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Dialogue and Judicial Review

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DIALOGUE AND JUDICIAL REVIEW

Barry Friedman*

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INTRODUCTION

I'll give you a hint. Contradictions do not exist. Whenever you think that you are facing a contradiction, check your premises. You will find that one of them is wrong.¹

We have been haunted by the "countermajoritarian difficulty" far too long. At least since Alexander Bickel's *The Least Dangerous Branch*,² constitutional scholars have been preoccupied, indeed one might say obsessed, by the perceived necessity of legitimizing judicial review.³ The endeavor has consumed the academy and, as this article will argue, distracted us from recognizing and studying the constitutional system that we do enjoy.

The Constitution of the United States has been in force for over two hundred years, and judicial review has been a part of the working Constitution for almost all of that time.⁴ Granted, the nature of judicial review has evolved over the course of our constitutional history, as have many other aspects of American constitutionalism. But judicial review has long been an integral part of our system of government, for better or for worse. In today's workaday political world, judicial review seems both firmly entrenched and fully accepted.

1. AYN RAND, *ATLAS SHRUGGED* 199 (1957).

2. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). Although the countermajoritarian difficulty obviously predated Bickel, see James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), the modern obsession with the countermajoritarian difficulty certainly dates to his discussion.

3. See Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1016 (1984) ("Hardly a year goes by without some learned professor announcing that he has discovered the final solution to the countermajoritarian difficulty, or, even more darkly, that the countermajoritarian difficulty is insoluble."); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46 (1989) (noting that scholarly literature about judicial review has been dominated by the countermajoritarian difficulty for several decades).

4. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Not until *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), did the Court strike down another act of Congress, but the Court sanctioned judicial review of, and struck down many, state actions during that time. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). Certainly "constitutional interpretation and enforcement have become [the federal courts'] primary role since the Civil War." Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 281-82 (1990).

Some might find it more than a little odd, therefore, that within the academy judicial review has been suffering a crisis of legitimacy for at least the past quarter-century. Nonetheless, scholarly work after scholarly work dealing with constitutional law and the Supreme Court begins by recounting in some fashion the problem of judicial legitimacy.⁵ Almost inevitably this recounting is a prelude to a normative prescription regarding the role of courts — and particularly of the Supreme Court — that seeks to put the legitimacy problem to rest.⁶

Bickel certainly laid the groundwork. In *The Least Dangerous Branch* he put the problem bluntly: “The root difficulty is that judicial review is a counter-majoritarian force in our system.”⁷ For Bickel, and virtually everyone who followed him, the bedrock premise of American political life is democracy, by which Bickel meant some sort of system of governance representative of the will of the people.⁸ When courts exercise the power of judicial review to overturn decisions made by other branches of government, their acts appear to conflict with the bedrock premise of representative governance.⁹ Thus, concluded Bickel — and for all its familiarity the startling nature of the conclusion cannot be avoided — “nothing . . . can alter the essential reality that judicial review is a *deviant* institution in the American democracy.”¹⁰

Bickel’s conclusion set him off on a search that has preoccupied all of us who walk in his footsteps — to define a normative theory of judicial review that somehow can reconcile the role of judicial review with its apparently undemocratic, and thus deviant, character.¹¹ Bickel set out to resolve the countermajoritarian difficulty by defining a function for courts that rested on their ability to define enduring

5. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE* 3-5 (1982); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11-12 (1980); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* ix, 1-4, 9 (1982).

6. All of the authors in the works cited *supra* note 5 pursue this end to a greater or lesser degree.

7. BICKEL, *supra* note 2, at 16.

8. See *id.* at 16-23; JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 4-6 (1980); see also ELY, *supra* note 5, at 5; PERRY, *supra* note 5, at 9-10. Some scholars seek, as I do, to integrate judicial review, but usually also by way of reconciling judicial review with majoritarian democratic concerns. See, e.g., Chemerinsky, *supra* note 3, at 74-77. Chemerinsky argues that democracy does not require pure majoritarianism and that our system was designed in many ways to avoid purely majoritarian outcomes.

9. BICKEL, *supra* note 2, at 16-17.

10. *Id.* at 18 (emphasis added).

11. See BICKEL, *supra* note 2, at 23-24. For commentary on Bickel’s view of judicial review, see Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 *YALE L.J.* 1567, 1573-90 (1985). Kronman argues that Bickel’s “deviant institution” discussion only serves as a starting point for the more specific question of what role courts should perform. *Id.* at 1574-75.

values and principles that stood at risk in the immediacy of the everyday political process but that courts, insulated from electoral politics, could define and protect.¹² Ultimately, however, Bickel seemed to recognize his own failure to resolve the problem as he put it.¹³ Since Bickel, others have offered numerous diverse theories in attempt after attempt at putting to rest the problem Bickel stated so forcefully.¹⁴

This article *does not* seek to provide an overarching normative theory of judicial review. Although captivated by the problem since my early exposure to it, and certainly no less interested than those who have preceded me in offering some solution, I have run into a stumbling block of insuperable difficulty. My difficulty is that the descriptive starting ground for all such theories does not appear to me to describe accurately our constitutional system. Absent that familiar descriptive firmament, however, the normative task becomes an uncertain one at best.

This article argues that most normative legal scholarship regarding the role of judicial review rests upon a descriptively inaccurate foundation. The goal of this article is to redescribe the landscape of American constitutionalism in a manner vastly different than most normative scholarship. At times this article slips across the line into prescription, but by and large the task is descriptive. The idea is to clear the way so that later normative work can proceed against the backdrop of a far more accurate understanding of the system of American constitutionalism.

The theory of this article — if one can call a largely descriptive endeavor a theory — is that the process of constitutional interpretation that actually occurs does not set electorally accountable (and thus legitimate) government against unaccountable (and thus illegitimate) courts. Rather, the everyday process of constitutional interpretation integrates all three branches of government: executive, legislative, and judicial.¹⁵ Our Constitution is interpreted on a daily basis through an

12. See BICKEL, *supra* note 2, at 23-33.

13. See ELY, *supra* note 5, at 71 (explaining that Bickel gradually came to realize that there was no consensus upon which to rest a judicial value-imposition role and that members of the Court were simply imposing personal values (citing ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 3-5 (1975) [hereinafter BICKEL, *CONSENT*]; ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 177 (1970) [hereinafter BICKEL, *PROGRESS*])).

14. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); ELY, *supra* note 5; PERRY, *supra* note 5.

15. See Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 *YALE L.J.* 821, 866 (1985) (arguing that the Supreme Court's role must be assessed within our "dynamic and interacting and functioning governmental system").

elaborate dialogue as to its meaning.¹⁶ All segments of society participate¹⁷ in this constitutional interpretive dialogue, but courts play their own unique role. Courts serve to facilitate and mold the national dialogue concerning the meaning of the Constitution,¹⁸ particularly but not exclusively with regard to the meaning of our fundamental rights.

This article provides a descriptive framework that is free from the constraints of the countermajoritarian difficulty for evaluating judicial activity. The article describes what courts actually do and how they actually operate in our constitutional system. This dialogic description *integrates* courts, rather than alienating them.¹⁹ The description legitimates courts only by explaining that the never-ending attempts at legitimation are pointless and distract us from more practical and important questions. Like all the other segments of society, courts simply are, *and will remain*, participants in American political life.²⁰ Ironically, in fact, courts seem to participate with a good deal more popular approval (the views of the academy to one side) than the other branches of government.²¹ This article describes an America in which courts are a vital functioning part of political discourse, not some bastard child standing aloof from legitimate political dialogue.

This article proceeds in three separate parts. Parts I and II argue that the very premises of the countermajoritarian difficulty are faulty. Part I challenges the basic notion that courts are countermajoritarian. Part II rejects the underlying premises of the countermajoritarian ar-

16. This dialogue is, in part, similar to much of the modeling being done concerning the Supreme Court's and Congress' interaction in the area of statutory construction. See, e.g., William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991); William N. Eskridge, Jr. & John Ferejohn, *Making the Deal Stick: Enforcing the Original Constitutional Structure of Lawmaking in the Modern Regulatory State*, 8 J.L. ECON. & ORGANIZATION 165 (1991); John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992).

17. See BOBBITT, *supra* note 5, at 185 ("All constitutional actors participate in creating constitutional decisions of principally expressive significance.")

18. See Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) (calling Supreme Court Justices "teachers in a vital national seminar").

19. Success, for me, would be a recasting of the way we describe and study the role of courts in society. The majoritarian-countermajoritarian debate is descriptively inaccurate, and it unnecessarily and inappropriately focuses discussion on the question of judicial legitimacy. We ought to view courts as equal partners in the American constitutional process, different in their own way, but certainly not illegitimate. Once we get beyond the majoritarian-countermajoritarian dichotomy we are likely to find courts in some ways more like the rest of government than we thought, and different in ways we failed to consider. See MARTIN SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 41-44 (1966); Chemerinsky, *supra* note 3, at 77-83. This, in turn, can only help advance our knowledge of how courts operate and free us to make a sensible stab at normative questions regarding how they ought to operate.

20. Cf. Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1992 (1990) (arguing that minorities should not be "distracted" by whether the system is fair, "[t]he process simply works the way it works").

21. See *infra* notes 234-35 and accompanying text.

gument. Part III is a redescription of the landscape of American constitutionalism, one in which courts are seen as promoters of, and participants in, a national dialogue about the meaning of the Constitution.

In Part I, I argue, contrary to Bickel and others, that courts are not systematically less majoritarian than the political branches of government. If being "majoritarian" is so important, this Part suggests, then courts are majoritarian too. Part I begins by establishing some measures of majoritarianism — such as polling data, the sources of judicial constitutional interpretation, and the process of selecting judges — and then examines those measures to prove that courts are not systematically less majoritarian than the political branches. This argument concededly is made with tongue partially in cheek: many undoubtedly would dismiss as fanciful the claim that courts are not less majoritarian than, say, Congress. But, aside from the powerful evidence to the contrary in Part I, I ultimately argue that, if the conclusion that courts are "majoritarian" seems troubling, perhaps it is because the entire concept of majoritarianism is sufficiently incoherent that it cannot serve as a useful basis for comparing courts to other governmental actors.

Part II proceeds to the conclusion that the countermajoritarian difficulty itself is built upon faulty premises and thus fails as an accurate description of American constitutionalism. First, Part II argues that neither majoritarian government nor judicial review as we know it is necessarily what the Framers had in mind. Nonetheless, the two have matured together, checking and balancing one another, consistent with the Framers' broad theoretical design for our Constitution. Second, Part II challenges two fundamental premises of the countermajoritarian difficulty, premises that seem to lie at the bottom of virtually all constitutional scholarship regarding the role of courts and judicial review. The first premise is that American constitutionalism is founded first and foremost on, to use Michael Perry's phrase, "electorally accountable policymaking."²² Electorally accountable policymaking means that the people make decisions of governance, either by direct vote or through electorally accountable representatives.²³ The second premise is that courts, through the exercise of judicial review, depart in some significant way from the principles underlying the first premise and thus must be justified, or legitimated, by some principle that reconciles the apparently conflicting institu-

22. PERRY, *supra* note 5, at 4; see also ELY, *supra* note 5, at 4-7.

23. PERRY, *supra* note 5, at 3-4. Perry draws his definition from the work of various political scientists and philosophers. See *id.* at 3-4 & n.16.

tions of democratic governance and judicial review.²⁴ Part II demonstrates that each of these premises rests on a highly contestable assumption.

The premise of electorally accountable decisionmaking assumes there is such a thing as an identifiable majority will, when there is not. The premise of judicial interference assumes that judicial decisions are final, when they are not. Part II looks to set aside these faulty assumptions, replacing them with three actual facets of our constitutional system — constituency representation, spaciousness of the constitutional text, and the dynamic nature of constitutional interpretation — that form the basis for a more accurate description of how courts actually operate in society.

Part III then offers a very different description of American constitutionalism, one that I believe mirrors reality far more than does discussion of the countermajoritarian difficulty. Part III relies upon the three facets identified in Part II to describe the *actual* role of judicial review. This role is dialogic: courts interpret the Constitution, but they also facilitate and mold a societywide constitutional dialogue. Through this societal dialogue the document takes on meaning. Part III describes how the dialogue operates, focusing on one particularly significant constitutional dialogue, the debate about abortion. Part III then identifies the specific role that courts play in fostering dialogue. Finally, Part III concludes with a discussion of the inevitability of dialogue and the internal systemic forces that constrain judicial behavior. Underlying much of the countermajoritarian difficulty is a concern about judicial constraint; but the normative theories that inevitably follow a discussion of the countermajoritarian difficulty do not, in reality, constrain judges. There *is* constraint upon judicial behavior, however. Part III explains at some length how that constraint is inherent in our dialogic system, not external to it.

Some deride the dialogic thread of some recent constitutional

24. Chemerinsky, *supra* note 3, at 46; Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1513 (1990) ("In the received wisdom, judicial review is seen as countermajoritarian because it invalidates the products of the majoritarian political process."). Professor Jan Deutsch identifies an imbedded tension in much of the thinking about courts. We do not want courts to shift with political winds, yet we express concern at their insulation from electoral decisionmaking. See Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 187 (1968) ("What we cannot do . . . is have it both ways, simultaneously denying legitimacy to decisions of a politically unresponsive institution and to decisions of one that responds to shifts in political sentiment.").

scholarship.²⁵ The notion of dialogue has been called "trendy,"²⁶ and indeed it may be so. An idea is not wrong, however, simply because it is current. Prior attempts at resolving the countermajoritarian difficulty on its own terms have obviously failed to persuade.²⁷ Although one possibility is that the countermajoritarian difficulty simply is insoluble, another possibility is that none of the theories offered to address the countermajoritarian difficulty succeeds in persuading because the countermajoritarian difficulty and the premises supporting it do not rest upon an accurate portrayal of the constitutional system we actually enjoy.²⁸ The theories often are aspirationally useful, or instructive, but they do not mirror society. To persuade, a theory must fit the evidence it seeks to describe.

Although mine is not the first work on constitutional interpretation and the role of courts to rely upon the idea of dialogue, this article is different in important respects. Much of the notion of dialogue discussed by others is normative and builds upon what I believe to be the descriptively inaccurate premises of the countermajoritarian difficulty. Bruce Ackerman's work provides a good example.²⁹ Ackerman extols an America in which the Constitution "is the subject of an ongoing dialogue amongst scholars, professionals, and the people at large"³⁰ But the America that Ackerman extols has a "rediscovered"

25. See Earl M. Maltz, *The Supreme Court and the Quality of Political Dialogue*, 5 CONST. COMM. 375 (1988); Robert F. Nagel, *Political Pressure and Judging in Constitutional Cases*, 61 U. COLO. L. REV. 685, 700 (1990); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 434-37 (1990).

26. See Nagel, *supra* note 25, at 700.

27. See ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 2 (1989) (discussing a "parade of theories, each one brilliantly argued and each one profoundly unsatisfactory").

28. Ely's theory, for example, is normatively interesting but descriptively inaccurate. Ely argues that courts should defer to majoritarian decisionmaking unless judicial action is necessary to protect the functioning of the political process or to protect a minority group subject to prejudice in the political process. See ELY, *supra* note 5, at 102-03; John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 833 n.4 (1991). Courts obviously seem to do more than perform the role Ely spells out for them, however. See, e.g., *Lee v. Weisman*, 112 S. Ct. 2649 (1992); cf. Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. REV. 893, 893 (1990) (arguing that the Constitution "simply will not fit the discipline of the accounts commonly offered on its behalf").

Public choice theory actually presents the converse of this problem. Public choice theory seeks to be brutally honest about our political world, but in its brutality seems to miss some of the nobler — or at least more ideological — aspects of political life. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 23-33 (1991); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 276 (1988).

29. See ACKERMAN, *supra* note 14, at 5-7; see also Ackerman, *supra* note 3; Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989).

30. ACKERMAN, *supra* note 14, at 5.

constitution set up along his own novel "dualist" theory.³¹ According to that theory, the people's voice is sovereign and can be heard in one of two ways: either through the operation of ordinary politics, or during periods of extreme mobilization of the people.³² Ackerman's view is that periods of extreme mobilization in effect amend the Constitution.³³ Thus, courts are *justified* in following the voice of the people over ordinary politics when — and only when — such extreme mobilization occurs. In setting out his dualist theory, therefore, Ackerman reveals that he too is caught up in the need to legitimize courts and solve (or, as he says, "dis-solve")³⁴ the countermajoritarian difficulty.

The conclusions of this article deviate from such generally accepted theory and thought, as to both the role of constitutional courts and the nature of constitutional rights. Courts, as described here, do not stand aloof from society and declare rights. Rather, they interact on a daily basis with society, taking part in an interpretive dialogue. Rights, by the same token, do not override majority will. Rather, "the People" define and redefine their rights every day as the interpretive dialogue proceeds.

At the close of this article, I discuss Antoine de Saint Exupéry's Little Prince,³⁵ who in his travels meets a king.³⁶ What a peculiar king he is: "He tolerated no disobedience. He was an absolute monarch. But, because he was a very good man, he made his orders reasonable."³⁷ So it is with our Supreme Court. Since *Cooper v. Aaron*,³⁸ at least, the Court has pretended to absolute supremacy in interpreting the Constitution. Whatever the value of this pretense, which itself gives rise to the discussion of the countermajoritarian difficulty, the reality is quite different. Rather than declaring what the Constitution means and expecting obeisance, courts solicit opinions and discussion from the body politic as to constitutional meaning and integrate popular views into constitutional interpretation. This article is, above all else, about understanding the difference between the pretense and the reality of judicial review.

31. *Id.*

32. *Id.* at 6-7.

33. For a description of the process of "higher lawmaking," see *id.* at 266-94.

34. Ackerman, *supra* note 3, at 1016.

35. ANTOINE DE SAINT EXUPÉRY, *THE LITTLE PRINCE* (Katherine Woods trans., 1971).

36. *Id.* at 41.

37. *Id.* at 42.

38. 358 U.S. 1 (1958).

I. MAJORITARIAN COURTS?

One thing is clear: courts are the bodies of government that seem to require explanation. Despite considerable scholarship questioning the extent to which much of our government is majoritarian or representative, commentators continue to appear concerned that *courts* are the “deviant” institution that must be legitimated.³⁹ Although a great deal of work has been devoted in recent years to the notion that the legislative process is not as majoritarian as we idealize, little focus has been given to the other side of the equation.⁴⁰ This section is devoted to challenging the notion that courts and judicial review are systematically less majoritarian than the “political” process. On close examination, one must question just how “countermajoritarian” courts are.

The point of this Part is not to prove that courts are majoritarian. This would be a surprising conclusion, especially in light of the serious questions as to whether the rest of government is, strictly speaking, majoritarian. Rather, my more modest goal is to show that courts do not trump majority will, or remain unaccountable to majority sentiment, nearly to the extent usually depicted. Measured by a realistic baseline of majoritarianism, courts are relatively majoritarian.

A. Defining Majoritarianism

One might assume that legal commentators⁴¹ agree on precisely what “majoritarianism” encompasses. After all, majoritarianism lies

39. Chemerinsky, *supra* note 3, at 46 (“For several decades, the scholarly literature about judicial review has been dominated by a quest for objective constitutional principles and a conviction that judicial review is a deviant institution in a democratic society.”).

40. Some exceptions (although not pursuing my dialogic theme) are Chemerinsky, *supra* note 3 (arguing that courts properly are countermajoritarian); Spann, *supra* note 20 (questioning the extent to which the Court possibly could fulfill its “traditional” role of protecting minorities); Winter, *supra* note 24; Steven L. Winter, *Tennessee v. Garner and the Democratic Practice of Judicial Review*, 14 N.Y.U. REV. L. & SOC. CHANGE 679 (1986) [hereinafter Winter, *Judicial Review*]; Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEXAS L. REV. 1881 (1991) [hereinafter Winter, *Upside/Down*].

41. The discussion that follows draws primarily from legal scholarship. Another, and perhaps more sophisticated, body of literature on majoritarianism is found in social science, and particularly political science, writing. That writing suggests an underlying problem with the entire structure upon which the countermajoritarian difficulty is built, the problem that the notion of a majority of the people is a fiction in and of itself. See DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* (1989), and particularly *id.* at 206-14. I address this problem in Part III. Moreover, work on public choice draws heavily from the social sciences in addressing the other half of the countermajoritarian difficulty, asking how majoritarian the political branches are. See *infra* notes 48-49 and accompanying text. Although footnotes throughout the article draw on this social science literature, my focus in *defining* majoritarianism is, again, legal scholarship. My reason for the focus is that this article is a response to the *legal* literature, not to the political scientists. Part of my point is that, just as public choice has helped us assess constitutional theory regarding the political branches, we should question our assumptions regarding courts.

at the heart of the countermajoritarian difficulty. But beyond agreement in the most general terms, commentators differ in their understanding of the countermajoritarian difficulty with judicial review in a system of ostensibly majoritarian governance.

No one seems to go quite as far as Alexander Bickel in stating the problem.⁴² Bickel's concern was that courts overturned majority will.⁴³ Majoritarianism was, for Bickel, the heart of democratic governance. Without majoritarianism there was no consent, and without consent no legitimacy.⁴⁴ Because courts interfered with the will of the majority,⁴⁵ judicial review was a "deviant institution."⁴⁶ Bickel was aware of all the difficulties with this argument, but he managed at bottom to dismiss them and leave us with what might be called the purest form of the countermajoritarian difficulty.⁴⁷

Those who have followed Bickel seem unwilling to state the problem so forcefully. Most of their difficulty stems from the recognition that, although democracy has something to do with majority rule,⁴⁸ in a representative system like our own majority rule is purely a question of degree.⁴⁹ All evidence suggests the Framers of our Constitution did not intend to base the document upon the principle of majority rule.⁵⁰

42. Bickel's work — rather than just setting out the countermajoritarian difficulty — sought to solve it. Bickel did not suggest that judicial review was deviant and should be abolished. Rather, his goal was to justify the practice, which he did by extrapolating from the nature of courts as opposed to the other branches of government. Focusing in particular on the Supreme Court, Bickel concluded that, given its insular position, the Court could serve as an opinion leader, a "shaper and prophet" leading the people to higher and more enduring values. BICKEL, *supra* note 2, at 239; see also Kronman, *supra* note 11.

43. See BICKEL, *supra* note 2, at 16-17 ("[T]he Supreme Court . . . thwarts the will of representatives of the actual people . . .").

44. See *id.* at 20 ("[C]oherent, stable — and morally supportable — government is possible only on the basis of consent . . .").

45. *Id.* at 16-17 ("[W]hen the Supreme Court declares unconstitutional a legislative act . . . it exercises control, not on behalf of the prevailing majority, but against it.")

46. *Id.* at 18.

47. See *id.* (discussing and dismissing difficulties).

48. See Chemerinsky, *supra* note 3, at 64 ("During this century, a definition of democracy as majority rule has emerged."); Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 810 (1974) ("[M]ajority rule has been considered the keystone of a democratic political system in both theory and practice."); see also ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 135 (1989) (describing strong and weak forms of majority rule; "virtually everyone assumes that democracy requires majority rule in the weak sense that support by a majority ought to be necessary to passing a law").

49. See Chemerinsky, *supra* note 3, at 82 (arguing that political branches fall on a "continuum" of relative majoritarianism); Choper, *supra* note 48, at 816 (noting that all branches of government have undemocratic aspects).

50. See Ackerman, *supra* note 3, at 1015 (arguing that "[t]he historical truth is that the Constitution was a fundamentally anti-popular act" that "was not intended as a democratic charter in the first place"); see also *infra* notes 191-201 and accompanying text (discussing Framers' intent).

Even if it was their intent, in reality the ideal seems unobtainable.⁵¹ Thus, most commentators view the majoritarian problem as one of judicial interference with the actions of popularly elected bodies or those accountable to such bodies.⁵²

It remains to explain, however, why judicial interference with popularly elected bodies and those accountable to them is problematic. What do courts lack that legislatures have? To this question there appears a host of answers; at the risk of inaccurate generalization a rough division is possible.

One objection is *substantive*. The decisions that count in a democracy are the ones that reflect majority will. In our system the best reflection of this majority will is thought to be legislative judgment.⁵³ If so, when courts overturn legislative judgments they are interfering with the best assessment of majority will.⁵⁴ This is seen as particularly problematic when a judicial decision is constitutional, because constitutional decisions are viewed as immune from popular overruling.⁵⁵

The other objection is one of *process*. Whether or not any given legislative determination actually reflects majority will, democracy theoretically assures majority control.⁵⁶ The process for implementing this control is popular election. As the theory goes, legislators are subject to election, and other officials are at least subject to legislative

51. See Chemerinsky, *supra* note 3, at 78 ("research . . . has powerfully demonstrated that legislative action frequently does not reflect the sentiments of society's majority"); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 272 (1992) ("It is impossible to have government rule in a nation of this size under a system that requires every individual, or even a majority, to consent to every decision."); see also *infra* notes 307-08 and accompanying text (discussing public choice theory).

52. See, e.g., BICKEL, *supra* note 2, at 17; Suzanna Sherry, *Issue Manipulation by the Burger Court: Saving the Community from Itself*, 70 MINN. L. REV. 611, 613 (1986) ("[W]hen the Court invalidates a statute, it is overturning the decision of a popularly elected body; in essence, it is enforcing its own will over that of the electorate.").

53. See Ackerman, *supra* note 3, at 1035 ("[T]here is only one place in which the political will of the American people is to be found: the Congress of the United States."); Sherry, *supra* note 52, at 612 (noting that our representative democracy possesses a majoritarian structure).

54. BICKEL, *supra* note 2, at 16-17; Sherry, *supra* note 52, at 613; Winter, *supra* note 24, at 1513.

55. Choper, *supra* note 48, at 811-12. See BICKEL, *supra* note 2, at 17 (arguing that democracy means that a representative body has the power to reverse judicial decisions). The countermajoritarian difficulty undoubtedly is seen as most acute when courts overturn political decisions on constitutional grounds, the presumption being (as the cited sources suggest) that the judicial decision then removes the issue from the realm of political decisionmaking. In this article I endeavor to show that such a judicial decision often has popular support or rests upon sources that reflect majority will. I also argue that even this notion of judicial finality is, at best, overstated. See *infra* notes 332-86 and accompanying text.

56. See Henry S. Commager, *Judicial Review and Democracy*, 19 VA. Q. REV. 417, 418 (1943) ("the one non-elective and non-removable element in the government rejects the conclusions as to constitutionality arrived at by the two elective and removable branches"); Sherry, *supra* note 52, at 612 (stating that our representative democracy is majoritarian in structure).

control.⁵⁷ Thus, a rough chain of majority control constrains those who govern.⁵⁸ Judges stand in stark contrast to this model of governance. Judges, unelected and appointed for life, are unaccountable to the majority even though their decisions, like legislative and executive ones, impose rules upon the majority.⁵⁹

From this discussion, it is possible to derive some benchmarks of majoritarianism against which judicial review can be measured. First, there is *substance majoritarianism*, which looks to determine whether judicial decisions interfere with or actually comport with majority rule. Substance majoritarianism in turn has two measures: results and sources. *Result majoritarianism* examines the actual results of judicial decisions in order to determine whether those results correspond with majority preferences. Because information is not always available to assess majority sentiment regarding judicial decisions, however, *source majoritarianism* looks to the *sources* of judicial decisionmaking, asking to what extent courts have turned to and relied upon evidence of popular will in deciding cases.⁶⁰

Second, there is *process majoritarianism*. Process majoritarianism examines the extent to which the judiciary is accountable to majority

57. BICKEL, *supra* note 2, at 19.

58. See *infra* notes 295-301 and accompanying text (discussing chain of accountability).

59. Louis M. Seidman, *Ambivalence and Accountability*, 61 S. CAL. L. REV. 1571, 1586 (1988) ("Whatever else one believes the concept [of majoritarianism] includes, there is surely general agreement that it does not normally include substantive decisionmaking by officials who are deliberately shielded from any form of popular control."). Professor Seidman provides a particularly eloquent discussion of judicial accountability, demonstrating the nexus between source majoritarianism and process majoritarianism:

Sometimes we say that persons are accountable when they are required to give an account of themselves — that is, to give reasons or justifications for conduct and to demonstrate that such conduct is not the product of mere whim or caprice. If one uses the word in this sense, judges — at least most appellate judges much of the time — *are* accountable. The custom of judicial opinion writing is a highly developed system for providing accounts of the resolution of disputed questions. Indeed, when the word is used in this fashion, the main difficulty we face is explaining the absence of *legislative*, rather than judicial accountability.

"Accountability" is also used in a second sense, however. We sometimes talk of persons being *held* accountable for their decisions — that is, being made responsible for them or being forced to bear the costs of a mistake. When the term is used in this fashion, the accountability of judges is more problematic, and it is this kind of judicial accountability that I will address in the remainder of this essay.

Of course, the two meanings of the term are interrelated. One way that people are made accountable is by forcing them to give an account of themselves. . . .

Id. at 1574.

60. Source majoritarianism actually may be seen as related both to substance and to process. It relates to substance in that reliance on the sources that represent majority will may be intended to guarantee results consistent with popular preference. Reliance on sources that represent majority also may relate to accountability, however, in that one could argue that if judges *do* rely on such sources they are constrained by, and thus in a sense accountable to, the majority. Rigid categorization is unimportant: these definitions are useful only to the extent they organize a way of looking at judicial majoritarianism. I am, however, using the concept of source majoritarianism more in the former sense, and I thus have included it in the discussion of substance.

will. As in the legislative realm, the inquiry here recognizes that all governmental decisions cannot actually depict majority will; thus, the question is whether, if the majority is unhappy with judicial decisions, it can influence who the judicial decisionmakers will be.

B. *Assessing Majoritarianism*

This section employs the measures of majoritarianism set out in the previous section to test the majoritarian nature of courts. With regard to *substance majoritarianism*, the section first examines *sources* of constitutional decisionmaking, finding that courts frequently draw upon evidence of majoritarian will in reaching decisions. Next, it examines polling data relating to some controversial judicial decisions in order to assess whether judicial *results* reflect majoritarian will. The answer is that quite often they do. Finally, the section turns to the question of *process majoritarianism*, examining whether the selection and accountability of judges somehow differs so significantly from that of other governmental officials as to account for the countermajoritarian label affixed to courts. The answer again turns out to be that there are accountability constraints on the judiciary.

1. *Substance Majoritarianism*

There are two measures of substance majoritarianism: sources and results. The following examination of source majoritarianism indicates that courts often rely on majoritarian sources in interpreting constitutional guarantees. The examination of result majoritarianism confirms that even the most controversial judicial decisions often enjoy popular support.

a. Sources. The first task is to measure the sources of constitutional interpretation, with an eye toward demonstrating just how majoritarian the sources are.⁶¹ Before tackling that task, however, a word regarding the essentially deferential nature of judicial review.⁶²

i. An aside on the majoritarian nature of constitutional decision-making. The entire pattern of judicial interpretation of constitutional rights is woven into a fabric of deference to the will of ostensibly more

61. See Spann, *supra* note 20, at 1982 ("In many instances, the governing substantive principles of law themselves incorporate majoritarian values . . ."), 1984-85.

62. See generally Richard Fallon, *Individual Rights and the Powers of Government*, 27 GA. L. REV. (forthcoming 1993). In this piece, which follows his 1992 Sibley Lecture at Georgia Law School, Professor Fallon argues convincingly that rights are not conceptually independent "constraints on government, but are defined in terms of what powers it would be prudent or desirable for government to have." *Id.* (manuscript at 1-2). Fallon meticulously defends his thesis with numerous examples of rights defined with reference to government powers.

majoritarian branches.⁶³ True, a judicial decision that bucks what appears to be the trend often will receive great media and even scholarly attention. But the fact of the matter is that courts usually approve the work of legislative and executive officials.⁶⁴

Judicial deference is built into the system of judicial review. Courts often make decisions about whether to trump government action with a thumb on the side of the scale that represents the will of the ostensibly majoritarian branches. This is true, for example, of any form of tiered review, such as that used for equal protection and substantive due process claims.⁶⁵ In tiered review, courts determine whether the challenged governmental rule or conduct passes means-end scrutiny, which involves two or three or more levels.⁶⁶ Courts view the vast majority of such governmental decisions through the prism of low-level, or rational basis, scrutiny.⁶⁷ Implicit in low-level scrutiny is deference to the government's chosen course.⁶⁸

63. Chemerinsky, *supra* note 3, at 57 (“[O]ne obvious consequence of the Court’s jurisprudence is that the government generally wins constitutional cases.”); *cf.* Winter, *supra* note 24, at 1475 (“[L]aw is nested in and entirely contingent on the wider social practices and understandings that are sedimented in any culture.”). Some evidence exists that the government’s success rate has been unusually high in constitutional litigation under the Rehnquist and Burger Courts, but the Warren Court may simply have been aberrational in ruling *against* the government so frequently. *Cf.* Chemerinsky, *supra* note 3, at 58 (presenting statistics regarding the government’s success rate under each Court). In this regard, Dean Stone has compiled some extremely valuable statistics. See Geoffrey R. Stone, *O.T. 1983 and the Era of Aggressive Majoritarianism: A Court in Transition*, 19 GA. L. REV. 15, 16-17 (1984). Stone’s point was that the Burger Court looked increasingly majoritarian if one studied the winners and losers in Supreme Court constitutional cases. Although Stone’s statistics do indeed show the Court increasingly rejecting constitutional claims, those same tables also show a very limited period in which the Court actually decided in favor of the constitutional claimant more than 50% of the time. See *id.* at 16 (In chart showing five-year intervals, only 1963 and 1968 are periods with over 50% of the decisions favoring a constitutional claim.).

64. See Stone, *supra* note 63, at 16-17 (reviewing decisions of the Burger Court).

65. See Chemerinsky, *supra* note 3, at 73 (arguing that the Court has internalized the majoritarian paradigm; “[n]owhere is this internalization more clear than in the familiar ‘tiered jurisprudence’ employed in fundamental rights and equal protection cases”).

66. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 532-33 (2d ed. 1991) (discussing tiered scrutiny in equal protection); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting) (challenging Court’s attempts to place equal protection cases into “two neat categories”).

67. See Chemerinsky, *supra* note 3, at 73 (noting that most cases are decided under low-level scrutiny under which “government almost always wins”).

68. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 1440 (2d ed. 1988); Chemerinsky, *supra* note 3, at 73; D. Don Welch, *Legitimate Government Purposes and the Enforcement of the Community’s Morality*, 1993 U. ILL. L. REV. (forthcoming 1993) (manuscript at 14) (discussing deferential low-level scrutiny test). The Court only extremely rarely strikes down government conduct when applying low-level scrutiny. See Chemerinsky, *supra* note 3, at 73. In fact, in order to obtain high-level scrutiny in substantive due process cases, a litigant must convince the Court that a right is “fundamental,” a requirement that in turn has a majoritarian cast. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986) (determining whether homosexual sodomy is a fundamental right by asking whether right is “‘deeply rooted in this Nation’s history and tradition’ ” and examining state practices on subject); *Moore v. City of East Cleveland*, 431 U.S. 494, 503-05 (1977) (plurality opinion) (determining whether right for family members be-

Sometimes the Court engages in balancing rather than tiered scrutiny. Rather than seeking to define the scope of the right in the abstract, for example, the Court regularly defines the right by weighing the government's interests in regulation, or balancing the interests of the government in not recognizing the right, against the value of the right to the individual.⁶⁹ Although theoretically balancing need not favor one side of the rights-deference equation, in practice balancing tends to overweigh government interests. Judicial opinion after judicial opinion demonstrates this, deferring to the "legitimate" or "substantial" needs of government to give content to a right.⁷⁰ Courts often fail to scrutinize seriously these claimed needs.⁷¹

Care must be taken, therefore, in jumping to conclusions of judicial countermajoritarianism. The following discussion takes up the task of demonstrating that, even when courts rule in favor of individuals in contexts that appear facially countermajoritarian, the courts nonetheless struggle to apply majoritarian sources of decision. But a necessary first step in this analysis recognizes that this is a relatively rare event. For the most part, courts defer to — indeed offer support to — the decisions of ostensibly majoritarian government. Courts have a built-in mechanism to do so.

ii. The sources of constitutional interpretation. The discussion that follows draws largely from U.S. Supreme Court cases interpreting the content of the right to trial by jury. The jury right plays a central role

yond nuclear family to live together is fundamental by examining the "Nation's history and tradition" through census data, studies on family living patterns, and other evidence of American traditions).

69. Fallon, *supra* note 62 (manuscript at 25-27). Balancing or weighing is familiar in criminal constitutional law decisions. *See, e.g.*, *Baltimore City Dept. of Social Servs. v. Bouknight*, 493 U.S. 549, 555-56 (1990) (holding privilege against self-incrimination reduced in light of government's legitimate noncriminal regulatory needs); *South Dakota v. Opperman*, 428 U.S. 364, 368-76 (1976) (permitting inventory search of glove compartment; government interests in securing cars and contents outweigh intrusion of search); *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967) (finding warrantless search of houses justified by exigencies of situation). Balancing is also prevalent in First Amendment cases. *See, e.g.*, *Central Hudson Gas & Elec. Corp. v. Public Serv. Commn.*, 447 U.S. 557, 566 (1980) (In commercial speech cases, the Court asks, in part, whether government has a sufficiently substantial interest to permit regulation of speech that is not misleading and concerns lawful activity.); *FCC v. Pacifica Found.*, 438 U.S. 726, 748-51 (1978) (stating that government's interest in regulating airwaves may outweigh interest in broadcasting indecent, yet not obscene, speech); *United States v. O'Brien*, 391 U.S. 367, 376-82 (1968) (stating that government's substantial interest in operation of Selective Service system may justify regulation of conduct that includes "speech" and "nonspeech" elements).

70. *See supra* note 69.

71. *See Illinois v. Lafayette*, 462 U.S. 640, 647-48 (1983) (upholding inventory search, eschewing need to examine "less intrusive" means, refusing to "second-guess" police practices, and declining to require police to make "fine and subtle distinctions" between what can and what cannot be searched). *See generally* Barry Friedman, *Trumping Rights*, 27 GA. L. REV. (forthcoming 1993) (discussing how notions of countermajoritarian difficulty cause courts, when balancing, to defer to assertions of government interests).

in the Bill of Rights.⁷² Perhaps more important for present purposes, the jury cases are especially rich in their invocation of a variety of sources of decision. The argument does not rest solely upon the right-to-jury cases, however; the section that follows briefly discusses the pervasive nature of the Court's majoritarian approach to defining constitutional rights.

The sources of judicial decision are discussed in the order that originalists would deem to be acceptable in judicial interpretation. Thus, I begin with the constitutional text, proceed to the intent of the Framers, and then move to increasingly less originalist sources. Observe in this ordering a wonderful irony: the very sources of interpretation deemed *most* legitimate by originalists, textualists, and the like will prove the *least* majoritarian. Conversely, the sources deemed illegitimate (and also the sources most often apparently determinative) in a judicial decision are the most majoritarian in nature. This discussion thus proceeds from least to most majoritarian sources.

The obvious beginning point for defining the content of constitutional rights is, of course, the text of the Constitution.⁷³ Although one could argue that textual reliance is majoritarian,⁷⁴ the opposite argument seems more persuasive.⁷⁵ Most of the text is two hundred years old, and few of us alive today had any hand in changing the text to any significant extent. Moreover, to alter the text by formal amendment would require more than a majority of the citizenry. Reliance on the text of the Constitution therefore seems countermajoritarian. Perhaps this is why the Supreme Court often ignores the text, or at least fails to pay close attention to it. The jury cases provide a good example. The Court has struggled with the question of when a criminal defendant is entitled to a jury. The answer seems obvious enough from the text. The Sixth Amendment reads: "In *all* criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . ." ⁷⁶ But "all"

72. See Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991) ("If we seek a paradigmatic image underlying the Bill of Rights, we cannot go far wrong in picking the jury.").

73. Cf. Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEXAS L. REV. 1207, 1233 (1984) ("All constitutional theories are to some extent interpretivist, because all at least begin by interpreting the language of the written Constitution.").

74. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971); see also Seidman, *supra* note 59, at 1579 ("[R]espect for the text and the intention of the framers serves [for originalists] as a functional substitute for political accountability."); cf. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 288-89 (1977).

75. See Seidman, *supra* note 59, at 1580-81.

76. U.S. CONST. amend. VI (emphasis added).

turns out not to mean all: it just means some.⁷⁷

Reaching contratextual conclusions requires attention to sources beyond the text. The next obvious candidate is the Framers' intent. If courts do not know what the text means (or know but want to disregard the text), they frequently turn to those who had a hand in drafting or ratifying the words. The Framers can be cited on almost any subject, but such citation generally occurs at a level of generality useless to resolve a case.⁷⁸ Thus, in *Duncan v. Louisiana*,⁷⁹ addressing the question of whether the Fourteenth Amendment incorporates the right to jury trial, the Court stated: "The framers of the [federal and state] constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action."⁸⁰ Probably true enough, but those very same Framers also rejected a constitutional amendment that explicitly would have applied the right to jury trial against the states.⁸¹ The Framers' intent becomes increasingly less helpful as the question is framed with greater specificity, particularly when the specificity includes conditions today that may differ dramatically from the time of framing.⁸² Is reference to the Framers' intent majoritarian? To the contrary; it amounts to rule by the dead hand from the grave.⁸³

Often the Framers failed to give us enough information to determine their intent, and so the Court turns to preconstitutional history,

77. Having rejected the explicit language of the Constitution, the Court had to determine whether or not particular offenses implicated the right to jury trial. The Court has interpreted "crimes" and "criminal prosecutions" in Article III and the Sixth Amendment in light of the common law, under which petty offenses — as opposed to serious crimes — were not subject to jury trial requirements. See *Schick v. United States*, 195 U.S. 65 (1904); *Callan v. Wilson*, 127 U.S. 540 (1888). In making such determinations, the Court has relied on several of the sources discussed below. See *District of Columbia v. Clawans*, 300 U.S. 617, 624-30 (1937) (relying on pre- and postconstitutional history, "polling," and whether the offense "so offends the public sense of propriety and fairness"); *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930) (characterizing offense at issue as "petty" would "shock the general moral sense").

78. For problems with originalism generally, see DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 376-85 (1990). On this specific point see *id.* at 381-83; Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); cf. Chemerinsky, *supra* note 73, at 1241 (addressing problems with identifying who Framers were or what they intended).

79. 391 U.S. 145 (1968).

80. 391 U.S. at 156.

81. See 391 U.S. at 153 n.20; see also *Williams v. Florida*, 399 U.S. 78, 92-99 (1970) (reviewing the history of the adoption of the Sixth Amendment and concluding that "there is absolutely no indication in 'the intent of the framers' of an explicit decision to equate the constitutional and common law characteristics of the jury").

82. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 536-37 (1975) (noting that the justifications for excluding women from juries no longer exist).

83. Chemerinsky, *supra* note 73, at 1228-30 ("Judges applying the framers' intent are striking down statutes enacted by popularly elected legislatures based on the desires of men who lived two centuries ago.").

the history of England, or the history of English-speaking peoples,⁸⁴ to divine the content of the right of jury trial. Thus, several jury cases recount the "frequently told" history of trial by jury, a history with "impressive credentials traced by many to Magna Carta."⁸⁵ Like the Framers' intent, this appeal to history too seems countermajoritarian.

By now a tremendous irony has presented itself. If one wants to show that judicial decisions are majoritarian, the constitutional text and its history and prehistory make for a bad start. The irony is that the sources discussed thus far are the very sources by which commentators most concerned about the countermajoritarian nature of judicial decisions would have courts abide.⁸⁶ These are the sources that in the eyes of many properly constrain majority will. And yet these "legitimate" sources seem plainly countermajoritarian.⁸⁷

Interestingly, the Court rarely considers itself bound by the sources discussed thus far. The discussion regarding "all" in the text of the Sixth Amendment provides one example.⁸⁸ Another arises in the context of whether juries must number twelve and the impact of preconstitutional history on the question. In *Williams v. Florida*⁸⁹ the Court examined that history and, despite finding considerable evidence of preconstitutional practice requiring a jury of twelve members, held that twelve jurors were not required.⁹⁰ Although historical practice was uniform, it was but a "historical accident."⁹¹ The number twelve, it turns out, was serendipity, and at best indicated "mystical or

84. *E.g.*, *Williams*, 399 U.S. at 86-99; *Duncan*, 391 U.S. at 151-54. One particularly wonders how relevant the history of "English-speaking peoples" (alone) will seem as less and less of the population is in fact descended from such people.

85. *Duncan*, 391 U.S. at 151.

86. See Robert H. Bork, *The Constitution, Original Intent and Economic Rights*, 23 SAN DIEGO L. REV. 823, 826 (1986) ("The only way in which the Constitution can constrain judges is if the judges interpret the document's words according to the intention of those who drafted, proposed, and ratified its provisions and its various amendments."); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POLY. 5, 10 (1988) (arguing that judges should construe Constitution in light only of text and original understanding).

87. I am perfectly aware that the response of such scholars would be that sticking to these sources represents "legitimate" countermajoritarianism, in the sense that the courts' role is to enforce unequivocal constitutional commands. This response, however, presents at least two enormous problems. First, one might ask by what authority this countermajoritarianism is "legitimate." What majority decided that rule? No one alive today was afforded the opportunity to sign on to the document. Second, the response rests on the notion that text, intent, and so forth are determinate, a notion even the Court seems to reject. See *infra* notes 370-72 and accompanying text.

88. See *supra* note 77 and accompanying text; see also *Taylor v. Louisiana*, 419 U.S. 522 (1975) (discussing exclusion of women from juries).

89. 399 U.S. 78 (1970).

90. 399 U.S. at 86-103.

91. 399 U.S. at 89.

superstitious insights into the significance of '12.'⁹²

Things become increasingly majoritarian from this point forward. Let us next consider a complex of sources, all of which point to practices subsequent to ratification of the Constitution. Although the categories are somewhat pliable, two suggest themselves, each containing a host of specific sources upon which the Court relies.

First, there is postconstitutional history. The Court apparently considers such evidence valuable because, "if they did *X* so soon after ratification, at the time of ratification the intent must have been *X*." Thus, while giving scant attention to the Senate's decision not to propose an amendment requiring trial by jury in the states, the *Duncan* Court gave weight to the fact that "[t]he constitutions adopted by the original States guaranteed jury trial. Also, the constitution of every State entering the Union thereafter in one form or another protected the right to jury trial in criminal cases."⁹³ This evidence is more majoritarian in nature, although one may question how well it stands the test of time.

A close cousin to postconstitutional history is custom or practice. Thus, the *Duncan* Court continues its argument for imposing jury trial in criminal cases on the states:

Jury trial continues to receive strong support. The laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so. Indeed, the three most recent state constitutional revisions . . . carefully preserved the right of the accused to have the judgment of a jury when tried for a serious crime.⁹⁴

This hardly is the language of a court rushing to impose its will on a resistant majority. Rather, the Court here is looking directly to majority practice.

History and practice refer to things that are measurable to some extent, but the Court is even more enthusiastically majoritarian when examining less tangible evidence. Whenever a principle presents itself for which the Court seems to lack hard evidence, it puts its finger on the American pulse. So it was in *Taylor v. Louisiana*,⁹⁵ in which the Court confronted the question whether the Sixth and Fourteenth Amendments guaranteed a jury from which women had not been excluded. The Court described the "American concept" of a jury, which included an "established tradition" that the jury be "truly representa-

92. 399 U.S. at 88.

93. 391 U.S. 145, 153 (1968).

94. 391 U.S. at 154.

95. 419 U.S. 522 (1975).

tive of the community.”⁹⁶ Excluding particular groups would be “at war with our basic concepts of a democratic society and a representative government.”⁹⁷ Whether we see it as convincing the people or assessing their views, the Court is clearly attempting to tie itself to majority will.

Most remarkable, perhaps, is the extremely majoritarian source to which the vast majority of the opinions ultimately lead. The Court turns time and again to a head count of states to discern the majority practice. My own name for this practice is *polling*, and it is a technique prevalent throughout constitutional cases.⁹⁸ Thus, in *Duncan* the Court concluded by assuring the states, albeit in a footnote, that its decision would have little impact because “most of the States have provisions for jury trials equal in breadth to the Sixth Amendment”⁹⁹ In *Williams v. Florida* Justice Harlan, dissenting, accuses the majority of resolving the case “based on a poll of state practice” saying “[t]his is a constitutional *renvoi*.”¹⁰⁰ In *Taylor v. Louisiana*, the Court states that “women are qualified as jurors in all the States. The jury-service statutes and rules of most States do not on their face extend to women the type of exemption presently before the Court”¹⁰¹

Polling is not the only way to assure that consensus supports the Court’s results. The Court similarly relies upon nationally recognized standards and even upon changing societal norms. *Taylor* stands out in this regard, for in deciding to invalidate Louisiana’s then-existent

96. 419 U.S. at 527. Justice Scalia’s heavy use of tradition has prompted commentary on this aspect of constitutional interpretation. See David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699 (1991). An excellent recent discussion of the use of tradition in interpreting the Constitution is Rebecca L. Brown, *Tradition and Insight: A Theory of Cognitive Interpretation* (unpublished manuscript, on file with author). Brown examines possible rationales for the use of tradition in constitutional adjudication and finds them generally wanting, at least to the extent tradition is deemed determinative. Rather, Brown argues, tradition plays a role because “[b]oth the constitutional interpreter and the document itself are creatures and creators of tradition, which they bring to the interpretative endeavor.” *Id.* at 5. “Tradition must be neither defined nor deified.” *Id.*

97. 419 U.S. at 527 (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

98. I commend Steve Winter’s excellent discussion of this majoritarian approach in *Winter, Judicial Review*, *supra* note 40.

99. 391 U.S. 145, 158-59 n.30 (1968).

100. *Williams v. Florida*, 399 U.S. 78, 122 (1970) (Harlan, J., dissenting).

101. 419 U.S. at 533 n.13; see also *Burch v. Louisiana*, 441 U.S. 130, 138 (1979) (noting that only two states allow nonunanimous verdicts by six-member juries in trials of nonpetty offenses and stating that “this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not”); *Baldwin v. New York*, 399 U.S. 66, 70-73 (1970) (noting that almost all states provide a jury trial when the penalty exceeds six months and stating that “[t]his near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn — on the basis of the possible penalty alone — between offenses that are and that are not regarded as ‘serious’ for purposes of trial by jury”).

rule requiring women to opt in for jury service, despite judicial approval of such a rule several years earlier, the Court went on at length to discuss the changing role of women in American society, complete with citations to federal Bureau of Labor Statistics reports.¹⁰²

Of course, not all of the Court's bases for decision easily can be called majoritarian or counter-majoritarian. The Court relies heavily on precedent (although it will abandon precedent when changing times require¹⁰³ and will even cite precedent for abandoning precedent).¹⁰⁴ Whether or not precedent is majoritarian depends in part on what that precedent said. As Professor Luban recently observed, courts tend to cite newer precedent when possible, eliminating the problem of being controlled by decisions from the past.¹⁰⁵ Similarly, parts of decisions built on reason or common sense present a difficult question — although, to the extent we presume the majority is rational, this appears to be an appeal to that majority's better judgment.¹⁰⁶

Actually, the latter point helps categorize a host of stray sources the Court uses in reaching decisions. The Court relies heavily in the jury cases upon expert opinions and experiments, for example to determine the size of a jury necessary to foster deliberation.¹⁰⁷ The Court commonly will cite professionally recognized standards or statements

102. 419 U.S. at 531-37 & n.17.

103. See *Williams*, 399 U.S. at 90-93 (rejecting precedent requiring 12-person juries). A recent thoughtful entry on the appropriate size of juries is George C. Thomas III & Barry S. Pollack, *Rethinking Guilt, Juries, and Jeopardy*, 91 MICH. L. REV. 1 (1992) (arguing from an approach very different from the Court's that the Court's decisions on jury size are correct).

104. See Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 76 (1991) (arguing that no clearly applicable precedent ever forced Court into a decision it did not want to reach).

105. See David Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1043 (1991); see also Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEXAS L. REV. 1073 (1992). Professor Zeppos offers a comprehensive empirical study of the sources that courts actually rely upon in statutory construction cases. In that context precedent is the most dominant source of authority. *Id.* at 1093. A similar study in the arena of constitutional interpretation would be extremely useful.

106. One "source" possibly omitted from the above discussion is "reason," which some might also use to refer to moral philosophy. I have trouble calling this a "source" of decision, perhaps because I agree with John Hart Ely that "reason alone can't tell you anything: it can only connect premises to conclusions." ELY, *supra* note 5, at 56. Ely goes on to argue that there is no more one correct moral philosophy than there is one right legal answer. Inevitably, then, a judge's own values become intertwined in reasoning. Whether reason is majoritarian or counter-majoritarian ultimately will vary depending upon whether the judge's values track the majority's. See *infra* notes 185-88 and accompanying text.

107. See *Ballew v. Georgia*, 435 U.S. 223, 231-39 (1978) (citing empirical studies on the effects of jury size and stating that "[w]e have considered them carefully because they provide the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment"); *Williams v. Florida*, 399 U.S. 78, 101-02 (1970) (citing studies on the effects of jury size); *Duncan v. Louisiana*, 391 U.S. 145, 157 (1968) (citing study in defense of use of lay juries).

from professional organizations.¹⁰⁸ These sources seem on their face neither apparently majoritarian nor countermajoritarian. When, for example, Hans Zeisel publishes a soon-to-be-famous study on jury behavior,¹⁰⁹ we do not necessarily have any clue what the majority might think of the study or his conclusions. Characterizing "expert" sources requires us to understand that the majority of the people often will not have thought through a particular issue. When the Court is grappling with a technical issue unlikely to have seized clearly the interest of the majority, it does precisely what we idealize a legislature as doing: the Court turns to experts for advice. Thus, the Court reads and cites studies, standards, and experiments. Like a legislative committee, the Court engages the assumption that the majority would want a result based on study and reason.

Even if one is skeptical about judicial assessment of majoritarian concerns, one simply cannot ignore the fact that judicial decisions are written for a public audience. Judicial opinions make clear that the Court perceives the need, if not to poll the majority, then at least to persuade it. The persuasion function explains the majoritarian nature of several aspects of the judicial opinion. Appeals to common sense and reason, discussed above, fit into this category. So too does frequent citation to sources that are not thought of as typical judicial authority, such as expert analyses.

But perhaps no part of an opinion is so easily overlooked as the statement of the facts. Review of the statement of facts suggests strongly a judicial effort to persuade a broad audience that it has reached the correct decision. In *Duncan v. Louisiana*,¹¹⁰ for example, the Court imposed the right to trial by jury in criminal cases on the states; the facts underscore the need for jury review. The story in *Duncan* is about an older black cousin who seeks to intervene in a developing fracas between black and white youths. Duncan is ultimately convicted for assault: the white youths claimed Duncan hit one of them, while the black youths claimed Duncan merely laid a hand on the victim's arm.¹¹¹ Whose version is true is far from clear, but the Court's statement of the facts suggests to me that the Court

108. See, e.g., *Roe v. Wade*, 410 U.S. 113, 141-47 (1973) (citing positions of medical and other professional organizations on abortion); see also LOUIS FISHER, CONSTITUTIONAL DIALOGUES 23 (1988) ("The practice of citing professional journals goes back at least to Justice Brandeis in the 1920s.").

109. Several jury cases rely on Zeisel's now-famous study with Harry Kalven, HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966). See *Ballew*, 435 U.S. at 238; *Williams*, 399 U.S. at 101 n.49.

110. 391 U.S. 145 (1968).

111. 391 U.S. at 146-47.

doubts the result in the case and feels that jury factfinders chosen from the broad community can best avoid such dubious results (perhaps an overly optimistic conclusion).

This persuasive function of opinions also comports with a majoritarian approach to resolving problems. Just as legislatures may turn to experts for information to resolve questions about which the majority may have no clear preference, so too the legislature may seek to persuade the majority of a certain course of action. Even taking into account current cynicism regarding the tendency of politicians simply to read polls to determine a course of action,¹¹² the more political branches at times will inevitably lead by example. Looking to statements of facts, or reliance on experts, does not undermine the notion of judicial majoritarianism. Results are not majoritarian because reached solely with reference to majoritarian sources. Rather, judicial results are as likely as legislative ones to be majoritarian in part because they employ similar techniques for resolving questions.

* * *

Determining precisely why a judge, or even a court, decided a case in a particular fashion is, of course, extremely difficult.¹¹³ Judicial opinions provide surprisingly little guidance in this inquiry. Few of them are models of clarity, and fewer still betray thoughtful organization. Rather, the decisions tend to be a hodgepodge of a familiar series of arguments cast together in a somewhat loose form.¹¹⁴ Any survey of the type I have engaged in is susceptible, therefore, to the claim that judicial opinions seldom betray the majoritarian or counter-majoritarian nature of the true basis for judicial decision. Judicial opinions may be nothing more than post hoc rationalizations for judicial imposition of the judges' own values. At the least, discerning which of the many arguments offered in an opinion proved determinative generally is impossible.

All this and more is true, and yet the preceding exercise is a telling one nonetheless. First, nothing said above particularly distinguishes courts from other governmental bodies such as legislatures. Likewise,

112. See, e.g., Jonathan Peterson, *Washing Our Hands of Politics*, L.A. TIMES, May 20, 1992, at A1 ("[T]he public's cynicism may come from the practice of modern politics, a dubious art that often seems driven more by opinion polls, money raising and manipulation than heartfelt leadership . . .").

113. STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 372-435 (1990); Zeppos, *supra* note 105, at 1078-80; see also Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) (arguing that judges and lawyers should employ a hierarchy of sources in addressing legal questions).

114. See Fallon, *supra* note 113; Zeppos, *supra* note 105, at 1078-80 (discussing wide range of writing relied upon by courts in deciding statutory interpretation questions).

judicial opinions that appear to rest on majoritarian sources cannot be discounted simply because we are unsure which argument ultimately was persuasive to the court, or even if a written argument mattered to an individual judge at all. If the argument can be sustained on majoritarian terms — if it appears to respect majority will — it is majoritarian. At any rate, examining the sources of constitutional decision makes increasingly apparent the extent to which judges seek to appeal to majoritarian values, if not to rely upon them entirely.

iii. The pervasiveness of the majoritarian approach. The prior section illustrated the wealth of judicial standards used to assess and write into law majoritarian preferences. The section relied heavily on Sixth Amendment jury trial cases, and one might object that the jury right by its nature seems majoritarian. Juries permit community values to play a role even in judicial decisions.¹¹⁵ Perhaps a more accurate assessment of the majoritarian nature of judicial decisionmaking must confront some right with a less majoritarian cast.

The dichotomy between the jury as a majoritarian right and other constitutional rights is, however, false. Although the jury right seems peculiarly addressed to majoritarian values, many of the rights in the Bill of Rights share this cast. Indeed, in a recent article Professor Akhil Amar makes just this point regarding the original intent underlying the Bill of Rights. Amar concludes that “[t]he essence of the Bill of Rights was more structural than not, and more majoritarian than counter.”¹¹⁶ Amar saves for another day analysis of the extent to which modern interpretation has strayed from the original structural and somewhat majoritarian nature of the manifesto of popular limits on governmental power. The Bill of Rights as interpreted does differ from what those who framed or ratified the original constitutional amendments might have imagined. But it nonetheless is true — indeed it is evident from the text of those rights — that many of them were intended to be majoritarian or popular in nature.

That the Court, in defining the nature of constitutional rights, often refers to majoritarian sources of decision should thus come as little surprise. As indicated earlier, many judicial decisions begin and end with the principle of deference to governmental decisions.¹¹⁷ When deference is deemed inappropriate, the court turns to broader evidence of what majoritarian desire might be. This section briefly

115. See Amar, *supra* note 72, at 1182-99.

116. *Id.* at 1133.

117. See *supra* notes 63-71 and accompanying text.

tours some other rights in order to demonstrate the pervasiveness of the majoritarian approach.

Perhaps the easiest example to illustrate my point that the Supreme Court defines much of the Bill of Rights from a majoritarian perspective¹¹⁸ is the Eighth Amendment. As judicially interpreted, the most majoritarian of all rights seems to be the Eighth Amendment's Cruel and Unusual Punishment Clause.¹¹⁹ But the excessive bail provision of that same amendment also is interpreted from a majoritarian perspective.¹²⁰

The majoritarian approach similarly is evident in a less expected

118. Several readers suggested that the majoritarian flavor I identify in Court decisions is primarily a phenomenon of the Burger and Rehnquist Courts. Clearly those Courts have been reluctant to uphold claims of constitutional rights. *See generally* Sherry, *supra* note 52; Stone, *supra* note 63. Equally clearly this trend mirrors popular thought. *See* Stone, *supra* note 63, at 22-23 ("The shift is due, in part, to a more general shift in our national politics and attitudes."). This evidence standing alone, however, *supports* my thesis. The remaining issue is whether the Court mirrored society at other times. I believe the breadth of sources I discuss suggests it did, although a definite answer would require an even more systematic comparison of judicial decisions and popular views over time. The Court's practice, however, is generally to rule against claims of constitutional rights. *See supra* note 63 (discussing Dean Stone's study).

119. The Court has held that punishments challenged under the clause are to be reviewed by applying "objective indicia that reflect the public attitude toward a given sanction." *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). Rather than construing the clause solely with regard to punishments forbidden when the clause was ratified, the Court has utilized a "flexible and dynamic" interpretive technique, the keystone of which involves looking to the prevailing standards of "modern American society as a whole." *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989). The Court also has described its Eighth Amendment analysis as one "recogniz[ing] the 'evolving standards of decency that mark the progress of a maturing society.'" *Ford v. Wainwright*, 477 U.S. 399, 406 (1986) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Warren, C.J.)).

The Court has used this approach to examine the constitutionality of a number of provisions under the Eighth Amendment. *See, e.g.*, *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) (holding that imposition of a mandatory life sentence without parole for possession of more than 650 grams of cocaine does not violate the Eighth Amendment); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion) (holding that the death penalty is cruel and unusual as applied to an individual who was under age 16 at the time of the offense); *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that the Eighth Amendment prohibits imposition of the death penalty upon one who neither took life, attempted to take life, nor intended to take life); *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (holding that imposition of the death penalty for the rape of an adult woman constitutes cruel and unusual punishment). Polling generally is determinative in these cases. Indeed, the differing conclusions reached by majority and dissenting opinions, particularly in close cases, often turn on conflicting characterizations of the state statutes polled. *See* *Stanford v. Kentucky*, 492 U.S. at 370-71 n.2 (five-to-four decision); *Thompson v. Oklahoma*, 487 U.S. at 829 n.29 (plurality opinion); 487 U.S. at 848 (O'Connor, J., concurring); *Enmund v. Florida*, 458 U.S. at 793 n.15 (five-to-four decision); *cf.* *Ford v. Wainwright*, 477 U.S. at 431-33 (Rehnquist, J., dissenting) (pointing out that, in relying on state legislation to prohibit execution of the insane, the majority fails to distinguish the Florida statute it invalidates from the majority of state statutes cited, which, like Florida's, leave insanity determinations to the executive branch or the prisoner's custodian).

120. Bail is considered excessive if greater than necessary to ensure a defendant's presence at trial. *Stack v. Boyle*, 342 U.S. 1, 5 (1951). But that amount itself is considered against the norm of bail "usually imposed" for certain crimes. 342 U.S. at 6. *But see* *United States v. Salerno*, 481 U.S. 739, 754 (1987) ("Nothing in the text of the Bail Clause limits permissible Government consideration solely to questions of flight.").

setting: in the guarantees of judicial process.¹²¹ Admittedly, the primary focus of the Supreme Court in cases that involve judicial process is upon the adversary system of justice and the system's goal of finding truth.¹²² In interpreting these guarantees, however, the Supreme Court frequently turns to highly majoritarian sources. In *Maryland v. Craig*,¹²³ for example, the Court faced the question whether the Confrontation Clause prohibited the state from employing a rule in a child abuse case that the victim witness testify outside the defendant's physical presence by one-way closed circuit television. In holding that the Confrontation Clause does not categorically prohibit such a rule, the Court analyzed what was required for "rigorous testing" of evidence in an "adversary proceeding."¹²⁴ As part of its analysis of what the adversary system requires generally, the Court turned to the state's interest in its system.¹²⁵ In validating the state's interest, the Court relied upon numerous expert and majoritarian sources, including the fact that "a significant majority of States has enacted [similar] statutes,"¹²⁶ a report of the Maryland state Governor's Task Force on Child Abuse,¹²⁷ a brief for the American Psychological Association as amicus curiae, experts' opinions, and state court decisions.¹²⁸

Majoritarian sources stand at the heart of judicial interpretation of many other "judicial process" guarantees. The Court's double jeop-

121. See, e.g., U.S. CONST. amend. VI (confrontation); amend. V (double jeopardy); amend. VI (right to counsel).

122. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (stating that, "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him"); see also *Maryland v. Craig*, 497 U.S. 836, 845 (1990) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."); *Taylor v. Illinois*, 484 U.S. 400, 408-11 (1988) (characterizing the right to present witnesses as "an essential attribute of the adversary system" and balancing it against the need for procedural rules without which "[t]he adversary process [likewise] could not function effectively"); *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987) ("The right to cross-examination, protected by the Confrontation Clause, thus is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial."); *Strickland v. Washington*, 466 U.S. 668, 696 (1984) (holding that the standard for determining ineffective assistance of counsel is "whether . . . the result of the particular proceeding is unreliable because of a breakdown in the adversarial process"); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion) (noting that only after indictment does a defendant need an attorney to contend with "our whole system of adversary criminal justice. . . [and] the prosecutorial forces of organized society").

123. 497 U.S. at 840.

124. 497 U.S. at 845.

125. 497 U.S. at 852.

126. 497 U.S. at 853.

127. 497 U.S. at 854.

128. 497 U.S. at 853-57; see also *Rock v. Arkansas*, 483 U.S. 44, 57-60 (1987) (relying on state practices and expert opinions regarding the reliability of hypnosis); *Crane v. Kentucky*, 476 U.S. 683, 689 (1986) (relying on "the statutory and decisional law of virtually every State in the Nation").

ardy jurisprudence is almost completely majoritarian; a court first inquires whether the sentence or retrial is consistent with legislative intent,¹²⁹ for the Double Jeopardy Clause is a bar on courts and prosecutors, not legislatures.¹³⁰ Similarly, extension of the right to counsel to state proceedings in *Gideon v. Wainwright*¹³¹ was premised in part on majoritarian arguments,¹³² and *Gideon* had the support of a great number of states as amici curiae.¹³³ Subsequent to *Gideon* the Court assessed the breadth of the right to counsel with a careful eye on the costs associated with that right and the needs of state government.¹³⁴

The First Amendment may strike some as the most difficult amendment to frame from a majoritarian cast,¹³⁵ but even here we find several instances in which constitutional protections seem to derive from majoritarian sources or to take into account majoritarian preferences. The entire concept of permitting the regulation of obscenity is extremely majoritarian.¹³⁶ Time, place, and manner regulation also

129. *Ohio v. Johnson*, 467 U.S. 493, 499 (1984) (“[T]he question under the Double Jeopardy Clause whether punishments are ‘multiple’ is essentially one of legislative intent . . .”); *Missouri v. Hunter*, 459 U.S. 359, 366 (1983) (“[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”); see also *Albernaz v. United States*, 450 U.S. 333, 340-42 (1981).

130. As the court explained in *Brown v. Ohio*:

Because it was designed originally to embody the protection of the common-law pleas of former jeopardy . . . the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

432 U.S. 161, 165 (1977) (citations omitted). Conversely, “[w]here . . . a legislature specifically authorizes cumulative punishment under two statutes . . . the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.” *Missouri v. Hunter*, 459 U.S. at 368-69.

131. 372 U.S. 335 (1963).

132. For example, the Court noted that “[f]rom the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials . . .” *Gideon*, 372 U.S. at 344.

133. *Gideon*, 372 U.S. at 345 (noting that 22 states supported the right to counsel in state criminal trials while only three states opposed).

134. See *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (limiting the right to counsel to defendants sentenced to actual imprisonment because “any extension would create confusion and impose unpredictable, but necessarily substantial, costs on fifty quite diverse states”); *Argersinger v. Hamlin*, 407 U.S. 25, 37 n.7 (1972) (addressing and dismissing as unwarranted argument in concurrence that providing counsel to indigents facing imprisonment will strain state resources; counsel required to represent indigent misdemeanants far fewer than licensed attorneys in United States).

135. In the First Amendment context, second perhaps only to small parts of equal protection jurisprudence, the Court most unabashedly seems to take on the majority in the name of minority rights. This is consistent with the general thrust of this article; all branches of government likely will be countermajoritarian in some instances. Indeed, the Court might confine its countermajoritarian activity to certain special cases, legitimating these with otherwise frequent reference to majority will.

136. See *Roth v. United States*, 354 U.S. 476, 485 (1957), overruled by *Miller v. California*, 413 U.S. 15 (1973) (referring to the “universal judgment that obscenity should be restrained” and

contains its share of majoritarian analysis. Absent a claim that the speaker seeks to utilize a traditional "public forum" (itself a question resolved by reference to majoritarian sources),¹³⁷ the Court merely assures itself that no content regulation is occurring and that the regulation is "reasonable"¹³⁸ — an approach highly deferential to government and highly majoritarian.¹³⁹

None of this suggests that *all* Supreme Court decisions are majoritarian, or even rely on majoritarian sources. The recent decisions in the flag-burning cases¹⁴⁰ appear to provide an example to the contrary. Although the Court relied on a number of sources to resolve the cases — including some that seem majoritarian¹⁴¹ — evidence sug-

citing international, federal, and state prohibitions). The three-part test to determine whether expression constitutes obscenity asks

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (citations omitted). The first prong of the *Miller* test, calling for the application of "contemporary community standards," is patently majoritarian. In addition, the nature of the test as a question of fact means that majoritarian values will likely inform application of the test as a whole through the medium of a local jury. More recently, however, the Court has made clear that, unlike the inquiries under the first two prongs of the *Miller* test, the value of the work as a whole must be assessed under national and not local standards. See *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987) ("The proper inquiry is not whether an ordinary member of any given community would find serious . . . value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole."). One might question the degree to which a jury is capable of objectively evaluating a work's merit. See 481 U.S. at 504-05 (Scalia, J., concurring).

137. See, e.g., *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983) (stating that traditional public fora are those that "by long tradition or governmental fiat have been devoted to assembly and debate."); *Hague v. CIO*, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public . . .").

138. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, (1989); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 808 (1985) ("The Government's decision to restrict access to a nonpublic forum need only be reasonable . . ."); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984) ("[R]easonable time, place, or manner restrictions on expression are constitutionally acceptable.").

139. See *supra* notes 63-71 and accompanying text (discussing majoritarian tilt to Court's approach to constitutional cases). Thus, in *United States v. Kokinda*, 497 U.S. 720 (1990) (plurality opinion), the Court was asked to determine whether postal regulations forbidding the solicitation of funds on postal premises were "reasonable" time, place, and manner restrictions. The Court concluded they were, focusing on the recent history of such regulations, 497 U.S. at 731, a "common sense" analysis of disruption and delay attendant such solicitation, 497 U.S. at 732-35, and the postal service's "empirical" study of the impossibility of case-by-case regulation. 497 U.S. at 735.

140. *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

141. See *Johnson*, 491 U.S. at 408-10 (noting that no breach of the peace actually occurred and that the Court's opinion will not prevent states from preserving the peace); 491 U.S. at 411 (noting that federal law permits burning the flag as a means of disposal).

The Court, however, expressly disclaimed the relevance of majority opinion to its decision in *Eichman*:

gests that the decisions went against popular will. Almost two thirds of society appeared to support a constitutional amendment to ban flag burning.¹⁴²

Even in cases such as this, however, care is required before labeling the result *countermajoritarian*. At the least, a more sophisticated view of majoritarianism, taking into account the relative strength of preferences, is required. After the second flag-burning decision — striking down a congressional statute — there was a move in Congress to amend the Constitution to prohibit flag burning. The move ultimately died. Given the high profile of the debate, one suspects that congressional action reflected the will of constituents, which in turn raises interesting questions about what was going on. Because proposing a constitutional amendment requires the assent of two thirds of the Congress, one possibility is that, despite majority support for an amendment, sponsors could not muster the necessary supermajority.¹⁴³ Second, the people may have initially believed flag burning outside the scope of constitutional protection, but changed their stance upon reflection and education. Thus the value of dialogue. Third, although many people may have disfavored constitutional protection for flag burning, their preference was perhaps weaker than the preference of those who favored constitutional protection.¹⁴⁴

At any rate, the Court undoubtedly will hand down countermajoritarian decisions some of the time: the question is, how

We decline the Government's invitation to reassess [*Johnson*] in light of Congress' recent recognition of a purported "national consensus" favoring a prohibition on flag-burning. . . . Even assuming such a consensus exists, any suggestion that the Government's interest in suppressing speech becomes more weighty as popular opposition to that speech grows is foreign to the First Amendment.

496 U.S. at 318 (citations omitted).

142. See GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 1990*, at 66 (1991) (showing that, in June of 1990, 66% favored a constitutional amendment to prohibit flag burning). Of course, this does not mean the majority necessarily disfavored the Court's result: the majority might have felt the Court correctly interpreted the Constitution but wanted to amend the Constitution for that reason. This seems unlikely, however.

143. The vote in the House of Representatives, 254 in favor of the amendment to 177 against, was 34 votes short of the two-thirds majority of each house needed to approve a constitutional amendment. Steven A. Holmes, *Amendment to Bar Flag Desecration Fails in the House*, N.Y. TIMES, June 22, 1990, at A1. The amendment fell nine short of the necessary two thirds in the Senate, with 58 in favor and 42 opposed. Helen DeWar, *Senate Follows House in Killing Flag Measure*, WASH. POST, June 27, 1990, at A8.

144. Many of the representatives whose votes helped to block passage of the amendment reported surprise at their constituents' apparent lack of interest. Holmes, *supra* note 143, at A14 ("Lawmakers and political strategists said mail and telephone calls in favor of the amendment were nowhere near as heavy as last year [following the *Johnson* decision]."); Tom Kenworthy & Paul Taylor, *Opponents of Flag Amendment Seeking Quick Kill on House Floor*, WASH. POST, June 19, 1990, at A8; Susan F. Rasky, *For Flag Vote, History Won Over Political Risk*, N.Y. TIMES, June 23, 1990, at A6. Of course, the decreased public clamor in favor of the amendment could reflect either a change in view or merely a loss of interest.

often?¹⁴⁵ This abbreviated tour through parts of the Bill of Rights demonstrates that the Court often defines those rights from a highly majoritarian perspective. The Court's decisions are hardly always majoritarian. But employment of majoritarian sources is unquestionably common.

b. Results. One might doubt the power of judicial use of majoritarian sources if courts systematically reached results contrary to popular will. That perception, indeed, is the basis for the countermajoritarian difficulty. Nonetheless, this easy assumption about judicial trumping of majority will may well be incorrect. Courts may reflect majority will more often than we think. As with legislatures, precisely measuring the congruity between judicial and public views is difficult. Yet some measure is possible. Public opinion polls establish that, contrary to common thought, judicial decisions often garner substantial public support. A brief survey of fairly controversial decisions of the U.S. Supreme Court reveals that although there may be sharp disagreement nationally on these issues — hence the controversy — a majority or a substantial plurality often favors the judicial outcome.

The Court's decision in *Roe v. Wade*,¹⁴⁶ for example, is one of its most controversial. Before the *Roe* decision, in 1972, fully sixty-four percent of those polled agreed the decision whether to have an abortion should be made solely by a woman and her physician.¹⁴⁷ Since *Roe*, at least a plurality of those polled consistently favor the *Roe* result.¹⁴⁸ Admittedly, the numbers are close. But close is not

145. In this regard, see the opinion of Justice Kennedy, concurring in *Johnson*, hinting that the case presented a rare instance in which binding legal precepts overcame personal predilection. See *Johnson*, 491 U.S. at 420-21 (Kennedy, J., concurring) ("The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result.").

146. 410 U.S. 113 (1973).

147. 1 GEORGE H. GALLUP, *THE GALLUP POLL: PUBLIC OPINION 1972-1977*, at 54 (1978). Although I find these polling data intriguing and believe their general indication is telling, I share Professor Rosenberg's admonition that "[o]ne must be careful in evaluating poll results." GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 236 (1991) (discussing difficulties with polling on abortion issue, including that "differences in question wording and question order turn out to make a difference in responses").

148. See GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 1986*, at 49, 51 (1987) (showing that, in 1974, 47% favored and 44% opposed *Roe*; in 1981, 45% favored and 46% opposed *Roe*; in 1983, 50% favored and 43% opposed *Roe*; and in 1986, 45% favored and 45% opposed *Roe*); DENNIS A. GILBERT, *COMPENDIUM OF AMERICAN PUBLIC OPINION 369-70* (1988) (citing an ABC News/*Washington Post* poll showing that in 1985, 54% approved and 38% disapproved of *Roe*); LOUIS HARRIS AND ASSOCIATES, INC., *THE HARRIS SURVEY YEARBOOK OF PUBLIC OPINION 1973: A COMPENDIUM OF CURRENT AMERICAN ATTITUDES 387* (1976) [hereinafter HARRIS SURVEY] (showing that in 1973, 52% favored and 41% opposed *Roe*).

countermajoritarian. The data on *Brown v. Board of Education*,¹⁴⁹ though somewhat less clear, also show majoritarian support. Two Gallup polls, taken immediately after *Brown*,¹⁵⁰ show that over fifty percent of the population favored the result. Other polls show support slightly lower, but still above a plurality.¹⁵¹ The National Opinion Research Center shows support for *Brown* today at ninety percent of those polled.¹⁵²

Of course, not all Supreme Court decisions garner majoritarian support,¹⁵³ any more than legislative or executive decisions do.¹⁵⁴ Two areas in which controversial judicial decisions have not had majoritarian support, school prayer and capital punishment, actually confirm rather than undermine the conclusion that judicial review does not overrule majority preferences. The Court's decisions banning prayer in public schools always have been contrary to relatively substantial majoritarian will.¹⁵⁵ What is interesting is the extent to which school prayer continues despite judicial approbation. As I and others have observed, when a majority strongly disagrees with a Supreme Court decision, defiance is the result.¹⁵⁶ With regard to the death penalty, on the other hand, the Court seems to have followed the public.¹⁵⁷ The Court's decision in *Furman v. Georgia*,¹⁵⁸ essentially

149. 347 U.S. 483 (1954).

150. See 2 GEORGE H. GALLUP, *THE GALLUP POLL: PUBLIC OPINION 1935-1971*, at 1250, 1332-33 (1972) (showing public approval of the *Brown* decision of 54% in June 1954 and 56% in April 1955).

151. See GILBERT, *supra* note 148, at 266 (stating that in 1956, 49% of American public favored racial integration in schools); cf. Spann, *supra* note 20, at 2016 ("*Brown* and the cases implementing it can be understood as the product of a majoritarian coalition that advanced the immediate interests of racial minorities.").

152. See GILBERT, *supra* note 148, at 266-67 (citing a CBS/*New York Times* poll for the proposition that 90% of Americans think "white students and black students should go to the same schools").

153. One interesting case in which a controversial decision did have majoritarian support was *Bowers v. Hardwick*. Polls suggest a majority favored the Court's result in *Bowers*, GALLUP, *supra* note 148, at 214 (showing that in July of 1986 51% approved of *Bowers*), but also indicate that prior to the AIDS epidemic the public's view might have differed. *Id.* at 215-16 (showing that coincident with growing public concern about AIDS the percentage of Americans favoring legalization of homosexual relations dropped dramatically from 45% in 1985 to 33% in 1987 and that in 1987, 37% of Americans claimed that their opinions of homosexuals had worsened as a result of the AIDS epidemic).

154. See *supra* notes 140-45 and accompanying text (discussing flag-burning cases).

155. See GILBERT, *supra* note 148, at 312-13 (citing several polls showing substantial majorities favoring prayer in public schools, ranging from 60% favoring prayer in public schools in general to 83% favoring voluntary silent prayers).

156. See Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 768-71 (1992).

157. See generally Winter, *Judicial Review*, *supra* note 40, at 686-89 (discussing Court's majoritarian approach to death penalty).

158. 408 U.S. 238 (1972).

striking all state death penalty statutes, appears not to have garnered majority support.¹⁵⁹ Nonetheless, *Furman* was decided at a time when public support for the death penalty was near its lowest point ever.¹⁶⁰ *Furman* thus kicked off an experiment — a test of American sentiment. As polls have increasingly showed stronger support for the death penalty, the Court has eliminated procedural hurdles to its imposition.

The above information is neither perfect nor comprehensive. Yet, for all that, it is telling. Although these results do not reflect *all* judicial decisions, they do track the decisions that give rise to the greatest complaints of countermajoritarian courts. As such, they suggest that, contrary to laments about the countermajoritarian difficulty, even controversial judicial decisions often are majoritarian.

2. Process Majoritarianism

So far, we have seen that judicial review of ostensibly majoritarian decisions is extremely deferential, that judicial review itself often relies heavily upon majoritarian sources to determine the content of rights, and that polls suggest that even some of the most controversial judicial decisions comport with majoritarian will. All this, taken together, paints a picture of a judiciary far more majoritarian than generally described. Nonetheless, one further measure of majoritarianism has yet to be assessed. That is the process majoritarianism question of accountability.

What distinguishes judges from other public actors in the minds of many is judges' lack of accountability to majoritarian concerns.¹⁶¹ In our idealized view of American constitutionalism, those who govern us represent us. Although representation is not a perfect mirror of majority will, the sense remains that executive and legislative officials are accountable to the electorate in ways that judges are not. But this is true only in the most formalistic and unanalytic of senses: on close examination the judiciary is much more accountable than it appears.

159. I say *appears* because the polls asked about favoring the death penalty; *Furman* was about the process of imposing it. See 1 GALLUP, *supra* note 148, at 20, 74, 371; 2 *id.* at 754 (showing majorities in favor of the death penalty for persons convicted of murder of 50% in March of 1972, 57% in November of 1972, 64% in 1974, and 65% in 1976); HARRIS SURVEY, *supra* note 148, at 375 (showing that in April of 1973, 59% stated that they believed in the death penalty).

160. Although the lowest percentage in favor of the death penalty recorded by a Gallup poll was 42% in 1966, compared to showings of 75% in favor in November 1985, the 50% in favor just prior to *Furman* was rather low. See GALLUP, *supra* note 148, at 57; GALLUP, *supra* note 147, at 20.

161. See *supra* notes 40-43 and accompanying text.

Elections appear to be the key to the theory of accountability.¹⁶² Because judges are not elected, they are not accountable to the electorate. But both halves of this equation are debatable: some judges *are* elected, and elections do not appear to guarantee accountability.

Many state judges, for example, are elected.¹⁶³ While methods of election and retention may vary, a great number of judges charged with making constitutional decisions are nonetheless accountable to the electorate to some extent. Moreover, in the face of growing legislative incumbency rates,¹⁶⁴ it is at least worth questioning whether the requirement of standing for election has much at all to do with accountability. The electorate increasingly feels it cannot control its elected officials in any meaningful sense. The numbers support the assertion: in many cases, despite the need to stand for election, legislators are serving every bit as long as unelected judges, and periodic elections do not appear to threaten this state of affairs significantly.¹⁶⁵

Furthermore, the concern about legislative accountability is not based solely on incumbency. Rather, the entire notion of majoritarian representation is in a sense questionable. Legislative representatives make countless decisions every day, most of which are obscured from public view or buried in an avalanche of legislative business.¹⁶⁶ There are very few "big ticket" issues on which the electorate even could chart the performance of a representative and make an intelligent deci-

162. See MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 121 (1988) ("Because legislators must seek reelection, they are more likely than judges to be sensitive to the ways in which laws — or the absence of laws when judges find some statutes unconstitutional — actually affect the lives of real people.").

163. William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 *JUDICATURE* 340, 343 (1987) (noting that by 1976, 12 states used merit selection with retention elections); Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 *JUDICATURE* 128, 132 (1990) (sidebar) (noting that 33 states employ merit selection instead of popular election of judges).

164. The recent drives to limit legislative terms illustrate this problem. See Charles Krauthammer, . . . and the Perils of Populism, *WASH. POST*, Nov. 8, 1991, at A25 (citing polls showing 75% support for term limits among electorate; suggesting that support may collapse under scrutiny); *A Wake-Up Call on Term Limits*, *CHI. TRIB.*, Nov. 10, 1991, at 3 (noting that term limitation measures graced ballot in 10 to 15 states; Washington State defeat of term limits was first after three victories).

165. Richard Pierce, *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 *N.Y.U. L. REV.* 1239, 1249 (1989) (noting that incumbents in the House of Representatives enjoy a near 99% reelection rate and concluding that "House members today enjoy de facto tenure approaching that of judges — they are potentially removable only if their constituents believe they are involved in widespread illegal or unethical conduct"); see also Peter Bragdon, *St. Germain Out, But Incumbents Still Strong*, 46 *CONG. Q.* 3266 (1988).

166. Moreover, even if a legislator is following the will of her electors, low electoral participation may mean that she still may not be following the wishes of a majority of her constituents. See TUSHNET, *supra* note 162, at 103 ("Participation in politics is so low as to raise questions about the representativeness of the process as a whole.").

sion at the ballot box regarding retention.¹⁶⁷ Conversely, what “big ticket” issues there are may in fact distort the process — single-issue and strongly ideological voters on issues such as abortion may overshadow the general question of representation.¹⁶⁸

With such a low possibility for the electorate sensibly to monitor legislative performance, factors other than performance have overtaken the election process, leading to the current level of incumbency. When performance becomes obscured, name recognition and money take over.¹⁶⁹ Incumbents attract funds, which attract name recognition, and incumbency begets incumbency.¹⁷⁰ The important point is that lengthening incumbency rates are a symptom of the loss of electoral control, not a disease in and of themselves. Compared with the electoral control over legislatures, judges may not seem so relatively unaccountable.

This may seem somewhat of a cheat, however. Just because one aspect of representative government has gone bad does not mean that another problem is acceptable. But even assuming that judicial accountability is a “problem” (after all, the system has varied less here from original intent than in the case of the legislature), it still is unclear that the problem is anything but a myth.

In this regard, it is profitable to examine the hardest case, that of the federal judiciary. Federal judges, unlike some of their state counterparts, are not chosen by election,¹⁷¹ and they generally serve for many years. Surely on the federal bench, one might argue, there is an accountability problem.

Before proceeding to explain why the federal judiciary is more majoritarian from a process perspective than we often believe, it is

167. More than one scholar has suggested that the desire for reelection may lead legislators to spend their time on pork barrel legislation for their districts and on casework for their constituents, rather than on addressing hard policy issues. See MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 39-43 (2d ed. 1989); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 46-61, 81-158 (1974).

168. “[I]n contrast to the direct or participatory democracy of the town meeting, it is inherent in the system of representative government that the electorate must buy its political representation in bulk form.” Choper, *supra* note 48, at 818.

169. See FARBER & FRICKEY, *supra* note 28, at 23 (“Because voters don’t know much about a legislator’s conduct, elections may turn on financial backing, publicity, and endorsements.”); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 862-67 (1979).

170. See *supra* note 165.

171. Under the federal Constitution, the President appoints, with the advice and consent of the Senate, all Supreme Court Justices. U.S. CONST. art. II, § 2, cl. 2. Congress vested similar appointment powers in the President for federal circuit and district court judges. See U.S. CONST. art. III, § 1 (empowering Congress to establish lower courts); 28 U.S.C. § 44 (1988) (granting the President the power to appoint circuit court judges); 28 U.S.C. § 133 (1988) (granting the President the power to appoint district court judges).

worth acknowledging that most arguments offered to prove this point do not carry great weight. There is, for example, the option of impeachment.¹⁷² But the threat of impeachment is so small as to render it almost entirely meaningless for accountability. Likewise the possibility of legislative control of federal jurisdiction;¹⁷³ interesting as this puzzle is, with a few notable exceptions this power — if indeed it is a legislative power — has lain dormant for most of the nation's history.¹⁷⁴ Finally, attempts at Court-packing are rare.¹⁷⁵

Somewhat more promising is the nature of judicial appointment. Although federal judges are not elected, they are appointed by Presidents who stand for popular election. Judicial appointments often mirror the popular will that elected a President.¹⁷⁶ This undoubtedly does assure some confluence with popular interests. Moreover, the confirmation process for federal judges seems designed to ensure that judges are in the mainstream of popular views, at least insofar as the legislature is representative of the mainstream, and also to "teach" judges what those views are.¹⁷⁷

Despite evidence that judges often mirror the views of the Presidents that appoint them and that those views likely are consistent with popular will, one might respond that the aura quickly wears off: judges remain on the bench with no threat of removal to ensure ac-

172. The federal Constitution provides that federal judges "shall hold their Offices during good Behaviour." U.S. CONST. art. III, § 1.

173. Article III of the federal Constitution provides that "[t]he 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, and that the Supreme Court "shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." *Id.* § 2. Scholars such as Michael Perry argue that "the legislative power of Congress . . . to define, and therefore to limit, the appellate jurisdiction of the Supreme Court and the original and appellate jurisdiction of the lower federal courts" protects majority rule. PERRY, *supra* note 5, at 128. On the debate over Congress' power to curtail federal jurisdiction, see Akhil R. Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U. L. REV. 1 (1990).

174. See Friedman, *supra* note 173, at 9 ("Congress seldom has attempted a bald removal of federal jurisdiction . . .").

175. See STONE ET AL., *supra* note 66, at 180-81 (discussing Court-packing plan).

176. See Chemerinsky, *supra* note 3, at 82 ("Presidential appointments assure that the Court's ideology, over time, will reflect the general sentiments of the majority in society."); Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307, 311-12 (1990) (significant evidence in study of unpublished decisions that appointees to U.S. Court of Appeals by Democratic presidents issue more liberal decisions than their Republican counterparts).

177. See Chemerinsky, *supra* note 3, at 82 (finding that "[t]he Senate's rejection of almost twenty percent of nominees for the Supreme Court in American history has served as another majoritarian influence"); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1516 (1992) (suggesting that, although commitments made during confirmation hearings are not enforceable, they nonetheless will lead a Justice to "think twice" before violating them).

countability. This complaint, however, makes the fundamental mistake of assessing institutional accountability with reference to the selection and retention of *individual* institutional actors, rather looking at the institution as a *whole*. When we discuss accountability we tend to compare like this: senators are elected every six years; judges are appointed for life; senators thus are accountable and judges are not.¹⁷⁸ But in terms of results, the accountability of the Senate — and the judiciary — is what is important, not that of individual members. Just as the Senate, rather than individual senators, makes decisions that affect us, so too with the judiciary. True, judges decide individual cases (just as senators make individually important decisions). But for matters of serious public moment, decisions are made by the judiciary as a whole. Matters of policy treated by the judiciary bubble up through a judicial system until agreement is reached. Really important questions are decided not by one court, but by several — often many. As a question advances through tiers of review, the judicial bodies become less monolithic and more collegial, with individual district judges giving way to appellate panels. Decisions depend not on one judge, but on a collection of “representatives.”

Viewed through the institutional prism, the judiciary is far more accountable than we often recognize. In my lifetime alone the judiciary has made two dramatic political shifts, to the political left and the political right.¹⁷⁹ This level of responsiveness is rare in any legislative body. Perhaps more important, viewing the judiciary from an institutional perspective suggests why and how it is accountable in ways that legislatures currently are not. Viewed from an institutional perspective, the power of presidential appointment is very important, and retention accountability is far less so. The judiciary is inherently fluid in composition. The judiciary is a river, constantly moving. Judges are always leaving and new judges are always taking their places. Occasionally the judiciary grows, and more room for change opens up.¹⁸⁰ As vacancies occur, presidents fill them with judges whose views are at least somewhat similar to their own and, more important, to the views

178. See, e.g., Chemerinsky, *supra* note 73, at 1212 (acknowledging that, if democracy is defined as a requirement that only electorally accountable officials may make decisions, then the Supreme Court is not a democratic institution because the Justices have lifetime appointments and are not directly accountable to the electorate); see also *supra* notes 40-43 and accompanying text.

179. Compare the expansion of individual liberties under the Warren Court with their restriction under Chief Justices Burger and Rehnquist's tenures.

180. An example of this occurred with the Federal Judgeship Act of 1990, which created 85 new federal district and appellate judgeships, all to be filled by the Bush administration's nominees. Pub. L. No. 101-650, §§ 201-206, 104 Stat. 5089, 5098-5104 (codified at 28 U.S.C. §§ 44, 133, 331 (Supp. 1991)).

of the people who elected them.¹⁸¹ Thus, as the views of the electorate change, the change is reflected in the changing composition of the judiciary. The mirroring process is, concededly, imperfect, but it is subject to continual modification. Besides, imperfection must be compared with the alternatives.

Seen as an institution, the judiciary appears accountable. Natural attrition plays an important role in judicial accountability.¹⁸² Moreover, results appear to favor the notion of judicial accountability. The character of the judiciary *has* changed, noticeably, to mirror shifts in societal attitude.¹⁸³ Again, the argument is not that the judiciary is perfectly majoritarian or perfectly accountable. No branch of government is. The judiciary as an institution does, however, appear responsive to majoritarian will, not only with regard to substantive results, but from a process perspective as well. Indeed, we shall see that the judicial appointment process provides an important internal constraint on the judges in the dialogic system that we actually enjoy.

C. *The Difficulty with Majoritarianism*

Some undoubtedly will resist the characterization of courts as majoritarian and the propriety of understanding the rights courts define and protect as based on and subject to majority will, arguing that the Supreme Court's "recent" "majoritarian" streak is aberrational and inappropriate.¹⁸⁴ The notion that a constitutional right is subject to majoritarian definition understandably seems antithetical to our ideal. Although this article primarily is directed to those who dwell on the countermajoritarian nature of the judiciary and view it as an argument for narrowing the scope of judicial review, some brief response to this other group is appropriate.

The idea of a branch of government charged with defining rights in aloof fashion, remote from the will and whim of popular politics, is an engaging one. It is a myth that could capture a nation's heart. On the other hand, one hardly could expect that mythic branch of govern-

181. See *supra* note 176.

182. As Bill Clinton's term began there were 100 judicial vacancies; 150 more are expected during his term. See Nan Aron, *Clinton's First Picks for Judicial Vacancies*, S.F. CHRON., Jan. 2, 1993, at A18. For what the comparison is worth, during the last election 122 Senate and House seats turned over — a very large number. Clifford Krauss, *Political Mess: Vying for Committees, Freshmen Mimic Insiders*, N.Y. TIMES, Nov. 30, 1992, at A11; see also Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 83 n.195 (1991) (discussing debate about relative accountability of judges and legislators by measuring length of terms and likelihood of promotion; concluding differences in political accountability are "less than one might think").

183. See *supra* note 179 and accompanying text.

184. See Chemerinsky, *supra* note 3; Sherry, *supra* note 52; Stone, *supra* note 63.

ment to exist. It is, for any number of reasons, simply inevitable that our rights should have a majoritarian cast. After all, judges are products of our society, as likely as not to impose our society's values on the rather broad text of the Constitution.¹⁸⁵ This may give rise to serious objection that ours is not one monolithic society with one monolithic set of values. But the point should not obscure the broad truth that the values that judges use to define constitutional rights will reflect the judges' own values.¹⁸⁶ At some level those values are our values, or at least the values of some of us. Judges are products of the society in which they live and will turn to its values when they define constitutional rights.¹⁸⁷ Indeed, where else could they turn?

When courts are discussed in countermajoritarian terms I often get a funny picture of judges as aliens come from Mars to impose Martian values upon an unwilling electorate. One cannot help but wonder who the academy believes these "countermajoritarian" outsiders are, who can define a set of values separate from the societal consensus. Moreover, if Martian (countermajoritarian) values are being defined, it seems it would take one awfully big Martian army to impose them; the very fact that no such force typically is needed to enforce constitutional decisions suggests at least some level of approval of judicial decisions. Unless constitutional rights find some level of acceptance in the body politic, those rights will not be enforced.¹⁸⁸

By the same token, I concede there *is* a real problem with the notion that courts are majoritarian. The problem lies not, however, in the court-legislature dichotomy of the countermajoritarian difficulty — the idea that courts differ from other branches of government in that other branches follow majority will while courts trample upon it. Rather, the problem lies with the broader notion that there even *is* a majority will that legislatures mirror, and that courts trump or do not

185. See Spann, *supra* note 20, at 1982 ("[J]ustices are socialized by the same majority that determines their fitness for judicial office . . ."). This insight is central to much of Steve Winter's excellent writing on courts and the countermajoritarian difficulty. See, e.g., Winter, *supra* note 24, at 1520-22 (discussing process of jurisgenesis in which judges, who are "situated" in society, probe society's norms); Winter, *Upside/Down*, *supra* note 40, at 1889 ("judicial independence is a matter only of formal institutional design. In a crucial[ly] important sense, however, judges are entirely *dependent* on the cultural understandings that make meaning possible"). Winter, however, adds a caveat: "[D]ominant conceptions are not the same thing as majority decisions." *Id.* at 1925-26.

186. Winter, *Upside/Down*, *supra* note 40, at 1925. Professor Chemerinsky concedes this. Chemerinsky, *supra* note 3, at 98-103 ("In almost all controversial cases, the decisions result from the Justices' value preferences.").

187. Winter, *Upside/Down*, *supra* note 40, at 1925 ("[T]he mutual entailment of the epistemic and the political means that judges cannot even think without implicating the dominant normative assumptions that shape [our] society . . .").

188. Friedman, *supra* note 156.

trump. As the next Part explains, our society is not mono- or even bilithic: thus, it becomes difficult to identify a "majority" whose will courts are trumping. The countermajoritarian difficulty simply is not rich enough in content to describe the complex society we are. The next Part takes up this real problem, which cuts to the very premises underlying the countermajoritarian difficulty.

II. THE FALLACIES UNDERLYING THE COUNTERMAJORITARIAN DIFFICULTY

In this Part I argue that the countermajoritarian difficulty inaccurately describes our constitutional system. As indicated earlier, most current normative theories of judicial review rest upon, accept, or seek to resolve the countermajoritarian difficulty. The problem is that no reason exists to begin a discussion of judicial review with the assumptions of the countermajoritarian difficulty; these assumptions are at best highly overstated, and at worst simply inaccurate.

This Part's two sections approach the inaccuracy of the countermajoritarian difficulty from different directions. The first section questions why anyone would begin from the notion that our constitutional system was intended to be majoritarian. To the contrary, the Framers were deeply troubled by such a system and designed our Constitution to avoid majoritarianism. This section explains how our Constitution has *become* more majoritarian, but it offers two caveats. First, as we shall see, the majoritarianism of our modern Constitution is not the same as the concept of "majoritarianism" that underlies the countermajoritarian difficulty. Our political process has become more *inclusive*, and even a bit more direct, but it has not in any fashion adopted the notion of "majority rule." Second, as popular democracy has been on the rise, so too has judicial review. As we shall see, these two elements of modern democracy have grown together, checking one another in a manner consistent with the Framers' original design.

The second section challenges directly the twin assumptions of the countermajoritarian difficulty. The countermajoritarian difficulty assumes, first, that there is a majority whose will courts are trumping and, second, that judicial decisions are sufficiently final to act as "trumps." I intend to show that neither of these assumptions is correct. While critiquing the countermajoritarian difficulty, I also seek to identify and describe actual aspects of our everyday constitutionalism that help explain the role of judicial review. In preview they are these: first, that popular democracy and judicial review have grown up as checks on one another; second, that, rather than a majoritarian government, we have a government of varying and shifting constituencies

that clamor to be heard; third, that our Constitution, rather than being determinate, is spacious and capable of varying interpretations; and finally, that judicial decisions are not final, but encourage a dynamic interpretation of the Constitution. All this leads to our government of dialogic constitutionalism, which I describe in Part III.

A. *The Framers' Constitution and Our Own*

This section contrasts our everyday Constitution with that of the Framers. First it illustrates that the Framers did not necessarily intend either of the two aspects of our modern government that feed the countermajoritarian difficulty — majoritarianism and strong judicial review — to operate as they do.¹⁸⁹ Second, and *because of*, not *despite* the dual growth of majoritarianism and judicial review, there is remarkable adherence to the Framers' overriding theory of how the Constitution would operate. Writ large, the Framers' intent was to create a Constitution that separated and checked power. The Constitution would protect liberty by requiring agreement among branches of government before government could regulate.¹⁹⁰ Although the Framers perhaps did not intend majoritarianism and judicial review to operate precisely as they do, those institutions nonetheless have grown up one alongside the other, balancing power against power. Thus, the beauty of the system is that, although it has evolved considerably, its evolution has maintained the fundamental idea of checks and balances embodied in the Framers' plan.

1. *The Framers' Constitution*

The Framers would be surprised, one might speculate, at our current obsession with majoritarianism. Their constitution was designed to prevent the control of government by faction, particularly by a majority faction.¹⁹¹ Thus, time and again during the period of drafting and ratification of the Constitution, the Framers condemned the evil

189. Speaking of the Framers' intent is a dicey business. See, e.g., BOBBITT, *supra* note 5, at 9-24; Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209-17 (1980); Glenn H. Reynolds, *Sex, Lies and Jurisprudence: Robert Bork, Griswold and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045, 1080 (1990). It is particularly dicey in the context of this discussion because, as Robert Burt observes, "the founders disagreed among themselves about how to design institutions so as to achieve or approach unanimity, and they did not resolve but rather implicitly embedded this disagreement in their constitutional scheme." ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 46-47 (1992).

190. See generally Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1531-40 (1991) (arguing that Framers intended to secure "ordered liberty" through structural arrangements); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 38-45 (1985).

191. Chemerinsky, *supra* note 3, at 65 ("The framers' distrust of majoritarian politics is well documented.").

of faction and expressed fear of the tyranny of the majority.¹⁹² The concern about majority opinion was expressed most often, and perhaps most eloquently, by Madison. Writing to Jefferson during the ratification period, and commenting on the need for a bill of rights, Madison stated:

Repeated violations of these parchment barriers [the states' bills of rights] have been committed by overbearing majorities in every State. . . . Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.¹⁹³

Although Madison was particularly strong-minded on the subject,¹⁹⁴ he was by no means alone. Over and over during the framing of the Constitution concern was expressed about factions' gaining control of the legislature or the tools of government.¹⁹⁵

While the fear of faction and majority tyranny was strongest among the Federalists, many anti-Federalists were of a like mind. True, some among the anti-Federalists supported pure democracy,¹⁹⁶

192. Many of the Framers were prepared to conclude that the great danger to republicanism was not magisterial tyranny or aristocratic dominance but majority faction, which is the majority "united and actuated by some common impulse or passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." THE FEDERALIST No. 10, at 57 (James Madison) (Jacob E. Cooke ed., 1961). This "factious majoritarianism" was the focus of the Federalist perception of politics. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 502 (1972).

In the minds of the Framers, majority faction posed its greatest threat in the legislatures. Benjamin Rush commented: "In our opposition to monarchy, we forgot that the temple of tyranny has two doors. We bolted one of them by proper restraints; but we left the other open, by neglecting to guard against the effects of our own ignorance and licentiousness." Benjamin Rush, An Address (1787), quoted in FARBER & SHERRY, *supra* note 78, at 16. James McHenry agreed: "Our chief danger arises from the democratic parts of our constitutions. It is a maxim which I hold uncontrovertible, that the powers of government exercised by the people swallow up the other branches. None of the constitutions have provided sufficient checks against the democracy." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 26-27 (Max Farrand ed., 1911) [hereinafter FARRAND]. Elbridge Gerry noted that "[i]n England, the people will probably lose their liberty from the smallness of the proportion having a right of suffrage. Our danger arises from the opposite extreme: hence in Mass[achusetts], the worst men get into the Legislature." *Id.* at 132.

193. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 THE CONSTITUTION AND THE SUPREME COURT 122 (Louis H. Pollak ed., 1966).

194. During the Federal Convention, Madison noted that, "where a majority are united by a common sentiment and have an opportunity, the rights of the minor party become insecure. In a Republican Govt. the Majority if united have always an opportunity." 1 FARRAND, *supra* note 192, at 136; see also *supra* text accompanying note 193.

195. See *supra* note 192; see also Sager, *supra* note 28, at 948 ("Publius, whoever happened to be driving, did not suffer from an excess of confidence in the body politic.").

196. According to Gordon Wood, the populism of the anti-Federalists cannot be impugned. "They were true champions of the most extreme kind of democratic and egalitarian politics expressed in the Revolutionary era." WOOD, *supra* note 192, at 516. Philadelphensis wrote,

and the chief focus of the anti-Federalists was government at a more local level,¹⁹⁷ where majority tyranny, although a concern, was ameliorated by the supposed similarity of views in the smaller body politic.¹⁹⁸ Even so, many anti-Federalists spoke of the danger of majority rule.¹⁹⁹

Democracy was certainly on the Framers' minds and rightfully so given their recent experience with despotism. But they understood that despotism of the many could be as dangerous to government and to individual liberty as despotism of the few, and they designed their democracy to ensure against both evils.²⁰⁰ The Framers' fear of majority faction is evident: their constitution is countermajoritarian in numerous respects.²⁰¹ The document clearly is founded in part on

"America under [a government] purely democratic, would be rendered the happiest and most powerful nation in the universe . . ." *Essays of Philadelphiensis X*, reprinted in 3 THE COMPLETE ANTI-FEDERALIST 99, 131 (Herbert J. Storing ed., 1981).

197. "[The anti-Federalists] were 'localists,' fearful of distant governmental, even representational, authority for very significant political and social reasons that in the final analysis must be called democratic." WOOD, *supra* note 192, at 520.

198. The anti-Federalists were less likely than the Federalists to see majority faction as the most dangerous and likely evil of popular government. "They were inclined to think, with Patrick Henry, that harm is more often done by the tyranny of the rulers than by the licentiousness of the people." 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 196, at 40; see also 5 *id.* at 211-20. Moreover, they believed in confronting any threat of licentiousness in the same way, fundamentally, as the threat of tyranny: by the alert public-spiritedness of the small, homogeneous, self-governing community. 1 *id.* at 40.

199. "In general . . . the Anti-Federalists acknowledged the possibility of majority faction and the need to guard against it . . . because it can lead to unjust deprivations of individual liberty." 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 196, at 39-40. This was one of the reasons some of the anti-Federalists wanted a bill of rights. Agrippa wrote that a bill of rights "serves to secure the minority against the usurpation and tyranny of the majority. . . . [u]nbridled passions produce the same effect whether in a king, nobility, or a mob. . . . It is therefore as necessary to defend an individual against the majority in a republic[] as against the king in a monarchy." *Letters of Agrippa XVI* (Feb. 5, 1788), reprinted in 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 196, at 111. A Maryland farmer made the point even more emphatically:

Often the natural rights of an individual are opposed to the presumed interests or heated passions of a large majority of democratic government; if these rights are not clearly and expressly ascertained, the individual must be lost In such government the tyranny of the legislative is most to be dreaded.

Essays by a Farmer (Feb. 15, 1788) reprinted in 5 *id.* at 15. At the Philadelphia Convention, both George Mason and Elbridge Gerry, later prominent anti-Federalists, admitted "the danger of the levelling spirit" flowing from "the excess of democracy" in the American republics. 1 FARRAND, *supra* note 192, at 48-49.

200. See WOOD, *supra* note 192, at 598-600 (stating that the traditional colonial aversion to the executive and judiciary and the growing suspicions of the "unrepresentative" legislature guided the Framers in creating a government in which the three branches were "drawn from the same source . . . animated by the same principles," and directed to the same end — that of serving as the "limited agency of the sovereign people.").

201. Indeed, as others have observed, adherence to the Constitution itself presents a difficult countermajoritarian problem. One of the most perplexing questions for constitutional theorists is the legitimacy of the Constitution itself. Often the Constitution is referred to as legitimate because it is founded on majority ratification. But even if one puts aside problems with this theory at the time of ratification, compare Ackerman, *supra* note 3, at 1013, 1017-23, 1058; John Leubsdorf, *Deconstructing the Constitution*, 40 STAN. L. REV. 181, 187 (1987) with Akhil R. Amar,

permitting and expecting the populace to speak through its elected representatives. By the same token, the Constitution is shot through with provisions that in effect might defeat the decisions of a popular majority. To call the Constitution majoritarian, therefore, simply is inaccurate. Such a characterization certainly would have surprised the Framers. If one can imagine sitting down with some of the Framers and describing current notions of majoritarianism, one must imagine hearing: "This is not the Constitution we gave you."

2. *The Rise of Majoritarianism . . .*

Just because the Constitution the Framers gave us is not majoritarian does not mean our Constitution cannot be majoritarian.²⁰² One of the important lessons addressed here is that constitutions must change and grow to survive.²⁰³ Ours certainly has.²⁰⁴ In fact, popular democracy has been on the rise since the time the Framers finished their work.²⁰⁵ The Framers' plan was for a highly *representative* democracy, with strict limitations on those who had a voice.²⁰⁶ Our democracy has become much more *inclusive* and *direct*, with participatory rights accorded to a greater portion of the

Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043, 1047-48 (1988), there is no reason to assume majority assent today. See Ackerman, *supra* note 3, at 1017, 1058; Richard S. Kay, *The Illegality of the Constitution*, 4 CONST. COMM. 57 (1987). Thus, even at the core level of constitutional legitimacy, a serious question exists whether majoritarianism is the governing principle.

202. See ACKERMAN, *supra* note 14, at 67 (discussing modern selection of presidency; "[w]hatever else is obscure about this modern system, one thing should be clear: it exists despite the contrary intentions of the Philadelphia Convention").

203. See *infra* notes 373-75 and accompanying text.

204. See William N. Eskridge, Jr., & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 533 (1992) ("The world of the Framers is not our world," given the development of the modern administrative state.).

205. Robert Burt makes just this point. See BURT, *supra* note 189, at 35-36; see also Chemerinsky, *supra* note 3, at 67-68 (stating that, as belief in natural law waned, majoritarian concept of democracy expanded). Chemerinsky argues that during the Progressive Era democracy began to become an end in itself. *Id.* at 67.

206. Madison called representation — "the delegation of the Government . . . to a small number of citizens elected by the rest" — "the pivot" on which the unique American system moved. THE FEDERALIST No. 10, at 62 (James Madison) (Jacob E. Cooke ed., 1961); WOOD, *supra* note 192, at 596-97. The franchise, however, was limited to a relatively small number of people. Though the requirements varied somewhat, the states maintained that voters had to be free white male citizens, *id.* at 167-70, and "all of the states required some sort of tax-paying or property qualification for the suffrage." *Id.* at 168. The point was to ensure that only those free from influence and knowledgeable of the consequence of their trust could vote. *Id.* at 167-70. The Framers did not undertake the difficult and controversial task of setting uniform standards for the suffrage because "the qualifications for voting so differed in the various states that [doing so] . . . might have disenfranchised previously qualified citizens in some states." FARBER & SHERRY, *supra* note 78, at 142. The Framers did agree, though, that the rule of representation for the legislature would be according to "the whole number of white and other free citizens and inhabitants" and "three-fifths of all other persons . . . except Indians not paying taxes." *Id.* at 121; see U.S. CONST. art. I, § 2; see also BURT, *supra* note 189, at 50: "[T]he founders did not

populace. In this specific sense our government has become more majoritarian.

Perhaps the most significant structural move toward this majoritarianism in the Constitution was the Seventeenth Amendment, providing for direct election of senators.²⁰⁷ Likewise, the franchise explicitly has been extended to broad segments of society.²⁰⁸ The Fifteenth Amendment forbids denying the franchise based upon race.²⁰⁹ The Nineteenth Amendment extended the franchise to women.²¹⁰ The Twenty-sixth Amendment extended the franchise to those citizens eighteen years and older.²¹¹ In addition, the Twenty-fourth Amendment abolished poll taxes,²¹² and the Twenty-third Amendment gives citizens of the District of Columbia electors for (at least) the election of President of the United States.²¹³ In fact, seven of the fourteen amendments enacted since the Civil War explicitly extend the franchise or remove obstacles to its exercise. Thus, the majoritarian strain has grown increasingly prominent in our Constitution.

Not only the Constitution has become more majoritarian, however; so has the society that document governs. Indeed, it is sometimes difficult to tell which transformation has caused the other. We have become a society enamored of the accouterments of popular governance. We revel in national polls; every day we devour media reports on what the polls say we think.²¹⁴ Our presidential candidates promise national electronic town meetings.²¹⁵ We vote with television and telephone on 1-900 numbers,²¹⁶ and even if the votes do not count

expect that the direct commandatory voice of the sovereign People would be heard very often in the daily affairs of governance."

207. U.S. CONST. amend. XVII, cl. 1; see Stewart A. Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 178 (1977) (describing the Seventeenth Amendment as a "blow to formal federalism").

208. See ELY, *supra* note 5, at 7.

209. U.S. CONST. amend. XV, § 1. For a discussion of the historical background, enactment, and ratification of the Fifteenth Amendment, see PAGE SMITH, *THE CONSTITUTION: A DOCUMENTARY AND NARRATIVE HISTORY* 452-53 (1978).

210. U.S. CONST. amend. XIX, cl. 1.

211. U.S. CONST. amend. XXVI, § 1. For a discussion of the extension of majority rule through Amendments Fifteen, Seventeen, Nineteen, and Twenty-six, see FARBER & SHERRY, *supra* note 78, at 339-42.

212. U.S. CONST. amend. XXIV, § 1.

213. U.S. CONST. amend. XXIII, § 1.

214. Andrew Mollison, *Keeping You Up to Date: Too Much Power for Polls?*, ATLANTA J. & CONST., May 26, 1992, at A6 (stating that polls are more important than ever to voters).

215. See Edward Epstein, *Perot's Go-It-Alone Candidacy Breaks with History*, S.F. CHRON., June 8, 1992, at A5 (detailing Ross Perot's promise of national electronic town meetings to resolve important policy matters).

216. See, e.g., Susan Gilmore, *Polling Firm's Abortion Flier Hit*, SEATTLE TIMES, Oct. 10, 1991, at B4 (describing poll in which Seattle residents call a 1-900 number and vote on the abortion issue). Nova Scotia liberals can now vote for a party leader by calling a 1-900 number.

in a formal sense they surely have their impact. One of the primary complaints of modern politics, although it may challenge an inevitability, is that politicians fail to lead and simply follow the polls.²¹⁷ We have become a people accustomed to speaking our minds, and having our opinions heard.

Ironically, one great engine of majoritarianism, both in reality and in rhetoric, may have been the Supreme Court. Such was the view of Alexander Bickel, and there is much truth in what he said.²¹⁸ Bickel believed that the Court had created a "leveling" majoritarian furor by a number of its decisions, most notably the "one person, one vote" rule of the apportionment cases.²¹⁹ Bickel decried this "[p]opulist majoritarianism, not some complex checked and balanced Madisonian adjustment among countervailing groups and factions"²²⁰ He warned that "[m]ajoritarianism is heady stuff. . . . The tide could well engulf the Court itself also."²²¹

3. . . . *And of Judicial Review*

But Bickel was wrong on that final point. In reality the Court of today has a stature and importance in the public eye perhaps unparalleled during any other time in history.

The judicial power was central to the Framers' Constitution. Scholars debate the extent to which judicial review was intended to limit government, and on this as on so many matters the minds of the Framers undoubtedly differed. Nonetheless, the original Constitution had *three* great articles, creating not two but *three* branches of government, one of which was the judiciary. Thus, Jefferson argued to Madison that the Bill of Rights would be another quiver in the judiciary's bow: "In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary."²²²

Mark Blanchard, *Canada's Home Voting Network: "Dial-a-Leader" Gives New Meaning to Voting the Party Line*, CAMPAIGNS & ELECTIONS, Sept. 1992, available in LEXIS, CMPGN Library, C & E File.

217. See Dan Balz & Richard Morin, *A Tide of Pessimism and Political Powerlessness Rises*, WASH. POST, Nov. 3, 1991, at A1, A16.

218. Ely built a theory upon this notion. Ely argues that a primary role of the Supreme Court is ensuring the free operation of majoritarian politics. See ELY, *supra* note 5, at 105-34.

219. See BICKEL, *PROGRESS*, *supra* note 13, at 108-09.

220. *Id.* at 110.

221. *Id.* at 111-12.

222. Thomas Jefferson's reply to James Madison (Mar. 15, 1789), in *THE CONSTITUTION AND THE SUPREME COURT*, *supra* note 193, at 121-22. As Robert Burt points out, Madison was not a particular fan of judicial review. See BURT, *supra* note 189, at 64. Yet, as Burt also makes clear, Madison's view of how judicial review should operate was similar to the dialogue I describe here (and to Burt's own view): "His first principle was that constitutional interpretation takes

Nonetheless, the Court in its early days bore little resemblance to the Court of today. Not only did the Framers call the Supreme Court the "least dangerous" branch,²²³ but its prestige seemed to mirror this assessment of its power. It was not easy to get people to serve as Supreme Court Justices.²²⁴ The very reason *Marbury v. Madison* is viewed as such a coup is that the fundamental power of the third branch — the exercise of judicial review — was *not* a given.²²⁵ Today few scholars seriously argue that judicial review by the Court of congressional decisions was unintended, and fewer still (if any) argue that *Marbury* was incorrect.²²⁶ But at that time, the matter was not free from doubt.

The rise of the Supreme Court and of the judiciary as a whole represents a gradual accretion of power. Perhaps one measure of that power is the frequency with which the Court overruled the national legislature and the legislatures of the states, measured against popular acceptance of such overruling. The next overruling of Congress after *Marbury* was some fifty years later, in the infamous *Dred Scott* decision.²²⁷ Supreme Court decisions overruling state legislatures reached their greatest frequency during the *Lochner* era,²²⁸ yet another low

place over time, not in a single instant at a fixed and privileged institutional locus of interpretative authority." *Id.* at 68. For my description of why judicial review is dynamic, not static or final, see *infra* notes 332-86 and accompanying text.

223. THE FEDERALIST No. 78, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton reasoned that the judiciary, as opposed to the other branches of government,

has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment

This simple view of the matter . . . proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power It equally proves, that . . . the general liberty of the people can never be endangered from that quarter . . . so long as the judiciary remains truly distinct from both the legislature and executive.

Id. at 523.

224. See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 3.

225. ACKERMAN, *supra* note 14, at 63 ("[O]nly during the middle republic did the Court begin to review the constitutionality of national legislation on a regular basis").

226. See *infra* note 237.

227. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) (invalidating federal statute that prohibited slavery in the Louisiana Territory).

228. From the decision in *Lochner v. New York*, 198 U.S. 45 (1905), to the mid-1930s, the Court relied on the Due Process Clause of the Fourteenth Amendment to invalidate approximately two hundred state economic regulations. The decisions centered primarily on labor legislation, the regulation of prices, and restrictions on entry into business. See, e.g., *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (invalidating law prohibiting any person to manufacture ice without first obtaining a certificate of convenience and necessity); *Tyson & Bro. v. Banton*, 273 U.S. 418 (1927) (invalidating law regulating price of theater tickets), *overruled by Olsen v. Nebraska*, 313 U.S. 236 (1941); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating law establishing minimum wages for women), *overruled by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Coppage v. Kansas*, 236 U.S. 1 (1915), and *Adair v. United States*, 208 U.S. 161 (1908) (invalidating, respectively, state and federal legislation forbidding employers to require

point in the Court's history.²²⁹ Similar overruling of national decisions arguably sealed the fate of the New Deal Court.²³⁰ The fact that overruling of national and state legislative decisions once marked the low points for judicial review simply may be coincidence. A decision similar to *Dred Scott* may have hurt the Court whether or not a congressional statute was involved. But today's Court seems to be able to overrule both Congress and the state legislatures with relative impunity.²³¹

Bickel and his contemporaries were sure that judicial activism would sink the Court.²³² For them, judicial legitimacy was a fragile reed that required tending and nurturing. They believed judicial interference with political decisions might spell the end of popular adherence to judicial decisions.²³³ If anything, however, the opposite seems to be true.²³⁴ Opinion polls suggest that the public perceives the Court more favorably than it perceives the other two branches of government.²³⁵ The public takes interest in Supreme Court decisions and appears widely to accept the role of the judiciary in resolving constitutional disputes.²³⁶ In this context, judicial overruling of national and

employees to agree not to join a union), *overruled by* *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

229. See GERALD GUNTHER, *CONSTITUTIONAL LAW* 453-54 (11th ed. 1985).

230. The Hughes Court invalidated several New Deal measures as exceeding the power given Congress in the Commerce Clause. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act of 1935, which established price and labor rules for coal mines); *Railroad Retirement Bd. v. Alton R.R.*, 295 U.S. 330 (1935) (striking down the Railroad Retirement Act of 1934); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating the National Industry Recovery Act's labor rules for the New York poultry market). Such activity led to Franklin Roosevelt's Court-packing plan. GUNTHER, *supra* note 229, at 128-29.

231. I stress *relative*. See Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 660 (1992) ("[T]he bolder the Court is in confronting the policies of Congress, the less confidence citizens bestow it as an institution.").

232. See Chemerinsky, *supra* note 73, at 1254 nn.303-04, 306.

233. See Carter, *supra* note 15, at 843 (describing this argument: "[T]he ultimate brake on the courts is the judges' fear that if they go too far they will be ignored").

234. See Chemerinsky, *supra* note 73, at 1254-55 & n.309 (concluding that the Court has retained its legitimacy and increased its power despite its exercise of judicial review). See generally Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 807 (1983) (describing two distinct meanings of judicial legitimacy).

235. See THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 138-42 (1989) (stating polls consistently show Supreme Court outscoring Congress and the Executive branch with regard to public confidence); Caldeira & Gibson, *supra* note 231, at 640-41, 659 (noting public's support for Court not conditioned on basic support for its policies); see also Philip B. Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts "To Say What the Law Is"*, 23 ARIZ. L. REV. 581, 583 (1981) ("I venture that no governmental body in history has maintained so unblemished an escutcheon, free of venality, and personal vindictiveness, as the Supreme Court of the United States.").

236. Professor Rosenberg obviously disputes the extent of public attention to Supreme Court

state legislative decisions is relatively frequent and has become an accepted fact of American governance.²³⁷

None of which is to say that this state of affairs is permanent or unquestioned. Critics of the Court, among them a former Attorney General of the United States, regularly attack the Court for creating rights rather than simply "finding" those rights the Framers put into the Constitution.²³⁸ Moreover, the Court has been an issue in the last several elections, and the abortion debate suggests the trend is on the rise. If the Court ever deviates significantly from the public's views, it may face substantial opposition again.

The present point, however, is that the role of judicial review has grown alongside the rise of majoritarianism. Neither of these elements held primacy in the early days of the Framers' Constitution. But like majoritarianism, judicial review has become a strong and established aspect of modern constitutionalism.²³⁹

4. Reprise: The Framers' Constitution

The Framers created a *system* of government.²⁴⁰ They spelled out many particulars but left others to history. Over time the Constitution has changed. History has filled in some of the gaps, and even many of the particulars operate differently than in the Framers' time. Witness, for example, the growth of the commerce power. Despite these changes, the most enduring legacy of the Framers has been the *theory* of their Constitution. While particulars have changed, the Framers' theory is what holds our Constitution together and what ties our Constitution to theirs. The Framers' theory was that a constitution must divide and balance power to protect liberty.²⁴¹ The Framers imple-

decisions. See ROSENBERG, *supra* note 147, at 229-35 (suggesting controversy about abortion actually *lower* after *Roe* than before it).

237. See Carter, *supra* note 15, at 844 ("For better or worse, generations of Americans have been socialized into accepting the interpretive authority of the legal community."); Chemerinsky, *supra* note 73, at 1209 ("None of the critics of the Supreme Court's activism suggests that all judicial review should be eliminated."); Winter, *Upside/Down*, *supra* note 40, at 1924 (The ideas that "judicial review is undemocratic" and "should stop" are "unthinkable.").

238. See Edwin Meese III, Address to the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), in *Construing the Constitution*, 19 U.C. DAVIS L. REV. 23, 28 (1985); see also ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 143 (1990).

239. See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 36 (1979); Winter, *Upside/Down*, *supra* note 40, at 1923 (noting that no one in the legal academy is ready to give up on judicial review or declare *Marbury* wrongly decided).

240. See Carter, *supra* note 15, at 847.

241. See Brown, *supra* note 190, at 1534 ("separation of powers aimed at the interconnected goals of preventing tyranny and protecting liberty"). The Framers may have harbored a secondary concern for greater efficiency in government, but clearly the doctrine of separation of powers was adopted to "preclude the exercise of arbitrary power." *Id.* at 1534; see also FARBER &

mented that theory by creating a government of separated powers.²⁴² Accompanying the separated powers was a complicated system of checks and balances.²⁴³ The magic of the Constitution is that the interlocking, interdependent, interwoven, and mutually checking bodies of government could for two hundred years counterbalance one another, preserving the Union and with it liberty.²⁴⁴

Many of the forces the Framers thought would serve as checks and balances have not operated precisely as intended. For example, the Framers envisioned that Congress would be the strongest branch, and they set up elaborate checks upon it.²⁴⁵ Either because the Framers overestimated Congress' power or because their checks worked too well, the Executive has been, at least in the past quarter century, the strongest of our elements of governance. As power has shifted to the Executive, Congress has struggled to develop new ways to balance that power.²⁴⁶ But the Framers' broad theoretical view has continued to

SHERRY, *supra* note 78, at 51-145, 175-218 (giving an overview of the Framers' proposals and debates on the powers granted to each branch and the limitations imposed on each in order to protect liberty and avoid usurpation of power, especially by the legislature); Spann, *supra* note 20, at 1975 & n.11 (stating that Framers sought to establish government that would check inclination of factions to benefit themselves).

242. "The principle of separated powers is a prominent feature of the body of the Constitution, dictating the form, function, and structure of a government of limited powers." Brown, *supra* note 190, at 1513; see WOOD, *supra* note 192, at 604 (stating Framers expanded and exalted the "libertarian doctrine of separation of powers" to the "foremost position in their constitutionalism"). Actually, the Framers' system of dividing and checking power is much more elaborate than just separation of powers along the horizontal of the national government. The Constitution also established the vertical division of federalism and numerous other structural checks. See Sunstein, *supra* note 190, at 44.

243. "[T]he Constitution had 'so contriv[ed] the interior structure of government . . . that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.'" BURT, *supra* note 189, at 60 (quoting Madison in THE FEDERALIST No. 51); see also Brown, *supra* note 190, at 1531-32.

244. See BOBBITT, *supra* note 5, at 182 (suggesting that a test for whether a Constitution works is whether it encourages "collaboration and harmony" among constitutional institutions).

245. During the discussion over whether the national judiciary should be associated with the executive in the revisionary power, Madison noted:

It was much more to be apprehended that notwithstanding this co-operation of the two departments, the Legislature would still be an overmatch for them. Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitution; & suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.

2 FARRAND, *supra* note 192, at 74; see also THE FEDERALIST No. 48 (James Madison); THE FEDERALIST No. 49 (James Madison).

This sentiment was also expressed during the debates over the Senate's impeachment power. Charles Pinckney did not approve of the measure because it would render the President "too dependent on the Legislature. If he opposes a favorite law, the two Houses will combine ag[ain]st him, and under the influence of heat and faction throw him out of office." 2 FARRAND, *supra* note 192, at 551. Though Gouverneur Morris thought the Senate could be trusted, he called legislative tyranny "the great danger to be apprehended." *Id.*

246. See, e.g., INS v. Chadha, 462 U.S. 919, 960 (1983) (Powell, J., concurring) (discussing enactment of legislative veto for this purpose). Bill Eskridge and John Ferejohn offer a strong

operate, despite deviation from the way they intended the particulars to function. The system of checks and balances simply has taken on a life of its own.²⁴⁷

The lesson here is that majoritarianism and judicial review have grown to be precisely the kind of checks and balances the Framers favored. These two forces, much changed since the framing, nonetheless have grown up together, both fostering and checking one another.²⁴⁸ As majoritarianism and judicial review have achieved some primacy, they have fit into the mold of the Framers' original design and reinforced the design in the face of change.

5. *All Checks and No Balances?*

We should therefore not try to legitimize courts in a manner different than the other branches of government, for they simply are a fact of our constitutional system; rather, we should study the more practical question of how judicial review actually operates as a check and balance.²⁴⁹ Many of the checks and balances in the Constitution are fairly specific, with power checking power; for example, the President's veto power is set out quite clearly, as is Congress' override power.²⁵⁰ Judicial review appears problematic to many because they believe that, once a court reaches a constitutional decision, that decision flat-out trumps majority action. When the Supreme Court finds

critique of the Supreme Court's decisions regarding the lawmaking process. They argue that the Court has failed to adjust originalist views for the emergence of the modern administrative state and that the individual decisions of the Court frustrate, rather than further, the Framers' intentions regarding checks and balances in the lawmaking process. See Eskridge & Ferejohn, *supra* note 204. In essence, Eskridge and Ferejohn argue that the Court should permit the development of interbranch structures that fulfill the underlying intentions of Article I, § 7. The shift in interpretation they champion would be similar to the evolution of majoritarianism and judicial review as checks and balances. See also Eskridge & Ferejohn, *supra* note 16, at 167 (discussing legislative veto and need to "restor[e] something of the original constitutional balance between presidential and congressional lawmaking powers").

247. "We do well to remain attached to institutions that are often the products more of accident than of design, or that no longer answer to their original plans, but that challenge our resilience and inventiveness in bending old arrangements to present purposes with no outward change." ALEXANDER M. BICKEL, *REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM* 3 (1971); see also Kramer, *supra* note 51, at 285 ("Indeed, the best reading of the framers' intent with respect to separation of powers may be that they wanted to see how things went while retaining enough flexibility to develop appropriate institutional responses.").

248. Spann, *supra* note 20, at 1978 (arguing that, as "structural safeguards diminished in importance, the significance of Supreme Court protection increased"); see also BURT, *supra* note 189, at 29 (claiming that to call judicial review "deviant" is misleading; rather, it is "logical response" to contradiction "between majority rule and equal self-determination").

249. Carter, *supra* note 15, at 865 (asserting that theorists should focus on system of checks and balances, and the role of the Court in that context, rather than on the Court's interpretive norms).

250. U.S. CONST. art. I, § 7, cl. 2.

merit to a plaintiff's claim of constitutional right, for example, that seems to end the matter: 1-0, Court wins. Isn't this all check and no balance?²⁵¹

Discussion of the countermajoritarian difficulty arises from this apparent constitutional imbalance. Judicial review can be and is used to check the actions of wayward majorities. But exactly how one checks the judges is unclear. Judges therefore are seen as possessing a huge amount of power, and the rules for exercising that power are uncertain.

The typical scholarly response is to offer a normative theory of constitutionalism and judicial review that contains a set of rules designed to constrain judges. Such constraint arguably would limit the power of judges, providing some sort of internal check on the use of the judicial review power. The obvious problem is that, however many theories one might spin, judges seem neither to adopt these theories nor to be constrained by them. The apparent lack of judicial constraint gives rise to invariable and strident criticism.

This entire concern with constraining judges, however, does not rest on an accurate description of our constitutional system. Judicial review appears to contain all checks and no balances only if one ignores important facts about our American brand of both "majoritarianism" and judicial review. As the next section explains, the countermajoritarian difficulty does ignore these essential facts.

B. *The Faulty Premises of the Countermajoritarian Difficulty*

The countermajoritarian difficulty rests on two premises: that the bedrock principle of constitutional government is accountability to the people, and that judicial review conflicts with this principle.²⁵² Although each of these ideas contains some truth, both are seriously flawed as foundations for the countermajoritarian difficulty. Each rests on an assumption that is highly contestable. These assumptions are, respectively, that there exists a "majority" whose will is represented by government decisions and that judicial decisions are "final"

251. A number of constitutional devices often are noted at this point in the argument to show where balance lies. For example, the Senate has the power of advice and consent with regard to judges, U.S. CONST. art. II, § 2, and Congress can impeach errant judges. U.S. CONST. art. I, § 3. Yet the former has the most impact on the front end of a judge's career, and the latter is so rare as to be meaningless. Standing alone, these devices appear to be of little use in resolving problems posed by the countermajoritarian difficulty. Indeed, one of the most powerful arguments made in support of Congress' power to control federal court jurisdiction is the absence of other effective checks. See PERRY, *supra* note 5, at 126-28. Yet this check too rarely is utilized, and it is of dubious constitutionality in certain contexts. See Friedman, *supra* note 173, at 57 (discussing uncertainty regarding Congress' power to control federal jurisdiction).

252. See *supra* notes 15-17; BICKEL, *supra* note 2, at 16.

and thus trump the will of that majority. This section seeks to replace these faulty assumptions with three ideas of constitutional government that *do* comport with reality and begin to explain the judicial role. The three ideas are that government operates not to represent a majority but to hear and integrate the voices of many different constituencies; that the constitutional text is spacious enough to accommodate the several interpretations inevitably offered by shifting constituencies; and that the process of constitutional interpretation is dynamic, not static, giving primacy to different interpretations at different times. These three ideas undergird the vibrant national dialogue on constitutional meaning that goes on every day. As Part III will explain, this dialogic view describes the workings of our constitutional government much better than does the countermajoritarian difficulty.

1. *Electoral Accountability*

a. The faulty assumption of a "majority." The first premise upon which the countermajoritarian difficulty rests is that decisions in our government must be made in electorally accountable fashion, either by the people themselves or by their representatives. According to a familiar statement of the countermajoritarian difficulty, the problem with judicial decisions is that they often "thwart" the will of popular majorities.²⁵³ The decisions of the other branches, or of state and local governments, ostensibly represent popular will.²⁵⁴ Courts, on the other hand, are undemocratic. When a court finds in favor of a party asserting a constitutional right to be free from some government action, the court interferes impermissibly with majority will.²⁵⁵ The assumption underlying this premise goes to the very heart of the countermajoritarian difficulty. Those who worry about the countermajoritarian difficulty favor decisions made by branches other than courts because such decisions ostensibly represent the will of the "majority," while courts' decisions do not. This view, however, depends for its coherence on the assumption that there is an identifiable majority whose will can be assessed.²⁵⁶

253. See *supra* notes 52-54 and accompanying text; Sherry, *supra* note 52, at 613.

254. BICKEL, *supra* note 2, at 17.

255. *Id.* at 16-17; see Winter, *supra* note 24, at 1513 ("In the received wisdom, judicial review is seen as countermajoritarian because it invalidates the products of the majoritarian political process."); *supra* notes 52-54 and accompanying text.

256. Pluralism rests on the notion that public good can be determined by an aggregate of individual preferences. Sunstein, *supra* note 190, at 32-33. Even Mark Tushnet falls into the assumption that there is a majority whose will could govern. See TUSHNET, *supra* note 162, at 16 ("In general the choice made by a majority is to be respected, but on some issues and in some contexts majoritarian decisions may be overridden.").

Those enamored of the countermajoritarian difficulty might demur, arguing that what is important is that courts overturn the will of *representative* branches. The Constitution does not rely upon popular majorities, the argument goes; rather, it establishes a system of *representative* government, with the representatives accountable to the people.²⁵⁷ Thus, the difficulty arises whenever courts overrule representative decisions.

This argument, however, cuts loose the countermajoritarian difficulty from the claim of legitimacy that moors it. The countermajoritarian difficulty posits that the "political" branches are "legitimate" because they further majority will, while courts are illegitimate because they impede it. Part I already has suggested some empirical difficulty with this argument. But once one disclaims reliance on the argument that legislatures *actually* represent majority will, or that courts *actually* override it, the countermajoritarian difficulty loses its force. Absent a claim that legislative acts *actually* represent majority will, one only has an argument about the relative legitimacy — without regard to actual majority support — of each branch of government. But that is silly: the Constitution creates three "legitimate" branches of government, one of which is the judiciary.²⁵⁸ Academic constitutional theory, and not constitutional text, deems two of the branches "legitimate," but not the third. Moreover, this argument merely raises the countermajoritarian difficulty to another level of abstraction: to whom are the executive and legislative branches accountable?²⁵⁹ The countermajoritarian answer must be "majority will." Thus, countermajoritarian theory rests explicitly on the notion that the other branches of government "represent" majority will in a way the judiciary does not, which in turn rests on the assumption that there is a majority will.

The premise that government operates in an electorally accountable fashion is seriously flawed. As the examples that follow make clear, there is room to question whether the "accountable" branches of government represent majority will. Beyond that, however, lies the even broader question whether there is such a thing as "majority will" to be ascertained.

Courts are supposedly at their countermajoritarian worst when

257. BICKEL, *supra* note 2, at 17.

258. See Amar, *supra* note 201, at 1085 (recognizing that all three branches represent the people); cf. Chemerinsky, *supra* note 3, at 77 (section aptly titled "The Three Branches of Democracy").

259. On the concept of and problems with "representation," see HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* (1967); HANNA F. PITKIN, *REPRESENTATION* (1969).

they strike down congressional enactments.²⁶⁰ These enactments, after all, have garnered the support of a majority of both houses of Congress and have either avoided an Executive veto or mustered the two-thirds majority necessary for an override. Nonetheless, for courts to overturn congressional statutes on constitutional grounds may not be countermajoritarian at all. Consider *United States v. Jackson*,²⁶¹ which involved a challenge to the Federal Kidnapping Act on the ground the Act impermissibly burdened the right to a jury trial. The Act provided that a kidnapper who harms her victim "shall be punished . . . by death . . . if the verdict of the jury shall so recommend, or . . . by imprisonment . . . if the death penalty is not imposed."²⁶² The lower court had found that, because death could not be the penalty absent a jury trial, accused kidnappers could waive their right to a jury and plead guilty or accept a bench trial to avoid the possibility of death.²⁶³ This opportunity in turn unconstitutionally burdened the right to trial by jury.²⁶⁴ The Supreme Court agreed and struck down the capital punishment provision of the Act.²⁶⁵ The Court concluded, however, that Congress would have wanted the Act to remain in effect even if the penalty provision was struck,²⁶⁶ and so the Court severed the unconstitutional penalty provision and preserved the Act, albeit with no death penalty.²⁶⁷

Was the Court's action countermajoritarian? Perhaps it was. Where previously there had been a legislatively mandated death penalty for kidnapping, there was no more. Even at this level of generality, however, the countermajoritarian character of the Court's decision is dubious. Whether a majority of citizens, or even a majority of Congress, really favored the death penalty for kidnapping is difficult to know.²⁶⁸ As the Court's opinion makes clear, the Senate opposed the

260. Charles Black takes the view that such enactments are the only ones that raise "the philosophy or the political problems of *Marbury v. Madison*." CHARLES L. BLACK, JR., DECISION ACCORDING TO LAW 70 (1981).

261. 390 U.S. 570 (1968).

262. 18 U.S.C. § 1201(a) (1964), as amended by 18 U.S.C. § 1201(a) (Supp. II 1970).

263. 262 F. Supp. 716, 718 (D. Conn. 1967).

264. 262 F. Supp. at 718.

265. *Jackson*, 390 U.S. at 585.

266. 390 U.S. at 585-91.

267. 390 U.S. at 591.

268. One empirical study compared the views and voting records of 116 members of Congress in 1958 with the views of their constituents. The study found a dishearteningly low relationship between the majority view in each district on issues of social welfare and foreign policy and what that district's representative thought was the district's majority view. Warren E. Miller & Donald E. Stokes, *Constituency Influence in Congress*, 57 AM. POL. SCI. REV. 45, 51 (1963). A much stronger relationship did exist between the representatives' perceptions and their constituents' actual majority view in the area of civil rights, arguably the dominant issue of the time.

death penalty provision even after a conference and ultimately capitulated in a vote taken without debate.²⁶⁹ The history of other statutes demonstrates that this capitulation could have been part of a deal in which senators opposed to the provision conceded the issue in order to obtain something that mattered more.²⁷⁰ They may even have capitulated because they did not know what they were voting on when they approved the penalty.²⁷¹

But this level of generality, at which countermajoritarian problems tend to get examined if they get examined at all, does not accurately state the problem. The real question is whether a majority of citizens, or even Congress, favored the particular penalty provision that Congress actually enacted and that the Court subsequently invalidated. Once the problem is stated properly, assuming that the Court acted in a countermajoritarian fashion becomes increasingly difficult. There was no evidence that even Congress favored giving accused kidnappers the choice of a jury trial with the possibility of death or a bench trial with the lesser sanction. Everyone concerned with the case seemed a bit squeamish about the statute as written.²⁷² Most likely Congress never considered the problem.²⁷³ Once we acknowledge that Congress

Id.; see ROBERT A. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT* 134 (1967); Choper, *supra* note 48, at 820-21, 838-39. More recent studies suggest a closer tie between constituent preferences and the votes of members of the House of Representatives. See Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 J.L. & ECON. 103 (1990).

269. The Act as originally enacted in 1932 contained no capital punishment provision. See *Jackson*, 390 U.S. at 586. Although a majority of the House of Representatives had favored the death penalty, they feared that an attempt to persuade the Senate to include the provision would delay, or even defeat, passage of the bill. Not until 1934 was an amendment authorizing capital punishment enacted, and then only after a conference committee reported the amendment out after initial disagreement in the Senate. See 390 U.S. at 586-90 & nn.29-36. Whether the Senators initially opposed the death penalty provision because they disagreed with capital punishment or because they disagreed with placing the capital punishment decision within the discretion of the jury, rather than the trial judge, is not clear.

270. See Chemerinsky, *supra* note 3, at 78-79 & n.158.

271. See Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1311-12 & nn.63-64 (1990) (noting that enacted bills alone in an average Congress total over 7000 pages and suggesting that this volume, combined with the hectic schedules of members of Congress, prohibits legislators from reading all bills proposed).

272. The government, for example, maintained that Congress' failure to enact a capital punishment provision that addressed defendants who pleaded guilty or waived jury trial "was no more than an oversight that the courts can and should correct." *Jackson*, 390 U.S. at 578.

273. In fact, Congress initially created the same problem in another, later-enacted statute but corrected it upon urging of the Department of Justice, who by that time had been schooled in the difficulties of the Kidnapping Act. See *Jackson*, 390 U.S. at 578 n.15 (citing 70 Stat. 540 (1956), 18 U.S.C. § 34, which prohibited the wrecking of aircraft and provided that violators whose conduct caused death "shall be subject . . . to the death penalty . . . if the jury shall in its discretion so direct, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order." (emphasis in *Jackson*)). During the same session in which Congress enacted the aircraft-wrecking statute, Congress ad-

probably goofed, the countermajoritarian nature of the judicial action in *Jackson* is dubious at best.²⁷⁴

But, one might protest, *Jackson* is an odd case. It is an old case. It cannot be taken as the norm when congressional statutes are overruled. The problem, however, is not that *Jackson* cannot be taken as the norm, but that there is no norm. Courts overrule statutes under numerous circumstances. Few of these statutes are of such moment that one can say the public's will was embodied in the statute. The public undoubtedly has little cognizance of many statutes,²⁷⁵ and when it does its reaction is uncertain. Indeed, the voting representatives themselves have little cognizance of many statutes, instead following the lead of floor leaders and committee chairs.²⁷⁶ These people often are captured by special interests.²⁷⁷ On some occasions judicial striking of congressional statutes certainly appears to thwart majority

ded a technical amendment to the Kidnapping Act but neglected to add a similar provision on the death penalty. 390 U.S. at 579 n.15.

274. Statutory interpretation teachers would have a heyday with this case. The government urged the Court to save the statute by making the jury's recommendation in jury cases advisory only, putting sentencing in the hands of judges (something Congress seems explicitly to have rejected), and then permitting judges also to empanel advisory juries in cases of bench trials and guilty pleas. 390 U.S. at 572-73. Alternatively, the government argued that all defendants should be forced through jury trials even if they wished to plead guilty. 390 U.S. at 584. The dissent argued that the statute should be upheld only after giving trial judges instructions to ensure that jury waivers were not encouraged by the statutory provision. 390 U.S. at 591-92 (White, J., dissenting). The defendant, freedom in sight, argued that Congress would not have wanted any kidnapping statute if there were no death penalty provision. 390 U.S. at 589-91. The appellees argued that, without its capital punishment provision, the Act would fail to distinguish the penalties for kidnappers who harmed their victims and those who did not. The appellees claimed that Congress would not want the Act to stand absent such a distinction. 390 U.S. at 590. Even this argument had some support in the record. The argument was that states already had kidnapping provisions; the advantage of a federal act was the additional penalty, which would not depend on state law. One congressman stated as much, arguing in favor of the death penalty. See 390 U.S. at 586-87 & n.31. The Court observed that only one congressman made the argument, 390 U.S. at 587; but how many others nodded their heads in silent agreement and voted for the death penalty?

275. See *CHOPER*, *supra* note 8, at 31; see also Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 88 n.1 (1991) ("The precise language used in statutes . . . is rarely the product of representative democracy, but rather of chance, hired drafters, or of arbitrarily selected 'committees on style.'").

276. Legislation often results from the individual desires of party leaders. Moreover, congressional committees have enormous power in determining whether legislation is passed, regardless of the desires of a majority of Congress. This power is focused more acutely in the hands of the committee chairpersons, who set the agendas for consideration of bills. Finally, members of the conference committees, appointed to reconcile different versions of legislation passed by the House and Senate, have enormous power in writing the legislation that ultimately goes to the President. See *Choper*, *supra* note 48, at 821-30.

277. See Richard Briffault, *Distrust of Democracy*, 63 TEXAS L. REV. 1347, 1361 (1985) (book review) ("Private wealth and special interests dominate the financing of candidate elections as well as initiative petition drives and ballot proposition campaigns."); Ray Forrester, *The New Constitutional Right to Buy Elections*, 69 A.B.A. J. 1078, 1078-79 (1983) (describing the dependence of political candidates on large campaign budgets and the possibility of undue influence of contributing interest groups); Marlene A. Nicholson, *Campaign Financing and Equal Protection*,

will.²⁷⁸ But judicial striking of congressional statutes is surely not always countermajoritarian.²⁷⁹

Of course, the vast majority of judicial overruling of governmental activity is concerned not with statutes or actions of the legislature, or even the chief executive,²⁸⁰ but with the work of administrative offi-

26 STAN. L. REV. 815 (1974) (arguing that the inequities that result from the financing of campaigns through large private contributions compels campaign finance reform).

278. One example is the case of flag burning. See *supra* notes 140-45 and accompanying text.

279. Of course, this discussion deals with the *national* legislature. The problems are compounded when *state* or *local* legislative activity is at issue. This is a point the purveyors of majoritarianism often overlook. See, e.g., BICKEL, *supra* note 2, at 33 (criticizing Court's overruling of state legislation). But see CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 120-55 (1960) (arguing that Supremacy Clause offers clear legitimation of judicial overruling of state legislative decisions).

When a court strikes down a *state* statute as countermajoritarian, there is an additional problem beyond those posed by judicial review of congressional statutes. That is the problem of the relevant majority. Consider *Ford v. Wainwright*, 477 U.S. 399 (1986), in which the Supreme Court held states may not execute insane individuals and invalidated Florida procedures for determining whether a person is insane.

Ford carries with it all the problems with labeling judicial invalidation of any statute countermajoritarian. First is the problem of generality: Did the Florida citizens really prefer Florida's chosen procedure? Second is the "as applied" problem: perhaps the people favored the statutory provision but would not have approved of the Governor's interpretation of it. If indeed the people did not want insane individuals executed, the Court's decision might have been majoritarian in furthering popular will rather than approving the work of elected representatives, whose decisions perhaps would result in the execution of an insane person. But third, what the people wanted is difficult to know. Did they really care about executing insane people? If not, the Court's entire decision rested on a countermajoritarian premise, although the Florida statute did appear to prohibit execution of the insane and thus also was "countermajoritarian."

Beyond all this, however, is the problem of relevant majorities. Even if the majority of Florida citizens favored this particular procedure, implemented as the Governor did, is that the relevant majority? After all, this case implicates a right included in the federal Bill of Rights. One could argue that the relevant majority is therefore national. Perhaps a majority of U.S. citizens disfavored Florida's procedure. If the national majority was the relevant one, again the Constitution might have proved majoritarian.

Thus, pinning the countermajoritarian label on the Court is particularly difficult in cases involving state statutes. Even if one overcomes all the difficulties inherent in an assumption that statutory choice reflects popular will, such a state statute really represents a clash between principles of federalism and the concept of a national Bill of Rights. That, however, presents not a countermajoritarian problem, but a problem of relevant majorities. Yet, as the debates over abortion and the death penalty demonstrate, the rhetoric of countermajoritarianism is often most heated with regard to overturning state legislative judgments.

280. Perhaps the best case for the countermajoritarian difficulty is not the overruling of statutes, but judicial invalidation of executive action. After all, the President, more than anyone else, has a true national constituency. See Choper, *supra* note 48, at 846-47 (finding the President "the single federal official with a nationwide constituency" and concluding that the presidency "comes closer to the majoritarian ideal than practically any other national office in the modern western democracies"). Even a quick glance at the history books proves this argument overstated, however. The most famous overrulings of executive action involve situations in which the President's popular or congressional support was questionable at best. See, e.g., *United States v. Nixon*, 418 U.S. 683, 713 (1974) (holding that presidential privilege must yield to the public's interest in criminal justice); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637, 639 (1952) (Jackson, J., concurring) (noting that Congress had enunciated three statutory policies inconsistent with the President's action). In these situations, there is a good argument the Court's actions may well have been majoritarian. Moreover, the famous examples are typical. Rarely can a court go head to head with a popular President and survive very long. Witness the New Deal and Roosevelt's Court-packing plan. See *STONE ET AL.*, *supra* note 66, at 180-81.

cials, from the loftiest cabinet officer²⁸¹ to the lowest administrative actor.²⁸² The actions range from administrative policymaking to application of administrative rules. In these cases making the countermajoritarian difficulty stick is extremely difficult.

*Rust v. Sullivan*²⁸³ provides one telling example. *Rust* involved the decision of the Secretary of Health and Human Services to withhold federal family planning funds from any program that provided "counseling concerning the use of abortion as a method of family planning" or "referral for abortion as a method of family planning."²⁸⁴ The regulations promulgated to implement this policy were challenged on a number of constitutional grounds.²⁸⁵ The Supreme Court found the challenges meritless and upheld the regulations.²⁸⁶ That a majority of Congress, let alone the people, favored the Court's result in *Rust* is anything but clear. The Court said of the statute, "we agree with every court to have addressed the issue that the language is ambiguous."²⁸⁷ Similarly, "the legislative history is ambiguous and fails to shed light on relevant congressional intent."²⁸⁸ So much for knowing

Thus, courts usually do not trump popular presidential decisions. At the least, it is once again difficult to maintain that, when they do, a countermajoritarian Court is overruling a majoritarian President.

281. *See, e.g., Butz v. Economou*, 438 U.S. 478, 480 (1978) (suit against, inter alia, Secretary of Agriculture).

282. *See, e.g., Jean v. Nelson*, 472 U.S. 846, 848 (1985) (suit against low-level Immigration and Naturalization Service officials).

283. 111 S. Ct. 1759 (1991).

284. Grants for Family Planning Services, 42 C.F.R. § 59.8(a)(1) (1991). The regulations also prohibited funded projects from engaging in any activities to "encourage, promote or advocate abortion as a method of family planning." 42 C.F.R. § 59.10(a) (1991).

285. Grantees of the federal funds and doctors who supervised the funds sued on behalf of themselves and their patients. They claimed that the regulations were not authorized by Title X of the Public Health Service Act, 84 Stat. 1506 (codified as amended at 42 U.S.C. §§ 300-300a-6 (1988)), and that they facially violated the First and Fifth Amendment rights of Title X clients and the First Amendment rights of Title X health providers. *Rust*, 111 S. Ct. at 1766.

286. The Court first found that Title X authorized the regulations. 111 S. Ct. at 1768. The authorizing language stated only that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6 (1988). The Court concluded that it was "unable to say that the Secretary's construction of the prohibition in § 1008 to require a ban on counseling, referral, and advocacy within the Title X project, is impermissible." 111 S. Ct. at 1768.

The Court next addressed the constitutional claims. The Court found no merit to the First Amendment claim, stating that "the general rule that the Government may choose not to subsidize speech applies with full force." 111 S. Ct. at 1776. The Court disposed of the Fifth Amendment claim by reaffirming earlier cases' holdings that the government need not fund abortions and findings that "Congress' refusal to fund abortion counseling and advocacy leaves a pregnant woman with the same choices as if the government had chosen not to fund family-planning services at all." 111 S. Ct. at 1777 (citing *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989)).

287. 111 S. Ct. at 1767.

288. 111 S. Ct. at 1768. The Court continued: "At no time did Congress directly address the issues of abortion counseling, referral, or advocacy. The parties' attempts to characterize highly

what Congress wanted when it passed on authority to the agency. Moreover, congressional activity since *Rust* suggests the Secretary's action was not consistent with the wishes of subsequent Congresses.²⁸⁹ As for the body politic, polls suggest that its will, while not clear, is largely opposed to the agency's decision.²⁹⁰

Rust is an atypical case because the regulation at issue received tremendous public scrutiny. The vast majority of administrative actions are not as public and do not touch matters of such broad public concern. *Rust* is telling for just that reason: if we cannot tell whether judicial review is majoritarian or countermajoritarian in such a prominent case, we likely will have little basis for making such a determination in the ordinary case.

In *Rust*, the Court concluded that, in the absence of knowing what Congress wanted, it should defer to the agency's interpretation.²⁹¹ This is consistent with the general rule regarding judicial review of agency action.²⁹² On its face such a rule might appear majoritarian. The alternative, after all, is to have Article III judges decide all the rules. Reviewing the rationales offered by the Court and academy for such deference is instructive, however, for they indicate that deference to agency decisionmaking hardly can be called majoritarian.

Sometimes deference to agency decisions is justified on the grounds of agency expertise.²⁹³ Putting aside whether such deference is war-

generalized, conflicting statements in the legislative history into accurate revelations of congressional intent are unavailing." 111 S. Ct. at 1768.

289. President Bush vetoed legislation designed to overturn the gag rule, and Congress could not override the veto. Maria Puente, *Abortion Counseling Ban Upheld*, USA TODAY, Nov. 20, 1991 at 1A. Subsequently the Bush administration amended the gag rule to permit doctors to give abortion advice, but public reaction has been critical because in publicly funded clinics most counseling is done by nondoctors. See, e.g., Ellen Goodman, *Abortion Doublespeak*, BOSTON GLOBE, Mar. 26, 1992, at 17 (editorial criticizing wavering by White House on whether gag rule should be changed at all); *Mixing Up the Signals*, L.A. TIMES, Mar. 28, 1992, at B7 (calling President Bush's latest amendments to gag rules his "most cynical").

290. The *Rust* decision triggered a flurry of polling activity, including conflicting polls commissioned by Planned Parenthood Federation of America and the National Right to Life Committee. Except for the latter, the polls showed very strong public opposition to *Rust*. See Helen Dewar, *Hill Moves Briskly on Abortion Bills*, WASH. POST, June 4, 1991, at A5 (reporting a *Washington Post*-ABC News Poll's finding that 63% support legislation to overturn *Rust*); Renu Sehgal, *Abortion Groups, Pro and Con, Report Differing Poll Results*, BOSTON GLOBE, June 25, 1991, (Metro/Region) at 5 (reporting that although a Louis Harris Poll, commissioned by Planned Parenthood Federation of America, found 74% opposed to the *Rust* decision, a Richard B. Wirthlin Poll, commissioned by the National Right to Life Committee, found 48% opposed to and 48% in favor of the decision).

291. 111 S. Ct. at 1769.

292. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (announcing that, if a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

293. See, e.g., *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) ("[A] reviewing court must remember that the Commission is making predic-

ranted, expertise does not speak directly to the majoritarian problem; expertise is not the same as accountability. Deferring to agency decisions on the grounds of expertise is no more or less majoritarian than deferring to the courts on those grounds — or to a queen, for that matter.²⁹⁴

Sometimes, however, deference is grounded on arguments of accountability.²⁹⁵ Perhaps Bickel put it best: “[these officials] are most often responsible to officials who are themselves elected and through whom the line runs directly to a majority. . . . [S]o long as there has been a meaningful delegation by the legislature to administrators, which is kept within proper bounds, the essential majority power is there”²⁹⁶ This “chain-of-accountability” argument only is as strong as its weakest link, and any observer knows just how weak the links are. The delegation doctrine is exceedingly broad.²⁹⁷ Political oversight may or may not be effective,²⁹⁸ and, perhaps more important, commentators suggest that oversight in itself may not be particularly majoritarian.²⁹⁹ Moreover, many of the decisions reviewed by

tions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.”).

294. Actually, deferring to expertise may be majoritarian in the sense that the people, too busy to bother with all the details or lacking in the expertise themselves to decide, might well choose to defer to experts. See *supra* notes 107-09 and accompanying text (discussing judicial deference to experts).

295. See, e.g., *Chevron*:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices — resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

467 U.S. at 865-66.

296. BICKEL, *supra* note 2, at 19, 20; see *supra* note 42 and accompanying text.

297. The delegation doctrine requires that “Congress clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.” *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). The Supreme Court has struck down only two delegation statutes under the doctrine, both in 1935. See *Mistretta*, 488 U.S. at 373 n.7 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935)). For an in-depth review of the history of the delegation doctrine, see HAROLD H. BRUFF & PETER M. SHANE, *THE LAW OF PRESIDENTIAL POWER* 64-88 (1988).

298. A primary vehicle for congressional control of agency action was the legislative veto, see Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1372-73 (1977), but the Supreme Court invalidated the use of such vetoes in *INS v. Chadha*, 462 U.S. 919 (1983). The executive branch has formal oversight authority under Executive Order Nos. 12,291 and 12,498, but use of this oversight is controversial. See Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 399 & n.270 (1989).

299. See DANIEL A. FARBER ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* (forthcoming 1993) (discussing how focusing oversight in smaller units of Congress can encourage and further rent-seeking activity).

courts inevitably are not subjected to particular efforts at oversight or granted any approval of a majoritarian nature. *Rust* again is instructive because it is atypical. *Rust* involved regulations approved at the highest level of the executive branch and subjected to careful scrutiny.³⁰⁰ Accountability should have been at its highest in *Rust*. Even so, Secretary Sullivan's action may well have been countermajoritarian in a popular sense and likely was contrary to the will of Congress.³⁰¹

Public choice theory has raised important questions about the extent to which the representative branches of government do in fact represent majority will, whether a voting process can ascertain the majority view, or even whether there is such a thing as a "majority" view.³⁰² The preceding examples drew in part from that critique. But beyond the critique lies a far broader problem with the idea that non-judicial actors are majoritarian or that their actions represent majority will. The erroneous assumption, which pervades the countermajoritarian difficulty, is that such a thing as "majority will" exists to legitimate decisions of the "representative" branches. No such majority will is identifiable. Rather, majorities come and go as the public engages in debate. At best there is a constantly shifting tide of public opinion.

The countermajoritarian difficulty ultimately fails because it sees the majority and majority will as static, when in reality the viewpoint of the populace is fluid and dynamic. The concept of majoritarianism sees government as an institution designed simply to aggregate preferences.³⁰³ Government is one big ballot box, and when the results are in no court ought to tamper with them.³⁰⁴ This overstates the countermajoritarian difficulty's simplistic view of public choices, but not by very much. In the world of the countermajoritarian difficulty, mustering a "majority" viewpoint is possible because choices are bi-

300. The regulations were adopted by the Secretary of the Department of Health and Human Services in 1988, President Ronald Reagan's last year in office. *Rust v. Sullivan*, 111 S. Ct. 1759, 1764-65 (1991).

301. See *supra* notes 287-90 and accompanying text.

302. For a good summary of the public choice arguments and a careful analysis of these arguments that raises questions of how they should be interpreted, see FARBER & FRICKEY, *supra* note 28, at 38-62. See also WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 49-51 (1988).

303. JOHN ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 33 (1983) (noting argument of some that only role of State is to create mechanism to aggregate preferences); TUSHNET, *supra* note 162, at 70 ("Just as the market for goods aggregates consumer choice through the mechanism of demand and supply, the market for public policy aggregates citizen choice through voting.")

304. Or courts should tamper with them only under specified circumstances. See Elhaug, *supra* note 182, at 44-48 (discussing proposals for greater judicial review in light of the public choice critique).

nary. We are either for something or against it. Yet in real life choices arise on a continuum. We must rank our preferences and then determine how important they are and what we reasonably can hope to achieve.³⁰⁵ In reality, our preferences are extremely malleable, relative, influenced by choices stacked against them,³⁰⁶ and changed by discussion.³⁰⁷ They vary depending upon whom we are talking to, what we are being asked to decide, when we are asked to decide it, and what information is available at that time. Yet the countermajoritarian difficulty does little to account for the chimerical nature of public opinion.

Public choice literature establishes how this type of analysis causes problems in the context of aggregating preferences on a societal level. The work of Kenneth Arrow, for example, suggests that the idea of a majority is incoherent because of the problem of cycling.³⁰⁸ Simply put, if three people have three separate preferences, the outcome of a "majoritarian" process will depend upon the order in which the votes are taken, not on what a majority might want.³⁰⁹

Similar problems present themselves at the level of individual decisionmaking. First, individual decisions tend not to be binary (*Do you favor abortion rights?*). Rather, many questions arise, such as whether we would permit abortion in any situation, just in cases of rape or incest, without public funding, and so on.³¹⁰ Important policy issues are too complex for our governmental system ordinarily to pose choices in a way that lets us express what we really feel.

Second, agenda setting is a problem, for individuals as well as in the public sphere. Some people feel so strongly about issues such as abortion that they choose their representatives on that basis alone.³¹¹ For many of us, however, representatives represent a variety of views,

305. See BICKEL, *supra* note 247, at 16-17 (discussing the role of intensity of preference in majoritarian politics); TUSHNET, *supra* note 162, at 79-80 ("People who care deeply about an issue regularly have a larger influence in the legislative process than their numbers alone would suggest."); Elhauge, *supra* note 182, at 50, 65 (arguing that voters properly register intensity of preference in the political process).

306. See ELSTER, *supra* note 303, at 109-24 (discussing counteradaptive preferences).

307. See ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* 247 (1990).

308. KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 46-60 (1951).

309. Thus, Einer Elhauge argues that by identifying cycling problems Arrow perhaps made the case against a political process that would simply value ordinal preference rankings (i.e., pure majoritarianism) without regard to intensity of views, agenda-setting, and the like. Elhauge, *supra* note 182, at 103-04. On the public choice critique generally see FARBER & FRICKEY, *supra* note 28; Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1545-46 (1992).

310. See *infra* notes 439-40 and accompanying text (discussing polling data on abortion choices).

311. Elhauge, *supra* note 182, at 41 n.41.

and we vote on the bundle.³¹² We may be willing to give up things about which we have an opinion, but which matter less than other issues. When the candidate-turned-representative votes on matters about which voters disagreed with her, however, there is no representation, at least not in the sense of majority will.³¹³

Third, because our individual preferences change constantly in response to a number of factors,³¹⁴ societal preferences also are constantly in flux. Change can occur because of new information³¹⁵ or simply because someone we respect expresses a different view. A good example is the transformative effect the discovery that Magic Johnson had tested positive for the HIV virus had on our view of AIDS. Suddenly the airwaves were flooded with information, people were more concerned, AIDS had gained in importance,³¹⁶ and the stigma of having AIDS probably decreased.³¹⁷ When one sudden event can have such an impact on the populace, the notion of a static majority will becomes ephemeral.

Finally, accommodation to the views of others is integral to all aspects of social existence.³¹⁸ Sometimes we are persuaded. Sometimes we decide to accept the second best because it is all we can get, or we *believe* it is all we can get.³¹⁹ Sometimes we decide we have to live with something we do not like because accommodation is easier than other alternatives.³²⁰ Sometimes others' views are imposed upon us and we feel we have no choice.³²¹

In a sense the countermajoritarian difficulty treats popular will as the aggregation of fixed exogenous preferences,³²² when preferences

312. CHOPER, *supra* note 8, at 13 ("[T]he electorate must buy its political representation in bulk form."); Elhauge, *supra* note 182, at 41 & n.41.

313. CHOPER, *supra* note 8, at 13 ("Hardly ever will a candidate share all the preferences of an individual elector.").

314. *See, e.g.*, Seidman, *supra* note 59, at 1596 ("tastes depend upon context").

315. ELSTER, *supra* note 303, at 81, 113 (questioning preferences shaped with incomplete information); GIBBARD, *supra* note 307, at 230 ("Sometimes judgments of competence lead us to revise judgments we started out accepting.").

316. *See* Anne Michaud, *Home HIV Test Kit May Soon Be on Market*, L.A. TIMES, June 9, 1992, at D7 (noting that since Magic Johnson announced that he was HIV positive the public is "newly concerned" about AIDS); Dave Raffo, *Learning the Value of a Dollar*, FIN. POST, Apr. 27, 1992, § 5, at 51 (finding that the Magic Johnson story had "a big influence" on 85% of those surveyed).

317. *See* Jim Clardy, *Ashe Pays Visit to His Hometown*, WASH. TIMES, May 7, 1992, at B3.

318. This idea is central to the notion of "sour grapes." ELSTER, *supra* note 303, at 22; *see id.* at 109 ("[W]hy should the choice between feasible options only take account of individual preferences if people tend to adjust their aspirations to their possibilities?").

319. GIBBARD, *supra* note 307, at 241.

320. The slavery clauses in the Constitution likely offer an example of this. *See id.* at 238-41.

321. *Id.* at 236-37.

322. *See* TUSHNET, *supra* note 162, at 46 (stating that liberal tradition "tend[s] to treat each

necessarily are shifting and endogenous.³²³ Preferences are continually shaped and reshaped by public opinion.³²⁴ Every minute is an ordering and reordering for each of us about what we want and care about. The assumption that there is a "majority" whose "will" is embodied in governmental decisions is, at best, overstated. Decisions must be made at specific times.³²⁵ At best, there may be one *brief* moment when a governmental decision does represent majority will, though that moment may come and go in an instant as views and choices change.³²⁶ The political process cannot possibly reflect individuals' and society's constantly changing preferences. More likely, a governmental choice is the result of structured decisionmaking that represents "majority will" only after ruling out many choices many people would have preferred.

In this sense, the countermajoritarian difficulty fails even to describe the "majoritarianism" that, as discussed in the last section, has evolved in our constitutional system. True, the franchise has been extended to many people, and democracy has become more direct and less representative. But neither of these actual changes in our system has anything to do with the existence of an identifiable majority will.³²⁷

Thus, the first premise of the countermajoritarian difficulty — that

of us as an autonomous individual whose choices and values are independent of those made and held by others"); cf. ELSTER, *supra* note 303, at 121 (arguing that standard theory of social choice sees preferences "as given independently of the choice situation." The alternative "is to see preferences as causally shaped by the situation."); Cass R. Sunstein, *Republicanism and the Preference Problem*, 66 CHI.-KENT L. REV. 181, 184 (1990) ("[W]hen preferences are a function of legal rules, the rules cannot, without circularity, be justified by reference to the preferences.").

323. This is an important foundation of neorepublican thought. See Richard A. Epstein, *Modern Republicanism — Or the Flight from Substance*, 97 YALE L.J. 1633, 1642 (1988) ("In one sense" it "has to be correct" that preferences are not exogenous.); Sunstein, *supra* note 190, at 82 ("Preferences adapt to available options; they are not autonomous. . . . [P]olitics properly has, as one of its central functions, the selection, evaluation, and shaping of preferences . . ."); Sunstein, *supra* note 309, at 1541-43; see also ELSTER, *supra* note 303, at 34-35 (discussing idea that political system could be geared to changing preferences, rather than aggregating them).

324. See GIBBARD, *supra* note 307, at 247 (noting that discussion leads us "to accept certain norms of accommodation").

325. See ELSTER, *supra* note 303, at 38 (noting that decisions must be made at a specific time, even if disagreements are not worked out).

326. Robert Dahl observed in his now-famous article that over half of the Supreme Court decisions striking down congressional legislation occurred more than four years after the legislation was passed. DAHL, *supra* note 268, at 157 (adapted from Robert A. Dahl, *Decision-Making in a Democracy: The Role of the Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957)). Where legislation was overruled in less than four years, Dahl found that Congress' policy view generally won out, albeit after a struggle. *Id.* at 158-63.

327. See also BURT, *supra* note 189, at 100-01 (describing how the view of those who promote countermajoritarian difficulty resembles Stephen Douglas' view that the slavery question should be resolved by majority rule: "But Lincoln also understood — as Madison had grasped in more hopeful times — that if we abandon the effort to persuade one another, then we will have embraced the tyranny of some over others.").

there is an identifiable majority will — simply fails to describe accurately the vitality of the American electorate. More significant for the focus of this article, the transient nature of majoritarian preferences calls into question the notion that courts are countermajoritarian. Courts cannot trump majority will where no static, identifiable majority exists. One may disapprove of what courts do, but the basis for that disapproval must be something other than the countermajoritarian difficulty.

b. Contrast: the idea of constituency. Experience suggests that, rather than having an identifiable majority, we are a nation best described as comprised of coalitions and constituencies, all clamoring to be heard. Here I use *constituency* not in the sense of a fixed interest group, although that would not be completely inaccurate. Rather, a constituency is a body of support for one or another position on an issue before the body politic. Constituencies rise, fall, and shift as issues come before the polity.

Although the precise system of government the Framers established was largely a product of compromise, the Framers nonetheless ended up with a system that permits varying, often overlapping, representation of different constituencies.³²⁸ Although the system may differ today from what the Framers intended, their grand design is preserved. Members of the House of Representatives represent relatively small populations, likely to be relatively homogeneous. They are elected every two years and thus are likeliest among elected officials to be in touch with the people. Senators originally represented state legislatures and now represent broader state land areas; six years in office gives them a broader perspective. The President's constituency is the widest, and the President's term intentionally rests between the length of the other two.³²⁹ The Framers' design of multiple constituencies stretched to state and local governments, each with its own representative systems.

Each of the governmental units grants voice to a constituency in debates over matters of national import. This is true not only of the branches of government at the national level but also of the countless

328. See TUSHNET, *supra* note 162, at 9-10 (“[T]he framers created a federal structure that, as a practical matter, requires the concurrence of many representatives with substantial local constituencies before the national government can act.”). Constituency representation may not today occur as the Framers envisioned it. See *id.* at 13 (“Much of what we know about contemporary politics belies” Framers’ assumptions about representation.)

329. This description of constituencies *does* differ from the Framers’ design. The Senate, chosen from state legislatures, was thought to represent parochial interests. See Akhil R. Amar, *Article III and the Judiciary Act of 1789: the Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1512 (1990). The House would be more national in perspective. The President, of course, would be chosen not by the people but by independent electors.

governmental bodies at the state and local levels. Moreover, our governmental system allows for numerous nongovernmental ad hoc interest groups, further giving voice to constituencies.³³⁰ Rather than majority aggregation, then, we have a debate among constituencies. Babble is perhaps a more accurate word. Government cannot simply follow majority will, because none is readily identifiable. Government's job is to find guidance and direction in the babble nonetheless.

Given that no static majority exists, courts must be doing something in this system other than trumping majority views. What courts do is similar to the task performed by other governmental bodies — they give voice to constituencies under certain circumstances. Moreover, with regard to issues of constitutional interpretation, courts play a unique role of reaching into the body politic and thrusting one constituency's view to the fore, making it — at least for a short while — the focus of a discussion that many call dialogue.³³¹ This role of courts is spelled out in detail in Part III.

2. *Judicial Interference*

a. The faulty assumption of judicial "finality." The second premise of the countermajoritarian difficulty is that judicial decisionmaking conflicts with the first premise, because electorally unaccountable judges thwart the will of the majority.³³² Lurking in this argument is the implicit assumption that judicial decisions are final — that when a court, or at least the Supreme Court, determines a claim of right to have merit, a judicially made choice is substituted for a democratically made choice. The "people" have made a choice, but the courts have

330. See Sunstein, *supra* note 190, at 43-45 (describing Framers' scheme for constituting government as series of interlocking constituencies). Frank Michelman describes this most vividly:

The full lesson of the civil rights movement will escape whoever focuses too sharply on the country's most visible, formal legislative assemblies — Congress, state legislatures, the councils of major cities — as exclusive, or even primary, arenas of jurisgenerative politics and political freedom. I do not mean that those arenas are dispensable or unimportant. Rather I mean the obvious points that much of the country's normatively consequential dialogue occurs outside the major, formal channels of electoral and legislative politics, and that in modern society those formal channels cannot possibly provide for most citizens much direct experience of self-revisionary, dialogic engagement. *Much, perhaps most, of that experience must occur in various arenas of what we know as public life in the broad sense, some nominally political and some not: in the encounters and conflicts, interactions and debates that arise in and around town meetings and local government agencies; civic and voluntary organizations; social and recreational clubs; schools public and private; managements, directorates and leadership groups of organizations of all kinds; workplaces and shop floors; public events and street life; and so on.* Those are all areas of potentially transformative dialogue.

Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493, 1531 (1988) (emphasis added). Nonetheless, Michelman insists at times that only judges write the story.

331. See *infra* note 388.

332. See *supra* notes 23-24 and accompanying text.

trumped that decision.³³³ Courts apparently get the last word.

This notion of "judicial finality" seriously overstates the impact of a judicial decision, however, even a decision by the Supreme Court. A judicial decision is an important word on any subject. But it is not necessarily the last word.³³⁴ Because the judicial word is not the last word, the countermajoritarian difficulty loses force.

There are two ways in which a judicial decision might mistakenly be considered the last word. The first is that a court's word in any given case dictates action to resolve that *case*. The other, far more important for the purposes of this article, is that a court's word — particularly the Supreme Court's — on any given issue constitutes the final say on that *issue*.

Although the latter sense of finality will play a larger role here, it is useful to begin by observing that a court's word is not even necessarily final in the context of a case. We all have been cautioned, and properly so, not to minimize the impact of a judicial decision. Most notable perhaps is Robert Cover's admonition that judicial decisions are not like other literary texts, in that they deal "pain and death."³³⁵ Judges decree things, and they happen.³³⁶ But Cover was well aware

333. Robert Burt refers to the general phenomenon of "judicial supremacy," and the primary object of his recent book is to argue for replacement of notions of judicial supremacy with "an egalitarian conception" of judicial review. BURT, *supra* note 189, at 6; see generally *id.* at 103-268 ("Judicial Supremacy in Practice"). Burt's view is that judicial supremacy is as troubling as tyranny of the majority. *Id.* at 102. My own view is that, despite the rhetoric of today's politics, we largely have the system Burt wishes. Burt does not necessarily see it that way, largely because he fails to see that even judicial *inaction* is action, and also because he overstates the "finality" of judicial action. For example, Burt condemns the Supreme Court for its hurried schedule in the Nixon Tapes Case. *Id.* at 319-20. But given the Special Prosecutor's request of the Court, *id.* at 318-19, a decision not to move quickly would have been perceived as some sort of statement in Nixon's favor. Everything the Court does is a statement, but Burt, as this section argues, overstates the chilling effect of judicial action. Indeed, Burt seems at times to deviate somewhat from his own principles, though perhaps this only underscores that, as appealing as his general principles are, they are sometimes difficult to apply. Burt, for example, seems to favor a greater judicial role in banning the death penalty on the ground that the death penalty is "so grossly subjugative that it violates the core values of the democratic equality principle." *Id.* at 343. But in light of Burt's own evaluation of national sentiment in favor of the death penalty, *id.* at 330-31, this would seem the height of judicial supremacy.

334. Commenting on Justice Jackson's famous statement that "[w]e are not final because we are infallible, but we are infallible only because we are final," *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring), Louis Fisher rejoins: "As the historical record proves overwhelmingly, the Court is neither final nor infallible." FISHER, *supra* note 108, at 244.

335. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986); see also Sanford Levinson, *Law as Literature*, 60 TEXAS L. REV. 373, 386 (1982) ("As Chairman Mao pointed out, a revolution is not a tea party, and the massive disruption in lives that can be triggered by a legal case is not a conversation."). My own response to Levinson is that it can be both.

336. See Cover, *supra* note 335, at 1613. Cover's central point was that "[t]he practice of constitutional interpretation is so inextricably bound up with the real threat or practice of violent deeds that it is — and should be — an essentially different discipline from 'interpretation' in literature and the humanities." Robert M. Cover, *The Bonds of Constitutional Interpretation: Of*

that, although the bond between decree and enforcement is close, the two are not the same thing.³³⁷ One reasonably expects that, in a society governed by the rule of law, enforcement will not often tarry far behind a judicial decree.³³⁸ But enforcement is by no means automatic.

Indeed, there is a continuum of nonenforcement of judicial decrees. At one end of the continuum are the instances in which nonenforcement is legitimate in every sense because, as societal mechanisms are structured, the court does not really have the "final" word. In the context of Cover's own discussion, for example, executive clemency is always a possibility even after the opportunity for legal appeals has run its course in a death penalty case.³³⁹ Such clemency is not common, but it does provide an entirely lawful, noncontroversial step between judgment and enforcement. At the other end of the continuum³⁴⁰ is open defiance. Judicial orders ultimately depend upon acceptance outside the judicial realm for enforcement, and sometimes the lack of acceptance thwarts enforcement altogether. A familiar historical example is President Lincoln's failure to comply with Justice Taney's decree in *Ex Parte Merryman*.³⁴¹ An example of more widespread and popular interference with judicial orders is the footdragging that accompanied federal court school desegregation decrees.³⁴²

I do not mean to suggest even remotely that defiance of judicial decrees is a good or appropriate thing. Defiance poses a real threat to the rule of law, and those who defy judicial decrees ought to pay the price. Sometimes they do and sometimes they do not. The fact simply is that in many instances judicial decrees do not constitute the final

the Word, The Deed, and The Role, 20 GA. L. REV. 815, 816 (1986). I believe the dialogic story I tell here is quite compatible with Cover's point.

337. See Friedman, *supra* note 156, at 753-67 (discussing techniques judges must use to obtain majority acceptance of decrees, and thus enforcement). Sadly, "pain and death" are part of the dialogue. Precisely because enforcement is not automatic, our commitment to rights is tested by the extent to which decision triggers activity. See Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1894 (1987).

338. Cover, *supra* note 335, at 1613 ("[J]udges' words . . . serve as virtual triggers for action.").

339. Cover actually relies upon the "almost stylized" process of death penalty appeals. See Cover, *supra* note 335, at 1622-24.

340. In between, no doubt, is postjudgment settlement of disputes.

341. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9485). Compare the remark attributed to President Jackson in the wake of the Supreme Court's decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832): "John Marshall has made his law, now let him enforce it." Charles F. Wilkinson, *The Impact of Indian History on the Teaching of American History*, Occasional Papers in Curriculum Series of the Newberry Library, D'Arcy McNickle Center for the History of the American Indian, No. 2, at 111 (Chicago Conference, 1984).

342. Friedman, *supra* note 156, at 765-67 (discussing Supreme Court "toleration" of defiance of judicial decrees).

word in a case.³⁴³

Far more important for present purposes, however, is the extent of finality accorded the *lawsaying*³⁴⁴ function of the courts.³⁴⁵ When commentators complain about thwarting popular will, one gets the sense they are not complaining about what happens to a party in a given case. For example, a court may arouse ire in the popular press when it overturns the conviction of a violent criminal on the grounds that the confession was obtained in violation of Fifth Amendment guarantees.³⁴⁶ Critics concerned with the legitimacy of judicial review, however, seem most concerned when courts, by rendering constitutional decisions, interfere with, invalidate, or overturn broader societal choices.³⁴⁷ Examples are the questions of whether to prohibit abortion or to engage in segregation.

Precisely when judicial lawsaying is at issue, however, is the fallacy of judicial finality most evident. Critics of judicial interference with popular will tend to see constitutional decisions as roadblocks to majoritarian action. Because the Constitution trumps all other legal (read *legitimate*) decisionmaking, a judicial decision, if final, would frustrate majority will.³⁴⁸ But judicial decisions do not necessarily have that effect.³⁴⁹

Admittedly, authoritative judicial opinions seem to claim this sort of finality. Perhaps the most notable such statement is *Cooper v. Aaron*,³⁵⁰ in which the Supreme Court appeared to deem itself the "ul-

343. Robert A. Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984), discusses the role of adjudication when this possibility of noncompliance is present. Burt argues that judicial decisions, despite their inability to coerce compliance, may serve to impose "a course of dialogic engagement," *id.* at 487, in which parties are forced to listen to one another and respond.

344. Ann Althouse gets credit for this excellent term. See Ann Althouse, *Standing, In Fluffy Slippers*, 77 VA. L. REV. 1177, 1182 n.22 (1991) ("[T]he word 'lawsaying' . . . [is] derived from *Marbury v. Madison* . . .") (citation omitted).

345. "Lawsaying" and decision of a given case concededly are not two distinct things. "Judicial acts enable subsequent claims to be made while also allowing formal and informal resistance to the very boundaries enunciated by the court." Minow, *supra* note 337, at 1886.

346. Cf. Stuart Taylor Jr., *Hinckley Case and Suspects' Rights*, N.Y. TIMES, Feb. 25, 1982, at A24 (questioning whether order to suppress statements John Hinckley made on the day of his arrest for shooting President Reagan "was a case of carrying a good principle a bit too far").

347. Thus, the inevitable topics are school desegregation, abortion, the death penalty, and the like. See, e.g., ACKERMAN, *supra* note 14; BICKEL, *PROGRESS*, *supra* note 13; BURT, *supra* note 189.

348. See *supra* notes 53-54; see also Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984).

349. For a strong view that political events often alter Supreme Court decisions, see Louis Fisher, *The Curious Belief in Judicial Supremacy*, 25 SUFFOLK U. L. REV. 85, 87 (1991) ("For the most part, Court decisions are tentative and reversible like other political events.")

350. 358 U.S. 1 (1958).

timate arbiter" of what the Constitution says.³⁵¹ A strict reading of *Cooper* would seem to say that the Court is charged with determining what the Constitution says, and once the Court has spoken, those not even parties before the Court are bound. Alexander Bickel read *Cooper* this way, though he evidently questioned the sense of it.³⁵² But *Cooper* in theory and *Cooper* in practice are two different things.

First, as Bickel well knew, civil disobedience can and does undermine the finality of even the lawsaying function.³⁵³ Again, this is not to countenance widespread civil disobedience. But even the Supreme Court seems to have suggested, or perhaps acquiesced in, the obvious fact that some people will pay the price to be disobedient.³⁵⁴

Far more important, however, is the orderly, not infrequent, completely legitimate process of testing the finality of judicial lawmaking.³⁵⁵ In *Roe v. Wade*,³⁵⁶ for example, the Court held that the right to choose abortion was a constitutionally protected fundamental right. That was in 1976. Now, a mere fifteen years later, the Supreme Court's decision in *Planned Parenthood v. Casey* redefined the right,³⁵⁷ and at some time in the not-so-distant future the Court may overrule that constitutional protection.³⁵⁸ Whether it does so or not, the right certainly has changed. This change did not occur as a result of action taken by the Court on its own. Rather, it was a function of state legislatures continually passing laws that slid around, sought to narrow, and even blatantly challenged *Roe*.³⁵⁹ Each of those laws was litigated. But there was no widespread cry that such challenges were unlawful. Rather, the law is changing in response to a somewhat ac-

351. See Burt, *supra* note 343, at 472-73; Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387.

352. See BICKEL, *supra* note 2, at 265 (discussing *Cooper* and its aftermath; derisively speaking of the "decisive issue . . . going beyond the fictions of *Marbury v. Madison*").

353. See *id.* at 264-65 (noting that Southerners narrowly missed succeeding in opposition to *Brown v. Board of Education*); BICKEL, CONSENT, *supra* note 13, at 101-02, 106. A very good example is the area of school prayer, in which Supreme Court pronouncements have been widely disregarded. See BOBBITT, *supra* note 5, at 196.

354. See Friedman, *supra* note 156, at 766-67 (discussing *Spallone v. United States*, 493 U.S. 265 (1990), in which the Court appeared to permit recalcitrant city council members to opt to pay judicial contempt fines that would bankrupt their city if they chose not to comply with a judicial decree).

355. See ACKERMAN, *supra* note 14, at 79 ("Neither Lincoln nor Douglas accepted *Dred Scott* as if it were the last word."); Burt, *supra* note 343, at 477 (pointing out that the *Cooper* principle certainly does not bind new Justices).

356. 410 U.S. 113 (1973).

357. 112 S. Ct. 2791 (1992).

358. See 112 S. Ct. at 2844 (Blackmun, J., concurring and dissenting) (expressing his "fear for the darkness as four Justices anxiously await the single vote necessary to extinguish the light").

359. See *infra* note 433 and accompanying text.

cepted process of political testing.³⁶⁰

Plenty of arguments can be mounted against this description, but none of them seriously undermines it. For example, one might point out that *Roe* was final *for a time* or that *Roe* would not have been eroded absent a change in judicial membership. But the Supreme Court has changed its mind even without a significant change in membership, as the shift from *Gobitis*³⁶¹ to *Barnette*³⁶² suggests.³⁶³ Moreover, those cases show how quickly the law can change, as do the recent cases regarding victim impact statements in death penalty cases.³⁶⁴ To say that judicial decisions frustrate the will of the majority is simply too simple.³⁶⁵ The populace certainly feels the impact of judicial decisions; but, as I will argue presently, the converse also is true. That is why there is dialogue.

b. Contrast: the twin ideas of spaciousness and dynamism. Finality is neither likely achievable nor necessarily desirable. It is human nature to challenge that with which we do not agree. We make mistakes and want to correct them or see them corrected. Thus, agreement on a rule of finality is virtually impossible to imagine. Yet, absent agree-

360. I confess some ambivalence about this, as do my students when we discuss *Cooper v. Aaron*, 358 U.S. 1 (1958). There is a very real tension between finality and results we can live with. Students invariably think decisions such as *Brown v. Board of Educ.*, 347 U.S. 483 (1954), should not have been met with recalcitrance and subjected to repeated challenge. But their certainty begins to slip away with *Roe*, and fritters away completely when we discuss enforcement of fugitive slave laws and state resistance. Ideally, I suppose, our moral compasses could reflect which decisions would, over time, gain widespread popular approval; but then, the ability to see into the future would be useful in many ways. Charles Black discusses this very problem and appears to adopt a "good faith" test:

The Court itself has since declared that it does not see anything wrong in such action by Congress, and this seems to be the common-sense solution, with the caveat that such action, if taken without reason to believe it could succeed, and merely for the purpose of harassing individuals and embarrassing the courts, would obviously lack the ingredient of good faith.

BLACK, *supra* note 260, at 21.

361. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

362. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

363. See Gerhardt, *supra* note 104, at 99 (discussing how changes in Court membership acted as a catalyst to overrule *Gobitis*); Sager, *supra* note 28, at 930 (discussing change in popular opinion between *Gobitis* and *Barnette*); see also RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 152 (1990) (arguing that *Barnette* represented change in "outlook" rather than response to new information).

364. Compare *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989) with *Payne v. Tennessee*, 111 S. Ct. 2597 (1991). See Gerhardt, *supra* note 104, at 80 (discussing use of certiorari to reshape law in victim impact cases).

365. Undoubtedly the Court does frustrate popular will in some instances, and sometimes for a fair amount of time. See Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L. REV. 383, 390 (noting that people can overturn Supreme Court decisions, although "it may take decades to accomplish the reversal of a single decision"). But evidence suggests such frustration is rare, and it is particularly rare that the Court frustrates majority will for a prolonged period of time. See DAHL, *supra* note 48, at 186-92 (stating that congressional policy usually prevails if majority sentiment supports it and that protracted disagreement is rare).

ment, finality will not occur.³⁶⁶ The Court can say its word is final.³⁶⁷ There might even be some benefit to pretending the Court's word is final.³⁶⁸ But people will ignore judicial decisions, or challenge judicial decisions with which they disagree, or evade judicial decisions. *Cooper v. Aaron* again is instructive. *Cooper* hardly was the last word on school segregation for Little Rock, let alone the rest of the nation. Schools everywhere remained (and remain) segregated, and still there is resistance.³⁶⁹

This lack of finality seems the inevitable result of the general indeterminacy of the Constitution's text. One need neither agree with nor even rely upon much of the extended debate about the general determinacy of language and the reading of texts³⁷⁰ to accept the argument of constitutional indeterminacy.³⁷¹ The debate about indeterminacy of language is a difficult one that many people find deeply troubling. But the Constitution, ironically, presents an easy case on which there is widespread agreement.³⁷² Nor is the indeterminacy of much of the Constitution's language a problem: the very idea of a living Constitution requires that its language be spacious, accommodating varying interpretations over time.³⁷³ The spaciousness of the Constitution pro-

366. See FISHER, *supra* note 108, at 233 ("No decision by the Court is ever final if the nation remains unsettled and seriously divided over a constitutional issue.")

367. See Burt, *supra* note 343, at 482 (arguing that the Court is "not obliged to admit" the possibility of noncompliance). Burt makes the interesting point that pretending that the Court's decision is the last word may be useful to someone who wishes an excuse to follow the Court's lead. See *id.* at 475 (questioning whether this description fits President Eisenhower's view of *Brown v. Board of Education*).

368. After listening to some of these ideas for a semester, a student left me this on the cover of a bluebook:

Leo, you don't hold elected office; you only run this town because people *think* you run it. And the minute they stop thinking it, you stop running it.

—Gabriel Byrne, from "Miller's Crossing"

Having never seen the movie, I cannot vouch for the correctness of the quote.

369. James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1465-79 (1990).

370. See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980); see also JAMES BOYD WHITE, *HERACLES' BOW* (1985). White makes the extended argument that the "questions about determinable meanings and intention are . . . false ones." *Id.* at 82. He denies that texts have concrete, certain meanings but nonetheless believes "shared understandings" of texts are possible. *Id.*

371. See Seidman, *supra* note 59, at 1580.

372. See Carter, *supra* note 15, at 847 ("The problem, all agree, is constitutional adjudication based on a text charitably described as indeterminate."); Erwin Chemerinsky, *Wrong Questions Get Wrong Answers: An Analysis of Professor Carter's Approach to Judicial Review*, 66 B.U. L. REV. 47, 56 (1986) (arguing that "the Constitution is silent or ambiguous" regarding important structural issues). Even Frederick Schauer admits that "[t]he text of the Constitution is not, by itself, going to provide answers to hard constitutional questions [A]nyone with any sense knows that." Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 439 (1985).

373. Philip Bobbitt thus offers a "prudential" argument: "[C]onstitutional argument which is accentuated by the political and economic circumstances surrounding the decision" arises from the fact that "[i]n constitutional questions, competing texts can almost always be found." BOB-

vides flexibility, so that the document can grow and change along with the society it governs.³⁷⁴ Without flexibility, every material in the universe breaks under pressure. There is no reason to believe a constitution is different, as others' experiences with their own constitutions confirm.³⁷⁵ Despite this tremendous pressure of two hundred years of history, our Constitution has endured.

The amendment process of Article V has hardly provided the flexibility needed to preserve our Constitution.³⁷⁶ Over one third of the amendments practically came with the document. A huge percentage of the remainder deal solely with the franchise. The remaining

BITT, *supra* note 5, at 60-61; *see also id.* at 177 ("The particular Bill of Rights we have serves, and seems chosen to serve, as more than a text for exegesis. It acts to give us a constitutional motif, a cadence of our rights, so that once heard we can supply the rest on our own."). *But see* NAGEL, *supra* note 27, at 17 ("The Constitution was written down so that its words would provide reasonably certain and permanent constraints.").

374. *See* Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1372-73 (1990) (comparing the Constitution to a long-term contract, which requires either formal amendment or flexible interpretation to adjust to altered circumstances). *See generally* Sanford Levinson, *Accounting for Constitutional Change*, 8 CONST. COMMENTARY 409, 417-28 (1991) (discussing explicit textual change as opposed to numerous interpretive changes to the Constitution and questioning whether some or all of the latter are "amendments"); NAGEL, *supra* note 27, at 11-12 ("[W]hat is surprising is not the role of judicial interpretation in altering 'permanent' constitutional principles but the contrasting notion that the Constitution might have plain, durable content.").

Chief Justice Rehnquist agrees that the Framers often used "majestic generalities" in drafting constitutional language and that "general language" gives "latitude to those who would interpret the instrument to make that language applicable to cases that the Framers might not have foreseen." William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693, 694 (1976). Nonetheless, Rehnquist eschews the notion of a "living Constitution" and urges unelected judges not to make decisions in reliance upon the constitutional text simply to address areas the political branches are not addressing, such as prison conditions. *Id.* at 695. There is obviously some tension between these two positions, one that Rehnquist plainly resolves against judicial action simply because his underlying vision of the Constitution is majoritarian.

375. France has had 16 constitutions and draft constitutions. *See* Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1024 (1989). Venezuela has had 25 constitutions. Gisbert H. Flanz, *Venezuela*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 1-14 (Supp. 1983) (Albert P. Blaustein & Gisbert H. Flanz eds.).

376. There is a vibrant literature about the legitimacy for amending the Constitution outside of Article V. *See, e.g.*, Amar, *supra* note 201; Ackerman, *supra* note 3, at 1016; David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 4 (1990). Some of the commentators endorse the concept that Article V is nonexclusive and that sufficient evidence of popular sovereignty can "amend" the Constitution. *See* Ackerman, *supra* note 3; Amar, *supra* note 201. Others' claims are absolute and, to say the least, extravagant. *See* Dow, *supra*, at 4 ("My thesis is that the only way to amend the Constitution is in accordance with the mechanism outlined in [A]rticle V. My further claim is that the mechanism outlined in [A]rticle V is clear, exclusive, and that it means what it says."). My own view, consistent with the descriptive theme of this Article and my notion that the never-ending search for legitimacy is unproductive, is that the Constitution so often has been amended outside of Article V, at least by judicial decision, that the question itself is of questionable utility. More profitable is the question of when a formal amendment ought to be required. *See* Levinson, *supra* note 374; *see also* Sager, *supra* note 28, at 933-34 (distinguishing between decisions *about* the Constitution, which "are closed, at least comparatively," and decisions *authorized by* the Constitution; the former are defined as decided by the Constitution, which is "broadly understood" to include the judiciary's interpretation of the Constitution).

amendments — largely taxes, alcohol, and Presidential succession — do not describe the extent of change our Constitution has had to undergo.³⁷⁷ The Constitution has evolved far more outside Article V than within it.³⁷⁸ Interpretations of constitutional clauses have undergone sea changes from generation to generation, far outstripping the consequence of many explicitly worded amendments. Obvious examples abound: the Commerce Clause, the Contracts Clause, the Fourth Amendment, the Equal Protection Clause, and so on.³⁷⁹ One seriously wonders if the Constitution would have endured absent language spacious enough to accommodate such change.

Because the Constitution is spacious, no single offered interpretation of the text is likely to be accepted as correct now and for all time.³⁸⁰ The Court is free to change its mind. The people are free to disagree with the Court. The Court is free to disagree with the people. The members of the Court are free to, and usually do, disagree with one another. As disagreement occurs, the document will take on new meanings.³⁸¹

377. None of this, of course, undermines the significance of the explicit amendments, such as the Thirteenth, Fourteenth, and Fifteenth Amendments. But much of the significance of those amendments also is the product of judicial interpretation. In addition, those amendments were the product of a Civil War, obviously the least desirable method of constitutional change.

378. See Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1041-50 (1981). Indeed, the more interesting question may be why the relatively few amendments we have were even necessary. A likely answer, suggested by the theory I am discussing, is that the amendment process actually picks up the slack when other dialogue fails. If the Court or other branches of government cannot be convinced to come around, then the amendment process kicks in, as the people's last dialogic resort. This suggests in turn that the vast majority of discussion about amending outside Article V emphasizes the wrong subject.

379. See Sager, *supra* note 28, at 895 (stating that the Constitution has been "refurbished from time to time through the judiciary's interpretation of its provisions"); see also NAGEL, *supra* note 27, at 11 ("Specifics cannot capture the scope of the alterations accomplished by interpretation over the years."); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1729 (1984) (explaining how shift in attitude toward property had impact on interpretation of key constitutional phrases); Winter, *supra* note 24, at 1508 (discussing change in Fourth Amendment's interpretation over time).

380. Judge Posner makes this point exceedingly well, taking into account as he does the intensity of the interpreters' views:

If the only constraints on constitutional decisionmaking are good arguments, the embarrassment is the number and strength of good arguments on both sides — on many sides — of the hot issues.

Heat is important here. If you're indifferent to the outcome of a dispute, you'll weigh up the arguments on both sides and give the nod to the side that has the stronger arguments, even if the weaker side has good arguments too. But if you have a strong emotional commitment to one side or another, it would be not only unnatural, but imprudent, to abandon your commitment on the basis of a slight, or even not so slight, preponderance of arguments against your side. Our deepest commitments are not so weakly held. Hence there can be practical indeterminacy about an issue even if a disinterested observer would not think the competing arguments evenly balanced.

Richard A. Posner, *Legal Reasoning from the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433, 445-46 (1992) (citing POSNER, *supra* note 363, at 124-25).

381. Thus, Philip Bobbitt maintains that we have a "participatory Constitution," BOBBITT,

Nor is the lack of finality necessarily a bad thing. Change both is healthy and inevitable.³⁸² In reality, the process of constitutional interpretation is dynamic, not static.³⁸³ Perhaps Martha Minow, in her searching response to Robert Cover, puts this best:

Even beyond the particular right granted by the Supreme Court . . . the claim of any right initiates a form of communal dialogue. A claimant asserts a right and thereby secures the attention of the community through the procedures the community has designated for hearing such claims. The legal authority responds, and though this response is temporary and of limited scope, it provides the occasion for the next claim. Legal rights, then, should be understood as the language of a continuing process rather than . . . fixed rules. Rights discourse reaches temporary resting points from which new claims can be made.³⁸⁴

Moreover, such dynamism is critical to the success of the venture. Judges too are human, and judges get things wrong. For example, judicial decisions may be too broad, and experience will suggest tailoring. Judicial decisions are experiments, and experiments rarely are completely successful. Sometimes they are dismal failures.³⁸⁵

Finality would curtail the evolution of our Constitution; dynamism encourages it. Constitutional meaning changes because people disagree about what the text means. Dynamism is to be encouraged, for the dynamic process helps formulate the interpretation of our fundamental charter.³⁸⁶ Of course, there is a balance to be struck between dynamism and finality. Just as evolution and change is valuable, the rule of law is essential to a stable society. To stress "finality" may even be beneficial, because it corrects for the human tendency to edge too enthusiastically toward dynamism. But dynamic the system is.

Under the countermajoritarian difficulty, legitimacy rests on finding some normative set of constraints on judges. But no such "external" constraint presents itself. The alternative is to recognize that ours is a dynamic system of interpretation, with a Constitution spacious enough to permit interpretive disagreement. This disagreement

supra note 5, at 238, and insists that all constitutional actors play their part in interpreting the document. *Id.* at 185-86.

382. See ACKERMAN, *supra* note 14, at 34 ("[T]he Constitution is more than an idea. It is an evolving historical practice, constituted by generations of Americans as they mobilized . . .").

383. See Chemerinsky, *supra* note 73, at 1256-57 (arguing that the "evolving" nature of the Constitution was resolved as early as Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 415, 427 (1819)).

384. Minow, *supra* note 337, at 1875-76 (footnote omitted).

385. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

386. The First Amendment metaphor of a marketplace of ideas seems apt here. Judicial pronouncements are speech containing ideas, just like any other speech. There is no reason such ideas would not benefit from a process of reconsideration and modification.

leads to a dialogue about interpretation. In this dialogue the courts have a voice — an essential voice as I soon will explain — but it is not a voice that pretends to shout out the crowd.

III. FROM "DIFFICULTY" TO "DIALOGUE": THE JUDICIAL ROLE IN CONSTITUTIONAL INTERPRETATION

The challenge now is to define a judicial role in our constitutional system that sidesteps the faulty premises of the countermajoritarian difficulty and integrates the triple virtues of spaciousness, dynamism, and constituency representation. Many theories of judicial review are by their own terms *ideals*; these theories are constructed with an "ought" in mind. "Oughts" are important, but reality often falls short of such normative first principles.³⁸⁷ The alternative is to describe rather than define. My goal here is to describe the manner in which courts actually operate in society. This description should resonate with readers for the simple reason that it actually describes the world in which we live.

I call the process of judicial review that actually occurs in the workaday world *dialogue*.³⁸⁸ The term emphasizes that judicial review is significantly more interdependent and interactive than generally described. The Constitution is not interpreted by aloof judges imposing their will on the people. Rather, constitutional interpretation is an elaborate discussion between judges and the body politic.³⁸⁹

387. Cf. Epstein, *supra* note 323, at 1633 (describing how normative vision of republicanism falls short as a descriptive matter).

388. I am not the first to observe this dialogue, or to use the term. See ACKERMAN, *supra* note 14, at 5; BICKEL, CONSENT, *supra* note 13, at 111 (discussing "conversation" the Supreme Court has with society, lower courts, and so forth); Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 851-59 (1986); Michelman, *supra* note 330, at 60; see also Gerhardt, *supra* note 104 (arguing for greater candor and elaboration on the value of judicial precedents in order to facilitate dialogue on the stability of constitutional law). Dialogic theories come in many shapes and sizes, and I have been influenced by many of them. I also have tried to develop the idea of dialogue significantly more than others, many of whom simply allude to it. See Epstein, *supra* note 323, at 1633 ("While both men [Sunstein and Michelman] praise the virtues of deliberation, they do not give us any guidance as to the form that deliberation should take or the ends that it should seek."). One notable exception is Robert Burt's new book. See BURT, *supra* note 189.

389. Robert Nagel advances the novel perspective that less dialogue is better. In his recent book, Nagel implies that too much judicial interpretation of the Constitution creates uncertainty and upsets shared meanings. See NAGEL, *supra* note 27, at 7-12. Nagel argues that an "uninterpreted constitution," in which the Constitution gets its meaning "from practice rather than from interpretation," *id.* at 12, would be superior to the process of dialogue. I agree with some of Nagel's central points, for example that certain constitutional issues are better left unresolved. See Friedman, *supra* note 173, at 56-58 (arguing that uncertainty is a virtue regarding Congress' power to control federal jurisdiction). Nonetheless, Nagel seems to overstate the extent to which judicial interpretation can or should be avoided. This article demonstrates that judicial participation, while not contributing to settled meaning, can play a vital role in national debate regarding the meaning of the Constitution.

The American body politic consists of numerous constituencies clamoring to be heard and striving to prevail on any given issue. Government's task is to reconcile the views of these constituencies, find consensus when possible, reach a compromise, and move forward.³⁹⁰

Courts play a vital part in this task. Constitutional courts adjudicate claims of right and challenges to government action that purportedly trench upon mandated institutional arrangements. Courts resolve these disputes by participating in and fostering debate about the proper course of government. When government seeks to act, constituencies will object, claiming that the action violates established rights, or tramples on a constitutionally mandated structural arrangement. The Constitution's spacious text permits divergence on these questions. It provides a framework for constituencies to disagree and struggle over the document's meaning. The Court, like all other institutions, speaks to the meaning of the text. In this sense, the Court is, like all other branches of government,³⁹¹ an active participant in the debate over the Constitution's meaning. In another sense, however, the Court is able to do much more. The Court facilitates and shapes the constitutional debate. The Court sparks discussion as to what the text should mean by siding with one constituency's interpretation, or synthesizing several, as to what our norms should be. The Court dictates how the dialogue will proceed by choosing one interpretation. The process of reaching an interpretative consensus on the text is dynamic.³⁹² The Court may offer an interpretation that is operative for a time, but the Court's opinions lead debate on a path that often ultimately changes that interpretation.³⁹³ Not coincidentally, the accepted interpretation shifts and changes as constituencies shift and grow in strength.

This process of constitutional interpretation hardly pits the Court against the people. Rather, the Court mediates the views of various people.³⁹⁴ The process is interactive, like all mediation, and the ulti-

390. Robert Burt describes similar arguments about the function of government in *The Constitution in Conflict*. BURT, *supra* note 189, at 96-99. This notion also comports with both Burt's and my own description of how judicial review operates. *See id.* at 99, 102 (describing Lincoln's view of the *Dred Scott* decision and suggesting "the possibilities for rekindling this Lincolnian ideal").

391. *See, e.g.*, BURT, *supra* note 189, at 99 (describing Madison's view that the Court is but one interpreter of the Constitution).

392. Philip Bobbitt offers an elegant expression of this idea. He describes a "mutually affecting reaction between a society and its law" in which "all constitutional actors" interpret the constitutional text and "participate in creating constitutional decisions of principally expressive significance." BOBBITT, *supra* note 5, at 184-85.

393. When an interpretation remains constant for some time it accretes legitimacy. *See* BOBBITT, *supra* note 5, at 236 (describing how holdings become "true" over time).

394. Bickel himself seemed to recognize this, at least early on, when he said that the Court's

mate result depends upon participation by all interested parties. Simply put, our process of constitutional interpretation is a dialogue.

A. *The System of Dialogue*

This section tells the story of how constitutional dialogue occurs. Because the dialogue is ongoing, this story could begin at any point. Moreover, telling the story in all its complexity would require far greater exposition than is possible here. A complete narrative would require writing in several directions at one time, in order to track the contours of the interpretive dialogue itself. We think and write in a linear mode, however; my narrative therefore follows our method of thinking. This description of American constitutionalism deviates from the account offered by the countermajoritarian difficulty; the narrative thus implicitly asks the question which description provides a better portrait of how constitutional interpretation actually occurs.

This story begins with governmental action. Such action may be taken by what we deem a majority — through the legislature — but this need not be true. It may not even be the norm. A significant portion of government action that affects individuals is taken by officials or by collectives of officials that represent the “majority” in only the most theoretical and questionable manner.³⁹⁵ But this narrative starts with some governmental action that affects an individual.

The individual balks. He believes that the government has overstepped its bounds. “I have a right,” he asserts. (Individuals also may assert violations of structural guarantees, but this description will focus on claims of right.) The individual’s claim is adjudicated (although adjudication is not the only way to resolve a claim of right). Evidence and arguments are mustered. The adversarial process produces some answer as to whether the individual’s right was violated. A single judge resolves the claim in the first instance.

Of course one judge rarely settles the dispute. Her decision inevitably is appealed to another tribunal. The more important the issue, the likelier more judges will participate. If the governmental action affected a number of individuals, a number of separate adjudications may ensue. There may be conflicting decisions.³⁹⁶ Several jurisdic-

judgment on an issue likely will reflect popular will through the Court’s “continuing colloquy with the political institutions and with society at large . . .” BICKEL, *supra* note 2, at 240; *see also* BURT, *supra* note 189, at 23.

395. *See supra* text accompanying notes 280-81.

396. *See* Sunstein, *supra* note 309, at 1562 (“[D]isagreement can be a creative force. National institutions were set up so as to ensure a measure of competition and dialogue; the federal systems would produce both experimentation and mutual controls.”).

tions and many judges will be involved.³⁹⁷

If the issue is of general importance the Supreme Court may hear the case. At this point in the process, an *issue*, not just a *case*, is clearly being debated. The Court will hear argument about the issue, which will have been tailored throughout the litigation by the process of winnowing and synthesizing. Groups that might be affected will file their own briefs and will offer help to the parties. Debate is sharpened.

The Court issues its decision. The Supreme Court is important, like the President, or Congress: it is the "last" judicial voice, at least for this round.³⁹⁸ The public notices when the Supreme Court decides.³⁹⁹ Reporters cover the cases the Court will hear — generating interest — and the decisions, which generate debate.⁴⁰⁰ Some people agree with the Court; others are outraged. People discuss the decision in formal meetings, or in informal gatherings, or they act alone. Articles are written commenting on the Court's decision. More lawsuits are brought, some formulated specifically to test the bounds of the Court's decision.⁴⁰¹ Town councils act. School boards act. Legislatures act at every level of government.⁴⁰²

This cycle of action creates more media attention. Some issues become more important than others. The Court has made some previously dormant issues important. People take sides.⁴⁰³ They formulate

397. A certain amount of redundancy inheres in the system, apparently pursuant to the Framers' desire to limit government power. TUSHNET, *supra* note 162, at 9-10. On such dialogic redundancy in specific contexts, see Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048-50 (1977) (describing federal-state dialogue in the context of habeas corpus litigation); Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 335 & nn.230-32 (1988) (describing dialogue in governmental tort litigation); Judith A. Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 882 (1984) (describing federal-state dialogue in context of habeas corpus litigation).

398. On the special role of the Supreme Court, see Friedman, *supra* note 173, at 10-28.

399. Robert Cover found this uniqueness "jurispathic." In Cover's view, law is created by various communities, but the hierarchy of decision leads courts, and particularly the Supreme Court, to suppress one law in favor of another. Robert M. Cover, *The Supreme Court 1982 Term — Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40-44 (1983). Cover's thesis, while true in a sense, places too much weight on the finality of judicial decisions. A court's choice of one law may ultimately lead to communal adoption of quite another law.

400. Martha Minow suggested to me that the role of the media is yet another important structural part of our system of self-governance that may not operate precisely as the Framers intended but nonetheless bears the seeds of their thinking. In this regard it is interesting to compare Gerald Rosenberg's conclusion that courts have not had a great impact on the women's rights movement, ROSENBERG, *supra* note 147, at 226-27, with his own reports of the media's strongly worded comments to the contrary. See *id.* at 173 (citing, for example, a news story referring to *Roe v. Wade*, 410 U.S. 113 (1973), as "a landmark decision"). I, perhaps more than Rosenberg, tend to think that, if the media says it enough, it gains some truth.

401. Or any court's decision; the Supreme Court is not the only catalyst, merely the most visible one.

402. Michelman's description, quoted *supra* note 330, is appropriately vibrant.

403. In so doing, people participate in writing the story about the Constitution's meaning.

opinions. They listen as others speak, and thus they change their opinions. They vote, or mail in a check to an organization, or write their representative in the legislature. A political campaign ensues. Promises are made. Candidates are elected, including Presidents and senators. These candidates have views, shaped throughout the debate, on judicial candidates.⁴⁰⁴ New judges are appointed. The judges have views similar to those of the officials who appointed them.⁴⁰⁵ Cases come to these new judges.⁴⁰⁶ The judges observe legislative action and note the "unworkability" of prior decisions.⁴⁰⁷ They work around the prior decisions. They confront the prior decisions. New Justices also are appointed to the Supreme Court,⁴⁰⁸ or perhaps the Supreme Court finally "hears" the people. The people dig in; the Court bails out. The Constitution is *re*interpreted, and its meaning changes.

So it goes in infinite progress.⁴⁰⁹ This is only a tiny glimpse at an

Despite my great respect for much of Frank Michelman's work, I thus disagree with him in one very fundamental respect. "To be precise," Michelman writes, "we do not write the story unless we happen to be Justices." Michelman, *supra* note 330, at 65. To the contrary, people write the story every day. The story is written when police officers conduct illegal searches, when teachers invite students to engage in prayer despite Supreme Court pronouncements, and when legislators refrain from adopting restrictive abortion laws despite Court invitations to do so.

404. "On a larger scale, over time, the Court's decisions on many important issues have a strong effect on politics; politics affect elections; elections affect who is appointed to the Court, which affects the Court's decision; and so on." Glenn H. Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110, 114 (1991).

405. Gerhardt, *supra* note 104, at 100-01 (discussing how appointments to the Court fulfilled President Reagan's and President Bush's campaign promises to be tougher on criminals); Strauss & Sunstein, *supra* note 177, at 1506 (When the President has criticized the Court, "the President's appointments can be counted on to reflect his own commitments."); see also Elhauge, *supra* note 182, at 81-83 (discussing role of interest groups in judicial appointments); Mark Silverstein, *The People, the Senate and the Court: The Democratization of the Judicial Confirmation System*, 9 CONST. COMMENTARY 41 (1992) (the title of which says it all); Sager, *supra* note 28, at 931 (suggesting that judges are a part of the society that surrounds them).

406. In *Constitutional Dialogues*, Louis Fisher discusses the view of private organizations, which see litigation as simply another "political process" in which to become involved. FISHER, *supra* note 108, at 15-24.

407. The doctrine of *stare decisis* is in tension with this notion, although the doctrine supposedly has less weight in constitutional cases for precisely this reason. See, e.g., *Harmelin v. Michigan*, 111 S. Ct. 2680, 2686 (1991) (stating that "*stare decisis* is less rigid in its application to constitutional precedents"). In their joint opinion announcing the Supreme Court's decision in *Planned Parenthood v. Casey*, however, Justices O'Connor, Souter, and Kennedy spelled out at length a "reliance" model of *stare decisis* that could be read as chilling this transformative process. 112 S. Ct. 2791, 2808-09 (1992). On the other hand, the joint opinion may well restrain attempts by new appointees to transform constitutional law quickly.

408. In the context of another point Cover puts it best, referring to "the extraordinary capacity of small shifts in membership of the Supreme Court to transform not only the decisional law of that Court, but also the strategic significance of the entire federal judiciary . . ." Cover, *supra* note 399, at 58. For a good critique of the "transformative" power of judicial appointments, see ACKERMAN, *supra* note 14, at 52-54.

409. My conception of the process of constitutional interpretation thus diverges from Bruce Ackerman's "dualist" description of democracy. In Ackerman's view the Court's job is to uphold the work of "ordinary politics" unless a course of action runs afoul of "higher lawmaking." Higher lawmaking represents decisions made by the people during moments of extraordinary

intricate, involved, robust process. Yet the description serves its purpose, primarily because readers know the process so well. This process of interpreting the Constitution is interactive. It is dialogic. Courts play a prominent role, but theirs is assuredly not the only voice in the dialogue.⁴¹⁰

B. *An Example: The Dialogue About Abortion*

Thus far my account has been somewhat abstract. The following discussion gives content to the concept through a dialogic tour of one of the most controversial issues facing the judiciary and the people today, the issue of abortion.⁴¹¹

consensus. These periods may be embodied in explicit constitutional amendments, but courts also can discern other periods of extraordinary change. For Ackerman, there have been only three such periods. See ACKERMAN, *supra* note 14, at 58. As my description of dialogue makes clear, I believe dialogue consistently is transformative of political life.

Ackerman presents a railroad metaphor of democracy, with judges sitting in the back, always synthesizing the past in order to discern and interpret higher law. See ACKERMAN, *supra* note 14, at 98-99. Steve Winter rightfully critiques Ackerman's metaphor as "too quaint and European for a modern, mobile America." Winter suggests that judges are not simply synthesizing our past: judges are "always on the freeway and always looking forward, backward, and side-to-side at all the other drivers." Winter, *supra* note 24, at 1522; see also Winter, *Judicial Review*, *supra* note 40, at 685 (arguing that interpretation can come from bottom (people) up (to court)); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1521-24 (1988) (criticizing Ackerman's characterization of the law as authoritarian); Sager, *supra* note 28, at 931 (criticizing Ackerman's dualist regime).

While I agree that Ackerman's thesis does not mirror reality, in that it limits too severely the transformative role of dialogue, Winter's own conception of dialogue also seems to me too one-sided. In Winter's dialogue judges synthesize popular views and then hand down law. But Winter takes inadequate account of the converse. People also *listen* to what judges say and change *their* political views. Thus, people not only influence courts, but courts influence people. I envision constitutional interpretation as a highly interactive dialogue, in which both sides are influential. See Michelman, *supra*, at 1523. Ackerman seems to appreciate this *at times*:

By dramatizing the fundamental constitutional principles raised by the New Deal, the Old Court contributed to a more focused, and democratic, transformation of constitutional identity than might otherwise have occurred. By holding up a mirror to the American people that re-presented the fundamental principles of the middle republic, the Old Court made it easier, not harder, for the citizenry of the 1930's to clarify what they found wanting in the traditional structure. . . .

ACKERMAN, *supra* note 14, at 104.

410. This is the central thesis in Louis Fisher's *Constitutional Dialogues*. Fisher develops a theory of "coordinate construction" in which "the executive and legislative branches necessarily share with the judiciary a major role in interpreting the Constitution." Fisher makes the point wonderfully, by offering telling examples. FISHER, *supra* note 108, at 231; see also Fisher, *supra* note 349. I differ with — or move a step past — Fisher in that I believe that all branches facilitate a dialogue in which the people give content to the constitutional text.

411. As I embark on this discussion, one piece of work on the role of the Supreme Court deserves special mention, perhaps because I struggled for a long time to understand exactly what I could or should say about it. That piece of work is Professor Gerald Rosenberg's intriguing study of the Supreme Court's role in social reform, *The Hollow Hope*. ROSENBERG, *supra* note 147. In *The Hollow Hope* Rosenberg ultimately concludes that courts are not very good engines of social reform, in large part because of the constraints courts face in implementing a social reform agenda. See *id.* at 336-43. I have little quarrel with this proposition in general terms. As I argue throughout, courts tend to achieve results when there is majoritarian support for what they decide, and courts tend to decide in ways for which there is majoritarian support. Thus, I

*Roe v. Wade*⁴¹² is one of the most criticized decisions of the Supreme Court.⁴¹³ From the perspective of the countermajoritarian difficulty, this makes sense. Commentators regularly level the charge that *Roe* represents judicial fiat rather than constitutional "law."⁴¹⁴ *Roe* is, for these commentators, the epitome of the problem with an unconstrained judiciary: without sound basis in the Constitution judges have interfered with the majority's right to regulate abortion.

The story that must be told about *Roe*, to be consistent with the countermajoritarian difficulty, is highly contestable, however. The first premise of the countermajoritarian difficulty insists that state laws regulating abortion represented majority will. *Roe*, which struck down those laws, thus ostensibly thwarted majority will. Polling data suggest just the opposite, however. A majority, or at least a strong plurality, of the population has supported *Roe* since the time of deci-

am little surprised by the data Rosenberg offers consistently showing that major social reform efforts already were underway by the time the Court acted. *See, e.g., id.* at 241 ("I will highlight the simple point that the women's movement was moving full blast before Court decisions on behalf of women's rights came to be.").

Nonetheless, I am left with the sense that Rosenberg seriously understates the impact of courts, perhaps because his focus is on a slightly different question than mine. With regard to the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), for example, Rosenberg generally concludes that progress toward abortion rights was steady before *Roe*, and that the *Roe* decision was at best partially successful in aiding the availability of abortion. ROSENBERG, *supra* note 147, at 178-80. But Rosenberg also observes that, "in the years after 1973, opposition to abortion strengthened and grew." *Id.* at 182. Rosenberg's conclusion with regard to abortion and the role of the Court seems quite ambivalent; any change that occurred is attributed to outside factors, such as political support, that enabled the Court to proceed. *Id.* at 201.

Because he is looking primarily for "social change," *id.* at 1, or "social reform," *id.* at 5, and because he looks in areas in which the liberal agenda is said to have been furthered by Court action, Rosenberg tends to miss the impact of Court decisions that are reactive or, as I would say, dialogic. As my own telling of the abortion story will suggest, much of *Roe's* impact, at least initially, was to mobilize the antichoice forces. This mobilization had an enormous impact, yet Rosenberg (although acknowledging this reaction) counts it little in his assessment of the role of the Court. I believe this impact is significant in terms of the societal dialogue.

By the same token, Rosenberg does not lend particular effort to assessing the extent to which judicial anti-"reform" or "change" decisions had a positive impact. Yet, as I suggest elsewhere, it could be, for example, that the Supreme Court's opinion in *Bowers v. Hardwick*, 478 U.S. 186 (1986), had the impact of further mobilizing the gay community toward broader societal acceptance of their arguments. *See infra* note 475.

Finally, none of this should be read to suggest that the only impact I see of Supreme Court decisions is "negative reaction." Despite, or perhaps reading around, Rosenberg's evidence, I nonetheless believe judicial decisions can have the effect of crystalizing developing public opinion.

412. 410 U.S. 113 (1973).

413. *See* LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 79 (1990).

414. *See, e.g.,* BORK, *supra* note 238:

In the years since 1973, no one, however pro-abortion, has ever thought of an argument that even remotely begins to justify *Roe v. Wade* as a constitutional decision. . . . There is no room for argument about the conclusion that the decision was the assumption of illegitimate judicial power and a usurpation of the democratic authority of the American people. *Id.* at 115-16; *see also* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920, 947 (1973) ("[*Roe*] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.").

sion.⁴¹⁵ By the same token, the countermajoritarian difficulty must view *Roe* as the *end* of the story.⁴¹⁶ *Roe* is depicted as *thwarting* majority will in some way that *precluded* further popular action. In reality, however, *Roe* is at best a beginning.⁴¹⁷ Relating the story of the abortion debate emphasizes the dialogic nature of judicial review.

Actually, the modern story of abortion rights begins well before *Roe*.⁴¹⁸ Just as *Roe* has proved a catalyst for the abortion debate, *Roe* also was a product of political activity that preceded the decision.⁴¹⁹ Why abortion rights moved to center stage in the early 1970s is difficult to say, beyond the broad influence of changing societal views on sexuality and personal privacy. What is evident is that *Roe* was the product of a push for social change that had become difficult, by 1973, for the Court to ignore.⁴²⁰ As early as 1959 the American Law Institute had recommended more permissive abortion laws,⁴²¹ and in 1967 the American Medical Association endorsed the ALI position.⁴²² Some states had liberalized their abortion policies in the years between 1960 and *Roe*.⁴²³ The battle for liberalization was fought largely by women's groups, including the newly formed National Association for Repeal of Abortion Laws (NARAL) and the National Organization for Women (NOW).⁴²⁴

415. See *supra* text accompanying notes 147-49.

416. Even Robert Burt, who talks of constitutional dialogue in sophisticated and sensible terms, sees *Roe* as final and thus condemns the decision in the context of his preference for egalitarian interpretation. BURT, *supra* note 189, at 357-59. I believe Burt wrongly emphasizes the finality of *Roe* and thus overlooks the complicated, *dialogic* story told in this section.

417. In addition to the following discussion, see TUSHNET, *supra* note 162, at 153, and Carter, *supra* note 388, at 821, both of whom see *Roe* as a beginning, of sorts, of a dialogue.

418. See generally TRIBE, *supra* note 413, at 35-51 (tracing the history of abortion in America from the 1950s to 1973).

419. See, e.g., *id.*; Nancy Stearns, *Roe v. Wade: Our Struggle Continues*, 4 BERKELEY WOMEN'S L.J. 1, 5-6 (1988-89) ("We must never forget that *Roe v. Wade* did not just 'happen.' That decision came only after the short but intense political and legal efforts of women across the country.").

420. Robert Burt argues with some persuasive force that the *Roe* Court should not have addressed the merits but should have utilized "the passive virtues" to permit the societal dialogue to continue unimpeded. See BURT, *supra* note 189, at 348-51.

421. TRIBE, *supra* note 413, at 36. The 1959 proposal would have amended the American Law Institute's Model Penal Code to allow abortion where: (1) "continuation of the pregnancy 'would gravely impair the physical or mental health of the mother'"; (2) the "child was likely to be born with 'grave physical or mental defects'"; or (3) "the pregnancy resulted from rape or incest." *Id.*

422. *Id.* at 38.

423. Nineteen states reformed their abortion laws between 1967 and 1973. See TRIBE, *supra* note 413, at 49. Most of these reforms resembled the ALI's 1957 proposal. See *id.* at 42. Four states, however, left the abortion decision completely to the pregnant woman, at least during the first 20 weeks of pregnancy. See *id.* at 51.

424. Although women's groups had not initially been major participants in the movement to reform criminal abortion laws, by 1973 they "almost universally supported complete repeal" of such laws. TRIBE, *supra* note 413, at 43.

Quite sensibly, the battle for liberalization was fought in courts as well as legislatures. For organized groups with limited resources concerned with societal change, courts are a logical place to turn. As compared with trying to force change in the legislative arena, courts are relatively accessible. Judicial actions require far fewer resources than legislative challenges. Inertia is more easily overcome in the courts. Thus, a number of court actions had been brought before 1973, with varying results.⁴²⁵

The Supreme Court's own decisions had in fact been partly responsible for the forces that brought *Roe* to the Court. The 1966 decision in *Griswold v. Connecticut*,⁴²⁶ permitting married couples to use contraceptives, certainly fueled the hope that the Court would extend the privacy right to the abortion context. Following *Griswold*, however, the Court ducked the abortion question about as often as it could⁴²⁷ before deciding to hear and address the issue in *Roe*.

The decision in *Roe*, legalizing abortion under certain conditions, served as a catalyst for political and legislative action. Although hardly the beginning of the debate, *Roe* certainly signaled a new era in thinking about abortion. In fact, one might say the Court began a process of *requiring* the citizenry to think about abortion. With legislative inertia on the side of those who cared about and opposed abortion, and with the prochoice movement still relatively nascent, the number of Americans that had given serious thought to the question before *Roe* is unclear. Almost twenty years later, one reasonably can guess that most Americans have a view on the question and have given the question some thought.⁴²⁸

425. See Stearns, *supra* note 419, at 4-5 (discussing pre-*Roe* legal challenges to state abortion laws brought by large groups of women plaintiffs in New York, New Jersey, Connecticut, Pennsylvania, Massachusetts, Tennessee, and Rhode Island); *Abele v. Markle*, 342 F. Supp. 800 (D. Conn. 1972) (holding that Connecticut's abortion law violated women's rights to liberty and privacy), *vacated*, 410 U.S. 951 (1973).

426. 381 U.S. 479 (1965).

427. *Roe* was the second Supreme Court decision concerning abortion. BURT, *supra* note 189, at 344. The first was *United States v. Vuitch*, 402 U.S. 62 (1971), in which the Court upheld a statute prohibiting abortions based on its conclusion that statutes should always be construed to uphold their constitutionality and thereby avoided consideration of the abortion issue.

428. There is some support for this in the increasing number of single-issue voters on abortion, a fairly rare phenomenon 15 years ago. See *Bush's No-No on Abortion*, TIME, Nov. 6, 1989, at 30 (citing a TIME/CNN Poll finding that 54% of adult women believe that "abortion is one of the most important issues facing the country today"). Justice Thomas' statement during his confirmation hearings that he had not given the matter serious thought or reached a conclusion on the subject is thus somewhat remarkable. See Tony Mauro, *Thomas Lets Conservative Vote Do the Talking*, U.S.A. TODAY, June 30, 1992, at 2A. One suspects that Thomas recognized that any candidate with a public opinion on the question was unlikely to be confirmed, especially if the opinion stood against abortion rights. See *A Blank Slate*, TIME, Aug. 6, 1990, at 16 (citing a TIME/CNN poll showing that 59% of Americans "oppose a Supreme Court nominee who would vote to overturn *Roe v. Wade*").

Roe most immediately served to motivate the antiabortion forces.⁴²⁹ Fueled by a Vatican statement that *Roe* was morally monstrous, the Catholic Church largely was behind early efforts to restrict abortion rights despite *Roe*.⁴³⁰ Although the movement quickly secularized, abortion nonetheless remained a primary issue of the religious right. In addition, *Roe* likely was one of a number of decisions that gave rise to increasing political movement in the 1980s by the evangelical right.⁴³¹

After *Roe* the focus of the dialogue shifted to state legislatures. Unlike many Supreme Court decisions that provoke and permit a lower level of defiant activism, such as continuing to pray in public school classrooms despite pronouncements forbidding the conduct, challenging *Roe* effectively called for a legislative response.⁴³² *Roe* was followed by an onslaught of legislation aimed at abortion rights, running the gamut from open challenge to optimistic subterfuge. Some states enacted restrictive laws that could not possibly have been thought constitutional in light of *Roe*. Others erected roadblocks to abortion by restricting its availability under differing circumstances or by imposing requirements that raised the cost of the procedure.⁴³³

429. See TRIBE, *supra* note 413, at 16 ("The main consequence of the decision in *Roe* . . . was to galvanize a right-to-life movement . . .").

430. See *id.* at 139, 143, 145-47. "[I]t is widely believed that the Catholic Church either supported or quietly ran most right-to-life organizations during the years immediately following *Roe*." *Id.* at 145-46. In 1975, the National Conference of Catholic Bishops unveiled a "comprehensive pastoral plan for pro-life political activities." *Id.* at 146.

431. See *id.* at 147 ("By 1976 opposition to abortion was on its way to becoming a main vehicle for the rise in political influence of Protestant fundamentalism in the United States.").

432. Actually, some defiant action occurred in the form of abortion clinic bombings. See *id.* at 172 (noting that between 1977 and 1990, antiabortion extremists "bombed or set fire to at least 117 clinics and threatened 250 others").

433. See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (invalidating extreme reporting and informational requirements as well as requirement that physicians exercise due care to preserve the life of a viable fetus when possible at no additional risk to the woman's health), *overruled in part* by *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *Planned Parenthood Assn. v. Ashcroft*, 462 U.S. 476 (1983) (upholding Missouri requirements (i) that two physicians be present at all postviability abortions and (ii) that a pathologist perform a tissue sample analysis in all abortions); *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (invalidating city requirements that (i) all post first-term abortions be performed in hospitals, (ii) all minors under age 15 obtain parental consent, (iii) physicians provide information designed to influence a woman's informed decision, and (iv) women wait for a fixed period between seeking and obtaining an abortion), *overruled in part* by *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992); *H.L. v. Matheson*, 450 U.S. 398 (1981) (upholding a Utah parental notification law); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding denial of Medicaid funds even for some medically necessary abortions); *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion) (holding that a state cannot require a minor to obtain parental consent before obtaining an abortion without providing a bypass procedure); *Colautti v. Franklin*, 439 U.S. 379 (1979) (invalidating a Pennsylvania law imposing a special duty of care on physicians to preserve fetal life when they had sufficient reason to believe that the fetus might be viable); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding Connecticut regulation preventing use of state Medicaid funding for nontherapeutic abortions); *Planned Parenthood v. Danforth*, 428

Legislative response to *Roe* also occurred at the national level. *Roe* has spawned numerous proposed constitutional amendments directed at overturning it.⁴³⁴ Congress also has considered a host of legislative proposals, ranging from attempts to restrict the jurisdiction of the federal courts⁴³⁵ to curtailment of federal funding for abortion.⁴³⁶

The decision in *Roe* — not just the judgment but the Court's opinion — was a vital force in shaping the challenges mounted by abortion opponents. Pro-life forces tailored their responses to language in the *Roe* opinion, as well as to the bases for the *Roe* decision. The Court's suggestions in *Roe* regarding permissible areas for state regulation led to complicated regulatory schemes quite obviously designed to limit abortions. Language in the *Roe* decision indicating that the Constitution's references to "life" did not include the unborn fetus led to efforts to define life in constitutional or legislative terms.⁴³⁷ *Roe* therefore generated a highly interactive process of legislative enactment-federal court response, tailoring the areas in which states could regulate the abortion process. For example, parental consent laws early on provided one area in which the Court was willing to sanction state regulation.⁴³⁸ A cycle of state law-court decision-state law evolved, with legislatures ultimately passing laws the Court approved. This process can hardly be described exclusively as the Court speaking and legislatures listening. The Court undoubtedly was educated along the way, as to both the types of regulation that might occur and the intensity of popular opinion.

Indeed, popular opinion plays an important role in the abortion dialogue, though the discussion of legislative action somewhat ob-

U.S. 52 (1976) (invalidating a Missouri law that required women to obtain the written consent of their spouses before having first-term abortions and prohibited saline amniocentesis after the first trimester, but upholding state requirements that (i) women certify in writing that their consent to an abortion is informed and voluntary and (ii) detailed records of all abortions be kept). See generally ROSENBERG, *supra* note 147, at 176-77; Albert M. Pearson & Paul M. Kurtz, *The Abortion Controversy: A Study in Law and Politics*, 8 HARV. J.L. & PUB. POLY. 427 (1985).

434. See Pearson & Kurtz, *supra* note 433, at 446-55 (discussing the numerous attempts to overturn *Roe* by constitutional amendment). In 1982, the Hatch Amendment, which would have overturned *Roe*'s constitutional protection of abortion rights and allowed the states or Congress to determine the legality of abortion, was defeated in the Republican Senate by a vote of 50 to 49. TRIBE, *supra* note 413, at 162-65.

435. See Pearson & Kurtz, *supra* note 433, at 456-59 (discussing congressional attempts to restrict lower federal court jurisdiction and Supreme Court appellate jurisdiction over abortion issues).

436. See *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the Hyde Amendment, which limited to cases of rape, incest, and danger to the mother's life the use of federal funds to pay for abortions).

437. The Human Life Bill, for example, would have defined human life as beginning at conception. See Pearson & Kurtz, *supra* note 433, at 460-63.

438. See, e.g., *Planned Parenthood Assn. v. Ashcroft*, 462 U.S. 476 (1983) (upholding a parental consent requirement).

scures it. Public opinion consistently has provided more support for judicial action liberalizing abortion laws than for legislation restricting those rights.⁴³⁹ But, interestingly, public opinion also tends to support parental consent laws.⁴⁴⁰ Perhaps not coincidentally, the Court was more sympathetic to parental notification and consent even at the height of the hegemony of *Roe*.⁴⁴¹ For all the talk of countermajoritarian courts, the Supreme Court may well have voiced the predominant view when it decided *Roe*.

Roe also served to draw countless interested groups into the debate about abortion, informing and shaping the debate. Organized religion obviously long has been concerned with abortion. The *Roe* Court's opinion acknowledged and referred to this. Over time religious groups increasingly became active not only in public debate but also in filing amicus briefs before the Court in abortion cases. Likewise with the medical profession. The Court consistently has referred to and relied upon medical evidence in shaping abortion rules. This, in turn, has led the medical profession to speak on the issue and assert its influence over the debate.

While *Roe* spurred a great deal of activity, the decision also had a chilling effect on some political activity.⁴⁴² While *Roe* energized those opposed to abortion, the decision simultaneously slowed the activity of those who favor abortion rights by assuring them that the right was

439. The public has generally supported the decision in *Roe*. See *supra* note 148. The public also disfavors laws that would drastically restrict the availability of abortions. See GALLUP, *supra* note 155, at 45 (showing that, in 1990 only 42% favored a proposed Idaho law that would have restricted the availability of abortions to cases of rape, incest, fetal deformity, and danger to the life of the mother, while 52% opposed the law); GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1989, at 165 (1990) (showing that in 1989 36% favored and 59% opposed passing laws and regulations that would make it difficult for women's clinics that perform abortions to continue to operate).

However, considerable public support exists for less drastic restrictions on abortion. See *id.* at 169-70 (showing that in 1989 (1) 54% favored and 43% opposed laws forbidding abortions in public hospitals except when necessary to save the life of the mother; (2) 52% favored and 41% opposed laws requiring that women who are five months pregnant take a test to determine if the fetus might survive outside the womb before having an abortion; and (3) 67% favored and 29% opposed laws requiring that women under eighteen years of age obtain parental consent before having an abortion).

440. See GALLUP, *supra* note 439, at 165 (showing that in 1989, 67% favored and 29% opposed laws requiring that women under 18 years of age obtain parental consent before having an abortion).

441. See *Ashcroft*, 462 U.S. 476 (upholding parental consent requirement); *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (plurality opinion) (approving parental notice so long as the state provides a judicial bypass procedure).

442. Thus, my friends remind me that dialogue can be both beneficial and harmful. Ann Althouse chided me concerning my description of the abortion controversy because the Court, while spurring some political activity, chilled other activity. See also *infra* text accompanying note 443. For a related view, see Spann, *supra* note 20, arguing that the Court's supposed affinity for aiding minorities, and decisions such as *Brown v. Board of Education*, may actually chill minority political activity, which in the long run might be more fruitful.

protected.⁴⁴³ As history demonstrated, hasty regrouping was required to reactivate the abortion rights energy in state legislatures as the Supreme Court ceded more and more regulatory authority over abortion to the states during the 1980s.

Nonetheless, *Roe* and its progeny have had an enormous impact in motivating the public on the issue of abortion. Although polls suggest that much of the public for some time did not place abortion rights near the top of the political agenda,⁴⁴⁴ those who cared have managed to find their voice with political candidates. As antiabortion activity rose in fervor, from increased bombings of abortion clinics⁴⁴⁵ to more vigorous political activity on the right, the issue began to take on greater importance in elective politics.⁴⁴⁶ The number of single-issue voters against abortion rights expanded.⁴⁴⁷ Candidates for President had to respond to these voices, and they did so by promising and appointing Supreme Court Justices, and federal judges, who were purportedly far more hostile to abortion rights.⁴⁴⁸ Eventually *Roe* reached a critical moment in the Supreme Court. First came expressions of dissatisfaction from new, conservative members of the Court.⁴⁴⁹ More new Justices then joined them.⁴⁵⁰ *Roe* was suddenly in serious danger.

The climate surrounding the Court's decision in *Webster*⁴⁵¹ tells one of the most dramatic parts of the story regarding political debate and abortion rights. In April of 1989, on the eve of oral arguments in *Webster*, some 400,000 people marched on the nation's capitol in favor

443. Thus, Robert Burt criticizes the Court for favoring one side of the debate in *Roe*, frustrating even discussion. See BURT, *supra* note 189, at 348.

444. See TRIBE, *supra* note 413, at 150 (following the 1976 presidential election, "[v]oters asked to rank the importance of fifteen issues ranked abortion fifteenth").

445. See *id.* at 172 (noting that, between 1977 and 1990, antiabortion extremists "bombed or set fire to at least 117 clinics and threatened 250 others").

446. See *Bush's No-No on Abortion*, *supra* note 428, at 30 (citing a TIME-CNN Poll finding that 54% consider abortion "one of the most important issues facing the country today").

447. See Margaret Carlson, *The Battle Over Abortion*, TIME, July 17, 1989, at 63 (citing a July 1989 poll by Yankelovich Clancy Shulman finding that 24% are so opposed to abortion that they would never support a candidate who favored abortion regardless of the candidate's views on other issues).

448. President Reagan appointed over half of the federal bench and three Supreme Court Justices. TRIBE, *supra* note 413, at 17.

449. See, e.g., *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452-61 (1983) (O'Connor, J., dissenting) (questioning soundness of *Roe's* analytic framework).

450. See TRIBE, *supra* note 413, at 17-20 (noting that the appointments of Justice Sandra Day O'Connor in 1981, Justice Antonin Scalia in 1986, and Justice Anthony Kennedy in 1987 reduced the number of Justices that had previously supported the constitutional protection of abortion rights to four).

451. *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989).

of abortion rights.⁴⁵² The march represented a tremendous mobilization of prochoice forces that had been spurred to movement by the changing tenor of judicial decisions.⁴⁵³ *Webster* itself was momentous. The Bush administration asked the Court to overrule *Roe*.⁴⁵⁴ Seventy-seven other groups participated in the case as amici.⁴⁵⁵ The *Webster* Court declined to overrule *Roe*,⁴⁵⁶ but it did loosen the fetters on antiabortion state legislatures.⁴⁵⁷ In *Webster*, Justice Scalia commented specifically on the political activity designed to influence the Court.⁴⁵⁸

Webster spurred the prochoice movement just as *Roe* had emboldened the antiabortion movement.⁴⁵⁹ After *Webster*, NOW and NARAL each reported over 50,000 new members,⁴⁶⁰ and NARAL raised over a million dollars in a single month.⁴⁶¹ Abortion rights advocates vowed to carry the fight wherever they had to and apparently scored some early victories, "knocking off" political candidates that opposed abortion.⁴⁶² Meanwhile, the number of voters who declared themselves "single-issue" on the proabortion rights side of the debate increased dramatically.⁴⁶³

Abortion quickly became one of the central issues in political debate. Some state legislatures enacted laws directly challenging *Roe*.⁴⁶⁴ Some state courts located the right to abortion in state constitutions.⁴⁶⁵ The Republican Party, long antiabortion, toned down its

452. See Ethan Bronner, *Throngs Rally in D.C. to Keep Abortion Legal*, BOSTON GLOBE, Apr. 19, 1989, at 1.

453. See *id.*

454. Kathryn Kolbert, *Webster v. Reproductive Health Services: Reproductive Freedom Hanging By a Thread*, 11 WOMEN'S RTS. L. REP. 153, 155 (1989) (noting that the Attorney General filed an amicus brief urging the Court to use the *Webster* case to overrule *Roe*).

455. *Id.* at 153.

456. See *Webster*, 492 U.S. at 521.

457. See 492 U.S. at 520-21 ("There is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of [prior] cases.").

458. See, e.g., 492 U.S. at 535 (Scalia, J., concurring).

459. See Margaret Carlson, *Can Pro-Choicers Prevail?*, TIME, Aug. 14, 1989, at 28.

460. *Id.*

461. *Id.*

462. See Robin Toner, *Divisive Abortion Politics Bring Iowa Democrats' Primary to a Boil*, N.Y. TIMES, May 28, 1990, at A1 (discussing post-*Webster* elections where proabortion rights candidates defeated those who opposed abortion rights).

463. See Carlson, *supra* note 447, at 63 (citing a July 1989 poll by Yankelovich Clancy Shulman finding that 32% would never vote for a candidate who supported restricting a woman's right to abortion).

464. See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 912 (1990).

465. See, e.g., *Planned Parenthood League of Mass. v. Operation Rescue*, 550 N.E.2d 1361, 1365 (Mass. 1990); *Doe v. Director of Dept. of Social Servs.*, 468 N.W.2d 862, 868-69 (Mich. App. 1991); *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

rhetoric, finding room under its "big tent" for many voices.⁴⁶⁶ Candidates could clearly rise or fall on the abortion issue.

In the face of all this came the Supreme Court's dramatic decision last term in *Planned Parenthood v. Casey*.⁴⁶⁷ In *Casey* a splintered Court upheld the basic right in *Roe* while modifying the *Roe* framework substantially. The Court held that, although a woman has the right to *choose* abortion until the fetus is viable, the states may enact laws substantially affecting that choice, including requiring information to be provided to the woman in an attempt to persuade her not to choose abortion.⁴⁶⁸ Not surprisingly, *Casey* followed news media reports showing a growing public consensus on abortion: Americans largely support choice in the first trimester but grow increasingly uncomfortable with abortion as the fetus matures.⁴⁶⁹ One can only speculate whether *Roe* shaped public opinion or whether public opinion has shaped judicial decisions. Similarly, one can only speculate on where the abortion debate would be absent judicial participation.

Speculation is somewhat pointless, however, because the Court's role in American politics generally and in this debate in particular is so pervasive. Throughout the debate the Court has been a vital, but by no means dispositive, participant. What seems apparent, however, is that the story of the abortion rights debate does not support the premises of the countermajoritarian difficulty.⁴⁷⁰ Rather, that story demon-

466. See Eleanor Clift, *Abortion Contortions*, NEWSWEEK, Mar. 5, 1990, at 18 ("Today the [GOP] party platform continues to oppose abortion But GOP party Chairman Lee Atwater recently said the GOP is 'a big tent' with room for different views."). By 1992 the pendulum had swung again: the Republican Party adopted an inflexible antiabortion plank. See Myron S. Waldman, *Disenchantment in the Delegation*, NEWSDAY, Aug. 21, 1992, at 38.

467. 112 S. Ct. 2791 (1992).

468. 112 S. Ct. at 2818.

469. See Carlson, *supra* note 447, at 63.

470. The danger of using one specific example to illustrate the concept of dialogue is that skeptics might charge that this particular example is uniquely dialogic. Lest there be any doubt, dialogue is everywhere. Once one is attuned to looking at judicial review in dialogic terms, the prevalence of dialogue becomes apparent. Indeed, I regularly experience this phenomenon through the eyes of my students.

I have written about dialogue in other contexts. Dialogue is extremely common in the fashioning of jurisdictional doctrines. See Friedman, *supra* note 173. The process of remediation involving violations of constitutional rights is dialogic as well. See Friedman, *supra* note 156.

The dialogic process I have described is common in other areas involving constitutional rights. A good example is the death penalty. *Furman v. Georgia*, 408 U.S. 238 (1972), overturned the death penalties of many states. Although the *Furman* Court was extremely fragmented, *Furman* highlighted the problem with broad sentencer discretion and suggested that in order to have a constitutionally valid death penalty states must limit jury discretion. *E.g.*, 408 U.S. at 249 (Douglas, J., concurring). In response states enacted varying laws. Some, which imposed mandatory death penalties, were subsequently invalidated. See, *e.g.*, *Roberts v. Louisiana*, 428 U.S. 325 (1976). By the same token, statutes that severely limited sentencer discretion by enumerating specific aggravating and mitigating circumstances to be weighed also ran into trouble when the Supreme Court subsequently decided that legislatures could not limit the mitigating circumstances defendants could offer to avoid the death penalty. See, *e.g.*, *Lockett v.*

strates a vibrant public dialogue over the issue. Courts have had an important voice in this dialogue, particularly in facilitating it, but theirs is not the final or only voice.

C. *The Role of Courts*

I now focus more closely on what courts actually do in our constitutional system. Courts play two roles in the dialogue: the role of speaker and the role of shaper or facilitator.⁴⁷¹

The role of speaker requires less exploration, as this role closely parallels how courts are viewed under the traditional formulation of the counter-majoritarian difficulty. Under the traditional view, courts are seen as speaker, but also as enforcer: courts *declare* rights, but those declarations are expected to take effect. As my discussions of judicial finality and of the abortion controversy have demonstrated, this grossly overstates the case. In some instances the courts declare a right, accompanied by a clear and simple mandate, and the mandate is carried out. But in other cases the judicial decision is filtered and watered down, evaded, and avoided; or, over time, the public voice engenders a judicial change.

Far less obvious is the role of courts as facilitators and shapers of constitutional debate. Facilitation is to some extent a natural part of the declaration of constitutional meaning; as the foregoing description suggests, the process is dynamic because pronouncements spark activity. But some facilitation appears more deliberate. The courts' role in the dialogue over the meaning of the Constitution is highly interactive.

Ohio, 438 U.S. 586 (1978). This development in turn led to a real tension between sentencing discretion and unlimited mitigation. See Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1991). Eventually the Supreme Court also loosened the rules regarding aggravating circumstances, upholding death penalties in instances in which the jury or court had considered aggravating circumstances that were beyond the purview of the statute or were invalid. See, e.g., *Barclay v. Florida*, 463 U.S. 939 (1983). This tightening and loosening of sentencing discretion — the essence of *Furman* — also was reflected in the Court's hasty turnabout on the use of victim impact information in capital sentencing. See *supra* note 364. Finally, an undercurrent of *Furman* was a concern about racial discrimination in sentencing, as well as disparate treatment based upon economic status. See, e.g., *Furman*, 408 U.S. at 366 (Marshall, J., concurring). In *McCleskey v. Kemp*, 481 U.S. 279 (1987), when faced with evidence of such discrimination, however, the Court nonetheless upheld the Georgia death penalty.

Dialogue at one obvious level is occurring here. As states test out new statutes and the Court evaluates them, a natural evolution unfolds. But the evolution mirrors what is occurring in society at large. As noted earlier, *Furman* was decided at a time when society's approval of the death penalty was near its low point. See, e.g., James Patterson & Peter Kim, *A Strong Show of Support for Capital Punishment*, SEATTLE TIMES, Aug. 7, 1991, at G1; see also *supra* note 162. If one matches up Supreme Court decisions with the tide of public opinion, the dialogic give and take is obvious.

471. See Gerhardt, *supra* note 104, at 84 (“[T]he Court is a critical interpreter of and player in historical events . . .”).

Courts act as go-betweens in the dialogue, synthesizing the views of society and then offering the synthesis to society for further discussion.⁴⁷² Courts serve as society's tennis partner, always volleying the ball back.⁴⁷³ This interactive process points to certain roles for courts.

Courts *synthesize* society's views on constitutional meaning. Given the spacious constitution and the views of the many constituencies, a collection of constitutional interpretations often exists. Courts collect these views and consolidate them, striving for a common norm.⁴⁷⁴ This distillation resembles a legislative debate begun with a multiplicity of viewpoints and ultimately presented as a binary choice.

Courts also *focus* debate. As courts synthesize, they inevitably choose. Courts accept one interpretation and reject others. The decision is not final, but it is sharp and immediate. Thus, a debate that might have proceeded without clear direction now has focus.

Similarly, court decisions may act as a *catalyst*, causing society to debate issues that might not otherwise have stood at the top of the

472. Professor Paul Brest argues that constitutional interpretation ought to shift from what he perceives as the primary focus in the courts to legislatures and to the people. See Paul Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175, 180-81 (1986). As this article makes clear, I generally disagree with the premise that constitutional interpretation currently occurs primarily in courts.

Professor Robin West offers an intriguing rejoinder to Brest. She argues that interpretation occurs primarily in courts, and perhaps ought to, because contemporary interpretation primarily is amoral, adhering to an authoritarian view of the Constitution. Robin L. West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531, 532 (1988). West proceeds to argue that the people ought only to concern themselves with constitutional interpretation if the interpretive act is seen as normative, rather than simply an exercise in determining what we are compelled or permitted to do. West cites as examples of the authoritarian strain the decisions in *Bowers v. Hardwick*, 478 U.S. 140 (1986), and *Roe v. Wade*, 410 U.S. 113 (1973). See West, *supra*, at 532-33.

West's argument is worthy of serious thought. I differ with her in one significant and noteworthy respect, however. I believe that decisions such as *Bowers* and *Roe* parade around in authoritarian language but that even their authors recognize the moral dimension of the decisions. Thus, the interesting question is why we address moral questions in legalistic terms.

473. I disagree in this respect with Professor Carter. In a series of articles, Carter discusses a dialogic form of judicial review not unlike that I describe here. See Carter, *supra* note 15; Stephen L. Carter, *The Right Questions in the Creation of Constitutional Meaning*, 66 B.U. L. REV. 71 (1986); Carter, *supra* note 388. Carter describes a relatively two-sided dialogue, each side yammering at one another, but with serious limits on how far dialogue will go to effect change. See, e.g., Carter, *supra* note 15, at 851 (arguing that the Court can guide policy choices but rarely initiates them; the Court usually can be circumvented by the legislature); Carter, *supra* note 388, at 855 ("[T]he Justices, if they possess sufficient fortitude, will nearly always win — at least for the near term."). I, on the other hand, see a constant process of mutual influence and accommodation, with ultimate results as much a product of compromise as a tug-of-war. My vision of the role of courts is far more cooperative, interactive, and intertwined than Carter's.

474. See Alfred Hill, *The Political Dimension of Constitutional Adjudication*, 63 S. CAL. L. REV. 1237, 1251 (1990) (arguing that in cases such as *Reed v. Reed*, 404 U.S. 71 (1971), the Court cannot be called countermajoritarian; it is "essentially catching up in an area where a changed consensus has already won wide recognition"); cf. TUSHNET, *supra* note 162, at 154 ("Certainly courts — even appellate courts — are places where, sometimes, community and shared values can be brought into being.").

agenda.⁴⁷⁵ Sometimes judicial decisions address a topic that is timely and pressing. But judicial decisions also can come out of relative obscurity, provoking intense debate over an issue over which debate had only occurred at a lower level of interest. Judicial decisions can upset the status quo, requiring societal response and thus fostering societal consideration.⁴⁷⁶

Further, courts *shape* the debate over constitutional meaning. Judicial decisions essentially are policy papers on the interpretation of the Constitution. Opinion writing collects and organizes thoughts. This organization tends to give body to loosely held views.

Courts also give *voice and body* to the dialogue. Courts can take an unusual or uncredited position and move it to the center. Courts can interrupt societal patterns of thought, presenting wholly new or inadequately considered views, whether the views are welcome or not.

Moreover, by deciding to confront an issue themselves or by deferring to other decisionmakers, courts can *prod* other institutions to speak. Thus, the Supreme Court often attributes intent to Congress even in instances where Congress may not have had an intent, placing the ball in Congress' court.⁴⁷⁷ In effect, at times the Court asks other actors to speak.

Finally, and in an entirely separate vein, courts *moderate and tend* the debate, largely by protecting the institutions that participate in the dialogue. Vital debate over constitutional meaning depends upon an open and vigorous political process. The Framers' system imagines voices from every level of government, filtered through various systems of representation. Judicial decisions maintain (or disrupt) balance in the system of separation of powers and federalism, and — to

475. Frank Michelman, for example, criticizes the Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), from a republican perspective. Michelman argues that Court decisions must bring groups like gay people into "full and effective participation in the various arenas of public life." Michelman, *supra* note 409, at 1533.

My difficulty with this conclusion is that, although I am sympathetic to Michelman's value-laden outcome, from a dialogic standpoint the decision in *Bowers v. Hardwick* at least *might* have been more transformative than a decision in favor of *Hardwick*. The Court's decision, by keeping an active group on the fringe, may have served as a catalyst for more dynamic civic action.

For a fuller description of the notion of "Court as catalyst," albeit a view its author generally rejects, see ROSENBERG, *supra* note 147, at 25-26.

476. See Gerhardt, *supra* note 104, at 86 (suggesting that "the Court's decisions inform the choices or agendas of the other branches"). As Louis Fisher points out, the Court can invite response, thus fostering dialogue. See FISHER, *supra* note 108, at 247. I have identified the Court's decision in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), as just such an invitation. See Friedman, *supra* note 156, at 770.

477. See BOBBITT, *supra* note 5, at 192-93 (noting that courts often offer a "cue" to other branches); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (arguing that the Court uses statutory construction rules to force Congress to consider constitutional issues); see also Friedman, *supra* note 156, at 751-52 (discussing *Bivens* line of cases as such a cue).

quote John Hart Ely — “clear[] the channels of political change.”⁴⁷⁸

All this is apparent in the debate over abortion. The Supreme Court has spoken time and again on the nature of the abortion right. But by the same token, the Court galvanized public opinion through a lengthy process of dialogue.⁴⁷⁹ And the Court in turn was genuinely influenced by that dialogue. This discussion is not intended to exhibit a Panglossian view of courts. As indicated, courts can hamper or chill dialogue as well as provoke it.⁴⁸⁰ But as a *descriptive* matter the dialogic role of courts cannot be ignored. Approaching the question in dialogic terms, rather than in terms of the countermajoritarian difficulty, should inspire a discussion of how to make the dialogue more open, more vibrant, and more effective.

D. *Dialogue and Constraint*

The dialogic role presented here differs significantly from normative theories of judicial review. Other theories prescribe what judges should do and measure the work of judges against the theory. The dialogic view simply accepts what judges do. The dialogic view thus is subject to inevitable challenge on the grounds that it permits judges to “do anything.” Commentators might rightly inquire as to whether limitations exist on what courts properly can do pursuant to dialogue. I have been asked whether, under a dialogic theory, courts would be constrained to accept a situation like Nazi Germany.⁴⁸¹ Underlying such questions are quite reasonable concerns about constraint and legitimacy. We perceive courts as more remote than legislative and executive officials. Moreover, the subject with which courts deal — our rights and liberties — understandably arouses jealousies. That is why academics struggle to define the parameters of judicial action and to ensure that judges will stay within some bounds.

The dialogue described here does constrain judges. Rather than relying on a normative theory easily and often ignored by judges,⁴⁸² however, the constraint in dialogue is inherent and systemic: judges

478. ELY, *supra* note 5, at 105; see also Seidman, *supra* note 59, at 158 (“[T]o the extent that there are nonmajoritarian ‘defects’ in the political process, an independent judiciary can actually play a pro-democratic role by eliminating the defects.”). Commentary is mixed, of course, as to whether the Supreme Court’s intervention to protect politics always is well advised. See John Moeller, *The Supreme Court’s Quest for Fair Politics*, 1 CONST. COMMENTARY 203 (1984).

479. See *supra* notes 429-31 and accompanying text.

480. See *supra* notes 442-43 and accompanying text.

481. As Professor Carter puts it, “[i]f judicial review really proceeds in this manner — so the standard question runs — then what could a court do to stop the Holocaust?” Carter, *supra* note 473, at 90.

482. In addition, as Philip Bobbitt observes, adoption of a normative theory would “lead to the superimposition of a single convention on the Constitution.” BOBBITT, *supra* note 5, at 238.

are constrained by the system of government in which they operate.⁴⁸³ This section at least preliminarily describes how internal constraints operate upon the judiciary.

One obvious constraining force is found in the sources of judicial decisionmaking. As I argued earlier, the bases for judicial decisionmaking are firmly grounded in the norms of society.⁴⁸⁴ The clearest example is the practice in many cases of "polling" state legislative practice in order to determine whether a right is generally recognized and should be accorded constitutional status.⁴⁸⁵ But this is not the only example. Many references to sources supporting constitutional judgments are an appeal to the values of the people.⁴⁸⁶

Whether reference to judicial decisions reveals what judges actually rely upon in deciding cases is irrelevant. Judges may rely upon their gut instinct (which I would argue is "majoritarian"), whim, or what they had for breakfast. What is important is that judges find it necessary to, and can, support their conclusions with sources that appear to reflect the sentiment of the people. Thus, one properly might question the entire notion that courts enforce norms contrary to popular will. Because judges are chosen from and live among "the people," their decisions naturally reflect popular will to some degree.⁴⁸⁷ The following discussion of systemic constraints explains how this system continues to reflect popular will even as judges are appointed to supposedly insular, life-tenured positions.

In his excellent article "Ambivalence and Accountability," Professor Louis Michael Seidman examines the paradox of judicial review in a majoritarian system. Seidman's task, like many before him, is to search for a way of reconciling our adherence to judicial review with

483. In discussing Alexander Bickel's philosophy, Professor Kronman calls this constraint *external*, as opposed to an *internal* theory such as a normative theory of rights. See Kronman, *supra* note 12, at 1579-80. Professor Chemerinsky, on the other hand, uses the notions of "internal" and "external" constraint quite differently. Chemerinsky defines "internal" constraints as "norms of proper Court behavior that the Justices feel obligated to follow." Chemerinsky, *supra* note 73, at 1251-53. Examples of these are the need to adhere to or distinguish precedents and the need to write reasoned decisions. *Id.* at 1251-52. "External" constraints "arise from the interaction of the Court with other branches of government," *id.* at 1252, including the need for enforcement of judicial orders and the control exercised when Presidents appoint new Justices. *Id.* at 1252-53; see also Chemerinsky, *supra* note 3, at 101 & n.236.

484. See *supra* text accompanying notes 61-114; see also FISHER, *supra* note 108, at 13-14; MARSHALL, *supra* note 235, at 31-36 (discussing evidence of Supreme Court reliance on public opinion in deciding cases); Winter, *Upside/Down*, *supra* note 40, at 1920-21 ("[M]uch of what the Court does necessarily employs mainstream conceptions that already preclude or impair minority concerns . . ."). But see *id.* at 1925-26 ("[D]ominant conceptions are not the same thing as majority decisions.").

485. See *supra* notes 98-101 and accompanying text; Winter, *Judicial Review*, *supra* note 40.

486. See *supra* text accompanying notes 61-139.

487. See *supra* text accompanying notes 61-139.

our devotion to majoritarian government. Unlike most others before him, however, Seidman concludes "[t]he search for a normative justification for judicial nonaccountability is . . . bound to be both fruitless and pointless."⁴⁸⁸

Seidman's reasoning is as important as his conclusion. After tracing the contradiction inherent in a system where judicial review stands side by side with majoritarianism, and concluding that the contradiction cannot be reconciled, Seidman argues that the attempt to reconcile the two is misguided. Seidman relies on an analogy to a patient who must undergo a life-saving amputation without anesthesia. The patient precommits to the operation, instructing the physician to ignore any plea during the operation to terminate the procedure. Then, during the procedure, the patient (now in great pain) begs the doctor to stop, yet when the doctor does so the patient later asks why the doctor disregarded the earlier order.⁴⁸⁹ "What are we to make of this sort of intertemporal conflict?"⁴⁹⁰ Seidman asks, drawing the obvious analogy between his story and the precommitment to judicial review.⁴⁹¹ Seidman concludes that we are deeply ambivalent about judicial review: the process of judicial review represents the body politic's taking its medicine. Thus, even the fact that judicial decisions will not always reflect popular choices is in a sense a popular choice. We are, intellectually, going in two directions at once, thereby "continually redefin[ing] ourselves and our community."⁴⁹²

There is much to commend in Seidman's frank and certain recognition of our inability to legitimize judicial review by reconciling it with what we call majoritarianism. Seidman's question about intertemporal conflict speaks volumes about our system. Intertemporal conflict is not merely accidental; it is in a sense the built-in mechanism that makes our system run while simultaneously constraining the system's actors.

Another analogy reflects the day-to-day system of American con-

488. Seidman, *supra* note 59, at 1599.

489. *Id.* at 1588, 1590.

490. *Id.* at 1591.

491. Other commentators have produced significant work on this "intertemporal conflict." See Ackerman, *supra* note 3, at 1045-46; Amar, *supra* note 201, at 1076-79.

492. Seidman, *supra* note 59, at 1600; see also Welch, *supra* note 68. Welch examines instances in which legislation is struck down by courts applying low-level scrutiny, in an attempt to determine the extent to which community morality — standing alone — can justify legislation. Welch concludes that the due process arena entertains conflicts in community morality that are played out in constitutional cases. Manuscript at 88-90. On the one hand, governmental moral choices — such as bans on nude dancing — are legitimate. On the other hand, equally a part of our community morality, is the concept that "liberty . . . limits the scope of government." *Id.* at 89. Constitutional adjudication thus is the process of reconciling these conflicting moralities.

stitutionalism. Picture an oscilloscope, with three sine waves running across its screen, all at varying frequencies. Label one line the Executive, one the Congress, and one the Judiciary. The peaks and troughs represent deviations from the views of each branch's constituency. Thus, each branch moves in and out of sync with its electorate or constituency. To pick the simplest example, the Executive may well be at its peak when newly elected to a first term; by the end of the second term the congruence may be substantially reduced.

One condition endemic to our system is that the branches rarely will be equally in sync with their constituencies at the same time. Rather, the waves run on at different intervals, perhaps not entirely independent of one another, but not on the same track either. This pattern was not accidental: the Framers designed the system so that the varying terms of senators and representatives would give rise to long-term or short-term views more or less in sync with the will of the people.⁴⁹³

Like the description of the dialogue itself, this description is oversimplified. At the least, one probably would want two waves for the legislature, one representing the Senate, the other the House of Representatives. But an accurate picture of American constitutionalism might require countless more lines: state legislatures, state governors, town councils, school boards, and so forth. The list is long if not endless.

An inquiry into what the line representing the judiciary would look like and the consequences of the line-drawing exercise in general is enlightening. Discussions of the countermajoritarian difficulty ignore the subtlety of this system, because the difficulty assumes that the judiciary is out of sync with the majority. The truth of this assumption, however, varies at different times. The times when it is true, especially vis-à-vis the peaks and troughs of the other branches, teach a good deal about the protections of our constitutional system.⁴⁹⁴

Considering when the actions of the nonjudicial branches generally will mirror the views of their constituencies provides a useful start. At some level this is subject to happenstance; the lines will not really be as

493. Mark Tushnet, *The Politics of Constitutional Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 219, 223-24 (David Kairys ed., 2d ed. 1990) (describing different election terms and methods of federal branches to foster different constituencies). For more on the representative and institutional nature of the branches, including discussion on how our modern system differs from the Framers' intent, see ACKERMAN, *supra* note 14, at 67-70.

494. See Reynolds, *supra* note 404, at 114 ("Despite this unpredictability, the actions of the Supreme Court are not random. Just as there is structure within chaos, so there is pattern of sorts within the actions of the Court . . .").

smooth as sine waves but will be spiked and somewhat chaotic,⁴⁹⁵ and there also may be tremendous variance from issue to issue. Nonetheless, the Framers did have a specific design. The Framers believed that each body would represent its constituents closest to election time because the representative would be most fully imbued with the electorate's values following an election.⁴⁹⁶ Public choice theory suggests just the opposite: immediately prior to an election the representatives will be trying hardest to represent the electorate's views.⁴⁹⁷ In either case, the sine wave ought to be intersecting with public opinion around election time.

This circumstance suggests two useful points about the elected branches. First, as I argued earlier with regard to the judiciary, it may be more instructive to measure the extent to which an *institution* represents the views of the public, rather than the extent to which an *individual representative* mirrors constituents' views. Government is likely to be representative of majority will at times when the most elective offices are up for grabs. Second, and perhaps more important, just as the Framers intended, the elective seats are not open at the same time. The Framers' concern with faction and over-accountability to the majority led them to construct a system in which some branches would have longer terms free of the electorate's most pressing desires (i.e., the Senate), and planned to have the branches on somewhat different election cycles.⁴⁹⁸

The next step is to compare the wave representing the judiciary to those of the elected branches. Because federal judges do not stand for election,⁴⁹⁹ the obvious question is whether there is any benchmark analogous to the election cycle for outlining the judicial wave.

The likeliest time for judges as individuals to reflect the will of the populace is at the time of appointment. There are a number of reasons for this conclusion. First, Presidents select judges whose ideologies

495. *But see* Tushnet, *supra* note 493, at 230 ("The rhythm of politics in the Supreme Court and constitutional law is somewhat more sedate than that of politics elsewhere in government").

496. *See* REFLECTIONS ON THE CONSTITUTION 58 (Richard Maidment & John Zvesper eds., 1989).

497. *See* FARBER & FRICKEY, *supra* note 28, at 22-23.

498. *See generally* Tushnet, *supra* note 493, at 223-25 (describing how constitutional structure defeats attempts of majority to gain control of all branches). As with other structural elements, this construct might not have come off precisely as the Framers intended. As Bruce Ackerman points out, the Framers *did* construct the branches differently both to represent different constituencies and to lessen the possibility of factions' capturing government. But notions underlying their plan have not come quite to fruition. *See* ACKERMAN, *supra* note 14, at 67-70. In particular, the House of Representatives was intended to be the nationalistic body, while the Senate was to represent parochial interests. Today just the opposite seems true. *Id.* at 69.

499. U.S. CONST. art. III, § 1.

resemble their own.⁵⁰⁰ Second, this effect is enhanced to the extent that Presidents are elected in part on a platform representing some concern about judicial ideology.⁵⁰¹ Third, the confirmation process is an exercise calculated not only to ensure as much as possible that a nominee's values represent mainstream thought but also to educate the nominee as to the concerns of the populace.⁵⁰²

To the extent this observation is correct (and even to an extent if it is not), the judicial wave likely will be considerably more chaotic than the waves of the elected branches. Professor Mark Tushnet has observed that it takes roughly ten years for one party in charge of the judicial selection process to shape a judiciary in its image.⁵⁰³ This alone may be a rare and random event. But the premise underlying the assessment also is unpredictable. Judicial attrition, unlike elections, does not occur on a fixed schedule. Judges and Justices are appointed at differing ages and serve for far differing terms.⁵⁰⁴ Congress may create judgeships.⁵⁰⁵ Any number of factors have an impact on whether one President will have enough vacancies to work a substantial change in the federal judiciary.

A related point is that the judiciary is likely to be out of sync with the political branches quite often.⁵⁰⁶ In part this fluctuation reflects the chaotic nature of the situation where the judicial wave runs alongside the more predictable waves of the political branches. But the flux also reflects the time necessary for a President to name a large number

500. Although this has not always been the case, Presidents certainly have chosen judges of similar philosophy in recent years. See Ely, *supra* note 28, at 842-54; Strauss & Sunstein, *supra* note 177, at 1506-07; cf. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989) (measuring recent Justices' value preferences and voting records). A wealth of literature discusses the extent to which presidential appointees mirror the ideology of the President. See, e.g., LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* (1985); Ronald D. Rotunda, *Predicting the Views of Supreme Court Nominees*, TRIAL, Nov. 1990, at 42.

501. Strauss & Sunstein, *supra* note 177, at 1506-07.

502. See Nina Totenberg, *The Confirmation Process and the Public: To Know or Not to Know*, 101 HARV. L. REV. 1213, 1213 (1988) (characterizing the current confirmation process as the public's "last chance to affect the least accountable branch of government"). For a critical view of the confirmation process of late, see Strauss & Sunstein, *supra* note 177.

503. TUSHNET, *supra* note 493, at 225.

504. Justice Powell was 64 years old when President Nixon appointed him to the Supreme Court. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN* 160 (1979). In sharp contrast, Justice White was only 44 years old when President Kennedy appointed him to the Court. 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 2951 (Leon Friedman & Fred L. Israel eds., 1969).

505. See, e.g., Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, § 2, 94 Stat. 1994 (amending 28 U.S.C. § 41 (1951)) (creating the Court of Appeals for the Eleventh Circuit).

506. See Reynolds, *supra* note 404, at 114-15 (discussing fluctuation in the judicial system).

of judges to the bench, matched up against the vicissitudes of ordinary politics. Politics tends to move in cycles; people will favor one approach and then, after a time, favor a change. Just as a President is gaining firm control over the judiciary, the people are likely to change political direction, leaving the judiciary and the political branches at odds.

This is precisely the state of affairs that frustrates the majoritarian and leads to talk of the countermajoritarian difficulty. Judges often appear to be moving in a separate direction from the political branches.⁵⁰⁷ Although this frustrates the majoritarian, the system that gives rise to that frustration was no accident. The time of a majoritarian's delight is precisely what the Framers feared most. The majoritarian will be most content when all sine waves are crossing their middle point and government — including the judiciary — is most sensitive to the will of the majority. But fear of tyranny of the majority is precisely what caused the Framers to erect our governmental structures in a way that seeks to minimize these instances.⁵⁰⁸

The reality is that, despite the different cycling, times of congruence do occur. There are times when all the branches will be highly representative of majority will. Often these are times of great political progress, such as the New Deal.⁵⁰⁹ But the Framers justifiably were concerned that if such states of affairs existed for too long people's rights would be trampled by zealous majorities. The important thing about the Framers' design is that the system does not stand still: the waves always are moving somewhat independently through peaks and troughs.

Just as the system will have cycles in which all waves are crossing the middle point, the system also works to ensure that no wave will get too far out of cycle. The process of election and judicial appointment works to keep the lines somewhat responsive to one another and within the rough bounds of public opinion. Of course, this process sometimes fails, leading to constitutional crises. *Dred Scott* may well represent a time when the waves were far out of sync; the period of

507. See Spann, *supra* note 20, at 2008-12 (discussing types of political preferences to which the Supreme Court will be uniquely responsive).

508. See *supra* notes 189-200 and accompanying text.

509. Intriguingly, the sine wave analogy may offer some support for Ackerman's notion of constitutional moments. Ackerman identifies three periods of high lawmaking, two of which followed, respectively, the Civil War (in part moved along by *Dred Scott*) and the Supreme Court's resistance to the New Deal. See ACKERMAN, *supra* note 14, at 40. If these periods represent points when the waves were seriously out of sync, in their wake the period of adjustment may have involved a point in time when all waves were in sync.

judicial opposition to the New Deal may signal another. But such periods have been mercifully rare.

This tentative thinking suggests a picture of a judiciary that rarely is completely on target with the body politic but is never too far ahead or behind.⁵¹⁰ The judiciary can be at times visionary, and at times reactionary, but never too much of either. When the judiciary slides toward either extreme a correction begins, moving the wave back in the other direction. One oft-studied example may be the progress of the Warren Court's expansion of constitutional rights. In the model of judicial behavior that arose from the Warren era, courts are supposed to protect minorities. The judiciary can pursue this role because its relative isolation from ordinary politics allows it to do unpopular things that the political branches cannot. Undoubtedly there is some truth to the model, but the sine wave analogy raises serious doubt about its descriptive accuracy.⁵¹¹ The question is whether judges, or the judiciary collectively, really do engage in such conduct, and how successfully.⁵¹²

A description of the Warren era more in keeping with the sine wave analogy views the judicial wave as intersecting with popular opinion at that moment. There were probably substantial pockets of popular support for the actions taken by the Warren Court.⁵¹³ The members of that Court hardly were radicals. More likely they tapped into a strong undercurrent of public sentiment about racial justice and rights for the underprivileged.⁵¹⁴ Like Seidman's intertemporal conflict, the sine wave analogy shows how the judiciary can act as an "appeal from John drunk to John sober."⁵¹⁵ The Warren era may have resulted from a submerged sense of injustice regarding inaction by the political branches on civil rights.

510. DAHL, *supra* note 48, at 190 ("[T]he views of a majority of the justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country."); FISHER, *supra* note 108, at 12; Sandalow, *supra* note 378, at 1039.

511. See Spann, *supra* note 20, at 1990-2008 (arguing that courts are institutionally incapable of advancing minority interests in the face of majority opposition).

512. This accords with a thought of Robert Cover's: "I favor federal courts taking a lead in reforming institutions when the other officials fail. . . . At times the federal courts have been our allies in those commitments. There is every reason to believe that such a convergence of interests was temporary and accidental. . . ." ROBERT M. COVER ET AL., PROCEDURE 730 (1988), *cited in* Winter, *Upside/Down*, *supra* note 40, at 1890 n.31.

513. See, e.g., Spann, *supra* note 20, at 2008-2018 (describing *Brown v. Board of Educ.*, 347 U.S. 483 (1954), as a decision that had majority support).

514. See MARSHALL, *supra* note 235, at 87 (concluding that 61% of the Warren Court's decisions were "majoritarian").

515. Mark Tushnet, *Justice Brennan, Equality, and Majority Rule*, 139 U. PA. L. REV. 1357, 1370 (1991); see also Chemerinsky, *supra* note 3, at 83-84 (arguing that emphasis on majority rule gives too much weight to short-term goals rather than long-term values).

By the same token, the judiciary rode the wave of the Warren Court into a trough fairly quickly. Twenty-five years later the judiciary looks completely different.⁵¹⁶ When the next trough and peak occurred is hard to isolate. My own suspicion is that the trough came fairly quickly after the Warren years, that the conservative Burger-Rehnquist Court itself mirrored popular opinion for only a short time, and that the current very conservative bench rapidly is falling out of step with the mood of the country. That may be why what many expected to be the most conservative Term in a long while turned out not to be so.⁵¹⁷

By now the connection between the sine wave analogy and the dialogue should be clear. The sine waves that represent the system of government the Framers designed drive the dialogue. The judiciary is both visionary and reactionary simply because it is always somewhat out of sync with the waves of more political branches — always inching ahead or lagging behind.⁵¹⁸ The divergence between popular sentiment and the judiciary is what makes the dialogue work.⁵¹⁹ In this respect, judicial action may deserve greater credit than the countermajoritarian difficulty accords it. Judicial action creates the dynamic tension that moves the system of constitutional interpretation along.⁵²⁰

The sine wave also represents the constraint against a judiciary completely out of step with the majority. Rather than spinning normative theories to constrain judges, we should see that the constraint is internal. Judges are constrained by the political system that surrounds them.⁵²¹ When judges stray too far from the mark, pressures build — in judicial appointments and in political rhetoric — to bring them back into line.⁵²² The dialogic protection is that the judiciary —

516. See ELDER WITT, *A DIFFERENT JUSTICE: REAGAN AND THE SUPREME COURT 52-56* (1986) (discussing conservative alliance in Rehnquist Court).

517. See, e.g., Kathleen Sullivan, *Packing the Court Is Harder than It Appears*, RECORDER, Aug. 7, 1992, at 9 (discussing the Court's surprising decision not to reverse *Roe v. Wade*).

518. Cf. Sager, *supra* note 28, at 916.

519. Some criticize the notion that the Court should lead society aggressively. For example, Robert Nagel differs with the notion that "the judiciary should routinely confront and reshape society." NAGEL, *supra* note 27, at 23. Judicial deference to or agreement with society avoids "the constitutional costs of a routinely pugnacious judiciary," *id.*, and permits acceptance of societal practice as itself an interpretation of the Constitution. *Id.* at 23-24.

520. See Reynolds, *supra* note 404, at 115 ("Politically, the fluidity of the Supreme Court's jurisprudence means that no coalition is set in stone over time, and that people are often pressed to become involved with politics in order to protect their interests . . .").

521. See Symposium, *Positive Political Theory and Public Law*, 80 GEO. L.J. 457 (1992).

522. The classic cite for this proposition is ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT 224* (1960) ("[I]t is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand."), followed by Robert A.

or the people — always are struggling to achieve convergence.⁵²³ The constraint is inherent in the judicial process rather than external to it. The people will follow judicial decrees so long as the judges seem right. When the judges no longer appear to be correct, the people will press for judicial change. Intuitively, at least, the judges know this.

This is not meant to diminish the value of normative theories of constitutional interpretation. To the contrary, the idea of dialogue encourages such theories, to be used as arguments in the dialogue itself. But rather than posing as “correct” because of divine adherence to some constitutional plan, such theories must rest, and persuade, based on their own value.⁵²⁴

Dialogue simply is inevitable. Wish as some might that constitutional determinacy existed, the fact is that the Constitution is spacious and admits of diverse interpretations. Moreover, the reality of our system is that the people speak to their judges, and the judges speak to the people. We should acknowledge the flexibility of this system, and determine what we can make of it, rather than deny it.

IV. CONCLUSION: THE LITTLE PRINCE AND THE COURT

Millions of adults and children alike have been moved by Antoine de Saint Exupéry's story *The Little Prince*.⁵²⁵ I happened to be reading the book while working on this article, and one tale seemed such an apt parable for my entire point that I brought the book to school and read a chapter to my Federal Courts class.⁵²⁶

In Chapter Ten the Little Prince visits Asteroid 325, and there he meets a king. Tired from his journey, the little prince yawns, which evokes instant criticism from the king.

“It is contrary to etiquette to yawn in the presence of a king,” the monarch said to him. “I forbid you to do so.”

“I can't help it. I can't stop myself,” replied the little prince, thor-

Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). Compare Dahl's more recent statement:

Jurists known to be sharply at odds with the basic outlook of the president or a majority of senators are not nominated by the president and confirmed by the Senate. Thus the views of a majority of justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country.

DAHL, *supra* note 48, at 190; *see also* Ely, *supra* note 28, at 842-54 (discussing politicization of the judicial appointment process and its impact upon appointments).

523. *See* TUSHNET, *supra* note 162, at 169-70 (“[C]ourts are unlikely to remain substantially out of line with the majority's views for very long.”).

524. Carter, *supra* note 473, at 87 (decrying tendency to equate question of whether case was “wrongly decided” with question of whether decision is “beyond the power” of the Court); *see also* Carter, *supra* note 388, at 846-47.

525. SAINT EXUPÉRY, *supra* note 35.

526. The following discussion and quotation all refers to *id.* at 41-47.

oughly embarrassed. "I have come on a long journey, and I have had no sleep . . ."

"Ah, then," the king said. "I order you to yawn. It is years since I have seen anyone yawning. Yawns, to me are objects of curiosity. Come, now! Yawn again! It is an order."

"That frightens me . . . I cannot, anymore . . ." murmured the little prince, now completely abashed.

"Hum! Hum!" replied the king. "Then I — I order you sometimes to yawn and sometimes to —"

He sputtered a little, and seemed vexed.

For what the king fundamentally insisted upon was that his authority should be respected. He tolerated no disobedience.⁵²⁷ He was an absolute monarch. But, because he was a very good man, he made his orders reasonable.⁵²⁸

And so the little prince and the king entered into a discussion, in which the king explained that he was entitled to command absolute authority because his orders were always objectively reasonable. "Accepted authority rests first of all on reason. If you ordered your people to go and throw themselves into the sea, they would rise up in revolution. I have the right to require obedience because my orders are reasonable."⁵²⁹

The king, of course, is our Supreme Court, and the prince one of the Supreme Court's subjects. Despite the Court's insistence on its absolute authority, the Court's authority clearly rests on reasonableness — on popular acceptance of the premises of a judicial order.

But the parallel does not end there. I began with Bickel. Perhaps the most controversial aspect of *The Least Dangerous Branch* was Bickel's discussion of *The Passive Virtues*, by which Bickel advocated the Court's use of justiciability doctrines to ensure that the Court only ordered something when the time was right, when acceptance could be anticipated.⁵³⁰

This point did not escape the king's notice. Given the king's absolute dominion, the little prince requested a sunset.

"You shall have your sunset. I shall command it. But, according to my science of government, I shall wait until conditions are favorable."

"When will that be?" inquired the little prince.

"Hum! Hum!" replied the king; and before saying anything else he consulted a bulky almanac. "Hum! Hum! That will be about — about — that will be this evening about twenty minutes to eight. And you will

527. Cf. *Cooper v. Aaron*, 358 U.S. 1, 17-20 (1958).

528. SAINT EXUPÉRY, *supra* note 35, at 41-42.

529. *Id.* at 45.

530. BICKEL, *supra* note 2, at 111-98.

see how well I am obeyed!"⁵³¹

Well, of course, as society has caught on to our Court, the little prince caught on to the king. The little prince wished to go. The king said "No." " 'If your Majesty wishes to be promptly obeyed,' [the little prince] said, 'he should be able to give me a reasonable order. He should be able, for example, to order me to be gone by the end of one minute. *It seems to me that conditions are favorable . . .*' "⁵³²

When the king failed to answer, the little prince ("with a sigh") took his leave. Never to be out of step, the king responded. " 'I make you my Ambassador,' the king called out, hastily. He had a magnificent air of authority."⁵³³

This analogy, for all its resonance, may seem to provide an unduly cynical and greatly understated view of the Court's authority. I do not intend to paint such a picture. But remember, this article responds to what I view as a great error leaning in the other direction, the error of the countermajoritarian difficulty. The problem with the countermajoritarian difficulty is that it *overstates* the role of courts and thus understates society's responsibility. My point is that we should neither understate *nor* overstate the role of courts; we must account accurately for the critical role of the rest of society, the people. One of my favorite thoughts in this regard comes from Judge Learned Hand:

Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.⁵³⁴

531. SAINT EXUPÉRY, *supra* note 35, at 45.

532. *Id.* at 47 (emphasis added).

533. *Id.*

534. LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY* 189, 190 (3d ed. 1960).