72 U. Cin. L. Rev. 1257

University of Cincinnati Law Review
Summer, 2004

William Howard Taft Lecture

THE IMPORTANCE OF BEING POSITIVE: THE NATURE AND FUNCTION OF JUDICIAL REVIEW

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I. Introduction

Judicial review is under attack today, as it is every time the Supreme Court rises from its posture of deferential review and actively strikes down laws, particularly congressional ones.[1] The current wave of criticism is strong. We might have to look back to the early 1970s, the time of Roe v. Wade,[2] or the aftermath of Brown v. Board of Education[3] in the 1950s, to find such a period of sustained academic concern about what it is that the Court is doing. Yet, it is true today, as it typically has been in the past, that commentary on the Court inevitably is motivated and molded as much by approval or disapproval of the Court's immediate decisions as by an attempt to stand aloof from present events and ascertain what the institution does, and whether on balance it is worth it.[4]

The title of this talk is The Importance of Being Positive: The Nature and Function of Judicial Review, and it is the "positive" aspect that is critical here. "Positive" does not mean "approving," or even "optimistic," as in a "positive attitude." Instead, the approach is one, drawn from the social sciences, that looks at political institutions in order to develop a theory of how they work, and why they work the way they do. "Positive," in this sense, is juxtaposed with "normative." Most scholars in the ***1258** legal academy, and especially in constitutional theory, take it as their business to tell the Court what it should do. A positive approach is more concerned with trying to understand what the Supreme Court does do, and why it does it. It is that descriptive, explanatory lens that grants some small measure of remove from a subject about which there typically are strong feelings. The idea here is to try-for just a little while-to put aside strong feelings, whatever they may be, and engage in the social scientific endeavor of trying to understand how the Supreme Court, and judicial review, operate in practice.

In broad design, the discussion that follows has three Parts. The first is descriptive: it sets the stage by looking at what the Supreme Court has been up to of late, and what the critics have had to say. From this perspective, we can draw out the essence of complaints about judicial review. The next Part is deconstructive. We will use the lens of history and the tools of political economy to see why the concerns we typically hear expressed about judicial review likely are not correct, and perhaps cannot possibly be correct. Finally, we will engage in reconstruction. Using the same sort of positive analysis, we will think about what role judicial review actually performs.

What ultimately will emerge is a theory of judicial review.[5] It may seem there already are enough theories of judicial review to go around, but ironically this is not the case. Many of those who write about judicial review at present are concerned with telling the Court what it should not do. But unless the Court is to do nothing at all, the Court's critics too often leave us somewhat at a loss as to what the Court should do. Few of those critics actually believe judicial review should be abolished,[6] and for good reason. Whether judicial review is a good thing ought to rest-at least in part-on an empirical analysis of whether the institution does more harm than good with regard to things we hold dear. We are not remotely close to an answer to that question, in part because we are not close to understanding how judicial review operates, nor what it actually does.

The theory of judicial review advanced here attempts to account for what it is that judicial review actually accomplishes. It is only once we come to some understanding of this that those in the academy with the ***1259** tools to do the measuring can determine whether judicial review is an institution worth keeping, modifying, or even abolishing. To put my cards on the

table at the outset, my intuition is that the institution plays a useful role. As we will see, it is not the role ascribed to judicial review by most observers in the legal academy, in which the Supreme Court-for better or for worse-decides constitutional meaning. Rather, in my view the Supreme Court's exercise of judicial review forces a conversation within the polity about what the Constitution should mean. And I think this is a good thing. Nonetheless, I think there surely is room to entertain discussion about institutional design, whether of judicial review itself, or of some of its attendant practices, such as the confirmation process. And I would stress that all I offer is an intuition; I am open to evidence that my intuition is wrong. At the same time, I also must be candid in telling you that firm evidence is not so easily come by-perhaps for reasons that might already be apparent. We live in a world of judicial review, and it is difficult to compare it to a world identical to our own but without it. Thus, you, like me, might ultimately be cast back on faith. Yet even our faith should be guided by some evidence in our own world. It is to that world that I wish to turn.

II. October Term 2002

As good a place as any to begin the story would seem to be the Supreme Court's most recent Term. But at what point during the October 2002 Term should one focus? What began as business as usual, by Term's end left many with mouth agape.[7]
As late as January 2003, people knew what the Rehnquist Court was about, and how they were supposed to feel about it.[8] The Court that took the bench in October 2002 was understood to be profoundly conservative, even if sharply split. This was the Court that seemed to be rolling back the New Deal settlement, paying small heed to a constitutional regime that had operated comfortably for some sixty years. The ***1260** Court was unabashed about placing federalism limits on Congress.[9] It had invigorated the Eleventh Amendment, emphasizing State immunity from paying money damages for constitutional violations.[10] The Rehnquist Court had been tough on criminal defendants, habeas petitioners, illegal aliens, and minority groups seeking protection in the courts, despite a bit of leftward movement of late.[11] The only rights that received much protection were "States' rights" and property rights, and perhaps those under the strangely ubiquitous First Amendment.[12] And then, of course, there was Bush v. Gore.[13]

It was the very stability and continuity of this conservative movement that gave rise to present controversies about judicial review. The Warren Court, that time of left-leaning judicial activism, came to a close in 1968.[14] From the early 1970s on, the Supreme Court has tilted in a more conservative direction, but from the elevation of Warren Burger as Chief Justice, replacing Earl Warren, until, say, 1994, the record of the Supreme Court was sufficiently mixed as to engender no strong ***1261** liberal backlash to the Court.[15] Sure, the Court gradually caved in on things like the death penalty,[16] school desegregation,[17] and even affirmative action,[18] not to mention habeas corpus.[19] But perhaps because liberal agendas were shifting, and perhaps because the Court hung in there on things that mattered to the left-like the remarkable plurality in Casey v. Planned Parenthood[20] upholding a woman's right to reproductive choice-liberals were content to leave their criticisms to the details and remain signatories to the idea of judicial review itself.
Then, beginning in 1994, the Supreme Court took on an increasingly activist and conservative cast, especially with regard to congressional enactments. During the last decade the Court invalidated no less than thirty-three congressional laws, qualifying it as among the most activist in history.[21] Many of these were progressive laws enacted by Democratic Congresses. This past Term signaled the first one since 1994 in which the Court did not strike down at least one congressional law.
Toss Bush v. Gore into the mix, and it is fair to say liberal academics had had it. In addition to the usual scholarship on the substance of the Court's jurisprudence, all of the sudden law reviews and bookshelves were full of writing condemning the Court, and urging action of various sorts, from structural change (an attempt to address all those five-to-four decisions)[22] to standards of review (urging a return to deferential review, ***1262** especially of congressional factfinding).[23] While complaints about the substance of Supreme Court decisions are to be expected, and there have been plenty of them, what really has been striking of late is the tone of the writing and the extreme nature of the remedies proposed. The last time liberals were heard to sound such notes was seventy years ago, when a recalcitrant Supreme Court stood in the way of Franklin Roosevelt's New Deal.[24]
Once one studies two hundred years of attacks on the Supreme Court and judicial review, it becomes clear that the critics' stance toward the Court at any given time necessarily reflects what the Court is doing at the moment.[25] And so it was that the specific nature of the Rehnquist Court's activism engendered particular criticisms. Many of the congressional laws struck down by the Court have been enacted under Congress' power set out in Section 5 of the Fourteenth Amendment. That provision seems to give Congress its own authority to interpret the Constitution.[26]
Liberals thus find deeply grating the Court's increasingly hegemonic tone, its all-too-frequent insistence that it is the sole

constitutional interpreter.27 The root complaint of liberals is that today's Court had **1263* grown too big for its britches in claiming an exclusive right to interpret the Constitution, at the direct expense of "the People."28 Liberal scholars urge more deference be given to constitutional interpretation "outside the courts."29 They advance theories of "popular constitutionalism."30

Of course, liberal scholars are not the only ones speaking up, though the conservative line has been a bit slower to reveal itself. At least since the late 1800s, conservatives have approved of judicial review as a bulwark of constitutional safeguards. By the end of the Warren Court, conservatives (or at least some of them) were changing their tone, raising the "countermajoritarian" problem with judicial review.31 But their claim was not so much that we should abandon constitutional judging, as that we must confine the discretion of those judges to the preferences of the Framers, a theory commonly referred to as originalism.32 Thus, when the 1994 onslaught began, it was easier for conservatives to present the face of consistency. This seeming activism, conservatives might claim, was only a Court come round again to the values that **1264* animated us in 1787. (Never mind that liberals said the same thing after they got hold of the Court in the early 1940s.)33

Even yet, there was a subtle shift occurring in conservative circles. Since the 1950s, conservatives of various stripes have been disgusted with the direction of the courts, even with many conservatives on the bench.34 As the Court entered its 2002 Term, conservatives were just again finding the wind in their lungs to shout approval and defend the very sort of vigorous judicial activity they might have been expected to condemn.35 Which is to say, conservatives are no different than liberals: their view of judicial review ultimately depends on what the courts are doing.

And then came the Spring of 2003. A handful of cases does not a Term make, let alone does it indicate the Court's direction. Yet, that handful of cases, some of the most anticipated in years, on some of the hottest issues of our day, caused the rest of the Court's Term to fade quickly from public view. Robert Post's Supreme Court Foreword chronicling the October 2002 Term rightfully focuses its attention on these decisions, thunderbolts each, if only because the consistently "liberal" nature of the results were unanticipated by many.36 In **1265* Hibbs37 the Supreme Court upheld Congress's power to enact the Family and Medical Leave Act, despite its seeming vulnerability under such past precedents as Lopez38 and Morrison.39 In the duo of Gratz40 and Grutter,41 the Court stamped with approval at least some university affirmative action programs. And in Lawrence v. Texas,42 in a decision that sounded a strong note of equal respect for the rights of gays, lesbians, and bisexuals in our society, the Supreme Court overruled Bowers v. Hardwick43 and held that states may not criminalize homosexual sodomy.

This, one might ask, is a conservative Court? The Term left some conservatives apoplectic, and many liberals scratching their heads.44 It is far too early to say whether this Term will influence a change in thinking about the Supreme Court. One might assume that liberals will **1266* not quickly abandon their condemnation of the Rehnquist Court, even though this triumvirate of judicial holdings is going to require some adjustment in liberal complaint, some shift in calculation. Conservatives who were just jumping onto the bandwagon of judicial review might find themselves hopping back to the curb. As they dust themselves off, they are likely to make their displeasure known.

All of which is to say that, on balance, criticism of the Court is likely to increase in volume, not decrease. Indeed-and there have been some hints of this in the air for a while now-discontented liberals and shaken conservatives may find common communion in skepticism about the entire idea of constitutional review. After all, recent liberal insistence on the interpretive authority of the political branches as to constitutional meaning actually echoes a claim that originally was the conservatives' own.45

For our purposes, the Supreme Court's October Term 2002 decisions are a blessing, because they force us to look deeper to understand the source of complaints about judicial review. What is useful about the Court's seeming ideological flip of last Term is that it permits us to see that the "problem" of judicial review is not one of substance and ideology. When the Court's ideological valence is stable over a certain period, then it is easy to get hooked into thinking that the problem is the way in which the Court is deciding cases on the merits. Ideological consistency in Supreme Court decisions also is likely to split opinion about what the Court is doing between those opposed and those who would defend the Court. Throughout history liberals and conservatives typically find themselves on opposite sides of the fence regarding judicial review. Thus, the debate over constitutional judging easily can look like a partisan, or ideological, contest.

**1267* The quick flip of the past year, even if it proves fleeting, reveals the deeper issues at stake regarding the institution of judicial review, issues that always have been running just below the surface of immediate controversy. It is to those more enduring issues that we now turn. We will come back to this Term, and when we do we will see that if not altogether

predictable, this Term's decisions are not all that surprising. We might not be able to "explain" the decisions in any strong causal sense, but we surely will be able to lay a finger on the forces that likely had some hand in the results. Indeed, one of those forces, as we will see, may have been the criticism of the Court's conservatism itself.

III. The Hope and Threat of Judicial Review

With an eye on history-and history is going to play a large role here-it is easy to see that there is a pair of framing assumptions regarding judicial review that comes to the fore time and again. History shows that these framing assumptions are not unique to liberals or conservatives. Repeatedly we see that when the Court is attacked there often is a common concern resting at the bottom of that criticism, representing the harm that judicial review can work.[46] And when judicial review is defended there is a common premise to those defenses, the promise-or hope-that judicial review holds out.[47] This harm and ***1268** promise, or threat and hope, are the bookends in any serious discussion of the role of judicial review in democratic government.

Echoing a point made at the close of the last Part, it is important in considering these bookends to understand that whether one is on the side of hope or threat has nothing whatsoever to do with ideology, with political preferences. Which side one is on is at best an accident of history. It depends on whose ox the courts are goring at themoment, and whose is spared from slaughter. Perhaps it need not be so. Perhaps there have been those who, while the ox is being gored, rose to defend the sword bearer, just as there were those who, while seeing the ox spared, nonetheless rued the intervening force. But typically one's perspective on judicial review mirrors one's view of outcomes, and at different times in history liberals and conservatives have taken both postures.[48]

The threat identified by the Court's detractors at any given moment is that judicial review actually will be detrimental to the ability of the people to govern themselves, indeed that it might be radically inconsistent with democracy. When the Supreme Court is attacked, often the claim put forth is that the Court is interfering with the will of the people. Perhaps the most famous statement of the problem is Alexander Bickel's from The Least Dangerous Branch, in which he stated that the "reality" is "that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it."[49]

***1269** On the other hand, the Court's defenders emphasize the hope of judicial review, which is that it will protect us, or some group of us, from momentary democratic fervor. Like the threat, this hope gets stated in many ways. Some see it as the protection of minorities, some as the defense of constitutional rights, fundamental or otherwise.[50] Others may simply say the Court will enforce the Constitution against majority will.[51]

There is an enormous irony to the ideas of hope and threat, of course, in that the very same problem that rests at the heart of the threat is what animates the promise or hope of judicial review as well. At bottom, all the good roles that the judiciary might play, all these reasons we might want judicial review, also rest on the assumption that in exercising its power the Court will be standing up to today's governors, that it will be exercising the same power that at other times seems to pose a threat.

To be direct, whether one is attacking or applauding the Supreme Court, the central assumption seems to be that the Court acts contrary to the majority's will. When critics express disenchantment with the Court, it is that the Court interferes with majoritarian politics. When supporters praise the Court, it is for the very same thing: standing against the majority to safeguard some cherished value.

It is this very assumption that requires challenging. And it is the positive approach of social scientists that can help us in this. So much ***1270** of what is thought about judicial review rests on the notion that courts can, and do, act contrary to popular will. Yet, as we will see, there is reason to doubt the very correctness of the assumption itself.

IV. Positive Analysis and the Problem with Hope and Threat

A positive approach can help us to see the difficulty with characterizing our system of judicial review by either extreme, hope or threat. Looking through the lens of history reveals that both extremes are overstated as a generalized description of judicial review. Then, looking to the political economy of the judiciary, we can see why this is so.

A. History

History provides no theory, but it can provide some perspective with which to cast an eye upon the problem. Throughout history whenever the judiciary is active, it is attacked. Its attackers commonly advance the threat story, and its defenders speak of the hope. Yet, both claims are overstated dramatically.

There have been times when the Supreme Court's exercise of judicial review seemed to fulfill its hope, but they have been relatively few.[52] This is not to deny the many cases where judicial review is exercised, perhaps uncontroversially, in defense of a right or a minority group. But every controversial period of sustained exercise in furtherance of judicial review's hope can be matched with startling instances of failure.[53] For **1271* every Brown v. Board of Education,[54] there is a Dred Scott[55] or a Plessy;[56] for every United States v. Nixon[57] or Youngstown Steel[58] taking on the President, there is a Korematsu[59] failing to do so, and perhaps a Clinton v. Jones[60] arguably doing so in the wrong fashion. And so on.

Things are the same on the threat side of the ledger. Yes, there were times when the judiciary seemed to stand in the way of popular will. The Lochner era is legendary;[61] Franklin Roosevelt's Court-packing plan signaled another.[62] But the legendary nature of those times alone should stand as a signal that through the vast run of history the Court has not been seen as an obstacle to democratic governance. As Larry Kramer points out, when the Court sticks itself into the gears of democracy, typically it is the Court itself that inevitably pays the price.[63]

Most important-once again sounding a consistent theme here-even in the rare instances in which hope or threat arguably have been germane depictions of what the Supreme Court was up to, often both claims were being raised simultaneously. That is to say, one person's hope typically is another's threat, complicating the story of judicial review enormously. The Lochner era may be the most sustained period during which the Court was vilified, but at that time prominent voices were heard in defense of the Court.[64] Those voices applauded the role of judicial review in protecting rights-property rights to be sure-safeguarded in the Constitution itself. During the Warren Court era the Supreme Court acted vigorously to protect minority rights and First Amendment rights (often conjoined); it was attacked for violating settled **1272* constitutional commands, but also for rushing ahead of popular sentiment, thus interfering with the ability of the people to rule themselves.[65]

It is this very difficulty of characterizing judicial review that should lead us to try to understand it better. Most often, the Supreme Court's exercise of judicial review poses neither a hope nor a threat. And when the Court is active, rousing cries of threat, many see the hope, suggesting the story always is a complex one. It is better to try to understand precisely what motivates the Court, how we can expect it to act, and what occurs when it does. That is the benefit of a positive approach.

B. Politics

It should come as little surprise that neither hope nor threat are accurate characterizations of the sustained role played by judicial review. What students of politics would tell us is that the political milieu in which the Supreme Court and the judiciary operate serve as moderating forces, constraining judges from posing too much of a hope or a threat. It thus behooves us to examine that milieu, and use what we learn as a stepping stone to understanding how we should characterize the function of judicial review, if not by hope or threat.

Our guide here largely will be social scientists, particularly those who have spent many years studying judicial behavior. Just as in the legal community, many political scientists study the judiciary. But where the concern in law often is normative-how ought judges to behave-in the social sciences the questions are "how do they behave" and "why?" In order to answer these questions, social scientists build models, and conduct empirical studies, seeking explanations of judicial behavior and motivations. Some of this is explicitly about the behavior of judges in constitutional cases; much of the rest can be extrapolated.

It probably bears stating at the outset that, like all academic work, this social science literature has its limitations and difficulties. To cite an obvious example, empirical study requires data that one can code and count. For that reason, social science studies tend to focus on judicial **1273* votes rather than the language of the opinions themselves, a shortcoming whose seriousness is obvious.[66] The work of judges happens as much in the opinions as in the votes. For Supreme Court Justices most of what is important occurs in the written opinion. At a deeper level, political economists have had a difficult time modeling law, and perhaps they even have skepticism about its operation. Yet their studies often seek to control for law to tease out some other effect. Despite these limitations, social scientists have learned some things that shed light on the practice of judicial review, information that deserves more attention than it receives from normative legal scholars.

What the social science literature reveals is that judges, including Supreme Court Justices, operate under many "political"

constraints. This point about constraint is important because most theoretical understandings of judicial review treat judges as relatively unconstrained. Both the "hope" and "threat" understanding of judicial review rest on the assumption that judges simply can declare what they want, and expect it to happen. To the extent the constraints identified by political scientists are real ones-and the literature seems convincing in many regards-it explains why neither hope nor threat provides an adequate explanation of what judicial review does.

Simply put, Supreme Court Justices do not decide cases on their own, uninfluenced by other forces. Rather, they act in a complicated milieu, in which the preferences of many other actors will have some bearing on how cases are decided.[67] This is decidedly not how we think of things in the legal academy. We think that life tenure does, and perhaps should, buy independence to decide cases "according to law."[68] We recognize that fidelity to the rule of law may include some very different ideological takes on what it is that the law demands. But normative scholars tend to assume that judges regularly vote their "sincere" ***1274** understandings of what the law requires, discounting as rare any instances in which judges might vote "strategically," i.e., resolve a case other than according to an independent view of what the law itself requires. The political science literature suggests the opposite: that strategic concerns do affect outcomes.[69] Now, these positions can be reconciled fairly easily. It is entirely possible that a judge intuitively incorporates these competing forces, so that what is "sincere" and what is "strategic," what is compelled by "law" and what is not, are unalterably stewed together in the judge's mind. Still, the political scientists' effort to try and separate the two contributes mightily to understanding the forces that influence judges, and thus to our understanding of the role played by judicial review.

We can begin with an example of constraint well familiar to legal scholars, even though it claims little theoretical attention. Justices do not act alone, they sit in an aggregate called a Court.[70] This very familiar but often overlooked reality has important consequences that tend to temper both hope and threat. The set of views represented on the Court at any time is likely to span quite a broad range. There is no regular pattern to appointments, but they tend to come every couple of years or so.[71] Lately, it has been longer. Thus, the membership on the Court is the result of a political appointment process that itself spans a generation or more.[72] In order to do anything, the Court typically has to muster at least a majority.[73] The variety of views represented on the ***1275** Court by Justices appointed over such a long period of time, and the need to gain a majority of those Justices, are likely to have a moderating influence on the Court.[74] That is not to say that-as at present-a group of at least five cannot render important decisions. It is to say that putting together five who vote together so consistently is going to be relatively rare, and far rarer will be the occasions in which this five-vote coalition acts regularly against popular political preferences. Undoubtedly there are counter-examples-the five-to-four majority of the Lochner era suggests itself as a possibility[75]-but the social scientist would have us look closely to see how typical these instances are, why they occur, and if they really are examples of the Court so running against the grain as to make the threat or promise of judicial review a reality. Second, Supreme Court judges sit atop a hierarchy of great breadth and diversity of views, and they must manage it. There are only nine Supreme Court Justices (and one Supreme Court). There are hundreds more federal circuit and district court judgeships.[76] But that is just the tip of the iceberg, because where constitutional law is concerned there are also fifty state judiciaries that must be superintended.

Normative scholarship typically assumes all these lower court judges simply will comply with Supreme Court rulings-at least for the most part.[77] But social scientists see that matters are far more complex. The ***1276** Supreme Court simply cannot review all these cases. This fact presents opportunities for outright defiance, to be sure, but perhaps more important it also presents a lot of wiggle room for lower court judges who want to go their own way.[78] Hope and threat both assume judges are imposing their will upon a contrary majoritarian sentiment. But were that truly the case, the lower courts would have to be in cahoots. More likely, lower court judges have their own views-perhaps quite close to those of the communities in which they sit-and the farther the Supreme Court wanders from those views, the more it will have to struggle to have its way over time.

To provide just one example, it is no secret that some of the most controversial Supreme Court decisions at present are those involving federalism as a constraint upon Congress's powers, decisions like United States v. Lopez[79] and United States v. Morrison.[80] But how have those decisions fared in the lower federal courts, where most of the work of judicial review ultimately gets accomplished? Two scholars have studied just this question, and the title of one of their articles says a great deal: What if the Supreme Court Held a Constitutional Revolution and Nobody Came?[81]

***1277** This attention to the workings of the judiciary-the Supreme Court and the lower federal courts-has only delayed our focusing on a far more important set of constraints that might influence Supreme Court decisionmaking: the other branches of

government and public opinion itself. This subject is vast and complex, and so we necessarily must approach it in summary fashion. Perhaps Alexander Hamilton should be our guide here. He explained famously in Federalist No. 78 that courts are the least dangerous branch because they lack the means to enforce their own orders.82 Courts may declare all they wish, but the population must go along. One can overstate the travail the Court faces; the rule of law obviously carries a great deal of force in this country. The Supreme Court told Nixon to turn over the tapes; he did.83 The Justices renounced Little Rock, Arkansas' defiance of desegregation orders and Eisenhower sent in the troops, skeptical though he might have been of Brown v. Board of Education.84 But even these examples show the dependence of law on political support.

Defiance of Supreme Court decisions certainly has occurred. Lincoln defied judicial orders, claiming it necessary to save the Union.85 Roosevelt was prepared to do so if the Court had ruled against the government in the Gold Standard cases.86 In addition, compliance gets tricky if the object of a court ruling is diffuse. The Nixon case had but one respondent. Bans on prayer in school-frequently defied-have many.

From the Supreme Court's perspective the problem is actually more complex: not only can the other branches refuse to comply, they can attack the Court and the institution of judicial review itself. Justices ***1278** could be impeached, jurisdiction withdrawn, judicial budgets cut, courts packed.87 Are these responses legitimate?88 Views vary, and on some, such as jurisdiction stripping, shades of gray might matter most. Are these moves likely? The point is that all have been threatened, some have been used. True, in recent years resort to such tactics has diminished. But the potential is there, and the Justices know it.89 If they get too far out of line-remember, we are thinking hope and threat here-then they may well end up in serious trouble.

The claim here simply is that the Court's dependence on the other branches to enforce decrees and to refrain from attacking the institution of judicial review necessarily acts as a moderating force for hope and threat. Whether this is true or not deserves far greater study than it has received, but there is some tentative work that suggests this theory holds a fair amount of weight.90 Think, in particular, of the present controversy over the Supreme Court. Was it an accident that the Supreme Court's activist burst of the last decade only began in 1994, when Republicans took control of the Congress, thereby immunizing the Supreme Court from reprisals? Empirical evidence suggests that it was not.91 ***1279** Perhaps the Court is beholden to those in power, and perhaps it acts that way. If so, hope and threat likely are grossly overstated.

The Court must reckon with one final force, as must the officials who might disregard or challenge the Court: public opinion.92 This is the mightiest force of them all. The inhabitants of the political branches are elected by us and work for us, true enough, but they are not always faithful agents. They might attack the courts, only to find the public is not behind them, and thus be forced to back off. This arguably is what happened in 1937.93 It also could be that politicians content to leave well enough alone with the courts find that the populace is discontent in a way that provides political opportunity. When politicians attack courts, it sometimes is open to question whether they believe this is a sound idea or instead are pandering to constituents who find it an appealing issue.

Public opinion serves as an important check, both on the Supreme Court and on those who would attack or defy it. This is a huge subject, and one on which the empirical evidence is not yet strongly developed. But the notion of public opinion as a check is not surprising. This is why crises over judicial independence are relatively rare in American history, and why-as Kramer says-when push comes to shove the public shoves the Court back into line.94

The sum total of all these forces with which the Justices must grapple is that the Court operates on a leash-or perhaps a bungee cord provides a better analogy. The Court has some freedom to go its own way. But if it strays too far away from these constraining forces, it ***1280** inevitably is brought back into place.95 There is room to roam, but it is not unlimited.96

This "bungee cord" theory of judicial responsiveness to political forces may seem problematic in light of times in history where hope or threat appeared very real. One might, for example, still want to point to the Lochner era or judicial resistance to the New Deal as threat periods. Perhaps the Warren Court era still looks like a hope.

Yet, these may be the seeming exceptions that actually prove the rule. Looking at these periods in enough depth to explain each precisely would require a large diversion from our path, but it is worth pausing to gesture at some explanations. First, political scientists explain some of these periods as a result of broader regime change.97 To put it simply, the problem is not so much courts running contrary to popular opinion, but rather big shifts in democratic views. When the ship of state changes course suddenly, the judiciary-which shifts more slowly because of the tenure of judges-gets caught by the change of direction. What we then see in these periodic fights and capitulations is the judiciary ultimately ducking its head so as not to

be hit by the mast as the boatcomes around. Whether this is a good explanation ultimately will turn on the evidence in any given situation. To provide one example, this is what some scholars argue was happening in 1937: the Depression led to a populace willing to support FDR's vision of a changed balance in federal-state relations, but the sitting Court was still buried in old ideas.

*1281 Second, sometimes appearances are misleading. Sometimes we think the judiciary is acting contrary to popular will, or some of its detractors claim this is the case, when in fact there is quiet popular support. The period surrounding Brown v. Board of Education is often identified as one of the greatest periods in support of the hope argument. But there are excellent works of scholarship that explain that popular sentiment favored what the Court was doing and national interests were furthered by it, but that other dysfunctions in American government-such as strong Dixiecrat control over the Senate-ultimately forced the Court to be the first mover.[98] Similarly-and this is a topic we will return to shortly-despite discontent among many academics with the Supreme Court's federalism revolution, there is plenty of room to argue that strong popular forces in society support what the Court is doing, if not in every jot and tittle, then at least in broad strokes.[99]

One final point deserves attention before moving on: some political scientists argue that judges are as unconstrained as normative legal scholars themselves seem to believe is the case. There is prominent thinking in political science that judges most frequently vote their own preferences, that judicial ideology is the dominant force in judicial decisionmaking.[100] There certainly is data that suggests this. From this data, some social scientists, called attitudinalists, conclude that judges are unconstrained, that they do what they wish.[101]

Although attitudinalists likely are correct that judges have and exercise a certain amount of discretion-after all, that is perfectly *1282 consistent with the bungee theory-still, those claims likely are overstated. There are methodological reasons why attitudinalists might fail to observe constraint. First, Supreme Court Justices simply can avoid having to decide cases in which they are constrained by denying certiorari review in the first place.[102] Existing attitudinal studies have not taken this possibility into account. Second, it is in this attitudinal literature that the practice of counting votes rather than looking at judicial decisions poses the greatest difficulty. It really is not that much of a surprise that in the cases the Court does decide to take, conservative Justices vote conservatively, and liberals liberally. What might matter when it comes to constraint is not the direction of the vote but the strength of the opinion. If so, social science studies would miss this.

One quick example shows how attitudinal studies are too quick to come to the conclusion that there is no constraint. This past Term the Supreme Court decided two cases involving affirmative action in higher education. In one of them, the Court struck down an affirmative action plan, with the Justices voting five-to-four, largely as attitudinal studies would suggest.[103] The problem, of course, is that looking at that case alone, one would think (from an attitudinal perspective, or at least from the only perspective attitudinalists can take) that affirmative action in higher education had been prohibited. As luck had it, this Term also yielded a companion decision, which makes clear that within certain bounds such plans were constitutionally acceptable.[104] Of course, in that second decision, attitudinal predictions fell through, as the conservative Supreme Court reached a liberal result. For present purposes it is useful to note that the second decision was not inconsistent with the first: it only looked like it if one focused solely on the vote, and not the opinion.

To sum up, the Supreme Court is not as free to act, unconstrained by politics, as hope or threat suggests. To the contrary, many forces operate on the Court, and they tend to have a moderating influence. The question is whether we can take this observation, and from it build a theory of judicial review.

V. The Separation of Law and Politics

If both hope and threat are over-characterizations, as they surely are, then what is it exactly that judicial review can or does accomplish in American society?

*1283 Before turning to the affirmative argument about the role and function of judicial review, it will be profitable at least to touch on one last problem that lays even deeper than hope and threat in the minds of those who fret over the institution of judicial review. That problem is the separation of law and politics. It is important to mention this problem because when we turn from critique to affirmative theory, this is precisely where we will want to start.

To put it simply, when legal academics doing normative work search for a role for judicial review, a bedrock principle is that they must find it in something that is different than "politics," something that we call "law."[105] This is a sort of first principle of judicial review.[106] Judges are expected to operate in the world of principle, not expediency; or, to put things differently, they must stick to their knitting and do what judges do, deciding legal questions and not entering into the realm of policy.

The problem with requiring law to be separate from politics-the root of much of the angst about judicial review-is that what seems necessary may not be entirely possible. The entire preceding discussion about influences on the judiciary suggests that law cannot be entirely separated from the political world. As Robert Post explains so clearly, law and our political culture are inevitably bound up in one another.[107] Judges decide cases based on law, but they are selected in a political way and, as we have just seen, their decisions must take root in a world of politics. The political world invariably spills back on what judges are doing. One of the mysteries-and perhaps wonders-of our legal system is that judge-made law, common law or constitutional, tends to incorporate the felt necessities of the time. How it does so is complex, but surely we are all familiar with the phenomenon.

This is only to say that the very bottom requirement of judicial review might, at least in the terms offered by most academics, be elusive. It **1284* might be that law and politics are not so easily cabined off one from another.[108] If an airtight separation between law and politics is essential, we might have a problem. But perhaps we can do a better job by coming at the question in a different way.

VI. Separating the Constitution from Ordinary Law

In turning to development of an affirmative theory of judicial review, separation nonetheless may be the right place to begin. It is true that separating law entirely from politics is extremely difficult, if not impossible. The idea of separating the two may not even be coherent. And yet, there may be something to the instinct of separation that is telling.

Perhaps the relevant separation ought to be between what the Constitution requires or prohibits, and what political will immediately prefers. If living under a Constitution means anything, then it seems that separating constitutional law from ordinary law is essential.[109] In other words, we need a way to determine whether the Constitution prohibits what government otherwise would seek to achieve. Our Constitution embeds some set of permissions and prohibitions, some basic ground rules. One might differ on what they are or how they are to be identified. An originalist may believe the values are fixed for all time; a living constitutionalist might believe they evolve. A judicial supremacist may believe the task of deciding belongs solely to the Supreme Court; a departmentalist may believe each branch is left to figure this out for itself. But whatever the means, keeping straight the difference between what the Constitution permits or forbids and what **1285* government plans to do must be at the very heart of constitutionalism. If there is no line of separation, what is constitutionalism about?[110]

This is-admittedly-a normative beginning to what promised to be a positive theory of judicial review. What follows is entirely positive, and what has just been said is not, strictly speaking, necessary to what follows. But this normative point-that constitutionalism means separating out what the Constitution means from what government proposes to do-is the very basest of normative claims, and one that would seem hard to deny. No constitutional theorist argues otherwise. Many do not focus on this point adequately. But even those who eschew judicial review as a solution, and even those who praise popular involvement in the interpretation and enforcement of the Constitution, do not seem to be suggesting that the line between the Constitution and what government seeks to do is unimportant or without meaning.

On the other hand, as obvious as this line of separation is to identify in theory, it is remarkably difficult to achieve in practice. It is, of course, no answer to say that the Constitution will perform this task itself. Even if interpretation were unnecessary, even if the Constitution's text were clear enough to demarcate what the governors may do and what they may not, we would need a way to enforce the separation. But as we are all aware, even the originalists among us do not believe the Constitution's text is this clear.[111] Thus, interpretation poses one challenge, and enforcement another.

Similarly, it is unlikely that control over such separation in the hands of the political branches, or the people, is going to be a successful strategy standing alone. It is perfectly natural for those in power to conflate what they are doing or would like to do with what is permitted by the Constitution. It is equally understandable if a supportive citizenry views the matter similarly.

It is important to stress the difficulty of achieving this separation because it renders some prominent attempts to define a theory of judicial review problematic. For example, some scholars today, discontent with judicial interpretations of the Constitution, apparently view popular support for the government's present agenda as enough to satisfy **1286* constitutional concerns, at least on some issues. If the governors believe something is within the Constitution, and if the people likewise find what the government is doing permissible under our fundamental charter, that is all that must be resolved.[112] If one wants to move courts and judicial review out of the picture, then this is a perfectly logical line of argument to pursue.

But let us put courts to one side for the moment and confront the argument on its own terms. If one believes the Constitution

has meaning, and if one believes it controls the powers of government, then it seems fair to observe that leaving it to those in power to decide if their conduct comports with the Constitution simply is not likely to work. The problem is the extraordinary human capacity for justification. Think of many commitments you make in your life, and how they come under tension.113 It is Sunday, and you are committed to going to church on that day. But you are invited to go on a once-in-a-lifetime venture of some sort, fishing, surfing, climbing, whatever. We have all had experiences like this, and we know what happens. We make excuses. We'll go to church another day. This experience will be spiritual. We will pray in our own way.114

For this same reason, it is overly optimistic to argue, as some have done, that "the People" will restrain their governors in such instances. This is because the very same forces that compel the governors, especially in a well-functioning electoral government, are likely to impel the People to believe that what the governors are doing is constitutionally permissible. At the least, this will be true in the immediate present in which such questions arise. The People are as likely to be swept away in the fervor that motivates the governors-or at least enough of the People that government will feel itself justified. We have plenty of examples in American history, from imprisonment of Japanese-Americans in camps during World War II to congressional laws prohibiting flag-burning.115

***1287** Difficulty in solving this problem of separation has driven two of the most prominent theories of judicial review,116 those of Bruce Ackerman and Alexander Bickel.117 Bickel was, and Ackerman is, an astute student of politics, and neither believed that law and politics could be entirely separate. Nonetheless, they saw the need for separating what is in the Constitution from what is not, and their searches led them to judicial review as an answer. Both are worthy of mention because even though they saw the right problem, their solutions ultimately asked more of judges than our positive understanding of judicial behavior and constraint would suggest is possible. For all their attention to politics, Ackerman and Bickel are normative theorists, and their work presents examples of what not to expect out of a theory of judicial review.

Bruce Ackerman would place in the hands of judges the "preservationist" task of enforcing constitutional guarantees against the governors when the governors overstep the bounds demarcated by the Constitution.118 What the Constitution means, according to Ackerman, is determined by the People in rare moments of "higher lawmaking."119 Often this exercise of higher lawmaking results in a constitutional amendment, but it need not. Ackerman offers an elaborate schema of how judges should know when higher lawmaking has occurred. Once the People have spoken, then judges are charged with ensuring the governors do not step outside their constitutional mandate.

***1288** With all due credit to Ackerman's ambitious and thoughtful project, it asks more of judges and "the People" than we can count on to make aconstitutional system work. Judges must have the ability to recognize a moment of higher lawmaking.120 They then must know how to interpret it, even if there is no text. Many commentators have offered similar critiques of Ackerman's work.121

From the perspective of the prior discussion of judicial behavior, however, Ackerman's theory is even more problematic. Ackerman's, like most normative theories of judicial review, depends ultimately on judges standing up to the political branches, and to the People. Judges would have to be superhuman to enforce a past set of commitments against a government set on its immediate policy.122 In light of the political forces we have seen influencing judges, this ultimately is a thin reed on which to stake constitutionalism and individual liberty.

Bickel's judges, in contrast, were to be more proactive than Ackerman's. Bickel believed the role of judicial review was precisely to discover the deeper, fundamental constitutional values of the People.123 Sometimes judges would arrive at these values after the People had done so, but in Bickel's world they often would do it in advance. Judges would be seers and prophets, who then by force of example would educate the People to the truth.124

Bickel ultimately gave up on the idea as futile, and perhaps it is obvious why. This is the very sort of thing that occasions giggles from ***1289** skeptics about judicial review. Bickel himself ultimately saw-consistent with the theory of judicial behavior and politics described here-that judges could not take the people where they did not wish to be led.125 More to the point, people like Anthony Kennedy and Ruth Bader Ginsburg may be fine Justices, but viewing them as seers and prophets really is going a bit far.

But need we, like Bickel, give up on judicial review itself? Bickel was an astonishingly eloquent man, and in a noteworthy line explaining why it is misguided to search for specific answers to specific present day problems in historical materials regarding the framing of the Constitution, he said "no answer is what the wrong question begets."126 The question Bickel and those who have followed him down the road of constitutional theory have been asking is "what should judges do." But, consistent with what we are discussing here, perhaps we can once more cast that question aside and ask merely "what do

constitutional judges do?"

VII. The Role of Judicial Review

A. Interpreting the Constitution

So now it is time finally to ask: what is it that judges are doing when they sit up there on that high bench in those black robes, telling us what the Constitution means? There is an answer to this question. It is neither complex, nor elegant, and it is likely to disappoint if one is looking for something sophisticated. For it is an answer stunningly simple.

What are these judges doing when they say what the Constitution means?

They are telling us what the Constitution means, no more and no less. Not because they are particularly smart, or just, or forward-seeing, though we might wish they could be all those things, but because by definition that is their job description, and it is what they do. Whether the power of the judges to say what the law is occurred by original ***1290** design or evolution does not matter one iota at this point. All that matters is that cases raising constitutional issues come to the judiciary, and when they are decided the judiciary often is called upon to-and does-make a pronouncement as to the meaning of the Constitution.

Before you come out of your chair, in anger, or disgust, or simple disappointment, hold on for just one second. You might think this is begging the question, and that the pertinent question is: should judges get to say what the Constitution means? But this is not question begging at all, it is simple description. This is what a positive theory does.

B. What Comes Next: Fomenting Constitutional Dialogue

If you feel let down, however, be patient. This is only the beginning of the story. Although most normative scholars focus on justifying the judicial act of interpretation, it is actually what comes next that matters. All the action is downstream.

If what happened next, after the judiciary pronounced the meaning of the Constitution, is that we all fell to obeisance and the question were not raised again, if we followed the Court's pronouncement in hushed murmurs, we would have a formidable problem on our hands. This is what so troubles people: a very strong form of judicial supremacy.[127] This leads to what is referred to as the "countermajoritarian difficulty."[128] But this is hardly what happens.[129]

A more accurate depiction of the aftermath of a constitutional decision, especially one of any import, is that there commences-if it ***1291** had not begun already (and often it has)-a national discussion about whether the Supreme Court got the meaning of the Constitution correct. This conversation occurs in explicitly constitutional terms. People debate what the Constitution means, and what it should be understood to mean.[130]

This idea of promoting constitutional dialogue is developed just ahead, for this is the role and function of judicial review. Indeed, just ahead there is a turn from the positive to the normative. The argument will be that promoting such a dialogue is an important function in a constitutional democracy, one that achieves the separation of constitutional requirements from immediate political preferences, and does so in a way that ensures that judicial review does not pose a threat to democratic principles.[131]

But first it is important to describe what actually happens after a constitutional interpretation is rendered, particularly a judicial ruling that seems to some at least to interfere with judgments properly made by the democratic political process. This is, after all, largely a positive account. What we will see is that judicial constitutional decisions set off a special process of national conversation that ultimately registers widespread sentiments and keeps the judiciary within the range that the bungee cord allows. Whether this is to be admired is a normative question. But consider first whether as a positive account this description of constitutional dialogue is not more accurate than frequent claims of judicial supremacy.

1. Backlash

Studies both historical and empirical suggest that more often than not, once the Court hands down a controversial decision, the most ***1292** important (and sometimes strongest) immediate reaction is a negative one. Occasionally the Court might hand down a decision that is received with near-universal acclaim. Undoubtedly the Court also decides cases that fall like

leaves in the forest, unheard. But when the Court is heard, when dust is stirred up, and before it starts to settle, mostly what occurs first, is opposition.

Michael Klarman, a historian who has looked into this phenomenon, calls it "backlash."[132] Political scientists also have noticed how opinion in reaction to a Supreme Court decision tends to solidify most among those who dislike it. Testing Bickel's (and perhaps we should say Eugene Rostow's) theory that the Supreme Court can serve as a national educator, a shaper of opinion,[133] those political scientists have documented that rather than shaping opinion favorably, the Court's decision gives those who oppose it a reason to come together.[134]

This same phenomenon can be seen in the way constitutional decisions play out in the world of action. Gerry Rosenberg's book The Hollow Hope is a study of whether reformist judicial decisions like Brown or Roe accomplish anything.[135] The Hollow Hope is understood as a testament to how little judicial review actually can change life on the ground. But Rosenberg also may have been looking in the wrong place. Rosenberg looked in one direction, when the action might have been in another. Even accepting that Rosenberg was correct about change along the lines the Court's decision mandates, there is no gainsaying the reaction in the other direction.[136]

1293 We have seen this progression from decision to dissent in a variety of places, in responses large and small. The Supreme Court says "do not pray in schools."[137] Prayer continues to break out, appearing at football games, at student-led events, and "spontaneously" at school activities.[138] The Supreme Court says "women have a right to choose to terminate a pregnancy, unimpeded during the first trimester and only regulated for medical reasons during the second."[139] State laws are passed, some of which try cleverly to surmount this legal obstacle, others of which take it head on.[140] One might debate whether these responses are appropriate, but at a purely descriptive level we can observe that similar reactions are common following the law-pronouncing function of the Supreme Court.

2. Stickiness

What happens next, of course, is that after all is said and done, if the fight is fought and pursued with focus, and attracts enough adherents, the law changes. Roe becomes Casey. Bowers becomes Romer and then Lawrence. Brown becomes Croson, then Adarand, and then Grutter and Gratz. Commerce Clause cases are overruled, only to be revived some sixty years later.

One concerned about judicial review might say, this is all fine and well, but majority will still is frustrated. The legal landscape may change, but it takes time, sometimes a lot of it. And in that period, a lot of people can suffer the ill effects of a constitutional ruling.

Constitutional rulings are in fact sticky, for reasons that bear notice.[141] They might be overcome by constitutional amendment, but that takes mustering an extraordinary majority. Alternatively, they can be reversed by the Court changing its mind. Sitting Justices might do that, voting to overrule themselves. More typically constitutional change ***1294*** occurs through the gradual attrition of the Justices, and through presidential appointment of successors.

It is this very stickiness of judicial review that gives rise to controversy. For some period of time, and in some fashion, judicial decisions affect outcomes and peoples' lives.[142] Critics of judicial review find their dissatisfaction in this, though as we have seen their claims about judicial review may well be overstated.

Although the stickiness of constitutional decisions causes controversy, it is instructive to see what stickiness adds. Stickiness raises the stakes of the debate, and intensifies it, assuring that when change occurs it is the result of a dialogue somewhat different than ordinary politics. Either those who seek to overturn the Court must muster an unusually large majority of their citizens to amend the Constitution, something that rarely has happened and even more rarely happened quickly (though it has happened). Or, they must run the long race of politics, keeping the issue salient for long enough to push it to a place on the agenda where it influences not only the appointments process, but also public thought, so that people take the bench prepared to see change happen.

3. Popular Opinion

One last fact ties up this story. It is drawn directly from the positive account of the political milieu in which judicial review operates, of the constraint that constitutional judges face. This fact gives lie to the claim that judicial review poses a grave threat, or a great promise. The fact is that-as many studies have shown-when all is said and done, judicial outcomes tend over

time to come into line with popular opinion.[143] The mechanism by which this occurs is imperfectly understood, and there may be failures.[144] Yet, there is enough in the story about how judicial review operates in politics, not apart from it, that lets us understand this is a likely result.

*1295 Although the evidence is not perfect, a variety of studies have come to the conclusion that the decisions of the Supreme Court do not long stay out of line with popular opinion.[145] Those decisions kick off a debate, to be sure. Even if the Court is in line with a majority or plurality of citizens, if there is intense opposition the debate is inevitable. But as the debate runs its course, the Court gradually aligns itself with the weight of popular opinion.

We have seen this occur often enough in recent years to find the phenomenon a familiar one. Think, once again, of the controversy set off by Roe that brought us to Casey; or the controversy set off by Brown that distilled popular opinion about racial segregation. Think of the Supreme Court's adventure to limit the death penalty, one that ultimately caused the Court to back away. In the long run, as popular opinion shifts, judicial decisions and ultimately constitutional meaning shift with it.

C. Constitutional Dialogue and its Normative Appeal

What should now be apparent is that there is not the sort of strong judicial supremacy supposed by many who rue the threat of judicial review. It is not the case that judicial decisions are followed without dissent, thereby putting an end to the matter. Instead, controversial decisions set off a process. Dissenters speak up and organize. They run the race of politics, and if they are successful their views become law. The Supreme Court does not buck public opinion for long, but ultimately comes into step with it, at least on most matters.[146]

From a descriptive posture then, the Supreme Court is not the Supreme Ruler that poses a hope or a threat; rather, the Supreme Court acts as a catalyst for debate, fostering a national dialogue about constitutional meaning. Prompting, maintaining, and focusing this debate about constitutional meaning is the primary function of judicial *1296 review.[147] The claim is not that the country is incapable of having a constitutional discussion absent a Supreme Court pronouncement, only that constitutional dialogue seems the inevitable result of an important or controversial constitutional decision. The debate over slavery is just one example of a national conversation about constitutional meaning that, while helped along by a judicial decision, was not only a result of judicial intervention.[148] However, because the nature of a judicial decision is to cast something in constitutional terms, when that decision is debated, the Constitution more typically plays a central role.

Congressional debates, to pick a counter-example, less commonly display this constitutional nature, even if that would be warranted.[149] At least it seems that way, absent some empiricism that suggests otherwise. Perhaps this is to be expected, even preferred, given the exact nature of Congress's task, i.e., doing the nation's business. And when the Constitution does appear in congressional debate, typically it is because of a question of how the Court will react much as what the Constitution should mean.

Nothing here is intended to speak to the counterfactual-that is, what if there was no judicial review. Thayer famously took the view that too much judicial review dampened broader constitutional debate.[150] Maybe this is so, maybe not. But in the world in which we live, the courts foment and sustain constitutional dialogue. This is the central role of judicial review.

Although this largely has been a positive account, it is worth making the normative turn, if ever so briefly. On examination, it is possible to see that the positive account points to a role for judicial review that *1297 disarms complaints about judicial review. It ought to be clear from this account that although the hope of judicial review may be overstated, the threat is overstated as well. Critics challenge the hegemony of judicial interpretations of the Constitution, but this drastically overstates the case. Many judicial interpretations raise no controversy.[151] But when they do, what occurs is not obeisance to the courts, but a healthy process of constitutional debate and often constitutional change.

This process of constitutional dialogue and constitutional change matters, because this ultimately ensures that the Constitution is owned by all of us.[152] As Richard Fallon says, with regard to constitutional legitimacy, "the first crucial point is the fact of widespread acceptance."[153] Some judicial decisions do strike a national nerve, and when they do, they rouse opposition. That opposition invites participation in the process of reaching consensus about constitutional meaning. Participation can occur at great levels but also trivial ones, like sending a small check to an interest group. The cumulative effect of this political activity concerning a constitutional issue may be a shift and coalescing of public opinion.

However-and this is important-the Supreme Court's responsiveness to public opinion is not to immediate popular preference so much as to a body of opinion that endures over time. This is the case precisely because constitutional law is sticky, changing only after an appropriately intense national conversation occurs. The conversation can be short-lived but intense enough to generate an immediate supermajority, such as when a constitutional amendment is passed in response to a court decision. Or, constitutional law can change-as it more typically does-only after a long, drawn-out process of political engagement.

The benefit of the process of constitutional change is that it serves the separating function, of helping to determine and distinguish between immediate political preference and deeper commitments. The stickiness of constitutional law means that most political change occurs only after a sustained campaign during which public opinion can become educated and coalesce, a period of time over which immediate popular preference becomes tested. Alternatively, new constitutional law comes **1298* about because immediate preference is so intense as to do what so rarely is done: forge a constitutional amendment.[154]

VIII. Deciding Constitutional Cases

What is left is to make sense of the Supreme Court's October 2002 Term. Doing so now should seem an easier task, as much of what needs to be said has been already. To those accustomed to seeing the Supreme Court only on the spectrum of liberal-conservative, the events of that Term may seem perplexing. But in light of our positive theory of judicial review, and constitutional dialogue, an easy explanation is at hand.

The theory is that, over time, Supreme Court decisions reach an equilibrium position with sustained public opinion.[155] When the Supreme Court resolves a case, it does not decide an issue with finality, but by deciding kicks off a broader societal conversation about what the Constitution should mean. That discussion runs over a period of time, during which issues inevitably will find their way back to the Court. And as issues come back to the Court, judicial decisions and public opinion tend to converge.

The mechanism for this process is not entirely clear, but it necessarily rests ultimately in the constraints placed upon the Court by the political milieu in which judicial review occurs.[156] We cannot know how the Court gauges public opinion, or whether it even tries to do so consciously. But we do know that the Court's freedom of movement is not unlimited, and that the Justices seem aware of this.[157]

In light of this theory, we stand a better chance of understanding the Supreme Court's recent decisionmaking. Nor is this explanation limited to the October 2002 Term alone. This Term was perplexing, but **1299* preceding Terms roused equal controversy. We now should be able to see that some of the recent complaints leveled at the Court have missed the mark.

A. Public Opinion and the Rehnquist Court

Despite strident claims in the academy that over the last decade the Supreme Court has been deviating from popular preferences, there is reason to be skeptical of the claim. As we have seen, such complaints about judicial review are frequent, the countermajoritarian problem lying underneath both the hope and threat models of judicial review.[158] But in light of the positive explanation for judicial behavior, it would seem the burden of proof should rest with those who would accuse the Court of deviating from popular opinion. In other words, looking at what the Court does, rather than what it should do, suggests that-as we have now seen for some time-the Court more likely will not be countermajoritarian. Thus, claims to the contrary require proving out.

There is good reason to think that, academic complaints aside, the Supreme Court's federalism revolution is perfectly consistent with popular opinion. Others have made this point.[159] In 1994, Republicans swept into power in the Congress on a Contract With America that had at its core the notion of devolution, moving power from the federal government to the states. The Contract continued a longstanding Republican agenda, one many thought transcendent as of the election of Ronald Reagan. It is not at all clear the public disagrees with the Court's revitalization of federalism.

None of this is meant to suggest that the public understands the jots and tittles of federalism, but it also is true that the federalism cases have thus far not challenged much of what the public is likely to hold dear. If you disagree, hold your seats for a moment. The Eleventh Amendment cases deprive people of real remedies, and there is reason to disapprove of those decisions. But prior to the Supreme Court's plurality decision in Union Gas, there was little basis for thinking states could be sued for money damages.[160] Which is to say, nothing much has **1300* changed. The direct limits on congressional power,

such as those apparent in cases like Lopez,161 Morrison,162 and Printz,163 have the potential to wreck havoc with modern government, but they have not done so. Obviously, the laws struck down mattered to some people, but there often were ways around the specific roadblock placed by the Court. Moreover, as cases like the October 2002 Term's controversial decision in Garrett made clear, the Court's decisions often only nullify a small part of larger legislation.164 Though Garrett held the states themselves cannot be liable for a violation of the Americans With Disabilities Act, the ADA remains intact.

As the decisions of the October 2002 Term indicate, the Court may have a good sense of its boundaries in this area. Exemplary here is the decision in Hibbs.165 Hibbs raised the question whether Congress could impose upon the states a money damages remedy for violation of the Family and Medical Leave Act. There was good reason to think, in light of the decisions just discussed, that the FMLA was vulnerable. Yet, the Supreme Court stepped back from the brink, in a six-to-three decision authored by the Chief Justice. How can we explain this? Well, a beginning is that the FMLA was an enormously popular law, one that was a poker chip in a presidential campaign. Messing with the FMLA may have tuned a lot of people in to what the Court is about. Moreover, as Robert Post explains, a contrary decision in Hibbs would have jeopardized the constitutionality of Title VII of the Civil Rights Act of 1964.166 That would have created a lot of heat for the Court to handle. It is easy, as a matter of constitutional politics, to see Hibbs as the decision of a Court avoiding the brink.

This brings us to the Court's two other surprising decisions, Lawrence167 and Gratz/Grutter (the affirmative action cases).168 What we know about these decisions is that they were hardly the Court's first word on these subjects. To the contrary, in prior opinions the Court had staked out its position, which then was subject to searching debate and political commentary.

With just this much said, it should be readily apparent that the Court's decisions on issues of gay rights and affirmative action are perfect examples of the theory here playing out. It certainly is true that **1301* prior to the decisions in Bowers v. Hardwick169 and Regents of the University of California v. Bakke,170 issues of gay rights and affirmative action already had salience in society. But those decisions set the terms of constitutional debate, and provoked extensive societal soul-searching as to what the correct answer might be. The very stickiness of the decisions energized movements in response to them, both among those opposed and those approving. The movements in turn sparked and sharpened debate. After years of consideration, the Court ruled again.

It should come as little surprise to learn that the positions taken by the Supreme Court in Lawrence and the affirmative action cases fall squarely in the mainstream of evolving public opinion.171 Moreover, while this idea of public dialogue influencing Supreme Court decisions is pretty apparent in these high profile cases, it is worth noting the same phenomenon elsewhere. The Rehnquist Court has been a difficult time for criminal suspects and habeas petitioners, and that was the case long before 1994.172 The War on Drugs has eaten away huge chunks of the Fourth Amendment, and the Rehnquist Court has rolled back many of the protections of habeas corpus expanded during the Warren Court years. Yet, to the sensitive eye, the last few Terms have seen a shift even in these typical "get tough" areas.

When we look to see why the Supreme Court has moved to the left in areas such as the Fourth Amendment or habeas corpus, once again we can see deeper societal trends that help provide an explanation. Lowering crime rates and public concerns about racial profiling seem to have had some influence in the criminal area. How enduring this will be, especially in light of fears about terrorism, remains to be seen. Similarly, societal concern about the death penalty has been fueled by DNA testing and the revelations of numbers of innocent inmates who **1302* are on death row. This in turn has raised questions in the public mind-questions that should have been lurking for a long time-about the standards of competency of defense counsel. Taken together, we are seeing a perfectly explicable shift in the doctrine.

This all may seem a bit too pat, and in a moment I will argue it is. Nonetheless, positive theory deserves its due. Although there are rough edges to the theory, and deeply problematic aspects of prediction, the explanation is enlightening, and comports with much of what we know. The Court did not have to decide the cases the way it did, but we now have an explanation why it might have.

B. On "Positive" Explanations and Dialogue

Lest the explanatory force of this positive understanding of judicial behavior seem overstated, it is important to acknowledge one seeming difficulty with the theory. The difficulty rests in a question that might go like this: how certain can we be about how Sandra Day O'Connor (or perhaps Anthony Kennedy) will vote? The positive theory advanced here rests in part on the assumption that the Supreme Court ultimately comes into line with public opinion. But suppose O'Connor did not see it the

way she did on, say, affirmative action. Would the positive theory have lost its force? Even attitudinalists have difficulty predicting how the median Justices will vote. Does the viability of this theory all rest on the shoulders of these unpredictable Supreme Court Justices?

Before arguing that this theory does not rest on any single vote, it is worth observing that the median Justices on the present Court seem consciously attuned to public opinion. We have seen this in judicial statements, such as the remarkable plurality opinion in Casey v. Planned Parenthood.173 Although one might quibble with the plurality's understanding of stare decisis in constitutional cases-the dissent certainly did174-it seems hard to gainsay that the plurality understood that the eyes of the public were on them, and that they acted accordingly. Extrajudicially, Justice O'Connor has been quite explicit in pointing out that in the long run it is public opinion that accounts for change in politics, and in judicial doctrine.175

1303 But what we are after is a generalization, over different Supreme Courts and many years. Yes, O'Connor and Kennedy seem in tune with public opinion in some ways, and maybe many Justices are, consciously or not. But what about when the magic mechanism fails? What, to be blunt, if Justice O'Connor had voted the other way in the affirmative action cases, if Justice Kennedy did not stand up for gay rights, if the Court had missed the mark in Hibbs? Would the theoretical claim made here still hold water?

The answer is that it would not have mattered at all. Because although the claim is that over time the Court will not diverge from public opinion, there necessarily is not any claim about the Court's decisions at a specific time. In the world of Supreme Court decisionmaking and public opinion, there is no "ultimately." Lawrence was not the end of a debate, but only-as is true of any decision-the beginning of its next stage. Polls show, unsurprisingly, that Lawrence caused some hardening of opinion against gay rights.176 Gay marriage presents a new battleground. The debate will reinvigorate, though its terms will shift, until it peters out in consensus.

Which is to say that, ultimately, there may be nothing other than dialogue.

Footnotes

a1 Jacob D. Fuchsberg Professor of Law, New York University School of Law. This Article originally was given as the William Howard Taft Lecture on Constitutional Law at the University of Cincinnati College of Law, and as the Jacob D. Fuchsberg Chair Inaugural Lecture at the New York University School of Law. I am grateful for the comments and suggestions of those in attendance at both lectures. Additional thanks are due to Jenna Bednar, Richard Fallon, Randy Kozel, and Robert Post for their helpful comments on a draft of this paper, and to Christine Bateup for her substantive help and her research assistance.

1 See Barry Friedman, The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner, 76 N.Y.U. L. Rev. 1383 (2001) (describing popular attacks on the judiciary from 1895 to 1924 when conservative judges invalidated a range of social legislation).

2 410 U.S. 113 (1973).

3 347 U.S. 483 (1954).

4 Nothing said here is intended to be critical of those who challenge, praise, or condemn the Court or its decisions. These commentators-often colleagues and friends-simultaneously perform a two-fold function. They are scholars who are trying to define the terms by which judicial review ought to occur. And they are advocates, whose strong voices should and likely do influence how real cases are decided, and how the power of judicial review is wielded. But it can be difficult to disentangle the two. Often when controversy is highest we most need to understand the object of that controversy dispassionately. Yet, it is at those times that dispassion becomes most difficult, and the advocate's agenda most pressing.

5 Strictly speaking, the theory advanced here is not so much a positive one, as one drawing on positive literature. Positive theories typically are subject to falsification, and the theory here may be a bit too gangly to meet that criterion. But the aspiration is that large parts of the theory can be subjected to testing.

6 There are more such voices of late, but still the numbers are small. See, e.g., Mark V. Tushnet, Taking the Constitution Away from the Courts 175-76 (1999) (advocating a constitutional amendment to abolish judicial review). Cf. Steven L. Winter, An Upside/Down View of the Countermajoritarian Difficulty, 69 Tex. L. Rev. 1881, 1923-24 (1991) (arguing that "judicial review is itself an institution so firmly established . . . that its continued existence is utterly unassailable.").

7 In what follows, the expressions "conservative" and "liberal" are used as they commonly are in today's political parlance. By the end of this talk, it will be clear those terms are deeply problematic, at least insofar as discussions of judicial review are concerned.

8 Or at least the second Rehnquist Court. See Thomas W. Merrill, The Making of the Second Rehnquist Court: A Preliminary Analysis, 47 St. Louis U. L.J. 569, 573-74 (2003) (distinguishing between the two Rehnquist Courts: "differences in personnel and rates of change in personnel; differences in the number of cases heard by the Court; a shift in emphasis from cases presenting social [justice] issues to cases presenting issues of constitutional federalism; differences in the number of 5-4 decisions and the willingness of the Justices to adopt important legal innovations in 5-4 decisions; and differences in the number of plurality decisions").

9 See, e.g., United States v. Lopez, 514 U.S. 549 (1995) (striking down the Guns-Free School Zone Act); United States v. Morrison, 529 U.S. 598 (2000) (striking down the civil damages remedy in the Violence Against Women Act).

10 See, e.g., Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (striking down a provision of the Age Discrimination in Employment Act that imposed monetary liability on states); Bd. of Trs. v. Garrett, 531 U.S. 356 (2001) (striking down a provision of the Americans with Disabilities Act that imposed monetary liability on states).

11 See, e.g., Teague v. Lane, 489 U.S. 288 (1989) (holding that habeas petitions that either rely on, or ask the Court to establish, new rules of law should be dismissed at the threshold, subject to only narrow exceptions); Herrera v. Collins, 506 U.S. 390 (1993) (holding that claims of actual innocence based on newly discovered evidence are not sufficient to ground federal habeas relief, absent an independent allegation of a constitutional violation); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding that state and local affirmative action programs will be subject to strict scrutiny); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (extending strict scrutiny to federal affirmative action programs). For commentaries criticizing the Rehnquist Court for failing to protect minority rights, see Erwin Chemerinsky, The Supreme Court, 1998 Term: Foreword-The Vanishing Constitution, 103 Harv. L. Rev. 43 (1989); Erwin Chemerinsky, The Rehnquist Court and Justice: An Oxymoron?, 1 Wash. U. J.L. & Pol'y 37 (1999); Girardeau A. Spann, Race Against the Court: The Supreme Court and Minorities in Contemporary America (1993).

12 See, e.g., Alden v. Maine, 527 U.S. 706 (1999) (barring Fair Labor Standards Act claims against nonconsenting states in state courts); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (articulating a right of expressive association to protect the Boy Scouts from having to comply with a state law barring discrimination against gays and lesbians in places of public accommodation); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (striking down as an impermissible restriction on commercial speech a state law that prohibited advertisement of the price of alcoholic beverages); Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001) (striking down a federal appropriations law that limited the arguments that could be made by those representing indigent clients as impermissible viewpoint-based discrimination under the First Amendment). On the ubiquity of the First Amendment, see generally Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765 (2004) (examining the magnetic force of the First Amendment). See id. at 1794 ("[T]he First Amendment's magnetism leads strategic actors to embrace it as easily as politicians embrace motherhood, the flag, and apple pie.").

13 531 U.S. 98 (2000).

14 See infra note 65 and accompanying text (discussing the close of the Warren Court era).

15 In relation to the mixed record of the Burger Court, see The Burger Court: The Counter-Revolution That Wasn't (Vincent Blasi

ed., 1983).

16 Compare Furman v. Georgia, 408 U.S. 238 (1972) (holding that the administration of the death penalty was arbitrary, capricious, and discriminatory, in violation of the Eighth Amendment), with Gregg v. Georgia, 428 U.S. 153 (1976) (holding that the death penalty is not per se unconstitutional), Proffitt v. Florida, 428 U.S. 242 (1976) (same), and Jurek v. Texas, 428 U.S. 262 (1976) (same).

17 Compare Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (approving busing as a remedy to achieve integration), with Milliken v. Bradley, 418 U.S. 717 (1974) (disapproving inter-district remedies for desegregation where there has been no inter-district violation).

18 Compare Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (applying intermediate scrutiny to two minority preference policies of the FCC that were mandated by Congress, and holding that the policies did not violate equal protection principles), with Adarand Constructors, Inc. v. Pena, 515 U.S. 20 (1995) (holding that all racial classifications, whether imposed by federal, state, or local governments, are subject to strict scrutiny and overruling Metro Broadcasting to the extent inconsistent with this holding).

19 See Stone v. Powell, 428 U.S. 465 (1976) (holding that persons who claim to have been convicted on evidence obtained in violation of the Fourth Amendment were not entitled to raise that claim in habeas corpus proceedings); Wainwright v. Sykes, 433 U.S. 72 (1977) (holding that no constitutional claim can be raised in habeas corpus proceedings if the convicted person or his or her counsel had a fair opportunity to raise the claim at trial and failed to do so).

20 Planned Parenthood v. Casey, 505 U.S. 833 (1992).

21 See Jed Handelsman Shugerman, A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court, 37 Ga. L. Rev. 893, 893 (2003) (observing that while before 1995 the Supreme Court had struck down 134 congressional statutes since its inception, since 1995 the Rehnquist Court has invalidated 33 different federal statutes).

22 See Evan H. Caminker, Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past, 78 Ind. L.J. 73 (2003) (proposing the imposition of a supermajority requirement before Justices can strike down congressional legislation); Shugerman, supra note 21, at 895 ("[A] six-three voting rule would appropriately supplement the Justices' individualized determination of deference to Congress.").

23 See William W. Buzbee & Robert A. Schapiro, Legislative Record Review, 54 Stan. L. Rev. 87 (2001) (criticizing the Court's focus on the legislative record in federalism cases as a development that improperly imports a model from administrative law jurisprudence to constitutional interpretation); Evan H. Caminker, "Appropriate" Means-Ends Constraints on Section Five Powers, 53 Stan. L. Rev. 1127 (2001) (arguing that the means-ends test for congressional legislation enacted under Section 5 of the Fourteenth Amendment should be the same as the "rational relationship" test established by McCulloch v. Maryland, and not the "congruence and proportionality" test that the Court has adopted in recent cases); Philip P. Frickey & Steven S. Smith, Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique, 111 Yale L.J. 1707 (2002) (maintaining that the Court's "due deliberation" model imposing fact-gathering requirements in federalism cases places unrealistic constraints on the legislative process in light of the common understanding of Congress in social science literature); Stephen M. Griffin, Judicial Supremacy and Equal Protection in a Democracy of Rights, 4 U. Pa. J. Const. L. 281, 283 (2002) (arguing that the Supreme Court should move away from heightened scrutiny in equal protection jurisprudence, as "the political branches have a distinct deliberative advantage over the judiciary in ensuring that racial minorities are protected against discrimination").

24 See infra note 93 and accompanying text.

25 See infra notes 45-47 and accompanying text.

26 See U.S. Const. amend. XIV, § 5.

27 See, e.g., Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 545 (2001) ("Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy."); United States v. Morrison, 529 U.S. 598, 617 n.7 (2000) ("[E]ver since Marbury this Court has remained the ultimate expositor of the constitutional text."); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19 (1995) ("Article III establishes a 'judicial department' with the 'province and duty . . . to say what the law is' in particular cases and controversies. Marbury v. Madison, 5 U.S. 137, 1 Cranch 137 (1803). The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy.").

28 See Larry D. Kramer, The Supreme Court, 2000 Term-Foreword: We the Court, 115 Harv. L. Rev. 4, 12 (2001) ("[I]t was the people themselves-working through or responding to their agents in the government-who were responsible for seeing that the Constitution was properly interpreted and implemented. The idea of turning this responsibility over to judges was unthinkable."); see also Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review 7 (2004).

29 Cass R. Sunstein, The Partial Constitution 9 (1993) ("the Constitution is aimed at everyone, not simply the judges. Its broad phrases should play a role with legislators, executive officials, and ordinary citizens as well."); Tushnet, supra note 6, at ch. 2 (examining "Doing Constitutional Law Outside the Courts"); Robert C. Post & Reva B. Siegel, Protecting the Constitution from the People: Juricentric Restrictions on Section 5 Power, 78 Ind. L.J. 1, 43 (2003) (exploring the Rehnquist Court's understanding of Section 5 of the Fourteenth Amendment resting on the claim of exclusive authority to interpret the Constitution, which they term the "juricentric Constitution," and arguing that "Congress must self-consciously address" the Court's denial "that Congress plays any role in articulating constitutional understandings.").

30 Kramer, supra note 28, at 163 ("Popular constitutionalism is not some quaint curiosity from the Founders' world. It is a vital principle that has been part of our constitutional tradition all along. To deny that there are spaces outside the Court where constitutional decisions are made, decisions to which judges are subservient, is a radical and unprecedented idea."); Tushnet, supra note 6, at 194 (advocating a "populist constitutional law," which entails that "the public generally should participate in shaping constitutional law more directly and openly . . . [and] reclaim [the Constitution] from the courts.").

31 See, e.g., Robert H. Bork, The Supreme Court Needs a New Philosophy, Fortune, Dec. 1968, at 138, 140 ("[M]en are likely to prefer legislatures more representative of contending interest groups, more mindful of social complexities, and, most important, more subject to control-legislatures, that is, whose members can be voted in and out of office.").

32 See, e.g., Robert H. Bork, The Tempting of America 176 (1990) ("[T]here is a historical Constitution that was understood by those who enacted it to have a meaning of its own . . . . It is that meaning the judges ought to utter."); John Harrison, Originalism and Historical Truth: Forms of Originalism and the Study of History, 26 Harv. J.L. & Pub. Pol'y 83, 89 (2003) (advocating a form of originalism he terms "Originalism Mark II," which posits that "an authoritative text should be understood as of the time that the text was written instead of some other time, like the present"); Stephen Presser, Recapturing the Constitution 21 (1994) (arguing for a return to constitutional originalism by recapturing "the religious and moral basis for the Constitution").

33 See Barry Friedman & Scott B. Smith, The Sedimentary Constitution, 147 U. Pa. L. Rev. 1, 21-25 (1998) (discussing how the Warren Court embraced both originalism and living constitutionalism as each suited the needs of the time).

34 See, e.g., Bork, supra note 31, at 138, 140 (describing the Warren Court's failure to explain and justify its decisions as a "lack of 'craftsmanship,'" and suggesting that wide belief existed that some Justices on the Court "decide cases not according to the criteria they cite but according to their social and political sympathies"); Lino A. Graglia, Disaster By Decree 17 (1976)

(criticizing the Court's desegregation efforts following Brown, and concluding that "[w]hat the country needs to understand today in regard to compulsory integration is that, not only has it been imposed by the Supreme Court and not by the Constitution, but it has been imposed by the Court most improperly"); James Jackson Kilpatrick, A Very Different Constitution, 21 Nat'l Rev. 794, 796 (1969) ("[T]he grave offense imputed to the Warren Court in its handling of the Constitution [is that] [t]he Court did not interpret; it amended.").

35 See Steven G. Calabresi, A Government of Limited and Enumerated Powers, 94 Mich. L. Rev. 752, 830-31 (1995) (arguing that "the Supreme Court is institutionally competent to enforce constitutional federalism" and should continue "on its way down the Lopez path"); Steven G. Calabresi, Textualism and the Countermajoritarian Difficulty, 66 Geo. Wash. L. Rev. 1373, 1375-82 (1998) (contending that judicial intervention in federalism cases does not implicate the countermajoritatian difficulty and should continue); Charles Fried, Saying What the Law Is: The Constitution In The Supreme Court 46-47 (2004) ("The recent federalism decisions are best understood as assertions that the Constitution does embody a conception of the relation between state and national power; that that conception can find an expression in constitutional doctrine, and that when cases come before it implicating that doctrine it is 'the province and the duty of the Court to say what the law is.'"); Saikrishna B. Prakash & John C. Yoo, Questions For the Critics of Judicial Review, 72 Geo. Wash. L. Rev. 354, 361 (2003) (asserting that "[i]f judicial review is conceded to exist, then it must exist over federalism questions as well as individual rights . . . "); Lino A. Graglia, The Myth of a Conservative Supreme Court: The October 2000 Term, 26 Harv. J.L. & Pub. Pol'y 281, 292 (2003) ("There is force in the argument that, since everyone agrees that the Constitution created a federal government of limited powers, it is the duty of the Court to find and enforce some limits.").

36 Robert C. Post, The Supreme Court, 2002 Term-Foreword: Fashioning the Legal Constitution: Culture, Courts and Law, 117 Harv. L. Rev. 4 (2003) (focusing on Hibbs, Grutter, and Lawrence).

37 Nev. Dep't of Human Resources v. Hibbs, 538 U.S. 721 (2003).

38 United States v. Lopez, 514 U.S. 549 (1995).

39 United States v. Morrison, 529 U.S. 598 (2000).

40 Gratz v. Bollinger, 539 U.S. 244 (2003).

41 Grutter v. Bollinger, 539 U.S. 306 (2003).

42 539 U.S. 558 (2003).

43 478 U.S. 186 (1986), overruled by Lawrence v. Texas, 539 U.S. 558 (2003).

44 Liberals, who had prepared for the possibility that the Court would strike down the affirmative action plans in both Gratz and Grutter, were euphoric, if slightly shocked, following the decisions. Gary Orfeld, founding co-director of the Civil Rights Project at Harvard University, described the Court's decision in Grutter as "remarkable" given that "it's a much more conservative [Court] than the one which upheld Bakke." Simon W. Vozick-Levinson, High Court Upholds Affirmative Action, Harv. Crimson, June 23, 2003, available at http://www.thecrimson.com/article.aspx?ref=348443. Theodore Shaw, associate director-counsel of the National Association for the Advancement of Colored People, described the decision as "fortunate, given the current conservative makeup of the court." Jeremy Berkowitz & Tomislav Ladika, Supreme Court Upholds Affirmative Action, Rejects Point System, Mich. Daily, June 24, 2003, available at http://www.michigandaily.com/vnews/display.v/ART/2003/06/24/3ef84fd007bcc?in_ archive=1. Nonetheless, while applauding the decisions of the Court, liberals continued to warn of the threat posed by the Rehnquist Court, particularly if President Bush is able to make an appointment to the Court during his presidency. For example, Kim Gandy, president of the National Organization of

Women, was quoted as saying: "The 5-to-4 split in Grutter is a brutal reminder of the Court's delicate balance and what is at stake with the next resignation of the Court." Jim Lobe, U.S. Rights: U.S. High Court Upholds Affirmative Action, Inter Press Service, June 23, 2003. Conservatives, in contrast, were critical of the Court's decisions. Grutter and Lawrence were described as "[a]d hoc policy judgments" by former Reagan administration official Michael Carvin. Jan Crawford, High Court Rulings Stun the Right Decisions on Race, Gays Show Justices' Knack for Surprise, Sun-Sentinel, June 29, 2003, at 4A. Clint Bolick, of the libertarian Institute for Justice, described the ruling in Grutter as "a tragedy for all Americans." David G. Savage, Supreme Court Rulings: Court Affirms Use of Race in University Admissions, L.A. Times, June 24, 2003, at 1; see also Pat Robertson, Today Show (NBC Television Broadcast, July 16, 2003) ("They have distorted the Constitution. They have perverted the law. They've entered into the arena on the side of evil . . . ."). Sandy Rios of Concerned Women of America (CWA) commented: "If there's no rational basis for prohibiting same-sex sodomy by consenting adults, then state laws prohibiting prostitution, adultery, bigamy, and incest are at risk . . . . This decision is further evidence that 'We the People' have virtually lost the right to govern ourselves because of judicial activists who think they have a right to create law." CWA Says: Supreme Court Wrong to Declare a Right to Sexual Perversion, U.S. Newswire, June 26, 2003. Ken Connor, president of the Family Research Council, said that "[t]his kind of activism undercuts the democratic process." Joan Biskupic, Decision Represents an Enormous Turn in the Law, USA Today, June 27, 2003, at 5A.

45 See John Harrison, The Role of the Legislative and Executive Branches in Interpreting the Constitution, 73 Cornell L. Rev. 371, 372-73 (1988) (arguing that the President and Congress are not legally obliged to follow the courts' constitutional interpretation of laws where those interpretations exist as precedents rather than judgments in specific cases, as "[t]he argument that the Constitution allocates the interpretive power to the courts is wrong."); Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 Iowa L. Rev. 1267, 1268 (1996) ("It is emphatically the province and duty of the President to say what the law is, including the law embodied in the Federal Constitution."); Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217, 221 (1994) ("The power to interpret law is not the sole province of the judiciary; rather, it is a divided, shared power not delegated to any one branch but ancillary to the functions of all of them within the spheres of their enumerated powers."). Also note Steven Calabresi's criticism of five-to-four majorities on the Supreme Court that Caminker echoes supra, in note 22: "In my judgment, the biggest problem raised by our practice [of judicial review] is that it is too easy for five to four Supreme Court majorities to invalidate State laws, given that the Constitution prescribes bicameralism and presentment before national lawmaking should occur." Steven G. Calabresi, Caesarism, Departmentalism, and Professor Paulsen, 83 Minn. L. Rev. 1421, 1429 (1999).

46 Both liberal scholars in the Lochner era and conservative scholars in the Warren Court era advanced arguments based on the harm that can be caused by judicial review. E.g., compare J. Allen Smith, The Spirit of American Government 103 (1907) (denouncing the power of judicial review as a "dangerous innovation" as it gave the judiciary power to thwart the people's will), Louis B. Boudin, Government by Judiciary, 26 Pol. Sci. Q. 238 (June 1911) (arguing that the courts had "reached the condition of 'judicial despotism' . . . . The essence of despotism is the right of a few to make the laws or to control their making, without being responsible to the people."), and Gilbert E. Roe, Our Judicial Oligarchy 197 (1912) (accusing the judiciary of "using the great powers of the judicial office to block and thwart the public will" and claiming that "[w]hile the people have been laying the foundation for democracy, the courts have been building an oligarchy."), with Bork, supra note 31, at 138 ("What, after all, justifies a non-elected committee of lawyers in overriding the policies of the elected representatives of the people?"). See also Editorial, Court's 'Legislation' Undermines Democracy, Augusta Chron., July 10, 2003, at A4 ("The Supreme Court makes a very poor legislature. Its broad pronouncements of new rights restrict our collective right to create the kind of society we prefer through democratic means."). See generally Barry Friedman, The Birth of an Academic Obsession: The Countermajoritarian Difficulty, Part Five, 112 Yale L.J. 153 (2002); Friedman, supra note 1, at 1428-47.

47 Arguments based on the hope that judicial review offers were made by both conservative scholars in the Lochner era and by liberal scholars in the Warren Court era. During the Lochner era, conservative organizations promoted "Constitution Day" in order to promote public awareness of the role of the courts "in providing a barrier against unrestrained democracy that could threaten personal and economic liberties." William G. Ross, A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937 233 (1994). Arnold Paul also notes that "by the 1890s it was a root principle of American conservatism that in a time of social crisis, when rampant populism might threaten the established order, the Supreme Court must act as counterweight to election returns, as defender of minority rights against majority rule." Arnold M. Paul, Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895 229 (1960). Cf. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 70 (2d ed. 1986) (describing the Court's role in judicial review as "defender of the faith, proclaimer and protector of the goals"); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 103 (1980) (proposing the "representation-reinforcing" theory of judicial review, in which appointed judges "are comparative outsiders in our

governmental system" and are in a position "objectively to assess claims . . . that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interests of those whom the system presupposes they are."); Philip B. Kurland, Toward a Political Supreme Court, 37 U. Chi. L. Rev. 19, 45 (1969) (describing the Supreme Court's primary function to "protect the individual against the Leviathan of government and to protect minorities against oppression by majorities").

48 This historical contingency of support for the Court was also recognized by some liberal commentators during the Lochner era. See George W. Alger, The Courts and Legislative Freedom, Atlantic Monthly, March 1913, at 345 ("Twenty-five to fifty years ago there were time-honored phrases which were applied by lawyers with more or less popular approval to the American judiciary. The courts were the 'Palladium of our liberties,' the 'Guardians of the Ark of the Covenant.' To-day the public attitude has largely changed. These phrases are no longer current. The people are dissatisfied with the guardians, and in some quarters there is dissatisfaction with the ark itself.").

49 Bickel, supra note 47, at 17. For those versed in constitutional theory, undoubtedly Bickel's famous, if infelicitous, expression for this problem-the "counter-majoritarian factor"-comes to mind. But it is good to avoid that phrase for a reason worth mentioning. Despite the fact that the phrase has certainly caught on, the problem Bickel described was so imprecise as to be maddening. Is the complaint that judicial review interferes with the will of the majority? With the majority's representatives? With the actions of any aspect of democratic governance? Historically it means all of these and more, because-as explained earlier-the complaint tends to be tailored to whatever the Court is doing at the moment. Thus, while its lack of precision is frustrating, its core sentiment is not, and that is where the focus here rests. Judicial review feels, to those who see it as a threat, as an impediment to the people governing themselves as they might like.

50 See, e.g., Ely, supra note 47, at 8 (conceiving judicial review as a way of "protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule"); Bickel, supra note 47, at 109 ("the Supreme Court . . . is an institution charged with the evolution and application of society's fundamental principles"); Terrance Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1184 (1977) ("[C]onstitutional law must now be understood as the means by which effect is given to those ideas that from time to time are held to be fundamental in defining the limits and distribution of governmental power in our society.").

51 See, e.g., 1 Bruce Ackerman, We the People: Foundations 10 (1991) ("[T]he courts serve democracy by protecting the hard-won principles of a mobilized citizenry against erosion by political elites who have failed to gain broad and deep popular support for their innovations."); Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1380 (1997) (arguing that one of the reasons for judicial supremacy under a Constitution is "to remove a series of transcendent questions from short-term majoritarian control"); Jesse Choper, Judicial Review and the National Political Process 68 (1980) ("Since, almost by definition, the processes of democracy bode ill for the security of personal rights and, as experience shows, such liberties are not infrequently endangered by popular majorities, the task of custodianship has been and should be assigned to a governing body that is insulated from political responsibility and unbeholden to self-absorbed and excited majoritarianism.").

52 The lower courts are an entirely different matter altogether. In reviewing Mark Tushnet's book Taking the Constitution Away from the Courts, Erwin Chemerinsky makes the valuable point that those who attack judicial review often focus solely on the Supreme Court. It is possible that even when the Supreme Court is under attack, the lower courts exercise the power of judicial review to remedy countless lower-profile constitutional violations, providing support for the "hope" side of the ledger. See Erwin Chemerinsky, Losing Faith: America Without Judicial Review?, 98 Mich. L. Rev. 1416 (2000) (book review). This is an extremely important point, although-in the context of the present discussion-it is possible those courts leave just as many unremedied.

53 See Tushnet, supra note 6, at 129-53, 154 ("[T]he historical record and considerations of constitutional theory and structure suggest that judicial review does not make much difference one way or the other."); Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 338 (1991) ("U.S. courts can almost never be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government. Problems that are unsolvable in the political context can rarely be solved by courts."); Michael J. Klarman, From Jim Crow to Civil Rights: The Supreme Court and

the Struggle for Racial Equality 450 (2004) ("When a minority group suffering oppression is most in need of judicial protection, it is least likely to receive it. Groups must command significant social, political and economic power before they become attractive candidates for judicial solicitude.").

54 347 U.S. 483 (1954).

55 Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).

56 Plessy v. Ferguson, 163 U.S. 537 (1896).

57 418 U.S. 683 (1974).

58 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

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

60 520 U.S. 681 (1997).

61 See, e.g., Sujit Choudhry, The Lochner Era and Comparative Constitutionalism, 2 Int'l J. Const. L. 1, 4-15 (2004) (describing three different meanings of the Lochner era in American constitutional thought, which equate Lochner with constitutional crisis); Howard Gillman, The Constitution Beseiged: The Rise and Demise of Lochner Era Police Powers Jurisprudence 10-11 (1993) (arguing that the Lochner era is not best understood as a "sudden corruption of the law and the judicial function," but as a story of "how the judiciary's struggle to maintain the coherence and integrity of a constitutional ideology averse to class politics was complicated and ultimately derailed by the maturation of capitalist forms of production and the unprecedented efforts of legislatures to extend special protections to groups that considered themselves vulnerable to increasingly coercive market mechanisms").

62 See William E. Leuchtenberg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt 82-162 (1995) (describing President Roosevelt's motivations in proposing the Court-packing plan, including the growth of popular anti-Court sentiment).

63 See Kramer, supra note 28, at 207.

64 See Paul, supra note 47 (containing a variety of statements from prominent lawyers and judges in support of the Lochner era jurisprudence and the protection of property rights).

65 See Alpheus Thomas Mason, The Supreme Court: Palladium of Freedom 169-70 (1962) ("The ill effects and shortcomings, if such there be, of the Warren Court's decisions can be removed by an ordinary act of Congress. It is under attack for responding to public aspirations, perhaps in moving ahead of them, as in the desegregation decisions."); Alexander M. Bickel, Close of the Warren Era, New Republic, July 12, 1969, at 13, 15 ("A Court . . . tends to attack problems at retail, in the smallest possible compass, illuminating ultimate principles in the glare of its headlights, as it were, but seldom speeding ahead . . . . Speed, however, and the confident, single-minded imposition of solutions to problems of the first magnitude-these have been the hallmarks of the Warren Court."); Term's End for the Court, N.Y. Times, June 28, 1964, at E8 (warning of the danger that the Court is "moving too swiftly," "getting too far ahead of what the country accepts as right and just," and "seeking to legislate in its own right").

66 Reflecting this tendency to focus on judicial votes rather than outcomes, see Theodore W. Ruger et al., The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking, 104 Colum. L. Rev. 1150, 1162 (outlining the results of applying two different methods to predict the outcome of every argued case during the Supreme Court's 2002 Term. "Because our study does not account for this content [of judicial decisions], there is much it does not, and cannot, say about the judicial process.").

67 Lee Epstein & Jack Knight, The Choices Justices Make 17 (1998) ("[W]e cannot fully understand the choices justices make unless we also consider the institutional context in which they operate."). The argument here is elaborated upon in Barry Friedman, The Politics of Judicial Review (unpublished manuscript, on file with author).

68 See Gordon Bermant & Russell R. Wheeler, Federal Judges and the Judicial Branch: Their Independence and Accountability, 46 Mercer L. Rev. 835, 839 (1995) ("It is the essence of good judicial process that it is uncontaminated by pressures for decision beyond those presented by the particular facts and the applicable law. The salary and tenure protections of the Constitution were intended to secure decisional independence. It is the decisional independence of federal judges that the nation relies on for the emergence of its 'unlikely heroes' on the bench.").

69 Epstein & Knight, supra note 66, at 10 (presenting the strategic account of judicial decisionmaking, which recognizes that "justices are strategic actors who realize that their ability to achieve their goals depends on a consideration of the preferences of other actors, the choices that they expect others to make, and the institutional context in which they act").

70 See Forrest Maltzman et al., Crafting Law on the Supreme Court: The Collegial Game 149 (2000) (presenting a strategic model of interaction between Supreme Court Justices as a "collegial court game" and arguing that "preferences alone do not dictate the choices justices make. Instead, their decisions result from the pursuit of their policy preferences within constraints endogenous to the Court. The constraints primarily stem from intra-institutional rules on the Court, which give the Court its collegial character"); Lewis A. Kornhauser & Lawrence G. Sager, The One and the Many: Adjudication in Collegial Courts, 81 Cal. L. Rev. 1, 56 (1993) ("Appellate adjudication is a collegial enterprise, in which agency of performance lies with the court, not with the judges as individuals.").

71 Terri Jennings Peretti, In Defense of a Political Court 100 (1999) ("On average, a vacancy on the Court occurs every 1.82 years, giving a single-term president 2.2 appointments and a two-term president 4.4 appointments.").

72 See Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 Va. L. Rev. 1045, 1076 (2001) ("Parties who control the presidency install jurists of their liking-given whatever counterweight the Senate provides. Those jurists in turn create decisions which are embodied in constitutional doctrine and continue to have influence long after those who nominated and confirmed the jurists have left office. One might think of this as 'counter-majoritarian,' but in fact, it is not. It represents a temporally extended majority rather than a contemporaneous one.").

73 See Gregory A. Caldeira et al., Sophisticated Voting and Gate-Keeping in the Supreme Court, 15 J.L. Econ. & Org. 549 (1999) (presenting evidence that Supreme Court Justices vote to grant or deny certiorari in a manner that is inconsistent with the Justice's most preferred ideological position where their views are not supported by a majority of the Court).

74 See Peretti, supra note 71, at 100 ("Given turnover on the Court and a membership that has passed the partisan and ideological litmus test applied by elected officials, it can be concluded that the values of the justices mirror and certainly lie within the range of those values currently or recently receiving official representation in other branches of government.").

75 The present, despite a flood of scholarship suggesting the contrary, does not. Scholars today suggest the Supreme Court is trumping popular political preferences. See, e.g., Griffin, supra note 23 (arguing that over the last twenty years the Court has acted to limit the constitutional rights of minorities, despite the repeated attempts of Congress to expand the rights protected under the Fourteenth Amendment). Yet, at the least, it seems plain it is not interfering with the preferences of those presently in power. See

infra notes 155-72. See Barry Friedman & Anna L. Harvey, Electing the Supreme Court, 78 Ind. L.J. 123 (2003) (explaining that present activism represents a conservative Court striking liberal enactments at a time when Congress is in conservative hands).

76 See 28 U.S.C. §§ 44, 133 (1993 and Supp. 2003) (authorizing the President to appoint 179 circuit court and 663 district court judges).

77 See Alex Kozinski, The Many Faces of Judicial Independence, 14 Ga. St. U. L. Rev. 861, 867 (1998) ("Lower courts follow higher courts, and you're supposed to do what the big boys and girls upstairs tell you to do."); Sanford Levinson, On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation, 25 Conn. L. Rev. 843, 847 (1993) ("'Inferior' judges know their place. . . which is the enforcement of the decisions of superiors, whatever their own views."); M.B.W. Sinclair, Statutory Reasoning, 46 Drake L. Rev. 299, 364 (1997) ("A judge is . . . bound by the prior decisions of the courts superior to her court in the jurisdiction's hierarchy; that's vertical stare decisis. It is just what it means to have an hierarchical structure in the court system. Although it includes the control of horizontal stare decisis, it is more powerfully binding because, as a matter of social power, the reasons of higher courts play very strongly in lower courts. Reasons, policy judgments, and even dicta can thus have vertical precedential power.").

78 See, e.g., McNollgast, Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law, 68 S. Cal. L. Rev. 1631, 1646 (1995) ("Doctrine emerges as part of the equilibrium interaction among the Supreme Court and the lower courts, each acting to maximize its own preferences or ideology. . . . Judges in the lower courts are . . . strategic actors facing a trade-off between pursuing a personal policy agenda and seeing some of their decisions reversed by a higher court, and adopting the best available complying doctrine, without fear of successful appeal."); Donald R. Songer et al., The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions, 38 Am. J. Pol. Sci. 673, 690-694 (1994) (finding in the context of search and seizure cases that while "the courts of appeals were highly responsive to changing policy trends on the Supreme Court," nonetheless this "did not prevent entirely the judges on the courts of appeals from pursuing their own policy preferences."). Accord Balkin & Levinson, supra note 72, at 1073-74. Because the federal docket is so large, lower court judges are given-or, perhaps more accurately, take-the practical power to float all sorts of new possibilities in constitutional interpretation. These ostensibly "inferior courts" often prove to be testing grounds for what will later be recognized as constitutional revolutions.

79 514 U.S. 549 (1995).

80 529 U.S. 598 (2000).

81 Glenn H. Reynolds & Brannon P. Denning, Lower Court Readings of Lopez, or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?, 2000 Wis. L. Rev. 369, 371 (2000) (undertaking a survey of lower court decisions subsequent to United States v. Lopez and finding that "lower courts have tended to limit Lopez to its facts, rather than using it as a springboard to enforce a more robust theory of federalism."); see also Brannon P. Denning & Glenn H. Reynolds, Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts, 55 Ark. L. Rev. 1253, 1256 (2003) (extending their analysis of lower courts' treatment of Commerce Clause cases and suggesting that there remains "evidence from the lower courts' opinions that they are still reluctant to take Lopez seriously, even after Morrison's clarifying opinion"). Interestingly, lower courts may even take Supreme Court decisions and apply them in situations having a very different ideological cast, posing the difficult question whether such a decision is compliant or not. See, e.g., Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003) (granting the plaintiffs a preliminary injunction to prevent denial of access to medical marijuana as authorized under state law, on the basis that their Commerce Clause challenge to the federal Controlled Substances Act has a strong likelihood of success). The Ninth Circuit panel distinguished United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001), in which the Supreme Court held that a medical necessity exception for marijuana was at odds with the unambiguous terms of the Controlled Substances Act, on the basis that the Court had expressly reserved the Commerce Clause issue.

82 The Federalist No. 78, at 433 (Alexander Hamilton) (Clinton Rossiter ed., 1999) ("[T]he judiciary, from the nature of its functions, will always be the least dangerous [branch] to the political rights of the constitution . . . . The judiciary . . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no

active resolution whatever. It may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm for the efficacious exercise even of this faculty.").

83 United States v. Nixon, 418 U.S. 683 (1974). On President Nixon's decision to comply with the orders of the Supreme Court, see Stanley I. Kutler, The Wars of Watergate: The Last Crisis of Richard Nixon 515-16 (1990).

84 On President Eisenhower's personal skepticism about Brown, and his decision to send in the troops, see Lucas A. Powe, Jr., The Warren Court and American Politics 35-36, 157-59 (2000).

85 For President Lincoln's instructions to ignore the order in Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), see Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), reprinted in 4 Collected Works of Abraham Lincoln 421, 430-31 (Roy P. Basler ed., 1953).

86 On President Roosevelt's intended reaction in the event of a negative decision in the Gold Standard cases, see Leuchtenberg, supra note 62, at 86-88; Barry Friedman, The History of Countermajoritarian Difficulty, Part Four: Law's Politics,148 U. Pa. L. Rev. 971, 1032-34 (2000).

87 See Richard H. Fallon, Jr., Implementing the Constitution 55 (2001) (discussing these weapons in Congress's arsenal: "[n]ot unreasonably, the Justices might consider any of these consequences to be undesirable").

88 See John Ferejohn, Independent Judges, Dependent Judiciary: Explaining Judicial Independence, 72 S. Cal. L. Rev. 353, 355-65 (1999) (distinguishing between "legitimate" congressional or presidential interference with the judiciary by "'packing' courts with new judges, regulating their jurisdiction, or enacting general laws that overturn judicial interpretations of statutes," and "illegitimate" interference that tries to "get an individual judge to alter her decisions."); Fallon, supra note 87, at 55 (stating that Justices "appropriately take into account" congressional responses to judicial decisions).

89 For example, members of the Court still remember the lessons of the Lochner era. See, e.g., United States v. Morrison, 529 U.S. 598, 644 (2000) (Souter, J., dissenting) ("The Court in Carter Coal was still trying to create a laissez-faire world out of the 20th-century economy, and formalistic commercial distinctions were thought to be useful instruments in achieving that object. The Court in Wickard knew it could not do any such thing and in the aftermath of the New Deal had long since stopped attempting the impossible."); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 787 (2002) (Breyer, J., dissenting) ("This understanding led the New Deal Court to reject overly restrictive formalistic interpretations of the Constitution's structural provisions, thereby permitting Congress to enact social and economic legislation that circumstances had led the public to demand.").

90 See, e.g., Lee Epstein et al., The Supreme Court as a Strategic National Policymaker, 50 Emory L.J. 583, 610 (2001) (providing empirical evidence that supports the proposition that Supreme Court Justices "adjust their decisions in anticipation of the potential responses of the other branches of government.").

91 See Friedman & Harvey, supra note 75, at 139 (finding that the Supreme Court is more likely to strike down congressional statutes when it is facing a friendly Congress); Mark Tushnet, The Supreme Court, 1998 Term-Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration, 113 Harv. L. Rev. 29, 78-79 (1999) ("[T]he Court is only now confronting questions about the interpretation and constitutionality of statutes enacted during the previous constitutional regime. From the new regime's perspective, these statutes-even those recently enacted-are outdated in the sense that they could not be enacted in the new regime."). There are other theories, of course. The appointment of Justice Clarence Thomas in 1991 may have sealed the Federalism Five. But there are problems with this theory. See Merrill, supra note 8, at 590-601 (suggesting that while the replacement of Justice White by Justice Thomas can partly explain the Court's federalism jurisprudence, it accounts for only one of the five votes in the federalism coalition, and does not explain the substantial innovations in federalism jurisprudence compared to the decline in emphasis on social issues). See also John O. McGinnis, Continuity and Coherence in the Rehnquist

Court, 47 St. Louis U. L.J. 875, 877 (2003) ("The appointment of someone like Justice Thomas and the rise of strong originalism as a thinkable methodology of judging was possible only after the perceived failures of centralized government stimulated a renewed consideration of the virtues of the Framers' Constitution. Hence, Justice Thomas's appointment is a confirmation of the changing political ideals that have propelled originalism's revival and that explain much of the Rehnquist Court's doctrine.").

92 See generally Peretti, supra note 71, at 164, 163-77 (discussing social science research regarding the relationship between public opinion and judicial review).

93 See Gregory A. Caldeira, Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan, 81 Am. Pol. Sci. Rev. 1139 (1987) (examining Gallup Polls undertaken between February 3 and June 10, 1937 in relation to FDR's court-packing plan and concluding that judicial behavior and mass media played a crucial role in shaping public opinion regarding the Supreme Court in this period); Leuchtenberg, supra note 62, at 137-39, 144-47, 152-54, 159 (discussing negative public reaction to FDR's court-packing plan). See also supra note 85 and accompanying text.

94 See generally Kramer, supra note 28, at 207.

95 Robert A. Dahl, Democracy and Its Critics 190 (1989) ("[T]he views of a majority of the justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country."); Robert G. McCloskey, The American Supreme Court 224 (1960) ("[I]t is hard to find a single instance when the Court has stood firm for very long against a really clear wave of public demand.").

96 Some studies suggest that the judicial appointment process is the primary means by which popular influence is felt on the Supreme Court. See, e.g., William Mishler & Reginald S. Sheehan, The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions, 87 Am. Pol. Sci. Rev. 87, 96-97 (1993) (finding a lag of five to seven years in Supreme Court responsiveness to public opinion; authors suggest the key explanation is the politically motivated use of the appointment process); Helmut Norpoth & Jeffrey Segal, Popular Influence on Supreme Court Decisions, 88 Am. Pol. Sci. Rev. 711, 716 (1994) ("While justices are not accountable to the populace, presidents and senators, who share the power to choose them, are. Whatever configuration of public opinion elects a president, in particular, could transpire in his or her Court appointments. . . . It is not that the justices pay keen attention to public opinion but that they have been chosen by a president (with the advice and consent of the Senate) who presumably shares the public's views.").

97 Keith Whittington, Political Foundations of Judicial Supremacy: The Presidency, The Supreme Court, and Constitutional Leadership in U.S. History (forthcoming) (manuscript at 45, ch. 2, on file with author) (examining "the consistency of departmentalism with the American constitutional tradition," and arguing that the authority to give meaning to the Constitution has historically shifted away from the judiciary to the political branches of government in times of reconstructive constitutional regimes).

98 See, e.g., Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 (1980) (arguing that judicial decisions during the Brown period only accommodated the interest of blacks in racial equality to the extent that this converged with the interests of whites); Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 Stan. L. Rev. 61 (1988) (placing Brown in the context of the U.S. government's foreign policy efforts to fight communism abroad and to promote democracy in Third World countries); Michael J. Klarman, Brown, Racial Change and the Civil Rights Movement, 80 Va. L. Rev. 7, 10 (1994) ("[T]he Brown decision was judicially conceivable in 1954 only because the forces for change had been preparing the ground for decades.").

99 See infra notes 155-72 and accompanying text.

100 The so-called "attitudinal model" of judicial behavior holds that when Justices make decisions they want the outcomes to approximate as closely as possible to their ideological attitudes and policy preferences. See Jeffrey A. Segal & Harold J. Spaeth,

The Supreme Court and the Attitudinal Model (1993); Jeffrey A. Segal & Harold J. Spaeth, The Supreme Court and the Attitudinal Model Revisited (2002). Cf. Lawrence Baum, The Puzzle of Judicial Behavior 37-55 (1997) (suggesting that in addition to policy goals, goals relating to career and standard of living, limiting work load, and judicial audiences may have a significant impact on the behavior of Supreme Court Justices); Richard A. Posner, Overcoming Law (1995) (discussing the different sources of judicial motivations, including the importance of practical consequences of decisions).

101 See Jeffrey A. Segal, Separation-of-Powers Games in the Positive Theory of Congress and Courts, 91 Am. Pol. Sci. Rev. 28 (1997) (comparing the attititudinal and separation-of-powers game theories of voting behavior by Supreme Court Justices and concluding that the Justices "overwhelmingly engage in rationally sincere behavior.").

102 See Anna L. Harvey & Barry Friedman, The Limits of Judicial Independence: The Supreme Court's Constitutional Rulings 1987-2000 (unpublished manuscript, on file with author).

103 Gratz v. Bollinger, 539 U.S. 244 (2003). See also supra note 44 and accompanying text.

104 Grutter v. Bollinger, 539 U.S. 306 (2003). See also supra note 44 and accompanying text.

105 For example, the recent defense of judicial supremacy by Alexander and Schauer rests on the assumption that the Constitution is law, rather than politics. They state that "[a]n important aspect of the Constitution, as of all law, is its authority," Alexander & Schauer, supra note 51, at 1361; "The reasons for having laws and a constitution that is treated as law are accordingly also reasons for establishing one interpreter's interpretation as authoritative. Cooper v. Aaron thus reflects the very reason for having a constitution that is regarded as law," id. at 1377. See also Sunstein, supra note 29, at 93 ("[T]he Constitution is law. If the Constitution is law, then it stands above politics. . . The Constitution does not mean what particular people want it to mean; otherwise it would not be law at all."); Kramer, supra note 28, at 24 ("In our world, there is law and there is politics, with nothing much in between. For us, the Constitution is a subset of law, and law is something presumptively and primarily, even if not exclusively, within the province of courts.").

106 For what it is worth, the obviousness of the point is clouded by another possible cause of insistence on the law-politics divide: deep insecurity in the legal establishment, since the Legal Realist Movement, about the autonomy of law. See generally Friedman, supra note 46.

107 See Post, supra note 36, at 8 ("[C]onstitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.").

108 See generally Jack M. Balkin, What Brown Teaches Us About Constitutional Theory, Va. L. Rev. (forthcoming 2005), available at http:// www.yale.edu/lawweb/jbalkin/articles/whatbrownteachesus1.pdf (discussing impact of social movements as motivating force for major Supreme Court decisions); Post & Siegel, supra note 29, at 17-29 (discussing the significance of the law/politics distinction in American constitutional culture); Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section 5 Power: Policentric Interpretation of the Family and Medical Leave Act, 112 Yale L.J. 1943, 1947 (2003) (proposing a model of "policentric constitutional interpretation" which "holds that for the purposes of Section 5 power the Constitution should be regarded as having multiple interpreters, both political and legal. The model attributes equal interpretive authority to Congress and to the Court."); Reva B. Siegel, Text in Contest: Gender and the Constitution from a Social Movement Perspective, 150 U. Pa. L. Rev. 297, 302 (2001) (discussing "the role of social movements in shaping constitutional meaning in a different framework"); William N. Eskridge, Jr., Lawrence's Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics 3 (unpublished manuscript, on file with author) (claiming that the key to understanding Lawrence "is the Supreme Court's recognition that American democratic pluralism must meet the lesbian, gay, bisexual, and transgendered (LGBT) rights social movement at least halfway.").

109 See 1 Ackerman, supra note 51, at 262, 266-94 (distinguishing between ordinary legislation, enacted during times of "normal

politics" by the People's representatives "whose word is not be to be confused with the collective judgment of the People themselves," and the Constitution, which represents the true voice of the People and can be amended directly by them in moments of "constitutional politics").

110 See Stephen Holmes, Passions and Constraints 274 (1995) ("Constitutionalism . . . assumes the passions of men will not conform to the dictates of reason and justice without constraint."). See also Friedman & Smith, supra note 33, at 78 ("At bottom, constitutionalism necessarily must be the reconciliation of present-day, popular preferences with some set of deeper, more enduring values. Without the juxtaposition between present-day preferences and more enduring values, the idea of constitutionalism is meaningless.").

111 See, e.g., Bork, supra note 32, at 163 (recognizing that "two judges equally devoted to the original purpose may disagree about the reach or application of the principle at stake and so arrive at different results").

112 This description oversimplifies calls for "popular constitutionalism" but not by much. At least with regard to the question whether Congress has power to enact certain laws-under the Commerce Clause, or Section 5 of the Fourteenth Amendment-commentators seem to believe a deferential stance is constitutionally-required. See supra note 23. (On the question whether an exercise of power violates constitutional rights, the approved role of the Court may be broader, though commentators differ.).

113 Cf. Katherine T. Bartlett, Tradition, Change, and the Idea of Progress in Feminist Legal Thought, 1995 Wis. L. Rev. 303, 334 (1995) ("Individuals attain new understandings of themselves and others by struggling to resolve the incoherence between their deeply ingrained habits and norms and their experiences and insights.").

114 This example is drawn from Friedman & Smith, supra note 33, at 78-79.

115 See Korematsu v. United States, 323 U.S. 214 (1944) (upholding the detention of Japanese-American citizens during Word War II); United States v. Eichman, 496 U.S. 310 (1990) (striking down a provision of the Flag Burning Act of 1989 which criminalized flag-burning. The Act had been passed by Congress in response to the Supreme Court's decision in Texas v. Johnson, 491 U.S. 397 (1989)).

116 A third who deserves mention is John Hart Ely, whose book Democracy and Distrust provides a detailed account of the role of judicial review. See generally Ely, supra note 47. Boiled to its essence, Ely would have judges patrol the political process, standing in to protect minorities whose rights might be neglected by majoritarian bodies. As such, Ely's theory suffers from that same problem, of being overly optimistic about the possibilities of judicial review. Ely's judges must spot and strike down prejudice engaged in by contemporaries in the political process. Undoubtedly judges can and sometimes do this. But often they will not, either because they have the same mindset or because they are reluctant to interfere with political decisions. And if judges were to do what Ely suggest on a regular and vigorous basis, then-if the underlying legislation mattered to the body politic-the judges might well find their authority under attack.

117 See generally 1 Ackerman, supra note 51; 2 Bruce Ackerman, We the People: Tranformations (1998); Bickel, supra note 47; Alexander Bickel, The Supreme Court and the Idea of Progress (1970) [hereinafter Idea of Progress]; Alexander Bickel, The Morality of Consent (1975) [hereinafter Morality of Consent].

118 1 Ackerman, supra note 51, at 10 ("[T]he dualist sees the discharge of the preservationist function by the courts as an essential part of a well-ordered democratic regime. . . . [T]he courts serve democracy by protecting the hard-won principles of a mobilized citizenry against erosion by political elites who have failed to gain broad and deep popular support for their innovations.").

119 Id. at 299-301 (1991) (describing a two-track system that distinguishes between "higher lawmaking" and "normal lawmaking"); see also id. at 6-7 ("If [the People] wish to claim this higher form of democratic legitimacy, they must take to the specially

onerous obstacle course provided by a dualist Constitution for purposes of higher lawmaking. Only if they succeed in mobilizing their fellow citizens and gaining their repeated support in response to their opponents' counterattacks may they finally earn the authority to proclaim that the People have changed their mind and have given their government new marching orders.").

120 Even in their moments of extreme engagement, the most they may do is vote, or send in a check to the National Rifle Association, the NAACP, or the Democratic party. It is often going to be difficult to tell the difference between the People engaged and the People at home watching Reality TV.

121 See, e.g., Michael J. Klarman, Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments, 44 Stan. L. Rev. 759, 768-771 (1992) (book review) (criticizing Ackerman's failure to provide a clear answer to the question of how a court is to know when non-Article V constitutional change has occurred and querying how courts will be able to ascertain its content); Suzanna Sherry, The Ghost of Liberalism Past, 105 Harv. L. Rev. 918, 930 (1992) (book review) ("Although Ackerman describes what must happen for constitutional politics to take place, he never sufficiently explains how we are to know when it has happened.").

122 Just saying "superhuman" calls to mind Ronald Dworkin's famous judge "Hercules," who possesses superhuman traits, so that he can engage in the complex, but right-minded, exercise of assuring integrity in constitutional law. But even Dworkin does not look to ordinary judges to be superhuman in the way Ackerman does. Indeed, he disclaims just this pretension, arguing that: "An actual justice must sometimes adjust what he believes to be right as a matter of principle, and therefore as a matter of law, in order to gain the votes of other justices and to make their joint decision sufficiently acceptable to the community so that it can continue to act in the spirit of a community of principle at the constitutional level." Ronald Dworkin, Law's Empire 380-81 (1986).

123 Bickel, supra note 47, at 23-33.

124 Id. at 236 ("The function of the Justices . . . is to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law. . . . The Justices will then be fit to extract 'fundamental presuppositions' from their deepest selves, but in fact from the evolving morality of our tradition.").

125 Id. at 26 (describing the courts as "a great and highly effective educational institution"); Bickel, Morality of Consent, supra note 117, at 3-5 (suggesting that members of the Court simply impose personal values when making decisions); Bickel, Idea of Progress, supra note 117, at 179 ("Because we hope that in the direst need the Court perhaps can save us-or to put it more realistically, may show us that we are not as riven as we feared-we allow it continually to try to save us when it cannot, and when authoritarian salvation is not what we need."). Accord Fallon, supra note 87, at 55 (Bickel used the term "prudence" to cover "worry by the Court about whether its decisions are likely to lead to a public backlash against it.").

126 Bickel, supra note 47, at 103.

127 The assumption that once the Court speaks, its decisions are final and binding, commonly lurks in the academic literature that defends judicial supremacy. See, e.g., Alexander & Schauer, supra note 51, at 1371-72 (arguing that judicial supremacy is essential to the settlement function of the law); Ronald Dworkin, Life's Dominion 120 (1994) ("For all practical purposes, the federal courts, and finally the Supreme Court, have the last word about what rights the Constitution affirms and protects, and what the national and state governments therefore cannot do.").

128 The classic formulation of the "countermajoritarian difficulty" is Bickel's. See Bickel, supra note 47, at 16 ("The root difficulty is that judicial review is a countermajoritarian force in our system."); see also Kramer, supra note 28, at 14 ("Institutions immune or removed from politics may be vital to secure principles that are prerequisites for democratic rule. . . . Yet ultimately nothing can vouchsafe the rightness of what these institutions do, nothing can save them from partiality and blindness, other than democratic challenge, scrutiny, and revision. . . . This is the paradox of constitutional democracy."); Suzanna Sherry, Issue Manipulation by the Burger Gov't: Saving the Community from Itself, 70 Minn. L. Rev. 611, 613 (1980) ("[W]hen the Court invalidates a statute,

it is overturning the decision of a popularly elected body; in essence, it is enforcing its own will over that of the electorate.").

129 For the sake of completeness, we would have a different sort of problem if what happened after a judicial decision was nothing, if judicial decisions fell on deaf ears without a murmur of approval of dissent. Obviously something does happen after the Supreme Court speaks, and it is the aftermath of decisions that causes all the hullabaloo. But precisely because the aftermath not only is nothing, but also is not as much as critics claim, it is the aftermath that should be the focus of our discussion of the nature and function of judicial review.

130 On the subject of constitutional dialogue, see Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 653-80 (1993) (discussing the process of judicial review as "dialogue" in which a dynamic interaction takes place between the Court and the entire country regarding constitutional meaning); Bickel, supra note 47, at 240, 244 (discussing a "continuing colloquy" about constitutional meaning that takes place between the Court, the political branches, and society at large); Bickel, Morality of Consent, supra note 117, at 111 (discussing the "conversation" that the Supreme Court has with society, lower courts, and the other branches of government). Compare the conception of constitutional dialogue that principally focuses on the dialogue that takes place between the Court and the other branches of government, rather than between the Court and the American body politic as a whole: Neal E. Devins, Shaping Constitutional Values 40 (1996) ("Constitutional decision-making neither begins nor ends with a court decision. The shaping of constitutional values is a dynamic process that involves all parts of elected government in an ongoing dialogue."); Louis Fisher, Constitutional Dialogues 3 (1988) ("[Constitutional law] is a process in which all three branches converge and interact with their separate interpretations.").

131 See infra notes 146-54 and accompanying text.

132 Michael J. Klarman, How Brown Changed Race Relations: The Backlash Thesis, 81 J. Am. Hist. 81 (1994) (describing Brown as causing social change only indirectly, by prompting a massive white "backlash" in the South that eventually led to the crystallization of a strong national consensus in favor of civil rights); Michael J. Klarman, How Great Were the "Great" Marshall Court Decisions?, 87 Va. L. Rev. 1111, 1182 (2001) ("Supreme Court rulings often produce unpredictable backlash effects. In the same way that Brown mobilized southern whites to resist further changes in the racial status quo, and Roe v. Wade inspired right-to-lifers to organize politically against abortion, McCulloch v. Maryland may well have mobilized a states' rights opposition to the nationalist principles articulated by the Marshall Court."); see also Klarman, supra note 53, at 385-442, 464-66.

133 Bickel, supra note 47, at 26 (describing the courts as "a great and highly effective educational institution"); Eugene V. Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193, 208 (1952) ("The Supreme Court is, among other things, an educational body, and the Justices are inevitably teachers in a vital national seminar.").

134 See Charles H. Franklin & Liane C. Kosaki, Republican Schoolmaster: The U.S. Supreme Court, Public Opinion and Abortion, 83 Am. Pol. Sci. Rev. 751 (1989) (finding that Roe v. Wade tended to reinforce the views of those who opposed discretionary abortions); id. at 767 ("If the public homogenously favors the Court's position prior to the ruling, support will rise across all groups. Similarly, if the populace uniformly opposed the Court's positions beforehand, support will actually decrease in the aftermath. In both cases, the mechanism is the same: individuals are moving in the direction of their (homogenous) social context.").

135 Rosenberg, supra note 53.

136 Cf. Mark Tushnet, Some Legacies of Brown v. Board of Education, Va. L. Rev. at 20 (forthcoming) (explaining that some of Rosenberg's argument is "overstated" because "cultural changes . . . are rarely measurable by the methods Rosenberg used").

137 See Engel v. Vitale, 370 U.S. 421 (1962) (banning prayer in public schools); Lee v. Weisman, 505 U.S. 577 (1992) (invalidating official prayers at public school graduation ceremonies).

138 See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (striking down a public high school policy that allowed student-led prayer prior to school football games). Following this decision, it was reported that students began to rise spontaneously in their seats at high school football games in Texas and recite the Lord's Prayer. See Noah Feldman, From Liberty to Equality: The Transformation of the Establishment Clause, 90 Cal. L. Rev. 673, 720 (2002) (citing Paul Duggan, A Few Texas Faithful Make Stand for Prayer; Big Football Showing Fails to Happen, Wash. Post, Sept. 2, 2000, at A1).

139 Roe v. Wade, 410 U.S. 113 (1973).

140 See Friedman, supra note 130, at 662 and n.433 for corroboration of this point.

141 See Christopher Eisgruber, Constitutional Self-Government 16-18, 20-25 (2001) (discussing the constitutional obduracy that results from the rigid amendment procedures of Article V).

142 See Bickel, supra note 47, at 16-17 ("[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now. . ."); Chemerinsky, supra note 11, at 45 (criticizing the Rehnquist Court's "devastating" effect on civil rights during the 1988-1989 Term, lamenting that "[t]he decisions of the last Term will profoundly affect human lives. Many women will find it harder to obtain abortions; more workers will be subject to drug tests; fewer civil rights plaintiffs will prevail; perhaps lessening the deterrent to employment discrimination; more individuals, in particular juveniles and the mentally retarded, will be executed.").

143 For further elaboration of this point, see Barry Friedman, Mediated Popular Constitutionalism, 101 Mich. L. Rev. 701, 711-35 (2003).

144 For example, some issues with which the Court deals will not be salient; the public may not tune in sufficiently to judicial decisionmaking; and there are ways of manipulating public opinion. See generally Friedman, supra note 143, for an extended discussion of these problems. Still, in high profile cases, the difficulties likely are diminished.

145 See Dahl, supra note 95; Mishler & Sheehan, supra note 96 (finding a lag of five to seven years in Supreme Court responsiveness to public opinion); William Mishler & Reginald S. Sheehan, Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective, 58 J. Pol. 169, 196-98 (1996) (finding a five-year lag in some Supreme Court Justices' response to public opinion). Cf. Robert Weissberg, Public Opinion and Popular Government (1976) (finding that Supreme Court decisions in the areas of school integration and the death penalty have tended to coincide with public opinion to a greater extent than in the school prayer cases).

146 One possible exception, and this could use proving empirically, is with regard to the First Amendment. An example might be the flag-burning controversy. Whether this is in fact the case requires further study, and if it is the case, it would be interesting to know why this occurs. Finally, there is then room to examine a normative case for this exception.

147 For an explanation of this dialogic process in the context of abortion, see Friedman, supra note 130, at 658-68.

148 See generally Robert M. Cover, Justice Accused: Antislavery and the Judicial Process (1975) (discussing the judicial responses to the enforcement of slave laws).

149 See Mark Tushnet, Non-Judicial Review, 40 Harv. J. on Legis. 453, 460 (2003) (examining the use of constitutional points of order in the United States Senate and observing that while "the constitutional arguments made in these debates are usually quite truncated," it nonetheless seems that "nearly all the debates contain the skeletons of decent constitutional arguments, and sometimes there is even a bit of flesh on the bones"); Abner J. Mikva, How Well Does Congress Support and Defend the

Constitution?, 61 N.C. L. Rev. 587, 587 (1983) ("For the most part, legislative debate does not explore the constitutional implications of pending legislation; and, at best, Congress does an uneven job of considering the constitutionality of the statutes it adopts."). See also Mark Tushnet, Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies, 50 Duke L.J. 1395 (2001).

150 See James Bradley Thayer, John Marshall 106-107 (1901) ("[I]t should be remembered that the exercise of [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors . . . The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.").

151 It is a perfectly fair point that popular notions of judicial supremacy may influence the level of acceptance of judicial decisions. Thus, people may be unhappy with judicial decisions yet fail to speak up for fear this seems inappropriate. Though beyond the scope of this paper, this is indeed a serious issue, one worthy of study and perhaps concern. The question is considered in Kramer, supra note 28, at 227-33.

152 See Christopher L. Eisgruber, The Fourteenth Amendment's Constitution, 69 S. Cal. L. Rev. 47, 53 (1995) ("Constitutionalism is, among other things, a way for a political community to 'talk out' its political identity.").

153 Fallon, supra note 87, at 122.

154 This theory has obvious affinity with Bruce Ackerman's, but it is not the same. Ackerman's is a stylized theory requiring specific steps to confirm the people have enacted higher law, so that judges can recognize it. Here the argument simply is that over time popular opinion coalesces as to constitutional meaning, and courts come to incorporate these changed understandings. There is no stylized process that legitimates some constitutional change and not others. Accordingly, there is no need for judges to engage in complicated interpretive maneuvers with regard to prior acts of higher lawmaking. This theory accounts for constitutional change that is slow-moving, whereas Ackerman focuses on more cataclysmic moments.

155 See William N. Eskridge, Jr. & Philip P. Frickey, The Supreme Court, 1993 Term-Foreword: Law as Equilibrium, 108 Harv. L. Rev. 26, 32 (1994) ("Law is . . . an equilibrium, that is, a balance of competing institutional pressures.").

156 See Friedman, supra note 143, at 714-18 (discussing the incentives judges face as possible mechanisms of popular control).

157 See Richard Davis, Decisions and Images: The Supreme Court and the Press (1995) (providing evidence that Supreme Court Justices are attentive to media coverage of the Court and its decisions).

158 See supra note 51 and accompanying text.

159 See, e.g., Balkin & Levinson, supra note 72, at 1073-74 (The federalism, voting rights, and affirmative action cases that we have witnesses in the last decade are the predictable (though not inevitable) product of a conservative Republican hegemony during the 19802 and early 19902 that produced judges and Justices sympathetic with President Reagan's vision of federalism and states' rights, a vision well-reflected in a 1987 executive order setting out a series of "fundamental federalism principles."); Christopher H. Schroeder, Causes of the Recent Turn in Constitutional Interpretation, 51 Duke L.J. 307, 334-59 (2001) (discussing the relationship between popular loss of faith in government and the Court's federalism jurisprudence).

160 Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

161 United States v. Lopez, 514 U.S. 549 (1995).

162 United States v. Morrison, 529 U.S. 598 (2000).

163 Printz v. United States, 521 U.S. 898 (1997).

164 Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

165 Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721 (2003).

166 Post, supra note 36, at 19-24.

167 Lawrence v. Texas, 539 U.S. 558 (2003).

168 Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

169 Bowers v. Hardwick, 478 U.S. 186 (1986).

170 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

171 In a public opinion poll taken just prior to the Court's decisions in Gratz and Grutter, a majority of those polled favored both affirmative action programs designed to help minorities get better jobs and education, and those programs that gave special preferences to qualified minorities in hiring and education. However, the results also reflect the conflicted and contradictory nature of the public's attitudes about affirmative action, as only 24% of those polled agreed that every possible effort should be made to improve the position of minorities, if this means giving them preferential treatment. See The Pew Research Center for the People and the Press, Survey Report, Conflicted Views of Affirmative Action (May 14, 2003), available at http://people-press.org/reports/display.php3?ReportID=184. Similarly, polling data suggests that while public opinion regarding the legality of homosexual relations was low throughout the 1980s, a majority of the public now supports gay rights in this area. A useful graph synthesizing Gallup Polls undertaken between 1977 and 2000 regarding the legality of homosexual relations can be found at the Public Agenda website, http://www.publicagenda.org/issues/angles_graph.cfm?issue_type=gay_rights&id=479&graph=majpropgaylegaltime.jpg (last visited July 11, 2004). See also Balkin, supra note 108, at 5 ("Lawrence occurred well after public opinion had shifted toward decriminalization of sodomy").

172 See supra note 11.

173 505 U.S. 833 (1992).

174 Id. at 953-65 (Rehnquist, J., dissenting); id. at 993-94 (Scalia, J., dissenting).

175 See Sandra Day O'Connor, The Majesty of the Law: Reflections of a Supreme Court Justice 166 (2003) ("Real change, when it comes, stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory-in court or legislature-that is not a careful by-product of an emerging social consensus. Courts, in particular, are mainly reactive

institutions."); Sandra Day O'Connor, Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust, 36 Ct. Rev. 10, 13 (1999) ("As judges, court administrators and attorneys, we all rely on public confidence and trust to give the courts' decisions their force. We don't have standing armies to enforce opinions, we rely on the confidence of the public in the correctness of those decisions. That's why we have to be aware of public opinions and of attitudes toward our system of justice, and it is why we must try to keep and build that trust.").

176 See Alan Cooperman, Sodomy Ruling Fuels Battle Over Gay Marriage, Wash. Post, July 31, 2003, at A1 (citing a Gallup Poll which found that the portion of Americans who said "homosexual relations between consenting adults should be legal" dropped from 60% in May 2003 to 48% in the month following the Lawrence decision); accord Balkin, supra note 108, at 6 ("if anything, Lawrence served to propel the gay rights debate forward onto the question of gay marriage").

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