Introduction

For someone like myself who grew up in the middle of the last century, the image of the Supreme Court as the Supreme Defender of the constitutional rights of racial minorities is still vivid in memory. In the mid-1950s the Supreme Court declared an end to separate but equal in schools, parks, and all government-run facilities.\(^1\) It was a shock to the South and was met with considerable resistance, including by governors, and even mob violence. To be sure, the Court then allowed for a turtle’s pace rate of speed for correcting segregation, which pace it called “all deliberate speed.”\(^2\) Despite the Court’s producing an opinion in 1958 signed by all nine justices (for the only time in Court history) that insisted that community opposition is never a valid reason for government to deny or postpone honoring someone’s constitutional rights,\(^3\) by 1964 there had been hardly any actual school desegregation.

The assassination of President John F. Kennedy, however, supplemented by televised coverage of brutal treatment of peaceful black protesters led by Martin Luther King and his allies, created a wave of sympathy that enabled JFK’s former Vice President Lyndon B. Johnson to push through Congress the pending 1964 Civil Rights Act (originally proposed by Kennedy), despite opposition from most of the southern Democrats. The majority of the votes for the 1964 Civil Rights Act came


\(^3\) *Cooper v. Aaron*, 358 U.S. 1, 16–17 (1958).
from Republicans. Then the debacle of Barry Goldwater’s candidacy for President against Lyndon Johnson swept a historically large Democratic majority into Congress, and LBJ was able to use this to get Congress to pass the follow-up, 1965 Voting Rights Act, and the 1968 Open Housing Act. By the mid-1960s LBJ’s efforts to persuade Congress received additional impetus from urban riots that were happening every summer for several years as well as immediately consequent to the assassination of Martin Luther King in April of 1968.

The 1964 Act had the crucially important feature of cutting off the new federal financial assistance to local public schools for any system that stayed segregated. This federal monetary assistance received a big boost in 1965 in the Elementary and Secondary Education Act. This money-based carrot-and-stick approach pushed the South to desegregate promptly.

The other main features of the 1964 Act were, first, the insistence on racially non-discriminatory access to privately owned public accommodations—hotels, restaurants, theaters, and gas stations—that affect interstate commerce. Secondly, the 1964 Act prohibited race-based, nationality-based, and gender-based discrimination in employment within interstate commerce.4 This law eventually changed the face of America. Within a couple of decades, one saw faces of color where they had not been before—one television, as leads in movies, in mainstream commercials, as clerks in high end department stores, as bank tellers, and also as customers in hotels and restaurants throughout the country.

The Supreme Court continued in a leadership role by first, in 1964 and 1967 making clear that laws making it a crime to engage in sex across racial lines were unconstitutional. The Court struck down state laws forbidding interracial cohabitation5 and interracial marriage.6 In doing so, the Court deployed the “strict scrutiny test” that it had developed for dealing with anti-Japanese discrimination during World War II.7

On school desegregation, the Court also continued to lead, by insisting that schools formerly segregated by the force of laws now had to use laws to un-segregate. They could not just remove the labels “colored” and “white” from the schoolhouse door and pretend all was well. They had to

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4 For a more complete description of the Civil Rights Act of 1964, see below, Chapter 6, text at nn.205–9.
7 Ibid., at 9–12.
actively mix together the kids whose racially-segregated school attendance habits the laws had been shaping for generations.\textsuperscript{8} Available tools for this de-segregating included the option of busing, the Court said in 1971,\textsuperscript{9} and these rules also applied to northern districts,\textsuperscript{10} like the one in Boston that used laws surreptitiously rather than openly to push the races apart in district schools. Boston’s reaction to court-ordered busing, as recently as 1974–75, showed that white mob violence against blacks, unfortunately, was not limited to the South.\textsuperscript{11}

Even in the face of clear and strong popular opposition to “forced busing” all over the U.S., the Supreme Court continued in the posture of insisting on actual desegregation up through the late 1980s.\textsuperscript{12} In 1989 for the first time it started applying the rule of strict scrutiny against race-based affirmative action programs, and around 1991 started declaring (as it had predicted it would back in 1971) that school districts were now effectively desegregated and did not need to continue further racial mixing.\textsuperscript{13} Throughout the period of 1954–89 (for thirty-five years), the Court played a role of clear and strong moral leadership, upholding constitutional principles, first when Congress was unwilling to act and secondly, long after Congress had started to oppose what it called “forced busing.”\textsuperscript{14} Eventually, the Court (whose retirees are replaced by nominees

\textsuperscript{8} Green v. New Kent County, 391 U.S. 430 (1968).
\textsuperscript{9} Swann v. Charlotte-Mecklenburg N.C., 402 U.S. 1, 29–31 (1971). The Court noted that the length of bus rides should not be so excessive as to interfere with the learning process or children’s health and well-being. Riding a bus to school was a well-entrenched practice in American public schooling by this time.
\textsuperscript{11} Wolff 2014.
\textsuperscript{12} In addition to supporting busing orders, the Supreme Court aggressively enforced old civil rights laws that had lain dormant for a century. See Jones v. Alfred Mayer, 392 U.S. 409 (1968) and discussion of it and its sequelae in Rutherglen 2013, 137–8.
\textsuperscript{13} Richmond v. Croson, 488 U.S. 469 (1989) (strict scrutiny of state-level affirmative action); Adarand v. Pena, 515 U.S. 200 (1995) (strict scrutiny of federal level affirmative action); Swann, 402 U.S. at 31–2, “Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system” (1971); Oklahoma City v. Dowell, 498 U.S. 237 (1991); Freeman v. Pitts, 503 U.S. 467 (1992).
\textsuperscript{14} “Congressional Anti-Busing Sentiment Mounts in 1972.” Congress adopted the anti-busing measure S 659-PL 92-318 in 1972, but Supreme Court Justices Lewis Powell and William Rehnquist each ruled (in separate cases) that the law would not affect any actual judicial busing orders because of the way it
of elected presidents), one might say, was tamed into submission, and began exhibiting the uneasiness about affirmative action that majority sentiment seems to feel.

I told this tale many times in courses in American Government, but as a political scientist, had to wonder, How typical is this? Has the Court over the long haul been more supportive of the Constitutional rights of unpopular racial minorities than the other branches?

Alexander Hamilton, urging his fellow New Yorkers to ratify the pending U.S. Constitution in the summer of 1788, wrote that people need not fear the provision for lifetime tenure of Supreme Court justices. Such tenure, wrote he, would keep the justices independent from majoritarian political pressures, thereby enabling them to stand firm in defense of the constitutional rights of the individual, to “prevent oppressions of the minor party,” and also to “mitigate[e] the severity” of “unjust and partial laws” that operate with harshness on “particular classes of citizens” but do not amount to an “infraction[] of the Constitution.”

Justice Joseph Story in his magisterial *Commentaries on the Constitution*, published while he served on the Court, similarly justified independence of the judiciary from electoral politics:

> There can be no security for the minority in a free government, except through the judicial department … [I]n free governments, where the majority who obtain power for the moment, are supposed to represent the will of the people, persecution, especially of a political nature, becomes the cause of the community against one … . In free governments … the independence of the judiciary … is the only barrier against the oppressions of a dominant faction, armed for the moment with power, and abusing the influence, acquired under accidental excitements, to overthrow the institutions and liberties which have been the deliberate choice of the people.

Surely both Hamilton and Story were conscious that majority oppression on the basis of race was a problem crying out for amelioration in the United States. Alexander Hamilton, himself, was concerned enough about the evils of slavery to have been one of the co-founders of the was worded. (It banned busing for “racial balance” and the justices said that the judiciary was ordering busing for “desegregation” rather than “racial balance.” Ibid.)

15 *Federalist Papers* #78.

Manumission Society of New York. Justice Story while on the Court participated in several important cases involving both slaves and Native Americans, quintessential examples of oppressed minorities. Outside of his judicial role he consistently expressed the view that slavery was an unjust and immoral institution, and that people of European descent were systematically treating the Indians with gross injustice. Within his judicial role he expressly condemned trade in slaves as unjust and immoral.17

The U.S. Supreme Court is both notorious for having (in 1857) issued the dictum that under the Constitution of this country, “[The black man] had no rights which the white man was bound to respect,”18 and famous for having (in 1954) declared the unconstitutionality of *de jure* segregated public schools, a system that harmed black children because it “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,” thereby undermining their motivation to learn and producing unequal education.19 These well-known judicial pronouncements show the Court first re-entrenching (indeed, arguably exacerbating) the majority’s oppression of a racial minority, and the second, the Court fighting against it, as Hamilton and Story predicted the Court would. Which is the more apt, or more typical, picture of the Court’s tendencies over the course of U.S. history? Has the judicial branch, staffed by lifetime appointees intended to be immune from political pressures, in fact as a general matter served to “prevent oppressions of the minor party” more typically than the elected branches have? That is the answer this book aims to uncover. And

17 Cover 1975, 238–43; Roper 1969, 532. For instance, at a public meeting in Salem in 1819, Story insisted that the principles of the Declaration of Independence and the spirit of the Constitution demand that Congress ban slavery in the territories. Ibid. As to the slave trade, on circuit in *U.S. v. La Jeune Eugenie*, 26 F. Cas. 832 (1822), Story went on for page after page to condemn it as “breach[ing] all the maxims of justice, mercy and humanity,” as involving “corruption, plunder and kidnapping” of “the young, the feeble, the defenceless and the innocent,” as “desolate[ing] whole villages and provinces,” as resulting in massive numbers of deaths in transit due to the “cold blood[ed]” and “inhuman” treatment of the captives, and as “incurably unjust and inhuman.” 26 F.Cas., 845–8. While one of the Cherokee cases was pending in Congress, Story wrote his wife of the Cherokee, “I feel as an American, disgraced by our gross violation of the public faith toward them.” Letter to Mrs. Joseph Story, Washington, Jan 13, 1832, in W.W. Story 1851, II, 79. Similar additional letters are cited in the discussion of the *Prigg v. Pennsylvania* case in chapter 2.


if Hamilton and Story were correct, or if they were mistaken, which aspects of U.S. institutions explain why?

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White British settlers established the first British colony in North America at Jamestown, Virginia in 1607. They were preceded here by French to the north and Spaniards to the south, not to mention the Native Americans, who preceded all of the Europeans. By the time of the British landing, the European diseases to which indigenous people had been exposed for 100 years had already decimated perhaps as many as 90 percent of the natives, known as Indians to the Europeans.20

In 1619, black Africans were brought to Jamestown, and initially were treated as indentured servants, who were freed after their period of servitude. Only in the second half of the seventeenth century did laws begin to make sharper distinctions between indentured persons and slaves, and to link slavery specifically to persons of African descent.21

By the time of the U.S. Constitution, although several states in the northern U.S. had freed their slaves by legislation, and Massachusetts had done so by judicial interpretation of her state Constitution, slavery was firmly entrenched by law in the majority of states.22 At some point or other, prior to the Civil War, every single state, along with the federal government, discriminated against blacks in some way. Some examples were white preferences for the militia, segregated schools, laws against miscegenation (interracial marriage), laws imposing on blacks stiffer property qualifications for voting, and laws requiring of blacks proof of freedom and a posted bond in order to enter the state (the latter went unenforced).23

Apart from U.S. law’s specialized treatment of Native Americans, or Indians, the myriad of law-enforced discriminations in both the pre- and

20 R.M. Smith 1997, 520, n.30. Historians previously estimated 50 percent, but the more recent consensus is toward 90 percent.
21 Higginbotham 1978, 21–2; Finkelman 1986, 1; C. Harris 1993, 1716–21.
22 Completing the post-Revolutionary-War trend of abolition in the states north of Delaware, New York in 1799 and New Jersey in 1804 adopted legislation that freed the slaves but did so quite gradually. Pennsylvania’s Abolition Act of 1780 also had been quite gradual; it liberated only persons born after that Act and established indentured servitude until the age of 28 for all offspring of present slaves. By 1830, more than 3500 (elderly) blacks remained in slavery in the North, two-thirds of them in New Jersey. Litwack 1961, 3, 14. Harper 2003.
23 Litwack, passim.
Introduction

the post-Civil War U.S. between “white” and “other” people or between white and “colored,” produced legal questions eventually over who counted as “white.” Such cases involved not only east Asians, such as Chinese or Japanese people, but also simply darker complexioned people such as Mexican-Americans, people of India, Afghans, Filipinos, Syrians, Lebanese, and Armenians.\textsuperscript{24}

This book explores the rights of racial minorities, as perceived by the Supreme Court, and also as protected or attacked by either of the elected political branches of the federal government. It compiles this history in order to judge whether the constitutional project of establishing judicial review to be exercised by judges with lifetime appointments as a preventive of “oppressions of the minor party” has succeeded, as weighed against the behavior of the more popularly accountable branches.

Of course, the case can be made that each of the branches to one degree or another is “undemocratic,” but there can be no doubt that the federal judiciary is less accountable to the electorate than is either elected branch. All but the two top members of the executive bureaucracy are appointed rather than elected, but the two at the top wield significant hiring and firing power and do face election and re-election; moreover, the top layer of the executive bureaucracy is subjected to elected officials’ judgment both as to nomination by the elected President and confirmation by the elected Senate. The Supreme Court justices, once in office never have to fear ouster by failing to get re-elected, nor has any ever been removed from office consequent to impeachment. Similarly, Congressional staff members, who are unelected, have great influence over the legislation of the land, but, again, at least their bosses who hire and fire them do have to stand for re-election.\textsuperscript{25} Have these facts mattered in the way they were expected to? This book aims to uncover the answer.

\textsuperscript{24} Lyman 1991.
\textsuperscript{25} Granted, those elections take place in gerrymandered districts, with a large incumbency advantage, but there has never been a nationwide Congressional election in which no one gets voted out of office.