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"Shut Up He Explained"

Mark V. Tushnet

Georgetown University Law Center, tushnet@law.georgetown.edu

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Mark V. Tushnet

Professor of Law

Georgetown University Law Center

tushnet@law.georgetown.edu

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“SHUT UP HE EXPLAINED”

Mark Tushnet

According to Robert Bennett, judicial review should generate a sense of difficulty, but not because it is, in Alexander Bickel's famous characterization, counter-majoritarian.¹ To be counter-majoritarian, judicial review would need to stand against a majoritarian system in the other branches. But, as Bennett cogently argues, the nonjudicial branches are not well-described as majoritarian.² Rather, they are conversational, in the sense Bennett outlines. Still, Bennett argues, judicial review in its contemporary form is counter-conversational, despite some attempts at what Bennett calls “conversational outreach by the courts.”³ The counter-conversational nature of contemporary judicial review cannot be eliminated, according to Bennett, without substantial revision in the prevailing understanding that the Constitution (and statutes) are to be interpreted by the courts. Ordinary interpretation is, in Bennett's view, counter-conversational as well, because it terminates, or at least substantially transforms, an ongoing conversation about the Constitution's meaning or the meaning of statutes expressing the political branches' views on public policy.⁴

Bennett presents his argument with his usual insight. He is, however, a bit too delicate in his presentation. The contemporary Supreme Court is not simply counter-conversational.⁵ Rather, the Court's self-understanding leads it to authoritarian efforts to shut off conversation by disparaging those who refuse to shut up after the Court has spoken.⁶ Bennett locates the counter-conversational difficulty in the concrete consequences of judicial

* RING LARDNER, *The Young Immigrants*, in THE RING LARDNER READER 411, 426 (Maxwell Geismar ed., 1963) (“Are you lost daddy I asked tenderly? Shut up he explained.”).

** Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. I would like to thank Frank Michelman for comments and for directing me to some of his writings that I had overlooked.

¹ See Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 Nw. U. L. REV. 845 (2001); see also Editor's Note, 95 Nw. U. L. REV. 843 (2001) (providing a brief introduction to the *Northwestern University Law Review* Spring 2001 Symposium exploring the counter-majoritarian difficulty).

² See *id.* at 847-52, 854-71.

³ See *id.* at 880-88.

⁴ *Id.* at 852-53, 871-80.

⁵ I refer to the contemporary Supreme Court in the belief that the Court did not always hold the self-understanding it now has, and in the hope that it might some day hold a different self-understanding.

⁶ I draw the term “authoritarian” from Robin L. West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531 (1988).

review. In contrast, I suggest that the difficulty is at least exacerbated by the contemporary Court's rhetoric.

Part I of this Commentary examines the conversational model of politics. I argue that the virtues Bennett finds in the conversational model exist only when, and to the extent that, participants in civil and political society can engage in undominated conversation. The requirement that conversation be undominated generates a substantial set of social prerequisites, mostly dealing with equality. And yet, determining what social arrangements actually satisfy those prerequisites is itself a matter of constitutional controversy. Resolving such controversies through politics is no solution, because the political arena is where we seek to ensure that nondomination prevails in civil society, and, in turn, to ensure that nondomination prevails in political society.

The courts might seem a promising alternative. Part II of this Commentary examines the contemporary Supreme Court's participation in our constitutional conversations. After noting the ways in which the Court might be seen as a voice in the wilderness, speaking to no one but itself, I raise questions about the need for judicial participation in a conversation structured by the Constitution. Part II concludes with a more extended discussion of the contemporary Supreme Court as an institution that seeks to dominate its conversational partners. Resolving the controversies over what constitutes an appropriate condition of nondomination through the courts would require that the Court itself renounce the authoritarianism it has lately exhibited. My own view is that American constitutionalism has developed to the point where such a renunciation is extremely unlikely. But one can always hope.

I. THE POSSIBILITY OF UNDOMINATED CONVERSATION

According to Bennett, one advantage of a conversational model of constitutional adjudication is that conversations give those who lose out in a particular dispute a stake in the ongoing operation of society.⁷ As I argue in Part II, some forms of conversation may produce alienation rather than solidarity. A conversation with a bully is unlikely to enhance the partner's identification with a community in which the bully and the partner participate. Indeed, a conversation with a bully is hardly a conversation at all.

The problem of conversational domination is larger than this, however. The democratic advantages Bennett sees in a conversational model of constitutional adjudication can be obtained only when the conversational participants are undominated, not only within the process of constitutional adjudication, but in the domain of civil society where they develop the views they bring into these constitutional conversations. Bennett describes and criticizes a "vote-centered" model of democracy, but not democracy it-

⁷ Bennett, *supra* note 1, at 875.

self.⁸ Yet, democracy presupposes that people are free and equal. Satisfying that presupposition, in turn, requires the existence of certain institutional arrangements.⁹ Conversational outreach will have limited value if those whom the Court invites to participate in conversation are constrained in what they can say. Identifying the conditions of undominated conversation leads to additional difficulties for Bennett's model of constitutional adjudication.

The German political theorist Jürgen Habermas has developed what is probably the most developed account of political life on a conversational model.¹⁰ Habermas's aim is a society in which undominated conversations—that is, conversations that reflect the basic normative presupposition that all people are created equal—can occur. The most important feature of Habermas's model is a set of rather thick prerequisites to any social system in which true conversations aimed at reaching a normatively justified political agreement can occur. The precise content of that set of prerequisites is unimportant for present purposes. For heuristic purposes, we can think of the model as requiring that every member of society have sufficient material resources to be reasonably independent of others with respect to obtaining the necessities for a minimally decent life and that every member of society have sufficient education to be able to participate on reasonably equal terms in conversations about matters of political concern.

Frank Michelman has explored the problems associated with embedding a conversational model of judicial review in a conversational model of politics generally.¹¹ The basic idea is simple. Some conversations deal with adopting appropriate policies on such things as public assistance and provision of medical care. When do people have reasons for affiliating themselves with the social order that produces policies on those matters even if they disagree with the policies chosen? When the conditions for undominated conversation are satisfied, because those conditions ensure that even the losers have been treated respectfully and as equals.

The problems arise when the policies at issue implicate the conditions for undominated conversation. The best we can do in advance is identify

⁸ Those who are dominated in civil society may gain a sense of a stake in society by participating in conversations about government, but the *democratic* pedigree of the stake they have can surely be questioned. At this point, Professor Bennett's claim that he is interested in describing the American constitutional system, not prescribing a normative position, becomes quite important. For myself, I doubt that one could fully account for the sense of a *difficulty* absent some normative position. In addition, the U.S. constitutional system's deviations from a vote-centered model of democracy can be, and in my view should be, justified as derived from various (sometimes contestable) democratic premises. If that is so, Professor Bennett does not criticize democracy as such.

⁹ Jürgen Habermas refers in this connection to the "co-originality of civic and private autonomy." JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 127 (William Rehg trans., 1996).

¹⁰ See generally *id.*

¹¹ See FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 3-62 (1999).

such conditions in a rather abstract way: a “reasonably adequate” education, “basic minimum” material well-being, and the like.¹² However, our public policies on those matters will inevitably have a far more concrete content. For example, our discussions of education policy may require us to decide which form of bilingual education best satisfies the abstract requirement of reasonable adequacy.¹³ Suppose that the outcome of the policy debate on education is that we adopt an English language immersion program. Now, the losers lack reasons to affiliate themselves with the outcome. They will conclude that the particular policy makes it impossible to have undominated conversations, because, in their view, only some other policy would produce an education system compatible with the preconditions for undominated conversation.

Pretty clearly, there can be no *substantive* solution to this problem, because the problem reproduces itself at every higher level to which one might try to move. Michelman and Habermas both suggest an institutional solution consistent with their conversational commitments. We need to ask, they say, what sort of institution is most likely to make undominated conversations about the conditions for undominated conversation to take place *within that institution*.

Bennett offers an answer much like Michelman’s. According to Michelman, the most promising setting for such conversations is one in which the decision maker is constantly exposed “to the full blast of the sundry opinions on the question of the rightness of one or another interpretation, freely and uninhibitedly produced by assorted members of society listening to what the others have to say out of their diverse life histories, current situations, and perceptions of interest and need.”¹⁴ The Court’s mechanisms of conversational outreach, discussed by Bennett, are ways of maximizing the Court’s exposure to that full blast.

Michelman’s formulation may be conceptually inadequate,¹⁵ but it does point us in the right direction. Recall that what is at issue is precisely *whether* the opinions to which the Court is exposed are the product of “free” and “uninhibited” decisions, deliberations, or choices. We are never

¹² For a cogent formulation, see Frank Michelman, *How Can the People Ever Make the Laws? A Critique of Deliberative Democracy*, in *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* 145, 163-64 (James Bohman & William Rehg eds., 1997) (describing contestable claims about which policies will achieve the desired goals).

¹³ Michelman repeatedly uses the examples of campaign finance and anti-pornography legislation for his expository purposes, but the structure of the argument is the same as that presented here.

¹⁴ MICHELMAN, *supra* note 11, at 59.

¹⁵ As Michelman acknowledges elsewhere, this and related formulations presuppose that “[i]ndividuals are regarded as ideally and primordially free and equal.” Frank I. Michelman, *Human Rights and the Limits of Constitutional Theory*, 13 *RATIO JURIS* 63, 74 (2000) [hereinafter Michelman, *Human Rights*]; see also Michelman, *supra* note 12, at 162-65 (describing the “regress problem”). But, of course, what is at issue is whether individuals located in real societies are *in fact* free and equal, according to standards that are themselves in dispute.

going to be able to know whether they are or not. The best we can do is design institutions receptive to the full blast of whatever happens to be out there in the society. We then hope those institutions will interact with the holders of diverse opinions in the society to move us toward a situation in which those who lose on questions going to the conditions of undominated conversation nonetheless believe that they have been, and will continue to be, treated as equals.

We could next try to specify the characteristics of institutions likely to be open to the full blast of diverse opinions. We might say, for example, that such an institution ought to be accessible pretty much on demand by anyone who feels aggrieved by some policy affecting the preconditions for undominated conversation. We might add that such an institution ought to be required to give a definitive decision when a demand is made on it. And, of course, we would want the institution to treat respectfully all who come to it, by giving them all a reasonably full opportunity to explain why the policy they think ought to be implemented is more compatible with the preconditions of undominated conversation than are alternative policies.

The conceptual problem with this effort should be obvious. Once again we are describing institutional characteristics at a fairly high level of generality. Assume, for example, that we think a judicial institution seems to have the listed characteristics. Does it continue to do so when the court has discretion to consider which cases it will hear? This is exactly the sort of substantive question that the move to institutions was designed to avoid.¹⁶

Perhaps, however, the conceptual difficulty can be avoided by a comparative and empirical move.¹⁷ We might examine the actual institutions we have instead of attempting to design an institution that satisfies whatever conditions we think are appropriate, and evaluate these institutions comparatively to see which is *more* open to the full blast of competing opinions, without attempting to decide whether the one that comes out ahead in that comparison is open *enough*.¹⁸

Not being a scholar of our legislative processes, I am not in a position to conduct the comparative inquiry. But, as a scholar of the Supreme Court, I can say some things about the present Supreme Court's openness to the full blast of competing opinions. The short answer, developed in more detail in the next Part of this Commentary, is that the present Court is not all

¹⁶ See Michelman, *Human Rights*, *supra* note 15, at 76 ("So again we are thrown back on trying to show respect-worthiness, this time of the lawmaking procedures that produced the constitutive laws of democracy. Looming now is an infinite regress of respect-worthiness claims.").

¹⁷ Michelman suggests this in asserting, as a solution to the regress problem, that "nothing suffices for validity short of actual submissibility, at any time, of pending derivations to the critical and corrective rigors of *actual* democratic discourses." Michelman, *supra* note 12, at 165.

¹⁸ See *id.* at 166 ("To take validity to be the key to political rightness is to be ready, sometimes, to accept as morally binding . . . fundamental-law resolutions that we *now honestly* judge to be in some material degree deviant from justice, just because those resolutions came out of a democratic procedure that (i) is in force and (ii) we judge to be reasonably defensible as justice-seeking.").

that open. Of course, this does not establish that our legislative institutions are any better, but it may help motivate a further inquiry into the degree to which vote-centered institutions, as Bennett describes them, have the characteristics we seek in an institution charged with determining policy on questions going to the preconditions of undominated conversation.¹⁹

II. THE DANGLING CONVERSATION²⁰

What are the Supreme Court's contributions to our constitutional conversations? I suggest three possible answers: (1) the Court is a *voice in the wilderness*, saying things that no one pays much attention to, or a *puppet*, mouthing words written elsewhere; (2) the Court *babbles incomprehensibly*, saying things that have no substantial content; or (3) the Court *shouts down* its conversational partners, insisting that they have nothing to contribute to the supposed dialogue. These are, of course, mostly incompatible answers. I believe that one of them, or perhaps some reconcilable elements of them, provides a more accurate description of the Court's participation in constitutional conversations than does Bennett's more cautious description.

A. *The Court as Voice in the Wilderness or as Puppet*

Glendower asserted that he could "call spirits from the vasty deep." Hotspur replied, "Why, so can I, or so can any man; But will they come when you do call for them?"²¹ Perhaps the Supreme Court participates in constitutional conversations in the way Glendower called the spirits forth: the Court says what it thinks about the Constitution, and life goes along pretty much as before.

Gerald Rosenberg is skeptical about the Court's ability to contribute to constitutional dialogues.²² As Rosenberg sees it, the Court has little ability to affect policy outcomes in areas of real importance. Rather, policy outcomes are determined by the confluence of political forces, which the Supreme Court may sometimes ratify. But the Court's intervention fails when it attempts to act on a specific and important issue without substantial pre-existing support on that issue from politically organized forces.

¹⁹ Honesty requires me to note, though, that my untutored intuition is that Congress and many other legislatures do reasonably well on the scale of desirable characteristics. For example, my intuition is that ordinary citizens find it easier to get answers to their concerns from their local legislators, and even from their members of Congress, than from the Supreme Court, which will listen (almost) only when the complainant is able to present his or her case through a sufficiently talented lawyer.

²⁰ "You can hear the ocean roar/ In the dangling conversation/ and the superficial sighs/ in the borders of our lives." PAUL SIMON & ARTHUR GARFUNKEL, *The Dangling Conversation, on PARSLEY, SAGE, ROSEMARY AND THYME* (Columbia 1966).

²¹ WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE FOURTH* act 3, sc. 1.

²² See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

The social theory underlying Rosenberg's account of the courts' role is simple. The courts are not autonomous actors in politics. They have relatively little power, and everyone, including the justices, knows it. True, the courts have a modest resource in a widespread ideological belief that they implement the rule of law, something distinct from the rule of men and women implemented in other parts of the political system. But, the generalized ideology of the rule of law does not give the courts enough power to allow them to prevail over well-organized opposing forces. In short, sometimes the Supreme Court is a voice in the wilderness, whose communications everyone else ignores, or it is a puppet, saying only what is already being said by other political actors with more power to accomplish things.

Barry Friedman has offered a more optimistic version of this account of the Court's role in constitutional conversations.²³ He has explored the dialogue between the Supreme Court and other governing institutions.²⁴ In a simplified version, the dialogue proceeds as follows: Congress makes an initial determination that some statute advances public policy goals in a constitutionally permissible manner.²⁵ The Court then offers its opinion on the constitutional question, and to some extent may suggest that the set of public policies Congress sought to advance would be equally well-promoted by a slightly different, and constitutionally permissible, statute. Congress then responds. Sometimes Congress adjusts its statute to take account of the Court's concerns. Sometimes Congress reasserts its view that the statute it initially enacted remains a constitutionally permissible way of advancing the complex set of policy goals it had in mind and that the Court's suggested adjustments would unduly compromise some policy goals. Congress may make some purely cosmetic changes in its statute to avoid a constitutional confrontation, but in the end, Congress gets what it wants. The possibility of a noncosmetic change to the statute gives Friedman's account its optimistic element. But, I think, even he concedes that such an element is a relatively small part of the dialogic process.

As with Rosenberg's account, the social theory underlying Friedman's account is reasonably straightforward. According to that theory, courts have some degree of independence from the other parts of a state's governing system. Their independence arises from structural features, such as life tenure in the U.S. constitutional system and from ideological commitments, such as a pervasive belief in the rule of law. Independence gives the courts a chance to say something different from what the other parts of the government say, and the commitment to the rule of law means that what the courts

²³ Here optimism is measured by the extent to which one places positive value on the Court's participation in our governance process. It is not clear to me that Professor Rosenberg does so, which is why I characterize his position as skeptical rather than pessimistic.

²⁴ See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

²⁵ The account can be generalized to incorporate elements in the political system other than Congress, such as state legislatures. I do not think that my comments would differ substantially were I to consider the generalized argument, and so use Congress-Court dialogues as my expository vehicle.

have to say will sometimes be taken seriously. There are, of course, some limits on the courts' independence, which means that they may not often say much that is different from what the other parts of the government are saying.²⁶ And, as I suggest below, sometimes the Court's actions are seen as incompatible with a neutral commitment to the rule of law, in which case the Court loses the influence that the ideology of the rule of law gives its statements. Still, in Friedman's view, sometimes the Court and Congress engage in a productive dialogue.

Despite the conflict between their views, both Rosenberg and Friedman clearly have captured something about the Court's role in our constitutional dialogues. I believe that Rosenberg slightly understates the degree to which the Supreme Court can operate autonomously, drawing on the power generated by the ideology of the rule of law. I believe as well that he understates the significance of judicial intervention on behalf of large, albeit minority, interests. The ideology of the rule of law may be sufficient to give a boost to the political power of such a minority, so that the minority gains enough support that its policy may be implemented even though the policy could not have been implemented without the judicially provided boost. Finally, I believe that Friedman somewhat overstates the independent contribution the courts make to constitutional conversations, particularly because other political actors also make the constitutional arguments the courts do. Taking these qualifications into account, I think the conclusion must be that the Supreme Court makes at most a modest contribution to constitutional conversations and that the counter-conversational tension Bennett describes may be rather small. If so, the Supreme Court is not an impediment to democratic self-governance through constitutional conversation, but it is not a major factor in improving self-governance either.

B. The Court Talking to Itself

Perhaps the Supreme Court has even less to contribute to constitutional conversations than the qualified version of the Friedman-Rosenberg argument suggests. The metaphor of *conversation* implies that there are conversational partners. Perhaps, though, the Court is simply talking to itself.

Here I canvass several possibilities. First, sometimes constitutional doctrine is so arcane that it matters only to the parties in a specific case and to a small segment of the legal elite, including the justices themselves. Constitutional doctrine becomes increasingly arcane as it develops into complex three- or four-part tests that have little connection to the way non-

²⁶ As Professor Bennett notes, this is the conclusion of the classic article by Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). According to Dahl, the Supreme Court never gets substantially out of line for an extended period with what the nation's governing coalition desires. See *id.* at 285. Terms such as "substantially" and "extended period" show that Dahl recognizes the Court's relative independence, but his overall thesis stresses the term "relative" more than it does "independence." See *id.*

lawyers understand the Constitution. Or, sometimes, the Supreme Court's decisions turn on previously obscure constitutional provisions, which the Court interprets by identifying the fragmentary evidence of original understanding or the passing comments made on the provisions in earlier cases.²⁷ In either case, no one other than a limited class of specialists can know or understand what the Court has done.

Doctrinalization may be an inevitable phenomenon in a mature constitutional system,²⁸ but it comes at some cost. Robert Nagel has offered the definitive critical analysis of doctrinalization of constitutional law.²⁹ One way of taking Nagel's argument is that the Supreme Court's elaborate doctrinalized decisions, and its obscurantist technical ones, seem to be addressed to an audience in the general public, but that the decisions are essentially unintelligible to that audience. The Supreme Court, then, is not engaged in a conversation at all; it is simply talking to itself and to its friends.

So far I have speculated about the way in which the Court's interventions might be received in the real social world. There is, in addition, a point about constitutional theory that seems worth making. One might see the Constitution as doing nothing more than setting up a structure within which conversations about matters of substance take place. Consider the implications of this view for questions of substantive constitutional law. The Constitution's structure might make the Supreme Court one of the participants in these constitutional discussions, as Bennett's argument would have it. Alternatively, however, the Constitution's structure might make the Supreme Court the *supervisor* of these substantive conversations.

In my interpretation of Bennett's view, the Court is simply one of many participants in discussions about the Constitution's substance. The counter-conversational difficulty then arises because of the Court's assertion of the finality of its decisions, an assertion that Bennett finds grounded in rule-of-law principles.³⁰ In the alternative view, the Court does not take part in substantive discussions. Rather, it merely checks whether the discussions conducted elsewhere take place within the structures created by the Constitution. Here the counter-conversational difficulty does not (yet) arise, because the Court has nothing to say about the content or outcome of substantive discussions.

²⁷ I have in mind here the recent presidential election cases. See *Bush v. Gore*, 121 S. Ct. 525, 533 (2000); *Bush v. Palm Beach County Canvassing Bd.*, 121 S. Ct. 652 (2000).

²⁸ See, e.g., Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56 (1997) (examining the origin, development, and effects of Supreme Court doctrines).

²⁹ Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985). According to Professor Nagel, the Court's elaborate doctrines estrange the public from the fundamental issues of governance with which the Constitution is concerned. *Id.*

³⁰ Bennett, *supra* note 1, at 889-92, 898-99.

The difficulty can arise, of course, when those discussions concern the very structure created by the Constitution. These are the classic separation-of-powers cases, in which one side in the conversation asserts that some institutional innovation changes the constitutional structure,³¹ and the other replies that the innovation is compatible with that structure. Judicial intervention to resolve this dispute could be justified by treating the Court's distinctive role as supervising structures rather than outcomes.³² And, once again, the counter-conversational difficulty would arise. The counter-conversational difficulty arises even more dramatically when the subject of the conversation is precisely the Court's role in the constitutional structure. There the Court cannot be a neutral arbiter standing apart from the contestants and determining only the terms on which the conversation proceeds, for whatever it does will be its own specification of its proper role. This might lead one to argue, along lines suggested by Herbert Wechsler and Jesse Choper,³³ that political and other forces place so many constraints on the conversations about structure that the benefits of judicial supervision are small and outweighed by the counter-conversational difficulty.

C. *The Court Shouting Down the Opposition*

I suppose that we have all been in situations—I cannot call them *conversations*—with someone who simply plows down all conversational opposition, refusing to acknowledge the relevance of another participant's interventions, continuing to talk whenever someone else tries to get a word in edgewise, and the like. The modern Supreme Court sometimes acts like one of these conversational bullies. Bennett notes that a *counter-conversational* difficulty may inevitably accompany judicial review.³⁴ The modern Court may also be *anti-conversational* as a matter of (one hopes) contingent fact.³⁵

The examples of the Court as a conversational bully are familiar. Probably the most offensive is the discussion by Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v.*

³¹ This side may claim as well that the change in structure has some implications for the way in which future conversations about constitutional substance will proceed.

³² See, e.g., Joan L. Larsen, *Constitutionalism Without Courts?*, 94 NW. U. L. REV. 983 (2000) (book review).

³³ See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 4-59 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

³⁴ Bennett, *supra* note 1, at 880-83.

³⁵ The Court's self-conception would then undermine the credibility of the procedures Professor Bennett describes as conversational outreach. One might say in this context that those to whom the Court reaches out, rather than the Court itself, play the role of Glendower.

Casey of the relationship between the Supreme Court and the public.³⁶ According to the joint opinion:

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe [v. Wade]* . . . , its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.³⁷

The joint opinion's authors observe that intensely controversial decisions generate substantial opposition, and assert that the Court must demonstrate that it does not succumb to "political pressure" by overruling a decision that might have been wrong in the first instance.³⁸ "So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."³⁹ The joint opinion specifically addressed:

[T]hose who themselves disapprove of the decision's results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing.⁴⁰

This passage in *Casey* asserts that those who disagree with the Court's decision should subordinate their own views to the Court's because the Court has "call[ed] the contending sides . . . to end" their division—on the Court's terms. And it asserts that those terms should be accepted because otherwise the Court's legitimacy would be called into question. An opponent of the right to choose with respect to abortion might reasonably respond: "It is not we who are putting your legitimacy in question, but you yourselves, by having decided *Roe* and adhering to it." The Court's response to its critics is not so much a conversational reply, but a forceful insistence that the critics have nothing to say worth listening to.

The Court's opinion in *City of Boerne v. Flores*,⁴¹ while somewhat less offensively phrased, rests on the same assumption that the Court's conversational "partners" really have nothing significant to contribute to the discussion. True, the Court said that "[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make

³⁶ 505 U.S. 833 (1992).

³⁷ *Id.* at 866-67.

³⁸ *Id.*

³⁹ *Id.* at 867.

⁴⁰ *Id.* at 867-68.

⁴¹ 521 U.S. 507 (1997).

its own informed judgment on the meaning and force of the Constitution.”⁴² But, in invalidating the Religious Freedom Restoration Act because it was not a proper exercise of Congress’s power to enforce the guarantee of religious liberty provided in Section One of the Fourteenth Amendment, the Court told us that Congress acted within its proper sphere only when it did things of which the Court approved. The Court would pat Congress on its head for refusing to enact statutes the Court would hold unconstitutional, but would slap it around for making a conscientious judgment on constitutionality with which the Court disagreed.

Other language in *Boerne* reflects the same understanding. Congress’s power to enforce the Fourteenth Amendment could not allow “Congress [to] define its own powers by *altering* the Fourteenth Amendment’s meaning.”⁴³ “Shifting legislative majorities could *change* the Constitution. . . .”⁴⁴ The words “alter” and “change” demonstrate that the Court takes its decisions as providing the Constitution’s permanent meaning (until the Court itself decides to overrule a prior decision). Under this understanding of the Court’s role, judicial decisions are not invitations to further discussion, because when someone else tries to jump into the conversation and disagrees with the Court, the Court simply stops the conversation.⁴⁵

One might, of course, take a somewhat longer-range perspective on the Court’s rhetoric aimed at terminating constitutional conversations. Perhaps the problem with the Religious Freedom Restoration Act was that it came too hard on the heels of the Court’s decision it attempted to revise, and then the Act arrived at the Court too quickly.⁴⁶ Congress’s rejection of the Court’s prior interpretation of the Constitution might then seem, not a reasoned intervention in an ongoing conversation, but rather a direct insult to the Court. Notably, the dissenters in *Boerne* did not challenge the majority’s view of the roles of Court and Congress in constitutional interpretation. They insisted instead that the Court had earlier read the Constitution incorrectly and that its erroneous decision should be overruled. That would align the Court’s view of the Constitution with Congress’s, not because Congress had something special to say but because the Court had made a mistake in the first place. But, as the joint opinion said in *Casey*, overruling decisions should occur infrequently and by implication only after a reasonable amount

⁴² *Id.* at 535.

⁴³ *Id.* at 529 (emphasis added).

⁴⁴ *Id.* (emphasis added).

⁴⁵ For critical commentary on the Court’s view of the role of Congress in constitutional interpretation, see David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31; Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).

⁴⁶ See *Dickerson v. United States*, 530 U.S. 428 (2000) (invalidating a statute enacted in 1968 in response to a 1966 Supreme Court decision, where executive decisions had delayed until 2000 presenting to the Court the question of the statute’s constitutionality).

of time has passed so that the Court would not be seen as overruling under fire. On this view, the constitutional conversation must be leisurely.

One consequence of the Court's view of itself as having the last word in conversation may be an inflated sense of importance held by the justices. Because they see themselves as having the final word in every conversation, they can come to think of themselves as did the Lord Chancellor in *Iolanthe*: "The Law is the true embodiment/ Of everything that's excellent/ It has no kind of fault or flaw,/ And I, my Lords, embody the Law."⁴⁷ The pompous rhetoric of the *Casey* joint opinion is hardly atypical. Frequently a Justice closes an important opinion with a paragraph asserting, in orotund tones, why the public should stop jabbering at it and instead sympathize with the difficulty of the justices' job.⁴⁸ Philip Kurland cited the old bar-room sign, "Don't shoot the piano-player. He's doing his best," as part of a biting criticism of the Court.⁴⁹ The justices seem to have turned the advice into a command.⁵⁰

I think it is worth emphasizing, however, a difference between Bennett's identification of a counter-conversational difficulty and the Court's actions as conversational bully. According to Bennett, the counter-conversational difficulty arises from the rule of law itself, which requires that judicial decisions have a degree of finality. The Court's recent rhetoric, in contrast, seems entirely an accident of history. Getting a different set of justices on the Supreme Court might reduce the difficulties arising from the Court's rhetoric. It cannot alleviate the counter-conversational difficulty.

III. CONCLUSION

Bennett's concept of constitutional adjudication as conversation has normatively attractive aspects and is descriptively at least as accurate as alternatives are. However, the present Supreme Court may not be as receptive to conversation as Bennett would have it be; its anti-conversationalism may exacerbate the counter-conversational difficulty. A more complete comparison among institutions might lead us to conclude that the counter-conversational difficulty associated with constitutional adjudication is large

⁴⁷ W. GILBERT & A. SULLIVAN, *IOLANTHE*, Act I (1882), reprinted in W. GILBERT, *THE SAVOY OPERAS* 212 (1926).

⁴⁸ A recent example is the final paragraph of *Bush v. Gore*, 121 S. Ct. 525, 533 (2000), in which the majority, Uriah Heep-like, asserted, "None are more conscious of the vital limits on judicial authority than are the members of this Court When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." This, after exercising an entirely discretionary power to stay a lower court decision and an equally discretionary decision to grant review.

⁴⁹ Philip B. Kurland, *The Supreme 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, 176 (1964).

⁵⁰ As Professor Bennett observes, the Court cannot guarantee that this command will be honored. That is why I stress in this Part the effects of the Court's self-conception on its own performance rather than its effects on the public.

enough to make conducting constitutional conversations in our legislatures alone more attractive, particularly if the present Court's anti-conversationalism is systemic rather than contingent.⁵¹ But, with the conversational model of constitutional adjudication on the table, we may now be in a position to engage in more fruitful discussions than constitutional scholars' obsession with the counter-majoritarian difficulty have been producing recently. So, let these new conversations about conversation begin!

⁵¹ The counter-conversational difficulty cannot be eliminated from adjudication because, as Professor Bennett argues, it arises from rule-of-law concerns. But it can be eliminated from *constitutional* conversations by eliminating judicial review in the classic U.S. mode. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). And, as I argue in Part I of this Commentary, the counter-conversational difficulty is most serious with respect to conversations about the conditions for undominated conversation, that is, with respect to constitutional adjudication.