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STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS*, HARVARD UNIVERSITY PRESS, 2021¹

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In this book of one hundred pages, Justice Breyer explains in the preface: “Put abstractly, the Court’s power, like that of any tribunal, must depend upon the public’s willingness to respect its decisions—even those with which they disagree, and even when they believe a decision seriously mistaken” (pp. 1-2). That position underscores the Court’s dependence on public support and acceptance, but later in the book Breyer implies that the Court has authority to deliver the final word on the Constitution. Those issues reappear throughout the book.

Why would the public be willing to respect Supreme Court decisions, “even those with which they disagree, and even when they believe a decision seriously mistaken” (pp. 1-2)? The record of over two centuries offers many examples in which public opinion not only

1. STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* (2021).

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opposed a Supreme Court ruling but eventually prevailed. Examples include the cases from 1940 to 1943 involving a compulsory flag salute in Pennsylvania. An 8-1 decision in *Minersville School District v. Gobitis* (1940) upheld the flag salute.² However, negative public reaction led three of the Justices to abandon the majority in *Jones v. City of Opelika* (1942), reducing the majority to 5-4.³ When two of the five retired they were replaced by Justices who joined the four, producing a 6-3 majority the next year in *West Virginia State Board of Education v. Barnette* (1943), overturning the 1940 decision.⁴ That type of broad public dialogue on constitutional issues happens often, but Breyer does not discuss the flag-salute cases or similar examples.

Breyer asks a key question: “Which branch will have the authority to determine what limits the Constitution sets forth and when a branch has exceeded them?” (p. 8). The President? Breyer points to the “risk that the president would simply decide that whatever action he or she takes is consistent with the Constitution” (p. 9). What about Congress? Its members are “popularly elected” and “likely understand popularity,” but he asks if Congress can “be trusted to protect the unpopular” (p. 9). That leaves the third branch. In Breyer’s judgment, “[j]udges understand law” and “are unlikely to become too powerful, for they lack the power of purse and of sword” (p. 9). For that reason, “the judicial branch and the Supreme Court in particular should have the last word” (p. 9). Hundreds of cases could be presented to demonstrate that the Court does not have the final word on legal and constitutional issues. I explore those themes in a book published in 2019 called *Reconsidering Judicial Finality: Why the Supreme Court Is Not the Last Word on the Constitution*.⁵ In the preface to that book, I offer this observation by Chief Justice Rehnquist: “It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.”⁶

2. 310 U.S. 586, 599-601 (1940).

3. See 316 U.S. 584, 611-20 (1942).

4. See 319 U.S. 624, 642-47 (1943).

5. See generally LOUIS FISHER, RECONSIDERING JUDICIAL FINALITY: WHY THE SUPREME COURT IS NOT THE LAST WORD ON THE CONSTITUTION (2019).

6. *Id.* at xi (quoting *Herrera v. Collins*, 506 U.S. 390, 415 (1993)).

In seeking Supreme Court support for his position, Breyer turns first to *Marbury v. Madison* (pp. 10-13). William Marbury and several other individuals did not receive their positions as judges because their commissions were never delivered to them.⁷ John Adams's Secretary of State was responsible for delivering those commissions but was unable to do so before the end of Adams's term.⁸ His name? It was John Marshall.⁹ How could he later write for the Court in *Marbury*? Because he had a clear conflict of interest, he should have recused himself and left the issue to the other Justices.

In deciding the case, Marshall held that the statute Marbury and his colleagues cited to allow them to come directly to the Supreme Court was unconstitutional and struck it down.¹⁰ There was no need to do that. Marshall (or the Court) should have advised Marbury's attorney that the statute did not apply to the plaintiffs. For that reason, they needed to start in district court. Although Marbury is regularly lionized by courts and legal scholars, it has many serious shortcomings. To Breyer, Marshall in *Marbury* "strengthened the norm of judicial review" and "did so in a way strategically designed to avoid the risk that [President Jefferson] would ignore what the Court ordered" (pp. 12-13). In interpreting the case in that fashion, Breyer underscores that the decision was not a professional effort at constitutional interpretation but was instead highly political and partisan on both sides. Why treat Marbury with such respect?

Breyer does not discuss the child-labor cases. They underscore that decisions by the Supreme Court do not announce the "final word" on constitutional issues. In 1918, a 5-4 Court in *Hammer v. Dagenhart* struck down legislation passed by Congress that relied on its interstate commerce power to regulate child labor.¹¹ Congress next turned to the taxing power to accomplish that purpose, but an

7. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 139 (1803).

8. *See id.*

9. *Biographies of the Secretaries of State: John Marshall (1755-1835)*, DEP'T OF STATE, OFF. OF THE HISTORIAN, <https://history.state.gov/departmenthistory/people/marshall-john> [<https://perma.cc/BU5T-HLK3>].

10. *Marbury*, 5 U.S. at 176-80.

11. 247 U.S. 251, 275-77 (1918).

8-1 Court struck down that effort in *Bailey v. Drexel Furniture Co.*¹² Did the Court now have the last word? No.

In 1924, Congress passed a constitutional amendment to support its power to regulate child labor but could not receive sufficient support from the states.¹³ In 1938, Congress again passed legislation on child labor, relying on its powers over interstate commerce.¹⁴ Two years later a federal district court, guided by the 1918 decision in *Hammer*, held the statute to be unconstitutional.¹⁵ In *United States v. Darby* (1941), the Supreme Court not only upheld the statute but did so unanimously, stating that the reasoning advanced in 1918 “was novel when made and unsupported by any provision of the Constitution.”¹⁶ Remarkable language: no element of support in the Constitution! That statement repudiates both the doctrine of judicial finality and the assertion of judicial infallibility.

In discussing *Bush v. Gore*, in which the Court decided in favor of George W. Bush over Al Gore for U.S. President,¹⁷ Breyer notes that he wrote a dissenting opinion (p. 27). Although he says that about half the country believed the Court to be “misguided,” the public “accepted the majority’s holding without violent protest” (p. 27). To Breyer, the ruling suggests “respect for those decisions even when one considers them wrong” (p. 28). Many examples could be offered to challenge that position.

For example, in *Ledbetter v. Goodyear Tire & Rubber Co.* (2007), the Supreme Court split 5-4 in deciding that Lilly Ledbetter had filed an untimely claim against Goodyear Tire for pay discrimination.¹⁸ According to the majority, the law required that she file her claim within 180 days after a discriminatory pay decision, but it took her nearly two decades to learn she was paid less than men for doing the same work.¹⁹ In her dissent, expressing detailed opposition to the majority opinion, Justice Ginsburg recalled that the Civil

12. See 259 U.S. 20, 41-44 (1922).

13. Dina Mishra, *Child Labor as Involuntary Servitude: The Failure of Congress to Legislate Against Child Labor Pursuant to the Thirteenth Amendment in the Early Twentieth Century*, 63 RUTGERS L. REV. 59, 87-91 (2010).

14. See *United States v. F.W. Darby Lumber Co.*, 32 F. Supp. 734, 737-38 (S.D. Ga. 1940).

15. See *id.* at 736-37.

16. 312 U.S. 100, 116 (1941).

17. See 531 U.S. 98, 100-03, 110-11 (2000).

18. 550 U.S. 618, 618-20 (2007).

19. *Id.* at 630-33.

Rights Act of 1991 overturned in whole or in part nine decisions of the Supreme Court. She remarked: “Once again, the ball is in Congress’ court.”²⁰ No final word by the Supreme Court. Congress proceeded to pass legislation to reverse the decision on Ledbetter, and it was signed into law by President Obama.²¹ The legislation provides that discriminatory compensation is an unlawful employment practice.²² Discriminatory actions carry forth in each paycheck, allowing women to file a complaint in a timely manner for relief.

Breyer later steps back from his claim of judicial finality by stating, “the Court will normally have the last word” (p. 37). A few pages later, he discusses *Korematsu v. United States* (1944) in which the Court upheld a presidential order that placed American citizens of Japanese origin in detention camps.²³ He acknowledges that most Americans today, “including most judges, believe that the majority was wrong and committed a serious injustice” (p. 41). Quite true. However, Breyer does not discuss what the Court said in *Trump v. Hawaii*.²⁴

Writing for a 5-4 Court, Chief Justice Roberts noted that Justice Sotomayor invoked *Korematsu* in her dissent.²⁵ He then added: “Whatever rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case.”²⁶ He said that the relocation of U.S. citizens “to concentration camps” had nothing to do with President Trump’s actions against certain foreign nationals seeking to travel to the United States.²⁷ Yet Roberts proceeded to say that *Korematsu* “was gravely wrong the day it was decided” and “has been overruled in the court of history.”²⁸ Wrong the day it was decided in 1944 and yet not overruled by the Court until 2018! What

20. *Id.* at 661 (Ginsburg, J., dissenting).

21. See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (codified at 42 U.S.C. § 2000e-5(e)(3)).

22. *Id.*

23. See 323 U.S. 214, 219 (1944).

24. See 138 S. Ct. 2392 (2018).

25. *Id.* at 2423.

26. *Id.*

27. *Id.*

28. *Id.*

of the other case involving Japanese Americans: *Hirabayashi v. United States*?²⁹ Is that still good law?

Midway through the book, Breyer states that “the American people, directly or through their elected representatives, gradually adopted the custom and habit of respecting the rule of law, even when the ‘law’ included judicial decisions with which they strongly disagreed” (p. 47). In fact, the history underscores Supreme Court decisions not only face strong disapproval but have been overturned by public opinion and congressional statutes. The process of forming constitutional law includes a strong dialogue involving all three branches of government and the general public. In his book, *The Least Dangerous Branch*, Alexander Bickel explained the process of developing constitutional principles in a democratic society: they “evolve[] conversationally [and are] not perfected unilaterally.”³⁰ In her testimony on July 20, 1993, before the Senate Judiciary Committee after her nomination to the Supreme Court, Ruth Bader Ginsburg explained: “Justices do not guard constitutional rights alone. Courts share that profound responsibility with Congress, the President, the states, and the people.”³¹

Breyer adds that “[j]udges should not, and virtually never do, pay particular attention to public opinion” (p. 59). There are many examples of the Supreme Court acknowledging that public opinion has appropriately and squarely challenged its decisions, leading the Court to reverse itself. Those issues include child labor, the compulsory flag salute, the Ledbetter litigation, and many other issues. In *The Nature of the Judicial Process*, Benjamin Cardozo wrote: “The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.”³² Breyer does acknowledge that “to suggest a total and clean divorce between the Court and politics is not quite right either” (p. 62).

Toward the end of the book, Breyer expresses his understanding that the process of forming constitutional law is broad in scope, going beyond the results of litigation: “The Constitution creates

29. 320 U.S. 81 (1943).

30. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 244 (1962).

31. RUTH BADER GINSBURG, *MY OWN WORDS* 183 (2016).

32. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

methods for resolving differences through participation, through argument and debate, through free speech, through a free press, and through compromise” (p. 97). A page later he states that when he hears students “lament the divisions within our country as too deep,” he “ask[s] them to remember the constitutional need for participation, for argument, for deliberation, for efforts to convince others, for voting, all of which typically involve cooperation and compromise” (p. 98). The final page underscores those points. The authority of the Supreme Court, “like the rule of law, depends on trust, a trust that the Court is guided by legal principle, not politics” (p. 100). To accomplish its purpose and retain trust, the Court must understand that it is part of a rich and complex dialogue that includes many legitimate participants outside the judiciary.

Judge Wilkinson of the Fourth Circuit published *Cosmic Constitutional Theory* in 2012. He analyzed various doctrines used to interpret the Constitution, including originalism, textualism, minimalism, and the living Constitution.³³ He warned that these “cosmic” theories produced a harmful effect by encouraging judicial activism, “taking us down the road to judicial hegemony where the self-governance at the heart of our political order cannot thrive.”³⁴ In comparing the relative performances between the judiciary and the elected branches, he concluded that “the elected branches succeeded far more in attacking invidious racial discrimination than the Court had on its own.”³⁵ Women discovered that their constitutional rights were protected far better by elected officials than by the courts. The Constitution, he stressed, “is not the courts’ exclusive property. It belongs in fact to all three branches and ultimately to the people themselves.”³⁶ As another reason for not depending exclusively on the Supreme Court to define and shape constitutional values, he concluded that courts “are less adept than legislatures at assessing the precise content of society’s values.”³⁷

33. See J. HARVIE WILKINSON, III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* (2012).

34. *Id.* at 4.

35. *Id.* at 17-18.

36. *Id.* at 22.

37. *Id.*