

# THE CYCLES OF CONSTITUTIONAL THEORY

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## I

### INTRODUCTION

Constitutional scholarship—of which constitutional theory is one branch<sup>1</sup>—is inevitably a reaction to what is occurring today in constitutional law. The primary focus is upon the Supreme Court, but even with regard to the Constitution as it operates outside the courts, a good portion of the scholarship tends to focus on what is of immediate political interest. It would be surprising if things were any different.

Historical perspective, however, suggests some difficulty for the inevitably present-driven endeavor of constitutional theory. Seen through the lens of history, it is apparent that arguments about the Constitution have a way of coming around again. When they do, they carry the potential to embarrass their original sponsors. Today's arguments may not be so appealing under very different circumstances. But do changing circumstances necessarily justify changing constitutional theory? Is it even possible to adopt theoretical views about constitutional meaning and interpretation that will endure over time?

These problems are acute when it comes to the mainstay of constitutional theory, scholarship about judicial review. Theorizing about judicial review necessarily occurs in response to Supreme Court decisions. Those decisions themselves are a function of the composition of the bench, the issues that come before the Court, and the Court's position vis-à-vis the other branches of government.

When the ideological valence of Supreme Court decisions shifts, constitutional theorizing about judicial review tends to shift as well.<sup>2</sup> Over the last cen-

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1. The primary difference between constitutional law scholarship and constitutional theory (if there is a difference) is that constitutional theory deals with the deeper principles and ideas underlying constitutional law itself. By this definition, constitutional law scholarship would be directed more at doctrinal issues. Another interpretation is that constitutional theory is simply what used to be called constitutional law scholarship, but in a world in which being a “theorist” apparently is important, constitutional scholars have become constitutional theorists.

2. See *infra* Part I.

tury or more there have been two general positions taken about judicial review: that it is a blight in a democratic system that must be curtailed, and that it is a valued part of U.S. government essential to the protection of constitutional liberty. One is a critique, the other a justification. Progressives<sup>3</sup> and conservatives have advanced both positions (in various permutations) at different times, depending upon which position seemed most apt to present circumstances, given their political views.<sup>4</sup>

This Article explores the implications of the cycling of normative arguments, especially those about judicial review, for constitutional theory. It is an auspicious time to explore these issues because progressive and conservative positions are shifting again at this very moment. Not only that, but they are shifting in ways that permit us, perhaps for the first time in U.S. constitutional history, to see a full cycle clearly. Progressives at the turn of the twenty-first century are echoing criticisms offered by progressives one hundred years earlier, though progressives took a more positive position toward judicial review during the Warren Court. And it is appropriate to consider this problem now, because the next cycle may come more quickly than prior ones, raising questions regarding the consistency of constitutional theory more urgently.

The problem of cycling arguments poses a difficult problem for scholars, who must respond to present events while struggling for theoretical consistency. At first blush it might seem that constitutional theorists are disingenuous because they grab the best arguments available to justify their positions under present circumstances and are too quick to abandon those arguments in favor of others as circumstances change.<sup>5</sup> But that is too trite a dismissal of deeply sophisticated and sustained projects about judicial review, constitutional law, and the process of constitutional change. It also might seem that constitutional theory cannot ever meet its promise to deliver “theoretical” or transcendent perspectives because the grist for the constitutional scholarship mill is simply too political to sustain enduring theory. But this is too easy as well, because over time, the arguments—despite their cycling—become more sophisticated in ways that unquestionably teach us a great deal about what it means to run a constitu-

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3. “Progressive” here is used as the ideological opposite of a “conservative.” Often the word “liberal” is used in this place, but partisan politics has given the “L” word (liberal) a bad name, so perhaps it is time for a change. “Progressive” carries positive connotations, and does seem descriptively the proper alternative to “conservative.”

4. See generally Barry Freidman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. (forthcoming 2004).

5. See Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981) (“One [strategy] is simply to acknowledge that most of our writings are not political theory but advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good.”); Keith E. Whittington, *Herbert Wechsler’s Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509, 530 (2000) (“One might well question the likely quality of scholarship that takes this starkly partisan form, but, less contentiously, one can at least note the limitations inherent in such an approach to constitutional theory.”); see also Richard A. Posner, *Madison Lecture: Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 3 (1998) (“[C]onstitutional theory has no power to command agreement from people not already predisposed to accept the theorist’s policy prescriptions.”).

tional democracy. Moreover, as will be apparent, constitutional theorists ignore immediate political events at peril to the value of their projects.

The first part of this Article describes how some very prominent constitutional theory can be understood as a reaction by deeply thoughtful scholars to the events of constitutional law and constitutional politics occurring around them. These examples were chosen specifically to deny a claim of instrumentalism and show how sophisticated intellectual thought about constitutional theory cannot by its very nature escape the political realities of immediate constitutional controversy. The second part then takes a broader historical perspective, describing both the cycling of constitutional theory during the last century and how such cycling can put constitutional scholars in difficult positions. The third part of this Article explains the tension constitutional scholars face between responding to immediate events in ideological ways that seem to undermine theory, and ignoring the ideological valence of immediate events at the risk of seeming naïve or irrelevant. The fourth part recommends some rules constitutional scholars might use to ameliorate the problem of cycling: empirical humility, historical humility, testing by hypothetical foresight, and contextual (and perhaps more minimalist) theory.

## II

### THE RELATIONSHIP BETWEEN CONSTITUTIONAL EVENTS AND CONSTITUTIONAL THEORY

It cannot be news that constitutional scholarship tends to follow what is happening at the moment. Law reviews want to publish material about what is current, and constitutional scholars write articles that oblige them. In *Lopez*,<sup>6</sup> the Supreme Court rendered its first decision striking down a federal law on Commerce Clause grounds in over fifty years, and we were awash in symposia about federalism.<sup>7</sup> Several Eleventh Amendment cases are decided,<sup>8</sup> and con-

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6. *United States v. Lopez*, 514 U.S. 549 (1995).

7. See, e.g., Symposium, *The Allocation of Government Authority*, 83 VA. L. REV. 1275 (1997); Symposium, *Constructing a New Federalism: Jurisdictional Competence and Competition*, 14 YALE J. ON REG. 1 (1996); Symposium, *The Dilemma of American Federalism: Power to the People, the States, or the Federal Government?*, 1996 BYU L. REV. 329 (1996); *Federalism: Dual Sovereigns Duel—A Symposium*, 1 DEL. L. REV. 223 (1998); *Symposium Papers—Federalism in the 21st Century*, 45 U. KAN. L. REV. 971 (1997); *The Federalism Symposium: The United States Chamber of Commerce: Institute for Legal Reform*, 25 HARV. J.L. & PUB. POL'Y 840 (2002); Garrett, *Disability Policy, and Federalism: A Symposium on Board of Trustees of the University of Alabama v. Garrett*, 53 ALA. L. REV. 1075 (2002); Henry J. Miller Lecture Series and Symposium: *New Frontiers of Federalism*, 13 GA. ST. U. L. REV. 923 (1997); Symposium, *Major Issues in Federalism*, 38 ARIZ. L. REV. 792 (1996); Symposium, *National Power and State Autonomy: Calibrating the New "New Federalism,"* 32 IND. L. REV. 1 (1998); Symposium, *The New Federalism After United States v. Lopez*, 46 CASE W. RES. L. REV. 635 (1996); Symposium, *Reflections on United States v. Lopez*, 94 MICH. L. REV. 533 (1995); *The Twentieth Annual Law Review Symposium: Fear and Federalism*, 23 OHIO N.U. L. REV. 1179 (1997).

8. See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002) (holding sovereign immunity bars federal administrative adjudications against a state agency); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (striking down the provision of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (2000), that imposed monetary liability on states as a violation of the Eleventh

ferences on sovereign immunity sprout like mushrooms after a heavy rain.<sup>9</sup> The newest trend, apparently, is symposia and conferences that mix questions of politics and of law quite explicitly.<sup>10</sup>

Nor can it be surprising to learn that what constitutional scholars write is shaped by the way they view the events they write about, as well as by their ideological commitments. Think about the buckets of scholarship on the Clinton impeachment,<sup>11</sup> or the truckloads on *Bush v. Gore*.<sup>12</sup> For someone who read the texts and knew the authors, was it really so very surprising which positions, broadly speaking, were taken by which scholars?

There is a deeper point than the trivial, obvious one these comments are likely to evoke. Yes, constitutional scholarship can be “political” or “ideological.”<sup>13</sup> But more important, that scholarship is not *just* politics and ideology.

Amendment); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that the Fair Labor Standards Act, 29 U.S.C. § 201-19 (2000), claims against nonconsenting states in state courts violate sovereign immunity).

9. See, e.g., Symposium, *Federalism after Alden*, 31 RUTGERS L.J. 631 (2000); Symposium on *New Directions in Federalism*, 33 LOY. L.A. L. REV. 1275 (2000); Symposium, *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity*, 53 STAN. L. REV. 1115 (2001).

10. See, e.g., Symposium, *The Law of Politics*, 65 LAW & CONTEMP. PROBS. 1 (Summer 2002); *The Assault of Federalism: Developing New Strategies to Protect Civil Rights in a Conservative Era*, CONFERENCE AT HARVARD LAW SCHOOL (Apr. 2002); *Congressional Power in the Shadow of the Rehnquist Court*, CONFERENCE AT INDIANA LAW SCHOOL (Feb. 2002).

11. See, e.g., Charles J. Cooper, *A Perjurer in the White House?: The Constitutional Case for Perjury and Obstruction of Justice as High Crimes and Misdemeanors*, 22 HARV. J.L. & PUB. POL'Y 619 (1999); Neal Devins, Point/Counterpoint, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 165 (1999); Christopher L. Eisgruber & Lawrence G. Sager, *Impeachment and Constitutional Structure*, 5 WIDENER L. SYMP. J. 249 (2000); Cass R. Sunstein, Dunwoody Distinguished Lecture in Law, *Lessons From a Debacle: From Impeachment to Reform*, 51 FLA. L. REV. 599 (1999); Cass R. Sunstein, Point/Counterpoint, *Professors and Politics*, 148 U. PA. L. REV. 191 (1999); Symposium, *Bidding Adieu to the Clinton Administration: Assessing the Ramifications of the Clinton “Scandals” on the Office of the President and on Executive Branch Investigations*, 60 MD. L. REV. 1 (2001); Symposium, *The Independent Counsel Investigation, the Impeachment Proceedings, and President Clinton’s Defense: Inquiries into the Role and Responsibilities of Lawyers*, 68 FORDHAM L. REV. 559 (1999); Michael J. Gerhardt, *The Perils of Presidential Impeachment*, 67 U. CHI. L. REV. 293 (2000) (book review). The *George Washington Law Review* also dedicated the majority of its March 1999 edition to the topic of the Clinton impeachment. See 67 GEO. WASH. L. REV. 601-790 (1999) (devoting ten articles to the “Background and History of Impeachment”).

12. 531 U.S. 98 (2000). For examples of the voluminous scholarship on *Bush v. Gore*, see generally ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001) (examining the 2000 election’s implications for the Supreme Court and the political motivations behind the decision); HOWARD GILLMAN, *THE VOTES THAT COUNTED* (2001) (providing an extensive analysis of the politics of judicial decisionmaking during the 2000 presidential election); RICHARD POSNER, *BREAKING THE DEADLOCK* (2001); *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* (Cass R. Sunstein & Richard A. Epstein eds., 2001) (offering essays spanning a wide array of perspectives on *Bush v. Gore*); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001); Symposium, *Bush v. Gore*, 68 U. CHI. L. REV. 613 (2001); Linda Greenhouse, *Thinking About the Supreme Court After Bush v. Gore*, 35 IND. L. REV. 435 (2002); Symposium, *The Law of Presidential Elections: Issues in the Wake of Florida 2000*, 29 FLA. ST. U. L. REV. 325 (2001); Bruce Ackerman, *Anatomy of a Constitutional Coup*, LONDON REV. BOOKS, Feb. 8, 2001, at 3; Ronald Dworkin, *A Badly Flawed Election*, N.Y. REV. BOOKS, Jan. 11, 2001, 1; Charles Fried, “A Badly Flawed Election”: An Exchange, N.Y. REV. BOOKS, Feb. 22, 2001, at 8; Richard L. Hasen, *A “Tincture of Justice”: Judge Posner’s Failed Rehabilitation of Bush v. Gore*, 80 TEX. L. REV. 137 (2001) (book review).

13. As Judge Posner observed,

The writing on these subjects is still very scholarly. Events may dictate what is written about, and ideology may influence the perspective taken by each individual author, but the output is a genuine contribution to thought about constitutional law.

As it happens, a similar story can be told about sustained theoretical projects, or “grand theory.” By definition, such scholarship is so theoretical that ideology is less obviously the impetus for the scholar’s work. Yet, like constitutional scholarship generally, grand theory can be understood both as a reaction to trends in constitutional events, and as influenced by the ideological commitments of its author.

Consider some of the grand theory that followed on the heels of the Warren Court. The authors whose works are discussed all are progressive, and all undoubtedly saw something to admire in the Warren Court. But they all have something else in common: they wrote their greatest works after the Warren Court was over. What distinguishes these works is their increasing distance from the Warren Court, and a generally more embedded conservative court. In other words, the agenda these authors favored was, as each wrote, receding further into the past. It is thus possible, in this deeply admirable body of theoretical work, to see the influence of rising despair among progressives about judicial review. This work is the sediment of the ages of constitutional law between 1960 and 2000.

The Warren Court ended in 1968, and John Hart Ely took up the cudgels in its defense. Ely expressed both unabashed admiration for Earl Warren and support for what that Court had done. He also saw the vulnerability of the Warren Court’s project, and hence the need to justify that project in theoretical terms. The result was a long series of law review articles culminating in *Democracy and Distrust*,<sup>14</sup> one of our greatest projects of constitutional theory. The book was a sweeping justification of the Warren Court’s decisions. It concededly is difficult to know if Ely was more concerned with the direction of future progressivism or with increasing judicial conservatism. *Democracy and Distrust* has a two-edged quality to it, implying “thus far but no farther.” Ely was disdainful of decisions like *Roe v. Wade* and the unenumerated rights movement in full flower at the time.<sup>15</sup> But there is a preservationist quality to *Democracy and*

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Constitutional theorists are normativists; their theories are meant to influence the way judges decide difficult constitutional cases; when the theorists are law-trained, as most of them are, they cannot resist telling their readers which cases they think were decided consistently with or contrary to their theory. Most constitutional theorists, indeed, believe in social reform through judicial action.

Posner, *supra* note 5, at 2.

14. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) [hereinafter ELY, *DEMOCRACY AND DISTRUST*]; John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978) [hereinafter Ely, *Foreword*]; John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978) [hereinafter Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*]; John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) [hereinafter Ely, *Wages of Crying Wolf*].

15. See ELY, *DEMOCRACY AND DISTRUST*, *supra* note 14, at 88 (“[P]reserving fundamental values is not an appropriate constitutional task.”); JOHN HART ELY, *ON CONSTITUTIONAL GROUND* 455 n.3

*Distrust* that cannot be denied, and by the time the book was published, Ely understood that things were going in a direction more conservative than the era he so admired. Whether intentional or not, his book offered a theoretical perspective that—had the Supreme Court adopted it—would have stemmed the conservative tide.

Although undeniably shaped by his own reaction to current constitutional politics, Ely's work can only with difficulty be called anything other than a most serious piece of intellectual thought. The cornerstone of the book was "footnote four" of *Carolene Products*,<sup>16</sup> and on that cornerstone Ely built an entire theory of constitutional interpretation. The years following the advent of Roosevelt's Court were full of process theory articles now largely lost to our recollection.<sup>17</sup> But Ely brought all of that thinking together, advancing our understanding of judicial review in a comprehensive (and engaging) way that no one can deny. Right or wrong, this was theory at its best.

Fast forward ten years, and we see the development of Bruce Ackerman's magisterial project, *We the People*.<sup>18</sup> Here, too, is a work of sustained and intricate scholarship. Ackerman blended exhaustive historical research with deep thought about the nature of constitutional change to offer up what unquestionably is one of the most creative and nuanced theories of constitutional

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(1996) ("I later changed my mind about the propriety of inferring a general constitutional right of 'privacy,' though I continued to have qualms about whether it would apply in cases like *Griswold* and *Roe*."); Ely, *Wages of Crying Wolf*, *supra* note 14, at 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.").

16. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see ELY, *DEMOCRACY AND DISTRUST*, *supra* note 14, at 75 ("The Warren Court's approach was foreshadowed in a famous footnote in *United States v. Carolene Products Co.*, decided in 1938."); Ely, *Foreword*, *supra* note 14, at 5-6 ("Generally speaking, the Warren Court was a *Carolene Products* Court, centrally concerned with assuring broad participation, not simply in the processes of government but in the benefits generated by those processes as well."); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, *supra* note 14, at 452-3 ("Other Courts had recognized the connection between such political activity [as the process of making society's laws] and the proper functioning of the democratic process; the Warren Court was the first seriously to act upon it.").

17. See, e.g., CHARLES P. CURTIS, JR., *LIONS UNDER THE THRONE* 327-28 (1947) ("Where the democratic process is not working and the statute is not its result, the Court is free to make up its own mind without the exercise of any self restraint."); PAUL G. KAUPER, *FRONTIERS OF CONSTITUTIONAL LIBERTY* 51-52 (1956) ("The play of economic forces and the resolution of conflicts between competing economic groups is a matter for determination by the democratic process expressing itself in the legislative voice. . . . But by contrast, freedom of expression . . . goes to the heart of the democratic process."); ALPHEUS THOMAS MASON, *THE SUPREME COURT: PALLADIUM OF FREEDOM* 177-78 (1962) ("The majority must leave open the political channels by which it can be replaced when no longer able to command popular support."); EUGENE V. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* 160 (1962) ("The freedom of the legislature to act within wide limits of constitutional construction is the wise rule of judicial policy only if the processes through which they act are reasonably democratic."); Paul A. Freund, *The Supreme Court and Civil Liberties*, 4 *VAND. L. REV.* 533, 550 (1951) ("If . . . the court stands one step removed from the clash and compromise of contending interests, its function is basically to keep that process clear and clean."); see also Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153, 226-28 (2002) (discussing the many Justices and scholars at mid-century who embraced process theory and footnote four of *Carolene Products*).

18. BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

change that has been seen in this field. Small wonder that Ackerman's work has become a focal point for so much other scholarship.

Yet, in context, Ackerman's work also reflects the political reality he faced. Where Ely's project was preservationist, Ackerman's is so in spades. Ely would have had the Court stop in the Warren Court's tracks. Ackerman would have it move forward, but on tracks forged during the New Deal. Ackerman wanted to keep the Court on its progressive track. This was evidently so important to him that he sometimes appears perfectly unwilling to acknowledge that, even under his own theory, these times they might be a changin'.<sup>19</sup> Ackerman is nothing if not a progressive, and he wrote during the tenure of a Court that was nothing if not conservative.

Like Ely's, Ackerman's project is far too serious an effort to understand both the Constitution and constitutional change to be seen simply as a response to a series of Supreme Court decisions. Both Ely and Ackerman wrote books that read as if they were written for all time. But it is inevitable that what they believed, and what they saw around them, necessarily informed the way they perceived the world, including the world of constitutional law. In an inchoate way, the theories that sprang from their heads necessarily connected the dots of a world view they held. This is the very nature of the intellectual endeavor; no scholarly subject is ever viewed by the author abstracted from the world the author inhabits. The intellectual project is one of trying to understand and explain one's world. No surprise, then, that one's scholarship is a reaction to that world.

Fast forward a few more years, and Cass Sunstein urged constitutional minimalism.<sup>20</sup> A few years later, Mark Tushnet advocated taking the Constitution away from the courts.<sup>21</sup> These works also are both evolved works of theory and responses to the Supreme Court's ever-increasing conservatism. If you do not approve of what the courts are doing, but respect judicial review, then the solution is to have judges do less.<sup>22</sup> Slow things down. Sunstein's work—though somewhat derivative of Alexander Bickel's<sup>23</sup>—provided a com-

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19. For example, Ackerman quite emphatically argues that “[t]he Reagan ‘Revolution’ was a failed constitutional moment.” *Id.* at 56. Mark Tushnet has noted, however, that the Reagan Revolution (along with the Republican victory in the 1994 congressional elections) was “a constitutional moment of the sort Bruce Ackerman has written about.” Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845, 846 (1996).

20. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

21. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

22. See Cass Sunstein, *A Narrowed Right to Challenge the States*, N.Y. TIMES, May 31, 2002, at A23 (“By creating an unjustified principle of immunity through its own overreaching, the court is diminishing the power of the president and Congress. So much for judicial restraint.”); SUNSTEIN, *supra* note 20, at 263 (“[Minimalism] has distinctive uses in constitutional law, where judges, well aware of their own limitations, know that sometimes the best decision is to leave things undecided.”).

23. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962) (suggesting that the Supreme Court make careful use of the “passive virtues” to avoid deciding controversial cases until society has had time to grapple with them); see also SUNSTEIN, *supra* note 20, at 39 (“Insofar as the minimalist judge seeks to promote democratic goals while recognizing social pluralism, the minimalist project is easily linked with the idea of ‘passive virtues,’ as discussed by Alexander Bickel.”).

prehensive plan to put the brakes on the process of constitutional change. Then again, if all seems hopeless, head instead in the direction that Mark Tushnet ultimately did, and suggest that we might be better off without judicial review altogether.<sup>24</sup>

Tushnet's book makes the point best. One does not suggest doing away with judicial review out of a fit of pique at a set of disliked decisions. *Taking the Constitution Away from the Courts* is both a work of theory from a scholar whose historical and political science credentials are well established, and a product of years of thought on the subject. To say that Tushnet was just being strategic or political is to be trite in the worst of ways. One must assume Tushnet believed what he said, and was willing to stand by it, no matter who sat on the Court, filled the halls of Congress, or inhabited the White House. On the other hand, one can doubt whether Tushnet would have written the book if the Chief Justices following Warren had been Abe Fortas and David Souter, and if they had held majorities on their Courts.<sup>25</sup> It simply may not have occurred to him to see things that way; in a different world he would have had a different world view.

The phenomenon of theoretical work being informed by political events is not confined to progressive theory. On balance, there are fewer conservative than progressive works of theory.<sup>26</sup> This is perhaps because over the last few years so many conservative intellectuals have spent their time more politically engaged. If so, their efforts have borne fruit.

Nonetheless, the very same phenomenon is plainly evident in conservative scholarship. The claim that the Supreme Court is countermajoritarian is not new, but it should come as little surprise that, among conservatives, that claim went from being a defense of courts to a complaint about them beginning in 1968. In that year, Robert Bork began his odyssey of constitutional scholarship with a diatribe against the Court in *Fortune* magazine.<sup>27</sup> The magazine article grew into a law review article,<sup>28</sup> which grew into a set of increasingly angry but

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24. See TUSHNET, *supra* note 21, at 163 ("In the end we have to decide whether on balance the risk of extreme cases and the possibility of successful resistance is great enough to justify routine judicial review. I doubt that it is."); *id.* at 194 ("As Lincoln said, the Constitution belongs to the people. Perhaps it is time for us to reclaim it from the courts."); see also Erwin Chemerinsky, *Losing Faith: America Without Judicial Review?*, 98 MICH. L. REV. 1416, 1420 (2000) ("Indeed, my sense, as a reader, is that much of what animates this book [*Taking the Constitution Away from the Courts*] is Tushnet's great frustration with the current and recent conservative Supreme Courts.").

25. Tushnet, however, takes the position that he has been concerned about judicial review since his earliest works of scholarship. *Oral Remarks of Tushnet at Duke Conference*.

26. Still, there are prominent conservative scholars. Besides Bork, discussed above, one might see (some or all of) the work of scholars such as Raul Berger, Steven Calabresi, Richard Epstein, Lino Graglia, Gary Lawson, Robert Nagel, Antonin Scalia, Charles Fried, John Harrison, Michael McConnell, and Michael Paulsen (with apologies to anyone omitted).

27. Robert H. Bork, *The Supreme Court Needs a New Philosophy*, FORTUNE, Dec. 1968, at 138. ("What, after all, justifies a non-elected committee of lawyers in overriding the policies of the elected representatives of the people?").

28. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971) ("The result, of course, is that courts are without effective criteria and, therefore we have come



nonetheless theoretical works abjuring judicial review.<sup>29</sup> Bork's theories about judicial review were so developed that he was still taking on the institution even though the ideological victory seemed to be his. In an odd way, that is to his credit. No doubt conservative scholars will soon be moving in a different direction. But Bork's work began and developed in reaction to a Court of which he did not approve.

### III

#### THE PROCESS OF CONSTITUTIONAL (POLITICAL) CHANGE AND THE CYCLES OF CONSTITUTIONAL THEORY

The problem is, things change. Usually they change slowly, and so each generation's scholarly works retain some cohesiveness. Even in works of grand theory, progressives take positions that have happy consequences for progressives, conservatives take conservative positions, and everyone knows on what side of the theory line to stand. Courts, and the branches of government whose work they review, are stable enough that the middle of the theoretical arena is not muddied up, with conservative and progressive positions tripping over one another. Usually.

For example, from 1890 until 1937 it was possible to know what side one was on. The courts were conservative. The political branches were (more) progressive.<sup>30</sup> Their respective records were mixed, but as a general matter constitutional scholars knew what they were supposed to say about judicial review. Progressives were troubled by it; conservatives admired its preservationist and anti-democratic character.<sup>31</sup>

All of that changed in the period between 1937 and 1968. Things flipped. The Court became the progressive force for change, and the "political" branches—especially if one took the state governments into account—were decidedly more conservative.<sup>32</sup> When things flipped, so did constitutional scholar-

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to expect that the nature of the Constitution will change, often quite dramatically, as the personnel of the Supreme Court changes.”).

29. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) [hereinafter BORK, *THE TEMPTING OF AMERICA*] (arguing against allowing political calculations to enter judicial decisionmaking); ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 96-119 (1996) [hereinafter BORK, *SLOUCHING TOWARDS GOMORRAH*] (arguing that the Court's increasing activism is concomitant with a general cultural decline).

30. See Friedman, *supra* note 17, at 218.

31. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1437 (2001) (“The Progressive reaction to *Lochner* harped repeatedly on the theme of judicial deference to majoritarian judgments.”); *id.* at 1446 (referring to “a wealth of remarkable statements by many prominent lawyers, including Supreme Court Justices, regarding the need for courts to stem the popular tide”).

32. The progressivism of the Court and the conservatism of state governments and the other federal branches are apparent in the Court's major opinions of the era. On a variety of different issues—race, criminal procedure, free speech, the rights of Communists and Communist sympathizers—the Court was notably more progressive than the legislatures. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring the reading of now-famous *Miranda* rights before a confession elicited by police interrogation could be introduced into evidence); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring that

ship.<sup>33</sup> All of the sudden, liberals were for judicial review, though admittedly angst-ridden about how to justify it.<sup>34</sup> Conservatives (witness Bork) ultimately decided for the first time that judicial review as they were experiencing it was not such a good thing, and that we should trust our faith in the people's representatives.<sup>35</sup>

Lest there be any question, it is important to make equally clear that over time neither conservatives nor progressives have offered a consistent methodology of constitutional interpretation. It is not a sufficient response to the cycling of constitutional theory to claim that theories of interpretation have remained ideologically stable. Without the lens of history, we forget. Bork

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the states provide criminal defendants with counsel); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (banning the reading in classrooms of the "Lord's Prayer" or bible verses); *Engel v. Vitale*, 370 U.S. 421 (1962) (banning the use of New York's "Regent's Prayer" in schools); *Jencks v. United States*, 353 U.S. 657 (1957) (requiring the government to turn over investigative material the defense might need to cross-examine government witnesses); *Schwartz v. Bd. of Bar Examiners*, 353 U.S. 232 (1957) (reversing the New Mexico Bar Examiner's denial of an applicant who was unable to show good moral character due to his use of aliases and his past membership in the Communist Party); *Konigsberg v. State Bar*, 353 U.S. 252 (1957) (reversing the California Bar Examiner's decision to refuse an applicant's admission because he had ostensibly failed to show good moral character by refusing to respond to questions regarding past and present membership in the Communist Party); *Watkins v. United States*, 354 U.S. 178 (1957) (holding that the House Un-American Activities Committee could not require a witness admitting involvement with the Communist Party to name his associates, even without invoking his Fifth Amendment rights); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (reversing the conviction of a witness who refused to answer a question regarding the Progressive Party during an investigation of subversive activities); *Yates v. United States*, 354 U.S. 298 (1957) (reversing the convictions of defendants charged with conspiring to advocate and teach the forcible overthrow of the U.S. government and to organize the Communist Party in violation of the Smith Act on the grounds that "organize" referred only to creation of a new organization and not to already existing organizations); *Serv. v. Dulles*, 354 U.S. 363 (1957) (reversing the Secretary of State's discharge of a foreign service officer, which had been based on an FBI investigation revealing his communication of secret military plans to a pro-Communist magazine); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (holding that the Smith Act, which prohibits the knowing advocacy of the overthrow of the U.S. government by force or violence, suspends the enforceability of the majority of the state antisection statutes); *Slochower v. Bd. of Educ.*, 350 U.S. 551 (1956) (reversing the dismissal of a college professor who had been dismissed without a hearing based upon his invocation of the Fifth Amendment in response to inculpatory questions regarding membership in the Communist Party); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (declaring *de jure* racial discrimination in the public schools unconstitutional).

33. "[O]ne is struck by the irony that liberals and conservatives have today adopted views completely the reverse of those each held in the constitutional crisis of the 1930s." J. Patrick White, *The Warren Court Under Attack: The Role of the Judiciary in a Democratic Society*, 19 MD. L. REV. 181, 196 (1959); see also Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 2 (1957) ("[T]he word conservative does effectively evoke a type of politician and commentator arrayed in defense of the Supreme Court twenty years ago and now in full cry against it."); Fred Rodell, *The Warren Court Stands Its Ground*, N.Y. TIMES, Sept. 27, 1964, § 6 (Magazine), at 120 ("Accusations of too-much-Court-power have also reversed polarity. In the [1930s] it was the liberals who cursed the Court for killing progressive legislation. . . . Today it is, by and large, conservative elements who accuse the Court of usurping power and upsetting the Federal balance . . ."); Alan F. Westin, *When the Public Judges the Court*, N.Y. TIMES, May 31, 1959, § 6 (Magazine), at 16 ("Previously, it was the spokesmen for liberalism and majority rule . . . who denounced the Supreme Court. . . . Yet, in the [1950s], liberal groups are defending the judiciary as a wise agency. . . . A similar reversal has taken place in the conservative camp.").

34. For a deeper discussion of this switch and the liberal anxiety it produced, see Friedman, *supra* note 17, at 238-54 (2002).

35. See Bork, *supra* note 27, at 138 ("What, after all, justifies a non-elected committee of lawyers in overriding the policies of the elected representatives of the people?").

avored originalism, which ultimately came to be the darling of conservatives.<sup>36</sup> But the conservative *Lochner* Court, by contrast, was hardly originalist in result or in the style of opinions it rendered; conservatives defended that Court nonetheless. Later, the Warren Court itself resorted to originalism when it suited.<sup>37</sup> Historians complained it was bad history,<sup>38</sup> but if bad originalism were a sin, many Supreme Court Justices would be rewriting their opinions in purgatory at this very moment. Moreover, while conservatives were defending non-originalist *Lochner* era judges, progressives during that very same period were accusing judges of doing what Bork accused them of later: imposing their own values upon the Constitution.<sup>39</sup> The point is that neither progressives nor con-

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36. According to Bork, “[t]he interpretation of the Constitution according to the original understanding, then, is the only method that can preserve the Constitution, the separation of powers, and the liberties of the people.” BORK, *THE TEMPTING OF AMERICA*, *supra* note 29, at 159. Moreover, “[t]he search is not for a subjective intention. . . . All that counts is how the words used in the Constitution would have been understood at the time.” *Id.* at 144; *see also* Bork, *supra* note 28, at 8 (“Where constitutional materials do not clearly specify the value to be preferred . . . the judge must stick close to the text and the history, and their fair implications, and not construct new rights.”).

37. *See, e.g.*, *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969) (looking to the history of the guarantee against double jeopardy); *Duncan v. Louisiana*, 391 U.S. 145, 151-54 (1968) (charting the history of trial by jury in criminal cases); *Miranda v. Arizona*, 384 U.S. 436, 458-66 (1966) (looking to the history of right against self-incrimination); *Bell v. Maryland*, 378 U.S. 226, 286-318 (1964) (Goldberg, J., concurring) (using history to show that the Fourteenth Amendment and the Civil Rights Act of 1866 applied to racial discrimination between private persons). *Engel v. Vitale*, 370 U.S. 421, 425-30 (1962) (relying on almost sixteenth- through eighteenth-century evidence to erect a constitutional “wall of separation between church and State”); *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (relying on the words of Jefferson for the same).

38. *See, e.g.*, Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 156 (charging the Court with using history as a tool of “advocacy,” rather than one in search of “objective truth”); Paul L. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 77 (1963) (accusing the Court of practicing “law office history”). *But see* John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 220 (1993) (defending “forensic history” and arguing that “[t]he legitimacy of forensic history cannot be left to the professional standards of academic historians”).

39. *See, e.g.*, FRANK J. GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* 247 (1911) (“What the courts actually do in cases in which they declare a law of this sort unconstitutional, is to substitute their ideas of wisdom for those of the legislature, although they continually say that this is not the case.”); L.B. Boudin, *Government by Judiciary*, 26 POL. SCI. Q. 238, 267 (1911) (“Each case is supposed to stand ‘on its own merits,’ which . . . simply means that each law is declared ‘constitutional’ or ‘unconstitutional’ according to the opinion the judges entertain as to its wisdom.”); W.F. Dodd, *The Growth of Judicial Power*, 24 POL. SCI. Q. 193, 195 (1909) (“The courts seem now to have reached the point of treating as unconstitutional practically all legislation which they deem unwise.”); Eaton S. Drone, *The Power of the Supreme Court*, 8 FORUM 653, 657 (1889) (“Consciously or unconsciously, honestly or otherwise, judges on the supreme bench have been controlled or influenced by their political beliefs, by partisan bias, by public sentiment . . . [by] the theories of the party with which they have acted or may sympathize.”); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 501 (1908) (“A vote of the court necessarily depends not upon any fixed rules of law, but upon the individual opinions upon political or economic questions of the persons who compose it . . . .”); William M. Meigs, *The Relation of the Judiciary to the Constitution*, 19 AM. L. REV. 175, 191 (1885) (concluding that a judge’s decision in a case “depends as a matter of fact upon his pre-conceived views of the political history and tendency of his country; and these, again, have been enormously influenced by what may be his theory and belief as to the best and most advisable form of government”); Theodore Roosevelt, *Nationalism and the Judiciary*, 97 OUTLOOK 532, 534 (1911) (“But in the concrete there has often been much ingenious twisting of the Constitution, doubtless entirely unconscious, in order to justify judges to their own conscience in deciding against a given law.”); *Judges as Statesmen*, NEW REPUBLIC, Sept. 12, 1923, 62, at 63 (asserting that the Supreme Court “will have earned its own downfall by at-

servatives have adopted a consistent methodology over time; neither has claimed a monopoly on a form of critique, and neither is likely to do so now.

Even when change happens slowly, however, there is that point when a shift occurs, and constitutional thinkers get caught. One of those times was the late 1950s and early 1960s, when, as one commentator pointed out, “one is struck by the irony that liberals and conservatives have today adopted views completely the reverse of those each held in the constitutional crisis of the 1930s.”<sup>40</sup> Or, as Alan Westin said on the pages of the *New York Times Magazine*, “Previously, it was the spokesmen for liberalism and majority rule . . . who denounced the Supreme Court. . . . Yet, in the [1950’s], liberal groups are defending the judiciary as a wise agency. . . . A similar reversal has taken place in the conservative camp.”<sup>41</sup>

Not just the observers get befuddled; the participants do, too. In 1958 Joseph Ruah, the national director for the Americans for Democratic Action, testified before Congress against the Jenner-Butler bill, designed to strip the Supreme Court’s jurisdiction in response to several decisions upholding the rights of Communists and Communist sympathizers. His own puzzlement was patent:

It is unusual to find an organization of liberals acting as one of the most outspoken defenders of the Court. History shows that it has always . . . been [those representing] the conservative interest in America who have defended the Supreme Court against liberal attack. We have had . . . a 180-degree switch since the [Court-packing plan] in which the liberals in America . . . were supporting the plan, and the conservative interests were opposed to the plan. And today I would say that the reversal of the situation is somewhat strange.<sup>42</sup>

The change caught constitutional scholars just as much as it caught pundits and political activists. Fred Cahill, a liberal, published a book whose title says it all: *Judicial Legislation*.<sup>43</sup> The book was a reaction to the events of the New Deal. Problem? It was published in 1952. In two short years, the world would begin to look different to progressive intellectuals, and it would look more and more different as the Warren Court moved on. But sometimes it takes academics a while to see what is happening. In 1956 Paul Kauper wrote, “It needs no special astuteness to observe that we have now passed the period of high tide in the protection of the First Amendment freedoms and that a period of recession has set in.”<sup>44</sup> In 1957 Bernard Schwartz published a lengthy book, *The Supreme Court: Constitutional Revolution in Retrospect*, in which he said

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tempting to read the personal and professional sympathies and antipathies of its members into the law of the land”).

40. White, *supra* note 33, at 196.

41. Westin, *supra* note 33, at 16.

42. *Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearings on S. 2646 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws*, 85th Cong. 47 (1958) [hereinafter *Jenner-Butler Hearings*].

43. FRED V. CAHILL, JR., *JUDICIAL LEGISLATION* (1952).

44. PAUL G. KAUPER, *FRONTIERS OF CONSTITUTIONAL LIBERTY* 41 (1956). Kauper also may have misjudged the changing political valence of the First Amendment. See Fred Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935 (1993).

[I]f there was one principle that nineteenth-century liberals agreed upon, it was that of the primacy of legislative power. To them, it was the elected representatives of the people, not an irresponsible judicial organ, who were endowed with primacy in the governmental structure. . . . [I]s this not the proper distribution of governmental power in a representative democracy?<sup>45</sup>

Reviewing Schwartz's book, Arthur Selwyn Miller commented, "As it was, a book published on June 20, 1957, was in need of major revision the day it was released."<sup>46</sup> That was because three days before the book came out, the Supreme Court decided four of what would be ten pro-Communist-rights decisions, invalidating government acts on constitutional grounds.

Today things are changing once again. The hope of the Warren Court has passed. The Court is not only conservative, but aggressively so. Even if the Burger Court was "The Counter-Revolution That Wasn't,"<sup>47</sup> things still have been on a rightward slide for some time. Now, there are angry murmurings from liberals about the Supreme Court and judicial review. Conferences are held, societies are formed, profound concern is expressed.<sup>48</sup>

If a turning point needs be picked, perhaps it should be 1994. Commenting on the 1993 Term, William Eskridge and Phillip Frickey could talk of the triumph of the Legal Process school, and urge the Court out of its restraintist posture.<sup>49</sup> Thereafter, the Contract with America brought Republicans into Congress in force.<sup>50</sup> With Justice Clarence Thomas as a fifth solid conservative vote, the Supreme Court began what surely is one of its most notable binges of congressional-law striking in history.<sup>51</sup> *Planned Parenthood v. Casey*<sup>52</sup> was a finger

45. BERNARD SCHWARTZ, *THE SUPREME COURT: CONSTITUTIONAL REVOLUTION IN RETROSPECT* 371 (1957).

46. Arthur S. Miller, Book Review, 6 J. PUB. L. 522, 526 (1957) (reviewing SCHWARTZ, *supra* note 45).

47. See, e.g., THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (Vincent Blasi ed., 1986).

48. See *supra* note 8; see also <http://www.americanconstitutionsociety.org> (last visited September 23, 2004) (describing an organization set up to counter conservative visions of the law).

49. William N. Eskridge & Phillip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 76 (1994) ("A key legal process assumption apparent from the foregoing description is the Court's typical desire to avoid open conflict with the political branches, either by deferring to them or by obscuring conflicts under cover of textualist technique or clear statement rules."); *id.* at 77 (urging greater constitutional review when constitutional rights are at stake).

50. See *Contract with America* (1994), available at <http://www.federalist.com/histdocs/contract.htm> (last visited September 23, 2004). On September 27, 1994, more than 300 Republican congressional candidates signed the list of election pledges they called the "Contract with America." In the elections that followed, Republicans took control of the House of Representatives. For a report on the political maneuver before the election, see David E. Rosenbaum, *Republicans Offer Voters a Deal for Takeover of House*, N.Y. TIMES, Sept. 28, 1994, at A16.

51. See, e.g., William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217, 1223 (2002) ("The current Court has been one of the most activist in history. . . . [T]he Court has invalidated over twenty-six federal laws since 1995. This number is indeed striking given that the Court voided only 127 federal laws in the first 200 years after constitutional ratification."); Larry D. Kramer, *The Supreme Court v. Balance of Powers*, N.Y. TIMES, Mar. 3, 2001, at A13 ("For nearly a decade, the court's five conservative justices have steadily usurped the power to govern by striking down or weakening federal and state laws. . . ."); Cass R. Sunstein, *Taking Over the Courts*, N.Y. TIMES, Nov. 9, 2002, at A19 ("[T]he new judicial activists are beginning to dominate. Since 1995, the Supreme Court has struck down at least 26 acts of Congress on constitutional grounds.").

in the dike, leading liberals to believe not all treasured decisions would be rolled back. But as the conservative tide rolled on, liberal scholars became more despondent.<sup>53</sup> *Bush v. Gore*<sup>54</sup> likely was the breaking point.

All of the sudden, the talk *among progressives* is of complaints about judicial supremacy and the hegemony of the Supreme Court. We have come full circle: the early 2000s are the early 1900s all over again, and one might as well forget that the Warren Court happened in the middle. Larry Kramer, at the end of what is surely one of the most scholarly and important Harvard *Forewords* ever, seems almost to switch voice: “The Supreme Court has made its grab for power. The question is: will we let them get away with it?”<sup>55</sup> In a series of historically polished, extremely theoretical, and erudite articles, Reva Siegel and Robert Post (writing alone and together) call what is happening an “assault” on Congress by the Supreme Court, and express anxious concern about “the Court’s claim to exclusive interpretive authority.”<sup>56</sup> They suggest it has “implications that far transcend the professional boundaries of the legal system.”<sup>57</sup> Younger scholars, such as Rachel Barkow and Laura Fitzgerald, decry the Court’s single-minded grab for authoritative interpretive power.<sup>58</sup> Linda

52. 505 U.S. 833 (1992).

53. See, e.g., Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 302 (2002) (finding that “[t]he current Court increasingly displaces Congress’s view with its own without much more than a passing nod to Congress’s factual findings or policy judgments”); *id.* at 319-35 (arguing for revival of the political question doctrine and deference to Congress); Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281, 281 (2002) (“Even before the controversy stirred by *Bush v. Gore*, a number of scholars had initiated a debate concerning the long-term viability of judicial supremacy. Post-*Bush*, these arguments may well receive a more respectful hearing.”); Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 14 (2001) (“We have moved from a world in which the interpretive authority of the political branches was clear and that of the Supreme Court questionable and uncertain, to one in which the Court’s authority stands unchallenged while that of everyone else is under siege. . . . [N]othing similar [to the original and historical reasons for judicial review] justifies the drift to judicial sovereignty—which appears to be based on a fundamental misunderstanding of constitutional history, fortified by the displeasure some of the Justices feel with Congress’s performance.”); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 444 (2000) (“We question the court-centered model of constitutional interpretation that these decisions assume. . . . We argue that this history [of the relationship between Congress and the Court in shaping Equal Protection] justifies a continuing role for democratic vindication of equality values.”).

54. 531 U.S. 98 (2000).

55. Kramer, *supra* note 53, at 169.

56. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People*, 78 IND. L.J. 1, 2 (2003).

57. *Id.*; see also Reva B. Siegel, *Text in Context: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 303 (2001) (“[T]his Article invites constitutional theory to develop more complex positive accounts of the practices through which nonjudicial actors participate in the production of constitutional meaning.”); Post & Siegel, *Equal Protection by Law*, *supra* note 53, at 455 (“The Court’s new interest in constraining Section Five power, when considered in light of the developments in Commerce Clause and Eleventh Amendment jurisprudence we have just discussed, raises disconcerting questions for the future of federal antidiscrimination law.”).

58. See Barkow, *supra* note 53, at 241 (“[M]y emphasis is on the Supreme Court’s view in recent years that it alone among the three branches has been allocated the power to provide the full substantive meaning of all constitutional provisions.”); Laura S. Fitzgerald, *Beyond Marbury: Jurisdictional Self-Dealing in Seminole Tribe*, 52 VAND. L. REV. 407, 408 (1999) (“The Court ruled in its own favor

Greenhouse, whose job it is to cover the Court, parodies the power-hungry Chief Justice: “So, just between us, I have no intention of settling for co-equal. In my view, the Supreme Court is not co-anything. If the election case proved anything, I trust it proved that.”<sup>59</sup>

At present, that famous line from *Marbury*—“It is emphatically the province and duty of the judicial department to say what the law is”<sup>60</sup>—does not look so good to progressives as it once might have.<sup>61</sup> Now the mantra of progressive scholars is fast becoming “popular constitutionalism.”<sup>62</sup> That is not to say there necessarily is inconsistency: after all, progressive legal scholars also fretted over the similar assertion of hegemony in *Cooper v. Aaron*,<sup>63</sup> and things might in fact be different in some important way today.<sup>64</sup> More to the point, this is all serious, thoughtful scholarship.

Nonetheless, it is essential to recognize that the intellectual thrust of this work—like that of Ely, Ackerman, Sunstein, and Tushnet—is inevitably a reaction to what is occurring in the world, and a reflection on the scholars’ own feelings about current events. It is altogether reasonable to assume that this latest torrent of theory would sound quite different if the Court were playing a different game. As Neal Devins recently explained,

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each time it decided an overt question about the federal ‘judicial Power’ vested by Article III, consistently voting to fortify the Court’s status within the Constitution’s structure for the separation of powers, often at Congress’ direct expense.”).

59. Greenhouse, *supra* note 12, at 438.

60. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

61. See Barkow, *supra* note 53, at 239 (“The problem, of course, is that this eloquent excerpt from *Marbury* cannot be taken out of context. The duty ‘to say what the law is’ does not necessarily imply a court monopoly on interpretation.”); Greenhouse, *supra* note 12, at 437 (portraying Chief Justice Rehnquist’s use of that sentence as “really about . . . protecting the Supreme Court’s authority to have the last word”); Kramer, *supra* note 53, at 88 (“Read in context, this sentence does not say what it seems to say to modern eyes when read in isolation.”).

62. See TUSHNET, *supra* note 21, at 181 (“Populist constitutional law deals with the values that ought to animate our public life.”); Kramer, *supra* note 53, at 165 (“Much simpler is just to acknowledge that the Constitution is not and never has been ordinary law, that while it has many features we associate with ordinary law, it retains a substantial ingredient of popular constitutionalism.”); Post & Siegel, *supra* note 56, at 44 (“The Court may assert that it possesses the exclusive prerogative to interpret the Constitution, but in the final analysis it shares that authority with the American people.”); cf. Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2599 (2003) (sketching “an understanding of constitutionalism and judicial review that rests upon popular acquiescence, and is more strongly tied to democratic electoral processes than most legal scholars acknowledge or believe to be the case”); Friedman, *supra* note 31, at 1387 (“[T]he work of constitutional judges must have both ‘legal’ and ‘social’ legitimacy. . . . [I]f those familiar with the Court’s decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate.”).

63. 358 U.S. 1 (1958). See generally Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387, 388-89 & nn.8-19 (surveying early scholarly criticism of *Cooper v. Aaron*).

64. According to Reva B. Siegel,

As the Supreme Court has most recently posed the question of judicial review, however, it has reoriented the question away from the countermajoritarian difficulty and the prerogative of judges to interpret the Constitution, and instead put in issue the prerogative of nonjudicial actors to participate in defining the Constitution’s meaning.

Siegel, *supra* note 57, at 305. There is something to this; then again, the two problems may be flips of a very similar coin.

A world without judicial review? Not that long ago—when the Left fought tooth and nail to defend the legacy of the Warren and (much of the) Burger Courts—the thought of taking the Constitution away from the courts would have been horrific. . . . How things change. Today, the Left is increasingly skeptical of a judge-centered Constitution. In part, smarting from several Rehnquist Court defeats, progressives see elected government as more apt to embrace their agenda than the judiciary.<sup>65</sup>

And from conservatives, a strange silence. Again, it could be they were too busy launching and participating in the conservative revolution to write about it. But it does not take a lot of effort to observe that some of what they wrote at the time of the conservative entrenchment was not as clear as it is now, and will not prove as helpful to them at the moment. Perhaps the best example is that the idea of the “Constitution outside the courts” now so prominent on liberal lips was originally a conservative idea.<sup>66</sup> As Robert Lipkin tells us, “[p]rogressive majoritarians now join the chorus by recommending a larger role for the elected branches in ascertaining constitutional meaning.”<sup>67</sup> The irony of progressives taking the conservative line was apparent to Devins and Fisher: “The degree to which some scholars now dismiss the Supreme Court as the exclusive source of constitutional law prompted Mike Paulsen recently to ask, somewhat plaintively: ‘Will nobody defend judicial supremacy anymore?’”<sup>68</sup> Now that their own slogan has been usurped by progressive scholars, one might suspect it will be less appealing in conservative quarters.<sup>69</sup>

#### IV

##### THE DILEMMA OF CONSTITUTIONAL THEORY

What are we to make of this? Forget for the moment what side you are on, assuming you are sure of that. Just sit back and think about what all this means for constitutional scholarship and constitutional theory. Should constitutional scholars feel comfortable switching sides in reaction to what the Court is doing and to who is sitting in the other branches of government? Can that be squared with the idea of doing “theory”?

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65. Neal Devins, *Reanimator: Mark Tushnet and the Second Coming of the Imperial Presidency*, 34 U. RICH. L. REV. 359, 359-60 (2000).

66. For examples of conservative scholarship placing interpretive authority outside the judicial branch, see John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371 (1988); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

67. Robert Justin Lipkin, *The New Majoritarianism*, 69 U. CIN. L. REV. 107, 113 (2000)

68. Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 84 (1998).

69. John Yoo is a notable exception. Although Yoo is a conservative, he candidly attacks even conservative activism. In examining the politicization of the appointments process, Yoo writes that “it seems that the Court’s recent effort to transform judicial review into a doctrine of judicial supremacy is an indispensable contributing factor. The emergence of judicial supremacy certainly seems to have occurred at the same time as the rise of interest in the ideological views of the Justices.” John C. Yoo, *Choosing Justices: A Political Appointments Process and the Wages of Judicial Supremacy*, 98 MICH. L. REV. 1436, 1458 (2000) (book review). Moreover, “[w]hile the Warren Court may not have truly claimed supremacy over the coordinate branches, its more conservative successors took the next step. . . . Despite its alleged efforts to reverse the Warren Court revolution, the Rehnquist Court has actually expanded the judiciary’s claims to supremacy.” *Id.* at 1459.



There are no easy answers. But there are words of caution. There is a saying, “Fool me once, bad on you; fool me twice, bad on me.” The switch that occurred between the beginning of the New Deal and the Warren Court was profound, but the further one got into it, the more permanent it seemed. It looked as though courts really could be forces for progressive change—or a troublesome trump of the elected branches, depending on how you saw it. It looked so permanent that long after the Warren Court was over scholars wrote (on both sides of the ideological divide) as though things had not changed again.

For perhaps the first time in U.S. constitutional history, the cycle has come full circle in a poignant way. Everyone is aware that the judiciary is in squarely conservative hands, that things are looking a lot like the early twentieth century again. That is why progressive scholars today sound so much like both their progressive cousins in the early 1900s and their conservative opponents of mid-century and beyond. We can be confident that if things remain the way they are, as soon as conservatives get their scholarly motor going, they are going to sound today like *Lochner* era conservatives in their defense of judicial review.

The next switch might come a bit sooner than the last one. We are living in volatile political times. The Court is 5-4 and has been for a long time. With the Republican victory in the 2002 congressional elections, the conservative tilt of the Court seems assured for at least the near future. Yet it remains impossible to predict how long Republican control will last. Moreover, the division between Republicans and Democrats in the Senate remains close enough to guarantee a Democratic veto over at least the most conservative appointments.

In light of having come full circle, and facing the possibility that things could begin to switch more quickly, it becomes necessary for us to confront what this means for us as constitutional theoreticians. When change was slow, and we lived cabined in our own generations, we could go about our business blissfully unaware. But history and historicism have stripped us of that luxury. Assuming we do not simply decide to play the ostrich, how do we respond?

The claim here assuredly is *not* one of hypocrisy or bad faith. For the most part the scholars writing today were not writing thirty years ago. There is no individual scholar to whom one can point as having switched sides on the question of judicial review. Nor is the claim that the work is not serious enough to be deemed theoretical. The point of Part I was to explain that the most serious of theoreticians face this very problem.

Rather, the claim here is that constitutional theorists are caught in a dilemma. On the one hand, they can adhere to their views, ignore shifting institutional politics, and write theory that at best will have the smell of the lamp about it, at worst might betray their own ideological values. On the other hand, they can allow their views to shift with politics, risking that they will appear as something less than aloof theoreticians.

The backward-looking eye of history suggests that the first horn of the dilemma—obliviousness to political change—can come at a serious price. There were scholars who sought during the last “Great Change” to adhere to their in-

tellethical positions, no matter what the circumstance. Although these thinkers have their place in the pantheon, critical history cannot treat them so kindly. Learned Hand and Felix Frankfurter both exemplify the difficulty faced by scholars (and judges) who try to adhere to their views long after those views have any meaning for those of their respective political persuasions. They struggled for consistency and paid a price.

For Frankfurter, that price was irrelevance, a certain amount of unavoidable (if not entirely conscious) hypocrisy, and a failure to be the leader of the Court he loved so dearly. As H.N. Hirsch explained,

Throughout the twenties and thirties, Frankfurter had decried the Court's strangulation of liberal social legislation. . . . Yet in the area of jurisprudence that was in fact to become the main preoccupation of the post-1937 Court—civil liberties and civil rights—Frankfurter was unprepared for what was to come.<sup>70</sup>

And even Frankfurter did not adhere to his restraintist creed in all cases, hard-pressed though he (and others) were to explain moments of deviance. When the Court struck down a state release program for religious instruction in *McCullum v. Board of Education*,<sup>71</sup> Frankfurter concurred, in an opinion one of his biographers observed “violated nearly every assumption upon which his system of judicial belief supposedly rested.”<sup>72</sup> In *Sweezy v. New Hampshire*,<sup>73</sup> Frankfurter concurred in the Court's judgment invalidating a state investigation into the lectures and political affiliation of an academic.<sup>74</sup> Bickel praised the opinion as one of “first importance,” but conceded he never successfully “identified sources from which this judgment was to be drawn that would securely limit as well as nourish it . . . .”<sup>75</sup>

Perhaps it is Hand who should stand as the paradigmatic example of the danger of failing to account for politics in constitutional theory, for he alone among the former challengers to judicial authority stuck staunchly to his restraintist creed. Hand had been against judicial overturning of legislative judgments during the progressive era, and he held to that position. In his famous *Holmes Lectures* he complained, “I cannot frame any definition that will explain when the Court will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the states within their accredited authority.”<sup>76</sup> Those lectures set off a storm, not least because Hand explicitly acknowledged that *Brown v. Board of Education*<sup>77</sup> was problematic. Virtually

70. H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 132-33 (1981).

71. 333 U.S. 203 (1948).

72. HIRSCH, *supra* note 70, at 193.

73. 354 U.S. 234 (1957).

74. *Id.* at 255.

75. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 33, 34 (1970).

76. LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES* 55 (1958).

77. 349 U.S. 294 (1955)

no one in the academy would waltz with him on the question of judicial review.<sup>78</sup> The *Lectures* made Hand a conservative pawn in the Jenner-Butler debate over jurisdiction stripping, to the point that he had to go public and clarify that his positions were being abused.<sup>79</sup>

Hand's insistence on consistency ultimately led him, in a fundamental way, to be blind to reality. Thus, in eulogizing Chief Justice Harlan Fiske Stone, who had, after all, authored footnote four of *Carolene Products*, Hand portrayed Stone as standing with him, consistently against judicial review:

[Stone] could not understand how the principle which he had all along supported, could mean that, when concerned with interests other than property, the courts should have a wider latitude for enforcing their own predilections, than when they were concerned with property itself. . . . There might be logical defects in his canon, but it deserved a consistent application or it deserved none at all. . . . It was because he was throughout true to his view, that, it seems to me, we should especially remember him with gratitude, and honor him as a judge.<sup>80</sup>

Hand might have been speaking of himself, but it is worth pointing out that neither Hand nor Stone is honored for the reason Hand suggested. Consistency is not a virtue that enshrines constitutional judges in revered memory.

On the other horn of the dilemma, scholars really must consider whether shifting their views in response to political change is consistent with the mantle of "theory." It is true that today's progressive or conservative scholars are not the very same people as their predecessors who took different positions in a different era. Still, there is an obligation to see oneself as part of a scholarly tradition, and to make sense of that tradition, rather than abandon it when it is no longer convenient.

It seems too easy to respond that, simply because constitutional law is inevitably wrapped up with politics, constitutional theory necessarily will shift along with political arrangements themselves. This goes to the heart of what it means to do theory. Whether normative or positive, a theory is by definition an understanding that applies across a set of cases. Cases may be different and need different theories to explain them. But theory also has the responsibility to explain coherently why the cases are different. That is the very obligation of constitutional theory.

## V

### SOME RULES FOR CONSTITUTIONAL THEORISTS

There are some lessons constitutional theorists might employ to ameliorate the difficulty of shifting theoretical positions. Observing change over time, and

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78. Even Herbert Wechsler, who gave the *Holmes Lectures* the year after Hand and also was critical of *Brown v. Board of Education*, was careful to distinguish himself on the ultimate question of judicial review. See Barry Friedman, *Neutral Principles, A Retrospective*, 50 VAND. L. REV. 503 (1997).

79. See 104 CONG. REC. 18, 673 (1958) (quoting a letter from Hand clarifying his position and distancing himself from conservatives who had cited his *Lectures* in favor of their Court-curbing plan).

80. Learned Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 696, 698-99 (1946).

the cycling in theory that accompanies it, suggests some rules scholars might adhere to in fashioning their own constitutional theories. They are rules of humility, testing, and theoretical minimalism and contextualism.

The first thing constitutional scholars might do is proceed with what might be called “empirical” humility.<sup>81</sup> This is humility about things for which we do not have all the evidence. Mark Tushnet has suggested we do away with judicial review, finding that on balance it does more harm than good.<sup>82</sup> Yet, with all due respect to Tushnet (whose scholarly credentials are enormous), we simply do not know nearly enough to answer this question at the level of generality he insists upon. For one thing, Tushnet’s focus—as is true of most constitutional scholars—tends to be on the Supreme Court. Attention to life in the lower courts might teach that, even in a conservative era, progressives might yet find many small outrages that those courts can and still do remedy.<sup>83</sup> Is this power to be taken away? For another, it is very difficult to imagine how our world might be different had we not had judicial review. In an excellent recent piece, Charles Cameron surveys the literature about whether judicial review contributes over time to liberal democracy by facilitating economic growth, the preservation of human rights, and the maintenance of democracy.<sup>84</sup> His verdict? We don’t know—though in fairness he seems skeptical of claims that judicial review provides no help to these values.<sup>85</sup> Adrian Vermeule suggests that we will never know.<sup>86</sup> Maybe he is right, but those who approach things empirically have learned something about the relationship between judicial review and social

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81. See Mark Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQUIRY 309, 320-22 (2002) (book review) (taking grand constitutional theorists to task for giving insufficient attention to empirical reality).

82. See TUSHNET, *supra* note 21, at 154-76 (arguing in his chapter “Against Judicial Review” that the best solution may be to amend the Constitution to eliminate judicial review). *But see* Whittington, *supra* note 5, at 541 (criticizing Tushnet for being “short on specifics about the precise nature of [the] proposal”).

83. See generally Chemerinsky, *supra* note 22, at 1423-25 (describing how Tushnet ignores matters such as lower court decisions that fall below the attention of the Supreme Court).

84. Charles H. Cameron, *Judicial Independence: How Can You Tell It When You See It? And, Who Cares*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY INQUIRY 134 (Stephen B. Burbank & Barry Friedman eds., 2002); see also Rebecca L. Brown, *Activism is Not a Four-Letter Word*, 73 U. COLO. L. REV. 1257, 1271 (2002) (“I would much rather impose on the government the obligation to justify its incursions into the lives of its citizens—knowing that sometimes it will be erroneously prevented from governing exactly as it wishes—than take what is today known as the “judicial minimalist” approach, leaving any matter that is in doubt to the democratic process and leaving individuals to blow in the wind of majority will with no protection from courts.”); Chemerinsky, *supra* note 22, at 1421-33 (discussing ways in which Tushnet minimizes impact of judicial review); Whittington, *supra* note 5, at 537 (“Even if Tushnet is right in his argument that judicial review mostly amounts to ‘noise around zero,’ in this context the noise might matter.”).

85. Cameron, *supra* note 84, at 141-45.

86. See Adrian Vermeule, *Judicial Review and Institutional Choice*, 43 WM. & MARY L. REV. 1557, 1563 (2002) (arguing that “the number and scope of the variables we’d need to consider, in a fully-specified institutional-choice analysis of judicial review, is staggering,” and concluding that adding or taking away information only increases the problem).

good,<sup>87</sup> and even in the absence of a clear answer there are indications that suggest caution.

Similarly, empirical humility is called for when making assumptions about where support for one's positions lies. Much of the talk about the Constitution outside the courts, popular constitutionalism, and even the countermajoritarian problem, seems to rest on the assumption that the "people" have a different political worldview than the Supreme Court at the moment.<sup>88</sup> Yet there is a vast body of literature that suggests, as a general matter, that this is wrong. Certainly one could listen to Robert Bork attack courts for interfering with popular will,<sup>89</sup> hear him cite abortion as an example,<sup>90</sup> study actual poll results,<sup>91</sup> and wonder just what he was talking about. The same may be true today regarding the Supreme Court's federalism decisions, which progressives seem to believe run counter to popular opinion.<sup>92</sup> Perhaps assertions of this sort require more caution, a little less certainty.

Another form of necessary humility for constitutional theorists should already be apparent: historical humility. Eric Severeid once said that "[t]he most

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87. See Cameron, *supra* note 84, at 141-45 (finding, *inter alia*, "important relationship[s]" between judicial independence and areas such as economic growth and civil liberties); see also J. Mark Ramseyer, *Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 723-28, 740-47 (1994) (finding that despite similar constitutional provisions, Japanese courts are empirically less independent and more tightly controlled by politicians than their U.S. counterparts and suggesting that such differences may result from the less-contested nature of Japanese elections).

88. See, e.g., Kramer, *supra* note 53, at 11 ("[I]t was the people themselves—working through or responding to their agents in the government—who were responsible for seeing that the Constitution was properly interpreted and implemented. The idea of turning this responsibility over to judges was unthinkable."); Post & Siegel, *supra* note 56, at 44 (making the point that the Court's "aggressive new vision of the juricentric Constitution" will need to pass public muster); TUSHNET, *supra* note 21, at 194 ("[T]he public generally should participate in shaping constitutional law more directly . . . [and] reclaim [the Constitution] from the courts.")

89. See BORK, SLOUCHING TOWARDS GOMORRAH, *supra* note 29, at 174 ("*Roe* is nothing more than the Supreme Court's imposition on us of the morality of our cultural elites.>").

90. *Id.*

91. See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 608 (1993) (citing polls finding that "[b]efore 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," and that "[s]ince *Roe*, at least a plurality of those polled consistently favor the *Roe* result."); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 756-57 (finding that, depending on circumstances, between seventy and ninety percent favored a legal, as opposed to moral, right to abortion); see also David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policy Maker*, 5 LAW & POL'Y Q. 405, 423-24 (1983) ("Subsequent surveys showed a growing majority favoring a woman's right to obtain an abortion, at least under certain circumstances.").

92. See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066-83 (2001) (relating the story of how the present Court's stance toward federalism is a result of political events arguably calling for just that); Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307, 334-59 (2001) (discussing the relationship between the loss of popular faith in government and the Court's federalism jurisprudence); Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 496-509 (2001) (explaining the Court's "velvet revolution" in federalism as a function of political forces); cf. Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 31-32, 34-37, 51-62 (1999) (describing how constitutional orders change in response to political events).

distinguished hallmark of the American society is and always has been change.”<sup>93</sup> It is too easy to enjoy the benefit of hindsight, forgetting that foresight is often unattainable. Two years before they happened, did anyone expect the scandal that led to the Clinton impeachment, or the events of September 11, 2001? Was anyone any more certain two years in advance of the result in *Brown v. Board of Education*,<sup>94</sup> or even of *Lopez*<sup>95</sup> for that matter?

Historical humility suggests that we must test our theories in the crucible of very different circumstances. When we devise theories of constitutional meaning, and especially ones that govern judicial review, we ought to interrogate them by properly asking whether they are theories we would be willing to live with under different political configurations. The past can help us with this. We can ask, “Is this a theory about judicial review that I would have advanced in the heyday of the X (pick some favored—or disfavored) Court?” But we need to be able to peer into the future as well. It is sometimes easy to distinguish the past, because the differences are apparent. In developing constitutional theory, one perhaps should conjure up the most difficult future case imaginable, not simply explain away one from the past.

Thus, for example, frustrated with the current Court’s treatment of matters of race, some scholars have suggested that the political branches are more appropriate to address matters of racial equality, and that race legislation should be reviewed under a rational basis standard.<sup>96</sup> In a world in which the Supreme Court has been hostile to rights protection and has a narrow view of equality, while the Congress has been relatively more understanding and active, it is easy to see why these arguments are advanced. Moreover, it is possible to develop a rationale for greater deference when looking into the mirror of the past. Stephen Griffin does so in a sustained argument that relies specifically on the democratization of society and of the legislative branches, such that the legislature is now more trustworthy than the courts in matters of race.<sup>97</sup> In other words, Griffin has a serious argument about why things have changed in a way that justifies a change in rules.

But Griffin may be overly optimistic about what the future holds. To ensure this is a rule he really wants, he should assess whether he plans to abide by this rule should the now-democratized legislative bodies in which he places faith

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93. Peter de Jager, 1 *MANAGING CHANGE & TECH.* 1, 12 (2000) (quoting Severeid), available at <http://www.technobility.com/pdfs/mct0108.pdf>.

94. 349 U.S. 294 (1955).

95. *United States v. Lopez*, 514 U.S. 549 (1995).

96. See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 2025 (2003) (“Courts applying the law of the Constitution should interpret Section Five as authorizing Congress to act on its own independent understanding of the Constitution.”); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 *NW. U. L. REV.* 410, 435 (1993) (“What emerges is a picture in which we understand ourselves to be obliged—to be constitutionally obliged—to address the injustice of poverty and entrenched racial disadvantage, but see the primary addressees of this obligation as elected officials rather than judges.”); Griffin, *supra* note 53, at 312-13 (advocating abolishing heightened scrutiny in cases of “statutes enacted to prevent unjust discrimination”).

97. Griffin, *supra* note 53.

turn out not to be as supportive of the racial equality he prefers. Suppose, for example, that a future Supreme Court thinks well of affirmative action in education,<sup>98</sup> but that Congress believes all racial preferences should be prohibited. Perhaps Griffin believes this impossible, but he must be willing to live with his theory if the results are the ones he dislikes.

Finally, the process of political change and the problem of cycling theory might suggest that we narrow and contextualize our solutions, pay careful attention to the precise immediate problem, and eschew quick calls for fundamental structural change. The more ready we are to adapt familiar cures unthinkingly, the more likely we are to be wrong in our diagnosis of the disease itself. The more wide-reaching our solutions, the more likely they are going to need to be tailored in the future.<sup>99</sup>

History here, as always, has something to teach us. In the past, some were angry with the Warren Court and its often remarkably close cousin, the early Burger Court. Simply adopting the progressives' slogan, conservatives attacked that Court at times for interfering with popular will.<sup>100</sup> The criticisms often were remarkably inapt. For example, it seemed odd to criticize the Warren Court's reapportionment decisions as countermajoritarian: those decisions were wildly popular, not least because democracy could not seem to fix the problem.<sup>101</sup> The

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98. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (decided after this article was written, upholding some affirmative action remedies in higher education).

99. For example, Stephen Griffin suggests—or at least attributes to the “new critique”—the idea that “judicial review should never be exercised to restrict the scope of any constitutional right.” Stephen M. Griffin, *Has the Hour of Democracy Come Round at Last? The New Critique of Judicial Review*, 17 CONST. COMMENT. 683, 699 (2000) (book review). It is easy to see the appeal of such a suggestion to progressives watching the Supreme Court invalidate rights-expanding legislation. It is also easy to forget that such a rule would not have benefited progressive efforts during the *Lochner* era, and that constitutional rights come in a variety of flavors.

100. Following a series of decisions limiting congressional and state power with regard to Communists and Communist sympathizers, Senators William Ezra Jenner and John Marshall Butler introduced a bill designed to curtail the Supreme Court's jurisdiction. *A Bill To Limit the Appellate Jurisdiction of the Supreme Court in Certain Cases*, S. 2646, 85th Cong. (1957). During the hearings over the bill, scathing attacks were leveled at the Court for usurping the role of the legislature and trampling popular will. See, e.g., *Jenner-Butler Hearings*, *supra* note 42, at 113 (statement of R. Carter Pittman) (“Nine men in black robes [rode] herd over the Congress and the people.”); *id.* at 168 (statement of the Honorable William Old, Missouri Circuit Court Judge) (“It is now clearly apparent, from a long list of revolutionary decisions by the Supreme Court, headed by Chief Justice Warren, that the Court is determined to destroy our dual system of government under the Constitution, and create, by usurpation and encroachment, a judicial oligarchy of unparalleled proportions.”); *id.* at 246 (statement of W.E. Michael) (“This usurpation of power, without constitutional authority, not only relegates to subordinate positions the legislative and executive branches, but has the effect of destroying the sovereignty of the individual States, their constitutions and courts, by creating a highly centralized Federal Government headed by a supercourt.”); David Riesman, *New Critics of the Court*, NEW REPUBLIC, July 29, 1957, at 11 (“The Court has usurped the power of the Congress, the State appellate courts and the juries of the States. In the exercise of dictatorial powers the difference between the Kremlin and the Supreme Court is that the Kremlin is composed of 11 men and the Supreme Court only 9” (quoting a Columbia, South Carolina, newspaper, *The State*)).

101. See, e.g., Alexander M. Bickel, *Reapportionment and Liberal Myths*, 35 COMMENT. 483 (1963) (opposing decisions but conceding their popularity); William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 606 (2002) (“[O]pinion polls indicated that the Court's decision in *Reynolds*, the most sweeping of its reapportionment decisions, received far more support than disapproval.”); see also Philip B. Kurland, *The Su-*

point here is that the Warren Court's problem, if it had one, was not in undoing the work of the other branches (which often were sitting on their duffs waiting for someone else to take action). And it was not in interfering with popular will, because at least many of the Warren Court's decisions had public approval. (Besides, what is judicial review for?) Rather, as some more careful critics noted, the Warren Court simply was moving too fast, rushing ahead of a society already moving in the right direction. The criticism may be valid: surely *Roe v. Wade*<sup>102</sup> and *Miranda*<sup>103</sup> both have undergone revision.

Similarly today, progressives are angry at the Court, especially about its striking down progressive legislation protecting minority rights. It is not clear—from a theoretical standpoint—that the answer is, as some suggest, eliminating judicial review entirely. It is not even clear that the right rule is one of generalized deference to Congress,<sup>104</sup> or quick acceptance of congressional factual records.<sup>105</sup> It is hard to say, of course; that is the point. But theoretical responses to the Supreme Court are more likely to survive the test of history if they tackle the merits of what the Court is doing<sup>106</sup> rather than jump to suggestions of structural change. For example, there is a persuasive case that, in terms of equality and the need for national action, the Supreme Court got it exactly wrong in *United States v. Morrison*,<sup>107</sup> striking down the civil damages remedy of the Violence Against Women Act.<sup>108</sup> This sort of substantive, narrow critique also demands respect for the judgment of the people and Congress. Suggestions for

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*preme Court 1963 Term—Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 167 (1964) (suggesting that there are “many” who are not convinced that the Supreme Court exceeded its role in the reapportionment decisions); J. Skelly Wright, *The Role of the Courts: Conscience of a Sovereign People*, REPORT, Sept. 26, 1963, at 30 (“In state after state, citizens’ groups have stepped forward, swiftly and effectively, to demand enforcement of the Constitutional principles of equality of which the Supreme Court had reminded them.”).

102. 410 U.S. 113 (1973).

103. *Miranda v. Arizona*, 384 U.S. 436 (1966).

104. See Griffin, *supra* note 53, at 312-13 (advocating deference to any use by Congress of its Section Five power); see also Sager, *supra* note 96, at 419 (“[O]ur concern is with the possibility that there are limited circumstances in which the judiciary should stay its hand and leave the enforcement of some aspects of the Constitution to popular political institutions.”).

105. The literature here is very thoughtful, although it seems tilted strongly (by current events) toward a rule of generalized deference, and against requiring serious fact-finding out of Congress. See, e.g., William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 90 (2001) (“Legislative record review . . . represents a novel mode of judicial review that . . . threatens to impose procedural and substantive constraints on legislative action that have no support in precedent or in constitutional text or structure.”); Phillip P. Frickey & Steven S. Smith, *Judicial Review, The Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002) (presenting a careful review of how the Court's demands upon Congress with regard to fact finding square up with how political science literature understands Congress to operate, and determining that the Court's approach is “institutionally wrongheaded,” with special emphasis on its federalism decisions).

106. See Brown, *supra* note 84, at 1272-73 (“Accordingly, what we should be talking about is not superficial resemblances between the Warren and Rehnquist Courts, or the hypocrisy of their respective critics and supporters, but rather the defensibility of the current Court's constitutional values.”)

107. 529 U.S. 598 (2000).

108. 49 U.S.C. § 13981 (1994).



structural change demand that same respect, but a narrow critique is less likely to resound in difficult ways under different circumstances.<sup>109</sup>

None of this is to deny that if fast change is wished of the Supreme Court, attacks on it and the institution of judicial review might be the best way to achieve it. History unquestionably teaches that the Court tends to respond to threats to its institutional independence. Such was apparently the case in 1937, and in 1957,<sup>110</sup> and these are lessons that some on the Court still remember.<sup>111</sup> Those who have forgotten would probably benefit from a refresher.

Initiating such a refresher, however, seems appropriate to the realm of advocacy, and not to theory. In the past, such moves have been unequivocally politically activist. Though they have achieved their desired purpose, there also has been some discomfort with having had to travel this route.<sup>112</sup> Among academics, some of whom participated in the great battles of 1937, this problem

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109. See Post & Siegel, *supra* note 53, at 513-15 (discussing the Court's interpretation of Equal Protection and Section Five power in the wake of *Kimel* and *Morrison*, and arguing that it gives "institutionally mediated expressions to social norms," when read carefully).

110. President Roosevelt's Court-packing plan was in part defeated by a series of 1937 Supreme Court opinions narrowly upholding New Deal legislation. See Turner Catledge, *Split on Court Bill*, N.Y. TIMES, Apr. 13, 1937, at 1 (reporting that opponents of the Court plan called the decision a "death-blow," and that even Roosevelt conceded that the decision "tended to relieve the 'urgency' for court reorganization"); *Press Views on the Labor Decision*, N.Y. TIMES, Apr. 13, 1937, at 21 (summarizing headlines from across the country, including "Blow to Court Packing" in the *Kansas City Star*, "Should Remove Plan's 'Last Prop'" in the *Hartford Courant*, and "Roosevelt View Held Disproved" in the *Los Angeles Times*).

In 1957, in response to a series of decisions limiting state and congressional power with regard to Communists and Communist sympathizers, Senators Jenner and Butler introduced a bill designed to curtail the Supreme Court's jurisdiction. See *supra* note 100 and accompanying text. The Supreme Court responded to the crisis by tempering its more controversial positions. See C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT 1957-60, at 121 (1961) ("[T]he Court itself contributed to the defeat of the anti-Court legislation by subsequent moderation of the position taken in some of its controversial decisions."); Mark Tushnet, *The Warren Court as History: An Interpretation, in THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE* 6 (Mark Tushnet ed., 1993) ("[T]he Court retreated—or so it seemed. . . . [T]he Court's majority insisted that it had not changed course[,] but . . . many commentators were skeptical of the majority's claims, particularly because the later cases were decided over strong dissents by the liberal core of the Warren Court . . .").

111. See, e.g., *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 787 (2002) (Breyer, J., dissenting) ("This understanding led the New Deal Court to reject overly restrictive formalistic interpretations of the Constitution's structural provisions, thereby permitting Congress to enact social and economic legislation that circumstances had led the public to demand."); *United States v. Morrison*, 529 U.S. 598, 644 (2000) (Souter, J., dissenting) ("The Court in *Carter Coal* was still trying to create a laissez-faire world out of the 20th-century economy, and formalistic commercial distinctions were thought to be useful instruments in achieving that object. The Court in *Wickard* knew it could not do any such thing and in the aftermath of the New Deal had long since stopped attempting the impossible."); *Washington v. Glucksberg*, 521 U.S. 702, 760 (1997) (Souter, J., concurring) ("*Allgeyer* was succeeded within a decade by *Lochner v. New York*, and the era to which that case gave its name, famous now for striking down as arbitrary various sorts of economic regulations that post-New Deal courts have uniformly thought constitutionally sound.") (citation omitted).

112. See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 58-63 (2002) (describing how after the fact, court attackers seemed to regret the course of action that had been taken).

proved particularly acute, especially when they had to make the turn from politics back to theory in the aftermath of these battles.<sup>113</sup>

None of this is to suggest that discussions of structural change are, or should be, off limits for constitutional theorists. Indeed, as parts of the world democratize, as the fifty United States consider judicial reform, there are ample opportunities for constitutional theorists to suggest how the Framers got it wrong with regard to the federal judiciary. Perhaps they got it wrong enough that even in the context of the federal courts, change is appropriate. It is just that advancing these claims in the realm of theory is—or should be—entirely different than doing so in the heat of political battle.

## VI

### CONCLUSION

There is no guarantee that these lessons—of humility, of testing, of avoiding quick claims to structural solutions and focusing carefully on the exact problem—will solve the problems of constitutional theory. It cannot be said too many times: there are no easy answers. But simply because there are no easy answers does not mean there is not a problem. History has shown us that theoretical constitutional arguments have an uncomfortable way of coming around again. That suggests that if we really want to call what we do “theory,” we need to think of exactly what that means in the inevitably political realm of constitutional law.

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113. See Laura Kalman, *Law, Politics, and the New Deal(s)*, 108 YALE L.J. 2165, 2207 (1999) (discussing legal process scholars who had been in favor of court packing).