The Claim of Judicial Finality in the United States: A Popular Theory that Lacks Evidence

Louis Fisher

Louis Fisher is visiting scholar at the William and Mary Law School. From 1970 to 2010 he served at the Library of Congress as senior specialist in separation of powers at Congressional Research Service and specialist in constitutional law at the Law Library of Congress. He has testified before congressional committees more than fifty times on a range of constitutional issues. Author of 32 books and more than 600 articles, many of his articles and congressional testimony are posted on his personal webpage at http://www.loufisher.org.

In law schools as well as political science and history classes, students are generally taught that when the Supreme Court decides a constitutional issue it delivers the final word unless the Court changes its position. That is the prominent theory. In 1953, Justice Robert Jackson promoted the doctrine of judicial finality by making a statement that is often cited: 'We are not final because we are infallible, but we are infallible only because we are final'.[1] Perhaps a clever and witty turn of phrase but it advances a claim unsupported by facts.

What has occurred from 1789 to the present time is not judicial finality but an ongoing dialogue among all three branches of the national government, the states, scholars, and the general public. On occasion, members of the Supreme Court will acknowledge that errors and misconceptions can occur in the judicial process. Chief Justice William Rehnquist spoke bluntly in 1993: 'It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible'.[2]

The person who should have understood that point is Robert Jackson. In 1940 the Court upheld a compulsory flag-salute with a strong majority of 8 to 1.[3] The final word? No. The decision was subject to such criticism from the public and scholars that three Justices in the majority (Hugo Black, William Douglas. and Frank Murphy) announced two years later that the decision was wrongly decided.[4] That reduced the majority to 5-4. Two of the Justices in the 8-1 majority retired and their replacements joined the four Justices to produce a 6-3 decision in 1943 reversing the 1940 decision.[5] Who wrote the majority opinion in 1943? It was Robert Jackson.

Early Precedents

The claim of judicial finality appears in a unanimous decision by Chief Justice John Marshall in *McCulloch v. Maryland* (1819), which held that Congress possessed an implied power to create a national bank. He said if the case had to be decided 'by this tribunal alone can the decision be made'. On the Supreme Court 'has the constitution of our country devolved this important duty'.[6] He concluded that the statute to create the Bank of the United States 'is a law made in pursuance of the constitution, and is a part of the supreme law of the land'.[7] The fact that Congress created the Bank and the Supreme Court upheld it did not prevent the elected branches from reaching a different conclusion a few decades later.

On July 10, 1832, President Andrew Jackson vetoed a bill to restore the U.S. Bank. While admitting that the bill had some positive features and had gained support from the Supreme Court, he noted the mixed history of the Bank: Congress favoring it in 1791, voting against it in 1811 and 1815, but supporting it in 1816.[8] As to

1 Brown v. Allen, 344 U.S. 443, 540 (1953).
2 Herrera v. Collins, 506 U.S. 390, 415 (1993).
3 Minersville School District v. Gobitis, 310 U.S. 586 (1940).
4 Jones v. Opelika, 316 U.S. 584, 624 (1942).
5 West Virginia State Board of Education v. Barnette, 319 U.S. 614 (1943).
6 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819).
7 ibid 424.
8 James D Richardson (ed), *A Compilation of the Messages and Papers of the*

the decision in *McCulloch*, he denied that the Court's ruling, even if it 'covered the whole ground of this act', ought 'to control the coordinate authorities of this government'. Congress, the President, and the Supreme Court 'must each for itself be guided by its own opinion of the Constitution'. A public officer who takes an oath to support the Constitution 'swears that he will support it as he understands it, and not as it is understood by others'. 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'.[9]

Congress did not override Jackson's veto. Aware of Jackson's action, John Marshall had full appreciation of the degree to which the elected branches could reverse constitutional decisions by the Supreme Court. The overriding picture was a broad and open dialogue among the three branches of government, the general public, and scholars. Marshall passed away on July 6, 1835.

Three-Branch Interpretations

The pattern of all three branches sharing constitutional interpretation continued in subsequent years. An interesting example is the effort of Congress in 1916 to pass legislation to regulate child labor. The statute prohibited the shipment in interstate or foreign commerce of any article produced by children within specified age ranges: under the age of sixteen for products from a mine or quarry, and under the age of fourteen from any mill, cannery, workshop, factory, or manufacturing establishment.[10] Two years later the Supreme Court, divided 5-4, struck down the statute as unconstitutional.[11] The Court claimed that the steps of 'production' and 'manufacture' of goods were local in origin and therefore not part of the 'commerce' among the states that would be subject to regulation by Congress. To the Court, although child labor might be harmful the goods produced from their labor 'are of themselves harmless'.[12] The last word? Not at all.

Members of Congress did not accept the Court's ruling as final. Instead, they decided to pass legislation to regulate child labor through the taxing power. A federal excise tax would be levied on the net profit of persons employing child labor within prohibited ages. By a vote of 8 to 1, the Court struck down the new child labor law.[13] The end of this dispute? No. Congress passed a constitutional amendment in 1924 to support its power to regulate child labor but by 1937 only twenty-eight of the necessary thirty-six states had ratified it.[14]

Although the Supreme Court had twice struck down child-labor statutes, Congress in 1938 again passed legislation to regulate this issue. During debate, lawmakers did not bow down to the doctrine of judicial finality.[15] In 1940, a federal district court in Georgia held the child-labor statute unconstitutional because the activity within the state was not 'interstate commerce' subject to the control of Congress. The court accepted the Supreme Court's position in *Hammer v. Dagenhart* that the 'manufacture' of goods is not commerce.[16]

In 1941, a thoroughly reconstituted (and chastened) Supreme Court not only upheld the new statute governing child labor but did so unanimously. A brief opinion by Justice Harlan Fiske Stone noted that 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'.[17] He proceeded to say that *Dagenhart* was 'novel when made and unsupported by any provision of the Constitution'.[18] Quite extraordinary language! A Supreme Court opinion issued without any support in the Constitution. In using this language, Stone repudiated not only the doctrine of judicial supremacy but the assertion of judicial infallibility. To him, judgments on what goods to exclude from interstate commerce – considered injurious to the public health, morals, or welfare – are reserved to the elected branches, not to the judiciary.[19] The motive and purpose of a regulation on interstate commerce 'are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control'.[20]

Judicial Errors that Inflate Presidential Power

In its decisions, the Supreme Court has often promoted independent presidential power in external affairs by relying on serious misconceptions. A prime example is the *Curtiss-Wright* case of 1936. The core issue was whether Congress could delegate to the President certain powers in the field of international relations. In 1934, Congress authorized the President to prohibit the sale of arms in the Chaco region in South America whenever he found 'it may contribute to the reestablishment of peace' between belligerents.[21] The issue was legislative, not executive, power. When President Franklin D. Roosevelt imposed the embargo he relied exclusively on statutory authority. His proclamation prohibiting the sale of arms and munitions began: 'NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting and by virtue of the authority conferred in me by the said joint resolution of Congress…'.[22]

On what possible grounds could the Supreme Court two years later discover exclusive and independent powers for the President? The answer: a total misconception of a speech delivered by John Marshall when he served in the House of Representatives in 1800. At no time in the speech did he claim for the President some type of exclusive and independent power over external affairs. The year 1800 marked an election contest between President John Adams and Thomas Jefferson. In the House, supporters of Jefferson argued that Adams be either impeached or censured for turning over to England an individual charged with murder. Because the case was already pending in an American court, some lawmakers wanted to

Presidents vol 3 1145.

9 ibid.

10 Public Law No. 64-249, 39 Stat. 675 (1916).

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

12 ibid 271-72.

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

14 John Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-2002* (ABC-CLIO 2003) 63.

15 For details on this legislation, see John Fliter, *Child Labor in America: The Epic Legal Struggle to Protect Children* (University Press of Kansas 2018) 191-214; Louis Fisher, *Reconsidering Judicial Finality: Why the Supreme Court Is Not the Last Word on the Constitution* (University Press of Kansas 2019) 98-99.

16 United States v. F.W. Darby Lumber Co., 32 F. Supp. 734, 736 (S.D. Ga. 1940).

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

18 ibid 116.

19 ibid 114.

20 ibid 115.

21 48 Stat. 811 (1934).

22 ibid 1745.

sanction Adams for encroaching upon the judiciary and violating the doctrine of separation of powers. A House resolution rebuked Adams for interfering with judicial decisions.[23]

Much of the issue depended on the nationality of the person released to the British. The House resolution stated: 'it appears to this House that a person, calling himself Jonathan Robbins, and claiming to be a citizen of the United States', was held on a British ship and committed to trial in the United States 'for the alleged crime of piracy and murder, committed on the high seas, on board the British frigate Hermione'.[24] Notice the vague language: 'it appears', 'calling himself', and 'claiming to be'. In fact, Robbins was an assumed name. The individual was actually Thomas Nash, a native Irishman.[25]

Marshall took the floor to methodically shred the move for impeachment or censure. He pointed out that the Jay Treaty with England contained an extradition provision in Article 27, directing each country to deliver up to each other 'all persons' charged with murder or forgery.[26] Nash, being British, would be turned over to England for trial. President Adams was not attempting to make foreign policy unilaterally. He was carrying out a treaty and fulfilling his Article II, Section 3, authority to take care that the laws, including treaties, be faithfully executed. Under Article VI of the Constitution, all treaties 'shall be the supreme Law of the Land'.

In the course of delivering his speech, Marshall added this sentence: 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations'.[27] The phrase 'sole organ' is ambiguous. 'Sole' means exclusive but what is 'organ'? To Marshall, it is simply the President's duty to communicate to other nations U.S. policy decided by the elected branches, including provisions in treaties. Marshall was merely defending Adams for carrying out the extradition provision in the Jay Treaty. After Marshall completed his presentation, Jeffersonians found his argument so tightly reasoned that they decided to cease any effort to punish Adams.

Despite the clarity of this issue regarding Marshall's intent to defend Adams, the Supreme Court completely misread Marshall's reference to the President as 'sole organ'. Writing for the Court, Justice George Sutherland added pages of dicta (judicial comments that have no bearing on the issue before a court) that not only misrepresented Marshall's speech but offered judicial support for independent presidential power in external affairs. Although President Roosevelt explained that he carried out the 1934 statute by relying solely on authority delegated to him, Sutherland announced that the President in the field of international relations possessed 'plenary and exclusive power over external affairs', an argument that not only exceeds what Marshall argued in his speech but violates express language in the Constitution. Anyone reading the Constitution would understand that the Framers did not concentrate all powers of external affairs in the President. Sutherland added not only dicta but erroneous dicta. Sutherland inserted another error in *Curtiss-Wright* by claiming that the Constitution commits treaty negotiation exclusively to the President: 'He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress is powerless to invade it'.[28]

23 10 Annals of Cong. 533 (1800).

24 ibid 532.

25 ibid 515.

26 8 Stat. 129 (1794).

27 10 Annals of Cong. 613 (1800).

28 Curtiss-Wright Corp., 299 U.S. at 319, emphasis in original.

That was pure dicta. Nothing in the case before the Supreme Court had anything to do with treaties or treaty negotiation. It was not merely dicta. It was erroneous.

To cite persuasive evidence for this error would be a book published in 1919 by someone who had served in the U.S. Senate. He explained how Senators regularly participated in treaty negotiation and that Presidents acceded to this 'practical construction'. As the book notes, the right of Senators to participate in treaty negotiation 'has been again and again recognized and acted upon by the Executive'. How would Sutherland be aware of this book? He was the author.[29] Moreover, Presidents have invited members of the House of Representatives to participate in treaty negotiation as a means of building political support for authorization and appropriation bills needed to implement treaties.[30] Here is another example of Supreme Court Justices adding not only dicta to their decisions but erroneous dicta.

A Broad Dialogue

Corrections in constitutional positions are often required to take account of shifts in public attitudes. In a book published in 1962, Alexander Bickel noted that the process of developing constitutional values in a democratic society 'is evolved conversationally not perfected unilaterally'.[31] A study published in 1989 by Thomas Marshall analyzed the impact of public opinion on the Supreme Court and concluded that the Court 'appears to enjoy an enviable position as a policy maker' because overriding the Court by constitutional amendment 'requires cumbersome, time-consuming efforts, and very few attempts have ever succeeded'.[32]

In a book published by Princeton University Press in 1988, I offered my views on *Constitutional Dialogues: Interpretation as Political Process.* I concluded that the belief in judicial supremacy 'imposes a burden that the Court cannot carry. It sets up expectations that invite disappointment if not disaster'.[33] Court decisions 'are entitled to respect, not adoration. When the Court issues its judgment we should not suspend ours'.[34] Judicial review fits our constitutional system because we like to fragment power through a system of checks and balances. This 'very preference for fragmented power denies the Supreme Court an authoritative and final voice for deciding constitutional questions'.[35]

On the back cover of this book are three statements promoting my book. One is by Ruth Bader Ginsburg when she served on the D.C. Circuit Court. She agreed that constitutional law 'neither begins nor ends with Supreme Court decisions'. Multiple actors in the political system participate, underscoring 'the colloquy or interplay constantly at work among the people, their elected representatives, and appointed judges in the joint enterprise of constitutional interpretation'. After her nomination to the Supreme Court, she offered this statement on July 20, 1993 to the Senate Judiciary

29 George Sutherland, *Constitutional Power and World Affairs* (Columbia University Press 1919) 123.

30 Louis Fisher, 'Congressional Participation in the Treaty Process' (1989) 137 U. Pa. L. Rev. 1511, 1517.

31 Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962) 244.

32 Thomas Marshall, *Public Opinion and the Supreme Court* (Unwin Hyman 1989) 167.

33 Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton University Press 1988) 278.

34 ibid 279.

35 ibid.

Committee: 'Justices do not guard constitutional rights alone. Courts share that profound responsibility with Congress, the President, the states, and the people'.[36]

After being confirmed as a Supreme Court Justice, Ginsburg often underscored how willing she was to reject the notion of judicial finality. In 2007 the Court decided the case of Lilly Ledbetter who had filed a lawsuit against Goodyear Tire after learning that she was being paid less than men for doing the same work. It took her two decades to learn that fact. In July 1998, she filed a formal charge of sex discrimination under Title VII and also a claim under the Equal Pay Act of 1963. Writing for a 5-4 Court, Justice Samuel Alito agreed with the Eleventh Circuit in rejecting Ledbetter's complaint.[37] The Court said she should have file her case within 180 days of each alleged discriminatory pay action, but she did not know of Goodyear's actions against her until two decades later.

In a dissent joined by Stevens, Souter, and Breyer, Ginsburg noted the disparity between Ledbetter's monthly salary as area manager and those of male counterparts at the end of 1997. The latter group ranged from a high of $5,236 to a low of $4,286. Her monthly salary for that time period was $3,727. As for the failure of Ledbetter to file discriminatory charges before 1998, Ginsburg explained that Goodyear Tire had withheld comparative pay information from her. Recalling the Civil Rights Act of 1991 that overturned in whole or part nine decisions of the Supreme Court, Ginsburg remarked: 'Once again, the ball is in Congress' court. As in 1991, the Legislature may act to correct this Court's parsimonious reading of Title VII'. She made clear that a decision by the Supreme Court was not necessarily the final word. The elected branches could now enter the picture to reverse the Court.

The Court issued its decision on May 29, 2007. In response, Senator Ted Kennedy said the Court had 'undermined a core protection' of Title VII of the Civil Rights Act of 1964.[38] In late July, the House of Representatives debated the Lilly Ledbetter Fair Pay Act to reverse the Court's decision. Representative Jerrold Nadler of New York, objecting that Goodyear could pay her less just because she was a woman, offered this response: 'Once again, Congress must correct the Supreme Court and instruct it that when we said discrimination in employment was illegal, we meant it, and we meant for the court to enforce it'.[39] By a vote of 225 to 199, the House passed the Ledbetter bill.[40]

After the Senate filibustered the bill, no further action was taken until early 2009 when President-elect Barack Obama was poised to occupy the White House. This time the House passed the Ledbetter bill by a vote of 247-171.[41] The Senate debated the bill on January 22 after Obama had taken office. The bill passed the Senate 61-36. The House voted 250-177 to support the Senate bill. As enacted, the bill provides that an unlawful employment practice occurs when a discriminatory compensation decision is adopted. Nothing in the statute limits an employee's right to challenge an unlawful employment practice.[42] Discriminatory actions carry forth in each paycheck, allowing women to file a complaint in a timely manner for relief. A congressional statute overrode a Supreme Court decision.

36 Ruth Bader Ginsburg, *My Own Words* (Simon & Schuster 2016) 183.
37 Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007). For further details on this case, see Fisher (n 15) 75-78.
38 153 Cong. Rec. 14530 (2007).
39 ibid 21432.
40 ibid 21929.
41 155 Cong. Rec. 458-59 (2009).
42 Public Law No. 111-2, 123 Stat. 5 (2009).

Japanese-American Cases

In its decisions in *Hirabayashi* (1943) and *Korematsu* (1944), the Supreme Court upheld actions against Japanese-Americans to prosecute them for violating a curfew order and to place them in detention camps because of their race. Although deficiencies were discovered with both decisions, not until *Trump v. Hawaii* in 2018 did the Supreme Court announce that *Korematsu* was 'gravely wrong the day it was decided'. If *Korematsu* was that deficient, why did it take the Court 74 years to admit it? And what of *Hirabayashi*? Is that still good law? The record demonstrates not only a capacity of the Supreme Court to issue erroneous decisions but an unwillingness to correct them.

On February 25, 1942, President Franklin D. Roosevelt issued Executive Order 9066, leading to a military curfew that covered all persons of Japanese descent within a designated military area.[43] A month later, Congress passed legislation to ratify the executive order.[44] Gordon Hirabayashi, a U.S. citizen of Japanese descent, was prosecuted in federal district court for violating the curfew order. A unanimous Supreme Court upheld the government's policy.[45] The Court stated that a decision by General John L. DeWitt, who established the curfew, 'involved the exercise of his informed judgment'.[46] In fact, his judgment was not professionally informed. He believed that all Japanese-Americans, by race alone, are disloyal.[47] Judicial deference to military judgments might be acceptable but not deference to pure racism.

Roosevelt's executive order led to the transfer of Americans of Japanese descent to a number of relocation centers, imprisoned solely for reasons of race. Divided 6-3, the Supreme Court supported these detention camps in various parts of the western states. Writing for the majority, Justice Black offered this judgment: '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'.[48] What 'principles' were announced in *Hirabayashi*? Answer: the Court should defer to whatever the elected branches decided to do. The guiding value was not protection of constitutional principles but judicial deference to Congress and the President.

This decision did yield three dissents. Justice Murphy objected that the exclusion order was based on an 'erroneous assumption of racial guilt' included in General DeWitt's report, which described all individuals of Japanese descent as 'subversives' who belonged to 'an enemy race' and whose 'racial strains are undiluted'. Murphy refused to accept this 'legalization of racism'. The dissent by Justice Jackson described the administration's position as 'an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents to which he had no choice, and belongs to a race from which there is no way to resign'.

Those two decisions produced a number of critical reviews. In an article published in 1945, Eugene Rostow objected that the treatment of Japanese Americans had been 'hasty, unnecessary, and mistaken',

43 7 Fed. Reg. 1407 (1942).
44 56 Stat. 173 (1942).
45 Hirabayashi v. United States, 320 U.S. 81 (1943).
46 ibid 103.
47 Hirabayashi v. United States, 627 F. Supp. 1445, 1452 (W.D. Wash. 1986).
48 Korematsu v. United States, 323 U.S. 214, 217-18 (1944).

leading to actions that produced 'both individual injustice and deep-seated social maladjustments of a cumulative and sinister kind'.[49] In making his recommendations to the Secretary of War on February 14, 1942, General DeWitt referred to the Japanese as 'an enemy race' whose 'racial strains are undiluted'.[50] An article published in 1945 by Nanette Dembitz objected to the Court's deference to military judgments over civilians. Automatic judicial acceptance of military judgment 'will stand as an insidious precedent, unless corrected, for the emergencies of peace as well as of war'.[51]

On December 18, 1944, the Supreme Court issued an interesting decision involving Mitsuye Endo, an American citizen of Japanese descent. She was 'relocated' to the Tule Lake Center and later transferred to Utah Center. A unanimous Court noted that the Justice Department and the War Relocation Authority conceded she was 'a loyal and law-abiding citizen',[52] thereby rejecting the claim that all Japanese-Americans are by race disloyal. The Court noted: 'A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or saboteur'.[53] Although that judgment undermined both *Hirabayashi* and *Korematsu,* the Supreme Court chose to leave those decisions untouched. The belief in judicial finality allowed two unprincipled decisions to remain in place.

On February 20, 1976, President Gerald Ford issued a proclamation that apologized for the treatment of Japanese Americans during World War II, resulting in the 'uprooting of loyal Americans'.[54] A clear message that repudiated President Roosevelt's actions and invited the Supreme Court to reconsider *Hirabayashi* and *Korematsu.* No such steps were taken. In 1980, Congress established a commission to determine the wrong done by Roosevelt's order. The commission's report, issued in December 1982, stated that the order was not justified by military necessity. Instead, the factors that led to the decisions 'were race prejudice, war hysteria, and a failure of political leadership'. In the commission's judgment, 'the decision in *Korematsu* lies overruled in the court of history'.[55] Yet the Supreme Court took no steps to overrule either *Hirabayashi* or *Korematsu.*

Results in the lower courts were more promising. In the 1980s, both Hirabayashi and Korematsu returned to court after newly discovered documents revealed the extent to which executive officials had deceived federal courts and the general public. Both of their convictions were overturned in the lower courts.[56] The Justice Department chose not to appeal either case. By 1988, the Supreme Court had abundant evidence that its decisions in the two cases had lost any credibility. Yet the Court chose not to offer any public reevaluation of those rulings.

A step toward correcting the errors in *Hirabayashi* and *Korematsu* was taken on May 20, 2011, when Acting Solicitor General Neal Katyal publicly stated that Solicitor General Fahy in the two Japanese-American cases failed to inform the Supreme Court of evidence that undermined the rationale for internment.[57] Among other defects, Fahy did not acknowledge that the Federal Bureau of Investigation and the Federal Communications Commission had already discredited reports that Japanese Americans had used radio transmitters to communicate with enemy submarines off the West Coast.

Korematsu was finally the subject of Supreme Court rebuke in 2018. No mention was made of *Hirabayashi.* Why did the Court take more than seven decades to partly correct its record? In *Trump v. Hawaii*, issued on June 26, 2018, the Court split 5-4 in upholding a travel ban ordered by President Trump in September 2017. Writing for the majority, Chief Justice John Roberts concluded that the executive branch had offered sufficient national security justification for its actions.[58] Toward the end of his opinion, he noted that the dissent by Justice Sotomayor, joined by Justice Ginsburg, had repudiated *Korematsu.* To Roberts, whatever 'rhetorical advantage the dissent may see in doing so, *Korematsu* had nothing to do with this case'. After having apparently excluded any consideration of that decision, Roberts proceeded to find serious flaws with it.

In his judgment, the forcible relocation of Japanese Americans 'to concentration camps, solely and explicitly on the basis of race' lacked any application to 'a facially neutral policy denying certain foreign nationals the privilege of admission'. Yet he regarded Trump's travel ban as 'well within executive authority'. After explaining the difference between *Korematsu* and the travel ban case, he stated the following: 'The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and – to be clear – 'has no place in law under the Constitution', 323 U.S., at 248 (Jackson, J., dissenting)'.

If *Korematsu* was wrong 'the day it was decided', why did it take the Court until 2018 to make that admission? Interestingly, Roberts said the decision was overruled long ago 'in the court of history'. Indeed, *Hirabayashi* and *Korematsu* were repudiated by Presidents Ford and Carter, Congress, scholars, and the lower courts in the 1980s that reversed the convictions of Hirabayashi and Korematsu. From 1944 forward, the Supreme Court had abundant evidence from presidential statements, a congressional commission, the 1988 statute that supported the commission's findings, and lower court rulings in the 1980s that the executive branch had deceived the judiciary and withheld vital documents.

After the Supreme Court in 2018 decided to discredit *Korematsu*, why did it not also repudiate *Hirabayashi*? Is the latter still 'good law'? It was evident that both rulings were defective because the executive branch relied on the belief that all Japanese Americans, including those who were U.S. citizens, were disloyal solely on grounds of race. Moreover, it appears that the Court in 2018 might not

49 Eugene V. Rostow, 'The Japanese American Cases – A Disaster' (1945) 54 Yale L. J. 489, 489.

50 ibid 520-21.

51 Nanette Dembitz, 'Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions' (1945) 45 Columbia L. Rev. 175, 239.

52 Ex parte Endo, 323 U.S. 283, 294 (1944).

53 ibid 302.

54 Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 20, 1976).

55 Personal Justice Denied, Report of the Commission on Wartime Relocation and Internment of Citizens, December 1982, at 238.

56 Korematsu v. United States, 584 F. Supp. 1406 (D. Cal. 1984); Hirabayashi v. United States, 627 F. Supp. 1447 (W.D. Wash. 1986); Korematsu v. United States, 828 F.2d 591 (9th Cir. 1987).

57 Neal Katyal, 'Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases' *The United States Department of Justice Archives* (20 May 2011) <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment> accessed 6 June 2022.

58 Trump v. Hawaii, No. 17-965, argued April 25, 2018 and decided on June 26, 2018.

have admitted error in *Korematsu* had Justice Sotomayor made no mention of that case in her dissent. It is remarkable that the Court could finally repudiate *Korematsu* but say nothing about *Hirabayashi*.

Legislative Vetoes: Invalidated, They Continue

Even though we associate the word 'veto' with the President, the two elected branches have developed a process that allowed agencies to seek permission from the Appropriations Committees (usually its subcommittees) whenever they felt a need to move funds from one area to a more pressing need. This process is called 'reprogramming' and a 'legislative veto'. As a staff member of the Library of Congress, I learned a lot about this arrangement by working closely with the Appropriations Committees. The legislative veto served the needs of both branches.

In the early 1980s, the Supreme Court considered a case called *INS v. Chadha*, which involved a legislative veto available to either house of Congress. With this decision pending, I published an article in the *Washington Post* called 'Congress Can't Lose on Its Veto Power'. It predicted that if the Court attempted to strike down the legislative veto, Congress would nevertheless remain 'knee deep in administrative decisions, and it is inconceivable that any court or any president can prevent it. Call it supervision, intervention, interference, or plain meddling, Congress will find a way'.[59] Members of Congress placed my article in the *Congressional Record* five times, leading to discussion during floor debate.[60] The legislative veto in the reprogramming process would survive any Supreme Court decision because both of the elected branches understood the benefits of the process, something the Supreme Court failed to comprehend.[61]

In what was widely considered a major separation of powers decision, the Supreme Court on June 23, 1983, struck down a one-house veto over the decision of the Attorney General to allow a deportable alien, Jagdish Rai Chadha, to remain in the United States. The breadth of the 7-2 decision appeared to invalidate all versions of the legislative veto. Writing for the Court, Chief Justice Burger regarded the legislative veto as unconstitutional because it violated both the principle of bicameralism and the Presentation Clause of the Constitution, which requires all bills to be submitted to the President. In his judgment, whenever congressional action has the 'purpose and effect of altering the legal rights, duties, and relations of persons' outside the legislative branch, Congress must act through both houses in a bill presented to the President.[62]

This position by Burger was far too broad. As the Justice Department has acknowledged in a memo prepared by the Office of Legal Counsel, each house of Congress may alter the legal rights and duties of individuals outside the legislative branch without resorting to bicameralism and presentment. One example is issuance of committee subpoenas to testify and bring requested documents to a hearing.[63] Neither agency officials nor lawmakers would be satisfied with the model of separation of powers presented in *Chadha*. Deficiencies in the Court's ruling were pointed out by Justice Lewis F. Powell, Jr. in his concurrence and in dissenting opinions by Justices Byron White and William Rehnquist.[64] Despite the Court's ruling, the elected branches agreed to continue various types of legislative veto.

The Court's theory of government was unacceptable to the elected branches. Agency officials and lawmakers found the Court's reasoning in *Chadha* far too static and artificial. The conditions that spawned the committee veto over reprogramming had not changed. Executive officials still wanted substantial latitude to administer delegated authority. Lawmakers were determined to maintain control without having to pass another statute. An article in the *New York Times* in 1989 explained how the legislative veto 'goes on and on' in the years following *Chadha*, underscoring the degree to which the Court lacked an understanding of the legislative process.[65]

Regardless of the Court's decision in *Chadha*, the reprogramming process continues as before. Agency officials seek approval from designated committees and subcommittees before funds can be shifted to another purpose. In a book published in 2015, former Secretary of Defense Robert Gates describes a situation he faced in 2011, wanting to reprogram money to an urgent need. To carry out that purpose, he needed approval from four committees in the House and Senate. He was able to reach a compromise to move the funds.[66] In another memoir from the Obama administration, Leon Panetta reflected on his years as CIA Director. He explained how he met with congressional committees and legislative leaders to gain support for reprogramming funds from one purpose to another.[67]

In the years following *Chadha*, Presidents would at times in signing a bill object to the presence of committee vetoes. In signing a bill on December 21, 2000, President Bill Clinton offered this comment about provisions in the legislation 'that purport to condition my authority or that of certain officers to use funds appropriated by the Act on the approval of congressional committees'. He said he would treat such provisions 'to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha*'.[68] Do we take that as evidence that the Clinton administration refused to abide by the reprogramming process followed decade after decade? No. Someone with no understanding of how agency officials and committees of jurisdiction jointly agree to move funds to meet emerging needs placed that language in a signing statement and Clinton failed to understand that no administration bowed down to *Chadha*. Presidents say many foolish things in signing statements. In point of fact, executive agencies continued to seek committee approval to reprogram funds. Reprogramming instructions released by federal agencies are explicit about the need to obtain committee approval.[69]

Just because the Supreme Court in *Chadha* did not understand how government operates does not require executive agencies to embrace judicial ignorance. Neither Congress nor executive agencies want the artificial model announced by the Court. Important accommodations need to be fashioned by committees and agency

59 Louis Fisher, 'Congress Can't Lose on Its Veto Power: If the Supreme Court Blocks Its Use, the President is Likely to Be the One Hurt' *Washington Post* (Washington, 21 Feb 1982) <www.loufisher.org/docs/lv/legveto82.pdf> accessed 6 June 2022.

60 Fisher (n 15) 204.

61 For details on the growth of legislative vetoes, see ibid 204-15.

62 INS v. Chadha, 462 U.S. 919, 952 (1983).

63 'Constitutional Separation of Powers between Cong. and the President' (1996) 20 Op. O.L.C. 138.

64 Fisher (n 15) 216-17.

65 Martin Tolchin, 'The Legislative Veto: An Accommodation That Goes On and On' *New York Times* (New York, 31 March 1989) A11.

66 Robert Michael Gates, *Duty: Memoirs of a Secretary at War* (WH Allen 2015) 513-14.

67 Leon Panetta, *Worthy Fights: A Memoir of Leadership in War and Peace* (Penguin 2015) 298-99.

68 Public Papers of the Presidents, 2000-2001, Book III, 2776.

69 Fisher (n 15) 220-21.

officials. In one form or another, legislative vetoes will remain an important process for reconciling legislative and executive interests.[70]

The 'Sole Organ' Doctrine Returns

Litigation starting in the George W. Bush administration prompted the Supreme Court to review some of the erroneous dicta about presidential power found in the *Curtiss-Wright* case of 1936. The story begins with legislation passed by Congress in 2002 that involved issuance of a passport to a U.S. citizen born in the city of Jerusalem. Under that statute, the Secretary of State 'shall, upon the request of the citizen or the citizen's legal guardian, record the place of birth as Israel'.[71] In signing the bill, President Bush objected that several provisions 'impermissibly interfere with the constitutional functions of the presidency in foreign affairs, including provisions that purport to establish foreign policy that are of significant concern'. Three times he referred to 'the unitary executive branch'. He expressed particular constitutional concern about Section 214 of the bill.[72] By referring to the President's constitutional authority to 'speak for the Nation in international affairs', he implicitly, if not explicitly, relied on *Curtiss-Wright* dicta, much of it erroneous.

According to Bush, Section 214 would 'impermissibly interfere with the President's constitutional authority to formulate the position of the United States'. However, the process of creating public policy, in both internal and external affairs, is a constitutional duty assigned to both of the elected branches. In his signing statement, Bush asserted that Section 214 interfered with the President's authority to 'determine the terms on which recognition is given to foreign states', suggesting that the recognition power is vested solely in the President under Article II of the Constitution. Scholars have pointed out that there is no evidence that the Framers placed the recognition power in the President and 'certainly not a power that is plenary in nature'.[73] Instead, Congress has also exercised the recognition power and Presidents have acquiesced in that legislative judgment. Executive recognition decisions 'are not exclusive but are subject to laws enacted by Congress'.[74] Those issues were explored in a number of federal cases from 2006 to 2012.[75]

In a decision issued on July 23, 2013, the D.C. Circuit concluded that the President 'exclusively holds the constitutional power to determine whether to recognize a foreign government' and that Section 214(d) of the 2002 statute 'impermissibly intrudes on the President's recognition power and is therefore unconstitutional'.[76] In seeking legal and historical precedents, the court turned to Supreme Court decisions, relying heavily on the sole-organ doctrine in the *Curtiss-Wright* case. The D.C. Circuit said the Supreme Court in that case 'echoed' the words of Congressman John Marshall by describing the President as the 'sole organ of the nation in its external relations, and its sole representative with foreign nations'.[77] The court echoed the words of John Marshall but not his meaning. The D.C. Circuit demonstrated no understanding that the sole-organ doctrine was not merely dicta but *erroneous* dicta. The court said that 'carefully considered' language of the Supreme Court, 'even if technically dictum, generally must be treated as authoritative'.[78] Nothing in *Curtiss-Wright* about the sole-organ doctrine was carefully considered. It wholly distorted what Marshall said.

This decision by the D.C. Circuit about the sole-organ doctrine prompted me to file an amicus brief with the Supreme Court on July 17, 2014. The summary to the brief explained that the purpose of John Marshall's speech in 1800 was to defend President Adams for carrying out a treaty provision and that nothing in the speech promoted independent and exclusive presidential authority in external affairs.[79] I pointed out that scholars had regularly identified defects in the dicta that Justice Sutherland had added to *Curtiss-Wright* 'but the Supreme Court has yet to correct his errors. It is time to do so'.[80] Erroneous dicta in *Curtiss-Wright* 'have misguided federal courts, the Justice Department, Congress, some scholarly studies, and the general public'.[81]

While the Supreme Court is in session, the *National Law Journal* runs a column called 'Brief of the Week', selecting a particular brief out of the thousands filed each year. On November 3, 2014, it selected my brief in *Zivotofsky*. The column carried a provocative but accurate title: 'Can the Supreme Court Correct Erroneous Dicta?'[82] On June 8, 2015, the Supreme Court reviewed the brief submitted by Secretary of State John Kerry, who urged the Court to define executive power over foreign affairs in broad terms, relying on *Curtiss-Wright* language that described the President as 'the sole organ of the federal government in the field of international relations'.[83] In response, the Court said it 'declines to acknowledge that unbounded power', stating that *Curtiss-Wright* 'does not extend so far as the Secretary suggests'.[84]

In its brief rejection of Kerry's position, the Court never clarified how the statutory issue at question had anything to do with the President's recognition power. Moreover, it did not acknowledge that when the D.C. Circuit upheld the administration it relied five times on the erroneous sole-organ dicta in *Curtiss-Wright*. Readers would not understand the legal significance of the sole-organ doctrine in this case. Also, the Court did not explain at all how Justice Sutherland flagrantly misinterpreted John Marshall's speech.

70 For additional studies on how the legislative veto continued after *Chadha*, see Daniel Paul Franklin, 'Why the Legislative Veto Isn't Dead' (1986) 16 Pres. Stud. Q. 491; Louis Fisher, 'The Legislative Veto: Invalidated, It Survives' (1993) 56 Law & Contemporary Prob. 273; Darren A. Wheeler, 'Implementing INS v. Chadha: Communication Breakdown?' (2006) 52 Wayne L. Rev. 1185; Michael J. Berry, *The Modern Legislative Veto: Macropolitical Conflict and the Legacy of* Chadha (University of Michigan Press 2016); Louis Fisher, *Supreme Court Expansion of Presidential Power: Unconstitutional Leanings* (University Press of Kansas 2017) 182-98.

71 116 Stat. 1366, sec. 214(d) (2002).

72 Public Papers of the President, 2002, II, 1697-99.

73 Robert J. Reinstein, 'Recognition: A Case Study on the Original Understanding of Executive Power' (2011) 45 U. Rich. L. Rev. 801, 802.

74 Robert J. Reinstein, 'Is the President's Recognition Power Exclusive?' (2013) 86 Temp. L. Rev. 1, 60.

75 Fisher (n 15) 112.

76 Zivotofsky v. Secretary of State, 725 F.3d 197, 220 (D.C. Cir. 2013).

77 ibid 211.

78 ibid 212, citing Overby v. Nat'l Ass'n of Letter Carriers, 595 F.3d 1290, 1295 (D.C. Cir. 2010).

79 Brief Amicus Curiae of Louis Fisher in Support of Petitioner, Zivotofsky v. Kerry, No. 13-628, U.S. Supreme Court, July 17, 2014, 2 <www.loufisher.org/docs/pip/Zivotofsky.pdf> accessed 6 June 2022.

80 ibid 2-3

81 ibid 35.

82 Jamie Schuman, 'Brief of the Week: Can the Supreme Court Correct Erroneous Dicta?' (2014) Nat'l L. J., Nov. 3 <www.loufisher.org/docs/pip/fisherbrief.pdf> accessed 6 June 2020.

83 Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S.Ct. 2076, 2089 (2015).

84 ibid.

Why ignore such basic and important questions? Was it considered inappropriate to point an accusing finger at Justice Sutherland and how he and his colleagues failed to properly understand Marshall's speech? Would that explanation discredit the Supreme Court as an institution capable of constitutional analysis? A frank discussion of Sutherland's error would have properly alerted the D.C. Circuit and other courts to take special care when relying on dicta, particularly when the sole-organ doctrine had been repudiated by scholars for more than seven decades.

Furthermore, the Court left in place Sutherland's erroneous dicta about the President possessing sole power to negotiate treaties. It even added its blessing to that misconception, stating that the President 'has the sole power to negotiate treaties, see *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 57 S.Ct. 216, 81 L.Ed. 255 (1936)'.[85] Not only can the Justice Department, reporters, and others continue to cite this erroneous dicta from *Curtiss-Wright* but they can refer to the Court's fresh endorsement of a misconception.

The Court failed to cite scholarly articles from 1938 to the present time that regularly attacked *Curtiss-Wright* for its errors about presidential power. The Court did cite a fine law review article by Michael Glennon on *Curtiss-Wright* published in 1988. However, it failed to mention what Glennon said about that case. In an extensive critique, he detailed the many errors and serious misconceptions, calling the decision an 'extravagant scheme concocted by Justice George Sutherland'.[86] He proceeded to describe Sutherland's opinion as 'a muddled law review article wedged with considerable difficulty between the pages of United States Reports'.[87]

Having rejected the sole-organ doctrine from *Curtiss-Wright*, the Court proceeded to create a substitute that promotes independent presidential power in external affairs. It began by stating that the recognition of foreign nations is a topic on which the federal government must 'speak . . . with one voice' and that voice 'must be the President's'.[88] According to the Court, between the two branches 'only the Executive has the characteristic of unity at all times'.[89] Obviously that is an abstraction that has little to do with the record of Presidents. Various administrations regularly display inconsistency, conflict, disorder, and confusion. That is evident not only by studying particular Presidents but by reading memoirs published by top officials who highlight the infighting and disagreements within an administration, including in foreign affairs.

To the quality of unity the Court identified four other qualities of the President: decision, activity, secrecy, and dispatch. It borrowed those four qualities from Alexander Hamilton's Federalist No. 70.[90] On what grounds would the Court assume that unity plus those four qualities are inherently positive, justifying support for broad presidential power in external affairs? The quality of decision, activity, secrecy, and dispatch can certainly have negative consequences. One need only recall presidential initiatives from 1950 forward: Truman allowing U.S. troops in Korea to travel northward, provoking the Chinese to introduce their military forces in large numbers and resulting heavy casualties on both sides; Johnson's decision to escalate the war in Vietnam; Nixon involved with Watergate and his eventual resignation; Reagan's involvement in Iran-Contra that led to the prosecution of many officials and nearly to his impeachment; Bush in 2003 using military force against Iraq on the basis of six claims that Saddam Hussein possessed nuclear weapons, with all six claims found to be entirely empty; and Obama ordering military action against Libya in 2011, leaving behind a country broken legally, economically, and politically.[91]

In an article published in 2015, Jack Goldsmith evaluated the Court's decision in *Zivotofsky*, noting that until the Court released its opinion on Section 214(d) executive branch lawyers had to rely on 'shards of judicial dicta, in addition to executive branch precedents and practices, in assessing the validity of foreign relations statutes thought to intrude on executive power'. But now these lawyers 'have a Supreme Court precedent with broad arguments for presidential exclusivity in a case that holds that the President can ignore a foreign relations statute'.[92] Ironically, although the Court presumably dismissed the *Curtiss-Wright* sole-organ doctrine, it created a new model that strongly endorses independent presidential power in external affairs.

Goldsmith points out that although the Court appeared to 'distance itself' from some parts of *Curtiss-Wright* by making statements about 'presidential exclusivity' and judicial 'dicta', it would be wrong to assume that *Zivotofsky* 'expressly repudiates the *Curtiss-Wright* dicta'.[93] In various parts of the opinion, the Court affirmed '*Curtiss-Wright*'s functional approach to exclusive presidential power'.[94] Those who favor independent presidential power in external affairs will seek to exploit the Court's 'untidy reasoning'.[95]

In another analysis of *Zivotofsky*, Esam Ibrahim points out that executive branch lawyers sought to exploit various dicta in *Curtiss-Wright*, including the sole-organ doctrine. Yet in supposedly raising questions about those dicta, the Court now added other dicta that have the potential for promoting independent presidential power in external affairs, such as attributing to the President such qualities as unity, decision, activity, secrecy, and dispatch. As Ibrahim notes. the dicta in *Zivotofsky* 'may be even stronger precedent than *Curtiss-Wright* ever was'.[96] The Court's ruling in 2015 is 'probably going to replace *Curtiss-Wright* as support for broad inherent executive power' in opinions issued by the Office of Legal Counsel.[97]

In an article published in *Constitutional Commentary* in 2016, I discuss how erroneous dicta in both *Curtiss-Wright* and *Zivotofsky* have broadened presidential power in external affairs.[98] I begin by explaining how careless and mistaken judicial dicta can undermine constitutional government. I then focus on how *Curtiss-Wright* involved legislative, not presidential, power, and how scholars who studied *Curtiss-Wright* thoroughly repudiated Justice Sutherland for his 'careless and erroneous understanding of the process of treaty

85 ibid 2086.
86 Michael J. Glennon, 'Two Views of Presidential Foreign Affairs Power: *Little v. Barreme* or *Curtiss-Wright*?' (1988) 13 Yale J. Int'l L. 5, 11.
87 ibid 13.
88 Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S.Ct. at 2086.
89 ibid.
90 ibid.
91 Louis Fisher, *Presidential War Power* (3rd edn, University Press of Kansas 2013) 100-03, 132-37, 209-32, 238-47.
92 Jack Goldsmith, '*Zivotofsky II* as Precedent in the Executive Branch' (2015) 129 Harv. L. Rev. 112, 114.
93 ibid 129.
94 ibid 130.
95 ibid 146.
96 Esam Ibrahim, 'The Dangers of Zivotofsky II: A Blueprint for Category III Action in National Security and War Powers' (2017) 11 Harv. L. & Policy Rev. 585, 592.
97 ibid 593.
98 Louis Fisher, 'The Staying Power of Erroneous Dicta: From *Curtiss-Wright* to *Zivotofsky*' (2016) 31 Const. Commentary 149.

negotiation'.[99] In a section on how the executive branch relies heavily on dicta in *Curtiss-Wright* to expand presidential power, I point out how Attorney General Robert Jackson in a book published in 1941 described *Curtiss-Wright* as 'a Christmas present to the President'.[100] Although the Supreme Court in *Zivotofsky* seemed to discard the sole-organ doctrine, it allowed 'other erroneous dicta' in *Curtiss-Wright* to continue.[101] I conclude with this observation: 'Because the majority opinion in *Zivotofsky* is in many areas carelessly drafted and analyzed, it will add unnecessary and unwanted confusion about the role of the two elected branches in foreign affairs, most likely advancing presidential power over that of Congress'.[102]

Conclusions

Scholars, attorneys, and reporters continue to endorse the doctrine of judicial finality, insisting that on constitutional matters the Supreme Court must have the last word. In a book published in 2012, Jeffrey Toobin concluded that a Supreme Court decision 'interpreting the Constitution can be overturned only by a new decision or a constitutional amendment'.[103] Reporters for major newspapers often promote judicial finality. Adam Liptak, writing for the *New York Times* on August 21, 2012, concluded that 'only a constitutional amendment can change things after the justices have acted in a constitutional case'.[104] Offering his views in the *Washington Post* on October 25, 2014, Robert Barnes wrote that *Marbury v. Madison* 'established the court as the final word on the Constitution'.[105]

The examples offered in this article promote a much broader dialogue in shaping constitutional values. The Court's decision in *McCulloch v. Maryland*, upholding the U.S. Bank, was later reversed by President Jackson's veto of a bill attempting to restore the U.S. Bank. The 'last word' on this constitutional matter came when Congress failed to override his veto. The fact that the Supreme Court in 1918 and 1922 twice struck down child labor legislation passed by Congress did not stop Congress from trying again in 1938. On that occasion a unanimous Court upheld the statute. What those cases underscore is not judicial finality but rather a broad public dialogue on constitutional issues. That view was underscored by Alexander Bickel's book in 1962, stating that the process of developing constitutional values in a democratic society 'is evolved conversationally not perfected unilaterally'.[106]

During her appearance before the Senate Judiciary Committee on July 20, 1993, seeking confirmation as a Justice of the Supreme Court, Ruth Bader Ginsburg reinforced that point: 'Justices do not guard constitutional rights alone. Courts share that profound responsibility with Congress, the President, the states, and the people'.[107] A clear example of that position came in 2007 when the Supreme Court decided the Lilly Ledbetter case, blocking her right to seek justice in the courts. As explained earlier in this article, Ginsburg's dissent urged Congress to pass legislation 'to correct this Court's parsimonious reading' of sex discrimination policy. Within a few years Congress did precisely that.

The doctrine of judicial finality is undermined by other examples in this article, including the Court's record on the erroneous 'sole organ' doctrine in *Curtiss-Wright* and the Japanese-American cases. The record demonstrates that all three branches of government, at both the federal and state level, are capable of serious error. What is needed is a broad dialogue that continues to press for improvements and better understanding. The Supreme Court is not the Constitution. To treat the two as equivalent is to abandon individual responsibility, the system of checks and balances, and America's quest for self-government. Supreme Court opinions are entitled to respect, not adoration. Just because the Court issues its judgment does not mean we should suspend ours. The record makes clear how often the Supreme Court commits errors.[108]

J. Harvie Wilkinson III, a federal judge on the Fourth Circuit, published a book in 2012 that analyzes various doctrines used to interpret the Constitution: Originalism, Textualism, Minimalism, and the Living Constitution. He warned that these 'cosmic' theories produced a harmful effect by encouraging judicial activism, 'taking us down the road to judicial hegemony where the self-governance at the heart of our political order cannot thrive'.[109] The 'great casualty' of those theories 'has been our inalienable right of self-governance', encouraging an increase in 'judicial misadventures' in the years to come.[110] The Constitution, he stressed, 'is not the courts' exclusive property. It belongs in fact to all three branches and ultimately to the people themselves'.[111] He concluded that courts 'are less adept than legislatures at assessing the precise content of society's values'.[112]

99 ibid 186.
100 ibid 201.
101 ibid 218.
102 ibid 219.
103 Jeffrey Toobin, *The Oath: The Obama White House and the Supreme Court* (Random House International 2012) 194.
104 Adam Liptak, 'In Congress's Paralysis, A Mightier Supreme Court' *New York Times* (New York, 21 August 2012) A10.
105 Robert Barnes, 'Addressing the Supreme Court with Fun' *Washington Post* (Washington, 25 October 2014) A1.
106 Bickel (n 31) 244.
107 Ginsburg (n 36) 183.
108 Louis Fisher, 'Correcting Judicial Errors: Lessons From History' (2020) 72 Maine L. Rev. 1.
109 J. Harvie Wilkinson III, *Cosmic Constitutional Theory: Why Americans Are Losing Their Inalienable Right to Self-Governance* (Oxford University Press 2012) 4.
110 ibid 9.
111 ibid 22.
112 ibid.