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THE WILL of THE PEOPLE

How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution

"Thought-provoking and authoritative . . . Friedman's contribution . . . is the breadth and detail of his historical canvas, and it's a significant one."

—EMILY BAZELON, *The New York Times Book Review*

INTRODUCTION

"[T]o decide upon the meaning of the constitution"

In the first half of the 1930s, the American people faced two seemingly intractable problems. The first was the Great Depression, the country's worst-ever economic downturn. Desperate for a leader, if not a savior, the people elected Franklin Roosevelt President and gave him a strong Democratic majority in Congress. Following Roosevelt's inauguration, Congress began adopting New Deal measures with alacrity; the pace of legislation was simply breathtaking. Many today dispute how effective these measures ultimately were, but at the time, Roosevelt's program offered something people sorely needed: hope.

The second problem was the Supreme Court. In case after stunning case the justices struck down New Deal legislation, ruling that it violated the Constitution. To Roosevelt and the millions who supported him, the Supreme Court's persistent veto was an unfathomable breach of the democratic principle: that the will of the people should govern.

In the winter of 1937, Roosevelt struck back at the Court. Fresh from a landslide victory that *The New York Times* dubbed "a political Johnstown flood," Roosevelt determined that the justices would no longer stand in the way of his popular agenda.[1] He asked Congress to give him the power to add an additional appointee to the Court for every justice over the age of seventy who refused to retire. Should the elderly and recalcitrant justices not yield, Roosevelt planned to "pack" the Court with as many as six new members of his choosing.

For five anxious months, the question of whether or not Congress should approve Roosevelt's dramatic plan gripped the country. In the very thick of it *Newsweek* reported that "state legislators, public officials, editors, and millions of plain John Does had joined in a furious debate." Gallup polling, still in a relatively primitive state, showed voters shifting to and fro in response to the latest development. "Street-corner discussions, arguments at restaurant tables, a seemingly endless stream of radio addresses and newspaper reports, protracted hearings before the Senate Judiciary Committee and animated congressional debates" convinced Merlo Pusey, a prominent historian and editorialist who chronicled the fight and went on to write the Chief Justice's biography, that "our national conscience has been deeply stirred."[2]

How Congress voted on Roosevelt's plan would say much about the future of the Supreme Court. But it would say far more about the American people and the sort of government they preferred. To hear it told, they faced a stark choice: either demand the triumph of the popular will and approve FDR's proposal to subjugate the Court, or insist that even a democratic government must operate within the limits of the Constitution and reject the plan.

As it happened, the country and the Court found a way out of the seeming dilemma, a solution that has influenced the nature of American government ever since. Congress rejected Roosevelt's plan. But it did so only after the Court signaled its capitulation and began to approve New Deal measures, at which point public opinion turned squarely against the plan. In effect, a tacit deal was reached: the American people would grant the justices their power, so long as the Supreme Court's interpretation of the Constitution did not stray too far from what a majority of the people believed it should be. For the most part, this deal has stuck.

Roosevelt's attack on the Court was brazen, but it was only one of many that have occurred throughout the nation's life. What follows is the chronicle of the relationship between the popular will and the Supreme Court as it unfolded over two hundred–plus years of American history. It reveals how the Supreme Court went from being an institution intended to check the popular will to one that frequently confirms it. And it explains that this occurred as the American people gradually came to understand and then to shape the role played by the justices, thus defining the terms of their own constitutional democracy.

JUDICIAL REVIEW AND DEMOCRACY

The specific target of Roosevelt's ire was the power of judicial review, the practice by which courts, and particularly the Supreme Court, determine whether

government actions are consistent with the Constitution. In American life, the Constitution reigns supreme. Exercising judicial review, courts have the power to strike down even congressional statutes and acts of the President when they are found out of keeping with constitutional standards.

Throughout history, the chief complaint against judicial review has been that it interferes with the right of the people to govern themselves. After the Supreme Court struck down yet another New Deal measure in 1936, the *New York Daily News*, the country's first tabloid, with a circulation at the time of well over one million, thundered: "We do not see how old judicial gentlemen . . . can forever be permitted to override the will of the people as expressed through the people's own elected Legislatures, Congress and President."[3] A union official, expressing support for Roosevelt's plan, explained the problem: "Unless all branches of our national government are made responsive to changing conditions and thereby truly democratic, popular elections are turned into a farce. The judiciary is no exception."[4] The President, the members of Congress, and the states' chief executives and legislators all are accountable to the people through regular elections. Not so the justices of the Supreme Court, who are appointed (not elected) and who—short of removal by impeachment, which has never happened—serve for life. Yet when the justices base a ruling on the Constitution, the country must live with that decision unless and until the Court reverses itself or the rare constitutional amendment is adopted. There is no overriding the Court otherwise.

This extraordinary power was a rather uniquely American innovation, emerging without plan or design in the period prior to the Constitutional Convention as a means of checking the excesses of democracy.[5] In the years following independence, increasing numbers of Americans watched with apprehension as legislative assemblies trampled fundamental rights. Gradually, almost imperceptibly, judges answered the call of lawyers to refuse to enforce such laws on the ground that they were "repugnant to" the state constitutions. Then the framers of the United States Constitution adopted the innovation of judicial review to solve a problem of their own: how to ensure that the state governments followed national authority. James Madison, one of our most revered founders, suggested that Congress have a veto over every state law, but few of his colleagues were willing to go that far. Instead, they left it to the judges to decide if particular state laws (and perhaps federal laws as well) conflicted with national authority, and in particular with the Constitution.

Although few in the early days of American democracy recognized the full potential of judicial review, some who did were alarmed. As the struggle over ratification of the Constitution entered its most heated days, the Anti-

Federalist (i.e., anti-ratification) pamphleteer "Brutus" weighed in, expressing grave concern about the proposed federal judiciary. He thought it almost unimaginable to give judges the power "to decide upon the meaning of the constitution."[6] Brutus pointed to Great Britain, where "I believe [the judges] in no instance assume the authority to set aside an act of parliament under the idea that it is inconsistent with their constitution." Brutus reminded his readers that the judges possessing this extraordinary authority "cannot be removed from office or suffer a diminution of their salaries." "The supreme court under this constitution," Brutus predicted—some would say quite accurately—"would be exalted above all other power in the government, and subject to no control." No fewer than four times he intoned: *"[T]here is no power above them."*[7]

When Roosevelt defended his Court-packing plan, he joined hands across the ages with Brutus in condemning the Supreme Court's unaccountability to the popular will. Devoting one of his legendary fireside chats to the plan, Roosevelt described American government as a "three horse team provided by the Constitution to the American people so that their field might be plowed. . . . Two of the horses [the Congress and the executive] are pulling in unison today; the third is not." Roosevelt stressed that this was not as it should be: "It is the American people themselves who are in the driver's seat. It is the American people themselves who want the furrow plowed. It is the American people themselves who expect the third horse to pull in unison with the other two."[8] Many at the time were of like mind.

These sorts of challenges to the Supreme Court's power should sound extremely familiar. Throughout the course of American history, many of the United States' most revered public figures have expressed similar sentiments. Like Roosevelt and his followers in the 1930s, Thomas Jefferson, Abraham Lincoln, and Theodore Roosevelt before them all struggled with the judiciary, and all said essentially the same.[9] Jefferson, who fought history's first great battle against the Court, complained that "our judges are effectually independent of the nation."[10] In its notorious 1857 decision, in *Dred Scott v. Sandford*, the Supreme Court denied Congress had the constitutional authority to resolve the question of slavery in the territories. Lincoln responded: "[I]f the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court . . . the people will have ceased, to be their own rulers."[11] In his 1912 third-party bid for the presidency, Theodore Roosevelt concurred: "The American people and not the courts are to determine their own fundamental policies."[12]

The current mantra against "activist judges" is simply the latest incarnation of this persistent complaint about judicial accountability. If anything is new today, it is only that, for the first time in American history, the Supreme Court's power of judicial review has come under siege simultaneously from both sides of the ideological spectrum.[13] Modern-era critics on both the political left and the right paint a picture in which Brutus's worst nightmare has come true in spades. The problem is no longer judicial review, they say; it is "judicial supremacy"—on issue after issue of grave public concern the justices insist on having the last word, if not the only one. Critics who agree on little else now unite in decrying the Court's all-powerful approach.

DEBATING CONSTITUTIONAL MEANING

There is a weighty response to this complaint about judicial hegemony. In the American system of democracy, the popular will nonetheless is subject to those boundaries specified in the Constitution. What is the point of having a written Constitution if government officials can transgress it at will?

When the justices strike down laws, they are quick to offer reassurance that they are not imposing their own will on the American people; rather, they simply act in the name of the Constitution. "There should be no misunderstanding as to the function of this court," urged Justice Owen Roberts, one of the men in the middle on a divided Supreme Court during the New Deal struggle. "This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."[14]

Roberts's absolution—"the Constitution made us do this"—reverberates throughout history's most famous decisions, both those reviled and those admired. When the Supreme Court limited Congress's power over slavery in *Dred Scott*, it was (naturally) offered as a necessary interpretation of the Constitution. When the Supreme Court struck down school segregation in *Brown v. Board of Education*, the reason was that the Constitution's Equal Protection Clause demanded it. When the Court protected the right of Jehovah's Witnesses children who refused to salute the flag in public schools because their religion forbade it, the First Amendment to the Constitution was determinative. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities," explained the Court majority.[15]

Anytime the Supreme Court is under attack, its defenders will quite naturally brandish the Constitution, insisting that those who govern must play by its rules. Opponents of the Court plan—and in the 1930s this included many of FDR's political supporters—argued that threatening the Court effec-

tively threatened constitutional government itself. Frank Gannett owned a chain of newspapers in the Northeast; he favored Roosevelt early on but came to have a change of heart and ultimately led the attack against the Court plan through his National Committee to Uphold Constitutional Government. Gannett and many others saw Roosevelt's proposal as a giant end run around the Constitution. Gannett penned an open letter to the American people in which he said: "If it is necessary to change the Constitution it should be done in the regular way."[16] The respected historian James Truslow Adams, one of a flood of notables who took to the radio to debate Roosevelt's proposal, worried aloud that "if the Constitution is to be changed by packing the Court, then that same method might some day be used to alter those parts which guarantee us our religious and other liberties."[17]

The great problem, of course, is that when the issue is fraught, the American people typically disagree over what the Constitution means. So do the justices themselves. That is why judicial decisions interpreting the Constitution become so controversial.

Roosevelt did not challenge the Supreme Court merely by relying on the election returns (though he surely did allude to the strength of his popular majority). Instead, he argued that the justices' understanding of the Constitution was wrong. During his fireside chat on his plan to reorganize the judiciary, Roosevelt pointed to vehement dissent within the Court itself over the proper outcome of New Deal cases. "In the face of these dissenting opinions, there is no basis for the claim made by some members of the Court that something in the Constitution has compelled them regretfully to thwart the will of the people." His plan, Roosevelt explained, was simply a way "to take an appeal from the Supreme Court to the Constitution itself." He insisted that if read properly, the Constitution provided ample power to address the problems of the Depression. Roosevelt urged the American people to read the Constitution for themselves: "Like the Bible, it ought to be read again and again."[18]

As often as not, fights over judicial power really are fights over the meaning of the Constitution. This is not to say that judicial power isn't an issue in and of itself; it is always a fair question in a democracy whether a public official has too much power, or is insufficiently accountable to the people. But judicial power becomes an issue precisely because judges interpret the Constitution and because judicial decisions seem so very final. This has been the case from the start. Brutus did not challenge the authority of the Supreme Court in the abstract. Rather, he opposed adoption of the Constitution because he feared the power of a strong central government. Brutus believed the Court inevitably would side with the national government against the states, and so he fretted over the extent of judicial power. The very same was true of Jefferson, Lincoln, and Theodore Roosevelt: each attacked the Court precisely because he had a very different understanding of the Constitution from the one held by a majority of the justices.

Caught up in immediate controversy, Americans can overlook this point. They fail to see that what looks to be a roaring battle over judicial power is simply the latest round in a much broader struggle over the proper interpretation of the Constitution. In a constitutional democracy, majority will regularly is pitted against minority rights. This tension, which is at the heart of constitutional democracy, would exist even if there were no judges. It is the meaning of the Constitution itself that is up for grabs, and judicial power is nothing more than a pawn in that battle.

In a sense, the history of the relationship between judicial review and the popular will has been one of great continuity. The justices decide cases involving constitutional questions of substantial importance to the American people. Given the seeming finality of judicial decisions, those who disagree with the justices lash out at the Court and the power of judicial review. Those who agree with the justices jump to their defense, waving the Constitution. And a fight over the Constitution becomes one about the judges.

CONSTRUCTING JUDICIAL POWER

Although this is a story of continuity, it also is one of fundamental change. The nature and extent of the Supreme Court's authority have plainly grown over time, in ways that are both unmistakable and undeniable. The power the Court wields is the product of a lengthy evolution in American political thought. In the course of struggling over judicial review as a proxy for their greater constitutional disagreements, the American people came to tailor, and then ultimately to accept, the role of the Supreme Court.[19] We have the Court we do because the American people have willed it to be so.

History makes clear that the classic complaint about judicial review—that it interferes with the will of the people to govern themselves—is radically overstated. The American people have always had the ability to limit judicial review—or even to eliminate it entirely. The persistent question throughout history has been whether, and to what extent, they should exercise this power. In the course of answering that question, the American people have confronted, and given meaning to, the idea of democratic government under a constitution.

During the debate over ratification of the Constitution, Alexander Hamilton, writing as "Publius" in *The Federalist Papers*, rejected Brutus's prediction that the judiciary would prove all powerful. Hamilton's "Federalist No. 78" remains today one of history's great defenses of judicial independence. But the most memorable part of Hamilton's tract was his point that there was no need to worry about the judges because they had little capacity to threaten democratic principles.

Judges, Hamilton explained, lacked both the executive's control over the "sword" and Congress's control over the "purse." Possessing "neither FORCE nor WILL, but merely judgment," the judiciary "must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." For this reason, he assured his readers, the judiciary would be "the least dangerous" of the three branches of government.[20] It turned out that Hamilton was at least as prescient as Brutus about judicial power.

It is difficult to appreciate today the devastating nature of some of the early challenges to judicial authority. In the aftermath of the Civil War, Congress had the task of "reconstructing" the southern states as part of restoring the Union. Many at the time believed that given the chance, the Supreme Court would render a decision invalidating continued military rule of the South before Congress could consolidate the gains the Union had achieved on the battlefield. But quite unlike all the hand-wringing we hear today, judicial supremacy did not trouble members of Congress then. Listen to Representative John Bingham of Ohio, a Republican leader of the Congress:

> If . . . the court usurps power to decide political questions and def[ies] a free people's will it will only remain for a people thus insulted and defied to demonstrate that the servant is not above his lord by procuring a further constitutional amendment and ratifying the same, which will defy judicial usurpation by annihilating the usurpers in the abolition of the tribunal itself.[21]

As it turned out, Bingham's colleagues did not have to go nearly so far as "annihilating" the Supreme Court to ensure they controlled it. Rather, Congress simply withdrew the Court's jurisdiction at a critical moment, and the justices bowed to a greater power. So much for Brutus's worries.

The irony of the defeat of Roosevelt's Court-packing plan is that the very weapon denied him in his struggle against judicial authority was used freely by Abraham Lincoln's generation. Lincoln and his fellow Republicans swept into power as the Civil War began. The *Dred Scott* decision having made the potential dangers of judicial review perfectly clear, the newly Republican Congress was hardly going to stand pat and allow the justices to threaten its

efforts to hold the Union together. Three times during the Civil War and its aftermath, Congress altered the number of justices who sat on the Supreme Court. In each instance, proponents of enlarging or reducing the number of justices offered a reason that had nothing to do with ensuring political control of the Court, just as Roosevelt wrapped his own plan in the flimsy gauze of an argument that the elderly justices were behind in their work and needed help. But those watching were perfectly aware that by altering the number of justices, Congress ensured that the Court majority rested in hands that could be trusted.[22]

Roosevelt failed where the Civil War Congress succeeded in part because Americans' understanding of the Supreme Court and its role had changed between 1868 and 1937. This was not history's first change of attitude toward judicial review. When the Supreme Court decided the *Dred Scott* case, holding that Congress could not regulate slavery in the territories, many of Lincoln's generation feared the decision would ultimately tear the country asunder. Yet very few of them said that *Dred Scott* should simply be ignored or defied. This may not be surprising to us today, when talk of defying the Supreme Court is taboo, a signal that one is unwilling to play by the basic rules of American governance. It was apparently unsurprising to many Americans in 1857 as well. Nonetheless, a generation or two earlier, defiance of the Supreme Court by state governments was the order of the day.[23]

Some prominent works of political science and history have taken into account the relationship between the popular will and judicial power, but they fail to capture how that relationship has evolved throughout the course of American history. This is unfortunate, because it is only through observing this evolution that we can begin to really understand the authority the Supreme Court wields today. In 1960, Harvard political scientist Robert McCloskey published a wonderful, engaging history entitled *The American Supreme Court*, in which he argued that the justices ignore public opinion at their peril. For this reason, he concluded, the Court "seldom strayed very far from the mainstreams of American life and seldom overestimated its own power resources."[24] Despite its remarkable insight, McCloskey's justly famous history failed to grapple with just how judicial power had been sculpted by those very instances in which the justices did in fact overestimate their own power. The justices today unequivocally exercise more authority than they did at the founding. But that authority exists as it does today only because through a process of trial and error, step and misstep, the country came to understand what it wanted out of the Supreme Court, as well as what it would tolerate.

THE CONTOURS OF THE HISTORY

There have been four critical periods in the American people's changing relationship with judicial review and the Supreme Court. The lines between the periods are hardly distinct. History resists easy categorization; major developments come in fits and starts. Still, attention to these periods allows us to see how American thought about the role of judicial power has evolved over time.[25]

The first period—from the time of independence until the early 1800s—saw the remarkably quick acceptance of judicial review, followed by grave threats to the independence of the judiciary as the implications of the practice became evident. It was in this period that judges began to strike state legislative measures and the Constitutional Convention in Philadelphia adopted judicial review as a means of keeping the states in line with national authority. Soon enough, though, the country saw the danger of unaccountable judges with the power to interpret the Constitution. In the late eighteenth century, the country split into two political parties, which had great enmity for each other. Following the "Revolution of 1800," in which Thomas Jefferson's Republicans captured the executive branch and the Congress, the Federalist Party tried to fight a rearguard action from the judiciary. The newly empowered Republicans were not prepared to accept such partisan conduct on the bench. Congress abolished some of the judgeships created by the Federalists and threatened the impeachment of Supreme Court justices, acts that were criticized by the Federalists as a grave disregard for the independence of the judiciary. This first period came to a close in the early 1800s only after a tacit deal had been reached by which judicial independence was guaranteed so long as the judges refrained from engaging in blatant partisan politics from the bench.[26]

The second period, which ran from roughly the War of 1812 until the Nullification Crisis of 1832–1833, was characterized by frequent, officially sanctioned defiance of judicial decrees. Most of the Supreme Court's constitutional decisions in this period were aimed at state governments. Yet in the states' rights environment in which the Court was operating, the states would regularly fail to show up when haled before the justices and would often defy orders the Court issued. Virginia's highest court refused to concede that the Supreme Court had the authority to review its decisions. Georgia actually hanged a man in the face of a Supreme Court order to the contrary.[27]

This period of defiance came to a gradual close only when the national leaders recognized they needed the Supreme Court to help keep the states in line. President Andrew Jackson had no particular fondness for the Supreme Court, whose rulings often conflicted with his policies. In 1832, however, when South Carolina claimed the power to nullify federal laws and threatened to secede from the Union, Jackson did an abrupt about-face. He in turn threatened to use force against South Carolina and placed the authority of his office squarely behind the Supreme Court as an arbiter of constitutional disputes.[28]

The Supreme Court's reviled decision in *Dred Scott* ushered in the third period of judicial authority, that of controlling the courts. Though the nation had come gradually to reject official defiance of Court decisions, what was to be done if the Court put the country into a seemingly impossible situation, as it seemed to many to have done in *Dred Scott*? If judicial decisions were going to stick, in ways potentially in conflict with the popular will, then the answer was to exercise control over the courts to make sure the judges handed down only those decisions the people were prepared to accept. It was in this period that John Bingham uttered his threat to annihilate the Court, while his colleagues manipulated the size of the Court thrice and stripped it of jurisdiction.[29]

The third period continued until 1937. During this time the Supreme Court learned the importance of playing to a constituency, of having a patron that could protect it. Between the end of Reconstruction and the Great Depression, the judiciary grew in power by offering its backing to corporate and commercial interests that exercised enormous authority throughout the country.[30] In the late 1800s, the federal judiciary eliminated state laws that interfered with interstate commerce. In the early 1900s, the courts struck down progressive legislation adopted to ease the plight of workers caught up in America's industrial revolution. Throughout this long period there were many attempts to control the judges; some were successful, but many failed. Although the reasons why it proved so hard to control the judges in struggle after struggle were complex, the impact of the failure was not. The result was a great loss of faith in the objectivity of the judiciary and of law itself.[31]

The Court fight of 1937 served as the threshold to the modern era. Central to the importance of these events was Roosevelt's success in assembling a coalition of the common people of the country. With Roosevelt's chief constituency signaling its disapproval of the Court-packing plan, the idea of control gave way to the seeming supremacy for which the Court is noted today. In retrospect, the Supreme Court's breathtaking 1954 decision in *Brown v. Board of Education* barring segregated public schools was but the opening salvo in what has been sweeping judicial intervention in some of the country's most controverted issues. Since the 1950s, the Supreme Court has

granted women equality, legalized abortion, expanded the rights of criminal defendants, taken control over imposition of the death penalty, recognized gay rights, banned prayer in schools, limited Congress's power to regulate as it sees fit, and even decided one of history's closest presidential elections.

No wonder that today the Supreme Court is described as practically impregnable. Politicians decry the justices; scholars condemn them. Remedies for judicial power are sought. Yet year after year, the nine members of the Court take their seats on the nation's highest bench and continue to tell Americans what the Constitution means, seemingly aloof from the controversy that swirls about them.

THE MODERN ERA

Still, appearances can be deceiving. In a sense, today's critics of judicial supremacy are right: the Supreme Court does exercise more power than it once did. In another sense, though, they could not be more wrong. The Court has this power only because, over time, the American people have decided to cede it to the justices. The grant of power is conditional and could be withdrawn at any time. The tools of popular control have not dissipated; they simply have not been needed. The justices recognize the fragility of their position, occasionally they allude to it, and for the most part (though, of course, not entirely) their decisions hew rather closely to the mainstream of popular judgment about the meaning of the Constitution. It is hardly the case that every Supreme Court decision mirrors the popular will—and even less so that it should. Rather, over time, as Americans have the opportunity to think through constitutional issues, Supreme Court decisions tend to converge with the considered judgment of the American people.

In rejecting the Court plan, but only after the justices' turnabout, the American people defined the modern era. They would support the exercise of judicial review so that the Court could do precisely what its New Deal defenders said it would—specify and enforce constitutional liberties—but they would offer this support only so long as the Court's decisions did not stray far, and for long, from the heart of what the public understood the Constitution to mean. And this, to a remarkable extent, is what has happened. On issue after contentious issue—abortion, affirmative action, gay rights, and the death penalty, to name a few—the Supreme Court has rendered decisions that meet with popular approval and find support in the latest Gallup Poll.

In short, the modern era is one of a symbiotic relationship between popular opinion and judicial review.[32] The Court will get ahead of the American

people on some issues, like the death penalty or perhaps school desegregation itself. On others, such as gay rights, it will lag behind. But over time, with what is admittedly great public discussion, but little in the way of serious overt attacks on judicial power, the Court and the public will come into basic alliance with each other.

In the course of acting thus, the Supreme Court has made itself one of the most popular institutions in American democracy. The justices regularly outpoll the Congress and often even the President in terms of public support or confidence. When the Supreme Court decided the contested presidential election of 2000 in *Bush v. Gore*, many saw this as a low point for the justices. Yet prior to the decision more than 60 percent of the country said it was the Court's job to resolve the matter, compared with only 17 percent for Congress! And within a year of the decision in *Bush v. Gore* the Court again was running at high levels of support among Republicans and Democrats alike.[33]

These facts profoundly call into question the image of the Supreme Court as an institution that runs contrary to the popular will. In the modern era, the supposed tension between popular opinion and judicial review seems to have evaporated. The Court certainly is under persistent attack. Those who lose fights over the meaning of the Constitution are never happy and rarely go down quietly. Still, the more salient Supreme Court decisions generally meet with great public approval.[34] And even when they do not, the public supports the Court's right to decide the cases nonetheless.

The ultimate question, of course, is whether this is a good thing. Though the developments of the last half century may seem to put to rest the tension between judicial review and the popular will that Roosevelt and many others have felt so acutely, they actually serve only to raise a set of questions that are crucial to a full understanding of American constitutional democracy. The popularity of the Court and its decisions notwithstanding, it remains the case that the Constitution was supposed to be a shoe that pinches. The Constitution was intended to serve as a limitation on the popular will, at least at certain times. If judicial decisions are running in popular traces, has the Constitution been abandoned? What does it mean to have a Constitution that is regularly interpreted to mean what the American people want it to mean? Is popularity what we really desire from the justices—and should we? Perhaps most important: What is the capacity of the Court to stand up for the Constitution at times when constitutional values are threatened precisely because they are unpopular with the American people? Is there any hope in the Supreme Court for the protection of constitutional liberty?

Although these are the right questions to ask, even tentative answers nec-

essarily await the conclusion of the story. The framers and their successors would have scoffed if they had been told that the judges were to follow the popular will. For generations, the Supreme Court seemed at best a nettlesome thorn in the side of the American people, not their walking companion. Before we even begin to answer these questions, then, it is necessary to understand the events that brought us to the modern state of affairs—and the changes in American thought that went along with them. It is nearly impossible to evaluate the Court's present symbiotic relationship with the American people without a full picture of how that relationship evolved and how it operates today.

The short answer, though, rests in distinguishing the passing fancy of the American people from their considered judgment. Judicial review would indeed be a puzzling addition to the American system of government if all the Supreme Court did was mirror transient public opinion. The value of judicial review in the modern era is that it does something more than that. It serves as a catalyst for the American people to debate as a polity some of the most difficult and fundamental issues that confront them. It forces the American people to work to reach answers to these questions, to find solutions—often compromises—that obtain broad and lasting support. And it is only when the people have done so that the Court tends to come into line with public opinion.

This, then, is the function of judicial review in the modern era: to serve as a catalyst, to force public debate, and ultimately to ratify the American people's considered views about the meaning of their Constitution. Admittedly, this was hardly the framers' vision for the Supreme Court, nor is it one that most Americans, scholars of the Court included, believe the Court plays. Yet given that constitutional meaning cannot remain entirely stable over the entire course of American history, and given the incredible difficulty of the constitutional amendment process the framers bequeathed us, this role has proven to be one we could hardly live without.

THE AMERICAN PEOPLE AND THE CONSTITUTION

Typically, histories of the Supreme Court focus on the justices and their decisions. Here, however, the chief protagonists are the American people. This is a chronicle of their shifting attitudes toward the Supreme Court, judicial review, and constitutional government. If anything should be evident by the conclusion, it is that the Supreme Court exercises the power it has precisely because that is the will of the people.

Claiming to capture the evolving views of the American public is something any author ought to do with enormous trepidation. Public opinion is an enormous force in the United States, as many famous visitors to our shores, such as Alexis de Tocqueville and Lord James Bryce, have noted with wonder.[35] Yet anyone who spends time in this country knows equally well there is no single American voice. Public opinion is a collage of ever-shifting views.

For these reasons and more, giving expression to the popular will can indeed seem a daunting task. At the least, history privileges elite voices.[36] The words of members of Congress and Presidents are recorded for posterity. The publishers of journals and authors of books have the means to ensure what they think, and their thoughts remain available to the ages.[37] Not so, necessarily, of the many "John Does"—to use the words of the 1937 *Newsweek* story about the fight over Roosevelt's plan—whose views often seem to slip unheard or unheeded beneath the ocean of time. It is a fact worthy of note that the voices of prominent women and people of color are so few in this story, at least until its later years.

Indeed, something as seemingly clear as a tally of votes, or a poll, can misrepresent the views of the American people in important ways. African-Americans did not receive the franchise until after the Civil War, and during the following decades it was stripped of many of them once again through the calculated machinations of state officials. The Nineteenth Amendment, giving women the franchise, was not ratified until 1920. Nor are vote tallies necessarily representative of the views of those Americans who can vote. Voter turnout has risen and fallen throughout American history, in ways both provocative and puzzling. During the end of the nineteenth century, upward of 80 percent of the electorate would turn out to vote in some elections; by the 1920s, following all the Progressive Era "reforms," participation plummeted sharply.[38] Even during times of high turnout, corporate influence and machine politics have played distorting roles.[39]

Still, capturing and writing about American public opinion toward the judiciary are not as daunting as they might appear. Despite all these quite reasonable cautions, which many historians face, there is very good reason to have faith in the possibility of chronicling changes in public attitudes toward the idea and the institution that is judicial review.

For one thing, controversies in American politics often replicate the adversarial form of the courtroom. By the time matters reach the boiling point, the American people are frequently asked to come down for or against some very basic proposition. At least with the luxury of hindsight, it is possible to see what the issues were and which side prevailed.

For another, it is wrong to say the voices of the vast majority of Americans are not preserved to us. Many of the elites whose views are recorded here were chosen or retained their places precisely because of their ability to give voice to the sentiments of their constituents and audiences. That is what long-serving politicians and successful journalists do. Sometimes they mold public opinion; more often they mirror it. In either case, they can be its embodiment.[40]

Perhaps most important, in some of the most crucial moments in the struggle over judicial review there was an extraordinary engagement of the American people.[41] That is precisely what Merlo Pusey was capturing when he described "[s]treet-corner discussions, arguments at restaurant tables," and the like. The Jane and John Does of the era *did* stand up to be noticed; they wrote letters, held meetings, and organized civic responses in a way that, quite frankly, might seem remarkable today. We do have access to their views.[42] One of the noteworthy aspects of this story is the way in which the role of the judiciary often was defined most by those—the composite groups and individuals—who in fact opposed it.

This struggle over judicial power has been of the greatest consequence, for through it the American public has come to work out the deepest underlying tension in their form of government, the tension between a democratic government and a Constitution that limits what popular majorities and their elected officials may do. How is it possible to reconcile a belief that the people should at any moment be permitted to find their own way with a set of rules that limits what it is the people can do? Even as some of our greatest thinkers have struggled with the question at a theoretical level, the American people have managed to work it out as a matter of daily practice. This is the story of how they did so.

CONCLUSION: WHAT HISTORY TEACHES

"[A] dialogue . . . with the people"

As the baton of one Chief Justice passed to another, it became clear that while the story of judicial review is constantly evolving, it retains an eerie familiarity. The same arguments for and against the practice are offered time and again. There is a reason for this, an important one: these arguments reflect the intractable tension between majority rule and constitutionalism that is innate to the American system of government. Despite the persistent claims of critics, judicial review has never been the source of the problem. It merely reflects (and perhaps exacerbates) it. In a constitutional democracy, minority rights are going to come into collision with majority rule, whether there are judges to say so or not.[1]

Judicial review did evolve, though, and what most have failed to see is that in its evolution, judicial review actually has become the American way of mitigating the tension between government by the people, and government under a Constitution. Our Constitution is almost a quarter of a millennium old. It is unavoidable, and plainly apparent to all but those willfully blind to the fact, that what the Constitution is understood to encompass has changed over time in ways that are dramatic, sweeping, and often permanent.[2] Although these changes are reflected in judicial decisions, they are rarely initiated there and in any event never would endure without the blessing of the American people. Ultimately, it is the people (and the people alone) who must decide what the Constitution means. Judicial review provides a catalyst and method for them to do so. Over time, through a dialogue with the justices,

the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values. It frequently is the case that when judges rely on the Constitution to invalidate the actions of the other branches of government, they are enforcing the will of the American people.

THE ONCE AND FUTURE COURT

The long-awaited change in the membership of the Supreme Court finally came in the summer of 2005. Sandra Day O'Connor retired from the Court.[3] President George W. Bush nominated John Roberts to fill O'Connor's spot. Roberts was a District of Columbia Court of Appeals judge who had served in both the White House Counsel's and Solicitor General's offices. Deeply conservative, he was widely admired, even among liberals, for his intellect and ability. Before Roberts's confirmation hearings commenced, the Chief Justice died of the cancer he had battled for some time. Bush promoted Roberts, picking him to fill Rehnquist's center chair.[4]

Roberts's confirmation hearings as Chief Justice were a cakewalk. Though some viewed this as a "defeat for liberal advocacy groups," it was not clear their hearts were really in it.[5] Roberts, who had clerked for Chief Justice Rehnquist, was generally seen as an ideological swap. "It's hard to imagine a choice more similar to Chief Justice Rehnquist than John Roberts," observed former Solicitor General Walter Dellinger.[6] Add to that the fact that Roberts's performance during the hearings was "almost flawless," leaving everyone wowed.[7] No sense going to war over Superman, especially if it might not matter to the long-term direction of the Court. The Senate approved Roberts 78–22.[8]

"The pivotal appointment is the next one," declared Democratic senator Dianne Feinstein.[9] This nominee would replace Sandra Day O'Connor, who had been the heart of the Court for more than a decade. "We are all living now in Sandra Day O'Connor's America," Jeffrey Rosen wrote in his 2001 article "A Majority of One." "Take almost any of the most divisive questions of American life, and Justice O'Connor either has decided it or is about to decide it on our behalf."[10] The person who filled this seat, many believed, could decide the future of the Court for a long time to come. The moment was compared with Justice Powell's retirement in 1987, which had led to the contentious fight over Robert Bork.[11]

George Bush's first nominee to the position to fill O'Connor's seat, his counsel Harriet Miers, was savaged—by conservatives in his own party no less.[12] "The decisive element," wrote Norman Dorsen, New York University School of Law professor and old school liberal, ". . . was the opposition of right-wing Republicans who concluded that she would not be reliable on the

'social' issues—including abortion, gay marriage and voluntary end of life."[13] So Bush traded "a fight with his conservative base for a war with liberals," nominating a fan of the right, Judge Samuel Alito.[14] In Alito, wrote law professor Andrew Siegel on the pages of *The New Republic*, liberals "may have met their worst nightmare."[15] Once again, the airwaves and webwaves were filled with hysteria. The left, for example, attacked an Alito decision in which he voted to uphold the strip search of a ten-year-old girl on the scene of a drug bust; the right responded with a commercial saying the "'left-wing extremists" opposing Alito's nomination "may have found new allies, drug dealers who hide their drugs on children."[16] It was business as usual in the confirmation wars.

Despite the intensity of the fight among activists, most of the country snored its way to Alito's confirmation. Polls showed a clear majority in favor of putting him on the bench. Many Democrats voted against him, recognizing the importance of the seat and under pressure from left-wing interest groups. Still, Alito was confirmed 58–42, largely along party lines.[17] Having "squandered" the filibuster "on a series of ultimately insignificant lower court appointments," opined *The San Diego Union-Tribune*, the Democrats had given us "a nominee who, though modest and affable, is a literal avatar of right-wing jurisprudence."[18]

As they had been at other times in the past, prognosticators were again certain that there was a working conservative majority on the Court. *The New York Times* reported gloomily that adding Alito to the bench was "expected to tilt the balance of the court to the right on matters like abortion, affirmative action, and the death penalty, and partisans on each side said the outcome would echo through American politics for decades."[19] A former Reagan Justice Department official and conservative law professor crowed: "It is a Reagan personnel officer's dream come true. It is graduation. These individuals have been in study and preparation for these robes all their professional lives."[20]

Time will tell how well this latest round of predictions about a conservative Court proves out. The pundits' take on the Roberts Court seems to change after every term.[21] But the long-run fate of the Roberts Court is not seriously in doubt; its decisions will fall tolerably within the mainstream of public opinion, or the Court will be yanked back into line. Whether or not this is a good thing—the question typically is obscured in passionate debates over the proper role of judges in a democracy—is far more difficult to say.

THE WILL OF THE PEOPLE

Throughout history, contending forces have had basically two opposing things to say about the Supreme Court. Those unhappy with the justices

have accused them of interfering with the will of the majority.[22] Call this the *threat* of judicial review. Those supportive have emphasized the need for judicial review to protect constitutional rights.[23] Call this the *hope*.

It is about the threat of judicial review that we have heard the most over the years. In his classic *The Least Dangerous Branch*, Alexander Bickel gave this problem a descriptive but ungainly name, the "counter-majoritarian difficulty."[24] In theory, majority will is supposed to govern, yet judicial review runs against that principle. Thus it is "counter-majoritarian." (The "difficulty" represents the problem Bickel and other intellectuals have seen in trying to justify judicial review given its anti-majoritarian tendencies.)[25] Bickel's concern about judicial power has echoed throughout American history whenever the Supreme Court has seemed to be exercising great authority.

Ironically, though, the expressions of both the hope and the threat of judicial review rest on a common supposition: that the judiciary even has the *capacity* of running contrary to the will of the majority. Those who express fear of judicial review, who worry that judicial decisions trump majority will, presume the judges could do so with regularity if they wished.[26] Those who hope that the judges will stand up against the majority, however, need to make precisely the same assumption.[27]

As must certainly be clear by now, this underlying assumption, central to both perspectives on judicial review, is deeply problematic. The people and their elected representatives have had the ability all along to assert pressure on the judges, and they have done so on numerous occasions. The accountability of the justices (and thus the Constitution) to the popular will has been established time and time again. To the extent that the judges have had freedom to act, it has been because the American people have given it to them. Judicial power exists at popular dispensation.

Shrewd witnesses to Roosevelt's fight with the Court understood this relationship between judicial review and public opinion quite well. "No appointive body of nine men can fly in the face of public opinion for too long without provoking an answering attack," explained the journalists Alsop and Catledge.[28] Of similar view was Dean Alfange, whose book *The Supreme Court and the National Will* was one of several written to assist "nonprofessional readers" in an "understanding of the relation of judicial review to the processes of democratic government." "No institution," Alfange wrote, "can survive the loss of public confidence, particularly when the people's faith is its only support." For this reason, the Court has, "with but few exceptions, adjusted itself in the long run to the dominant currents of public sentiment."[29]

Those who doubt the accountability of the Supreme Court to the popular will point to the recent assertiveness of the justices. They fret that the Court has gone well beyond the accepted practice of judicial review and insisted upon final, if not exclusive, authority over the meaning of the Constitution.[30] There certainly are hints of this in some of the Rehnquist Court's decisions. In one instance, the late Chief Justice stated unequivocally, as have his colleagues in other instances, that the Congress and President can have their views about the Constitution, but the Supreme Court is the "ultimate expositor of the constitutional text."[31] It is these sorts of assertions that have led to broad attacks from the left and the right.

In off-the-bench remarks, however, several of the justices have been quite candid in acknowledging the Court's dependence on popular support. In his own early days on the Supreme Court, Justice Rehnquist was asked whether the justices are able "to isolate themselves from the pressure of public opinion." His response was that "we are not able to do so and it would probably be unwise to try."[32] For many years Justice Sandra Day O'Connor sat in the middle of the Court. Hers were the votes that led the Court to the center of public opinion on such controversial issues as abortion and affirmative action. Justice O'Connor was quite frank in explaining that "[w]e don't have standing armies to enforce opinions." Instead, "we rely on the confidence of the public in the correctness of those decisions. That's why we have to be aware of public opinions and of attitudes toward our system of justice, and it is why we must try to keep and build that trust."[33]

Not only have the justices acknowledged the importance of public opinion, but, as we have seen time and time again, their decisions plainly reflect the tug of public views. Some express concern about judicial hegemony nonetheless, arguing that of late the people have become complacent.[34] This is a dubious claim. Anti-Court activism has been rampant to such a degree in recent years that the justices and others have gone on the stump to protect judicial independence in the face of particularly strident criticisms and legislative measures they view as a threat.[35] The legal academy likewise responded: in 2005, 75 percent of the nation's law school deans signed a letter opposing congressional calls for judicial impeachment of activist judges.[36] Yet none of the attacks on judges has gotten very far, and it is unlikely that complacency is the reason. The weight of the evidence seems to support a quite different reading, that by and large, for now, the people are simply content with the system of judicial review. Perhaps more than ever before, Supreme Court decisions run in the mainstream of public opinion. If the people were unhappy with the courts, they could, as they have in the past, signal that discontent.

Yet polling data indicate widespread satisfaction with the judiciary, in sharp contrast with other branches of government.[37]

THE POLITICAL COURT

While the close relationship between popular opinion and judicial review goes a long way toward addressing Bickel's "counter-majoritarian difficulty," it actually raises a question that is far more profound and tends to receive far too little attention. If any worry seems legitimate, it is that the "hope" of judicial review too often proves effervescent, that the justices kowtow to public opinion and pay insufficient heed to the traditional role of judicial review in protecting minority rights.[38] Even conceding for the moment the very odd fact that the Court of late seems to be doing a better job than the Congress in meeting public expectations, it is still difficult to argue that such a state of affairs justifies judicial review. Is it really the role of the Supreme Court only to rubber-stamp public opinion?

Just as the Court has been criticized for interfering with the popular will, so it has been condemned equally strongly throughout history for failing to stand up for the Constitution when necessity demanded it. Take, for example, what might be the Court's greatest single failure (at least from this perspective) in all its history, the decisions in the Japanese internment cases. During World War II, more than one hundred thousand American citizens of Japanese descent (along with many other noncitizen Japanese) were herded from their homes on the West Coast and locked in detention camps in the middle of the country.[39] There was virtually no evidence of a security risk; the stark racism behind the internment later became clear.[40] The question of the internment's constitutionality came to the Supreme Court in the later days of the war, when its needlessness was already somewhat apparent, and in any event its constitutional difficulties should have been. Nonetheless, the justices upheld the acts of the President and military officials in decisions that are hard to justify intellectually or accept emotionally.[41] In time, the country rightly tripped over itself apologizing. Many today would pick *Dred Scott* as the Court's greatest gaffe, but at least in that case the justices thought they were standing up for minority rights, albeit the property rights of slaveholders.[42] It is difficult to understand *Korematsu*, the most prominent of the internment cases, as anything but stark capitulation to the decisions made by military and political authorities.[43]

Although no work of scholarship has really attempted to come to grips with what motivated the justices to decide *Korematsu* as they did, the currents of public opinion against the interned Japanese came to be very strong.[44]

Gallup did remarkably little polling on the question, which is itself telling of how little most people really seemed to care what was going on.[45] But the answers Gallup did elicit are a little chilling. In 1942, Gallup asked whether those interned inland should be allowed to return at the end of hostilities. By a 48–34 percent margin, the answer was no (the rest had "no opinion"). In a follow-up of "no" voters on what should happen, the most popular responses advocated throwing them out of the country or sending them back to Japan, and 3.8 percent indicated that they should just be killed.[46] The *Los Angeles Times* issued an editorial praising *Hirabayashi*, a predecessor to the *Korematsu* decision, stating that the decision would help stymie "[a]gitation for the return of Japs to the Pacific Coast."[47] It is not very encouraging to think the Supreme Court might be responsive to this sort of public opinion.

What we ought to care deeply about, what we ought to be asking, is how much capacity the justices have to act independently of the public's views, how likely they are to do so, and in what situations. Is the Court even capable of standing up for constitutional rights when they are jeopardized by the majority? Imagine the Court as tethered to public opinion by a bungee cord. The justices plainly have a certain freedom of movement. But what determines how far the Court can move away from the public before it is snapped back into line?

These are questions for which our understanding is remarkably impoverished, an embarrassing fact, given that we are more than two hundred years into our national experiment with judicial review and democracy. Far too much time has been spent and ink spilled debating *whether* the judiciary is beholden to or independent of majority will (even among those who should know better). Surprisingly little is devoted to analyzing where between these two poles the answer rests and how the system of judicial review actually works.

The failure to devote adequate attention to these important questions traces back to a long-standing disagreement between political scientists and legal scholars over whether law or politics motivates the Supreme Court's decisions, one dating back to the aftermath of Roosevelt's Court-packing plan.[48] In recent years, fortunately, scholars in both law and politics have begun to move past this silliness. Plainly what the justices do is law, and it does not detract from this point to acknowledge that they have a certain amount of discretion, even a large amount of it. But politics plainly influences the Court as well, in numerous ways ranging from the appointments process to responsiveness to public sentiments. Recent scholarship endeavors to say something tangible about the Supreme Court's responsiveness to (and independence from) popular politics, about what decides cases, and how all this works.[49] What we know is tentative; it may amount to little other than an

agenda for further research. But if we can at long last move past the question of *whether* the justices are influenced by popular opinion, a question whose only conceivable answer is yes, we can at least start to tackle the really meaningful question of when and how the justices are free to stand up to the popular will in the name of the Constitution.

THE ALIGNMENT OF THE JUSTICES WITH POPULAR OPINION

Understanding how much freedom of movement the Supreme Court enjoys requires answering a prior question: Why might the justices' decisions come into line with public opinion in the first place? Only by examining what motivates the justices to listen to the siren call of public opinion can we assess how beholden to it that they are likely to be.[50]

Undoubtedly, the fact that Presidents select Supreme Court justices and the Senate confirms them plays some role in ensuring that the Court heeds the cry of public opinion.[51] But it probably does not explain nearly as much as one would think. Contrary to folk wisdom, Presidents can usually get the sort of justice they want; however, they rarely are driven to appoint justices who capture the mainstream of popular thought.[52] Only recently have Presidents become so single-mindedly focused on the ideology of their appointees, and in doing so they often have proven beholden to extremists in their own party.[53] Even if a justice is appointed as a perfect proxy for public opinion, things may not remain that way for long. Historically, a justice has retired about every two and a half years, putting each of them on the Court on average for more than a generation, though that period of service is going up as justices are appointed younger and live longer.[54] In the years between appointment and present decisions, justices may experience "ideological drift," which is to say their views may move right or left. Even if they stick to their guns—and evidence suggests most of them do drift by the tenth year on the bench—the nature of the issues coming to them may make their views outmoded.[55] The appointments process, standing alone, cannot guarantee responsiveness to public opinion.

On the other hand, the fact that the justices are only human may say a lot for why responsiveness to public opinion occurs. The justices are no less vain than the rest of us, and it is human nature to like to be liked or even applauded and admired. Part of being a judge means getting used to the fact that you always are disappointing one of the parties before you. The Supreme Court is a bit different, though: it decides issues as much as individual controversies, and the justices' decisions regularly are front-page news and the subject of numerous editorials. Some justices appear to play to immediate

public opinion. Chief Justice Chase desperately wanted to be President. William O. Douglas liked the image of populist champion.[56] Many others are undoubtedly affected by what is said about them.

Aligning the Court with public opinion does not require many justices on the Court at any time to be sensitive to public opinion. The Court will always have its extremists. But the justices make decisions by majority vote, giving the "median" justice, the justice in the middle of the Court, enormous power. Recent studies suggest that when it actually comes to drafting opinions, as opposed to deciding the outcome of cases, the authority of the median may not be all it appears. Still, it is a rare (and likely far from significant) case in which the extreme justices are going to be calling the shots.[57]

The most telling reason why the justices might care about public opinion, though, is simply that they do not have much of a choice. At least, that is, if they care about preserving the Court's institutional power, about having their decisions enforced, about not being disciplined by politics. Americans have abolished courts, impeached one justice, regularly defied Court orders, packed the Court, and stripped its jurisdiction. If the preceding history shows anything, it is that when judicial decisions wander far from what the public will tolerate, bad things happen to the Court and the justices.

One might wonder why given the nature of the sticks used to beat up on the Court for its decisions, the opinion of the *public* matters, as opposed to, say, that of the President or the Congress. Political scientists in particular tend to focus on the institutions of government, rather than the people at large.[58] But the United States is a democracy, and the will of the people still prevails, at least on the big issues. Of course, the justices have to pay attention to what the Congress and the President are saying.[59] But they must do more. Typically, there is some slack between what the governed want and what the governors provide, but that slack closes up when issues rise to the top of the public's consciousness.[60] When the public has a view, its elected officials tend to heed it. The Court has to be attuned to aroused public opinion because it is the public that can save a Court in trouble with political leaders and likewise can motivate political leaders against it.

Astute outside observers of the American system have long noted the influence of public opinion on the Supreme Court. In *Democracy in America*, the French intellectual Alexis de Tocqueville described the Supreme Court's power as "immense, but it is the power springing from opinion." It is no wonder that having made his tour of the United States in 1831, as the Cherokee conflict raged and defiance of the Court's decisions was the constant talk of politics, Tocqueville qualified his remarks by saying the justices retain their authority "so long as the people consent to obey the law; they can

do nothing when they scorn it."[61] James Bryce was a British diplomat and scholar who spent considerable time here and wrote a multivolume work on the United States. Like Tocqueville, he concluded: "The Supreme Court feels the touch of public opinion." Bryce was observing the Court's response to Granger legislation firsthand, which is what led him to recognize that "[o]pinion is stronger in America than anywhere else in the world, and the judges are only men." If not entirely comfortable with the arrangement, Lord Bryce did not see that the judiciary had any choice. "To yield a little may be prudent, for the tree that cannot bend to the blast may be broken."[62]

Skeptics might point out—in fact some do—that it has been a long time since the justices were disciplined in any significant way.[63] Court packing disappeared in 1937; impeaching the justices never really got off the ground. The Jenner-Butler jurisdiction-stripping measure in 1957 failed. True, Congress recently stripped the Court of jurisdiction to hear the claims of Guantánamo detainees, but it was a naked political ploy that the justices (those appointed by Republicans and Democrats alike) swatted away like a gnat.[64] Indeed, if anything seems paradoxical, it is that in recent years, as these weapons to control the justices look to have been ruled off the table or lost their force, the Court has come most directly into line with public opinion.

The explanation for this paradox is that it has taken the Court and the public some time to learn how their relationship might work; now that it is understood, violent upheaval is no longer necessary.[65] What would transpire over the course of two hundred–plus years was hardly obvious at the outset to either the justices or those who would control them. To the contrary, history has been full of misjudgments and corrections.[66] It took the Court quite a while to understand the limitations that motivated public opinion imposed on its freedom of movement. By the same token, it took the public several iterations to assess how it felt about disciplining the Court, and in what ways. The relationship between the people and the justices developed slowly over time, as in any other marriage. As in any other marriage too, a few serious dustups were to be expected at first, until the rules got ironed out.

Now that the justices and the public understand how things work, the system tends to rest in a relatively quiet equilibrium.[67] Political scientists call this anticipated reaction.[68] The justices don't actually have to get into trouble before retribution occurs; they can sense trouble and avoid it. The people do not actually have to discipline the justices; if they simply raise a finger, the Court seems to get the message. If one wants the relationship to continue, and there is every indication the American people and the justices want this one to, then meeting expectations becomes the norm, and it does not take as much as it used to in the way of repercussions.

THE INDEPENDENCE OF THE JUSTICES

None of this is to say the Court will always be in line with public opinion. The justices neither need to, nor necessarily do, respond to what the public wants. To name a couple of relatively recent examples, the Court's school prayer and flag burning decisions have been wildly unpopular.[69] If anything, public opposition has seemed to make the justices only more resolute on these issues. There are a variety of factors that protect the justices' independence and allow them to deviate from popular opinion. Even these suggest, however, that over the long term on the important issues the people are going to have their way.

One obvious candidate as a safeguard for the Supreme Court's independence is the sheer difficulty of enacting a law to punish the justices. The American separation of powers system is designed to make it difficult to pass legislation, requiring majorities in two houses of Congress and the President's signature on the bill. But it is not just the President who has a "veto"; so too do the relevant congressional committee chairs, who can stall hearings or avoid them altogether. (Emanuel Celler, a New York representative who served in the House for half a century, stalled consideration of any response to the school prayer decisions for two years.)[70] There is a certain range—what political scientists describe as the gridlock interval—in which it is hard to overturn any policy because of the difficulty in mustering legislative support.[71]

Still, as we have already seen, and as political scientists seem to acknowledge, the force of mobilized public opinion can be a great way of overcoming congressional gridlock.[72] (Political pressure ultimately forced Celler to hold hearings on the school prayer amendment.)[73] Besides, it does not require enacting legislation to exercise one of the biggest sticks against the Court: defiance. The states—or the people of the states—have done quite well on their own. Witness here the widespread defiance of the 1820s to which Tocqueville plainly was alluding, the "massive resistance" in response to *Brown v. Board of Education*, and the low-grade evasion that has afflicted the school prayer rulings. If the Court engenders widespread resistance, it threatens its legitimacy; even lower levels of defiance eat away at its credibility. No judge wants to be defied, and the threat of a harsh counterreaction has certainly given some pause. The justices tempered the remedy in the school desegregation cases precisely because they feared defiance.

The Court also has a better chance of going its own way in cases that are of low public salience. The Court decides lots of cases, and only so many of them can make it to the public consciousness. In others, the Court can fly under the radar, unnoticed. The Roberts Court has decided a large number

of "pro-business" cases, often decided by large margins, if not unanimously.[74] Though this has gotten some attention in the press, for the most part the media's focus has been on certain high-profile cases like those involving abortion, pupil assignment to schools, gun control, and the like.[75]

Yet, again, the justices need be mindful that any decision or string of decisions could suddenly become an issue of great moment. The Supreme Court decides few enough cases, and the decisions are of sufficient import, that interested eyes always are watching the docket. Lest they forget this, there are periodically painful reminders, such as the enormous negative (and likely unanticipated) public reaction to the *Kelo* case regarding government taking of private property for ostensible public uses.[76] To the extent the pro-business decisions start to step on enough toes, there will be coverage.

It also is sometimes the case that the justices listen to elite voices, rather than that of the average person. This is a frequent complaint against the Court, and it may well explain the school prayer and flag burning decisions. To say that the justices like to be popular is to fail to ask, "With whom?" If a justice is in tune with his peer group, and his peers have elite views not shared by most of the country, the justice will seem to be going his own way.[77] Thus even those justices who appear not to care a farthing for what the public thinks may actually just have a particular public they play to. Antonin Scalia delights in being controversial; as a matter of constitutional theory and of personality, winning plaudits in the daily press plainly is not what he thinks he is supposed to be doing.[78] But Scalia is plenty popular with his colleagues in the Federalist Society.[79] One infers that satisfying this particular "base" sustains him well enough.

The cases in which the Supreme Court seems to deviate from public opinion most often are those involving the First Amendment, which could be explained because the First Amendment has its own special constituency, the press. Journalists love the First Amendment for obvious reasons (it protects freedom of the press).[80] The justices are more likely to be attacked in print (or praised) for their decisions in First Amendment cases than almost any other.[81] But journalists also may provide the justices with a distorted view of public opinion. The fondness of the media may explain the Court's particular willingness to stand tough on certain First Amendment rights—such as for pornography and against school prayer—even when the country generally expresses contrary views.

Sometimes the justices look to be independent when they are simply poorly informed about popular preferences. While elite views provide one example of this, another important one is provided by the novel case.[82] When the justices approach a matter for the first time, they have a decent chance

of misreading public opinion even if they seek to be attuned to it. The public may not have considered a matter fully, public opinion may not have jelled, or the justices may simply lack good information. And the justices are most likely to get in trouble with the public when a case presents itself only once, or in one short period of time, so that they lack the opportunity to ensure that their decisions converge with public views. *Dred Scott* and *Korematsu* both might present examples of the problem the justices face with one-off issues.[83]

Ultimately, though, the best explanation for the justices' independence may simply be that the public decides to grant it to them. Although the public seems to insist on the Court's being relatively in line on most issues, "relatively" and "most" are the key words here. When it comes to public support for institutions like the Supreme Court, political scientists distinguish two types, "diffuse" and "specific" support.[84] Specific support is the obvious one; people stand behind the Court (or other institutions) when they like its specific decisions and desert it otherwise.[85] "Diffuse" support, on the other hand, refers to the idea that there is enough institutional support for the Court that people will tolerate a certain amount of deviation, a number of decisions they dislike.[86] In short, diffuse support is the measure of the slack the Court has to go its own way on some issues.

It is not entirely clear why diffuse support would exist. Perhaps the Court has simply been around a long time, and people resist change to long-standing institutions even if they are angry with them. At least one study shows that the longer a country has a high court, the more diffuse support it enjoys.[87] Perhaps nobody really wants a Supreme Court that simply panders to majority opinion. Maybe people figure that although they do not agree with particular decisions, down the road they may want the majority to refrain from attacking the Court when it sides with their unpopular cause.[88] Some people may welcome the Court's unique perspective. Theories abound; all have some supporting evidence, and none is conclusive.

History provides "anecdotal" evidence that diffuse support exists. Take *Bush v. Gore* as an example. Many people loathed that decision and thought it was infected by partisan bias, but polls showed that support for the Court quickly returned to where it had been.[89] Yet it turns out to be extremely difficult to measure the extent of diffuse support. This is too bad. Ultimately, diffuse support may be the measure of the length of the Court's leash. Studies regularly show the existence of diffuse support, but the tests used by those studies are problematic. Surveys ask people whether they would support responses such as packing the Court or stripping its jurisdiction if the justices issued unpopular decisions.[90] It's the "if" that is tricky here; the volatil-

ity in polling measures during the Court-packing fight of 1937 suggests it is difficult for people to reach a firm conclusion on disciplining the Court even when the chips are down. When they are not, it is all a bit too hypothetical to trust what people say.[91] The bottom line is that to the extent the Court can and does deviate from public opinion, it may be for no other reason than that the public allows it to, but we do not know nearly enough about popular preferences in this regard.

The Supreme Court's ultimate reliance on public dispensation calls into question the much-vaunted separation between "law" and "politics." When people speak of holding the two apart, what they typically mean is that judicial decisions ought not to be influenced by political considerations. In particular as it matters to this discussion, judges should not simply give in to the will of the mob.[92]

One can see the concern over the demarcation between law and politics in the justices' reaction to the annual pilgrimages to the Supreme Court in support or protest of the 1973 abortion rights decision in *Roe v. Wade*. Some years these marches have reached into the tens and even hundreds of thousands.[93] The justices' anxiety about the crowds outside their windows burst into public view in the 1992 decision in *Planned Parenthood v. Casey*. Justices O'Connor, Kennedy, and Souter's plurality opinion said that in light of the "sustained and widespread debate *Roe* has provoked," it was all the more important that the Court's decisions be seen "as grounded truly in principle, not as compromises with social and political pressures."[94] Though Justice Scalia dissented on the merits in *Casey*—he favored overruling *Roe*—he too agreed on the need to separate judicial decision making from political pressure. "How upsetting it is," he wrote, "that so many of our citizens . . . think that Justices should properly take into account their views, as though we were engaged not in ascertaining objective law but in determining some kind of social consensus."[95]

In theory, this desire to separate law and politics is an admirable one. Certainly we do not want trial judges who are deciding the fate of individual cases to be swayed by aroused community sentiments.[96] Studies showing that the chance that a death sentence will be upheld increases as state high court judges come closer to their elections are simply nauseating.[97] There has to be some room for law to decide which way the chips fall without the immediate pressure of public opinion.

Yet the instinct to keep politics entirely separate from decisions about constitutional law is plainly impossible with regard to the Supreme Court. It simply is the case that the judiciary's capacity to give the Constitution meaning, to protect minority rights, always has been limited by popular support

for those decisions. The *Dred Scott* justices believed they were protecting constitutional rights; ultimately that judgment fell to contrary popular opinion and America's bloodiest war. Consensus was a long time developing, but when it did, the justices' interpretation of the Constitution gave way to the popular will. The justices in *Brown v. Board of Education* argued they were protecting constitutional rights, but once again it was evolving national views that supported the Court's judgment and enabled its enforcement. The decisions of the justices on the meaning of the Constitution must be ratified by the American people. That's just the way it is.

THE DEMOCRATIC CONSTITUTION

This brings us back to the extraordinarily important question with which we began: If the Supreme Court ultimately is accountable and responsive to the will of the people, doesn't that threaten the whole idea of constitutionalism? If the judiciary always, or even often, trumped the popular will, we would have a crisis of democracy. But if the facts tend to the opposite, what is there to preserve the Constitution against the majority?

On "I Am an American Day" in 1944, Judge Learned Hand gave an address in Central Park that became an instant classic. His words were eloquent, his topic "The Spirit of Liberty." In his address, Hand wondered whether "we do not rest our hopes too much upon constitutions, upon laws, and upon courts" to preserve the spirit of liberty. Calling these "false hopes," Hand insisted that "[l]iberty lies in the hearts of men and women; when it dies there, no constitution, no laws, no courts can even do much to help it." But "[w]hile it lies there it needs no constitution, no law, no court to save it."[98]

Hand's words, though heartfelt and gripping, seem oddly out of place for a man who served so long on the federal bench. Courts and the Constitution have *nothing* to add? Hand was an old-line progressive who saw courts at what he believed was their worst, and he never got over it. But was he right to be so pessimistic?

Hand's error, like that of many others, was in focusing solely, or even primarily, on the role *courts* play in the process of judicial review and constitutional interpretation. Courts say they are the last word, and many believe them. The fight becomes whether courts should have this power or not.

What matters most about judicial review, however, is not the Supreme Court's role in the process, but how *the public reacts* to those decisions. This is the most important lesson that history teaches. Almost everything consequential about judicial review occurs after the judges rule, not when they do. Judges do not decide finally on the meaning of the Constitution. Rather,

it is through the dialogic process of "judicial decision—popular response—judicial re-decision" that the Constitution takes on the meaning it has.

To say that the Supreme Court follows popular opinion, or even that it should, is hardly to say that the Court ought to be responsive to every passing fancy, to the immediate demands or wishes of the American people.[99] Even those leading Americans who have called on the Supreme Court to be responsive to the people have distinguished between the passions of the moment and some deeper sense of the popular will. "What we should ask of our judges," wrote Woodrow Wilson several years before becoming President, "is that they prove themselves such men as can discriminate between the opinion of the moment and the opinion of the age." Theodore Roosevelt, who spent much of his career arguing that judges should not interfere with the people's will, said much the same. He distinguished between the "permanent popular will," which he said judges should follow, and "popular opinion at the moment," which a "good judge" should not.[100]

The problem is that there is something romantic, and plainly unrealistic, about asking judges to distinguish on their own between the "permanent" will of the people and the "opinion of the moment." Judicial robes are worn by ordinary mortals, typically political appointees. It is asking a lot of them to imagine they are any better than the rest of us in evading the pressures of the moment in favor of some deeper, more enduring set of values. The fact that Supreme Court justices have lifetime appointments provides some insulation, but history suggests that it often is not enough. Decisions like *Korematsu* indicate the difficulty with putting one's faith in the notion that judges will be able to perceive the difference between what is momentarily popular and what is ultimately right, let alone that those judges will be able to hold the line against an aroused citizenry.

The magic of the dialogic system of determining constitutional meaning, however, is that it works whether the judges rule properly or not—precisely because everything important happens after they render their decision.[101] What history shows is assuredly not that Supreme Court decisions always are in line with popular opinion, but rather that they come into line with one another *over time*. There was a very good argument that the Supreme Court's decision in *Roe v. Wade* was consistent with social trends, but still, it attracted only plurality support in polls, and there was profound disagreement with the Court's conclusion that had not received an extended public hearing. By the time the Court handed down its decision in *Planned Parenthood v. Casey*, however, which watered down *Roe* in important ways and which—all polls and pundits agreed—was remarkably in line with popular opinion, a generation of vibrant public debate had occurred.

When it comes to alignment with popular opinion, the justices will often seem to blow it badly the first time out on an issue, precisely because the public has not yet really made up its mind. The death penalty decision in *Furman v. Georgia* makes this clear. The same phenomenon was apparent during the New Deal. Although the early decisions striking down New Deal measures were met with some dismay, the President's criticism of the Court apparently angered the citizenry more. Public opinion was unsettled. It clarified quickly, though, and when it did, the Court had little choice but to come into line. In fact, if there is any worry about the New Deal, it is that with a big gun pointed at their head, the justices came into line too quickly. (If there is any reassurance, it is that the New Deal "settlement" was tested time and time again thereafter and endured by and large in the public mind.)[102]

It is through the process of judicial responsiveness to public opinion that the meaning of the Constitution takes shape. The Court rules. The public responds. Over time, sometimes a long period, public opinion jells, and the Court comes into line with the considered views of the American public.

Indeed, it turns out that one of the most important features of Supreme Court decisions interpreting the Constitution is that they are "sticky," which is to say that they are difficult to change or get around. Either the people must amend the Constitution, or they must persuade the justices to change their minds. This is what bothers critics of judicial review, what accounts for the concern about the "counter-majoritarian" nature of the practice.[103] But it turns out there is a certain virtue in this stickiness; it plays an essential role in separating out the considered "constitutional" views of the American people from passing fancy. Precisely because it is difficult to get around constitutional decisions, the debate that surrounds them proceeds differently from our other political debates. If judges interpret a statute in an unpopular way, Congress can change it. When a decision is put on constitutional grounds, it takes greater mobilization, and often more time, to develop the political will to change it.[104]

One of the most valuable things that occurs in response to a Supreme Court decision is backlash. People who disagree with the decision tend to react more strongly than those who agree, and they dissent in any variety of ways. If over time those dissenters muster strong support, then, and only then, the Court tends to fall into line with the dissenting opinion. For this reason, social movements play an enormous role in shaping public constitutional understandings.[105]

It is apparent time and again that what the Supreme Court responds to most often is the sustained voice of the people as expressed through the long process of contesting constitutional decisions. This is what Woodrow

Wilson and Theodore Roosevelt were calling for when they insisted that the Court should follow the "permanent popular will," when they asked the Court to distinguish the "opinion of the moment" from the "opinion of the age." The system works not because the justices are solons with a special capacity for distinguishing between the two but because separation occurs through the regular process of decision, response, and redecision, as it plays out over time.

This give-and-take between the courts and the people is of the utmost consequence, for through it the substance of constitutional law itself is forged. Supreme Court justice Ruth Bader Ginsburg noted this phenomenon, explaining that judges "do not alone shape legal doctrine." Rather, she observed from experience, "they participate in a dialogue with other organs of government, and with the people as well." [106] Justice O'Connor made much this same point: "[R]eal change, when it comes," she said, "stems principally from attitudinal shifts in the population at large. Rare indeed is the legal victory—in court or legislature—that is not a careful by-product of an emerging social consensus." [107] As we have seen, Owen Roberts, the swing vote on the Court Franklin Roosevelt attacked, conceded years later, once he was off the bench, that "it is difficult to see how the Court could have resisted the popular urge" for change in the Court's doctrine.[108] As judicial rulings respond to social forces, and vice versa, constitutional law is made.

The making and enforcing of constitutional meaning thus are the result of an extended dialogue between and among the courts and the American people. Learned Hand had it right, and wrong, at the same time. Unless the people possess the spirit of liberty, constitutions are parchment barriers and courts are false hopes. But perhaps the central function of judicial review today is to serve as the catalyst for the people to take their Constitution seriously, to develop their constitutional sensibilities, in the hope that they will adhere to those sensibilities when the chips are down. When Hand spoke, he was echoing in some fashion the words and worries of a famous mentor of his, James Bradley Thayer. At the World's Fair in Chicago in 1893, Thayer gave an address that became a classic, one of the most famous constitutional tracts of all time. In it, Thayer worried about the power of judicial review. His concern was that if judges took on this task too aggressively, the people (or at least their representatives) would abandon it to them and thus lose their own constitutional sensibility. The people, he feared, "not being thrown back on themselves, on the responsible exercise of their own prudence, moral sense, and honor, lose much of what is best in the political experience of any nation." [109]

American politics has been a constant, unrelenting process of constitutional contestation and dispute. Though Hand's and Thayer's worry is a reasonable one, it has also proven to be false. It is difficult to know what our society would be like without judicial review, as we have rarely lived without it. But it is impossible to spend any time looking at the television, the Internet, or a newspaper and miss the fact that we live in a *constitutional* democracy, that the terms of our Constitution are constantly being debated and discussed. The Constitution is central to American political discourse.

Ultimately, Thayer's and Hand's instinct is correct: we have nothing but ourselves to fall back upon. But it is wrong to claim, as many have, that the judges have stolen the Constitution from us. Judicial review is our invention; we created it and have chosen to retain it. Judicial review has served as a means of forcing us to think about, and interpret, our Constitution ourselves. In the final analysis, when it comes to the Constitution, we are the highest court in the land.