CONSTITUTIONAL STABILITY AND THE DEFERENTIAL COURT

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INTRODUCTION

Although Alexander Hamilton famously called the American judicial system the least dangerous branch in *Federalist No. 78*,[1] many legal scholars and political scientists in recent years have been troubled by the powerful role of the Supreme Court in constitutional interpretation and the countermajoritarian difficulty.[2] Scholars holding this view worry that an unelected Court with the power to declare a legislative act or the action of an elected executive unconstitutional subverts the will of the prevailing majority.[3] They often share the normative orientation of classic legal scholars of judicial review.[4]

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1 THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan, eds., 2001).

2 *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002) (discussing the positive and negative interplay between politics and judicial independence, especially during the Reconstruction period); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) (presenting reasons for mid-twentieth-century academics' obsession with the countermajoritarian difficulty); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383 (2001) (examining the *Lochner* era cases to conclude that the test for public legitimacy of Supreme Court decisions is whether they are socially legitimate, not legally legitimate); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000) (arguing that the New Deal Court changed in response to public opinion pressures, not in response to political pressures like the Court-packing plan); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998) (documenting the countermajoritarian difficulty from the Constitution's beginning to the advent of the civil war).

3 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) (defending the practice of judicial review despite its problems); *see also* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS

In an important new book, Friedman at once addresses this issue and offers a major new positive argument about the Court's behavior. Far from thwarting the popular will, Friedman argues, the Court frequently confirms it.[5] This positive argument has an obvious normative implication: to the extent that Supreme Court decisions reflect public opinion, especially on the most important issues brought before it, the countermajoritarian difficulty is less problematic.

This paper casts the countermajoritarian difficulty in a different light, drawing on positive political theory to analyze the relationship between a deferential Supreme Court with powers of judicial review and a constitution's ability to survive. Too often, normative studies of judicial review and the countermajoritarian difficulty take the constitutional stability of the American system for granted and do not enquire about how this stability—unique in the world—arises. Recent empirical work by Elkins et al. reveals that most new constitutions fail; in particular, the median democracy lasts only sixteen years.[6] This means that constitutions that prove durable have special features. We argue that, to be sustained, a democratic constitution must be self-enforcing in the sense that actors with power to disrupt democracy choose not to do so.[7]

The central questions of this paper are: how is American constitutional stability maintained, and how does the Supreme Court contribute to this stability? To address these questions, we develop a theory

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INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 258–62 (2009) [hereinafter FRIEDMAN, WILL OF THE PEOPLE] (documenting the changing views regarding judicial review and public opinion).

4 *See* BICKEL, *supra* note 3; CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 207–08 (2008) (emphasizing that the original conception of constitutional interpretation saw the Supreme Court as but one of many interpreters, including the people); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 7 (2004) [hereinafter KRAMER, THE PEOPLE THEMSELVES] (arguing that the original conception of the Constitution was a democratic one, driven by the people themselves); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 960 (2004) [hereinafter Kramer, *Popular Constitutionalism*] (presenting the view of popular constitutionalism and its major arguments against judicial supremacy).

5 FRIEDMAN, WILL OF THE PEOPLE, *supra* note 3, at 4 (describing Friedman's book's purpose as "reveal[ing] how the Supreme Court went from being an institution intended to check the popular will to one that frequently confirms it").

6 ZACHARY ELKINS ET AL., THE ENDURANCE OF NATIONAL CONSTITUTIONS 2 (2009).

7 *See generally* Adam Przeworski, *Self-Enforcing Democracy, in* OXFORD HANDBOOK OF POLITICAL ECONOMY 313 (Barry R. Weingast & Donald Wittman eds., 2006) (outlining a conception of democracy whereby all actors prefer democracy over another regime); Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law,* 91 AM. POL. SCI. REV. 245–63 (1997) [hereinafter Weingast, *Political Foundations*] (utilizing game theory to argue that all political officials must respect democracy's limits on their behavior).

of the self-enforcing constitution.[8] After presenting our theory of self-enforcing constitutions, we offer a brief illustration of how our framework can be usefully applied to evaluate the role of a "deferential Court"—one that defers to public opinion—in creating constitutional stability. We draw attention to the mechanisms through which the deferential Court supports or undermines constitutional stability. In doing so, we show that our theory of constitutional stability has surprising implications for the countermajoritarian difficulty.

Our approach suggests that the modern Supreme Court, acting within the American constitutional framework, often contributes to constitutional stability by helping to resolve three fundamental problems. The first fundamental problem concerns the rationality of fear. When citizens feel threatened by the regime in power, they may support extra-constitutional action, such as a coup, to protect themselves. Too often high-stakes politics lead to coups and constitutional failures, as in Spain in 1936 or Chile in 1973. The deferential Court reduces the likelihood of extra-constitutional action by lowering the stakes of political activity. The second fundamental problem of constitutional stability concerns the fundamental coordination problem underlying democracy, namely, whether citizens have the ability to act in concert against political leaders who transgress constitutional rules. By punishing political officials who transgress rights, widespread citizen coordination, in turn, deters political officials who are tempted to transgress. The deferential Court encourages widespread coordination against a government that attempts to transgress citizen rights by creating new constitutional focal points in its opinions. The third fundamental problem concerns change. The deferential Court's powerful role in creating constitutional focal points requires that it create forms of what North calls "adaptive efficiency"—the capacity to adjust constitutional interpretation in the face of shocks and effectively deal with new circumstances.[9]

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8 *See* Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America's First Century* 1 (Hoover Inst. & Stanford Univ., Working Paper, 2010) [hereinafter Mittal & Weingast, *Self-Enforcing Constitutions*], *available at* http://politicalscience.stanford.edu/faculty/weingast/MITTALsecFINAL100724submission4.pdf (developing a theory of the self-enforcing constitution which asks whether political officials have the appropriate incentives to honor the Constitution).

9 *See* DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 77–78 (2005) (arguing that America and Western Europe's adaptive efficiency—the ability to maintain efficiency despite outside shocks—is more important than mere economic growth); Sonia Mittal, *Constitutional Stability in a Changing World: Institutions, Knowledge, and Adaptive Efficiency* (Stanford Univ., Working Paper, 2010) [hereinafter Mittal, *Constitutional Stability*] (on file with author); Mittal & Weingast, *Self-Enforcing Constitutions*, *supra* note 8, at 12 ("The adaptive efficiency condition addresses the fundamental problem of

However, we remain cautious in interpreting the results of this preliminary assessment of the deferential Court's role in supporting constitutional stability. This brief sketch is intended to illustrate the range of new questions that emerge by embedding the classic understanding of the countermajoritarian difficulty in a positive framework explicitly concerned with constitutional stability. As events of the late 1860s and the mid-1930s show, Supreme Court justices are not always compelled to contribute to a self-enforcing constitution. When the Court has been unwilling or unable to defer to public opinion, the public has chosen to retaliate in a variety of ways that have the potential to threaten constitutional stability at the system-wide level.

Scholars of judicial review and the countermajoritarian difficulty too often take constitutional stability for granted. Because most new constitutions fail, ones that remain stable for extended periods must have special properties. Our study of the self-enforcing constitution and the deferential Court suggests that countermajoritarian features of a wide variety are often important in creating constitutional stability.[10] This suggests that the conventional view of countermajoritarian difficulty is incomplete, and that a more comprehensive account emerges by tracing the mechanisms through which majoritarian and non-majoritarian institutions interact to create or undermine constitutional stability.

With respect to the Supreme Court, we show that the deferential Court plays a unique and important role in helping to maintain constitutional stability by lowering stakes, establishing focal points, and creating adaptive efficiency. Moreover, we show that the Court's role in the three mechanisms of constitutional stability has required the Court at times to declare a legislative act or the action of an elected executive unconstitutional against the will of prevailing majorities. Although this action raises the classic question of the countermajoritarian difficulty, two reasons suggest that it is not as problematic as conventionally thought. First, as Friedman argues, the Court often acts in concert with public opinion.[11] Second, the Court's ability to

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change. . . . Successful constitutions are designed to address [possible instability] and enable adaptation so as to maintain cooperation as circumstances change.")

10 In fact, part of the reason that the Court is popular is that it protects seemingly nonmajoritarian features of the Constitution. In particular, it protects structure and process features such as the Bill of Rights that are themselves widely popular because they serve to lower the stakes for citizens. These provisions also constrain majorities and their representatives, for example, from abridging the rights of minorities.

11 *See* FRIEDMAN, WILL OF THE PEOPLE, *supra* note 3, at 14–17 (stating that at least one "function of judicial review in the modern era" is "ultimately to ratify the American people's considered views about the meaning of their Constitution").

preserve constitutional stability at the system-wide level by creating focal points requires that it make popular decisions, ones that attract widespread support.

This paper proceeds as follows. In Part II, we outline our framework for self-enforcing constitutions. In Part III, we offer a brief application of this framework to Friedman's 2009 history, sketching the implications of a deferential Court for constitutional stability. Conclusions and extensions follow.

PART II: A THEORY OF SELF-ENFORCING CONSTITUTIONS

Why have some countries sustained stable democratic constitutions for decades while others have failed?[12] Political scientists have persuasively argued that democratic stability requires that political leaders observe a few simple rules that limit their behavior.[13] Incumbent officials who lose elections must step down; and those out of power must be willing to refrain from using force as a means of taking control of government. Further, democratic stability requires that officials have incentives to honor the democratic rules; that is, that democracy is self-enforcing.

Mittal and Weingast argue that democratic political stability, particularly during "Przeworski moments" of transition,[14] requires that citizens and the government have incentives to abide by the rules embodied in a constitution.[15] Three fundamental problems impede constitutional stability. Paralleling each problem is a condition that explains how the problem can be solved or mitigated.

The first fundamental problem concerns the rationality of fear.[16] When citizens feel threatened by the regime in power, they may support extra-constitutional action, such as a coup, to protect themselves. Self-enforcing constitutions mitigate this problem through the *limit*

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12 The framework in this Part draws on our more extensive treatment of these ideas. *See generally* Mittal & Weingast, *Self-Enforcing Constitutions*, *supra* note 8.

13 Weingast, *Political Foundations, supra* note 7, at 245–63.

14 *See generally* ADAM PRZEWORSKI, DEMOCRACY AND THE MARKET 37 (1991) (examining the strategic situations that arise when a dictatorship collapses to conclude that a democracy is only one among many possible outcomes).

15 *See* Mittal & Weingast, *Self-Enforcing Constitutions, supra* note 8, at 6–7 (stating that "all actors must find it in their interests to adhere to the constitutional rules and as circumstances change, they must be able to adapt policies and institutions to maintain that stability over time").

16 *See generally* Rui J.P. de Figueiredo, Jr. & Barry R. Weingast, *The Rationality of Fear: Political Opportunism and Ethnic Conflict, in* CIVIL WARS, INSECURITY, AND INTERVENTION 261, 266–67 (Barbara F. Walter & Jack Snyder eds., 1999) (arguing that the fear of extreme consequences, such as being a victim, can lead citizens to active violence).

condition, the idea that the constitution must reduce the stakes of politics. When people have less to lose, they are less likely to support extra-constitutional action. For the limit condition to hold, the constitution must protect what those with the power to disrupt democracy hold most dear.

The second problem of constitutional stability concerns the fundamental coordination problem underlying democracy. When citizens have the ability to act in concert against transgressions by those in power, they can punish officials for transgressing by withdrawing support and forcing incumbents out. In the face of this punishment, incumbents will forgo transgressions.[17] For this mechanism to work, citizens must have the ability to act in concert against political leaders who transgress constitutional rules. But coordination is hardly assured. The diversity of interests among the citizenry means that citizens typically disagree about fundamental rights, the appropriate procedures of government, and the content of legislation. These disagreements make decentralized or spontaneous coordination nearly impossible.

The *consensus condition* suggests that self-enforcing constitutions encourage widespread coordination by creating focal points that guide citizen coordination in the face of constitutional violations. Constitutional focal points involve provisions concerning the process of government, such as the production of sovereign commands, and about citizen rights, such as property rights or the right to free assembly. To serve this function, focal points must lead to outcomes widely perceived as beneficial.[18] Absent this condition, citizens are hardly likely to act to preserve the constitution.

Overall, we know too little about how such focal points are created. Often they are produced in times of crisis through pacts among contending elites. Indeed, Elster suggests that many durable constitutions were created in times of crisis.[19]

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17 Weingast, *Political Foundations, supra* note 7, at 245–63.

18 *Id.* at 245–63.

19 Elster writes:

> The occasions for constitution-making include social and economic crisis, as in the making of the American constitution of 1787 or the French constitution of 1791; revolution, as in the making of the French and German 1848 constitutions; regime collapse, as in the making of the most recent constitutions in Southern Europe and in Eastern Europe; fear of regime collapse, as in the making of the French constitution of 1958, which was imposed by de Gaulle under the shadow of a military rebellion; defeat in war, as in Germany after the First or Second World War, or in Italy and Japan after the Second; reconstruction after the war, as in France in 1946; creation of a new state, as in Poland and Czechoslovakia after the First World War; and liberation from colonial rule, as in the American states after 1776 and in many third world countries after 1945.

The third fundamental problem concerns change. Economies boom and bust; technological innovations alter the way citizens interact; and a wide variety of circumstances change the relative power and distribution of relevant groups in society. More formally, North describes our environment as non-ergodic—a world of regular, if episodic, change.[20] Non-ergodic change means that nations regularly face new problems and crises where solutions are not obvious. These changes require that humans must constantly create new and updated theories to comprehend their environment and then use these theories to help address new problems.

The ubiquity and unpredictability of change complicates the first two fundamental principles of constitutional stability. Institutions designed to lower stakes or enable widespread coordination typically create static or short-term stability. Changes in the environment may alter the payoffs to cooperative activity and therefore render such institutions unstable.

Dynamic or long-term constitutional stability requires adaptation to new circumstances in ways that maintain the limit and consensus conditions over time. The *adaptive efficiency condition* addresses the fundamental problem of change. Adaptive efficiency refers to the capacity to adjust in the face of shocks and to restructure institutions within the constitutional framework that effectively deal with an altered reality.[21]

Adaptive efficiency is often created through the lawmaking process. Lawmaking is traditionally associated with legislatures—assemblies with the power to create and amend law—but usually involves other constituent executive and judicial institutions. When states encounter changes that threaten political stability, laws are made to restore cooperative activity in the new state of the world. From the perspective of constitutional stability, lawmaking is the state's primary means of adaptation.

The three conditions of constitutional stability are complementary. The limit condition holds that credible limits on the state inhibit resorts to extra-constitutional measures, rendering constitutions more likely to survive. The consensus condition identifies the mechanisms under which these limits are credible—i.e. when citizens have solved the coordination problem and can take action against of-

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JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 159 (2000).

20 NORTH, *supra* note 9, at 19–20.

21 *Id.*; *see also* Mittal, *Constitutional Stability*, *supra* note 9, at 12; Mittal & Weingast, *Self-Enforcing Constitutions*, *supra* note 8, at 4.

ficials who violate these limits. The adaptive efficiency condition explores how the first two principles are preserved over time and in changing circumstances. While the first two principles create static stability, stability over time requires adaptive efficiency.

PART III: APPLICATION

As Friedman argues, the classic concern raised by the countermajoritarian difficulty—that judicial review interferes with the will of the people—is radically overstated.[22] He argues instead that the persistent question throughout history has been whether, and to what extent, *should* the Supreme Court exercise the power of judicial review. A complete answer to this question must begin with an analysis of the implications of judicial review for outcomes of interest.

Our analysis begins with the problem of constitutional stability. Many Framers of the Federal Constitution of 1787 were concerned, if not obsessed, with creating lasting political and constitutional stability. Madison, for his part, placed all hope of "furthering justice and the public good" on the foundation of preserving political order.[23] Deeply disturbed by the chronic instability plaguing government under the Articles of Confederation, leading Federalists sought to create a republic that would endure.[24] In confronting the manifest deficiencies of the Articles, our earliest leaders boldly confronted the challenges inherent in maintaining political stability in an uncertain and rapidly changing world. Since the Founding, preserving the Union has been of continuing interest to each new generation of Americans—and stability continues to be a central, if under-conceptualized, concern in today's debates on the Court's ongoing role in constitutional interpretation.

How does the development of a Court with strong powers of judicial review contribute to or threaten constitutional stability? Friedman persuasively argues that the Court defers to the people far more often than it challenges them. This basic empirical finding can be analyzed formally in a standard deterrence framework. Credible threats of punishment (e.g. jurisdiction-stripping, court-packing, or

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22 FRIEDMAN, WILL OF THE PEOPLE, *supra* note 3, at 9 (stating that "[c]aught up in immediate controversy, Americans . . . fail to see that what looks to be a roaring battle over judicial power is simply the latest round in a much broader struggle over the proper interpretation of the Constitution," and that "the history of the relationship between judicial review and the popular will has been one of great continuity").

23 DREW R. MCCOY, THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY 44 (1989).

24 Mittal, *Constitutional Stability*, *supra* note 9, at 15.

worse, ignoring the court through non-compliance) successfully deter the Court from straying far from public opinion.

In this framework, successful popular deterrence of the Court contributes to constitutional stability by inducing opinions that are far less likely to provoke serious challenges from the public. Our framework for self-enforcing constitutions helps explain why this mechanism works by embedding the deferential Court in a broader theory of constitutional stability. Paralleling the three conditions in our framework discussed in Part II, we show that a deferential Court with strong powers of judicial review contributes to constitutional stability in at least three ways.

Per the first problem of constitutional stability, a Court that fears punishment is less likely to permit the passage of widely unpopular and potentially destabilizing legislation or, more broadly, government actions. This induced behavioral feature of the Court helps preserve the limit condition; it reliably serves to lower the stakes in politics for ordinary citizens. Indeed, Friedman shows that many of the most controversial decisions issued by the Court have been destabilizing precisely because they unexpectedly and significantly raised the stakes for large groups of citizens.[25] For instance, the Supreme Court's 1819 decision in *McCulloch v. Maryland* involved an expansive interpretation of the Necessary and Proper Clause.[26] Because it potentially allowed a much broader range of national government powers, this decision "fully raised the states' rights bear from its slumber."[27] The opinion seriously threatened several states—leading some down the path of noncompliance and eventually nullification.

The importance of lowering the stakes of political activity raises the important question of what "the will of the people" is and how it can be measured. What does it mean for the Court to be deferential to public opinion? To whose opinion should it defer? Friedman's richly researched history is broadly concerned with capturing "the evolving views of the American public"—by which he often means the

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25 *See generally* FRIEDMAN, WILL OF THE PEOPLE, *supra* note 3, at 9 (arguing that many of the most controversial Court decisions were destabilizing precisely because they dramatically affected large groups of citizens).

26 *See generally* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (holding that the Necessary and Proper Clause permits Congress to pursue any objective rationally related to an enumerated power so long as it is not expressly prohibited by the Constitution).

27 FRIEDMAN, WILL OF THE PEOPLE, *supra* note 3, at 82; *see also* Jack N. Rakove, *Judicial Power in the Constitutional Theory of James Madison*, 43 WM. & MARY L. REV. 1513, 1514 (2002) (arguing that James Madison was concerned with the Court's decision in *McCulloch* because of the potential damage it could cause to a republican system of government).

view of the "majority" or the people at large.[28] In doing so, he confronts the challenging methodological problems inherent in reconstructing the "collage of ever-shifting views" of public opinion.[29] By necessity, he often relies on journalistic sources such as newspaper and magazine articles for measures of public opinion. Sometimes these sources report the results of surveys and polls, and at other times they reflect the journalist's subjective impression of the state of public opinion.

Dorf offers a more specific conception of public opinion emphasizing the importance of the median.[30] "Although courts do regularly invalidate state and federal action on constitutional grounds, they rarely depart substantially from the median of public opinion."[31]

Neither Friedman nor Dorf justifies their conceptions of public opinion theoretically. Why is it that the opinion of the "majority" or the "median" is so important? Our positive political theory framework provides an answer. Part of the means of success for the deferential Court is that, as circumstances evolve, it adapts the constitutional bargain not in an arbitrary or personal way, but in a way that continues to resolve the three constitutional problems noted above. But how exactly does the Court do so?

Standard spatial modeling techniques and positive political theories of political competition provide basic insight into this problem. Assuming that citizen preferences are single-peaked and normally distributed in a uni-dimensional issue space, the Court satisfies the most people (thereby lowering stakes as much as possible) by ruling consistent with the mean (or equivalently the median) of public opinion. Given these standard assumptions, the farther the Court moves from the center of public opinion, the less the Court satisfies the people. Our framework and this simple model explain why the center of public opinion is so important to Friedman's history and suggests how the Court can optimally lower stakes given lumpy or asymmetric distributions of citizens' preferences. Pursuing median-favored policies maximizes overall support for the Supreme Court's opinions.

Per the second fundamental problem, over the course of America's history many opinions of the Supreme Court have come to serve

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28 FRIEDMAN, WILL OF THE PEOPLE, *supra* note 3, at 17–18.

29 *Id.* at 17.

30 *See* Michael Dorf, *Interpretive and Institutional Responses to the Majoritarian Difficulty* (Cornell Law Sch., Working Paper, 2010), *available at* http://www.dorfonlaw.org/2010/01/judiciary-and-popular-will.html.

31 *See id.* at 1.

as focal points for widespread coordination. The ability to coordinate against the government through the creation of focal points provides a powerful deterrent to destabilizing constitutional transgressions. Because citizen coordination to withdraw their support from a leader following a constitutional violation threatens the leader's political future, leaders have strong incentives to adhere to the rules. Concomitantly, leaders are more likely to pursue transgressions when they believe they will retain sufficient support to remain in power.

Acting to preserve and adapt focal points allows the deferential Court to enhance the public's ability to coordinate against the government by creating shared signals on just what actions constitute a transgression, the rights of citizens, and appropriate public policies. Absent these signals, differences in citizens' experience, interests, and values often lead to coordination failure. Moreover, the Court's position in the American constitutional framework enhances the clarity of its signals because it is the sole source of binding opinion, and those opinions are supreme and authoritative for the entire judiciary. The opinions of a Court deferential to the people are more likely to be regarded as focal because citizens are more likely to value the opinion and to believe that others will act in accordance with it.

The institutional significance of the evolving constitutional bargain between the Court and the people that Friedman's history describes is this: by deferring to the people, the Court was gradually conferred—or, perhaps, was gradually able to assume—the power to serve as an unambiguous creator of constitutional focal points. This power gives the Court a central position in creating and maintaining constitutional stability. Friedman argues that in the early 1800s a tacit deal emerged between Federalists and Republicans "that set the judiciary on the course to the authority it maintains today."[32] Federalist judges acknowledged the importance of refraining from blatant partisanship on the bench and the Republicans, for their part, allowed the judiciary limited independence.[33]

As a result, Friedman's narrative of the growth of the Court's independence and powers of judicial review can be usefully reframed as the story of the development of the Court's institutional capacity to create focal points for widespread coordination. Our emphasis on the Court's role as creator of focal points offers a theoretically driven approach to concerns often raised by the legal literature on the

32 FRIEDMAN, WILL OF THE PEOPLE, *supra* note 3, at 45.

33 *Id.* at 44–71.

Court's "settlement power."[34] Usually, the ability to create constitutional focal points implies not only the power of judicial review but also some level of discretion to determine what the Constitution means. The contemporary Court's role in settling constitutional meaning is not usually thought of as being constrained to a single choice by various forms of partisan and institutional gridlock. Rather, the contemporary Court has gained some measure of independence—allowing it to choose constitutional focal points from a range of possibilities. That latitude and the range of possible constitutional focal points are shaped by the people and their willingness to defer to the Court's choice.[35]

Bush v. Gore serves as a useful illustration used by Friedman to highlight the deferential Court's definitive status as the primary chooser of constitutional focal points.[36] In this decision, the Court intervened in the outcome of a close presidential election. Although Friedman writes that many were troubled by the Court's intervention, the people quickly deferred to the Court's decision.[37] In fact, Friedman reports that within a year of the decision the Court returned to high levels of bipartisan support.[38]

Per problem three, a deferential Court also creates adaptive efficiency by creating focal points for coordination as the state faces new and unanticipated circumstances and constitutional issues. Moreover, this behavioral feature of the Court is enhanced to the extent that, per Friedman, the Court supports effective adaptation by entrenching new constitutional norms *after* public opinion has matured and crystallized.

In a rapidly changing world, the state regularly encounters new problems with which the government and public have little experience. These situations are potentially problematic for constitutional stability because more than one constitutional interpretation exists and people typically disagree about which is most appropriate.

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34 Kramer, *Popular Constitutionalism*, *supra* note 4, at 962 (arguing that controversies would never end if the Court did not have the final say on a given matter).

35 *See* FRIEDMAN, WILL OF THE PEOPLE, *supra* note 3, at 31; *see also* KRAMER, THE PEOPLE THEMSELVES, *supra* note 4, at 65–68.

36 *See generally* Bush v. Gore, 531 U.S. 98 (2000) (making a federal constitutional matter out of a seemingly state-based issue regarding the state of Florida's vote re-counting process).

37 *See* FRIEDMAN, WILL OF THE PEOPLE, *supra* note 3, at 358, 379 (noting how quickly even Democrats had high levels of confidence in the Court, despite Court's decision in *Bush*). *See generally id.* at 323–66 (noting that today, the people tend to acquiesce to Supreme Court decisions quickly).

38 *See id.* at 15 (noting that the negative public sentiment associated with the Court's decision in *Bush* dissipated quickly).

In these situations public opinion matures and crystallizes over time and with intervening events. A Court deferential to public opinion contributes to constitutional stability by adapting old or establishing new constitutional focal points that privilege the "considered judgment" of the American people over their "passing fancy."[39] As Friedman suggests, Court rulings both catalyze and entrench public discussion of important issues. Through the iterative process of judicial decision—popular response—judicial re-decision, the Court prompts the public to debate issues of fundamental interest and to find solutions and compromises that "obtain broad and lasting support."[40] "This, then, is the function of judicial review in the modern era: to serve as a catalyst, to force public debate, and ultimately to ratify the American people's considered views about the meaning of their Constitution."[41]

The Court's central position as chooser of constitutional focal points and the ever-present possibility of popular retaliation give the Court considerable incentives both to distinguish the passing fancy of the people from their considered judgment and, ultimately, to craft opinions that implement the latter. Entrenching constitutional focal points in deference to the "passions" of the people has led to considerable instability as opinions changed. Friedman suggests that perceived switches by the Court with respect to the Wagner Act, Communist activities, and death penalty cases seemed to reflect a desire to ultimately ratify only the considered opinion of the people.[42]

PART IV: CONCLUSIONS

As practiced by the deferential Court, judicial review contributes to constitutional stability in an important way by lowering stakes in politics, establishing new constitutional focal points, and creating adaptive efficiency.

Our application of the self-enforcing constitutions framework to the problem of judicial review suggests a new understanding of the countermajoritarian difficulty and the Court's ultimate role in a constitutional democracy. The classic legal debate of the Court's role, whether the Court follows public opinion or exercises various forms

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39 *Id.* at 16.

40 *Id.* at 16, 381 (arguing that the most important role that judicial review serves is to foster public debate about important issues).

41 *Id.*

42 *See id.* at 232, 254–55, 285–86 (explaining these cases and identifying examples of instances where the Court seemingly bowed to public opinion despite strong legal arguments to the contrary).

of independence qua the countermajoritarian difficulty, is too narrow. Our framework suggests that the Court simultaneously follows public opinion and exercises independence.

The deferential Court leads the people in supporting constitutional stability by solving new coordination problems as they appear, for example, in circumstances unanticipated by the Founders or when circumstances reveal new ambiguities in the text. It leads by choosing focal points out of an array of possibilities in new situations (and especially crises) or extends existing focal points when new circumstances or unexpected contingencies arise.

But the deferential Court's choice of focal points is constrained by the public and what it values. Unpopular decisions fail to serve the purpose of creating new focal points. Recall our interpretation of Friedman's argument—by deferring to the people, the Court was gradually conferred the power to serve as a central creator of constitutional focal points. Because the Court requires public support to assure its independence from elected officials, justices must temper reliance on their own ideological views so as to reflect the views of the public. In this view, a deferential Court catalyzes debate and solidifies public opinion, rather than creating more divisive debate.

However, this analysis should not lead to unqualified optimism about the overall implications of the deferential Court for constitutional stability. The history of popular deterrence of the Supreme Court has not been without controversy and judicial review has not always been self-enforcing—as events of the 1860s and 1930s clearly show. When the Court has been unwilling or unable to defer to public opinion, the public and their elected representatives have *chosen* to retaliate in a variety of ways that have had the potential to seriously threaten constitutional stability at the system-wide level. Friedman writes, "Americans have abolished courts, impeached one justice, regularly defied Court orders, packed the Court, and stripped its jurisdiction."[43]

Given that the Court has become a central source of focal points that foster widespread coordination, its institutional capacity to retain this power by deferring to the public becomes all the more important for overall constitutional stability.[44] Popular punishment can seriously threaten the Court's role in preserving constitutional stability. Jurisdiction-stripping has the potential to remove the Court's ability to create focal points on precisely those issues that require widespread

43 *Id.* at 375.

44 Mittal, *Constitutional Stability*, *supra* note 9, at 90.

coordination in the future. For its part, court-packing can undermine the legitimacy of the Court in ways that can unexpectedly raise stakes for citizens and undermine the focal potential of rulings.

Indeed, the threat of popular retaliation has at times induced the Court to adopt institutional procedures with mixed implications for constitutional stability. The mechanisms that Friedman argues the Court uses to self-correct and lower stakes in the face of threats (for instance, ruling on an issue in a series of opinions or using indeterminate language) can undermine the clarity and focal potential of opinions. Moreover, potential conflict with the political branches has led the Court to voluntarily adopt limitations on jurisdiction and justiciability,[45] thereby depriving the system of its institutional expertise and focal potential in a variety of areas.

So far the Court has yet to be punished in a way that has seriously undermined its role as a co-equal branch of government and the stability of the constitutional system as a whole. But as Friedman reminds us, "[i]f the preceding history shows anything, it is that when judicial decisions wander far from what the public will tolerate, bad things happen to the Court and the justices."[46]

Once we recognize that constitutional stability cannot be taken for granted, the countermajoritarian difficulty and the Court's ultimate role in a constitutional democracy appear differently than cast in the literature. Classic works on the countermajoritarian difficulty question the role of a Court that invalidates actions of elected officials (e.g., Bickel). Friedman addresses this point in part by observing the critical importance of the Court's deference to understanding the countermajoritarian difficulty. Nonetheless, Friedman's framing of the countermajoritarian debate, whether the Court follows public opinion or exercises various forms of independence, remains too narrow. Our framework suggests that the Court simultaneously follows public opinion and exercises independence, and that in doing so, it contributes to constitutional stability.

Put another way, the problem of maintaining constitutional stability has come to suggest an important role for the Court that does not involve its complete deference to public opinion. As a society, we therefore face a tradeoff: a Court that is not fully deferential has greater ability to adjust focal points under changing circumstances;

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45 *See* John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint* 77 N.Y.U. L. REV. 962, 1001 (2002) (noting that the Court has adopted limits on its own jurisdiction in order to avoid potential conflict with other branches of government).

46 FRIEDMAN, WILL OF THE PEOPLE, *supra* note 3, at 375.

but to do so, it must at times invalidate the actions of elected officials against the will of the prevailing majority. On the other hand, greater deference necessarily implies less flexibility to adjust focal points. To the extent that the Court acts on the recommendations of those fearing the countermajoritarian difficulty—that is, it becomes more deferential to elected officials—it weakens its ability in its current role to maintain and adapt the Constitution.