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Popular Constitutionalism, circa 2004

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INTRODUCTION

American constitutional law has, practically from the start, consisted of a struggle between two principles, which we can call “popular constitutionalism” and “legal constitutionalism.” In a system of popular constitutionalism, the role of the people is not confined to occasional acts of constitution making, but includes active and ongoing control over the interpretation and enforcement of constitutional law. Legal constitutionalism, in contrast, relocates final authority to interpret and enforce fundamental law in the judiciary. Although both principles have been with us from nearly the beginning, popular constitutionalism came first and was dominant for most of American history—leaving the judiciary, like the political branches, subject to ultimate supervision by “the people themselves.”

This claim comes as a surprise to contemporary judges, lawyers, and legal commentators. For something changed in the last few decades of the twentieth century. Not only did legal constitutionalism suddenly find widespread acceptance, but history itself was recast. Conventional legal wisdom today thus recognizes traces of popular constitutionalism in our past but

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† Russell D. Niles Professor of Law, New York University School of Law. This Lecture was originally intended to be the final chapter of a just published book, *The People Themselves: Popular Constitutionalism and Judicial Review*. A handful of snippets from the book remain in the text. I am exceedingly grateful to Robert Post, Erwin Chemerinsky, Reva Siegel, and Fred Schauer for commenting on the manuscript and for their comments, from which I learned a great deal. I am also grateful to Barry Friedman, Don Herzog, and Keith Whittington for helpful comments on an earlier draft.

treats them as exceptional—as dangerous, revolutionary, and faintly illegitimate moments signaling a break in the normal legal order. A judicial monopoly on constitutional interpretation is treated as natural and desirable. Not surprisingly, this belief has brought with it a conspicuous enlargement of judicial power.

Yet change is in the air, and the traditional discomfort with judicial authority seems to be stirring again—in the academy, at least. For the unparalleled activism of what some commentators have started calling “the second Rehnquist Court”¹ is generating a new debate, one grounded not in the liberal/conservative dialectic of the past four decades, but in the older tradition of popular constitutionalism. Rather than worry about what judges do solely from concern for the domain of ordinary politics, the Court’s new critics worry as much or more about judicial usurpation of the people’s role as constitutional interpreters. This shift in perspective, in turn, has changed the grounds of debate by raising different arguments against judicial supremacy, arguments that rest on different conceptions of the Constitution and its relationship to democratic citizenship. The aim of this Lecture is to describe the contours of the emerging new discourse.

Recognizing that some kind of movement is indeed taking shape—that there is more here than scattered, idiosyncratic griping from a few fussy contrarians—is obviously necessary if we are to understand the new scholarship’s content and evaluate its potential significance. The discussion below thus seeks to show that such a movement exists and that it presents a comprehensive and well-thought-out challenge to the Court’s preeminence. Hence, after briefly rehearsing the historical background in Part I, we turn to an examination of the main scholarly lines of attack. Part II reviews a body of work describing the existence, persistence, and, indeed, inevitability of at least some forms of popular constitutionalism in American legal and political discourse. While implicitly endorsing this fact, the general thrust of this scholarship is largely descriptive: one might agree with this work and still view the existence of popular constitutionalism as either good or bad—as something to be celebrated or, to the extent possible, suppressed. Part III therefore looks at work defending the normative attractiveness of extrajudicial constitutionalism. Most of the work described in Part III seeks to reconcile popular constitutionalism with judicial supremacy, offering new and better ways to understand a dialogue in which popular politics plays a central and useful role but in which courts retain ultimate authority to settle constitutional conflicts. Part IV, in contrast, examines a body of work that stakes out a more radical position by arguing that we can, literally, take the Constitution away from the courts. This

1. Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 569-70 (2003). Merrill dates the emergence of this “second” Court to the 1994 October Term.

work challenges common assumptions about how political and legal institutions handle questions of constitutional law, and it calls into question both the prevailing skepticism about democratic politics and an equally prevalent complacency about the process of adjudication.

At the end of the day, the arguments and ideas recounted in Parts II-IV may not conclusively settle the question of the Court's proper role, but they do raise serious issues about the necessity of a powerful judiciary. Part V therefore briefly considers why, in the face of so many reasons for doubt, judicial supremacy has nevertheless gained such a strong foothold in today's legal culture.

My purpose is not to defend or advance any particular version of popular constitutionalism.² It is, rather, to present an overview of scholarly work on the matter and, in this way, to show the surprising breadth, strength, and coherence of the case for some form of popular constitutionalism. In fact, the body of work that can be described as falling within this rubric is enormous—with important contributions coming from scholars in law, political science, history, sociology, and philosophy. Consequently, my survey of the literature does not even pretend to be comprehensive. Instead, I have picked out a sampling of especially useful contributions with which to sketch out the main lines of attack.³

2. My own vision of this, which leaves room for judicial review but rejects judicial supremacy, is developed elsewhere. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) [hereinafter KRAMER, *THE PEOPLE THEMSELVES*].

3. My apologies to the many scholars whose work on popular constitutionalism does not appear in these pages. Although I am a fan of all the work discussed in the text that follows, which I found to be both worthwhile and important, the same could be said of much scholarship that does not appear. My choice of works to discuss was based less on judgments about relative merit than on my sense of expository convenience in reconstructing what I take to be the central, shared lines of analysis.

I should say a word about one person whose work will not appear in the discussion that follows. I mean Bruce Ackerman, and in particular Ackerman's well-known theory of non-Article V amendments. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998). Although Ackerman's work in these books (and various related articles) is associated in many people's minds with the notion of popular constitutionalism, it does not in fact fit the concept as I understand and will be using it. "Popular constitutionalism" refers to the idea that authority to interpret and enforce the Constitution is not deposited exclusively or ultimately in courts (or in any agency of government, for that matter), but remains in politics and with "the people themselves." It refers, in other words, to some idea that the people retain authority in the day-to-day administration of fundamental law. No one—not even the most legalistic of legal constitutionalists—has ever doubted or denied the authority of the people to make or amend fundamental law. The critical question for popular constitutionalism has always involved the locus of authority to resolve interpretive ambiguities that call for action short of affirmative change. Under Ackerman's theory, this authority is fully vested in judges, whose task is, indeed, to preserve "constitutional regimes" inviolate between the rare constitutional "moments" when "We the People" revise them. Ackerman argues that the theory of popular sovereignty makes room for an amendment process outside Article V, but the stringent rules of recognition he imposes on that process make clear that it is meant to be limited and to fend off popular authority in day-to-day administration. (Indeed, Article V amendments are considerably easier to obtain than Ackerman's informal amendments, which is why there have been so many more of them.) This, too, is why Ackerman is at such pains to emphasize the revolutionary character of his constitutional moments, which are lawmaking moments,

I

THE CONTINUING STRUGGLE OVER POPULAR
CONSTITUTIONALISM: AMERICAN CONSTITUTIONAL HISTORY
IN A NUTSHELL

The Constitution of the United States originated within a system of “popular constitutionalism.”⁴ In this system, government officials were required to do their best to interpret the Constitution while going about the daily business of governing, but their interpretations were not authoritative and were instead subject to direct supervision and correction by the superior authority of “the people themselves,” conceived as a collective body capable of independent action and expression.

A competing model of legal constitutionalism emerged as early as the mid-1790s, formulated by conservative Federalists reacting to the French Revolution abroad and to partisan conflict at home. Because courts were “organized with peculiar advantages to exempt them from the baneful influence of Faction,” James Kent explained in 1794, the judiciary provided “the most proper power in the Government to . . . maintain the Authority of the Constitution.”⁵ Controversial from the beginning, this principle of judicial supremacy was repudiated in the election of 1800 and its aftermath: the repeal of the Judiciary Act of 1801 and the midterm elections of 1802.

An argument for judicial supremacy reemerged in the early 1830s, now offered as a solution to persistent and seemingly intractable constitutional conflicts generated by such issues as slavery, tariffs, banks, and states’ rights. But rather than talk about how popular majorities were quick to inflict injustice on defenseless minorities (as Federalists had done in the 1790s), the judiciary’s new champions emphasized what scholars today call the “settlement function” of law, arguing that there would be no end to controversy unless judges had final say.⁶ Once again, the argument fizzled as its proponents were outmaneuvered politically by Andrew Jackson and his followers. The Jacksonians made challenging judicial authority a centerpiece of their 1832 presidential election campaign, which they then won

founding moments, and do not imply any popular authority in the interpretation or enforcement of established or accepted constitutional law. In this respect, Ackerman’s theory is unlike that of his colleague Akhil Amar, whose argument for non-Article V amendments *does* sound in popular constitutionalism—indeed, in a notion so strong that it risks collapsing any distinction between ordinary and constitutional politics. See Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994).

4. The material in this and the following four paragraphs summarizes chapters one through eight of KRAMER, THE PEOPLE THEMSELVES, *supra* note 2.

5. James Kent, *An Introductory Lecture to a Course of Law Lectures* (1794), in 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 936, 942 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

6. See *infra* note 90.

by a landslide. The new Democratic party was organized around the idea of reinvigorating popular control over the Constitution and constitutional law—as, ironically, was its rival, the Whig party.

Yet the idea of judicial supremacy did not simply disappear. The very diffuseness and decentralization of popular constitutionalism, combined with uncertainty over the means through which it was expressed, left room for advocates of judicial authority to continue nursing their claim. Supported by elites within the legal profession, judicial supremacy survived, sharing space with popular constitutionalism in American political culture.

The result was a dialectical tug of war. Struggle was not constant, but consisted of periodic confrontations or blowups occurring after years or sometimes decades during which active backers of the two perspectives jostled for position while ordinary citizens remained largely indifferent or unconcerned.⁷ Though we cannot know for sure, it is possible, and maybe even probable, that popular constitutionalism was the dominant public understanding during most of these latent periods, even as judicial supremacy was favored by and within the legal profession. What is certain is that popular constitutionalism was the clear victor each time matters came to a head. Yet the end of one cycle simply began another in which the Court and its supporters eventually renewed their efforts to establish judicial supremacy. Resurgent claims of judicial authority, in turn, gave rise to a new wave of criticism as opponents of the judiciary pushed back by advocating a revived or restored commitment to popular constitutionalism.

The pattern began to change only in the latter half of the twentieth century. After *Cooper v. Aaron*,⁸ the idea of judicial supremacy seemed gradually, at long last, to find active and widespread public acceptance. The Court's decisions were still often controversial. State legislatures sometimes enacted laws they knew the Court would strike down and compliance with the Justices' most contentious rulings, like those on abortion and school prayer, was willfully slack in many places. But sometime in the 1960s, these incidents of noncompliance evolved into forms of protest rather than claims of interpretive superiority. Outright defiance, in the guise of denying that Supreme Court decisions define constitutional law, seemed largely to disappear.

Popular constitutionalism remained very much alive at first, as evidenced by the period's various protest movements or by Richard Nixon's law-and-order campaign in 1968. But by the 1980s, most protests that

7. For a useful analysis of the political dynamic that typically provokes these outbursts, see THOMAS E. CRONIN & MICHAEL A. GENOVESE, THE PARADOXES OF THE AMERICAN PRESIDENCY 224-72 (1998); STEPHEN SKOWRONEK, THE POLITICS PRESIDENTS MAKE (1993); Keith E. Whittington, *The Politics of Constitutional Meaning* (unpublished manuscript, on file with author).

8. 358 U.S. 1 (1958).

touched on constitutional matters were being directed *at* rather than *against* the Court and acceptance of judicial supremacy seemed to become the norm.⁹ Witness the reaction to former Attorney General Edwin Meese's 1986 suggestion that Supreme Court decisions might be binding only on the parties to a case.¹⁰ Meese was accused of inviting anarchy and of "making a calculated assault on the idea of law in this country: on the role of judges as the balance wheel in the American system."¹¹ He quickly backed down, softening his criticism to concede that judicial decisions "are the law of the land" and "do indeed have general applicability."¹²

Explaining this rather extraordinary development is not easy. One factor in the background, certainly, was the general skepticism about popular government that came to characterize western intellectual thought after World War II.¹³ The seeming eagerness with which mass publics in Europe had embraced fascism and communism eroded intellectual faith in popular democracy. The new thinking, associated most closely with Robert Dahl and Joseph Schumpeter,¹⁴ denigrated democratic politics as a site for developing substantive values and replaced it with a self-interested competition among interest groups. Viewing electoral politics in this unflattering light, in turn, made it easier to defend courts as a better setting in which to preserve constitutional commitments and to carry on the moral deliberation that everyone agreed was a crucial aspect of democratic government. Whence was born the curious notion of the judiciary as a "forum of principle."¹⁵

Closer to home in promoting acceptance of judicial supremacy was the still more curious fact of the Warren Court itself—a liberal activist Court that, for the first time in American history, gave progressives a reason to see the judiciary as a friend rather than a foe. This had never been a problem for conservatives. Going all the way back to the Federalist era, conservatives had always embraced an idea of broad judicial authority, including judicial supremacy, and they continued to do so after Chief Justice Warren took over. For them, the problem with the Warren Court was simply that its decisions were wrong. Their protests were directed at the substantive interpretations of the liberal Justices, whom they saw falsely using

9. See SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES 7-9 (1992).

10. Edwin Meese III, *The Law of the Constitution*, 61 TULANE L. REV. 979, 983 (1987).

11. Anthony Lewis, *Law or Power?*, N.Y. TIMES, Oct. 27, 1986, at A23; see also Ronald J. Ostrow, *Meese's View that Court Doesn't Make Law Scored*, L.A. TIMES, Oct. 24, 1986, at I13 (quoting Ira Glasser describing Meese's speech as an "invitation to lawlessness").

12. Edwin Meese III, *The Tulane Speech: What I Meant*, WASH. POST, Nov. 13, 1986, at A21.

13. See RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS (1999).

14. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1942).

15. RONALD DWORKIN, A MATTER OF PRINCIPLE (1985).

the Constitution as cover to deal with matters that constitutional law did not in fact address.

Beginning with Robert Bork's 1968 attack on the Court in *Fortune* magazine,¹⁶ many conservatives started to assail the Court using the traditionally liberal rhetoric of countermajoritarianism. In adopting this rhetoric, however, they were not embracing some abstract idea of judicial restraint unconnected to any substantive position, and they certainly were not adopting a principle of popular constitutionalism. They were arguing that the Warren Court's unwarranted expansion of constitutional law needlessly truncated ordinary politics. Few conservatives rejected judicial review, and almost all supported a practice of judicial supremacy over the Constitution as they understood and interpreted it.¹⁷ Conservatives continued to insist, for example, that the New Deal Court had been wrong to abandon judicial enforcement of limits on federal power.

Liberals had a more difficult time deciding how to respond to the Warren Court. On the one hand, liberal intellectuals strongly supported what the Court was doing, believing deeply and without reservation in the substantive value and importance of the Court's reconstructive endeavors. On the other hand, their teachers and heroes had led the fight against *Lochner v. New York*,¹⁸ and many of them had devoted their professional lives to the idea that courts acted inappropriately when they interfered with the will of the people. An unspoken tension between this belief and the Supreme Court's "preferred position" jurisprudence was kept at bay during the 1940s and early 1950s by the Justices' general reluctance to act, evidenced most strikingly in the capitulation to McCarthyism.¹⁹ *Brown v. Board of Education*²⁰ and other judicial innovations that soon followed were thus a wrenching test of the traditional liberal commitment to judicial restraint.

The tortured intellectual path required to reconcile these conflicting commitments has been insightfully documented by others, especially Edward Purcell, Morton Horwitz, Laura Kalman, and Barry Friedman.²¹ For present purposes, we need simply note that as Warren Court activism crested in the mid-1960s, a new generation of liberal scholars discarded opposition to courts and turned the liberal tradition on its head by

16. Robert H. Bork, *The Supreme Court Needs A New Philosophy*, FORTUNE, Dec. 1968, at 138, 140.

17. BURGESS, *supra* note 9, at 7-9.

18. 198 U.S. 45 (1905).

19. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 252, 258 (1992).

20. 347 U.S. 483 (1954).

21. EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE (1973); HORWITZ, *supra* note 19, at 247-72; LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 1-131 (1996); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

embracing a philosophy of broad judicial authority. Though familiar with the history of *Lochner*, these younger scholars had not lived through it. To them, the countermajoritarian difficulty just did not seem so difficult: not when viewed through the lens of a Court obviously dedicated to helping (in Morton Horwitz's words) "those who are down and out—the people who received the raw deal, those who are the outsiders, the marginal, the stigmatized."²²

Not every liberal made the change. A strand of the older concern for judicial restraint survived, reaching its apotheosis in the 1980 publication of John Hart Ely's much praised (though seldom followed) *Democracy and Distrust*.²³ But the main body of liberal intellectuals put aside misgivings about electoral accountability, frankly conceding that judicial review might be in tension with democracy while justifying any trade-off on the ground that courts could advance the more important cause of social justice.

The upshot was—again, for the first time in American history—that conservatives and liberals found themselves in agreement on the principle of judicial supremacy. They continued to disagree about its proper domain and even more about the appropriate techniques for judges to use in interpreting the text. But liberals and conservatives alike took for granted that it was judges who should do the interpreting and that the judges' interpretations should be final and binding. The idea of popular constitutionalism faded from view.

This is not to say that no one imagined a role for constitutional interpretation outside the courts. There was, for example, the political question doctrine—though the existence of this anemic principle, requiring special justifications like those offered in *Baker v. Carr*,²⁴ looks more like the proverbial exception that proves the rule. Still, other examples can be found of arguments that seemed to recognize a role for nonjudicial interpretation. Herbert Wechsler's famous essay on "the political safeguards of federalism"²⁵ can be understood this way, though the better reading of Wechsler is that various constitutional structures work to make Article I limits on Congress self-enforcing. The point, in any event, is that there are traces of popular constitutionalism in the debates, but these tend to be marginal and unfocused: fuzzy patches around the edges of a painting whose central details have absorbed all the attention.

22. Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 10 (1993).

23. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Although Ely offered "representation reinforcement" as both a justification of and a limitation on judicial review, only the former has found acceptance. Courts and commentators are willing to defend judicial review where it opens or replaces clogged democratic arteries without similarly restricting the practice to such situations.

24. 369 U.S. 186, 217 (1962).

25. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

As time passed, moreover, these traces grew fainter and less frequent. Once the Warren Court was in full swing, focus shifted almost entirely to the judiciary. Conservatives argued that the Court's decisions were wrong, while liberals defended its interpretive methods and outcomes. An idea of popular constitutionalism, of "the people" bridging the divide between law and politics by acting as authoritative interpreters of a constitutional text, was no longer a meaningful part of the intellectual universe. The principle of judicial supremacy came to monopolize constitutional theory and discourse,²⁶ a monopoly that thrived during the tenure of Chief Justice Burger and persisted into the early years of the Rehnquist Court.

As in times past, the aggressive assertion of judicial power has triggered a response, albeit one so far confined mainly to the academy. Scholars working in numerous fields have reexamined, and found wanting, virtually every aspect of the stories told to justify judicial supremacy. Other scholars have taken note of this work—to the point, indeed, where it has become banal to acknowledge interest in "the Constitution outside the Court." Yet this offhand way of describing the matter reveals nothing so much as *un*awareness of the real strength and import of the assault on legal constitutionalism, for a surprisingly comprehensive intellectual critique has been developed. Talk about "the Constitution outside the Court" trivializes what is, in fact, better characterized as a movement to reconstitute the great American tradition of popular constitutionalism.

II

"THE POLITICAL CONSTRUCTION OF AUTHORITATIVE NORMS": THE INEVITABILITY OF POPULAR CONSTITUTIONALISM

We can begin with a substantial body of scholarship that addresses popular constitutionalism from a descriptive rather than a normative perspective. Scholars writing in this vein seek, in myriad different ways, to rebut the assumption that "law," and especially constitutional law, is or ever could be only what courts say it is. These scholars deny, in other words, that the judiciary even has the option to monopolize or fully control the resolution of constitutional disagreements. Stephen Griffin, for instance, argues that "the meaning of most of the Constitution is determined through ordinary politics."²⁷ Citing examples like the emergence of

26. See BURGESS, *supra* note 9, at 7-12; Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 362 (1997); Robert Nagel, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 380, 381-82 (1988); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDozo L. REV. 113, 119-20 (1993); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 777 & n.21 (2002) (reporting polls showing 60% of respondents identifying the Supreme Court as having the final say on constitutional matters).

27. STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 45 (1996).

political parties, the rise of an administrative state, and the development of a national security apparatus, Griffin observes:

The meaning of most provisions in the Constitution is thus determined in the course of the interaction between the executive and legislative branches. While it is possible for these branches to change their interpretations of the Constitution through legalistic procedures involving carefully reasoned written arguments (as change is supposed to occur in the judicial branch), change does not most often occur in this manner. Instead, these branches alter the Constitution in the course of ordinary political struggles, without much attention to legal and constitutional values that lawyers and judges think important.²⁸

Keith Whittington similarly argues that judicial interpretation and action “elucidate only a portion of the Constitution’s meaning.”²⁹ Much, if not most, constitutional law, Whittington maintains, has been created outside the judiciary through an overtly political process of “constitutional construction.” Whittington insists that this process can and should be distinguished from ordinary legal interpretation because it operates “in the interstices of discoverable, interpretive meaning, where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules.”³⁰ The Constitution’s text, on this view, offers meaningful guidance for only a handful of issues, while generating a much larger number of additional problems that must be resolved if the Constitution is to work but about which the text is effectively silent. Solutions to these problems must therefore be “constructed,” which is to say created ad hoc—a process in which courts occasionally participate, but one that can be concluded authoritatively only outside the courthouse, through “the political construction of authoritative norms.”³¹

The Supreme Court has, in a few instances, expressly recognized a need for this kind of construction via the political question doctrine. But as Whittington convincingly demonstrates, the Court has silently watched as a much larger number of problems were resolved in and through politics. Whittington describes some of these in detail, such as defining the terms of judicial independence in the Chase impeachment and resolving the constitutionality of protective tariffs in the fight over nullification.³² Yet Whittington’s list of relevant constructions covers a broader range of subjects, most with somewhat lower political profiles. These encompass the creation of organic political structures (e.g., cabinet departments, the size

28. *Id.*

29. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1 (1999).

30. *Id.* at 5.

31. *Id.* at 7.

32. *Id.* at 20-71 (Chase impeachment), 72-112 (nullification).

of the Supreme Court, congressional committees), the distribution of important political powers (e.g., embargoes, the scope of the President's veto, congressional subpoena and contempt powers), the definition of certain individual or collective rights (e.g., secession, the draft), the structure of politics (e.g., the cap on the size of the House of Representatives, use of the Australian ballot, the requirement of winner-take-all districts), the allocation and exercise of legislative jurisdiction (e.g., annexation of new territory, home rule in the District of Columbia, extension of coastal national waters), and numerous issues of international governance (e.g., entry into NATO and the United Nations, executive agreements, recognition of foreign powers).³³ The overall picture is consistent with, and indeed tends to substantiate, Lawrence Sager's suggestion that judges have "single[d] out comparatively few encounters between the state and its citizens as matters of serious judicial concern."³⁴ These political resolutions may not be conventionally thought of as "law" (because they were not dictated by courts), yet they rest on interpretations and constructions of the Constitution that have proved as or more durable than judicial precedent.³⁵

Another group of scholars argues that the judiciary's authority and control over constitutional law is limited even with respect to all those matters conventionally thought to present controversies of a type addressed by courts. This group includes writers who insist that "[i]n our political system the executive and legislative branches *necessarily* share with the judiciary a major role in interpreting the Constitution."³⁶ According to Louis Fisher, among the most prolific writers associated with this idea,³⁷ "the historical record proves overwhelmingly" that "the Court is neither final nor infallible. Judicial decisions rest undisturbed only to the extent that Congress, the President, and the general public find the decisions

33. See *id.* at 12 (Table 1.2 listing more than eighty examples of "selected constructions").

34. Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 410-11 (1993); see also Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

35. The political constructions Whittington identifies have been stable for decades, even centuries in some cases, whereas Supreme Court precedent is seldom so stable.

36. LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* 231 (1988) (emphasis added).

37. In addition to his book *Constitutional Dialogues*, Fisher has coauthored a textbook with Neal Devins entitled *Political Dynamics of Constitutional Law* (2d ed. 1996) and published a number of articles developing similar themes. See Louis Fisher, *The Canons of Constitutional Law: Teaching With a Political-Historical Framework*, 17 CONST. COMMENT. 275 (2000); Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83 (1998); Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 PEPP. L. REV. 57 (1990); Louis Fisher, *Constitutional Interpretation By Members of Congress*, 63 N.C. L. REV. 707 (1985). One could also add a number of shorter articles in which Fisher has reviewed books on constitutional interpretation written by others. See Louis Fisher, Book Review, 49 FED. LAWYER 61 (2002) (reviewing WHITTINGTON, *supra* note 29); Louis Fisher, Book Review, 47 FED. LAWYER 52 (2000) (reviewing MICHAEL A. BAMBERGER, *RECKLESS LEGISLATION: HOW LAWMAKERS IGNORE THE CONSTITUTION* (2000)); Louis Fisher, Book Review, 44 FED. LAWYER 70 (1997) (reviewing ROBERT A. KATZMANN, *COURTS AND CONGRESS* (1997)).

convincing, reasonable, and acceptable. Otherwise, the debate on constitutional principles will continue.³⁸ A model of law that rests on a simple one-to-one correspondence between what the Court says and what affected actors do is misleading. Not only do Congress, the President, the states, and other relevant players find room to act in, around, and between judicial decisions, but the Court often finds that it must work in partnership with these nonjudicial actors to give shape to constitutional values in the first place.³⁹

A particularly rich strand in this line of scholarship explores the Supreme Court's strategic interactions with other political actors and finds that the Justices "rarely oppose strong majorities and almost never do so for any length of time."⁴⁰ Mr. Dooley's familiar adage about the Court's attention to election results may be somewhat overstated,⁴¹ but a sizeable body of empirical work supports the view that the judiciary is seldom far out-of-step with legislative majorities at the national level and that when there is a divergence it rarely lasts.⁴² Lawyers hate this sort of stuff. Witness the ill will provoked by Gerald Rosenberg's concededly provocative book, *The Hollow Hope*, which argued that even celebrated cases like *Brown*, *Roe v. Wade*,⁴³ and *Miranda v. Arizona*⁴⁴ were either

38. FISHER, CONSTITUTIONAL DIALOGUES, *supra* note 36, at 244. The authors of one constitutional casebook have sought to make this argument part of the pedagogy of constitutional law by including materials from a variety of extrajudicial sources in order to show students "that the Supreme Court is not the only interpreter of the Constitution, even if it is surely the most obvious and important one for most lawyers." PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (4th ed. 2000).

39. See STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM 130-62 (1990).

40. Mark A. Graber, *The Law Professor as Populist*, 34 U. RICH. L. REV. 373, 382 (2000).

41. FINLEY PETER DUNNE, MR. DOOLEY AT HIS BEST 77 (Elmer Ellis ed., 1969) ("no matter whether th' Constitution follows th' flag or not, th' Supreme Court follows th' iliction returns.").

42. This idea was first and most famously advanced by Robert Dahl in 1957. See Robert A. Dahl, *Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957). Subsequent generations of sociologists and political scientists have since examined and reexamined his assertions, adding considerable refinement but confirming the basic thesis that "[h]igh profile decisions by and large reflect public opinion." LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 713 (3d ed. 2003); see DAVID G. BARNUM, THE SUPREME COURT AND AMERICAN DEMOCRACY 284 (1993); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT ix (1989); Gregory A. Caldeira, *Courts and Public Opinion*, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT 303, 313 (John B. Gates & Charles A. Johnson eds., 1991). For a brief and readable survey of the literature discussing how courts interact with other political actors, see Barry Friedman, *Mediating Popular Constitutionalism*, 101 MICH. L. REV. (forthcoming 2004); Michael McCann, *How the Supreme Court Matters in American Politics: New Institutionalist Perspectives*, in THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS 63, 65-78 (Howard Gillman & Cornell Clayton eds., 1999).

43. 410 U.S. 113 (1973).

44. 384 U.S. 436 (1966).

inconsequential or ineffective as engines of social change.⁴⁵ But the data are numerous and consistent, and there is now a general consensus among social scientists that courts have not been a strong or consistent counter-majoritarian force in American politics. No similar consensus yet exists about why this should be so,⁴⁶ but that it *is* so seems hard to deny.

I do not wish to overstate what the evidence actually shows: judges are not irrelevant, nor do courts merely replicate what the political system would otherwise produce. On the contrary, most scholars agree that courts play a significant role in shaping the strategic terms of political debate and that, in certain circumstances, they may even have a part in defining those terms. To say the Supreme Court can rarely undertake or sustain bold policy initiatives is not to deny that judicial rulings can nudge matters in one direction or another when public opinion is uncertain or divided. And even apart from directly molding substantive values, judicial decisions can shape the political agenda by addressing issues that elected officials do not or will not face, by offering a means for weak or excluded groups to enter the public debate, by providing one side or another with leverage in ongoing political bargaining, by creating constraints or disincentives that affect how or which parties proceed, by stimulating counter-mobilization, and in a myriad of other, similar ways.⁴⁷ But look how far the discussion has moved: rather than assuming that constitutional law is what the Supreme Court says it is, we are now explaining how and why the Court is not irrelevant.

Some of the most interesting and important work in this vein has been done by sociolegal scholars exploring how judicial rulings are absorbed and understood by nonlegal actors.⁴⁸ This work begins with the following

45. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) [hereinafter ROSENBERG, THE HOLLOW HOPE]. Rosenberg's analysis and argument have methodological problems, of course, problems recognized by others in his field, but such problems hardly explain the fury and denial his work engendered in law schools. See Stephen L. Carter, *Do Courts Matter?*, 90 MICH. L. REV. 1216 (1992) (book review); Neal Devines, *Review Essay: Judicial Matters*, 80 CALIF. L. REV. 1027 (1992).

46. Different scholars pointed to a wide range of plausible factors, including appointments, overt or implied threats of legislative and executive retaliation, statutory reform, judges' attitudes and sense of role, awareness of public displeasure, and more. As Barry Friedman muses after surveying this literature, "it would be neat to identify one mechanism by which judicial opinions coalesce with popular opinion. But things are messy here in the real world." Barry Friedman, *Modeling Judicial Review* 116 (2003) (unpublished manuscript, on file with author).

47. See Graber, *supra* note 40, at 403-10 (listing ten ways in which judicial review matters); McCann, *supra* note 42, at 69-76 (outlining "five general ways that are suggestive of how the Court shapes the terms of strategic interaction among political actors in society").

48. Representative examples include JOHN BRIGHAM, THE CONSTITUTION OF INTERESTS: BEYOND THE POLITICS OF RIGHTS (1996); KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984); MICHAEL W. McCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); Michael W. McCann, *Reform Litigation on Trial*, 17 L. & SOC. INQUIRY 715 (1992) (reviewing ROSENBERG, THE HOLLOW HOPE, *supra* note 45 [hereinafter McCann, *Reform Litigation on Trial*]]; Sally Engle Merry, *Concepts of Law and Justice Among*

straightforward (and presumably undeniable) proposition: “[T]he messages disseminated by courts do not . . . produce effects except as they are received, interpreted, and used by (potential) actors.”⁴⁹ Scholars who study this process of reception reject as simplistic and inaccurate the conventional view that “law is formulated by legal elites (such as judges) in insular institutional settings of the state (such as the federal courts) and imposed as an alien, exogenous force upon a society otherwise structured largely by extralegal interests and conventions.”⁵⁰ Law is not so much enforced against society, these scholars say, as constituted through it, “inscribed within the very institutional fabric of social relations.”⁵¹ Rather than existing as independent, self-sufficient constructs that regulate social activity, legal rules are comprehensible only because and insofar as they are embedded in community understandings that determine their actual meaning in practice. Ordinary citizens are more than mere subjects of law, though they are that too: they are participants, “mobilizers,” whose activities create and shape legal norms in routine social and political interactions.⁵² There is no separation between law and society, and culture is as constitutive of law as the reverse.

This work has multiple and important applications in the study of legal systems generally.⁵³ What is most pertinent for our purposes, however, is simply to recognize that what citizens and nonjudicial actors hear may not be what a court wanted to say—and that the difference often matters. Popular understandings inexorably overtake and reshape judicial pronouncements, a process facilitated by the fact that opinions are virtually always indeterminate to some extent and so invariably open to multiple interpretations. As a result, Michael McCann observes, “citizens routinely reconstruct legal norms into resources for purposes quite unintended by judicial officials.”⁵⁴ In actual practice, Supreme Court decisions do not settle constitutional disputes so much as provide ammunition for their continuation, often in settings beyond the power of courts to reach. Consider, for example, the complex ways in which the *Lochner* Court ended up supplying Populists and Progressives with intellectual and ideological tools

Working-Class Americans: Ideology as Culture, 9 LEG. STUD. FORUM 59 (1985); Austin Sarat, “...The Law is All Over”: Power, Resistance, and the Legal Consciousness of the Welfare Poor, 2 YALE J. L. & HUMAN. 343 (1990).

49. Marc Galanter, *The Radiating Effects of Courts*, in EMPIRICAL THEORIES ABOUT COURTS 136 (Keith D. Boyum & Lynn Mather eds., 1983).

50. McCann, *supra* note 42, at 79.

51. *Id.* at 80.

52. See Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV. 690 (1983); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987).

53. These, too, are briefly surveyed in McCann, *supra* note 42, at 78-92.

54. McCann, *Reform Litigation on Trial*, *supra* note 48, at 733.

(such as the sanctity of property) that they then used to promote their own, very different agendas.⁵⁵

We can, in a sense, view all this work on the existence and necessity of popular constitutionalism as a kind of upping the ante on legal realism. Where the realists taught us to look beyond “the rules” to what courts actually do, we now see that even this does not go far enough. We must also look beyond the courts to see how judicial rulings are absorbed, transformed, and sometimes made irrelevant. This is especially true when it comes to the Supreme Court’s constitutional jurisprudence. Whether because of practical institutional limitations or a need for support from other branches or a willingness to behave strategically to preserve institutional capital or an inability to overcome deeply inscribed societal norms, the Supreme Court can never monopolize constitutional lawmaking or law interpreting. Popular constitutionalism is, to some extent, perhaps a very great extent, inevitable and unavoidable.

The question is what to make of this fact. That the Supreme Court does not fully determine the course of constitutional law is something most lawyers and judges already know—including, I am sure, the Justices of the Supreme Court. We sometimes talk or write as if we thought otherwise, but that is because most legal scholarship is about (and so mainly interested in) only the formal legal system. Aware that there are limits to this system’s effectiveness, we leave them unspoken because such qualifications are beyond the problem being addressed and because we assume they will be taken for granted.

Maybe this is a mistake. By declining to qualify what we say or failing to consider the fate of law beyond the courthouse, legal scholars have almost certainly overestimated the influence of judicial pronouncements and overlooked extrajudicial influences that matter. To that extent, the work of scholars like Griffin, Whittington, Galanter, Rosenberg, McCann, and others provides a useful and important corrective, a reminder that judicial lawmakers face substantial obstacles and that nonjudicial actors and activities have real significance for law and especially for constitutional law.⁵⁶

Yet nothing in this scholarship provides a basis for criticizing or challenging even the most ambitious claims of judicial authority. Quite the contrary, evidence that courts face inherent limits in establishing and

55. See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); VICTORIA C. HATTAM, *LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES* (1993); KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES* (1991); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997) [hereinafter Pope, *Labor's Constitution*]; Alan Furman Westin, *The Supreme Court, the Populist Movement, and the Campaign of 1896*, 15 J. POL. 3 (1953).

56. See, e.g., GRIFFIN, *supra* note 27; ROSENBERG, *THE HOLLOW HOPE*, *supra* note 45; WHITTINGTON, *supra* note 29; Galanter, *supra* note 49; McCann, *supra* note 42.

enforcing constitutional norms may simply give those who believe in the necessity of judicial supervision a reason to redouble their efforts to shut down extrajudicial interpretation. The reason is straightforward: barriers to the Supreme Court's ability to monopolize constitutional interpretation are not exogenous to beliefs about what the status of the Court's rulings ought to be. Grant that the Justices will, at some point, inevitably run up against limits on their ability to control the course of constitutional law. The location of these limits will nevertheless vary depending on how much authority ordinary citizens and political leaders believe the Court ought to have. Yet we cannot decide where we want the limits to be without first deciding whether popular constitutionalism is a good or a bad thing—something about which its mere existence tells us nothing. Murder and love will both inevitably exist in society, but we feel very differently about whether to encourage or discourage them.

Put another way, whether I would actively oppose a decision or course of decisions will depend on whether I think the decision or course of decisions is legitimate; and my judgments about legitimacy turn not only on whether I agree or disagree with the Court's rulings, but also on whether I feel entitled to disagree and, more important still, to act on my disagreement. Think of an analogy to agency law: I obviously will be quicker to second-guess and resist the decision of an inferior (popular constitutionalism) than that of a superior (judicial supremacy)—and this even if it is the same substantive decision. So, too, at a collective level the Court may, eventually, do things that would arouse active opposition even from a people that generally endorses a philosophy of judicial exclusivity. But it will take longer and require more extreme judicial misbehavior before this people resists than would be true if it rejected judicial exclusivity for a more decentralized theory of interpretive authority.

Is this a good or a bad thing? That is, should we embrace or discourage such resistance?⁵⁷ The inevitability of a certain amount and kind of popular constitutionalism does not help us to answer such questions. It tells us that we may be talking about a choice between shades of gray, and not between black and white—between a little popular constitutionalism and a lot of it. But as a normative matter the basic choice remains exactly the same.

57. Among the more interesting findings made by political scientists is the surprising extent to which the Supreme Court can legitimate its own authority simply by exercising it, an effect facilitated by assistance from what political scientist John Brigham calls "the cult of the Court": the worshipful lower courts, judges, and mass media whose fawning invests the Court's every action with a sense or appearance of profundity. See JOHN BRIGHAM, THE CULT OF THE COURT (1987); McCann, *supra* note 42, at 81-82. The best way to enlarge judicial control and shrink the space available for popular constitutionalism, in other words, may be to make precisely the sort of overweening claims for judicial exclusivity now being made by the Rehnquist Court.

III

**"THE MANY SOCIAL ACTORS WHO ARE SPEAKING ABOUT THE
CONSTITUTION'S MEANING": THE DESIRABILITY OF
POPULAR CONSTITUTIONALISM**

Building on this work, another group of scholars has sought to explain why there is normative significance in the certain existence of some degree of popular constitutionalism. These scholars argue, in various ways, that constitutional principles and ideas developed outside the Court are crucial in expanding the possibilities for constitutional development and in mediating tensions that occasionally arise between constitutional law and the culture in which it operates. Popular constitutionalism, on this view, provides the inspiration for reshaping the Constitution so as to keep it fresh and current with society.

Much of this scholarship was inspired, directly or indirectly, by Robert Cover's recondite 1983 article, *Nomos and Narrative*.⁵⁸ Law, Cover said, is "but a small part of the normative universe"—or "*nomos*"—that structures a social order.⁵⁹ Law acquires meaning and force only by virtue of being embedded in a larger narrative, an account of culture and history that explains the normative universe that a particular community's members live by. The urge to generate such narratives—to locate norms, including legal norms, within a (hi)story that makes sense of the world—is irrepressible, a human impulse that Cover names "*jurisgenesis*".⁶⁰ It is, like all forms of creativity, a good thing in itself. It helps us order our lives and offers a way to link our imaginations with reality and to realize ideals by reconceptualizing their potential in the world.

There is, however, a problem: the problem of multiplicity. We are not one community, but many. We may all be "Americans," but we are also Jews or Christians or Mennonites or Muslims. We are laborers or managers, farmers or cops, Californians or Texans. We are rich or poor, black or white, male or female. Looking at the same text, members of different interpretive communities will inevitably generate their own interpretations of law based on their own *nomos* and their own narrative. In a perfect world, this would not be a problem. "[L]aw would indeed grow exclusively from the hermeneutic impulse—the human need to create and interpret texts. Law would develop within small communities of mutually committed individuals who cared about the text, about what each made of the text, and about one another and the common life they shared."⁶¹

58. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

59. *Id.* at 4.

60. *Id.* at 11-19.

61. *Id.* at 40.

But ours is not a perfect world, and in the real world, communities overlap and interact and their narratives collide. That is where the state enters the picture: “[T]he origin of and justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy.”⁶² Lawyers typically think of this as a process of resolving uncertainty, but uncertainty exists only because different parties have different plausible understandings of what a law means. So where a choice must be made, it becomes the court’s task to decide which interpretation shall prevail—leading Cover to pronounce the judges’ “jurispathic” office: “Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.”⁶³

Though this may not be a good thing, it is a necessary one. We have no choice but to suppress certain views of law: because they cannot co-exist with other views, because they inflict harm, because they are fundamentally unjust. Yet in so doing, we deny validity to the meaning some community has given to constitutional principles as it struggles to maintain the coherence and authority of its *nomos*. We thus deny these communities’ autonomy and threaten the validity of their larger narratives. Equally important, we deprive ourselves of the possibility that, with time and experience, we might come to share their vision. Again, this may sometimes be necessary. But rather than rushing to do it, Cover says, we should, within the minimal demands of justice and order, strive to preserve as many of these alternate visions as possible:

The challenge presented by the absence of a single, “objective” interpretation is . . . the need to maintain a sense of legal meaning despite the destruction of any pretense of superiority of one *nomos* over another. By exercising its superior brute force, however, the agency of state law shuts down the creative hermeneutic of principle that is spread throughout our communities. The question, then, is the extent to which coercion is necessary to the maintenance of minimum conditions for the creation of legal meaning in autonomous interpretive communities.⁶⁴

Building on Cover’s essay, a great many scholars have examined the constitutional visions and understandings of assorted racial, geographic, economic, religious, and ideological communities—seeking to show the integrity and potential attractiveness of their self-generated constitutional visions. By way of illustration, consider the exchange between James Gray Pope and William Forbath on the constitutional struggle of the 1930s.⁶⁵

62. *Id.*

63. *Id.* at 53.

64. *Id.* at 44.

65. See Pope, *Labor’s Constitution*, *supra* note 55; James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law*, 1921-57, 102

The “standard story,” Pope observes, portrays a clash between a conservative Supreme Court vision of laissez-faire constitutionalism and a progressive New Deal understanding of the Constitution as permitting government—including the federal government—to intervene, regulate, protect, and redistribute. According to Pope, this familiar story “omits a third great constitutional vision: labor’s constitution of freedom.”⁶⁶ Unlike the Constitution of the *Lochner* Court, this alternative vision assigned organized labor a central role in the constitutional order: a role defined by “rights of self-organization and collective action that workers believed had been won in the Civil War and constitutionalized in the Thirteenth Amendment.”⁶⁷ This understanding put labor at odds not only with the Court, but also with many New Deal progressives. For labor insisted that the ability to organize was itself a constitutionally protected right: a negative right akin to the freedom of contract so prized by conservatives, and not merely good legislative policy from the perspective of economics or social science. Workers wanted more than relief from judicial interference and more than permission for legislators to enact statutory reforms on their behalf. Workers wanted guarantees of what they saw as essential constitutional freedoms.

What labor got, according to Pope, was a sellout, a betrayal. Notwithstanding lip service to the labor movement’s constitutional vision, a small group of government lawyers working with certain key legislators decided not to argue that the Thirteenth Amendment required Congress to protect labor, but instead to say only that the Commerce Clause permitted Congress to do so. Worse, they went out of their way to marginalize and delegitimize the Thirteenth Amendment theory altogether. According to Pope, they did not do so because labor’s theory was implausible or stood no chance of prevailing; on the contrary, “[b]y the early 1930s, this core theory had won wide acceptance, and legislators routinely echoed labor’s claim that restrictions on worker self-organization and protest amounted to slavery and involuntary servitude.”⁶⁸ New Deal leaders abandoned labor’s theory because they did not like its political consequences: “While labor constitutionalists sought power for unions and workers, progressive lawyers sought power for social scientists and other professionals, including themselves.”⁶⁹

COLUM. L. REV. 1 (2002) [hereinafter Pope, *Thirteenth Amendment*]; William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165 (2001) [hereinafter Forbath, *Constitution in Exile*]; see also Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989).

66. Pope, *Labor’s Constitution*, *supra* note 55, at 942.

67. Pope, *Thirteenth Amendment*, *supra* note 65, at 5.

68. *Id.* at 112.

69. *Id.* at 113.

The result, Pope says, is an object lesson in why Cover was right to worry about needlessly choking off popular constitutional visions. For the consequences of repudiating an approach to labor based on principles of slavery and emancipation in favor of one based on bureaucratic expertise and economic management have been profound. On one side, we have the troubled subsequent history of the Commerce Clause, which, had labor's vision prevailed, might not have been forced into the posture of infinite expandability that continues to provoke controversy today. On the other side, a robust Thirteenth Amendment "might also have opened new paths of development for civil rights law,"⁷⁰ including substantive protections for poor and black workers rather than limited arguments for equality, and civil rights legislation based on notions of freedom and human rights rather than effects on commerce.⁷¹

Without contesting Pope's depiction of labor's constitution, William Forbath argues that Pope is too quick to accept the conventional wisdom respecting New Deal constitutionalism. The New Dealers sought more than an expansion of Congress's lawmaking authority, Forbath says, more than judicial restraint and room for legislative discretion. They advanced a constitutional vision that included new rights of national citizenship and that laid affirmative obligations on the political branches of government to supply these rights. Called the Constitution of "social citizenship" by some and the "general Welfare Constitution" by others (including FDR), the New Deal Constitution "held that all Americans had rights to decent work and livelihoods, social provision, and a measure of economic democracy, including rights on the part of wage-earning Americans to organize and bargain collectively with employers."⁷² The New Dealers did not reject labor's Constitution because they were reluctant to cede power, as Pope suggests, but rather because they were reluctant to cede power to *courts*, which is where labor's Constitution (with its reliance on negative rights) was apparently located. Labor's Constitution was too narrow, too limited. The New Dealers imagined a constitution with affirmative rights to welfare and employment, and they turned to lawmakers as the appropriate interpreters and guarantors of those rights.

For a moment, in the late 1930s, it looked as if they had succeeded. As a nation, we came tantalizingly close to adopting the New Deal Constitution of social citizenship. But realizing a program this ambitious requires more than a single election victory. It requires a sustained period of creation and implementation until there is sufficient legislation to embed

70. *Id.* at 118.

71. See Risa Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609 (2001).

72. Forbath, *Constitution in Exile*, *supra* note 65, at 166.

the new vision irrevocably in the fabric of government. And Jim Crow stood in the way. Forbath explains:

The nation's betrayal of Reconstruction prevented the legislative enactment of the New Deal vision of national citizenship. Measures instituting rights to decent work and social provision for all Americans enjoyed broad support, yet they expired in Congress. Thanks to their numbers, their seniority, and their control over key committees, southern Democrats had a hammerlock on Congress.⁷³

Determined not to let Congress meddle in the South's labor market, with its oppressive system for exploiting black labor, Dixiecrats bottled up legislative proposals in committee or killed them with filibusters or gutted them with amendments. By 1945, the moment had passed. The New Dealers had successfully tamed the Court, but the affirmative side of their constitutional vision was lost.

One interesting aspect of Pope's and Forbath's reconstruction of constitutionalism in the 1930s is that both describe then-prevalent theories of the Constitution that lawyers and judges today dismiss out of hand as implausible, irrelevant, and lacking foundation in American constitutional history. A handful of scholars have, to be sure, toyed on occasion with a Thirteenth Amendment theory of civil rights or a notion of affirmative rights to welfare.⁷⁴ Yet even they tend to present their ideas somewhat sheepishly, as if slightly embarrassed to offer something so radically at odds with traditional constitutional understandings. Most other commentators, in the meantime, not to mention lawyers, judges, and politicians, dismiss these musings as academic flights of fancy—the kinds of things only law professors, unconnected to reality, would think worth pursuing.

Maybe knowing that both theories came achingly close to achieving success (and in the not-too-distant past) will not lead anyone to change their minds today. It will, I assume, make it at least a little harder to continue insisting that such theories have no basis in our Constitution and are not part of our history. But the critical point cuts deeper, for the real question—an impossible counterfactual one, to be sure, but nevertheless suggestive—is how we *might* have thought about these theories if we had never been cut off from their history in the first place. I know there are

73. *Id.* at 203.

74. On the Thirteenth Amendment, see, for example, Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359 (1992); Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990). On positive rights to welfare, see, for example, Lawrence Sager, *The Domain of Constitutional Justice*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 235 (Larry Alexander ed., 1998); Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 FORDHAM L. REV. 1893 (2001); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

scholars who sincerely believe that they develop ideas based only on abstract reason, logic, and rigorous analysis, and who believe that knowing stories like these would not affect their thinking about today's problems (other than, perhaps, by affording additional social science data). But the reality is that problems come to us framed by a multitude of implicit understandings and assumptions that limit and shape how we reason by defining our sense of how things work—understandings and assumptions that are created by exposure to precisely stories like these.⁷⁵ “We ought to stop circumscribing the *nomos*,” Cover said, “we ought to invite new worlds.”⁷⁶ And in this, at least, he was surely right: paying careful attention to constitutional visions generated outside the official organs of the state is important, if for no other reason than the certainty that our own sense of the good will be improved by a more catholic sense of the possible.

Work like Pope’s and Forbath’s suggests that taking popular constitutionalism seriously might help to counter an otherwise unnoticed tendency to perceive the Constitution and its possibilities myopically. Other scholars have taken the case a step further by contending that popular constitutionalism has or ought to have direct relevance to the actual substance of constitutional law. In a recent article entitled *Text in Contest*, for example, Reva Siegel argues that “[c]laims on the text of the Constitution made by mobilized groups of Americans outside the courthouse helped bring into being the understandings that judges then read into the text of the Constitution.”⁷⁷ Popular constitutionalism ought to matter, in other words, even to those inclined to accept the supremacy of judicial interpretations, because what courts say is itself only the end product of a larger, societal process of generating legal meaning.

Siegel’s immediate target is David Strauss, who claims that the text of the Constitution plays at most a nominal role in constitutional law because the written Constitution long ago became “part of an evolutionary common law system” in which issues are decided based on precedent, policy, and judicial perceptions of tradition.⁷⁸ According to Strauss, even amendments “are at most a minor part of the process of constitutional change,” which is always controlled by judges employing a conventional mode of common

75. Anyone who studies history quickly learns this fact. Revisionist history may move those taught to believe an established paradigm to change their views but never in the same way or to the same extent as those for whom the revisionist story is their initial exposure. I believe it equally to be true that a first generation of scholars would have reached different conclusions had the revisionist story been what they originally learned.

76. Cover, *supra* note 58, at 68.

77. Reva B. Siegel, *Text in Contest: Gender and the Constitution From a Social Movement Perspective*, 150 U. PA. L. REV. 297, 312-13 (2001).

78. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 883, 885 (1996).

law adjudication.⁷⁹ Courts do respond to evolving social understandings, Strauss concedes, but these understandings are not shaped in any special way by written law, and the Court's response to them is likewise not affected by the existence or nonexistence of a snippet of constitutional text. Hence, enactment of the Fifteenth Amendment did nothing to enfranchise blacks, whose right to vote had to wait more than a century for a civil rights movement and a change in views on race, while enactment of the Nineteenth Amendment did not enfranchise women so much as signal that American society was at last prepared to accept women's suffrage. "[W]hat controls the pace of change," Strauss concludes, "is the culture, not the amendment."⁸⁰

Siegel criticizes Strauss (rightly, in my view) for equating constitutional law wholly and exclusively with the official pronouncements of judges and thereby missing the actual process by which constitutional change comes about. In Strauss's world, there is something out there, called "culture," that apparently stands apart from courts and law and that gradually evolves for other reasons (presumably such things as demographics, changing mores, economics, and the like). At some point, judges—who monitor these changes on behalf of law—are persuaded to incorporate the new cultural understandings into formal legal doctrine. Strauss is not saying that judges stand outside of culture; that obviously is impossible. His point, rather, is that judges respond to culture just like everybody else and that any reliance they place on constitutional text is essentially epiphenomenal. The text provides, at most, a hook with which to announce a change determined by other factors and is not itself something that ever plays a significant role in bringing change about.

What Strauss overlooks, Siegel argues, is the crucial role that the text of the Constitution plays in forming these new cultural understandings in the first place. Constitutional text is special in at least two, related ways. To begin with, "understandings about the authorship of the Constitution empower citizens to voice objections to official [i.e., judicial] declarations of constitutional law" in ways that simply are not true for other sources of law, like contract or property.⁸¹ The Constitution, after all, is "our" law, written by "We, the People," and as such it has historically been an especially fertile source of inspiration for social reformers. At the same time, the particular shape and content of the claims made by social movements are significantly affected and determined by constitutional text: because ordinary citizens are not trained legally they take the text seriously while nevertheless infusing it with meanings that professional lawyers are apt to

79. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1465 (2001).

80. *Id.* at 1503.

81. Siegel, *supra* note 77, at 322.

dismiss as unfounded. And it is these social movements—animated by precisely the vision of Constitution as text that Strauss brushes aside—that frequently drive and give shape to the changing cultural understandings that are subsequently incorporated into judicial interpretations of the Constitution.

Siegel illustrates her argument with two examples from the women's movement. We have already seen how Strauss dismissed the Nineteenth Amendment as an after-the-fact embodiment of society's acceptance that women should vote; he also said that failure to ratify the ERA was unimportant because the Court created the same law without it in response to changing social views of sex discrimination. But how did these changing views of sex come about? How but for the efforts of social reform movements whose source and inspiration came very much from the Constitution and, indeed, from particular constitutional text? The women's suffrage movement emerged in the struggle to ratify the Fourteenth and Fifteenth Amendments and in efforts that followed ratification to persuade courts that the Fourteenth Amendment should be interpreted to embrace a woman's right to vote.⁸² Even if, as Strauss says, society had "changed to the point that it was willing to accept (and even insist on) women's suffrage" by the time the Nineteenth Amendment was ratified,⁸³ this change came about through a struggle over the meaning of the Constitution's text.

The same thing is true for the law of sex equality. Attitudes toward women did not change naturally or under the guidance of some benevolent invisible hand. "During the decade leading up to the Court's declaration that sex-based state action would be subject to heightened scrutiny under the Equal Protection Clause, groups coalesced around the goals of supporting or defeating the ERA and making claims about the meaning of the Fourteenth Amendment."⁸⁴ Attitudes changed in the context of this protest movement, which not only forced the issue into public consciousness, but framed it in legal and constitutional terms that eventually changed people's—and judges'—minds.

On the surface, Siegel has done no more than refute Strauss's contention that the text of the Constitution is irrelevant to constitutional law. She has done so, however, by depicting a process of generating constitutional meaning that has broad normative implications, for it makes the text relevant as a reference point and inspiration for a larger constitutional culture, most of which is located outside the courthouse. Popular constitutionalism in this conception is more than an inevitable constraint on what courts can

82. *Id.* at 334-42; see also Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

83. Strauss, *supra* note 79, at 1503.

84. Siegel, *supra* note 77, at 308.

accomplish and more than a source of ideas for the Supreme Court to consider as it goes about making law for the rest of us. Popular constitutionalism is the mechanism that mediates between constitutional law and culture. It is how we ensure that the spirit of our Constitution remains consonant with the society it is supposed to govern. Even accepting that new interpretations become “law” only after judges have given them the final stamp of approval, a self-conscious popular constitutionalism is the engine that generates and shapes these interpretations, that makes them seem plausible (or not), and that, in this way, keeps constitutional law vital. Siegel says:

[J]udges do not merely translate otherwise mute “social developments” into legality; rather, actors outside the courts are engaging in creative acts of constitutional interpretation, and judges interpret the Constitution while listening to the many social actors who are speaking about the Constitution’s meaning.⁸⁵

There is a more important lesson to be learned from this than the by now familiar point that social understandings of law shape legal understandings. The real lesson, I think, is that a sensible court should embrace this fact; it should see popular influence not as a problem, but as a source of political strength and an opportunity for constructive engagement. In subsequent work, coauthored with Robert Post, Siegel has emphasized this aspect of the argument, using the Supreme Court’s handling of civil rights issues in the 1960s and 1970s by way of illustration.

Post and Siegel contrast the Rehnquist Court’s efforts to drain congressional interpretation of authority with the ways in which, in this earlier era, the Court “welcomed Congress’s active engagement with constitutional questions.”⁸⁶ In *Frontiero v. Richardson*, for example, the first case formally to recognize the possibility of heightened scrutiny for sex under the Equal Protection Clause, the plurality cited federal statutes prohibiting sex discrimination and observed that “Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.”⁸⁷ This was a Court, Post and Siegel explain, that believed it should learn from Congress rather than strive to silence it, a Court whose regard for the work of a coordinate branch derived from an “acute[] aware[ness] of the many ways that

85. *Id.* at 315-16.

86. Robert C. Post & Reva B. Siegel, *Protecting the Constitution From the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 33 (2003) [hereinafter Post & Siegel, *Protecting the Constitution*]; for other work developing and elaborating these themes, see Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 515-22 (2000); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

87. *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973).

the project of understanding and implementing constitutional commitments required for its fulfillment the participation and support of the political branches of government.”⁸⁸

It is hard to think of the Rehnquist Court giving similar weight to congressional views today. On the contrary, while the Court makes occasional gestures toward mutual interbranch respect, the principal leitmotif of its decisions has been to deny that congressional views about the Constitution are entitled to any special weight or respect.⁸⁹ Instead of a Court interested in collaborating with Congress and encouraging popular participation in the formation of constitutional values, we now have Justices telling us that a presumption of constitutionality is “unwarranted” because Congress cannot be trusted to be faithful to the Constitution.⁹⁰

There is great irony here. As Post and Siegel note, the ability of the Rehnquist Court to assert itself as forcefully as it has rests very much on a widely accepted “romantic narrative” of the Warren Court’s “heroic and lonely” fight to defend civil rights.⁹¹ Certainly there is irony in the present Court using goodwill earned for it by an earlier Court to undo what the earlier Court accomplished. But the greater irony is that the narrative on which this all rests is false—false because, as Post and Siegel point out, it “efface[s] the crucial role played by social movements and the representative branches of government in challenging segregation and advancing new forms of equality” and “ignore[s] the many ways in which the Court itself encouraged and relied upon popular participation in the project of entrenching new understandings of the Equal Protection Clause.”⁹² Although “at times the [Warren] Court insisted that the judiciary have the last word” about constitutional meaning,

at other times it encouraged vigorous congressional participation in the formation of constitutional culture. Notwithstanding its pronouncements in *Cooper*, the Court never imagined that the Constitution spoke only to judges.

The Court was in fact so intent upon mobilizing the support of the popular branches of government that it repeatedly crafted holdings that endowed Congress with wide latitude to express its own constitutional understandings, in the full knowledge that these understandings would differ from the standards that the Court was prepared itself to enforce in litigation.⁹³

88. Post & Siegel, *Protecting the Constitution*, *supra* note 86, at 33.

89. Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 130-58 (2001).

90. See *A Shot From Justice Scalia*, WASH. POST, May 2, 2000, at A22.

91. Post & Siegel, *Protecting the Constitution*, *supra* note 86, at 34.

92. *Id.*

93. *Id.* at 34-35.

The Justices facilitated this collaborative relationship with a variety of doctrinal techniques, ranging from formal deference, to deliberate ambiguity, to explicit acknowledgment that rights might vary depending on whether they were enforced by Congress or by courts.⁹⁴ And because the legislature was more politically responsive, as well as more capable of gauging the forces of popular constitutionalism outside the Court, Congress managed “to mediate between the constitutional understandings of the judiciary and those of the nation.”⁹⁵ The resulting partnership served both to define the meaning of civil rights and equality and to assure that the new understandings were popularly accepted. It was this cooperative effort, Post and Siegel conclude, the fruits of actively embracing popular constitutionalism, that made possible the civil rights gains of the period.

IV

“TAKING THE CONSTITUTION AWAY FROM THE COURTS”: THE CASE AGAINST JUDICIAL SUPREMACY

None of the work we have seen so far is inconsistent with, much less repudiates, the idea of judicial supremacy. It bespeaks the existence of certain natural and inevitable limits on the Court’s authority—indeed, on the authority of any public body that claims to have the “last” word on constitutional interpretation. It offers reasons for greater circumspection by the Justices, and it suggests they would do well to be less dismissive of popularly generated constitutional understandings. It underscores the desirability of seeing popular constitutionalism as a source of strength rather than weakness or danger. Above all, it suggests that the Justices should discharge their office with modesty and caution, looking to accommodate rather than to suppress alternative interpreters. But none of the scholars we have discussed to this point actually rejects the idea that, insofar as somebody’s word must be treated as final and authoritative, this somebody ought to be the Supreme Court. That position has been taken by yet another group of scholars, including most notably Jeremy Waldron, Mark Tushnet, and Sanford Levinson.⁹⁶

94. *Id.* at 35-42; for examples, see *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Fullilove v. Klutznick*, 448 U.S. 448 (1980). *Katzenbach* left unclear the scope of Congress’s power under section 5 of the Fourteenth Amendment, an ambiguity the pre-Rehnquist Court systematically and quite self-consciously preserved in subsequent decisions.

95. Post & Siegel, *Protecting the Constitution*, *supra* note 86, at 42.

96. Waldron has been writing in this vein for many years, though two recently published books draw together his central themes. See JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999) [hereinafter WALDRON, *LAW & DISAGREEMENT*]; JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999). For Tushnet, opposition to judicial review is a more recent position. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). For Levinson, suggesting the possibility of a world without judicial review is but one of many similar provocative ideas he has forced legal scholars to ponder over the course of a very productive career. This one he advanced a number of years ago, in a thoughtful book entitled *Constitutional Faith* (1988).

While commentators who take this view have certainly helped broaden our understanding of how popular constitutionalism works, their more significant contribution may be in forcing us to rethink certain arguments that are almost ritualistically proffered to justify assigning primary or final responsibility for constitutional interpretation to judges.⁹⁷ I do not include among these arguments the Supreme Court's own originalist claim, a classic instance of "law office history" that is simply impossible to defend with a straight face.⁹⁸ I am, rather, referring to certain other propositions developed by the Court's academic defenders to explain its supremacy in constitutional interpretation. One 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.⁹⁹ A second argument is that the whole purpose of a constitution is to entrench particular rights and rules as precautions sensible democratic citizens take against their own future dangerousness, a strategy of precommitment that will not work unless judges have final say.¹⁰⁰ A final argument is that courts are better and more trustworthy than electorally accountable bodies when it comes to addressing questions of principle.¹⁰¹

97. Though not yet on record as opposed to judicial supremacy, Keith Whittington has also raised important questions as to its justifications, and I have drawn significantly from his work in the discussion below. *See* Whittington, *supra* note 26.

98. First essayed in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), the Court now routinely asserts that the Constitution was written with the idea of making judges its supreme expositors. *See* *United States v. Morrison*, 529 U.S. 598, 616 n. 7 (2000); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). For explanations of why that claim cannot be sustained, see KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 2, chs. I-4; Kramer, *supra* note 89, at 16-74. Even defenders of the Rehnquist Court concede that judicial supremacy cannot be justified on originalist grounds. *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 890, 926 (2003).

99. The leading article making this argument is Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997). Susan R. Burgess collects other examples in BURGESS, *supra* note 9, at 20, 112-14.

100. This argument is most famously associated with Stephen Holmes. *See* Stephen Holmes, *Precommitment and the Paradox of Democracy*, in CONSTITUTIONALISM AND DEMOCRACY 195 (Jon Elster & Rune Slagstad eds., 1988). In fairness to Holmes, however, we should note that his argument does not refer to or discuss judicial review, and he nowhere suggests that constitutional entrenchment necessarily requires or entails judicial enforcement. Holmes merely explains why restrictions on ordinary democratic politics are not necessarily antidemocratic, without in any way addressing the means by which such restrictions should be enforced. Judicial supremacy is obviously a possibility, but there are just as obviously others. James Madison, for example, thought that size, separation of powers, and federalism would do the trick, complicating ordinary politics just enough to create a constitutionally defined equilibrium. THE FEDERALIST NO. 51, at 347 (James Madison) (Jacob E. Cooke ed., 1961).

101. This position is today most closely associated with the career and writings of Ronald Dworkin, though other scholars working in the same vein have made valuable contributions. *See* RONALD DWORKIN, *FREEDOM'S LAW* (1996); RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). Other works that either complement or build on Dworkin include CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001) and LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES* (2004).

A. Settlement in Constitutional Law

Of these three arguments, the claim that we need judicial supremacy to overcome disagreement and bring an end to conflict is the easiest to refute. The argument is straightforwardly empirical, and we can simply ask what basis there is for believing it to be true. Lawyers and legal commentators who take this position typically just assume that we need the judiciary to bring matters to closure without offering any concrete evidence to back up the intuition. A number of scholars have recently challenged and effectively countered this assumption.

Their first point may be obvious, but it nevertheless needs to be emphasized: there is no such thing as perfect finality or “settlement” in law. All legal systems can—indeed, must—tolerate some uncertainty and lack of clarity. There will be uncertainty and instability even in a regime of perfect judicial supremacy: because *stare decisis* is not absolute, because opinions reflect compromises and are open to interpretation, because voting preferences in a multimember body (including a court) may produce unpredictable cycles, because of new appointments, and for a myriad of other reasons. Conversely, we obviously will get some degree of finality and resolution even without judicial supremacy. Constitutional politics is not utterly capricious. On the contrary, over the course of American history, constitutional understandings determined in politics have been impressively stable, often lasting for decades and proving themselves at least as durable as judicial doctrine. “The practical choice,” Keith Whittington observes, “is not really between order and chaos, but between different levels and types of stability, and different mechanisms for securing stability and change. Simply pointing to the settlement function of the law provides little guidance for making decisions about the relative interpretive authority of different political institutions.”¹⁰²

A second point, equally obvious, is also equally important to emphasize: we cannot ask how much stability different institutional arrangements will provide in the abstract. As Mark Tushnet notes, “the question for institutional design is not what *principles* govern the institutions, but what *practices* they engage in.”¹⁰³ Proponents of judicial supremacy on settlement grounds have been notoriously inattentive to what we know about how political institutions actually handle constitutional questions, content to argue from stereotypes and theoretical possibilities. Yet experience suggests that if there is a “settlement gap” between a world with judicial supremacy and a world without it, that gap is likely to be small.

102. Whittington, *supra* note 26, at 789.

103. TUSHNET, *supra* note 96, at 28.

This is so for a number of reasons. Nonjudicial actors also value stability and predictability and work hard to produce it.¹⁰⁴ More important, the structure of American politics—including not just the formal Constitution, but also subconstitutional devices like the filibuster and congressional committee system—tends to reinforce these natural incentives by requiring large coalitions to bring about change.¹⁰⁵ “The difficulty of getting laws passed unless they have really strong support,” Tushnet offers, “means that making our fundamental law depend on what Congress enacts would almost certainly be no more unstable than making it depend on what five Justices say.”¹⁰⁶ Partly for this reason, moreover, it would never be the case (as the argument is sometimes caricatured) that everything would be 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 can still be expected to conclude most constitutional disputes even without a formal doctrine of judicial supremacy. Courts do come last, after all, at least as a matter of political consciousness and perception, and this means 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 change. 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 (a phenomenon social scientists refer to as “diffuse support”).¹⁰⁷ The Court can earn this support—can in effect make itself final—by handling its business intelligently and with political savvy.

This is what Madison meant when he remarked in a letter he wrote in 1834 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

104. Whittington, *supra* note 26, at 806-07. For case studies, see WHITTINGTON, *supra* note 29; DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY (1966).

105. KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 230-31 (1998); Thomas H. Hammond & Gary J. Miller, *The Core of the Constitution*, 81 AM. POL. SCI. REV. 1155, 1157-63 (1987).

106. TUSHNET, *supra* note 96, at 52.

107. See WALTER F. MURPHY ET AL., PUBLIC EVALUATIONS OF CONSTITUTIONAL COURTS: ALTERNATIVE EXPLANATIONS (1973); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635-36 (1992); David Easton, *A Re-Assessment of the Concept of Political Support*, 5 BRIT. J. POL. SCI. 435 (1975).

public as the surest expositor of the Constitution."¹⁰⁸ The difference, of course, is that the Justices would have to *earn* their claim to have final say and (to paraphrase Justice Jackson)¹⁰⁹ would be neither final nor infallible beyond their ability to claim public confidence in going about their business. That the Court may successfully do this, however, is something historical experience makes abundantly clear.¹¹⁰

None of this provides us with 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 must be 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. If some see in the existence of disagreement a need to mandate closure, others see a strong argument for leaving things to be settled democratically. As Jeremy Waldron says, the men and women who fought and struggled and died to establish democracy and earn the right to vote were looking for more than a voice "on interstitial issues of policy that had no compelling moral dimension":

They fought for the franchise because they believed that controversies about the fundamental ordering of their society . . . were controversies for them to sort out . . . because *they* were the people who would be affected by the outcome. Moreover, they did not fight for the vote on the assumption that they would then all *agree* about the issues that they wanted the right to vote on. . . . But they fought for the vote anyway on the ground that the existence of such principled disagreements was the essence of politics, not that it should be regarded as a signal to transfer the important issues that they disagreed about to some other forum

108. Letter from James Madison to Mr. _____ (1834), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 349, 350 (1865).

109. See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

110. See David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policymaker*, 5 LAW & POL. Q. 405 (1983); Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209 (1986); Caldeira & Gibson, *supra* note 107, at 635-36; James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 356 (1998); Roger Handberg, *Public Opinion and the United States Supreme Court 1935-1981*, 59 INT'L SOC. SCI. REV. 3 (1984); Joseph Tanenhaus & Walter F. Murphy, *Patterns of Public Support for the Supreme Court: A Panel Study*, 43 J. POL. 24 (1981).

altogether, which would privilege the opinions and purses of a few.¹¹¹

There may well be reasons to favor judicial supremacy, but is quelling disagreement really one of them? Should we not at least require evidence that, without courts having final say, we would face serious and substantial and escalating problems of maintaining order and allegiance?

B. Precommitment and Judicial Supremacy

In contrast to the settlement argument, the precommitment justification for judicial supremacy seems unanswerable at first. It appears perfectly to fit the classic metaphor of Ulysses wisely binding himself to the mast in order to hear the Sirens' song without killing himself. But as Jeremy Waldron points out, there is a crucial difference between Ulysses and a democratic polity. The rule Ulysses has adopted is clear and easily understood, and when Ulysses's comrades refuse to untie him despite his pleading to be set free, they do so confident that they are enforcing a decision Ulysses himself made to keep himself from committing precisely this mistake. Not so the interpreter of a constitution, who is invariably called upon to exercise judgment and make choices among plausible alternatives in a context of uncertainty. Rather than "precommitment by an agent A at time t_1 to a decision (for time t_2) which A himself has chosen," Waldron says, constitutional interpretation by judges is more like "a form of submission by A at time t_1 to whatever judgement is made at t_2 by another agent, B, in the application of very general principles which A has instructed B to take into account."¹¹² The difference, he urges, is huge:

Precommitment cannot preserve the aura of autonomy (or democracy in the constitutional case) unless the person bound really is the judge of the point and extent of his being bound. Ulysses of course may not be able to give us a rational answer if we do not get round to asking him until he is already under the influence of the sirens' song. Then there is nothing we can do but make *our own decision* about whether to [unbind] him or not. At that stage we should stop justifying our decision by calling it a consummation of Ulysses' autonomy. The best we can now say on autonomy grounds is that we are acting, paternalistically, as Ulysses *would have acted* had he been lucid and in possession of full information etc., not that we are acting in the way he clearly wanted us to act in defence of his autonomy. So, similarly, if we follow the logic of precommitment in the political case, the people are presumably authorities—not judges in their own cause, but *authorities*—on what they have precommitted themselves to. If that

111. WALDRON, LAW AND DISAGREEMENT, *supra* note 96, at 15-16; see also TUSHNET, *supra* note 96, at 14; Whittington, *supra* note 26, at 797.

112. WALDRON, LAW AND DISAGREEMENT, *supra* note 96, at 265.

authority is challenged—for example, because the people are now thought to be in the very state (of panic or anger, etc.) that they wanted their precommitment to counteract—then all we can say is that the notion of precommitment is now no longer useful in relation to the controversy. Once it becomes unclear or controversial what the people have committed themselves to, there is no longer any basis in the idea of precommitment for defending a particular interpretation against democratic objections.¹¹³

One might, of course, try to sustain the argument by claiming that many or most constitutional questions have clear answers and thus still fit the precommitment rationale for judicial supremacy—though, as Waldron explains, even then a precommitment rationale would face apparently insurmountable objections.¹¹⁴ But real world constitutional problems are seldom clear and invariably require a choice among plausible alternatives. Subsequent developments may sometimes come to make one of the alternatives appear wrong, even preposterous—as seems to be the case, for example, with the Alien and Sedition Acts or, more obvious still, with slavery. But these obvious answers were not so obvious at the time and never would be, for issues are inevitably framed at the margins, and political actors cannot expect to make headway without at least a plausible story for the legality of what they propose to do. Nor can this fact of politics be explained by some overhanging threat of authoritative judicial intervention because no such threat existed until very recently.

Note, however, that Waldron's critique of the precommitment justification recognizes that people may sometimes “be in the very state (of panic or anger, etc.) that they wanted their precommitment to counteract.”¹¹⁵ This suggests a different reason for possibly embracing a doctrine of judicial supremacy. Waldron could be right that the notion of precommitment itself no longer carries weight once the content or meaning of a constitution's provisions are seen as unclear. But what about the risk that the people (or the politically accountable institutions through which they speak) will make bad decisions because of the very irrational impulses that a constitution's precommitments are supposedly designed to check and control? Perhaps judges should be final arbiters of constitutional law for the simple reason that they can be expected to do the best job.

113. *Id.* at 265-66.

114. Even assuming that we know with certainty what a majority preferred at t_1 , Waldron says, the fact of disagreement at that time presents a problem of justification if, at t_2 , a new majority sides with the earlier minority. Our confidence in the necessity of precommitment must be low in such circumstances, for we have no *a priori* reason to believe that the earlier majority was right. By enforcing the initial decision, the Court is really doing nothing more than taking sides in an internal dispute, “sustain[ing] the temporary ascendancy” of one view held by a majority of the polity at one point in time. Whether something else may still be invoked to justify this, an analogy to Ulysses at the mast will not. *Id.* at 266-70.

115. *Id.* at 266.

C. Determining the "Best" Interpreter

This, in essence, is the third argument for judicial supremacy: courts provide a "forum of principle"¹¹⁶ whose supremacy over constitutional law makes sense because they can be expected to show greater fidelity to principles of justice and law. Sometimes this is presented as a claim about results, and we are told that judges in fact promote social justice in ways that legislators and politicians do not or will not (look at *Brown*, look at *Roe*). Other times the same claim comes more modestly dressed as one about the general nature of legal versus political institutions. The structure of the judiciary—its independence, the setting in which it deliberates, the requirement of drafting an opinion, and so forth—is said to give us confidence that judges can generally be expected to do a better job. Sometimes the claim is defended as a counterweight to democratic excess: judicial supremacy may be countermajoritarian, but this is good because it checks "the tyranny of the majority." More recently, the claim has been described as an aspect of democratic theory: to be legitimate, democracy requires that decisions be made in light of a certain kind of deliberation, and this is something courts can do with and for the American people better than other available institutions. In all its guises, however, the essential and necessary first premise is that judges will do better than other political actors when it comes to addressing the matters of principle that lie at the heart of constitutional law. Though applicable in theory to any or every form of constitutional commitment, including federalism and separation of powers, the argument has been made most often (and most powerfully) in connection with the individual liberties protected by the Bill of Rights.¹¹⁷

116. See *supra* note 15.

117. The constitutional theorists who make this sort of claim seldom distinguish between judicial review and judicial supremacy. For their purposes, judicial review means judicial supremacy, the latter being merely a strong version of the former. Most of the arguments therefore apply equally to both. This does not hold true, however, for one claim sometimes made on behalf of courts: the claim that "the quality of public argument is often improved" by treating issues as constitutional problems for judges to address. DWORKIN, FREEDOM'S LAW, *supra* note 101, at 345. This is true, according to Dworkin, because when courts handle an issue, debate "concentrates from the start on questions of political morality." *Id.* Although this seems rather overstated, it surely is not farfetched to say that a pronouncement from the Supreme Court can help generate or give focus to a national debate. And to the extent this is true, it is a possible advantage of judicial review that nevertheless cuts against judicial supremacy. Jeremy Waldron explains:

Civic republicans and participatory democrats are interested in *practical political deliberation*, which is not just any old debating exercise, but a form of discussion among those who are about to participate in a binding collective decision. . . . The exercise of power by a few black-robed celebrities can certainly be expected to *fascinate* an articulate population. But that is hardly the essence of active citizenship. Perhaps such impotent debating is nevertheless morally improving. . . . But independent ethical benefits of this kind are at best desirable side-effects, not the primary point of civic participation in republican political theory.

WALDRON, LAW AND DISAGREEMENT, *supra* note 90, at 291.

Critics of this position have questioned what it means to say that judges are “better” at constitutional interpretation. Some, like Richard Parker, challenge the whole notion that the sort of dispassionate, intellectual conversation favored by supporters of judicial supremacy should be deemed superior to “the political energy of ordinary people.”¹¹⁸ This is not, Parker says, a matter of flipping preferences, of seeing emotion as superior to reason. It is, rather, a matter of reorienting our frame of reference. Rather than ask who will reason best (while imagining “best” to mean the kind of discussion that takes place in a good academic workshop), we might ask what is likely to encourage political engagement among citizens; rather than seek to maximize the authority of elites by making them independent of politics, we might look for ways to minimize the disdain and contempt of elites for ordinary people, which leads to withdrawal and enervates politics.¹¹⁹

We will return to Parker’s argument in Part V. For now, I want to focus instead on Jeremy Waldron’s appraisal of the claim about judges and principle—probably the most effective critique if only because Waldron challenges judicial supremacists on their own turf. While Waldron’s analysis is, like that of the people he is criticizing, phrased chiefly in terms of individual rights, his arguments, like theirs, are also more generally applicable. And the central fact with which any theory of constitutional interpretation must grapple, Waldron urges, is the existence and persistence of pervasive disagreement:

[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.”¹²⁰

Waldron is at pains to emphasize that the intractability of disagreement is not a product of intellectual limitations or unwillingness to listen to reason or anything like that. “It is not a case,” he says, “of there being some of us who are in possession of *the truth* about rights—a truth which our opponents willfully or irrationally fail to acknowledge because they are

118. Richard D. Parker, “Here, the People Rule” 60 (1994).

119. *Id.* at 60-65.

120. WALDRON, *LAW AND DISAGREEMENT*, *supra* note 96, at 268. Amy Gutmann and Dennis Thompson similarly emphasize the significance of unavoidable disagreement in thinking about democracy, though they have no particular interest in the problem of courts and judicial review. See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996).

blinded by ignorance, prejudice, or interest.”¹²¹ 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 disagreement will always and necessarily remain:

Even if scepticism is rejected, even if there *are* moral facts which make true judgements true and false judgements false, still the best a judge can do is to impose his *opinion* about such facts on the “hapless litigants” who come before him. They will have beliefs and opinions of their own about the matter, and even if they too become card-carrying moral realists, they will continue to ask why the judge’s view of the moral facts should prevail over theirs. The truth of moral realism (if it is true) does not validate any particular person’s or any particular judge’s moral beliefs. At best, it alters our understanding of the character of a moral disagreement without moving us any closer to an understanding of who is right and who is wrong.¹²²

Nor can we settle disputes about right and wrong by resort to a shared method or technique for resolving disagreements, for we disagree as much about what counts as a justification as we do about what rights we ought to have:

[U]tilitarians have one view, Kantians another, Christian fundamentalists yet another, and so on. Aristotelians, Nietzscheans, Marxists, traditional conservatives like Burke, liberals like Rawls, feminists like Gilligan—all acknowledge that the disagreements between them are important (if any are). Yet unlike their counterparts in the scientific community, they share virtually nothing in the way of an epistemology or a method with which these disagreements might in principle be approached.¹²³

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 correct 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

121. WALDRON, *LAW AND DISAGREEMENT*, *supra* note 96, at 12.

122. *Id.* at 181.

123. *Id.* at 178.

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 principle “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 “fl[ies] in the face of other epistemic precepts”—for example, “that decisions about rights are best taken by those who have a sufficient stake in the matter to decide responsibly.”¹²⁴ And how do we resolve *that* disagreement? Yet without concurrence on the necessary or proper circumstances for reaching correct results, any argument that judges are more likely to do so either lacks foundation or begs the question:

Without an epistemology—and an epistemology which is to some extent less controversial (or at any rate differently controversial) than the knowledge claims it covers—there cannot be a theory of expertise. Thus the epistemic inadequacy of moral realism is far-reaching: in practical matters, it deprives realists of almost everything that they might want to say or argue for in the name of objectivity.¹²⁵

It does not follow that we must reject judicial supremacy. Uncertainty about which answers or processes are best does not automatically point us toward any other institution to resolve disagreements either. Perhaps backers of judicial supremacy need to 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 still offers the best solution. Waldron recognizes this but suggests two reasons for lodging final interpretive authority elsewhere.

First, Waldron says, the unavoidable existence of disagreement and uncertainty about outcomes means that any argument based on “rights-instrumentalism”—the notion that this or that decision-making procedure is likely to produce more correct results—will never rest on anything other than faith and will be decided less on the basis of hard evidence than a priori postulates about how different actors behave.¹²⁶ The turn to judges, for example, relies on and reflects a fairly profound skepticism about the ability of politicians and ordinary citizens to handle constitutional questions: a belief that, at its most cynical, sounds something like “legislative and electoral politics is entirely a matter of self-interest,

124. *Id.* at 253.

125. *Id.* at 185.

126. *Id.* at 252-54.

and . . . representatives and voters never raise their minds above the sordid question, ‘What’s in it for me?’”¹²⁷ Yet the assumption that ordinary citizens cannot be trusted to understand or respect the principles that animate constitutional rights stands at odds with the assumption we make about why they are entitled to those rights in the first place—which is that human individuals are thinking agents, “endowed with an ability to deliberate morally, to see things from others’ points of view, and to transcend a preoccupation with [their] own particular or sectional interests.”¹²⁸

This being so, Waldron reasons, should we not rather resolve our uncertainty about rights in favor of individual participation? How can we say we are offering someone the respect he or she is owed as an active, thinking person entitled to rights if, at the same time, we ignore what he or she has to say about the matter? Not that individuals will always make correct choices, either for themselves or (collectively) for others. But insofar as uncertainty will always remain about which choices are in fact correct, the affected individuals should themselves be the ones to decide. This might be true even were we certain that “a nine man junta clad in black robes and surrounded by law clerks”¹²⁹ would generally do a better job. But surely it seems right where we can have no basis for such confidence. This position, Waldron explains:

[E]mbodies a conviction that these issues of principle are *ours* to deal with, so that even if they must be dealt with by some institution which comprises fewer than all of us, it should nevertheless be an institution that is diverse and plural and which, through something like electoral accountability, embodies the spirit of self-government, a body which can discern the manifest footprints of our own original consent.¹³⁰

One does not want to be too cavalier in making arguments like this. It may be unduly cynical for proponents of judicial review to portray ordinary citizens “as selfish and irresponsible predators.”¹³¹ But supporters of popular constitutionalism must likewise be careful not to affect “a pure proceduralist’s nonchalance about the fate of individual rights under a system of majority-decision.”¹³² Ultimately, we cannot avoid making our best guess in light of what we know about the relative capacities of courts and legislatures to act responsibly when it comes to rights. Hence, Waldron’s second argument against judicial supremacy is that, empirically, we have no particular reason to favor it over popular constitutionalism.

There are two main sources of evidence to draw upon here:

127. *Id.* at 230.

128. *Id.* at 250.

129. *Id.* at 309.

130. *Id.*; *see also id.* at 249-52.

131. *Id.* at 282.

132. *Id.*

experience in countries that lack judicial review and our own history. With respect to the former, Waldron notes that “[m]any such societies” exist—think of England, New Zealand, the Netherlands, Sweden, and France¹³³—and that these generally “seem to be at least as free and as just as the United States.”¹³⁴ While this seems right, Waldron concedes that it is hard to know what to make of such comparisons given peculiarities of American politics and culture.¹³⁵ But our own history scarcely provides stronger support for judicial supremacy. The Court’s champions presumably have in mind cases like *Brown* and *Roe*—that is, the accomplishments of the Warren and Burger Courts, which naturally loom large in the eyes of folks who lived through and helped shape them. More distant evils, like the 150 or so laws struck down during the *Lochner* era by judges anxious to stymie progressive legislative reform,¹³⁶ tend to lose their salience over time. This is even more true of still older judicial misadventures like the dismantling of Reconstruction; *Dred Scott*; or the Federalist-era, judicially inspired, sedition campaign.¹³⁷

How should we balance these examples of judicial excess—and one must not forget to include the current Court’s systematic hobbling of congressional power to remedy discrimination—against whatever good the judiciary might accomplish in forcing recognition of or preserving rights? Like all counterfactuals, this one requires some impossibly difficult guesses. We have no idea, for instance, how the struggles for racial equality or women’s rights might have unfolded without the Court. There

133. France is, concededly, a complicated case. It is becoming popular to describe the role of the Conseil constitutionale as injecting judicial review into the French legal system. It would be more accurate, however, to describe the Conseil as possessing a veto power akin to the one proposed in Revolutionary America for a Council of Revision. The Conseil’s jurisdiction is limited to reviewing for constitutionality legislation referred to it by the French Parliament. Its authority exists only prior to enactment, and once a bill has become law, the Conseil has no power to control its interpretation or application or to entertain appeals. The Conseil has no authority over or direct connection to any court, and is, rather, part of the legislative branch. See JOHN BELL, FRENCH CONSTITUTIONAL LAW 9-56, 227-42 (1992); ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE (1992).

134. WALDRON, LAW AND DISAGREEMENT, *supra* note 96, at 288.

135. *Id.*

136. FORBATH, *supra* note 55, at app. A and C (1991) (listing laws held unconstitutional); see also WALDRON, LAW AND DISAGREEMENT, *supra* note 96, at 288.

137. Constitutional scholars seem to forget that federal courts began this on their own, using the draconian common law of sedition, and that when Congress enacted the Sedition Act it was partly to dampen the excessive enthusiasm of Federalist judges by liberalizing the law. JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 65, 81-83 (1951); STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 96 (1991). Nor was this the last time that federal courts went out of their way to be more repressive than Congress or the President. In World War I, worried federal judges construed the Espionage Act of 1917 in ways that ignored congressional limits and were harshly repressive. See Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335 (2003).

is, as we have seen, a body of evidence suggesting that the judiciary's actual accomplishments have been overstated, but even ignoring that, we cannot know how soon or how much things might have changed without the Court. "The claim about justice," Waldron concludes, "may in the end be impossible to verify."¹³⁸ At the very least, however, there are significant reasons to doubt the empirical validity of the claim made by supporters of judicial supremacy.

A number of other scholars have joined Waldron on this last point, offering additional reasons to doubt that the judicial process is significantly more principled. Judicial supremacists tend to be rather hyperbolic in their portrayals of courts and legislatures. The judiciary is depicted as a high-powered debating society where judges studiously ponder weighty questions of principle before crafting careful explanations that reflect deeply on the theoretical and philosophical dilemmas they have faced. Legislators, in the meantime, are presented as unthinking automatons, incapable of deliberating seriously about anything. They are either thoroughly unresponsive to those they represent and attentive only to private interests dangling campaign dollars before their eyes; or they are thoroughly unprincipled and willing to act instantly on the most hateful urges of their constituents (who are themselves presented as creatures without reason, ever in thrall to irrational emotions).¹³⁹ The authors of these hyperventilated accounts sometimes acknowledge that they are stylized and exaggerated, but only in asides that do not matter because the conclusions being defended rest on precisely these exaggerations. In reality, as a number of the Court's critics have recently argued, both the judicial and the legislative processes are more mixed than such accounts typically allow.

To begin with, the judiciary is a far more complex institution than these simplistic stories would have it. No less than legislators, judges are subject to influences and incentives that skew their judgment. A desire to expand their authority and responsibility is an obvious example.¹⁴⁰ More complicated, as Keith Whittington explains, the Supreme Court is itself enmeshed in and dependent upon "its own set of interest groups, from corporate litigants to public interest legal groups, that seek to influence its decisions" and that play a critical role in setting the Court's agenda, framing the issues, and giving shape to the arguments.¹⁴¹ "Judicial politics is not the same as legislative politics," he concedes, "but the reasoning of judicial

138. WALDRON, *LAW AND DISAGREEMENT*, *supra* note 96, at 288.

139. That these two portraits of a legislator are completely at odds tends to pass unnoticed. It is possible, of course, to view legislators as acting consistently with both models depending on the issue. Yet the resulting depiction of public officials bouncing from one unprincipled way of behaving to the opposite but equally unprincipled way merely underscores the extent to which these narratives are obviously overdrawn.

140. TUSHNET, *supra* note 96, at 26.

141. Whittington, *supra* note 26, at 817.

constitutional interpretation is deeply contested and implicated in the same considerations as extrajudicial constitutional interpretation.”¹⁴²

Still, the main criticism here should not be that judges are somehow really just like politicians. Politicians are unquestionably influenced more, and more directly, by “outside actors” than are judges. A lot more. This is the whole basis and reason for arguing that we should prefer legislators to judges on democratic grounds. Legislatures do not perfectly mirror or translate popular will, and courts are to some extent responsive to democratic pressures. But it would be ludicrous to treat the two as comparable in this respect.

No, the main criticism must be that judges are just like judges, which is to say that they are not at all like philosophers or academics. Articulating, even contemplating, visions of justice and political theory just is not a big part of the job. Analyzing precedent; examining antecedent practices; making crude, seat-of-the-pants judgments about policy and consequences—these describe a typical day’s work at the Court. Sometimes, to be sure, the Justices (or their clerks) throw some fancy rhetoric into their opinions, but the Court’s deliberations are almost wholly technical and legalistic. To take an obvious example, compare the opinion in *Brown* with the congressional debate over the Civil Rights Act of 1964. As instances of serious deliberation about matters of principle, the comparison is not even close.¹⁴³

There is nothing wrong with this. We expect and want our courts to be technical and legalistic. Laymen and first-year law students sometimes bridle at law’s technicality, angrily resisting it as an effort to mystify and confuse them. But, of course, it is not: there are good reasons for most of law’s complexity, reasons that explain why we need a body of lawyers and judges with the necessary experience and training to run the age-old machinery of the law. And which is why we do not want our lawyers and judges pretending that they are somehow specially suited to engage in deliberations about morality and principle for the rest of us. The needs and demands of law serve to divert judges from making decisions based on abstract principles in much the same way as the needs and demands of politics do for politicians. The particular distortions differ, but the consequences are just the same in limiting the space available to think

142. *Id.* at 817-18.

143. As discussed below, the same thing could be said for almost any issue that comes up in both the Court and Congress, whether it be abortion, the death penalty, gay rights, euthanasia, or other like issues. This is because the question before the legislature is always whether and why to do something. One may not like what the legislators have to say, though it seems hard to say that discussions in Congress compare unfavorably with those of the Court on issues like gay rights, abortion, race, or other current problems. Be that as it may, in terms of focus, emphasis, and amount of energy, congressional debates are explicitly about substantive values to a much greater extent than judicial opinions or deliberations.

about or act on these sorts of considerations. This is not a formalist claim that judges are constrained by some inherent quality of legal doctrine; that would be silly, especially as applied to the Supreme Court. It is, rather, a claim about the *culture* of judging, which structures how judges approach their jobs just as the culture of politics does for politicians, and which not only pushes judges toward the technical and legalistic, but generally keeps them there. We should not forget that Hercules is just a myth.

Turning to Congress, the portrayal of legislators as sating a single-minded obsession with reelection by becoming willing puppets of narrow interest groups is scarcely less distorted on its side than the picture of judges as black-robed philosophers. As Mark Tushnet notes, 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.¹⁴⁴ Political debates on matters of constitutional principle are common in Congress, partly because voters care about such matters, and an important element of any legislator's job consists of explaining decisions to constituents back home.¹⁴⁵

Obvious examples of such debates include congressional discussions of war powers, line-item vetoes, balanced budgets, and federalism—all of which have received and continue to receive studious attention in Congress. But the list of subjects is not limited to questions of structure and includes individual rights as well. Keith Whittington again finds the right note:

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.¹⁴⁶

The point is not that it is the members of Congress rather than judges who turn out to be our philosophers. 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

144. TUSHNET, *supra* note 96, at 65-66; see also RICHARD L. HALL, PARTICIPATION IN CONGRESS (1996).

145. See JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 47 (3d ed. 1989).

146. Whittington, *supra* note 26, at 820-21.

different laws might be received by voters, and helping to communicate relevant information to the public.¹⁴⁷ But the process inevitably requires making all sorts of compromises. Conscientious legislators must struggle against politics to find space for completely principled decisionmaking, 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.¹⁴⁸ Justifications that are, in a word, reasonable.

None of this argues conclusively against the doctrine of judicial supremacy. It simply calls into question assumptions about judges and legislators 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 residual difference 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?

V

"A MATTER OF SENSIBILITY": POPULISM AND ANTI-POPULISM IN THE STRUGGLE OVER JUDICIAL AUTHORITY

More could undoubtedly be said both for and against these various efforts to justify judicial supremacy. More (indeed, much more) has already been said, for the question of judicial supremacy has been at the heart of constitutional theory for more than two generations. But we have seen enough to make one thing indubitably clear, something that is not

147. See JEFFREY M. BERRY, *THE NEW LIBERALISM* 87-118 (1999); JOHN MARK HANSEN, *GAINING ACCESS* (1991); JOHN R. WRIGHT, *INTEREST GROUPS AND CONGRESS* (1996); Richard A. Smith, *Advocacy, Interpretation, and Influence in the U.S. Congress*, 78 AM. POL. SCI. REV. 44 (1984).

148. R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 64-87 (1990); RICHARD F. FENNO JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* 141-57 (1978); KINGDON, *supra* note 145, at 47-54.

changed by following the debate through additional layers of intricacy. At every critical juncture, whether it be the necessity of overcoming disagreement or the relative ability to deliberate on matters of principle, the arguments turn out 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.¹⁴⁹

“Once we reach this point in the argument,” Tushnet observes, “it is impossible to avoid personal judgments.”¹⁵⁰ The question is, how do we make these personal 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 judges, lawyers, pundits, and legal commentators 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, with no hesitation, 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.”¹⁵¹ 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.”¹⁵² According to Parker, 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

149. Many others have made this point. See, e.g., GRIFFIN, *supra* note 27, at 112; Charles M. Cameron, *Judicial Independence: How Can You Tell It When You See It? And, Who Cares?*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 134 (Stephen B. Burbank & Barry Friedman eds., 2002); Graber, *supra* note 40, at 376, 397-98; Adrian Vermeule, *Judicial Review and Institutional Choice*, 43 WM. & MARY L. REV. 1557, 1561-62 (2002).

150. TUSHNET, *supra* note 96, at 106.

151. PARKER, *supra* note 118, at 4.

152. *Id.* at 56.

that ordinary people make, "is not just low in quality, but dangerous as well."¹⁵³

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 shortsightedness that afflict the *hoi polloi*. 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 countermajoritarian terms—as if this were self-evident, as if a constitution could be nothing else.¹⁵⁴

Other commentators have similarly noted the profoundly antidemocratic 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."¹⁵⁵ 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 hubris."¹⁵⁶ In a particularly strong indictment, Roberto Unger identifies "discomfort with democracy" as one of the "dirty little secrets of contemporary jurisprudence."¹⁵⁷ 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 overriding 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

153. *Id.* at 58. The preceding few sentences are drawn from Parker's list of contrasting elite and nonelite characteristics, which is lengthier and more elaborate. *Id.* at 57-58.

154. *Id.* at 69-70.

155. TUSHNET, *supra* note 96, at 177.

156. J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1951 (1995) (book review).

157. ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 72 (1996).

national refounding; 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.¹⁵⁸

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 belief 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 emergence of the cult of the Court and in the general complacency that accompanies even the most aggressive judicial interferences in politics, as if the judiciary were our parent or our teacher. The *New York Times* actually summed up a recent Term of the Supreme Court as providing “a report card on the elected branches,”¹⁵⁹ and a leading public intellectual (and sitting federal judge) audaciously defended the Court’s intervention in *Bush v. Gore* on the ground that Congress was “not a competent forum” to decide matters of such importance.¹⁶⁰

A profound mistrust of popular government and representative assemblies is, in fact, one of the few things (perhaps the only thing) that the right

158. *Id.* at 72-73.

159. *Supreme Court Term: Beyond Bush v. Gore*, N.Y. TIMES, July 2, 2001, at A1.

160. RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 145 (2001).

and the left today share in common. From the right we get public choice, positive political theory, and law and economics: all centrally dedicated to explaining why democratic institutions are irrational and inefficient. Better the invisible hand of a market—decentralized, unselfconscious, 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.¹⁶¹

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 negative 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 naïve or just catering to others who are weak or naïve.

These deep-seated misgivings about ordinary citizens explain why modern scholars 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

161. See, e.g., Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153 (2002); Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119 (2002) (reviewing PAUL SLOVIC, THE PERCEPTION OF RISK (2000)). Specialists in behavioral economics tend to be somewhat more restrained in their conclusions and even some legal scholars have recognized that experts may not be all that much better in evaluating risks and benefits. See Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027 (1990).

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.¹⁶²

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.”¹⁶³ 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.¹⁶⁴

Once again, one must be careful not to overdraw the argument being made. 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 direct democracy. They recognize the need for representation, and presumably do not object to institutional arrangements designed to slow politics down (i.e., 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.

162. PARKER, *supra* note 118, at 92.

163. Balkin, *supra* note 156, at 1949.

164. WALDRON, *LAW AND DISAGREEMENT*, *supra* note 96, at 13.

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 a lot. Second, the choice one makes in this regard does not turn on evidence or logic, much as legal scholars 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.

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 a 1792 essay entitled *Who Are the Best Keepers of the People's Liberties?*¹⁶⁵ Madison created a character named “Republican” who answered that “[t]he people themselves” are the safest repository—to which Madison had “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.”¹⁶⁶ 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 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 still being made. Following Madison, Van Buren says that American politics have always been defined by a struggle between two great principles, which he 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.”¹⁶⁷ Van Buren shares Madison’s hostility to the aristocratic impulse, but he is

165. See James Madison, *Who Are the Best Keepers of the People's Liberties?* (Dec. 20, 1792), in 14 THE PAPERS OF JAMES MADISON 426 (Robert A. Rutland et al. eds., 1983).

166. *Id.* at 426-27.

167. MARTIN VAN BUREN, *INQUIRY INTO THE ORIGINS AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES* 352 (1867); see GERALD LEONARD, *THE INVENTION OF PARTY POLITICS* 35-47 (2002). Madison had similarly written that American history could best be understood in terms of a struggle between two consistent forces, which he called republican and anti-republican and which he defined as appealing to those who “believ[e] in the doctrine that mankind are capable of governing themselves” and those who have “debauched themselves into a persuasion that mankind are incapable of governing themselves.” The names of particular parties changed with the issues—Whigs and Tories, Federalists and Anti-Federalists, Republicans and Federalists—but the underlying sensibilities reflected in their positions remained ever the same. James Madison, *A Candid State of Parties* (Sept. 22, 1792), in 14 The Papers of James Madison, *supra* note 165, at 370-72.

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. I say this not to be disparaging but rather to connect them with that strand in American thought that has always been concerned first and foremost with "the excess of democracy."¹⁶⁸ Today's aristocrats presumably are no more interested in establishing a hereditary order than were Alexander Hamilton, Gouverneur Morris, John Marshall, or John Quincy Adams. 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 this 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: Thomas Jefferson, James Madison, and Martin 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 these risks justify circumscribing popular control by overtly undemocratic means. In earlier periods, aristocrats and democrats found themselves on the 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.

VI

"AS AN AMERICAN . . .": CONCLUDING OBSERVATIONS

From the perspective of American history, and I mean the full sweep of that history, the circumstances of constitutional law today look downright unnatural. For while there may always have been champions of the aristocratic sensibility alongside the democratic one, there never was much doubt about the democratic principle's dominance, as reflected in the evolving practices of popular constitutionalism. Until now, that is. Earlier generations of Americans did sometimes let their guard down, giving those who worry excessively about democracy an opportunity to assert themselves and relieve their anxieties. These overanxious souls invariably grasped the opportunity, too, seeking as best they could to extend their control over politics, whether by concentrating power at the national level (like the Federalists of the 1790s) or turning for help to the Supreme Court (like conservatives during the *Lochner* era). Yet once the threat had become clear and Americans understood what was at stake, they always reasserted their right and their responsibility to say finally what the

168. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Max Farrand ed., rev. ed. 1966) (comments of Elbridge Gerry) (Madison's Notes, May 31, 1787).

Constitution means, disdaining the nervous paternalism of those who would define their fundamental values for them.

Are Americans today willing to do the same? Are we prepared to insist on our right to control the meaning of the Constitution? I wonder. This is not a matter of liberal versus conservative politics. It is a matter of choosing complacently to accept the Court's word as final regardless of the issue, regardless of what the Justices say, and regardless of the Court's political complexion. Why else has the appointment process come to matter so much?¹⁶⁹ Liberals 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. Senator Patrick Leahy, former Democratic chairman of the Senate Judiciary Committee and an active critic of the Rehnquist Court, takes great pains to purge his speeches of any hint of challenging the Court's authority. "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."¹⁷⁰ And in that "of course" lies the crux of today's reigning sensibility. Nor do conservatives differ in this respect, as evidenced by their own passivity toward the Court's authority and their matching obsession on the matter of appointments.

Whatever else one might think, this plainly represents a profound change in attitude from what 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 submissive about their place as republican citizens. They would not have accepted—they 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. Even if such a country could still be called "democratic," it would no longer be the kind of democracy Americans had fought and died to create. Madison thought he 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."¹⁷¹ What changed to make this sarcastic caricature not just respectable, not just real, but prevalent?

169. Charles G. Geyh, *Judicial Independence, Judicial Accountability and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 156-57 (2003).

170. Patrick Leahy, *The Supreme Court's Decision in Board of Trustees v. Garrett* (Feb. 28, 2001), in CONG. REC. S1671-73.

171. Madison, *Who Are the Best Keeper's of the People's Liberties?*, in 14 THE PAPERS OF JAMES MADISON, *supra* note 165, at 426.

Somehow, Americans have been pacified, lulled into believing that the meaning of their Constitution is something beyond their compass, something that should be left to others. Somehow, constitutional history has been recast as a story of judicial triumphalism. A judicial monopoly on constitutional interpretation is 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.

How and why we reached this pass is a complicated story, though I alluded to a few of the causes above. Some factors are internal to constitutional law—such as the historical anomaly of the Warren Court, which instilled in many liberals a naive faith in the judiciary; and the swiftness with which the Court returned to conservatism, which has left many of these same liberals tongue-tied for fear of seeming hypocritical.¹⁷² Other factors reflect broader and more long-term intellectual trends, like the heightened skepticism of democracy occasioned by fascism and other variants of twentieth-century totalitarianism and the emergence of interest group and rational choice theory.

There are perhaps deeper causes, too. The twentieth century ended with a spectacular surge of democracy, the greatest by far since the end of the eighteenth. In simple numbers of people getting their first taste of self-government, the spread of democratic sentiments across the globe dwarfed the tiny American and French Revolutions. As remarkable as this late-century embrace of democratic institutions, however, was the late-century swell of cynicism in the places where democracy is oldest and that have seen its benefits best. Signs of the phenomenon are all around us. Voter turnout in the United States continues to drop, despite occasional bounces. In Europe, splinter parties with extremist agendas and depressingly thin commitments to democracy have made hair-raising gains. Scandals abound, even as politicians become cleaner under the ceaseless glare of public scrutiny. On both continents, the electorate willingly embraces extravagantly implausible amateur politicians, while polls report persistently rising levels of mistrust in leadership and skepticism about the ability of politics to make life better. The willingness to surrender constitutions to courts—another phenomenon that is occurring worldwide—can and perhaps should be seen as a symptom of this larger trend.

Whatever the reasons for the change, it would be foolish and short-sighted to assume that it is permanent. For now, so far as most Americans are concerned, the stakes may remain obscure and esoteric. But if history teaches anything, it is that this will change if the Court persists on its current path. The intellectual case against judicial supremacy and in favor of

172. See James E. Fleming, *The Constitution Outside the Courts*, 86 CORNELL L. REV. 215, 225-26 (2000) (book review).

popular constitutionalism is, as we have seen, already being built—has already been built. The question is whether the Justices are listening.

Actually, whether the Justices are listening ultimately matters less than whether anyone else is. For the choice between popular constitutionalism and judicial supremacy—between what Sanford Levinson has called a “protestant” and a “catholic” Constitution¹⁷³—is necessarily and unavoidably one for the American people to make. The Constitution does not make the choice for us. Neither does history or tradition or law. We may choose as a matter of what Levinson calls “constitutional faith” to surrender control to the Court, to make it our platonic guardian for defining constitutional values. Or we may choose to keep this responsibility, even while leaving the Court as our agent to make decisions. Either way, we decide.¹⁷⁴

173. LEVINSON, *supra* note 96, at 27-30.

174. This point is also made, with a great deal of force and elegance, in SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 195-222 (1990).

