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Determining Notoriety in Supreme Court Decisions

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I. INTRODUCTION

In a symposium proceeding from the assumption that some of the decisions rendered by the Supreme Court of the United States have been notorious mistakes, one would hope to find some collective understanding about governing principles. If, as I suspect, there will be little agreement about which decisions (and accompanying opinions) qualify as notorious, perhaps there will be greater agreement about evaluative criteria. For example, even if one might not expect to find consensus about whether *Roe v. Wade*[1] was a notorious mistake, one might at least anticipate a shared sense, among those searching for such mistakes, of how the search might proceed. But what might that shared sense include? And can we fashion any durable criteria for determining notoriety? This essay investigates those questions.

The essay proceeds in three stages. First, I identify two cases out of a handful that would be on many commentators' lists of notorious mistakes, and at the same time identify some largely implicit criteria that have typically affected the analysis of judicial opinions in America. I then

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1. 410 U.S. 113 (1973).

suggest that those criteria can serve to determine notoriety, but that they bear a particular relationship to one another, one that may not be well understood. Understanding that relationship, I argue, is critical to the process of assigning notoriety to Supreme Court decisions.

Next I argue that because the criteria can serve to reinforce one another and also to oppose one another, evaluators of Supreme Court decisions are required to prioritize among them, or even choose some over others. The need to prioritize among multiple criteria that point in different directions makes the evaluative process highly dependent on the weight assigned to a particular criterion. The process of assigning notoriety thus runs the risk of collapsing into subjectivity because individual evaluators might simply be assigning greater or lesser weight to one criterion or another.

The third stage of the essay seeks to restore some integrity to the criteria for determining notoriety. In this stage I use a decision rarely placed on anyone's list of mistakes, *United States v. Carolene Products Co.*,[2] to illustrate that the choice to label a particular decision notorious amounts to a choice to treat criteria that are often self-opposing as self-reinforcing. The notorious decision ends up being one that is characterized as transcendentally mistaken. Not only is it on the "wrong" side of history, it gets no discount for the historical context in which it was decided.[3]

II. EXAMPLES OF NOTORIOUS MISTAKES: A FIRST LOOK

In the long history of Supreme Court jurisprudence, a small number of cases have been consistently identified as notorious mistakes by commentators. Those cases need to be distinguished from a much larger group of cases that were severely criticized at the time they were decided but over the years have secured a degree of acceptance. *Martin v. Hunter's Lessee*,[4] *McCulloch v. Maryland*,[5] *Brown v. Board of Education*,[6] and *Miranda v. Arizona*[7] are in the larger group of cases. The smaller group seems to include only a few cases, which appear to be distinguished by the fact that successive generations of commentators have continued to regard them as notorious. What gives those cases their notoriety? Perhaps a comparison of two cases regularly placed on the list of notorious mistakes will aid us in that inquiry.

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2. 304 U.S. 144 (1938).

3. I will subsequently say more about what I mean by "transcendentally mistaken" decisions, and by "historical discounting."

4. 14 U.S. (1 Wheat.) 304 (1816).

5. 17 U.S. (4 Wheat.) 316 (1819).

6. 347 U.S. 483 (1954).

7. 384 U.S. 436 (1966).

Dred Scott v. Sandford[8] and *Korematsu v. United States*[9] are likely to appear on nearly everyone's list of notorious mistakes.[10] Some sense of why can be gleaned from a characterization of *Dred Scott* by David Currie in 1985, and of *Korematsu* in a 1982 Congressional report on that case. Currie described *Dred Scott* as "bad policy and bad judicial politics . . . [and] also bad law."[11] The Congressional report stated that *Korematsu* had been "overruled in the court of history."[12] Taken together, those characterizations of *Dred Scott* and *Korematsu* suggest that four characteristics have been attributed to notorious decisions: misguided outcomes, a flawed institutional stance on the part of the Court, deficient analytical reasoning, and being "on the wrong side" of history with respect to their cultural resonance.

The *Dred Scott* decision concluded that African-American slaves and their descendants were not "citizens of the United States" and hence ineligible to sue in the federal courts.[13] The decision further concluded that Congress could not outlaw slavery in federal territories because to do so would constitute an interference with the Fifth Amendment property rights of slaveholders.[14] The *Korematsu* decision allowed the federal government to evacuate American citizens of Japanese origin from the West Coast, where they were detained in internment centers during the course of World War II, even though the sole basis of their evacuation and detention was their national origin, and even though Americans of German or Italian extraction were not comparably treated.[15] Thus, *Dred Scott* committed the Court to the propositions that the Constitution protected the "rights" of humans to own other humans as property, and that African-Americans descended from slaves were a "degraded race" not worthy of United States citizenship, whereas *Korematsu* committed the Court to the proposition that American citizens of a particular ethnic origin could be summarily incarcerated by the government simply because of their ethnicity. Those

8. 60 U.S. (19 How.) 393 (1857).

9. 323 U.S. 214 (1944).

10. *See, e.g.*, Erwin Chemerinsky, Korematsu v. United States*: A Tragedy Hopefully Never to Be Repeated*, 39 PEPP. L. REV. 163 (2011); Daniel A. Farber, *A Fatal Loss of Balance:* Dred Scott *Revisited*, 39 PEPP. L. REV. 13 (2011); Paul Finkelman, *Coming to Terms with* Dred Scott*: A Response to Daniel A. Farber*, 39 PEPP. L. REV. 49 (2011); Robert J. Pushaw, Jr., *Explaining* Korematsu*: A Response to Dean Chemerinsky*, 39 PEPP. L. REV. 173 (2011).

11. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 264 (1985).

12. COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 238 (1997).

13. *Dred Scott*, 60 U.S. (19 How.) at 404.

14. *Id.* at 451.

15. *See* Korematsu v. United States, 323 U.S. 214 (1944).

propositions, as policy statements, seem blatantly at odds with the foundational principles of American civilization that all persons are created equal and may not be arbitrarily deprived of their liberty by the state.

The outcomes reached in *Dred Scott* and *Korematsu* appear to suggest that the Court found the policies of slavery and discrimination on the basis of ethnicity to be constitutionally legitimate. The decisions could also be seen as reflecting an inappropriate institutional stance by the Court with respect to its role of determining the constitutionality of the actions of other branches of government.

In *Dred Scott* the Court was asked to decide whether an African-American slave who had been taken by his owner into a federal territory where slavery was not permitted, and then "voluntarily" returned to a slave state, could sue for his freedom in federal court.[16] A majority of the Court found that African-American slaves were ineligible to sue in federal court.[17] That finding made any inquiry into the constitutional status of slavery in the federal territories irrelevant to the decision, but Chief Justice Roger Taney's opinion, which was characterized as the "opinion of the court," went on to conclude that the Due Process Clause of the Fifth Amendment, which according to Taney protected the property rights of slave owners, prevented Congress from abolishing slavery in the territories.[18]

The interaction of slavery and westward expansion has been recognized as one of the most deeply contested political issues of the antebellum period. The power of Congress to decide the status of slavery in federal territories had been acknowledged by supporters and opponents of slavery ever 1789, when Congress divided land acquired from Virginia, North Carolina, Pennsylvania, New York, and Connecticut into "northwest" and "southwest" portions, with the Ohio River serving as a boundary, and outlawed slavery in the northwest section while remaining silent on it in the southwest section.[19]

As slavery became a polarizing national issue in the early nineteenth century, it was generally conceded that although the federal government had no power to abolish slavery in states, it appeared to retain that power in federal territories.[20] All of the political compromises related to the westward expansion of slavery that were fashioned by Congress between 1820 and 1850 proceeded on that assumption. Moreover, as the United States acquired a vast amount of new territory between 1803 and 1853, the attitude

16. "Voluntary" is meant in the sense that the slave in question was not a fugitive from his or her owner, having returned in the company of the owner or, in Dred Scott's case, the owner's wife. *See Dred Scott*, 60 U.S. (19 How.) at 398.

17. *Id*. at 399, 404.

18. *Id*. at 451.

19. For more detail, see WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA 276–85 (1977); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 361–62 (2009).

20. WIECEK, *supra* note 19, at 16, 93, 102–04.

of Congress toward slavery in portions of that territory was thought to foreshadow the attitude of residents of those portions when states formed from them sought to enter the Union. The process by which Congress gave permission to new states to enter the Union was heavily influenced by expectations about whether the states would be free or slave, and those expectations were influenced by Congress's treatment of slavery in the portions of territory from which prospective states were carved out.[21]

By reaching out to decide the constitutional status of slavery in the federal territories in *Dred Scott*, the Taney Court treated the delicate balancing of free and slave territories, and free and slave states, as if it had been based on an erroneous assumption. Suddenly, Congress had no power to outlaw slavery in any federal territory.[22] That conclusion represented a dramatic intervention by the Court in an extremely sensitive political issue that Congress had sought to keep in equipoise. Moreover, the intervention was not necessary to the decision in *Dred Scott*.

Taney's conclusion that Congress had no power to outlaw slavery in the federal territories rested on two propositions. First, he announced that Congress's constitutional power to make rules and regulations for federal territories[23] extended only to territory within the United States in 1789.[24] Second, he maintained that the Due Process Clause of the Fifth Amendment protected property in slaves.[25] Both propositions were novel. Taney'sreading of the Territories Clause of the Constitution would have prevented Congress from exercising any of its enumerated powers outside the original thirteen states,[26] and Taney's interpretation of the Due Process Clause could not easily be squared with federal or state bans on the international or interstate slave trade, both of which were in place at the time of *Dred Scott*.[27]

In short, *Dred Scott* can be seen as reaching a pernicious result, representing a categorical judicial resolution of an issue long regarded as deeply contested in the political branches of government, and resting on some dubious legal arguments. In addition, it was described as a mistake by

21. For support for the observations in the above paragraph, see WIECEK, *supra* note 19.

22. *Dred Scott*, 60 U.S. (19 How.) at 441–42.

23. U.S. CONST. art. IV, § 3, cl. 2.

24. *Dred Scott*, 60 U.S. (19 How.) at 441–42.

25. *Id.* at 451.

26. *See* CURRIE, *supra* note 11, at 269; DON E. FEHRENBACHER, THE *DRED SCOTT* CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 367–68 (1978).

27. CURRIE, *supra* note 11, at 271–72.

contemporaries,[28] the Republican Party adopted a platform in the 1860 election pledging to continue to outlaw slavery in federal territories in defiance of the decision,[29] and it was explicitly overruled by the Thirteenth and Fourteenth Amendments to the Constitution.[30]

One could construct a similar analysis of the *Korematsu* decision. It gave constitutional legitimacy to the incarceration of large numbers of American residents of Japanese descent simply on the basis of their ethnicity. The internment program made no effort to distinguish aliens from citizens or Japanese loyal to the United States from those loyal to Japan.[31] Internments were of indefinite duration. They were often accompanied by the confiscation of property owned by Japanese residents. Detainees could not challenge their detentions through writs of habeas corpus. And even though Justice Hugo Black's opinion for the Court asserted that Japanese residents of the West Coast were "not [interned] because of [their] race" but "because we are at war with the Japanese Empire,"[32] the United States was also at war with Germany and Italy at the time, and few residents of German or Italian descent were interned during the course of that war.

Whereas the Court's posture with respect to other branches of government in *Dred Scott* might be described as awkwardly interventionist, its institutional posture in *Korematsu* might be described as awkwardly supine. The Court in *Korematsu* merely posited that military authorities had determined that allowing Japanese to remain on the West Coast posed threats of espionage and sabotage because Japan might invade the West Coast, and that relocating *all* Japanese to internment centers was necessary because there was no easy way to distinguish "loyal" from "disloyal" members of the Japanese population.[33] Although the *Korematsu* majority maintained that "legal restrictions which curtail the civil rights of a single racial group are immediately suspect," and courts "must subject them to the most rigid scrutiny,"[34] it arguably did not subject the restrictions on Japanese residents of the West Coast to any scrutiny at all. It simply noted that exclusion of "the whole group [of Japanese]"[35] from the West Coast was justified because of military authorities' concerns about espionage and sabotage by the Japanese on the West Coast, and their inability to "bring about an immediate segregation of the disloyal from the loyal."[36] The

28. For a sample of negative contemporary reactions to the *Dred Scott* decision, see 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 1836–1918, at 302–19 (1926).

29. JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 227 (1988).

30. U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 1, cl. 1.

31. Korematsu v. United States, 323 U.S. 214, 216 (1944).

32. *Id*. at 223.

33. *Id.* at 219.

34. *Id.* at 216.

35. *Id.* at 219.

36. *Id.*

Korematsu majority made no effort to determine whether military authorities had attempted to ascertain the loyalty of particular Japanese, or whether they had attempted to detain Germans or Italians anywhere in the United States. Instead, it concluded that the military authorities who ordered Japanese residents on the West Coast to leave their homes and report to "Assembly Centers," the first stage in their internment, were justified in doing so because they "considered that the need for action was great, and time was short."[37]

The legal arguments mounted by Black for the *Korematsu* majority were no more statured than those employed by Taney in *Dred Scott*. Although Black rhetorically endorsed strict scrutiny for acts restricting the civil rights of racial minorities, he failed to subject the internment policy to searching review while denying that the internment policy was racially motivated. Justice Robert Jackson pointed out in dissent that the standard of review implemented by Black's opinion—whether the military reasonably believed that one of its policies was justified by a grave, imminent danger to public safety—could not realistically be applied by courts.[38] Moreover, the *Korematsu* Court had not heard any evidence on what the military believed or whether they could distinguish loyal from disloyal Japanese. It would subsequently be revealed that most of the basis for the internment order rested on stereotyped assumptions about the "unassimilated" status of Japanese communities in America rather than on military necessity, and government officials concealed this evidence from the Court.[39]

Part of the reason that *Korematsu* would be "overruled in the court of history" resulted from the Court's subsequent implementation of the strict scrutiny standard for racial classifications proposed by Black in a series of cases reviewing classifications of African-Americans on the basis of their race.[40] Once the Court began to put some teeth into its review of policies affecting the civil rights of racial minorities, its rhetorical posture in *Korematsu* appeared disingenuous. In addition, the factors that led to the internment policy being formulated and upheld (uninformed stereotyping of a racial minority by military and civilian officials and reflexive deference on the part of the Court to the decisions of military officials in times of war) suggested that unless the Court actually followed through on its promise to subject racial discrimination to exacting scrutiny, the *Korematsu* precedent

37. *Id.* at 223–24.
38. *Id.* at 247 (Jackson, J., dissenting).
39. *See* PETER IRONS, JUSTICE AT WAR 186–218 (1983).
40. *See, e.g.*, *In re* Griffiths, 413 U.S. 717 (1973); McLaughlin v. Florida, 379 U.S. 184 (1964).

might become, as Jackson put it, "a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[41]

III. CHARACTERISTICS OF "MISTAKEN" DECISIONS: A FURTHER ANALYSIS

Dred Scott and *Korematsu* thus share pernicious outcomes, a questionable institutional stance on the part of the Court, flawed legal reasoning, and, over time, a location on the wrong side of history. At first glance those criteria might appear to be useful baselines for identifying notorious Supreme Court decisions, but a closer look at the criteria suggests that three of them seem heavily dependent on the fourth.

Suppose one were to make some assumptions about the *Dred Scott* and *Korematsu* decisions that numerous contemporaries of those decisions made. Suppose, with respect to *Dred Scott*, one believed that slavery was a creation of positive law, so that if states chose to permit it, they created "property rights" in slaveholders. Suppose further that it was understood that slave status was a matter for states to decide, and other states and the federal government needed to respect those decisions. Both those assumptions were in place at the time of the *Dred Scott* decision[42] and were part of the reason why Congress and a series of antebellum presidents attempted to maintain a precise equilibrium between slave states and free states as new public lands states entered the Union. In this setting, the idea that Congress could outlaw slavery in all of the territory acquired by the United States between 1803 and 1853—an area that more than doubled the size of the nation—was threatening to states with sizable slave populations. For example, in 1846, when President James K. Polk requested a congressional appropriation for funds to purchase lands from Mexico as part of a settlement to the Mexican War, David Wilmot, a Congressman from Pennsylvania, sought to attach a proviso to the appropriation that slavery would not be permitted in any of the territory acquired.[43]

Thus, contemporaries of the *Dred Scott* decision might well have thought that granting power to Congress to abolish slavery in federal territories would result in much of the newly acquired territory being "free," and thus, over time, the balance between slave states and free states in Congress being disrupted.[44] Many residents of slave states believed that it was a small step from that situation to an antislavery majority in Congress seeking to abolish slavery in the states.[45] When the 1860 presidential platform of the Republican Party defied *Dred Scott*'s conclusion that slavery

41. *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

42. *See* WIECEK, *supra* note 19, at 38–39, 276–77.

43. DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848, at 767–68 (2007).

44. MCPHERSON, *supra* note 29, at 190, 230, 232.

45. *Id*. at 232.

could not constitutionally be banned in federal territories, and Lincoln and a Republican congressional majority prevailed in the 1860 election, the Southern states who seceded from the Union stated that they were doing so because they believed that Congress would eventually seek to force them to abolish slavery.[46]

In addition, antebellum constitutional jurisprudence had a strong tradition of protection for "vested" rights of property. Once one assumed that humans could legitimately be "owned" by other humans, the idea that Congress or a state legislature could take away the property rights of slaveholders seemed no different, conceptually, than other legislative appropriations of property that were inconsistent with the vested rights principle. It was one thing for citizens of a state to decide, collectively, that they did not want to hold slaves as property. It was another for slaveholders to have their ownership rights in slaves dissolved merely because they had become residents of a federal territory.[47]

Finally, by the time *Dred Scott* was heard by the Court, Congress had demonstrated that it was no longer capable of containing the sectional tension that had resulted from the interaction of slavery with westward expansion. In the place of the Compromise of 1850's retention of the calibrated balance between slave and free states in the Union, Congress had substituted, in the Kansas-Nebraska Act of 1854, the idea that "popular sovereignty" would govern the treatment of slavery in federal territories aspiring to become states.[48] The results were the appearance of competing pro- and anti-slavery legislatures and constitutions in Kansas, subsequent violence in that state, and the prospect that the entire mass of western federal territory might be subjected to similar treatment. In this atmosphere a definitive constitutional treatment of the status of slavery in federal territories may have seemed a welcome solution to many contemporaries of the *Dred Scott* case.[49] Justice James Wayne advanced this argument in a memorandum to the Taney Court urging the Justices to take the occasion of *Dred Scott* to rule on the constitutionality of slavery in the federal territories.[50]

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46. *Id*. at 243–45.

47. *See* WIECEK, *supra* note 19, at 279, 283 (quoting resolutions by Southerners in 1850 and 1860, affirming protection from the property rights of slaveholders against interference by the federal government).

48. *See* 5 CARL B. SWISHER, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836–64, at 596 (1874).

49. *See* SWISHER, *supra* note 48, at 592–99.

50. *Id*. at 619 (citing letter from John A. Campbell, Supreme Court Justice, to George T. Curtis, co-counsel for Dred Scott (Oct. 30, 1879) (on file with the University of Virginia Library)).

If one emphasizes those antebellum assumptions about slavery and its political and constitutional status, the Court's intervention in *Dred Scott* becomes more explicable and more consistent with American constitutional jurisprudence at the time. One should recall that the Constitution interpreted in *Dred Scott* had all its "proslavery" provisions intact and that no major political candidate, including Lincoln, was advocating for the abolition of slavery in states where it had become established.[51] With this in mind, it is possible to see *Dred Scott* as a case not about the constitutional legitimacy of slavery itself, but about the constitutional legitimacy of *extending slavery into federal territories*. Were persons such as Dr. John Emerson, the owner of Dred Scott, and his wife to be at risk of losing their property every time they took up residence in a federal territory? If slavery was to prove economically viable in the territory acquired by the United States after the Mexican War, could Congress prevent it from taking root there? Faced with those possibly dire uncertainties, the Court in *Dred Scott* sought to settle the matter.[52]

The decision in *Dred Scott* thus can be deemed pernicious only if one concludes that a number of the decision's contemporary observers were radically wrong about the legitimacy of humans owning other humans as property, so that all the antebellum common law decisions, statutes, and constitutional provisions treating slavery as legitimate were entitled to no legal weight. That is what successive generations of Americans after *Dred Scott* have concluded. But that fact only shows that *Dred Scott* was on the wrong side of history. It does not provide support for the other criteria associated with notorious Supreme Court decisions.

To be sure, one could criticize the Court's aggressively interventionist stance in *Dred Scott*, and some of Taney's arguments in the opinion, as analytically flawed.[53] But many Supreme Court opinions have been criticized for undue activism or for inept reasoning. *Dred Scott*'s notoriety rests on something different: it upheld the constitutional legitimacy of slavery and suggested that African-Americans were an inferior class of beings. Once one restores a sufficient amount of historical context to show that both of those attitudes were part of the discourse of antebellum constitutional jurisprudence, the notoriety of *Dred Scott* initially seems to rest on its being on the wrong side of history.

A similar analysis is possible for *Korematsu*. For many years Chief Justice Earl Warren, who had been one of the architects of the internment

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51. For more detail on Lincoln's position, which deplored slavery as a moral evil, opposed its spread into new federal territories, hoped for its eventual abolition, but indicated that he would not interfere with slavery in states where it existed, see MCPHERSON, *supra* note 29, at 181–88.

52. For evidence that the Justices on the Taney Court broadened the inquiry in *Dred Scott* to include ruling on the constitutionality of slavery in federal territories, see SWISHER, *supra* note 48, at 611–19.

53. *See* CURRIE, *supra* note 11, at 265–69.

policy during his years as Attorney General and Governor of California, and Justices Black and Douglas, who had joined the majority in *Korematsu*, were unrepentant in their defense of the decision despite its apparent inconsistency with their willingness to protect the civil rights of minorities as members of the Warren Court.[54] In their defense of *Korematsu*, those Justices suggested that their critics needed to recall the decision's context. The United States Navy had been attacked by Japan at Pearl Harbor, and for two years after that attack, the Japanese navy appeared to be in control of the Pacific. Japanese submarines had been observed off the West Coast. Unlike German and Italian residents of America, Japanese residents were thought to be disinclined to assimilate into the general population, living in closely-knit communities and retaining Japanese as their first language.[55] Many first-generation Japanese citizens had close relatives in Japan, and some traveled back and forth between Japan and the United States.[56]

Warren, Black, and Douglas maintained that in this setting it was difficult for civilian authorities on the West Coast, most of whom did not speak Japanese, to determine the loyalty of the resident Japanese population. Warren recalled that numerous Japanese were engaged in the commercial fishing industry, resulting in fishing boats operated by Japanese regularly venturing into Pacific waters.[57] Warren was engaged with civil defense issues as Attorney General and Governor, and he and his staff worried that fishing boats manned by Japanese residents of America could be employed to flash signals to Japanese submarines, or possibly portions of the Japanese fleet, stationed off of the coast.[58] It seemed at the time, Warren recalled, that

54. *See* G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 75–76 (1982) [hereinafter WHITE, EARL WARREN]. As late as 1962, Warren defended the internment policy. *See* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 192 (1962).

55. *See* WHITE, EARL WARREN, *supra* note 54, at 75.

56. In *Hirabayashi v. United States*, a case testing the constitutionality of the curfew orders confining Japanese-Americans on the West Coast to their homes between the hours of 8:00 p.m. and 6:00 a.m., Chief Justice Harlan Fiske Stone's opinion, for a unanimous Court, contained the following paragraph:

> There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population. In addition, large numbers of children of Japanese parentage are sent to Japanese language schools outside the regular hours of public schools in the locality. Some of these schools are generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan. Considerable numbers, estimated to be approximately 10,000, of American-born children of Japanese parentage have been sent to Japan for all or a part of their education.

Hirabayashi v. United States, 320 U.S. 81, 96–97 (1943) (citations omitted).

57. EARL WARREN, THE MEMOIRS OF EARL WARREN 148 (1977).

58. *Id.*

potential sabotage or espionage could be forestalled by moving the resident Japanese population away from where they might have access to Japanese forces in the Pacific.[59]

In defending their role in implementing and sustaining the internment of Japanese residents of the West Coast, none of the Justices openly suggested that German or Italian residents were perceived of as less of a security threat than those of Japanese extraction, despite the fact that there were German submarines stationed off the Atlantic Coast. But both those populations had been in America far longer than Japanese residents, who had only come to the United States in substantial numbers in the early twentieth century and who were mainly located on the West Coast.[60] Americans had far greater linguistic familiarity with German and Italian than with Japanese. At the time the United States entered World War II, few Americans had encountered Japanese students in public schools or colleges. There were reasons for contemporaries of the *Korematsu* decision to believe the stereotype of "unassimilable" Japanese communities in America.

Further, there was considerable revulsion against Japan in the United States for the bombing of Pearl Harbor. President Franklin D. Roosevelt referred to the event as a "date which will live in infamy."[61] Numerous Americans regarded it as outside the unwritten rules of wartime engagement since the United States was not a belligerent at the time the naval base at Pearl Harbor was attacked. Among the negative stereotypes applied to the nation of Japan after Pearl Harbor were tendencies to dissemble and to exhibit a ruthless disregard for human life. Sabotage operations among "unassimilable" Japanese communities on the West Coast were consistent with those stereotypes.

As for the Court's toothless standard of review in *Korematsu*, it was actually more searching, at least rhetorically, than the standard the Court had employed in *Hirabayashi v. United States*, decided a year earlier. Although technically the *Hirabayashi* case only involved a curfew order, not evacuation, a unanimous Court concluded that its standard of review of the order should be whether there was a rational basis for concluding that the curfew was necessary to protect against espionage and sabotage which might accompany an invasion. Even though there had been no evidence of sabotage, and even though officials had not advanced any reasons for why

59. *Id.* at 147–49.

60. Substantial German immigration to the British colonies in America had begun by the middle of the eighteenth century, and the numbers of German immigrants to the United States increased after the widespread political strife in Western Europe in the late 1840s. Italian immigration to the United States began to reach substantial numbers by the 1850s and continued to increase through the 1920s. *See* A DOCUMENTARY HISTORY OF THE ITALIAN AMERICANS 27–38 (Wayne Moquin & Charles Van Doren eds., 1974); LA VERN J. RIPPLEY, THE GERMAN AMERICANS 72–77 (1976).

61. Franklin D. Roosevelt, President of the United States, Address to the Congress Asking That a State of War Be Declared Between the United States and Japan (Dec. 8, 1941), *reprinted in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 514 (Samuel I. Rosenman ed., 1950).

Japanese residents should be singled out among those groups of residents that had "ethnic affiliations with an invading enemy,"[62] the Court concluded that it could not say that the officials were mistaken in thinking that requiring Japanese-Americans to remain in their homes from 8:00 p.m. to 6:00 a.m. was necessary to the war effort.[63]

Thus Black's opinion in *Korematsu* at least recognized that the supine form of review adopted in *Hirabayashi* gave officials license to selectively restrict the activities of racial minorities without having to say why. Of course then after asserting that nothing but the gravest national emergency could justify classifications disadvantaging racial minorities, Black blithely accepted the same supposed justifications for interning Japanese residents on the West Coast that the *Hirabayashi* opinion had accepted in sustaining the curfew order. But given the fact that the United States and Japan were still at war in 1944, when *Korematsu* was handed down, and that American naval supremacy in the Pacific was far from assured at the time, how likely was the Supreme Court of the United States to engage in a searching investigation of a civil defense strategy designed to protect the West Coast from a Japanese invasion?

Black argued in *Korematsu* that "[t]o cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue."[64] Korematsu, Black claimed, "was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese empire."[65] There was no way at the time for civilian or military authorities to gauge the threat of a Japanese invasion of the West Coast and little way of predicting the response of Japanese residents in America to that prospect. One could argue that *Korematsu* is one of those decisions that looks far worse in retrospect than it did at the time because some contingencies that were part of the basis of the decision—an invasion, Japanese-directed sabotage or espionage on the West Coast—did not actually occur. In light of that nonoccurrence, and the heightened sensitivity of late twentieth century and twenty-first century Americans toward racial classifications, *Korematsu* has ended up on the wrong side of history.

The question raised by the above analyses of *Dred Scott* and *Korematsu* boils down to this: should one conclude that the ranking of previous

62. Hirabayashi v. United States, 320 U.S. 81, 101 (1943).
63. *Id*.
64. Korematsu v. United States, 323 U.S. 214, 223 (1944).
65. *Id*.

decisions by the Court is essentially determined by whether a decision is perceived as being on the right or wrong side of history?

That conclusion seems oversimplified. Most decisions of the Court have a limited doctrinal shelf life. None of the Marshall Court's decisions interpreting the scope of the Commerce Clause[66] or the reach of the Contracts Clause[67] would be considered authoritative today. Nor would the efforts by late nineteenth century and early twentieth century Courts to "prick out the boundary," in police power and due process cases, between permissible and impermissible exercises of the police powers of the states be considered authoritative today.[68] Nor would the early and mid-twentieth century Court's treatment of obscenity,[69] commercial speech,[70] or subversive advocacy[71] be considered authoritative today. Does doctrinal obsolescence in a decision of the Court render it notorious? The answer would seem to be, on the whole, no.

A recent treatment of the majority opinion in *Lochner v. New York* can serve as an illustration. That opinion was a candidate for notoriety for several years in the middle and late twentieth century, primarily on the ground that it employed the discredited judicial doctrine of "liberty of contract" to invalidate maximum hours legislation initiated as a health measure. But the majority opinion in *Lochner v. New York* has been "rehabilitated" on the ground that in an era in which Justices were expected to engage in pricking the boundary between the police power and private rights in due process cases, it rested on the widely held assumption that legislative efforts to fix hours in the baking industry were unwarranted, paternalistic interferences with the freedom of employees to contract for their services. Furthermore, judicial efforts to attach substantive meaning to

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66. *See* Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829); Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

67. *See* Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823); Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819); Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815); New Jersey v. Wilson, 11 U.S. (7 Cranch) 164 (1812); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

68. *See* Tyson & Brother—United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418 (1927); Adkins v. Children's Hosp., 261 U.S. 525 (1923); Block v. Hirsh, 256 U.S. 135 (1921); Coppage v. Kansas, 236 U.S. 1 (1915); German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914); Muller v. Oregon, 208 U.S. 412 (1908); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905). The "pricking out the boundary" language is from Chief Justice Taft's dissenting opinion in *Adkins*, where he said that in police power and due process cases, Justices would be pricking out "[t]he boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the Fifth and Fourteenth Amendments." *Adkins*, 261 U.S. at 562.

69. *See* Memoirs v. Massachusetts, 383 U.S. 413 (1966); Roth v. United States, 354 U.S. 476 (1957).

70. *See* Breard v. Alexandria, 341 U.S. 622 (1951); Valentine v. Chrestensen, 316 U.S. 52 (1942).

71. *See* Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 47 (1919).

terms such as liberty in the Due Process Clause were then regarded as consistent with the judiciary's role as a guardian of private rights under the Constitution.[72]

In short, the *Lochner* majority's being on the wrong side of history for later commentators was not in itself a reason for treating the opinion as notorious if it was on the right side of history for contemporaries. *Lochner* was handed down by a divided Court, with Justice John Marshall Harlan's dissenting opinion also engaging in "boundary pricking," but concluding that the statute establishing maximum hours of work in the baking industry could be justified as reasonable exercise of the power to the states to protect the health of their citizens.[73] Only Holmes's dissenting opinion suggested that "liberty of contract" was an unwarranted judicial gloss, and no commentator would endorse that position for another four years.[74] It was not until 1937 that a majority of the Court would back away from the doctrine.[75]

In contrast, the *Korematsu* decision was criticized, as early as six months after it was decided, as "hasty, unnecessary and mistaken," "in no way required or justified by the circumstances of the war," and "calculated to produce both individual injustice and deep-seated social maladjustments of a cumulative and sinister kind."[76] As for *Dred Scott*, we have seen that criticism of that decision was immediate and widespread, and the election of 1860 suggested that its holding as to the status of slavery in the federal territories would not be enforced by either the Lincoln Administration or Congress.

Thus perceptions about the wrongheadedness of a result can affect evaluations of the reasoning accompanying that result and of the institutional stance adopted by the Court in the decision, but, taken alone, neither the doctrinal obsolescence of an opinion nor the subsequent estrangement of commentators from an outcome are enough to ensure notoriety. It seems to

72. *See generally* DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

73. *Lochner*, 198 U.S. at 66–71.

74. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 464 (1909). For more detail, see G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 363–65 (1993) [hereinafter WHITE, JUSTICE OLIVER WENDELL HOLMES].

75. In *West Coast Hotel Co. v. Parrish*, Chief Justice Hughes, for the Court, said that "[t]he Constitution does not speak of freedom of contract. . . . [R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

76. Eugene Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 489 (1945). That criticism was echoed in JACOBUS TENBROEK ET AL., PREJUDICE, WAR AND THE CONSTITUTION 236–41 (4th prtg. 1970).

be implicitly acknowledged that the popularity of outcomes reached by the Court in its decisions will change over time, and that the shelf life of the Court's constitutional doctrines will be comparatively short. What seems necessary for notoriety is a combination of foundational wrongheadedness and transparently defective reasoning, both of which *are identified by contemporaries of the decision*. On that ground both *Dred Scott* and *Korematsu* qualify. Taney's interpretation of the Territory Clause and his conclusion about the "degraded" status of African-Americans at the founding were attacked by Justice Benjamin Curtis in his *Dred Scott* dissent[77] and numerous commentators in the press at the time.[78] Black's rationale for upholding the evacuation order in *Korematsu* and the general treatment of Japanese-Americans by the United States government was savaged shortly after the decision was handed down by Yale law professor Eugene Rostow.[79]

Lochner's notoriety appears more fleeting. Commentary on the decision when it was handed down was confined to the issue present in all of the early twentieth century Court's police power and due process cases: the appropriate boundary line between public power and private rights.[80] *Lochner* only became "notorious" when, in the late 1930s, redistributive social welfare legislation came to be seen as politically and economically acceptable and, in part for that reason, the Court began to abandon its "boundary pricking" stance in police power cases. At that point *Lochner* began to look like a decision that combined judicial overreaching with support for outmoded theories of political economy.[81] But as late twentieth century and early twenty-first century Courts have revived aggressive scrutiny, even occasionally of legislation affecting social and economic transactions, and free market theories of political economy have resurfaced, *Lochner* looks less like a foundationally wrongheaded decision than a product of a phase in the Court's history.[82]

What can we conclude from the above exercise? First, although a pernicious outcome is a necessary condition of notoriety in a decision and has the capacity to infect analysis of the legal reasoning in that decision, it is not a sufficient condition. Neither is inept legal reasoning, nor an indefensibly supine or aggressive review stance. What seems necessary is a

77. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 584–88, 624–27 (1857) (Curtis, J., dissenting).

78. See sources cited in WARREN, *supra* note 29, at 302–19.

79. Rostow, *supra* note 76, at 503–09, 531–33.

80. *See* WHITE, JUSTICE OLIVER WENDELL HOLMES, *supra* note 75, at 364 nn.65–66.

81. For more detail, see G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 265–68 (2000) [hereinafter WHITE, THE CONSTITUTION AND THE NEW DEAL].

82. For more detail, see G. EDWARD WHITE, *Historicizing Judicial Scrutiny*, *in* HISTORY AND THE CONSTITUTION: COLLECTED ESSAYS 136 nn.4–5 (2007) [hereinafter WHITE, HISTORY AND THE CONSTITUTION].

combination of all of those qualities, plus a recognition of the decision's notoriety by contemporaries. The reason this last criterion is important is that it serves to wrest the decision from its historical context, thereby ascribing to it a kind of transcendental wrongheadedness. Here we see the difference between *Dred Scott* and the *Lochner* majority opinions. The former was recognized as an abomination by contemporaries; the latter only became "abominable" when mandatory hours and wages legislation came to be treated as enlightened, so that scrutiny of that legislation in the name of hitherto acknowledged economic liberties against the state fell out of favor. *Dred Scott* shows no signs of losing its status as an abomination. In contrast, the assumptions that drove the critique of the *Lochner* majority now seem as historically driven as those that fueled *Lochner* itself.[83]

IV. NOTORIETY AND DISCOUNTING FOR HISTORY: *CAROLENE PRODUCTS*

I began this analysis by suggesting that since the outcome of a decision has a capacity to infect the analysis of the legal reasoning accompanying it, or the institutional stance adopted by the Court in it, the process for determining notorious decisions runs the risk of becoming overwhelmed by subjectivity. But then another dimension of the process of determining notoriety surfaces. Observation reveals that only a relatively small number of decisions have been treated as notorious throughout time. A much larger number of decisions whose outcomes have come to be regarded as wrongheaded, and whose reasoning has come to be thought obsolete, have escaped being labeled notorious. This observation suggests that commentators do not reflexively ascribe notoriety to decisions with those latter characteristics, but tend to be more tolerant of changing historical attitudes and more accepting of doctrinal obsolescence than might first appear. What seems to be taking place is an implicit trade-off between "discounting for history"—a recognition that since many outcomes and much reasoning will seem outmoded with time, obsolescence should not in itself stigmatize a decision—and the power of subjective revulsion against an outcome.[84] Sometimes a decision will seem so wrongheaded that one is tempted to call it notorious, but, on further examination, one runs up against the fact that most of its contemporaries found the decision unproblematic.[85]

83. This sort of commentary, extending back to the 1980s, is now conventionally referred to as "*Lochner* revisionism." *See* BERNSTEIN, *supra* note 72, at 120–22.

84. I use the phrase "discounting for history" in a different context in G. Edward White, *Neglected Justices: Discounting for History*, 62 VAND. L. REV. 319 (2009).

85. Consider, in this vein, two majority decisions written by Justice Holmes: *Buck v. Bell*, 274 U.S. 200 (1927) and *Baltimore & O.R. Co. v. Goodman*, 275 U.S. 66 (1927). The former, which is

At that point closer analysis will typically reveal that the reasoning of the decision was grounded on starting assumptions which subsequent generations have abandoned. That revelation serves to make the decision appear historically contingent rather than transcendentally wrongheaded.

Two features of the above analysis require some additional discussion. The first involves the weight to be assigned to criticism of arguably notorious decisions by contemporaries at the time the decisions were handed down. If that criterion is to be made a basis for considering the decisions as transcendent mistakes, who counts as critics, and what sort of criticism can be deemed sufficiently weighty to label a decision as problematic from the moment of its issuance?

Here one confronts a basic challenge in any sort of historical analysis. A historian can never fully exhaust the source material presented by the past, nor provide definitive accounts of past events or the attitudes of historical actors. The explicit or implicit selection and presentation of historical data is a core function of historical scholarship, and that scholarship carries with it a burden of persuading its audiences that the historian's choices in selecting and presenting data have been plausible. Thus, choosing to attribute significance to the criticism of Supreme Court decisions by some contemporaries is not different in kind from the choice to give interpretive weight to any historical data.

That said, the process of extracting and analyzing past criticism of Supreme Court decisions will invariably privilege those commentators whose criticism appears in published sources of some durability, such as books, newspapers, journals, legal opinions and commentary, and, in some cases, collections of letters. Contributions to such sources, for most of American history, have been primarily the province of literate elites. Thus, in attributing historical significance to such criticism, one is necessarily attributing a form of influence to elites and to elite audiences. This is not to suggest that the attitudes of such members of the public *should* be given disproportionate weight, merely to recognize that it has been those members that have been able to publicize their opinions widely and to preserve them in public records.

The second feature follows from the fact that what I am calling "historical discounting" is a process in which past decisions are not only historicized—treated as largely historical documents that are the product of the experiences and attitudes of previous generations—but also enlisted, by

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treated at length in this symposium, was joined by seven members of the Court, including Justice Brandeis and Justice Stone, with only Justice Pierce Butler dissenting without opinion. The latter, laying down the "stop, look, and listen" rule for drivers of vehicles crossing railroad tracks, was unanimous. For symposium articles discussing *Buck v. Bell*, see Edward J. Larson, *Putting* Buck v. Bell *in Scientific and Historical Context: A Response to Victoria Nourse*, 39 PEPP. L. REV. 119 (2011); Victoria Nourse, Buck v. Bell*: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 101 (2011).

current courts and commentators, as present sources of authority. Just as a past decision of the Court is capable of being rendered "obsolete" by subsequent generations, it is capable of having its authority *enhanced* as an authoritative precedent or an illustration of some fundamental principle of law.

I want to consider *United States v. Carolene Products Co.*[86] as an illustration of this twofold quality of historical discounting. That decision, far from being labeled a notorious mistake, is conventionally thought of as remarkably prescient, one in which the Court simultaneously adopted a posture of deference in cases reviewing the constitutionality of legislation affecting social and economic transactions and laid the groundwork for more heightened review where legislation affected the civil rights of minorities.[87] A closer look at *Carolene Products*, however, suggests that it rested on a set of unarticulated and historically contingent starting assumptions.

Carolene Products challenged the constitutionality of a 1923 congressional statute prohibiting the shipment in interstate commerce of skimmed milk compounded with any fat or oil other than milk fat. The Carolene Products Company had manufactured a compound of condensed skim milk and coconut oil, called "Milnut," that resembled condensed milk or cream. The statute declared that "filled milk," which it defined as any milk to which had been added any fat or oil other than butter fat, was "an adulterated article of food, injurious to the public health" and "a fraud on the public."[88] Violators of the statute were subjected to fines and possible imprisonment. The Carolene Products Company challenged the statute as exceeding the scope of Congress's power under the Commerce Clause and denying the company equal protection of the laws, as well as depriving it of property without due process of law under the Fifth Amendment. The basis for the latter two claims[89] was that Congress had not seen fit to apply the statute to oleomargarine, a butter substitute in which vegetable fat was

86. 304 U.S. 144 (1938).

87. *Carolene Products* has been called a "great and modern charter for ordering the relation[s] between judges and other agencies of government" and containing "the most celebrated footnote [outlining bifurcated review] in constitutional law." *See* Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979); Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982).

88. *Carolene Products*, 304 U.S. at 146, 147.

89. The Commerce Clause issue was doctrinally one-sided, and Justice Stone, writing for a majority of the Court (Justice Black joined that portion of Justice Stone's opinion) easily disposed of it. The company's argument was that in seeking to regulate public health Congress was invading the police powers of the states. A long line of cases had held that Congress could exclude articles from interstate commerce if it reasonably concluded that their use would be injurious to public health, even if in so doing its exercise of the commerce power was "attended by the same incidents which attend the exercise of the police power of the states." *Id.* at 147.

substituted for butter fat, and that no determination had been made that Milnut was actually injurious to public health.

Prior to *Carolene Products*, a federal or state statute challenged on constitutional grounds would typically have been subjected to the uniform level of scrutiny adopted by the Court in such cases, in which no presumption of constitutionality was afforded to the statute.[90] Had that level of scrutiny been undertaken, Congress would have needed to establish that Milnut was in fact dangerous to public health, by way of negating the possibility that the legislation was not a health measure at all, but an illustration of effective lobbying by producers of whole milk who sought to retard competition from less expensive milk substitutes.[91] Justice Stone, however, referred to a "presumption of constitutionality" when the Court reviewed challenged legislation, subsequently adding that,

> [R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.[92]

He cited two cases in support of those claims, neither of which provided independent support for them.[93]

Once the presumption of constitutionality and his "rational basis" standard of review were in place, Justice Stone suggested, it would have been enough that Congress had declared "filled milk" products lacking in butter fat to be injurious to the public health even if it had not stated a reason, because the Court could derive a rational basis for the legislation from the declaration itself.[94] But Congress had held hearings and made

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90. *See* WHITE, HISTORY AND THE CONSTITUTION, *supra* note 82, at 135.

91. A study of the legislation in *Carolene Products* has concluded that the statute was the result of a lobby effort by milk producers rather than a health measure. Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397, 398–99.

92. *Carolene Products*, 304 U.S. at 152.

93. The first of those cases, *Metropolitan Casualty Insurance Co. v. Brownell*, another Stone opinion, stated that "the burden of establishing the unconstitutionality of a statute rests on him who assails it," with no supporting citations. Metro. Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1934). The second case, *State Board of Tax Commissioners v. Jackson*, only stated that in cases of taxation, states could make distinctions among classes of trades or businesses so long as they were not arbitrary or capricious. State Bd. of Tax Comm'rs v. Jackson, 283 U.S. 527, 537 (1931). Taken together, the cases did not provide support for Justice Stone's claim that legislation affecting "ordinary commercial transactions" should be presumed to be constitutional.

94. As Stone put it,

> There is no need to consider [the statute's assertions that filled milk was injurious to public health and its sale a fraud on the public] as more than a declaration of the legislative findings deemed to support and justify the action . . . . Even in the absence of

reports in connection with the Filled Milk Act, and its committees had based their conclusions that filled milk was injurious to public health on the testimony of experts that "[b]utter fat, which constitutes an important part of the food value of pure milk, is rich in vitamins, food elements which are essential to proper nutrition."[95] Those elements were "wanting in vegetable oils."[96] The use of filled milk as a dietary substitute for pure milk thus resulted, "especially in the case of children, in undernourishment [which] induces diseases that attended malnutrition."[97]

When one looks closely at Justice Stone's opinion in *Carolene Products*, it becomes clear how much work was being done by his presumption of constitutionality and his endorsement of a rational basis standard of review for "regulatory legislation affecting ordinary commercial transactions."[98] Those devices enabled him to avoid the critical question in the case, whether Congress could prohibit shipments of Milnut in interstate commerce without a specific finding that Milnut was injurious to public health. A more searching scrutiny of the Filled Milk Act might have resulted in the Court concluding that a complete prohibition on interstate sales of Milnut, based only on the supposition that products containing vegetable oil were less nutritious than those containing butter fat, was a deprivation of property without due process, especially since that prohibition had not been extended to oleomargarine.[99]

Even if one assumes that Congress had decided to start off by prohibiting sales of filled milk, which could be made to look and taste very much like whole milk, and might get around to prohibiting sales of oleomargarine (at the time more easily distinguishable from butter), the idea

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> such aids the existence of facts supporting the legislative judgment is to be presumed . . . .

Carolene Products, 304 U.S. at 152.

95. *Id.* at 149 n.2.

96. *Id.*

97. *Id*. Justice Stone added, "There is now an extensive literature indicating wide recognition by scientists and dietitians of the great importance to the public health of butter fat and whole milk as the prime source of vitamins, which are essential growth producing and disease preventing elements in the diet." *Id*. at 150 n.3.

98. *Id.* at 152.

99. That argument presupposed an "equal protection" dimension to the Fifth Amendment, despite its lacking an Equal Protection Clause. The presupposition, well established in early twentieth century constitutional jurisprudence, was that in some instances federal legislation establishing unjustifiable discriminations among classes of persons could amount to denials of due process. Stone responded to that argument by stating that "[a] legislature may hit at an abuse which it has found, even though it has failed to strike at another," and the decision as to "whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited" was up to Congress. *Id*. at 151, 154.

that butter fat was more nutritious in a diet (or even that it contained more vitamins than vegetable oil) would certainly be contested by some contemporary theories of nutrition. Thus the entire premise of the legislation, that milk products containing coconut oil were injurious to public health in a manner that milk products containing butter fat or butter substitutes containing vegetable oil were not, appears suspect. Heightened scrutiny of the Filled Milk Act might have revealed that producers of oleomargarine, in addition to producers of whole milk, had been more effective lobbyists than producers of filled milk.

The last feature worth noting about *Carolene Products* is that the portion of Justice Stone's opinion declaring that legislation regulating "ordinary commercial transactions" [100] should be presumed constitutional if grounded on a rational basis was not endorsed by a majority of the Court. Of the nine Justices on the Court when *Carolene Products* was handed down, two, Justice Cardozo and Justice Reed, took no part because their appointments had taken place after the case had been argued. Of the seven remaining, Justice McReynolds dissented, Justice Butler concurred in the result, and Justice Black concurred in all of Justice Stone's opinion "except the part marked '*Third*,'"[101] the portion in which Justice Stone announced the presumption of constitutionality for legislation regulating "ordinary commercial transactions." Thus, Stone's decision to adopt a posture of rational basis review for an indefinite number of cases involving legislation regulating economic activity or redistributing economic benefits was endorsed only by Justices Hughes, Brandeis, and Roberts. And since footnote four of *Carolene Products*, for which the opinion has been most celebrated, was also in the portion Justice Black disclaimed, there was also no majority for the suggestions in that footnote that heightened scrutiny might be reserved for other sets of cases, including those involving legislative "prejudice against discrete and insular minorities."[102]

In sum, a close reading of *Carolene Products* seems compatible with several conclusions. First, the Court gave little attention to the possibility that the Filled Milk Act, as a health measure, was based on scanty evidence about the health effects of milk products made with vegetable oil. Additionally, the Court altered the standard of review for legislation regulating "ordinary commercial transactions," shifting it from a more heightened form of scrutiny, hitherto uniform across a range of cases, to rational basis scrutiny, and it provided no basis for that change other than unsupported language in an earlier opinion by Stone. Finally, at the same time, the Court invented a "presumption of constitutionality" for "ordinary

100. *Id*. at 152.
101. *Id*. at 155.
102. *Id.* at 153 n.4.

commercial transactions" legislation, in that instance providing no support whatsoever.

The Court's innovations affecting its standard of review in *Carolene Products* would play a substantial role in the development of its constitutional jurisprudence over the next several decades. On the whole, commentators have been supportive of a review posture that has had the effect of sustaining most challenges to the legislative regulation of commercial transactions and made it more difficult for legislatures to restrict civil rights, especially those of minorities. It may not be too much to claim that the bifurcated review initiated by *Carolene Products* was the Court's chief response to the argument, increasingly fashionable after World War II, that any effort on the part of an unelected group of nine Justices to second-guess the policy decisions of elected branches of government was "counter-majoritarian" and therefore inconsistent with democratic theory.[103] One commentator referred to the Warren Court, which overruled legislation establishing racial classifications, apportioned seats in state legislatures on grounds other than population, and required prayers in public schools, as a "*Carolene Products* Court."[104]

But one could argue that the celebrated status of *Carolene Products* has come almost entirely from being on the right side of history, the side in which members of current generations enlist past decisions as support for policies they endorse in the present. On the whole, middle and late twentieth century Americans favored legislation regulating economic activity and redistributing economic benefits, while at the same time demonstrating increased support for civil liberties and heightened concern about discrimination based on race, religion, national origin, and gender. The bifurcated review posture prefigured in *Carolene Products* reinforced those policies.

Yet there did not seem to be any compelling *legal* reason for the *Carolene Products* Court to adopt its posture of bifurcated review. Prior to the early twentieth century the Court made no effort to condition the degree of scrutiny it afforded legislation challenged on constitutional grounds on the subject matter of the legislation. The "boundary pricking" posture

103. That argument is often associated with Alexander Bickel's 1962 book, *The Least Dangerous Branch*, which coined the phrase "counter-majoritarian difficulty." ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962). Bickel's phrase is best understood as the encapsulation of arguments that had emerged in law review commentary over the preceding two decades. For illustrations, see the sources cited in G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 91–99 (2010).

104. John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 5 (1978).

adopted by late nineteenth century and early twentieth century Courts was employed in cases where legislatures restricted noneconomic as well as economic "liberties."[105] Boundary pricking presupposed that the Court would be an active guardian of individual rights, whether the rights in question derived from the Constitution's protection for property or for freedom of speech. On numerous occasions late nineteenth century and early twentieth century Courts sustained legislation as an appropriate exercise of the power to regulate public health, safety, or morals; on other occasions they invalidated the legislation. Pricking out the boundary between public power and private rights was assumed to be a central function of the judicial branch under the Constitution.

The idea that judicial glosses such as "liberty of contract" were impermissible substitutions of the economic theories of judges for those of more representative institutions emerged when the established nineteenth century conception of judging as an exercise in finding and declaring a body of preexisting legal principles was undermined by modernist theories of causal agency, which posited that "law" was synonymous with the policies of its interpreters, so that judges were simply another species of policymakers. Once modernist conceptions of judging became prominent, the "difficulty" that Supreme Court Justices were substituting their policy views for those of more majoritarian legislatures emerged.[106]

A deferential theory of judicial review was consistent with those conceptions of judging because it ostensibly limited the ability of judges to make policy decisions in the guise of constitutional interpretation, thereby ensuring that policy would be made by more majoritarian institutions. But the logic of modernist theories of judging supported deferential review in all cases. *Carolene Products* review was not uniformly deferential, but bifurcated. The retention of a heightened standard of review for certain cases suggested that certain noneconomic liberties were simply being given greater priority. In the wake of *Carolene Products*, one of the rationales for heightened review in free speech and freedom of religion cases that surfaced on the Court in the 1940s was that freedom of expression occupied a "preferred position" among constitutional rights in a democratic society because of its close connection to participatory government.[107]

So the best explanation for the appearance of *Carolene Products* review in the late 1930s and 1940s is that it fit comfortably with modernist

105. For example, the Court concluded that police power statutes infringed on the Fourteenth Amendment's "liberties" to learn foreign languages and direct the upbringing of children. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–36 (1925); Meyer v. Nebraska, 262 U.S. 390, 400–03 (1923).

106. The relationship of deferential and bifurcated review to modernist theories of causal agency and modernist conceptions of judging is discussed in more detail in WHITE, THE CONSTITUTION AND THE NEW DEAL, *supra* note 81, at 165–236.

107. For more detail, see *id*. at 143–52.

conceptions of judging and policies that favored legislative regulation of economic activity and disfavored legislative restrictions on certain civil rights, notably freedom of speech and religion. Over time, as cases involving racial segregation heightened attention to legislative discrimination against the civil rights of racial and ethnic minorities, paragraphs two and three of footnote four in *Carolene Products*, which suggested that heightened scrutiny might be called for when legislation was directed against powerless "discrete and insular minorities," came to be emphasized as well.[108] None of those developments were based on a provision of the Constitution or some other authoritative legal source. They were simply ways of accommodating judicial review to modernist theories of the judicial function, diminished support for the primacy of economic rights, and a heightened concern for the civil liberties of minorities.

Thus, one could see the features of *Carolene Products* that both drove the outcome in that case and ushered in the bifurcated standard of review as largely the products of Stone's problematic reasoning, but at the same time on the right side of history because they were culturally resonant. Stone and many of his fellow Justices wanted to get the Court out of the business of boundary pricking in police power cases so that Congress and the states could get on with the regulatory and redistributive legislation that seemed appropriate for a damaged economy. Moreover, in an age where totalitarian governments were emerging across the globe, members of the Stone Court did not want to leave religious and political minorities wholly at the mercy of legislative majorities. *Carolene Products* review facilitated both those goals. But at the same time it was a departure from the Court's long-established posture of judicial review, and a departure that had been fashioned on the slimmest of legal authorities.

V. CONCLUSION

Few persons would be inclined to ascribe notoriety to *Carolene Products*. But a close analysis of that decision serves to highlight the balance between a substantive appraisal of outcomes and discounting for history that is at the heart of the process of labeling a decision "notorious." If one focuses on the way in which Stone arrived at the outcome in *Carolene Products*, the decision appears to turn on a largely unsupported reversal of the Court's traditional standard of review of constitutionally challenged legislation, resulting in supine deference to the questionable findings about nutrition used by Congress to buttress arguably pretextual legislation. If, on

108. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

the other hand, one focuses on the emergence of modernist theories of law and judging in the early twentieth century and the mainstream political and economic attitudes of Americans in the late 1930s, the decision seems historically resonant in a quite powerful fashion. *Carolene Products* turns out to be a case in which the twofold effect of discounting for history reveals itself: the resonance of a decision to later generations serves to increase its stature and to downplay its problematic features.

Notoriety thus seems reserved for those decisions where historical discounting is neither sufficient to overcome the stigma associated with their outcomes, nor to ameliorate difficulties with their legal reasoning or their institutional posture. The reason comparatively few decisions end up in the category of transcendent mistakes is that, in most cases, examination of the historical context of decisions serves to provide evidence of why they seemed plausible to contemporaries, if not necessarily plausible to subsequent generations. Moreover, in some instances, as *Carolene Products* illustrates, the subsequent resonance of decisions can serve to minimize their shaky analytical foundations.

Closer analysis of the qualities previously identified with notorious decisions has shown that the outcomes reached in cases have a way of infecting reactions to the legal analysis employed by the Courts who reach them and the institutional stances reflected in the decisions. *Dred Scott*'s conclusion that the federal government was powerless to eradicate slavery in federal territories was regarded as sufficiently pernicious to place Taney's interpretations of the Territory Clause and the Fifth Amendment's Due Process Clause under searching scrutiny, and both of those readings have been severely criticized. Moreover, *Dred Scott*'s effort to fashion a definitive resolution of the constitutional status of slavery in all the newly acquired territory of the United States has invited criticism of the Taney Court for reaching out to resolve that issue when its resolution was not necessary to the central question in the case, whether a person of African-American descent could sue in the federal courts of the United States.

One could argue that all that criticism of *Dred Scott* can be associated with the fact that the decision, which legitimated slavery in federal territories and suggested that the federal government could never abolish it, was on the wrong side of history. But when a historical discount is applied to *Dred Scott*, it does not serve as a substantial counterweight to the perniciousness of the decision because numerous contemporaries reacted to the outcome with revulsion and criticized it on legal and policy grounds. Thus the typical role historical discounting plays in the evaluation of cases, to demonstrate how retrospective criticism of a decision is often a function of altered attitudes about public policy rather than some transcendent

wrongheadedness in the decision itself, is not present in notorious cases.[109] Contemporaries of those decisions can be enlisted to show that they were regarded as pernicious and flawed at the time they were handed down.

If one employs the criteria for notoriety outlined in this article, one would expect the number of notorious Supreme Court decisions, those whose wrongheadedness is of sufficient magnitude to transcend their historical contexts, to be small. That seems appropriate if a substantial historical discount is to be applied to decisions of the Court. Given that the doctrinal shelf life of most Court decisions is comparatively short, that attitudes toward the role of Supreme Court Justices as social and political actors have changed dramatically over time, and that so many features of American society once taken as beyond dispute have subsequently been revealed as historically contingent, such a discount seems necessary if the bulk of the Court's decisions are to be properly understood. Discounting most of the Court's "obsolete" decisions also has the effect of shining a brighter light on its transcendent mistakes, the decisions for which the Court gets no historical discount. By ascribing notoriety to those decisions, we remind ourselves that although judges, like other humans, are mainly creatures of their historical circumstances, they are also occasionally capable of making mistakes that can span the ages.

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109. *Cf.* Balt. & Ohio R.R. Co. v. Goodman, 275 U.S. 66 (1927). This case was overruled seven years after it was decided, and whose "stop, look, and listen" rule for vehicles crossing railroad tracks has long been regarded as nonsensical. The *Goodman* case was unanimous, possibly because having a uniform rule establishing a standard of care in grade crossing cases meant that few of those cases, which typically came to the Court as diversity of citizenship cases on appeal from the lower federal courts in a setting in which the contributory negligence of an injured driver would be a complete bar to recovery, would show up on the Court's docket. Plaintiffs in grade crossing cases would only be able to recover if they followed the "stop, look, and listen" formula and then were injured by the railroad's negligence. Given the number of railroad crossings without gates and the much smaller number of motor vehicles in use at the time, *any* rule establishing a uniform standard of care for grade crossing accidents would reduce the number of cases brought.

Further, the "stop, look, and listen" rule arguably made more sense in a setting with light traffic, because the features of the rule that subsequently resulted in its being abandoned—drivers having potentially to get out of cars, thereby running the risk of encountering other vehicle traffic, in efforts to learn of an approaching train that might have come upon them in the interval when they returned to their cars—were less otherworldly if one assumed that at most crossings only a few cars would be passing over railroad tracks, and those in a single line.

Goodman was thus a case where the Supreme Court decided that laying down a uniform standard of care for grade crossing accidents would create disincentives for injured persons to sue out-of-state railroad corporations in the federal courts. Given the Court's jurisdiction at the time *Goodman* was handed down, the decision seemed to be one of practical utility. It rested, however, on an imperfect understanding of the behavior of drivers at grade crossings, and thus ended up on the wrong side of history. Under the analysis employed in this article, that fact alone does not suffice to make the *Goodman* decision notorious.

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