The Chief Justice's history is, as we have seen, deeply problematic. But that matters less than the neat way this passage encapsulates the overriding jurisprudence of the modern Supreme Court: a jurisprudence that treats constitutional limits as synonymous with judicial enforcement and that, as a result, calls for the Court to adopt an aggressive stance vis-à-vis the political branches.

9

As an American

POPULAR CONSTITUTIONALISM, CIRCA 2004

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The present Court's activism is best understood as the latest instance of a recurring pattern in American politics. For more than two centuries, every reaffirmation of popular constitutionalism has predictably been followed by efforts to restore or enlarge judicial authority. In each instance, a supposedly tamed Court slowly extended its reach, usually starting with small steps, then quickening the pace as its confidence grew in response to public acceptance or indifference. In each instance, the Justices eventually went too far, seeking to control matters at the heart of contemporary politics and precipitating a confrontation with the political branches that called upon Americans to decide yet again whether judges should have so much say over their lives.

Americans in the past always came to the same conclusion: that it was their right, and their responsibility, as republican citizens to say finally what the Constitution means. The question is, would Americans today do the same? Are we still prepared to insist on our prerogative to control the meaning of our Constitution?

"Leaving the Care of Their Liberties to Their Wiser Rulers"

To listen to contemporary political debate, one has to think the answer must be no. Why else has the appointment process come to matter so much? Lib-

erals fight hard to block conservative nominations because they believe and are ready to accept that once in office these Justices should have the power to decide matters once and for all. Nor do conservatives differ in this respect, as evidenced by their own passivity toward the Court's authority and their matching obsession on the subject of appointments.[1]

The acceptance of judicial authority is most apparent, however, in the all-but-complete disappearance of public challenges to the Justices' supremacy over constitutional law. Apart from a few academic dissidents, everyone nowadays seems willing to accept the Court's word as final—and to do so, moreover, regardless of the issue, regardless of what the Justices say, and regardless of the Court's political complexion. Opposition has become a matter of working to change either the Court's mind or its composition. No public official has questioned judicial supremacy since Edwin Meese received a drubbing for doing so in 1984. More common today is the attitude of Senator Patrick Leahy, a leading critic of the Rehnquist Court and among its most committed adversaries in Congress. Though often questioning the Justices' decisions, Senator Leahy takes great pains to purge his speeches of any hint that he means by this to challenge the Court's authority as final arbiter of constitutional law. "As a member of the bar of the Court, as a U.S. Senator, as an American," he says, "I, of course, respect the decisions of the Supreme Court as . . . the ultimate interpretation of our Constitution, whether I agree or disagree."[2] And in that "of course" lies the crux of today's reigning consciousness.

Whatever else one might think, this plainly represents a profound change from what we have seen was historically the case. Neither the Founding generation nor their children nor their children's children, right on down to our grandparents' generation, were so passive about their role as republican citizens. They would not have accepted—did not accept—being told that a lawyerly elite had charge of the Constitution, and they would have been incredulous if told (as we are often told today) that the main reason to worry about who becomes president is that the winner will control judicial appointments. Something would have gone terribly wrong, they believed, if an unelected judiciary were being given that kind of importance and deference. Perhaps such a country could still be called democratic, but it would no longer be the kind of democracy Americans had fought and died and struggled to create. Madison was being snide, after all, when he had Anti-republican say that the people "should think of nothing but obedience, leaving the care of their liberties to their wiser rulers."[3] What changed to make this deprecated sentiment not just real, not just respectable, but apparently prevalent?

Sometime in the past generation or so (it is impossible to pinpoint a moment in what was, after all, a gradual process), Americans came to believe that the meaning of their Constitution is something beyond their compass, something that should be left to others. Constitutional history was recast—turned on its head, really—as a story of judicial triumphalism. A judicial monopoly on constitutional interpretation is now depicted as inexorable and inevitable, as something that was meant to be and that saved us from ourselves. The historical voice of judicial authority is privileged while opposition to the Court's self-aggrandizing tendencies is ignored, muted, or discredited.

We see this in the excessive celebration of *Marbury v. Madison*, whose bloated significance seems immune to historical correction. We see it in the tendency to conflate constitutional history with the history of Supreme Court doctrine. We see it in chronicles that portray the Court as a major force advancing American liberty—as if most gains were not in fact made in spite of rather than because of the Justices. *Marbury* and *Brown* loom large in these histories. The judicially inspired prosecutions for sedition, *Dred Scott*, the dismantling of Reconstruction, the fifty years of opposition to social welfare legislation, *Korematsu*, complicity in the Red scares, and the current hobbling of federal power to remedy discrimination all somehow shrink into insignificance. We see it in histories that ignore resistance to the Court's view of the Constitution, unless it is to demonize and disparage the opposition as populist excess or political opportunism. We see it in the fiercely hostile reactions to evidence that the practical significance of even the Court's few genuine contributions (like *Brown*) may have been exaggerated. And we see it, above all, in the tendency to minimize moments of popular constitutionalism, to portray opposition to the Court as something rare, exceptional, dangerous, and revolutionary: an act of civil disobedience to properly constituted authority.

It could be, of course, that what looks like widespread acceptance of judicial supremacy is nothing more than evidence that people are not unhappy with the Court in the way that provoked earlier controversies. Pressure for action against the Warren Court was building in the late 1960s, for example, until what might have become a dramatic confrontation was avoided by Richard Nixon's good fortune in being handed four quick appointments. The newly constituted Burger Court was still activist (to describe a court that fabricated the law of sex equality, invented a right to abortion, and struck down the death penalty in any other terms would be fatuous), but it somehow never seemed quite as revolutionary as its predecessor. The most far-reaching deci-

sions, like *Roe v. Wade* and *Furman v. Georgia*, came early in Burger's tenure, and the Court quickly moderated its tone by backing away from their more radical implications. And, in the meantime, the Nixon appointees were generally successful in tempering or undoing much of what the Warren Court had attempted in the domain of criminal procedure, which had become the chief source of controversy by the end of Earl Warren's tenure.

A similar story can be told to explain the absence of popular resistance to the new activism of the Rehnquist Court. Since 1995, the year the Court's "federalism revolution" began in earnest, the Justices have struck down mainly minor provisions of statutes enacted prior to 1994, the year the Republicans regained control of Congress. As a consequence, not only have the laws held unconstitutional been insignificant—especially by comparison to such things as the Second Bank, the Missouri Compromise, or the New Deal—but by the time the Court acted, these laws also lacked strong political support from the electorate. The absence of a backlash thus indicates, at worst, public indifference to the Court's actions, and it could even reflect popular endorsement. Outside the liberal academy and the ever shrinking liberal wing of the Democratic party, in other words, it may simply be that no one thinks the Rehnquist Court is doing anything all that wrong.[4]

Even if accurate, as seems plausible, this account is missing something crucial. For implicit in stories of this nature is the assumption that a doctrine like judicial supremacy is irrelevant and epiphenomenal. All that matters is whether people agree or disagree with the Court's results. So long as they like the outcomes, or at least do not dislike them strongly enough to drain the Court's general reservoir of good will (what social scientists refer to as "diffuse support"),[5] the decisions stand. The Justices may, at some point, go too far too often on matters that people care about, and when that point is reached we will witness resistance. But this is entirely a matter of how the public and those who influence public opinion view the consequences of judicial activism.[6] There are, in other words, inherent limits on how far the Court can go in dictating to Americans what the Constitution means, but these are a straightforward product of substantive policy preferences.

What this way of thinking about the Court overlooks is that any inherent limits on judicial authority, whatever they may be, are not unconnected to or unaffected by beliefs about the formal status of the Court's rulings. Grant that the Justices will, at some point, inevitably reach the end of their ability to control constitutional law. The point at which this happens will nevertheless vary depending on how much authority ordinary citizens and political leaders believe that the Court ought to have.

The reason this is true, if not self-evident, is easily explained: whether we actively oppose a decision or course of decisions will depend on whether we think the decision or course of decisions is legitimate. But judgments about legitimacy turn not only on whether we agree or disagree with the Court's results, but also on whether we feel entitled to disagree and, more important still, to act on our disagreement. To draw an analogy to agency law, we will be quicker to second-guess and resist the decision of an inferior than that of a superior—and this even if it is the same substantive decision. The Court may, eventually, do things that would arouse active opposition even from people who generally endorse a philosophy of judicial supremacy. But it will take longer and require more extreme judicial misbehavior before such people resist than would be true if the same people rejected judicial supremacy for a more decentralized theory of interpretive authority. Put another way, a Court that embraces a philosophy of judicial supremacy and claims to be the Constitution's sole authoritative expositor will reach farther and do more than a Court that does not. By the same token, a people that accedes to the Court's pretensions in this respect will permit the Justices to go farther and do more than a people that does not.

Bush v. Gore is a telling example. One need not take sides on the merits of the case to see that public reactions to the Court's decision cannot be explained as a matter of widespread indifference, much less political consensus.[7] Nor is it anachronistic to observe that if the Supreme Court had stepped in this way when Hayes and Tilden deadlocked in 1876, the half of the country that supported the loser would not have stood passively by. They might have attempted to impeach the Justices or to impose new responsibilities designed to make their lives miserable (as Jefferson did). They might have sought to ignore or frustrate the Court's judgment (as Jackson and Lincoln did). They might have moved to slash the Court's budget or strip it of jurisdiction (as the Reconstruction Congress did), or tried to pack the Court with new members (as the Reconstruction Congress did and Roosevelt tried to do). They might have done any number of things. But they surely would have done something: something other than submissively yield while explaining that to challenge the Court would look unpatriotic. Which is why, of course, no one at the time of this earlier election—on or off the Court—ever dreamed of trying to resolve it in litigation.

The reaction to *Bush v. Gore* is merely suggestive, moreover, of a larger point. It could well be that a majority of the country presently supports what the Rehnquist Court is doing. That still does not explain why all those who disagree, and disagree strongly, nevertheless feel constrained

passively to accept the Court's rulings while waiting for Justices to die or retire in the hope they can be replaced by judges whose views are more sympathetic. Nor does it explain why someone like Patrick Leahy thinks it his duty "as an American" to affirm that decisions of the Supreme Court are "the ultimate interpretation of our Constitution" no matter how wrong he thinks they are.

What presumably does explain facts like these is the broad change in public attitudes toward the Court that occurred in the latter half of the twentieth century. Where most people's unarticulated, intuitive sense in earlier generations presupposed the rightness and naturalness of popular constitutionalism, today that sense has switched to favor judicial supremacy—a turnabout in beliefs with effects across the whole political and ideological spectrum. In several recent surveys, more than 60 percent of respondents answered that the Supreme Court has the "last say" on constitutional questions, with another 11 percent responding that they did not know.[9] Equally interesting is that the surveys' authors thought it obvious that choosing the Court should be graded the "correct" answer.

These sorts of beliefs about the locus of constitutional authority are and always have been less a matter of active, self-conscious commitment on the part of ordinary citizens than an implicit background assumption of popular political culture. But background assumptions like these are crucial in framing how ordinary Americans understand their role as citizens and what they expect from their political leaders. And that, in turn, shapes what these leaders say and do. As products of the same political culture as their constituents, leaders like Senator Leahy and Vice President Gore may believe what they say about the Court's supremacy. But even were this not so, they are also astute politicians—astute enough to sense that trying to build opposition to the Court by decrying judicial supremacy will not go down well with most Americans. Not today, at any rate.

How and why this change in attitudes came about is a complicated story, though we have already alluded to some of the causes: heightened skepticism about popular democracy occasioned by twentieth-century totalitarianism; the historical anomaly of the liberal Warren Court; two generations of near consensus about judicial supremacy among intellectuals and opinion-makers on both the left and the right (not to mention among high school civics teachers).[9] But whatever the explanation, there can be little doubt either that a change occurred or that it has affected how the Supreme Court and its decisions are received by ordinary citizens as well as by public officials, and by opponents of the Court as well as by its supporters.

Furthermore, understanding this tells us something important about the nature of judicial supremacy itself. Supremacy is an ideological tenet whose whole purpose is to persuade ordinary citizens that, whatever they may think about the Justices' constitutional rulings, it is not their place to gainsay the Court. It is a device to deflect and dampen the energy of popular constitutionalism. That energy cannot ever be wholly contained, and history has repeatedly demonstrated how irresistible political pressures will be brought to bear against a Supreme Court that goes "too far." The object of judicial supremacy is to make this breaking point as distant as possible: to maximize the Court's authority by inculcating an attitude of deference and submission to its judgments. It is akin to telling jurors that they "must" follow the judges' trial instructions in order to mask and minimize the use of the jury's undoubted power of nullification.[10]

As with the jury, moreover, successfully persuading people to accept judicial authority does more than raise the barriers to rebellion. It affects how the whole system works. Public acceptance of judicial supremacy pervades constitutional law and politics. It changes how the Justices conceive their role, how they decide cases and write opinions. It changes how politicians, the press, and other affected actors internalize the Court's rulings—and in this way it changes the effects of those rulings beyond the particular case. It changes how Supreme Court decisions are "inscribed within the . . . institutional fabric of social relations" and so how citizens "reconstruct legal norms" in their own lives.[11] It changes everything, in other words, and in ways that are subtle and pervasive and not seen only (or even mainly) in big, explosive confrontations about whether to obey a particular decision.

"The Surest Expositor of the Constitution"

That being so, surely we should ask whether the principle of judicial supremacy makes sense. Not because the liberal Warren Court or the centrist Burger Court or the conservative Rehnquist Court should be judged good or bad or deserve our praise or condemnation, but because much bigger issues are at stake. Against the larger backdrop of American history, the acceptance of judicial supremacy in modern constitutional times is exceedingly anomalous. It is not too much to say that it has fundamentally altered the meaning of republican citizenship by, as a conceptual matter, taking ordinary people out of the process of shaping constitutional law. Except in the most abstract sense, "We the People" have—apparently of our own volition—handed

control of our fundamental law over to what Martin Van Buren in an earlier era condemned as "the selfish and contracted rule of a judicial oligarchy."[12] Perhaps Van Buren was wrong, along with Jefferson, Jackson, Lincoln, Roosevelt, and all our other forebears who worked to contain judicial authority. Perhaps this really is the right thing to do. If so, however, there should be good reasons for it.

Most people who support the Court's supremacy in constitutional law today probably do so without thinking about it much, based either on an assumption that judicial supremacy follows naturally from the Constitution's status as law, or a belief that this supremacy was originally intended or established early on: both claims contradicted by the previous eight chapters. Academic defenders of the Court, however, have offered several additional reasons to justify giving it the last word on constitutional meaning, modern elaborations of arguments first developed in the eighteenth and nineteenth centuries. One frequently heard argument is that we need judicial supremacy to serve the so-called settlement function of law: absent firm judicial control, we are told, constitutional law would become unacceptably chaotic, unpredictable, and nonuniform.[13] The other still more common claim is that judges should have final say because the constitution entrenches particular rights and rules as precautions sensible democratic citizens take against their own future dangerousness, and courts are more trustworthy than electorally accountable bodies when it comes to respecting such commitments.

Much could undoubtedly be said both for and against these justifications. Much, indeed, has already been said, for the question of judicial supremacy has been at the heart of academic constitutional debate for more than two generations.[14] Thankfully, we need not rehearse the by-now elaborate arguments here, except to establish one crucial point—to wit, that both justifications turn out, after inspection, to rest on controversial empirical assumptions, assumptions about whose truth (if we are being honest) it is difficult to have too firm a conviction because they turn on "facts" that can never be tested or proved.

The claim that we need judicial supremacy to settle matters and bring an end to conflict is straightforwardly empirical: that this claim is anything but obvious is equally straightforward. To begin with, there is no such thing as perfect finality or "settlement" in law. Uncertainty and instability will exist even in a regime of total judicial supremacy, while we will find a considerable degree of finality and resolution even without it. The choice is not between order and chaos or stability and anarchy, but between different types of stability and different mechanisms for achieving it.[15] Whether there is a "settlement gap" between a world with judicial supremacy and a world without it, and if so, whether that gap is large or small, depends on how different institutions handle constitutional questions.[16] Proponents of judicial supremacy on settlement grounds have been notoriously inattentive to what we know about the way in which political institutions actually deal with the Constitution, content to argue from stereotypes and theoretic possibilities. Yet experience suggests that if there is a settlement gap, which is by no means clear, that gap is likely to be small.

This is so for a number of reasons. Nonjudicial actors also value stability and predictability and work hard to produce it.[17] The structure of American politics, in turn, reinforces these natural incentives by requiring large coalitions to bring about change.[18] For this reason, constitutional understandings determined in politics over the course of American history have been impressively stable, often lasting for decades and proving themselves at least as durable as judicial doctrine. For the same reason, moreover, it would never be the case that everything was up for grabs all the time. Issues might come and go; things that were once settled might again become controversial. But at any given time, the vast majority of constitutional law would be stable and settled.

Plus, Supreme Court decisions could still be expected to conclude most constitutional disputes even without a formal doctrine of judicial supremacy. Courts do come last, after all, if only as a matter of political consciousness and perception. This means that their rulings are going to be final as a practical matter except where opposition is strong enough to overcome the institutional hurdles our political system puts in the way of those seeking to upset an existing state of affairs. Once the Court has ruled, moreover, these hurdles consist of more than just getting a majority in the House, a filibuster-proof majority in the Senate, and the President to agree that a different decision would have been better. They now include getting agreement that the difference is important enough to challenge the Court, which can itself become a quite significant impediment. The Justices do not need a doctrine of judicial supremacy to earn respect and support from the public, including support for particular rulings that are unpopular. The Court can earn this support—can in effect make itself final—by handling its business intelligently and with political savvy.[19] This is what Madison meant back in 1834 when he remarked that, notwithstanding his and Jefferson's departmental theory of coordinate interpretation, "it may always be expected that the judicial bench, when happily filled, will . . . most engage the respect and reliance of the public as the surest expositor of the Constitution."[20] The difference, of course, is that the

Justices would have to earn their claim to have final say and (to paraphrase Justice Jackson)[21] would be neither final nor infallible beyond their ability to claim the confidence of a watchful public in going about their business. That the Court may successfully do this, however, is something historical experience makes abundantly clear.

None of this provides a clear answer to the settlement argument. It only muddies the waters while leaving some unanswerable questions. If the idea of judicial supremacy counts for anything, there probably is at least some difference in the amount of uncertainty and disagreement that exists with and without it. But how much? And does the difference pertain to issues or exist in forms that should bother us? And even assuming that there is a difference and that it should bother us, how much should it bother us? How important is an increase or decrease in settlement at the margins, which is the most we are talking about when all is said and done? Clarity and finality obviously matter, but they are not the only values or even the most important ones in a legal system, and no one thinks we should pursue them at all costs.

The second justification for judicial supremacy—that courts provide a more secure forum for the preservation or just determination of the Constitution's fundamental commitments—seems more plausible, though it, too, turns out to rest on uncertain empirical grounds. Here we begin with an inevitable fact of constitutional practice: the existence and persistence of pervasive disagreement. Jeremy Waldron explains:

> [I]n the constitutional case we are almost always dealing with a society whose members disagree in principle and in detail, even in their "calm" or "lucid" moments, about what rights they have, how those rights are to be conceived, and what weight they are to be given in relation to other values. They need not appeal to aberrations in rationality to explain or characterize these disagreements. . . . [D]isagreements about rights are sufficiently explained by the difficulty of the subject matter and by what Rawls refers to as "the burdens of judgment."[22]

As Waldron is at pains to emphasize, the intractability of disagreement is not a product of intellectual limitations or unwillingness to listen to reason or ignorance or prejudice or interest or anything like that.[23] These are simply hard questions, much too complicated ever to be solved or put to rest once and for all. This is so, moreover, even if one accepts the claims of moral realists that there are objectively "right" answers to questions about justice and rights. Whatever is objectively "out there," after all, is still accessible to us

only insofar as our flawed, subjective capacities permit us to comprehend it, and on this level room for legitimate disagreement will always and necessarily remain.[24]

Advocates of judicial supremacy ask us nevertheless to turn our disagreements over to judges, arguing that certain characteristics of the judicial process make judges more likely to reach desirable outcomes than politicians or ordinary citizens. This assumes, of course, that while we might legitimately disagree about results and about justifications, we should nevertheless be prepared to agree that the particular characteristics attributed to courts and judges make them more likely to make decisions that are, in fact, right. But why should we do that? What is different about this question of process that makes anyone think we should be more prepared to agree on it than we are on results?

Consider, for example, the argument that judges can reason about questions of political morality "better" because institutional independence insulates them from the sort of grubby self-interest that distorts the thinking of ordinary citizens and politicians. Even granting the very questionable proposition that judges are meaningfully insulated from self-interest (as opposed to experiencing it in a different form), the argument that this is a good thing runs counter to other epistemic principles—for example, that hard choices are best made by those who have a sufficient stake in the matter to decide responsibly.[25] And how do we resolve that disagreement? Yet without concurrence on the necessary or proper circumstances for reaching morally correct results, any argument that judges are more likely to do so either lacks foundation or is question-begging.[26]

It does not follow that judicial supremacy must be rejected. Uncertainty about which answers or which processes are best does not automatically point us toward any other institution to resolve disagreements either. Perhaps backers of judicial supremacy should be less confident about their argument, but incertitude is not the same thing as incapacity. We still must decide who should decide, and one could still choose the judiciary because one believes (all things considered) that the judicial process offers the best solution. Ultimately, we cannot avoid making our best guess about which of our institutions is likely to do the best job in light of what we know about their relative capacities to act responsibly when it comes to the Constitution. It is, however, only a guess.

Most commentators seem to have little difficulty guessing that a political institution like Congress cannot be trusted to take constitutional questions seriously. Maybe it was different in the nineteenth century, they say, think-

ing of the erudite floor debates that fill the pages of the *Register of Debates* and *Congressional Globe*. But today? Except on rare occasions, congressional "debate" today consists of members making canned speeches to an empty house, hoping that what they say will be replayed for the folks at home on C-SPAN. This may have benefits politically, but who would seriously maintain that it is remotely as good as the deliberations of the Supreme Court?

Such comparisons are worth rethinking. Who said that the only or best place for serious congressional debate is on the floor in open session? This may have been how they did it in the nineteenth century, whereas today Congress limits serious floor debates to matters of great public import. Yet this is not because there is no serious discussion or deliberation. It is because, as with most public institutions, changes in the nature and amount of business to be transacted have forced Congress to bureaucratize. As a result, deliberations are now carried on mainly behind-the-scenes: in committees or caucuses, between individuals, by e-mail, through staff, and so on. But as anyone who has worked closely on legislation can attest, the process remains deliberative and, in fact, permits many more voices to be heard and much more information to be assimilated than would be possible if congressmen were wasting hours every day discussing matters on the floor. Indeed, the amount of discussion that takes place and information that is processed dwarfs what Congress did in the nineteenth century. It also dwarfs anything the Supreme Court can do—which is as it should be.

This is no less true when it comes to constitutional questions than anything else, and committees and staff devote hundreds of hours to understanding, debating, and resolving constitutional issues. Obvious examples include congressional discussions of war powers, line-item vetoes, interbranch relations, and federalism—all of which have received and continue to receive studious attention in Congress. Nor is the list of subjects limited to questions of constitutional structure. Keith Whittington observes:

> Continuing extrajudicial debates over affirmative action, euthanasia, the death penalty, pornography, school prayer, gay rights, Internet privacy, sexual harassment, and gun control reflect sustained concern with individual rights, constitutional values, and political principles. We may disagree with the conclusions that various extrajudicial bodies reach in these debates, as we may disagree with the conclusions of the courts. But it is difficult to maintain that such extrajudicial decisions are unconsidered or neglect considerations of justice and principle.[27]

If Congress does not do better, moreover, this may itself partly be a product of judicial supremacy—a possibility Mark Tushnet labels the "judicial overhang."[28] "[I]f Congress does badly because the courts are on the scene," he points out, "[w]e really cannot know how Congress would perform if the courts exited."[29]

Standing behind the skepticism of Congress are certain stereotypes about legislators and the legislative process generally. In both scholarship and the press, legislators are dismissed as unthinking automatons, incapable of deliberating seriously. They are presented as either thoroughly unresponsive to those they represent and attentive only to private interests dangling campaign dollars before their eyes, or as thoroughly unprincipled and willing to act instantly on the most hateful urges of their constituents—who are themselves portrayed as creatures without reason, ever in thrall to irrational emotions.

Obviously such accounts are exaggerated and overdrawn. Scholars who study Congress generally agree that while legislators are naturally concerned with reelection, they have other things on their minds as well—not the least of which is making a difference and building a reputation by creating good public policy.[30] Which is not to say that members of Congress should be recast as ideal interpreters of a Constitution. To accomplish anything, legislators must work with interest groups. This has important benefits that legal commentators tend too easily to overlook, such as providing legislators with much needed information, helping them to understand and anticipate how legislation will affect relevant groups, reducing uncertainty about how different laws might be received by voters, and helping to communicate relevant information to the public.[31] But the process still inevitably requires making all sorts of compromises. Conscientious legislators must struggle against politics to find space for principled decision making, space that is rarely, if ever, unconstrained in the real world. Yet to say that legislators do not operate in some Habermasian ideal speech situation is not to say that the legislative process is therefore nondeliberative or devoid of principle. Congressional decisions still turn on whether appropriate justifications can be found for a vote: justifications that are persuasive, that a legislator believes he or she can publicly offer to constituents back home, and that are consistent with or reasonably distinguishable from other positions he or she has taken.[32] This is particularly true when it comes to high-profile constitutional issues that spark national controversy—meaning, at the very least, that Congress is a better institution than today's hyperbolic portrayals might lead one to believe.

Turning to the Supreme Court, we may want to question romanticized accounts of the Justices as lawyers-cum-philosophers/political scientists, studiously pondering weighty questions of principle before crafting careful explanations that reflect deeply on the theoretical dilemmas they have faced. After all, the Court has not been immune from the same pressures to bureaucratize that changed the rest of government, and like Congress, the Court now leaves most of its business to staff working behind closed doors. Indeed, if comparisons are wanted with the nineteenth century, consider the Court then and now. The Justices used to do all their own work. They used to hold oral arguments that lasted for days, laboring assiduously with counsel to understand a case and develop their ideas. They used to discuss each other's opinions in detail and at length. Today, most of the Justices rely on law clerks to prepare a case for them, seldom reading more than a "bench memo" or the parties' submissions. Oral argument is limited to one hour, which the Justices use essentially to get clear on the facts and to signal their thinking to one another. One reason they need to signal each other this way is that they spend so little time talking. Conferences are as short as possible, consisting mainly of terse declamations by each Justice explaining his or her vote, with little or no actual debate or discussion. The detailed legal analysis is done almost exclusively by the clerks, recent law school graduates with at most a year or two of experience. Opinions are drafted by a single chamber, with minimal input from other chambers (except via conversations among the clerks). The Justices almost never meet to discuss a drafted opinion and they never work out their reasoning as a group. The veneer of careful deliberation is generated almost entirely by the law clerks, who draft most of the long opinions that constitute the Court's only public statement. The Justices' role consists mainly of dictating the outcome, instructing the clerks on how an opinion should look, and editing. This does not mean that the Justices are not in control, but there is a considerable gap between this kind of control and the stories told to justify judicial supremacy.

To say these things is not to criticize. Supreme Court Justices work very hard and do a remarkable job considering the volume and difficulty of the work they face. If this description sounds harsh, it is only because we have stubbornly held onto a myth of the Court as some sort of institution that time forgot, the one public body that somehow managed to remain immune from pressures that remolded every other public institution. But, of course, the Court has not been immune, and these pressures have affected it as much as Congress. One can admire the Court for how it handles its respon-

sibilities while still being realistic about who does what and under what circumstances.

None of this argues conclusively against the doctrine of judicial supremacy. It simply calls into question some assumptions that modern commentators have come to take for granted. Yet given our actual historical experience, not to mention the experience of other democracies that have flourished without judicial review, how confident should we be that it is necessary to assign the Court this high political authority? How significant is the difference, really, between the Court and Congress? Even assuming that the Court is less affected (or, more plausibly, differently affected) by short-term political pressures, what about the pressures that do distort its decision making—ideology, lack of information, ignorance of consequences, the confounding effects of law's technicality, and the like? And even if these distortions are for some reason less worrisome, how should we weigh any differences against the superior democratic pedigree attached to decisions made by other political institutions? Is it significant in this respect that the Court itself is invariably as divided as the rest of the country on controversial questions?

"A Matter of Sensibility"

"Once we reach this point in the argument," Mark Tushnet observes, "it is impossible to avoid personal judgments."[33] The question is, how do we make these judgments? Or, to pose the problem from a slightly more sociological perspective, what moves people to make the judgments they make? And, still more interesting, what makes them so certain? For while a small circle of scholars may be prepared to abandon judicial supremacy, most people not only favor ceding this power to courts, but think it obvious that our constitutional system would be significantly worse without it. Some go so far as to say, still without hesitating, that American constitutionalism might not survive if the judiciary did not have final say on constitutional questions. Given uncertainty about the empirical grounds, how do we explain such assurance?

The root of the matter, says Richard Parker, has nothing to do with logic or evidence or history or law. It is "a matter of sensibility."[34] And the dominant sensibility among lawyers, judges, scholars, and even politicians, Parker maintains, is "Anti-Populist"—by which he means of the view that "ordinary political energy . . . is problematic because of attributes that set it apart from, and identify it as qualitatively inferior to, more 'refined' sources of political

participation."[35] All the anxiety about Congress is ultimately not so much about legislative institutions or legislators as it is anxiety about *us*, about what we will permit or encourage politically accountable actors to do. The modern Anti-Populist sensibility presumes that ordinary people are emotional, ignorant, fuzzy-headed, and simple-minded, in contrast to a thoughtful, informed, and clear-headed elite. Ordinary people tend to be foolish and irresponsible when it comes to politics: self-interested rather than public-spirited, arbitrary rather than principled, impulsive and close-minded rather than deliberate or logical. Ordinary people are like children, really. And being like children, ordinary people are insecure and easily manipulated. The result is that ordinary politics, or perhaps we should say the politics that ordinary people make, "is not just low in quality, but dangerous as well."[36]

It comes as no surprise that people who hold these sorts of beliefs about ordinary people would gravitate toward something like judicial supremacy. Seeing democratic politics as scary and threatening, they find it obvious that someone must be found to restrain its mercurial impulses, someone less susceptible to the demagoguery and short-sightedness that afflict common people. This is High Federalism redux. And like the High Federalists of the 1790s, modern commentators have come to see the whole point of the Constitution in exclusively counter-majoritarian terms—as if this were self-evident, as if a constitution could be nothing else.[37]

Other commentators have similarly noted the profoundly anti-democratic attitudes that underlie modern support for judicial supremacy: attitudes grounded less in empirical fact or logical argument than in intuition and supposition. Mark Tushnet points to a "deep-rooted fear of voting" among modern intellectuals and suggests they "are more enthusiastic about judicial review than recent experience justifies, because they are afraid of what the people will do."[38] Jack Balkin describes a dominant "progressivist sensibility," constituted by "elitism, paternalism, authoritarianism, naivete, excessive and misplaced respect for the 'best and brightest,' isolation from the concerns of ordinary people, an inflated sense of superiority over ordinary people, disdain for popular values, fear of popular rule, confusion of factual and moral expertise, and meritocratic hurbris."[39] In a particularly strong indictment, Roberto Unger identifies "discomfort with democracy" as one of the "dirty little secrets of contemporary jurisprudence."[40] This discomfort shows up, he says, in every area of contemporary legal culture:

> [I]n the ceaseless identification of restraints upon majority rule, rather than of restraints upon the power of dominant minorities, as the over-riding responsibility of judges and jurists; in the consequent hypertrophy of countermajoritarian practices and arrangements; in the opposition to all institutional reforms, particularly those designed to heighten the level of popular political engagement, as threats to a regime of rights; in the equation of the rights of property with the rights of dissent; in the effort to obtain from judges, under the cover of improving interpretation, the advances popular politics fail to deliver; in the abandonment of institutional reconstruction to rare and magical moments of national refoundation; in the single-minded focus upon the higher judges and their selection as the most important part of democratic politics; in an ideal of deliberative democracy as most acceptable when closest in style to a polite conversation among gentlemen in an eighteenth-century drawing room; and, occasionally, in the explicit treatment of party government as a subsidiary last-ditch source of legal evolution, to be tolerated when none of the more refined modes of legal resolution applies. Fear and loathing of the people always threaten to become the ruling passions of this legal culture. Far from being confined to conservative variants of contemporary legal doctrine, these passions have left their mark upon centrist and progressive legal thought.[41]

Those who see themselves as targets of such critiques may bridle at the pejorative overtones, choosing to present what they think about ordinary people and politics using kinder, gentler adjectives. But they would not deny or repudiate the underlying core: that constitutional law is motivated by a conviction that popular politics is by nature dangerous and arbitrary; that "tyranny of the majority" is a pervasive threat; that a democratic constitutional order is therefore precarious and highly vulnerable; and that substantial checks on politics are necessary lest things fall apart. While perhaps wanting to say that Parker, Balkin, and Unger have used rhetoric to create a caricature, supporters of judicial supremacy would nevertheless insist on the fundamental correctness of the story that ordinary politics is too dangerous to permit without some independent body to control its excesses and injustices.

This sort of skepticism about people and about democracy is a pervasive feature of contemporary intellectual culture. We see it in persistent misreadings of the Founding that selectively focus on statements expressing fears of popular majorities, that do not even see the more important, more pervasive theme celebrating the rise of popular rule. We see it, too, in the rise of the "cult of the Court" and in the complacency accompanying even the most aggressive judicial interferences in politics, as if the judiciary were our parent

or our teacher.[42] Consider in this respect that the *New York Times* summed up a recent Term of the Supreme Court as providing "a report card on the elected branches,"[43] and a leading public intellectual (and sitting federal judge) defended the Court's intervention in *Bush v. Gore* not because it was legally justified but on the ground that Congress was "not a competent forum" to decide matters of such importance.[44]

A profound mistrust of popular government and representative assemblies is, in fact, one of the few things (perhaps the only thing) that the right and the left today share in common.[45] From the right we have public choice, positive political theory, and law and economics: all centrally devoted to explaining why democratic institutions are irrational and inefficient. Better the invisible hand of a market—decentralized, unself-conscious, uncoordinated—than a body in which deliberate choices about how to govern are made. From the left, we get "deliberative democracy," a philosophical school that emphasizes preconditions for legitimate rule and that turns out to be mostly about deliberation and hardly at all about democracy. Popular rule is legitimate, we are told, only if certain stringent prerequisites are satisfied: prerequisites that it just so happens can be met only by small bodies far removed from direct popular control. And now we have the emerging discipline of behavioral economics, which at least some practitioners apparently find attractive because it helps them to "prove" by experiment and simulation how ordinary people cannot be expected to act rationally and need to defer more to experts and specialists.[46]

The point of all this is not to imply that modern scholars want to abolish democracy or are secretly hankering for some other form of government. Nor is it that they hate ordinary people. But Parker is right that most contemporary commentators share a sensibility that takes for granted various unflattering stereotypes respecting the irrationality and manipulability of ordinary people and their susceptibility to committing acts of injustice. To those who believe in the stereotypes, such weaknesses of mind and character are inevitable "facts" that must be confronted and dealt with by those who would preserve democracy. Accepting these facts, they say, is just being realistic. Those who would deny the stereotypes, who would defend the capacity of ordinary citizens to govern responsibly, are viewed as weak or naive or just catering to others who are weak or naive.

These deep-seated misgivings about ordinary citizens explain why modern intellectuals worry so about the risks associated with popular government and why these risks loom so large in their eyes. Their qualms consistently lead them to resolve disputes about the proper structure of democratic institutions in ways that favor minimizing or complicating popular participation. This is not a formal rule, of course. It is a matter of intuitive judgment: given plausible arguments for two versions of democracy or for two institutional arrangements, both of which can be abstractly justified under democratic theory, the one that complicates or qualifies popular participation or that places more or greater obstacles in its way invariably seems preferable. And it is this sensibility that explains why for so many of these scholars the question of judicial review is easy and obvious.

For those with a different sensibility, the opposite conclusion seems just as easy and just as obvious. Parker, for example, finds palpable "[t]he exaggeration on display" in conventional stories about majoritarian politics:

> Surely, the exertion of political energy is not—in and of itself—incipiently tyrannical. (Think of the Constitutional Convention of 1787.) Nor is the exertion of such energy by ordinary people. (Think of the Revolution or the Abolitionists or the Civil Rights Movement.) When we make sweeping claims about tendencies of majority opinion to intolerance, we display the same kind of exaggeration. . . . We frequently dismiss majority opinion as founded on nothing but prejudice—when it plainly is more complicated—simply in order to emphasize our disagreement with it.[47]

Balkin likewise questions whether depicting ordinary citizens as easily manipulated, unreasoning, unreasonable creatures reflects anything more than elite prejudice and distaste for popular culture. Ordinary people, he says, "are not mere passive receptors," and treating them as such is "just another way of denigrating [their] intelligence and abilities."[48] One may not agree with the conclusions they reach, but as Waldron urges, disagreement about hard and important questions is the very essence of democracy. Slogans like "the tyranny of the majority" are just that: slogans. Absent some reason to believe that other members of society are not approaching questions with the same good faith we attribute to ourselves—and the fact that they reach conclusions we disapprove is not itself such a reason—we have no basis to presuppose that "we" are right while "they" need discipline and control.[49]

Once again, one must be careful not to overdraw the argument. Just as supporters of judicial supremacy are not secretly itching for monarchy, its opponents are not dreaming of some pie-in-the-sky model of Athenian direct democracy. They recognize the need for representation, and do not object to institutional arrangements designed to slow politics down (i.e., to

separation of powers). Still, there is a qualitative difference between political restraints like bicameralism or a veto and a system of judicial supremacy. It is the difference between checks that are directly responsive to political energy and those that are only indirectly responsive, between checks that explicitly operate from within ordinary politics and those that purport to operate outside and upon it.

Two conclusions follow. First, the difference between friends and foes of judicial authority is ultimately a matter of degree. One might wonder whether this difference is important enough to worry about, but most people clearly believe that it is—clearly believe, in other words, that the decision to have or not to have judicial supremacy matters. Second, the choice one makes in this regard does not turn on evidence or logic, much as intellectuals on both sides of the question might want to believe otherwise. It turns, as Parker says, on differing sensibilities about popular government and the political trustworthiness of ordinary people.

"A Proper Respect for the People"

This is, we can now see, a very old conflict: one that started the moment Americans set their sights on creating a republic and that has scarcely ever flagged since then. In the epigraph to this book, James Madison asks "Who Are the Best Keepers of the People's Liberties?" Madison's faux-debater Republican answers that "[t]he people themselves" are the safest repository—to which Madison has Anti-republican reply: "The people are stupid, suspicious, licentious" and "cannot safely trust themselves." "Wonderful as it may seem," Anti-republican continues, "the more you make government independent and hostile towards the people, the better security you provide for their rights and interests." Correcting for the peculiar phraseology of the period and for Madison's evident hostility to Anti-republican's side of the argument, is it not remarkable the extent to which this 1792 exchange prefigures the debate we are still having today?

Look ahead six decades, to Martin Van Buren's 1857 *Inquiry into the Origins and Course of Political Parties in the United States*, and one finds the same arguments being made. Following Madison, Van Buren says that American politics have always been defined by a struggle between two great principles, which Van Buren labels "democracy" and "aristocracy" and which he describes in terms of their appeal to those who have "a proper respect for the people" and those who have "an inexhaustible distrust . . . of the capacities and dispositions of the great body of their fellow-citizens."[50] Van Buren shares Madison's hostility to the aristocratic impulse, but he is neither wrong nor off base in identifying the persistence of these two views and in emphasizing their centrality in shaping politics.

Simply put, supporters of judicial supremacy are today's aristocrats. Once can say this without being disparaging, meaning only to connect modern apologists for judicial authority with that strand in American thought that has always been concerned first and foremost with "the excess of democracy." Today's aristocrats are presumably no more interested in establishing a hereditary order than were Alexander Hamilton, Gouverneur Morris, or Joseph Story. But like these intellectual forebears, they approach the problem of democratic governance from a position of deep ambivalence: committed to the idea of popular rule, yet pessimistic and fearful about what it might produce and so anxious to hedge their bets by building in extra safeguards.

Today's democrats, in the meantime, are no less concerned about individual rights than were their intellectual forebears: Jefferson, Madison, and Van Buren. But like these predecessors, those with a democratic sensibility have greater faith in the capacity of their fellow citizens to govern responsibly. They see risks, but are not persuaded that the risks justify circumscribing popular control by overtly undemocratic means. In earlier periods, aristocrats and democrats found themselves on opposite sides of such issues as executive power or federalism. Today, the point of conflict is judicial review, as it was for much of the twentieth century. Yet while the field of battle may have changed over time, it is still the same old war.

The question Americans must ask themselves is whether they are comfortable handing their Constitution over to the forces of aristocracy: whether they share this lack of faith in themselves and their fellow citizens, or whether they are prepared to assume once again the full responsibilities of self-government. And make no mistake: the choice is ours to make, necessarily and unavoidably. The Constitution does not make it for us. Neither does history or tradition or law. We may choose as a matter of what Sanford Levinson has called "constitutional faith" to surrender control to the Court, to make it our platonic guardian for defining constitutional values.[51] Or we may choose to keep this responsibility, even while leaving the Court as our agent to make decisions. Either way, we decide.

The point, finally, is this: to control the Supreme Court, we must first lay claim to the Constitution ourselves. That means publicly repudiating Justices who say that they, not we, possess ultimate authority to say what the Constitution means. It means publicly reprimanding politicians who insist

that "as Americans" we should submissively yield to whatever the Supreme Court decides. It means refusing to be deflected by arguments that constitutional law is too complex or difficult for ordinary citizens. Constitutional law is indeed complex, for legitimating judicial authority has offered an excuse to emphasize technical requirements of precedent and legal argument that necessarily complicated matters. But this complexity was created by the Court for the Court and is itself a product of judicializing constitutional law. In reclaiming the Constitution, we reclaim the Constitution's legacy as, in Franklin D. Roosevelt words, "a layman's instrument of government" and not "a lawyer's contract."[52] Above all, it means insisting that the Supreme Court is our servant and not our master: a servant whose seriousness and knowledge deserves much deference, but who is ultimately supposed to yield to our judgments about what the Constitution means and not the reverse. The Supreme Court is not the highest authority in the land on constitutional law. We are.

Epilogue

JUDICIAL REVIEW WITHOUT JUDICIAL SUPREMACY

* * *

An earlier, more tendentious article sketching out a preliminary version of the history in this book concluded with the following: "The Supreme Court has made its grab for power. The question is: will we let them get away with it?"[1] Surprisingly, these two short sentences elicited more responses than anything else in the article. "What does *that* mean?" numerous readers asked. "How are we supposed to stop them?"

That so many people had this reaction only proves how much things have changed, for these are not the sorts of questions that would have puzzled Americans in the past. And, indeed, to find answers one need only look to American history. What did earlier generations of Americans do? What did Jefferson, Jackson, Lincoln, the Reconstruction Congress, and Roosevelt do? The Constitution leaves room for countless political responses to an overly assertive Court: Justices can be impeached, the Court's budget can be slashed, the President can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members or give it burdensome new responsibilities or revise its procedures. The means are available, and they have been used to great effect when necessary—used, we should note, not by disreputable or failed leaders, but by some of the most admired Presidents and Congresses in American history.

Just mentioning such devices sends a chill down the spines of most lawyers and legal scholars (not to mention judges). The same anxiety that leads them to favor judicial supremacy—that panicky feeling that popular politics is a wild animal to be kept at bay—makes the possibility of frontal attacks on the Court seem positively terrifying. That would be letting the animal out of its cage; worse, it would be letting the animal tear down its cage. Immediately we begin to hear how fragile and precarious judicial authority is, as if the Court would feebly collapse were it ever challenged in more than words. How ironic if the only way we can sustain this supposedly weakest branch is by making it the strongest one: letting it order the others about with impunity while forbidding them to resist and insisting that their only recourse is to wait for the Court's members to die or tire of the job.

The nations of modern Europe have found more sensible ways to handle this problem of control. Recognizing that constitutional enforcement is not and never could be like ordinary legal interpretation, the post–World War II constitutions of Europe established special courts, not part of the ordinary legal system, whose sole function is to review constitutional questions.[2] Given the high political station these courts occupy, additional safeguards were added to ensure an appropriate level of political accountability without needlessly compromising judicial independence. Appointment to the bench thus typically requires a supermajority in one or both houses of the legislature, guaranteeing that constitutional courts have a mainstream ideology, while judges serve terms that are limited and staggered to ensure a regular turnover.[3] In addition, the constitutions themselves are more easily amendable than ours. The combined effect of these innovations is to relieve the pressure a doctrine of supremacy creates by reducing the likelihood of serious breaches between the constitutional court and the other branches of government, and by making political correctives easier to implement when breaches occur. Partly as a result, constitutional courts in Europe have managed successfully to mimic American activism without the same controversy, though recent developments suggest that European judges, too, may be approaching the limits of their authority.[4]

No similar devices are found in the U.S. Constitution because when our Founding Fathers wrote no one had yet imagined anything even remotely like modern judicial supremacy. Judicial independence was thought of primarily in connection with the courts' ordinary law functions, and life tenure and salary protection were valued chiefly as devices to eliminate executive and legislative influence over ordinary litigation.[5] It was only as the judicial power expanded and its potential and political importance became clear that

we discovered a need to compensate for this gap in our Constitution, so we scrambled to create a degree of control and accountability by turning to blunter political tools like those mentioned above and described in earlier chapters.

The resulting system has worked tolerably well over the course of American history, though its operations are hardly smooth and its costs can be high.[6] Given this experience, one might think it makes sense to amend the U.S. Constitution to incorporate some of these European improvements. The availability of a filibuster in the Senate already functions as a kind of supermajority requirement—though lack of constitutional formality, combined with lingering doubts about the filibuster's legitimacy, have hindered its use in the context of judicial appointments. But limited and staggered terms seem like obviously sensible reforms, and a strong case can be made for easing the difficulty of amendment as well.[7] Certainly any sensible constitution-maker today, if starting from scratch, would think seriously about incorporating such devices. Unfortunately, we are not starting from scratch. Realistically speaking, there is very little chance of revising the U.S. Constitution to incorporate European ideas given the cumbersomeness of our existing amendment process. We simply have to live with the jerry-built system of accountability that evolved for us in practice.

That system may be ill-defined and uncertain. It may be costly and clumsy. It is, however, all that we have. And one thing we can say about it with a fair degree of confidence is that there is little reason to fear that using it will destroy the Supreme Court's effectiveness. For experience shows the Court to be anything but fragile. As a historical matter, the Court has been able to get away with a great deal before being seriously attacked; it has also been capable of withstanding enormous pressure once its actions finally provoked an outcry. Except after *Dred Scott*, moreover, the Court recovered quickly from the few instances in which political weapons were finally brought to bear against it effectively. Not that one cannot imagine a scenario in which the political branches inflicted serious damage on the judiciary. But if history is any guide, this risk of wounding the Court is far smaller than the alternative danger—which is that we let excessive concern for injuring our supposedly fragile Court become an excuse for giving the Justices license to roam in deciding matters that could and should be left to constitutional politics.

Still, how do we explain the Court's apparent strength and durability? Certainly it cannot be attributed to judicial supremacy, which as we have seen was not the rule for most of American history. Rather, as social scientists have long understood, a reasonably prudent Court can establish and sustain

a high degree of authority even without formal support from a doctrine of supremacy.[8] The reasons are mainly those identified by Madison back in 1834, which are worth quoting a second time. Even within a departmental framework, Madison speculated:

> [T]he Judicial department most familiarizes itself to the public attention as the expositor, by the *order* of its functions in relation to the other departments; and attracts most of the public confidence by the composition of the tribunal. . . . [T]he public deference to and confidence in the judgment of the body are peculiarly inspired by the qualities implied in its members; by the gravity and deliberation of their proceedings; and by the advantage their plurality gives them over the unity of the Executive department, and their fewness over the multitudinous composition of the Legislative department.[9]

What Madison does not say, but what is implicit in his argument, is that these sorts of factors carry weight because of certain expectations the public holds in respect to the Court and its role. The potential usefulness of the judiciary in a separation-of-powers scheme is not difficult to comprehend, and politicians and ordinary citizens alike can and do appreciate that there are advantages in giving the Court some leeway to act as a check on politics.[10] This includes understanding that many benefits of judicial involvement are long term and systemic and so may require accepting individual decisions with which one disagrees. It takes a lot to persuade a majority in this country that particular rulings are wrong enough to overcome this presumption.[11] To this, moreover, we must add the assorted obstacles our political system puts in the way of anyone seeking to change law (through bicameralism, the congressional committee system, filibusters, presidential vetoes, and the like), and the disproportionate power these obstacles give political minorities in blocking new measures. The upshot is that the Court's conduct must be quite provocative and very unpopular, usually over a sustained period, before it will produce actual legislative or executive countermeasures.[12]

It does not follow that nothing is at stake in the choice between a system of judicial supremacy and one based on departmental or coordinate construction. In the latter system, the authority of judicial decisions formally and explicitly depends on reactions from the other branches and, through them, from the public. This, in turn, can make an enormous difference in how the Justices behave. There may be political obstacles to punishing the Court that make it possible even without judicial supremacy for the Justices to have

their way most of the time. But the obstacles are smaller: smaller by precisely the weight conferred on Supreme Court decisions by the doctrine of judicial supremacy, which, if that doctrine is widely accepted, can be considerable.

The result of removing this weight is not more conflict. Indeed, a great irony of making clear that we can and should punish an overreaching Court is that it will then almost never be necessary to do so. Rather than more or constant conflict, we will instead see a different equilibrium emerge, as a risk-averse and potentially vulnerable Court adjusts its behavior to greater sensitivity on the part of political leadership in the other branches.

Making this shift should not entail major changes in the day-to-day business of deciding cases. There would still be briefs and oral argument and precedents and opinions, and the job of being a Supreme Court Justice would look pretty much the same as before. What presumably would change is the Justices' attitudes and self-conception as they went about their routine. In effect—though the analogy is more suggestive than literal—Supreme Court Justices would come to see themselves in relation to the public somewhat as lower court judges now see themselves in relation to the Court: responsible for interpreting the Constitution according to their best judgment, but with an awareness that there is a higher authority out there with power to overturn their decisions—an actual authority, too, not some abstract "people" who spoke once, two hundred years ago, and then disappeared. The practical likelihood of being overturned by this authority may be small, but the sense of responsibility thus engendered, together with a natural desire to avoid controversy and protect the institution of the Court, would inevitably change the dynamics of decision making. It is this, in fact, that explains how the Supreme Court has historically husbanded its authority even without judicial supremacy, as well as why crises occurred only when an overconfident Court claiming to be supreme paid too little mind to the public's view of things.