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Judicial Intervention in a Twenty-First Century Republic: Shuffling Deck Chairs on the Titanic?[†]

KRISTOFOR J. HAMMOND*

There is no shortage of scholarship addressing the intriguing paradox that under our seemingly democratic form of government, the actions and enactments of the elected branches—the President and Congress—are susceptible to being overturned by an unelected judiciary which answers to the Constitution rather than majority will.¹ But for the impact of new technology on the law,² many would consider another exposition of the “countermajoritarian difficulty” theory³ to be a needless sacrifice of valuable timber. Yet recent developments suggesting that America is experiencing the rise of technologically driven majoritarianism, a “technological difficulty,” have received little attention.

We are currently witnessing political and social instability characteristic of periods of dramatic change, and much of that change can be traced to the influence of emerging technology.⁴ Late twentieth century technology, from cable

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1. Professor Robert Hopperton notes that new ideas in this area “must get in line and compete with an almost countless number of other approaches to constitutional theory propounded by legal scholars and professional critics over the last four decades.” Robert J. Hopperton, *Majoritarian and Counter-Majoritarian Difficulties: Democracy, Distrust, and Disclosure in American Land-Use Jurisprudence*, 24 B.C. ENVTL. AFF. L. REV. 541, 544 (1997). Professor Barry Friedman charges that the countermajoritarian difficulty “has been the central obsession of modern constitutional scholarship.” Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998). Since “[t]he fixation is so great the proposition hardly requires citation,” I will refer readers to Friedman’s recitation. *Id.* at 334 n.1.; see also Hopperton, *supra*, at 544 n.23.

2. The “shuffling the deck chairs” cliché in the title highlights two underlying themes in this Note: that academic theory divorced from political implementation will not prevent an impending disaster and that technology—the Titanic was a technological wonder in its day—can be an instrument of grace or misfortune.

3. Although Alexander Bickel coined the phrase “countermajoritarian difficulty,” he was not the first scholar to broach the topic and certainly not the last. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962).

4. Nearly 30 years ago, futurist Alvin Toffler recognized the connection between latter-20th century technology, knowledge, and social change:

The computer burst upon the scene around 1950. With its unprecedented power for analysis and dissemination of extremely varied kinds of data in unbelievable quantities and at mind-staggering speeds, it has become a major force behind the latest acceleration in knowledge acquisition. . . .

. . . “Knowledge is change”—and accelerating knowledge-acquisition, fueling

television to the Internet, has and will continue to influence the behavior of legislators, chief executives, judges, and the law at both the domestic and international levels.⁵ Although this development has received some attention, the dramatic impact that technology could have on the balance between countermajoritarian judicial power and majoritarian democratic power has not been explored. And, despite the vital leadership role which elites must play if the “difficulty” is to be resolved, many constitutional theorists tend to discuss premises and conclusions through the use of convoluted arguments and nuanced terminology, their target audience being other academics, judges, lawyers, and law students⁶ (or perhaps only other academics⁷), rather than the average American citizen.

Blessed with a historically unprecedented level of communication technology available even to those with modest financial resources,⁸ Americans are woefully unaware of the part played by the judicial branch in drawing the boundaries of the

the great engine of technology, means accelerating change.

ALVIN TOFFLER, *FUTURE SHOCK* 28-29 (1970).

5. See Henry H. Perritt, Jr., *Cyberspace and State Sovereignty*, 3 J. INT’L LEGAL STUD. 155, 195 (1997) (“Because the Internet eases access to the channels of communication to . . . world wide audiences, it fundamentally alters the balance of power between different political actors.”).

6. John Domino, former Director of Programs for the American Judicature Society, observed that efforts to respond to attacks on judicial independence “have been in relative isolation and directed at members of the legal profession as the primary audience.” American Bar Association, Public Hearings of the Commission on the Separation of Powers and Judicial Independence 112 (Dec. 13, 1996) (statement of John C. Domino, Director of Programs, American Judicature Society), available in American Bar Assoc. Gov’t Affairs Office, *An Independent Judiciary: Report of the Commission on Separation of Powers and Judicial Independence* (visited on Nov. 16, 1998) <<http://www.abanet.org/govaffairs/judiciary/home.html>>. Therefore, “until a coordinated national education campaign to promote judicial independence is undertaken, overt as well as subtle but significant intrusions will continue to erode independence and public confidence.” *Id.* As always, there are exceptions. A recent book by AKHIL REED AMAR & ALAN HIRSCH, *FOR THE PEOPLE* (1998), is one attempt to bring constitutional law back down to the level of the lay reader and still offer new insights to the accomplished scholar.

7. See Richard Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 4 (1998) (“[T]he real significance of constitutional theory is . . . the increased academification of law school professors, who are much more inclined than they used to be to write for other professors rather than for judges and practitioners.”).

8. In 1997 alone, the cost of home computers featuring the latest technology fell from \$1,200-2,300 to \$700-1,400. See Jim Carlton, *Cheaper PCs Start to Attract New Customers*, WALL ST. J., Jan. 26, 1998, at B8. The affordability of modern computers far superior in speed and memory to even their recent ancestors presents a dramatic contrast to their original counterparts. The birth of home computing occurred in 1960 when Digital Equipment Corp. (“DEC”) introduced an alternative to mainframes costing millions of dollars with a desktop version for a mere \$120,000. See Evan Ramstad & Jon G. Auerbach, *Compaq Buys Digital, An Unthinkable Event Just a Few Year Ago*, WALL ST. J., Jan. 27, 1998, at A1. By the late 1960s, the price of a DEC personal computer had fallen to \$18,000. Although an impressive six feet high and weighing 250 pounds, it had “less raw computing power than some wristwatches do today.” BILL GATES, *THE ROAD AHEAD* 11-12 (1995).

public policy arena. In order to maintain its legitimacy, the judiciary⁹ must communicate a coherent vision of its constitutional role to a public increasingly empowered by the "electronic revolution."¹⁰ In light of the recent efforts by activist groups and some members of Congress to turn public opinion against federal judges who, it is contended, have exceeded their constitutional authority, it is imperative that legal minds articulate the roots of the judiciary's authority to intervene in the democratic realm in a manner which is both persuasive and comprehensible to a reasonably intelligent voter.

Previously, highly controversial Supreme Court decisions which ran counter to majority preference rarely dwelt upon the countermajoritarian aspect of the ruling.¹¹ In *Brown v. Board of Education*,¹² for example, a unanimous Court simply applied its analysis that separate schooling of whites and blacks was inherently unequal and did not address the "anti-democratic" or controversial nature of its holding.¹³ In *Roe v. Wade*,¹⁴ the dissents, although vigorous, did not openly question the legitimacy of the Court.¹⁵ Recently, as if to acknowledge the forces of change in society, the debate between the Justices has intensified, producing elaborate justifications, candid reflections, and bitter critiques of the Court's use of its power and the sources from which that power is derived.¹⁶

9. For the reasons of simplicity and focus, the scope of my discussion will be limited to federal judges. Although state constitutions vary, state judges are often in a more precarious position than federal judges, in part because they are usually subject to retention elections or a similar electoral device. For an intensive examination of this "majoritarian difficulty," see Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

10. A personal computer can be found in approximately 40% of the nation's households, and some analysts believe the rate will exceed 50% within a few years. See Carlton, *supra* note 8, at B8.

11. The Court typically stands most united and issues its strongest language when its authority is directly challenged. See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[A] permanent and indispensable feature of our constitutional system" is that "the federal judiciary is supreme in the exposition of the law of the Constitution.").

12. 347 U.S. 483 (1954).

13. The Justices were nevertheless keenly aware of the controversial nature of the case, and fashioned the vague "with all deliberate speed" remedy accordingly. See DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 350 (4th ed. 1996) ("As much an apology for not setting precise guidelines as a recognition of the limitations of judicial power, the phrase ['with all deliberate speed'] symbolized the Court's bold moral appeal to the country."); see also WILLIAM SAFIRE, *SAFIRE'S NEW POLITICAL DICTIONARY*, 881-82 (1993) (outlining the phrase's origin in history and literature).

14. 410 U.S. 113 (1973).

15. "As an exercise of raw judicial power, the Court perhaps *has authority to do what it does today*; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court." *Id.* at 222 (White, J., dissenting) (emphasis added). "While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent." *Id.* at 171 (Rehnquist, J., dissenting).

16. The tone of the dissenting opinions on the topic are increasingly vitriolic. Justice Scalia in particular has written scathing, sarcastical dissenting opinions challenging not only the majority's reasoning, but the Court's legitimacy. For example, in the Virginia Military Institute case, *United States v. Virginia*, Scalia declared:

There is one decision which provides ample material for analyzing the nexus of the countermajoritarian difficulty and the technological difficulty: the pivotal 1992 abortion case *Planned Parenthood v. Casey*.¹⁷ That decision offers the opportunity to examine several aspects of the countermajoritarian difficulty: the concept of stare decisis and whether public opinion should play a role in overturning precedent; whether the Court should protect only those rights enumerated in the Constitution and if not, the source of those rights; and how the Court should communicate to the public its vision of the Constitution.¹⁸

Part I of this Note provides a thumbnail sketch of the source of the countermajoritarian difficulty and its treatment by academics. Although this section is designed to provide background for the lay reader, observations which may be of interest to those familiar with constitutional theory are included as well. Part II reflects on the current social situation in the electronic age and ascertains why the technologically driven trend towards majoritarianism requires a reconfiguring of the calculus used in resolving the countermajoritarian difficulty (if in fact it is resolvable). Thereafter, this Part surveys current activity by Congress and activists to roll back judicial power. Two classic examples of anti-judicial fever from bygone eras, Roosevelt's 1937 "court packing" plan and the impeachment (and subsequent acquittal) of Supreme Court Justice Samuel Chase at the beginning of the Nineteenth century,¹⁹ suggest that such activity is not new. A closer assessment, however, demonstrates that the political techniques have

[I]t is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members' personal view of what would make a "more perfect Union," (a criterion only slightly more restrictive than a "more perfect world"), can impose its own favored social and economic dispositions nationwide.

United States v. Virginia, 518 U.S. 515, 601 (1996) (Scalia, J., dissenting) (citation omitted) (parenthetical in original).

17. 505 U.S. 833 (1992). Many other recent decisions would be useful for analyzing the countermajoritarian difficulty in this context. In addition to *Virginia, Boerne v. Flores*, 117 S. Ct. 2157 (1997), addressed in particular the question of whether the Court possesses the sole authority to define the Bill of Rights as incorporated by the Fourteenth Amendment; *United States v. Lopez*, 514 U.S. 549 (1995), concerned the importance of findings and deference to Congress, and what the Court's role should be in economic matters, particularly where concerns of federalism are implicated; and *Romer v. Evans*, 517 U.S. 620 (1996), like *Planned Parenthood v. Casey*, considered whether tradition and morality of the majority sufficiently outweigh the rights of a minority. Note that *Casey*, unlike most of these cases *has* received due attention as to its antimajoritarian aspects. See, e.g., RONALD DWORIN, FREEDOM'S LAW 117 (1996) ("[*Casey*] may prove to be one of the most important Court decisions of this generation . . . because three key justices . . . reaffirmed a more general view of the nature of the Constitution which they had been appointed to help destroy.").

18. There is a danger that the use of the *Casey* decision as a vehicle for analyzing the Court, given the controversial nature of the abortion issue, will obscure the central thesis of this Note. That thesis is not ideological—scholars of all persuasions should be concerned about the effect of technology on the judiciary. I will focus on *Casey* rather than the other decisions because this decision offers the most substantive "dialogue" between the Justices.

19. See STERLING HARWOOD, JUDICIAL ACTIVISM: A RESTRAINED DEFENSE 24 (rev. ed. 1996); William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 Nw. U. L. Rev. 903, 905-10 (1991).

changed, that political structures designed to rein in democratic excess are decaying, and that grass roots forces are more readily mobilizable now more than ever.

Finally, Part III examines the *Casey* decision from two vantage points. First, one must ask whether the decision is doctrinally sound. The controlling plurality opinion in *Casey* (the "joint opinion") employed a pervasive pragmatism throughout the opinion, yet strove to pay some allegiance to formalism. In other words, the primary opinion in *Casey* reached its decision by candidly weighing rather nonformalist factors (such as public opinion), yet attempted to justify its opinion through reliance on a formalist (and sometimes contorted) view of history and logic.

The second question is, given the rising majoritarianism, what does *Casey* say about the Supreme Court's ability to command authority in America today when adjudicating controversial cases? On one hand, the case is notable (even admirable, perhaps) for its attempt to address a non-legal audience. Yet, by attempting to communicate in a way which makes its opinions more accessible to the layperson, the Court becomes more susceptible to criticism. At least in cases touching on highly controversial public policy issues, "[t]he Court must take care to speak and act in ways that allow people to accept its decisions . . . as grounded truly in principle."²⁰

I. THE COUNTERMAJORITARIAN DIFFICULTY REVISITED: DEFINING THE ROLE OF THE JUDICIARY IN A MODERN CONSTITUTIONAL REPUBLIC

Recognizing that only a judiciary truly independent of the legislative and executive branches and isolated from the pressure exerted by the majority can check the whims of majority will,²¹ the Founders placed the "rudder" of the Constitution in the hands of the judicial branch pursuant to the judicial power clause of Article III.²² Following appointment by the President and confirmation by the Senate,²³ federal judges retain their offices subject to digressions from "good Behaviour."²⁴ The congressional power to exercise control over the

20. *Casey*, 505 U.S. at 865. The *Casey* opinions are written in a manner more understandable to a lay reader, and this change in style could be viewed as an effort by the Justices to accommodate the reality of the rising majoritarianism.

21. "[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." THE FEDERALIST NO. 78, at 229 (Alexander Hamilton) (Roy P. Fairfield ed., Johns Hopkins 2d ed. 1981).

22. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ." U.S. CONST. art. III, § 2.

23. See U.S. CONST. art. II, § 2, cl. 2.

24. "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

treasury cannot violate the compensation clause, which forbids the reduction of judicial salaries.²⁵

The separation of powers doctrine bestows upon no branch the entitlement to absolute independence. Therefore, the Constitution outlines what devices the other branches may use to check assertions of judicial power: The President can seek and nominate judges who share the chief executive's legal philosophy.²⁶ The House and Senate possess the respective powers to impeach and remove "all civil officers" for committing "high crimes and misdemeanors."²⁷ Congress also has the power to establish or eliminate all federal courts below the Supreme Court²⁸ and limit the Supreme Court's appellate jurisdiction.²⁹

Experience subsequent to the founding demonstrates that checks upon the judiciary bark much louder than they bite. For perhaps political and institutional reasons, proposals to blatantly exclude the judiciary from hearing specific legal questions have failed even when political conditions appeared favorable.³⁰ Likewise, the rare use of judicial impeachment³¹ reinforces Thomas Jefferson's view that for the judiciary, impeachment is a "mere scare-crow."³² Finally, several

25. *See id.*

26. However, the President's discretion in appointing Supreme Court Justices will be significantly narrowed if the Senate is controlled by the opposite party. *See Terry Eastland, Deactivate the Courts*, AM. SPECTATOR, Mar. 1997, at 60 (arguing that had the Republicans held the Senate longer or at least prevented the rejection of Robert Bork, *Roe v. Wade* would have been overruled).

27. U.S. CONST. art. II, § 4.

28. The Supreme Court is the sole court expressly established by the Constitution. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

29. "[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2.

30. Conservative Republicans attempted to capitalize on the election of President Ronald Reagan by proposing measures which would have severely limited the ability of federal courts to either issue injunctions or even hear cases addressing certain legal issues. *See, e.g.*, H.R. 73, 97th Cong. (1981) (proposal to limit the jurisdiction of the lower federal courts in matters relating to abortion); H.R. 865, 97th Cong. (1981) (limiting the jurisdiction of both the Supreme Court and district courts in cases involving school prayer).

31. Congress has conducted 11 impeachment trials over 200 years, four of which ended in acquittal. All five judges convicted in this century had, by the time of their removal, already been convicted of a crime or were accused of activities which constituted crimes. *See Warren S. Grimes, Hundred-Ton-Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges*, 38 UCLA L. REV. 1209, 1214-15 (1991). *See generally* RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (1973), for a noteworthy examination of the impeachment process.

32. Letter from Thomas Jefferson to T. Ritchie (1820), in THOMAS JEFFERSON ON DEMOCRACY 63, 63 (Saul K. Padover ed., 8th prt., Mentor Books 1961) (1939); *see also* Transcript, *The Goldwater Institute and the Federalist Society: Federalism and Judicial Mandate*, 28 ARIZ. ST. L.J. 17, 24 (1996) ("As President Jefferson was soon to discover when his party attempted to remove Justice Samuel Chase from the Supreme Court, impeachment was a 'farce,' 'not even a scare-crow.'") (comments by Lino Graglia); *id.* at 97 ("The impeachment authority is a hollow check on judicial power.") (comments by Fife Symington). *But see* HARWOOD, *supra* note 19, at 24 ("Intimidating impeachments can be de facto

Supreme Court Justices have surprised Presidents with judicial philosophies which ran counter to what their appointers had in mind at the time of selection.³³

Given that judicial elites appointed to the federal courts are as a practical matter beyond the democratic process, the recurring dilemma raised by the countermajoritarian difficulty is that judges, being human, will tend to consciously or unconsciously prefer one political philosophy over another. According to conventional wisdom, the injection of personal values into the judicial decisionmaking process places select interest groups at a disadvantage in the political process by disrupting a political arena where public opinion is said to be influenced by the rulings of the Supreme Court.³⁴ The evidence does not support this conventional view, however.³⁵ The far more troublesome implications

successful in controlling the court.”).

33. After leaving office in 1961, President Dwight D. Eisenhower considered the appointments of Justice William Brennan and Chief Justice Earl Warren to be among two of his most prominent mistakes. See HARWOOD, *supra* note 19, at 23. Likewise, Justice Bryon White, a Kennedy appointee, often voted with conservatives in criminal rights cases. See, e.g., *United States v. Leon*, 468 U.S. 897 (1984) (establishing a good-faith exception to the exclusionary rule); *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding a recidivist statute imposing a life sentence for three nonviolent criminal offenses involving a total of \$229.11); *Miranda v. Arizona*, 384 U.S. 436, 526-45 (1966) (White, J., dissenting) (objecting to the rule for excluding improperly obtained evidence).

Similarly, George Bush, at the time of choosing David Souter to replace Justice Brennan, desired a Justice who would practice “judicial restraint” and decide cases based upon the “intent of the framers.” Peter Parisi, *Judicial Limitation*, WASH. TIMES, Aug. 13, 1997, at A17. Widely recognized as a disappointment to the Bush camp, Souter joins the opinions of Clinton appointees Ginsburg and Breyer 62% of the time, and he co-authored the *Casey* joint opinion reaffirming the “essential holding” of *Roe v. Wade*. See Joan Biskupic, *The Supreme Court’s Balance of Power*, WASH. POST, July 3, 1997, at A17. Of course, determining whether Justice Souter is in some fashion exercising “judicial restraint” depends upon one’s definition of that term. See RICHARD A. POSNER, *THE FEDERAL COURTS* 314 (1996) (outlining in detail five different meanings of “judicial restraint”); see also American Bar Association, Public Hearing of the Commission on the Separation of Powers and Judicial Independence, American Bar Association 33-53 (Oct. 11, 1996) (statement of Prof. Stephen Burbank, University of Pennsylvania Law School), available in American Bar Assoc. Gov’t Affairs Office, *An Independent Judiciary Report of the Commission on Separation of Powers and Judicial Independence* (visited on Nov. 16, 1998) <<http://www.abanet.org/govaffairs/judiciary/home.html>> [hereinafter Burbank]. “[Although] a normal and perfectly understandable part of the political process,” the practice of Presidents vetting their judicial appointments for substantive policy positions should not be taken to an extreme. *Id.* at 41.

34. Justice Scalia opined in *Casey* that “*Roe* created a vast new class of abortion consumers and abortion proponents by eliminating the moral opprobrium that had attached to the act. (‘If the Constitution *guarantees* abortion, how can it be bad?’—not an accurate line of thought, but a natural one.)” *Planned Parenthood v. Casey*, 505 U.S. 833, 995 (1992) (Scalia, J., concurring in part and dissenting in part) (emphasis and parenthetical in original).

35. Convening on the eve of Robert Dahl’s 1957 path-breaking article, the political science jury has since that time rendered the verdict that the Court does not influence public opinion, but is still out on the issue of whether the public influences the Court. See Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293 (1957) (“By itself, the Court is almost powerless to affect the course of national policy.”); LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 676 (2d ed. 1996) (“The overwhelming majority of research . . . has found the Court to be without power to influence

of judicial decisionmaking executed with the conscious intention to advance an ideological end is that the process becomes rather arbitrary, the result of a somewhat "objective" written Constitution being displaced by the subjective personal policy preferences of the judge.³⁶

The essential issue addressed by constitutional theorists is what methods for disposing of cases and controversies are both workable and prudentially acceptable for use in interpreting the Constitution. The proposed tools and subsequent variations of those tools are now so numerous that the mere listing and explanation of them presents a daunting task. The two competing theoretical paradigms can roughly be broken down into "interpretivists" (also known as "originalists" or "textualists") and "noninterpretivists."³⁷

Originalist scholars, most notably Robert Bork³⁸ and Raoul Berger³⁹ argue that the interpretation of the Constitution should be consistent, to the greatest practicable degree at least, with that of its authors.⁴⁰ Theorists of this persuasion lament the fading acceptance of their tradition in the courts and a perceived bias by those courts against their public policy preferences. Hoover Institution scholar Thomas Sowell writes:

Constitutional right after constitutional right has been stretched far beyond anything encompassed by those rights when they were written—but only when the rights in question were consonant with the vision of the anointed. Where a constitutional right goes counter to, or inhibits, some aspect of that vision, that constitutional right is far more likely to be reduced or

public opinion."); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 338 (1991) ("U.S. Courts can *almost never* be effective producers of significant social reform.") (emphasis in original). Nevertheless, the continuing success of perception sans concrete evidence continues.

36. One would like to believe that resolution of constitutional issues can be commanded by an objective truth emanating from the Constitution which awaits discovery by judges if they will only have the integrity and intellect to discern its mysteries. Practical considerations of constitutional interpretation suggest this is a faint hope, particularly when the document being interpreted is more than 200 years old. Professor Chemerinsky writes: "The search for determinacy is inherently futile. . . . The choice to have a constitution written in abstract, general language—something that allows it to serve as a constitutive document—ensures that choices must be made in giving specific content to individual provisions." ERWIN CHERMERINSKY, *INTERPRETING THE CONSTITUTION* 110-11 (1987).

37. EDWARD F. HENNESSEY, *JUDGES MAKING LAW* 47 (1994).

38. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 143 (1990) ("In truth, only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy.").

39. Raoul Berger, "*Original Intentions*" in *Historical Perspective*, 54 *GEO. WASH. L. REV.* 296 (1986); see also THOMAS SOWELL, *THE VISION OF THE ANOINTED* 227-31 (1995) (discussing the continuing relevance of originalism and the "gross distortion" of the theory by its opponents).

40. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 1 (1980) (concluding that interpretivism pledges that "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution"); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* at xv (1988) ("Generally an interpretivist is one who believes that courts should stay as closely as possible to the text of the Constitution, to original intent if ascertainable, to principles and purposes derived from the Constitution, to history, and probably to precedents and conventional rules of construction.").

ignored. . . . The selective indignation of the anointed is reflected in legal theory that is selectively cosmic.⁴¹

Sowell neglects many cases concerning issues of takings,⁴² race,⁴³ and civil rights⁴⁴ which many commentators consider to be “conservative activism.” Others contend that the law maintains a decidedly right-of-center posture, or at least favors elite interests at the expense of the disadvantaged.⁴⁵ Nevertheless, Sowell

41. SOWELL, *supra* note 39, at 223 (citing the double jeopardy aspect of prosecuting the officers for both state criminal and federal civil rights laws in the Rodney King case and Fifth Amendment property rights cases as examples of selective expansion of rights); *see also* Lino A. Graglia, *It's Not Constitutionalism, It's Judicial Activism*, 19 HARV. J.L. & PUB. POL'Y 293, 298 (1996) (“[T]o fully understand contemporary constitutional law [one must know] that, almost without exception, the effect of rulings of unconstitutionality over the past four decades has been to enact the policy preferences of the cultural elite on the far left of the American political spectrum.”); William Kristol, *The Judiciary: Conservatism's Lost Branch*, 17 HARV. J.L. & PUB. POL'Y 131, 133 (1994) (“[M]embers of the cultural elite are overwhelmingly liberal, and the lawyers populating the Supreme Court are part of that elite.”). Kristol, however, minimizes the consequences of this phenomenon: “Though judicial triumphs are helpful at the margins, no substitute exists for real political victories. . . . The real battles over the most contentious issues will be waged during presidential elections or before Congress and state legislative bodies. They always are.” *Id.* at 134.

42. *See, e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Professor Hopperton contends that “in *Lucas* Justice Scalia . . . produced perhaps the most activist opinion in the history of Supreme Court land-use jurisprudence.” Hopperton, *supra* note 1, at 550; *cf.* Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 667 (1996) (concluding that although the Supreme Court has used the “tools of the *Lochner*-era Court,” it has limited this usage to takings, an area which is “far immune to the forces of a national conservative electorate”).

43. *See* Koteles Alexander, *Adarand: Brute Political Force Concealed as a Constitutional Colorblind Principle*, 39 HOW. L.J. 367, 387 (“The *Adarand* majority’s application of strict scrutiny reflects political judgment rather than a doctrine influenced by a fidelity to federalism and the rule of law.”); Patricia A. Carlson, *Recent Development*, *Adarand Constructors, Inc. v. Pena: The Lochnerization of Affirmative Action*, 27 ST. MARY’S L.J. 423, 452 (1996) (“[T]he justices’ substitution of their notions of individual rights and economic liberty for Congress’s judgment that minorities are socially and economically disadvantaged illuminates the Court’s *Lochner*-like preference for promoting individual rights at the expense of social rights without regard to the original meaning of the Fourteenth Amendment.”).

44. *See* David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23 *passim* (1989) (asserting that the Supreme Court has unduly narrowed the availability of civil rights actions by broadly construing qualified immunity).

45. Steven Loffredo writes that the Burger and Rehnquist Courts have displayed exceptional sensitivity toward elite communicative modes such as corporate campaign financing, corporate speech, large scale political expenditures . . . [while simultaneously being] markedly inhospitable toward distinctively plebeian modes of political expression and participation, like the public display of posters, picketing, residential distribution of handbills and demonstrations in public parks.

Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1364-65 (1993). Likewise, defense attorney Gerry Spence, a veteran of many a battle with insurance companies and the government, perceives a manifestly different, yet equally sinister

is correct that on balance “conservative” policy positions have suffered the court-imposed stigma of unconstitutionality more than “liberal” positions.⁴⁶

In contrast to interpretivists, noninterpretivist scholars tend to base their method on contemporary values not necessarily found in the text or history of the Constitution,⁴⁷ but grounded in fundamental principles of justice and morality. Nonoriginalists such as noninterpretivists Lawrence Tribe,⁴⁸ Ronald Dworkin,⁴⁹ and Michael Perry,⁵⁰ and libertarian natural rights theorists,⁵¹ reflect the diversity of the academic landscape, their primary points of agreement being most often related to the stalwart opinion that the originalist approach is a thoroughly discredited school of thought.⁵² Anti-originalists generally maintain that strict

corporate oligarchy commanding the elites in black robes: “Our judges, with glaring exceptions known to all, loyally serve the New King, the corporate core, whose money and influence are responsible for their office. They are not bad people [but] they faithfully serve the law and, accordingly, the King.” GERRY SPENCE, *FROM FREEDOM TO SLAVERY* 52 (1993).

46. Although the reader will understand in a general sense the policy positions I allude to here, I place quotation marks around the terms “liberal” and “conservative,” because, like the distinction between political “left” and “right,” its utility as a precise descriptive device is nearly nonexistent.

47. See ELY, *supra* note 40, at 1 (Noninterpretivism proposes that “courts should go beyond [the constitutional text] and enforce norms that cannot be discovered within the four corners of the document.”).

48. Professor Tribe could be termed a “moderate” noninterpretivist because although he flatly dismissed originalism as “one way not to read the Constitution,” he also rejects radical nonoriginalist interpretations such as Professor Mark Tushnet’s view that “we ought to read the Constitution as requiring socialism.” LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 20, 22 (1991).

49. Professor Dworkin endorses a “moral reading” of the Constitution which “proposes that we all—judges, lawyers, citizens—interpret and apply these abstract clauses [such as the First Amendment] on the understanding that they invoke moral principles about political decency and justice.” DWORKIN, *supra* note 17, at 2.

50. Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669 (1991).

51. Although I have grouped libertarian theorists with noninterpretivists for the convenience of drawing a contrast with the interpretivists, a precise parsing of the two is as follows:

The distinction is between a progressive belief in a discernable but evolving list of fundamental rights and a libertarian belief that the only essential rights are those directly related to the free market economy. For the former, social engineering, particularly by the judiciary, is an artform to be promoted and perfected; for the latter it is anathema.

Allan Ides, *The American Democracy and Judicial Review*, 33 ARIZ. L. REV. 1, 27 (1991). Therefore, unlike most noninterpretivist scholars, who relegate property rights to the back of the constitutional bus, libertarian natural rights theorists reject what they see as both the unworkable framework of originalism and the false dichotomy between personal liberty and property rights. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); STEPHEN MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* 60 (1987) (noting “the failure of judges on the right and the left carefully to examine the reasons supporting restrictions on individual liberty, whether economic or personal”).

52. Yale law professor Stephen Carter, who, as a defender of abortion rights and a strong supporter of Anita Hill, cannot easily be tagged with the “conservative” ideological label, professes that “my constitutional law scholarship . . . has consistently adhered to a vision of the

adherence to the original intentions of the framers, to the extent that such inclinations are even verifiable, would freeze rights and liberties at a particular point in history and entail consequences which the public would never accept.⁵³ Professor Erwin Chemerinsky even implies that if originalists properly applied their own theory, they would advocate noninterpretivism:

An examination of the Framers' jurisprudence . . . supports the view that they expected the meaning of the Constitution to evolve. . . . The Framers did not see it as necessary to enumerate the rights they believed to be natural[,] . . . [but rather] that courts would articulate natural law principles in the process of deciding cases. . . . Thus, the Constitution's protection of natural rights was intentionally left vague, and it was knowingly left to the judiciary to specify the particular meaning of the rights.⁵⁴

Given that these approaches to constitutional interpretation are fundamentally at odds, the basic legitimacy and intellectual integrity of the opposing theory is often called into question. Robert Bork takes the dark view that strategically-speaking, it is beneficial for modern constitutional theorists that their works are generally not read by the nonlegal community:

Although it is unlikely that many persons outside the academy are even aware of this literature's existence, much less its content, that does not mean it [has no effect on judges]. Its very inaccessibility may, paradoxically, be a source of its influence. Because the public at large and the legal profession as a whole are unaware of what is being taught and written, the reaction of ridicule and hostility that might have been expected has not been forthcoming.⁵⁵

Stephen Presser goes even further, declaring: "Most current constitutional theory, so complex as to be virtually impenetrable, is, at bottom, a rather shameless attempt to legitimate what ought properly to be regarded as the blatantly

original understanding as the basis for constitutional adjudication, a claim that is practically anathema among serious legal theorists, most of whom come from the Left." STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 146-47 (1991).

53. Professor Sunstein provides an adequate parade of horrors:

The consequences of [Bork's originalism] are not obscure. There is no right of privacy. . . . [D]iscrimination on the basis of gender, or on almost any other basis, is likely to be upheld. . . . Poll taxes are permissible, as are violations of the principle of one person-one vote. . . . Compulsory sterilization of some criminals would be acceptable. Many federal programs of the New Deal period and after would be unconstitutional.

CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 97 (1993).

54. CHEMERINSKY, *supra* note 36, at 62. See generally JACK N. RAKOVE, ORIGINAL MEANINGS (1996). For an originalist response to Rakove, see Raoul Berger, *Jack Rakove's Rendition of Original Meaning*, 72 IND. L.J. 619 (1997).

55. BORK, *supra* note 38, at 135; accord CHRISTOPHER WOLFE, JUDICIAL ACTIVISM: BULWARK OF FREEDOM OR PRECARIOUS SECURITY? 127 (1991) ("If ordinary citizens come to see more clearly how lawyers and judges understand judicial power, then the foundations of modern judicial power could become shaky."). For his condemnation of nonoriginalist writing, Bork has won the contempt of such authors. See, e.g., DWORKIN, *supra* note 17, at 302-03 ("Some other conservative legal scholar might succeed further with the idea of an original understanding than Bork has. But until someone does we are entitled, on the evidence of [*The Tempting of America*], to store the theory away with phlogistonism and the bogeyman.").

unconstitutional decisions of the Supreme Court of the past sixty years”⁵⁶ If shameful obfuscation is in fact the *modus operandi* of modern constitutional theory, it will be interesting to see whether the non-legal community eventually learns of this “shameless” scholarship via information technology and what impact this knowledge will have on the power of academics and judges.

Combatants in the noninterpretism-versus-originalism debate tend to avoid the question of whether attempting to resolve the dilemma through judicial interpretation alone is futile. As nonoriginalist Paul Brest has conceded, “no defensible criteria exist” to “assess theories of judicial review”⁵⁷ and therefore “the Madisonian dilemma is in fact unresolvable.”⁵⁸

Thomas Jefferson’s writings illustrate the current constitutional tension that partially vindicates the views of both theoretical factions. On one hand, he sounds like an originalist:

On every question of construction, carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.⁵⁹

On the other hand, despite Jefferson’s “endorsement” of the original intent brand of constitutional interpretation, he may not have anticipated a constitution older than twenty years, much less that many decades. In an 1816 letter to Samuel Kercheval, Jefferson acknowledged:

[L]aws and institutions must go hand in hand with the progress of the human mind. . . . As new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times. . . . Each generation . . . has a right to choose for itself the form of government it believes the most promotive of its own happiness. . . . A solemn opportunity of doing this every 19 or 20 years should be provided by the constitution.⁶⁰

56. STEPHEN B. PRESSER, *RECAPTURING THE CONSTITUTION* 4 (1994) (footnote omitted).

57. Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063, 1065 (1981).

58. *Id.* at 1097.

59. Letter from Thomas Jefferson to Judge William Johnson (June 12, 1823), in 15 *THE WRITINGS OF THOMAS JEFFERSON* 439, 449 (Andrew A. Lipscomb & Albert E. Bergh eds., 1904). This quotation and countless others from Jefferson and other Founders can also be found on the Internet. See e.g., *Thomas Jefferson on Politics and Government* (visited Sept. 28, 1998) <<http://etext.virginia.edu/jefferson/quotations/>> (letter written to William Johnson, 1823). Although Jefferson displays a “strict constructionist” tendency here, this attitude might extend only to Article I powers and therefore “his overall theory of constitutional interpretation is less easily pigeonholed.” David N. Mayer, *Justice Clarence Thomas and the Supreme Court’s Rediscovery of the Tenth Amendment*, 25 *CAP. U. L. REV.* 339, 423 n.46 (1996).

60. Letter from Thomas Jefferson to S. Kercheval (1816), in *THOMAS JEFFERSON ON DEMOCRACY*, *supra* note 32, at 67 (first, third, and fourth omission in original). Jefferson believed that one generation cannot bind the next, and therefore each generation must expressly consent to the old constitution, or draft a new one if the old document is found to be inadequate. Because more than half of those individuals 21 years of age and older at the time of a constitution’s adoption would thereafter die within 18 years and eight months, Jefferson determined the optimal interval for drafting a constitution to be every 20 years. Given the increase in life expectancy since the late eighteenth century, the appropriate interval today

In sum, while mandating adherence to the original understanding of our foundational legal document may be the only reliable way to effect the simultaneous goals of judicial restraint and majority constraint, the fundamental problem is that social conditions change, new definitions of liberty develop, and, with the passage of 210 years, “[j]ust what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”⁶¹

Jefferson undoubtedly would have contended, however, that each generation’s choice of government would be made by the masses rather than the judiciary.⁶² Nevertheless, given the population’s lack of experience with the current constitution⁶³ as well as the instability such a dramatic change would bring in a fast-paced and increasingly interdependent world, a constitutional convention every fifty years does not appear feasible or prudent.⁶⁴ Likewise, altering the meaning of the Constitution piecemeal through the Article V constitutional amendment process⁶⁵ has proved to be a frustrating experience, and nearly unworkable in the face of institutional forces resistant to a dramatic disruption of the status quo.⁶⁶ Rexford Tugwell observed:

A serious difficulty with any agreement embodied in a document and widely accepted, as the Constitution of 1787 eventually came to be, is that its provisions eventually tend to become scriptural and that those who have an

would be closer to 40 years. See WILLIAM J. QUIRK & R. RANDALL BRIDWELL, *JUDICIAL DICTATORSHIP* 69-70 (1995).

61. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

62. Although Jefferson in 1787 might have given judges some leeway, by the early 19th century he was clearly discontented with the route the independent judiciary had taken. For example, in 1820 Jefferson wrote to a certain William Jarvis that “[t]o consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy.” Letter from Thomas Jefferson to Jarvis (1820), in THOMAS JEFFERSON ON DEMOCRACY, *supra* note 32, at 64 (second alteration in original).

63. See discussion *infra* Part II.A.

64. The public must also be prepared to trust the current leadership of the United States to write a document guaranteeing as much or more freedom than that currently possessed by Americans.

65. Although the states have the power to initiate the amendment process, all 27 amendments were proposed in Congress. To be successfully ratified, a proposed amendment must pass both houses of Congress by a two-thirds vote and thereafter be ratified by three-fourths of the state legislatures. See U.S. CONST. art. V.

66. Of the thousands of constitutional amendments proposed between 1790 and the present day, only 17 became part of the Constitution. The increasing number of proposed amendments in recent years demonstrates a heightened dissatisfaction with the current document. For criticism of this increased tendency to propose constitutional amendments, see John Conyers, Jr., *Is the United States Constitution a “Rough Draft”?* *An Open Letter to the 105th Congress*, 6 WIDENER J. PUB. L. 323 (1997), and Kathleen M. Sullivan, *Constitutional Amendmentitis*, AM. PROSPECT, Fall 1995, at 20.

advantage under its provisions, and so have an interest in its perpetuation, are able to organize active protection for its provisions.⁶⁷

Because the legislative and executive branches are as a practical matter unable to alter the foundational document, the fate of the Republic has by default fallen into the hands of judges. Chance and circumstance thus return one full circle back to the countermajoritarian difficulty, which is primarily concerned with one question: How can a court conduct its constitutional duty to secure core constitutional rights and structural principles, which may necessitate striking down popularly enacted legislation, and simultaneously maintain its legitimacy as a counter-democratic force? Political legitimacy is the touchstone of an independent judiciary.⁶⁸ However, academics often focus on “theoretical” or “actual” legitimacy; that is, whether the theory at hand solves the legal problem in the minds of a majority of legal scholars. The more pressing concern is one of “perceived” legitimacy.⁶⁹ Even where an exercise of power is in a theoretical sense justifiable (or even the undoubtedly correct conclusion), if the politicians or citizens simply *perceive* the judiciary to be exceeding its constitutional mandate, the countermajoritarian difficulty remains unresolved.⁷⁰ In the following pages I hope to demonstrate that judges need and deserve guides more practical than the prevalent esoteric plunges into constitutional theory if the judiciary’s historical role in American society is to be preserved.

67. REXFORD G. TUGWELL, *THE EMERGING CONSTITUTION* at xv (1974).

68. “The Court’s power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.” *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992).

69. *See, e.g.*, Leslie Gielow Jacobs, *Even More Honest Than Ever Before: Abandoning Pretense and Recreating Legitimacy in Constitutional Interpretation*, 1995 U. ILL. L. REV., 363, 370 (describing a second type of legitimacy relying upon “general public perception”).

70. Some scholars have argued, with considerable evidentiary support, that the premise that the Court is antimajoritarian is in fact a faulty one and therefore the countermajoritarian difficulty does not in fact exist. *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 581 (1993). But even if one concedes the validity of this proposition, the *perception* of an anti-democratic Court persists. Hence, the difficulty remains unresolved.

II. THE ELECTRONIC REPUBLIC: A THREAT TO JUDICIAL INDEPENDENCE?

A. A Tale of Two Cities: Technological Progression and Republican Decline

Technology is expanding at an unprecedented rate.⁷¹ The advances in communications technology are profoundly affecting the manner in which people receive information regarding national events and how they view their civic role in modern American society. The former president of the Public Broadcasting System, Lawrence Grossman, sees the emergence of an "Electronic Republic" as "a revolution that is transforming our entire system of government before our very eyes."⁷²

The dramatic advance in technology provides the conscientious citizen with an unprecedented ability to access large quantities of information or to communicate with others.⁷³ Due to a relatively recent ability to travel long distances in a brief amount of time to appear in person, to communicate information instantaneously over the airwaves via satellite, or to hold "townhall meetings" over the Internet, members of Congress are in contact with their constituents far more often and in more ways than the Founders could have dreamed.⁷⁴ Both houses of Congress, as

71. In 1965, Intel co-founder Gordon Moore began issuing predictions regarding the amount of information storable in a single silicon computer chip. Today, the principle known as Moore's Law holds that the capacity of a silicon computer chip can be expected to double every 18 months. If this extraordinary rate of expansion continues for the next 20 years, a computation currently requiring an entire day of processing will be completed in fewer than 10 seconds. See GATES, *supra* note 8, at 31, 33.

72. Lawrence K. Grossman, *Reshaping Political Values in the Information Age: The Power of the Media*, VITAL SPEECHES, Jan. 15, 1997, at 205, 205.

73. Access to the Internet for those of modest means may not even require an investment in computer hardware, due to the installation of web-linked computers in public libraries, in classrooms, and even in fast food restaurants and truck stops. In July of 1998, a Burger King restaurant in New York City began offering 20 minutes of Internet time with a minimum purchase. See Michel Marriott, *New 'Combo' Meal: Dine and Surf*, N.Y. TIMES, July 30, 1998, at D3.

74. In a historical moment that illustrates the power of the new technology, the House of Representatives on September 11, 1998 at 2 p.m. EST placed the 445-page report from the Office of Independent Counsel on the Internet, making it simultaneously available to the American people, members of Congress, and the President. See *Referral to the United States House of Representatives Pursuant to Title 28, United States Code, § 595(c), Submitted by the Office of the Independent Counsel September 9, 1998* (visited Jan. 29, 1999) <<http://icreport.loc.gov/icreport/1cover.htm>>. Millions of Americans with the means to access the Internet were efficiently and inexpensively given the opportunity to fully inform themselves of a matter of great national concern and thus were in a better position to advise their representatives on what course the Congress should take.

well as the President, maintain web pages.⁷⁵ Furthermore, most members of Congress have their own personal web pages in order to better communicate with their constituents,⁷⁶ as do all of the leadership offices⁷⁷ and committees.⁷⁸ Likewise, every executive department, from the Internal Revenue Service to the Environmental Protection Agency, operates its own web page.⁷⁹

Unremarkably, given the prohibition of television cameras in its courtroom,⁸⁰ the Supreme Court does not have a web page, nor do any of the Justices maintain

75. The Senate and House web sites can be found respectively at *The United States Senate* (visited Nov. 4, 1998) <<http://www.senate.gov>>, and *U.S. House of Representatives* (visited Nov. 4, 1998) <<http://www.house.gov>>. The Library of Congress provides an extensive amount of legislative material at its "Thomas" web page, see *Thomas: U.S. Congress on the Internet* (visited Jan. 23, 1999) <<http://thomas.loc.gov/>>, and Cornell Law School's Legal Information Institute maintains a searchable version of the United States Code, see *United States Code* (visited Sept. 28, 1998) <<http://fatty.law.cornell.edu/uscode/index.html>>. The President can be reached at *Welcome to the White House* (visited Nov. 4, 1998) <<http://www.whitehouse.gov/WH/Welcome.html>>.

76. For reasons of "security" and a bit of formality, most members of Congress only respond by "snail mail" to e-mail messages from constituents. The degree to which the transition from letters, phone calls, and faxes to e-mail will alter legislator-constituent relations remains to be seen (particularly given the fact that an e-mail message entails no significant cost). See Bill McAllister, *Internet is Finding a Home on the Hill*, WASH. POST, Feb. 17, 1998, at A13; J. Scott Orr, *E-mail to Hill: Hello? Hello? Some Lawmakers Prove to be Offline*, STARLEDGER (Newark, N.J.), Sept. 8, 1998, at 1, available in 1998 WL 16957702; Nancy E. Roman, *How Much Clout Does E-mail Have in Congress?*, WASH. TIMES, June 8, 1998, at A10.

77. For example, the Speaker's Office is located at *Speaker News* (visited Nov. 4, 1998) <<http://speakernews.house.gov>>. For a listing of links for majority and minority leadership offices in the House of Representatives, such as the House Whip, see *The U.S. House of Representatives House Leadership Web Services* (visited Nov. 4, 1998) <http://www.house.gov/orgs_pub_hse_ldr_www.html>.

78. The official Senate committee sites provide such information as the text of pending bills, committee reports, and veto/signature information. See *Senate Committees* (visited Nov. 4, 1998) <<http://www.senate.gov/committee/committee.html>>, for a list of links to the respective web sites.

79. The Library of Congress offers connections to all of the executive branch offices, departments, and independent agencies. See *Official Federal Government Web Sites* (visited Nov. 4, 1998) <<http://lcweb.loc.gov/global/executive/fed.html>>. The quantity and quality of information at each site varies from the standard contact information and explanation of purposes, for example, the Coast Guard home page, see *U.S. Coast Guard Pacific Northwest Region* (visited Nov. 4, 1998) <<http://www.webcom.com/~d13www/welcome.html>>, to the Env'tl. Protection Agency's impressive offering in adobe photographic format of nearly all of the Code of Federal Regulations sections pertaining to environmental law, see *United States Environmental Protection Agency, Laws & Regulations* (visited Jan. 28, 1999) <<http://www.epa.gov/epahome/rules.html>>.

80. Some Justices on the Court vociferously object to the idea of cameras intruding on the work of the Supreme Court. Citing his concern that a judge's questioning or a lawyer's reply during oral argument might be reduced to a sound bite, Justice David Souter offered a memorable sound bite to the press: "The day you see a camera come into our courtroom it's going to roll over my dead body." David Hatch, *Cameras in Court: House Panel Moves on Proposal*, ELECTRONIC MEDIA, Mar. 16, 1998, at 38.

personal web pages.⁸¹ Nevertheless, the Court embraces technology when its use will not compromise institutional integrity.⁸² In addition, several organizations unaffiliated with the government supply numerous full-text Supreme Court decisions over the Internet.⁸³ Moreover, some court materials of public interest that are otherwise relatively difficult or cumbersome to obtain are regularly posted on the Internet,⁸⁴ sometimes even at very the moment they are released.⁸⁵

Unfortunately, the fast pace at which new technological capabilities move information has led the President and members of Congress to employ the use of sound-bite saturated news conferences⁸⁶ and emotionally laden public relations

81. The Administrative Office of the U.S. Courts does maintain a site on behalf of the Federal Courts. See *The Federal Judiciary Home Page* (visited Nov. 4, 1998) <<http://www.uscourts.gov>>. In addition, at least two web sites are dedicated solely to the task of honoring Justice Scalia. See *Cult of Scalia* (visited Nov. 4, 1998) <<http://members.aol.com/schwenkler/scalia/index.htm>>, which refers to the Justice as "perhaps the greatest jurist of our time," and *The Scalia Shrine* (visited Nov. 4, 1998) <<http://student-www.uchicago.edu/users/jfmitche/scalia>>. No other Justices on the Supreme Court are currently being "honored" with unofficial web pages.

82. The Supreme Court did not reject the first brief ever filed with the Court on CD-ROM in February 1997. The brief was an amicus curiae filed by a Philadelphia law firm in connection with the Internet free speech case, *Reno v. ACLU*, 117 S. Ct. 2329 (1997). See Martha Woodall, *Supreme Court Invited to Go Digital*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 22, 1997, at A9. However, the Supreme Court did not officially accept the CD-ROM version of the brief either, relying instead on the paper version. In July of the same year, the U.S. Court of Appeals for the Federal Circuit in a patent case, *In re Berg*, 140 F.3d 1428 (1998), became the first federal court to officially accept a CD-ROM submission. See M.A. Stapleton, *1st Brief on CD-ROM Finds Favor with U.S. Appeals Court*, CHI. DAILY L. BULL., July 30, 1997, at 1.

83. Cornell Law School's Legal Information Institute offers the texts of all Supreme Court decisions since 1990, as well as the full text of a large number of historical decisions prior to 1990 accessible by the Internet user's choice of topic, party name, or opinion author. See Cornell Law School, *Welcome to the Legal Information Institute* (visited Nov. 4, 1998) <<http://www.law.cornell.edu>>.

84. For example, the State Tobacco Information Center provides the text of (quite lengthy) complaints filed by Attorneys General in the ongoing tobacco litigation. See, e.g., *State of Oklahoma v. RJ Reynolds et. al. Original Complaint* (visited Nov. 4, 1998) <<http://stic.neu.edu/Ok/OKcomplaint.html>>.

85. A striking example is the heavily-publicized trial of English nanny Louise Woodward in which Massachusetts Judge Hiller Zobel released his opinion exclusively via the Internet. See *Au Pair Trial Decision* (visited Nov. 4, 1998) <<http://www.lawyersweekly.com/woodward.htm>>. The placing of court decisions on the Internet at the time of announcement is an encouraging development for it facilitates free, immediate access to judicial pronouncements unfiltered by the media.

86. A "sound bite" that typically commanded 42.2 seconds of a viewer's attention during the 1968 presidential campaign had, by the 1988 Presidential race, shrunk to a thin 9.8 seconds. See PAUL TAYLOR, *SEE HOW THEY RUN* 258 (1990). Despite the paucity of information they convey, sound bites effectively communicate information in a manner more likely to be remembered by an often distracted and uninterested public. The Medicare debate presents a textbook example. President Clinton and Congressional Democrats hammered the Republicans with deftly executed sound bites in commercials throughout the 1996 Presidential campaign. The Democrats were so effective in characterizing the Republicans as Medicare-cutters that while a great deal of the people polled by the *Washington Post* could not name even one

events in an attempt to assay the whims of a finicky electorate which in 1994 dramatically handed the Republican party both houses of Congress and yet by 1996 had turned the architect of the Republican "Revolution" into the bogeyman of American politics.⁸⁷ The model of the independent legislator, who comes to a conclusion based upon what she believes to be the best outcome even though her position may sometimes conflict with the opinions of previously unpolable or less-knowledgeable constituents, has in large part given way to the democratic legislator model. When faced with the prospect of voting against popular legislation, Congress has at times abdicated its responsibility to consider the constitutionality of its Acts, leaving to the courts the task of burying the ill-fated statutes.⁸⁸

Yet despite the enhanced ability to communicate their views to their representatives and evaluate her or his performance, a large majority of Americans are deeply dissatisfied and darkly cynical about their government.⁸⁹

Senator from their state (54%) or the gender of their representative (25%), an "impressive" 69% knew that the Republicans were proposing larger "cuts" in Medicare than the Democrats. See Richard Morin, *Who's in Control? Many Don't Know or Care*, WASH. POST, Jan. 29, 1996, at A6. Successful political tactics aside, debate by bumpersticker-like slogans does not make a deliberative democracy.

87. Newt Gingrich's approval rating sunk as low as 25% prior to his departure from the House following the 1998 congressional elections. See *Gingrich's Popularity Plummets* (visited Nov. 30, 1998) <<http://cnn.com/ALLPOLITICS/1997/03/29/newt.future/index.html>>. However, Republicans concerned that Gingrich's popularity derailed the legislative agenda he made possible can take solace in the fact that only 53% of Americans polled in a January 1996 *Washington Post* poll knew Gingrich was the Speaker of the House. See Morin, *supra* note 86, at A6.

88. In 1996, Congress passed the Communications Decency Act which sought to prohibit "patently offensive" and "indecent" material transmitted over the Internet. 47 U.S.C.A. § 223(a), (d) (West Supp. 1998). Few observers seriously believed that the Act, which extended beyond "unprotected" speech such as obscenity, could survive the strict examination required of content-based speech regulations. See *Hands Off the Internet, The Issue: Supreme Court Takes Up Communications Decency Act, Our View: It's Plainly Unconstitutional—We Hope*, ROCKY MOUNTAIN NEWS, Mar. 21, 1997, at 56A, available in 1997 WL 6826747; *New Cyberporn Law Is Far Too Restrictive*, TENNESSEAN, Mar. 23, 1997, at 4D, available in 1997 WL 10092683. See generally *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (striking down a content-based hate speech ordinance using a strict scrutiny-like analysis). Nevertheless, Congress passed the Act by wide margins. See 142 CONG. REC., S720 (daily ed. Feb. 1, 1996) (conference report passing in the Senate by a vote of 91-5 with three absent). The Supreme Court responded by unanimously striking the law down on vagueness grounds. See *Reno v. ACLU*, 117 S. Ct. 2329, 2346 (1997). Likewise, Congress passed the fated Gun-Free School Zones Act and Religious Freedom Restoration Act with little or no consideration of the constitutionality of its actions. See generally *United States v. Lopez*, 514 U.S. 549 (1995); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

89. In January 1997, an astounding 75% of Americans polled agreed that ethical violations are typical of most politicians. See *CNN/USA TODAY/Gallup Poll—January 6, 1997* (visited Jan. 27, 1999) <<http://allpolitics.com/1997/01/06/gingrich.poll/poll.html>> (conducted Jan. 3-5, 1997); see also SUSAN J. TOLCHIN, *THE ANGRY AMERICAN: HOW VOTER RAGE IS CHANGING THE NATION* 9, 108 (1996) (citing polling data showing a tremendous drop in public confidence in governmental institutions since 1964). Much of the declining confidence in government has been attributed to unsettling historical developments such as Watergate, Vietnam, oil shortages,

Canadian media observer Marshall McLuhan notes that "as the speed of information increases, the tendency for politics is to move away from representation and delegation of constituents, toward immediate involvement of the entire community in the central acts of decision."⁹⁰ Furthermore, this technologically empowered majority, having lost faith in its elected leaders, increasingly seeks to circumvent or limit the power of its congressional representatives and advance majoritarian causes through such devices as statewide ballot initiatives⁹¹ and term limits proposals.⁹² Finally, the 1992 candidacy of Ross Perot highlighted the fact that the two-party system fails to sufficiently reflect the policy preferences of many Americans.⁹³

An unfortunate aspect of the pervasive cynicism is that it primarily derives from factually exiguous impressions rather than healthy skepticism which endeavors to inform itself of current events. Individuals today are generally busy, distracted,⁹⁴ uninterested in political affairs, and overwhelmed by the amount of information available to them.⁹⁵ Large portions of the population have neglected their civic duties by lapsing into ignorance of even the most basic facts concerning our system of government, a republican constitutional democracy.⁹⁶

and adverse economic conditions. See TAYLOR, *supra* note 86, at 226. Others have argued that:

The expansion of the role of government has especially increased the number of policy issues addressed by government and, in many instances, the number of outcomes each issue may have. The result has been a decline in voter ability to express preferences by voting. This has produced a decline in voter turnout, increased voter apathy and alienation and, in some instances, a rise in the power of single-issue interest groups as a method of expressing at least the most salient of a voter's preference.

MARCIA LYNN WHICKER ET AL., *THE CONSTITUTION UNDER PRESSURE* 145 (1987); cf. SUZANNE GARMENT, *SCANDAL: THE CULTURE OF MISTRUST IN AMERICAN POLITICS* (1991) (documenting a dramatic rise in the number of political scandals and their corrosive effect on government).

90. Grossman, *supra* note 72, at 206.

91. See *infra* text accompanying notes 123-26.

92. In February 1997, the latest vote in the House of Representatives on a constitutional amendment to impose term limits on members of Congress fell 69 votes short. The measure drew fewer votes than on earlier occasions due in part to disagreement on the pro-term limit side as to the appropriate number of terms. See *House Rejects Bill to Impose Term Limits*, INTELLIGENCER J. (Lancaster, Pa.), Feb. 13, 1997, at A1.

93. See generally CAROLYN BARTA, *PEROT AND HIS PEOPLE: DISRUPTING THE BALANCE OF POLITICAL POWER* (1993).

94. Grossman notes that the republican model of the past where politics provided the "centerpiece of the nation's outdoor social and community life" has been "replaced by television's endless diversions and amusements, [and] the nonstop availability of nonpolitical entertainment and sports to occupy our time and distract us from reality." Grossman, *supra* note 72, at 207.

95. See TOFFLER, *supra* note 4, at 301-05 (discussing how the "information overload" encountered in modern society leads to "cognitive overstimulation" adversely affecting an individual's ability to "make effective, rational decisions").

96. In a *Washington Post* poll, 54% could not name even one senator from their state; 67% could not identify the congressional representative from their district; a paltry 34% correctly answered that Bob Dole was the Senate Majority Leader, even though Dole was then wrapping up a presidential nomination; and, somewhat supporting the validity of John Nance Garner's

Indeed, the current state of affairs augments the wisdom of the Founders in establishing a system of government which restrains the passions and whims of the majority.⁹⁷

Moreover, the electorate's lack of knowledge concerning the judicial branch suggests that the Supreme Court is, for the moment, still well-sheltered from the heat of public opinion.⁹⁸ Little over half know of the Court's central function as the final authority⁹⁹ on whether a law is constitutional.¹⁰⁰ Prior to his presiding over the Clinton impeachment proceeding in the Senate, only a minuscule 6% could correctly identify the current Chief Justice.¹⁰¹ A recent poll conducted by the National Constitutional Center found that 40% of those interviewed did not realize there are three branches of government,¹⁰² and 25% could not name any of the rights guaranteed by the First Amendment.¹⁰³

observation that the vice presidency is "not worth a pitcher of warm spit," 40% failed to correctly identify the Vice President. Morin, *supra* note 86, at A6. Despite these uncomfortable statistics, it is important to note that the American public is not a single, easily definable mass. The polls do not accurately reflect the knowledge and fervor of the relatively few activists who nevertheless have a disproportionate impact on public policy and public opinion.

97. In *The Federalist No. 78*, Hamilton wrote:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men or the influence of particular conjunctures sometimes disseminate among the people themselves; and which, though they speedily give place to better information and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

THE FEDERALIST NO. 78, *supra* note 21, at 231.

98. One scenario holds that due to their ignorance, citizens will be unable to properly assess the charges against the judiciary made by those with ulterior motives and a propensity to distort the truth. On the other hand, one might speculate that if citizens through the use of technology are better able to acquaint themselves with modern constitutional law, they might pull the curtain away to reveal an intellectually embarrassing jurisprudence. A possible synthesis of these two concerns is that politically active citizens will use the new technology to enhance their knowledge of government activity and ability to organize opposition to disfavored policy, while those who remain ignorant of the political system will become increasingly disenchanted with governmental institutions.

99. There are, of course, the rare situations in which a court for primarily prudential reasons employs the political question doctrine, declares the issue nonjusticiable, and leaves the resolution of the matter to the other branches. *See, e.g.*, *Orlando v. Laird*, 443 F.2d 1039, 1043-44 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971) ("The form which congressional authorization should take is one of policy, committed to the discretion of the Congress and outside the power and competency of the judiciary, because there are no intelligible and objectively manageable standards by which to judge such actions.").

100. *See* Morin, *supra* note 86, at A6.

101. *See id.*

102. *See* Peter Jackson, *Judges, State Lawmakers at Odds*, HARRISBURG PATRIOT & EVENING NEWS (Pa.), Oct. 5, 1997, at B13. Presumably the "forgotten branch" is the judiciary; one wonders how many Americans would agree if the current Congress proposed to scrap the Supreme Court as wasteful governmental spending on left-wing causes.

103. *See id.* Jackson, being a reporter, is presumably better educated on the First Amendment than the typical citizen. Nevertheless, he makes a fundamental error in stating that "one-quarter cannot name any of the rights granted by the First Amendment." *Id.* (emphasis added). Central

Thus, despite the increased access to information and their representatives, whether average voters in fact use the access to further their civic duties as citizens in a republic is an altogether different matter.¹⁰⁴ The wide variety of options now available to individuals facilitates a retreat into insular enclaves to entertain only those (often frivolous) topics citizens wish to address and to hear only those voices with which they agree.¹⁰⁵ Such activity was not unusual prior to the late twentieth century advances in communication technology, but from the multitude of narrowly focused cable channels to the personally tailored electronic newspaper of the not-so-distant future, the immersion has never been easier.

Furthermore, the elites in the press, in Congress, and in the state legislatures are losing their position as the gatekeepers of “proper” debate and verifiable information.¹⁰⁶ In Graeme Browning’s informative guide to technologically inspired political action, *Electronic Democracy*, he points out the duality that “[a]t the same time that the World Wide Web provides community activists who can’t afford to travel to Washington access to a wide range of Environmental Protection Agency data on toxic chemicals, it also gives white supremacist groups a soapbox from which to spout their loathsome theories.”¹⁰⁷ Nevertheless, the growing prominence of on-line journalism demonstrates that it will soon lose the

to the concept of the Bill of Rights is the notion that it merely *recognized* pre-existing fundamental rights which do not flow from the government but rather inhere in the individual.

104. Social commentators have long noted how the characteristics of the television medium affect the reporting of news which is often chosen on the basis of its entertainment value. See, e.g., NORMAN CORWIN, *TRIVIALIZING AMERICA: THE TRIUMPH OF MEDIOCRITY* 33-39 (rev. & enlarged ed. 1986).

105. Brown University President Vartan Gregorian observes that

the popular prediction that electronic communication would create a global village is wrong. [Instead,] [w]hat is being created . . . is less like a village than an entity that reproduces the worst aspects of urban life; the ability to retreat to small communities of the like-minded, where we are safe not only from unnecessary interactions with those whose ideas and attitudes are not like our own, but also from having to relate our interests and results to other communities.

Grossman, *supra* note 72, at 207. The Internet may result in more than a “retreat to small communities of the like-minded,” but in fact a retreat into solitude—a trend with profound implications for both psychological health and one’s ability as an individual to interact with groups of any size. See Amy Harmon, *Sad, Lonely World in Cyberspace*, N.Y. TIMES, Aug. 30, 1998, at A1. *But cf. Internet Users Aren’t Isolated Loners, Report Finds*, COMM. DAILY, Dec. 29, 1997, available in 1997 WL 13781797 (discussing surveys which found that Internet users are “more socially and politically active than many nonusers”).

106. See *ELECTIONS IN CYBERSPACE: TOWARD A NEW ERA IN AMERICAN POLITICS* at v (Anthony Corrado & Charles M. Firestone eds., 1996) (stating that the new communication technology is “reducing the need for traditional intermediaries (such as journalists, editors, and other gatekeepers) to filter or alter political messages and information”) (parenthetical in original); Perritt, *supra* note 5, at 164 (“The Internet threatens civic institutions such as the press, old interest groups, and professions (including the bar).”) (parenthetical in original).

107. GRAEME BROWNING, *ELECTRONIC DEMOCRACY: USING THE INTERNET TO INFLUENCE AMERICAN POLITICS* 71-72 (1996).

stigma of chaos, sensationalism, and unreliable reporting and take a position equal, if not superior, to that of traditional journalism.¹⁰⁸

In sum, political structures designed to rein in democratic excess are in decay, as “[b]oth American political culture and American political institutions have become even less republican and more democratic during the twentieth century.”¹⁰⁹ It is no coincidence that an atmosphere of declining political courage¹¹⁰ corresponded with the election in 1992 of a President inclined to craft his words, if not his agenda, by polls more often than principles¹¹¹ and a Congress where constituent service is next to godliness.¹¹² Beyond the issue of whether the President and Congress rely too heavily on polling is the more fundamental question of whether polls are “telling people what to think.”¹¹³ If the pervasive use of polls and publishing of poll results are corroding every citizen’s ability to carefully deliberate and reach a conclusion independent of majority whim, the prospects for sound public policy grounded in logic and truth are on the decline.

108. See Jamie Heller, *Industry View*, N.Y. TIMES, Aug. 3, 1998, at D6. Cyberjournalist Matt Drudge, a pioneer in the field of on-line journalism who has raised skeptical eyebrows in the traditional media, observes that

We have entered an era vibrating with the din of small voices. Every citizen can be a reporter, can take on the powers that be. . . . The [Internet] gives as much voice to a [31]-year-old computer geek like me as to a CEO or speaker of the House. We all become equal.

Matt Drudge, *Anyone with a Modem Can Report on the World, Address Before the National Press Club* (June 2, 1998) (visited Nov. 12, 1998) <<http://www.frontpagemag.com/Archives/miscellaneous/drudge.htm>>.

109. Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731, 809 (1997).

110. Historian Michael Beschloss notes that the prevalence of polls and heightened media scrutiny make the exercise of political courage greatly more difficult today than only 30 years ago. Michael Beschloss, *Address at the Kennedy School of Government* (Nov. 11, 1997).

111. The use of a strong polling strategy by presidents is a phenomenon which commenced in the 1970s. The cost of polling reflects its increased use. Whereas in 1989 and 1990 George Bush spent \$216,000 for public opinion polls, Bill Clinton spent nearly \$2 million in 1993 alone. Polling served Clinton well in terms of giving him the ability to closely tailor his message so that it will resonate with the public. See James M. Perry, *Clinton Relies Heavily on White House Pollster to Take Words Right Out of the Public’s Mouth*, WALL ST. J., Mar. 23, 1994, at A16. The contention that throughout his term of office President Clinton based his policy positions on the polls drew a rejoinder from advisor Paul Begala, who argued that the “[a]dministration uses polls as feedback, not to chart a course.” See James Carney, *Playing the Numbers*, TIME, Apr. 11, 1994, at 40, 40.

112. In a survey of senior congressional staffers, 56% cited effective constituent service to be the key factor determining a legislator’s political support, compared to 11% who believed the legislator’s legislative record to be most important. See Eric O’Keefe & Aaron Steelman, *Why Incumbents Yearn For Reforms*, WASH. TIMES, Aug. 17, 1997, at B4. In addition, an American National Election Study discovered that of the voters who requested service from their representative and were “very satisfied” with that service, 64.7% voted for the incumbent compared to 3% for the challenger. *Id.*

113. Karen Hosler, *Do Polls Tell People What to Think?*, BALTIMORE SUN, Sept. 19, 1996, at 2A. While the effect of polling data on public opinion has not yet been conclusively established, “news reports based on daily waves of ever more finely-tuned polls clearly have an impact on elections.” *Id.*

The sphere of ideas deemed to be “proper” would be increasingly dictated by the subtle, coercive effect of the majority viewpoint.¹¹⁴ Such an atmosphere also threatens the proper functioning of an independent judiciary guided only by precedent, a logical interpretation of statutes and the Constitution, and the long-standing traditions of the American people.

In short, the United States long ago began moving away from its republican roots towards a system more closely resembling a pure democracy.¹¹⁵ More than ever before, the technology is now in place for citizens to exert direct or indirect control over the decisions of their representatives. The leadership of activist organizations, effectively locating and bringing into the fold converts from the masses,¹¹⁶ could become the power brokers of the next century. Due to developments unforeseen by the Founders, the burden of keeping the constitutional ship on a proper course is today largely the province and duty of the “last republican bastion in our democratic society”: the Judiciary.¹¹⁷

Notwithstanding the egalitarianism that permeates our legal and social institutions, the entrustment of such a delicate task to elites imbued with atypical intelligence and temperament is nothing new. As William Henry notes in his “heretical” book *In Defense of Elitism*, “[i]n the unspoken assumptions that underlie everyday discourse, we are an elitist society because nothing else is logical. In the exchange of lies and euphemisms that constitutes the surface of

114. The coercion of the majority viewpoint is poignantly illustrated by a dialogue in *The Fountainhead*:

“You know,” [the Dean] said, “you would sound much more convincing if you spoke as if you cared whether I agreed with you or not.”

“That’s true,” said Roark. “I don’t care whether you agree with me or not.” . . .

“You don’t care what others think—which might be understandable. But you don’t care even to make them think as you do?”

“No.” . . .

. . . .

“ . . . You are a man not to be encouraged. You are dangerous.”

“To whom?” asked Roark.

But the Dean rose, indicating that the interview was over.

AYN RAND, *THE FOUNTAINHEAD* 26 (Signet Books 1971) (1943).

115. For example, the ratification of the 17th Amendment in 1913 implemented the mechanism for the direct election of senators. See C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* 27 (1995) (“The driving force behind the Seventeenth Amendment was the furtherance of democracy, which is exactly what the founders were trying to prevent when they deliberately placed the Senate beyond the immediate popular reach.”).

116. Several factors contribute here. For example, compared to the expense of mass mailings (materials, purchasing lists, etc.), the expense of sending e-mail messages is negligible. Furthermore, substantially more effort is required on the part of the would-be financial or petition supporter to contact the activist organization—writing a letter and mailing a request for information or picking up a phone and calling long distance compared with the convenience of typing two lines and e-mailing them when prompted to do so on an organization’s web site, a location that one might have stumbled upon by happenstance or a link from yet another politically aligned activist organization.

117. Graber, *supra* note 109, at 810.

polite discourse, we are egalitarian, because nothing else is diplomatic."¹¹⁸ In accordance with this principle, the Founders delegated the task of constitutional interpretation to the elites of the judicial branch and insulated that branch from undue influence by the masses. The problem now confronting the judiciary is that an electorate often unwilling to defer to the wisdom of its representatives is, in theory at least, less likely to defer to the wisdom of unelected judges.

However, given the current insulation of the judiciary from the public, one might wonder why a Supreme Court Justice, much less a lower federal court judge, should be concerned about the impulses of an electorate which hardly seems to be aware of the judiciary's existence. The answer is that, unlike the television revolution, the computer revolution *will* effect the judiciary.

The Web is but the latest development in a long chain of technological advances which have threatened the political establishment. William Jennings Bryan's use of the railroads to take his message directly to the people, President Franklin D. Roosevelt's fireside chats, the televising of the 1960 Kennedy-Nixon debates, and the 1992 Ross Perot presidential campaign are all instances in which "technology and politics have intersected with such force that the political landscape was unalterably changed."¹¹⁹ Unlike television, however, the Internet will impact the judiciary because judges communicate almost exclusively through the use of text, which is not readily convertible to a fast-paced visual medium. The Internet is a text and (usually) still-picture based medium.¹²⁰ On television, the nuances of a court decision are lost in the translation; often the pronouncements cannot be fully appreciated or understood without the context of those words and the building blocks of precedent used to argue for the holding.

The masses, to the extent they are even aware that a decision was issued, usually only learn of the holding and have no idea how the majority reached the decision it did.¹²¹ The lack of in-depth knowledge stems from a variety of

118. WILLIAM A. HENRY III, IN DEFENSE OF ELITISM 31 (1994).

119. BARTA, *supra* note 93, at 386-87. Barta contends that the Perot candidacy represents the fourth technology driven major political change in the past 100 years: "The sea change of 1992 was the emergence of 'electronic campaigning' largely exploited by Ross Perot—talk shows, cable TV, electronic town halls, infomercials, campaign videos, satellite television, faxed information, computer bulletin boards—all aimed at more participatory democracy." *Id.* at 387.

120. Technological trends suggest that the computer and television will eventually merge into a single device, what some call the "teleputer." GEORGE GILDER, LIFE AFTER TELEVISION: THE COMING TRANSFORMATION OF MEDIA AND AMERICAN LIFE 45 (rev. ed. Norton 1990). Gilder optimistically argues that the teleputer will shun television's vices and improve upon all of its benefits:

Rather than exalting mass culture, the teleputer will enhance individualism.

Rather than cultivating passivity, the teleputer will promote creativity. . . .

Perhaps most important, the teleputer will enrich and strengthen democracy and capitalism around the world. . . .

Television is a tool of tyrants. Its overthrow will be a major force for freedom and individuality, culture and morality. That overthrow is at hand.

Id. at 46-49.

121. Sometimes no decision at all, such as an order denying review of a lower court decision, is erroneously interpreted by the press to be a decisive statement of the law. See Ruth Bader Ginsburg, Address, *Informing the Public About the U.S. Supreme Court's Work*, 29 LOY. U.

practical considerations. The widespread lack of interest by viewers and readers determines the amount of information that those who are interested in judicial opinions are able to read and hear. In addition, the traditional print and (in particular) video and radio media cannot feasibly print or read long excerpts from court opinions due to the inherent limitations of each medium. In contrast, individuals at their leisure can read court opinions on the Internet, and interest groups—as well as ordinary citizens—will increasingly offer their line by line interpretation and criticism of controversial cases.¹²² Prior to the advent of the new technology, such an exchange would have been too time consuming, frustrating, and impracticable, but in the near future, if not already, it will be second nature.

It is within this environment that judges will increasingly be called upon to scrutinize ballot initiatives—laws directly enacted by the majority which have not been filtered through the legislative process where minority interests can halt or at least modify a law prior to enactment.¹²³ Judges are more vulnerable to attacks that this supposedly more democratic procedure has been short-circuited by judges bent on thwarting majority will,¹²⁴ a charge sometimes even leveled by other judges.¹²⁵ In addition to the novel problems of statutory interpretation presented by a statewide ballot initiative,¹²⁶ there is the problem that judges will

CHI. L.J. 275, 279 (1998).

122. See, e.g., *Rebuttal to Dissent in Romer v. Evans* (visited Nov. 5, 1998) <<http://www.rdrop.com/~half/Creations/Writings/Romer-v-Evans/ScaliaRebuttal.html>>.

123. For an in-depth analysis of judicial interaction with laws passed by popular vote, see Patrick L. Baude, *A Comment on the Evolution of Direct Democracy in Western State Constitutions*, 28 N.M. L. REV. 343 (1998); Kimberle Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683 (1998); Marci A. Hamilton, *The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 1 (1997); Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735 (1998); Matthew L. Spitzer, *Evaluating Direct Democracy: A Response*, 4 U. CHI. L. SCH. ROUNDTABLE 37 (1997); and Michael Vitiello & Andrew J. Glendon, *Article III Judges and the Initiative Process: Are Article III Judges Hopelessly Elitist?*, 31 LOY. L.A. L. REV. 1275 (1998).

124. Occasionally, political actors will submit that the activity of striking down laws passed by “self-governing people” is alone sufficient evidence of “judicial activism.” Former Attorney General Edwin Meese in June 1997 congressional hearings maintained, “[i]t is hard not to regard the *Romer* decision as the pinnacle of judicial arrogance: Six appointed justices struck down a law passed by 54 percent of a state’s voters in a direct election, the most democratic of all procedures.” *Judicial Activism: Defining the Problem and Its Impact: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 105th Cong. 17, 23-24 (1997) (statement of Edwin Meese III, Heritage Foundation).

125. The Ninth Circuit’s decision in *Coalition for Economic Equity v. Wilson*, with its strong criticism of the district court judge, is itself notable for its commentary on the countermajoritarian difficulty. Judge Diarmuid O’Scannlain, writing for the three-judge court, asserted that “[a] system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy.” *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 699 (9th Cir.), *cert denied*, 118 S. Ct. 397 (1997).

126. See generally Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995) (exploring the methodology used by courts when interpreting laws enacted through the initiative process).

be writing for a different audience. Although voters might be concerned when the striking down of a legislatively enacted statute results in a setback to a policy position they support, human nature suggests that citizens will more carefully examine the basis for judicial intervention if an initiative in which they personally invested a vote is nullified.

California's Proposition 209, the most dramatic example of statewide initiatives of recent years, passed in November of 1996 by a margin of 54 to 46%¹²⁷ and was unsuccessfully challenged in federal court.¹²⁸ That same year, however, a Colorado constitutional amendment passed via a statewide ballot that purported to merely wipe out all statewide local sexual orientation-based anti-discrimination ordinances met its fate in *Romer v. Evans*¹²⁹ when the Supreme Court struck the measure down by a 6-3 count.¹³⁰ The *Romer* decision elicited anger among conservatives, especially the "religious right," and may have provided a catalyst for the activity by activists and members of Congress discussed in the following part.

B. Developments in the 105th Congress: Oversight or Activism?

Given the vital importance the "least dangerous branch" must play in steering the constitutional ship entering twenty-first century waters, the growing number of calls for restraint or removal of federal judges due to disagreement with the substance of their decisions presents an ominous trend for constitutional stability. In Congress and from activist groups, charges of "judicial activism" can be heard.¹³¹ Whether acting out of frustration with the imposition of elitist values by unelected government officials, executing Congress's constitutional duty to check the other branches of government, responding to pressure from activists (and

127. See *Coalition for Econ. Equity*, 122 F.3d at 697. The amendment to California's constitution states that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. art. I, § 31(a).

128. See *Coalition for Econ. Equity*, 122 F.3d at 711.

129. 517 U.S. 620 (1996).

130. Justice Kennedy, writing for the majority, found that "[t]he amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies," *id.* at 627, and that the Colorado Legislature's motive was a "bare . . . desire to harm a politically unpopular group [which] cannot constitute a legitimate governmental interest," *id.* at 634 (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (omission and emphasis in original) (alteration added)). In response, Scalia charged that the majority "verbally disparag[ed] as bigotry adherence to traditional attitudes . . . [which] is nothing short of insulting." *Id.* at 652 (Scalia, J., dissenting).

131. The term "judicial activism" has proved in practice to be sufficiently malleable for use by all shades of the political spectrum in attacking court decisions. The phrase is usually employed pejoratively to refer to judges who insist on imposing their political whims on the electorate through the law. For a working definition of "judicial activism," see HARWOOD, *supra* note 19, at 2-5. The terminology is also occasionally used by judges against other judges. See discussion *infra* text accompanying note 258.

financial supporters), or merely pursuing expedient political goals, many politicians and activists are increasingly questioning the legitimacy of the judicial countermajoritarian role.

A defining moment in the ongoing tension between Congress and the federal judiciary arrived in September 1997 when House Majority Whip Tom DeLay issued a warning to would-be imperialist judges: "The judges need to be intimidated. They need to uphold the Constitution."¹³² He added that if the judges refuse to yield, "we're going to go after them in a big way."¹³³ Thereafter, DeLay announced that some members of Congress were preparing a list of judges in order to implement his earlier call in March for judicial impeachments.¹³⁴ DeLay's proposed solution drew opposition not only from constitutional scholars, but fellow Republicans as well.¹³⁵

What most critics of DeLay's comments overlooked was the key role played by anti-"judicial activist" interest groups and the possibility that he was merely "echoing the call of various conservative groups, particularly from within the 'Religious Right.'"¹³⁶ The following account (which is intended to be more descriptive than analytical) illustrates the impact of interest group power¹³⁷ and the degree to which many legislators distrust the federal courts.

132. Joan Biskupic, *Hill Republicans Target 'Judicial Activism,'* WASH. POST, Sept. 14, 1997, at A1.

133. *Id.*

134. *See Hands Off the Judges: Impeachment of Federal Judges Ought to Be Used Only for Those Accused of Criminal Behavior*, VIRGINIAN-PILOT & LEDGER-STAR (Norfolk, Va.), Apr. 3, 1997, at B10, available in 1997 WL 6399551.

135. In response to a national campaign to impeach district court judge Stewart Dalzell, Judiciary Committee member Senator Arlen Specter stated that although he believed the judge had committed "a very serious error in legal judgment, . . . no matter how egregious or wrong the legal judgment may be, that is not grounds for impeachment." Paul Bomberger, *Shows Take Their Case to Capitol*, INTELLIGENCER J. (Lancaster, PA), Sept. 18, 1997, at A1. In addition, the current Chief Justice of the Supreme Court (who is clearly not a defender of liberal judicial activism), believes that removing judges solely for the substance of their decisions is not a proper use of the impeachment power:

All of the charges against [Supreme Court Justice Samuel] Chase . . . were based on his performance of judicial duties while on the bench. Had Chase been convicted, it would have been a relatively short step, though by no means an inevitable one, for Congress to use impeachment as a method of curbing judges whose rulings did not please the dominant viewpoint in that body. Chase's acquittal shut the door on that possibility.

Rehnquist, *supra* note 19, at 910.

136. Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 REGENT U. L. REV. 111, 113 (1998). The day before DeLay initiated his impeachment campaign, he received a briefing from the National Legal Foundation (of which Fitschen is president) advocating the impeachment of the *Romer v. Evans* Court and a copy of DAVID BARTON, *IMPEACHMENT!: RESTRAINING AN OVERACTIVE JUDICIARY* (1996). *See Fitschen, supra*, at 113 n.12.

137. *See Perritt, supra* note 5, at 195 ("The Internet makes it easier to organize and maintain interest groups, both within and across state boundaries.").

After having issued in the 1992 *Planned Parenthood v. Casey*¹³⁸ decision what will likely be the last word from the Supreme Court concerning the continued vitality of *Roe v. Wade*,¹³⁹ the Court in the 1996 *Romer v. Evans* decision may have crowned *Roe*'s heir in terms of the ability of a single case to antagonize religious groups and mobilize interest group opposition to the Supreme Court. Justice Scalia's angry response to the *Romer* decision paralleled the fierce reaction from many academics, especially those in the conservative legal community.¹⁴⁰ Steven Fitschen, whose organization, the National Legal Foundation, called for the impeachment of the six Justices who signed the *Romer* majority opinion,¹⁴¹ recalls the cooperation among interest groups as they communicated their outrage via a variety of media following the announcement of the decision:

By May 23, 1996, . . . Free Congress [Foundation]'s President, Paul Weyrick, citing the research of the National Legal Foundation, called for the impeachment of the "Romer Six" during his *Direct Line Commentary* on National Empowerment Television. Weyrick's commentary was in turn picked up and reproduced by Intercessors for America and a Focus on the Family fund appeal letter . . . Thomas L. Jipping, also of Free Congress, began a steady barrage of op-ed pieces in the *Washington Times* warning of the dangers of judicial activism, including some pieces which advocated impeachment of federal judges. Phyllis Schlafly of the Eagle Forum suggested impeachment as one of several remedies to the problem of judicial tyranny in both her February 1997 and March 1997 newsletters.¹⁴²

The Washington, D.C.-based Free Congress Foundation appears to be the most successful and respected of the organizations lobbying for a curtailment of federal judicial power. From the utilization of interactive Internet and satellite broadcasts¹⁴³ to educate its target audience of the sources of and solutions to

138. 505 U.S. 833 (1992).

139. 410 U.S. 113 (1973).

140. *See, e.g.*, ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 114 (1996) ("There is no logical or constitutional foundation for the majority's decision in *Romer v. Evans*."); John Daniel Dailey & Paul Farley, *Colorado's Amendment 2: A Result in Search of a Reason*, 20 HARV. J.L. & PUB. POL'Y 215, 242-68 (1996); Fitschen, *supra* note 136, at 149 ("['The *Romer* 6' are guilty of] rendering unconstitutional opinions, subverting the fundamental laws, and introducing arbitrary power [which] are all high crimes and misdemeanors that constitute impeachable offenses."). *See generally* Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67; Steven A. Delchin, Comment, *Scalia 18:22: Thou Shall Not Lie with the Academic and Law School Elite; It Is an Abomination—Romer v. Evans and America's Culture War*, 47 CASE W. RES. L. REV. 207 (1996).

141. *See* Charles Levendosky, *Religious Right Targets Justices For Impeachment Over Amendment 2*, DENV. POST, Oct. 16, 1996, at B7 (characterizing the call for the impeachment of six Supreme Court Justices as a "crackpot idea").

142. Fitschen, *supra* note 136, at 114-15 (footnotes omitted).

143. The Free Congress Foundation's Judicial Selection Project hosted the "Taking Back Our Constitution" series, which aired on National Empowerment Television ("NET") from September 1997 through August 1998. The series in part discussed "the impact of judicial activism on the legislative process, direct democracy, individual liberty and self-government" and offered such solutions as "[i]mplementing judicial selection, impeachment and appellate jurisdiction" and "[e]nforcing judicial term limits, reconfirmation and legislative change in

“judicial activism,”¹⁴⁴ to comprehensive and systematic methods of grassroots coalition-building, the Free Congress Foundation is employing twenty-first century lobbying techniques. This activity by Free Congress and other organizations¹⁴⁵ has triggered a flurry of opposition from both ideological opponents, such as the People for the American Way (“PFAW”)¹⁴⁶ and National Organization for Women,¹⁴⁷ and institutional defenders of the judiciary such as the American Judicature Society.¹⁴⁸

In January 1997, the Free Congress Foundation gathered together a coalition of 253 conservative organizations which included such political heavy-weights as the National Rifle Association and the Christian Coalition and jointly signed a letter to Senate Majority Leader Trent Lott pledging to “promote judicial restraint and fight judicial activism with whatever tools and resources are legitimately at our disposal.”¹⁴⁹ The following six months witnessed a substantial amount of legislative proposals (some new and others perennial) expressing the temperament of that letter. Because the following overview of legislation and hearings reviews the activity of a Republican Congress, it will necessarily focus on activities by those on the “right” side of the political spectrum. Although lower

judicial procedures.” Free Congress Found., *Who Killed the Constitution?! (1997)* (unpublished publicity flyer on file with author). Interested citizens could participate in the free interactive conference by registering at the Free Congress Foundation web site. See Free Congress Research and Education Foundation, *Taking Back Our Constitution* (visited Nov. 4, 1998) <<http://www.freecongress.org/constitution/>>.

144. See the Free Congress web site for its definitions of the terms “judicial restraint” and “judicial activism,” as well as specific examples of this activism. See *What is Judicial Activism?* (visited Nov. 12, 1998) <<http://www.freecongress.org/jsmp/Activism.htm>>; *Judicial Activism Examples* (visited Nov. 12, 1998) <<http://www.freecongress.org/jsmp/actvexmpls.htm>>.

145. See, for example, the web site of the American Center For Law and Justice, which seeks to educate interested citizens on the dangers of the “Imperial Judiciary” endangering religious freedom. *The American Center for Law and Justice* (visited Nov. 4, 1998) <<http://www.aclj.org>>. The Prolife.org website features the Ultimate Pro-Life Resource List which aspires to be the “most comprehensive listing of right to life resources on the Internet.” *The Ultimate Prolife Resource List* (visited Nov. 4, 1998) <<http://www.prolife.org/ultimate>>. Among other features, the web site offers full text and overview formats of key privacy cases with some commentary, including *Griswold v. Connecticut*, *Eisenstadt v. Baird*, *Webster v. Reproductive Health Services*, and *Planned Parenthood v. Casey*. See *Roe v. Wade: 26 Years of Life Denied* (visited Dec. 16, 1998) <<http://www.prolife.org/rvw/court.html>>.

146. *People for the American Way* (visited Nov. 4, 1998) <<http://www.pfaw.org>>. E-mail subscription lists are the bread and butter of interest groups, and PFAW’s Right Wing Watch Online offers a thorough (and often even objective) account of the opposition’s activities. The National Rifle Association (“NRA”) and the National Organization for Women likewise make extensive use of e-mail subscription lists designed to inspire collective action for or against legislation at both the state and federal level. See, e.g., E-mail from NRA Alerts, Feb. 8, 1998 (containing information on state legislation affecting gun owners) (on file with author); E-Mail from the National Organization for Women, Oct. 10, 1997 (containing legislative updates on reproductive rights) (on file with author).

147. *National Organization for Women* (visited Nov. 4, 1998) <<http://www.now.org>>.

148. *American Judicature Society* (visited Nov. 4, 1998) <<http://www.ajs.org>>.

149. *Letter on Judicial Activism to Senator Lott, Jan. 27, 1997* (visited Nov. 4, 1998) <<http://www.4judicialrestraint.org/adopt/activismltr.htm>>.

federal court judges increasingly find themselves targeted by the right, the politicization of the Supreme Court confirmation process is, however, arguably a specialty of the left.¹⁵⁰

In the summer of 1997, the Senate Constitution, Federalism and Property Rights Subcommittee held a series of three hearings on "Judicial Activism: Defining the Problem and Its Impact." These hearings were held because "judicial activism strikes at the heart of our system of separation of powers and it represents a real . . . and tangible threat to the people's freedom to govern themselves."¹⁵¹ Likewise, the House in May heard testimony on "judicial misconduct" which implicitly addressed "judicial activism."¹⁵²

During the eighteen months prior to DeLay's comments, the rate of federal judicial confirmations had slowed dramatically,¹⁵³ due to either institutional

150. Although former Supreme Court clerk Edward Lazarus rejoiced at the Senate's rejection of Judge Robert Bork's nomination to the Supreme Court, he mused that:

In so subordinating constitutional interpretation to the demands of a single suspect doctrine [privacy], [Senate Democrats] invited precisely the charge they leveled against Bork and his supporters: that they had no regard for the integrity of the law or of the Court but only wanted their political point of view to prevail.

EDWARD LAZARUS, *CLOSED CHAMBERS* 247 (1998); *see also* BORK, *supra* note 38, at 268 (recalling Senator Edward Kennedy's infamous rendition of "Robert Bork's America" in a speech on the Senate floor); STEPHEN L. CARTER, *THE CONFIRMATION MESS* 150 (1994) (contending Bork's views were as within the mainstream as "just about any other nominee in recent decades[, and] we enact a terrible threat to the independence of the judiciary if we pretend the views are extremist when we really mean simply that we disagree with them"); *cf.* MARK GITENSTEIN, *MATTERS OF PRINCIPLE* 14-17 (1992) (contending that Bork "would have been the only Justice in history to espouse such a narrow view of the Constitution"); For alternative views of the Justice Clarence Thomas confirmation hearings, compare DAVID BROCK, *THE REAL ANITA HILL* 108 (1993) (contending that Senate staffers and anti-Thomas activists forced an uncooperative Anita Hill into the limelight in an attempt to "Bork" Thomas), with TIMOTHY M. PHELPS & HELEN WINTERITZ, *CAPITOL GAMES* 392 (1992) (characterizing Thomas as a man of questionable sincerity and speculating that Hill could have won a sexual harassment suit against Thomas), and SENATOR BARBARA BOXER, *STRANGERS IN THE SENATE* 37-57 (1994) (discussing the momentum for political change in the aftermath of the Thomas-Hill hearings).

151. *Judicial Activism: Defining the Problem and Its Impact: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary*, 105th Cong. 1 (1997) (opening statement of Chairman John D. Ashcroft).

152. *See Judicial Misconduct and Discipline: Hearing before the Subcomm. on Courts and Intellectual Property Comm. of the House Judiciary Comm.*, 105th Cong. 70 (1997) (statement of Roger Pilon of the Cato Institute) ("Because [judicial activism] is thought by many to constitute judicial misconduct, some in Congress are searching [in this hearing] for ways to discipline it.").

153. In 1996, only 17 federal district court appointments were confirmed (compared to 66 during George Bush's final year in office). During the first eight months of 1997, only 18 federal judges were confirmed by the Senate, leaving 100 seats vacant. Clinton did play some part in the delay, having sent only 40 nominations to the Senate. Most notably, approximately one-third of the Ninth Circuit chairs were vacant. *See* Ronald Brownstein, *GOP Stall Tactics Damage Judiciary, President Charges*, L.A. TIMES, Sept. 28, 1997, at A1.

inefficiency or closer vetting of the appointees.¹⁵⁴ In September, the tension over delays in the confirmation of federal judges finally broke out into the open when President Clinton in his radio address accused the Republicans of creating “a vacancy crisis in our courts” in the pursuit of “the worst of partisan politics.”¹⁵⁵ Taking note of DeLay’s comments, Clinton further asserted, “Under the pretense of preventing so-called judicial activism, [the Republicans have] taken aim at the very independence our founders sought to protect. The congressional leadership has actually threatened sitting judges with impeachment, merely because it disagrees with their judicial opinions.”¹⁵⁶ Senate Judiciary Committee Chairman Orin Hatch bluntly replied, “If you want to blame somebody for the slowness of approving judges to the 9th Circuit, blame the Clinton and Carter appointees who have been ignoring the law and are true examples of activist judging.”¹⁵⁷

Members of Congress also introduced legislation to cut back on federal judicial power in response to perceived overreaching by the federal judiciary. The ambitious Judicial Reform Act of 1997¹⁵⁸ as originally introduced by House Judiciary Committee Chairman Henry Hyde would have required that “[a]ny application for an interlocutory or permanent injunction restraining the enforcement, operation, or execution of a State law adopted by referendum” must be heard by a three-judge panel.¹⁵⁹ The Act also would have forbid any federal district court “to impose, increase, levy, or assess any tax for the purpose of enforcing any Federal or State common law, statutory, or constitutional right or law” unless the Court satisfies an extended list of requirements,¹⁶⁰ and would have

154. In September, prior to the Clinton radio address, Senate Majority Leader Trent Lott defended the process on the ground that the Senators “have a responsibility on behalf of the American people to look very closely at judicial nominees, make sure what their record is, because judicial activism is something we have a real problem with.” *President Blames GOP for Judicial Vacancies*, BALTIMORE SUN, Sept. 28, 1997, at 9A.

155. *Id.*

156. *Id.* Despite President Clinton’s defense of an independent judiciary, exactly four months later first lady Hillary Rodham Clinton, in an interview on the *Today* show, associated the circuit judge panel which appointed Special Counsel Kenneth Starr with a “vast right wing conspiracy.” *Today: Interview with Hillary Rodham Clinton* (NBC television broadcast, Jan. 27, 1998). President Clinton for his part joined Bob Dole in condemning a Fourth Amendment ruling by Judge Harold Baer and suggested the judge should resign. *See Judge Who Reversed His Decision in Drug Case Withdraws*, BOSTON GLOBE, May 18, 1996, at 5; R. Eugene Pincham, *A New Tyranny Against Judiciary*, CHI. TRIB., May 23, 1996, at 30 (describing a retired Illinois Appellate Court judge’s perspective that the criticism of and threats to impeach Judge Baer and Baer’s subsequent reversal of his decision under pressure was “despicable”).

157. Biskupic, *supra* note 132, at A1. Although the delay in confirmations has attracted much criticism for its propensity to stifle the proper functioning of the courts, other factors may be contributing as well. For an extended examination of the view that the post-1960 “unprecedented expansion in federal judicial business” is the primary culprit for overburdened federal courts, see POSNER, *supra* note 33, at 53.

158. H.R. 1252, 105th Cong. (1997).

159. *Id.* § 2.

160. *Id.* § 5.

mandated that a party in a civil case to be tried in a federal court was "entitled to one reassignment without cause as a matter of right."¹⁶¹

Of these three Judicial Reform Act provisions, only the three-judge panel requirement remained at the time of the bill's passage in the House one year later on a voice vote.¹⁶² Nevertheless, the panel requirement alone is significant in at least two respects. First, in accordance with the trend towards direct democracy and away from republican government, it represents both a congressional policy favoring the use of directly democratic means and a distrust that federal judges will properly exercise discretion when considering the constitutionality of referenda.¹⁶³ Second, although the requirement is limited to referenda, it must avoid the difficulties engendered by an analogous predecessor,¹⁶⁴ which, prior to its repeal in 1976, had attracted the widespread view that it was "the single worst feature in the Federal judicial system."¹⁶⁵

In March and April of 1997, constitutional amendments were proposed in the House and Senate which would amend Article III and limit the terms of federal judges. The Senate version limits terms to ten years and provides that thereafter the judges are eligible for reappointment and reconfirmation by the Senate.¹⁶⁶ The House proposal limits each term to a maximum of twelve years, appears to permit the judges to ascend the bench immediately after appointment, and allows twelve months for the Senate to confirm or reject the nominee.¹⁶⁷ Notably, while the House proposal does not require reappointment by a President, the Senate version

161. *Id.* § 6. This portion of the bill was originally introduced by Representative Charles Canady as the Peremptory Challenge Act of 1997, H.R. 520, 105th Cong. (1997).

162. *See* 144 CONG. REC. H2286 (daily ed. Apr. 23, 1998).

163. The legislation is a direct response to the actions taken by a district court judge who granted injunctive relief against Propositions 187 and 209. *See* H.R. REP. NO. 105-478, at 18 (1998) ("At a time when many states are using referenda as a means to provide for the expression of collective legislative will . . . it is fundamentally unfair and does not accord due process to allow one judge to thwart that collective will.").

164. *See* 28 U.S.C. § 2281 (repealed 1976).

165. S. REP. NO. 94-204, at 2 (1975), *reprinted in* 1976 U.S.C.C.A.N. 1988, 1989.

166. The Senate version, introduced by Senator Smith, decrees:

The Chief Justice and the judges of both the Supreme Court and the inferior courts shall hold their offices for the term of ten years. They shall be eligible for nomination and, by and with the advice and consent of the Senate, for appointment by the President to additional terms. This article shall not apply to any Chief Justice or judge who was appointed before it becomes operative.

S.J. Res. 26, 105th Cong. (1997).

167. The House version reads:

Notwithstanding [S]ection 1 of [A]rticle III of this Constitution, a judge of an inferior court created under that article shall not continue in office, except with the consent of the Senate, given within the first 365 days at the beginning of each successive 12-year period after the judge first takes office. For the purposes of this article of amendment, a judge who first took office before the adoption of this article shall be deemed to have first taken office on the date of such adoption.

H.R.J. Res. 63, 105th Cong. 2 (1997).

does require reappointment by a President other than the one who first appointed the judge.¹⁶⁸

Although judicial term limits could dramatically reduce the level of independence enjoyed by the current judiciary, the concept is once again as old as Thomas Jefferson. The author of the Declaration of Independence was considerably less generous than the creators of the House or Senate proposal:

[For the] difficult task in curbing the Judiciary in their enterprises on the Constitution . . . the best [remedy] I can devise would be to give future commissions to judges for six years . . . with a re-appointmentability by the president with the approbation of both houses. If this would not be independence enough, I know not what would be.¹⁶⁹

However, Jefferson's view directly conflicts with Alexander Hamilton's position on the issue:

That inflexible and uniform adherence to the rights of the Constitution and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated or by whomsoever made, would, in some way or other, be fatal to their necessary independence.¹⁷⁰

Like countless constitutional amendment proposals, the term limits amendment never saw the House floor and died a quiet death. Nevertheless, the concept of limiting judicial service to a set number of years could gain momentum given the popularity, albeit continued nonpassage, of term limits for Congress. Even if the amendment attempt is successful, it is doubtful that the power of the judiciary would be severely undermined. A far less dramatic measure than impeachment, term limits would still allow a judge free rein without fear of impending removal at every step. Moreover, the Senate would likely heed institutional protocol that demands inter-branch respect, resulting in a tradition whereby judges are re-confirmed as a matter of course unless they hand down truly outrageous rulings.

Despite the rumblings of discontent, these legislative proposals deliver a large quantity of smoke but produce very little fire. The various proposals have drawn few co-sponsors, and other events—particularly Tom DeLay's comments and the slow pace of confirmations—drew sharply negative media commentary.¹⁷¹

168. In addition, the Senate version contains a "grandfather clause" exempting current judges from the amendment. See S.J. Res. 26. The House version merely "resets the clock" and treats current judges as if they were confirmed the day the amendment is ratified. See H.R.J. Res. 63.

169. Letter from Thomas Jefferson to Pleasants (1821), in THOMAS JEFFERSON ON DEMOCRACY, *supra* note 32, at 65 (first omission and alterations in the original).

170. THE FEDERALIST NO. 78, *supra* note 21, at 232.

171. See, e.g., *Democracy, Judges and Jacobins*, ST. LOUIS POST-DISPATCH, Oct. 2, 1997, at 6B; *End Congress' War on Courts*, NEWSDAY, Oct. 5, 1997, at B3, available in 1997 WL 2711915; Molly Ivins, *Conservatives Aim to Cripple Nation's Courts*, SALT LAKE TRIB., Aug. 14, 1997, at A15, available in 1997 WL 3420130; Charles Levendosky, *Endangering America's Justice System*, SAN DIEGO UNION-TRIB., Oct. 3, 1997, at B9, available in 1997 WL 14527409; Marianne Means, *Taking Up a Sledge Hammer to Kill a Fly*, TIMES UNION (Albany, N.Y.), Oct. 5, 1997, at B5, available in 1997 WL 3506948; *Obstructionists at Work*, VIRGINIA-PILOT & LEDGER STAR (Norfolk, Va.), Sept. 22, 1997, at B8, available in 1997 WL 12456313.

Clearly, however, political pressure from interest groups is a major reason for the growing number of congressional proposals, and the strength of that pressure can be traced to recently invented technology. The era of the electronic republic is marked by increasingly sophisticated leaders of activist organizations with an unprecedented ability to communicate with their membership. Because those organizations are directing their attention at the courts with support, rather than opposition, from many legislators, the judiciary can no longer afford to remain quiescent.

III. *PLANNED PARENTHOOD V. CASEY*: UNSTEADY NAVIGATION INTO TWENTY-FIRST CENTURY WATERS

Back at the courthouse, the Justices continue the struggle over how to fit the triangular, circular, and rectangular pegs derived from a diverse modern America into a square Constitution ratified in 1787 by a predominantly homogeneous people.¹⁷² Although seemingly considering the popular views of citizens on particular issues to be irrelevant—"fundamental constitutional rights may not be submitted to vote; they depend on the outcome of no elections"¹⁷³—the Supreme Court does monitor the pulse of the nation and often "follows the election returns."¹⁷⁴ Recently, the Court has in several highly contentious cases grappled with the implications of the countermajoritarian difficulty to a degree that rivals Chief Justice Marshall's detailed examination of judicial authority in the foundation case, *Marbury v. Madison*.¹⁷⁵

In a situation akin to that leading up to the 1989 abortion case, *Webster v. Reproductive Health Services*,¹⁷⁶ in 1992 the Court was flooded with amicus curiae briefs attempting to influence the Court's decision in *Planned Parenthood v. Casey*.¹⁷⁷ The choice confronting the four Reagan-Bush appointees in *Casey* was whether to heed the strong wishes of their appointers¹⁷⁸ and overrule the 1973

172. Moreover, citizens actually wielding the power of franchise at the founding were as a group even more homogeneous: white males who owned property. Vermont (through its 1777 constitution) became one of the first states to abolish the property requirement and continued this policy following its admission to the Union in 1791. See WHICKER ET AL., *supra* note 89, at 127-28.

173. *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943).

174. *SAFIRE*, *supra* note 13, at 775. Following the war against Spain, the Democratic Party at its convention contended that constitutional protection extended to newly acquired Puerto Rico, a position embodied by the phrase: "We hold that the Constitution follows the flag." *Id.* The Democrats lost both at the polls on election day and in court when a case concerning the rights of Puerto Ricans supported the Republican position. This prompted author Finley Peter Dunne's fictional creation Mr. Dooley to comment: "No matter whether th' Constitution follows th' flag or not, the Supreme Court follows the iliction returns." *Id.* at 776.

175. 5 U.S. (1 Cranch) 137 (1803); see also *supra* note 17.

176. 492 U.S. 490 (1989).

177. 505 U.S. 833 (1992).

178. "Presidents Reagan and Bush, elected under [the promise to appoint judges who would overturn *Roe*], imposed the most stringent ideological tests for judicial appointments ever seen in America, not only for appointments to the Supreme Court but to all the subordinate federal courts as well." RONALD DWORKIN, *LIFE'S DOMINION* 8 (Alfred A. Knopf, Inc. 1993). President

landmark abortion case *Roe v. Wade*.¹⁷⁹ For Justices O'Connor, Kennedy, and Souter, *Casey* presented a Hobson's Choice¹⁸⁰—*Roe* would have to be upheld if the Court was to retain its legitimacy. In contrast, the fourth appointee, Justice Scalia, saw a dilemma, and in his mind not a difficult one to resolve.¹⁸¹

I will use *Casey* as an illustration of four basic criteria that currently are of greater importance due to the trend towards more candid opinion writing combined with the potentially greater scrutiny of judicial opinions resulting from the technological majoritarianism. First, there is the "perception problem" noted previously,¹⁸² the most important concern and often a product of the other three criteria. The second aspect is the literary style and accessibility of language, which asks whether the opinions are written in a manner easily understood by a layperson. This element played the least significant role in *Casey* in terms of accessibility, because all the opinions were written in a clear style. To the extent that some of the rhetorical flourishes purport to establish legal standards, however, *Casey* might make one long for the days of strict formalism.¹⁸³ The third criteria involves an examination of whether the opinion employs a coherent logic. Weak or strained reasoning can open a judge up to charges that he or she is using

Bill Clinton during the 1992 presidential campaign in like manner pledged to avoid appointing a Justice to the Court who would overturn *Roe*. See *id.* at 8-9.

179. 410 U.S. 113 (1973).

180. A Hobson's Choice concerns that which appears to be a free choice, but in fact offers no real alternative. The term is named after liveryman Thomas Hobson (1544-1631) who, in the interest that each horse be ridden equally, obliged customers to take the horse nearest the stable door or none at all. In contrast, a dilemma occurs when neither choice is particularly better than the other and both entail unfortunate consequences. See *SAFIRE*, *supra* note 13, at 329-30.

181. Because the most cogent "dialogue" in *Casey* concerning the countermajoritarian difficulty occurs between the joint opinion and Justice Scalia, I will primarily confine my analysis to these two opinions.

182. See *supra* text accompanying note 69.

183. Definitions of "formalism" vary, but one clear definition will serve for present purposes:

Legal Formalism asserted that the correct outcome in a legal dispute is determined by reasoning deductively from a set of core legal principles. The imagery is of the judge discerning the objective logic of the law, then applying that logic to the parties at hand without the influence of any personal or political predilections.

Milton C. Regan, Jr., *How Does Law Matter?*, 1 GREEN BAG 2d 265, 269 (1998). Although the Supreme Court has over the past few decades abandoned many aspects of formalism, see Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 559 (1996), it is "enjoying a resurgence in the Supreme Court," Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1663 (1990). Formalism is often a target of constitutional scholars. See, e.g., Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 GA. ST. U. L. REV. 959 (1997) (critiquing the Supreme Court's use of formalism in federalism cases); Jacobs, *supra* note 69, at 367 ("The Court must abandon the pretense that formalism can legitimate completely its decision making and accept the challenge of legitimating its constitutional value judgments by other methods."); Posner, *supra*, at 1666 ("Although professional discourse has always been predominantly formalist, most American judges have been practicing pragmatists, in part because the materials for decision in American law have always been so various and conflicting that formalism was an unworkable ideal.").

fallacious reasoning to obscure the fact that personal preference trumped objective legal conclusions. Finally, one should consider the credibility of the evidence used to support the logical reasoning (if any evidence is offered at all).

All of these considerations are straightforward and intuitive, but the layperson viewpoint (the view which will become more important if one accepts the proposition that knowledge is power) as to these considerations is often not considered for the simple reason that most nonlawyers do not read court opinions. A professor or law student, when presented with specious logic or mischaracterization of precedent might be critical and perhaps write a scathing critique with suggestions for how judges might correct the error. The action usually ends there, for there is a consensus that nearly every judge has written such opinions, for all manner of reasons. Private attorneys will usually not even advance to this stage; their duty is to serve clients, and it may not be prudent (and may even be considered unprofessional) to be highly critical of judges who will be in a position to determine the fate of future clients. The nonlawyer citizen outside of the circle of those who, until recently, have monopolized legal information is not so constrained by obligations to others, nor so conditioned to respect a court opinion.

Finally, note that these considerations are interrelated. For example, a judge can obscure weak logical reasoning with plain and conclusory language, or with convoluted tests and obscure terminology. Often the lack of evidence will undercut logic. Cryptic opinions which give the appearance of "hiding the ball" can lead to perception problems, for example. Because these elements are intertwined, they will not be evaluated separately. Instead, they will form the backdrop for evaluating *Casey's* privacy/substantive due process and stare decisis analysis in Part III.A. Thereafter, Part III.B will address some overarching considerations.

A. Articulating a "Constitution of Principle"

At issue in *Casey* were five provisions of the Pennsylvania Abortion Control Act of 1982.¹⁸⁴ Justices O'Connor, Kennedy, and Souter issued an unusual joint opinion,¹⁸⁵ which was joined in part by Justices Blackmun and Stevens. Although upholding most of the regulations, the joint opinion explicitly reaffirmed what it

184. The Act required: a general informed consent procedure; the dissemination of certain information to the woman at least 24 hours before the abortion is performed; the informed consent of one parent for a minor to obtain an abortion (including a judicial bypass procedure); a signed statement by a married woman seeking an abortion indicating that she notified her husband, absent certain exceptions; and certain reporting requirements for abortion providers. See *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992) (citing 18 PA. CONS. STAT. §§ 3205-3207, 3209, 3214 (1990)).

185. The decision begins, "Justice O'CONNOR, Justice KENNEDY, and Justice SOUTER delivered the opinion of the Court." *Id.* at 833. Because the joint opinion is joined in part by all members of the Court, it should be considered a controlling plurality opinion as to the reaffirmation of the "essential holding" of *Roe* (joined by Justices Blackmun and Stevens) and the manner in which the undue burden test was applied upon four of the five statutory provisions (joined by Justices Rehnquist, Scalia, and Thomas). See *id.* at 846, 879.

called the “essential holding” of *Roe*.¹⁸⁶ Nevertheless, a substantial portion of *Roe* did not survive. The joint opinion jettisoned the “rigid” trimester framework of *Roe*,¹⁸⁷ stripped the woman’s right of its “fundamental” status, and downgraded the state’s interest in protecting “potential life” from “compelling” to “substantial.”¹⁸⁸ In place of the trimester framework, the joint opinion installed the “undue burden” standard.¹⁸⁹ Although Justices Rehnquist, Scalia, and Thomas concurred with the joint opinion in upholding four of the five provisions, the logic behind the decisions of the two voting blocs was, as Justice Blackmun noted, “worlds apart.”¹⁹⁰

Professor Ronald Dworkin contends that the joint opinion in *Casey* located the basis of the abortion right by using an interpretive technique envisioning a “constitution of principle,” in direct opposition to the conservative coalition’s “constitution of detail.”¹⁹¹ A constitution of principle perceives the Constitution, particularly the Bill of Rights, to be “general, comprehensive moral standards” which require that the “American government respect the most fundamental principles of liberty and political decency and treat all citizens with equal concern and respect.”¹⁹² In contrast, the constitution of detail, embodied by the Rehnquist and Scalia *Casey* dissents, derives the source of constitutional rights from “a collection of independent historical views and opinions” of the “very specific, concrete expectations of the particular statesmen who wrote and voted for them.”¹⁹³ Hence, Dworkin, among other court observers,¹⁹⁴ implies that the joint opinion explicitly rejected formalism and ushered in a new era of “principled” constitutional interpretation.

A more accurate assessment of *Casey* is that it is a hybrid of formalism and nonformalism, or nonformalism in formalist clothing. Professor Leslie Jacobs’s general assessment of Supreme Court opinion writing is particularly true with respect to *Casey*:

Although I suspect (and hope) that the Justices have abandoned the idea of formal legitimacy as the model of constitutional interpretation, they most certainly have not done so in the explanation of their decisions. Their decisions consistently portray the constitutional meanings as flowing

186. *Id.* at 846. In the joint opinion’s view, the core ruling of *Roe* mandated: (1) a recognition that prior to fetal viability a woman may exercise her right to choose abortion without undue interference from the State; (2) acknowledgment of the State’s power to restrict abortions after viability provided that the law contains exceptions for pregnancies endangering a woman’s life or health; and (3) the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus. *See id.*

187. *See id.* at 873.

188. *Id.* at 876.

189. *Id.* at 879.

190. *Id.* at 943 (Blackmun, J., dissenting in part and concurring in part).

191. DWORKIN, *supra* note 178, at 126.

192. *Id.* at 119.

193. *Id.*

194. *See* James M. Winner, Comment, *Beds With Sheets But No Covers: The Right To Privacy and the Military’s Regulation of Adultery*, 31 LOY. L.A. L. REV. 1073, 1087 (1998) (“[In *Casey*], the Supreme Court rejected Justice Scalia’s strict substantive due process formalism in *Michael H.*”).

inevitably from the traditional sources of meaning, and deride alternate interpretations offered within the same decision as misguided or incorrect.¹⁹⁵

With this background, I will now turn to the *Casey* decision itself.

At the outset of the opinion, O'Connor, Kennedy, and Souter began their task with the declaration: "Liberty finds no refuge in a jurisprudence of doubt."¹⁹⁶ In announcing its decision, the joint opinion advanced three separate grounds for its reaffirmation of *Roe*: the constitutional merits of *Roe* itself; a concern for maintaining the Court's "institutional integrity"; and the rule of stare decisis.¹⁹⁷

As to the first ground, the three Justices proceeded to reiterate the Court's privacy doctrine. Frequent criticisms of *Roe* include that the source of the right to choose is not grounded in the text of the Constitution,¹⁹⁸ nor is it a fundamental and firmly rooted right within the tradition of the American people,¹⁹⁹ nor does *Roe* rest upon closely related analogous precedent.²⁰⁰ As with any controversial constitutional issue, the Court fares better if it is able to give the electorate "tangible" reasons for its decision; the absence of such reasons increases the

195. Jacobs, *supra* note 69, at 366-67 (parenthetical in original).

196. *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992).

197. *Id.* at 845-46.

198. The joint opinion sought to anchor the abortion right to the text of the Constitution via the Ninth Amendment ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.), noting that "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." *Casey*, 505 U.S. at 848. On the other hand, Justice Scalia, dismissing the constitution of principle approach as driven by "nothing but philosophical predilection and moral intuition," replied that the joint opinion erroneously applied the Ninth Amendment to be, "despite our contrary understanding for almost 200 years, a literally boundless source of additional, unnamed, unhinted-at 'rights,' definable and enforceable by us, through 'reasoned judgment.'" *Id.* at 1000 (Scalia, J., dissenting in-part and concurring in part) (quoting *id.* at 849).

199. *See, e.g., Casey*, 505 U.S. at 952-53 (Rehnquist, C.J., dissenting) ("[I]t can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as 'fundamental' under the Due Process Clause of the Fourteenth Amendment.").

200. The closest analogous precedents recited by the joint opinion are the familiar references to *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (extending substantive due process protection to the sale and distribution of contraceptives), *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (striking down on equal protection grounds a state law forbidding unmarried couples the use of contraceptives), and *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding unconstitutional a state law forbidding a married couple to use contraceptives).

The *Casey* joint opinion argued that these three cases "support the reasoning in *Roe* relating to the woman's liberty because they involve personal decisions concerning not only the meaning of procreation but also human responsibility and respect for it." *Casey*, 505 U.S. at 852-53. The joint opinion's own words suffice to cast doubt upon this contention: "Abortion is a *unique act*. It is an act fraught with consequences for others . . ." *Id.* at 852 (emphasis added). "[T]he liberty of the woman is at stake in a sense unique to the human condition and so *unique to the law*." *Id.* (emphasis added). "Where . . . the Court decides a case . . . to resolve the sort of *intensely divisive controversy* reflected in *Roe*[.] . . . its decision has a dimension that the resolution of the normal case does not carry." *Id.* at 866-67 (emphasis added).

likelihood that the Court will be accused of imposing its personal value system on the electorate.²⁰¹

In fashioning its constitution of principle, the joint opinion stands on the strongest ground when it invokes notions of bodily integrity (a concept rooted in the common law)²⁰² and the weakest when it uses lofty phrases that cannot plausibly be restricted to the issue before the Court.²⁰³ Having abandoned a strict formalist framework, the opinion's use of vague, general observations, rather than specific evidence, is problematic. One such development occurs early in the opinion; the arguably condescending tone could potentially alienate those individuals the Court might wish to persuade.

The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot *alone* be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, *without more*, upon its own vision of the woman's role, *however dominant that vision has been in the course of our history and our culture*. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.²⁰⁴

This passage could be interpreted as contending that most individuals and groups working to limit the availability of abortion are primarily driven by a desire that women be relegated to the domestic sphere. The text implies that this domestication goal is the *only* state interest, when it is doubtful that *any* of the legislators voted for the legislation for that reason.²⁰⁵ A different interpretation centers on the balance struck by the legislature in which the state interest in protecting a fetus is more highly regarded than a woman's interest in autonomy. Under this view, the joint opinion is simply stating that because this balance is a

201. The joint opinion recognizes this concern: "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code." *Casey*, 505 U.S. at 850.

202. *See id.* at 849.

203. For example, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.* at 851.

204. *Id.* at 852 (each emphasis added).

205. The paramount reason for regulating abortion articulated by self-described "pro-life" legislators is that a human life is being taken or that human life is conceptually sacred. *See, e.g.*, 137 CONG. REC. 34044 (1991) (statement of Rep. Robert Dornan) ("Life is the highest human good not on its own naturalistic merits, but because life is supernatural, a gift from God. Therefore, life is the highest human good because life is sacred.") (quoting Jessie Jackson, Address at Pro-Life Gathering (Jan. 1977)); *Health Care Reform: Women's Health: Hearings Before the House Subcomm. on Health and Env't Energy and Commerce Comm.*, 103d Cong. (1994), available in 1994 WL 14167521 (testimony of C. Ben Mitchell, Director of Biomedical and Life Issues, Southern Baptist Convention Christian Life Commission) ("If developing human life has no value, then perhaps legislators will decide that human life after 70 years of age has no value. What we do to our babies we will do to anyone.").

result of undervaluing a woman's interest due to the impetus of history and culture, the state interest in favoring motherhood does not outweigh the pain and suffering required of a woman to attain that interest.²⁰⁶

Either interpretation of this passage, that it stigmatizes Pennsylvania legislators by labeling them misogynists or merely makes dry, scholarly observations of innocent miscalculations of the woman's interest which the Court is duty bound to correct, is plausible. The ambiguity results from the abstract constructions "woman" and "mother," and a misleadingly simple statement of the state's position. This ambiguity is further compounded by the absence of any statistics, empirical evidence, or concrete examples supporting the joint opinion's legal position. When the Supreme Court writes controversial opinions that do not rely upon the institutional weight of formalism, extended assertions devoid of factual findings or persuasive case law will be insufficient.²⁰⁷ Otherwise, reasonable citizens are more likely to conclude that the Justices are not engaged in scholarly work but rather political judgments, a perception that could in the long run severely undermine the Court's legitimacy.

In addition to the argument that the merits of *Roe v. Wade* justified a continued adherence to that decision, two additional rationales, precedent and legitimacy, were essential to the outcome of the *Casey* decision. The joint opinion stated that "the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*."²⁰⁸

The amount of weight a Justice should give to precedent is an important consideration due to the ramifications of that decision for the countermajoritarian difficulty. The consideration often presents a "Catch-22" perception problem. On one hand, the Court overplays its countermajoritarian hand if it

206. Justice Kennedy (or his law clerk) drafted this section of the joint opinion. See LAZARUS, *supra* note 150, at 474-75; NPR: *Morning Edition* (radio broadcast, June 30, 1992) (reporting that Kennedy read the "mystery of human life" portion of the opinion in court), available in LEXIS, News Library, NPR file. Because Kennedy is a "devout practicing Catholic with a deep personal aversion to abortion," LAZARUS, *supra* note 150, at 470, and would not logically go out of his way to denigrate his personal views, the latter theory in the text above appears more plausible. Indeed, Justice Kennedy appears to be backhanding the infamous concurrence in *Bradwell v. Illinois*, which held that Illinois could deny a license to practice law on the basis of gender. Compare *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring in the judgment) ("The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator."), with *Casey*, 505 U.S. at 852 ("The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

207. I do not contend, however, that judges need to be so meticulous when writing dicta, when it is apparent that such assertions will not carry the force of the law. Dicta is not only a vehicle for contributing to the marketplace of ideas, but it also allows the judge to vent his or her frustrations stemming from the rigid nature of the law and the limitations on a judge's ability to correct its flaws. See, e.g., *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting) ("It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about 'liberty and justice for all'—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.").

208. *Casey*, 505 U.S. at 853 (emphasis in original).

uncompromisingly adheres to past precedents even when the premises upon which those previous decisions were built appear to be in serious error in the light of the modern day. On the other hand, if the Court overrules its precedents too easily, with the only intervening factor being a shift in the Court's personnel, the people could surmise that the interpretation process is more political than it is scholarly.²⁰⁹

The joint opinion, in the section authored by Justice Souter,²¹⁰ offered three primary arguments for upholding *Roe v. Wade* based upon principles of stare decisis: 1) the rule of *Roe* had "in no sense proven 'unworkable,'"²¹¹ 2) certain reliance interests had accrued since the 1973 decision, and 3) the lessons of history counseled against the option of overruling *Roe*. Because the first two reasons do not directly implicate the countermajoritarian nature of precedent, I will only address the third and most prominent precedential argument.

Justice Souter submitted that the historical record reveals that in certain cases overruling precedent can seriously undermine a court's legitimacy.²¹² The framework of Justice Souter's stare decisis argument presents an opportunity to consider both the coherent logic and the use of evidence criteria. Contorted, result-based reasoning has served Justices of all ideological persuasions from time to time, but will not perform its service very well in the electronic age. The following discussion is not itself a critique of Souter's brand of stare decisis

209. "There is . . . a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. . . . The legitimacy of the Court would fade with the frequency of its vacillation." *Id.* at 866. An intriguing question is why the Court declined to address the notable head-snapping reversal of *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) (upholding a requirement that pupils salute the national flag in daily school exercises as a condition of attending free public school), only three years after the case was decided. *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Justice Frankfurter's dissent in *Barnette* is particularly apt:

The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the deflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures. . . . That which three years ago had seemed to five successive Courts to lie within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justice[s]. . . . Is that which was deemed to be of so fundamental a nature as to be written into the Constitution to endure for all times to be the sport of shifting winds of doctrine?

Id. at 665 (Frankfurter, J., dissenting).

210. No one officially knows which Justices wrote what portions of the joint opinion, but the consensus is that Souter wrote the section presenting the stare decisis arguments. *See, e.g., LAZARUS, supra* note 150, at 472 ("Souter's job was to craft [the joint opinion's] explanation for why the principles of stare decisis argued, almost irrefutably, for reaffirming *Roe*.").

211. *Casey*, 505 U.S. at 855.

212. "In a less significant case, *stare decisis* analysis [would end here]. But the sustained and widespread debate *Roe* has provoked calls for some comparison between that case and others of comparable dimension that have responded to national controversies and taken on the impress of the controversies addressed." *Id.* at 861 (emphasis in original).

(which has received adequate attention elsewhere²¹³), but rather a hypothesis that judges must hold themselves to a higher evidentiary standard than politicians and the possible consequences if they do not.

The opinion focused on two landmark Supreme Court cases, *Lochner v. New York*²¹⁴ and *Brown v. Board of Education*²¹⁵ to support its argument.²¹⁶ *Lochner* was one of a long line of cases at the turn of the century which, based upon a "liberty of contract" theory,²¹⁷ imposed substantive limitations on legislation restricting economic liberty in favor of health and welfare regulations. In one case upholding the *Lochner* doctrine, the Court struck down a law requiring private employers to satisfy minimum wage standards for women. That case, *Adkins v. Children's Hospital*,²¹⁸ was overruled fourteen years later by *West Coast Hotel Co. v. Parrish*,²¹⁹ a decision which "signaled the demise of *Lochner*."²²⁰

Rather than conclude that the "freedom of contract" was invalid because it was simply unsupported by the text of the Constitution or a similar principle of constitutional interpretation, the joint opinion instead contended that by 1937 most people believed "that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."²²¹ This factual enlightenment "not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced."²²²

According to the joint opinion, the "separate-but-equal" doctrine, which *Brown* overruled, also rested primarily upon erroneous factual ground. That doctrine began with *Plessy v. Ferguson*,²²³ which held that laws requiring racial

213. Compare David K. Koehler, Comment, *Justice Souter's "Keep-What-You-Want-And-Throw-Away-The-Rest" Interpretation of Stare Decisis*, 42 *BUFF. L. REV.* 859, 883 (1994) ("Souter resorted [in *Casey*] to the neutral rhetoric of stare decisis to disguise his own value judgments and acknowledgment of social pressure."), with Liang Kan, Comment, *A Theory of Justice Souter*, 45 *EMORY L.J.* 1373 (1996) (discussing Souter's use of precedent from the time of his tenure as a New Hampshire judge to his current position on the Supreme Court). Note that it is not my intention to single out Souter as the only Justice prone to manipulating precedent. See, e.g., LAZARUS, *supra* note 150, at 516 & n. 4 (pointing to an inconsistency between the stare decisis methodology in *Casey* and *Adarand*); Carlson, *supra* note 43, at 448-49 (contending that Justice O'Connor's majority opinion in *Adarand* selectively relied "on precedent that was malleable enough to conform to the Court's most recent interpretation of the Equal Protection Clause"); Earl M. Maltz, *No Rules in a Knife Fight: Chief Justice Rehnquist and the Doctrine of Stare Decisis*, 25 *RUTGERS L.J.* 669, 670 (1994) ("It would be too simplistic to say that Chief Justice Rehnquist has no regard for precedent.").

214. 198 U.S. 45 (1905).

215. 347 U.S. 483 (1954).

216. Notably, the joint opinion neglected to even cite *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856), the infamous case widely viewed as a contributing cause of the Civil War. Justice Scalia, however, made that case the centerpiece of his precedential argument.

217. *Lochner*, 198 U.S. at 56, 61.

218. 261 U.S. 525 (1923).

219. 300 U.S. 379 (1937).

220. *Planned Parenthood v. Casey*, 505 U.S. 833, 861 (1992).

221. *Id.* at 861-62 (citing *West Coast Hotel*, 300 U.S. at 399).

222. *Id.* at 862.

223. 163 U.S. 537 (1896).

segregation in public transportation did not constitute a denial of equal protection and rejected the argument that de jure racial separation treated the black race as inferior.²²⁴ The *Casey* plurality noted that “it was clear by 1954 that legally sanctioned segregation [stigmatized those who were segregated with a ‘badge of inferiority,’] to the point that racially separate public educational facilities were deemed inherently unequal.”²²⁵ Again, the factual assumptions underlying the *Plessy* decision were “so clearly at odds with the facts apparent to the Court in 1954 that the decision to reexamine *Plessy* was on this ground alone not only justified but required.”²²⁶ The joint opinion thereafter reached the summit of its argument. Whereas *West Coast Hotel* and *Brown* relied upon facts either wrong or viewed in the wrong light, the joint opinion reasoned that

[b]ecause neither the factual underpinnings of *Roe*’s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.²²⁷

Well, what are “the factual underpinnings of *Roe*’s central holding?” Despite an extended and broad discussion of the relevant facts which supposedly commanded the *Lochner* and *Plessy* decisions, the Court offered a calculatingly narrow set of facts supporting *Roe*²²⁸ and did not provide a scintilla of evidence demonstrating that the nation’s (or the Court’s) understanding of the relevant

224. See *Casey*, 505 U.S. at 863 (citing *Brown v. Board of Ed.*, 347 U.S. 483, 494-95).

225. *Id.*

226. *Id.*

227. *Id.* at 864 (parenthetical in original). Justice Rehnquist contended that the evidence did not support the joint opinion’s argument that the *Lochner* Court had acted upon perceived factual changes: “Although the Court did acknowledge in the last paragraph of its opinion the state of affairs during the then current Depression, the theme of the opinion is that the Court had been mistaken as a matter of constitutional law when it embraced ‘freedom of contract’ 32 years previously.” *Id.* at 962 (Rehnquist, C.J., dissenting in part and concurring in part).

228. See *id.* at 860 (“[T]he attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided; which is to say that no change in *Roe*’s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.”). The vast majority of Americans have concluded that blacks are as a factual matter human beings possessing the same inherent rights as whites, in effect concluding that *Plessy v. Ferguson* was wrong because it relied on an incorrect premise. In contrast, the joint opinion conveniently concluded that *Roe*’s viability standard was the “critical fact.” Yet “viability” is a *measurement* which *produces* facts (the fact here being the point at which a fetus can survive outside the womb, a measurement which, like life expectancy, changes with improvements in technology). Unless the joint opinion is contending that the “critical fact” is that the *Roe* Court assumed that the point of viability would not shift (the opinion does not provide evidence to support such a contention), viability is not itself a fact capable of being proven or disproven.

facts had not changed.²²⁹ Furthermore, *Lochner* is frequently invoked by both conservative and progressive Justices as the quintessential example of impermissible judicial intervention for substantive philosophical reasons rather than due to the *Lochner* Court's supposed reliance on "fundamentally false factual assumptions."²³⁰ The *Casey* joint opinion's primary basis for distinguishing *Roe* from *Lochner* could be characterized as the use of an *ex post facto* justification in support of a preordained result.²³¹ In sum, the conclusions reached by the plurality "appear to be judicial fiat and nothing contradicts the suspicion that they stem from the personal preferences of the decision makers."²³²

229. The Justices could have plausibly argued that the country's understanding of such facts has moved in the direction of the *Roe* Court. Many polls suggest that the outcome of *Casey* is in sync with current public opinion. See, e.g., Elizabeth Ross, *Freedom of Choice Act Splits Activists in Pro-Choice Movement*, CHRISTIAN SCI. MONITOR, Apr. 9, 1993, at 2.

Nevertheless, America's inability to reach a consensus as to whether a fetus is a human being is one of the most persuasive grounds for arguing that *Roe* was wrongly decided, and it may be the reason why the *Casey* joint opinion evaded a discussion of the facts underlying the *Roe* opinion. Rather than leaving the fundamental question of whether a fetus is a human being to a deliberative community-wide decisionmaking process, the *Roe* court instead jettisoned this republican value and replaced it with one in which individuals determine in ad hoc fashion crucial issues of life and death. Not surprisingly, this radical delegation of power over life and death to individuals has led other individuals disenfranchised by the *Roe* decision to leave the community-wide decisionmaking process (which is now useless to them as a practical matter) and function as autonomous judges who believe that fundamental moral principles compel them to execute doctors who perform abortions, in order to delay or thwart the murder of innocent human beings.

230. Justice Souter laid bare the unstable logic of the *Casey* joint opinion when, in his dissenting opinion in *Seminole Tribe v. Florida*, he commented that it was

remarkable that as we near the end of this century the Court should choose to open a new constitutional chapter in confining legislative judgments on these matters by resort to *textually unwarranted common-law rules*, for it was just this practice in the century's early decades that brought this Court to the nadir of competence that we identify with *Lochner v. New York*.

Seminole Tribe v. Florida, 116 S. Ct. 1114, 1176 (1996) (emphasis added). (This is indeed a curious argument by Justice Souter, for *Griswold* and *Roe* expressly relied on little more than "textually unwarranted" judge-created rules.) Thus, four years after *Casey*, Souter writes that "textually unwarranted common-law rules" rather than *Casey*'s "fundamentally false factual assumptions" theory supply the predominant justification for vilifying *Lochner* and its progeny.

231. Although a majority of the Supreme Court continually frames the delegation of the abortion decision to individuals as a principle grounded in notions of autonomy and self-direction, this rhetoric is belied by its unequivocal acquiescence to state intrusion into such decisions as whether a woman ought to smoke marijuana in the privacy of her own home or wield a handgun for self-protection from an abusive husband. However, in an encouraging development, two recent opinions written by Justice Clarence Thomas breach this selective protection of liberty. See *United States v. Bajakajian*, 117 S. Ct. 2028, 2039 (1998) (confiscation of entire \$357,144 for failure to comply with currency reporting statute is a penalty grossly disproportionate to the offense in violation of the Excessive Fines Clause); *Printz v. United States*, 117 S. Ct. 2365, 2385-86 (1997) (Thomas, J., concurring) ("Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic.'") (quoting 3 J. STORY, COMMENTARIES § 1890, at 746 (1833)).

232. Jacobs, *supra* note 69, at 374.

The conclusion that pragmatic political calculations rather than objective legal reasoning determined the outcome of the historical *stare decisis* analysis is reinforced by the unusual candor with which the joint opinion attempts to articulate a vision of the Court's role in a democratic society and the open disclosure of the factors being balanced by the plurality in the course of reaching its final decision. In response to the argument that a substantial portion of the population (more precisely, a very vocal activist segment of the population) should be heeded, the joint opinion adopts a style not unlike a *New York Times* editorial:

[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question. . . .

The country's loss of confidence in the Judiciary would be underscored by an equally certain and equally reasonable condemnation for another failing in overruling unnecessarily and under pressure.²³³

In response, Justice Scalia chastised the plurality for what he saw as arguments akin to rationalization by politicians rather than reasoning by judges:

A decision either way on *Roe* can . . . be perceived as favoring one group or the other. But this perceived dilemma arises only if one assumes, as the joint opinion does, that the Court should make its decisions with a view toward speculative public perceptions. If one assumes instead, as the Court surely did in both *Brown* and *West Coast Hotel*, that the Court's legitimacy is enhanced by faithful interpretation of the Constitution irrespective of public opposition, such self-engendered difficulties may be put to one side.²³⁴

Justice Scalia took notice of the increased public attention and pressure bearing down on the Court,²³⁵ and brazenly attributed its cause to the Court's improper use of its countermajoritarian role.²³⁶ The joint opinion's approach, in Scalia's view, aggravated the perception problem:

As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about.²³⁷

The trouble, Scalia continued, began when the Justices began to impose their personal value configurations on the nation.²³⁸ This assumption is not entirely

233. *Casey*, 505 U.S. at 867.

234. *Id.* at 963-64 (Scalia, J., concurring in part and dissenting in part).

235. *See id.* at 999-1000 ("How upsetting it is, that so many of our citizens . . . think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus.").

236. *See id.* at 1000 ("The Court would profit, I think, from giving less attention to the *fact* of this distressing phenomenon, and more attention to the *cause* of it. That cause permeates today's opinion . . .") (each emphasis in original).

237. *Id.* (parenthetical in original).

238. *See id.* at 1000-01.

valid since nearly all judging requires the use of personal values.²³⁹ However, Scalia adroitly identified the potential danger of the perception problem:

[I]f in reality our process of constitutional adjudication consists primarily of making *value judgments* . . . then a free and intelligent people's attitude towards us can be expected to be (*ought to be*) quite different. . . . If, indeed, the "liberties" protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*.²⁴⁰

B. *The Legacy of Casey*

A Supreme Court decision with countermajoritarian characteristics should be evaluated according to how well, in terms of efficacy, prudence, and success in protecting individual rights, it explains the point at which the Court should properly interject itself into the democratic political process. The four criteria—perception, language, logic, and evidence—provide a framework for determining whether the explanation of the Court's role was successful.

In terms of perception, one of the consequences of the shaky rationales used in *Casey* is that if controversial Supreme Court decisions come to be viewed as political rather than scholarly,²⁴¹ the damage to the Court's power could be tremendous. The new communication technology presents a real threat to the old judicial order. Consider the impact of an interest group e-mailing the following hypothetical press release to thousands of its members; it is an attack which exploits the gap in Souter's *stare decisis* argument by mixing reasonable criticism with emotionally laden historical events:

In a Supreme Court decision issued today, Justice Souter indicated that the Court was correct in 1954 when it overruled a 100-year-old case because it recognized that black Americans were not equal if the state could force them to go to school separate from whites. Souter stated that it was okay to overrule a 100-year-old case because it was based on what he calls "fundamentally false factual assumptions." Yet in a death blow against civil rights for the unborn, he declined to overrule a 20-year-old case legalizing

239. See POSNER, *supra* note 33, at 310 ("The vastness and complexity of American law . . . make it inevitable that many judicial decisions will be based, in part anyway, on value judgments rather than just on technical, professional judgments."); Jacobs, *supra* note 69, at 376 ("Scalia [in *Casey*], too, makes a political choice and, with his rhetoric, conceals it.").

240. *Casey*, 505 U.S. at 1000-01 (Scalia, J., dissenting) (each emphasis and the parenthetical in original).

241. The judiciary has been a political branch from the day *Marbury v. Madison* was decided; the significant and recent trend is that many scholars and practitioners believe that the judiciary is now widely viewed by the public as a political branch. See *Term Limits For Judges?*, 1996 *Federalist Society Symposium*, 13 J.L. & POL. 669, 694 (1997) (statement of Charles Cooper, Cooper & Garvin) ("[T]he American people have come to accept [the Supreme Court's] decision[s] as political and as policy-making, not as something that can be understood as the neutral application of the rules of law as they are expressed and reflected in the sources of law, our constitutional provisions and our statutes."); Richard A. Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647, 1653 (1993) ("The increased political diversity of American culture has shattered the political or ideological consensus upon which a confident sense of the law's objectivity rested.").

abortion throughout all nine months of pregnancy. We demand that Souter explain why he believes that a human being is not killed during an abortion. Surely it is clear by now that *Roe v. Wade* was based upon the “fundamentally false factual assumption” that an unborn child is not a human being deserving protection from an abortionist’s scalpel.²⁴²

This fictional press release illustrates some dilemmas already faced by judges which will become more pronounced in the future. First, the press release assigns to Justice Souter a particular political position with which he may or may not personally agree. One does not really know if Souter “believes that a human being is not killed during an abortion.” Souter might actually believe that a human being exists in the third trimester, and even that belief might not dictate the outcome of a case involving a late-term abortion statute.²⁴³ The unsettling prospect is that if the courts become a true focal point of interest group and politician ire, institutional considerations which handicap judges may force them to rely heavily on pro-judicial interest groups and law professors to correct the distortions.²⁴⁴ The increasing frequency of the criticism of judges compels the

242. See generally CELESTE M. CONDIT, *DECODING ABORTION RHETORIC* 49-51 (1990) for an examination of attempts to rhetorically link abortion with slavery and the Holocaust. Although even wholesomely reasoned opinions are subject to distortion by those who stand to benefit, judges should be wary of inadvertently handing out ammunition to political groups on a silver platter. A case in point is Judge Harold Baer, who in *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y.), *vacated on reconsideration*, 921 F. Supp. 211 (S.D.N.Y. 1996), drew harsh criticism in particular for his contention that even though the suspects ran when they saw law enforcement officers, the police had no probable cause to search because “residents in this neighborhood tended to regard police officers as corrupt, abusive and violent. After the attendant publicity surrounding the above events, had the men not run when the cops began to stare at them, it would have been unusual.” *Id.* at 242; *see also supra* note 156 (containing additional commentary on Judge Baer’s decision). Although this ground was only one of many upon which Judge Baer rested his decision, a casual television viewer might have thought it was the sole rationale given the quality of reporting. *See, e.g., CBS Evening News: New York Judge Throws Out Evidence Against Alleged Drug Dealers Claiming Lack of Evidence to Search* (CBS television broadcast, Jan. 26, 1996) (focusing entirely on the running-from-police rationale).

Ironically, Judge Baer in *Bayless* offered a quotation that aptly described his subsequent political predicament and the possible difficulties that judges will increasingly face in the new Communication Age: “The great enemy of truth is very often not the lie—deliberate, contrived, and dishonest—but the myth—persistent, pervasive and realistic.” *Bayless*, 913 F. Supp. at 234 (quoting President John F. Kennedy, Commencement Speech, Yale University (1962)).

243. For example, many state statutes seeking to outlaw “partial birth abortion” have been struck down on account of vagueness. In such instances, the particular actions of the parties before the court are not at issue. Instead, the question becomes whether the statute, although intended primarily to reach late-term abortion procedures, insufficiently defines the prohibited activity and thus might extend to constitutionally protected activity. *See, e.g., Women’s Med. Prof’l Corp. v. Voinovich*, 130 F.3d 187 (6th Cir. 1997); *Planned Parenthood v. Woods*, 982 F. Supp. 1369 (D. Ariz. 1997); *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997).

244. *See* Ruth Bader Ginsburg, *On the Interdependence of Law Schools and Law Courts*, 83 VA. L. REV. 829, 835 (1997) (“Judges need critical commentary, but we also need defenders—caring teachers alert to the jealousy, mean spirit, oversight, or lack of understanding that sometimes triggers unfair comment from the political branches, the press, even the academy.”).

need for a long-term strategy addressing how the courts should, when necessary, defend themselves from such attacks.²⁴⁵

Second, the new communications technology is causing a dramatic reduction in the transaction costs incurred by interest groups seeking to monitor, inform, and mobilize their membership.²⁴⁶ Likewise, whereas only a relatively few people read court opinions in the past, this may no longer be true within the next ten years because of the convenience and cost-effective nature of reading a court opinion on-line, a process which does not require any knowledge of the legal citation system. Furthermore, a press release like the one outlined above would likely conclude with a message urging recipients to contact their legislators or the Justices themselves; a process facilitated by including e-mail addresses and web page links in the e-mail message which can be accessed with the click of a mouse button. The cumulative effect of the Internet and similar forums serving as a springboard for attacks on flawed (or supposedly flawed) judicial logic will likely result in Americans tending to view judges as more like politicians and less like priests.²⁴⁷

Given the heightened awareness of court opinions and the perception problem, the *Casey* joint opinion did not falter in stating the task before the Court:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions

245. The Citizens for an Independent Judiciary, a recently established public interest organization seeking to educate the public on the merits of an independent judiciary, is somewhat unique in that its founders are politicians, including former New York Governor Mario Cuomo and former Republican Representative Mickey Edwards. *See* Steve Lash, *New Group Steps Forward to Bolster Judiciary*, CHI. DAILY L. BULL., June 12, 1998, at 1.

246. *See* Perritt, *supra* note 5, at 169 ("Mass communication technologies such as the Internet . . . reduce the transaction costs of discovering common concerns, crystallizing positions, aggregating interests, and organizing entrepreneurship and maintenance. In other words, the Internet facilitates political action."); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 237 ("[C]yberspace permits bargaining over distances and time that never before could have been possible. Cyberspace lowers the absolute amount of transaction costs relative to the costs of the same transaction undertaken through some other means."); Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 116 (1997) (noting that many, though not all, business-related transaction costs are reduced by the Internet).

247. One simple but profound effect of new communications technology may be increased public awareness of Supreme Court opinions. Lee Epstein writes:

[S]ome evidence [suggests] that the public's evaluation of the Court responds to their awareness of the substance of Court decisions. This suggests that the dynamics of the public's evaluations of the Supreme Court may be much like those for Congress and the presidency. Thus, the stability of the Court's evaluations over time may be a function of insufficient knowledge rather than an enduring level of trust in what seems to be a Jovian institution. If this is so, then we might well wonder if greater awareness of the Court would result in more volatile evaluations and more problems of enforcement and compliance for an institution whose major currency is legitimacy.

EPSTEIN ET AL., *supra* note 35, at 373.

under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.²⁴⁸

But although the joint opinion displayed remarkable candor in some portions of the opinion, it claims to uphold *Roe* even as it cuts back dramatically on the scope of that decision.²⁴⁹ This aspect, when combined with the opinion's candid (and transparently pragmatic) assessment of the political consequences of overruling *Roe*,²⁵⁰ results in the impression that the Court handed down a political compromise which cannot satisfy the interest groups who propelled the case into court.²⁵¹ The abortion debate continues unabated,²⁵² notwithstanding the joint opinion's command that the parties end the national division "by accepting a common mandate rooted in the Constitution."²⁵³ By demanding that interest groups and legislators beat their swords into plowshares and accept a settlement the plurality could not realistically expect either side to accept,²⁵⁴ the strength and integrity of the Court were undermined in *Planned Parenthood v. Casey*.

However, it would be erroneous to maintain that only authors of majority opinions need concern themselves with the ramifications of communication technology. Because of its ability to mislead the less savvy reader or provide fodder for interest group propaganda, criticism within a judicial opinion becomes more important. Professor Christopher Smith argues that "[o]pinions containing

248. *Planned Parenthood v. Casey*, 505 U.S. 833, 865-66 (1992).

249. *See id.* at 944 (Rehnquist, C.J., dissenting in part and concurring in part) ("The joint opinion, following its newly minted variation on *stare decisis*, retains the outer shell of *Roe v. Wade*, but beats a wholesale retreat from the substance of that case.") (emphasis in original) (citations omitted).

250. *See* text accompanying *supra* note 233.

251. However, the opinion may be more satisfactory for those within the judiciary who are in a position to sympathize with the plight of O'Connor, Kennedy, and Souter. In his partially concurring opinion, Justice Blackmun lauded the joint opinion as "an act of personal courage and constitutional principle." *Casey*, 505 U.S. at 923 (Blackmun, J., dissenting in part and concurring in part).

252. The vitality of the debate surrounding the "partial birth" abortion procedure and other abortion-related matters in Congress demonstrates that the Court's pleas have not been heeded. *See* Lawrence J. Goodrich, *On Capitol Hill, Abortion Battle Intensifies on Many Fronts*, CHRISTIAN SCI. MONITOR, Sept. 9, 1998, at 4; David E. Rosenbaum, *House Dares Clinton on Abortion Bill*, N.Y. TIMES, July 16, 1998, at A26 (reporting that the House passed the Child Custody Protection Act of 1998, H.R. 3682, 105th Cong.).

Moreover, in perhaps one of the most ironic footnotes in Supreme Court history, both of the lead plaintiffs of the fountainhead *Roe v. Wade* and *Doe v. Bolton* cases, Norma McCorvey and Sandra Cano, have not heeded the Supreme Court but rather now advocate the overturning of the cases they won in the name of abortion rights. *See* Ronald J. Hansen & Francesca C. Simon, "Roe" and "Doe" Disavow Roles in Abortion Rulings, *Keynote Pro-life Gathering*, WASH. TIMES, Jan. 23, 1998, at C4. McCorvey declared in a Senate hearing that "the entire abortion industry is based on a lie" and that "I am dedicated to spending the rest of my life undoing the [case] that bears my name." *Roe v. Wade Anniversary Views on Abortion: Hearings Before the Senate Subcomm. on the Constitution, Federalism, and Private Property of the Senate Judiciary Comm.*, 105th Cong. (1998) (testimony of Norma McCorvey), available in 1998 WL 18919, at *6.

253. *Casey*, 505 U.S. at 867.

254. *See* LAZARUS, *supra* note 150, at 483 ("Judging by the reactions of partisans in the courtroom, the trio's plea for peace had fallen on deaf ears.").

open, personal attacks on fellow justices can harm the Court's image by magnifying perceptions that personal or ideological disputes, rather than legal principles, determine the justices' interpretations of constitutional law.²⁵⁵ On this point, Smith points to several opinions written by Justice Scalia.²⁵⁶ The Justice's *Casey* opinion provides plentiful support for this criticism, reaching a crescendo upon the pronouncement: "The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges . . . with the somewhat more modest role envisioned for these lawyers by the Founders."²⁵⁷ In sum, although Scalia may be blessed with both a sharp wit and the company of thick-skinned colleagues who do not likely take personal offense, it bears consideration whether prose saturated with such blatant, condescending sarcasm should be injected into a court opinion, particularly one likely to be read by nonlawyers whose unfamiliarity with the law may lead them to miss the hyperbolic qualities of Scalia's opinion. However, Scalia is not alone in this use of rhetoric; for example, that judges have tarred other judges with the words "judicial activism"—the "cuss words" of the opposition—is equally a cause for concern.²⁵⁸

255. CHRISTOPHER E. SMITH, JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOMENT 67 (1993).

256. *See id.* at 61-67. *See generally* Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1196 (1992) ("The most effective dissent, I am convinced, 'stand[s] on its own legal footing'; it spells out differences without jeopardizing collegiality or public respect for and confidence in the judiciary.") (quoting Collins J. Seitz, *Collegiality and the Court of Appeals*, 75 JUDICATURE 26, 27 (1991) (alteration in original)).

257. *Casey*, 505 U.S. at 996 (Scalia, J., concurring in part and dissenting in part). Other such statements by Scalia are instructive: "I must, however, respond to a few of the more outrageous arguments in today's opinion, which it is beyond human nature to leave unanswered." *Id.* at 981.

[A] Court that believes . . . that the function of this Court is to "speak before all others for [the people's] constitutional ideals" unrestrained by meaningful text or tradition . . . [and] that the Court must adhere to a decision for as long as the decision faces "great opposition" and the Court is "under fire" acquires a character of almost czarist arrogance.

Id. at 998-99 (quoting *id.* at 868) (second alteration in original). Finally, one quip demonstrating that Scalia may have a future in standup comedy after he leaves the Court (presumably in clubs near law schools) intones:

The Court's statement that it is "tempting" to acknowledge the authoritativeness of tradition in order to "cur[b] the discretion of federal judges," is of course rhetoric rather than reality; no government official is "tempted" to place restraints upon his own freedom of action, which is why Lord Acton did not say "Power tends to purify."

Id. at 981 (quoting *id.* at 847) (alteration in original).

258. The search for the following examples of judges using the "judicial activism" label was greatly facilitated by computer-based legal research; the same search would have been exceedingly difficult (if not impracticable) only 15 years ago. For use of the activism rhetoric by Supreme Court Justices, see *United States v. Lopez*, 514 U.S. 549, 611 (1995) (Souter, J., dissenting) ("[H]istory raises its objections that the Court's previous essays in overriding congressional policy choices under the Commerce Clause were ultimately seen to suffer two fatal weaknesses: when dealing with Acts of Congress . . . nothing in the Clause compelled the judicial activism . . ."); *Florida v. Wells*, 495 U.S. 1, 13 (1990) (Stevens, J., concurring in the

In addition to the perception problem, the *Casey* joint opinion often hid behind vague, flowery language which obscured concrete rationales for why and how their approach (as opposed to that of the two primary dissenters) would better protect individual rights and secure the Court's legitimacy. Although Justice Rehnquist's constitutional rights framework is arguably overly formalistic²⁵⁹ and Scalia's approach could be characterized as flippant,²⁶⁰ their formalist argumentation offers relatively bright lines for arguing whether a right deserves special protection. In contrast, the joint opinion's replacement of formalism with dreamy assertions such as, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life,"²⁶¹ provide no practical guidelines for distinguishing on a neutral basis the abortion right from other alleged rights falling under the general rubric

judgment) ("[T]o reach out so blatantly and unnecessarily to make new law in a case of this kind is unabashed judicial activism."); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 663 (1989) (Stevens, J., dissenting) ("I cannot join this latest sojourn into judicial activism."); *New Jersey v. T.L.O.*, 468 U.S. 1214, 1215 (1984) (Stevens, J., dissenting) ("Of late, the Court has acquired a voracious appetite for judicial activism in its Fourth Amendment jurisprudence, at least when it comes to restricting the constitutional rights of the citizen."); and *United States v. Wade*, 388 U.S. 218, 250 (1967) (Black, J., dissenting in part and concurring in part) (stating that to adopt the majority's rule of evidence on the basis of the Fourteenth Amendment "would be 'judicial activism' at its worst").

Lower federal court judges are increasingly employing the "judicial activism" barb, particularly when dissenting from a refusal to hear a controversial case en banc. For example, the 5th Circuit affirmative action case, *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), drew the commentary that

The label "judicial activism" is usually found in the lexicon of those voicing concern about judges whom they perceive to be "liberal," fashioning remedies beyond the scope of what is deemed to be appropriate under the law. Such judicial legislating is generally excoriated as a "bad thing." *Hopwood v. State of Texas* is a text book example of judicial activism.

Hopwood v. Texas, 84 F.3d 720, 722 (5th Cir. 1996) (Politz, C.J., dissenting from failure to grant rehearing en banc) (footnote omitted).

259. As of 1914, only nine states and the territory of Alaska permitted women to vote. See WHICKER ET AL., *supra* note 89, at 120. The 19th Amendment, which holds that the right to vote shall not be denied on the basis of gender, was not ratified until 1920. U.S. CONST. amend. XIX. In this light, Rehnquist's oft-repeated temporal argument, which consists of tallying the number of legislatures which had passed laws restricting abortion by 1868, *see, e.g., Casey*, 505 U.S. at 952 (Rehnquist, C.J., concurring in part and dissenting in part), seems insensitive and a bit disingenuous because it relies on the voting records of the completely male-dominated legislatures—politically answerable only to male voters—to determine if a woman's right is "firmly rooted."

260. Scalia states that he does not find a constitutional right to abortion "because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed." *Casey*, 505 U.S. at 980 (Scalia, J., concurring in part and dissenting in part).

261. *Id.* at 851.

of individual liberty.²⁶² The lack of rules which cabin the contours of the debate will provide a broader target for Court detractors to hit.

One final criteria one might use to judge the success of a controversial case in the electronic age is whether the opinion is written in a manner which connects with a nonlawyer audience. Despite the shortcomings of the joint opinion, the arguments are written in a natural style with clear language.²⁶³ Clarity can be an important tool in maintaining the legitimacy of the Court in its countermajoritarian role.²⁶⁴ If the people perceive incomprehensible opinions to be an exercise in “lawyering” or worse, the political give and take of politicians, the Court’s image could be impugned. In addition, schizophrenic “concur as to parts I, II and IV” situations detract from the fiction that the law is discovered rather than created by judges and produce confusion as to what the law is.²⁶⁵ It was therefore important for the “center” of the *Casey* Court to join together to produce one unified voice and thus offset the unified voice of Rehnquist, Scalia, and Thomas.²⁶⁶

262. The problem created is one of consistency. For example, within the “right to define” paradigm, it is difficult to explain why the state should, without any heightened scrutiny, be permitted to categorically ban mind-altering drugs. Although one may postulate that the nature of abortion is different from drug usage in terms of the life-altering effect of pregnancy on a woman, the Court has not explicitly articulated a useful framework verifying the existence of a distinction more profound than a bare subjective preference for a particular brand of autonomy.

Some Justices have found this methodology useful, however. Justice Stevens in the recent assisted suicide cases argued that: “Avoiding intolerable pain and the indignity of living one’s final days incapacitated and in agony is certainly ‘[a]t the heart of [the] liberty . . . to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.’” *Washington v. Glucksberg*, 117 S. Ct. 2302, 2307 (1997) (Stevens, J., concurring) (quoting *Casey*, 505 U.S. at 851) (alterations in original).

263. See Lackland H. Bloom, *Taking the People Seriously*, 79 CORNELL L. REV. 885, 901 (1994) (book review) (noting that the *Casey* joint opinion, when explaining why it declined to overrule *Roe*, was “written in a very clear and non-technical style”). In the view of some scholars, such clarity is unfortunately not a jurisprudential norm. Over the past 20 to 30 years, the Court’s opinions “in even the most important and interesting cases have grown technical, tedious, argumentative and fragmented.” *Id.* at 887. Yale law school professor Joseph Goldstein notes that “[o]ur justices on the Court must never forget that the Constitution, which they expound, emanated from Us, was meant to remain comprehensible to Us, and was established for Our prosperity to endure and to be modified with Our informed consent.” JOSEPH GOLDSTEIN, *THE INTELLIGIBLE CONSTITUTION* 7 (1992).

264. *Brown v. Board of Education* is a model example of such clarity at a crucial moment in American legal history. However, the “all deliberate speed” remedy, which purported to enforce *Brown*’s command to end segregated public education, was a model of studious ambiguity. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*).

265. Goldstein points to the abortion case, *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), to be a textbook example of the problems associated with fractured opinions. GOLDSTEIN, *supra* note 263, at 17.

266. In extremely controversial cases, such as *Brown v. Board of Education*, the Justices have often abided by a “strength in numbers” rationale. See LAZARUS, *supra* note 150, at 474 (“Just as the Court spoke unanimously in trying to quell resistance to *Brown*, the centrist trio [in *Casey*] called in unison for acceptance of their version of *Roe*.”).

Although the joint opinion's prose is generally clear and accessible, the trio neglected the most powerful tool of persuasion—storytelling.²⁶⁷ Justice Scalia closed his opinion with a story of historical import to powerfully argue that the joint opinion's attempt, in its words, to “call[] the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution”²⁶⁸ acquired an aura reminiscent of the infamous *Dred Scott v. Sandford* decision.²⁶⁹ To Justice Scalia, the lessons of history were clear. He concluded: “It is no more realistic for us in this litigation, than it was for [Justice Taney in *Dred Scott*] in that, to think that an issue of the sort they both involved—an issue involving life and death, freedom and subjugation—can be ‘speedily and finally settled’ by the Supreme Court”²⁷⁰

Nevertheless, one might question whether the joint opinion really expected interest groups and politicians to accept the “common mandate” announced by the plurality. It is debatable whether Justices O'Connor and Kennedy actually relied on cosmic substantive due process concepts, or envisioned Dworkin's “constitution of principle,” in light of the tone of their previous decisions.²⁷¹ Some commentators speculate that factors wholly apart from the law influenced O'Connor and Kennedy to join with Justice Souter in *Casey*.

First, the Justices are subject to internal peer pressure, a factor that may not be fully appreciated. Court observer Christopher Smith theorizes that Justice Scalia's incessant pounding of Kennedy and O'Connor with sharp sarcasm in previous abortion decisions finally turned them against Scalia's ideas.²⁷² However, at least

267. See GERRY SPENCE, *HOW TO ARGUE AND WIN EVERY TIME* 114 (1995) (“[T]he most effective structure for any argument will always be [a] *story*.”) (emphasis in original).

268. *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992) (Scalia, J., concurring in part and dissenting in part).

269. 60 U.S. (19 How.) 393 (1857). Scalia wrote:

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is all in black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment.

Casey, 505 U.S. at 1001-02 (Scalia, J., concurring in part and dissenting in part).

270. *Id.* at 1002 (quoting President James Buchanan, Inaugural Address (Mar. 4, 1857), in *INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES*, S. DOC. NO. 101-10, at 126 (bicentennial ed. 1989)).

271. For example, in a 1983 abortion case, Justice O'Connor commented that:

Irrespective of what we may believe is wise or prudent policy in this difficult area, “the Constitution does not constitute us as ‘Platonic Guardians’ nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, ‘wisdom,’ or ‘common sense.’”

City of Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting) (quoting *Plyler v. Doe*, 457 U.S. 202, 242 (1982) (Burger, C.J., dissenting)).

272. SMITH, *supra* note 255, at 91-102. In addition, compare LAZARUS, *supra* note 150, at 224 (contending that Scalia early in his tenure on the Court was “domineering,” “at times rude,” and “showed no deference to his colleagues”), with Justice Clarence Thomas, Remarks

as applied to O'Connor, this theory has been heartily challenged.²⁷³ Another theory concerning Kennedy points to his supposed desire to offset the votes of Justice Clarence Thomas.²⁷⁴ Second, there is the external political pressure which the joint opinion explicitly figured into its decision to refrain from overruling *Roe v. Wade*.²⁷⁵ In addition, some have charged that Kennedy succumbed to the "Greenhouse Effect," a desire to curry favor with elites inside the Beltway.²⁷⁶ As for Souter, one can only speculate whether the vicious attacks on his character and judicial record by interest groups at the time of his nomination influenced his judicial philosophy on the Court.²⁷⁷

to the National Bar Association, Memphis, Tenn. (July 29, 1998), in *WASH. TIMES*, July 31, 1998, at A21 ("Unlike the unfortunate practice or custom in Washington and in much of the country, the Court is a model of civility. . . . I have yet to hear the first unkind words exchanged among my colleagues.").

As the October 1997 term came to a close, Justice Ginsburg announced that collegiality at the Court is much higher than in the recent past. "Again this year, in line with what may now be the trend, the court's opinions so far have been steadily civil in tone." Richard Carelli, *Civility Reigns at Supreme Court*, Associated Press, June 12, 1998, available in 1998 WL 6680568. Although acknowledging that Justice Scalia during that term attacked a majority opinion with the disparaging words "febleness" and "utter lack of logic," Ginsburg stated that the author of the majority opinion in that case, Justice Stephen Breyer, "is not easily offended, and he enjoys (Scalia's) sparkling wit, as I do." *Id.* Nevertheless, even though it appears the Justices are professionals willing to take sharp criticism in stride, a fundamental and unresolved question is with what stride laypersons may view such attacks.

273. Professor Marci Hamilton, who clerked for Justice O'Connor during the 1989-1990 term, dismisses this theory and notes that no external influences would sway O'Connor either way. Hamilton believes that Scalia knew from the beginning that O'Connor would not overrule *Roe* and thus he wrote his opinions in a boisterous manner with no fear of losing a future vote. Finally, Hamilton points out that O'Connor articulated the undue burden standard early on and posits that furthermore she is the most consistent member of the Court on the issue. Interview with Marci A. Hamilton, Cardozo Law School Professor, in Bloomington, Ind. (Nov. 19, 1997).

274. This theory holds that the controversy surrounding the appointment of Clarence Thomas caused Kennedy to second guess his initial rejection of *Roe*. See SMITH, *supra* note 255, at 126.

275. See discussion *supra* text accompanying note 233.

276. Federal Judge Laurence Silberman coined the term "Greenhouse Effect," which refers to *New York Times* Supreme Court correspondent Linda Greenhouse. *Wall Street Journal* editor Max Boot offers Justice Kennedy's opinions in *Casey*, *Romer v. Evans*, and the Virginia Military Institute case as "evidence of how the capital's insidious influence can push supposedly conservative judges into becoming activists." Max Boot, *How Judges Can Make Friends In Washington*, *WALL ST. J.*, July 13, 1998, at A15.

277. A press conference in September 1990 provides an apt example of the paradox that many activists who continually call for the courts to nullify legislation hostile to their interests (actions which the judiciary can take only if it is truly independent) will subsequently threaten that very independence by reducing the judicial nomination process to a referendum on a narrow set of political issues. See Burbank, *supra* note 33, at 41 ("Taken to extremes, the use of criteria for appointments to the federal bench that are tied to an individual's views on important issues of law and social policy can fairly be seen as an attempt to abort rather than to predict the issue of judicial independence."); *News Conference by Organizations Who Oppose the Nomination of David Souter to the U.S. Supreme Court*, Federal News Service, Sept. 12, 1990, available in LEXIS, News Library, FEDNEW File. At the anti-Souter press conference, Eleanor Smeal of the Feminist Majority charged that a vote for Souter would kill

CONCLUSION

The *Casey* joint opinion correctly observed that “[t]he Court’s power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”²⁷⁸ Within these pages, I have sought to demonstrate that the rising majoritarianism will increasingly use technology to perpetuate itself and that judges must recognize the potential dangers this trend poses to judicial independence. However, I do not contend that the threat to the judiciary posed by information technology is imminent. In the relatively near future, the Internet and similar communication media will directly effect the elections of state and federal legislators to such a degree that a candidate cannot afford to neglect the new communication media.²⁷⁹ Careful consideration of the technological difficulty far enough in advance will ease the transition for the judiciary into this new era of human advancement.

Although many organizations seeking to protect judicial independence have acknowledged the upsurge of harsh judicial criticism²⁸⁰ and recognize the

women, announcing that “We believe that this is a referendum on abortion rights for American women. . . . [I]f it is the fifth vote . . . [because states will toughen abortion restrictions,] it means that some women will lose their lives.” *Id.* Center for Constitutional Rights representative Pat Maher closed her remarks with the statement, “It is absolutely intolerable to entertain the thought of someone like Souter in a society such as ours which should be striving towards justice, . . . an acceptance of diversity and . . . full human rights.” *Id.* Maher later added, “This thing, the Constitution, isn’t just a notion, it isn’t just a word, it is about real life. David Souter knows nothing about real life . . .” *Id.*

278. *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992). It is unfortunate that at a moment in history when the electorate is restless and disillusioned with government, the *Casey* Court appeared fractured (and the joint opinion impeccably vague) when declaring “what the Nation’s law means.” Even worse, Justice Blackmun in *Casey* dared the other two branches to challenge the Court’s authority. *See id.* at 924 (Blackmun, J., dissenting in part and concurring in part) (“What has happened today should serve as a model for future Justices and a warning to all who have tried to turn this Court into yet another political branch.”).

279. *See* William Booth, *Politicians Set Their Sites on the Web; More Are Going Online to Woo Voters, Donors, Volunteers*, WASH. POST, Oct. 17, 1998, at A1. The Internet has not yet advanced to the stage where political campaigns deem its importance to be comparable to that of television. *See* Greg Miller & Esther Schrader, *Internet’s Role in Campaigns Still Limited*, L.A. TIMES, Oct. 28, 1998, at A1.

280. A 1996 American Bar Association report notes that “[a] new cycle of intense judicial scrutiny and criticism are now upon us; one that has been forming over the last decade.” AMERICAN BAR ASSOC., AN INDEPENDENT JUDICIARY: REPORT OF THE COMMISSION ON THE SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE at i (July 4, 1997), available in ABA Governmental Affairs Office, *An Independent Judiciary: Report of the Commission on the Separation of Powers and Judicial Independence* (visited Jan. 28, 1999) <<http://www.abanet.org/govaffairs/judiciary/home.html>>. However, that report also placed the current situation in perspective, noting that “bashing judges has a long and distinguished tradition; indeed, many of our esteemed presidents, including Jefferson, Lincoln and both Roosevelts, rebuked judges of their day.” *Id.* at vi.

potential of new communications technology to educate the public,²⁸¹ the technological difficulty should be given attention commensurate with the potential danger it poses to the current constitutional structure. Given the public's considerable unfamiliarity with the history and role of the judiciary, education—a long-standing goal of concerned members of the bar—will become far more important than in the past.²⁸²

Although they undoubtedly were careful before, judges will observe that the substance of what they write, the manner in which they write their opinions, and what they say in public will be more heavily scrutinized as access to those opinions broadens. The fine line between avoiding too much candor (which will trigger the personal value judgment criticism) or not enough (thus drawing the “disingenuous” charge) which every judge walks will become more precarious with time. This will be particularly true in controversial cases where the stately aura of formalism is no longer available to clearly separate the law from its interpreter.²⁸³

Changes and constitutional proposals should not be met with a knee-jerk response. Not every proposal to limit the power of federal judges should be automatically attacked as an assault on the integrity of the judiciary branch with dire consequences for constitutional rights. If the Constitution is a malleable entity subject to being reinterpreted to reflect changes in society and culture,²⁸⁴

281. *See id.* at 62 (“An understanding of the communications mechanism [(the Internet and television)] by which children and adults learn about the justice and judicial systems is crucial to the success of any educational program.”).

282. One recommendation I will offer in this regard is that the Supreme Court syllabus accompanying every opinion should also contain a summary of dissenting opinions. Posting of Supreme Court material is often limited to the syllabus, due to space considerations and readability, and although a majority opinion is the only true opinion of a court, to provide only a summary of a majority opinion in a 5-4 decision can be misleading. Furthermore, if the dissent is required to submit the bare bones of the opinion, it will be fairly free of any caustic and misleading rhetoric.

283. It has been observed that “[i]n the past two generations the public philosophy of America has shifted radically from a religious to a secular theory of law The radical separation of law and religion in twentieth century American thought . . . creates a serious danger that law will not be respected.” Harold J. Berman, *The Interaction of Law and Religion*, 8 *CAP. U. L. REV.* 345, 350-51 (1979).

284. Compare Justice William Brennan's view of the Constitution's adaptability with Justice Scalia's perspective:

[T]he Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee.

Marsh v. Chambers, 463 U.S. 783, 816 (1983) (Brennan, J., dissenting).

“[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.”

Planned Parenthood v. Casey, 505 U.S. 833, 984 (1992) (Scalia, J., concurring in part and

it is not untoward to suggest that the role of the branch interpreting that document may need to change as well. If the judiciary and its defenders are willing to objectively evaluate the validity of thoughtful, modest, and appropriate structural limits on its power, then calls for substantive intrusions (such as impeachment for ideological reasons) will more easily be labeled unreasonable.

Finally, despite the unrelenting focus on restraining the judiciary, the primary source of the countermajoritarian difficulty today may be the Constitution.²⁸⁵ Judges, under the banner of a "living constitution," abandoned the original meaning in an effort to sustain the document. The growing number of contradictions and tensions within the Constitution which have grown over time²⁸⁶ suggest that the greatest document ever written in the history of government may be due for a replacement.²⁸⁷ Nevertheless, it is extremely unlikely that any such dramatic change will transpire in the near future.²⁸⁸

dissenting in part) (quoting *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (Curtis, J., dissenting)).

285. See discussion *supra* Part I.

286. For example, the gender integration of the Virginia Military Institute ("VMI") in *United States v. Virginia*, 518 U.S. 515 (1996), may be a just result which would gain the support of the American people if they were called upon to give the matter due consideration, but given the pervasive gender bias of the time it is inconceivable that the founders of the 14th Amendment believed they were opening VMI to women when they ratified the Amendment in 1868. Likewise, the destruction of federalism and any significant limitations on the scope of the Commerce Clause is so extensive that revival of the original vision may be impracticable. See *United States v. Lopez*, 514 U.S. 549, 601 n.8 (1995) (Thomas, J., concurring).

287. See TOFFLER, *supra* note 4, at 397 (declaring that governments across the globe will have to revise their structures because "they are increasingly unworkable—no longer fitted to the needs of a radically changed world").

288. See *supra* text accompanying note 67. Some theorists argue that the Constitution may be amended by other means more flexible than the Article V amending process, a development which would lessen the need for an entirely new constitution. For example, Professor Bruce Ackerman argues that the United States has periodically experienced "constitutional moments," such as the New Deal "switch," when the people implicitly amended the Constitution and the judiciary merely implemented the will of the people. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS passim* (1991).

In contrast, Professor Akhil Amar argues that the American people "retain an unenumerated, constitutional right to alter our Government and revise our Constitution" such that "an amendment or new Constitution could be lawfully ratified by a simple majority of the American electorate." Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 958-59 (1994); see also AMAR & HIRSH, *supra* note 6, at 8-18. Whatever the merits of these two theories standing by themselves (both have drawn criticism from a wide range of scholars), Professor Amar's view is clearly the superior of the two. Whereas Professor Amar would rely on the express will of the people announced after an open debate and casting of ballots (a process which he attempts to demonstrate is within the Founders' original contemplation), Professor Ackerman's theory essentially attempts to legitimize that which is patently illegitimate: His theory would establish a practice whereby judges who, without even declaring to the people that they are amending the Constitution, do not *interpret* but truly *rewrite* the Constitution and undertake this duty without any explicit authority in the Constitution or the explicit consent of the people.

Whatever the details of a solution to the technological difficulty, words from the current Chief Justice of the Supreme Court summarize the key to the judiciary's success in the twenty-first century: "Change is the law of life, and the judiciary will have to change to meet the challenges which will face it in the future. But the independence of the federal judiciary is essential to its proper functioning and must be retained."²⁸⁹

289. Chief Justice William H. Rehnquist, Keynote Address at the Washington College of Law Centennial Celebration (Apr. 9, 1996), in *Symposium on the Future of the Federal Courts*, 46 AM. U. L. REV. 263, 274 (1996).