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Pure Politics

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The present Supreme Court has been noticeably unreceptive to legal claims asserted by racial minorities. Although it is always possible to articulate nonracial motives for the Court's civil rights decisions, the popular perception is that a politically conservative majority wishing to cut back on the protection minority interests receive at majority expense now dominates the Supreme Court. In reviewing the work of the Court during its 1988 Term, *The United States Law Week* reported that "[a] series of civil rights decisions by a conservative majority of the U.S. Supreme Court making it easier to challenge affirmative action programs and more difficult to establish claims of employment discrimination highlighted the 1988-89 term's labor and

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employment cases."[1] *U.S. Law Week* went on to cite seven decisions handed down that Term that adversely affected minority interests.[2]

During the 1988 Term, the Court invalidated a minority set-aside program for government contractors and imposed the heavy burden of proving past discrimination as a prerequisite to the use of affirmative action remedies;[3] it permitted an affirmative action consent decree to be attacked collaterally by white workers who had chosen not to intervene in the Title VII action giving rise to the consent decree despite their knowledge that the Title VII action was pending;[4] it increased the burden of proof imposed on minorities who assert Title VII claims by requiring minority employees both to focus their challenges on specific rather than aggregate employment practices and to disprove employer assertions of legitimate job relatedness;[5] it adopted a narrow interpretation of the Reconstruction civil rights statute now codified in 42 U.S.C. section 1981, holding that the statute did not prohibit racial harassment of minority employees by their employers;[6] it held that discrimination claims filed against municipalities under 42 U.S.C. section 1981 could not be based upon a theory of respondeat superior;[7] it held that the statute of limitations for Title VII challenges to discriminatory seniority systems began to run when a seniority system was first adopted rather than when its discriminatory impact later materialized in the form of subsequent seniority-based demotions;[8] and it held

1. *Review of Supreme Court's Term: Labor and Employment Law,* 58 U.S.L.W. 3065 (Aug. 8, 1989).

2. *Id.*

3. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989). The burden of proof imposed by the case is so heavy that it was not satisfied by the well-known history of racial discrimination in Richmond, Virginia, *see* 109 S. Ct. at 723-24, or by the fact that in a city whose population was 50% black, only 0.67% of the city's prime construction contracts had been awarded to black contractors. *See* 109 S. Ct. at 714.

4. Martin v. Wilks, 109 S. Ct. 2180 (1989).

5. Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).

6. Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989).

7. Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989). *Jett* was a discrimination suit in which a white employee challenged his discharge by a black employer, but the holding applies to suits filed by minority plaintiffs as well. In a separate decision, the Court also held that 42 U.S.C. § 1983, another Reconstruction civil rights statute, did not permit race discrimination suits to be maintained against states as employers because states were not "persons" within the meaning of the § 1983 prohibition on discrimination occurring under "color" of state law. Will v. Michigan Dept. of State Police, 109 S. Ct. 2304 (1989).

8. Lorance v. AT & T Technologies, 109 S. Ct. 2261 (1989). Although *Lorance* involved a Title VII claim of sex-based discrimination, its holding applies with equal force to race-based discrimination claims asserted under Title VII.

that attorney's fees for a prevailing plaintiff in a Title VII case could not be assessed against a union that intervened in order to defend the discriminatory practice being challenged.[9]

For the time being, at least, Supreme Court adjudication appears to offer little hope for minorities seeking to protect their legal interests from either public or private disregard. The Court has responded to a conservative shift in majoritarian attitudes about race discrimination by subtly incorporating contemporary attitudes into the constitutional and statutory provisions that govern discrimination claims. One could argue, of course, that what we are witnessing is the proper operation of a complex and sophisticated governmental process. That, consistent with a refined understanding of its constitutional function, the Court is exhibiting a proper sensitivity to the evolving content of our fundamental social values. That the same social sensitivity that once permitted the Court to condemn segregation and permit miscegenation now compels the Court to retard the rate at which minority gains can be extracted from an increasingly disgruntled majority. The problem, however, is that judicial review is not supposed to work that way.

Under the traditional model of judicial review, the Court is supposed to be above the inevitable shifts that occur in the prevailing political climate. Exercising the skills of reasoned deliberation, within the constraints of principled adjudication, the Supreme Court is expected to protect minority rights from predictable majoritarian efforts at exploitation. The easy resonance of *U.S. Law Week's* political account of last Term's decisions reveals that no one really takes the countermajoritarian aspects of the traditional model very seriously. The Supreme Court has never sustained significant independence from the demands of ordinary politics, and likely never will. What eludes consensus, however, is an assessment of just how far the actual performance of the Court diverges from the ideal of the traditional model, and just how much significance that divergence ought to command. This article postulates that the discrepancy between actual and model Supreme Court performance is sufficient to preclude the

9. Independent Fedn. of Flight Attendants v. Zipes, 109 S. Ct. 2732 (1989). This adversely affects minority interests by limiting the sources of funding available to compensate victorious minority litigants for their attorneys' fees and by increasing the sources of opposition to minority interests that may be represented in particular suits through the elimination of a potential cost of participation.

existence of any qualitative difference between Supreme Court adjudication and ordinary politics.

Supreme Court adjudication is characterized most strongly by the existence of loosely constrained judicial discretion. This discretion may well render the Court incapable of withstanding in any sustained manner the majoritarian forces that govern representative politics. Indeed, far from serving the countermajoritarian function envisioned by the traditional model of judicial review, the Supreme Court can better be understood as serving the veiled majoritarian function of promoting popular preferences at the expense of minority interests. Rather than attempting an extended proof of this proposition, however, the present article simply describes the phenomenon of veiled majoritarianism and provisionally assumes its validity in order to confront a more intriguing question.

The purpose of the present article is to consider what impact the hypothesized failure of the traditional model should have on constitutional theory in general, and on the strategies that minorities should develop in order to protect their interests in particular. It would initially seem that failure of the traditional model should cause minorities to reconceive the Court as a political institution, and that minority political strategies should be refined to take account of the Court's veiled majoritarian political function. However, more careful analysis suggests that, as a practical matter, such a reconception is unlikely to have any discernible effect. Surprisingly, the validity or invalidity of the traditional model of judicial review may simply be irrelevant to the manner in which majoritarian political forces ultimately choose to accommodate minority interests. The reconception, however, may nevertheless be significant in more subtle ways that permit minorities to escape the dependency role to which they are assigned by the traditional model of judicial review.

Part I of this article considers the impact that judicial discretion has on the traditional model of judicial review, and that model's reliance on the Supreme Court as the primary guardian of minority interests. Part II argues that the interests of racial minorities can be better advanced through the ordinary political process than through the process of Supreme Court adjudication. Part III emphasizes that minority participation in Supreme Court proceedings cannot ultimately be avoided and, accordingly, suggests a political model of the Court that minorities can use in an effort to neutralize the Court's distortion of the polit-

ical process. Part IV considers the risks associated with political use of the Supreme Court. Finally, Part V concludes that the veiled majoritarian nature of judicial review poses an insoluble dilemma for racial minorities. Although the dilemma cannot be resolved, minorities do possess the power to transcend it in a way that may permit them to assume responsibility for their own interests.

I. MAJORITARIAN JUDICIAL REVIEW

The traditional model of judicial review, which emanates from the Supreme Court decision in *Marbury v. Madison,*[10] is premised upon the belief that the Court is capable of performing its adjudicatory function in a countermajoritarian manner. The viability of this countermajoritarian model ultimately rests upon the ability of doctrinal principles to constrain judicial discretion in a manner sufficient to prevent domination of the judicial process by the majoritarian preferences embodied in the socialized values of individual justices. However, the level of judicial discretion inescapably entailed in the process of principled adjudication seems to preclude continued adherence to the countermajoritarian assumption. In fact, that discretion actually implicates the Court in the majoritarian exploitation of minority interests, rather than permitting it to serve as the guardian of minority rights. It is unnecessary to offer an extended argument supporting the failure of the traditional model because, by provisionally assuming its failure, ultimately one is led to the conclusion that the validity or invalidity of the traditional model is largely inconsequential.

A. *The Traditional Model*

The system of government envisioned by the Framers was designed to operate in an essentially political manner. Influenced by the Enlightenment, the Framers understood the dangers of self-interest and faction. In a democracy, individuals and groups motivated by a desire to maximize their own welfare could be expected to form coalitions whose aggregate power would permit them to abridge the liberty and property interests of those who, because of their exclusion from the coalition, lacked the political power to protect themselves. The Framers sought to protect these political minorities by establishing a system of government in which the natural inclination toward self-interested factionalism would check itself.[11]

10. 5 U.S. (1 Cranch) 137 (1803).

11. For a general discussion of the historical and political context out of which the Constitu-

The Framers relied primarily on structural mechanisms. They adopted a democratic form of government, designed around James Madison's conception of republicanism, in which power was broadly dispersed in the hope of permitting the formation of only transitory, shifting majorities. Because today's majority perpetrators might be tomorrow's minority victims, the danger of retaliation created an incentive for factions to treat each other with deference. Accordingly, the Constitution diffused power horizontally within the federal government through the doctrine of separated governmental powers and vertically between the state and federal governments through the doctrine of federalism. Moreover, the establishment of distinct constituencies for the president and each house of the bicameral legislature, staggered terms of limited but different duration for each of the representative bodies, and indirect election of a president who possessed the power to veto legislative enactments all combined to minimize the concentration of power that factionalism requires in order to flourish.[12]

Because the concurrence of diverse power centers was difficult to secure, all governmental actions — including tyrannical actions — were less likely to ensue. In addition, the allocation of jurisdiction over most significant substantive matters to the states promoted a level of decentralization that was conducive not only to the emergence of qualified governmental leaders, but to optimal levels of citizen participation and civic virtue that would help to neutralize the threat of self-interest.[13] The Framers likely contemplated judicial review as an additional safeguard against the dangers of faction.[14] But in the begin-

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tion emerged and the objectives of the Framers, see J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 77-88 (1980); THE FEDERALIST (H. Lodge ed. 1888); G. GUNTHER, CONSTITUTIONAL LAW 10-21 (11th ed. 1985); G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 1-17 (1986) [hereinafter G. STONE]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1-17 (2d ed. 1988); Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation,* 74 VA. L. REV. 275, 280-83 (1988); Sunstein, *Beyond the Republican Revival,* 97 YALE L.J. 1539 (1988) [hereinafter Sunstein, *Republicanism*]; Sunstein, *Interest Groups in American Public Law,* 38 STAN. L. REV. 29, 31-48 (1985) [hereinafter Sunstein, *Interest Groups*].

12. *See generally* G. STONE, *supra* note 11, at 1-17.

13. *See generally id.*; Sunstein, *Republicanism, supra* note 11; *Symposium: The Republican Civic Tradition,* 97 YALE L.J. 1493-846 (1988).

14. There is some debate about whether the Framers intended to give the Supreme Court the power to invalidate the acts of coordinate branches. *See* P. BATOR, D. MELTZER, P. MISHKIN & D. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 8 n.34 (3d ed. 1988). The prevailing contemporary view appears to be that the Framers did intend to grant the Court the power to engage in such judicial review. *See id.* at 8-9; A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 15-16 (1962); G. STONE, *supra* note 11, at 30. However, the Framers may well have contemplated a fairly mechanical type of judicial review that entailed very little judicial discretion. *See* G. STONE, *supra* note 11, at 31-33. The flavor of such review is captured by Justice Roberts' famous statement in United States v. Butler, 297 U.S. 1 (1936):

It is sometimes said that the court assumes a power to overrule or control the action of the

ning, the protections for minority rights were primarily structural, and they were expected to operate in a political manner.[15]

Over time, the structural safeguards began to erode. Ultimately, the New Deal desire for economic recovery prompted the political bodies to adopt, and the Supreme Court eventually to endorse, the effective nullification of the Framers' primary precautions. The creation of administrative agencies, established with the conscious goal of increasing governmental efficiency, seriously diluted separation of powers protections while vesting the bulk of governmental power in the executive branch.[16] In addition, belief in the need for national solutions to national economic problems eliminated all meaningful sub-

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people's representatives. This is a misconception. . . . When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty, — to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

297 U.S. at 62-63, *quoted in* G. STONE, *supra* note 11, at 32. Many people question whether such nondiscretionary review is realistically possible. *See, e.g.*, Barnett, *Constitutional Interpretation and Judicial Self-Restraint*, 39 MICH. L. REV. 213, 227 (1940). Indeed, there is doubt about whether Justice Roberts intended the mechanistic sentiment often attributed to him. *See* Currie, *The Constitution in the Supreme Court: The New Deal, 1931-1940*, 54 U. CHI. L. REV. 504, 531 (1987). Skepticism about the Supreme Court's ability to engage in such mechanical review has led commentators to undertake the herculean task of developing theories of judicial review that comport with democratic principles. *See* G. STONE, *supra* note 11, at 31-38 (presenting several such theories).

15. The strength of this proposition is evidenced by the fact that the Constitution was drafted and ratified without a bill of rights that could guide legislative deliberations and serve as a basis for judicial review. Although the desirability of a bill of rights was forcefully asserted during the ratification debates, *see* G. GUNTHER, *supra* note 11, at 406; L. TRIBE, *supra* note 11, at 4 n.7, forceful opposition was also articulated on the grounds that the structural safeguards made a bill of rights not only superfluous but also counterproductive:

> [B]ills of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? . . . [I]t is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and . . . [therefore by] clear implication, that a power to prescribe proper regulations concerning [the area of power exempted by the bill of rights] was intended to be vested in the national government.

THE FEDERALIST, *supra* note 11, NO. 84 (Hamilton), at 537; *see also* L. TRIBE, *supra* note 11, at 4 n.7; G. STONE, *supra* note 11, at 115-22.

16. The Supreme Court has permitted administrative agencies to exercise legislative power, *see* Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (upholding grant of policymaking authority to administrative agencies); *cf.* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (last Supreme Court decision to invalidate grant of agency power under nondelegation doctrine), and adjudicatory power, *see* Wiener v. United States, 357 U.S. 349 (1958) (upholding adjudicatory power of War Claims Commission), in addition to the executive power granted to the president under the Constitution. In part to increase agency efficiency, the Court has also upheld the constitutionality of independent agencies that operate largely free of presidential control. *See* Humphrey's Executor v. United States, 295 U.S. 602 (1935). Moreover, in matters affecting foreign affairs, the powers of the president and the foreign affairs agencies are essentially plenary. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (upholding authority of president to impose fines for selling arms to foreign

ject-matter restrictions on the scope of federal power.[17]

As the Framers' structural safeguards diminished in importance, the significance of Supreme Court protection increased. John Marshall laid the foundation for this enhanced judicial role in *Marbury v. Madison,* where he characterized judicial review as essential to the protection of individual rights from majoritarian abrogation.[18] This *Marbury*-based model of judicial review has both endured and flourished over time, and the Supreme Court has now designated itself the ultimate guarantor of constitutional rights.[19] Although the Framers almost certainly did not intend to include racial minorities among the political minorities who required protection, enactment of the Reconstruction amendments gave racial minorities specific new constitutional rights that could be exercised against the majority.[20] This, in turn, enhanced the significance of judicial review as a means of protecting racial minority interests. As a result, we have now come to vest the Supreme Court, rather than the political process, with the

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government). *See generally* Sunstein, *Constitutionalism After the New Deal,* 101 HARV. L. REV. 421, 430-52 (1987).

17. In upholding the limitations imposed on private agricultural production by the Agricultural Adjustment Act — one of the pieces of New Deal legislation designed to ameliorate the economic hardships of the Depression — the Supreme Court held that the power to regulate interstate commerce under art. I, § 8, cl. 3 of the Constitution permitted Congress to regulate the production of an Ohio farmer who grew wheat for his own consumption. Wickard v. Filburn, 317 U.S. 111 (1942). Prior to the New Deal, such private production was viewed as inherently local and therefore beyond the reach of federal regulation. *Wickard* has now come to stand for the proposition that the scope of federal regulatory power is virtually limitless. *See* Sunstein, *supra* note 16, at 430-52.

18. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). John Marshall stated that "[t]he very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury" and that "[t]he province of the court is, solely, to decide on the rights of individuals . . . . " 5 U.S. (1 Cranch) at 163, 170. Although Marshall stated that the protection of individual rights was important enough to require invalidation of the acts of coordinate branches that abridged those rights, 5 U.S. (1 Cranch) at 177-78, in retrospect, Marshall's actions ironically seem to have been motivated by political considerations. Rather than being protected, Marbury's rights appear actually to have been sacrificed for partisan political gain. By denying Marbury his commission, Marshall was able to divert attention from his true objective, which was to establish a power of judicial review that would enable the recently defeated Federalist party to retain political power through its hold over the life-tenured judiciary. *See generally* G. STONE, *supra* note 11, at 25-31. This detail, however, has not deprived the decision of its symbolic significance as the harbinger of modern judicial review.

19. *Cf.* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (citing *Marbury* for proposition that Supreme Court "is supreme in the exposition of the law of the Constitution"). By reserving the right to decide finally the meaning of the Constitution, the Supreme Court has also reserved the right to decide finally the content of constitutional rights.

20. The thirteenth, fourteenth, and fifteenth amendments to the U. S. Constitution were enacted during the Reconstruction period following the Civil War in order to give certain rights to the newly freed former slaves and to authorize congressional legislation that might be needed to enforce those rights. The thirteenth amendment, ratified in 1865, prohibited slavery. The fourteenth amendment, ratified in 1868, gave all persons, including former black slaves, the rights of national and state citizenship, and guaranteed to such persons due process and the equal protection of the laws. The fifteenth amendment, ratified in 1870, gave blacks the right to vote.

primary responsibility for protecting the interests of racial minorities from disregard by the majoritarian branches of government.

Under the *Marbury* model of judicial review, the Constitution obligates the Supreme Court to nullify actions of the majoritarian branches that impermissibly interfere with rights guaranteed to minorities by the Constitution.[21] In order to perform this function, however, the Court must possess the *capacity* to operate in a countermajoritarian manner. To the extent that the Court is subservient to majoritarian desires, it cannot effectively protect minority interests from majoritarian exploitation. Accordingly, consistent with the traditional model, judicial independence is promoted by both formal and operational safeguards.

Formally, the Court's insulation from political pressure is established through life tenure and salary protection.[22] To the extent that the representative branches become concerned about the outcome of particular cases, life tenure and salary protection are designed to assure judges that they will not be fired or punished financially for disregarding the wishes of the representative branches.[23] The safeguards are also designed to insulate the judiciary from direct popular pressure by freeing judges from the need to worry about their prospects for reappointment or reelection, which might be jeopardized by the issuance of unpopular decisions. Realistically, the formal safeguards in and of themselves do little to ensure judicial independence. Congress and the president could circumvent those safeguards and impose political pressure on the Court in any number of ways.[24] However, even if

21. This judicial function is captured most crisply in the representation reinforcement model of judicial review, which is described and developed in J. ELY, *supra* note 11. For more recent variations of the traditional model, see R. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990); Chemerinsky, *Foreword: The Vanishing Constitution,* 103 HARV. L. REV. 43 (1989).

I emphasize Supreme Court invalidation of coordinate branch actions for the sake of simplicity. Much of the Court's work admittedly involves the interpretation of federal and state statutes and common law rules. Theories of judicial review that are relevant to Supreme Court constitutional adjudication can also have an important impact on the Court's statutory and common law interpretations. For present purposes, however, Supreme Court invalidation of the acts of representative branches serves as an adequate foundation for the thesis that I wish to present.

Similarly, I do not dwell upon the differences between the role of the Supreme Court and the role of the lower federal courts. There are differences, and for many purposes the differences are significant. Again, however, I have focused on the Supreme Court for purposes of simplicity and because Supreme Court adjudication is sufficient to illustrate the points that I wish to make.

22. U.S. CONST. art. III, § 1. The Framers rejected a proposed constitutional prohibition on judicial salary increases. *See* 4 THE FOUNDERS' CONSTITUTION 133-37 (P. Kurland & R. Lerner eds. 1987).

23. Impeachment is an available form of retaliation by the representative branches but its use may be too politically difficult to permit it to serve as the basis of a credible threat in typical cases. *See infra* note 130.

24. Congress could cancel the Court's term for political reasons, as it did with respect to the Court's June and December 1802 Terms. *See* G. GUNTHER, *supra* note 11, at 11. Congress

life tenure and salary protection are viewed as instrumentally ineffec-

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could also cut the Court's budget, or refuse to appoint needed additional judges as it did in the mid-1970s, when the Democratic Congress repeatedly declined to create new federal judgeships until a Democratic president was elected to appoint the new judges. *See Race Is On for 152 New Judgeships,* U.S. News & World Rep., Oct. 9, 1978, at 54.

To some extent at least, Congress could also restrict the Court's jurisdiction in order to coerce certain outcomes. The Constitution authorizes Congress to regulate the appellate jurisdiction of the Supreme Court. U.S. CONST. art. III, § 2, cl. 2. In the past, Congress has threatened politically motivated use of this power in a way that may well have influenced the Court's subsequent constitutional exposition. *See generally* G. STONE, *supra* note 11, at 70-74, 493 (discussing threatened use of power to regulate jurisdiction in various substantive areas including school prayer, reapportionment, school desegregation, and abortion).

Congress could even manipulate the Court's personnel in order to affect Supreme Court adjudications. The most famous effort at personnel manipulation involved President Franklin D. Roosevelt's "court-packing" plan. After the Supreme Court had invalidated several pieces of New Deal legislation on constitutional grounds, President Roosevelt proposed legislation that would expand the number of justices on the Supreme Court. The proposal called for one additional justice to be appointed, up to a maximum of 15, for each justice over the age of 70. In 1937, at the time that the proposal was made, six sitting justices were over the age of 70. Although the legislation was nominally offered to ease the caseload of the older justices, it is widely recognized to have been a politically motivated effort to "stack" the Court with justices that would be receptive to future New Deal legislation. The court-packing plan generated significant opposition. Senate Majority Leader Joseph Robinson, howver, might have been able to amass enough political support to secure enactment if he had not died of a heart attack shortly before the vote on the proposed legislation. *See generally* Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan,* 1966 SUP. CT. REV. 347.

In addition to the many methods that Congress could use to influence Supreme Court adjudications, the president could impose pressure on the Court by declining to give effect to its judgments. Thomas Jefferson threatened not to comply with Supreme Court directives affecting questions that he believed the Constitution delegated to the president rather than to the Court. See G. GUNTHER, *supra* note 11, at 22. President Lincoln also argued that the *Dred Scott* decision of the Supreme Court invalidating the Missouri compromise, *see infra* text accompanying notes 85-95, should be limited to the parties before the Court and should not be followed as a political rule by the representative branches. *See id.*, at 23-24. In addition, President Franklin D. Roosevelt was prepared to ignore any Supreme Court order that invalidated federal abrogation of "gold clauses" in federal obligations, thereby interfering with his New Deal economic recovery objectives. Although Roosevelt's actions were probably not known to the Court at the time that it upheld the government's power to abrogate gold clauses, subsequently acquired knowledge of the President's intentions may have affected the Court's behavior in later cases. *See id.* at 24-25.

The president could also simply threaten to defy the Court's orders. The perceived unwillingness of President Andrew Jackson to enforce judgments of the Supreme Court favorable to the Cherokee Indian Tribe appears to have affected the manner in which the Court chose to act in at least one case. In 1827, the Cherokee Tribe declared itself an independent nation with complete sovereignty over its tribal lands — lands the United States viewed as falling within the geographical boundaries of the State of Georgia. President Jackson responded to this declaration by asserting that the Cherokee must leave Georgia and move west in order to avoid the force of Georgia sovereignty. Toward this end, Jackson signed congressional legislation setting aside land in the territory west of the Mississippi River for the Cherokee Tribe.

As it became evident that the sovereignty dispute between Georgia and the Cherokee Tribe would end up before the U.S. Supreme Court, Georgia governmental officials openly vowed to disregard any Supreme Court judgment that questioned State authority to exercise sovereignty over Cherokee lands. Moreover, President Jackson was perceived to be sympathetic to this position. The resolve of the Georgia officials was demonstrated when the State of Georgia proceeded to execute an individual convicted of murder on Cherokee lands despite issuance by the U.S. Supreme Court of a stay of execution pending Supreme Court review. When the Court was formally petitioned to restrain enforcement of Georgia law over the Cherokee Tribe in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), the Court refused to reach the merits of the case. While expressing sympathy for the plight of the Cherokee, the Court ruled that it lacked jurisdic-

tive, they do convey a symbolic understanding of acceptable governmental behavior that might inhibit the representative branches from imposing inordinately high levels of political pressure on the Court and that might enhance the courage of the Court to resist whatever pressures do come to be exerted upon it.

The traditional model also relies on the judicial tradition of principled adjudication to promote judicial independence. The Supreme Court is able to perform in a countermajoritarian manner because of both the conventions surrounding judicial decisionmaking and the procedural context out of which judicial decisions emerge. The Court operates by inducing general principles from texts and precedents and then deducing from those principles proper resolutions of the particular cases with which it is confronted. Moreover, justices are selected in part on the basis of their aptitude and temperament for "reasoned elaboration,"[25] and the legitimacy of judicial actions is determined by the adequacy of the principled accounts that they offer for their adjudications. The doctrine of stare decisis under which the Court operates[26] is essentially an equality principle that requires like cases to be treated alike. Consistent with this doctrine, a justice tempted to deviate from the governing principle in resolving a particular case would be forced to hesitate before doing so for fear that an unprincipled decision today might bind the justice to reach a result that he or she would not desire in some future case. In addition, the procedural due process constraints that apply to the judiciary also promote principled decisionmaking. The stringent "record" requirements that the due process clause imposes focus the Court's attention on factors that are relevant to the governing principle and divert the Court's attention from extraneous political factors that have no proper bearing on the principled resolution of a case.[27]

In sum, the traditional model of judicial review posits a Supreme Court that is capable of protecting minority interests from

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tion to consider the case. *See* R. CHUSED, A MODERN APPROACH TO PROPERTY 104-09 (1978); Burke, *The Cherokee Cases: A Study in Law, Politics and Morality,* 21 STAN. L. REV. 500 (1969).

25. *See* THE FEDERALIST, NO. 78 (Hamilton) (discussing importance of judicial judgment and adherence to precedent).

26. *See* Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2370 (1989).

27. The due process clause provides procedural safeguards to individuals and minorities whose lack of political power makes pluralist political safeguards unavailable to them. That is why hearings and on-the-record decisions are essential in an adjudicatory context but are optional in a legislative context. *Compare* Londoner v. Denver, 210 U.S. 373 (1908) (due process requires hearing with respect to executive determinations, which affect small number of individuals) *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441 (1915) (due process does not require hearing with respect to legislative determinations, which affect large number of individuals).

majoritarian abridgement because it is able to operate in a countermajoritarian manner. The validity of the countermajoritarian assumption is, therefore, essential to the appeal of the traditional model. To the extent that the countermajoritarian assumption fails to hold, the Supreme Court cannot be relied upon to protect minority interests from majoritarian abridgement.

B. *Veiled Majoritarianism*

Close examination suggests that the countermajoritarian assumption of the traditional model cannot be valid. Because justices are socialized by the same majority that determines their fitness for judicial office, they will arrive at the bench already inculcated with majoritarian values that will influence the manner in which they exercise their judicial discretion. Accordingly, unless judicial discretion can be reduced to acceptably low levels, justices can be expected to rule in ways that facilitate rather than inhibit majoritarian efforts to advance majority interests, even at minority expense. None of the safeguards relied upon by the traditional model, however, can satisfactorily control judicial discretion. The formal safeguards of life tenure and salary protection, which are designed to insulate the judiciary from external political pressure, simply cannot guard against the majoritarianism inherent in a judge's own assimilation of dominant social values. Moreover, the operational safeguard of principled adjudication has not proved capable of significantly reducing judicial discretion. In many instances, the governing substantive principles of law themselves incorporate majoritarian values in a way that leaves the Court with no choice but to acquiesce in majoritarian desires. In other instances, the guidance available to the Court in selecting among potentially governing principles simply is insufficient to prevent the need for recourse to judicial discretion in making the selection. In still other instances, the ambiguities that inhere in a governing principle even after it has been selected require recourse to the socialized values of the justices. As a result, when the Court is called upon to protect minority interests, it may merely be participating in the sacrifice of those interests to majority desires.

Supreme Court justices are themselves majoritarian, in the sense that they have been socialized by the dominant culture. As a result, they have internalized the basic values and assumptions of that culture, including the beliefs and predispositions that can cause the majority to discount minority interests.[28] Indeed, a justice's sympathy

28. In the present context, the term "majoritarian" is an idealization. As a literal matter, a Supreme Court justice is no more likely to reflect the views of the actual majority than is a

toward majoritarian values is thoroughly tested by the appointment and confirmation process, which is specifically designed to eliminate any candidate whose political inclinations are not sufficiently centrist for the majoritarian branches to feel comfortable with that candidate's likely judicial performance.[29] As a statistical matter, therefore, a Supreme Court justice is more likely to share the majority's views about proper resolution of a given social issue than to possess any other view on that issue. Moreover, to the extent that the justice has been socialized to share majoritarian prejudices, he or she may not even be consciously aware of the nature of those prejudices, or the degree to which they influence the exercise of the justice's discretion.[30] Whatever factors cause majority undervaluation of minority interests, justices socialized by the dominant culture will have been influenced by them too. Accordingly, a justice will come to the task of protecting minority interests possessed by the very predispositions that they are asked to guard against.

Because judges will have personal attitudes and values significantly similar to those of the majority, judicial review cannot be expected to protect minority interests unless something in the judicial process guards against the influence of majoritarian preferences. The traditional model of judicial review assumes that the formal safeguards of life tenure and salary protection, as well as the operative safeguards attendant to the process of principled adjudication, can accomplish

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president, a senator, or a member of the House of Representatives. The "majority" that matters for present purposes is that segment of the electorate having the inclination and resources to influence representative politics. The fact that many individuals are effectively disenfranchised in the political process is so significant that it may ultimately render our operative vision of democratic government unappealing. The present thesis, however, expresses a type of skepticism about the utility of judicial review that persists even if the assumptions of representative democracy are accepted as true.

29. The nomination by President Reagan of D.C. Circuit Judge Robert Bork to the Supreme Court was not confirmed by the Senate largely because the nominee's political views were not sufficiently within the mainstream of contemporary American political thought. *See* Greenhouse, *Bork's Nomination is Rejected, 58-42; Reagan 'Saddened,'* N.Y. Times, Oct. 24, 1987, § 1, at 1, col. 3. Douglas Ginsburg, the successor nominee to Judge Bork, was forced to withdraw his name from consideration during the confirmation process when it was revealed that his past recreational drug use was not sufficiently within the mainstream of contemporary American views about recreational drug use. *See* Roberts, *Ginsburg Withdraws Name as Supreme Court Nominee, Citing Marijuana 'Clamor,'* N.Y. Times, Nov. 8, 1987, § 1, pt. 1, at 1, col. 6.

30. Professor Lawrence has emphasized that much racial discrimination is motivated by prejudices that occur at a subconscious level. *See* Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Indeed, the majority culture can transmit prejudices so subtly and effectively that even members of the racial minority being disadvantaged can come to adopt them. Unconscious racial prejudice may pose the bulk of the problem to which judicial review is directed. Although extreme cases of majoritarian racial discrimination may be motivated by malice or xenophobic dislike, the more typical discrimination case is one in which majoritarian policy formulators simply undervalue minority interests because of misinformation conveyed through cultural stereotypes, inability to empathize, or mere inattention. *See* J. ELY, *supra* note 11, at 157.

this task. Contrary to this assumption, however, neither set of safeguards is likely to be effective.

Although the instrumental value of the formal safeguards is questionable, the symbolic value of those safeguards may prompt a justice to resist majoritarian influences. Life tenure and salary protection, however, are directed at the problem of majoritarian pressures exerted by other branches of government. Accordingly, they may not prompt a justice to guard against his or her own majoritarian attitudes and values. Even if they do, however, and even if a justice makes strenuous efforts to compensate for his or her known prejudices, the justice will still be vulnerable to those biases and predispositions that continue to operate at a subconscious level — the level at which most noninvidious discrimination is likely to occur. As a result, the formal safeguards of life tenure and salary protection, enhanced by any symbolic importance they may have, are simply inapposite to the problem of majoritarian-influenced judicial values. A justice cannot be impartial simply by trying; majoritarian influences are too effective for such efforts to be more than marginally successful. If the countermajoritarian assumption of the traditional model is to hold, it will have to be through the constraints imposed upon judicial discretion by the process of principled adjudication.

However well the constraint of principled adjudication should work in theory, it simply has not worked well in practice. The Supreme Court often adopts legal principles that expressly incorporate majoritarian preferences into their meanings, and thereby provide no safeguard whatsoever from majoritarian desires. Perhaps the most celebrated example is the Court's ruling in *Garcia v. San Antonio Metropolitan Transit Authority,*[31] which held that the constitutional principle of federalism contained no judicially enforceable standards; the majoritarian branches themselves were responsible for defining the meaning of the constitutional standard.[32] Although that approach to constitutional enforcement might make some sense in the context of federalism, where the Senate arguably is capable of securing political protection for federalism interests, the Court has issued similar rulings in the context of race discrimination, where the very premise of the traditional model is that racial minorities do not possess the power to protect their interests in the political process.[33] In *McCleskey v.*

31. 469 U.S. 528 (1985).

32. 469 U.S. at 547-52. The Court left open the possibility that judicially enforceable limits might later be developed to govern unanticipated future circumstances. *See* 469 U.S. at 554.

33. *See generally* J. ELY, *supra* note 11.

Kemp,[34] the Court rejected equal protection and eighth amendment challenges to the imposition of capital punishment under a Georgia statute where statistical evidence indicated that black murder convicts were more than four times as likely to receive the death penalty if their victims were white than if their victims were black.[35] In rejecting the eighth amendment challenge, the Court held that the governing constitutional standard was to be given operative meaning through reference to the preferences of the state legislature[36] and the defendant's jury.[37] Both the legislature and the jury are majoritarian institutions. As a result, the Court's incorporation of the preferences of those institutions into the meaning of the constitutional standard had the ironic effect of constitutionalizing the level of discrimination that exists in the society at large.[38] In this sense, the Court seems actually to have promoted rather than prevented majoritarian exploitation of minority interests.[39]

When a legal principle does have content that is not derived from

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34. 481 U.S. 279 (1987).

35. 481 U.S. at 286-87. More specifically, all individuals convicted of murder were 4.3 times more likely to receive the death penalty if their victims were white than if their victims were black. In addition, blacks convicted of murder were, overall, 1.1 times more likely to be sentenced to death than white convicts. Accordingly, blacks convicted of murdering white victims were the most likely class of defendants to receive the death penalty, and the differences were statistically significant. The raw data also showed that, prior to adjustment for nonracial factors, the death penalty was imposed in 22% of the cases involving black defendants and white victims, but it was imposed in only 1% of the cases involving black defendants and black victims.

36. 481 U.S. at 300. The language of Justice Powell's opinion is revealing. It states:

> Thus, our constitutional decisions have been informed by "contemporary values concerning the infliction of a challenged sanction." In assessing contemporary values, we have eschewed subjective judgment, and instead have sought to ascertain "objective indicia that reflect the public attitude toward a given sanction." First among these indicia are the decisions of state legislatures, "because the . . . legislative judgment weighs heavily in ascertaining" contemporary standards. We also have been guided by the sentencing decisions of juries, because they are "a significant and reliable objective index of contemporary values."

481 U.S. at 300 (citations omitted).

37. 481 U.S. at 310. The language of the opinion is again revealing. It states: "Thus, it is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.' Specifically, a capital sentencing jury representative of a criminal defendant's community assures a 'diffused impartiality' in the jury's task of 'express[ing] the conscience of the community on the ultimate question of life or death.' " 481 U.S. at 310 (brackets in original; citations and footnote omitted).

38. One way to conceptualize the decision is that the Court permitted whites to have the increased deterrent and retributive benefits of a capital punishment statute even though the costs associated with those benefits (concomitantly lower deterrence and retribution, as well as higher execution rates) were disproportionately imposed upon blacks. Presumably, it is precisely such undervaluation of minority interests that the traditional model was designed to prevent. *See* J. ELY, *supra* note 11, at 157. For a general discussion of the *McCleskey* decision addressing this and other aspects of the case, see Kennedy, McCleskey v. Kemp: *Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1390-95 (1988).

39. Although the Court's express incorporation of majoritarian preferences may be rare, the Court often achieves the same submission to majoritarian preferences through deferential standards of review. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (using deferential rational

the majoritarian branches of government, the ambiguities encountered in both identifying and applying that principle eliminate any meaningful constraint on judicial discretion. In a case of first impression, selection of the governing legal principle is necessarily an act of unconstrained judicial discretion because the Court has no precedent to which it may turn for guidance.[40] The Supreme Court's history in choosing between intent and effects principles in discrimination suits illustrates the problem.[41] One could rationally prefer either principle. The basic argument in favor of focusing on intent is that a prohibition on innocently motivated, neutral actions that simply happen to have a racially disparate impact would unduly restrict the ability of governmental decisionmakers to use precise and efficient classifications that are directly responsive to the merits of the regulatory problems with which they are confronted.[42] The major drawback of focusing on intent is that evidence of intentional discrimination often is difficult or impossible to secure, thereby permitting acts of intentional discrimina-

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basis standard of review to reject equal protection challenge to Washington, D.C., police officer qualification examination despite racial nature of challenge).

Even when the Court decides to apply a heightened standard of review, there is a danger that it will find that standard to be satisfied precisely when racial minorities are most vulnerable to majoritarian abuse. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (upholding exclusion of Japanese-American citizens from certain areas of the West Coast after outbreak of World War II despite racial basis of classification in environment of racial animus).

The Court has also used its array of justiciability devices to defer to majoritarian preferences by declining to reach the merits of discrimination claims, as it did in dismissing a series of minority challenges to alleged patterns of governmental misconduct within the criminal justice system. *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983); Rizzo v. Goode, 423 U.S. 362 (1976); Spomer v. Littleton, 414 U.S. 514 (1974); O'Shea v. Littleton, 414 U.S. 488 (1974). Theoretically, damage actions by individuals who had already been injured by the challenged practices could serve as a basis for reaching the merits of the constitutional claims, although as a practical matter, the success of such actions would likely be frustrated by the doctrines of official and sovereign immunity. Will v. Michigan Dept. of State Police, 109 S. Ct. 2304 (1989), holds that such suits can now be maintained only against municipalities, with all of the difficulties attendant to successful maintenance of such suits, or against a government official by seeking funds from only the official's personal assets, which may well preclude such litigation from being cost-justified. Regardless of the ultimate viability of damage actions, however, the governmental misconduct cases do create the impression of a distinct reluctance on the part of the Court to reach the merits of the constitutional challenges.

40. In all cases other than cases of first impression, the act of principle selection really amounts to an act of principle application — the difficulties of which are discussed below. The only way that the selection of a governing principle can be constrained is by some other principle that controls the selection process. As a result, selection of the immediate principle, if not arbitrary, necessarily entails application of the metaprinciple.

41. This history is carefully detailed in Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989) (ultimately suggesting that intent test is inappropriate as sole test of unconstitutional discrimination because it often requires meaningless inquiries).

42. *See* Lawrence, *supra* note 30, at 320-21. It is sometimes argued that an intent test is preferable to an effects test because the Constitution guarantees procedural regularity but not particular substantive outcomes. That argument, however, merely states a preference for intent over effects. It does not offer a justification for why the Constitution should be viewed as simply a procedural document. In order to justify such a view of the Constitution, one would have to fall back on the types of arguments that are made in the text.

tion to escape invalidation by masquerading as acts of neutral policymaking. The basic argument in favor of focusing on effects is that harmful effects are harmful regardless of the intent with which they are produced; the major drawback is that such a focus would require governmental decisionmakers explicitly to consider race as a factor in formulating social policy, thereby contravening the very principle of racial neutrality embodied in our antidiscrimination laws.[43]

In *Washington v. Davis*,[44] the Supreme Court held that the applicable principle for equal protection clause purposes is the intent principle.[45] Five years earlier, however, in *Griggs v. Duke Power Co.*,[46] the Court had expressly rejected the intent principle for Title VII purposes, finding that the desire of Congress to reach discriminatory effects as well as discriminatory intent was "plain from the language of the statute."[47] How did the Court know that the intent principle governed discrimination claims asserted under the equal protection clause while the effects principle governed claims asserted under Title VII? Although one might initially suspect that the drafters of the two provisions must have had different intents, no evidence supports such a suspicion. The drafters of the fourteenth amendment appear to have left no hint of their views concerning which principle should apply to equal protection claims — at least the *Washington v. Davis* Court cited no such evidence in support of its "intent" decision. And contrary to the Court's assurance in *Griggs*,[48] nothing in the language or legislative history of Title VII compels the adoption of an "effects" test for statutory claims of discrimination.[49] The two decisions can be reconciled only on policy grounds. But the policy advantages and disadvan-

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43. *See id.* at 319-21.

44. 426 U.S. 229 (1976).

45. 426 U.S. at 238-48. The holding of *Davis* has been reaffirmed in a number of cases, including Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977), Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 272 (1977), and Hunter v. Underwood, 471 U.S. 222, 227-28 (1985).

46. 401 U.S. 424 (1971).

47. 401 U.S. at 429.

48. 401 U.S. at 431-32.

49. The language of Title VII provides, in pertinent part:

> It shall be an unlawful employment practice for an employer —
>
> . . . .
>
> (2) to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2 (1982) (emphasis added). It is difficult to see how this language favors effects any more than it favors intent. In fact, use of the phrase "because of" might well evidence congressional contemplation of an intent test. Although the statutory language is not dispositive, the Court failed to offer any legislative history in support of its effects construction. Moreover, in arriving at its effects construction, the Supreme Court was required to reverse the district court

tages associated with each principle, which have already been discussed, seem equally present in both cases. There is no obvious reason to suppose that the presence or absence or relative weight of these policy considerations should vary with the constitutional or statutory nature of the underlying cause of action, and the Court offered no nonobvious reason why this should be the case.[50]

Not only was the Court's discretion in making an initial selection between the intent and effects principles unconstrained, but after having made that initial selection, the Court deemed itself free to change its mind when confronted with a mildly different factual setting. The Court's most recent decision on the issue seems to defy all notions of consistency and constraint. In *Wards Cove Packing Co. v. Atonio,*[51] the Court held — consistent with *Griggs* — that the effects principle governed Title VII challenges to the discriminatory use of subjective employment criteria, but the Court also imposed a standard of proof — consistent with *Washington v. Davis* — that may well be more difficult to meet than the burden of proving discriminatory intent.[52] The Court's effortless vacillation between intent and effects principles reveals the absence of any meaningful constraint upon judicial discretion that operates at the principle selection stage. Even if the Court

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and the court of appeals, both of whom had read the statute to require intent. *See* 401 U.S. at 428-29.

50. One might be tempted to argue that Title VII's more expansive effects test could properly be imposed by a politically accountable Congress, whereas the politically unaccountable Supreme Court could not properly read such an expansive test into the meaning of the Constitution where it would be immunized from congressional revision. This argument, however, posits the majoritarian Congress, rather than the countermajoritarian Supreme Court, as the more effective guardian of minority rights. Moreover, because antidiscrimination remedies can adversely affect the interests of certain classes of white workers, who themselves might not be adequately represented in Congress, countermajoritarian Supreme Court intervention might be required to prevent Congress from utilizing an effects test for Title VII purposes. This, of course, is the subject of the contemporary affirmative action debate.

51. 109 S. Ct. 2115 (1989).

52. More specifically, the Court held that statistical disparities in racial representation between various segments of an employer's work force could not alone establish the plaintiff's prima facie case. The Court then went on to hold that the plaintiff in a disparate-impact subjective-standard case also had the burden of proving that particular employment practices, rather than the cumulative effect of the employer's hiring and promotion policies, were the legal cause of the disparate-impact of which the plaintiff complained. Finally, the Court held that the plaintiff had the burden of proving that the challenged practices were not justified by business necessity, even though business necessity had traditionally been treated as an affirmative defense that employers were required to prove in order to defeat a showing of disparate impact. *See* 109 S. Ct. at 2121-27; 109 S. Ct. at 2128-33 (Stevens, J., dissenting) (arguing that even under the intent test, the employer bears the burden of proving business justification as an affirmative defense).

The facts giving rise to the disparate-impact claim in *Wards Cove,* which included segregated housing and dining facilities, were sufficiently egregious that the dissenters found them to "bear an unsettling resemblance to aspects of a plantation economy." 109 S. Ct. at 2128 n.4 (Stevens, J., dissenting); *see also* 109 S. Ct. at 2136 (Blackmun, J., dissenting). If facts egregious enough to warrant such characterization are not sufficient to satisfy the Court's new effects test, it is difficult to divine a meaningful difference between this new test and the traditional intent test.

were constrained in its selection of governing principles, however, it would remain largely unconstrained when called upon to apply the principle that had been selected.

In theory, once a governing principle is identified, the principle reduces the danger of judicial majoritarianism because the principle rather than judicial discretion generates the adjudicatory result. This theory, however, cannot work for two reasons. First, in order to be generally acceptable, a legal principle must be stated at a high enough level of abstraction to permit interest groups with divergent preferences to believe that their objectives can be secured by the principle. This level of abstraction both precludes meaningful constraint and requires an act of discretion to give the principles operative meaning. Second, the contemporary nature of legal analysis makes it unrealistic to expect that even a precise principle can generate only one, consistent result. Since the advent of legal realism and its demonstration of the linguistic and conceptual imprecision of legal principles, legal analysis has tended to consist of functional or policy analysis.[53] However, because we are ambivalent about most of the social policies that we espouse, that ambivalence can cause a single principle to generate inconsistent outcomes.

The problem can be illustrated by considering the dilemma posed by the state action principle. The Supreme Court has held that the fourteenth amendment prohibits official acts of racial discrimination but that it does not reach acts of private discrimination.[54] The apparent purpose in drawing this distinction is to isolate a sphere of personal autonomy in which private parties are free to exercise their associational preferences free from state intervention, but to preclude the state itself from expressing a preference for one race over another. In *Corrigan v. Buckley,*[55] the Court held that a racially restrictive covenant in a white property owner's deed could be legally enforced by the state without offending the constitutional prohibition on official discrimination. Presumably, the Court viewed the state as a neutral actor making its legal enforcement machinery equally available to all citizens without regard to their private associational preferences, thereby advancing the purposes of the state action principle. Then, in *Shelley v. Kraemer,*[56] the Court changed its mind and held that judicial enforcement of racially restrictive covenants was unconstitutional,

53. This development is discussed at greater length in G. WHITE, TORT LAW IN AMERICA 63-75 (1980).

54. The Civil Rights Cases, 109 U.S. 3, 14-15 (1883).

55. 271 U.S. 323 (1926) (dismissing appeal for want of substantial federal question).

56. 334 U.S. 1 (1948).

because such enforcement facilitated private acts of discrimination and thereby undermined the goal of official neutrality. In essence, the *Shelley* Court inverted the perceived connection between the state action principle and its underlying policy objectives that had originally been established in *Corrigan.* The problem of determining which is the correct application of the state action principle is simply insoluble. Because state acquiescence can always be recharacterized as state action, the meaning of the state action principle can only amount to a matter of perspective, which inevitably will be colored in particular contexts by our ambivalent social views concerning the competing policy considerations on which the principle rests. For present purposes, however, it is sufficient to note that even after a legal principle has been selected, vast amounts of loosely constrained judicial discretion may still be needed in order to apply it.

Majoritarian preferences reside in the socialized attitudes and values of Supreme Court justices, and they find expression in the exercise of judicial discretion. Although a justice may be prompted by the formal safeguards of life tenure and salary protection consciously to guard against majoritarian influences, such efforts cannot be effective against the unconscious operation of those influences. Moreover, the operational safeguard of principled adjudication cannot guard effectively against majoritarianism because many legal principles incorporate majoritarian preferences into their meanings. In addition, the ambiguity inherent in both the selection and application of governing principles is too great to permit the principles to serve as meaningful constraints on the exercise of judicial discretion. Rather than protecting minority interests from majoritarian abrogation, as envisioned by the traditional model of judicial review, the Supreme Court appears actually to serve the function of advancing majority interests at minority expense, while operating behind the veil of countermajoritarian adjudication. Assuming that the traditional model has in fact failed, racial minorities must consider novel strategies to deal with the essentially majoritarian nature of the Court.

II. Race and Positive Politics

Contemporary minority attraction to judicial review has been premised on the belief that the Framers' political safeguards against factionalism could not adequately protect the interests of racial minorities who would effectively be under-enfranchised by their discrete and in-

sular character.[57] Moreover, the substantial dilution of the structured safeguards during the New Deal eliminated any effectiveness they may have had initially.[58] Reexamination of these assumptions in light of the majoritarianism inherent in judicial review, however, suggests that, whatever their defects, the political safeguards hold more promise for contemporary racial minorities than continued reliance on judicial review. Part I of this article has suggested that Supreme Court dispositions of legal claims will ultimately be governed by the majoritarian-influenced personal preferences of the justices who consider those claims. This means that the judicial process is ultimately a political process — preferences rather than principles will determine outcomes. Accordingly, the appropriate minority response to such judicial majoritarianism should be a political response.

In light of the failure of countermajoritarianism, minorities could rationally choose to forgo reliance on judicial review altogether and concentrate their efforts to advance minority interests on the overtly political branches of government. The Framers had faith in the ability of pluralist politics to protect the minority interests with which they were concerned. The political branches have historically done more than the Supreme Court to advance minority interests, while the predominant role of the Court, consistent with its veiled majoritarian design, has been to retard the rate at which minority claims of entitlement could prevail at the expense of majority interests. As is discussed in Part III below, it turns out that even *Brown v. Board of Education,*[59] the case most often cited as establishing the viability of countermajoritarian review, can be better understood as a product of veiled majoritarianism than as a triumph of the traditional model. Therefore, to the extent that minorities are able to forgo Supreme Court guardianship over their interests in favor of the protections available through the pure political process, the political option has considerable appeal.

A. *Pure Politics*

In a contest between competing societal interests that is ultimately to be judged by political considerations, minorities might well prefer to compete in an arena that is openly political, rather than one from

57. See J. ELY, *supra* note 11, at 77-88, 145-70 (describing representation-reinforcement theory of judicial review).

58. *See supra* text accompanying notes 16-17.

59. 347 U.S. 483 (1954) *(Brown I)* (abandoning separate-but-equal interpretation of fourteenth amendment); 349 U.S. 294 (1955) *(Brown II)* (requiring integration of public schools "with all deliberate speed").

which political concerns nominally have been excluded. In an overtly political process, minority interests will receive whatever degree of deference their innate strength can command, subject only to limitations in the bargaining and organizational skills of minority politicians. In a positive sense, therefore, the overt political process is pure. Outcomes are determined by counting votes, with no need to consider the reasons for which those votes were cast. The process purports to be nothing more than what it is — a pluralistic mechanism for generating binding results. Although rhetorical principles may accompany the solicitation of political support, the principles themselves are inconsequential. No one cares much about their content, and their meaning is measured only by the extent to which their rhetorical invocation proves to be effective.

For racial minorities, the overt political process has two attractions. First, the political process is definitionally immune from distortion because it has essentially no rules that can be violated. In the film *Butch Cassidy and the Sundance Kid,*[60] Butch Cassidy prevailed in a knife fight over one of his adversaries by exploiting the absence of formal rules. Butch first suggested that he and his adversary needed to clarify the rules of the knife fight. As the adversary — put off-guard by Butch's suggestion — protested that there were no such things as "rules" in a knife fight, Butch kicked the adversary very hard in a very sensitive part of his anatomy. With this one action, Butch was able both to establish the truth of the proposition being asserted by his adversary and to capitalize on that proposition in order to win the fight.

As a positive matter, the pure political process is nothing more than the process of casting and counting votes. Outcomes cannot be right or wrong, nor can they be just or unjust. They are simply the outcomes that the process produces. Although outcomes may be determined by how the issues are framed, how support for those issues is secured, and even by who is permitted to vote, minorities should not be distracted by considerations relating to whether the process is operating fairly. The process simply works the way it works. What minorities should focus on is how best to maximize their influence in that process. Minority participation in pluralist politics can, of course, take the form of voting, running for office, or making campaign contributions, but it is not limited to those forms of involvement. Minority participation can also take the form of demonstrations, boycotts and riots. Although such activities may be independently illegal, for purposes of positive politics their significance is limited to their potential

60. *Butch Cassidy and the Sundance Kid* (Twentieth Century-Fox 1969).

for increasing or decreasing political strength. This is not to say that no rules at all govern the positive political process. Operative rules determine which strategies will increase and which will decrease political power. However, the operative rules are not only too complex and contingent to permit them to be articulated accurately, but those rules need never be articulated, because the selective responsiveness of the political process itself will promote adherence to those rules without regard to the accuracy of their formal expression. The process of positive politics — like a knife fight — cannot be distorted because it has no formal rules. In addition, the operative rules that do govern the process tend to be self-enforcing.[61]

The second attraction of the overt political process is that it permits minorities to assume ultimate responsibility for their own interests. As discussed below, there are inherent limits on the political strength of any interest group. Within those limits, however, positive politics gives minorities themselves control over the degree to which minority interests are advanced. Minorities determine how important it is for minorities to engage in political activity; minorities determine how much political activity is appropriate; and minorities decide what minority priorities should be in selecting among competing political objectives. Positive politics gives minorities both the credit for minority advances and the blame for minority failures. By thus promoting minority self-determination, positive politics elevates minority dignity and self-esteem in a way that is likely to be of more long-term significance than minority success in advancing any particular interest.

The politics inherent in the process of judicial review is of a different order. Where the overt political process is transparent and unassuming, the Supreme Court political process is opaque and

61. There are, of course, competing conceptions of the political process under which the process is more principled than it is under my conception. Because those conceptions postulate adherence to principle, however, they share the same weaknesses that are inherent in a principled model of judicial review. The value of politics as I have conceptualized it here is that it escapes the need to depend upon principle for its proper operation.

Nevertheless, I do not wish to overstate the degree to which pure politics needs to be a self-regulating endeavor. Bribery, ballot box stuffing, and vote miscounting could be considered forms of misconduct that require external regulation — although strong positive arguments could be made that even these abuses are subject to correction by the political process itself. Nor do I wish to obscure the fact that differential access to the political process can drastically affect political outcomes. Rather, the present argument is that despite these potential abuses, the political process may still be preferable to policymaking processes involving the Supreme Court.

I also realize that some advocates of political pluralism hold the political process in high regard, according its outcomes the imprimatur of democratic legitimacy. *See, e.g.*, J. ELY, *supra* note 11; *cf.* Sunstein, *Republicanism, supra* note 11; Sunstein, *Interest Groups, supra* note 11 (emphasizing civic republican values that can be expressed in properly operating political process). The advantages of positive politics on which I am focusing, however, do not rest upon normative claims of external validity.

pretentious. The Court requires its political bargaining to be conducted in the vernacular of legal principle, and its referenda to be cloaked in the mantle of reasoned deliberation. Moreover, because judicial convention requires the justices to camouflage the political preferences that ultimately govern their applications of principle, political negotiation with the Court is haphazard and imprecise. Judicial opinions must be deciphered for clues regarding the concessions for which a justice will commit his or her vote. And once a commitment is made, members of the Court are largely impervious to any leverage through which future fidelity to that commitment could be enforced. Unlike the positive political process that is effectively immune from distortion, the Supreme Court process is itself a distortion that renders the outcomes of ordinary politics uncertain. Because it is the Court rather than the pluralist process that has the final say over which of the competing political interests will prevail, it is the Court, rather than the affected minority group, that retains ultimate control over the fate of the minority group's interests.

The positive reasoning that permits one to conceive of the overt political process as immune from the possibility of distortion also makes it possible to characterize the Supreme Court political process in such terms. However, this does not undermine the reasonableness of a minority preference for a simple process that does not involve the Supreme Court over a complex process that does. Less experienced players can master more easily the skills required for effective participation in a simple process than acquire the skills demanded of a complex process. A preference for simplicity is particularly sensible if complexities are differentially beneficial to participants depending on whether they wish to maintain or to change the status quo. Supreme Court political complexity creates just such a differential benefit, working to the disadvantage of minorities who typically wish to alter rather than preserve the socioeconomic status quo.

The Supreme Court adjudicatory process is political, but its political dimensions are complex and obscure. Even though every interest group competing for Supreme Court endorsement will be burdened similarly by the complexities of the Supreme Court process, a rational minority response to those complexities nevertheless would be to prefer the candor and elegance of representative politics. Pluralist politics is, of course, no panacea. Its historical loss of favor reflects genuine grounds for concern.[62] Nevertheless, pluralist negotiation offers more

62. *See, e.g.*, Peller, Neutral Principles *in the 1950's*, 21 U. MICH. J.L. REF. 561 (1988) (neutrality premises of pluralism impossible to realize); Sunstein, *Interest Groups*, *supra* note 11, at 81-85 (pluralism is normatively unattractive); Tushnet, *Darkness on the Edge of Town: The*

to minorities than continued reliance on judicial review. As discussed below, political theory suggests that minority interests can successfully influence majoritarian politics. Moreover, minority interests have historically been better served by the representative branches than by the Supreme Court, notwithstanding New Deal evisceration of the structural minority safeguards.

B. *Minority Influence in Pluralist Politics*

Majoritarian institutions can be expected to respond to minority political preferences for at least three reasons. First, the "logrolling" process through which majoritarian public policy is formulated gives minorities a degree of influence over policy formulation that is commensurate with minority political strength. Second, the majority can often best protect its own interests by protecting minority interests. Third, minorities can negotiate political concessions from the majority by invoking the apparent need of majoritarian institutions to conceive of themselves as capable of countermajoritarian acts. Although innate political strength imposes a theoretical limit on the concessions that minorities are ultimately able to secure from the majority, minority political skills are likely to have immediate impact on the scope of such concessions.

Pluralist political theory predicts that in a representative democracy, majoritarian public policy will be formulated through a process of negotiation between interest groups. The civic republican theorists view the negotiation process as an opportunity for collective deliberation to develop virtuous civic policies that transcend the selfish desires of the negotiating interest groups.[63] For these theorists, the interests

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Contributions of John Hart Ely to Constitutional Theory, 89 YALE L.J. 1037 (1980) (pluralism is descriptively inaccurate); Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378-79 (1988) (pluralist efforts to remedy race discrimination through colorblind antidiscrimination laws ignore racism inherent in status quo); Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1190-93 (1990) (legal standard of objective reasonableness used to resolve harassment cases represents failed pluralist attempt to mediate ultimately irreconcilable conflict between divergent societal perspectives).

For general discussions of pluralist political theory, see A. BENTLEY, THE PROCESS OF GOVERNMENT (1908); R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); J. FREEDMAN, CRISIS AND LEGITIMACY (1978); T. LOWI, THE END OF LIBERALISM (2d ed. 1979); D. TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (1962); THE BIAS OF PLURALISM (W. Connolly ed. 1969); Bourke, *The Pluralist Reading of James Madison's Tenth* Federalist, 9 PERSP. AM. HIST 271 (1975); Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEXAS L. REV. 873 (1987); Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

63. *See generally* T. PANGLE, THE SPIRIT OF MODERN REPUBLICANISM (1988); Appleby, *Republicanism in Old and New Contexts*, 43 WM. & MARY Q. 20 (1986); Horwitz, *Republican-*

of racial minorities will be protected by the prevailing moral theory to which the deliberants collectively adhere.[64] Others, often referred to as public choice theorists, view the political process as an inherently self-interested one in which the most powerful special interests will combine forces to impose their will on less powerful interest groups, often to the detriment of the overall public welfare.[65] For this group, the interests of racial minorities will be protected only to the extent that racial minorities have the political power to protect themselves.[66] Even assuming that the less flattering public choice depiction is correct, and that public policy results simply from a process of logrolling during which interest groups selfishly pursue their own interests by trading votes, contemporary racial minorities possess sufficient political influence to participate effectively in that process. Indeed, minorities may prefer the less flattering characterization, because it minimizes the need for external regulation of the political process, which could reintroduce the dangers of veiled majoritarianism.[67]

For present purposes, it is not necessary to determine whether racial minorities have always possessed the power to protect their own interests through participation in the pluralist political process.[68] To-

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ism and Liberalism in American Constitutional Thought, 29 WM. & MARY L. REV. 57 (1987); Simon, *The New Republicanism: Generosity of Spirit in Search of Something to Say*, 29 WM. & MARY L. REV. 83 (1987); Sunstein, *Republicanism*, *supra* note 11. *See generally Symposium: The Republican Civic Tradition*, *supra* note 13.

64. *See, e.g.*, Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1529-32 (1988). Obvious problems are posed if there is no common moral theory to which the deliberating interest groups subscribe.

65. For an introduction to public choice theory, see Farber & Frickey, *supra* note 62, at 875-906 and sources cited therein. *See also* K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1965); R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); W. ESKRIDGE & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 367-98 (1988); D. MUELLER, PUBLIC CHOICE (1979); Kelman, *"Public Choice" and Public Spirit*, 87 PUB. INTEREST 80 (1987); Mueller, *Public Choice: A Survey*, 14 J. ECON. LIT. 395 (1976). *See generally Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167-518 (1988).

66. *See generally* sources cited *supra* note 65.

67. Any theory which requires the majority to adhere to a substantive moral theory, or even to a theory of elaborate procedural regularity, requires some mechanism to enforce that adherence. To the extent that the mechanism resembles judicial review, all of the problems associated with veiled majoritarianism are posed once again.

68. Obviously, the history of de jure racial disenfranchisement in this country makes such an argument difficult to maintain. The argument, however, is not an impossible one. Sometimes, surrogate representation can compensate for lack of the power to vote directly. For example, white women almost certainly had a higher standard of living than black men between enactment of the thirteenth and the nineteenth amendments, even though black men could vote and white women could not. *See* U.S. CONST. amend. XV (ratified in 1870, giving blacks right to vote); U.S. CONST. amend. XIX (ratified in 1920, giving women right to vote). Moreover, white children presently have a higher standard of living than black adults, even though black adults can vote and white children cannot. *See* CHILDREN'S DEFENSE FUND, BLACK AND WHITE CHILDREN IN AMERICA: KEY FACTS 50 (1985) (report of Children's Defense Fund supplying data

day, minorities plainly possess significant political power. This is demonstrated by evidence as varied as the success of black political candidates among white voters in the most recent elections,[69] the strength of Jesse Jackson's showings in the two most recent presidential campaigns,[70] the adoption of minority set-aside programs such as the one the Supreme Court invalidated in *City of Richmond v. J.A. Croson Co.*,[71] and the notable presence of minority actors in television shows and commercials.[72] Pluralist political strength stems in part from numerical voting strength as a percentage of the total electorate. Today, minority groups comprise a large percentage of the total elec-

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indicating that in 1983, 30.1% of all black adults in United States lived in poverty while only 17.3% of white children under age of 18 lived in poverty). In addition, despite their disenfranchisement, blacks and women were somehow able to secure the right to vote through operation of the political process, even after the Supreme Court had failed them. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (holding that blacks did not have rights of citizenship, which was overruled by political process through Civil War and enactment of fourteenth amendment); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (upholding constitutionality of denying women right to vote, which was overruled by political process through enactment of nineteenth amendment).

69. In the November 1989 off-year elections, several black candidates defeated white opponents by piecing together coalitions that included both black support and substantial amounts of white support. The most notable is the election of Douglas Wilder as governor of Virginia, a state whose population is 80% white. Wilder is the first black ever to have been elected governor of a state since Reconstruction — although Tom Bradley lost the 1982 gubernatorial election in California by a margin of 1%, which is roughly the same margin by which Wilder won. In both the Wilder and Bradley elections, there appears to have been a substantial "silent" racist white vote that was not reflected in the polls. In addition, David Dinkins was elected the first black mayor of New York City (winning 91% of the black vote, 26% of the white vote and 65% of the hispanic vote); Norman Rice was elected the first black mayor of Seattle (a city whose population is only 10% black); John Daniels was elected the first black mayor of New Haven; Chester Jenkins was elected the first black mayor of Durham, North Carolina; and Michael White defeated his black opponent in the race for mayor of Cleveland by successfully competing for the white vote. *See* Attinger, *A Nice Guy Finishes First: But Dinkins May Not Be Tough Enough to Cope with New York*, TIME, Nov. 20, 1989, at 60; Fineman, *The New Black Politics: Candidates Across the Country Win Historic Victories by Emphasizing Mainstream Values*, NEWSWEEK, Nov. 20, 1989, at 52; Shapiro, *Breakthrough In Virginia: In a Model of Crossover Politics, Douglas Wilder Becomes the First Elected Black Governor and Shows Others How to Crash the Color Line*, TIME, Nov. 20, 1989, at 54; Toner, *Tuesday's Stakes: Black Politicians Are Leaning Against Some Old Barriers*, N.Y. Times, Nov. 5, 1989, § 4 (Week in Review), at 1, col. 1.

70. In 1988 Jesse Jackson received approximately 6.6 million votes in the Democratic primaries. *See* Dionne, *Jackson Share of Votes by Whites Triples in '88*, N.Y. Times, June 13, 1988, at B7, col. 1. This represented 29% of the overall Democratic primary vote. *See* Kondracke, *Campaign '88: Vultures*, THE NEW REPUBLIC, Nov. 7, 1988, at 10. In 1984, Jackson received approximately 3.3 million votes, comprising 18% of the Democratic primary vote. *See* R. SCAMMON & A. MCGILLIVRAY, AMERICA VOTES 16: A HANDBOOK OF CONTEMPORARY AMERICAN ELECTION STATISTICS 67 (1985) (supplying data on which 18% calculation is based).

71. 109 S. Ct. 706 (1989); *see supra* text accompanying note 3.

72. The presence of minority actors in television shows and commercials attests to the presence of minority purchasing power, which can be translated into political power. The success of the Montgomery, Alabama bus boycott, orchestrated by Martin Luther King, provides an example. *See* Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989).

torate.[73] By the middle of the next century, whites will constitute a minority.[74] Accordingly, in sheer numerical terms, racial minorities can form voting coalitions of either a temporary or a lasting nature that have sufficient political strength to demand concessions from the majority.[75] Of course, pluralist political power does not result solely from innate voting strength. Minority voting strength can be supplemented by the support of majority voters who perceive a correspondence between their own interests and minority interests on particular issues, as well as by majority voters who are simply sympathetic to minority preferences. Such majority-minority coalitions will not be formed if the discrete and insular nature of a minority group causes majority members to refuse to bargain with that group. That, however, does not seem presently to be the case. The available evidence indicates that the majority currently is bargaining with racial minorities.[76]

The welfare of minority interests is not limited solely to gains that can be attributed to minority political power in the logrolling process. Minority interests can also benefit incidentally from selfish actions that the majority takes in order to advance its own interests. Slavery offers a crass example. Assuming that slave owners have no concern for the

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73. Blacks currently comprise approximately 10% of the electorate. *See* Shogan, *Seeks to Avoid Hurting Party: Dukakis Ponders What Role He Can Offer Jackson,* L.A. Times, June 27, 1988, pt. 1, at 1, col. 1, at 14, col. 1. Hispanics comprise another 8.2%, and the Hispanic population is growing five times faster than the population at large. *See* Rich, *Hispanic Population of U.S. Growing Fastest: Census Bureau Puts Total at 20.1 Million,* Wash. Post, Oct. 12, 1989, at A3, col. 5.

74. *See* Henry, *Beyond the Melting Pot,* TIME, Apr. 9, 1990, at 28, 30.

75. Creation of a lasting coalition that will, *inter alia,* benefit racial minorities is the strategy embodied in Jesse Jackson's conception of the "Rainbow Coalition." The strategy appears to have become more effective over time. In 1988, Jackson received 12% of the white vote, consisting of approximately 2.1 million votes. In 1984, Jackson received only 5% of the white vote, consisting of approximately 650,000 votes. In addition, Jackson was able to capture 92% of the black vote in 1988, compared to 77% in 1984. *See* Dionne, *supra* note 70. Jackson's 6.6 million votes in 1988 are roughly comparable to the 7.0 million votes received by Edward Kennedy in 1980 and the 6.8 million votes received by Walter Mondale, who captured the Democratic nomination in 1984. *See* R. SCAMMON & A. MCGILLIVRAY, *supra* note 70, at 60, 67.

76. Not only does the varied evidence discussed above, *see supra* text accompanying notes 68-75, belie the suspicion that whites will refuse to bargain with racial minorities, but the remarkable popularity of the Bill Cosby television show attests to the erosion of feelings of alienation that might preclude such bargaining. The fact that *The Cosby Show,* which weekly — now daily in some markets — depicts blacks, whites, and hispanics interacting in a relaxed and uneventful manner, has achieved considerable popularity among white viewers, suggests the beginnings of cultural assimilation that will increase the likelihood of future majority-minority coalitions. As the degree of assimilation grows, race will ultimately come to lose its status as a characteristic around which interest group identities will be formed. The prospective barriers to pluralist bargaining are likely to be more economic than racial — the *Cosby* characters are firmly upper-middle class. Although there may be many sound reasons for which one would object to the loss of distinctive cultural identity attendant to assimilation into the dominant culture, in terms of the single goal of advancing pluralist political power, assimilation seems likely to be beneficial.

welfare of minority human beings, productivity concerns will nevertheless cause slave owners to make food, clothing and shelter concessions to their minority slaves. Although one could argue that these productivity concerns in fact give slaves the political power to demand concessions, that characterization seems unrealistic. The cost to slaves of exercising whatever bargaining leverage they may theoretically be said to possess is simply prohibitive. It is more meaningful to conceive of such concessions as incidents of majority efforts to advance their own interests, which occur independently of the exercise of minority political power. This suggests that minorities can maximize their welfare by allocating the political capital that they do possess to interests not subject to such derivative advancement. In addition, to the extent that minority politicians are skillful in framing the presentation of political issues, they can define issues relevant to minority interests in ways that make them appear to be issues that advance majority preferences. The abortion controversy may provide a contemporary example. If one assumes that liberal access to abortion services will advance minority interests — something that is, of course, open to debate — it might make sense for minority politicians to allocate their political resources to different issues, believing that politically powerful white middle class women will ensure such liberal access for themselves and incidentally for minority women. This is a useful example, because it also illustrates the potential danger of pursuing such an allocation strategy. The political preferences of white, middle-class women may ultimately prevail on the abortion issue, but their victory also may be obtained by deflecting anti-abortion opposition away from themselves and toward minority abortions. Arguably, that is precisely what happened after *Roe v. Wade,*[77] when liberal access to abortion services was available but abortion funding was not.[78] Accordingly, although minority political strength can be enhanced by free-riding on majority preferences, the strategy can be a risky one.

In addition to its inherent voting strength, supplemented by participation in voting coalitions, effective minority political power can also be enhanced by playing upon the majority's own need to believe itself capable of countermajoritarian sensitivities. The countermajoritarian model of judicial review was not preordained. Rather, it was a liberal political invention designed to counteract majoritarian threats to indi-

77. 410 U.S. 113 (1973) (finding constitutional right to abortion). *But see* Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (arguably limiting scope of constitutional right to abortion).

78. *See* Harris v. McRae, 448 U.S. 297 (1980) (upholding constitutionality of federal refusal to fund abortions), Maher v. Roe, 432 U.S. 464 (1977) (upholding constitutionality of state refusal to fund abortions).

vidual liberty that the majority itself perceived to be quite real.[79] Paradoxically, continued faith in the viability of this invention is essential to continued *majority* acquiescence in majoritarian authority.[80] This means that the Supreme Court must exhibit sufficient deference to minority interests during the process of judicial review to reassure the majority of the Court's countermajoritarian capabilities. In addition to the victories that minorities secure through the overt political process, therefore, minorities can also win some political victories before the Supreme Court, which by hypothesis they could not win before the political branches. As discussed below,[81] effective use of the Supreme Court as a political institution can be both difficult and risky enough that, if given the option, minorities could sensibly choose to avoid the Court. To the extent that the option of avoidance is unavailable, however, skillful use of the Court can provide yet another method for increasing the amount of operative political power that minorities possess.

In theory, the magnitude of minority political influence is limited by inherent minority political strength. Those limits, however, are of more theoretical than practical interest because they will never be reached. Variations in operative minority political power are so likely to result from the manner in which minorities make their political judgments and exercise their political skills that the innate limitations become relatively insignificant. Questions concerning when to form coalitions, when to free-ride on majoritarian preferences, how to frame political issues, and when to involve the Supreme Court, are so complex that there will always be opportunities for minorities to increase their political strength by increasing their political skills.

C. *Minority Frustrations in the Supreme Court*

The influence that pluralist theory predicts minorities will have in the majoritarian political process has been borne out empirically. Minorities have not only secured significant concessions from the representative branches, but the representative branches have typically done more than the Supreme Court to advance minority interests. In fact, the Supreme Court's civil rights performance has historically been so disappointing that it lends little, if any, support to the tradi-

79. *See supra* text accompanying notes 18-20.

80. If the majority voted to deprive itself of majoritarian governing authority in order to safeguard individual liberties, governmental compliance with such a vote would itself be an exercise of majoritarian authority that would remain operative only so long as it continued to command majority support.

81. *See infra* Parts III & IV.

tional model of judicial review. Rather, the Court's decisions serve more as a refutation than a validation of countermajoritarian judicial capacity.

Minority interests in the United States have typically been advanced through the political process. The most obvious example is the manumission of black slaves. Slavery itself was a political creation that the majoritarian Framers chose to accord some degree of constitutional protection.[82] At the time the Constitution was ratified, slavery was a very contentious issue that the Framers anticipated would continue to be the focus of future political attention.[83] That attention gradually resulted in total emancipation. First, some northern states enacted legislation that abolished slavery within their jurisdictions.[84]

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82. The Constitution contains three provisions that are directly addressed to slavery. Article I, § 9, prohibits Congress from terminating the importation of new slaves until 1808, and authorizes the imposition of a federal tax on imported slaves. U.S. CONST. art. I, § 9, cl. 1. Article I, § 2, apportions legislative representation in the House of Representatives on the basis of state population, counting each slave as three-fifths of a person for apportionment purposes. U.S. CONST. art. I, § 2, cl. 3 (1788, amended 1868). Article IV, § 2, prohibits one state from according free status to a slave who has escaped to that state from another state. U.S. CONST. art. IV, § 2, cl. 3 (1788, superseded 1865). *See* G. STONE, *supra* note 11, at 436.

83. *See, e.g.*, U.S. CONST. art. I, § 9 (prohibiting congressional termination of slave trade until 1808); *see* G. STONE, *supra* note 11, at 436-37.

84. *See generally* R. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975); SLAVERY, RACE AND THE AMERICAN LEGAL SYSTEM, 1700-1872, SER. NO. 7, STATUTES ON SLAVERY: THE PAMPHLET LITERATURE (P. Finkelman, ed. 1988); A. HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978); M. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST (1981); W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977).

The precise manner in which slavery was ended varied from state to state. For example, there is debate as to precisely when slavery came to an end in Massachusetts. The state constitution, ratified in 1780, contained a clause stating, "All men are born free and equal, and have certain natural and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberty . . . ." In 1783, the Supreme Judicial Court convicted a white defendant of beating and imprisoning a black man, despite the defense that the black man was the defendant's slave. In 1781, the court reached a similar result in the case of another alleged slave. In combination, these cases helped to promote prevailing public opinion that blacks should be deemed free, thereby effectively ending slavery in Massachusetts. *See* R. COVER, *supra,* at 43-50. The Massachusetts experience also dictated the status of slavery in the territory of Maine, which did not separate from its mother state of Massachusetts until 1820. *See* Wiecek, *supra,* at 51.

In Jackson v. Bulloch, 12 Conn. 38 (1837), the Connecticut Supreme Court ruled that the Connecticut Constitution, which also contained a "free and equal" provision, did not prohibit slavery. Rather, the court deferred to state emancipation statutes that freed slaves gradually. A 1774 statute prohibited the importation of slaves into Connecticut. A 1784 statute stated that no person of color born after that year could be forced to remain a slave after he or she reached the age of 25. *See* 12 Conn. at 38-44; R. COVER, *supra,* at 55 n.*. Similarly, in the 1845 case of State v. Post, 20 N.J.L. 368 (N.J. 1845), the New Jersey Supreme Court held that the "free and equal" clause in its constitution did not apply to slaves. 20 N.J.L. at 382-83. Therefore, the estimated 700 slaves remaining in New Jersey more than 40 years following the passage of a gradual emancipation statute in 1804 had to wait for their freedom under the Act. *See* R. COVER, *supra,* at 55-60.

The Pennsylvania Act of 1780 stated that all persons born after July 4, 1780, were to be free. Slaves born before that date would remain slaves during their lifetimes. Children of these slaves-

Then, Congress enacted federal legislation prohibiting slavery in the new territory acquired through the Louisiana Purchase.[85] Next, in 1861, after the outbreak of the Civil War, President Lincoln issued the Emancipation Proclamation, which abolished slavery in the southern states.[86] Finally, in 1865, after the end of the Civil War, Congress adopted and the states ratified the thirteenth amendment, abolishing slavery throughout the United States.[87] Manumission illustrates that even the interests of completely disenfranchised minorities will be advanced through the political process when they correspond to the per-

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for-life would remain slaves for 28 years. *See id.* at 62-63. The Vermont Constitution contained a "free and equal" provision that was implemented through a specific prohibition on keeping a person a "servant, slave or apprentice" after age 21 for males and age 18 for females. *Id.* at 275 n.5. The Vermont Supreme Court held that this clause ended slavery in the case of Selectmen of Windsor v. Jacob, 2 Tyl. 192 (Vt. 1802). New York passed a gradual emancipation statute in 1799. Children freed by this act remained slaves until age 28 for males and 25 for females. *See* W. WIECEK, *supra,* at 89.

Rhode Island passed a gradual emancipation statute freeing all children born after March 1, 1784. The statute declared that "all men are entitled to life, liberty, and the pursuit of happiness, and the holding mankind in a state of slavery, as private property, . . . is repugnant to this principle." 1784 R.I. Publ. Laws, *quoted in* W. WIECEK, *supra,* at 50. In 1843, Rhode Island adopted a constitution that removed any remaining traces of slavery in the state. *See* W. WIECEK, *supra,* at 50. Delaware, which was a slave state, had a clause in its constitution forbidding the importation of slaves. *See id.* at 48. In New Hampshire, slavery appears simply to have faded away without any specific legal cause. *See id.* at 51.

85. Missouri Compromise, ch. 22, 3 Stat. 545, 548 (1820). An amendment to the Act, which enabled Missouri to enter the Union without restrictions on slavery, was authored by Senator Jesse B. Thomas of Illinois. The Thomas Amendment was the key provision in what became known as the Missouri Compromise. The amendment stated that slavery was "forever prohibited" in the remaining portion of the Louisiana Territory, which was the area north of 36 degrees, 30 minutes latitude. There was little debate in either House of Congress over the Thomas amendment. President Monroe signed the Act, interpreting "forever prohibited" to mean for the duration of the territorial period. It was assumed that the Compromise could be extended to any additional territories that the United States would acquire. *See* D. FEHRENBACHER, THE *Dred Scott* Case: Its Significance in American Law and Politics 107-13 (1978).

By 1850, with California seeking to join the Union, it became apparent that a new compromise was needed if secession by the southern states was to be avoided. Henry Clay's suggested solution to the slavery problem became the basis for the Compromise of 1850. Under this agreement, California was admitted to the Union as a free state, while the Utah and New Mexico Territories were organized without restrictions on slavery. In addition, the slave trade was prohibited in the District of Columbia. The Compromise of 1850 did not repeal the Thomas amendment because Congress perceived it as unrelated to that amendment. *See id.* at 157-63.

The Kansas-Nebraska Act, which followed in 1854, did repeal the Thomas amendment as it applied to the Kansas and Nebraska Territories. *See id.* at 108. The Act, organizing the Nebraska Territory from 36 degrees, 30 minutes to the Canadian border, was a noninterventionist compromise "not to legislate slavery into any Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States." *Id.* at 184; *see id.* at 178-87.

Finally, in 1857, the greatly weakened Thomas amendment was invalidated by the Supreme Court on constitutional grounds in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (invalidating Missouri Compromise prohibition on slavery).

86. The Emancipation Proclamation stated: "[A]ll persons held as slaves within any State or designated part of a State, the people whereof [are] in rebellion against the United States, [are h]ence-forward, and forever free . . . ." *See* J. FRANKLIN, THE EMANCIPATION PROCLAMATION 96 (1963).

87. U.S. CONST. amend. XIII.

ceived interests of the majority.[88]

Manumission also illustrates that the political process can be much more advantageous to racial minorities than the judicial process. When the Supreme Court was given the opportunity to limit slavery six years before the Emancipation Proclamation in the infamous *Dred Scott* case,[89] it declined to do so, issuing an opinion so demeaning to blacks that it reads like a parody of Supreme Court insensitivity to minority interests. In rejecting the claim of free status asserted by a slave who had been taken by his owner to a free state, then to the Louisiana Territory where slavery had been prohibited, and then brought back to the owner's original slave state, Chief Justice Taney's opinion made two assertions that are remarkable coming from a purportedly countermajoritarian institution. First, the opinion asserted that the Court lacked jurisdiction over the suit because the subhuman character of the black plaintiff deprived him of the capacity for citizenship required to invoke the Court's diversity jurisdiction.[90] Second, even though the Court lacked jurisdiction, the opinion declared that

88. Formation of a majoritarian abolitionist coalition is attributable to four types of objections to slavery: religious and moral objections; philosophical objections; political objections; and economic objections.

The strongest objections on religious and moral grounds came from the Puritans and the Quakers. Similar concerns were also raised by Congregationalists, Methodists, Baptists, and Presbyterians. Philosophically, slavery as an institution ran counter to the idea of individual liberty upon which many individuals thought the country was founded. Slavery raised political concerns that denying liberty to some would weaken the nation as a whole. In addition, many feared retribution from slaves and wanted to diffuse what they considered to be a political time bomb.

Although no significant organized movement fought against slavery based upon economic grounds, many considered slave labor unprofitable. The cost of slave importation was high, slaves were often seen as an untrustworthy labor force, and it was costly to protect whites from the "undesirable" slave element of the population. Finally, many believed the existence of slavery discouraged white labor. *See* M. LOCKE, ANTI-SLAVERY IN AMERICA: FROM THE INTRODUCTION OF AFRICAN SLAVES TO THE PROHIBITION OF THE SLAVE TRADE (1619-1808) 1-11 (1965). *See generally* W. GOODELL, SLAVERY AND ANTI-SLAVERY: A HISTORY OF THE GREAT STRUGGLE IN BOTH HEMISPHERES: WITH A VIEW OF THE SLAVERY QUESTION IN THE UNITED STATES (Negro Universities Press reprint 1968) (1852); A. ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH (1967).

89. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

90. The opinion states:

> The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. . . . The question before us is, whether [blacks are] a portion of this people . . . . We think they are not and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.
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> . . . .
>
> It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was

the provision of the Missouri Compromise statute prohibiting slavery in the Louisiana Territory was unconstitutional because it deprived slave owners of a property interest in their slaves.[91] The first assertion is remarkable because it evidences an unmistakably strong attitudinal predisposition that would seem to be disqualifying for an institution charged with safeguarding minority interests. Considering the range of political positions concerning slavery that existed at the time, the subhuman position adopted by the Court seems to have been the *most* disadvantageous to blacks.[92] The second assertion is remarkable because it reveals that this subhuman-property predisposition of the Court was so strong that the Court felt itself obligated to invalidate a *majoritarian* enactment limiting the spread of slavery. It is even more remarkable because the Court relied upon the need to defer to majoritarian policymakers as a justification for its jurisdictional holding.[93] Indeed, most of the judicial encounters with slavery that oc-

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framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.

60 U.S. (19 How.) at 404-05, 407.

91. The opinion states:

[The] right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words — too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

60 U.S. (19 How.) at 451-52.

92. Although Chief Justice Taney purported to be reporting the views of the Framers rather than his own views concerning the status of blacks, *see* 60 U.S. (19 How.) at 404-05, 407, the tone of Taney's opinion belies any suggestion that Taney himself did not share those views. *See supra* notes 90-91. Although slavery has existed in numerous societies and cultures, the brand of slavery that existed in the American South developed to the highest degree a slaveholder ideology under which the honor of the slaveholder was directly dependent upon the degradation of the slave. *See* O. PATTERSON, SLAVERY AND SOCIAL DEATH 94-97 (1982).

93. In justifying its conclusion that the subhuman character of blacks made them incapable in the eyes of the Framers of acquiring the citizenship necessary to give the Court jurisdiction, the opinion states: "It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or lawmaking power . . . ." 60 U.S. (19 How.) at 405. It is more than a little ironic that the Court found itself to lack jurisdiction to entertain suits filed by those whose interests it was required to protect under the traditional model.

Although one might argue that Chief Justice Taney was deferring to the majoritarian Framers rather than to the majoritarian Congress that enacted the Missouri Compromise, arguments of this type pose insoluble analytical difficulties. Where the Framers did not specifically provide otherwise, *see supra* note 82, they likely desired congressional preferences to govern resolution of future issues that would arise concerning slavery. *See* G. STONE, *supra* note 11, at 436-37. The Framers, however, may have specifically "provided otherwise" by including in the Constitution

curred prior to the Civil War resulted in judicial invalidation of majoritarian efforts to limit slavery.[94] *Dred Scott* was the second Supreme Court decision to invalidate a congressional enactment on constitutional grounds; *Marbury* itself was the first. *Dred Scott,* therefore, can be seen as continuing the Supreme Court tradition established in *Marbury* of sacrificing the interests of those that the Court is charged with protecting in order to advance ulterior political objectives.[95]

The major advances that racial minorities have made since manumission have also come from the representative branches. The fourteenth amendment overruled *Dred Scott* by granting citizenship to blacks, and it provided constitutional validation for the Reconstruction civil rights statutes now codified in sections 1981, 1982, and 1983 of title 42 of the United States Code.[96] After a post-Reconstruction lapse in congressional responsiveness to minority interests, congressional civil rights activity increased in the mid-twentieth century. The Civil Rights Acts of 1957[97] and 1960[98] created federal remedies for voting discrimination. The omnibus Civil Rights Act of 1964 prohibited various types of public and private discrimination. Among its most significant provisions are Title II, which prohibits discrimination in public accommodations,[99] Title IV, which authorizes the Attorney General to maintain school desegregation suits,[100] Title VI, which prohibits segregation in schools receiving federal funds,[101] and Title VII,

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the protections for private property on which Chief Justice Taney relied to invalidate the Missouri Compromise prohibition on slavery. *See supra* note 91. It is precisely this sort of analytical difficulty that Part I of the present article argues can be resolved only through recourse to the personal preferences of individual judges.

It also is possible to argue that the *Dred Scott* Court was engaged in an act of countermajoritarianism precisely because it did invalidate the majoritarian Missouri Compromise, in order to prevent the majoritarian abrogation of individual property rights. This argument, however, is suspect because the Missouri Compromise appears to have been politically dead at the time of its judicial invalidation, thereby making the Court's decision more majoritarian than countermajoritarian. *See supra* note 85.

94. G. STONE, *supra* note 11, at 440.

95. *See supra* note 18.

96. *See* G. STONE, *supra* note 11, at 444-51.

97. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957) (codified as amended at 42 U.S.C. § 1971 (1982)).

98. Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86, 90 (1960) (codified as amended at 42 U.S.C. § 1971 (1982)).

99. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat 241, 243 (1964) (codified at 42 U.S.C. § 2000a (1982)).

100. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 248 (1964) (codified at 42 U.S.C. §§ 2000c-6 (1982)).

101. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 240 (1964) (codified at 42 U.S.C. §§ 2000d to 2000d-1 (1982)).

which prohibits discrimination in employment.[102] The Voting Rights Acts of 1965,[103] 1970[104] and 1975[105] substantially enhanced the federal safeguards against voting discrimination contained in the 1957 and 1960 Acts by suspending literacy tests for voter registration and by requiring attorney general preclearance of apportionment changes that might be used to dilute minority voting strength.[106] The Fair Housing Act of 1968[107] contains provisions that prohibit discrimination in the sale or rental of housing, and it imposes increased federal criminal sanctions for the violation of individual civil rights.[108] The Public Works Employment Act of 1977 contained minority set-aside provisions requiring that ten percent of the funds given to state and local governments for construction purposes had to be used to secure goods or services supplied by minority-owned enterprises.[109]

In addition to congressional enactments, the executive branch has also advanced minority interests. For example, the president by executive order has imposed affirmative action obligations on federal contractors.[110] The Department of Health, Education and Welfare developed the school desegregation guidelines used to implement the Title VI fund cut-off provisions under the 1964 Civil Rights Act.[111] In addition, the Equal Employment Opportunity Commission has developed guidelines to implement the Title VII employment discrimination provisions of the 1964 Civil Rights Act,[112] and the Department of Housing and Urban Development has developed guidelines to implement the fair housing provisions of the 1968 Civil Rights Act.[113] Ob-

102. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1982 & Supp. IV 1986)).

103. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

104. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970) (codified as amended at 42 U.S.C. §§ 1973 to 1973aa-1, 1973aa-2 to 1973aa-4, 1973bb (1982)).

105. Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975) (codified as amended at 42 U.S.C. §§ 1973 to 1973d, 1973h, 1973i, 1973l, 1973aa, 1973aa-1a to 1973aa-4, 1973bb (1982 & Supp. IV 1986)).

106. *See* G. GUNTHER, *supra* note 11, at 859, 929-30; G. STONE, *supra* note 11, at 580-81.

107. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (1982 & Supp. IV 1986)).

108. *See* G. GUNTHER, *supra* note 11, at 916-17.

109. Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (1977) (codified at 42 U.S.C. § 6705 (1982)).

110. *See, e.g.*, Executive Order No. 11,246, Part II, Subpart B, 3 C.F.R 339, 340-42 (1964-65).

111. *See* G. STONE, *supra* note 11, at 474.

112. *See* 29 C.F.R. § 1608 (1989) (affirmative action appropriate under Title VII of Civil Rights Act of 1964, as amended); 29 C.F.R. § 1690 (1989) (procedures on interagency coordination of equal employment opportunity issuances).

113. *See* 24 C.F.R. §§ 106, 109-20 (1990) (fair housing administrative meetings under Title VII of Civil Rights Act of 1968).

viously, the representative branches have not been uniformly or consistently deferential to minority interests. Rather, they have made concessions to minority interests when the overall political climate has been conducive to such concessions.

The Supreme Court has greeted majoritarian efforts to advance minority interests with a mixed response. On occasion those efforts have been validated, as when the Court upheld the federal minority set-aside program established by the 1977 Public Works Employment Act in *Fullilove v. Klutznick*.[114] Sometimes the Court has shown even more sensitivity to minority interests than the representative branch whose action the Court validated. For example, in holding that the Reconstruction statutes reached private as well as official government conduct, the Court may well have gone beyond the actual intent of the Reconstruction Congress in its solicitude for minority interests.[115] On other occasions, majoritarian efforts to advance minority interests have met with marked judicial hostility, as they did in *Dred Scott*.[116] For example, although the Court upheld the federal minority set-aside program in *Fullilove*, recently it invalidated a similar municipal program in *City of Richmond v. J.A. Croson Co.*[117] And although it recently reaffirmed the applicability of the Reconstruction statutes to private action, it simultaneously redefined the substantive scope of prohibited discrimination in a way that excluded much discrimination that did not constitute state action.[118] Like the representative branches, the Supreme Court has not been uniform or consistent in its deference to minority interests. Rather, the Court, too, has made concessions to minority interests when the overall political climate has been conducive to such concessions.

I have argued that a rational minority response to the veiled majoritarian nature of the Supreme Court would be to abandon efforts to influence the Court and to concentrate minority political activities on the representative branches, because minorities are more likely to

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114. 448 U.S. 448 (1980).

115. *See* Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989); Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); *cf.* The Civil Rights Cases, 109 U.S. 3 (1883); The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

116. *See supra* text accompanying notes 89-95.

117. 109 S. Ct. 706 (1989). For a discussion of this case, see *supra* note 3.

118. In Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989), the Court held that although the 42 U.S.C. § 1981 prohibition on discrimination in the formation and enforcement of contracts applied to private acts of discrimination, it did not cover discriminatory performance of a contract through racial harassment of an employee. Discriminatory enforcement occurred only if the state made enforcement remedies for breach of contract selectively available on the basis of race. 109 S. Ct. at 2372-77. The net effect of this holding was to reimpose a state action requirement in § 1981 suits with respect to discriminatory contract performance.

secure concessions from an overtly political branch of government than from a branch whose political dimensions are covert. I have also argued that comparison of the historical performances of the representative branches and the Supreme Court provides empirical support for this theory, because the representative branches have done more than the Court to advance minority interests. One might object to this asserted preference for the representative branches by arguing that if the actions of each branch are ultimately determined by majoritarian political preferences, it should not matter which branch minorities choose as the focus of their political efforts. The response to this objection is that, although the Supreme Court is a majoritarian branch of government, the Court responds to different types of political preferences than the preferences to which the representative branches respond.

III. A POLITICAL MODEL OF THE SUPREME COURT

However strong a rational minority preference for representative over Supreme Court politics might be, minorities do not have the practical option of forgoing Supreme Court adjudication completely. Minorities acting unilaterally cannot terminate the force of judicial review because nonminorities have the power to present the Court with political issues that minorities would prefer to have resolved by the representative branches alone. Moreover, minorities themselves will require judicial assistance in implementing the gains made through the political process. This means that minorities have no choice but to develop a model of Supreme Court politics that will enable them to make optimal use of the Supreme Court's political sensitivities.

The institutional characteristics of the Court suggest that it will be receptive to two types of political preferences. It will be receptive to durable preferences that command sustained majoritarian support, and to broad-based transitory preferences that command intense levels of majoritarian support. *Brown v. Board of Education,*[119] the case typically offered as establishing the viability of the traditional model, is better understood as an illustration of the Supreme Court's selective political sensitivity. Although proficient use of the Court as a political institution can advance minority interests, the complexities entailed in such political use of the Court make Supreme Court political strategies both difficult and risky.

119. *See supra* note 59.

A. *The Complexities of Supreme Court Politics*

Although representative politics is more promising than Supreme Court politics for minority interests, minorities do not have the luxury of concentrating their efforts exclusively on the representative branches. When minorities secure political concessions from the majoritarian branches, nonminority interest groups disadvantaged by those concessions can force minorities to defend their political victories before the Supreme Court. Many of the affirmative action gains that minorities have made through the political process have been subject to just such nonminority challenges.[120] In addition, minorities will often be compelled to seek judicial enforcement of the political gains secured from the representative branches. The assistance of the Court will be required both to resolve ambiguities in majoritarian enactments and to prompt compliance by recalcitrant nonminority interests.[121] Because minorities will be forced to engage in Supreme Court litigation on at least some occasions, minorities might well wish to develop a working model of the political claims to which the Court will be receptive, and the claims that it is likely to reject.

Part I of this article suggested that life tenure and salary protection are unable to provide any meaningful safeguard against the influence that a judge's own socialized majoritarian preferences will have on the adjudicatory process.[122] That does not, however, mean that life tenure and salary protection are irrelevant to judicial outcomes. Rather, they give the Court an institutional sensitivity to particular types of political arguments. To the extent that life tenure and salary protection

120. *See, e.g.*, Martin v. Wilkes, 109 S. Ct. 2180 (1989) (constitutional challenge by nonminority firefighters to Title VII consent decree giving minority firefighters preference over nonminority firefighters for certain promotions); City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (constitutional challenge by nonminority contractors to minority set-aside program giving minority-owned business enterprises preference over nonminority businesses in receiving certain construction funds); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (constitutional challenge by nonminority teachers to collective bargaining agreement giving minority school teachers layoff preference over nonminority teachers with greater seniority); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (constitutional challenge by nonminority applicant to medical school admissions program giving preference to minority applicants over nonminority applicants for certain seats).

121. *See, e.g.*, Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (minority employee sought aid of Court in using 42 U.S.C. § 1981 prohibition on discrimination in contract formation and enforcement to prevent racial harassment by employer); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (class of minority employees sought aid of Court in establishing that statistical disparities in employer use of subjective employment and promotion criteria were sufficient to prove Title VII violation); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (minority class action seeking aid of Court in imposing race-conscious class-based remedy under Title VII for discriminatory hiring by municipal fire department); Guardians Assn. v. Civil Serv. Commn., 463 U.S. 582 (1983) (class action filed by minority police officers seeking aid of Court in enforcing antidiscrimination provisions of Titles VI & VII).

122. *See supra* section I.B.

cause Supreme Court justices to remain on the bench for extended periods of time, at any particular moment the Court will include a significant number of justices whose political socialization occurred many years earlier.[123] Institutionally, a Supreme Court staffed by such individuals is likely to be receptive to two distinct types of political arguments.

Professor Tushnet has identified the first type of argument.[124] The Court will respond to arguments advancing political preferences that are durable rather than transitory. The amount of political power that a pluralist voting coalition possesses is a direct function of its longevity. A coalition that can secure majoritarian support for its position on a single issue will be able to prevail upon that issue, but it will not be able to implement a political agenda that encompasses multiple issues or even repeated tests of a single issue. In order to advance a political agenda, a coalition must command sustained political support. A coalition that can sustain majority support for a two-year period can control the House of Representatives, all of whose members are elected every two years.[125] Such a coalition, therefore, will be able to prevail in those contests where the position of the House is dispositive.[126] A coalition that can sustain majority support for a period of

123. The average age of a Supreme Court justice when appointed is 53 (55 for justices appointed in this century), and the average length of a justice's stay on the Court is 16 years. *See* W. LOCKHART, Y. KAMISAR, J. CHOPER, & S. SHIFFRIN, CONSTITUTIONAL LAW app. A (6th ed. 1986) [hereinafter W. LOCKHART] (providing data on which statistics are based).

By the term "political socialization," I mean to include the process of forming values and affiliations that occurs during the critical periods of one's personal political development. I am postulating the existence of such critical periods, although I am unsure precisely when they occur. Intuitively, critical periods could include the time at which one first becomes aware of the political preferences of one's parents — although the response to this awareness might be either to accept or to reject those preferences precisely because they are parental preferences. The period of adolescent idealism might also constitute a political critical period, as might the period in which that idealism is subsequently lost or supplanted by the pragmatism that can accompany marriage, parenthood, and financial obligations. For present purposes, all that matters is that these periods occur relatively early in one's adult life — something that intuitively seems to be correct. Although mid- and late-career changes in basic political values do occur, they occur infrequently. Mid- and late-career changes are more likely to concern particular issues than basic political orientation. The effects of the political socialization process can be tested by the political commitments, both tacit and express, that a potential justice is willing to make in order to secure appointment to the Supreme Court. Although these commitments are largely unenforceable, their extraction nevertheless filters out candidates who are unwilling to make the requested commitments.

124. Tushnet, *The Politics of Constitutional Law,* in THE POLITICS OF LAW (D. Kairys ed.) (2d ed. forthcoming).

125. In order to control the vote of a representative, a coalition must have the popular votes needed to secure initial election and, in addition, must for two years be able to maintain a credible threat that failure to comply with the wishes of the coalition will result in the failure of the representative to secure reelection.

126. The position of the House of Representatives alone will be dispositive with respect to issues such as impeachment, which the Constitution assigns exclusively to the House, *see* U.S. CONST. art. I, § 2, cl. 5. It can also be dispositive with respect to issues over which the distribu-

four years is in a much stronger position to advance its agenda. It not only controls the House of Representatives for two terms, but it also controls the president, who is elected to a four-year term. In addition, because one third of the Senate is elected every two years, a four-year coalition can also control the Senate, by controlling the votes of two thirds of its members. A coalition durable enough to last four years, therefore, can control the entire federal government — except for the judiciary. Because of their longer "terms of office," Supreme Court justices can only be controlled by political coalitions having substantial durability. Professor Tushnet postulates that a coalition must command majority support for approximately a decade before it can control the judiciary, which would then give it control over the entire federal government.[127] Hence, regardless of the particular political preferences that individual justices may have, the Supreme Court as an institution will be receptive to legal arguments advancing political positions that have the support of durable rather than transitory majorities. The ultimate effect of this selective sensitivity is to render the Court a force for preservation of the political status quo. Proponents of political change will be less successful before the Court than will their opponents.[128]

The second type of argument to which the Supreme Court will respond favorably is an argument that advances an issue whose political support, while transitory, is both broad-based and intense. This is due, in part, to the ability that proponents of such issues have to raise a credible threat of removal. Because Supreme Court justices have life tenure, political control over individual justices must normally be exercised at the selection stage. Under ordinary circumstances, politically motivated threats of retaliatory removal are unlikely to have much credibility in light of the political difficulty of securing impeachment. Tushnet's theory would predict that a political coalition having a four-year durability would be required to impeach and convict a justice.[129] In light of the reluctance of interest groups to use impeach-

tion of political power and the political climate give practical control to the House. Such issues will arise frequently when the House is controlled by a different political party than the party controlling the Senate and the White House.

127. *See* Tushnet, *supra* note 124. Tushnet does not offer a prediction for how much time it would take to control the Supreme Court alone, although the 10-year estimate seems reasonable for the Supreme Court too. Historically, the average tenure of a justice on the Supreme Court has been approximately 16 years. *See* W. LOCKHART, *supra* note 123, app. A (providing data on which statistic is based). If each justice serves for 16 years, on average, one of the nine justices will leave the Court every 1.75 years. This means that it will take approximately 9 years for a five-justice majority of the Court to turn over.

128. *See* Tushnet, *supra* note 124.

129. *See* U.S. CONST. art. I, § 2, cl. 5 & § 3, cl. 6 (requiring majority of House to impeach and two thirds of Senate to convict).

ment for ordinary political purposes, such a coalition would normally be quite difficult to amass. In a climate of intense political fervor, however, the threat of impeachment might be more credible. Both individuals and electorates are capable of taking acts in the heat of the moment that they would not take after calmer reflection.[130] More subtly, to the extent that the justices view intense popular resistance as a threat to the perceptions of legitimacy that the Court needs to issue unpopular decisions, the justices will respond favorably to expressions of popular disapproval that are intense enough to jeopardize the Court's continued legitimacy but not intense enough to pose a credible threat of impeachment. Cases like *Korematsu v. United States,*[131] in which the Court upheld the World War II geographic exclusion of Japanese-Americans from certain locations on the West Coast, illustrate such Supreme Court submission to an intense political preference. It is difficult to understand the case as anything other than judicial deference to popular desires for punishment of the Japanese after the bombing of Pearl Harbor.[132]

B. Brown *and the Political Model*

Brown v. Board of Education[133] is the case typically offered in support of the countermajoritarian capacity of the Supreme Court. The desegregation of southern schools that the *Brown* Court ordered in 1954 provoked predictable massive resistance. According to the tradi-

130. In the history of the nation, only one Supreme Court justice has been impeached. Samuel Chase, who was one of the signers of the Declaration of Independence, was appointed to the Court by George Washington in 1796. He was impeached in 1804 for charging Thomas Jefferson with "seditious attacks on the principle of the Constitution." He was acquitted by the Senate on March 1, 1805, by only four votes. He then continued to serve on the Court until 1811. *See* A. BLAUSTEIN & R. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 33 n.1 (1978); W. LOCKHART, *supra* note 123, app. A, at 5. In modern times, both Chief Justice Earl Warren, *see* B. SCHWARTZ, SUPER CHIEF 280-82 (1983), and Associate Justice William O. Douglas, *see* W. DOUGLAS, THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS: THE COURT YEARS: 1939-75, 359-64, 371-77 (1980), have been the targets of unsuccessful impeachment campaigns.

The fact that only one Supreme Court justice has been impeached and that no justice has been convicted can be used either to support or to refute the argument that the threat of impeachment can affect judicial behavior. The apparent difficulty of securing the political support necessary to impeach and convict may give the threat of impeachment little credibility, and concomitantly, little capacity to affect judicial behavior. On the other hand, the threat of impeachment might temper judicial views and prompt judicial responsiveness to majoritarian norms so that the political need for impeachment rarely arises.

131. 323 U.S. 214 (1944).

132. The decision was a product of wartime hysteria and racial resentment, and it has been widely criticized. *See, e.g.,* R. DANIELS, CONCENTRATION CAMPS: NORTH AMERICA, JAPANESE IN THE UNITED STATES AND CANADA DURING WORLD WAR II 130-43 (rev. ed. 1981); J. TENBROEK, E. BARNHART & F. MATSON, PREJUDICE, WAR AND THE CONSTITUTION 211-23 (1954).

133. 349 U.S. 294 (1955) *(Brown II);* 347 U.S. 483 (1954) *(Brown I).*

tional wisdom, the fact that the Supreme Court was willing to disregard such high levels of majoritarian disapproval in issuing its school desegregation order reveals that the Court must possess countermajoritarian capabilities. This conclusion is further buttressed by the post-*Brown* decisions in which the Court stuck to its convictions and ordered the lower courts to fashion novel equitable remedies such as busing to implement the *Brown* decision, again in the face of massive resistance. Notwithstanding this traditional view, *Brown* actually is better understood as an illustration of the selective political responsiveness of the veiled majoritarian Court.

The *Brown* decision is commonly viewed as having accomplished two things. As a practical matter, it required the desegregation of public schools.[134] As a doctrinal matter, it overruled the separate-but-equal principle of *Plessy v. Ferguson,*[135] and established the proposition that race-based classifications are inherently unequal because they inevitably operate to disadvantage the minority race.[136] As an actual matter, *Brown* may not have realized these accomplishments at all. Moreover, to the extent that these accomplishments were actually secured by the *Brown* decision, they appear to have corresponded to the political preferences of the durable majority whose interests were represented on the *Brown* Supreme Court. In addition, the Court's advancement of those majoritarian preferences may well have been secured at the expense of long-term minority interests, thereby illustrating the difficulties attendant to political use of the Supreme Court.

The fact that *Brown* is perceived to stand for the two propositions with which it is associated attests to the rhetorical success of the case. When needed, *Brown* is now available for citation in briefs and judicial opinions to support either the limited proposition that the Constitu-

134. *Brown I,* 347 U.S. 483, 495 (1954), declared the maintenance of separate-but-equal public schools to be unconstitutional. *Brown II,* 349 U.S. 294, 301 (1955), issued after reargument addressing the issue of remedy, ordered segregated public schools to be desegregated "with all deliberate speed."

135. 163 U.S. 537 (1896). *See Brown I,* 347 U.S. at 495. Although *Plessy* upheld the constitutionality of racially separate public facilities, the case did not by its terms require that those facilities be equal. Nevertheless, subsequent cases did require varying degrees of equality, and *Plessy* is the case that is typically cited for the separate-but-equal requirement. *See* G. STONE, *supra* note 11, at 454-56.

136. *Brown I* held that "[s]eparate educational facilities are inherently unequal," 347 U.S. at 495, because "[t]o separate [school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494. As a result, race-based classifications could be sustained only if they satisfied the most exacting scrutiny. 347 U.S. at 499 (quoting Korematsu v. United States, 323 U.S. 214, 216 (1944)) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.").

tion requires public schools to be desegregated or the broader proposition that race-based classifications in general are unconstitutional. As an actual matter, *Brown* of course did not desegregate the schools. A third of the black students attending public school in the United States still attend all-black schools, and sixty-three percent attend schools that are at least half black. Private schools, gerrymandered district lines, unequal funding, white flight, residential housing patterns, and resegregation are among the many factors that prevented the rhetorical promise of *Brown* from ever becoming a reality.[137] As an actual matter, *Brown* also did not terminate governmental use of race-based classifications. Although subsequent cases issued shortly after *Brown* relied upon the *Brown* decision to invalidate racial segregation in public facilities such as buses, beaches, and golf courses,[138] the Court did not rely upon *Brown* to invalidate all racial classifications. Most notably, the Court declined to invalidate miscegenation statutes, straining to avoid any application of *Brown* that would produce this result.[139] Realistically, *Brown* had enormous rhetorical success and only partial practical success.

The combination of substantial rhetorical success and limited practical success that I have attributed to *Brown* appears to have been precisely what the Court's durable majoritarian constituency desired. The massive resistance that accompanied *Brown* does not mean that the decision lacked majoritarian support. Indeed, the resistance was regional rather than national in scope. At the level of national politics

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137. *See* G. STONE, *supra* note 11, at 488-95. *See generally* D. BELL, RACE, RACISM AND AMERICAN LAW §§ 7.4-7.8 (2d ed. 1980).

138. *See* Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (public golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches).

139. *See* Naim v. Naim, 350 U.S. 891 (1955) (per curiam), *on remand,* 197 Va. 734, 90 S.E.2d 849, *appeal dismissed,* 350 U.S. 985 (1956) (per curiam). After issuing its 1954 decision in *Brown I,* 347 U.S. 483 (1954), invalidating separate-but-equal treatment based upon race, the Court nevertheless declined to invalidate a Virginia miscegenation statute, holding that the constitutional issue raised by the statute was not "properly presented." 350 U.S. at 985. The Court's action not only ignored the holding of *Brown* but constituted a refusal to exercise mandatory appellate jurisdiction assigned to the Court by statute. Accordingly, *Naim v. Naim* has been the target of considerable criticism. *See, e.g.,* Gunther, *The Subtle Vices of the "Passive Virtues" — A Comment on Principle and Expediency in Judicial Review,* 64 COLUM. L. REV. 1, 11-13 (1964); Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1, 34 (1959) (terming dismissal of appeal "wholly without basis in the law"). *But see* A. BICKEL, *supra* note 14, at 71 & n.30, 174 (arguing that *Naim v. Naim* was a prudent accommodation of principle and political expediency). The Court's dismissal is understood to have been a concession to perceived majoritarian pressure in the post-*Brown* era, where it had been asserted that school desegregation would lead to "mongrelization of the race." *See id.* at 174. *See generally* Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-58,* 68 GEO. L.J. 61-67 (1979). The Virginia statute was finally invalidated 11 years later in Loving v. Virginia, 388 U.S. 1 (1967). At that time, only 16 states had miscegenation laws, as opposed to the time of the *Brown* decision, when more than half the states had such statutes.

— the level of politics at which *Brown* was decided — it is easy to imagine the existence of a national coalition that supported the *Brown* decision. Professor Bell first hypothesized that *Brown* was decided the way that it was because it marked the point of convergence for three national interests.[140] The decision advanced the international objectives of foreign policy interest groups by reducing the embarrassment and competitive disadvantage that domestic racism produced in our competition with communism for influence over third world nations. The decision also advanced the interests of disillusioned post-War blacks who seemed to be missing out on all of the equality that the United States claimed to have been fighting for in World War II. In addition, the decision advanced the interests of whites who saw segregation as an impediment to the economic maturation and development of the South.[141] Professor Dudziak, in an article entitled *Desegregation as a Cold War Imperative,*[142] further developed the idea that *Brown* was a response to national majoritarian interests, emphasizing the particular interest suggested by her arresting title.[143] Just as the victorious northern coalition was able to impose civil rights enactments on the South after the Civil War in order to advance its own political interests, a similar national coalition was able to impose *Brown* on the South in order to advance its political interests.

Not only does the existence of a national coalition provide a plausible account of the *Brown* decision, but the durability of that coalition coincides with the success that minorities have had under *Brown* and its progeny. When the first *Brown* decision was issued, the Court set the case for reargument concerning the issue of remedy.[144] A year

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140. *See* Bell, Brown *and the Interest-Convergence Dilemma,* in SHADES OF *Brown:* New Perspectives on School Desegregation 91-106 (D. Bell ed. 1980).

141. *Id.* at 96-97. Professor Bell also suggested that moral and economic considerations might have played a role in the coalition that he was postulating. *Id.* Although he did not explicitly claim that the Supreme Court was incapable of countermajoritarian acts, Professor Bell did offer the following "principle" to account for the *Brown* decision:

> The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites; however, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle- and upper-class whites.

Id. at 95 (emphasis omitted). This caused Bell to conclude that the remedies for *Brown* would be co-extensive with white support, *id.* at 98-102, something that is consistent with the present thesis. *See infra* text accompanying note 146.

142. Dudziak, *Desegregation as a Cold War Imperative,* 41 STAN. L. REV. 61 (1988).

143. Professor Dudziak notes that the U.S. Department of Justice filed an amicus brief stressing the importance of a decision invalidating segregation because "[t]he United States is trying to prove to the people of the world, of every nationality, race and color, that a free democracy is the most civilized and most secure form of government yet devised by man." *Id.* at 65 (brackets in original).

144. 347 U.S. at 495 ("Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in

later, in *Brown II,* the Court ruled that although school desegregation need not be immediate, it had to be accomplished with "all deliberate speed,"[145] thereby giving both school officials and the Court itself some latitude in implementing the decision. For the next fifteen years, most of the Supreme Court school desegregation decisions were resolved in a manner that was considered favorable to minority interests. All of those decisions involved southern school districts. In the early 1970s, when school desegregation cases involving northern cities began to reach the Court, the Court began to rule against the minority interests.[146] This suggests that after fifteen years, the national coalition supporting *Brown* had broken down, in part because civil rights had ceased to be an important international issue, and in part because northern urban interest groups had withdrawn from the coalition after they were asked to internalize the costs of desegregation that had previously been deflected to the South. In a sense, *Brown* was the perfect veiled majoritarian decision. The majority garnered rhetorical benefits that were important at the time the decision was issued and that continue to be important today because of the manner in which they enhance the majority's self-image. Practical implementation of the decision, however, continued only as long as, and only to the extent that, *Brown* itself continued to command durable majoritarian support.

Brown and the cases implementing it can be understood as the product of a majoritarian coalition that advanced the immediate interests of racial minorities. It is unclear, however, whether membership in that coalition served to advance long-term minority interests. Professor Seidman has argued that *Brown* in fact advanced white majoritarian interests at the expense of long-term minority interests. By overruling *Plessy* and declaring that separate-but-equal treatment of racial minorities violated the Constitution, *Brown* saved the majority from a *Plessy*-based obligation actually to extend equal treatment to minorities.[147] Today, as a result of property-based tax structures and tax subsidies given to private schools, white students receive a significantly larger share of the governmental resources allocated to

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these cases presents problems of considerable complexity. . . . In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket . . . .").

145. Brown v. Board of Educ., 349 U.S. 294, 301 (1955).

146. *See* G. STONE, *supra* note 11, at 482-88. Although the ultimate point made in the text is valid, the actual pattern of southern victories and northern losses is not as tidy as the text suggests. For a more precise account see D. BELL, *supra* note 137, §§ 7.4-7.8.

147. *See* L. Seidman, *Brown* and *Miranda* (unpublished manuscript, on file with the *Michigan Law Review*).

education than minority students receive.[148] Ironically, this may well have been unconstitutional under *Plessy*'s separate-but-equal doctrine. *Brown,* however, makes this differential treatment constitutionally permissible. As long as a school district is not engaged in de jure segregation and has taken the requisite steps to eliminate the effects of any past de jure segregation in which it may have been engaged, its constitutional obligation has been satisfied. Because neither of these obligations entail anything resembling equal treatment, the majority is better off — and racial minorities are worse off — than would have been the case under a faithfully implemented separate-but-equal standard of constitutional law.[149] Moreover, to the extent that *Brown* has made it constitutionally difficult for the government to rely upon race-based classifications, *Brown* has disadvantaged minorities by depriving them of effective affirmative action remedies. Race-conscious remedies, such as minority set-asides, are being invalidated by the Court on constitutional grounds with increasing frequency, and they are being invalidated for the stated reason of preventing unfairness to whites.[150] In addition, disillusionment with the results of *Brown* has caused some minority activists to advocate separate minority-controlled schools for minority children.[151] If one assumes that such a strategy is in the present best interests of minorities, *Brown* has again adversely affected minority interests by making that strategy constitutionally impermissible. If one further assumes that the majority itself benefits from the preclusion of minority-controlled minority schools, *Brown* has again advanced majoritarian interests at minority expense.[152]

148. *See, e.g.,* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (upholding constitutionality of property tax public school financing despite drastic discrepancies in funds allocated to white and minority students).

149. *See* L. Seidman, *supra* note 147. This is not to suggest that a veiled majoritarian Court could not have contained the damage to majoritarian interests that would have been done by a separate-but-equal standard just as the Supreme Court was able to contain the damage done by desegregation under *Brown.* However, to the extent that Supreme Court tolerance of the differential treatment presently accorded minority and nonminority children in education would have been more difficult to justify under a separate-but-equal standard, the interests of racial minorities may have been disadvantaged by *Brown.*

150. *See, e.g.,* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 720-23 (1989) (invalidating minority set-aside program in construction industry because of adverse impact that program had on whites).

151. *See, e.g.,* Bell, *A Model Alternative Desegregation Plan,* in SHADES OF *BROWN:* New Perspectives on School Desegregation, *supra* note 140, at 124; Edmonds, *Effective Education for Minority Pupils:* Brown *Confounded or Confirmed,* in SHADES OF *BROWN:* New Perspectives on School Desegregation, *supra* note 140, at 109. *See generally* D. BELL, *supra* note 137, § 7.10 (stressing that eliminating segregated schools has often not resulted in equal educational opportunities for minorities).

152. Such a benefit to the majority could ensue, for example, by preventing minority children from escaping majoritarian control of a significant part of the attitude and value formation process to which children are exposed. *Cf.* Edmonds, *supra* note 151.

The selective political sensitivity of the Supreme Court suggests that political use of the Court cannot be optimized through reliance on the same strategies that are used before the representative branches, which are directly political. Supreme Court politics is more subtle and sophisticated. Because it is not easy to identify with precision the political issues that are sufficiently durable or intense to gain a favorable reception from the Court, the success of a Supreme Court political strategy will require well-developed political skills and prudent political judgments. *Brown* may well illustrate that careful use of such skills and judgments will permit racial minorities to make profitable use of the Court as a political institution. Or, alternatively, *Brown* may illustrate only that mastery of Supreme Court politics is so elusive that even seeming victories will ultimately mask long-term defeats. In light of the uncertainties involved, it makes little sense to try to develop a list of rules that minorities should follow in using the Court for political purposes. It does, however, make sense to develop an appreciation of the risks that are entailed in attempting political use of the Court, because those risks can be substantial.

IV. The Risks of Supreme Court Politics

Minority efforts to make political use of the Supreme Court pose two types of risks. First, minorities risk misallocation of their political capital, both among branches of government and across political issues. This risk, although potentially serious with respect to any particular issue, is relatively insignificant with respect to the overall status of racial minorities in the society at large. Second, in attempting political use of the Supreme Court, minorities may legitimate the rights-based assumptions of the traditional model and thereby perpetuate the status of minorities as Supreme Court dependents who lack the capacity for political self-determination. This risk does affect significantly the overall social status of racial minorities.

A. *Misallocation Risks*

The political model of the Supreme Court developed thus far suggests that political issues having either durable or intense majority support can be expected to prevail before the Court. Other types of political issues will fare better before the representative branches. Because minorities will have differential rates of success before the respective branches, depending on the nature of the particular issue under consideration, minorities are in danger of allocating political resources to the wrong branch of government. When the preferences of the representative branches and the Court coincide, the dangers of

misallocation are minimal because either institution will ultimately produce the same result. Moreover, the two institutions can be used in tandem so that their actions will be mutually reinforcing.[153] Misassessing the nature of a political issue in such circumstances poses the danger of inefficient allocation of political capital,[154] but this will affect the ultimate outcome only in marginal cases where a limited supply of political capital is exhausted before an otherwise available victory can be secured. By hypothesis, preferences intense enough to prevail before the Court will also prevail before the representative branches.[155] In many instances, the transitory preferences of ordinary representative branch politics will also correspond to the durable preferences of Supreme Court politics, so that the dangers of misallocation will remain minimal.[156]

Where the transitory preferences of the representative branches and the durable preferences of the Court coincide, but both preferences work to the disadvantage of minority interests, the costs of misallocation are higher. Because minority interests will not prevail in either forum, any political capital expended on such an issue simply will be wasted. In such circumstances, the danger is one of misallocation among issues rather than branches of government. Political miscalculations can cause minorities to devote political resources to issues on which they cannot prevail rather than to issues on which they can. Although the costs of this type of allocation error are high, the error is often avoidable because many readily identifiable issues have no future before any branch of government.[157]

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153. For example, Congress can be lobbied to enact legislation that will advance a minority interest, and the Court can then be petitioned to issue an expansive interpretation of the legislation that will maximize the statutory benefit. Similarly, the Court can be asked to endorse a minority interest, and the president can then be lobbied to make enforcement of the Court's decision a high priority.

154. In some cases, although the minority interest will prevail before either the representative branches or the Court, it may be faster, easier, and politically less expensive to concentrate efforts on one branch rather than the other.

155. Presumably this is what happened in Korematsu v. United States, 323 U.S. 214 (1944). *See supra* text accompanying notes 131-32.

156. For example, such correspondence was present in some of the school desegregation remedy cases, where race-conscious remedies could be obtained either from the court or from the school board itself. *See, e.g.*, McDaniel v. Barresi, 402 U.S. 39 (1971) (upholding school board use of race-conscious pupil assignment to remedy past discrimination); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (upholding district court use of race-conscious pupil assignment to remedy past discrimination).

157. For example, strong arguments can be made that proportional representation is in the long-term best interest of racial minorities. *See, e.g.*, D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 75-101 (1987). However, there is no significant political movement seeking to implement a proportional representation scheme in the United States either through legislative or judicial action, because the issue is not perceived to correspond to the current preferences of any branch of government.

Other issues can be more difficult to characterize. Although some evidence may exist that a

Perhaps the most costly form of allocation error is the error that can be made when the transitory preferences of the representative branches and the durable preferences of the Court diverge rather than coincide. In this situation, a minority interest will, by hypothesis, prevail before either the representative branches or the Court but not before both. On one level, therefore, political miscalculations will be more than inefficient, they will be outcome determinative. The resources expended before the wrong branch of government will simply be wasted, and the opportunity cost of not proceeding before the proper branch will deprive the minority of a victory that it could have secured with more accurate political calculations. On a deeper level, however, disagreement between the representative branches and the Court about proper resolution of the issue may preclude attaining a stable victory before any branch of government. Separation of powers permits only those preferences that all three branches of government share simultaneously to survive the policymaking process. Consistent with this theory, competing interest groups have the ability to cause the representative branches and the Court to work at cross purposes. A group seeking to advance its political interests will not only have to fight offensive battles before a sympathetic branch of government but will have to fight defensive battles before an unsympathetic branch as well.[158] As a result, the costs of political action with respect to an issue about which the representative branches and the Court disagree will be higher than the costs associated with an issue about which the branches agree.[159] In addition, when the branches disagree, whatever victories minorities secure will be transient, unreliable, and even illu-

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particular issue commands the support of one of the representative branches, that support may be illusory, in that it is contingent on the lack of support that the issue has before another branch. For example, passage of the D.C. Voting Rights amendment, H.R.J. Res. 554, 95th Cong., 2d Sess., 92 Stat. 3795 (1978), and perhaps the Equal Rights amendment, H.R.J. Res. 208, 92d Cong., 2d Sess., 86 Stat. 1523 (1972), may have occurred only because Congress assumed ratification by the states to be impossible. Other apparent support may simply be dishonest. For example, although President Bush has stated that he favors a balanced budget amendment, *see The Presidential Debate: Transcript of the Second Debate Between Bush and Dukakis,* N.Y. Times, Oct. 14, 1988, at A14, col. 1, it is unlikely that he really does.

Matters can become even more complicated if one views political responsiveness as something that can be cultivated by interest group activity. The pertinent question then becomes whether political capital ought to be invested in an issue, even though it has no present likelihood of prevailing, in order to plant the seeds of future political receptivity that will permit a victory at some later date. Because it is difficult to determine when such a strategy can be followed sensibly, allocation errors committed at this level of subtlety are probably common.

158. For example, the Court can invalidate or narrowly construe legislation that minorities secure from Congress, or the president can engage in lax enforcement of minority victories obtained from the Court, or Congress can limit the jurisdiction of the Court in areas of minority concern or deny the funding necessary for minorities to implement a Supreme Court victory. The inefficiency of checks and balances was purposely built into the Constitution by the Framers. *See supra* text accompanying and following notes 11-12.

159. Because both proponents and opponents of an issue will perceive the ability to prevail

sory, as gains and losses are variously dispensed by the different branches of government. Political expenditures made in connection with issues about which the representative branches and the Court disagree may, therefore, consume large amounts of political capital but yield no appreciable return.

All of this suggests that the highest priority for minorities ought to be avoidance of political involvement in issues where the minority interest is identifiably disfavored by both the representative branches and the Court, because political expenditures made on such issues simply will be wasted. The next highest priority ought to be political investment in issues with respect to which both the representative branches and the Court are receptive to the minority interest — that is, issues involving intense popular preferences and issues supported by both transitory and durable preferences. Where the preferences of the representative branches and the Court diverge, the strategic implication is more counter-intuitive. In such circumstances, interest groups naturally tend to invest the bulk of their political capital in the branch of government that they deem most receptive to their position on the issue under consideration.[160] This natural inclination, however, may be a bad one. The need to proceed simultaneously before multiple branches of government necessitates the expenditure of large amounts of political capital that may turn out to be a dead-weight loss. Moreover, cases like *Brown* suggest that even apparent victories may turn out to be long-term losses.[161] Perhaps the proper minority response to

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before at least one branch of government, each will make a larger political investment in that issue than either would make if all three branches favored the same resolution.

160. For example, after the Supreme Court decision in Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989), which arguably narrowed the scope of the constitutional right to abortion services, pro-choice interest groups made a strategic decision to announce that the Supreme Court was no longer receptive to pro-choice interests and that the representative branches were the forums to which the abortion struggle should be transferred. Immediately after issuance of the decision, Molly Yard, president of the National Organization for Women, asserted "[o]ur only choice now is to go right to the people." Enright, *Keyword: Abortion,* States News Serv., July 7, 1989 (available through NEXIS). *The National Journal* reported a variety of tactical changes that occurred shortly after issuance of the decision. Abortion rights activists began to run full-page advertisements in the *New York Times* and the *Washington Post,* and began to run radio and television messages. In addition, the National Abortion Rights Action League, the National Organization for Women, and the Planned Parenthood Federation of America hired pollsters, media consultants and experienced political operatives. Advocacy groups redirected many of their resources to state legislative battles. *See* Matlack, *Mobilizing for the Abortion War,* 21 Natl. J. 1814, 1814 (1989).

161. *See supra* section III.B. Some commentators have argued that erroneous branch-selection determinations have also frustrated pro-choice interests on the abortion issue. Rather than choosing to proceed incrementally before the representative branches, pro-choice advocates chose to proceed before the Supreme Court. This strategy resulted in Roe v. Wade, 410 U.S. 113 (1973), which made the pro-choice advocates' branch selection appear to have been correct. It may be, however, that the choice to proceed before the Court was, in fact, ill-advised because it provided a rallying point around which anti-abortion forces could coalesce and enhance their political power. A well organized anti-abortion movement may never have developed if the pro-

a divergence in preferences between the representative branches and the Court is simply to take the issue about which those preferences diverge off the agenda of current minority issues, and to allocate minority political capital to other more promising issues. That strategy, however, seems sufficiently self-defeatist and counter-intuitive that it is difficult to imagine it being implemented with any degree of conviction.[162] In the final analysis, ordinary politics is a complicated business, which the added complexities of Supreme Court veiled majoritarianism may render simply unmanageable. In any event, the existence of Supreme Court participation in this political process poses a fairly high risk that minority political resources will at some point be misallocated.

B. *Legitimation Risks*

The second risk posed by the existence of Supreme Court politics is the risk of legitimating the assumptions about the legal system that underlie the traditional model of judicial review. Unlike the misallocation risk, whose potential harm is by and large limited to particular issues in the minority agenda, the dangers attendant to the legitima-

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choice interests had chosen instead to proceed before the representative branches. *See* Tushnet, *Rights: An Essay in Informal Political Theory*, 17 POLS. & SOC. 403, 412 (1989). One does not have to accept this assertion in order to appreciate its plausibility, and to appreciate the implications that it has for the existence of imponderables in a political process involving the Supreme Court.

162. This, of course, poses a classic prisoner's-dilemma problem. Although both proponents and opponents of an issue would profit by mutually taking the issue off of their respective agendas, neither is likely to do so because of the disadvantage that would result from doing so unilaterally.

Things are, of course, more complex than my reductionist depiction would suggest. Success before one branch of government may be so dependent upon events occurring before another branch that it means very little to ask in the abstract whether the interest of the representative branches and the Court diverge or coincide, or whether one branch is likely to be more receptive than another to a particular issue. In addition, an issue may be so important to a racial minority that the decision to make it a low-priority agenda item simply lacks political viability. Moreover, the degree of success that a minority group has with respect to a particular issue, before a particular forum, at a particular time, in a particular political climate can increase or decrease the overall political capital that the group is perceived to have at its disposal. This may make political expenditures devoted to that issue rational even if a victory is shortly to be undermined by a defeat before another branch of government.

Factors such as these make the political process *more*, not less, complex than the rudimentary process I have described. For example, I must admit that I am occasionally drawn to a political strategy that includes efforts to implement a system of proportional representation. It is not clear, however, whether such a strategy should be rejected as one that is inconsistent with both durable and transitory preferences, or whether it is one that presently should be pursued in order to advance its likelihood of future success. *See supra* note 157. Nor is it clear how one could ever know which view was correct. The political assessments and judgments called for under even the rudimentary political model that I have described are so subtle and overdetermined that the model is useful more for its capacity to illustrate the complexities of a political process in which the Supreme Court is a player than for any practical guidance it provides concerning how best to use that process.

tion risk can adversely affect the overall social status of racial minorities, both in the eyes of the majority and in the eyes of racial minorities themselves. Legitimating the assumptions of the traditional model can perpetuate the view that racial minorities are incapable of self-determination, and that they must therefore subsist on Supreme Court largess.

Legitimation is the process by which a social practice or status comes to be viewed as appropriate under a set of generally agreed-upon governing criteria.[163] For example, when a criminal defendant is convicted after a fair trial, the conviction is viewed as legitimate, even though the jury may have been unknowingly mistaken in its conclusion about the defendant's guilt. Because we realize that ultimate accuracy is elusive, we are forced to settle for procedural regularity, seasoned with good faith and best efforts, as the basis for judging the appropriateness of a criminal conviction. The criteria governing the legitimacy of the criminal justice system emanate from a shared moral theory whose tenets are difficult to specify with precision. Despite this difficulty, we tend to believe the governing criteria are satisfied by the criminal justice system's insistence on good-faith procedural regularity. Indeed, it is precisely the process of legitimation that permits us to view the criminal justice system as morally appropriate even though we cannot articulate the governing criteria, and even though more careful scrutiny would almost certainly leave us skeptical about its legitimacy.[164]

The process of legitimation works best when its operation is undetected, because the results of the process can then be transmitted without ever being scrutinized. Consider the phenomenon of hypnosis. The fabled post-hypnotic suggestion derives its power from the amnesia that the hypnotist induces concerning the hypnotic process. Because the subject of the hypnosis is unaware of the process by which his or her hypnotically influenced beliefs were acquired, the subject accepts those beliefs with a degree of unthinking conviction that would never be possible if the actual origin of those beliefs were to become known. Similarly, the legitimation process owes its effectiveness to the

163. For a general discussion of the phenomenon of legitimation, on which the present discussion is based, see M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 262-95 (1987). Professor Kelman develops a model of legitimation that is more elaborate than is necessary for present purposes, but is nevertheless quite provocative. For a more skeptical discussion, suggesting that the legitimation phenomenon may not be as well founded as many commentators seem to believe, see Hyde, *The Concept of Legitimation in the Sociology of Law,* 1983 WIS. L. REV. 379. The Kelman model also offers responses to Professor Hyde's reservations. *See* M. KELMAN, *supra,* at 262-68.

164. For a demonstration of such scrutiny and a taste of the skepticism that it can generate, see Kelman, *Interpretive Construction in the Substantive Criminal Law,* 33 STAN. L. REV. 591 (1981), which is discussed in M. KELMAN, *supra* note 163, at 286-90.

surreptitious nature of its operation.[165]

The legitimation process evades detection through the technique of distraction. Arguments always rest upon underlying assumptions, but when one's analytical attention is focused on the intricacies of an argument, the underlying assumptions on which the argument rests may completely escape scrutiny. This is particularly true where the argument concerns a controversial topic. The controversy itself serves to increase the level of distraction, thereby also increasing the likelihood that underlying assumptions will be overlooked. The legitimating effect of rape laws provides an example. Professors Dworkin and MacKinnon have argued that rape laws legitimate assumptions about women that reinforce their status as objects of male sexual exploitation.[166] While vigorous arguments are exchanged concerning the meaning of controversial issues such as the nature and scope of a woman's consent, the debaters implicitly accept the underlying assumption that male-drafted rape laws properly can determine the circumstances under which women can be forced to submit to sexual intercourse.[167] The distraction legitimates the assumption by causing the assumption to be accepted without scrutiny.

Simplistic versions of legitimation theory depict legitimation as a tool of the elites who are in power to trick the masses into permitting them to remain in power. For the same reasons that legal doctrine cannot be counted on to generate only one predictable result, legitima-

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165. My psychiatrist friends insist that the phenomenon of hypnosis is much more complex than the process I have described. Although this is undoubtedly correct, my use of hypnosis is intended to be metaphorical rather than technically accurate.

166. *See* A. DWORKIN, RIGHT-WING WOMEN 77-80, 85-87 (1983); MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence,* 8 SIGNS 635, 638-39, 643-44, 647-55 (1983); M. KELMAN, *supra* note 163, at 285.

167. If the point seems trivial or artificial, consider that the legal system does permit men to engage in forcible intercourse with women. As a de jure matter, forcible intercourse is permitted by husbands, who in most jurisdictions lack the legal capacity to commit rape. Husbands are completely immune from rape prosecution in at least nine states. Ten states impose no restrictions on the ability of a wife to prosecute her husband for rape. In the remaining 31 states, rape prosecutions against husbands are permitted in only a limited number of circumstances, such as when the husband and wife are living separately under court order, or when divorce papers have been filed. *See* S. ESTRICH, REAL RAPE 107-08 n.3 (1987).

As a de facto matter, forcible intercourse is permitted by social acquaintances, against whom rape convictions are very difficult to obtain. A mid-1960s study showed that a jury was four times more likely to convict a rape defendant in cases that involved extrinsic violence — *i.e.,* guns, knives, or beatings — multiple assailants, or no previous relationship between the victim and the assailant than in cases in which those factors were absent. *See id.* at 4-5. Professor Estrich has concluded that the relationship between the victim and the defendant and the circumstances surrounding the initial encounter dictate the outcome in most rape cases. A review of New York City district attorney files indicated that, although 67% of reported rape cases involved acquaintances, in only 7% of those cases were indictments issued. *See id.* at 18. In addition, juries appear to be prejudiced against the prosecution in rape cases, and will strain to be lenient toward defendants if there is any suggestion of "contributory behavior" on the part of the victim, which includes hitchhiking, dating or talking to men at parties. *See id.* at 19.

tion doctrine — assumptions about what surreptitious activities will produce what societal outcomes — cannot be counted on to generate only one predictable result either. Accordingly, descriptions of the legitimation process as conspiratorially instrumental do not have much appeal.[168] A more sophisticated version of legitimation theory depicts legitimation as the process by which beneficiaries of the present distribution of societal resources seek to convince those who do not benefit that the social and legal systems responsible for the present distribution are basically fair and should not be replaced. Because the system is fair rather than capricious, parties who receive less will not object to redistribution of resources as rewards to those who comply with the system's norms. This theory is less crass, but it is still too conspiratorial to have ultimate appeal.[169] A more appealing depiction characterizes legitimation as an essentially passive process that perpetuates the status quo largely through inertia. Although the assumptions underlying the current system could easily be scrutinized and the unacceptable assumptions rejected if anyone ever thought to scrutinize and reject them, typically no one ever does. Use of the system reinforces itself because its underlying assumptions are too commonplace to be questioned before they are used, and each use further increases the strength of the assumptions so that subsequent questioning becomes progressively less likely. Those who possess societal power are as captive to the unquestioned assumptions as those against whom societal power is exercised. Rather than creating an instrumental threat, the process of legitimation more subtly threatens the appropriateness of the ways in which we conceptualize and perceive our situation.[170]

The traditional model of judicial review legitimates unhealthy majority assumptions about racial minorities, as well as minority assumptions about themselves.[171] Supreme Court adjudication is a heavily publicized distraction that focuses national attention on the cases that are argued before the Court each Term. Lawyers focus on the complex and esoteric doctrinal issues to which the bulk of the adjudicatory process is directed; nonlawyers focus on the controversial social issues that will be affected by the Court's decisions, as those decisions and

168. This simplistic version is developed and rejected in M. KELMAN, *supra* note 163, at 262-63.

169. This characterization too is developed and rejected by Professor Kelman. *See id.*

170. Professor Kelman has developed an elaborate "cognitive" model of legitimation. *See id.* at 269-95.

171. For a discussion of legitimation addressed specifically to antidiscrimination laws, see Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine,* 62 MINN. L. REV. 1049 (1978), and Freeman, *Antidiscrimination Law: A Critical Review,* in THE POLITICS OF LAW 96 (D. Kairys ed. 1982). For a discussion of how race itself can serve a legitimating function, see Crenshaw, *supra* note 62, at 1370-81.

their likely impact are popularized in the national press. For both, analytical attention is successfully deflected from important assumptions that underlie the concept of countermajoritarian judicial review. The traditional model rests on three assumptions that are necessary to the coherence of countermajoritarian review: first, that there exists a category of individual or substantive rights that the majority cannot legitimately abridge; second, that the Supreme Court can legitimately resolve ambiguities that inhere in the definition of those rights; and, third, that minorities cannot legitimately make demands on the majority that exceed the scope of those rights. The traditional model legitimates these assumptions by placing them beyond active scrutiny. Active scrutiny, however, could well cause those assumptions to be rejected.

Countermajoritarian review depends upon the existence of substantive rights because without such rights, judicial invalidation of majoritarian enactments would be undemocratic.[172] For over a decade, commentators along the periphery of mainstream legal scholarship have in fact attempted to subject the substantive rights assumption to closer scrutiny through what has come to be known as "the critique of rights."[173] Presently, however, the substantive rights assumption has received little scrutiny by mainstream legal scholars and virtually no scrutiny by anyone outside the fields of theoretical academics to which rights theory is directly relevant. Although a once-unquestioned assumption might be accepted rather than rejected after subsequent scrutiny, the substantive rights assumption does not seem to fit into this category. I suspect that many adherents to substantive rights theory are unfamiliar with the basic critique of rights,

172. Of course, democracy, too, legitimates a set of assumptions that scrutiny might render unacceptable.

173. Stated succinctly, the critique of rights asserts that a concept of rights can never protect a fundamental interest from political abridgement, because the contours of the fundamental interest can never be articulated in a manner that is sufficiently determinate to prevent its sacrifice for reasons of political expediency. Just as the doctrinal indeterminacy discussed in Part I, *supra,* undermines the traditional model of judicial review, the indeterminacy inherent in efforts to define fundamental rights undermines the ability of a political system to respect those rights in troublesome cases. Moreover, a rights-based approach to the protection of fundamental interests is counterproductive, because it legitimates the unstated assumptions on which particular claims of right necessarily rest in a way that permits those assumptions to be used against the very party asserting the claim of right. Finally, by limiting the scope of the discourse used to discuss social problems, rights rhetoric inhibits the imagination of new ways in which social problems and solutions can be conceptualized. *See* Tushnet, *An Essay On Rights,* 62 TEXAS L. REV. 1363, 1363-94 (1984); Crenshaw, *supra* note 62, at 1350-56; Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?,* 22 HARV. C.R.-C.L. L. REV. 301, 302-07 (1987). *See generally Symposium: A Critique of Rights,* 62 TEXAS L. REV. 1363 (1984). For a sample of the skepticism that this critique has produced concerning the continued utility of the concept of rights, see Tushnet, *supra* note 161.

and that many others misapprehend the nature of the critique.[174] The continued allure of substantive rights theory seems attributable more to the process of legitimation than to its acceptance after scrutiny. Furthermore, if the substantive rights assumption were subjected to serious scrutiny, it is unlikely that it could survive. It would be rejected for the same fundamental reason that Part I rejected the possibility of a countermajoritarian judicial capacity. A substantive right cannot be defined in a way that precludes the possibility of majoritarian abridgement through judicial interpretation. As a result, a substantive right can only *reflect* a judicial decision about how a particular dispute should properly be resolved, it cannot *determine* that decision.

It is easy to understand why the majority would acquiesce in the substantive rights assumption without scrutiny. The history of Supreme Court judicial review indicates that judicial recognition of substantive rights has typically served to advance majoritarian interests at the expense of the minority.[175] It is more difficult to understand why minorities themselves have not been more receptive to the invitation to rethink rights. A few minority commentators now seem skeptical of the substantive rights assumption.[176] Most minority commentators, however, sympathize with the critique of rights to some degree, but caution against wholesale rejection of the one concept that they believe has permitted minorities to obtain the few gains that have been secured to date.[177] Still other minority commentators strenuously defend the rights-based system, even against the few minority

174. Professor Carrington, who has in a sense become the victim of frustrations both felt and generated by the critical legal studies movement, *see* Carrington, *Of Law and the River,* 34 J. LEGAL EDUC. 222, 227 (1984) (suggesting that members of the critical legal studies movement should leave legal academics), is often accused of misunderstanding the arguments that he has rejected. *See "Of Law and the River," and Of Nihilism and Academic Freedom,* 35 J. LEGAL EDUC. 1 (1985) (responses to Professor Carrington's suggestion). Whether or not this is true with respect to Professor Carrington, the mere reflex acceptance of an assumption after only nominal scrutiny would not be sufficient to avoid the dangers associated with the process of legitimation. It is also true, however, that some of the commentators who have expressed skepticism about the critique of rights have a very sophisticated understanding of the critique. *See infra* note 177 (citing representative commentators).

175. *See supra* section II.C.

176. *See, e.g.,* Bell, *supra* note 140, at 94-98. I interpret Professor Bell's recent advocacy of proportional representation, *see* D. BELL, *supra* note 157, at 75-101, as a preference for political over judicial solutions to race-related problems. *Cf.* Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.,* 103 HARV. L. REV. 985 (1990) (using critique of rights as springboard for theological reconstruction of social hierarchy).

177. *See, e.g.,* Bracamonte, *Minority Critiques of the Critical Legal Studies Movement: Foreword,* 22 HARV. C.R.-C.L. L. REV. 297 (1987); Crenshaw, *supra* note 62, at 1356-69, 1381-84; Dalton, *The Clouded Prism,* 22 HARV. C.R.-C.L. L. REV. 435 (1987); Delgado, *supra* note 173; Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights,* 22 HARV. C.R.-C.L. L. REV. 401 (1987); Williams, *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color,* 5 LAW & INEQUALITY 103 (1987).

challenges that have been made to the substantive rights assumption. They advocate reform but not abandonment of the present system.[178] The fact that most members of racial minority groups embrace the concept of substantive rights and resist efforts to abandon that concept with varying degrees of vigor reveals how well the Supreme Court adjudicatory process has legitimated the substantive rights assumption.

The traditional model of judicial review also legitimates the assumption that ambiguities in the nature and scope of substantive rights are to be resolved through exposition by the Supreme Court. Once again, critical scrutiny could well cause that exposition assumption to be rejected. If a concept of substantive rights were deemed to be desirable, political enforcement of those rights through the structural safeguards established by the Framers would seem to be more desirable than Supreme Court enforcement.[179] The Supreme Court is mostly white and mostly male, and, as an institution, it is mostly nonresponsive to fresh or innovative political thinking.[180] Moreover, the Court's first two efforts to protect substantive rights from federal majoritarian abrogation produced *Marbury*[181] and *Dred Scott.*[182] There may have been a lesson in that. Part I of this article argues at length that the inevitable political biases and predispositions of the homogeneous Supreme Court cannot be prevented from dominating the judicial decisionmaking process. As a result, scrutiny of the exposition assumption would be unlikely to result in its continued acceptance. Once again, it is easy to understand why the majority, which typically has benefited from Supreme Court control over rights, would feel no pressing need to question the assumed appropriateness of that control. But even minorities often feel compelled to defend the Court against charges of racial bias or insensitivity.[183] And again, this illustrates the power of the legitimation phenomenon.

The third assumption legitimated by the traditional model is that

178. *See, e.g.*, T. SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY (1984) (criticizing contemporary civil rights movement for attempting to supplant goal of equal opportunity with goal of equal political outcomes, which politicizes and thereby undermines neutral rule of law); *cf.* Carter, *The Best Black, and Other Tales,* RECONSTRUCTION, Winter 1990, at 6 (same); Kennedy, *Racial Critiques of Legal Academia,* 102 HARV. L. REV. 1745 (1989) (rejecting argument that criteria used to judge legal scholarship are race-dependent and arguing that neutral criteria do in fact exist — something that implicitly accepts substantive rights assumption by endorsing belief in determinate standards necessary for existence of such rights).

179. The Framers envisioned such political enforcement. *See supra* text accompanying notes 11-12.

180. *See supra* section III.A.

181. *See supra* note 18.

182. *See supra* text accompanying notes 85-95.

183. *See, e.g.*, T. SOWELL, *supra* note 178; *cf.* Carter, *supra* note 178; Kennedy, *supra* note 178.

minorities are not entitled to any more than what the Supreme Court gives them in the process of protecting their substantive rights. Because the discrete and insular nature of racial minorities renders them unable to participate effectively in the political process (so the argument goes), the political process need not take their desires seriously. Moreover, because the Supreme Court is the specialist when it comes to determining what degree of majority deference to minority interests is appropriate, the representative branches are under no obligation to make more concessions to minorities than the Court requires them to make. As a result, any additional concessions that the political process does choose to make are gifts, emanating from majoritarian generosity, for which minorities should be grateful. However, if the representative branches become too generous and make concessions that the Court deems inappropriate, the Court itself will have to invalidate those concessions in order to protect the rights of members of the *majority* race. Racial minorities, however, cannot complain about this development because minorities themselves have forcefully insisted on Supreme Court protection of substantive rights. If scrutinized, the assumption that Supreme Court concessions should constitute a ceiling on the benefits to which minorities are legitimately entitled would almost certainly be rejected. The fourteenth amendment was enacted in order to authorize legislative — not judicial — protection of minority rights, thereby making it more than a little ironic for the Court to invalidate majoritarian enactments under the fourteenth amendment in order to protect majority rights.[184] In addition, for all of the reasons that the Court proved to be a dubious expositor of substantive rights, it is also a dubious arbiter of disputes over the proper allocation of societal resources. The allocation issue is inherently political. One particular resolution cannot be more "legitimate" than another. Different resolutions simply represent different outcomes in a process of pluralist political negotiations. For the same reason, a concession secured through the pluralist negotiation process should not be viewed as a gift. The concession evidences no generosity, it merely reflects the point along a continuum at which particular political interests intersect.

The three assumptions legitimated by the traditional model of judicial review convey an artificial impression of the legal system. Those assumptions, however, also combine to project an invidious image of racial minorities that is far more troubling. As envisioned by the traditional model, racial minorities are not capable of protecting their

184. *See* G. STONE, *supra* note 11, at 444-51.

own interests through the pluralist political process. Rather, their welfare derives from the solicitude of the Supreme Court, whose dependents they seem destined to remain. Although not able to participate unaided in the political process, racial minorities nevertheless do make occasional attempts to get more than they are legally entitled to by appealing to the generosity of the representative branches. Further, because the majority is in fact generous, minority requests for assistance are often granted. Racial minorities should be grateful for the protection that they have received from the Court, and for the consideration shown them by the majoritarian branches. Rather than demonstrating their gratitude, however, minorities often appear unsatisfied, unappreciative and shameless in their perpetual ability to ask for yet another majoritarian concession.

That this legitimated vision constitutes a widely shared majoritarian view of racial minorities is unfortunate. That it also constitutes a widely shared minority view is tragic.

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At the close of an article of this type, the author customarily emphasizes that the way to escape the legitimated assumptions of the traditional model, as well as the unfortunate vision of minorities that those assumptions convey, is for minorities to embrace a political model of the Supreme Court. If the Supreme Court adjudicatory process can be viewed as simply one aspect of the larger political process, the assumptions underlying the traditional model will no longer be legitimated by minority use of the Supreme Court to advance minority interests. Rather, political use of the Court will constitute an act of minority self-determination, not an act of continued dependency. Minorities will finally have learned to place their faith in the representative branches of government that are institutionally capable of respecting their interests, rather than the one branch whose design compels it to retard recognition of minority claims of entitlement.

The reason that I have not endorsed the traditional ending is that, in the present context, it is problematic. Political use of the Supreme Court will legitimate the assumptions underlying the traditional model as much as they are legitimated by purported countermajoritarian use. In order to be effective, political users of the Supreme Court will still have to be good litigators. They will have to invoke precedents in their briefs and pay homage to the justices in their oral arguments. Moreover, because the justices themselves will continue to adhere to the traditional model, minority advocates will also have to rely upon rights rhetoric in order to formulate winning arguments. Minority li-

tigators will not only have to employ the traditional mechanisms of Supreme Court review, but they will have to feign allegiance to the traditional model as well. From the outside, political and traditional uses of the Supreme Court look precisely the same. As a result, political use of the Court by racial minorities will do nothing to undermine the strength of legitimated assumptions in the minds of the majority. Rather, it will simply constitute additional use of the Court that will further reinforce the legitimated assumptions.

The only hope is that minorities themselves will attribute a different significance to Supreme Court litigation. The traditional model, however, is deeply ingrained. The strength of that model can be experienced simply by trying to picture an acceptable social order that does not incorporate a functioning concept of rights. Without considerable practice, most members of a liberal society find it difficult to imagine, let alone favor, such a social order. The strength of the traditional model is ingrained in minority minds just as it is in the minds of the majority. The legitimation process has been so successful that minorities may find it even more difficult than the majority to relinquish it.[185] Furthermore, because the dissonance generated by minority efforts to feign sympathy for countermajoritarian review while believing the process political will be at least substantial, if not overwhelming, attempted political use of the Court will pose a constant threat, even for minorities, of regression to the traditional model.

Rather than offering a prescription for remedial action, recognition of the countermajoritarian fallacy simply poses an inescapable dilemma. Because Supreme Court review cannot successfully be avoided, minorities have no alternative but to participate in a legal process that reinforces the traditional model. And they must do so even though the traditional model consigns them to a role of perpetual Supreme Court dependency. Ironically, the very structure of American constitutional government, dedicating an entire branch to the protection of minority rights, seems designed to ensure ultimate majoritarian control over minority interests and preclude racial minorities from ever securing the capacity for self-determination.

In a sense, it should not be surprising that a Supreme Court committed to the protection of minority interests would refuse to permit minorities ever to escape its protective control. Under the *Marbury*-based model of judicial review, minorities may be consigned to a role of perpetual Supreme Court dependency. But minority dependence is the lesser of the two dependencies that are created by the traditional

185. It seems that very few left-oriented political radicals are minority group members.

model of judicial review. Under the *Marbury* model, if there were no politically impotent minorities there could be no judicial review. And without judicial review, the Supreme Court would be deprived of its distinctive significance. Ironically, it is the Court that is ultimately dependent on the continued vulnerability of minorities in order to sustain its own constitutional legitimacy. Once minorities are able to attain an appreciation of the power that they possess over the Supreme Court, they will no longer be vulnerable to the supposed power that the Court has over them. It is true that, as presently conceived, the countermajoritarian dilemma can never be escaped. But by summoning the stamina, imagination, and ingenuity acquired through a history of oppression, racial minorities may be uniquely well-suited to transcend it. Although minorities may not ultimately possess the power to modify the manner in which the legal process deals with their interests, they do have the power to modify what they think about that process. And that may be just as good.

V. CONCLUSION

The traditional model of judicial review cannot work. That model posits the existence of a Supreme Court capable of protecting the interests of racial minorities by superseding the majoritarian preferences that are socialized into the justices who sit on the Court. The mechanisms relied upon to ensure this countermajoritarian capability, however, are ineffective. Neither the formal safeguards of life tenure and salary protection nor the operational safeguard of principled adjudication can insulate the Supreme Court process from majoritarian domination. Rather, the Court is a political institution that minorities must treat politically if they are to use the Court to facilitate rather than retard the advancement of minority interests. Effective political use of the Court, however, is difficult for two reasons.

First, the operation of Supreme Court politics is subtle and complex. Because the institutional design of the Court makes it unsympathetic to progressive social change, the Court is more likely to impede than to facilitate minority efforts to advance minority interests. Indeed, the subtleties and complexities of Supreme Court politics are such that, if avoidance were possible, a rational minority strategy would be to avoid the Supreme Court altogether and to concentrate minority political efforts on the overtly political branches. Supreme Court avoidance, however, is not an option. As a result, minorities are compelled to make the best political judgments that they can in the hope of using the Court to its utmost political advantage, recognizing that the effort is not likely to be very successful.

The second cause of difficulty in making effective political use of the Supreme Court is that any use of the Court entails reliance on the mechanisms and rhetoric of the traditional model. As a result, even efforts by minorities to limit their Supreme Court participation to political use will nevertheless legitimate the assumptions that underlie the traditional model. Sadly, this includes the assumption that racial minorities are Supreme Court dependents who are incapable of political self-determination. This poses an inescapable dilemma for minorities seeking to improve their social circumstances. Because the option of simply ignoring the Court is unavailable, minorities are forced either to acquiesce in the traditional model of judicial review or to further legitimate that model through their political efforts to escape it.

As a matter of constitutional theory, this leads to a rather interesting conclusion. It simply does not much matter whether the traditional model of judicial review is valid or not. Either way, minorities will have to continue to behave as if the model works, and continued minority reliance on the traditional model will reinforce majoritarian beliefs in its essential validity. Ironically, however, minorities have it within their power to understand the failure of the traditional model, and the subtle power inversions that that failure entails. And the majority need never learn of their escape until it is too late.