many women did not marry, a general rule imposed upon females the “paramount destiny and mission” to fulfill the roles of wife and mother. To Bradley: “This is the law of the Creator.”

Considering Bradwell’s success with the Illinois legislature, could women turn to Congress for support in their effort to practice law? Several years after the Supreme Court’s decision in 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. 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 goodwill and character, as was required of male attorneys), she may be admitted to practice before the U.S. Supreme Court.<sup>15</sup> Working in a Congress with all male members, her bill became law within one year.<sup>16</sup>

Lockwood received special support from Sen. Aaron Sargent of California. Expressing a view that could not be found in state or federal courts, 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 circumstanced, that bounds shall be set which they cannot pass.” The pursuit of happiness “in her own way, is as much the birthright of woman as of man.” 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 you out by law from profitable employments, and monopolize them for ourselves.”<sup>17</sup>

Not until 1971 did the Supreme Court issue an opinion striking down sex discrimination. A unanimous Court in *Reed v. Reed* declared invalid an Idaho law that preferred men over women in administering estates. A study published that year denounced the failure of courts to defend the rights of women: “Our conclusion,

independently reached, but completed 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.”<sup>18</sup>

For a contemporary issue, consider the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.* (2007). A 5-4 Court held that Lilly Ledbetter had filed an untimely claim against Goodyear Tire for pay discrimination. Only toward the end of her years at Goodyear did she learn that the company paid her less than it paid men for the same kind of work. However, the Court ruled that she needed to file within 180 days even though she had no knowledge of the discriminatory treatment until years later. Congress passed legislation in 2009, providing that when an unlawful employment practice occurs it carries forward with each paycheck, allowing women to file lawsuits to pursue justice.

### Securing Protection to Blacks

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 protection to blacks. Although the Civil War Amendments formally elevated blacks to the status of citizens, in many states they were denied access to public facilities. Congressional legislation in 1875 entitled all people 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 amusement.”<sup>19</sup>

During House debate, Benjamin Butler of Massachusetts and chair of the Judiciary Committee 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.”<sup>20</sup> Social equality, he explained, has nothing to do with law. Everyone has the right to select their own friends and associates. Those choices have nothing to do with access to public accommodations or with deciding who sits next to whom at a theater, restaurant, or train. President Ulysses S. Grant signed the bill into law.

In the *Civil Rights Cases* of 1883, the Court struck down the public accommodations provision as a federal encroachment on the states and an interference with private relationships.<sup>21</sup> Only one justice dissented, John Marshall Harlan. What Congress attempted to do in 1875 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. Private groups lobbied in favor of the bill, creating a political base that helped educate citizens and build public support. 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 accommodations title.<sup>22</sup> The active, driving, and effective force in protecting the constitutional rights of blacks came from the elected branches, finally overcoming judicial obstruction.

From 1865 to the *Civil Rights Cases* of 1883, the Supreme Court issued a number of decisions that undermined 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. 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.”<sup>23</sup> 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.”<sup>24</sup> Under that theory, state sovereignty would prevail over congressional efforts through the Civil War Amendments to protect the rights of newly freed blacks.

In the years following the Civil War, there was no clear pattern in the South of segregating blacks and whites in transportation systems. At times they traveled in the same railroad cars. Southern transportation “was not rigidly segregated in the quarter-century after the Civil War.”<sup>25</sup> By the late 1880s, however, some Southern states began passing Jim Crow transportation laws to separate blacks and whites. The timing here is significant. This movement came after the Supreme Court in the *Civil Rights Cases* invalidated the equal accommodation statute passed by Congress. Through that decisive ruling, 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 v. Ferguson*, the Court divided 7 to 1 in upholding a Louisiana statute enacted in 1890.<sup>26</sup> 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. The statute made one exception. It did not apply “to nurses attending children of the other race.”<sup>27</sup> In his dissent, Justice John Marshall Harlan predicted that *Plessy* would “prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case.” *Plessy* remained in force until the Supreme Court decided *Brown v. Board of Education* in 1954 and subsequent cases.

### Child-Labor Legislation

The reputation of the Supreme Court for reliable constitutional interpretation was severely damaged by two decisions that struck down congressional efforts to regulate child labor. In 1916, Congress passed legislation under the Commerce Clause to address the harsh and unhealthy conditions of child labor. Two years later, in *Hammer v. Dagenhart*, a 5-4 Court held the statute to be unconstitutional, ruling 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. The Court reasoned that although child labor might be harmful, the goods shipped from their efforts “are of themselves harmless.”

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. This time, in *Bailey v. Drexel Furniture Co.*, the Court struck down congressional efforts by the vote of 8 to 1. Congress now turned to a constitutional amendment, passed in 1924, to empower it to regulate child labor. By 1937, only 28 of the necessary 36 states had ratified it. Congress would make one more try, and on this occasion it prevailed.

Beginning in 1937, conservative justices began to retire, giving President Franklin D. Roosevelt his first opportunity to name justices to the Supreme Court. With this change in the Court’s composition underway, Congress in 1938 passed legislation to regulate child labor, relying on the same power the Court had earlier invalidated: the Commerce Clause. But far from repudiating this legislation, a thor-

oughly reconstituted (and chastened) Court not only upheld the new statute in *United States v. Darby* (1941) but did so *unanimously*. Moreover, it proceeded to publicly apologize for the Court's effort in 1918 to distinguish between the "production" and "manufacture" of goods (regarded as local in origin) and not subject to regulation by Congress.

The Court now explained: "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." Congress, the Court said, may exclude from interstate commerce whatever goods it considers injurious to the public health, morals or welfare." Those constitutional judgments, the Court now announced, are left to the elected branches, not to the judiciary. To the Court, the reasoning offered in *Hammer v. Dagenhart* in 1918 "was novel when made and unsupported by any provision in the Constitution." No support in the Constitution! That stands as a remarkable and healthy admission of judicial error.

### Treatment of Japanese-Americans

On Feb. 19, 1942, President Franklin D. Roosevelt issued Executive Order 9066, leading to a curfew ordered by the military of all people of Japanese ancestry within a designated military area. A month later, Congress enacted legislation to ratify the executive order. In 1943 and 1944, the Supreme Court upheld the curfew and also the detention of all Japanese-Americans, including those who were U.S. citizens. In the first case on the curfew order, Chief Justice Stone said it was "not for any court to sit in review of the wisdom" of what President Roosevelt and Congress decided "or substitute its judgment for theirs."<sup>28</sup> He stated that the policy of Gen. John L. DeWitt, who established the curfew, "involved the exercise of his informed judgment." DeWitt's judgment was not informed. He believed that all Japanese, by race, are disloyal. There could be no such thing as "a loyal Japanese." Deferring to military judgment might be justified. Deferring to racism is not. The 1943 decision was unanimous. In the 1944 decision, upholding the transfer of Japanese-Americans from their homes to detention camps, the Court divided 6 to 3. Writing for the Court, Justice Black noted: "In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did."<sup>29</sup>

The check on abuses to the Japanese-American community would come not from the Supreme Court but from the elected branches and the general public. On Feb. 20, 1976, President Gerald Ford issued a proclamation apologizing for the treatment of Japanese-Americans, resulting in the "uprooting of loyal Americans."<sup>30</sup> In 1980, Congress established a commission to gather facts to determine the wrong done by Roosevelt's order. Released in 1982, the report stated that the order "was not justified by military necessity." Moreover, the policies that followed from it—curfew and detention—"were not driven by analysis of military conditions." Instead, the factors that shaped those decisions were "race prejudice, war hysteria, and a failure of political leadership."<sup>31</sup> Missing from that list: a surrender of judicial independence and a decision to defer to executive assertions unsupported by any evidence.

In 1962, Chief Justice Earl Warren reflected on the Japanese-American decisions. In times of emergency, he suggested that

the judiciary could not function as an independent and coequal branch. Instead, he issued this warning: "To put it another way, the fact that the Court rules in a case like *Hirabayashi* that a given program is constitutional, does not necessarily answer the question, whether, in a broader sense, it actually is."<sup>32</sup> In short: the Court held that the government's action was constitutional when it was not.

### Contemporary Examples

As a way of controlling delegated authority, Congress has long relied on "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. Presidents and attorneys general did more than tolerate legislative vetoes and acquiesce. They often invited and encouraged their growth because they understood the benefits for the executive branch.<sup>33</sup>

Political accommodations that had supported the legislative veto largely came to an end in 1978 when President Jimmy Carter issued a broad critique of legislative vetoes.<sup>34</sup> The case that reached the Supreme Court involved a one-House veto over requests by the attorney general to suspend the deportation of aliens. I wrote an article in 1982 explaining that some types of legislative vetoes would survive no matter what the Supreme Court decided. 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).<sup>35</sup>

Writing for the Court in *INS v. Chadha*, Chief Justice Warren Burger attempted to strike down all forms of legislative veto. He 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 (bicameralism) in a bill submitted to the President under the Presentment Clause.<sup>36</sup> The Court 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 of a bill to the President. The issuance of committee subpoenas is one example.<sup>37</sup>

Instead of a one-House veto over proposals by the President to reorganize the executive branch, 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 specified number of days. In previous statutes, a presidential plan to reorganize the government would take effect unless one House disapproved. 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. He needed the support of four committees in the House and Senate. A compromise was reached to move the funds.<sup>38</sup> A memoir by Leon Panetta also published in 2015 reflects his experience as CIA director during the Obama administration. He described how he met with congressional committees and leaders to gain the support of a reprogramming request.<sup>39</sup> In these types of meetings between executive officials and

lawmakers, the participants proceed without any consideration of the Court's decision in *Chadha*.

Further insight into the judiciary lacking the last word on constitutional issues comes from *Goldman v. Weinberger* (1986), when the Supreme Court upheld an Air Force regulation that prohibited an observant Jew in the military from wearing a skullcap (Yarmulke) while on duty. Its ruling did not spell finality on the constitutional meaning of religious liberty. A year later, Congress passed legislation directing the Defense Department to allow members of the military to wear religious apparel unless it interfered with military duties.<sup>40</sup> How could Congress override the Court on this constitutional issue? It prevailed by acting under its express authority under Article I, § 8, to “make Rules for the Government and Regulation of the land and naval Forces.”

## Conclusion

Despite more than two centuries of activity by all three branches of the national government in deciding the meaning of the Constitution, the claim of judicial finality continues to be pressed. In 1997, Justice Anthony 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 branches.”<sup>41</sup> He then added, citing *Marbury v. Madison*<sup>42</sup>: “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.”<sup>43</sup> 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.<sup>44</sup> In 1821, Chief Justice Marshall berated those who rummaged around *Marbury* looking for “some dicta” to support their cause.<sup>45</sup> The “single question” before the Court in *Marbury*, he said, was “whether the legislature could give this Court original jurisdiction in a case in which the constitution had clearly not given it.”<sup>46</sup> That was the core holding. Everything else, including possible claims of judicial supremacy and judicial finality, amounted to dicta. Any suggestion of judicial finality in *Marbury* has been repeatedly swept aside by ongoing dialogues between the three branches of government. The record clearly demonstrates that a judicial ruling is not binding for all time simply because it has been issued. ☺



Louis Fisher is scholar in residence at the Constitution Project and visiting scholar at the William & Mary Law School. He served four decades in the Library of Congress as senior specialist in separation of powers at the Congressional Research Service and specialist in constitutional law at the Law Library. His books include *The Law of the Executive Branch: Presidential Power* (paper ed., 2015). His personal website is [loufisher.org](http://loufisher.org).

## Endnotes

<sup>1</sup>*Brown v. Allen*, 344 U.S. 443, 540 (1953).

<sup>2</sup>*Herrera v. Collins*, 506 U.S. 390, 415 (1993).

<sup>3</sup>JEFFERY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 194 (2012).

<sup>4</sup>Adam Liptak, *In Congress's Paralysis, A Mightier Supreme Court*, N.Y. TIMES, Aug. 21, 2012, at A10.

<sup>5</sup>*Pennsylvania v. Wheeling and Belmont Bridge Co.*, 54 U.S. (13

How.) 518 (1852).

<sup>6</sup>CONG. GLOBE, 32d Cong., 1st Sess. 2195 (1852).

<sup>7</sup>*Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421, 429 (1856).

<sup>8</sup>*Leisy v. Hardin*, 155 U.S. 100, 108 (1890).

<sup>9</sup>21 CONG. REC. 4642 (1890).

<sup>10</sup>20 Stat. 313 (1890).

<sup>11</sup>*In re Rahrer*, 140 U.S. 545 (1891).

<sup>12</sup>*In re Bradwell*, 55 Ill. 535 (1869).

<sup>13</sup>Illinois Laws, 1871-1872, at 578.

<sup>14</sup>*Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1883).

<sup>15</sup>7 CONG. REC. 1235 (1878).

<sup>16</sup>20 Stat. 292 (1879).

<sup>17</sup>8 CONG. REC. 1084 (1879).

<sup>18</sup>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).

<sup>19</sup>18 Stat. 335, 336 (1875).

<sup>20</sup>3 CONG. REC. 939-40 (1875).

<sup>21</sup>109 U.S. 3 (1883).

<sup>22</sup>*Heart of Atlanta Motel v. United States*, 379 U.S. 241, 250 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

<sup>23</sup>83 U.S. (16 Wall.) 36, 78 (1873).

<sup>24</sup>92 U.S. (2 Otto.) 542, 550 (1876).

<sup>25</sup>CHARLES A. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 9 (1987). See also *id.* at 11-12.

<sup>26</sup>163 U.S. 537 (1896).

<sup>27</sup>*Id.* at 541.

<sup>28</sup>*Hirabayashi v. United States*, 320 U.S. 81, 93 (1943).

<sup>29</sup>*Korematsu v. United States*, 323 U.S. 214, 217-18 (1944).

<sup>30</sup>Proclamation 4417, 42 FED. REG. 7741 (1976).

<sup>31</sup>COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED* 18 (1982).

<sup>32</sup>Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 192-93 (1962).

<sup>33</sup>MICHAEL J. BERRY, *THE MODERN LEGISLATIVE VETO: MACROPOLITICAL CONFLICT AND THE LEGACY OF CHADHA* (2016); LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 155-67* (6th ed., 2014).

<sup>34</sup>PUBLIC PAPERS OF THE PRESIDENTS, 1978, I, 1146.

<sup>35</sup>Louis Fisher, *Congress Can't Lose on Its Veto Power*, WASH. POST, Feb. 21, 1982, at D1.

<sup>36</sup>*INS v. Chadha*, 462 U.S. 919, 952 (1983).

<sup>37</sup>20 Op. O.L.C. 124, 138 (1996).

<sup>38</sup>ROBERT M. GATES, *DUTY: MEMOIRS OF A SECRETARY AT WAR* 513-14 (2015).

<sup>39</sup>LEON PANETTA, *WORTHY FIGHTS: A MEMOIR OF LEADERSHIP IN WAR AND PEACE* 198-99 (2015 ed.).

<sup>40</sup>101 Stat. 1986-87, sec. 508 (1987).

<sup>41</sup>*City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997).

<sup>42</sup>*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>43</sup>*City of Boerne*, at 536 (citation omitted).

<sup>44</sup>LOUIS FISHER, *DEFENDING CONGRESS AND THE CONSTITUTION* 22-47 (2011).

<sup>45</sup>*Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 397 (1821).

<sup>46</sup>*Id.* at 400.