

Gateway Journalism REVIEW

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CREDIBILITY



**A citizen's guide to a U.S. Supreme Court
losing legitimacy**

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TABLE OF CONTENTS

- 4 The view from the press section**
- 7 Chapter 1: Losing legitimacy**
- 14 Chapter 2: Missing from the constitution: democracy, equality, privacy, Blacks, women, the right to vote**
- 21 Chapter 3: Originalism vs. a living Constitution**
- 24 Chapter 4: Is there a right to privacy in the Constitution?**
- 31 Chapter 5: Bill of Rights – Well-heeled win today’s First Amendment disputes**
- 35 First Amendment makes us freest nation**
- 40 Chapter 6: ‘Remember the Ladies’**
- 47 Chapter 7: The Devil’s Bargain over slavery, segregation and discrimination**
- 56 Supreme Court: “imperial” power grab or backstop protecting democracy**

The view from the press section

By William H. Freivogel

When I fell in love with the U.S. Supreme Court in a college class taught by Stanford Professor Robert Horn, Earl Warren had just retired as chief justice, ending the greatest expansion of individual liberties and civil rights in the nation's history.

It is not an exaggeration to say that the Warren Court breathed life into many of the nation's most soaring promises – liberty, equality, due process and democracy. Many of those promises had been unkept before the Republican Gov. of California became chief justice in 1953.

By the time I started covering the Supreme Court for the St. Louis Post-Dispatch in the summer of 1980, a decade had passed since the end of the Warren Court. But the spark plug of the Warren Court, William J. Brennan Jr., still was making things happen. The momentum of expanding constitutional rights continued, if at a slower pace, for decades under three conservative chief justices appointed by Republican presidents – Warren E. Burger, William H. Rehnquist and John G. Roberts.

Roe v. Wade and the Pentagon Papers cases were decided under Burger. Rehnquist ended up embracing New York Times v. Sullivan protecting the press from ruinous court verdicts. Rehnquist, a man with a quiet, understated wit, loved political cartoons and ruled the First Amendment protected pornographer Larry Flynt's lewd cartoon parody of Jerry Falwell, the leader of fundamentalist Christians. And it was the Roberts Court – albeit with Roberts in dissent – that recognized same-sex marriage as a constitutional right – a decision no one expected, or even talked about, half a century ago.

Justice Brennan was a gregarious Irishman from New Jersey whom President Dwight D. Eisenhower had nominated in 1956. Eisenhower reportedly told another Supreme Court Justice, Harold Burton, that he regretted both the nominations of Brennan and Warren. In an interview with a historian, he referred to Warren as “that dumb son of a bitch.” Both nominations illustrated that presidents during that era were not as careful as today's presidents to name justices with predictable voting inclinations. One of the selling points of life tenure for justices was that they became independent once freed from political pressures.

In more than three decades on the court, Brennan deftly built coalitions. Court histories record that he encouraged Justice Harry Blackmun to write the Roe v. Wade decision in 1973 recognizing the abortion

right. Blackmun, a Nixon nominee, would have seemed an unlikely author of that rights-expanding opinion. But with nurturing from Brennan, Blackmun took the lead.

Brennan believed in a “living Constitution” where the broad promises of Equal Protection, Liberty and Due Process grew with the times to make good on the nation's founding declarations of freedom, equality and sovereignty originating with the people.

Brennan almost always allied himself with Justice Thurgood Marshall, the great civil rights litigator who had won Brown v. Board of Education in 1954 desegregating the schools.

In the oral argument on Dec. 8, 1953, Marshall had explained the absurdity of segregation in common sense terms: “I got the feeling on hearing the discussion yesterday that when you put a white child in a school with a whole lot of colored children, the child would fall apart or something. Everybody knows that is not true. Those same kids in Virginia and South Carolina – and I have seen them do it – they play in the streets together, they play on their farms together, they go down the road together, they separate to go to school, they come out of school and play ball together. They have to be separated in school. There is some magic to it...if they go to elementary and high school, the world will fall apart.”

The unanimous 1954 Brown decision a few months later trumpeted the arrival of the Warren Court and began a revolutionary expansion of individual rights.

By the time I was covering the court in the 1980s, Brennan and Marshall still had their occasional victories. I brought my four children to the press area in the courtroom on June 27, 1990 to see the last day Brennan sat on the bench, a day the court upheld the FCC's minority broadcast ownership policies to achieve diversity, a last victory for Brennan.

But a new wind was blowing. By the middle of Ronald Reagan's administration, Attorney General Edwin Meese was advocating a new way of interpreting the Constitution that was at odds with Brennan's living Constitution. Meese argued for following the “original intent” of the Framers. He also said the court never should have “incorporated” the Bill of Rights against the states – in other words, the court shouldn't have forced state and local governments to adhere to the Bill of Rights.

Court experts at the time ridiculed Meese's originalist philosophy. But Meese had the last laugh.

In 1986 Reagan named the brilliant Antonin Scalia to the Court with his highly articulate version of originalism. “The Constitution that I interpret and apply is not living, but dead,” Scalia said in one speech. Scalia believed that the Constitution meant what its Framers intended, not what some Platonic guardians on the court thought centuries later.

In 1987, President Reagan tried to add a like-minded conservative, Robert Bork, who lost his confirmation vote after asserting that the Constitution had no right to privacy. The brutal confirmation hearing before a Senate Judiciary Committee chaired by then Sen. Joseph Biden, outraged many Republicans and conservatives because Bork was a brilliant legal scholar. It also coined a new verb – being Borked – which means being denied a position for which one is highly qualified.

The eventual confirmation of Anthony M. Kennedy, Reagan's replacement for Bork, made a huge constitutional difference over the next three decades, especially when it came to privacy. Kennedy, who had taken conlaw from the same Robert Horn who taught me – emerged as the leading advocate of a right of equal dignity that encompassed same-sex relations and eventually same-sex marriage.

When Kennedy was confirmed, no one would have predicted that turn of events. In fact, the court had just ruled that same-sex sex in one's own home could be criminalized. Not a single state had recognized same-sex marriage before the turn of the 21st century. Kennedy himself probably would not have thought this extraordinary expansion of constitutional rights would become his great legacy.

It's safe to say that had Bork not been borked, the court would not have recognized a constitutional right to same-sex marriage, nor the First Amendment right to burn an American flag, nor that public high schools violated religious freedom by bringing in a minister to deliver a prayer at graduation.

In 1991 Clarence Thomas became its second Black Justice, replacing Marshall. Thomas' confirmation hearings made Bork's look tame. I covered the first set of Thomas hearings that summer, which focused on the law. My wife, Margaret Wolf Freivogel, covered the explosive second set of hearings that followed Anita Hill's allegations that Thomas had sexually harassed her.

We often forget as we look back from today's vantage point that sexual harassment was a new legal concept then. It had been only five years earlier

that the Supreme Court ruled that sexual harassment was illegal sex discrimination. The "Me-too Movement" was decades in the future. The notion of sexual harassment was just beginning to seep into the public consciousness. The Thomas-Hill hearings were a scalding lesson that sharply divided the nation. Thomas denied Hill's claims, famously calling the hearing a "high tech lynching." Twice as many people believed Thomas as Hill, although today a majority believe Hill.

Sen. John C. Danforth, Thomas' mentor, described a poignant scene just before Thomas' lynching speech. He, Thomas and their wives were praying in the senator's Russell Office Building bathroom. Danforth turned on a tape recording of the Mormon Tabernacle Choir singing, Onward Christian Soldiers.

"I pushed the stop button, put my hands on Clarence's shoulders, and spoke as a minister: "Go forth in the name of Christ, trusting in the power of the Holy Spirit."

Danforth wrote later that he had crossed the "boundary of propriety" in attacking Hill's credibility. "It was a departure from anything anybody would say was fair," he said later. "But if you're there in an alley and people are throwing rocks, you pick up a rock."

I paid close attention to Thomas, who was a St. Louis story because he had been a lawyer with Monsanto Co. and an assistant attorney general in Danforth's Jefferson City office. After the Hill allegations, I talked to another former assistant AG who told me that Thomas' off-color jokes around the office sometimes sent another assistant, the more straight-laced John Ashcroft, stomping off in disgust.

I wasn't surprised when Thomas began his career on the court as a mostly silent presence, with months passing without him asking a question. Those who knew him at Yale Law School had told me he sat in the back of the room and avoided attention. This trait was at odds, though, with the gregarious, cigar-chomping Thomas I had interviewed at the EEOC, who delighted in telling stories and laughing uproariously.

Thomas was the polar opposite of Marshall, who once referred to Thomas as a "snake."

While Marshall thought racial segregation stigmatized Blacks as inferior and was a badge of slavery, Thomas thought affirmative action stigmatized Blacks as inferior. Marshall's views persuaded the unanimous court to hand down Brown. Forty-one years later, Thomas was the deciding fifth vote in *Missouri v. Jenkins* to bring the era of court-ordered school desegregation to an end in Kansas City. The first line of his concurring opinion captures Thomas' philosophy: "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly



Warren Court with Justices Brennan and Marshall closest to the camera. Chief Justice Warren is in the middle of the front row.

Photo courtesy of U.S. Supreme Court

black must be inferior."

The court's decision in the Kansas City desegregation case was the culmination of a decade of efforts I had witnessed by Republican Attorney General John Ashcroft and then Democratic Attorney General Jay Nixon to end court-ordered school desegregation in St. Louis and Kansas City.

Ashcroft showed up at the White House and Justice Department in the early days of the Reagan administration to persuade the federal government to switch sides and oppose the nation's biggest

voluntary school desegregation program in the country, in St. Louis. Ashcroft easily succeeded because the Reagan Justice Department had broad plans for rolling back civil rights policies, from schools, to affirmative action, to housing, to voting rights. The Reagan administration even tried to give segregationist Bob Jones University a tax break, an unpopular fight it lost badly in the Supreme Court and in the court of public opinion.

Justice William H. Rehnquist was a

Continued on next page

lonely voice on the Supreme Court in the early 1980s.

I learned in 1981 that he had urged his fellow justices to consider reviewing St. Louis's largest in the nation voluntary inter-district school desegregation plan. The other justices refused to take up the case. The program, which was the nation's most expensive desegregation plan, was largely successful and is only now winding down.

The denial of court review – denial of a writ of certiorari – usually has no legal significance because the denial of cert doesn't mean the court agrees or disagrees with the lower courts. The press often makes the mistake of attaching too much significance to this act. But in this case the denial of cert was significant because it meant the court would not hear Ashcroft's case and the desegregation program would move forward in the face of strong political opposition in Missouri.

President Reagan won a string of Supreme Court decisions in the 1980s weakening civil rights laws. Danforth joined forces with Sen. Edward M. Kennedy to pass the Civil Rights Act of 1991 reversing those Supreme Court decisions. All this was happening the same fall that Danforth was standing by the nomination of his protege Thomas.

Similar dynamics were at work on abortion. Missouri attorney generals from Danforth to Ashcroft to William Webster defended Missouri abortion laws at odds with *Roe v. Wade*. In 1989, it appeared that Rehnquist and Scalia were on the verge of winning their battle against *Roe*, but the first woman on the Supreme Court, Justice Sandra Day O'Connor didn't go along with her fellow Reagan appointees. In *Webster v. Reproductive Health*, decided July 3 of that year, the court found a way to uphold provisions of the law without disturbing *Roe*.

The last decision that I wrote from Washington was *Planned Parenthood v. Casey* in 1992 when a remarkable three-justice alliance of Republican nominated justices – O'Connor, Kennedy and Justice David H. Souter – helped reaffirm *Roe* as legitimate precedent, an act that normally would protect it from future challenge.

Their votes illustrated that presidents cannot manipulate the justices they appoint like puppets. Many justices, with lifetime appointments, develop independent judicial philosophies. Republican nominees John Paul Stevens, Blackmun and Souter developed liberal voting records. Blackmun and Stevens even voted against all executions during their later years on the court. O'Connor, Souter and Lewis F. Powell before them became the moderate middle of the court that lasted for decades.

Souter was Brennan's replacement. Illinois Sen. Paul Simon asked Souter over and over again whether he had made the

effort to understand the problems that common people have and that come before the court. At the time, I wasn't impressed by his line of questioning, but I've wondered since if it had some effect.

With each conservative appointment, many of us in the press predicted the court would move to the right. I wrote that Souter's first term on the court confirmed the move in that direction, only to soon find out how wrong I was.

By the turn of the century, Brennan and Marshall were gone and Scalia and Thomas were in ascendance. Rehnquist, rather than an ineffective dissenter, was a powerful chief justice. But the moderate middle had held from Powell to O'Connor to Kennedy and Souter and there was even the startling new expansion of same sex rights and eventual recognition of same-sex relationships and marriage.

But with the 21st Century, Republican White Houses were vetting federal judges for ideological purity much more carefully, with the help of the conservative Federalist Society, which had become a dominant force in law schools and the picking GOP nominees for the judiciary. Whereas the recommendations of the American Bar Association had been the most important vetting of justices while I covered the court, the Federalist Society's stamp of approval became all important.

When O'Connor left the court to care for her ailing husband and was replaced by Samuel Alito, there was a definite move to the right, with Alito making the difference on guns, campaign finance, religious liberty and eventually abortion.

Originalism, once out of fashion, captured the majority of the court and became the legal rationale to justify broader citizen gun rights, unlimited corporate campaign spending and an end to abortion as a constitutional right.

In the pages that follow, we take a look at the court at this historical fulcrum where the abortion decision has placed it in the nation's attention. We look at:

- The loss of legitimacy the court has suffered with the *Dobbs* decision overturning the abortions right and what, if anything, can be done about it.
- The Constitution's success as an Enlightenment blueprint for a government where the people are sovereign, but also the failure of the Framers to include principles central to what the nation stands for – equality, democracy and individual freedom.
- Whether the Constitution is living or dead. Should it be interpreted as the dominant originalists would have it, based on the meaning of the Framers, or should it be a living Constitution whose broad protections take on the meaning of the times?

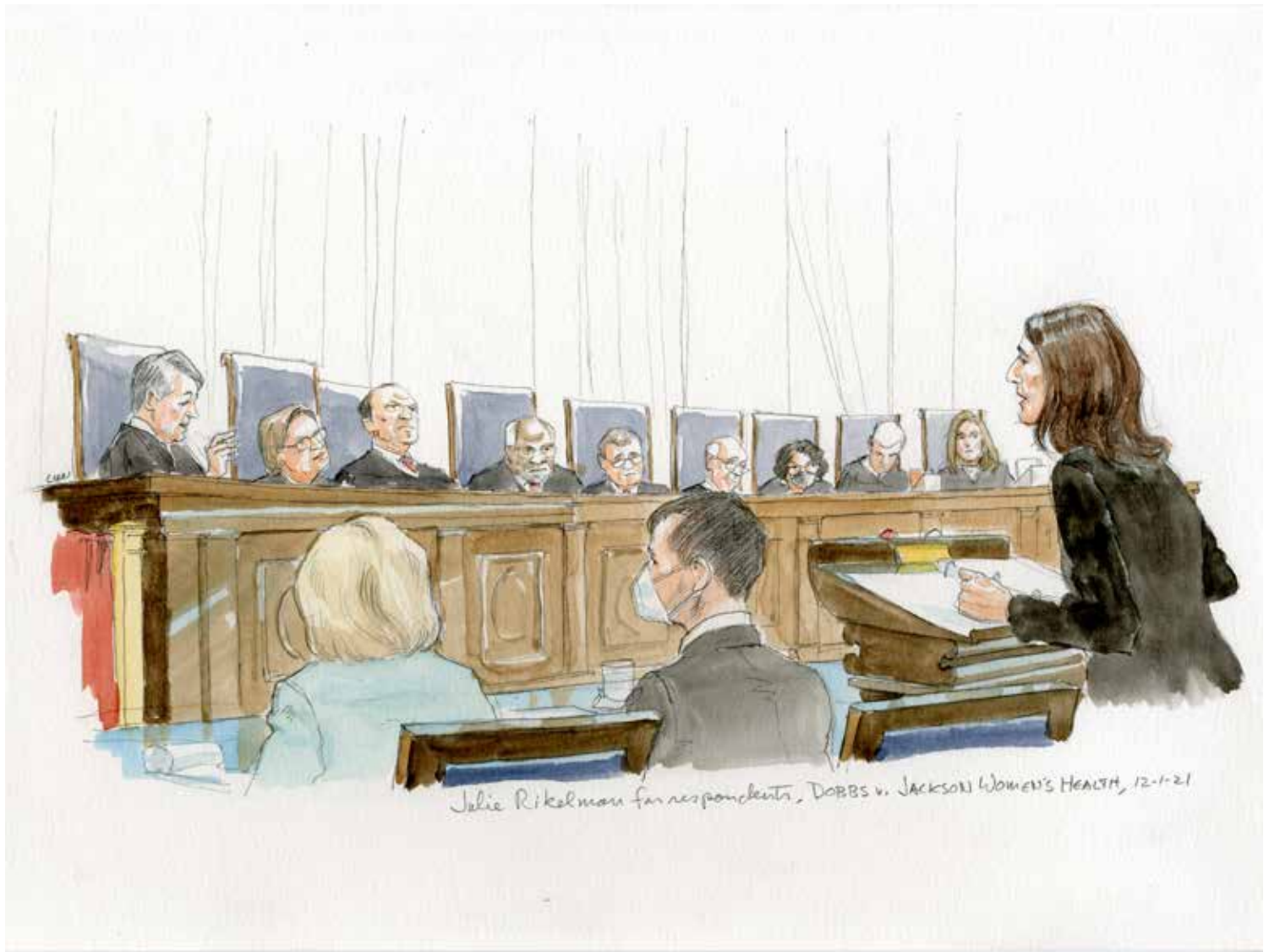
- The meteoric growth of the freedoms in the Bill of Rights and the Roberts court's shift to protecting the speech of the wealthy and powerful over the marginalized.
- The devil's bargain the Framers made with slavery that led to Civil War, post-war constitutional amendments strengthening the federal government and the Supreme Court's decades-long failure to enforce the amendments.
- The subordination of women even after "equal protection" was added to the Constitution after the Civil War. Many would assert that subordination has deepened by allowing states to control a woman's decisions about reproduction.
- Privacy and where it fits into a Constitution that never mentions the word but which most Americans take for granted.
- The constitutional structure of a separation of powers and check and balances among the branches of government that had made for an effective government structure.

This is a work of news interpretation where we try to place the facts in the context of the Supreme Court's history, from James Madison's notes at the Constitutional Convention to the Biden commission's report on Supreme Court reforms. I've looked back at the research for a big project the *Post-Dispatch* published on the 200th anniversary of the Constitution in 1987, including materials my wife and I collected during our research.

I'm a journalist with a law degree who has spent a half-century writing about my passions – civil rights, civil liberties and the Supreme Court. I'll try to level with you about an institution I love because over our lifetimes it has often been in the lead of the incomplete effort to achieve a more perfect union.

Bibliography: This project was compiled with the help of these publications: *The Constitution Then and Now*; *St. Louis Post-Dispatch*, 1987; *The Records of the Federal Convention of 1787*, edited by Max Farrand; *The Supreme Court in United States History*, Charles Warren; *Miracle at Philadelphia*, Catherine D. Bowen; *The Great Rehearsal*, Carl Van Doren; *Women's America, Refocusing the Past*, Linda K. Kerber and Jane Hart-Mathews; *Why the ERA Failed*, Mary Frances Berry; *Women and the Constitution*, Virginiia C. Purdy; *The Supreme Court*, Jeffrey Rosen.

A special thanks to Art Lien, an extraordinary artist who has drawn Supreme Court arguments for most the last half century. He donated his drawings for this publication



Julie Rikelman, senior litigation director for the Center for Reproductive Rights, answers question from the justices during the Dobbs oral arguments in December, 2021

Illustration by Art Lien

Chapter 1: Losing legitimacy

By William H. Freivogel

The Supreme Court's decision overturning *Roe v. Wade* has resulted in the steepest drop in respect for the U.S. Supreme Court in almost a century – the steepest since the Roosevelt court packing crisis of 1937.

James L. Gibson, a political science professor at Washington University and national expert on the subject, wrote in September that the *Dobbs v. Jackson* decision overturning *Roe* “may be the most legitimacy threatening decision since the 1930s...*Dobbs* produced a sizable dent in institutional support, perhaps an unprecedented dent, in part because abortion attitudes for many are infused with moral content.”

Gibson added, “in light of the substantial tilt of the court to the right since 2020, the

court's legitimacy may be at greater risk today than at any time since FDR's attack on the institution in the 1930s.”

A Gallup poll shows that after *Dobbs* disapproval of the court rose to the highest point this century – 58 percent – and approval sank to the lowest – 40 percent.

If the five conservative justices in the *Dobbs* majority hold together to overturn other long-standing precedents, then the court will tip sharply to the right and could continue on that path for years. The current term's affirmative action cases involving college admissions at Harvard and the University of North Carolina, are likely to end affirmative action and deepen the impression that the court has taken a sharp right turn. The court's six most conservative justices are also more willing to allow religion in the public square than

the courts of the past half century.

Gregory Magarian, a First Amendment scholar at Washington University Law School and former Supreme Court clerk, says today could be the conservative political counterpoint to 1954 when *Brown v. Board* heralded the beginning of the Warren Court and its expansion of civil rights, civil liberties and criminal rights.

One difference, Magarian says, is that the agenda of the current five-justice majority is less popular than the Warren Court's, despite the “Impeach Earl Warren” signs that dotted highways in the 1950s and 60s. The reaction to the *Dobbs* decision, expressed by voters in the November 2022 midterm elections, appears to confirm the view that *Dobbs* is unpopular nationwide.

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One major substantive difference between the Warren Court and Dobbs majority is that the Warren Court was expanding the rights of Blacks and women to fulfill promises of Equal Protection in the Constitution. But Dobbs was a major step in the opposite direction, requiring women in many states prove their lives were at risk before they could receive an abortion.

This was the biggest loss of liberty and equal rights in almost a century of steadily growing individual liberties.

If the court's conservative bloc holds together, the combination of a powerful Supreme Court and a hard to amend Constitution could mean the Constitution we celebrate in 2037 will be substantially different from what it was before former President Trump's justices tipped the scales of justice.

Other problems of legitimacy

About 85 percent of Americans favor abortion rights under all or some circumstances, according to a Gallup poll. But there are additional reasons for the court's legitimacy problem.

One is the lack of respect for stare decisis, precedent. The Dobbs majority jettisoned a precedent of almost 50 years that had been reaffirmed 30 years ago. Respect for precedent is central to legitimacy because it provides a check on the justices simply voting their personal or political preferences.

Roberts seemed almost to be pleading with his conservative colleagues when he wrote in Dobbs: "Surely we should adhere closely to principles of judicial restraint here, where the broader path the court chooses entails repudiating a constitutional right we have not only previously recognized, but also expressly reaffirmed applying the doctrine of stare decisis."

The Dobbs dissenters said: "The majority has overruled Roe and Casey for one and only one reason: because it has always despised them, and now it has the votes to discard them. The majority thereby substitutes a rule by judges for the rule of law."

In addition, President Trump's three judicial appointments – Justices Neil Gorsuch, Brett Kavanaugh and Amy Coney

Barrett – had appeared to affirm Roe during confirmation hearings, never suggesting they were ready to overturn it.

Also, the Dobbs decision followed more than 40 years of Republican presidents from Ronald Reagan to George H.W. Bush, to George W. Bush to Donald Trump nominating justices they hoped would overturn Roe. Those Republican presidents were able to name 11 justices, while Democratic presidents elevated five. Six of the nine justices on the current court were appointed by Republicans even though Democrats held the presidency for 16 of the past 28 years and won the popular vote in six of the last seven presidential elections.

In addition, the Senate rushed Barrett through confirmation hearings immediately before the 2020 election even though Senate Majority Leader Mitch McConnell had refused to hold a confirmation hearing for Merrick Garland under similar circumstances four years earlier.

Altogether, this gave the appearance that Trump and McConnell had packed the court through hardball politics and counter to constitutional norms.

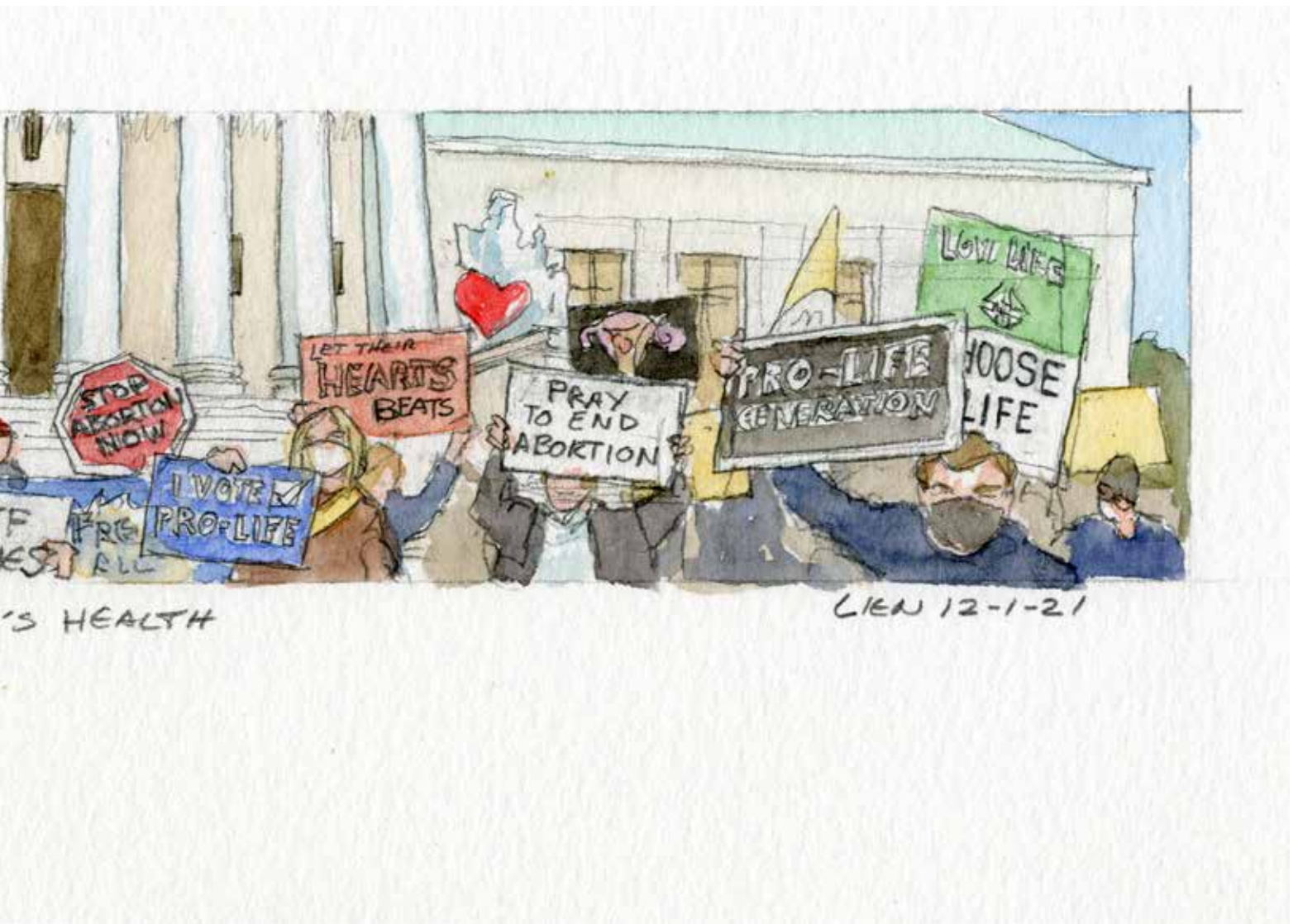


Illustration by Art Lien

Plus, it appeared the court majority had weakened democratic means for changing the direction of the court any time soon. The Roberts Court found key parts of the Voting Rights Act unconstitutional, refused to block partisan gerrymanders that had helped Republicans control state legislatures and congressional reapportionment and finally had allowed Republicans to impose new restrictions after the 2020 election that limited voters in the name of election integrity. Democratic efforts to nationalize voting requirements have run into the counter-majoritarian, and extra-constitutional constraint of the filibuster.

An additional blow to legitimacy has been Justice Clarence Thomas' refusal to recuse himself from cases involving the 2020 presidential election, even though his wife, Ginni, was deeply involved with the Trump White House in election denials.

Legal ethics experts say Thomas should recuse himself from cases involving the Jan. 6 insurrection at the Capitol. But Thomas did not recuse himself recently when the court refused to block the House

Jan. 6 committee's subpoena for phone records of Kelli Ward, chairwoman of the Arizona Republic Party. Thomas dissented from the court's action without comment. So, he was taking the side of the election deniers and his wife.

The leak of the Dobbs draft opinion last winter was an unprecedented breach of court protocol and reflected deep divisions within the institution, undermining court legitimacy. So far, Roberts' investigation of the leak has not yielded results.

Then, this fall, The New York Times disclosed that a former abortion foe had orchestrated social contacts between wealthy anti-abortion donors and Justices Alito and Thomas for several years. That news also unsettled the court because the man claimed Alito had leaked the outcome of a 2014 abortion-related decision at a dinner with anti-abortion fundraisers – a charge Alito denied.

Earlier in December, the House Judiciary Committee took up these matters in a hearing on a bill that would require the Supreme Court to adopt an ethical code or adhere to the code that already applies to

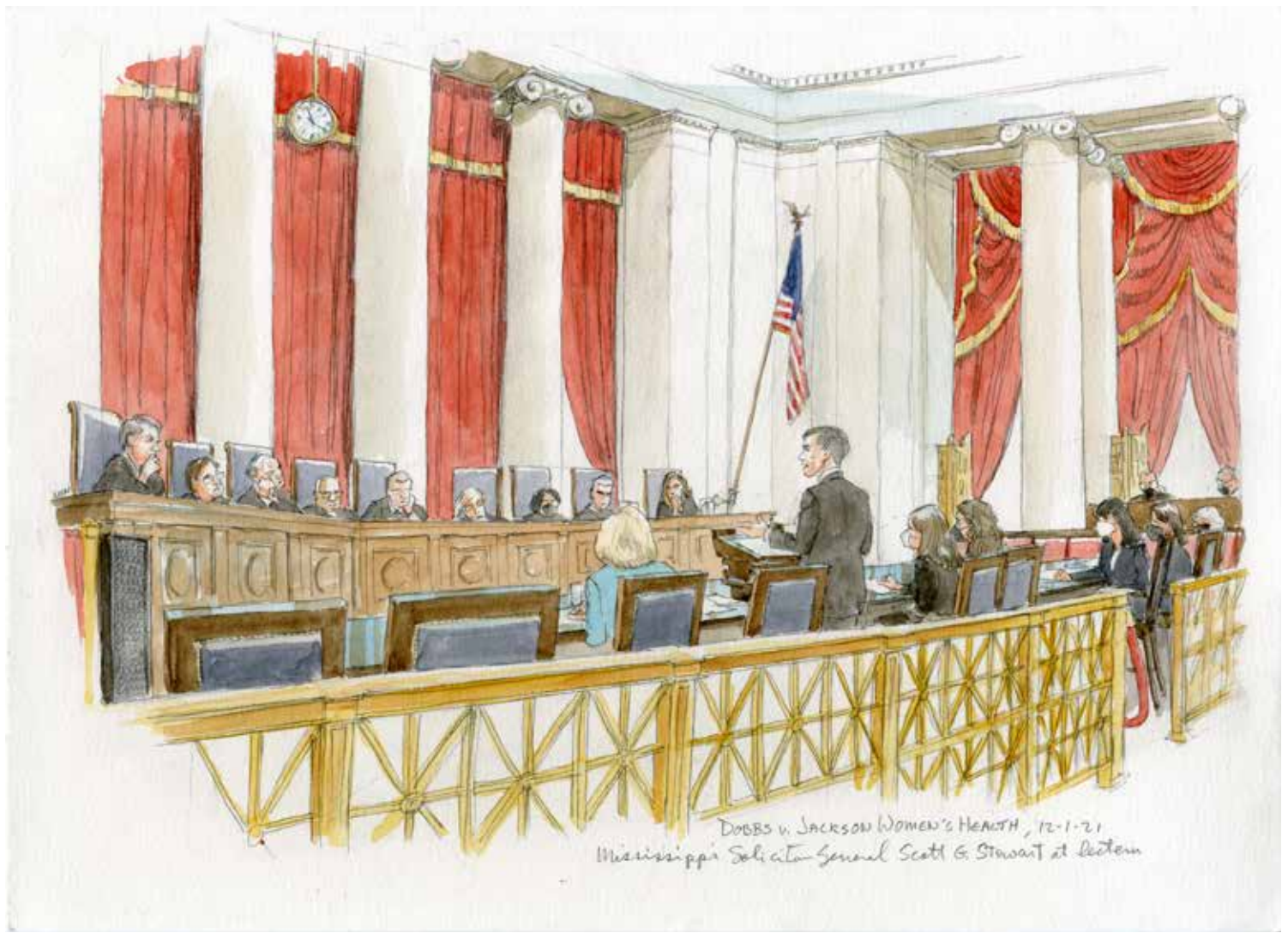
lower level federal judges. The Government Accountability Project and a host of other liberal groups called for passage of the bill, the Supreme Court Ethics, Recusal and Transparency Act of 2022.

Ironically, former President Trump himself doesn't think the Supreme Court has legitimacy. After the court turned down his attempt to keep his income taxes shielded, Trump wrote on Truth Social,

"Why would anybody be surprised that the Supreme Court has ruled against me, they always do! It is unprecedented to be handing over Tax Returns, & it creates [a] terrible precedent for future Presidents. The Supreme Court has lost its honor, prestige, and standing, & has become nothing more than a political body, with our Country paying the price. They refused to even look at the Election Hoax of 2020. Shame on them!"

Trump followed up that post in early December calling for termination of rules in the Constitution so he can be "declare(d) the RIGHTFUL WINNER" or "have a NEW ELECTION." He wrote: "A Massive Fraud

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Mississippi Solicitor General Scott G. Stewart opened his argument in *Dobbs* claiming that the *Roe v. Wade* and *Planned Parenthood v. Casey* "have no basis in the Constitution" **Illustration by Art Lien**

of this type and magnitude allows for the termination of all rules, regulations, and articles, even those found in the Constitution. Our great 'Founders' did not want, and would not condone, False & Fraudulent Elections!"

The title on a conlaw professor's blog on Trump's post was tongue in cheek: "Trump Stands in the Middle of Fifth Avenue and Shoots the Constitution."

The legitimacy of the Supreme Court can only suffer when the former president, who has appointed one-third of the court's justices, charges that the court has lost its honor and that the Constitution should be set aside to reinstate him to power. Trump maintained a day after the post that he was misunderstood.

Kavanaugh, the new middle?

The right turn that the court is taking might not end up as sharp as it now seems.

The five-justice majority that overturned *Roe* may not be as doctrinaire and closely knit as has been portrayed in the media and political arena.

Justice Kavanaugh signed on to

Justice Alito's majority opinion in *Dobbs*, but wrote a separate concurring opinion that suggested limitations. For one thing, he said *Dobbs* would not open the way for states that barred abortion to also criminalize a woman going out of state to get an abortion.

As he put it: "May a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to interstate travel." (Skeptics note, however, that the Constitution is no more explicit in protecting a right to travel than it was protecting a right to abortion.)

Kavanaugh also emphasized that *Dobbs* did not jeopardize other decisions based on personal privacy – interracial marriage, access to birth control or same-sex marriage.

Kavanaugh wrote, "Overruling *Roe* does not mean the overruling of those precedents, and does not threaten or cast doubt on those precedents." That assurance contradicted Justice Thomas, who called on the court to reconsider its decisions upholding contraception and same-sex relations in future cases.

The reason that Kavanaugh's view is important is that he could be a fifth justice, along with the chief justice and the three justices appointed by Democrats to limit the court's movement to the right.

Chief Justice Roberts will certainly try to lure Kavanaugh to the middle as he apparently failed to do in *Dobbs*. Roberts would have discarded *Roe*'s trimester formula but preserved an abortion right for a shorter period of several months to give women time to make a decision.

The legitimacy of the Supreme Court has long been Roberts' most important goal. Roberts is 67. The Roberts Court could last 20 or more years, even past the 250th anniversary of the Constitution. Roberts has demonstrated repeatedly, including in his decisive vote upholding *Obamacare*, that legitimacy is more important to him than ideology.

Lee Epstein, the former Ethan A. H. Shepley Professor and Distinguished Professor at Washington University, is the nation's leading expert on Supreme Court voting patterns. She says that last term's marquee decisions overturning *Roe* and protecting the right of people to have guns

outside the home, were predictable. But she adds that Kavanaugh, the new middle of the court, is unpredictable.

In a Slate interview this fall she put it this way: "It's hard to believe that people didn't see this (Dobbs) coming. Obama is president for eight years; he gets two appointments. Trump is president for four years; he gets three appointments, and he moves the center of the court toward Brett Kavanaugh, away from the chief justice. So, yeah, I told you so. There's a lot of predictability here, and abortion and guns—not at all surprising."

But she adds, "there's another side to this story, and that's from the data side. If you look at the data from last term, this doesn't look like a really socially, culturally extreme court. And that's what's a little perplexing about last term ...right now, there's a side to this court that looks, kind of, standard issue Roberts Court."

There was above average unanimity, with 50 percent of the decisions unanimous compared to the average of 33 percent in recent decades. And there weren't a lot of 6-3 conservative-liberal splits. Just 15 percent of the decisions came out that way.

In the cases that got the most attention, last term's decisions didn't look much different than previous terms, she says. "Look at the 2020 election challenges. Look at the Trump tax records, Obamacare, the cheerleader case...NCAA, the student athlete case.... This was not a total blowout for the Democratic side, which to me was a little unexpected...So, I'm going to push back a little bit on that point, the term looks different; actually it doesn't look that much different."

The mystery is Kavanaugh. "If you look at the data, he's normally, not always, but normally with the chief and why he didn't join the chief here (in Dobbs) is perplexing to me."

It's as if there were two courts operating at the same time. A Trump Court where the three Trump appointees join Alito and Thomas as they did in Dobbs. And then there's a Roberts court where Kavanaugh comes along with the chief justice and joins the Democratic appointees in a more moderate decision.

A signal of whether a Roberts/Kavanaugh middle bloc will check the more conservative justices could be the decision in *Moore v. Harper*, the "independent state legislature" case that was argued before the Supreme Court for three hours on Dec. 7. The case will determine how far state courts can go in overturning state legislatures on election rules.

The Republican controlled state legislature in North Carolina drew a congressional redistricting proposal that could have resulted in Republicans controlling 10 of 14 U.S. House seats in a

state roughly equally divided between the parties. The state supreme court said this was a blatant partisan gerrymander and experts drew a new map that resulted in a 7-7 split in the 2022 Midterm elections.

The state legislature argues that the state supreme court could not interfere in its redistricting plan because the Constitution says, "Times, Places and Manner" of congressional elections "shall be prescribed in each State by the Legislature thereof." Common Cause and the Justice Department countered that past Supreme Court precedents have always recognized that legislative redistricting must comply with state constitutions and the state supreme court enforces those constitutions.

Rick Hasen, the nation's leading expert on election law, blogged the oral argument Dec. 7 in which it appeared the court was divided into thirds. The three most conservative justices – Thomas, Alito and Gorsuch – are ready to adopt the independent state legislature theory and cut out state supreme courts. The three Democratically appointed justices – Elena Kagan, Sonia Sotomayor and Ketanji Brown Jackson – oppose it. Chief Justice Roberts and Justices Kavanaugh and Barrett looked for a compromise that would allow state supreme court involvement unless its decision was extraordinary.

If a conservative center blocks the conservative right's attempt to adopt the independent state legislature theory, then the court may appear more moderate.

A vibrant democratic response to Dobbs

One of the main criticisms of *Roe* from the time it was decided in 1973 was that it took the issue of abortion out of the democratic process at a time when a growing number of states were recognizing abortion rights. From 1967-73, four states repealed abortion bans and 13 others expanded abortion access in situations where a mother's life or health was at risk or in cases of rape and incest.

The late Justice Ruth Bader Ginsburg favored abortion rights but criticized *Roe* because "it seemed to have stopped the momentum on the side of change."

Because abortion rights advocates could always fall back on the courts and the constitutional right recognized in *Roe*, they didn't have to work as hard in the political arena. Meanwhile, Republican opponents of abortion rights built a powerful voting bloc that led to Republican presidents naming conservative, anti-abortion judges to the federal courts.

Justice Kavanaugh, in his opinion in *Dobbs*, said the decision "restores the people's authority to resolve the issue of abortion through the processes of

democratic selfgovernment established by the Constitution."

In the weeks after *Dobbs*, 12 states put abortion bans into place.

But arguably, the strength of the abortion-rights vote in the 2022 midterm election in helping Democratic candidates and passing abortion rights referenda illustrates that *Dobbs* revitalized the abortion rights supporters in the democratic process.

In five states, abortion was on the ballot – Kentucky, Michigan, California, Vermont, and Montana. In all five, voters supported protecting abortion access. In three, California, Michigan and Vermont, they voted to put abortion rights in the state constitutions.

Dobbs may have unlocked the vibrancy of the democratic process in regards to abortion with the result that more states voted to protect these rights in the 2022 elections. Congressional passage in December of a law protecting same-sex and interracial marriage is another sign of the *Dobbs* backlash in the democratic process. The legislation was fueled by reaction to Justice Thomas' *Dobbs* concurrence calling for the court to reconsider other cases built on privacy, including same-sex marriage and contraception, although he didn't mention interracial marriage, also partly based on privacy.

Winning in the democratic arena in some states doesn't help those in states where abortion remains illegal. A majority of states ban or restrict abortion now, whereas abortion was available as a constitutional right in all states before *Dobbs*. Supporters say a woman's right to control her body should not be subject to a vote at the ballot box and for that reason is properly a constitutional right protected by liberty in the 14th Amendment.

Previous crises of legitimacy

The Supreme Court has had crises of legitimacy before. The crises have resulted from one of four situations:

- Packing the court: A meddling Congress or president or both have repeatedly changed the number of justices on the court to try to affect decisions.
- Deciding a close presidential election: The court has twice become entwined in determining the results of a close presidential election, as it did in 1876 and 2000, taking actions that seemed to critics to be more political than principled.
- Infamous decisions: Some of the most infamous court decisions in history have inflicted long-term damage to the court's reputation. The 1857 *Dred Scott* decision denying Blacks constitutional

Continued on next page

rights led to the Civil War. Another was *Lochner v. New York* in 1905 during the Gilded Age of capitalist excess. The court elevated the right of contract over a law setting a 10-hour workday for bakers.

- Forceful presidents: Some of the most influential presidents in history – Jefferson, Jackson, Lincoln and Franklin D. Roosevelt – maintained that they could independently interpret the Constitution and were not bound by a contrary Supreme Court interpretation. As FDR put it, the Constitution is a “layman’s document, not a lawyer’s contract.”

After President John Adams lost the 1800 election to Thomas Jefferson, Adams’ Federalist Party tried to add new federal judges to be appointed by Adams as a lame duck – the so-called Midnight Justices. It also reduced the size of the Supreme Court from 6 to 5 to deny Jefferson a court appointment.

Jefferson’s party promptly reversed direction on the size of the court and in 1807 bumped the court up to seven to give Jefferson another appointment. Plus, the appointment of the Midnight Justices backfired because it led to the famous *Marbury v. Madison* decision establishing the Supreme Court as the arbiter of what the law is.

Jefferson and Jackson, two powerful Democratic presidents, quarreled with the Chief Justice John Marshall, the great Federalist chief who authored *Marbury* and other key decisions establishing federal actions, including the constitutionality of the Bank of the United States.

Both Jefferson and Jackson thought the president and democratic majorities in Congress and state legislatures should take precedence over constitutional decisions of the court. Jefferson’s views on state power led to the dangerous Nullification doctrine that eventually led to Southern secession and Civil War.

Congress gave Jackson two additional justices to increase the court to nine. Jackson appointed them and Congress confirmed them as the president was going out the door of the White House.

Lincoln gained prominence by attacking Chief Justice Roger Taney’s *Dred Scott* decision, which had read Blacks out of the Constitution. The Lincoln-Douglas debates were all about the *Dred Scott* decision. Two years later, Lincoln was president and the Civil War had started before he made it to Washington.

Lincoln, as president, ignored Taney’s decisions during the Civil War that would have required the president to abide by habeas corpus – the power of the court to free a prisoner. Also, Lincoln issued the



The Veterinary Says Your Horse Is Dead!

Illustration courtesy of U.S. Supreme Court Historical Society

Emancipation Proclamation on Jan. 1, 1863 even though most legal experts think he didn’t have constitutional authority to do it on his own. He wasn’t so sure himself.

Congress added a 10th vote for Lincoln to increase Republican control of the court, but after Lincoln’s assassination the Republican Congress reduced the court to seven so that President Andrew Johnson could not appoint Southern sympathizers who would block their Reconstruction laws intended to give political rights to freed Blacks.

Congress increased the number of justices to nine giving President Grant two new appointments in 1869 – an action that led directly to overturning a Supreme Court decision denying the government the authority to issue paper money – greenbacks. The two new justices turned a 4-3 decision against greenbacks into a 5-4 majority authorizing them to pay off Civil War debt.

In the election of 1876, Supreme Court justices were deciding votes in a compromise that elected Rutherford B. Hayes – the loser in the popular vote. As

part of the compromise, Hayes agreed to withdraw federal troops from the South. That allowed segregationists to disenfranchise Black voters for decades into the 20th century.

For the next half century or more, the Supreme Court was no friend of Blacks, women or workers. At the same time that the court was blocking attempts to use Reconstruction amendments and legislation for the purpose they were intended – extending rights to free Blacks – the court found a way to use those amendments to benefit the economic prospects of the industrialists of the Gilded Age.

In *Lochner v. New York*, 1905, the court held that the 14th Amendment passed after the Civil War protected contract rights for the benefit of employers. *Lochner* came to stand for this entire era of Supreme Court decisions striking down minimum wage and maximum hour laws. In *Lochner*, the court ruled that New York’s law setting a maximum 60 hour work week for baker’s was unconstitutional.

Key elements of President Franklin D.

Roosevelt's New Deal were struck down by the Supreme Court at a time of national emergency during the Depression – laws such as the Agricultural Adjustment Act and National Recovery Act. The court ruled that FDR and Congress violated the freedom to contract by regulating business and labor.

When FDR won by a landslide in 1936, winning all but two states and electing a heavily Democratic Congress, he sought to pack the court. He said the elderly court, where the average age was 71, was suffering from a judicial “hardening of the arteries.” He wanted Congress to allow him to appoint six new justices, one for each justice over 70.

Chief Justice Charles Evans Hughes opposed the plan but soon he and Justice Owen Roberts began approving New Deal laws, including the Social Security Act and the National Labor Relations Act. The flip flop was dubbed the “switch in time that saved nine.” FDR still pushed for his justices but lost a Senate vote after the chief sponsor died after a hot July debate on the Senate floor.

The verdict of history was so final that no president has since proposed packing the court by adding multiple justices.

Today's crisis of legitimacy is the most severe since the court's challenge to the New Deal and FDR's failed court-packing.

The Biden commission finds no solutions

Liberal and progressive forces, in anticipation and then reaction to Dobbs, have proposed ways to undo the Trump/McConnell court packing, which they say violated accepted constitutional norms. President Joseph Biden appointed a commission that reviewed alternatives and did not make a final recommendation in a report issued a year ago.

Law school critiques have called upon progressives to give up their long-held reliance on the Supreme Court to protect rights from abusive majorities.

Brad Snyder, a professor at Georgetown University Law Center, argued in Politico that the Warren Court had misinterpreted Marbury v. Madison and seized unconstitutional powers in enforcing civil rights decisions. He would seize the tools of conservative legislators from the Warren era to bar the court from hearing appeals on abortion, affirmative action, campaign finance, gun rights and voting rights.

“It is not too late to put the genie of judicial supremacy back in the bottle and to return policymaking and constitutional enforcement where it belongs – with the American people and their elected representatives,” he wrote.

Samuel Moyn, a professor of history and law at Yale, agreed, arguing that, “the

fact that the Supreme Court has seldom protected important rights flies in the face of the court's self-image and contradicts a romanticized view of the institution that arose during the mid-20th century” due to Brown and Roe. Moyn too thinks Congress should use jurisdiction stripping legislation.

In an essay with Ryan D. Doerflinger of Harvard, Moyn goes on to argue that the Constitution is “broken.” It should be made more “amendable,” the nation should be “packed” with more states and the role of the Senate should, as a co-equal branch, be altered. All tall orders. The professors admit that in trying to fix the broken Constitution, Congress would be “pretty much openly defying the Constitution.” For that reason, it would have to prevent the court from reviewing its fixes.

Jennifer Rubin, an influential columnist for the Washington Post, recently called for term limits on justices or adding new justices. At least, she said, there should be ethics reform, she wrote.

Congress clearly has the power to increase or decrease the number of justices on the court and to alter the court's appellate jurisdiction. One of the proposals considered by the Biden commission would expand the court to 13 as a response to Republicans breaking with constitutional norms in their refusal to consider Garland and then quickly confirming Barrett under similar circumstances.

But history's verdict on FDR's court packing effort provides a roadblock to this proposal. Packing the court to bring about more favorable results, itself, undermines the court's legitimacy and its role as a check on other branches of government and to abusive majorities.

As the Biden commission put it in a quote that Rubin left out of her column of support: “For opponents of Court packing, the historical condemnation of the 1937 Court packing plan illustrates what they regard as a fundamental principle of American constitutional government...the 1937 reform has long been regarded as one of the most disgraceful assaults on the Supreme Court in American history.”

Another proposal considered by the Biden commission was term limits for justices. But those ideas run into the language of the Constitution which states justices shall “hold their offices good behavior” – in other words for life unless they do something impeachable.

Other proposals considered by the commission included reducing the power of the Supreme Court by stripping some jurisdiction. The Constitution expressly permits Congress to determine the appellate jurisdiction of the Supreme Court – in other words, the appeals that it can hear.

Limiting the appellate jurisdiction of the

Supreme Court has more often been a tool of conservatives than liberals.

In 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) withdrew the Supreme Court's appellate jurisdiction to review decisions by the federal courts of appeals in death penalty cases.

The Detainee Treatment Act of 2005 tried to strip all federal courts of jurisdiction to consider habeas corpus petitions from noncitizens detained as enemy combatants in the war on terrorism. But the Supreme Court ruled that law violated the Constitution's provisions that limit the suspension of habeas corpus to cases of rebellion or invasion.

The Warren Court's decisions integrating public schools and ending mandatory state prayer in public schools led to a plethora of proposed constitutional amendments to take power away from the Supreme Court and turn it over to Congress or the states.

“Impeach Earl Warren” billboards were erected around the country by the right-wing John Birch Society.

The Supreme Court responded emphatically to the attack on its authority in the Cooper v. Aaron decision of 1958 requiring Arkansas officials to abide by the law after the Little Rock 9 disturbances. The court cited the Constitution's Supremacy Clause and Marbury v. Madison establishing the court “as ultimate interpreter of the Constitution.”

By the beginning of the Reagan administration, dozens of bills had been introduced to strip the courts of jurisdiction over busing, school prayer and abortion.

Biden's commission commented: “As this historical overview demonstrates, debates about the proper role of the Supreme Court are as old as the Constitution.”

It's even older, given Alexander Hamilton's observation in Federalist 78 that “nothing can contribute so much to [the judiciary's] firmness and independence as permanency in office,” a quality he regarded as “an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.”

The bottom line is that none of the reforms proposed by progressives and Democrats is moving forward and there is no prospect they will given the verdicts of history and the absence of a democratic majority supporting them. The major surgery they propose would raise new and different legitimacy questions.



Illustration by Steve Edwards

Chapter 2: Missing from the constitution: democracy, equality, privacy, Blacks, women, the right to vote

By William H. Freivogel

America reveres the Framers of the Constitution for writing the most successful and enduring governing document of the Enlightenment, installing "We the People" as the source of sovereign power for an elected republican form of government.

The Constitution exploded like a cannon shot across the ocean, rejecting centuries of rule by monarchs, potentates and popes. And it was a practical, durable plan for separating power among different branches of government that could check one another.

Yet, fundamental values essential to what we think of as American democracy were missing.

Democracy for one. Equality. Privacy. Due Process. Women. Blacks. Native Americans. The right to vote. Direct election of senators. Direct election of the president. Political parties. Judicial review. The number of justices on the Supreme Court. Whether there should be lower federal courts.

Even the freedoms of the Bill of Rights were left out. They were added four years later but weren't applied to the states for 130 years and have become powerful protections of individual freedom only in the lifetimes of Americans still living.

Plus, the Constitution is mostly a document of negative rights – things the government can't do to people. There are no positive rights, such as the right to education, food, housing, health care or other essentials of life.

We the People

America's two most powerful proclamations of national purpose are the Declaration of Independence's "all men are created equal" and the Constitution's preamble, "We the People." These short, dramatic statements of the equality, power and freedom of every man are the reason America became a beacon to the world.

Yet, the meaning of those words was uncertain at the time they were written, at

the time of the Lincoln-Douglas debates on the eve of the Civil War and remains so today.

Jefferson, who wrote that all men are created equal, owned more than 180 slaves and had six children by his slave Sally Hemings. In addition, all 13 of the original colonies protected slavery at the time of the Declaration.

Jefferson's first draft of the Declaration explicitly criticized the king for slavery. It read:

"He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him... Determined to keep open a market where men should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or restrain this execrable commerce."

But the passage was cut out.

The simple preamble to the Constitution – We the People – made it clear that the

authority to form the United States came from the people, not God, the pope, a king or other potentate.

That was a truly revolutionary view. But the ugly truth is that most people were left out.

Several groups were clearly not part of "all men" or "We the people..." Women for example. Also, children, Native Americans and what people of the time called "imbeciles." In addition, eight of the original 13 states were slave states.

THE CONVENTION

Wealthy white men forget the 'ladies'

All 55 of the Framers were white men, most wealthy, 13 owning slaves, including three of the first four presidents.

Jefferson referred to the men gathered in Philadelphia as "demigods" because they were a brilliant collection of minds – George Washington, Benjamin Franklin, James Madison, Alexander Hamilton, John Jay, Patrick Henry, Richard Henry Lee and George Mason among others. (Jefferson wasn't present because he was the American minister to France at the time; John Adams was envoy to Great Britain.)

Philip B. Kurland, a University of Chicago law professor and author of a study of the Constitution, said the architecture of the Constitution was "unique" in that it was "a government which looks to the people as sovereign...and distributes authority between a central power and the states within it."

Women were citizens, but there was no thought of giving women rights despite Abigail Adams 1776 exhortation to her husband, "in the new code of laws ... I desire you would remember the ladies and be more generous and favorable to them than your ancestors."

Nor was the Constitutional Convention in Philadelphia democratic. In fact, it was anti-democratic.

The wealthy men chosen for the Constitutional Convention were not elected. They were chosen by state legislatures. And they weren't even supposed to be writing a constitution. They were supposed to be improving the Articles of Confederation.

Some people have even suggested that the Constitution might be unconstitutional because the Convention didn't have the authority to write a Constitution.

Only propertied men could vote in most states, making the promise of the "We the People" a great exaggeration that the nation has sought over centuries of civil strife, civil war and protest movements to rectify in its search to achieve the rest of the Preamble – the blessings of liberty and a more perfect union.

All told, 85 percent of Americans couldn't vote under the new constitutional design.

The Framers feared democracy

The Framers did not want to create a democracy. During their deliberations, which were secret, the delegates spoke often of the excesses of democracy that they saw all around them.

Shays' rebellion of debtors in Massachusetts, an armed revolt put down just before the Constitutional Convention, was seen by some as a reason for a stronger central government.

Alexander Hamilton – one of the three authors of the Federalist papers supporting ratification of the Constitution – spoke openly of his distaste for democracy. He said popularly elected governments were "but pork, still with little change of sauce." He wanted lifetime terms for the president and senators.

Madison, another Federalist author and a reliable notetaker at the convention, also said he was worried about the "leveling spirit" alive in some state legislatures that were more interested in the debts of farmers than the rights of established property holders.

Roger Sherman of Connecticut wanted the state legislatures rather than the people to choose the House because "the people should have as little to do as may be about the government. They want information and are constantly liable to be misled."

Charles Pinkney of South Carolina said the people could not be trusted because "a majority of the people in South Carolina are notoriously for paper-money for legal tender."

Elbridge Gerry from Massachusetts agreed "the evils we experience flow from an excess of democracy," but he added that in Massachusetts "the worst men get into the legislature."

Benjamin Franklin, who often couldn't attend sessions because of difficulty walking, poked fun at those unwilling to trust the common man. "It seems to have been imagined by some that returning to the mass of the people was degrading the (president)... In free Governments the rulers are the servants and the people their superiors and sovereigns. For the former therefore to return among the latter was not to degrade but to promote them."

The Framers didn't include a right to vote in the Constitution because they opposed universal suffrage and wanted voting rights limited to property owners like themselves, the Harvard law professor Michael J. Klarman pointed out in his book, "The Framers' Coup: The Making of the United States Constitution."

Historian Charles Beard found in this 1913 book – *An Economic Interpretation of the Constitution* – that the business and financial interests of the Framers made them "immediately, directly and personally interested in, and derived economic

advantages from establishment of the new system."

Critics of Beard say the Framers were working toward national goals and not special interests, but they concede that a leading purpose of the Convention was to protect property rights against democratic state legislatures.

Leonard W. Levy, a historian, put it this way: "The Constitution was not an undemocratic document, was more democratic than the Articles of Confederation, and did not impede development of democracy. (But) to claim that the Constitution itself was a democratic document strained the evidence."

By 18th century standards, American society provided uncommon opportunities for the common man. In Europe, hereditary monarchs ruled and aristocrats owned property. But in America, 10 to 15 percent of the population owned property and had a voice in government.

By modern standards, however, the America of 1787 was no democracy.

Linda DePauw, who studied the 18th Century as a George Washington University law professor, said "in law and in fact no more than 15 percent of the Revolutionary generation was free to enjoy life, liberty and the pursuit of happiness."

Slaves composed about 20 percent of the population and were considered property, not people.

White servants composed about 10 percent of the population. They also were considered chattel and could not vote or take a drink in a tavern.

Native Americans were not citizens.

10 percent were white males who were free to acquire property but didn't have any. In most states they could not vote.

Women ceased to exist when they married. "She and her spouse became one in flesh and the flesh was his," De Pauw said. Married women had no voting rights or property and could be disciplined by their husbands like children or servants.

Checks on democracy

On May 29, 1787, Edmund Randolph of Virginia presented the Virginia Plan for a new government. He said, "Our chief danger arises from the democratic parts of our (state) constitutions...None of the state constitutions has provided sufficient checks against democracy."

George Mason, a planter from Virginia and influential member of the Convention, proposed that senators be property owners because "one important object in constituting the Senate was to secure the rights of property."

Eight of the future states had property qualification for members of legislatures.

Continued on next page

But Franklin turned the convention against the proposal stating, "some of the greatest rogues" he was "acquainted with are the richest rogues."

Gouverneur Morris, an aristocrat from Pennsylvania, proposed that House members should also have property.

Life and liberty were generally said to be of more value than property," Morris said. "An accurate view of the matter would nevertheless prove that property was the main object of Society."

But James Wilson, a more democratic delegate from Pennsylvania, said he "could not agree that property was the sole or the primary object of Government and Society....all men wherever placed have equal rights and are equally entitled to confidence," he said.

Later in the Convention, on Aug. 7, Morris proposed that only freeholders, men who held property, should be able to vote.

Mason and Wilson pointed out that some states had removed the property qualifications for voters, which would mean some people who could vote for the state legislature would not be able to vote for the national Congress. That situation would be "hard and disagreeable," Wilson said.

John Dickinson, a lawyer from Delaware, disagreed. He said freeholders were "the best guardians of liberty" and restricting the vote to them was "a necessary defense against the dangerous influence of those multitudes without property and without principle." The ignorant and dependent "can be as little trusted with the public interest" as children, he said.

Madison, looking ahead to industrialization, feared "a great majority of people will not only be without land, but any other sort of property" and could "become the tools of opulence and ambition."

But Franklin again won the day, warning, "it is of great consequence that we should not depress the virtue and public spirit of our common people, of which they displayed a great deal during the war and which contributed principally to the favorable issue of it."

On the final day of the convention, Mason, one of the most active delegates, withheld his signature because it didn't include a bill of rights and because he didn't think it was democratic enough. He predicted the Senate will "destroy any balance in government, and enable them to accomplish what usurpations they please upon the rights and liberties of the people."

Notes from James McHenry, a Maryland delegate, describe Franklin's famous comment to Elizabeth Willing Powel, a socialite. "A lady asked Dr. Franklin Well Doctor what have we got a republic or a monarchy. A republic replied the Doctor if you can keep it."

Substantial opposition to ratifying

the Constitution developed among anti-Federalists. Madison, Hamilton and Jay, in their anonymous Federalist papers put a more democratic spin on the Constitution than had been expressed behind closed doors in Independence Hall. In addition, Madison promised to write a bill of rights, which he did in the first Congress.

It took the 14th, 15th, 17th, 19th, 23rd, 24th and 26th amendments to extend the franchise to women, Blacks, young people and residents of the District of Columbia in addition to providing for direct election of Senators. The Electoral College and state control of voting rules continue to limit democracy to this day. The Electoral College determined in 2000 and 2016 that the candidate with the most popular votes did not become president.

THE FIRST CENTURY

Marbury v. Madison establishes judicial review

Jefferson won the presidency in the election of 1800, defeating John Adams in the nation's first partisan election. Before Adams left office, he appointed John Marshall as chief justice, setting the stage for what may have been the most consequential court decision in history – Marbury v. Madison.

Jefferson believed democratic majorities, especially state democratic majorities, should be preeminent. Marshall developed the judicial philosophy that checked the abuses of democratic majorities.

In 1798, the Federalist controlled Congress passed the Alien and Sedition acts making it illegal to criticize the president. Today, the law would be declared unconstitutional in short order. But 1798 was before judicial review.

About 25 Democrat-Republican newspaper editors supporting Jefferson were prosecuted and some jailed. One congressman was prosecuted for saying Adams had an "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice." Jefferson himself feared prosecution before unfriendly Federalist judges. He called the prosecutions "the reign of the witches."

In a 1798 letter, Jefferson said, "our general government has, in the rapid course of [nine] or [ten] years, become more arbitrary and has swallowed more of the public liberty than even that of (England)."

Jefferson believed that state legislatures should be the last word on the constitutionality of laws passed by Congress – a short-sighted view given the long history of states passing unconstitutional laws.

Jefferson wrote the Kentucky Resolution opposing the Sedition Act and expressing this belief in the supremacy of state

legislatures. It went so far as to advocate "nullification" – the dangerous philosophy that, in the hands of Sen. John Calhoun a few decades later, led to secession and Civil War.

Before Adams left office, the Federalist Congress not only reduced the size of the Supreme Court to take an appointment from Jefferson (an action quickly reverse by Jefferson's party), but it also allowed Adams to appoint 42 local party workers as justices of the peace in the District of Columbia, which led to the foundational Supreme Court decision of Marbury v. Madison.

By midnight of March 3, 1801 when Adams' term ended, the commissions appointing the judges sat undelivered on the desk of Adams' secretary of state – who happened to be John Marshall, who was serving as both chief justice and secretary of state in the last days of the administration.

Jefferson ordered his secretary of state, James Madison, not to deliver the commissions, which he called an "outrage on decency."

William Marbury, a prosperous landowner in D.C., asked the Supreme Court to order Jefferson to deliver his commission.

Marshall exhibited his unmatched talent for wringing useful compromises from politically treacherous situations. Writing for a unanimous court, Marshall wrote that Marbury was entitled to his commission, criticized Jefferson and Madison for "sport[ing] away the vested rights of others" by failing to deliver it and finally he ruled the Supreme Court did not have the power to order the commission delivered.

Marbury had filed a request for a writ of mandamus directly with the Supreme Court because that was permitted by the Judiciary Act of 1791. But Marshall said provision of the Judiciary Act was not constitutional because the Constitution listed all of the kinds of cases where the Supreme Court had original jurisdiction and writs of mandamus were not among them.

This allowed Marshall to avoid ordering Jefferson to deliver the commission, which he wouldn't have, thus leaving the court looking impotent. But at the same time, Marshall could establish the power of judicial review, which is nowhere mentioned in the Constitution, but is central to the court's power. Marshall wrote:

"It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act....Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be; or, that



Howard Chandler Christy painting of the signing of the Constitution. George Washington stands at the desk to the left of the flags. Below Washington, James Madison sits at a desk where he took notes. Benjamin Franklin, whose legs hurt him, sits in a chair in the foreground with Alexander Hamilton talking in his ear.

an act of the legislature repugnant to the Constitution is void."

Jefferson was angry, calling the decision "an attempt in subversion of the independence of the Executive and Senate."

Jefferson continued his bitter quarrel with Marshall until his death on July 4, 1826, constantly opposing Marshall's successful efforts to strengthen national powers.

Jefferson – along with President Andrew Jackson – attacked *McCulloch v. Maryland* in which the court upheld Congress' authority to charter the Bank of America and struck down Maryland's tax on the bank.

Marshall pointed to the 'necessary and proper' clause for executing Congress' powers and said the words should be construed broadly and practically. "Let the end be legitimate, let it be within the scope of the constitution," then the means to accomplish those ends are constitutional, he ruled.

But Jefferson maintained the Union was a compact of sovereign states and that any one of them could decide an act of Congress was unconstitutional.

The only "safe depository of the ultimate powers of the society," he said, is "the people themselves." He said it was "dangerous" for the courts to be beyond popular restraints.

Jefferson continued to express these

views until his last breath. In the process, he helped set the stage for nullification, secession and the Civil War.

Several of Marshall's decisions involved Native Americans. He expressed the traditional rule that Native Americans lost the right to lands because of the "discovery" and conquest by Europeans. "Conquest gives a title which the Courts of the conqueror cannot deny," he wrote.

But Marshall and the court ruled for the Cherokee Nation in *Worcester v. Georgia*, when Georgia began regulating Cherokee affairs after the discovery of gold on their lands.

Samuel Worcester was a white Christian missionary who lived with the Cherokees and advised them how to resist the state's imposition of new laws on the tribe. Worcester was convicted and imprisoned for refusing to pledge loyalty to the state. Chief Justice Marshall and the Supreme Court struck down the state law stating, 'The Cherokee Nation, then, is a distinct community occupying its own territory... in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter....'

Georgia ignored the decision and so did President Jackson. Horace Greeley, the famous newspaper editor, wrote decades later that Jackson had said "John Marshall

has made his decision; now let him enforce it!" The quote may have been apocryphal, but Jackson did ignore the decision and wrote in a letter "the decision of the Supreme Court has fell still born, and they find that they cannot coerce Georgia to yield to its mandate."

Worcester remained in jail and in 1838, the federal government forced the Cherokee to leave their land. About 4,000 Cherokee died on the "Trail of Tears" that took them west through southern Illinois and Missouri and eventually to Oklahoma.

Meanwhile, that same year, Gov. Lillburn Boggs of Missouri issued an order to the state militia stating that Mormons must be "exterminated or driven from the state." After being forced into Illinois, Joseph Smith, the founder, was imprisoned in Carthage, Ill. and then murdered by a mob on June 27, 1844.

Yet President Jackson believed in democracy and Jacksonian democracy was flourishing with the extension of the franchise to more white men.

In the 1810s and 1820s, many states eliminated taxpayer and property qualifications for voting and holding office. Most states entering the union, including Missouri in 1821, provided for universal white male suffrage.

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'No rights which the white man would be bound to respect.'

After *Marbury v. Madison*, the Supreme Court did not declare another law unconstitutional until the *Dred Scott* decision in 1857 when it declared the Missouri Compromise unconstitutional for violating the Bill of Rights.

In 1846, Dred and Harriet Scott filed for their freedom arguing they had become free when a former owner took them to free soil in Illinois and Minnesota.

To say the soil was free across the Mississippi wasn't really true. In 1763, there were 600 slaves in Illinois. The Northwest Ordinance banned slavery north of the Ohio River, but many Illinois residents had slaves illegally.

In the most infamous decision in the history of the U.S. Supreme Court, Chief Justice Roger Taney concluded on March 6, 1857 that Blacks "are not included and were not intended to be included, under the word citizens in the Constitution."

"We the people" did not include Blacks. "They had for more than a century before been regarded as beings of an inferior order," wrote Taney, "...and so far inferior that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit...."

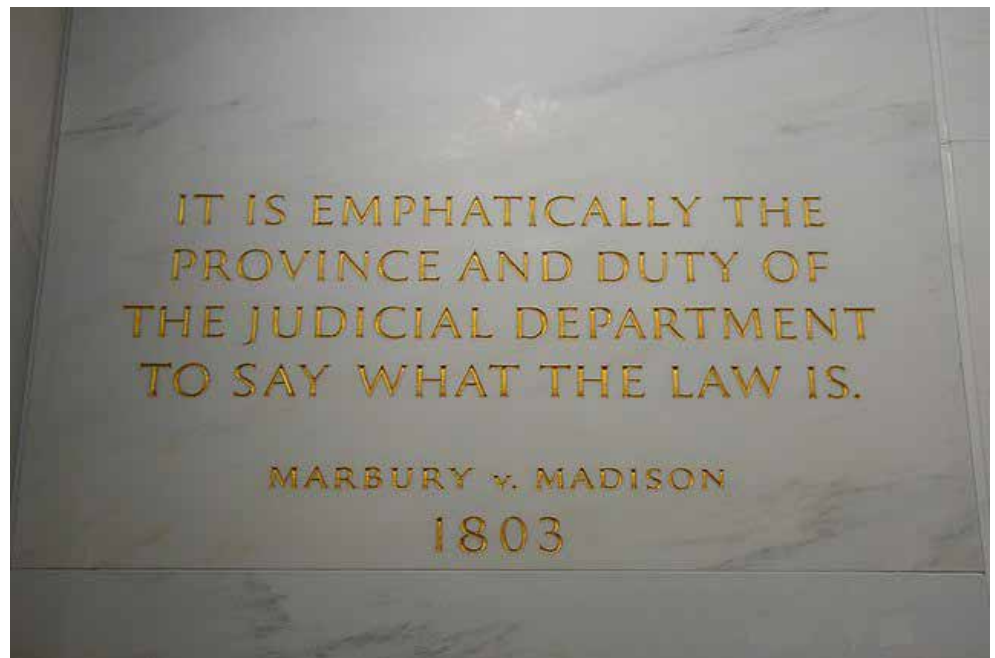
Taney said the Missouri Compromise was unconstitutional because Congress had no power to ban slavery in the territories.

Slaves were property protected like any other property by the Fifth Amendment of the Bill of Rights, the court said. So, when the Fifth Amendment said "no person" shall be "deprived of life, liberty, or property, without due process of law," it protected the property rights of white people to take away the liberty of Black people who weren't people under the Constitution.

A year later, Abraham Lincoln and Stephen A. Douglas drew throngs throughout Illinois as they debated the *Dred Scott* decision and how Blacks fit into the vision of freedom and equality created by the then dead Framers.

Lincoln said the Declaration of Independence's "All men..." had included Blacks. Lincoln said the Constitution used "covert" words to refer to slavery because the Framers thought slavery would die. But Douglas said they expected the Constitution to endure "forever" with the country half slave and half free. His idea of "popular sovereignty" would give each new state the opportunity to choose slavery or freedom.

It took the deaths of 750,000 Americans to settle the issue. Settle the issue of slavery that is. Equality is taking a lot longer.



It is noteworthy that some of the most significant actions that Jefferson and Lincoln took as president most likely violated the Constitution. Jefferson acknowledged that the Louisiana Purchase was not within his power, but went ahead because it was in the best interests of the nation, concluding it is sometimes better to be practical than pure.

Lincoln probably didn't have the power to issue the Emancipation Proclamation on his own, but thought it was essential both morally and to win the war. Lincoln also tried to block the distribution of anti-war, anti-draft newspapers. Also, Lincoln ignored Taney's orders on habeas corpus. But there was a civil war afoot that often threatened Washington D.C. itself.

Reconstruction Amendments: A constitutional revolution

After the Civil War, the 13th Amendment banned slavery, the 14th barred states from denying people life, liberty, property or equal protection and the 15th protected voting rights.

The only way the Congress could get the 14th Amendment ratified was to require ratification as a condition of each Confederate state being readmitted to the Union.

In the 20th century, the 14th Amendment became the powerhouse of the rights and equality revolution of the Warren Court.

But over the decades after the Civil War, the broad promises of liberty, equality and suffrage didn't mean what they seemed to say.

In a series of cases in the last part of the 19th century, the Supreme Court gutted and perverted the post-Civil War amendments. The court said the 14th and 15th Amendments did not give Blacks the

right to vote or live in an integrated society.

Women, black or white, weren't "persons" protected by the 14th Amendment. The court said in a case from Missouri that St. Louisan Virginia Minor couldn't vote because the "persons" whose equality was protected by the 14th amendment didn't include women. Nor could Myra Bradwell be admitted to the Illinois bar because she had no right to take legal actions without her husband's approval. The U.S. Supreme Court said the 14th amendment didn't make any difference.

Minor and Bradwell were white, but the Supreme Court read Blacks out of the equality guarantee as well.

In the 1873 Slaughterhouse Cases, the court said the 14th Amendment gave freedmen the rights of national citizenship, but not the rights of state citizenship.

Three years later, the court said the 15th Amendment "does not confer the right of suffrage upon anyone."

The Civil Rights Cases of 1883 grew out of the refusal of inns in Missouri and Kansas to provide lodging for Blacks, a Tennessee train conductor's refusal to admit a Black woman to the ladies car of a train and theater owners in New York and San Francisco refusing to sell seats to Blacks. The court concluded the 14th Amendment's equality guarantee did not permit Congress to reach this "private" discrimination.

Finally, *Plessy v. Ferguson* – upholding Louisiana's denial of a seat on the white railroad car to Homer Plessy because he was seven-eighths white – enshrined "separate but equal" as the meaning of "equal protection" for the next 58 years until *Brown v. Board* tossed it in the dustbin of the court's ignominious decisions, along with *Dred Scott*.

The court said in Plessy the 14th Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either....If one race be inferior to the other socially, the (Constitution) cannot put them on the same plane," wrote Justice Henry Billings Brown.

The lone dissenter was John Marshall Harlan, a Kentuckian who had owned slaves before starting his own regiment in the Civil War.

Harlan's dissent contained elements of white supremacy. He said Blacks would forever be inferior to whites just as "Chinamen" were "so different" that they were not permitted to be citizens. But he said legal segregation was a "badge of slavery" at odds with the 13th and 14th amendments.

"The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power...But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind."

Harlan's racist references to "Chinamen" were echoed by the full court in the Chinese exclusion cases. Congress passed the Chinese Exclusion Act in 1888 denying Chinese laborers entry into the United States. It even barred Chae Chan Ping reentry to the U.S. after a vacation in his homeland.

The court upheld the law even though it violated a treaty with China. The court said "a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific coast, and possibly to the preservation of our civilization there."

Because the Chinese arrivals were "industrious and frugal" and generally not accompanied by family, they had an advantage in competition with American workers, which led to unrest. "They remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country." Americans fear the "great danger that at no distant day that part of our country would be overrun by them" in "an Oriental invasion."

20TH CENTURY

Lochner Era: Protecting liberty of captains of industry

Even as the Supreme Court was reading Blacks and women out of the post-Civil War amendments, they were finding plenty of room to protect the industrial barons of the Gilded Age.

The 14th amendment protected the

right of contract, the court decided, making minimum wage, maximum hours and child labor laws unconstitutional.

One of the workhorses of the 14th amendment is the Due Process clause. It says states cannot deny any person "life, liberty or property, without Due Process of law."

The Supreme Court, which included justices who had worked as lawyers for some of America's big corporations, decided that minimum wage and maximum hour laws interfered with the right of contract. It reasoned that the freedom of employee and employer to make a contract was part of the liberty protected from government interference by due process. This entire era of the Supreme Court is called the Lochner era.

In the 1905 Lochner v. New York decision, the court threw out New York's Bakeshop law limiting bakers' hours. John Lochner, a New York baker, was arrested for employing bakers longer than the 10-hours-a-day and 60-hours-a-week maximum. The court held that the law interfered with the worker's liberty to decide how many hours are "appropriate or necessary for support of himself and his family."

It was interesting that the court claimed it was protecting the worker's rights, when it was the prerogatives of the corporations it was protecting,

The court was dismissive of the workers' conditions, suggesting that 10-hour-a-day, 60-hour-a-week was cushy. "To the common understanding, the trade of a baker has never been regarded as unhealthy," the court said.

Harlan, the Plessy dissenter, dissented again in Lochner. He pointed out that New York could reasonably conclude that the bakers' long hours could be harmful, citing "Diseases of the Worker, an official publication that concludes the labor of the bakers is among the hardest and most laborious imaginable" because it was performed at night in overheated factories.

In a more memorable dissent, Justice Holmes quipped "The Fourteenth Amendment does not enact Mr. Herbert Spencer' Social Statics." Spencer was an Englishman who authored a well-known libertarian theory popular among libertarians at that time – including Holmes.

The gist of the theory is survival of the fittest. Social Statics argued against public schools, health and safety regulations, medical licensing and welfare. Those "sufficiently complete to live...do live... (those) not sufficiently complete to live, they die, and it is best they should die...the whole effort of nature is to get rid of such, to clear the world of them, and make room for better."

Three years after Lochner, the Supreme Court made an exception for women, upholding Oregon's 10-hour work day for women. The court was persuaded to approve the law by a 113-page brief Louis Brandeis – a future and famous justice – filed in its support.

But the decision was hardly a victory for women. It was an invitation to a permanent status of inequality and inferiority.

"That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious," wrote Justice David J. Brewer. "This is especially true when the burdens of motherhood are upon her....by abundance testimony of the medial fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body and as healthy mothers are essential to vigorous offspring, the well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."

In 1927, Oliver Wendell Holmes, remembered in Supreme Court history as a great civil libertarian, delivered one of the most egregious and anti-woman decisions in history – Buck v. Bell upholding Virginia's forced sterilization law.

"Three generations of imbeciles are enough," wrote Holmes, skipping over the fact that the woman sterilized, Carrie Buck, had a daughter who made the honor roll. Holmes later wrote a friend that it "gave me great pleasure" to uphold the sterilization law because of his worries about overpopulation and fears that whites would be overwhelmed by brown and yellow races."

World War I - Birth of free speech

Holmes' was not an uncommon view among elites, liberals and conservatives in the early 20th century when the eugenics movement gained worldwide attention.

World War I featured another wartime crackdown on free expression and the first murmurings of First Amendment protection for dissenters.

President Woodrow Wilson declared "[disloyalty] was not a subject on which there was room for . . . debate" since such disloyal citizens "sacrificed their right to civil liberties." Congress passed the Espionage Act of 1917, making it illegal to "cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States" or willfully to "obstruct the recruiting or enlistment service of the United States."

Attorney General Charles Gregory warned, "May God have mercy on them, for they need expect none from an outraged

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people and an avenging government." Eugene Debs, who had won 6 percent of the vote for president in 1912 was convicted of Espionage and imprisoned for likening the draft to slavery."

Wilson's next attorney general, Mitchell Palmer, prosecuted hundreds of individuals in the "Palmer Raids" that followed the bombing of his house in Chevy Chase. In just one raid in January 1920, over 3,000 alleged Communists were rounded up without proof of criminal activity. A young J. Edgar Hoover led the roundup.

The Supreme Court upheld the criminal convictions of Debs and other war and draft protesters, but Justices Holmes and Louis Brandeis wrote dissents in the later cases arguing the protesters should be protected, the first inklings of what was to come.

Four horsemen and switch in time

As the nation entered the Depression and Franklin D. Roosevelt's New Deal, the Supreme Court still generally believed that the court should protect the liberty of contract from legislative majorities that might favor one or another electoral interest over another.

The so-called Four Horsemen – Justices Pierce Butler, James Clark McReynolds, George Sutherland, and Willis Van Devanter – voted to overturn New Deal legislation, such as the Agricultural Adjust Act and the National Recovery Act. They usually got a fifth vote to void the laws.

Roosevelt, emboldened by an electoral landslide in 1936, tried to pack the court with six additional justices, one for each member of the court 70 or older. Roosevelt failed to get a heavily Democratic Congress to go along, but after Justice Owen Roberts' "switch in time that saved 9," the court upheld important New Deal legislation including Social Security.

Civil rights, civil liberties promises finally fulfilled

At the time of FDR's court packing, most of the civil rights and civil liberties promises implicit and even explicit in the Constitution had been ignored.

Federalists promised to add the Bill of Rights to the Constitution to get it ratified. James Madison wrote the Bill of Rights, and it was ratified in 1791. But the Bill of Rights did not apply to the states until after the Civil War with the adoption of the 14th Amendment.

Blacks faced segregation in all aspects of life and were disenfranchised in the South. Women had gotten the vote in 1920 with the 19th Amendment but could not claim equal protection of the law for decades despite the words in the 14th Amendment. The Bill of Rights had adorned the Constitution, but had protected almost no one, except the slave owner who owned Dred and Harriet Scott.

No law – state or federal – had been set aside for violating the First Amendment until 1931.

By World War II, the ground was shifting. Yes, there still were terrible violations of people's liberty such as the court's approval of internment camps for Americans of Japanese descent in the 1944 Korematsu case.

One of the most stirring early civil liberties decisions was *West Virginia v. Barnette*. West Virginia had passed a law instructing that as part of its civics education to instill "Americanism," all children should give a salute while saying the Pledge of Allegiance. Failure to comply resulted in expulsion of the children who could be prosecuted for delinquency. Parents could also be jailed and fined for encouraging delinquency.

Jehovah's Witnesses believed such a salute was "idolatry" and violated the Bible. Marie and Gaihe Barnett instructed their children at Slip Hill Grade School, near Charleston, not to salute and they were sent home.

Justice Robert H. Jackson – who later took a leave from the court to prosecute Nazi war crimes in Munich – wrote that the law was unconstitutional. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

But as the Cold War with the Soviet Union began, Sen. Joseph McCarthy's Red Scare was forcing a new orthodoxy on the country, making demagogic charges that hundreds of Communists had infiltrated the Army and State Department. The Supreme Court upheld the Smith Act that made it a crime to be an officer of the Communist Party.

Professor Geoffrey Stone described the extent of the Red Scare as late as 1954. "The long shadow of the House Committee on UnAmerican Activities (HUAC) fell across our campuses and our culture . . . In 1954, Congress enacted the Communist Control Act, which stripped the Communist Party of all rights, privileges, and immunities. Hysteria over the Red Menace produced a wide range of federal and state restrictions on free expression and association. These included extensive loyalty programs for federal, state, and local employees; emergency detention plans for alleged subversives; pervasive webs of federal, state, and local undercover informers to infiltrate dissident organizations; abusive legislative investigations designed to harass dissenters and to expose to the public their private political beliefs and association; and direct prosecution of the leaders and members of the Communist Party of the United States."

The Warren Court - Civil rights and civil liberties come alive

But something else important was happening at the same time. Chief Justice Earl Warren had just been appointed to the bench and a vast expansion of individual rights and liberties followed.

Brown v. Board 1954 and the congressional passage of the Civil Rights Act of 1964, Voting Rights Act of 1965, Fair Housing Act of 1968 and Title IX in 1972 brought a vast expansion of rights for Blacks and women. Even though the Equal Rights Amendment fell short, Ruth Bader Ginsburg as a litigator and justice wrote most of its protections into law under the 14th Amendment's promise of "Equal Protection" of the law.

The Warren Court recognized the right of a public school student to wear a black arm band to protest the Vietnam War, and it guaranteed criminal suspects a lawyer and the right to remain silent. A married woman had a constitutional right to contraception and Blacks and whites had a right to marry. The Voting Rights Act was renewed during the Reagan administration with big, bipartisan majorities.

Yet, Chief Justice Roberts declared in 2013 in the *Shelby County v. Holder* that "our nation has changed" as he justified overturning a key part of the Voting Rights Act requiring federal pre-clearance of voting changes in the South. A deluge of election changes have followed as the nation turned back the clock and limited the franchise again. In the just concluded election, new voting districts in places like Alabama, Georgia, Florida and Texas caused Black and minority candidates to lose.

A case from Alabama argued on the second day of this court term could further weaken the Voting Rights Act by prohibiting the consideration of race in drawing voting districts. In the Alabama case, only one of 7 congressional voting districts elects a Black representative even though Blacks are 25 percent of the population and could win two with differently drawn districts.

In addition, the court is considering giving state legislatures the power to implement election changes, such as partisan gerrymanders, that violate state constitutions.

And Dobbs took from women a right of bodily integrity and equal dignity they had relied upon for half a century.

So, while the civil rights and civil liberties of Citizens United, Hobby Lobby and gun enthusiasts are winning broader protection, the rights of women seeking abortions and Blacks seeking fair elections are not faring well before today's Roberts Court.



Illustration by Steve Edwards

Chapter 3: Originalism vs. a living Constitution

By William H. Freivogel

Is the Constitution dead or alive?

The late Justice Antonin Scalia, long the chief advocate of originalism on the Supreme Court, was unequivocal. "The constitution that I interpret is not living but dead," he said in a 2008 speech.

His counterpart, the late Justice William J. Brennan Jr., intellectual leader of the Warren Court, was equally insistent it was a "living Constitution." He said, "the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone."

At the time the two men staked out their positions in the 1980s, Brennan's was more widely held and Scalia's on the margins.

But Scalia's view is dominant on today's court. Even the justices appointed by Democrats talk at times more like originalists than adherents of a living Constitution.

The Dobbs v. Jackson decision last

June - overturning the abortion right - dramatized that originalism has captured a majority of the current court. In other words, the majority believes that today's decisions should be based on what the original framers of the Constitution meant when they wrote the text.

Since Dobbs, an outpouring of legal scholars and commentators have criticized and ridiculed originalism as "bunk," a "charade" and misleading con job that promises objectivity it can't and doesn't deliver.

Among the questions the critics raise are:

- Why link the meaning of the Constitution to the flawed Founding generations who protected slavery and denied women rights?
- Why link the meaning to Framers who left out many important values - equality, democracy, the right to vote.
- Why originalism when the Constitution itself says nothing about how it is to be interpreted?

- Why originalism when the Framers themselves did not advocate it? In fact a number of the Framers suggested otherwise. The advocacy of originalism did not grow out of the Founding generation but was a 1970s phenomenon built by the conservative movement directly targeting the rights revolution of the Warren Court and seeking to roll back Roe.
- Why rely on the meaning of the Framers of the 14th Amendment after the Civil War for the interpretation of liberty and equal protection when those Framers ran racially segregated schools, opposed interracial marriage and refused to include women under the equal protection guarantee. The notion that same-sex marriage, interracial marriage or contraception were covered by the 14th Amendment would have seemed to them like it came from outer space.

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- Why in the Dobbs decision would the court look for historical guidance at the practices in England in the 1300s, during the Middle Ages?

Growth of originalism

No one would have believed when *Roe* was decided in 1973 that a majority of the Supreme Court would believe in originalism half a century later when the right was read out of the Constitution.

Robert Bork, a brilliant Yale law professor, planted the seeds of originalism in a 1971 article in the *Indiana Law Journal* criticizing the Warren Court's constitutional interpretations as unmoored from the text of the Constitution.

Central to his argument was his critique of *Griswold v. Connecticut*, the 1965 decision where the court struck down a Connecticut law making it a crime to provide married women with contraceptives.

Justice William O. Douglas, in his decision, recognized zones of privacy that extended from various parts of the Bill of Rights. He likened these zones of privacy to penumbras, the lighter part at the outside edge of a shadow.

He found penumbras of privacy in the First Amendment freedom of association, the Third Amendment ban on quartering troops in homes, the Fourth Amendment guarantee against unreasonable searches of homes and private effects, the Fifth Amendment right to remain silent and the Ninth Amendment reservation of unenumerated rights to the people.

Not a few constitutional scholars thought Justice Douglas' constitutional reasoning in *Griswold* was decidedly ephemeral. Eight years later when the court decided *Roe*, it was equivocal on where it found the right of a woman to make the abortion decision. Was it in the shadows of the Bill of Rights or in the liberty protected by the 14th Amendment? Justice Blackmun said the court favored the latter approach.

Justice Samuel Alito, in writing the *Dobbs* opinion this year, ridiculed the lack of a clear constitutional basis in either of those formulations.

Bork's defeat

Bork ended up paying dearly for arguing there was no privacy right. When President Ronald Reagan nominated him for the Supreme Court, Democrats led by Sen. Edward M. Kennedy, D-Mass., ran a political style campaign against confirmation emphasizing Bork opposed privacy. Bork didn't help himself by testifying that privacy was not in the text of the Constitution so it wasn't covered.

But already Reagan had succeeded in naming another brilliant originalist to the court, Scalia, whom the Senate confirmed

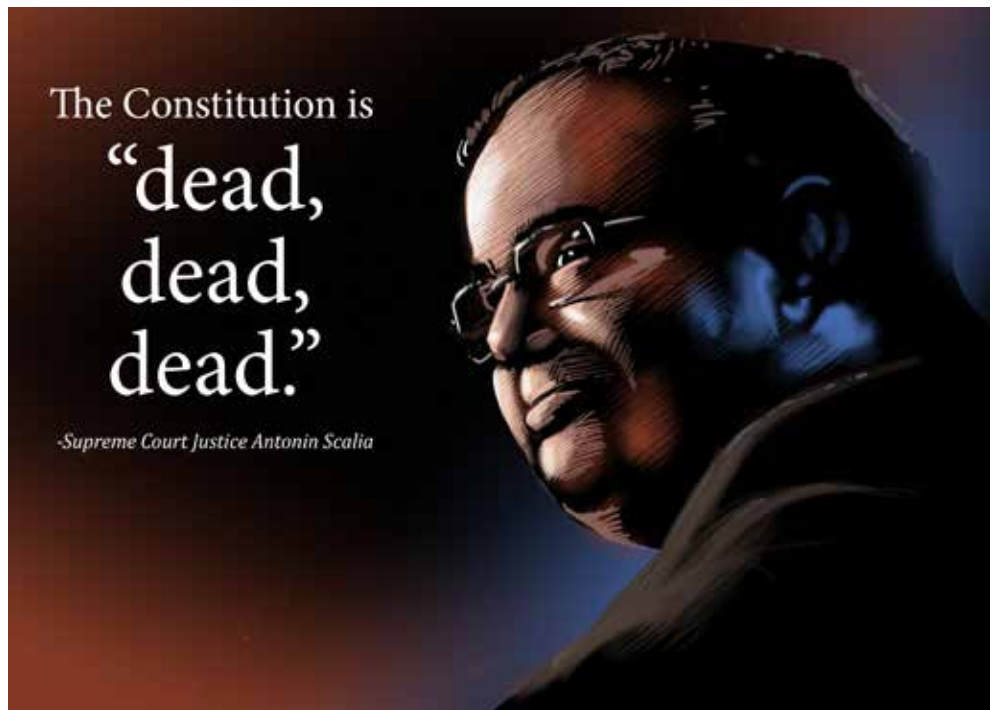


Illustration by Steve Edwards

unanimously - partly because he was very smart, partly because the Democrats were more focused on trying to stop the elevation of William Rehnquist to chief justice and partly because he was Italian-American, a big Democratic constituency.

Attorney General Edwin Meese also chimed in on originalism. At a July 9, 1985, speech to the American Bar Association Meese advocated a "Jurisprudence of Original Intention."

It is our belief," he said, "that only 'the sense in which the Constitution was accepted and ratified by the nation,'provides a solid foundation for adjudication. Any other standard suffers the defect of pouring new meaning into old words, thus creating new powers and new rights totally at odds with the logic of the Constitution and its rule of law."

Meese went on to maintain that the Supreme Court's application of the Bill of Rights to the states was at odds with the original intent of the Framers. The First Amendment's ban on an established church should not have been applied to the states, he said.

Meese's speech was mostly received with criticism and ridicule. Gerald Gunther, then a leading constitutional expert, called his speech "an extremely unusual position... Of the many scholars writing on the proper criteria for constitutional interpretation, I know of only one...who advocated simply reading the legislative debates of the Constitutional Convention to define what the Framers would have said about all the problems this constitutional polity has faced over the years. I think Attorney General Meese has made a mistake identifying himself with that discredited

notion of constitutional interpretation."

Supreme Court Justice John Paul Stevens, a Ford nominee, said in a speech that "no justice who has sat on the Supreme Court during the past 60 years has questioned" incorporation of the First Amendment to apply to the states.

Brennan gave the main response in a speech Oct. 12, 1985, at Georgetown University. He said, "Those who would restrict the claims of right to the values of 1789 specifically articulated in the Constitution turn a blind eye to social progress and eschew adaptation of overarching principles to changes of social circumstance.

"Our Constitution was not intended to preserve a preexisting society but to make a new one, to put in place new principles that the prior political community had not sufficiently recognized. Thus, for example, when we interpret the Civil War Amendments to the charter - abolishing slavery, guaranteeing blacks equality under law, and guaranteeing blacks the right to vote - we must remember that those who put them in place had no desire to enshrine the status quo. Their goal was to make over their world, to eliminate all vestige of slave caste."

Scalia prevails

Meese's advocacy of original *intent* didn't catch on.

Determining original intent is too tricky. Where would one look for the original intent of the drafters of the Constitution? In James Madison's diaries? In the statements made at ratifying conventions? In the *Federalist* papers written by Madison, Alexander Hamilton and John Jay under

the pseudonym Publius? Historians know those papers emphasized the democratic portions of the Constitution to give people a more positive impression.

And what of Thomas Jefferson and John Adams, two important Founders who were out of the country on diplomatic assignments to France and England respectively? Jefferson is the author of the metaphor about a "wall between church and state," but he wasn't around for the adoption of the Bill of Rights. Justice William H. Rehnquist argued that made Jefferson's metaphor irrelevant.

Scalia emphasized original meaning instead of original intent.

Scalia directly addressed his objection to a living constitution in an interview with NPR's Nina Totenberg: "If you somehow adopt a philosophy that the Constitution itself is not static, but rather, it morphs from age to age to say whatever it ought to say — which is probably whatever the people would want it to say — you've eliminated the whole purpose of a constitution. And that's essentially what the 'living constitution' leaves you with."

With a living Constitution the Supreme Court becomes a roving constitutional convention without the needed supermajorities. If people want to change the Constitution, say the originalists, they must pass an amendment, even though that is hard.

Scalia called himself a "faint-hearted" originalist because he didn't want to get rid of all of the precedents he thought were wrongly decided. Clarence Thomas, on the other hand, is much more likely to throw out a precedent he thinks was wrongly decided. That's why he was ready in *Dobbs* to move on to same-sex marriage and contraception.

Scalia told NPR, "You can't reinvent the wheel. You've got to accept the vast majority of prior decisions. ... I do not argue that all of the mistakes made in the name of the so-called living constitution be ripped out. I just say, 'Let's cut it out. Go back to the good, old dead Constitution...I am a textualist. I am an originalist. I am not a nut.'"

Like an umpire

One of the attractive things about originalism is that it's simple to explain and it sounds more empirical and less judgmental than a living Constitution. Originalists say the method discourages justices from activism and reaching out for new rights not specified in the Constitution.

Chief Justice John Roberts leaned on the appeal of empiricism in his confirmation hearing when he said famously: "Judges are like umpires. Umpires don't make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is

a limited role. Nobody ever went to a ball game to see the umpire... I will remember that it's my job to call balls and strikes and not to pitch or bat."

Critics say, however, that judging isn't like that. Voting patterns of justices show unsurprisingly that most justices vote their philosophic preferences, which often are linked to their political preferences and the president who appointed them. And originalists often are activists, the critics say, citing *Dobbs*, which overturned a 49-year-old precedent, and the decisions recognizing the individual right to own and carry a gun in the house and on the street.

Critics also point out that justices aren't historians and that law office history often falls short.

"For most constitutional provisions, there is no 'original meaning' to be discovered," writes Berkeley law dean Erwin Chemerinsky, author of a new book, "Worse Than Nothing: The Dangerous Fallacy of Originalism." He said that instead of a clear historical answer "there is a range of possibilities that allows for exactly the kind of judicial discretion that originalism seeks to eliminate."

A number of historians thought Justice Stevens' history on the original meaning of the Second Amendment was more persuasive than Scalia's, but Scalia had the 5th vote to recognize an individual Second Amendment right.

Similarly, Justice Ketanji Brown Jackson probably had her originalist history right in an oral argument earlier this fall in a race case, but that doesn't mean she will persuade the originalists.

She said, "I understood that we looked at the history and traditions of the Constitution, at what the framers and the Founders thought about. And when I drilled down to that level of analysis, it became clear to me that the framers themselves adopted the equal protection clause ... in a race conscious way. I don't think that the historical record establishes that the Founders believed that race neutrality or race blindness was required, right?"

Historians say she is right, but those who count votes on the Supreme Court don't expect many of the originalists to go along with her analysis.

Admonitions through history

Critics of originalism point to famous statements by founders, framers and great justices that seem to reject elements of originalism.

Thomas Jefferson wrote: "Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched....40 years of experience in government is worth a century of book-reading; and this they would say themselves, where they to rise

from the dead."

John Marshall, the great chief justice of the first third of the 19th century, wrote in support of the continuation of the Bank of the United States: "...we must never forget that it is a *constitution* we are expounding" and that the Constitution is "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."

Justice Robert Jackson wrote in the Supreme Court decision rejecting Harry S. Truman's seizure of the steel mills during the Korean War: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."

David Cole, national legal director of the ACLU and a professor at Georgetown University Law Center, says the broad language of the Framers in parts of the Constitution are clues that they were writing for the future and not just their time.

"The fact that the framers used general terms, such as 'liberty,' 'due process,' 'equal protection,' and 'cruel and unusual punishment,' strongly suggests that they understood they were drafting a charter meant to long outlive them, one that could guide unforeseeable resolutions to unforeseen problems. If you want to bind people to your specific intentions, you write with specificity. The framers chose not a stringent straitjacket but a set of enduring core principles whose meaning and applicability would unfold over time to meet the evolving needs of a growing nation.."

Alternatives

There are alternatives to originalism and the living Constitution, but they don't have the same pithy sound bite quality.

David Strauss, a law professor at the University of Chicago Law School, advocates a common law approach. This method recognizes that broad and open-ended provisions are fleshed out gradually over time as judges confront particular cases and seek to make sense of previous decisions. "It's what judges at every level have always done when they confront new cases," says Strauss.

Justice Stephen Breyer advanced another approach in a book on "Active liberty." It is making decisions about the Constitution "in light of its text, purposes, and our whole experience." He emphasizes judicial modesty, deference to Congress, connection to the people with recognition of people's changing needs and demands."

At the moment, though, the active and activist Supreme Court isn't looking for alternatives. Just as it took originalism half a century to take hold, any other approach would probably take decades to develop.

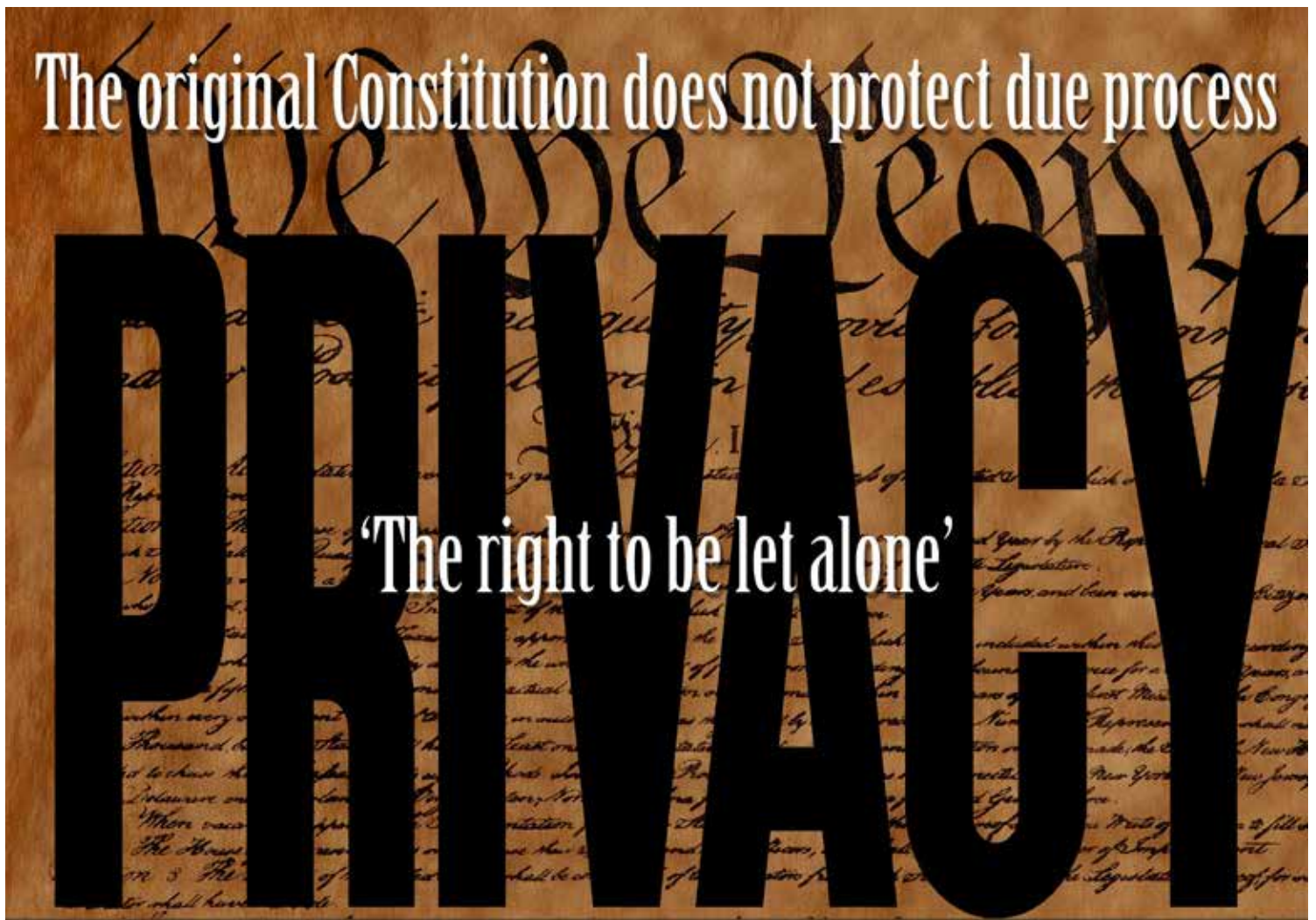


Illustration by Steve Edwards

Chapter 4: Is there a right to privacy in the Constitution?

By William H. Freivogel

The most important words in the 14th Amendment of 1868 – maybe in the entire Constitution – say no state shall “deprive any person of life, liberty, or property, without due process of law, nor deny any person...the equal protection of the laws.”

These promises of **liberty, due process and equality** eventually remade the country, remade the Constitution and by the 1960s, protected the privacy, individual dignity and personal autonomy of every person.

The 14th Amendment was written in the blood of the 750,000 men who died in the Civil War. And it took 150 years of political movements to breathe life into the words – the civil rights movement, the women's rights movement and the gender equality movement.

Those few words protect interracial marriage, same-sex marriage, private same-sex sexual relations, a woman's access to birth control, the right of a prisoner to marry, a family's decision to bring relatives into their home, a family's

decision to send a child to a parochial school, the right of a public school teacher to teach an unpopular subject such as German and a person's right not to be forcibly sterilized.

In addition, the Supreme Court has interpreted the liberty protected by due process to incorporate nearly all of the freedoms of the Bill of Rights – the other great wellspring of freedom in the Constitution. Before the 14th amendment, the Bill of Rights only applied to the federal government, not the states. So, states could willy-nilly violate rights named in the Bill of Rights. And they did.

In short, much of the freedom Americans take for granted rests on **liberty protected by due process**. The abortion right rested on these words, too, until the Supreme Court changed its mind earlier this year.

It took a century of Supreme Court decisions to bring these words alive from decisions about the family, to decisions

about women's rights, to decisions about contraception and reproductive freedom to decisions about marriage.

There is a legal term for the liberty protected by due process. Most people haven't heard it and it is somewhat confusing. It's called “substantive due process.” What that means is that due process doesn't just assure that government procedures will be fair. It also protects the substance of the right – liberty in this case.

Understanding this history is key to understanding the significance of the *Dobbs v. Jackson* decision overturning *Roe v. Wade*. *Roe* was anchored in the liberty protected by due process. One of the reasons that the *Dobbs* opinion alarmed some legal experts is that it called into question the legal rationale for this century of decisions expanding privacy and personal freedom.

Historically, conservative originalists on the court, such as Samuel Alito, Clarence

Thomas and the late Antonin Scalia, don't like substantive due process. More liberal justices think it is essential to protecting privacy.

In *Dobbs*, Alito wrote that, "Substantive due process" can be "treacherous" and lead the court to "usurp" elected officials.

Alito argued that liberty protected by due process should be limited to those freedoms 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'

That language comes from a 1937 decision, *Palko v. Connecticut*, where the court explained why double jeopardy was not fundamental enough to be included in rights the states had to recognize. The court subsequently also said the right to a lawyer and trial by jury were not fundamental enough either, although the Warren Court reversed all of those decisions in the 1950s and 1960s.

The truth is that many of the liberty rights protected by the court in the past hundred years are not deeply rooted in the nation's history. There were no legally protected same-sex marriages before the 21st century. Half the states made interracial marriages and contraception illegal as late as the 1960s. The Comstock Act after the Civil War made contraception illegal because it tempted women to be overly lustful.

In *Dobbs*, Alito hastened to add that the court was only addressing abortion – not these other substantive due process rights, noting that abortion was different because of the potential for human life.

But Justice Clarence Thomas wrote in a separate concurrence that the court should look at same-sex marriage and contraception as well. That is one of the reasons that the Congress moved quickly this fall to protect same-sex and interracial marriage.

In addressing what he considers the abuse of substantive due process, Alito said the nation must "guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans enjoy."

He noted that two of the most infamous Supreme Court decisions in history – *Dred Scott v. Sanford* in 1857 and *Lochner v. New York* in 1905 – were substantive due process decisions – and they were disastrous. In *Dred Scott*, the court said that a slaveholder's due process right to property was violated by laws against slavery in the territories. And in *Lochner*, during the Gilded Age around the turn of the 20th century, the court said a state law limiting bakers' hours violated the liberty of contract protected by due process.

Alito went on to ridicule as too broad the reasoning of the 1992 *Casey* decision

in which two justices appointed by Ronald Reagan and one by George H. W. Bush – Sandra Day O'Connor, Anthony M. Kennedy and David H. Souter – joined liberals in reaffirming the abortion right. Those justices said the abortion right was based on freedom to make "intimate personal choices" "central to personal identity and autonomy. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life."

The justices in *Casey* also injected an equality element to their court ruling. A number of the court's decisions on personal privacy have linked liberty interests and equal protection – the two ends of that important sentence in the 14th amendment. Both liberty and equality are the basis of the *Loving v. Virginia* decision in 1967 throwing out laws against interracial marriage and the *Obergefell v. Hodges* decision of 2015 recognizing the right to same-sex marriage.

Alito directly dismissed the equality argument from *Casey* saying it was overtaken by "modern development" that have helped women – laws against pregnancy discrimination, family leave laws, new attitudes toward unmarried mothers, better health care and more provisions for placing infants left at hospitals up for adoption. Feminists were furious that Alito had used progressive women's rights legislation as a justification for denying the right to an abortion.

Brandeis' 'right to be let alone'

The word privacy does not appear in the Constitution, although there are elements of the Bill of Rights that suggest the Framers were concerned about privacy. The First Amendment protects the right of association. The Third Amendment says people can't be forced to quarter troops in their homes. The Fourth Amendment says, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Fifth Amendment says suspects have the right to remain silent. And the Ninth Amendment protects the rights not enumerated in the others.

Still, the word privacy isn't used.

The person who first wrote about a legal privacy right was Louis Brandeis, who published the most famous law review article in history, "The Right to Privacy," along with his law partner Samuel Warren. (Brandeis, by the way, began his legal career in St. Louis where he was admitted to the bar in 1878 in the Old Courthouse where the *Dred Scott* case had been argued.)

Brandeis and Warren were upset by what they thought was the crass way the

press, toting portable cameras, covered upper class social events.

Warren, a Boston blue blood, had married Mabel Bayard, the daughter of a senator and friend of President Grover Cleveland's young wife, Frances Folsom. The press covered the wedding in 1883 in great detail. The *Washington Post* story was headlined: "A Ceremony in the English Style Attended By the Blue Blood of Delaware and Boston." It commented that the wedding was one "for which there had been hopes and fears, heart flutterings, and silent longings."

In the years that followed, the press covered the Warren-Bayard social gatherings in Boston and the visits between Mabel Bayard and the young First Lady. Grover Cleveland's female friends had been the source of a great deal of comment in the press. Cleveland acknowledged fathering a child out of wedlock with another woman and his courtship of the young Frances Folsom, 28 years his junior, was much covered. The *New York Times* had reported on the relationship between Cleveland and Folsom in an 1886 article headlined, "The President's Sweetheart."

In a speech at Harvard in 1886, Cleveland criticized the press as "purveyors of 'silly, mean, and cowardly lies that every day are found in the columns of certain newspapers which violate every instinct of American manliness, and in ghoulish glee desecrate every sacred relation of private life.'"

These press reports, along with the new technology of the movable camera, inspired Brandeis to develop the new legal theory of privacy.

Brandeis and Warren began their article by observing that the common law had recognized protections for liberty and property through history. But they said times had changed. They found a right to privacy in the "right to life." "The right to life," they wrote, "has come to mean the right to enjoy life, – the right to be let alone"

Brandeis and Warren left no doubt that they were responding to newspapers and that era's advance in technology – the movable camera that allowed photographers to take photos of people without permission. They wrote:

"Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'"

Brandeis and Warren noted that E.L. Godkin, founder of the *Nation*, had criticized sentimentalism in the press. He had written about a case brought by a dancer, Marian

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The celebration in front of the United States Supreme Court upon the announcement of the Court's decision in *Obergefell v. Hodges* that same-sex marriage is a constitutional right under the 14th Amendment. Dedicated to the public domain with a CC0 license.

Photo by Matt Popovich from Washington, DC, United States

Manola, against a photographer who had secretly photographed her from a theater box as she was playing a role requiring her appearance in tights.

"The press is overstepping in every direction the obvious bounds of propriety and of decency," wrote Brandeis. "Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle."

They wrote that gossip, "both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance."

First cases

By the time that Brandeis was on the Supreme Court, the new technology that was raising privacy questions was

wiretapping. In *Olmstead v. United States* in 1928, the court concluded that wiretapping did not violate the Fourth Amendment because it did not involve trespass into a person's home. "There was no search of the defendant's houses or offices," the court wrote.

Brandeis dissented. He did not mention his law review article but his words resonated with the same views, including his phrase about the right to be let alone. "Subtler and more far reaching means of invading privacy have become available to the government," he wrote. "Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."

Brandeis said that the Framers "knew that only part of the pain, pleasure and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men."

Development of constitutional right to privacy

During Brandeis' first decade on the Supreme Court, the right to privacy came up in contexts that did not involve the media but rather in the rights of individuals to control their bodies, families and other private decisions.

The cases involved the right of a school teacher to teach German, the right of Catholic parents to send their children to parochial schools and the right of a woman with a low I.Q. to have a baby. These decisions involving the autonomy of the individual and the family became the constitutional basis of the right to privacy.

Robert T. Meyer was arrested on May 25, 1920 for teaching German to 10-year-old Raymond Parpart. He was sentenced to 30 days in jail and a \$25 fine.

Nebraska and 21 other states had passed laws against foreign language instruction in reaction to immigration, in bitterness toward Germans after World War I and in reaction to the Russian Revolution. The Nebraska law said only English could be taught to children before eighth grade so that English would become their "mother tongue." The state claimed it had the power to "compel every resident of Nebraska so as to educate his children that the sunshine

of American ideals will permeate the life of the future citizens of this Republic."

The Supreme Court threw out the law. It said that the "liberty" protected by the 14th Amendment was more than freedom from bodily restraints. It also included "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men."

The same angry political atmosphere in the United States led to Oregon passing a law in 1922 requiring that all children between 8 and 16 attend public schools. Gov. Walter M. Pierce said that if "the character of the education of such children is to be entirely dictated by the parents of such children,...it is hard to assign any limits to the injurious effect from the standpoint of American patriotism."

The Catholic Society of the Sisters of the Holy Names of Jesus and Mary challenged the law arguing they could teach patriotism just as well as the public schools.

The Supreme Court again struck it down writing, "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." The child is not the "mere creature of the state," the court said.

The court was not so protective of privacy rights, however, in the shameful case involving the sterilization of Carrie Buck. Buck was a young woman in Virginia who was sterilized because she did poorly on an I.Q. test. Half of the white males were categorized as morons under the test.

Justice Oliver Wendell Holmes, famous for his decisions championing free speech, wrote the decision upholding the sterilization. He noted that Buck, her mother and daughter all were mentally defective and declared, "Three generations of imbeciles are enough." Holmes left out mention that one of Buck's daughters made the honor roll.

Holmes later wrote a friend that it "gave me great pleasure" to uphold the sterilization law because of his worries about overpopulation and fears that whites would be overwhelmed by brown and yellow races."

By 1942, the Supreme Court was ready to turn away from its Buck decision. Oklahoma law permitted the sterilization of habitual criminals and a judge had ordered a vasectomy for Jack T. Skinner, whose three felonies included stealing chickens. Justice William O. Douglas wrote, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."

Griswold v. Connecticut

One of the most famous privacy cases in Supreme Court history was *Griswold v. Connecticut* in which the court ruled that laws against providing birth control to married women were unconstitutional.

The decision was handed down in 1965, but the controversy had begun in the 1920s. Katherine H. Hepburn, the mother of the famous actress, was one of three organizers of a public meeting in 1923 that led to the formation of the Connecticut Planned Parenthood League to fight the law. First attempts failed.

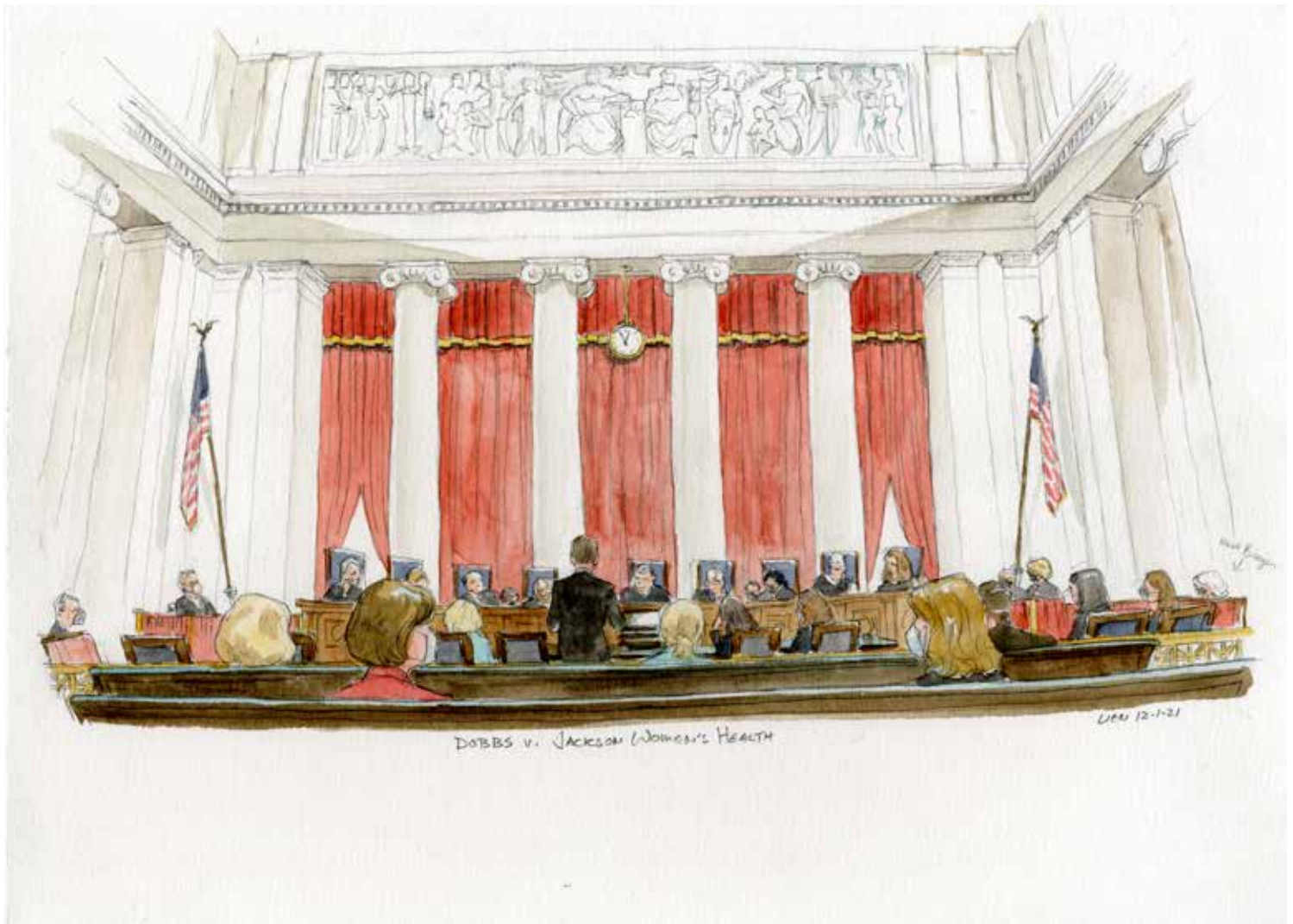
Subsequently, Dr. C. Lee Buxton, head of the Yale Medical School's obstetrics

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Justice Sotomayor questions Mississippi Solicitor General Scott Stewart during Dobbs arguments.

Illustration by Art Lien



View of courtroom during Dobbs arguments.

Illustration by Art Lien

unit in the 1950s was shocked to discover that he could not prescribe birth control devices for his married patients. He joined forces with Estelle Griswold and Yale law professor Fowler V. Harper to bring a lawsuit.

Griswold, a Junior Leaguer, opened an eight-room birth control clinic in New Haven in 1961. She knew she was likely to be arrested. That was the point. She wanted to challenge the state law. Griswold was arrested and charged. The criminal complaint said her crime was that she "did assist, abet, counsel, cause and command certain married women to use a drug, medicinal article and instruments, for the purpose of preventing conception." Both Griswold and Dr. Buxton were convicted and fined \$100 each. On June 7, 1965 the Supreme Court voted 6-2 to overturn the convictions.

The court's decision recognized a constitutional right to privacy for the first time, but no five justices had the same rationale for where in the Constitution they found that unenumerated right.

Justice Douglas, who wrote the main opinion, reasoned that "specific guarantees in the Bill of Rights have penumbras,

formed by emanations from those guarantees that help give them life and substance."

He said that five amendments in the Bill of Rights created these "zones of privacy." They were the First Amendment's freedom of association, the Third Amendment's limits on quartering troops, the Fourth Amendment's freedom from unreasonable searches and seizures, the Fifth Amendment's right against self-incrimination and the Ninth Amendment's reservation of rights to the people.

"The present case then," wrote Douglas, "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees... We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is coming together for better or for worse, hopefully enduring, and intimate to a degree of being sacred. The association promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble purpose as any involved in our prior decisions."

Three other justices said they agreed with Douglas but issued their own opinions. Justice Arthur Goldberg expanded on the role of the little used Ninth Amendment. He quoted from James Madison's speech to Congress stating the importance of the Ninth Amendment in protecting rights not enumerated in the Bill of Rights. "To hold that a right so basic and fundamental and so deep-rooted in our society as the as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it not effect whatsoever."

Two other members of the majority – Justices Byron R White and John Marshall Harlan – said they could not agree with either Douglas or Goldberg. They said that the law violated a liberty protected by the 14th Amendment.

In retrospect, Douglas' opinion about constitutional penumbra – the light, outer part of a shadow – may have done more harm than good. It was often ridiculed and turned out not to be a convincing constitutional home for protecting privacy.



Mildred and Richard Loving, who won their case challenging Virginia's law against interracial marriage.

Photo courtesy of Wikimedia Commons

Loving v. Virginia

A little after midnight in July, 1958, Caroline County Sheriff Garnett Brooks and his deputy invaded the bedroom of Mildred and Richard Loving, demanded they get out of bed and hauled them off to jail.

"They were standing over the bed," Mildred Loving recalled in an interview we had in 1987 in her rural Virginia farmhouse. "They told us to get up and get dressed, that we had to come with them.

"I was crying. I was scared and confused – and angry that they would walk into our home without so much as a knock. The sheriff asked Richard why did he marry me. Richard got kind of smart and asked him why did he marry his wife."

Brooks put the Lovings in the police car and carted them off to jail, drinking whiskey along the way.

The criminal charge was simple: "Richard Perry Loving being a white man and said Mildred Delores Jeter being a colored person did unlawfully go out of the State of Virginia for the purpose of being married" and were "cohabiting as a man and wife against the peace and dignity of the Commonwealth."

Virginia was one of 17 states at the time that criminalized inter-racial marriage. Missouri was another.

"I am sure now the sheriff was joking when he asked a black trusty if he wanted to spend the night with me. It scared me so, I hate to think about it," she recalled.

The Lovings were found guilty in January, 1959. Judge Leon M. Bazile said, "Almighty God created the races white, black, yellow, malay and red and he placed

them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."

Bazile levied a one year sentence but said he would suspend it if they got out of the state and stayed out for 25 years.

The Virginia courts later upheld the state law saying that its purpose was to "preserve the racial integrity of its citizens" and prevent "the corruption of blood," "a mongrel breed of citizens" and "the obliteration of racial pride."

After the Lovings were convicted, they moved to Washington for a time and Richard worked as a bricklayer, but they missed their families and hometown and moved back.

Mildred lay awake at night because she was afraid the police would come.

"I had all parts of thoughts at night," she said. "Is this the night the police will come? What can we do if they come? Maybe if I keep a light on they would think we are not asleep and go away. How did we get into this mess? Is it worth the hassle? Why didn't we stay in D.C.? God help us please."

Virginia defended its law saying marriage was traditionally a state matter. The court should stick to the original intent of the authors of the 14th Amendment, the post-Civil War amendment. The authors had no notion that equal protection of the law or protecting people's liberties would include interracial marriages.

Congressmen had said during the debate that the amendment would not affect laws against interracial marriages.

The Supreme Court threw out the

Virginia law on June 12, 1967. The law violated both the equality and liberty promises of the 14th Amendment, the court said.

"The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," wrote outgoing Chief Justice Earl Warren. "To deny this fundamental freedom on so unsupportable a basis as the racial classifications... so directly subversive to the principle of equality at the heart of the 14th Amendment, is surely to deprive all the State's citizens of liberty without due process of law."

Roe v. Wade six years later and Obergefell v. Hodges, 48 years later, cited this same reasoning – this marriage of liberty protected by due process with equal protection – in support of the personal decisions to have an abortion and to marry a person of the same gender.

The Supreme Court's decision in Loving was perfectly timed to the changing social mores. Guess Who's Coming to Dinner, about the marriage of an interracial couple, came out six months after Loving and was a box office hit, even in the South. The Black protagonist, Sidney Poitier, was a Nobel prize winning doctor.

Roe v. Wade

In 1972, the court expanded Griswold by ruling that states could not ban the distribution of birth control devices to unmarried persons. Justice William J. Brennan Jr. wrote, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

The Griswold decision set the stage for the most important privacy decision of the 20th Century – Roe v. Wade.

Sarah Weddington, a young lawyer in Austin, Tex. in the late 1960s, often heard that pregnant women were traveling to Mexico from that university town to have abortions. Many women came back with infections

Norma McCorvey, of Dallas, brought Weddington the test case she was looking for. She was unmarried and pregnant with her second child. Her first child was being reared by her mother. McCorvey, a high school dropout, couldn't hold a job and feared she'd lose her job waitressing if her pregnancy became known.

Justice Harry Blackmun wrote the opinion for the court striking down the Texas law. Blackmun was a Nixon appointee and expected to vote along with

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Chief Justice Warren Burger. They were called the Minnesota twins. But Blackmun surprised everyone.

Father of three assertive daughters and husband of a forceful wife, Blackmun spent the summer of 1972 in the Mayo Clinic researching abortion. The research led him to the trimester formula. During the first trimester of pregnancy, the abortion decision should be the woman's in consultation with her doctor. During the second trimester, the state could regulate abortions consistent with the health of the mother. After the fetus was viable – could live outside the womb – the state could prohibit abortion unless the life or health of the mother was at stake.

Blackmun concluded that a woman's "right of personal privacy includes the abortion decision, but...this right is not unqualified and must be considered against important state interests in regulation."

The 7-2 decision lacked a clear statement about where the court found the unenumerated right to privacy. Blackmun used equivocal language: "The right of privacy, whether it be founded in the 14th Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or...in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

In *Dobbs*, Alito maintained this equivocal language left the right in doubt.

Firing pregnant teachers

The court again relied on both liberty and equal protection in protecting teachers from pregnancy discrimination.

In 1970, Jo Carol LaFleur, then 23, became pregnant while a teacher at Patrick Henry Junior High School in Cleveland. School board policy required pregnant teachers to take unpaid leave five months before birth. They could reapply for a position the school year after the baby turned three months but would be subject to a physical exam and wouldn't get a job unless one was open. The schools said pregnant women often couldn't perform required duties during the last five months of pregnancy and that the policy was intended to protect the health of the mother and baby.

LaFleur was forced to resign in March when her due date wasn't until July. The Supreme Court ruled in 1974 that the policy violated LaFleur's liberty protected by the Due Process clause of the 14th Amendment.

"Freedom of personal choice matters of marriage and family life is one of the liberties protected by the due process clause," the court decided.

Taking in a grandson

When John J. Moore Jr.'s mother died before his first birthday, he went to live with his grandmother, Inez Moore, who owned a 2/1/2 story frame duplex in East Cleveland.

Inez Moore had raised six of her own children. She became John Jr.'s legal guardian and the boy fit in easily with the large extended family in the duplex.

Trouble began six years later when the City of East Cleveland decided that there were two families living in the house because another grandson of Inez's, Dale, also was living in the duplex. The two boys were cousins and Dale was like a younger brother to John.

But to East Cleveland, which was trying to stem the migration of Blacks from Cleveland proper, two families in one house was a violation of the housing code. It fined her \$25 and sentenced her to five days in jail.

In 1977, the Supreme Court ruled 5-4 that Inez Moore had every right to bring her extended family under one roof.

Justice Lewis Powell, a Nixon appointee, relied on substantive due process, writing that the court "has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the 14th Amendment..."

When Moore died in 1983, she had a special provision in her will requesting that her home be maintained as a place of refuge for her children and grandchildren.

Gay sex is illegal in 1986, but not in 2004

An Atlanta police officer, Patrolman Keith Torrick, was serving a warrant at Michael Hardwick's home in 1983. After stepping into the apartment, he looked through an open bedroom door and saw Hardwick in a bathroom having oral sex with a man – then, a crime in Georgia.

The Supreme Court upheld the law 5-4 in a controversial 1986 decision, *Bowers v. Hardwick*. Justice Byron R. White wrote the decision announcing that none of the court's previous privacy cases "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy...No connection between family, marriage or procreation on the one hand and homosexual activity on the other has been demonstrated."

Justice Powell later acknowledged that he had switched sides after having initially voted to strike down sodomy laws.

Blackmun, the author of *Roe*, had to change his draft majority opinion into a dissent. He quoted from Brandeis about the "right to be let alone" being the most comprehensive right of man.

It appeared at the time that the Supreme Court would soon be heading farther to the right with the nomination of Robert Bork to replace Powell moving toward the Senate. But Bork was defeated because he told the Senate straight out that there was no right of privacy. Anthony M. Kennedy was elevated to the court instead.

In a twist that no one predicted at the time, Kennedy became the most important advocate of same-sex rights on the court, writing a string of 5-4 decisions extending constitutional protect to same-sex sodomy and same-marriage.

Lawrence v. Texas in 2004 overturned *Bowers v. Hardwick* only 18 years after it had been decided. Then, the court threw out the Defense of Marriage Act and in 2015 recognized a constitutional right to same-sex marriage in *Obergefell v. Hodges*.

Kennedy breathed new life into the 14th Amendment's protection of what he called "equal liberty." Kennedy relied on the Loving interracial marriage decision and the LaFleur pregnant teacher firing to merge liberty and equality.

Kennedy didn't use the word privacy. He talked about liberty, a word that is in the Constitution. He wrote in the 2015 same-sex marriage decision that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy...Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make."

Justice Alito made clear in *Dobbs* that he doesn't think much of Kennedy's high-flown language. But he also made clear that he was limiting *Dobbs* to abortion where another potential life is involved.

Except for Justice Thomas, the conservative majority on the Supreme Court doesn't seem to have any plans to apply its reasoning to same-sex marriage or relations or interracial marriage. Congress and the president decided this month not to take any chances and passed a law requiring same-sex and interracial marriages be recognized across the country.

Chapter 5: Bill of Rights – Well-heeled win today's First Amendment disputes

By William H. Freivogel

Today's conservative Roberts Court is a bastion of First Amendment freedom as was the liberal Warren Court half a century ago. But the winners are different. Establishment insiders win today whereas outsiders won most often during the Warren years.

On its 200th birthday in 1991, the First Amendment had developed into a powerful shield against government abuse of outsiders, leftists, anarchists, communists, labor unions, Jehovah's Witnesses, atheists and non-Christians. It protected the press from government censorship and debilitating libel suits. It protected leftist flag burners and a dissident wearing a "Fuck the draft" jacket into a courthouse. And it protected little Mary Beth Tinker wearing an armband to school protesting the Vietnam War.

By its 231st birthday this month, the First Amendment winners are increasingly well-heeled. Corporations won the right to spend an unlimited amount of corporate money – millions, billions – to help their favored candidate win an election. Hobby Lobby won a decision based on religious liberty allowing it to refuse to provide contraceptive health coverage for its female workers. Conservative policy groups won a decision in an Illinois case blocking government unions from imposing mandatory union fees on non-members. And the court has lent a sympathetic ear to bakers and florists who say they won't serve same-sex couples whose marriages violated their religious beliefs.

Beyond that, gun owners won greatly expanded rights under a Roberts Court's reinterpretation of the Second Amendment. Corporations won decisions to force consumers and former employees into arbitration instead of class actions. Human rights lawyers lost their right to counsel foreign clients connected to terrorism about nonviolent conflict resolution. Polluters won a major victory cutting back on the government's power to address global warming. And the court just took up a case that could impair the right to strike by subjecting unions to state lawsuits.

Gregory P. Magarian, the Thomas and Karole Greene Professor of Law at Washington University and a former Supreme Court clerk, puts it this way: "The court has put much more energy into expanding the free speech rights of politically or economically powerful speakers, while largely disdaining the First



Hours before the Senate considered a Constitutional Amendment on campaign finance reform, U.S. Senators Tom Udall (D-NM), Bernie Sanders (I-VT), Sheldon Whitehouse (D-RI), Al Franken (D-MN) and Amy Klobuchar (D-MN), Rep. Ted Deutch (FL-21) and advocates from People for the American Way held a press conference to support Senator Udall's constitutional amendment to overturn Citizens United and get dark money out of American politics.

Amendment concerns of politically and economically disempowered speakers."

Justice Samuel Alito is a leader of the shift. Mark Sableman, a St. Louis media lawyer at Thompson Coburn, pointed out, in a recent speech on the Supreme Court. Alito wrote the 2017 decision throwing out a federal law that banned disparaging trademarks that were offensive. Alito wrote, "Speech may not be banned on the ground that it expresses ideas that offend." The ruling helped the Washington Redskins at the time in its effort to hold on to the Redskins name.

Alito also wrote the Hobby Lobby decision protecting corporate religious scruples. In addition, his replacement of Sandra Day O'Connor led to Citizens United opening the door to unlimited corporate political spending and to broader Second Amendment gun rights.

Magarian remarks, "Justice Alito is passionately committed to protecting rights and interests of people exactly like Justice Alito."

Chaos in the information universe

Meanwhile, the Bill of Rights is at the vortex of a hurricane of chaotic super-charged speech. Just about everybody thinks the other guy is taking away their

free speech rights.

Conservatives complain about a Woke culture, today's version of political correctness, where conservative speakers are disinvited from college campuses by so-called "cancel culture." Liberals complain that broadcast and Internet sites promote white supremacy, hate, misogyny and attacks on transgender people.

Sen. Josh Hawley, R-Mo., accuses social media companies, such as Twitter, of taking orders from the government to take down false information about COVID-19 and vaccinations. Liberals respond that the MAGA universe threatens public health and the health of democracy by spreading lies about COVID-19, vaccinations and who won the 2020 election.

Gov. Ron DeSantis, mentioned as a presidential candidate, boasts Florida is where "woke goes to die," and passed the so-called "Don't say gay" bill, limiting what public school teachers can say about gender issues in school. At the same time, Pen America reports from July 2001 to June 2002 there were 2,532 instances of individual books being banned, affecting 1,648 unique book titles. In Missouri, Secretary of State Jay Ashcroft, a possible gubernatorial candidate, is seeking to cut off money from public libraries that offer

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books that might appeal of some sexual preferences of minors.

At a recent court hearing, DeSantis' lawyer was asked what woke means. He responded: "it would be the belief there are systemic injustices in American society and the need to address them."

At the center of the storm is today's media, which bear only a passing resemblance to the media of 2000.

Think of the communications platforms and technologies that didn't exist 20 years ago, or were in their infancy.

Artificial intelligence. ChatGPT. Virtual reality. Facial recognition software. TikTok, Instagram, Facebook, Google, SnapChat, NewsMax, Breitbart, One America News, Huffington Post, tweets, GPS, citizen journalists, aggregators, page views, click bait, impressions, shares, comments, friends, likes, deep fakes, the filter bubble, podcasts, Google Earth, Google Street Views, WikiLeaks, the Intercept, Politico and on and on.

The Internet enthusiasts of 2000 predicted a blossoming of democracy with millions of new voices suddenly having the equivalent of a printing press in their hand-held smart-phone. But instead, we ended up in a dense fog of information and disinformation that can cause citizens to get lost. The legacy press, after a golden age of uncovering Watergate and the Pentagon Papers, steamed right into the unseen iceberg of new technology and began taking on water.

The press is having a nervous breakdown.

Hackers and spies manipulate digital information. Hackers in St. Petersburg, working for Russian intelligence, pulled incriminating information from the Democratic Party's digital files and leaked it – apparently via WikiLeaks – to the U.S. press to influence the 2016 election.

Then, a month before the 2020 election, powerful social media platforms used the technology usually reserved to block distribution of child porn to block distribution of a New York Post story on Hunter Biden's laptop. Twitter's Jack Dorsey apologized, but after the fact.

If the media universe wasn't chaotic enough, Elon Musk has bought Twitter and, as the chief "twit," immediately began writing a series of false and misleading posts. One relayed false allegations about the attack on Nancy Pelosi's husband. Another suggested his recently departed safety chief, Yoel Roth, was "in favor of children being able to access adult Internet service." A third called for the firing of Dr. Anthony Fauci and his criminal prosecution for supporting research that killed millions. Musk tweeted: "My pronouns are Prosecute/Fauci."

Missouri's Sen. Hawley leads the

charge against social media companies, complaining that it is a violation of the First Amendment for Twitter or other social media companies to consult with the government about posts containing false information about COVID-19 and vaccines. Hawley maintains this consultation makes the private social media giants "arms" of the government and White House and therefore violates the First Amendment.

Legal experts point out that the First Amendment applies to government censorship of speech, not editorial decisions by private media companies. The First Amendment would only be implicated if the government were to strongarm a private media company into blocking a speaker.

Hawley also has introduced a bill to remove trademark protections from Disney Corp. for having criticized Gov. DeSantis' so-called "Don't say Gay" bill. He took this action as DeSantis moved to remove special tax advantages that Disney had enjoyed for its theme park.

Magarian, the Washington University First Amendment expert, says this may violate Disney's free speech rights. "Corporations certainly are capable of expressing themselves, as Disney did when it spoke out against 'Don't Say Gay.' Government, in turn, may not retaliate against any speaker's political speech," he said.

Jonathan Turley, a libertarian law professor at George Washington University and adviser to Fox News, testified recently that, "The calls for greater governmental and private censorship in the United States are growing at a time when free speech is under unprecedented attack. Such movements remain a type of dormant virus in our body politic."

Turley is most concerned about college campuses canceling invitations to conservative speakers. "The extensive 'canceling of speeches and events on campuses often involves rejecting the classical view that free speech protects all speakers, even those who are viewed as advancing harmful ideas."

Charter to say no

Loud chaos may be exactly what we should expect from the Bill of Rights. It is every American's charter to say no.

"The Bill of Rights is a born rebel," wrote Frank I. Cobb, a 20th century news reporter. "It reeks with sedition. In every clause it shakes its fist in the face of constituted authority...It is the one guarantee of human freedom to the American people."

Magarian expressed a similar sentiment in the introduction to his book, *Managed Speech*:

"If a democracy doesn't make noise, it dies. We in the United States are supposed

to be a self-governing people...Self-government requires constant political debate...Those discourses can't just comprise polite expressions of mutual affirmation by wealthy and powerful elites. The discussion we need is boisterous, angry, and hopeful. It's aspirational, transgressive, and inclusive.

"It's the steady hum of ideas in laboratories and studios, in chat rooms and comment threads, and most of all in the streets. It's the shouts that forge social movements that shape our society, from revolutionary battle cries to abolitionist prophecies, from labor pickets to civil rights sit-ins, from blessings of same-sex marriages to whatever our shared future holds..."

"It's the exclamations, whispers, and laughter that make us the individuals we are, individuals who join together, govern ourselves...A democratic society needs to muster and sustain the broadest, deepest, noisiest public discussion we can all pull from our lungs."

Right of naysaying

America fought a revolution because we were contrarians, and the Bill of Rights protects our naysaying.

People can say:

- I don't agree with the president or Congress or the Supreme Court.
- I won't bow down to any orthodoxy, religious or political.
- I won't worship someone else's God or the state's God. I might not worship any god. But I like holiday exhibitions at city hall with a creche and a Christmas tree.
- The government generally can't tell me what to think, or what I can say, view, draw, photograph, read or tweet.
- The government can't stop me from speaking or even stop the publication of most national security secrets.
- I won't salute the flag. I might even burn it or the Bible or the Constitution or the Koran in protest. And if I'm a public school student even the principal can't force me to take off an armband protesting the war.
- The government can't take away the gun I have to protect my house, nor can the police search me or my house or my cell phone without a good reason.
- The government can't tell me I have to marry someone of a particular race, or religion or sex.
- The government can't refuse to teach the theory of evolution to my children because of religious objections. Nor can it force my children to hear the pseudo-science of creationism in public schools.
- The government can't make me confess to a crime or sentence me to prison unless I've had a lawyer and a fair trial



Dick Heller, who sued D.C. to establish a right to have a gun in his house, speaking at the 2018 Conservative Political Action Conference (CPAC) in National Harbor, Maryland.

Photo by Please Gage Skidmore

before an impartial jury. And if the punishment violates today's evolving standards of decency, the government can't impose it. Juveniles can't be executed, nor can rapists.

- The government can't tell me to stay out of the park or off the street with my signs and banners of protest. Nor can the police tell me I can't protest at night or shoot rubber bullets or bullets at me when I'm protesting peacefully.

Negative rights

The Bill of Rights protects negative rights – things the government can't do to its citizens. It's a perfect document for a nation of contrarians that got its start by shouting no to King George III, dumping tea into Boston Harbor and refusing to pay taxes.

The idea of the First Amendment is to protect the ideas people hate. There is no need for a First Amendment to protect popular ideas. The majority won't outlaw speech it likes.

This is why the First Amendment protects all sorts of distasteful speech that makes the majority mad. This includes hate speech, flag burning, cross-burning, Nazi parades, profanity, pornography, violent

video games, politicians' lies, multi-million dollar contributions to elect politicians, anti-gay protests at soldiers' funerals and slurs such as calling police pigs.

Nazis can parade through south St. Louis or through Skokie in front of Holocaust survivors. The Ku Klux Klan can wear hoods and robes, burn a cross and promise "vengeance" against "n....." and "Jews." A Vietnam protester can walk through a courthouse with a jacket that says, "Fuck the draft." Protesters can burn the flag in front of George H.W. Bush's nominating convention. The Westboro Baptist Church can picket funerals of soldiers displaying hateful, anti-gay signs. Pornographer Larry Flynt can publish a parody of the Rev. Jerry Falwell having sex with his mother in an outhouse in order to spoof the Christian majority. The alt-right – and the left for that matter – can post fake news on the Internet to tilt an election.

Free speech is not absolute

Free speech is not an absolute right. The First Amendment begins, "Congress shall make no law..." abridging the rights it promises – free speech, assembly, petitioning for redress of grievances, a free press and religious freedom.

But the word Congress is much more powerful than it seems and the word "no" much less absolute.

As the Supreme Court began incorporating the Bill of Rights and requiring states to abide by them, the word Congress meant a lot more than Congress. It meant a person's rights could be violated by every government agency and public actor from the president and Congress down to the city council, the public university and the local school board.

Justice Hugo Black, a mid-20th century justice, was a First Amendment absolutist. "No law" should mean "no law," he said. But Black did not prevail, and there are many exceptions to the First Amendment.

It doesn't protect obscenity, true threats, in-your-face fighting words, libel, slander, conspiracies to commit crimes, sedition, burning a draft card, racial or sexual harassment in the workplace or school, discriminatory housing ads or leaking classified government documents.

It won't protect overnight Occupy Wall Street protests in public parks. It doesn't protect advocacy of imminent unlawful action to overthrow the government or publication of the names of spies or troop

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movements. It doesn't allow the use of another person's image to make money, or a journalist invading the privacy of a living room with a hidden microphone or camera. It doesn't protect publication of a work owned by someone else and protected by copyright. Nor can the school board require the recital of a prayer in the classroom or the city council order the placement of a nativity scene on a courthouse's main staircase.

It's not immediately evident why the Nazi protest in Skokie should be protected but not Occupy Wall Street's overnight protest. Or why burning the flag is protected but not burning a draft card. Or why the president saying "God bless the United States" is more important to democracy than a state-sponsored school prayer at the beginning of the day. Or why the creche on the courthouse staircase is unconstitutional, while a display with a Christmas tree, Hanukkah menorah and sign of liberty in a park outside is okay.

There are reasons for all of these decisions. Neutral time, place and manner laws about safety and health shut down Occupy's overnight protests. The draft card was an essential element of the Selective Service System in a way the flag is not. The president's exhortation to God is his own free speech, while the state required prayer imposes an orthodoxy on impressionable school children. The nativity scene alone on the staircase makes non-Christians or atheists feel like strangers in their own city hall, while an ecumenical display with secular elements does not.

Some of the most difficult First Amendment decisions involve the clash between equality and freedom. Newspapers can't print racially discriminatory housing ads. In addition, employers and schools have a duty not to tolerate a racially or sexually hostile work or education environment. But the Supreme Court is deciding this term whether a florist can be required to serve a same-sex couple if she is religiously opposed to same-sex marriage. And if she can refuse to serve a same-sex couple, can she refuse a Black couple or interracial couple?

Truth wins out?

The First Amendment rests on the Enlightenment premise that truth wins over falsity on the battlefield of ideas. As John Milton put it in the 17th century: "who ever knew Truth put to the worse in a free and open encounter?"

Oliver Wendell Holmes Jr., one of the great civil libertarians of the 20th century, put the same idea in the libertarian lexicon of free markets. "When men have realized that time has upset many fighting faiths," he wrote in a 1919 dissent, "they may come to believe, even more than they believe the

very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market."

The other great free-speech justice of the early 20th century, Louis Brandeis, had a more communitarian explanation for free speech, describing its importance to democracy.

"Those who won our independence believed...that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth," he wrote. "That, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine....Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law."

Running through Milton, Holmes and Brandeis is an almost religious faith that everything will work out as long as people can freely express themselves. Undergirding this premise is the European Enlightenment's belief in empiricism. Science, study and analysis can find facts upon which people and democratic societies can make the right decisions.

What if truth doesn't win?

What if a free society doesn't land on the truth?

What if fake news gets more attention online than real news? BuzzFeed reported that in the 2016 election, "top fake election news stories generated more total engagement on Facebook than top election stories from 19 major news outlets combined."

What happens when a "publisher" like Julian Assange, who portrays himself as a truth teller, becomes an arm of Russian intelligence?

Through the lens of history, the First Amendment does not guarantee truth will win, or at least that it will win out immediately.

America enslaved and then discriminated against Blacks from its founding and before. It took centuries and hundreds of thousands dead to end slavery and almost another century, with lynchings and murders, to end segregation. Today, many don't believe there is systemic discrimination against Blacks and want to ban the idea from the schools.

America denied women the right to vote even longer than it did Blacks. Only in the past 40 years has the country begun to realize the truth of second-class treatment of women in the workplace and the extensiveness of sexual harassment on college campuses and in everyday life.

Yet, the nation can't agree on the simple statement in the Equal Rights Amendment "equality of rights under law shall not be denied or abridged...on account of sex." And now, women have lost the constitutional right giving them control of their reproduction.

America drove Native Americans from their land and killed them. And the U.S. still hasn't faced up to the truth of its oppression of the continent's original residents.

Is that a history of the First Amendment failing Milton's, Holmes' and Brandeis' faith in truth-finding? Or is it a story creeping closer to truth.

Newspaper editors are no longer jailed for criticizing the president as they were under the Sedition Act in 1798. Critics of war and the draft no longer are jailed for leafleting, as they were during World War I. A candidate for president couldn't be imprisoned for an anti-war speech, like Eugene Debs. The country seems to have accepted that the Japanese-American internment camps were a terrible injustice. It took years, but Joseph McCarthy was revealed as a demagogue and censured but by the Senate.

Slavery and segregation by law ended, women won the right to vote, broad civil rights protections for Blacks and women won passage. Same-sex marriage recently won constitutional protection. Women have access to birth control. The Equal Rights Amendment lost, but the Supreme Court expanded the Constitution's "equal protection" to include almost everything the amendment would have provided. Title IX has revolutionized women's roles in sports and college life. And campuses around the country are aware as never before of the extent of sexual harassment.

Thieves and rapists no longer are executed as they were at the time of the Bill of Rights. Nor are juveniles executed, even though they were as recently as the turn of the 21st century. People accused of crimes have a right to a lawyer. Prosecutors no longer can exclude Blacks from juries to create all-white ones – although they still try.

Today, Americans have finger-tip access to the broadest range of opinion, fact and fiction of any generation in history. The test of the rest of this third century of the Bill of Rights is whether the people of the freest nation on earth can chart a course through the sea of images, sounds, news and opinion that engulfs us and hold to the course that has moved us along a zigzag path toward a more perfect union.



Mary Beth Tinker, who wore an armband to school as a child to protest the Vietnam War, speaks as the E.W. Scripps School of Journalism at Ohio University. Her Supreme Court case, *Tinker v. Des Moines*, established that a student has free speech rights in public schools.

Photo by Eli Hiller

First Amendment makes us freest nation

By William H. Freivogel

The Bill of Rights has helped create what is arguably the freest enduring society in history.

It wasn't always that way.

The original Constitution didn't have a Bill of Rights.

Once the Bill of Rights was added, it didn't apply for a century to state governments.

As recently as 90 years ago, no one had won a First Amendment free speech case against the government.

Today the Bill of Rights - with a lot of help from its post-Civil War friend, the 14th Amendment, - is a constitutional powerhouse that protects people from government abuses by public actors from mayor to president.

In the beginning

For the first 150 years, the Bill of Rights was more the "parchment barrier" of James Madison's fears than the "impenetrable bulwark" of his hopes.

James Madison is called the father of

the Bill of Rights, but like other members of the Constitutional Convention, he opposed adding a Bill of Rights. He changed his mind mainly to avoid a second constitutional convention that might make major revisions to what the first Convention drew up.

It wasn't that the Framers were opponents of liberty. The tradition of legally guaranteed rights went back to the Magna Carta of 1215 when King John of England was forced to grant civil and political rights, including trial by jury.

The Revolutionary War leaders believed in the philosophy of John Locke, the 17th century English philosopher who thought men were born with "natural rights" the government couldn't take away. The Declaration of Independence trumpeted these "unalienable Rights" of "Life, Liberty and the pursuit of Happiness."

But the Convention turned down a bill of rights in August 1787. Roger Sherman of Connecticut said the states' bills of rights should suffice.

A few weeks later on Sept. 15, the last day of debate, George Mason of Virginia said he couldn't sign the Constitution that he had worked hard to draft because "there is no declaration of any kind, for preserving the liberty of the press, or the trial by jury in civil causes; nor against the danger of standing armies in time of peace."

Those objections became the theme of the Anti-Federalists who opposed ratification.

John Adams and Thomas Jefferson - two prominent Americans who were out of the country at the time of the Convention, Adams in Britain and Jefferson in France - also worried about the absence of a bill of rights. "What I do not like, first the omission of a bill of rights," Jefferson wrote Adams, "....A bill of rights is what the people are entitled to against every government on earth."

Patrick Henry, the fiery pamphleteer of the Revolution, likened the "tyranny of

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Philadelphia to "the tyranny of George III."

Alexander Hamilton of New York thought Henry was actually mad about the states losing power to a federal government and was bringing up the absence of a bill of rights to arouse the passions of Anti-Federalists - "frighten(ing) the people with ideal bugbears," was how he put it.

George Washington, who remained at his plantation during Virginia's ratification convention, also was annoyed by the bill of rights argument because he thought it a smokescreen for other objections.

Madison opposed a bill of rights as "unnecessary and dangerous - unnecessary because it was evident that the general government had not power but what was given it - ...dangerous because an enumeration which is not complete is not safe."

In Federalist 84, one of the essays written to support the Constitution - Hamilton said the whole Constitution should be understood as a bill of rights because of its checks and balances and federalism. "The people surrender nothing; and as they retain everything they have no need to particular reservations."

Henry was the most influential leader present at the Virginia convention, with Washington absent. Tall and thin with an ill-fitting wig, he said the absence of a bill of rights was a betrayal.

"Perhaps an invincible attachment to the dearest rights of man may, in these refined, enlightened days, be deemed old-fashioned." If so, he preferred to be an "old-fashioned fellow."

To win the votes needed for ratification in key states of Virginia and Massachusetts, the Federalists had to agree to resolutions calling for a bill of rights.

Madison switched to supporting the bill of rights when running for election to the first Congress in a district that included Anti-Federalist counties. Madison campaigned as a strong supporter of a bill of rights and won.

Even though he referred to it as his "nauseous project," he pushed ahead in order to "kill the opposition everywhere." Four states had already called for a new constitutional convention. Madison knew the Bill of Rights would blunt the move for the convention. And it did.

Madison's proposals were different from the French Declaration of the Rights of Man adopted that same summer. The French Declaration threw out centuries of feudal tradition and provided a broad statement of rights. Madison's proposals guarded rights already thought to exist. And he wrote in legally enforceable language: "Congress shall make no law...."

The House eliminated some rhetorical flourishes, such as calling freedom of

speech and the press "great bulwarks of liberty" and trial by jury "one of the best securities of the rights of the people."

The House also refused to add a phrase before the preamble "We the People" to make it clear the government derived from the people.

The Senate struck an amendment that would have required states to abide by jury trials, rights of conscience, free speech and the press. Madison thought the states were a greater threat to freedom than the federal government, and he turned out to be right.

The first two of 12 amendments were not ratified, making the third proposal the First Amendment. So it wasn't first because it was the most important, although it may be now.

Robert Henry Lee of Virginia, an anti-Federalist senator, was disappointed by the final version. He said the English language had been carefully culled to find words feeble in their nature and doubtful in their meaning.

But popular opinion favored them and they were ratified Dec. 15, 1791.

Jefferson noted the enactment of the Bill of Rights had a healing effect and "opposition to our new Constitution has almost totally disappeared."

Historian Leonard W. Levy wrote that "The Bill of Rights symbolized a new system of public morality based on the premise that government is but an instrument of man....a permanent reminder of its framers' view that the citizen is the master of his government, not its subject. Americans understood that the individual may be free only if the government is not."

First century

Seven years after ratification of the Bill of Rights, Congress violated it by passing the Alien and Sedition Acts making "scandalous" criticism of high government officials a crime.

President John Adams and his Federalist party supported England in its cold war with Napoleon's France. Jefferson and Madison, who had formed the Democratic-Republican party, favored France.

Pro-Jefferson newspaper editors assailed Adams and belittled him for excessive pomp. Adams thought the criticisms were unpatriotic. Hamilton, an ally, said Jefferson was subverting the government and was "an atheist in Religion and a fanatic in politics."

The Supreme Court had not yet established judicial review, so it did not rule on the constitutionality of the laws. Jefferson and Madison wrote the Kentucky and Virginia resolutions seeking state support for overturning the laws.

Jefferson's defeat of Adams in the election of 1800 settled the issue. Congress

repealed the law and Jefferson pardoned those who had been convicted.

In 1833, the Supreme Court confirmed in *Barron v. Baltimore* that the Bill of Rights did not apply to the states, allowing them to violate rights without consequence.

During the Civil War, President Abraham Lincoln's State Department censored the press and a kind of secret police arrested citizens without explanation and brought them before military tribunals.

When Chief Justice Roger Taney ordered Lincoln to release John Merryman, who had been arrested for Confederate sympathies, the president didn't even acknowledge the order.

In 1866 Congress approved the 14th Amendment, which in time became the means of applying major guarantees of the Bill of Rights to the states.

Rep. John A. Bingham of Ohio, who drafted the amendment, told the House he intended "the enforcement of the Bill of Rights, touching the life, liberty and property...within every organized state."

Sen. Jacob M. Howard of Michigan told the Senate that the privileges and immunities protected by it included "the personal rights guaranteed and secured by the first eight amendments."

But in the *Slaughterhouse* case of 1873, the Supreme Court said the 14th Amendment did not shift control of all civil rights from the states to the federal government.

The Louisiana legislature, while controlled by Northerners, had granted Crescent City Slaughterhouse a 25-year monopoly. The Butchers Benevolent Association challenged the arrangement saying it violated their right to practice their trade.

The Supreme Court upheld the state law. It ruled that if the 14th Amendment protected rights from the states, then the court "would constitute this court a perpetual censor upon all legislation of the States on the civil rights of their own citizens, with authority to nullify such as it did not approve."

That was the law for the next half century.

War challenged civil liberties

Times of war pose the greatest threat to free speech as fear often leads to speech restrictions. It was true in 1799 after passage of the Alien and Sedition Act. It was true during the Civil War with Lincoln's actions against civil liberties. And it has been true in the 20th and 21st centuries, from the Espionage Act of 1917 to the relocations of Japanese-Americans to concentration camps in the West during World War II, to the McCarthy Red Scare of the late 1940s and early 1950s to Attorney General John Ashcroft's rounding up

of 5000 Middle Eastern men after 9/11, even though there was no evidence of wrongdoing.

The federal government's crackdown on dissidents, newspapers, immigrants and labor unions was especially severe During World War I. The resulting court cases eventually awakened the sleeping giant of the First Amendment.

The Espionage Act and its Sedition amendments passed at a time of extreme fear about the war, the Russian Revolution, political anarchists, labor unions, immigrants from southern Europe and the arrival of Blacks from the South challenging whites for jobs in the North. The Ku Klux Klan was terrorizing and lynching Blacks and came close to taking over the Indiana legislature.

The Espionage Act is extremely broad. Provisions make it a crime for those "lawfully having possession of" or "having unauthorized possession of" information relating to the national defense to willfully communicate or retain it."

During the Senate debate, one senator pointed out that the language could cover a hypothetical Iowa farmer who disclosed the number of bushels of wheat or corn raised in that state, thus providing possibly useful information to the enemy.

If these laws mean what they say and are constitutional, press reports since World War II have been full of criminality. The front pages of the New York Times, Washington Post and Los Angeles Times arguably contain information several times a week the dissemination of which violates a literal reading of the Espionage Act. Yet no reporter or publisher has been convicted, even though a few have been threatened with prosecution. It is the officials leaking the secrets who are prosecuted.

Julian Assange, publisher of WikiLeaks, is the first journalist - if he is a journalist and not a hacker - who faces criminal prosecution under the Espionage Act.

The Sedition Act amendments to the Espionage Act made it a crime to speak abusive language about the flag, Constitution, armed forces or government. More than 1,000 people, most pacifists, were arrested and some newspapers censored in the World War I era.

Eugene V. Debs, the Socialist leader who got 6 percent of the popular vote in the 1912 election, found himself in prison with a 10-year sentence. His crime: an anti-war speech at an Ohio fairground likening the draft to slavery. Even though his speech would be protected today, none of the justices on the court voted then to protect it. Oliver Wendell Holmes Jr., who later became a champion of free speech, said Debs speech had the "natural tendency and reasonably probable effect to obstruct the recruiting services."

In another free-speech decision that same year - Schenck v. U.S., upholding the conviction of anti-draft pamphleteers - Holmes famously said that free speech was far from absolute. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. The question in every case is whether the words used...are of such a nature as to create a clear and present danger..."

Holmes' opinion was criticized by a young Harvard law professor, Zechariah Chaffee Jr., who suggested to Holmes that he should have been more protective of free speech.

Possibly in reaction to Chaffee's criticism, Holmes wrote the powerful, pro-speech dissent the next court term in *Abrams v. U.S.*, a case in which six Russian Jewish immigrants had distributed leaflets, printed in English and Yiddish, which were thrown out of a fourth-floor factory window in New York. The leaflets criticized President Woodrow Wilson for acting against the Russian Revolution. *Abrams*, who helped print them, was sentenced to 20 years in prison and the Supreme Court upheld the conviction.

Holmes, in dissent, toughened his "clear and present danger test" and said no one could think the protesters' silly leaflet would have an impact. "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion," he wrote. "Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man without more, would present any immediate danger..."

All of these cases were playing out in an America where Wilson was criticizing hyphenated Americans and Attorney General Mitchell Palmer's young director of the future FBI, J. Edgar Hoover, was rounding up anarchists, immigrants and dissidents.

After Palmer's Chevy Chase home was bombed by an anarchist in 1919, the government rounded up thousands of immigrants, anarchists and other dissidents without proof of crimes.

One congressionally created committee, the Committee on Public Information, removed favorable references to Germany from history texts. Another agency, the State Councils of defense, organized committees that investigated and harassed German-American shopkeepers. They even banned Bach and Beethoven at concerts.

Nebraska was one of 22 states that outlawed the teaching of German in school. It said the law was needed so "that the sunshine of American ideals will permeate" pupils' lives.

Incorporation of the Bill of Rights

In 1925, Benjamin Gitlow, a member of the Socialist Party, was prosecuted under New York's criminal anarchy law. His crime was publishing the Left Wing Manifesto criticizing mild socialism and calling for revolutionary socialism. The Supreme Court upheld the conviction. But Holmes and Louis Brandeis dissented, saying Gitlow did not pose a present danger.

However, there was one positive step for the First Amendment in Gitlow. For the first time the court said the First Amendment applied to state laws. This was the beginning of the incorporation of portions of the Bill of Rights against the states. The court based this decision on the 14th Amendment's command that states not deprive "any person of...liberty...without due process of law."

Two years later Brandeis set out in the most eloquent terms, the importance of the First Amendment to democracy. Charlotte Whitney, a socialite from a well-known California family, had helped form the Communist Labor Party of America. The state claimed the party advocated the violent overthrow of the government and thus violated the state criminal syndicalism law.

While Whitney denied being involved in violence, she lost in court. But Brandeis' opinion, joined by Holmes, is one of the great defenses of free expression. Brandeis said the founders of the nation "believed that the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth...the greatest menace to freedom is an inert people..."

"...Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears." For speech to be punished, Brandeis and Holmes said, it must threaten a serious evil and be an imminent danger.

During this same decade of the 1920s, a wave of Ku Klux Klan violence in the South resulted in hundreds of lynchings. The Supreme Court also upheld the forced sterilization of women considered immoral or mentally feeble under authority of Virginia's Racial Integrity Law of 1924.

Holmes, despite his civil libertarian beliefs, wrote the opinion in the 1927 sterilization case, *Buck v. Bell*, justifying the forced sterilization of Carrie Buck. "Three generations of imbeciles is enough," he wrote.

Finally, in 1931 in *Near v. Minnesota*, the Supreme Court for the first time threw out a state law that violated the First Amendment - 140 years after the Bill of Rights was passed and 65 years after the 14th Amendment applied it to the states.

Continued on next page

Minnesota's "gag law" gave courts the power to stop publication of a "malicious, scandalous and defamatory newspaper."

J.M. Near's Saturday Press in Minneapolis fit the bill. Near was anti-Semitic, anti-black, anti-labor and anti-Catholic, among other negatives. He claimed that "Jewish gangs" were running the county. The governor went to court and got an order stopping publication.

In First Amendment parlance, the injunction was a "prior restraint." A sacred principle of the First Amendment is that the government cannot stop the presses. It can punish a publication after distribution, but not beforehand.

The protection of news organizations from prior restraints set the precedent for the Supreme Court's rejection four decades later of President Richard M. Nixon's attempt to block publication of the Pentagon Papers.

The year after Near, the Supreme Court went beyond the First Amendment by incorporating the Sixth amendment right to counsel against the states. It took the action in the case of the "Scottsboro Boys," nine young black men 13 to 21 accused of raping two young white girls on a freight train passing through Scottsboro, Alabama.

They didn't have a lawyer until the day of the trial, even though they faced the death penalty. And that reluctant lawyer didn't talk to them. An all-white jury convicted them and they were sentenced to death. The Supreme Court said the right to counsel applied in all capital cases. In a retrial one of the white girls admitted the boys and men had not raped them. But the new jury convicted them anyway, although they were not executed.

Ordered liberty

In 1937 the court tried to explain how it decided what parts of the Bill of Rights applied to the states.

In *Palko v. Connecticut* Justice Benjamin N. Cardozo said the 14th Amendment only required the states to comply with rights essential to a "scheme of ordered liberty. - rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental."

The First Amendment rights of free speech and assembly were fundamental but not jury trials and double jeopardy. Connecticut could try Palko twice for a murder. The court followed up by saying the right to a lawyer was not fundamental unless it was a capital case like the Scottsboro boys. Nor was the right to remain silent fundamental, the court said in 1947.

Justice Hugo Black led four dissenters who said all the protections of the Bill of Rights should be incorporated against the states. Black lost the battle but won the

war because the court incorporated almost all of the protections of the Bill of Rights against the states.

Cardozo's formulation of fundamental rights rooted in the nation's traditions and conscience was a main point that Justice Samuel Alito made in the majority decision in *Dobbs*, maintaining the abortion right did not pass the test.



Fred Korematsu, center, sits with members of his legal team. He lost his challenge to internment camps for Japanese-Americans during World War II.

Photo courtesy of the family of Fred T. Korematsu

The Red Scare

Even though the Supreme Court had begun breathing life into the Bill of Rights, that didn't stop the internment of 115,000 persons of Japanese descent during World War II – most American citizens. Nor did it stop a wave of redbaiting after the war.

The Supreme Court upheld the detention of the Japanese-American citizens as falling under the president's war powers in a case involving Fred Korematsu.

Again, it was fear that provoked redbaiting - fear of the Soviet Union, which had quickly obtained a nuclear weapon when the United States had thought it had a monopoly on the Bomb.

President Harry S Truman implemented a loyalty policy that resulted in 7,000 resignations. The Supreme Court upheld a provision of the Taft-Hartley Act requiring union officers to swear they were not communists. The court also upheld the Smith Act, which had been used to imprison Communist Party officials for advocating the overthrow of the government.

In the Smith Act decision, *Dennis v. U.S.*, the court said the country did not have to "wait until the putsch is about to occur" before acting.

Meanwhile, Sen. Joseph McCarthy, a Republican from Wisconsin, was destroying careers and spreading fear through Washington and Hollywood with unsubstantiated claims that thousands of communists had infiltrated the Army, State Department and other parts of the government. Leading actors, directors and screenwriters were blacklisted in Hollywood and could not find work.

In 1954 the Senate censured McCarthy. The press, notably CBS's Edward R. Murrow, played a major role in exposing his demagoguery. In St. Louis, Post-Dispatch editorial editor Irving Dilliard campaigned against McCarthy so zealously that Joseph Pulitzer Jr. suggested he let a week pass without McCarthy's name in an editorial.

Fear of communists in government gradually eased and by 1957 the court had stepped back from *Dennis*, ruling that second-tier Communist Party officials could not be jailed. The court ruled that advocating the violent overthrow of the government is different from inciting an actual revolution.

The Warren Court

Chief Justice Earl Warren's court was now in full swing, bringing about the most rapid expansion of individual, civil and criminal rights in history. A flood of decisions followed the momentous *Brown v. Board of Education* decision in 1954 overturning segregation of public schools. In a little more than a decade, the Warren Court:

- Protected the press from libel laws, making it hard for public officials and figures to win. The press and democracy needed breathing room to make mistakes, the court said in *New York Times v. Sullivan*. The decision protected the northern media from the attempts of segregationist politicians to bankrupt them for aggressive reporting during the Civil Rights Movement.
- Declared a student does not lose First Amendment rights at the schoolhouse gate, backing the right of Mary Beth Tinker to wear an armband protesting the Vietnam War.
- Upheld in *Brandenburg v. Ohio* the First Amendment right to hateful speech, such as Nazi and KKK protests, unless it is directed at inciting or producing imminent lawless action and is likely to produce that action. Clarence Brandenburg's pathetic KKK rally in an Ohio field with a Nazi sympathizer threatened no one.
- Protected vulgar speech in *California v. Cohen*, where a man wore a jacket through a courthouse bearing "Fuck the draft." Justice John Marshall Harlan wrote, "one man's profanity is another man's lyric."
- Protected the right to keep pornography in one's home.
- Barred state-sponsored prayers in the public schools and threw out laws that banned teaching evolution and requiring the teaching of creationism.
- Recognized in *Gideon v. Wainwright* the Sixth Amendment right to a lawyer in state court. Clarence Gideon, a career criminal born in Hannibal, Mo., appealed

his conviction for breaking into a pool hall, saying he should have had a lawyer. The Supreme Court agreed.

- Applied the exclusionary rule to the states in *Mapp v. Ohio*, excluding illegally obtained evidence to force police compliance with the Fourth Amendment rules on unreasonable searches.
- Required in *Miranda v. Arizona* that police warn suspects of their Fifth Amendment right to remain silent and Sixth Amendment right to a lawyer.
- Recognized a right to privacy guaranteeing women access to contraceptives.
- Ruled in *Loving v. Virginia* the right of privacy and equality protected the interracial marriage of Mildred and Richard Loving, a decision that some 50 years later provided the basis for constitutional protection of same-sex marriage.

Hoover and COINTELPRO

A few blocks down Pennsylvania Avenue from Capitol Hill, J. Edgar Hoover, 40 years after the notorious Palmer raids of the Wilson administration, was busy on the 1960s version of his war on protesters.

Hoover placed FBI Agent William Sullivan in charge of the COINTELPRO – CounterIntelligence program – targeting anti-war and civil rights leaders, including the Rev. Martin Luther King Jr.

Hoover and Sullivan had a different reaction than most Americans to the “I have a Dream Speech” during the 1963 March on Washington. Sullivan wrote: “In the light of King’s powerful demagogic speech. ... We must mark him now if we have not done so before, as the most dangerous Negro of the future in this nation from the standpoint of communism, the Negro, and national security.”

One of Sullivan’s tactics was to send a hateful anonymous letter to King telling him to kill himself because of his “countless acts of adulterous and immoral conduct lower than that of a beast.”

The old St. Louis *Globe-Democrat* was complicit. One 1968 FBI document read: “The feeding of well chosen information to the St. Louis *Globe-Democrat*, a local newspaper, whose editor and associate editor are extremely friendly to the Bureau and the St. Louis Office, has also been utilized in the past and it is contemplated that this technique might be used to good advantage in connection with this program.”

And another document: “The St. Louis *Globe-Democrat* has been especially cooperative with the Bureau in the past. Its publisher [name deleted] is on the Special Correspondents List.”

In 1968, the FBI circulated a memo

to “cooperative news media sources.” The House Assassinations Committee concluded the FBI ghost editorial resulted in a *Globe-Democrat* editorial two days later, right down to the misspelling of capital.

“Memphis may only be the prelude to civil strife in our Nation’s Capitol [sic].—FBI memorandum, March 28, 1968

Memphis could be only the prelude to a massive bloodbath in the Nation’s Capitol [sic] ...—*Globe-Democrat* editorial, March 30, 1968

The House Assassinations Committee concluded that James Earl Ray didn’t read the editorial. He was in Birmingham that day buying the rifle he used to kill King.

COINTELPRO, like the Palmer raids, illustrates that Americans’ civil liberties can be violated without the Supreme Court ever getting a chance to do anything about it.

Burger, Rehnquist

Two of the biggest expansions of civil liberties occurred after the end of the Warren Court. *Roe v. Wade* established an abortion right in 1973 during the Burger Court and *Obergefell v. Hodges* established the right to same-sex marriage during the Roberts Court.

The Pentagon Papers decision of 1971 during the Burger Court was a big triumph for the press. It invalidated prior restraint against publication of the Pentagon Papers, the 47-volume secret history of the Vietnam War. The top secret documents disclosed presidents from Eisenhower to Nixon lying about Vietnam.

During the Rehnquist court the speech of outsiders continued to flourish with protection of flag-burning, Margaret Gilileo’s anti-war sign in the window of her Ladue home and the ribald parody that *Hustler* magazine printed of the Rev. Jerry Falwell having sex “for the first time” with his mother in an outhouse. It turned out that Rehnquist was a fan of cartooning and parodies. He said *Hustler*’s parody was a poor cousin of the great political cartoons but still deserved the protection of *New York Times v. Sullivan*.

But there were pullbacks as well. During the Burger Court Justice Byron R. White wrote two decisions that hurt the press. One, *Branzburg v. Hayes*, ruled that journalists could not invoke the First Amendment to protect confidential news sources. Most states now have “shield laws” that allow reporters to protect sources in state courts, but there is no federal shield law.

The other White decision that hurt the press was *Zurcher v. Stanford Daily* upholding a police search of the *Stanford Daily*’s files to look for evidence to prosecute anti-war demonstrators. Congress reversed the *Stanford Daily*

decision passing the Privacy Protection Act that requires authorities to use less intrusive subpoenas to obtain evidence - keeping police out of news rooms and giving the media a chance to contest any request for photos, notes or files.

Justice White issued a more damaging decision in 1988 during the Rehnquist court - *Hazelwood v. Kuhlmeier* - in which the court limited its protection of student speech by ruling that school administrators could censor the speech of students in school expressive activities such as the school newspaper.

The principal of *Hazelwood North* had removed a two-page spread from the *Hazelwood East Spectrum* newspaper. It was a well-reported look into issues affecting students’ lives - student pregnancy, contraceptive care, the impact of divorce.

Fourteen states have passed laws overturning *Hazelwood* and restoring rights of student journalists. Illinois is one of the states; Missouri is not.

(Congress and state legislatures can pass a law to overturn Supreme Court decisions - such as *Branzburg*, *Zurcher* and *Hazelwood* - as long as they are expanding rights, not contracting them. The rights guaranteed by the Constitution are a floor but not a ceiling.)

Rehnquist also wrote *Washington v. Glucksburg* in 1997 holding that there was no 14th Amendment right to physician assisted suicide because it was not part of the nation’s history or tradition. Alito cited this decision in *Dobbs*.

In the Roberts era, the winners in First Amendment cases have more often been powerful, established interests.

Corporations making political expenditures, pharmaceutical firms seeking to use big data for marketing efforts, corporations such as Hobby Lobby objecting on religious grounds to Obamacare rules on contraceptives. Labor unions, already threatened by expansion of right to work laws, are losing the power to charge union dues to workers who say union activities violate their free speech rights.

The other big conservative rights decision has been the broad expansion of the 2nd Amendment gun rights, first for protection in the home and more recently for protection on the street.

The court’s liberal justices wrote the great free speech decisions of the 60s and 70s. On the Roberts court, it is the conservative justices who are in the forefront of expanding free speech rights for corporations and established interests.

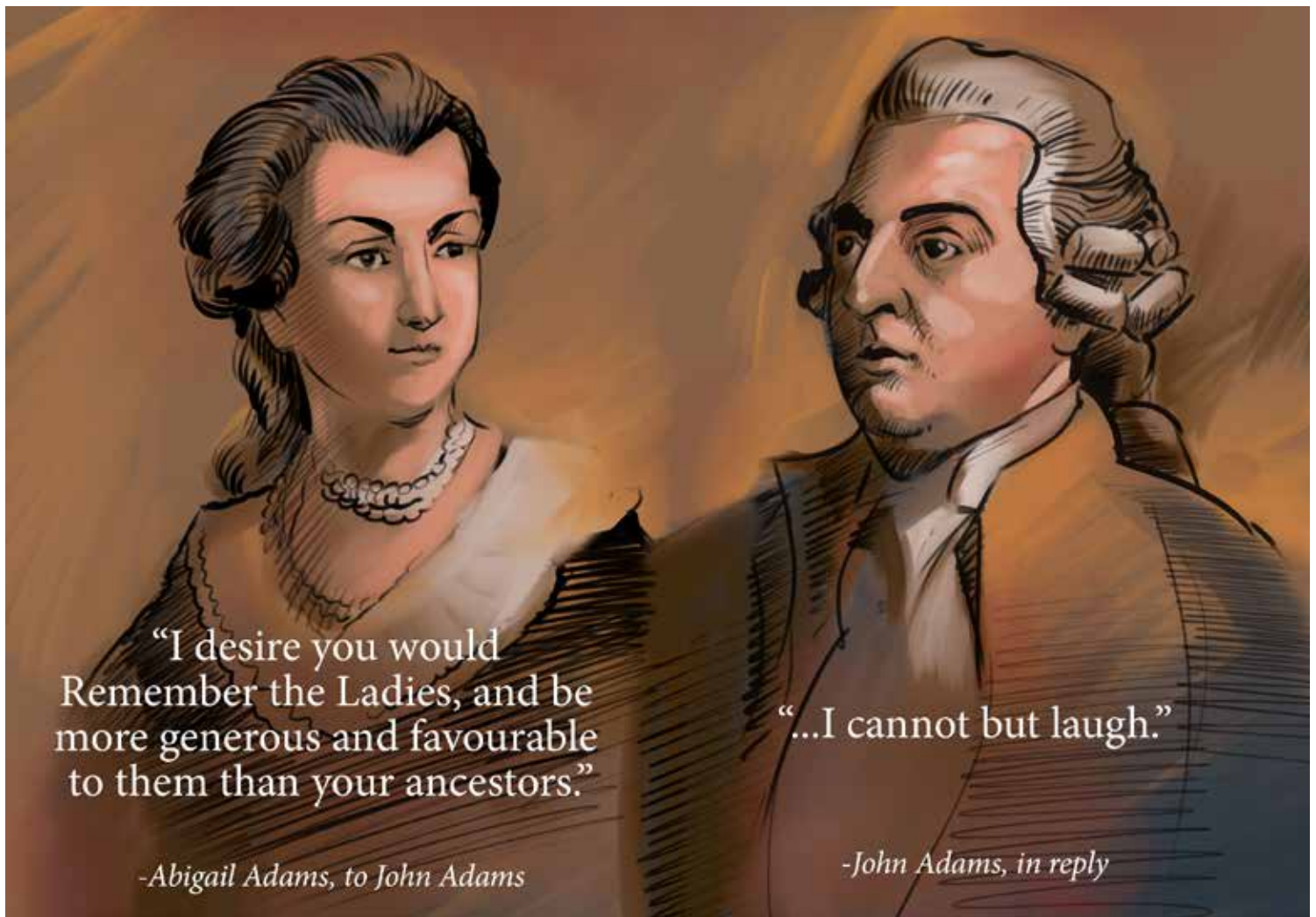


Illustration by Steve Edwards

Chapter 6: 'Remember the Ladies'

By William H. Freivogel

When the great-grandmothers of today's young women were born, women couldn't vote. They were expected to be mothers and homemakers.

When the grandmothers of today's young women were born, women had no legal protections against discrimination in education, jobs or credit. The Supreme Court said "Equal Protection" in the 14th Amendment didn't include women.

When the mothers of today's young women were born, the nation was in the midst of a great legal and social revolution so sweeping that women began to take their places as equals in society and before the law. They had gained control of their reproductive decisions and legal protection against pregnancy discrimination, sexual harassment and discrimination in education programs. Female teachers couldn't be fired any longer for getting pregnant and girls' and women's sports teams started getting more resources.

Today's young women are coming

of age at a time when their legal rights are being cut back for the first time in this century-long continuum of growing autonomy and expanding women's rights as the Supreme Court has taken away a woman's control of her reproductive decisions.

The Founding Fathers would not be surprised that the law would limit women's rights; they recognized no women's rights.

Abigail Adams, wife of one president and mother of another, took time out from managing the family farm and household in Braintree, Mass. to write a letter to her absent husband on March 31, 1776. She wrote: "...in the new Code of Laws which I suppose it will be necessary for you to make I desire you would Remember the Ladies...We are determined to foment a Rebellion and will not hold ourselves bound by any Laws in which we have no voice, or Representation."

Historians say she was mostly kidding and that's certainly the way her husband

took it in his reply talking about the "Despotism of the Petticoat."

Coverture and subservience

The subservient status of colonial women is shocking today, but it was accepted without question by the Framers of the Constitution who didn't even debate it at the Constitutional Convention.

"Most Americans for much of their history were convinced that God and nature had decreed that the two sexes inhabit different spheres and have different roles," said historians Linda K. Kerber and Jan Hart-Matthews. "Men's roles were public and political, women's domestic."

Through the entire 19th century and into the 20th, women's intellectual pursuits were widely believed to be improper, physically harmful and detrimental to motherhood and perpetuation of the race.

Thomas Jefferson hoped women would be "contented to soothe and calm the minds of their husbands returning ruffled

from political debate." As president, he quickly put an end to a rumor he might appoint women to political office – "an innovation for which the public is not prepared, nor am I," he said.

In antebellum days, the progressive ideal of a woman was defined by Republican Motherhood, influencing their husbands and educating their sons for public service. The ideal Republican Mother was rational, self-reliant and benevolent.

At this time, the rules of coverture – derived from English common law – gave husbands the rights to a wife's paid and unpaid labor, most of her property and her obedience. Wives couldn't sue or make contracts without their husbands' consent, nor could they vote. In the eyes of the law, the "very being or legal existence of the woman is suspended during marriage" wrote William Blackstone, the great 18th-century legal commentator from Britain.

In 1839, Mississippi enacted the first Married Women's Property Act, but it was mainly intended to give women continued control of slaves.

Catharine Beecher traveled the country campaigning for a schoolhouse in every community and a woman in every schoolhouse. Male teachers, she noted, were often "low, vulgar, obscene, intemperate" and bad teachers.

When women gathered at Seneca Falls in 1848, they wrote their Declaration of Sentiments, patterned on the Declaration of Independence, except they declared "all men and women are created equal." Instead of laying out King George's tyrannies, it laid out the tyrannies of men, beginning with the refusal to allow women to vote or have any voice in lawmaking. Other grievances were discrimination in education, jobs and pay and the prevailing double standard of morality.

Man "has endeavored, in every way that he could, to destroy woman's confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life."

Elizabeth Cady Stanton, who wrote the declaration, hadn't always believed in a public role for women. She and her husband attended a convention in London to discuss abolition of slavery. The men at the convention debated whether women should be allowed to join them, while the women sat in a curtained gallery and were forbidden to speak on the question. "Refined torture," Stanton called it.

That is where she met Quaker preacher Lucretia Mott from Philadelphia and was astonished to see her speak to a group of men. The two decided to hold a women's convention in the U.S., which became Seneca Falls. In the meantime, Stanton had been chafing at her husband's patronizing attitudes.

"How rebellious it makes me feel when I see Henry going about where and how he pleases," she complained in a letter. "He can walk at will through the whole wide world or shut himself up alone. As I contrast his freedom with my bondage I feel that, because of the false position of women, I have been compelled to hold all my noblest aspirations in abeyance in order to be a wife, a mother, a nurse, a cook, a household drudge."

Despite the bold words in the proclamation, none of the women at Seneca Falls was bold enough to be chairman; instead, they asked Mott's husband to serve as chair. Also, the call for suffrage for women passed by a bare majority.

The press roundly denounced the Seneca Falls declaration. Some papers called the women "Amazons." Others criticized those seeking a "petticoat empire." The Albany Advocate wrote, the Declaration of Sentiments was a mere parody and added, "it requires no argument to prove that this is all wrong. Every true hearted female will instantly feel that this is unwomanly."

"Equal" doesn't apply to women

The 14th Amendment provided in 1868 that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" and added, "No State shall...deny to any person within its jurisdiction the equal protection of the laws."

But when two women – one from Missouri and one from Illinois – went to the Supreme Court to claim the amendment's protection, they quickly found they were not included.

Myra Bradell had studied law in her husband's Chicago law office and ran a well-respected legal publication. The Illinois Supreme Court had denied her the right to practice law solely because she was a woman. She argued the privileges and immunities protected by the 14th Amendment included her right to pursue a profession.

Her lawyer in the Supreme Court, Matthew Hale Carpenter, harkened back to the Declaration of Independence saying, "In the pursuit of happiness all vocations, all honors, all positions, are alike open to every one; in protection of these rights all are equal before the law."

There was no lawyer arguing the other side of the case, but Bradwell lost anyway. As the 1873 opinion put it, "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for

many of the occupations of civil life."

"The harmony...(of) the family institution is repugnant to the idea of a woman adopting to a distinct and independent career from that of her husband...The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mothers. This is the law of the Creator."

Practicing law is a right that can be granted by a state, not a privilege guaranteed by the Constitution, the court said.

The next year, the Supreme Court turned away Virginia Minor, the president of the Women's Suffrage Association of Missouri, who had tried to register to vote in St. Louis in 1872 but been denied by the registrar.

Chief Justice Morrison Waite, writing for a unanimous court, wrote there was no doubt but that women may be citizens, but there was also no doubt that not all citizens of the United States can vote. It's up to the states to decide who has that right and Missouri said no.

"If the law is wrong it ought to be changed," the court said. "But the power for that is not with us."

Also after the Civil War, Anthony Comstock crusaded successfully for the passage of laws against pornography that included provisions Comstock himself had drafted making contraception illegal. Soon 24 states had passed laws outlawing contraceptives. Comstock believed that contraception caused lust and lewdness.

Woman not made for man

At the nation's centennial in 1876, women suffragists asked for permission to hold a silent protest at the reading of the Declaration of Independence. They were turned away, told the nation was celebrating "what we have done the last hundred years, not what we have failed to do."

Susan B. Anthony and four women showed up anyway and set up their counter-centennial speech across the street from Independence Hall. "We ask our rulers, at this hour, no special privileges, no special legislation. We ask justice, we ask equality, we ask that all the civil and political rights that belong to citizens of the United States be guaranteed to us and our daughters forever...We deny that dogma of the centuries, incorporated in the codes of all nations – that woman was made for man – her best interests, in all cases, to be sacrificed to his will."

Political Motherhood replaced Republican Motherhood. The extensive involvement of women in public life was justified as a kind of civic housekeeping and an extension of concern for children and families. Women joined the Women's Christian Temperance Movement, the



Solicitor General Elizabeth Barchas Prelogar presents the government's case to the court in the Dobbs case that overturned Roe v. Wade.

Illustration by Art Lien

settlement house movement and National Consumers' League.

Even when the Supreme Court seemed to be ruling in favor of women, it did so based on debilitating sex stereotypes. In 1908 in *Muller v. Oregon*, the court upheld Oregon's imposition of a 10-hour work day for women. The court was persuaded to approve the law by a 113-page brief that Louis Brandeis – a future and famous justice – filed in its support.

But the decision was hardly a victory for women. It was an invitation to a permanent status of inequality and inferiority.

"That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious," wrote Justice David J. Brewer. "This is especially true when the burdens of motherhood are upon her...by abundance testimony of the medial fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body and as healthy mothers are essential to vigorous offspring, the well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

"Education was long denied her and while now the doors of the school room are opened and her opportunities for acquiring

knowledge are great, yet even with that and the consequence in increasing the capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother.

"Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength... As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved."

The 19th Amendment

Internal splits developed within the Suffrage Movement. Anthony and Stanton tried to win support from racist Democrats by arguing that white women should be allowed to vote to offset the new electoral power of Black men. Others found these arguments reprehensible and said they undermined the moral authority of the movement.

The movement was strong but splintered by 1916. One group, the National American Woman Suffrage Association, relied on careful tactics and ladylike behavior. Headed by Carrie Chapman Catt, the 2-million strong organization set up a powerful grassroots lobbying campaign by leading citizens.

Many of the more moderate women wanted to concentrate on building on the nine states that had recognized women's suffrage by 1913.

Alice Paul organized the 1913 Woman Suffrage Procession for March 3, the day before Woodrow Wilson's inauguration. Hostile counter-demonstrators overwhelmed an inadequate police presence, with male counter-demonstrators threatening some of the women.

After the march, Paul broke with the National American Woman Suffrage Association and formed the Congressional Union – later called the National Woman's Party. It concentrated on pressuring President Woodrow Wilson to endorse a national constitutional amendment.

In January 1917, before Wilson's second inauguration, Paul and other members of the National Woman's Party picketed in front of the White House calling themselves "silent sentinels." Picketing in front of the White House was unusual and possibly unprecedented.

Paul and some of the picketers were arrested and jailed. Eventually, Paul began a hunger strike to protest jail conditions and was force-fed raw eggs through a tube. The protests, arrests and hunger strike drew national attention but also generated angry attacks from bystanders who thought it



Virginia Minor of St. Louis who tried unsuccessfully to register to vote claiming equal protection of the law under the 14th Amendment



Myra Bradwell around the time of her unsuccessful lawsuit to be admitted to the Illinois Bar, which excluded women. Photo taken circa 1870

Photo by Mosher photo studio

disloyal and treasonous to picket the White House during a war.

In 1918, Wilson announced support for the amendment and the House passed it but it fell two votes shy in the Senate. Protests continued into 1919, with Wilson burned in effigy for not doing more to pass the amendment, which finally made it through the Senate.

In August 2020, Tennessee provided the decisive ratification vote. The vote was so close that it turned on the decision of the

youngest member of the Legislature, Harry Burn. Burn said his mother had sent him a letter to "help Mrs. Catt." He changed his mind and voted yes.

Alice Paul campaigned for women's rights for four more decades, leading early advocacy of the Equal Rights Amendment and persuading Congress to add protection for women into the Civil Rights Act of 1964.

Even 'sprightly' barmaids may not apply

Even after women won the right to vote, the Supreme Court continued to give women second class status under the Constitution.

As late as 1948, the court upheld a Michigan law that forbade a woman to work as a bartender unless she was the "wife or daughter of the male owner."

Justice Felix Frankfurter jovially noted the "historic calling" of the "alewife sprightly and ribald," but cautioned that the 14th Amendment "did not tear history up by the roots." He added that Michigan could "beyond question, forbid all women from working behind a bar...The fact that women may not have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the States from drawing a sharp line between the sexes."

And in 1961, the court upheld a Florida law that excluded women from jury lists unless they requested inclusion, resulting in almost all all-male juries. The court continued to interpret equal protection in light of a woman's role in the family, just as it had in Bradwell almost a century earlier. A woman, who had been convicted of killing her husband with a baseball bat after he cheated on her, thought women on the jury would better understand her plea of temporary insanity.

But the court said no. "Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life."

New laws

Major legal gains for women began with the Equal Pay Act of 1963. In 1964, Congress passed the Civil Rights Act that included sex discrimination as an afterthought. A Southerner, Rep. Howard W. Smith, D-Va., helped add sex to the grounds for discrimination, possibly as a poison pill to defeat the entire act. Some members of Congress laughed. Smith joked the amendment would guarantee the right of every woman to a husband. Nevertheless, sex was included in the final law.

Another major victory for women and girls was Title IX of the Education

Amendments of 1972, which banned discrimination in education programs receiving federal funds.

Title IX is known best today for the enormous change brought in high school and college athletics. But it applies to all education programs receiving federal funds and has had a big impact on the investigation of sexual harassment on campuses.

Many of the early women's rights cases involved discrimination against pregnant women.

In 1970, Jo Carol LaFleur, then 23, became pregnant while a teacher at Patrick Henry Junior High School in Cleveland. School board policy required pregnant teachers to take unpaid leave five months before birth. They could reapply for a position the school year after the baby turned three months but would be subject to a physical exam and wouldn't get a job unless one was open. The schools said that pregnant women often couldn't perform required duties during the last five months of pregnancy and that the policy was intended paternalistically to protect the health of the mother and baby.

LaFleur was forced to resign in March when her due date wasn't until July. The Supreme Court, taking into account a brief filed by then attorney Ruth Bader Ginsburg, ruled in 1974 that the policy violated LaFleur's liberty protected by the Due Process clause of the 14th Amendment.

"Freedom of personal choice matters of marriage and family life is one of the liberties protected by the due process clause," the court decided. After the experience, LaFleur, now Jo Carol Nessel-Sale, went to law school and became a lawyer.

But later the same year the court ruled against pregnant women in another case. It upheld a California insurance program that did not cover pregnancy and birth. The majority said the state could make distinctions based on pregnancy unless there were "mere pretexts designed to effect an invidious discrimination against members of one sex." The court wrote in *Geduldig v. Aiello* that, "While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification."

Justice Samuel Alito in the *Dobbs* decision overruling *Roe* cites that case and concludes "regulation of abortion is not a sex-based classification" and therefore not subject to the close scrutiny that sex-based classifications would receive.

In 1976, the Supreme Court upheld a General Electric Co. disability plan that covered vasectomies and prostate surgery but not pregnancy. Justice William H. Rehnquist, wrote, "Exclusion of pregnancy



Male delegates to the Democratic National Convention in St. Louis, Missouri walk along the Golden Lane. June 14, 1916. The most visible suffrage event in Missouri occurred on the opening day of the 1916 National Democratic Convention in St. Louis. A Golden Lane, also known as the "Walkless, Talkless Parade," was formed on both sides of Locust Street, along the delegates' walking path from their hotel to the nearby St. Louis Coliseum. Over 3,000 women lined twelve blocks dressed in white, wearing yellow sashes and carrying yellow umbrellas.

Photo courtesy of Bryn Mawr College Library, Bryn Mawr, Pennsylvania

from a disability benefits plan providing general coverage is not a gender-based discrimination at all."

Justice William J. Brennan, the leading liberal on the court, thought this was nonsense. "Surely it offends common sense to suggest...that a classification revolving around pregnancy is not, at a minimum, strongly 'sex related.'"

After the setbacks in the Supreme Court, women's right groups persuaded Congress to pass the Pregnancy Discrimination Act in 1978 requiring employers with health insurance to provide coverage of pregnancy and births."

Ginsburg v. Schlafly

The next decades were a race between two very different women, Ginsburg and Phyllis Schlafly from Alton, Ill. Ginsburg was taking case after case to the Supreme Court to provide women with equal rights under the Constitution, while Schlafly was convincing state legislators to kill the Equal Rights Amendment for fear of same-sex bathrooms and women in the military. Schlafly said she only needed her husband's permission to lead her ERA battle.

Both women succeeded.

The ERA still is not part of the Constitution, and Ginsburg won almost complete legal equality by including women

as deserving "equal protection."

In several of Ginsburg's big cases, her clients were men, not women. Winning equal rights for men transferred equality to women.

Weinberger v. Wiesenfeld, grew out of the tragic death of Paula Wiesenfeld who died while giving birth to her son, Jason.

On Friday, June 2, 1972 Paul had taught school as usual. On Monday, she was dead. Unexpected labor complications caused her lungs to fill with fluid, which led to cardiac arrest.

Jason was the couple's first child. Wiesenfeld didn't even know how to change a diaper.

Because Paula had paid into the Social Security system for seven years, Jason was eligible for \$206.90 a month. Wiesenfeld asked if he was eligible.

"You would be if you were a woman," he was told. It made no difference that Paula had been the family's primary breadwinner.

Wiesenfeld hired a succession of five housekeepers who didn't work out. He quit computer programming and opened a bike store so he could spend more time with his son.

When a local newspaper wrote a story about men at home, he wrote a letter to the editor. A professor at nearby Rutgers University saw the letter and put him in

touch with the Women's Rights Project of the ACLU, which was run by Ginsburg. Ginsburg made sure Wiesenfeld sat right behind her at oral argument so the all male justices could see his face and sympathize.

The court ruled unanimously in his favor. "It's no less important for a child to be cared for by its sole surviving parents when that parent is a male rather than a female," Justice Brennan wrote for the court. Ginsburg lived to see Jason enter her alma mater, Columbia University law school.

The other victory for women won with a male client was Craig v. Boren, which ended up allowing fraternity men to buy near beer at 18 rather than 21.

Curtis Craig, a fraternity brother at Oklahoma State University, joined the owner of Honk 'n' Holler, a local liquor store, to challenge a state statute that permitted the sale of 3-2 beer to women because they were more refined drinkers who could handle their liquor.

Ginsburg called it a "gossamer" case, "a non-weighty interest pressed by thirsty boys." Ginsburg showed that the state didn't have evidence that its law had any effect on traffic safety and noted it was based on stereotypes and generalities. She convinced the all-male bench to use a new, tougher test for sex discrimination. The



Women protest outside the White House to pressure Woodrow Wilson to support the 19th Amendment.

Photo courtesy of Library of Congress



League of Women Voters rally in St. Louis Sept 13, 1920.

Photo courtesy of Wikimedia Commons

new standard was more demanding than the lowest standard for review the court uses – rational basis – but less demanding than the highest standard – strict scrutiny, used in race cases. The court adopted an in-between standard – intermediate scrutiny. That made it easier to challenge laws that favored one sex.

VMI

The pinnacle of Ginsburg's legal career was the opinion she wrote as a justice on the Supreme Court throwing out the male-only admission requirement of the Virginia Military Institute, a male bastion.

In an extraordinary public announcement of the decision from the bench, Ginsburg said a state violated equal protection when it "denies to women simply because they are women equal opportunity to aspire, achieve, participate in, and contribute to society based upon what they can do."

"...reliance on overbroad generalization

typically male or typically female tendency estimates about the way most women or most men are will not suffice to deny opportunity to women whose talent and capacity place them outside the average description...state actors may not close entrance gates based on fixed notions concerning the roles and abilities of males and females."

The Constitution, she said, does not justify "the categorical exclusion of women from an extraordinary educational leadership development opportunity afforded men. ...women seeking...a VMI quality education cannot be offered anything less."

The lone dissenter, Justice Antonin Scalia, issued a characteristically tart dissent calling it "one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal view of what would make a "more perfect Union,"...

What is a woman?

During Justice Ketanji Brown Jackson's confirmation hearing Sen. Marsha Blackburn (R-Tenn.) asked a seemingly simple question – "what a woman is."

Jackson's response was by turns puzzled, nervously amused and then lawyerly in saying she couldn't define the word without knowing the legal context.

The brief confrontation was one of those moments that captures the public imagination because suddenly all of the complexities of the Supreme Court are boiled down to one simple question a kindergartner might answer but a brilliant Harvard Law graduate would not. The exchange quickly became big news on Fox and other right-leaning media sites that used it in an unsuccessful attempt to derail her nomination.

Blackburn quoted a passage from Justice Ginsburg's opinion in the VMI case: 'Supposed "inherent differences" are no longer accepted as a ground for race or national origin classifications. Physical differences between men and women, however, are enduring. The two sexes are not fungible.'

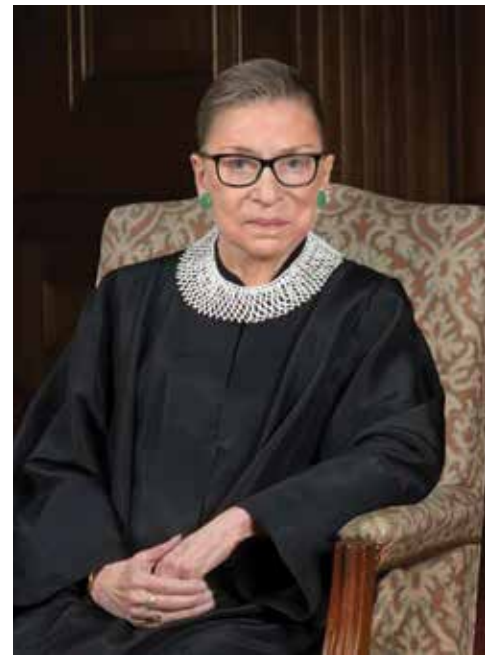
Blackburn asked Jackson if she agreed physical differences between men and women are enduring? The senator's political point was clear, however: Jackson's inability to define a woman underscores the "dangers of the progressive education that allows children to talk about their sexual identities."

"Just last week," Blackburn added, "an entire generation of young girls watched as our taxpayer funded institutions permitted a biological man to compete



Phyllis Schlafly wearing a "Stop ERA" badge, demonstrating with other women against the Equal Rights Amendment in front of the White House, Washington, D.C., February 4, 1977.

Photo courtesy of Library of Congress



Justice Ruth Bader Ginsburg

Photo courtesy of U.S. Supreme Court

and beat a biological woman in the NCAA," a reference to Lia Thomas, a champion transgender swimmer on the University of Pennsylvania's women's team.

Critics pointed out that Blackburn has a long record of opposing laws that Ginsburg had supported as a lawyer or upheld as a justice. Blackburn voted against the Lilly Ledbetter Fair Pay Act of 2009, the reauthorization of the Violence Against Women Act and opposed ratification of the ERA.

Jackson finally found a way not to answer the question. She pointed out that the definition of sex in the law was an issue that is likely to come before the court, so she should not express an opinion.

One interesting footnote is that Justice Neil Gorsuch, one of the most conservative justices on the court, wrote the decision in 2020 holding that the word sex includes sexual orientation and gender-identity.

Where were the women in Dobbs

In his majority opinion in Dobbs, Justice Alito quickly dismissed the equality dimension that Planned Parenthood v. Casey added in affirming Roe. That equality dimension was that control of reproduction was necessary for women "to participate equally in the economic life and social life of the nation."

Alito maintained that "a State's regulation of abortion is not a sex-based classification," citing a 1976 decision where women employees were denied health benefits for pregnancy.

Alito added that "this Court is ill-equipped to assess 'generalized assertions about the national psyche.'" Casey's notion of reliance on precedent was not

as concrete as reliance interests are when "property and contract rights" are involved," he said.

Alito also cited a number of equal rights advances for women as making abortion unnecessary for women to have an equal place in society.

He wrote that "'modern developments' in society's attitude toward women make these equality arguments outmoded, arguing that '...attitudes about the pregnancy of unmarried women have changed drastically; that federal and state laws ban discrimination on the basis of pregnancy, that leave for pregnancy and childbirth are now guaranteed by law in many cases, that the costs of medical care associated with pregnancy are covered by insurance or government assistance; that States have increasingly adopted safe haven laws, which generally allow women to drop off babies anonymously; and that a woman who puts her new-born up for adoption today has little reason to fear that the baby will not find a suitable home.'"

A controversial footnote that Alito added, quotes the Centers for Disease Control and Prevention stating that "the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent."

Legal commentator Emily Bazelon of The New York Times wrote that Alito's decision was ignoring the reality of a woman's life. Quoting from an amicus brief by economists, she wrote: "Pregnant people are still denied accommodations at work, despite a 1978 law that's supposed to protect them from discrimination. Women still experience an economic 'motherhood

penalty.' And the financial effects of being denied an abortion...are 'as large or larger than those of being evicted, losing health insurance, being hospitalized or being exposed to flooding' resulting from a hurricane."

Linda Greenhouse, the Times' long-time Supreme Court reporter, wrote in a companion article that she was shocked that women were almost entirely absent in the Alito opinion. It is "astonishing that in 2022 he would use his power to erase the right to abortion without in any way meaningfully acknowledging the impact both on women and on the constitutional understanding of sex equality as it has evolved in the past half-century."

Chained to the Past

Slavery compromises

Slave trade

Fugitive slave provisions

Three-fifths compromises

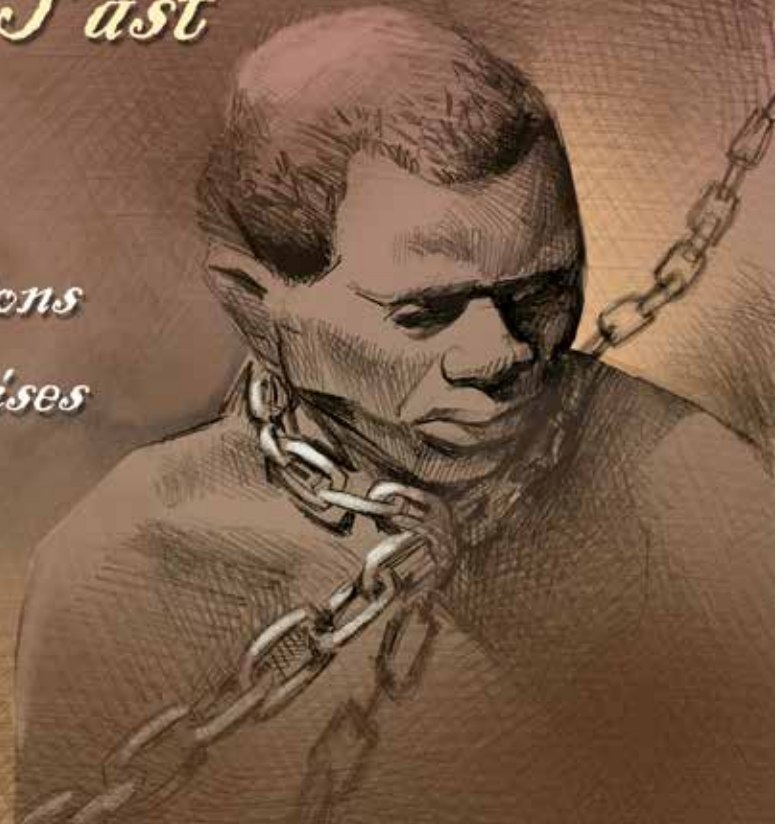


Illustration by Steve Edwards

Chapter 7: The Devil's Bargain over slavery, segregation and discrimination

By William H. Freivogel

When most of the nation was celebrating the 200th anniversary of the Constitution in 1987, Justice Thurgood Marshall had the temerity to spoil the party and point out that the praise heaped on the Framers of the Constitution was exaggerated.

He said: "The focus of this celebration invites a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the 'more perfect Union' it is said we now enjoy. I cannot accept this invitation, for I do not believe that the meaning of the Constitution was forever 'fixed' at the Philadelphia Convention.

"Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights we hold as fundamental today. When contemporary Americans cite 'The

Constitution,' they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago."

Anyone reading four paragraphs below the stirring "We the People" in the Preamble, stumbles over the devil's bargain that the Framers made by failing to include most people in "We the People."

One finds the strange wording of the three-fifths compromise that wrote slavery into the Constitution while carefully avoiding the word. "Representatives...shall be apportioned among the several States...according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons..., and excluding Indians not taxed, three fifths of all other Persons."

The "all other persons" were slaves, which Southern slave-holding states got to add to their electoral votes, making each free white man's vote in the South extra powerful.

Farther down, the Constitution states that the "Migration or Importation of Such

Persons any of the States now existing shall think proper to admit" – in other words the slave trade – can't be stopped by Congress before 1808. And then, there's the Fugitive Slave provision that any person who escaped "from service or Labour in One State" must be returned to "the Party whom such Service or Labour may be due."

Alexander Hamilton wrote that the slave compromises were required for a Constitution. Justice Marshall, in his 1987 speech, rejected that explanation. He said: "No doubt it will be said, when the unpleasant truth of the history of slavery in America is mentioned during this bicentennial year, that the Constitution was a product of its times, and embodied a compromise which, under other circumstances, would not have been made. But the effects of the Framers' compromise have remained for generations. They arose from the contradiction between guaranteeing liberty and justice to all, and denying both to Negroes."

The Declaration and the Convention

Jefferson's first draft of the Declaration of Independence explicitly criticized the king for slavery. It read:

"He has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him... Determined to keep open a market where men should be bought and sold, he has prostituted his negative for suppressing every legislative attempt to prohibit or restrain this execrable commerce."

But the passage was cut out, the biggest deletion made from the draft. Jefferson wrote that the passage was struck in "complacency to South Carolina and

Georgia who had never attempted to restrain the importation of slaves. Our northern brethren also I believe felt a little tender, because...they had been very considerable carriers of them."

Around the time of the Constitution, Jefferson fell one vote short of getting slavery abolished in the territories. In a compromise, the Congress of the Confederation passed the Northwest Ordinance in 1787, banning slavery north of the Ohio River, including Illinois.

A few months later, the Framers of the Constitution were struggling with slavery, according to historical accounts including James Madison's diaries. Carl Van Doren wrote in his history of the convention that most of the delegates from Virginia "opposed slavery on principle, regretted the existence of it in their state, and desired to see slavery abolished if this could be done without destroying the economy of a society which had inherited its slaves."

In the North, abolitionist sentiment was strong. For example, Benjamin Franklin was president of The Relief of Free Negroes Unlawfully Held in Bondage."

But no one at the Convention advocated abolition. Delegates from South Carolina and Georgia were adamant that their states' economies would collapse without slavery.

On June 11, 1787, Pierce Butler, a wealthy planter from South Carolina, said that because "money was power...the States ought to have weight in Government in proportion to their wealth" – including slaves.

But Elbridge Gerry of Massachusetts responded, "The idea of property ought not to be the rule of representation." Horses and cattle didn't factor into representation, so why should slaves.

James Wilson, an aristocrat from Pennsylvania, suggested the three-fifths compromise, stating that representation would be proportioned to the "whole number of white and other free citizens and three-fifths of all other persons except



Burning of McIntosh at St. Louis, in April, 1836.

Illustration by Steve Edwards

Indians not paying taxes..."

Slaves were not three-fifths of a person. They were not persons at all. They were property.

The three-fifths formula referred to the additional political power given white slave owners. White slave owners essentially had their own vote plus three-fifths of the votes of slaves. Jefferson became president in 1800 as a result of the three-fifths compromise. The 15 electoral votes that slaves added to the South provided his margin of victory.

The most heated argument came over the slave trade at the end of August 1787. On Aug. 21, Luther Martin of Maryland proposed a tax on the importation of slaves, calling slavery "inconsistent with the principles of the revolution."

John Rutledge of South Carolina responded, "Religion and humanity had nothing to do with this question. Interest alone is the governing principle of Nations... If the Northern States consult their interest, they will not oppose the increase of slaves which will increase the commodities of which they will become carriers."

George Mason of Virginia, a tall, white-haired plantation owner and major slave holder, gave the most impassioned and prescient speech about slavery at the Convention. He said slaves "bring the judgment of heaven on a country. As nations cannot be rewarded or punished in the next world, they must be in this. By an inevitable chain of causes and effects, providence punished national sins by national calamities."

Charles Pinckney, a young delegate from South Carolina, said slavery was "justified by the example of all the world" He cited Greece, Rome and other ancient states, adding, "In all ages, one half of mankind have been slaves."

Derrick Bell, a Harvard Law professor, said the convention was a triumph of

property over liberty.

"Required to give priority to one facet of their belief - that government should protect life, liberty, and property," he said, "they opted to protect property interests even when this choice necessitated the recognition and protection of slavery and the condemnation to that status of roughly 20 percent of the population."

Mason was right about slavery ending in a calamity – the calamity lay seven decades ahead and the road to that calamity and beyond ran straight through Missouri and Illinois.

The Missouri Compromise – 'Like a fire bell in the night'

Two hundred years ago, while many of the Founders still were alive, Missouri came to the forefront of the slavery fight. It has been inextricably entwined in the nation's struggle over race ever since.

Jefferson, as president, had persuaded Congress to abolish the slave trade at the earliest possible time, in 1808. But the slavery issue heated up again with the Missouri crisis of 1819. Northerners were alarmed that Mississippi and Alabama had recently been admitted as slave states. Now Missouri, which was north of the Mason-Dixon line, wanted admission as a slave state, too.

Rep. James Tallmadge Jr. of New York passed a House amendment to the Missouri bill that prohibited the "further introduction of slavery" and freed slaves at age 25. Tallmadge had made a name for himself opposing Illinois' black codes denying free Blacks the rights of citizenship. But the Senate refused to go along with Tallmadge's amendment.

Missourians were angry at Tallmadge. Southern planters had brought 10,000 slaves to Missouri, many in Little Dixie in Southeast Missouri where they worked on cotton and others in the western part of the



Illustration by Steve Edwards

state raising hemp.

Missouri newspapers opposed the Tallmadge amendment. Thomas Hart Benton's *St. Louis Enquirer* wrote: "Suppose the worst came to the worst and Congress actually passed the law to suit the views of the New England politicians, would Missouri submit to it? No! Never!"

Under the Missouri Compromise of 1820, drafted by Sen. Jesse B. Thomas of Illinois, himself a slaveholder, Missouri was admitted as a slave state and Maine as a free state. That retained the numerical balance of slave and free states. Congress banned slavery in the Louisiana Purchase above the southern border of Missouri. The compromise passed 90-87.

Jefferson opposed the compromise and expressed foreboding that it spelled dissolution of the Union. He wrote a friend, "like a fire bell in the night, (it) awakened and filled me with terror. I considered it at once as the knell of the Union. It is hushed indeed for the moment. but this is a reprieve only, not a final sentence. A geographical line, coinciding with a marked principle, moral and political, once conceived and held up to the angry

passions of men, will never be obliterated; and every new irritation will mark it deeper and deeper."

Unfortunately, Jefferson's belief in the importance of democratic majorities in state legislatures had led him to push the doctrine of state nullification – that each state legislature could nullify a federal law. And that doctrine led directly to the Civil War.

St. Louis greeted passage of the Missouri Compromise "with the ringing of bells, firing of cannon" and a transparency showing "a Negro in high spirits, rejoicing that Congress had permitted slaves to be brought to so fine a land as Missouri," wrote historian Glover Moore.

Pro-slavery politicians overwhelmed opponents and controlled the state constitutional convention in St. Louis in the summer of 1820. One provision of that state constitution guaranteed the perpetuity of slavery, and another barred free Blacks and mulattoes from entering the state.

Those provisions threw Congress back into a crisis. It passed a second Missouri Compromise authorizing the president to

admit Missouri only after the Legislature promised not to discriminate against citizens of other states.

Missourians felt disrespected. At an 1821 meeting in St. Charles, the Legislature adopted the resolution demanded by Congress, while at the same time declaring the resolution meant nothing. The state constitution would "remain in all respects as if the said resolution had never passed." Later, in 1847, the Legislature passed a law declaring "no free negro, or mulatto shall, under any pretext, emigrate to this State from any other State."

That same year, Missouri passed a law making it illegal to teach Blacks. "No persons shall keep or teach any school for the instruction of mulattos in reading or writing." A few brave teachers took skiffs into the Mississippi River to evade the law.

Elijah P. Lovejoy, editor of the *St. Louis Observer*, a Presbyterian weekly, angered pro-slavery forces with his abolitionist editorials.

On April 28, 1836, the mulatto cook on the steamboat *Flora*, Francis McIntosh, was arrested by police in St. Louis for disturbing the peace. When a policeman told him he

would spend five years in jail, he stabbed one officer to death and seriously injured another. He escaped, but a mob found him hiding. The mob, which grew to several hundred, chained him to a tree near 7th and Chestnut, piled wood up to his knees and burned him to death while he pleaded for them to shoot him. (The murder was one block from where the Citygarden Sculpture Park now provides respite from the urban St. Louis landscape, a few blocks from the Cardinals' stadium.)

The presiding judge over the grand jury, Luke Lawless, decided McIntosh's death was the result of a mass phenomenon and that no individuals should be prosecuted. Judge Lawless said McIntosh was an example of the "atrocities committed in this and other states by individuals of negro blood against their white brethren," adding that because of abolitionist agitators "the free negro has been converted into a deadly enemy." Lawless also misinformed the jury that McIntosh was a pawn of Lovejoy's.

A week later, Lovejoy editorialized that the lynching meant the end of the rule of law and the Constitution. Only one lawmaker in Missouri and Illinois condemned the lynching. Abraham Lincoln.

After Lovejoy's May editorial, a mob from downtown taverns destroyed Lovejoy's press and threw parts into the Mississippi.

Lovejoy moved across the river to Alton, which was officially a free state, although it was also home to slave catchers looking to capture slaves who escaped from Missouri.

In November 1837, a few weeks after Lovejoy held the Illinois Anti-Slavery conference at his church, a mob burned his warehouse and murdered Lovejoy as he tried to push down a ladder used by the arsonists. His press was thrown out of the warehouse and onto the river bank, where it was broken into parts and tossed in the river.

'No rights which the white man would be bound to respect.'

In 1846, Dred and Harriet Scott filed for their freedom arguing they had become free when a former owner took them to free soil in Illinois and Minnesota.

The Northwest Ordinance had banned slavery north of the Ohio River, but many Illinois residents, such as Arthur St. Clair, namesake of St. Clair County across from St. Louis, held slaves illegally. One way to get around the Northwest Ordinance was to force a slave to put an X on an agreement to become an indentured servant.

Illinois had passed a draconian Fugitive Slave law in 1819 that empowered whites to stop Blacks and challenge their freedom. Slaves were bought and sold in the state until 1845 and involuntary servitude did not end until 1848.

The Scotts' case was tried in the Old Courthouse, in St. Louis, in a courtroom on the opposite side of the courthouse from the east steps facing the Mississippi River where slaves were bought and sold.

The Scotts actually won their case in St. Louis in 1850. But the Missouri Supreme Court ignored its precedents and kept the Scotts in slavery. The judges worried about the growing power of abolitionists, remarking on the nation's "dark and fell spirit in relation to slavery" and adding, "...Under the circumstances it does not behoove the State of Missouri to show the least countenance to any measure which might gratify this spirit."

Slaves were far better off than the "miserable" African, the court said. "We are almost persuaded that the introduction of slavery among us was, in the providence of God...a means of placing that unhappy race within the pale of civilized nations."

In the most infamous decision in the history of the U.S. Supreme Court, Chief Justice Roger Taney concluded on March 6, 1857 that Blacks "are not included and were not intended to be included, under the word citizens in the Constitution."

"We the people" did not include Blacks. "They had for more than a century before been regarded as beings of an inferior order," wrote Taney, "...and so far inferior that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit..."

Taney said the Missouri Compromise was unconstitutional because Congress had no power to ban slavery in the territories.

Slaves were property protected like any other property by the Fifth Amendment of the Bill of Rights, the court said. So, when the Fifth Amendment said "no person" shall be "deprived of life, liberty, or property, without due process of law," it protected property rights of white people to take away the liberty rights of Black people who weren't people under the Constitution.

A year later, Abraham Lincoln and Stephen A. Douglas drew throngs throughout Illinois as they debated the Dred Scott decision, and how Blacks fit into the vision of freedom and equality created by the then dead Framers. There were seven debates, from Ottawa in the north to Jonesboro in Little Egypt, and from Charleston in the east to the final debate in Alton.

Douglas argued that the Founding Fathers never meant to include Blacks when they wrote the Declaration of Independence or the Constitution. They believed that the United States could endure "forever" half slave and half free, he said.

But Lincoln disagreed. Lincoln

pointed out in the last debate, at Alton, that the Constitution never used the word slavery but instead referred to it in "covert" language so as not to blemish the document they wanted to stand for the ages. This showed, Lincoln said, that the Founding Fathers thought slavery would gradually vanish.

A shocking thing about reading the Lincoln-Douglas debates today is they often weren't the high-minded political debates that history texts advertise. The debates appealed to the racism of whites.

Douglas championed "popular sovereignty," the idea that territories wanting to become states should be able to decide whether to enter the Union slave or free. He led passage of the Compromise of 1850 and the Kansas-Nebraska Act of 1854, which adopted popular sovereignty. That brought with it the possibility that slavery would be extended to states north of the southern border of Missouri – negating the Missouri Compromise of 1820, which had barred slavery north of Missouri's southern border, 36-30 north.

Douglas painted the picture of hundreds of thousands of freed Negro slaves from Missouri turning the beautiful Illinois plain into a Negro "colony." In Jonesboro, he ridiculed abolitionist friends of Lincoln's: "Why, they brought Fred Douglass to Freeport," he said, "when I was addressing a meeting there, in a carriage driven by the white owner, the negro sitting inside with the white lady and her daughter."

"Shame" murmured the crowd.

As for the man we call the Great Emancipator, he was no abolitionist. His preference was to send freed slaves back to Africa. But certainly he would not support equality between Blacks and whites.

At the Charleston debate he said: "...I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races, [applause] –...I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people; and I will say in addition to this that there is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race."

Douglas won the race for the senate after the debates. Lincoln won the presidency against Douglas two years later.

As late as 1862, Lincoln wrote to New York Tribune editor Horace Greeley that

his primary goal was saving the Union, not freeing slaves. He wrote:

"My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the union without freeing any slaves I would do it, and if I could save it by freeing all the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that."

It took the deaths of 750,000 Americans to settle the issue. Settle the issue of slavery that is. Equality is taking a lot longer.

Reading equality out of the Constitution

After the Civil War, the 13th Amendment banned slavery, the 14th barred states from denying people liberty and equality and the 15th protected voting rights.

But as with the Declaration of Independence and the Constitution, the broad promises of liberty, equality and suffrage didn't pan out.

Rep. James F. Wilson of Iowa, an author of the 14th Amendment said "equal protection" did not mean "that in all things, civil, social, political, all citizens without distinction of race or color, shall be equal.... Nor do they mean that all citizens shall sit on juries or that their children shall attend the same schools." At the same time Congress approved the 14th Amendment's equal protection guarantee, it segregated D.C. public schools.

Over the next 40 years, the Supreme Court gutted and perverted the post-Civil War amendments. The court said the 14th and 15th Amendments did not give Blacks the right to vote or to live in an integrated society alongside whites.

In the 1873 Slaughterhouse Cases, the court said the 14th Amendment gave freedmen the rights of national citizenship, but not the rights of state citizenship.

Three years later, the court said the 15th Amendment "does not confer the right of suffrage upon anyone," even though the amendment states explicitly: "The rights of citizens of the United States to vote shall not be denied on account of race, color, or previous condition of servitude."

The Civil Rights Cases of 1883 grew out of the refusal of inns in Jefferson City, Mo. and Kansas to provide lodging for Blacks, a Tennessee train conductor's refusal to admit a Black woman to the ladies car of a train and theater owners in New York and San Francisco refusing to sell seats to Blacks. The court concluded the 14th Amendment's equality guarantee did not permit Congress to reach this "private" discrimination. That would be "invasion of individual rights."

Finally, Plessy v. Ferguson – the 1896 decision upholding Louisiana's denial of

a seat on the white railroad car to Homer Plessy because he was one-eighth Black – enshrined "separate but equal" as the meaning of "equal protection" for the next 58 years until Brown v. Board tossed it in the dustbin of the court's ignominious decisions, along with Dred Scott.

The court said in Plessy the 14th Amendment "could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either...If one race be inferior to the other socially, the (Constitution) cannot put them on the same plane," wrote Justice Henry Billings Brown.

John Marshall Harlan was the lone dissenter. He wrote: "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power...But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful...In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the Dred Scott Case."

He was right.

St. Louis' schools were segregated until Brown and after as well. Before Brown, Black students in St. Louis suburbs were denied admission to their local high school and sent to Black St. Louis high schools instead. Members of the African American Carter family of Breckenridge Hills told me 50 years ago of the humiliation of having to pay for their own bus fare to Sumner and then to have to lie about their address to be admitted. Kirkwood students also were bussed to Sumner.

The 20th Century – 'SAVE YOUR HOME! VOTE FOR SEGREGATION'

In 1903, the court took up a blatant disenfranchisement of Blacks in Alabama but just rubber stamped Jim Crow.

Like other Southern states in the wake of Reconstruction, Alabama adopted a constitution with various tricks to disenfranchise almost all Black voters.

Alabama imposed strict qualifications for new voters that included literacy and character tests. But whites were grandfathered in without the requirements. Jackson Giles, a janitor in the federal courthouse in Montgomery, challenged the law on behalf of 5,000 disenfranchised Blacks. He lost 5-4.

Oliver Wendell Holmes Jr. – known today as a great civil libertarian – wrote

the opinion turning down Giles. He acknowledged that Alabama's scheme was a fraud on the Constitution, but said the Supreme Court could not order the Blacks registered without becoming an accomplice in the scheme. He told Giles to seek relief from the state legislators – the same people who passed the law.

Harlan dissented. During this period of time he was so concerned by the disenfranchisement of Blacks that he met with President William Howard Taft to warn of dire consequences of Southern efforts to keep Blacks from voting. "We are approaching a real crisis in the South," he said. "In the former Confederate states... there is a fixed purpose to destroy the right of the negro to vote despite previous provisions of the Constitution."

In 1916 – just before the deadly East St. Louis race riots – St. Louisans voted by a 3-to-1 margin to pass a segregation ordinance prohibiting anyone from moving into a block where more than three-fourths of the residents were of another race.

A leaflet with a photo of run-down homes said: "Look at These Homes Now. An entire block ruined by the Negro invasion...SAVE YOUR HOME! VOTE FOR SEGREGATION."

As so often was the case, supporters of the discriminatory legislation couched it in paternalistic terms of what was good for Black people.

The St. Louis supporters said it was needed "for preserving peace, preventing conflict and ill feeling between the white and colored races in the city of St. Louis, and promoting the general welfare of the city by providing...for the use of separate blocks by white and colored people for residence, churches and schools."

The St. Louis ordinance – replicated in a dozen cities from Baltimore to Oklahoma City – fell by the wayside when the Supreme Court struck down a similar law in Louisville in the 1917 Buchanan v. Warley decision.

But the court helpfully suggested in another case that real estate covenants, barring sales of houses to Blacks, would be a legal way to segregate housing because they didn't involve state discrimination.

St. Louis took up the suggestion, widely using restrictive covenants on home deeds, preventing sale to Blacks. Many trust indentures excluded "Malays" – along with Blacks and Jews – because Malays were displayed in the 1904 World's Fair in St. Louis.

By the end of World War II, Blacks in St. Louis were mostly segregated within a 417-block area near Fairground Park, partly because of these restrictive covenants. About 117,000 people lived in an area where 43,000 had lived three decades earlier.



Illustration by Steve Edwards

Biggest race riot of its time

During the great migration of Blacks from South to the North, thousands of Blacks arrived at the meatpacking town of East St. Louis, just across from America's fourth largest city. Many Blacks couldn't get jobs and ended up in shanties in the river bottoms.

Sensationalist newspaper stories led many whites to believe Blacks were on a crime spree. But crime and a Wild West atmosphere had long prevailed in East St. Louis. There is little evidence of the "reign of crime" by Blacks.

But Blacks were competing with whites for jobs. Non-union strikebreakers, some of them Black, forced white unions into collapse.

White mobs began to attack Blacks through the spring and summer of 1917 before a wholesale race riot exploded on July 2, 1917. By the end of the long, hot day, hundreds of Blacks had been brutally attacked, thousands fled the city and more than 300 homes and places of business had been destroyed by fire. White rioters threw many Blacks from bridges into the Mississippi.

The dozens, maybe hundreds, of Blacks

murdered were one of the biggest racial bloodbaths until the Los Angeles riots after the acquittal of police officers in the Rodney King beating 75 years later.

The East St. Louis riot was followed by a violent riot in Houston later in the summer and by the Red Summer of 1919, when two dozen cities and towns experienced deadly riots. And then came Tulsa two years later, where 175 people or more were killed.

More than 200 African Americans were lynched in Missouri and Illinois in the century from the 1840s to 1940s, often in a carnival-like atmosphere with families watching. The Ku Klux Klan was at a high point of power in the years right after World War I. Klan members in Indiana included the governor, more than half the legislature and 250,000 white men.

'No stone unturned' to preserve segregation at Mizzou

Missouri segregated its schools longer than most Southern states. It wasn't until 1976 – 22 years after *Brown v. Board* ruled segregation unconstitutional – that Missouri repealed its requirement of separate schools for "white and colored children."

Segregation applied to the University of

Missouri as well.

In 1938, the U.S. Supreme Court ordered Mizzou to admit Lloyd L. Gaines to its law school or to create a separate one of equal quality. The state took the latter option, turning a cosmetology school in St. Louis into the Lincoln University School of law.

University of Missouri President Frederick Middlebush promised to leave "no stone unturned" to block admission of Blacks to professional schools.

NAACP lawyers planned to challenge the separate law school Missouri set up, but Gaines vanished without a trace on a visit to Chicago. It never was determined if he had been attacked or wanted to escape the spotlight.

It was an era when Missouri had the trappings of Southern society. Schools, housing and education were segregated by law. White mobs lynched Blacks at Columbia in 1923, Maryville in 1931 and Sikeston in 1942.

In 1948, the U.S. Supreme Court ruled that Oklahoma had to admit Black students to professional schools immediately. The next year, the University of Missouri recommended the Legislature permit Blacks to attend professional schools at Columbia, but the proposal

died after the desegregation of Fairground Swimming Pool in north St. Louis led to a race riot with a white mob beating Blacks.

Almost 60 years later, when Black students blocked former Mizzou President Tim Wolfe during a homecoming parade – he refused to talk to them about the school's history of segregation. After demonstrations criticizing his lack of leadership on race relations, he was forced to resign.

House on Labadie

J.D. Shelley came to St. Louis before World War II and had a job in the small arms factory on Goodfellow during the war. He recalled later, "When I came to St. Louis, they had places like the Fox Theater, no colored could go there; and the baseball diamond up on Sportsman's Park, they didn't allow no colored in there at one time. When they did open up Sportsman's Park for colored, onliest place they could sit was in the bleachers. That changed after the war..."

In 1945, Shelley wanted to buy a house at 4600 Labadie for his wife and six children who joined him from Mississippi. But a restrictive real estate covenant barred sale to "persons not of Caucasian race."

Neighbors down the street at 4532 Labadie, Louis and Ethel Kraemer, sought to enforce the covenant. James T. Bush Sr., the Black real estate agent who had sold the property to the Shelleys, formed an association to pay for the Shelley's court costs. The lawyer for the association was Bush's promising daughter, Margaret Bush Wilson, who went on to have a storied civil rights career.

George L. Vaughn, a noted African American lawyer, argued Shelley's case to the U.S. Supreme Court. Vaughn said he wasn't seeking integration. "Negroes have no desire to live among the white people," he said. "But we were a people forced into a ghetto with a resultant artificial scarcity in housing."

Vaughn noted that thanks to restrictive covenants and other methods of segregation, about 117,000 people were crammed in a small area where 43,000 had lived in 1910.

In the 1948 decision, *Shelley v. Kraemer*, the U.S. Supreme Court outlawed judicial enforcement of racial covenants. The involvement of the state courts in enforcing the covenants made this a state action, not just private discrimination, the court said.

About the same time, the city tried to integrate the nearby Fairground swimming pool, a huge pool just north of Sportsman's Park where the Cardinals were winning three World Series in the 1940s. The pool could accommodate 10,000 swimmers. Forty Black children needed a police escort to leave the pool in what Life

magazine called a "race riot" on the first day of summer 1949. White youths wielded baseball bats and chased Black youths through the streets. The *Star-Times* quoted a middle aged white man shouting "Kill a n—r and make a name for yourself."

The Life story read, "In St. Louis, where the Dred Scott case was tried, the cause of racial tolerance seemed to be looking up last week. A negro police judge took office for the first time, and the Post-Dispatch hired its first Negro reporter. But when the city opened all of its swimming pools to Negroes on June 21...progress stopped... police had to escort 40 Negro swimmers through a wall of 200 sullen whites."

The mayor immediately reimposed segregation at the pool. The city's official report said it had been unfair to call the disruption a riot. (I never asked my dad about the riot, which occurred a month before I was born. My dad had been a lifeguard at the pool for many years before the riot and lived with his parents in the janitor's quarters of the Christian Science church within sight of the riot.)

FHA meant Blacks need not apply

Federal housing policies after World War II discriminated against Blacks by subsidizing rapid expansion of all-white suburbs while building largely segregated public housing projects.

Carr Square was built for Blacks and Clinton Peabody for whites.

Pruitt-Igoe, built in 1955-6, was Pruitt for Blacks and Igoe for whites. Architecture Review praised it as "vertical neighborhoods for poor people." The project quickly became all black and symbolized the failure of public housing when it was blown up in 1972.

In a crusade to clean up the slums, St. Louis displaced thousands of people who lived in the Mill Creek Valley "slum" just west of downtown, near the railroad tracks. But people didn't pay attention to those displaced. By the 1970s and 80s, the city began tearing down the bleak, dilapidated public housing towers. Pruitt-Igoe was dynamited in 1972.

The words – "FHA financed" – in housing ads were code for Blacks need not apply, writes Richard Rothstein in an Economic Policy Institute report on the root causes of the Ferguson protests. An FHA underwriting manual called for "protection against some adverse influences" adding "the more important among the adverse influential factors are the ingress of undesirable racial or nationality groups."

The U.S. Civil Rights Commission, which came to St. Louis in 1970, concluded: "Federal programs of housing and urban development not only have failed to eliminate the dual housing

market, but have had the effect of perpetuating and promoting it."

Through the last part of the 20th century Black enclaves in suburban St. Louis were wiped out or carved up by redevelopment in St. Louis County from Clayton to Brentwood to Kirkwood. Praised as urban renewal, they were often actually "Negro removal."

A Black Clayton neighborhood once prospered where the swanky Ritz-Carlton stands. A Black neighborhood in Brentwood gave way to the upscale Galleria. Part of Kirkwood's Meacham Park was gobbled up for a Target and many residents had to move out to north county.

Need for a playground

Suburban communities used exclusionary zoning to keep out Black families. Howard Phillip Venable, a noted African-American eye doctor, and his wife Katie were building a house in Spoede Meadows in Creve Coeur in 1956. Dr. Venable was chair of Ophthalmology at Homer G. Phillips Hospital and St. Mary's Infirmary and joined the Washington University Medical School faculty.

Spoede Meadows was an idyllic spot. Other African Americans wanted to buy lots nearby but were dissuaded by a local "white citizens committee."

Venable's application for a plumbing license was denied. Suddenly, the city discovered a need for a new park, right on Venable's property and used eminent domain to take his land. U.S. District Judge Roy Harper, notoriously opposed to civil rights, tossed out Venable's suit. The park stands today where the late doctor wanted to live. Creve Coeur recently recognized the bigotry and renamed the park for the late doctor.

In 1964, Joseph Lee Jones, a bail bondsman and his wife, Barbara, applied for a "Hyde-Park style" house in the Paddock Woods subdivision, five miles due north of the current Canfield Green apartments in Ferguson where Michael Brown died. Alfred H. Mayer Co. refused to sell the home.

Lawyer Sam Liberman took Jones' case to the U.S. Supreme Court, even though the liberal American Civil Liberties Union refused to back the suit because it interfered with private property purchases. Liberman won. The court ruled the Civil Rights Act of 1866 protects "the freedom to buy whatever a white man can buy, the right to live wherever a white man can live...when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it...is a relic of slavery."

The court said Congress had the power to enact the law under the 13th Amendment, which authorized legislation to remove badges of slavery.

Shortly after Jones v. Mayer, the Inter Religious Center for Urban Affairs planned to build Park View Heights, integrated, subsidized townhouses in an unincorporated area of north St. Louis County, not far from the Jones' house in Paddock Woods. Local opposition developed in the area that was 99 percent white and residents incorporated as the city of Black Jack. The new town promptly passed a zoning ordinance that barred construction.

Judge Harper threw out the challenge to this discriminatory zoning. A federal appeals court overturned the decision.

Appeals judge Gerald Heaney, who was as famous for his pro-civil rights decisions as Harper was notorious for opposing civil rights, wrote that when a law had a discriminatory effect, the burden is on the city to show it has a strong, non-discriminatory purpose. Black Jack didn't have such a purpose.

Although residential racial segregation has declined in St. Louis and most other cities, St. Louis was the tenth most racially segregated city based on the 2020 census.

Leland Ware, a former St. Louisan and professor at the University of Delaware, says the 1968 Fair Housing law was largely a "toothless tiger" with weak enforcement. "Lingering vestiges of segregation remain in the nation's housing markets that 'perpetuate segregated neighborhoods.'"

Climbing the Arch for jobs

CORE, the Congress for Racial Equality, was too militant for St. Louis's businesses, newspapers and even its chapter of the American Civil Liberties Union, which was upset the demonstrators were breaking the law by blocking entrance to private businesses, such as Jefferson Bank.

But CORE's tactics weren't muscular enough for Percy Green, who started ACTION in 1964, calling for "direct action" to gain civil rights.

Green and a white friend climbed one leg of the unfinished Gateway Arch on July 14, 1964 to demand that 1,000 Black workers be hired for the \$1 million construction project. There were no Black workers on the Arch construction project. He followed up demanding 10 percent of the jobs at utility companies — Southwestern Bell, Union Electric and Laclede Gas.

"Southwestern Bell had no telephone installers at the time," he recalled in an interview. "Laclede Gas had no meter readers...We managed to expose them to the extent that they had to start hiring Blacks in those areas. I think the first Black...telephone installer eventually retired as a top-notch official. At the time the excuse they gave for Blacks not being telephone installers...was they felt that these Black men would create problems by

going into white homes. That's what the president of the company said and a similar excuse was given me by the president of Laclede Gas."

A month after Green's protest at the Arch, McDonnell Douglas laid him off, saying it was part of a workforce reduction. Green thought the company was punishing him for climbing the Arch. ACTION held a stall-in near McDonnell Douglas to protest. Later, Green sued McDonnell. He lost, but the test laid out a national precedent making it easier for people to prove job discrimination. The law books are filled with references to McDonnell Douglas Corp. v. Green.

In 1972, Green organized the unmasking of the Veiled Prophet. The Veiled Prophet ball was a relic of the Old South, with St. Louis' richest leaders in business dressing up in robes that some people thought looked like Ku Klux Klan outfits. Meanwhile, their debutante daughters paraded in evening gowns.

"We realized," Green recalled, "that the chief executive officers who we had met with about these jobs also was a member of this organization and we put two and two together. No wonder these people don't hire blacks because they are socially involved in these all-white organizations...(And) they auctioned off their daughters...The fact that I used that language was very disturbing to these people. Here these same chief executive officers, racist in terms of their employment, they also were sexist in not allowing their females to live their lives."

In 1972, a woman from ACTION, the late Gena Scott, lowered herself to the stage along a cable and unmasked Monsanto's executive vice president Thomas K. Smith. The city's newspapers did not print Smith's name. Only the St. Louis Journalism Review published the name.

Minnie Liddell's mission

Even though Brown v. Board was handed down by the Supreme Court in 1954, it wasn't until the 1980s that the St. Louis area schools began to desegregate in earnest. One reason is that the legal effort to desegregate ran into not only the South's Massive Resistance but also the same hostile federal judiciary in St. Louis that had rejected Dr. Venable and the Black Jack suits. U.S. District Judge James C. Meredith ruled there was no legally imposed segregation. But the federal appeals court in St. Louis found the state of Missouri the "primary constitutional wrongdoer." After all, the law had said segregation was required.

Two of Missouri's most prominent politicians over the past 40 years — John Ashcroft and Jay Nixon — crusaded as attorneys general against the big, ambitious school desegregation plans in St. Louis

and Kansas City, each seeking political advantage by attracting opponents of desegregation.

Minnie Liddell wanted her son Craton to attend the nice neighborhood school instead of being bused to a bad neighborhood. Ironically, Liddell's lawsuit led to the nation's biggest inter-district voluntary busing program in the nation sending about 14,000 Black city students to mostly white suburban schools with several thousand suburban children attending magnets in the city.

NAACP lawyer William L. Taylor had pulled together evidence of the complicity of suburban school districts in segregation. Many suburban districts had bussed their students to all-Black St. Louis high schools.

In 1981, a canny judge and former congressman, William Hungate, put a gun to the head of the suburban districts. Either they would "voluntarily" agree to the inter-district transfer program, or he would hear all of the evidence of inter-district discrimination and then probably order a single metropolitan school district. He threw in a carrot to go along with this stick. The state, as the primary constitutional wrongdoer, would foot the bill.

The idea of a single metropolitan school district frightened suburban school districts and helped special master D. Bruce La Pierre, a Washington University law professor, persuade them to join the voluntary transfer program.

Ashcroft went to the Supreme Court trying to stop the plan, saying there was nothing voluntary about the court's requirement that the state pick up the tab — which came to \$1.7 billion over the next two decades.

His opposition to school desegregation helped propel him to the governor's mansion after a primary in 1984 in which desegregation was the leading campaign issue. Ashcroft out demagogued former County Executive Gene McNary in a political ad calling McNary "McFlip-Flop" for supposedly being willing to support the desegregation plan.

Ashcroft called the desegregation plan illegal and immoral and paid for a plane to fly leading anti-busing leaders around the state to attest to his anti-busing bonafides. It was his silver bullet.

Nixon on schoolhouse steps

In the fall of 1997, Attorney General Nixon tried to duplicate Ashcroft's political magic. He appeared on the steps of Vashon High School, a crumbling symbol of Black pride in St. Louis. He announced he would press to end the transfer program and spend \$100 million building new Black schools in the city. Some Black leaders, such as Mayor Freeman Bosley, complained

that the transfer program hollowed out city neighborhoods and skimmed off the cream of the students.

Opposition to desegregation did not turn out to be the silver bullet that it had been for Ashcroft. Rep. Bill Clay convinced President Bill Clinton to pull out of a fundraiser for Nixon. Republican Sen. Christopher S. Bond won a record number of votes in the African American community to defeat Nixon for the Senate.

But, in Kansas City, Nixon did win a big court battle against that city's expansive desegregation plan. This wasn't the Supreme Court of *Brown v. Board*. Gone was Justice Thurgood Marshall, who had won *Brown* as a lawyer. In Marshall's seat on the court was Clarence Thomas, a former Monsanto lawyer who had received his legal training in Missouri Attorney General John Danforth's office alongside Ashcroft.

Justice Marshall had thought segregated classrooms harmed Black children by stigmatizing them as inferior. Thomas had a different idea of stigma. "It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior," he wrote.

Thomas was the deciding vote in the 1995 decision effectively bringing an end to school desegregation in Kansas City and to court-ordered desegregation nationwide – but not in St. Louis.

Even though Ashcroft and Thomas both were mentored by Sen. Danforth, the Missouri senator was at the same time a strong proponent of civil rights, as the key Republican author of the Civil Rights Act of 1991, along with Sen. Edward M. Kennedy, D-Mass.

That law reversed a series of Supreme Court decisions in the 1980s when the Reagan Justice Department persuaded the court to sharply limit the reach of discrimination laws.

Congress also reversed Reagan Justice Department victories limiting the most successful of the civil rights laws from the 60s, the Voting Rights Act. In 1982, Congress reenacted and strengthened the law in big bi-partisan votes. Congress reenacted and strengthened the law again in 2006 by big majorities.

Yet, Chief Justice Roberts declared, in 2013, in the *Shelby County v. Holder* that "our nation has changed" as he justified overturning a key part of the Voting Rights Act requiring federal pre-clearance of voting changes in the South.

A deluge of election changes have followed as the nation turned back the clock and limited the franchise again. In the just concluded 2022 Midterm Election, new voting districts in places like Alabama, Georgia, Florida and Texas caused Black

and minority candidates to lose.

A case from Alabama argued on the second day of this court term could further weaken the Voting Rights Act by prohibiting the consideration of race in drawing voting districts. Traditionally, the Voting Rights Act has been interpreted to require the consideration of race to fairly represent Black voters.

In the Alabama case, only one of seven congressional voting districts elects a Black representative even though Blacks are 25 percent of the population and could win two with differently drawn districts. Court analysts said a majority of the court appeared to favor Alabama in the arguments.

Supreme Court tilts the law in favor of police over abused citizens

Hands up, don't shoot never happened. The Justice Department and St. Louis County grand jury investigations proved that.

Officer Darren Wilson allowed a confrontation with Michael Brown to escalate when he should have de-escalated. Brown contributed to the escalation. He grabbed Wilson's gun through the window of the squad car and fired it. After running away, Brown turned back and charged Wilson who shot him dead.

It shouldn't have happened that way. But it did and in the instant online explosion of social media that followed, Hands Up, Don't shoot became a national rallying cry.

But that isn't what made Ferguson into this century's Selma. It was the attention on police accountability, reform of prosecutors' offices and court and bail reform.

The federal investigation found the Ferguson police department's rampant unconstitutional practices fell heavily on Blacks. All of the department's police-dog bites occurred during arrests of African Americans. 96 percent of those arrested for not appearing in court were Black. 88 percent of all cases involving use of force were against Black suspects. And Blacks were far more likely to be searched than whites even though whites were more likely to be found with contraband.

Beyond that, the protests led to the realization that an invisible part of the American judicial system – municipal courts – was often abused by small towns that operated them like cash registers raising money for town operations. Citizens who never had committed a crime were locked up for having failed to appear in court to pay a fine. The result was lost jobs, lost apartments and wrecked families.

Brendan Roediger, a Saint Louis University law professor active in court reform, recalls deposing former Ferguson

Police Chief Thomas Jackson and asking how many of the 10,000 people locked up in the Ferguson jail over a recent five-year period were there after having been sentenced for a crime. "He said, 'Oh yeah, it happened one time.'" In other words, the other 9,999 people in jail were not there for crimes, says Roediger.

Thomas Harvey, who led ArchCity Defenders during Ferguson, had been trying to expose petty municipal corruption for years before Brown's death. But he couldn't get people to pay attention to the big impact minor fines, small town municipal courts and abusive police traffic stops could have on people's lives.

It took the death of Michael Brown in 2014 and the murder of George Floyd in 2020 to finally attract the nation's attention to this racist injustice that had been hidden in plain sight, along with all of the other vestiges of slavery and segregation.

Yet, the U.S. Supreme Court has handed down decisions for 150 years that have protected law enforcement officers who abuse the rights of Black men on the streets of American cities.

The Civil Rights Act of 1871, otherwise known as the Ku Klux Klan Act and now codified as Section 1983, allows citizens to sue when their rights are violated. But the Supreme Court has ruled that police only have to pay if the constitutional right the police officer violated was clearly established by past court precedent – which it almost never is. In addition, the officer gets the benefit of the doubt; the jury can't second-guess the officer.

And when another post-Civil War law – Section 242 – is used in a criminal prosecution against a police officer, the Supreme Court has ruled that the prosecution has to prove the officer had the actual intent to willfully take away the citizen's rights.

The overall impact of the Supreme Court rulings then and now has been to drastically cut back the protection that the post-Civil War laws were intended to provide.



President Richard Nixon (seated at right) meets with staff on March 13, 1970. From left are H. R. Haldeman, Dwight Chapin, and John D. Ehrlichman. The Supreme Court ruled Nixon had to turn over tapes of his Oval Office conversation to the special prosecutor. He resigned from office a few days after he was forced to turn them over.

Photo courtesy of Richard Nixon Library

‘Imperial’ power grab or backstop to democracy

By William H. Freivogel

The Framers of the Constitution said they left out the Bill of Rights because they thought their architecture of government protected people's rights through checks and balances, the separations of powers and federalism

Each center of government power could exercise only the power that it was delegated under the Constitution and that should keep them out of people's individual affairs.

Montesquieu, a 17th century French philosopher, is known for his advocacy of a separation of powers as a way to keep any

part of government from having too much power. Alexander Hamilton was one of the framers influenced by Montesquieu

In 1787, people weren't persuaded the separation of powers was enough to protect their freedoms and by 1791 the Bill of Rights was added.

But the architecture of the government has worked pretty well - with some rough patches along the way - to keep the machinery of government going.

The idea is simple. We learn it in civics class. Congress has legislative power to make the laws. The president has executive

power to carry them out. The courts have judicial power to interpret the laws.

Each of the three branches of government can check the others. The president can veto bills passed by Congress, the Congress can override the veto with a supermajority and the Supreme Court can declare a law unconstitutional if Congress is exceeding the powers granted in the Constitution. The president can be slapped down for using executive orders that usurp congressional power.

The controversy about the 2020 presidential election is a good example

of the system working. President Donald Trump filed scores of lawsuits to throw out votes and overturn the results of the election. The courts right up to the Supreme Court turned the suits aside, Trump-appointed judges and justices included.

Trump then tried to convince Congress not to certify the results of the Electoral College. That effort failed too with a little help from Vice President Mike Pence.

A 4th check

The First Amendment built in an informal, non-governmental check - the press. In cases such as the Pentagon Papers the Supreme Court has recognized that the press provided a check on a Congress and president misleading the American people about the Vietnam War.

The top-secret 47-volume document showed that presidents had lied to the American people about the likelihood of victory and that Congress allowed the president to wage war based on the Tonkin Gulf Resolution, passed based on sketchy details provided by the president and the military.

When President Richard M. Nixon tried to stop the presses of the New York Times, Washington Post and other major newspapers, the Supreme Court stepped in and stopped Nixon. Justice Potter Stewart, in his opinion in the case, recognized the check the press had provided to a runaway president and Congress.

Framers' surprise

The Framers might be surprised at how the balance of power has worked out among the branches of government.

Alexander Hamilton predicted in Federalist 78, arguing for ratification of the Constitution, that the judiciary would be the "least dangerous branch" of government because it had "no influence over either the sword or the purse."

But the Supreme Court has more power than the Framers expected. The court has made clear that its holdings are the law of the land.

As the court is buffeted by a crisis of legitimacy, some critics are calling it an "imperial" court.

In an article in the Harvard Law Review, Stanford law professor Mark A. Lemley wrote, "The past few years have marked the emergence of the imperial Supreme Court. Armed with a new, nearly bulletproof majority, conservative Justices on the Court have embarked on a radical restructuring of American law across a range of fields and disciplines...."

"The Court has taken significant, simultaneous steps to restrict the power of Congress, the administrative state, the states, and the lower federal courts....The common denominator across multiple

opinions in the last two years is that they concentrate power in one place: the Supreme Court."

Another new study by USC professors Rebecca Brown and Lee Epstein concludes the Roberts Court has been "uniquely willing to check executive authority."

They studied 3,660 cases since 1937. The executive branch during the Roberts Court won just 35 percent of the time in high profile cases that got front page news coverage.

As the authors put it: "Surprisingly, our study of voting data from Supreme Court Terms 1937-2021 shows that the Roberts Court is the most 'anti-President' Court in that period: it has ruled against the President at a greater rate than any other Court" and has shown "a strong penchant for judicial supremacy."

Chief Justice John Roberts reiterated in a speech to a judicial conference in September that the judiciary decides what the law is. "You don't want the political branches telling you what the law is," he said. Then quoting Chief Justice John Marshall in *Marbury v. Madison*, which established the power of the court to declare laws unconstitutional, he added, "It is emphatically the province and duty of the judicial branch to say what the law is."

That quotation has been used in many Supreme Court opinions, and increasingly so during the Roberts Court. Epstein and Brown found that half of the references to this Marshall statement in *Marbury* occurred during the Roberts Court.

Presidents have disagreed

Some of the most famous and effective presidents in history have disagreed with the Supreme Court's assertion of preeminence in interpreting the Constitution - Jefferson, Jackson, Lincoln and FDR among them.

Jefferson knew he probably didn't have the constitutional power to buy the Louisiana Purchase but did it anyway because it was good for the country. Jackson didn't like the Supreme Court's opinion in favor of the Cherokee tribe in Georgia, so he just ignored it. Chief Justice Roger Taney told Lincoln he had to obey habeas corpus. Lincoln ignored him too. Lincoln knew he probably didn't have the power to issue the Emancipation Proclamation, but he did it anyway because he thought it was right and would help win the war. FDR was angry that the Supreme Court was ruling his New Deal legislation unconstitutional and tried to pack the court to change its rulings. It turned out to be a political mistake, but the court got the message and started approving New Deal laws.

More often than not the president abides by the Supreme Court's assertion

that it has the final say about the law. And judging from recent history, that's a good thing.

During the Korean War President Truman seized the steel mills and the Supreme Court declared that action unconstitutional.

Justice Robert Jackson wrote in *Youngstown Sheet and Tube v. Sawyer* that the president's powers were at their height when he had the direct or implied authorization from Congress; at their middle ground, "a zone of twilight," when acting without either a congressional grant or denial of authority; and "at its lowest ebb" when a president acted against the expressed wishes of Congress.

During the Watergate scandal, President Nixon claimed that separation of powers and executive branch confidentiality required that the Supreme Court prevent the independent counsel from obtaining tapes of White House conversations.

"Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide," the court ruled.

Nixon left office days after the tapes were turned over.

During the war in Iraq, President George W. Bush sought to prosecute alleged terrorists as enemy combatants in military tribunals. Bush sought to block the federal courts from reviewing cases of enemy combatants held at Guantanamo Bay. Congress passed the Detainee Treatment Act to bar the courts from hearing appeals from detainees.

In a 5-4 decision in *Boumediene v. Bush*, the court ruled that the Detainee Treatment Act was not a substitute for habeas corpus, which was such an important protection that it was contained in the original Constitution before the addition of the Bill of Rights.

The court said that grave separation of powers issues were involved and the president and Congress had overstepped.

In *Hamdi v. Rumsfeld* the court ruled that a U.S. citizen detained as an enemy combatant had some due process rights to challenge his detention and had a right to a lawyer. Justice Sandra Day O'Connor wrote for the court that separation of power was an important consideration in bringing in the courts.

"[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the

courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government."

Citing the steel seizure cases, O'Connor added, "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

War power controlled by president

The Framers of the Constitution would have been chagrined had they known how little Congress' power to declare war had been used.

The Framers thought they had divided up war powers successfully between the president, who was commander-in-chief, and the Congress.

An initial draft of the Constitution had given Congress the power to "make" war. Framers, such as James Madison, wanted to avoid recreating a situation where the president could go to war as King George III had.

But Madison was persuaded that the word *make* had to change to *declare*, leaving with the president the power make war.

And presidents certainly have exercised that power.

The change in the nature of war - with nuclear weapons and terrorist threats requires immediate decisions. That often doesn't leave time for Congress to declare war.

Altogether the president had committed troops to armed conflicts without a declaration of war from Congress well over 200 times. Congress has only declared war 11 times, the last time in World War II.

Harry S Truman did not ask Congress to declare war in Korea but instead waged war as a "police action" under a United Nations resolution. The Gulf of Tonkin Resolution was not a declaration of war and was based on flimsy evidence, but it was the legal basis for the conflict.

Modern presidents invaded other countries without declarations of war - Ronald Reagan Grenada; George H.W. Bush in Panama and Somalia; Bill Clinton in Iraq, Haiti, Bosnia, Afghanistan, Sudan and Kosovo; George W. Bush in Afghanistan and Iraq with a congressional use of force resolution for terrorism; Barack Obama targeted Libya and dozens of unmanned drone strikes in Pakistan.

A War Powers Act passed because of Vietnam puts limits on how long the president can engage in hostilities without congressional approval, but hasn't provided much of a check on presidential actions.



Photo courtesy of Harry S. Truman Presidential Library

Congressional powers

At times, the Supreme Court has had to work hard not to check congressional power in consequential cases.

In the 1942 Wickard v. Filburn case the New Deal court upheld federal production controls on wheat grown on Roscoe Filburn's Ohio farm. The constitutional authority behind the controls was Congress' power to regulate interstate commerce.

Filburn grew only enough wheat to feed livestock on his own farm. The Supreme Court ruled, however, that Filburn's wheat reduced the amount of wheat he would buy for animal feed on the open market, which is traded interstate.

The Warren Court also gave generous reach to the Commerce Clause in its decision to uphold the Civil Rights Act of 1964.

Ollie's barbecue in Birmingham, Ala. claimed to have the best barbecue in the South and locals swore by it. Ollie's also had a rule against Blacks in the dining room. It had "takeout service only for Negroes."

Ollie's admitted it served a few customers who got off the interstate for their ribs, but claimed Congress exceeded its authority in regulating a small, local restaurant. The court disagreed. It wrote:

"The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere. The Civil Rights Act of 1964, as here applied, we find to be plainly

appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude. We find it in no violation of any express limitations of the Constitution and we therefore declare it valid."

When President Barack Obama and Congress relied on the Commerce Clause again in passing the Affordable Care Act, Chief Justice Roberts was not so willing to stretch it as far as it had been stretched to regulate Filburn's wheat and Ollie's barbecue joint.

But Chief Justice Roberts, whose primary goal is the legitimacy of the court, found a way to uphold the biggest social program since Medicare. Because there was a tax penalty connected to the law, it was constitutional under Congress' broad tax power, he ruled.

A little like Chief Justice Marshall in *Marbury v. Madison* two centuries earlier, Roberts gave the president most of what he wanted and still managed to get quite a bit of what he wanted. Marshall didn't force Jefferson to appoint *Marbury* as a magistrate, but at the same time established for the court the power of judicial review. Roberts gave Obama his program, but established that there would no longer be broad interpretations of congressional powers.

Now Roberts faces a new crisis of legitimacy because of this year's decision overturning the abortion right. As savvy as he has been as a chief justice, he wasn't savvy enough to build a majority for the abortion compromise he sought. How he responds in public and behind the scenes will be fascinating to watch and important for people's rights for decades ahead.

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