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PREFACE

This book's title may puzzle some readers. They might ask: How could a Congress that functions by majority vote ever reliably protect individual and minority rights? That is certainly a fair question, yet in this book I will provide ample evidence that Congress has performed well at protecting rights for more than two centuries—even in recent decades when Congress is routinely described as dysfunctional and “broken.”¹ Does the legislative record include failures? No doubt it does, but the executive and judicial branches have had their share of failures also, often quite major ones. As for Congress voting by majority, that is also true of appellate courts and the Supreme Court. Nevertheless, scholars and the media continue to describe the Supreme Court as “guardian” of individual rights even though its outcomes are also determined by majority vote.

The purpose of this book is to analyze Congress as part of a system of government dedicated to constitutional limits and the protection of individual rights. For some reason, the general public and scholarly studies routinely attribute to the President and the Supreme Court unique and often imaginary institutional qualities that enable them to protect rights. Those studies pay little or no attention to what Congress has accomplished. Moreover, praise for presidential and judicial action is based largely on assumptions and assertions, not on the record. When that history is examined with care, Congress emerges as a remarkably successful institution in meeting the Framers' expectation that government should exist not merely to exercise power but also to protect rights.

Congress, as with other branches during times of perceived dangers to national security, has failed to protect individual rights. This book analyzes those periods in detail. In recent decades, Congress has fallen short in fulfilling its institutional and constitutional duties. The final chapter explores what Congress could do to strengthen itself and restore a capacity to carry out its essential role in self-government. For those discouraged by the recent conduct of Congress, this book can highlight periods when Congress functioned well and provide a constructive model for the future.

1. Thomas E. Mann & Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (2008 ed.).

In the chapters that follow, readers will see Congress repeatedly responding in a positive manner to protect the rights of blacks, women, children, religious minorities, and Native Americans. The other branches were involved as well, but on many occasions Congress took the lead in bringing assistance to not only minorities but even minorities within minorities. From 1789 up to World War II, it is difficult to find any federal court decision that upheld and championed individual and minority rights. Blacks, women, and minorities found it necessary to turn to Congress and state legislative bodies for support. There remains (as always) the need for an open political process that can respond to constitutional rights. Congress fills that need. The judicial process is far too closed, limited, and unreliable.

During the court-packing battle of 1937, the Senate Judiciary Committee praised federal courts as guardians of individual and minority rights: "Minority political groups, no less than religious and racial groups, have never failed, when forced to appeal to the Supreme Court of the United States, to find in its opinions the reassurance and protection of their constitutional rights."² Given the judicial record at that time, it would be more accurate to replace "never failed" with "rarely succeeded."

In 1937, an article by Henry W. Edgerton, who later became a federal judge, drilled a hole through the assertions offered by the Senate Judiciary Committee. After studying Supreme Court opinions from 1789 to the 1930s, he concluded that judicial rulings "give small support to the theory that Congress had attacked, and judicial supremacy defended, 'the citizen's liberty.'" Far from defending individual and minority rights, the courts "sided uniformly with the interests of government and corporations."³ In a 1943 study, historian Henry Steele Commager reached a similar position. The Court had "intervened again and again to defeat congressional efforts to free slaves, guarantee civil rights to Negroes, to protect workingmen, outlaw child labor, assist hard-pressed farmers, and to democratize the tax system."⁴

The capacity of Congress to protect individual and minority rights has a long and distinguished history, both in taking the initiative to safeguard rights and in passing remedial legislation to correct errors in the courts. Little in the record over the past two centuries offers convincing evidence that courts are particularly gifted or reliable in coming to the defense of individual rights. That duty necessarily falls on all three branches, the fifty states, and the general public.

My approach to this subject draws from working for Congress for forty

2. S. Rept. No. 711, 75th Cong., 1st Sess. 20 (1937).

3. Henry W. Edgerton, "The Incidence of Judicial Control over Congress," 22 *Corn. L. Q.* 299 (1937).

4. Henry Steele Commager, *Majority Rule and Minority Rights* 55 (1943).

years, first as Senior Specialist in Separation of Powers with the Congressional Research Service and later as Specialist in Constitutional Law with the Law Library of Congress. It would be understandable for a reader to wonder how those four decades with Congress might have biased my perspective. I can only say that over that period I never hesitated in my dealings with lawmakers and their staff to push against legislative actions that I regarded as an invasion of executive and judicial powers. I did that on a regular basis, not only in private meetings and reports but in public testimony and books and articles.

The people I dealt with in the executive and judicial branches appreciated that my purpose was not to defend Congress alone but the larger constitutional and political system. That career is explained in a book I published after retiring from Congress in August 2010, *Defending Congress and the Constitution* (2011). Having worked closely with Congress, I fully appreciate both its promise and its pitfalls. In the end, I remain committed to a system of self-government and checks and balances, not to presidential or judicial supremacy.

I very much appreciate meeting with Chuck Myers of the University Press of Kansas to discuss my plans for this project and receive his advice and guidance on individual chapters. Jasmine Farrier and an anonymous reviewer for the University Press of Kansas provided me with detailed comments that proved of great value. Joel Goldstein of Saint Louis University School of Law invited me to send the first two chapters to his students for their comments. For an hour, over Skype, we discussed the major issues. I am indebted to many friends and colleagues who read individual chapters and provided excellent evaluations: Reb Brownell, Henry Cohen, Mike Crespin, Royce Crocker, Jeff Crouch, John Denvir, John Dinan, Chris Edelson, Jenny Elsea, Bruce Fein, Joel Goldstein, Katy Harriger, Henry Hogue, Nancy Kassop, Mike Koempel, Kevin Kosar, Bob Mutch, Walter Oleszek, Ron Peters, Dick Pious, Mort Rosenberg, Mark Rozell, Mark Rush, Mitch Sollenberger, Bob Spitzer, Jerry Waltman, and Don Wolfensberger. Many thanks to Kathleen Kageff for excellent copyediting and thoughtful suggestions.

The book is dedicated to the Library of Congress because it was my home for four decades, allowing me to learn firsthand from the daily process of interacting with experts in all three branches. During my ten years in New York City, I discovered that the speakers I most admired were not those who merely published or litigated. They were those actively involved in their day jobs in applying professional knowledge. They were practitioners, not merely experts. Perhaps I liked that because my undergraduate degree was in chemistry and I did graduate work in physical chemistry. I was used to trying things out in the laboratory. The Library of Congress became my laboratory, where I worked closely with lawmakers, committees, and professional staff. During my five years of retirement I continue to reach out and learn from those contacts.



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NOTE ON CITATIONS

All court citations refer to published volumes whenever available: *United States Reports* (U.S.) for Supreme Court decisions, *Federal Reporter* (F.2d or F.3d) for appellate decisions, and *Federal Supplement* (F. Supp. or F. Supp. 2d) for federal district court decisions. There are also citations to *Opinions of the Attorney General* (Op. Att’y Gen.) and *Opinions of the Office of Legal Counsel* (Op. O.L.C.) in the Justice Department. Several standard reference works are abbreviated in the footnotes using the following system:

- | | |
|-----------------|---|
| Elliot | The Debates in the Several State Conventions on the Adoption of the Federal Constitution (5 vols., Jonathan Elliot, ed., Washington, D.C., 1836–1845). |
| Farrand | The Records of the Federal Convention of 1787 (4 vols., Max Farrand, ed., New Haven, Conn.: Yale University Press, 1937). |
| The Federalist | The Federalist, Benjamin F. Wright, ed. (New York: Metro Books, 2002). |
| Landmark Briefs | Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law (Philip B. Kurland & Gerhard Casper, eds., Washington, D.C.: University Publications of America, 1978–). |
| Richardson | A Compilation of the Messages and Papers of the Presidents (20 vols., James D. Richardson, ed., New York: Bureau of National Literature, 1897–1925). |
| Stokes | Anson Phelps Stokes, Church and State in the United States, 3 vols. (New York: Harper & Bros., 1950). |
| Swindler | William F. Swindler, ed., Sources and Documents of United States Constitutions, 10 vols. (Dobbs Ferry, N.Y.: Oceana Publications, 1973–1979). |
| Thorpe | Francis Newton Thorpe, ed., The Federal and State Constitutions, Colonial Charters, and Other Organic Laws, 7 vols. (Washington, D.C.: Government Printing Office, 1909). |



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CONGRESS



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1

JUDGING THE THREE BRANCHES

The Framers created a constitutional system that depends heavily on checks and balances to avoid the abuse of political power concentrated in one branch. The purpose is to protect individual rights and the aspiration for self-government. That principle largely governed the federal government for the first century and a half. In the years following World War II, the American political and legal culture changed fundamentally to favor a strong President empowered to initiate national security and domestic policy on his own.

Over that same period, the Supreme Court emerged with the reputation of providing the “final word” on the meaning of the Constitution. Both developments would have astonished the Framers. Without a strong and independent Congress, we could not speak of democracy in America. Our political system would operate with two elected officers in the executive branch and none in the judiciary, a form of government best described as elitist.

The pronounced biases that guide contemporary debate on the three branches of the federal government are well displayed in symposia published by the *Boston University Law Review* from 2006 to 2009. The first two titles were neutral in tone: “The Role of the Judge in the Twentieth-First Century” (December 2006) and “The Role of the President in the Twenty-First Century” (April 2008). The third, published in April 2009, carries this weighted theme: “Congress: The Most Disparaged Branch.”¹ In one of the articles, David Mayhew put the matter in proper context: “Congress is an unlovely institution, but it has always been unlovely.”² He recalled what Alexis de Tocqueville said in 1835: “When one enters the House of Representatives at Washington, one is struck by the vulgar demeanor of that assembly.”³ Mayhew included the famous observation by Mark Twain in 1897: “Suppose you were an idiot. And suppose you were a member of Congress. But I repeat myself.”⁴

In a democracy, it is appropriate to poke fun at all three branches, but such comments are rarely aimed at the President and the Supreme Court. When Mayhew generalizes about the executive and judicial branches, he is

1. 89 B.U. L. Rev. 331 (2009).

2. David R. Mayhew, “Is Congress ‘The Broken Branch’?” *id.* at 357.

3. *Id.*

4. *Id.* at 358.

complimentary. The President offers “speed, coordination, and secrecy,” while the judiciary “traffics in coherence, consistency, and justice.”⁵ The downsides of presidential speed and secrecy are not explored, nor is there any analysis of the incoherence, inconsistency, and injustice that appear in decisions handed down by the Supreme Court. Mayhew observes: “Crisp, clear, decisive, theoretically elegant action is not ordinarily the congressional way.”⁶ That is true, but when Congress does act crisply, clearly, and decisively, as when it promptly passed the Tonkin Gulf Resolution in August 1964 to authorize war in Vietnam, with only two dissenting votes in the Senate, the resulting national security policy can be a disaster.⁷ As a deliberative body, Congress is not supposed to automatically and quickly salute presidential initiatives and assertions. That is not good for Congress or the country. Mayhew ends with a valuable insight: “Congress is not all that defective an institution once its role is properly considered.”⁸ This book is written to provide that essential consideration.

Congress

In discussing the role of Congress in protecting individual rights, it is important to recognize that entirely different methods are used to evaluate the three branches. Congress is criticized more than the other branches in part because it works largely in the open, particularly in the television age when the public can watch floor debates and committee hearings. Contentious disputes within Congress remain on full display. That is natural, healthy, and inevitable for a legislative body. The open process within Congress makes for better decisions because of public input and scrutiny from private citizens and experts who are called to testify before committee hearings, giving all sides an opportunity to make their case.

There is far less “groupthink” in Congress than in the executive branch, where advisers tend to anticipate what the President wants to hear and to speak accordingly as part of the drive toward consensus. The result of that executive behavior has led to numerous domestic and foreign policy failures ranging from the Korean War and Carter’s energy initiative to Clinton’s health plan, the war against Iraq in 2003, and military action against Libya in 2011.⁹

5. *Id.*

6. *Id.* at 359.

7. Louis Fisher, *Presidential War Power* 127–44 (3d ed., 2013).

8. Mayhew, “Is Congress ‘The Broken Branch?’,” at 369.

9. Irving L. Janis, *Groupthink* (2d ed., 1982). With regard to Korea, Iraq, and Libya, see Fisher, *Presidential War Power*, at 80–103, 209–32, 238–47 (2013). The Carter-Clinton policies are analyzed by Richard M. Pious, *Why Presidents Fail* (2008).

Interestingly, Congress pays a cost for its open process. Studies suggest that the general public is “generally dissatisfied with the core tendencies of the democratic legislative process: deliberation, debate, compromise, and disagreement.”¹⁰ Yet those qualities are unavoidable for a legislative body composed of 535 lawmakers, two branches, two parties, and a variety of committees and subcommittees. Donald Wolfensberger, after working for Congress from 1969 to 1997 in high-level staff positions, published a perceptive book in 2000 regarding the capacity of Congress to deliberate on matters of public policy. In examining the last two centuries, he concluded Congress “has adapted and drawn closer to the people while expanding individual rights, liberties, and opportunities. . . . Deliberative democracy has been on continuous trial from the beginning. And, over the long haul, members of Congress have acquitted themselves honorably.”¹¹

Deliberation, debate, compromise, and disagreement occur in the executive and judicial branches, but they are not as visible and on public display to the same extent as in Congress. White House, executive branch, and judicial branch activities are far more closed. We don’t watch the President discuss public policy with Cabinet officials, debate national security issues in the Situation Room at the White House, or participate in meetings with lawmakers and lobbyists. As noted in one study: “Nasty, visible disputes within the executive branch are fairly rare, and interest-group activity there is seldom reported.”¹² The President has a White House Press Secretary who attempts to present coherent reasons to justify executive actions. No such person speaks for Congress.

The Supreme Court listens to oral argument in public, but few people gain access to watch the proceedings. Proposals to televise oral arguments at the Supreme Court have thus far failed. A transcript and oral recording of the argument are made public, but no cameras are permitted in the courtroom. When Justices discuss pending cases in conference, that process remains closed. Perhaps decades later, in the papers of retired Justices, we may have the opportunity to read and interpret notes taken in conference.

Because of these marked differences in observing the three branches, operations by the President and the Supreme Court generally look more coherent, reasonable, and impressive than for Congress. In that sense, we use

10. Jessica C. Gerrity, “Understanding Congressional Approval: Public Opinion from 1974 to 2014,” in *The Evolving Congress*, Senate Committee on Rules and Administration, S. Prt. 113-30, 113th Cong., 2d Sess. 195 (2014).

11. Donald R. Wolfensberger, *Congress and the People: Deliberative Democracy on Trial* 283 (2000).

12. John R. Hibbing & Elizabeth Theiss-Morse, *Congress as Public Enemy: Public Attitudes toward American Political Institutions* 61 (1995).

two entirely different methods to evaluate the three branches: realistic for Congress, idealistic for Presidents and the Supreme Court. That bias and illusion grew more pronounced in the years following World War II, in large part because of the manner in which scholars began to describe the President and the judiciary. The result: severe misconceptions about the way the three branches govern and protect individual rights.

Evaluations of Congress are typically down-to-earth. See it for what it is. No need to invent imaginary properties that are complimentary and admiring. Praise and flattery are extremely rare. More likely are comments from humorists like Will Rogers: "This country has come to feel the same when Congress is in session as when the baby gets hold of a hammer." Generalizations about the President and the Supreme Court lie on an entirely different plane. Remarks are elevated, if not celestial, expressing broad acclaim.

Members of Congress take time from their official duties to regularly deride their own institution. Consider these titles of books written by lawmakers: *Congress: The Sapless Branch*, by Senator Joseph S. Clark (1964), *House Out of Order*, by Representative Richard Bolling (1965), and *The Futile System: How to Unchain Congress and Make the System Work Again*, by Representative John J. Rhodes (1976). On occasion, Presidents and federal judges will concede misjudgments in their branches, but not in a book that wholly attacks their institution.

Professors who teach courses on Congress typically concentrate on legislative procedures, parliamentary precedents, congressional leaders and parties, committees and subcommittees, campaigns and elections, lobbyists and interest groups, the President and the judiciary, and legislative oversight of executive agencies. Given the complexity and detail of those subjects, it would be highly unusual for a professor to devote any time to the contributions of Congress in protecting individual and minority rights. The focus is on process, not outcomes, and thus overlooks the substantial contributions of Congress in protecting individual rights. Students are likely to leave college without any appreciation for that legislative record.¹³

Richard Fenno has published insightful studies of Congress, relying heavily on interviews with lawmakers and their staff. Often he traveled with House members to their districts to observe their contacts with constituents. His research method "was largely one of soaking and poking—or just hanging around."¹⁴ Through these visits he could appreciate that the Supreme Court "does not even claim to be representative," and that when a President claims

13. For an excellent analysis by someone who teaches Congress and highlights the capacity of state legislatures to protect individual rights, see John J. Dinan, *Keeping the People's Liberties: Legislators, Citizens, and Judges as Guardians of Rights* (1998).

14. Richard F. Fenno, Jr., *Home Style: House Members in Their Districts* (1978).

to be “president of all the people,” it is “just that—a claim, not a fact.” Congress, not the President, “best represents the diversity of the country; and members of Congress, not the president, are in closest touch with the people who live in the country.”¹⁵

Unless they are rich and powerful, citizens have little access to the executive and judicial branches. They do with members of Congress and their staff, not only in offices on Capitol Hill but in field offices within states and congressional districts, with personal visits, phone calls, and e-mails. Members return home to meet with constituents personally and in town hall meetings. Self-government means more than voting in elections. Citizens need to be connected to Congress throughout the year to receive assistance on personal matters and give their thoughts on economic, social, and political issues.

The President

In the years prior to World War II, social scientists and the public made little effort to lionize the American President and manufacture heroic properties. The President was not placed on a pedestal and clothed with wondrous qualities, acting instinctively for the “national interest” and surrounded by advisers with unrivaled experience and unerring political judgment. On occasion, a glowing spotlight might be placed on a particular President, especially George Washington and Abraham Lincoln. Although revered now, the praise of Lincoln came after his assassination. Washington may have been the only President with an aura during his time in office.

Beginning with World War II and continuing into the Cold War and the current war against terrorism, many social scientists have increasingly singled out the President as best equipped to protect the nation, not only from foreign threats but in confronting and settling domestic disputes. On a regular basis these expectations and hopes are dashed by Presidents who fall short of what they promised and what voters hoped for. This cycle of high expectations followed by public dismay continues on a regular course from one administration to the next.

In the 1950s, such scholars as Clinton Rossiter, Richard Neustadt, James McGregor Burns, and Arthur Schlesinger championed inflated and wholly unrealistic models of presidential power. In previous periods and the years that followed, the executive branch established a clear pattern of operating with faulty facts, relying on mistaken judgments, and making misleading statements to Congress and the public. The result: costly wars and botched

15. *Id.* at 244.

domestic initiatives, demonstrating on numerous occasions a lack of executive branch capacity to formulate and implement effective policies.¹⁶

Rossiter's *The American Presidency*, published in 1956 and followed by a paperback edition in 1960, promoted an idealized image of executive power. Insisting he was not creating something new, he borrowed this 1861 praise from an Englishman, John Bright, about the U.S. President: "I think the whole world offers no finer spectacle than this; it offers no higher dignity; and there is no greater object of ambition on the political stage on which men are permitted to move." In Bright's estimate, after referring to various hereditary rulers, "there is nothing more worthy of reverence and obedience, and nothing more sacred, than the authority of the freely chosen magistrate of a great and free people; and if there be on earth and amongst men any right divine to govern, surely it rests with a ruler so chosen and so appointed."¹⁷ It is interesting to see such words as reverence, sacred, and divine. No such language would be used to describe a legislative body.

Rossiter defined the purpose of his book: "to confirm Bright's splendid judgment by presenting the American Presidency as what I honestly believe it to be: one of the few truly successful institutions created by men in their endless quest for the blessings of free government."¹⁸ Conceding that the office of the presidency had "its fair share of warts," he wanted "to make clear at the outset my own feeling of veneration, if not exactly reverence, for the authority and dignity of the President."¹⁹ Veneration and reverence? Those words typically express respect, awe, and devotion, describing an office as holy and sacrosanct. Nothing in the American presidency from 1789 to 1960 merited that level of flattery and idolatry. Those who write on Congress would not express themselves in that manner. What is it about the President that provokes such praise? Has the office retained some of the divine rule earlier attributed to monarchs, who could not only do no wrong but not even think wrong?²⁰

Other presidential scholars trumpeted the need for bold and unchecked presidential leadership. Arthur M. Schlesinger, Jr., ironically credited with exposing "the imperial presidency" (a phrase he also used as the title of his 1973 book), earlier played a major role in manufacturing a larger-than-life U.S. President. His book *The Age of Jackson* (1945) looked to Andrew Jackson as a model for preserving democracy under the 1940s threat of world fascism. He praised Theodore Roosevelt for "usher[ing] in a period of energetic

16. Louis Fisher, "Teaching the Presidency: Idealizing a Constitutional Office," 45 *PS: Political Science & Politics* 17 (2012); <http://www.loufisher.org/docs/ci/teach.pdf>.

17. Clinton Rossiter, *The American Presidency* 15 (1960).

18. *Id.*

19. *Id.* at 15–16.

20. See the first section in chapter 2.

government” and paid tribute to Woodrow Wilson for understanding “the need for executive vigor and government action.”²¹ His three-volume work *The Age of Roosevelt* celebrated activism and leadership by Franklin D. Roosevelt.²² Certainly presidential actions pursued merely to showcase “energy” and “vigor” can damage U.S. interests.

Writing in *The Crisis of Confidence* (1969), Schlesinger explained that the President did not have in internal affairs “the same constitutional authority he has in foreign policy,” and here he cited the Supreme Court’s decision in the 1936 *Curtiss-Wright* case and its reference to the President “as the sole organ of the federal government in the field of international relations.”²³ As a professional historian, Schlesinger should have read John Marshall’s sole-organ speech in 1800 to see if it promoted plenary and exclusive power for the President in the field of external affairs. Clearly it did not. In an amicus brief I filed with the Supreme Court on July 17, 2014, I pointed out what other scholars have said over the years: John Marshall merely argued that President John Adams, in turning over to Great Britain a British citizen charged with murder, was simply exercising extradition authority granted to him by the Jay Treaty.²⁴ On June 8, 2015, in *Zivotofsky v. Kerry*, the Supreme Court finally—after seventy-nine years—discarded the sole-organ doctrine. In adding extraneous dicta to *Curtiss-Wright*, Justice George Sutherland implied that Marshall recognized for the President plenary and exclusive powers in foreign affairs. That is plainly false, as even a cursory examination of Articles I and II of the Constitution would reveal.

Richard Neustadt’s *Presidential Power*, first published in 1960 and reissued as a paperback four years later, has had a profound impact among scholars, students, and the public. The book attracted broad support because it focused on stories, case studies, and the examination of presidential power in practical terms. The downside of Neustadt’s approach, as explained by Ronald Moe, was to jettison institutional, legal, and constitutional values, divorcing presidential studies from the framework of public law previously established by Edward S. Corwin.²⁵

21. Arthur M. Schlesinger, Jr., *The Age of Jackson* (paper ed., 1949; originally published in 1945).

22. Arthur M. Schlesinger, Jr., *The Crisis of the Old Order, 1919–1933* (1957); *The Coming of the New Deal* (1958); *The Politics of Upheaval* (1960).

23. Arthur M. Schlesinger, Jr., *The Crisis of Confidence* 220 (1969).

24. Louis Fisher, Brief *Amicus Curiae* of Louis Fisher in Support of Petitioner, *Zivotofsky v. Kerry*, No. 13-626, In the Supreme Court of the United States, July 17, 2014; <http://www.louisfisher.org/docs/pip/Zivotofsky.pdf>.

25. Ronald C. Moe, “At Risk: The President’s Role as Chief Manager,” in James P. Pfiffner, ed., *The Managerial Presidency* (1999); Ronald C. Moe, “Governance Principles: The Neglected Basis of Federal Management,” in Thomas H. Stanton & Benjamin Ginsberg, eds., *Making Government Manageable* (2004).

It is easy to misread Neustadt. He begins with a modest and attractive theme by defining presidential power as “the power to persuade.”²⁶ Persuasive power “amounts to more than charm or reasoned argument. . . . For the men he would induce to do what he wants done on their own responsibility will need or fear some acts by him on his responsibility.” The formal powers of Congress and the President “are so intertwined that neither will accomplish very much, for very long, without the acquiescence of the other.” In a phrase that seems consistent with the constitutional system of checks and balances, Neustadt refers to political power as “a give-and-take.”²⁷ In probably the most celebrated statement in the book, Neustadt wrote that the Framers did not create a government of separated powers. Instead, they “created a government of separated institutions *sharing* powers.”²⁸

Such remarks offer a reassuring and soft glow of mutual accommodations among the branches, fully consistent with the American system of checks and balances designed to safeguard individual rights. However, those comforting and familiar themes appear early in the book. As the reader proceeds deeper into the study, Neustadt urges Presidents to take power, not give it or share it. Power is to be acquired and concentrated in the presidency and used for *personal* reasons. Neustadt’s favorite President was Franklin D. Roosevelt, and he criticized Dwight D. Eisenhower for failing to seek political power for personal use. “The politics of self-aggrandizement as Roosevelt practiced it affronted Eisenhower’s sense of personal propriety.”²⁹

Of the many case studies in the book, one focuses on the Korean War. Neustadt faults Truman for giving too much latitude to General Douglas MacArthur and discusses the Supreme Court’s *Youngstown* decision in 1952, striking down Truman’s effort to seize steel mills to prosecute the war. At no time, however, did Neustadt inquire whether Truman possessed constitutional or legal authority to go to war against North Korea without coming to Congress to seek its approval. Other than meeting with a few congressional leaders, Truman made no effort to “persuade” Congress to grant him authority to take the country to war against another nation, as all Presidents before Truman felt compelled to do. Truman acted unilaterally. For Neustadt, there was no need for “give-and-take” or “shared power.” It was Truman’s job “to make decisions and to take initiatives.” Among Truman’s private values, “decisiveness was high upon his list.” Truman’s image of the President was “man-in-charge,” and Neustadt wrote for “a man who seeks to maximize his

26. Richard E. Neustadt, *Presidential Power* 23 (1964; originally published in 1960).

27. *Id.* at 43, 45, 47.

28. *Id.* at 42, emphasis in original.

29. *Id.* at 157.

power.”³⁰ Taken logically, that form of government would justify the decisions and actions of any autocrat.

To exercise authority, Neustadt argued that a President needed confidence “that his image of himself in office justify an unremitting search for personal power.”³¹ He measured presidential success by action, vigor, decisiveness, initiative, energy, and personal power. Absent from his analysis were constitutional checks, separation of powers, federalism, sources of authority, and the ends to which power is put. As political scientist John Hart has observed, Neustadt evaluates a President “on the basis of his influence on the outcome, but not on the outcome itself.”³²

When Neustadt reissued his book in 1990 under a different title, he seemed to alter his model of the President after the abuse of executive power during Lyndon Johnson’s Vietnam War and the scandals of Nixon’s Watergate and Reagan’s Iran-Contra. He now wrote in a manner entirely different from the tone of his 1960 and 1964 editions: “To share is to limit; that is the heart of the matter, and everything this book explores stems from it.”³³ Nothing in his earlier editions advanced those basic constitutional values that protect individual rights.

Thomas Cronin has helped puncture imaginary and misleading qualities that other scholars bestowed on the American President. In a paper delivered at the 1970 American Political Science Association Annual Meeting, he objected to romantic and idealized models of the presidency. Entitled “The Textbook Presidency and Political Science,” Cronin faulted scholars for promoting “inflated and unrealistic interpretations of presidential competence and beneficence.” Infatuation with the presidency, Cronin said, necessarily diminished the role of Congress, the Constitution, checks and balances, separation of power, and democratic processes.³⁴

In his book *On the Presidency* (2010), Cronin reviewed the record of fourteen Presidents from 1920 to 2009. He concluded: “Maybe about three were successful. At least half a dozen failed in one way or another.”³⁵ He deleted from the list of successful Presidents those who were forced from office, impeached, rejected when they sought reelection, or decided to step aside rather than face voter rebuke. Three Presidents survived this winnowing process: Franklin D. Roosevelt, Dwight D. Eisenhower, and Ronald Reagan. Despite

30. *Id.* at 166, 171.

31. *Id.* at 172.

32. John Hart, “Presidential Power Revised,” 25 *Political Studies* 48, 56 (1977).

33. Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* x (1990).

34. Thomas E. Cronin, “The Textbook Presidency and Political Science,” 116 *Cong. Rec.* 34914–28 (1970).

35. Thomas Cronin, *On the Presidency: Teacher, Soldier, Shaman*, Pol 2 (2010).

this bleak record, some contemporary scholars continue to attribute to the presidency romantic qualities of integrity, honesty, and competence rarely seen in those who actually sit in the Oval Office. It should be evident that the political skills required to survive primaries and general elections do not automatically translate into sound judgments needed to effectively exercise presidential power.

John Burke and Fred Greenstein compared how Presidents Dwight D. Eisenhower and Lyndon Johnson decided whether to intervene militarily in Vietnam. Eisenhower chose to stay out; Johnson entered and escalated the war. Contrary to those who might view Johnson as the stronger leader, Eisenhower comes across as better equipped through personal judgment and advisers to reach more thoughtful judgments about prospective costs and benefits.³⁶ In a subsequent study, Greenstein examined presidential styles from Franklin D. Roosevelt to Barack Obama. Rather than attempt to generalize about “Presidents,” he found a wide variety of skills in terms of public communication, organizational competence, and programmatic knowledge, as well as a range of self-destructive qualities.³⁷

In 2008, Richard Pious incisively analyzed presidential actions from Eisenhower through George W. Bush to highlight the reasons behind a pattern that led to repeated failings in office. His examples covered national security (Eisenhower and the U-2 flights, Kennedy and the Bay of Pigs, Johnson and Vietnam, Ford and the *Mayaguez*, Reagan and Iran-Contra, Bush II and Iraq) and domestic policy (Carter’s energy policy, Bush I and the budget summit, and Clinton’s health care proposal).³⁸ James Pfiffner focused on the extent to which Presidents resorted to telling lies about public policy and engaging in systematic deception.³⁹ Studies by Harold Bruff, Gene Healy, and Peter Shane explored the capacity of Presidents and their legal advisers to manipulate the law for political objectives, resulting not only in damage to the constitutional order but catastrophic policy outcomes.⁴⁰ Notwithstanding the quality of these works, outsized and unrealistic notions of presidential authority retain a firm foothold in the media and the White House, and among some scholars.

36. John P. Burke & Fred I. Greenstein, *How Presidents Test Reality: Decisions on Vietnam, 1954 and 1965* (1989).

37. Fred I. Greenstein, *The Presidential Difference: Leadership Style from FDR to Barack Obama* (3d ed., 2009).

38. Richard M. Pious, *Why Presidents Fail* (2008).

39. James P. Pfiffner, *The Character Factor: How We Judge American Presidents* (2004). See also his *Power Play: The Bush Presidency and the Constitution* (2008).

40. Harold H. Bruff, *Bad Advice: Bush’s Lawyers in the War on Terror* (2009), Gene Healy, *The Cult of the Presidency: America’s Dangerous Devotion to Executive Power* (2008), and Peter M. Shane, *Madison’s Nightmare: How Executive Power Threatens American Democracy* (2009).

A serious shortcoming in academic work on the presidency is the extent to which the discipline of political science has largely cut ties with public law and constitutional analysis. Similar weaknesses apply to studies on Congress. When political science developed in the United States in the 1880s, the study of politics necessarily incorporated public law. Politics and law were “interdependent.” Investigating one required investigating the other. A research project on government and public policy could not be pursued by excluding law. Beginning in the 1950s, behavioral studies gained traction in political science, and scholars began to divorce the Constitution from their studies.⁴¹ By 1963, behavioralism topped the list of fields in which significant work was being done. Located at the bottom: public law. Fortunately, a number of political scientists continue to orient their research to public law and monitor legal boundaries to presidential power.⁴²

Not only has the discipline of political science placed less weight on public law analysis, but so have some law professors. They remain attracted to a system of government that concentrates power in the President without any legal or constitutional checks, either from Congress or the courts. In *Terror in the Balance* (2007), Eric Posner and Adriane Vermeule describe the executive branch as the only institution of government with the resources, power, and flexibility to respond to national security threats. Individual civil liberties, they argue, are appropriately subordinated and marginalized because they “interfere with the effective response to the threat.”⁴³ They urge lawyers to “restrain other lawyers and their philosophical allies from shackling the government’s response to emergencies with intrusive judicial review and amorphous worries about the second-order effects of sensible first-order policies.”⁴⁴

What if the policies are senseless and abusive? What happens to individual rights when there are no external restraints on executive actions? It is curious that the work of Posner and Vermeule would appear several years after the George W. Bush administration went to war against Iraq on the basis of six claims that Iraq possessed weapons of mass destruction. Those assertions, of highly dubious quality, proved to be entirely false.⁴⁵ Moreover, the U.S. military intervention lacked competent preparation for what would happen to the

41. Mitchel A. Sollenberger, “Presidential Studies, Behavioralism, and Public Law,” 44 *Pres. Stud. Q.* 758 (2014).

42. Louis Fisher, “Connecting Presidential Power to Public Law,” 44 *Pres. Stud. Q.* 157 (2014). For a list of political scientists grounded in public law, see the individuals discussed in Louis Fisher, “Political Scientist as Practitioner,” 46 *PS: Political Science & Politics* 519, 520–23 (2013).

43. Eric Posner & Adriane Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 7 (2007).

44. *Id.* at 167.

45. Fisher, *Presidential War Power*, at 216–31.

country after toppling Saddam Hussein. Especially harmful was the decision to disband the Iraqi Army and exclude members of the Baath Party from the new Iraq government. The two decisions alienated hundreds of thousands of Iraqi troops and undermined the technical capacity needed for social and economic activity.⁴⁶

Posner and Vermeule developed the same theme, and even a more radical one, in *The Executive Unbound* (2010). Their advice is to trust not in law or the Constitution to constrain the President. Instead, they rely solely on public opinion and political elections, “substituting the rule of politics for the rule of law.”⁴⁷ To reach that position they follow two contradictory methods of analysis. For Congress and the judiciary, they review various deficiencies and weaknesses before dismissing both branches in the fight against terrorism. When they turn to the President and the executive branch, they create an imaginary and idealistic world, attributing to Presidents and executive officials an unmatched and unverified capacity to respond effectively to emerging threats. They express confidence that the President “knows the range of options available, their likely effects, their costs and benefits—thanks to the resources and expertise of the executive branch—and so, if he is well-motivated, he will choose the best measures available.”⁴⁸ The primary issue is not motivation. It is competence and the historical record, and yet Posner and Vermeule do not test their model against a string of presidential errors ranging from Korea to the Bay of Pigs, Vietnam, Iran-Contra, and finally the Iraq War in 2003.

The Judiciary

We are generally advised that courts, not the elected branches, are far better structured to protect individual rights. Constitutional scholar Laurence Tribe has written that the Supreme Court “often stands alone as the guardian of minority groups. The democratic political process, by its very nature, leaves political minorities vulnerable to the will of the majority.” His fundamental premise: majorities cannot protect minorities. Tribe conceded that the Court’s record “in championing the cause of oppressed minorities is hardly unstained.”⁴⁹ Other legal scholars conclude that it is necessary to place political power in an unelected Court to protect minorities “from democratic

46. James P. Pfiffner, “US Blunders in Iraq: De-Baathification and Disbanding the Army,” *Intelligence and National Security*, Vol. 25, No. 1, Feb. 2010, at 76–85.

47. Eric Posner & Adriane Vermeule, *The Executive Unbound: After the Madisonian Republic* 14 (2010).

48. *Id.* at 130.

49. Laurence H. Tribe, *God Save This Honorable Court* 20 (1985).

excess.”⁵⁰ Yet from 1789 through World War II, it is difficult to find federal court decisions that upheld and championed individual rights.

In a recent study, Noah Feldman correctly notes that not until the Supreme Court decided *Brown v. Board of Education* in 1954 could it be seen “as rightly devoted to the protection of minorities.”⁵¹ He further observes that the unanimous decision, widely praised, “was a compromise and, in that sense, incoherent as a statement of constitutional law.” The “mess” that resulted in the following years “reflected this incoherence.”⁵² The next section focuses on the record of the Warren Court in protecting individual rights. Chapter 3 examines *Brown* in greater detail.

In looking for early examples of judicial protection to minorities, one could cite the 1943 decision that struck down a school policy that compelled students who were Jehovah’s Witnesses to salute the American flag or be expelled. However, three years earlier the Court had upheld the policy by a resounding 8-to-1 majority, provoking severe criticism throughout the country. Those decisions are analyzed in chapter 5.

A famous footnote written by Justice Stone in a 1938 decision suggested that the Supreme Court might have a special responsibility to protect “discrete and insular minorities,” especially when “those political processes ordinarily to be relied upon to protect minorities” have been curtailed.⁵³ His statement recognized that individual and minority rights were often protected by the elected branches. Indeed, blacks, women, children, and other minorities regularly found it necessary to turn to Congress and state legislatures for support.

In *Law’s Empire* (1986), Ronald Dworkin created a model that entrusts to the Supreme Court the protection of individual rights: “The United States is a more just society than it would have been had its constitutional rights been left to the conscience of majoritarian institutions.”⁵⁴ In a footnote, he acknowledged that he offered “no argument for this flat claim” and he would have to take into account that the Court’s record “has been spotty.”⁵⁵ The material in this book finds little support for his generalization. As demonstrated in chapters 3 through 7, many judicial decisions regarding blacks, women, children, religious minorities, and Native Americans led to a less just society. Repeatedly, the corrective force came from legislative bodies and public participation.

50. William Mishler & Reginald S. Sheehan, “The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions,” 87 *Am. Pol. Sci. Rev.* 87, 87 (1993).

51. Noah Feldman, *Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices* 406 (2010).

52. *Id.* at 407.

53. *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n.4 (1938).

54. Ronald Dworkin, *Law’s Empire* 356 (1986).

55. *Id.* at 449, n.2.

Following World War II, the Supreme Court and scholars frequently announced that when the Court decides a case it speaks with finality. Justice Robert Jackson offered this assessment in 1953: “We are not final because we are infallible, but we are infallible only because we are final.”⁵⁶ A clever sentence, but it is misleading for two reasons. First, Jackson could only have been referring to decisions about constitutional, not statutory, questions. It is widely accepted that when the Court decides that a statute means A not B, Congress is at liberty to say: “No, it means B (or C), not A,” and pass another statute. That happens on a regular basis, as discussed in the Lilly Ledbetter equal pay issue in chapter 4.

Second, even confining Jackson’s statement to constitutional matters, he is clearly incorrect. Nothing in the Court’s record points to any evidence of judicial infallibility or finality. Jackson was too good a student of constitutional history to believe what he said. As explained in chapter 5, the Supreme Court’s decision in 1940 to uphold a compulsory flag salute for public school children produced intense criticism from the press, religious organizations, and the general public. In the face of this opposition, three Justices who had joined the majority changed their minds and publicly stated two years later that the 1940 case had been “wrongly decided.” Two other Justices from the majority retired, and their replacements helped form a 6–3 majority in 1943 to strike down the compulsory flag salute.⁵⁷ The author of the 1943 decision: Robert Jackson.

More broadly, the Supreme Court lacks finality on constitutional issues for the simple reason that it makes mistakes and has done so throughout its history. This book covers many examples. Chief Justice William Rehnquist put the matter crisply in 1993: “It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.”⁵⁸ Despite that plain talk, the Court and scholars continue to defend the “last word” doctrine. In a religious liberties case in 1997 discussed in chapter 6, the Court announced: “When the Court has interpreted the Constitution, it has acted within the province of the Judiciary Branch, which embraces the duty to say what the law is. *Marbury v. Madison*, 1 Cranch, at 177.” The Court concluded that when a conflict occurs between a Court precedent and a congressional statute, the Court’s ruling “must control.”⁵⁹

Over two centuries of constitutional history demonstrate that the Court’s position in 1997 is false. Many examples in this book will underscore that point. What of the famous case of *Marbury v. Madison* (1803)? It states: “It

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

57. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

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

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

is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”⁶⁰ Three points need be said about this frequently misunderstood passage from *Marbury*.

First, read the first sentence as often as you like, and it says nothing about judicial finality. One could easily rewrite it to produce another claim: “It is emphatically the province and duty of the legislative department to say what the law is.” No one could disagree with that, but it wouldn’t establish congressional finality or supremacy either. Second, if two laws conflict they can be resolved by the Court but also by subsequent legislation passed by Congress, which happens frequently. Examples will be given. Third, invoking this sentence from *Marbury* ignores what Chief Justice Rehnquist said in 1993: the Supreme Court makes errors, often major ones. Abundant details in this book reinforce that obvious point.⁶¹

Politically and legally, Marshall was too sophisticated a student of the Constitution and politics to believe that the Supreme Court was superior to the other two branches. Having declared a statutory provision unconstitutional in *Marbury*, he thereafter used judicial review only in a positive sense by consistently *upholding* congressional authority. His respect for the elected branches appears in a note he sent to Justice Samuel Chase on January 23, 1805, while the Senate considered whether to remove Chase from the Court after being impeached by the House. Marshall did not promote judicial supremacy. Instead, he recommended that it would be better to replace the impeachment process with “an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault.”⁶² This is not the language of a Chief Justice who believes the Court delivers the final word on legal and constitutional matters.

Nevertheless, scholars and reporters continue to promote judicial supremacy, claiming that a Supreme Court ruling can be reversed only through constitutional amendment or if the Justices change their minds. Writing in 2012, Jeffrey Toobin said that a Supreme Court decision “interpreting the

60. 5 U.S. (1 Cr.) 137, 177 (1803).

61. For closer analysis of the many misconceptions that flow from *Marbury v. Madison*: Louis Fisher, *On the Supreme Court: Without Illusion and Idolatry* 1–33, 221–28 (2014); Louis Fisher, *Defending Congress and the Constitution* 22–47 (2011).

62. 3 Albert J. Beveridge, *The Life of John Marshall* 177 (1919). Marshall dated the letter January 23, 1804, but modern scholarship fixes the date a year later; 6 *The Papers of John Marshall* 348, n.1 (Charles F. Hobson, ed., 1990). Like the rest of us, Marshall forgot to switch to the new year.

Constitution can be overturned only by a new decision or by a constitutional amendment.”⁶³ Tom Goldstein, who frequently argues cases before the Supreme Court, stated on June 20, 2013, that when the Court “interprets the Constitution, that is the final word. The President and Congress can’t overturn its decision. The only option is to amend the Constitution which is basically impossible.”⁶⁴ Reporters for major newspapers continue to promote judicial finality. Adam Liptak, writing for the *New York Times* on August 21, 2012, noted that “only a constitutional amendment can change things after the justices have acted in a constitutional case.”⁶⁵ Reporting for the *Washington Post* on October 25, 2014, Robert Barnes wrote that *Marbury v. Madison* “established the court as the final word on the Constitution.”⁶⁶

A contemporary example will establish that when the Supreme Court decides a constitutional issue, Congress has an opportunity to respond with legislation that gives individual rights greater protection. In the early 1980s, Captain Simcha Goldman objected that an Air Force regulation violated his religious liberty by prohibiting him from wearing his yarmulke indoors while on duty. A 5–4 Court held for the Air Force.⁶⁷ Within one year, Congress passed legislation directing the military to permit soldiers to wear religious apparel unless it interfered with military duties. How could Congress countermand the Court’s interpretation on this constitutional issue? The answer comes from language in Article I, Section 8, granting to Congress the power to make “Rules for the Government and Regulation of the land and naval forces.” That constitutional determination is left to Congress, not the judiciary. Details on this case appear in chapter 6.

In *Obergefell v. Hodges* (2015), the Supreme Court upheld the constitutionality of same-sex marriages. Although divided 5–4 with many bitter dissents, including one by Chief Justice Roberts, who said the majority’s opinion had nothing to do with the Constitution, the decision extended new rights to millions of people. Certainly other Supreme Court decisions have protected individual rights, particularly over the past six decades, but this book covers many instances of the elected branches advancing individual rights far better than the judiciary. Examples include Congress providing equal accommodations for blacks in 1875, only to be struck down by the Supreme Court in 1883; the Court in *Bradwell v. State* (1873) denying women the right to

63. Jeffrey Toobin, *The Oath: The Obama White House and the Supreme Court* 194 (2012).

64. <http://www.scotus.blog.com/2013/06/power>.

65. Adam Liptak, “In Congress’s Paralysis, a Mightier Supreme Court,” *N.Y. Times*, Aug. 21, 2012, at A10.

66. Robert Barnes, “Addressing the Supreme Court with Fun,” *Wash. Post*, Oct. 25, 2014, at A1.

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

practice law; the Court's decision in *Plessy v Ferguson* (1896) upholding racial discrimination; the child-labor decisions of 1918 and 1922; the decisions in 1943 and 1944 that upheld a curfew for and detention of Japanese Americans, two-thirds of them U.S. citizens; and more recent cases such as the *Goldman* yarmulke decision, just covered, and the equal pay decision involving Lilly Ledbetter in 2007.

The Warren Court

Those who associate the Supreme Court with protecting individual rights often have in mind the decisions handed down under Chief Justice Earl Warren. The school desegregation case in *Brown v. Board of Education* (1954) is frequently cited as a leading example of the Court safeguarding the rights of individuals. The previous section included the views of Noah Feldman about *Brown* and the implementing decision a year later in *Brown II*, but those decisions will be analyzed in detail in chapter 3.

The Warren Court gained a reputation for extending new rights to individuals charged with crimes, such as its decision in *Gideon v. Wainwright* (1963), which granted indigent defendants the right to counsel provided by the government. Such procedural safeguards are important, but the Court was not breaking new ground. A century earlier, several states had already begun to recognize that right. In 1854, the Supreme Court of Indiana stated that a "civilized community" could not prosecute a poor person and withhold counsel. Five years later, the Wisconsin Supreme Court called it a "mockery" to promise a pauper a fair trial and tell him he must employ his own counsel.⁶⁸ In 1892, Congress passed legislation to provide counsel to represent poor persons and extended that provision in 1910.⁶⁹

The Warren Court defended many other individual rights. *Griswold v. Connecticut* (1965) struck down a state law that made it a crime for any person, including married couples, to use any drug or article to prevent conception. There was little support for a statute that reached back to 1879, but the opinion by Justice Douglas was widely criticized for relying on "penumbras, formed by emanations" in the Bill of Rights. In *Baker v. Carr* (1962) and *Gray v. Sanders* (1963), the Court established the one person, one vote standard for reapportionment, and it helped the poor by abolishing poll taxes in *Harper v. Virginia Board of Elections* (1966). Other branches were involved with the issue of poll taxes. In 1962, Congress had passed a constitutional amendment

68. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Webb v. Baird*, 6 Ind. 13 (1854); *Carpenter v. Dane*, 9 Wis. 248 (1859).

69. 27 Stat. 252 (1892); 36 Stat. 866 (1910).

to eliminate the poll tax for federal elections, and it was ratified two years later. The Voting Rights Act of 1965 declared that the poll tax placed an unreasonable hardship on voter rights and gave federal courts jurisdiction to decide cases involving state and local elections. That statute led to the decision in *Harper*. Other noteworthy Warren Court decisions include a unanimous decision in *Torcaso v. Watkins* (1961), holding unconstitutional a Maryland provision that required all public officials to affirm a belief in God.

The Court's controversial decision in *Engel v. Vitale* (1962) struck down New York's "Regents' Prayer," which required public school children to acknowledge their dependence on God. Writing for the Court, Justice Black said, "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."⁷⁰ He explained that his decision did not indicate hostility toward religion or prayer. Instead, the Constitution left religious practices and beliefs to the individual, not to government.

In a concurrence, Justice Douglas offered unfortunate and unnecessary references to the fact that the Supreme Court convenes with the words "God save the United States and this Honorable Court," each House of Congress opens the day's business with guest chaplains who say a prayer, the Pledge of Allegiance includes the words "under God," and congressional legislation in 1865 authorized the placement of "In God We Trust" on coins. In his dissent, Justice Stewart observed that Presidents from George Washington to John F. Kennedy in their Inaugural Addresses ask the protection and help of God.

A number of newspapers incorrectly reported that the Court had prohibited prayer, when in fact it had banned *official* prayer. One newspaper headline announced: "Court outlaws God."⁷¹ Representative George Andrews of Alabama added: "They put Negroes in the school and now they've driven God out."⁷² Strong pressure developed to pass a constitutional amendment to nullify the Court's decision, but the movement lost steam after congressional hearings revealed broad support for the ruling by Protestant, Catholic, and Jewish organizations.⁷³ In 1963, the Court in *Abington School Dist. v. Schempp* decided that states may not require that students in public schools read verses from the Bible or cite the Lord's Prayer at the beginning of each day. Public criticism of this decision was not near as intense as with *Engel*.⁷⁴

70. *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

71. Lucas A. Powe, Jr., *The Warren Court and American Politics* 187 (2000).

72. *Id.* at 188.

73. Louis Fisher and Katy J. Harriger, *American Constitutional Law* 623–24 (10th ed., 2013).

74. Powe, *The Warren Court and American Politics*, at 361–63,

Building on cases involving coerced confessions, self-incrimination, and right to counsel, the Warren Court in 1966 handed down *Miranda v. Arizona*, announcing various rights for defendants held in police custody. To prevent compulsion by law enforcement officials, the person in custody must be informed before interrogation of the following: the right to remain silent, anything said may be used in court, the right to consult with an attorney and to have a lawyer present during interrogation, and the right to have a lawyer appointed if the accused is indigent. *Miranda* was bitterly attacked for interfering with the efforts of law enforcement officials, but the Court correctly noted that its holding was not “an innovation in our jurisprudence.”⁷⁵ *Miranda*-type warnings had been given routinely by federal agents in the past and had been given by state officials.⁷⁶

Individual Rights at Risk

In times of perceived emergencies and fears of disloyalty at home, all three branches have failed to protect individual rights. That has been the pattern from 1789 to the years following the terrorist acts of September 11, 2001. On a repeated basis, government turns against various groups and violates basic constitutional rights, at times apologizing decades later. At fault here is not merely Congress but also the President and the Supreme Court.

Congress passed the Alien and Sedition Acts in 1798, and they were signed by President John Adams. It is remarkable that the two elected branches could support such repressive legislation seven years after ratification of the Bill of Rights. When pressure mounted for going to war against France in 1798, individuals within the country fell into two discrete categories: loyal and disloyal. The nation’s leading periodical for the Federalist Party, Philadelphia’s *Gazette of the United States*, warned: “He that is not for us, is against us.”⁷⁷ Those who faced repression in 1798 were the foreign born: “enemy aliens” and “alien friends.”

Some of the incentive in passing these statutes lay in partisan calculations. The Federalists believed that immigrants were more likely to vote for the Republican-Jeffersonian Party. The legislation extended the waiting period for citizenship from five years to fourteen years. The Alien Friends Act authorized the President to deport any alien “he shall judge dangerous to the peace

75. 384 U.S. 436, 442 (1966).

76. *McNabb v. United States*, 318 U.S. 332, 336 (1943); *Haley v. Ohio*, 332 U.S. 596, 598, 604 (1948).

77. James Morton Smith, *Freedom’s Fetters: The Alien and Sedition Laws and American Civil Liberties* 15 (1956).

and safety of the United States”: a standard broad enough to put all aliens at risk. Deportation was allowed if the President had “reasonable grounds” to believe that an alien was involved in “any treasonable or secret machinations” against the federal government. Individuals targeted by this legislation had no right to a public trial to be heard by a jury, to confront witnesses, or access to other basic procedural safeguards. A separate statute covered “alien enemies,” subjecting all noncitizen males fourteen years or older to removal from the country. Mere identification with an enemy nation was sufficient to merit removal.⁷⁸

Under the Sedition Act of 1798, which applied to both aliens and citizens, individuals could be fined and imprisoned if they wrote or said anything about Congress or the President deemed by the government to be “false, scandalous and malicious,” intended to “defame” those political institutions or bring them into “contempt or disrepute,” “excite” any hatred against them, or “stir up” sedition or act in combination to oppose or resist federal laws or any presidential effort to implement those laws. Mere criticism of the government could result in prosecution.

The Adams administration prosecuted not only individuals but also newspapers deemed too critical of the Federalist Party and its policies. Most newspapers in the country were Federalist, not Republican-Jeffersonian. When Thomas Jefferson was elected President in 1800, he used his pardon power to relieve those punished by the Sedition Act.⁷⁹ In 1840, a congressional statute provided funds to reimburse those fined under the statute. A committee report accompanying the legislation denounced the statute as “unconstitutional, null, and void.”⁸⁰ Although the two elected branches subsequently pushed back against the Sedition Act, no such resistance came from the judiciary. The courts during the John Adams administration were safely Federalist, with no political interest or independence to check prosecutions by the executive branch. In *New York Times Co. v. Sullivan* (1964), the Supreme Court acknowledged that the Sedition Act was not struck down by a court of law but by the “court of history.”⁸¹

America has several times passed sedition laws to intimidate and punish citizens who thought and spoke in ways the government found unacceptable. In 1917, after the United States became involved in World War I, several states passed sedition legislation. Under a Minnesota law, one individual was prosecuted for remarking in public: “We were stampeded into this war by

78. Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime 16–70* (2004).

79. 11 Writings of Thomas Jefferson 43 (Albert Bergh, ed., 1904), letter to Mrs. John Adams, July 22, 1804).

80. H. Rept. No. 86, 26th Cong., 1st Sess. 2 (1840); 6 Stat. 802, ch. 45 (1840).

81. 376 U.S. 254, 276 (1964).

newspaper rot to pull England's chestnuts out of the fire."⁸² Congress relied on a Montana statute as model legislation. With the change of only three words it became the federal sedition act of 1918. Those convicted faced a fine of \$10,000 and twenty years in prison, or both. In the 1940 Smith Act, Congress passed legislation to punish seditious utterances. The statute did not use the word sedition, but the government nonetheless proceeded to hold sedition trials.⁸³

Another period of repression is the "Red Scare" of 1919–1920. Following the Russian Revolution of 1917 and the growth of the American radical movement, congressional committees investigated what it considered to be suspect organizations. Attorney General A. Mitchell Palmer took the lead in infiltrating these organizations and gathering names to be deported. State and local governments turned against groups suspected of being unpatriotic. As government abuses mounted and became public, the Red Scare ran its course.⁸⁴

In 1927, Justice Louis Brandeis warned about what fear can bring in a time of perceived threats, particularly unreasoned fear: "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."⁸⁵ The Framers, he said, "did not exalt order at the cost of liberty."⁸⁶ To protect self-government, members of Congress must demonstrate a capacity to think independently and explain their views clearly. If they merely take direction from the President or the Supreme Court, they cease being representatives, forsake their oath of office, and undermine the system of checks and balances that safeguards constitutional government.

In 1938, the House created the Un-American Activities Committee (HUAC), chaired by Martin Dies of Texas. Increasingly the committee turned its attention to Communism. Published hearings identified 640 organizations, 483 newspapers, and 280 labor organizations as "Communistic." The list included the Boy Scouts, the American Civil Liberties Union, the Catholic Association for International Peace, and the Camp Fire Girls.⁸⁷ During House debate on February 1, 1943, lawmakers took turns singling out writers, publishers, political activists, and executive officials thought to be linked to the Communist Party.⁸⁸

82. Stone, *Perilous Times*, at 211.

83. Louis Fisher, *The Constitution and 9/11*, at 131–38 (2008).

84. Stone, *Perilous Times*, at 220–26.

85. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

86. *Id.* at 377.

87. Stone, *Perilous Times*, at 246.

88. 89 Cong. Rec. 475–78 (1943).

The House created a special subcommittee to evaluate claims against federal employees considered to be disloyal or subversive. The subcommittee offered draft language to deny the use of federal appropriations to pay the salaries of three executive officials: William E. Dodd, Jr., Robert Morss Lovett, and Goodwin B. Watson. Although the Senate objected to discharging government employees based on secret testimony developed by the House subcommittee, eventually a bill denying salaries for the three men was sent to President Roosevelt. Because the bill contained emergency funding for World War II, he signed it but condemned the provision as an unconstitutional bill of attainder (legislative punishment without trial).⁸⁹ In 1946, the Supreme Court reached the same judgment.⁹⁰

World War II led to additional violations of individual rights, brought about by all three branches. On the basis of an executive order issued by President Franklin D. Roosevelt in 1942, followed by supportive legislation from Congress, the federal government acted against more than one hundred thousand Japanese Americans on the West Coast. Initially they were subject to a curfew order and later taken from their homes and placed in detention camps inland.⁹¹ In the *Hirabayashi* and *Korematsu* cases of 1943 and 1944, the Supreme Court upheld these actions, steps so damaging to individual rights that the nation later issued an apology to those injured. How could the Supreme Court sustain these policies?

In a 1962 article, Chief Justice Earl Warren reviewed the capacity of the judiciary to defend individual rights when endangered by the elected branches. To Warren, the two decisions underscored “the limitations under which the Court must sometimes operate” in an area in which the elected branches “must bear the primary responsibility for determining whether specific actions they are taking are consonant with our Constitution.” 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.” In other words, Warren advised his readers not to seek constitutional answers always from the courts. In a democratic society, the legislative and executive branches still have “the primary responsibility for fashioning and executing policy consistent with the Constitution.” He even warned against excessive reliance on the political branches: The “day-to-day job of upholding the Constitution really lies elsewhere. It rests, realistically, on the shoulders of every citizen.”⁹²

89. The Public Papers and Addresses of Franklin D. Roosevelt, 1943 Volume, at 385–86 (1950).

90. *United States v. Lovett*, 328 U.S. 303 (1946). For further details: Fisher, *The Constitution and 9/11*, at 138–43.

91. Fisher, *The Constitution and 9/11*, at 144–51.

92. Earl Warren, “The Bill of Rights and the Military,” 37 *N.Y.U. L. Rev.* 181, 202 (1962).

Following World War II, individual rights were jeopardized by elected branch actions. On March 25, 1947, President Harry Truman issued procedures to determine the loyalty of federal employees. Procedures were so carelessly drafted that employees, although entitled to a hearing, were often unable to learn the names of confidential informants. Truman's executive order, by blocking access to confidential files, permitted irresponsible trials that wrecked federal careers.⁹³ Initiatives by Senator Joseph McCarthy to seek out Communists and disloyal Americans produced additional violations of individual rights. On December 2, 1954, the Senate voted 67 to 22 to "condemn" him for bringing the Senate into "dishonor and disrepute" and acting to "impair its dignity."⁹⁴

Seeking a Better Balance

There is no evidence that the Framers ever intended the judiciary to be the "last word" on the meaning of the Constitution. No language in the Constitution supports that doctrine, either expressly or by implication. Some reasons have already been offered to reject the theory of judicial supremacy. Other evidence in this book will underscore that the Constitution has always been shaped by all three branches and the states, with no branch occupying a dominant position. To accept the Supreme Court as the ultimate arbiter of constitutional questions would do grave damage to the Framers' aspiration for self-government and individual rights.

President Abraham Lincoln framed the issue well in his first inaugural address. He did not question that some constitutional questions are decided by the Supreme Court, and that "such decisions must be binding in any case upon the parties to a suit as to the object of that suit." With *Dred Scott v. Sandford* (1857) in mind, a case in which the Court justified slavery on the ground that blacks were by nature permanently inferior to whites, he said: "The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in ordinary actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."⁹⁵

93. Fisher, *The Constitution and 9/11*, at 151–58.

94. 100 Cong. Rec. 16392 (1954).

95. Arthur M. Schlesinger, Jr., & Fred L. Israel, eds., *My Fellow Citizens: The Inaugural Addresses of the Presidents of the United States, 1789–2009*, at 146 (2010).

An early constitutional conflict, involving all three branches of government, came from the decision of Congress to create a U.S. Bank. Although nothing in the Constitution provided express authority to establish such an institution, the Court in 1819 upheld it as within the broad power of the Necessary and Proper Clause. As author of *McCulloch v. Maryland*, Chief Justice Marshall seemed to adopt the principle of judicial supremacy. He said that if a constitutional dispute must be decided, “by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.”⁹⁶

McCulloch has been described as one of the “fixed stars in our constitutional constellation.”⁹⁷ No doubt it is, but the decision had nothing to do with judicial finality. At stake in the U.S. Bank debate was whether the two elected branches possessed constitutional authority to create such an institution. It was left to them to create it or not. The Court had no role in that decision. Even if the Court were to bless their efforts, as it did in *McCulloch*, a future Congress or President could change their position on the constitutionality or the necessity of a U.S. Bank. If Congress were to decide not to reauthorize it, that political decision would be closed and final. The Court could have no part in that judgment. If Congress reauthorized the bank and the President vetoed it on policy or constitutional grounds and Congress failed to override the veto, the Court would again be excluded in such considerations.

Precisely that happened in 1832 when President Andrew Jackson decided to veto a bill reauthorizing the Bank. He was advised that he had to sign the bill because the Bank had been endorsed by previous Congresses, previous Presidents, and the Supreme Court. He disagreed, holding that “mere precedent” was a “dangerous source of authority.” He reviewed the checkered history of the Bank. The elected branches favored a national bank in 1791, decided against it in 1811 and 1815, and offered support in 1816. As to *McCulloch*, Jackson said it “ought not to control the coordinate authorities of this Government.” All three branches “must each for itself be guided by its own opinion of the Constitution.” His analysis of the bill convinced him that the Bank was neither necessary nor proper under Article I of the Constitution.⁹⁸ Congress did not override his veto. Last word on the U.S. Bank? The elected branches, not the Court.

Consider what happened in 1852 when the Supreme Court decided that the Wheeling Bridge over the Ohio River, constructed under Virginia state law, represented a nuisance because the structure was so low it obstructed

96. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819).

97. Jamal Greene, “The Anticanon,” 125 Harv. L. Rev. 379, 385 (2011).

98. 3 Richardson 1144–45.

navigation.⁹⁹ Congress responded by debating a bill to make the Wheeling Bridge “a lawful structure.”¹⁰⁰ Lawmakers discovered what the Court had missed: vessels had deliberately elevated their smoke chimneys so they would not clear the bridge.¹⁰¹ The bill provided that rather than altering the bridge to accommodate vessels, ships must adjust to the bridge.¹⁰²

The dispute now returned to the Supreme Court. Writing for the majority, Justice Samuel Nelson explained that in 1852 the Court regarded the bridge as inconsistent with the authority of Congress to regulate interstate commerce. But the new statute removed that objection.¹⁰³ Three dissenting Justices could not believe that the Court’s earlier decision that the bridge marked an unconstitutional obstruction of commerce could be reversed by congressional action. One Justice, Robert Grier, protested that allowing Congress to annul or vacate a Supreme Court decree “is without precedent, and, as a precedent for the future, it is of dangerous example.”¹⁰⁴ He ignored *McCulloch*. The fact that the Court decided the Bank was constitutional did not prevent Congress or the President from deciding it was not.

A similar dispute occurred in the 1890s, but by now the Court had learned that constitutional issues could go back and forth between the judiciary and the elected branches and in some cases the elected branches could prevail. In 1890, the Court ruled that Iowa’s prohibition of intoxicating liquors from outside its borders could not be applied to original packages or kegs coming from a firm in Illinois. Only after the original package entered Iowa and was broken into smaller packages could the state 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.”¹⁰⁵ States could not exclude incoming articles “without congressional permission.”¹⁰⁶

The Court’s opinion was issued on April 28, 1890. By May 14, the Senate reported a bill granting Iowa authority to regulate incoming intoxicating liquors.¹⁰⁷ The remedial legislation was enacted on August 6. 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

99. *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852).

100. *Cong. Globe*, 32d Cong., 1st Sess. 2195 (1852).

101. *Id.* at 2440 (Senator James Murray Mason).

102. 10 Stat. 112 (1852).

103. *Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421, 430 (1856).

104. *Id.* at 449. For further details on the Wheeling Bridge cases, see Fisher, *On the Supreme Court: Without Illusion or Idolatry*, at 78–83.

105. *Leisy v. Hardin*, 155 U.S. 100, 108 (1890).

106. *Id.* at 125.

107. 21 *Cong. Rec.* 4642 (1890).

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.”¹⁰⁸ Unanimously, the Supreme Court upheld this statute.¹⁰⁹

Subsequent chapters in this book reinforce the constitutional dialogue that occurs between the Supreme Court and the elected branches, including the effort for nearly a century to enact public accommodations legislation for blacks (chapter 3), to enable women to practice law (chapter 4), to pass child labor legislation after the Court twice struck down earlier congressional efforts (chapter 5), to secure religious liberty for minorities (chapter 6), and to protect the rights of Native Americans (chapter 7).

The constitutional system is strengthened when members of Congress, Presidents, courts, academics, reporters, the media, and the public at large treat all three branches of government as legitimate parts of a political system that debates and decides the meaning of the Constitution. Members of Congress take an oath to support the Constitution, not to defer to the Court or the President. It is appropriate for them to respect the Court and the President, just as the Court and the President should respect Congress. Members of Congress defer far too often to presidential claims and assertions. Similarly, at times they find it difficult to criticize judicial rulings, as though it is improper to do so. They announce support for a decision after first denouncing its reasoning and persuasive quality. Here are recent statements by three senior lawmakers who all chaired the House and Senate Judiciary Committees.

In a floor statement in 2001, Senator Patrick Leahy said he had become “increasingly concerned about some of the recent actions of the U.S. Supreme Court. As a member of the bar of the Court, as a U.S. Senator, as an American, I, of course, respect the decisions of the Supreme Court as being the ultimate decisions of law for our country.” Referring to himself again as “an American,” he accepted “any of its decisions as the ultimate interpretation of our Constitution, whether I agree or disagree.”¹¹⁰

Members of Congress should not automatically accept a Supreme Court decision. They should feel at liberty to state their disagreement with a decision, explaining in plain words why it is unsound. Frank and informed criticism can help the Court rethink its reasoning. Total deference will not. Members of Congress know that the Court is capable of making errors and has a long record of doing so, at substantial cost to the rights and liberties of individuals and minorities. There is no reason to imply it is unpatriotic

108. 20 Stat. 313 (1890).

109. In *re* *Rahner*, 140 U.S. 545 (1891). For further details on this case and congressional debate, see Fisher, *On the Supreme Court*, at 84–86.

110. 147 Cong. Rec. 2457 (2001).

or un-American to find fault with decisions of the Supreme Court. Blunt criticism is not only acceptable but reflects support for the system of self-government. Leahy noted that judicial activism “can work both ways. It can work to expand protections for all our rights or it can be used to limit our rights.”¹¹¹ If the latter, it is important to say so.

Leahy objected that a recent decision by the Court was “just the latest in a long and ever growing line of 5–4 decisions that second-guess congressional policy judgment[s] to strike down Federal statutes and generally treat Congress as a least favored administrative agency rather than a coequal branch of the Federal Government.”¹¹² A key point, and all the more reason to insist on coequality and not subordinate Congress to the Court as the ultimate interpreter. Leahy concluded with this thought: “Again, as I have said, I have stood on the floor of the Senate defending the Supreme Court as much or more than anybody I know in my 26 years here. I have defended the Supreme Court on decisions even when I disagreed with the Court.”¹¹³

Why defend what you disagree with? Robert Katzmann, now a federal judge on the Second Circuit, wrote in 1997 about the need for candid public comments on court rulings: “Reasoned criticism of judicial decisions and of the administration of justice are useful and valuable; but excesses in rhetoric and political attacks can heighten insecurity about legislative intention.” Courts need to understand that “not every disagreement is a threat to independence.”¹¹⁴ Because courts are part of making public policy, they should be subject to frank public evaluation.

Senator Orrin Hatch has had a long career in following and commenting on Supreme Court decisions. He knows how much the quality of court rulings can vary. When the Court decided *Boumediene v. Bush* in 2008, holding that Guantánamo detainees have a right of habeas corpus to federal district courts, Hatch announced his disagreement: “This decision, written by Justice Kennedy, gives terrorists one of the most important rights enjoyed by the people of the United States.” Actually, at issue were not the rights of terrorists but of detainees *suspected* of terrorism. The questions were difficult, Hatch admitted, but “I do not believe that the Supreme Court has provided the correct answer.” He understood that it is natural to be concerned about people’s rights, “even those of terrorists, but sometimes we have to be practical and pragmatic and do the things that have to be done to protect the American people, and our citizens overseas.”¹¹⁵

111. *Id.*

112. *Id.* at 2458.

113. *Id.*

114. Robert A. Katzmann, *Courts and Congress* 112 (1997).

115. 154 Cong. Rec. 12426 (2008).

Hatch might have left it at that. However, like Leahy, he gave full support to a decision he disagreed with: “There are many who will believe that the Supreme Court made the right decision and others, such as myself, who believe that the Court made a lousy decision. However, I will uphold the Supreme Court, even though it was a 5-to-4 decision. Nevertheless, it is a decision by one-third of the separated powers of this country, and must be recognized as such.”¹¹⁶ Why give one-third of the government the final say? Like the other two branches, the judiciary is fully capable of making errors and should be held publicly accountable for its decisions.

The third illustration of legislative deference to the Supreme Court comes from Representative John Conyers, who chaired the Judiciary Committee for several years and has a close understanding of legislative-judicial relations. In 2009, he participated in floor debate on the Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.* (2007), which rejected Lilly Ledbetter’s effort to receive back pay to compensate for years of gender discrimination. Although Conyers called the decision “wrongheaded,” he said he believed that “our courts are our last line of defense when it comes to protecting the fundamental rights enshrined in our Constitution and in our civil rights laws.”¹¹⁷ Judicial action was not the last line of defense for Lilly Ledbetter. That defense came from Congress when it passed legislation in 2009 to give greater protection to women that encounter pay discrimination. That dispute is covered in chapter 4.

Before turning to individual chapters on the rights of blacks, women, children, religious minorities, and Native Americans (chapters 3 through 7), the next chapter covers the constitutional principles that apply to all three branches, how the Framers were guided by some English precedents but broke with others, the steps from colonial status to national independence, the role of public participation in democratic government, and the risk to individual rights in times of perceived danger.



116. Id.

117. 155 Cong. Rec. 441–42 (2009).