

# Soft Supremacy

Corinna Barrett Lain

---

## Repository Citation

Corinna Barrett Lain, *Soft Supremacy*, 58 Wm. & Mary L. Rev. 1609 (2017),  
<http://scholarship.law.wm.edu/wmlr/vol58/iss5/6>

## SOFT SUPREMACY

CORINNA BARRETT LAIN\*

### ABSTRACT

*The debate over judicial supremacy has raged for more than a decade now, yet the conception of what it is we are arguing about remains grossly oversimplified and formalistic. My aim in this symposium contribution is to push the conversation in a more realistic direction; I want those who claim that judicial supremacy is antidemocratic to take on the concept as it actually exists. The stark truth is that judicial supremacy has remarkably little of the strength and hard edges that dominate the discourse in judicial supremacy debates. It is porous, contingent—soft. And the upshot of soft supremacy is this: we do not need popular constitutionalism, departmentalism, or any other theory de jour to put the people back in the Constitution. In numerous and substantial ways, they are already there.*

---

\* Professor of Law, University of Richmond School of Law. Special thanks to Eric Berger, Jud Campbell, Erin Collins, Paul Crane, Jessica Erickson, Barry Friedman, Jim Gibson, Shari Motro, Jack Preis, Allison Tait, and Kevin Walsh for comments on an earlier draft, and to Dan Hogan and Kevin Michel for their excellent research assistance and helpful comments along the way.

## TABLE OF CONTENTS

INTRODUCTION . . . . .	1611
I. "WE THE PEOPLE" IN CONSTITUTIONAL DECISION-MAKING . . . . .	1615
A. <i>The Judicial Appointments Process</i> . . . . .	1616
B. <i>Constitutional Doctrine</i> . . . . .	1621
1. <i>Rational Basis Review</i> . . . . .	1621
2. <i>Constitutional Decision-Making Based on State             Legislative Consensus</i> . . . . .	1623
3. <i>Justiciability Doctrines</i> . . . . .	1628
C. <i>Constitutional Dialogue with the Representative         Branches</i> . . . . .	1631
1. <i>The Solicitor General</i> . . . . .	1631
2. <i>Congressional Legislation</i> . . . . .	1634
D. <i>Constitutional Dialogue with the People Themselves</i> . . . . .	1636
II. "WE THE PEOPLE" AFTER CONSTITUTIONAL DECISION-MAKING . . . . .	1646
A. <i>The Judicial Appointments Process</i> . . . . .	1646
B. <i>Constitutional Amendment</i> . . . . .	1648
C. <i>Court-Curbing Measures</i> . . . . .	1649
D. <i>Nonenforcement</i> . . . . .	1652
E. <i>Statutory Pushback</i> . . . . .	1659
III. THREE IMPLICATIONS OF SOFT SUPREMACY . . . . .	1664
A. <i>What Soft Supremacy Does for Our Democratic         Discourse</i> . . . . .	1664
B. <i>What Soft Supremacy Does for the People</i> . . . . .	1668
C. <i>What Soft Supremacy Does for the Representative         Branches</i> . . . . .	1678
CONCLUSION . . . . .	1688

## INTRODUCTION

This symposium contribution offers a descriptive answer to a normative claim. The normative claim is that judicial supremacy is antidemocratic; it allows an unelected judiciary to decide issues that belong to the people themselves, and renders the people powerless to do anything about it.<sup>1</sup> The Constitution belongs to the people, critics claim—the people wrote it, the people ratified it, and the people should have a hand in deciding its meaning.<sup>2</sup> My descriptive answer is that they already do.

Those who claim that judicial supremacy is antidemocratic assume that because Supreme Court Justices are unelected, their constitutional decision-making is separate from, independent of, and even at odds with the will of the people.<sup>3</sup> “[J]udicial supremacy

---

1. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 242-43 (2004) (discussing “the profoundly anti-democratic attitudes that underlie modern support for judicial supremacy”); Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 *OXFORD J. LEGAL STUD.* 18, 42 (1993) (“[T]here is something wrong ... with an insistence that the very rights which the judges are interpreting and revising are to be put beyond the reach of *democratic* revision and reinterpretation.”); Norman R. Williams, *The People’s Constitution*, 57 *STAN. L. REV.* 257, 257 (2004) (reviewing KRAMER, *supra*) (presenting the antijudicial supremacy position as claiming that “the federal judiciary has usurped the role of we the People in guarding our constitutional commitments. Worse still, we have accepted that, once the federal courts have spoken, the judiciary’s word on the matter is final .... [W]e no longer live in a democracy in which the People decide for themselves the meaning of the Constitution; we live in an aristocracy in which a cabal of unelected judges decides for the rest of us what the Constitution means.”); Carson Holloway, *Constitutional Conservatism Rejects Judicial Supremacy*, *PUB. DISCOURSE* (Feb. 9, 2015), <http://www.thepublicdiscourse.com/2015/02/14410/> [<https://perma.cc/3UQV-DB9Q>] (“Judicial supremacy is dangerous: dangerous in some cases to the cause of law and justice, but in all cases to the American commitment to popular self-government.”).

2. See Edwin Vieira, Jr., *Dangers of “Judicial Supremacy,”* *NEW AM.* (Feb. 17, 2009), <http://www.thenewamerican.com/usnews/constitution/item/7636-dangers-of-judicial-supremacy> [<https://perma.cc/5W2L-V8PX>] (“‘Judicial Supremacy’ contradicts the Declaration of Independence’s overarching principle of popular sovereignty ... which mandates a government (as Abraham Lincoln correctly described it) ‘of the people, by the people, and for the people,’ not arbitrary rule by judicial (or any other) elitists responsible to no one but themselves.”); *id.* (“‘Judiciary supremacy’ thus challenges ‘We the People’ to reassert *their own* control over the power of construing *their own* Constitution.”); see also sources cited *supra* note 1 (noting claims that judicial supremacy is antidemocratic).

3. See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 7 (2007) (“The judiciary’s authority to set its opinions about the correct meaning of the Constitution above those of Congress, the president, or the electorate is at the root of judicial supremacy....

leaves us with no meaningful opportunity to participate in constitutional interpretation,”<sup>4</sup> one critic writes, and this is the crux of the claim—that judicial supremacy affords the people no say in constitutional decision-making on the front side and no control over what has been decided on the backside.<sup>5</sup> The Court decides the issue and it gets the last word. Hence the depiction of an imperial Supreme Court.<sup>6</sup>

But this is not the Supreme Court we have, and it is not how judicial supremacy actually works. In theory, the Court might be insulated from the will of the people, but in reality, its constitutional decision-making is inextricably intertwined with the will of the people, channeling the views of political and popular majorities in numerous ways. And in theory, the Court might have the last word on what the Constitution means, but in reality, its constitutional pronouncements are final only to the extent that the people and their representatives are willing to accept them, giving political and practical majorities control of a ruling’s staying power in numerous ways.

The stark truth is that judicial supremacy has remarkably little of the strength and hard edges that dominate the discourse of those who oppose it on democratic grounds. Judicial supremacy is porous,

---

[I]t is this elite rejection of popular judgments on deeply contested matters of fundamental political principle that is the most troubling aspect.”); see also LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 198 (2004) (noting the “need at the outset to disabuse ourselves of the picture ... in which the legislature is *us*, and the constitutional judiciary is *them*—an external mechanism intervening in our affairs”).

4. Michael J. Gerhardt, *Non-Judicial Precedent*, 61 *VAND. L. REV.* 713, 777 (2008) (“[J]udicial supremacy exacts a big price, for it comes at the expense of popular sovereignty. ‘We the People’ are the ultimate sovereign in our constitutional order, but judicial supremacy leaves us with no meaningful opportunity to participate in constitutional interpretation, except perhaps through efforts to amend the Constitution.” (footnote omitted)).

5. See *supra* notes 1-4.

6. As Mark Graber notes in his contribution to this symposium, “Participants in the debate over the proper allocation of constitutional authority dispute whether an imperial judiciary with the power to resolve (almost) all constitutional disputes is desirable, but not whether the United States actually has an imperial judiciary with the power to resolve (almost) all constitutional disputes.” Mark A. Graber, *Judicial Supremacy Revisited: Independent Constitutional Authority in American Constitutional Law and Practice*, 58 *WM. & MARY L. REV.* 1549, 1551 (2017); see also Stephen Griffin, *Departmentalism: What Went Wrong?*, *BALKINIZATION* (June 19, 2014), <http://balkin.blogspot.com/2014/06/departmentalism-what-went-wrong.html> [<https://perma.cc/6E34-45Z3>] (noting “the imperialism connoted by ‘supremacy’”).

contingent—*soft*. And the upshot of soft supremacy is this: we do not need popular constitutionalism, departmentalism, or any other theory *de jour* to put the people back in the Constitution. In a myriad of ways, they are already there.

I am not the first to recognize the power of the people in the Supreme Court's constitutional decision-making; a rich body of scholarship has demonstrated the point across a variety of domains. My aim here is to bring together the various strands of this scholarship to construct an accurate conception of the *reality* of judicial supremacy—one that stands in sharp contrast to the grossly oversimplified theoretical account that is all too common in judicial supremacy debates. In the end, my hope is to push the conversation in a more realistic direction. I want those who make claims about judicial supremacy to take on the concept *as it actually exists*.

Mainly, I am talking to departmentalists in this project—those who claim that the representative branches have equal authority to say what the Constitution means and are therefore not bound by what the Supreme Court says.<sup>7</sup> Not all departmentalists oppose judicial supremacy on democratic grounds, but many do, and even those who do not are prone to depict judicial supremacy in a formalistic fashion.<sup>8</sup> Indeed, what some portray as the advantages of departmentalism instead describes the world of judicial supremacy as it actually exists.<sup>9</sup> That world has unique implications for the

---

7. See Erwin Chemerinsky, Lecture, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 678 (describing departmentalism as the view “that every branch of government should interpret the Constitution and that every branch’s interpretation is equally authoritative”); see also WHITTINGTON, *supra* note 3, at xi (noting that departmentalism is the primary alternative to judicial supremacy and describing the departmentalist position).

8. See James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1377, 1378-80 (2005) (noting that not all departmentalists are populists, just as not all populists are departmentalists); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2063-64 (2010) (discussing the various versions of departmentalism).

9. See, e.g., Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 78 (1993) (arguing that the advantage of departmentalism is that “interpretive power is shared among the branches, and the courts are seen as being engaged in a continuing conversation with the political branches over the proper understanding of law”); see also *id.* at 76 (“Stripped of the power to bind the other branches with rules of law, the courts would have to attend more carefully to the views of the more politically accountable branches, and limit themselves to rulings likely to secure voluntary acceptance by these branches.”). For a discussion of the same attributes as components

departmentalist position, so at the end of the discussion I direct my comments specifically to those inclined to the departmentalist view.

But to be clear, the implications of recognizing judicial supremacy for what it is, as opposed to what constitutional theory posits it to be, are broader than the departmentalist position that is my primary aim. Some defend judicial supremacy on the belief that “[s]ome questions—questions of justice and rights—are too important to be left in the hands of legislative majorities or ‘the people themselves.’”<sup>10</sup> Others, those loosely dubbed “popular constitutionalists,” oppose judicial supremacy based on the flip side of that claim—the belief that questions of justice and rights are too important *not* to be left in the hands of legislative majorities and the people themselves.<sup>11</sup> Both positions assume that the Supreme Court’s constitutional decision-making is separate from, and independent of, the people and their representatives. Soft supremacy challenges that assumption, showing how porous the line between the Supreme Court on the one hand, and the people and their representatives on the other, actually is.

In the end, my point is this: if we are going to debate the merits of judicial supremacy, we at least ought to do so based on an accurate conception of how it operates, and that means recognizing the role of the people and their representatives in the constitutional decision-making process. To that end, Part I surveys the various avenues of influence that the people and their representatives have on the front side of constitutional decision-making, and Part II surveys the various avenues of control that the people and their representatives have on the backside of constitutional decision-making. In Part III, I explore three implications of this largely descriptive account, discussing what soft supremacy does for our democratic discourse, what it does for the people themselves, and what it does for the representative branches. In light of what judicial supremacy does for the representative branches, I ultimately

---

of soft supremacy, see *infra* Part I.C (discussing the constitutional dialogue between the Supreme Court and the representative branches), and Part II.D (discussing the Supreme Court’s need to consider the views of the representative branches in order to enforce its rulings).

10. WHITTINGTON, *supra* note 3, at 8-9 (quoting THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

11. See sources cited *supra* note 1.

ask whether departmentalism is good for even departmentalists (spoiler alert: the answer is no). In the end, the notion of “power to the people”<sup>12</sup> is not the problem with opposition to judicial supremacy on democratic grounds. The problem is its failure to recognize the power that the people have *now*—a power that lies at the heart of soft supremacy.

### I. “WE THE PEOPLE” IN CONSTITUTIONAL DECISION-MAKING

Critics of judicial supremacy claim that “the people should have a major role to play in constitutional interpretation.”<sup>13</sup> In this Part, I challenge the assumption that they do not have that now, surveying the various avenues by which the people and their representatives shape constitutional decision-making and influence the content of constitutional law. Scholars have been exploring these avenues for decades, in part to explain a somewhat inconvenient fact for those who think judicial supremacy is antithetical to democratic rule: since at least the 1930s, the Supreme Court’s decision-making has been roughly as reflective of the will of the people as that of the representative branches.<sup>14</sup> To be clear, my focus here is on inputs in the constitutional decision-making process

---

12. See Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CALIF. L. REV. 1013, 1018 (2004) (“As an abstraction [popular constitutionalism] sounds great; ‘power to the people’ always has appeal.”); see also Suzanna Sherry, *Why We Need More Judicial Activism*, in CONSTITUTIONALISM, EXECUTIVE POWER, AND THE SPIRIT OF MODERATION 11, 11 (Giorgi Areshidze et al. eds., 2016) (“Taking the Constitution away from the courts—and giving it back to the people—has become a rallying cry.”).

13. Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CALIF. L. REV. 1045, 1050 n.26 (2004) (defining the core claim of popular constitutionalism and surmising that departmentalism is substantially the same).

14. Both produce results consistent with public opinion around two-thirds of the time. See THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 97 (1989) (comparing nearly 150 national public opinion polls to the Supreme Court’s decisions on those issues and concluding that “[w]hen a clear poll majority or plurality exists, over three-fifths of the Court’s decisions reflect the polls. By the available evidence, the modern Supreme Court appears to reflect public opinion as accurately as other policy makers.”); *id.* at 80 (comparing the policy outcomes issued by Congress and the executive branch, which the public supported 64 to 68 percent of the time in public opinion polls, and concluding, “[a]gainst these comparisons, the modern Court appears neither markedly more nor less consistent with the polls than are other policy makers”); see also THOMAS R. MARSHALL, *PUBLIC OPINION AND THE REHNQUIST COURT* 2-3 (2008) (“This book suggests that the Rehnquist Court was consistent with public opinion in three-fifths to two-thirds of its decisions—roughly as often as were earlier Courts since the 1930s.”).



rather than outputs—but the two are not unrelated. Think the Supreme Court’s long-standing ability to reflect the views of the American people just happens by accident? A more likely explanation is that the people’s views are somehow making their way into the Court’s constitutional decision-making process. Here are the primary means by which I think this happens.

### A. *The Judicial Appointments Process*

The judicial appointments process is the conventional explanation for the Supreme Court’s responsiveness to the views of popular and political majorities.<sup>15</sup> The Justices may not be elected, but the Presidents who nominate them and the senators who confirm them are, and the idea here is that these elected representatives use the appointments process to stock the bench with jurists who share their constitutional views.<sup>16</sup> Over time, this process allows political majorities—and by extension, the popular majorities who elected them—to shape the Court’s decision-making in ways that reflect their own constitutional understandings.<sup>17</sup> In short, by controlling the Supreme Court’s composition, the people and their representatives

---

15. For the seminal account of this theory, see generally Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); see also William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POLITICS 169, 171 (1996) (recognizing the judicial-appointments process as the “conventional explanation of the relationship between public opinion and Supreme Court decisions”).

16. See WHITTINGTON, *supra* note 3, at 87 (“[T]he political appointment process by which federal judges are selected links them to dominant electoral coalitions. Affiliated leaders will expect to place like-minded judges on the bench and can expect that earlier affiliated leaders did the same. If so, then judicial understandings of the Constitution are likely to be broadly convergent with political understandings.”); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 38 (1993) (“[T]he people’s elected representatives ... nominate and confirm prospective justices whom they have good reason to believe share and can be expected to sustain their constitutional and policy preferences.”).

17. See Edward A. Purcell, Jr., *Barry Friedman’s The Will of the People: Probing the Dynamics and Uncertainties of American Constitutionalism*, 2010 MICH. ST. L. REV. 663, 671 (“When the voters choose one party over another, especially when they do so with some consistency over a series of elections, that party will be able to fill the bench with its ideological adherents, and the federal courts will consequently reshape the law to reflect the basic policies and values of that party.”).

have tremendous influence on its constitutional decision-making as a matter of institutional design.<sup>18</sup>

Granted, the judicial appointments process is far from perfect in this regard. Sometimes Presidents make appointment “mistakes,” thinking nominees embrace a particular set of constitutional commitments when in fact they do not.<sup>19</sup> Sometimes nominees are exactly who Presidents think they are, but then change when they get on the bench—or conversely, do not change when the country does.<sup>20</sup> Sometimes Presidents are of the same political party that controls the Senate, allowing for off-center, ideological appointments to appease the party base.<sup>21</sup> And sometimes Presidents do not have

---

18. See Lawrence M. Friedman, *Judging the Judges: Some Remarks on the Way Judges Think and the Way Judges Act*, in *NORMS AND THE LAW* 139, 150-51 (John N. Drobak ed., 2006) (“[O]utcomes vary with the values and attitudes of particular judges. Otherwise, why would anybody care who gets on the Supreme Court?... [E]verybody knows that Scalia and Thomas are not the same as Ginsburg or Stevens.”); see also NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 61 (2d ed. 2015) (“The battleground over Supreme Court nominations reveals that the President and the Senate both recognize that the best way to shape outputs (Court rulings) is to control inputs (who sits on the Court).”).

19. Illustrating the point, Dwight Eisenhower was reportedly asked whether he felt he had made any mistakes during his presidency. “Yes, two,” he replied, “and they are both sitting on the Supreme Court.” See KEVIN J. McMAHON, *RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO BROWN* 11 (2004) (quoting HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 200 (new and rev. ed. 1999)); see also Jason DeParle, *In Battle to Pick Next Justice, Right Says, Avoid a Kennedy*, N.Y. TIMES (June 27, 2005), <http://www.nytimes.com/2005/06/27/politics/in-battle-to-pick-next-justice-right-says-avoid-a-kennedy.html> [<https://perma.cc/T47Q-6CX6>] (discussing Justices who have disappointed the Presidents who appointed them, including Justices Brennan, Blackmun, Stevens, Kennedy, and Souter).

20. See RICHARD A. POSNER, *HOW JUDGES THINK* 24 (2008) (discussing “‘ideology drift’—the tendency of judges to depart from the political stance (liberal or conservative) of the party of the President who appointed them the longer they serve”); Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 159 (2012) (“Supreme Court Justices have a judicial life expectancy much longer than those who put them on the bench, so their views could easily differ from the prevailing ideology of any given moment.”).

21. See Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2609-10 (2003) (“Even when politics motivates presidents, judicial appointments can and are used to appease numerous constituencies, including those that may well fall outside the mainstream. Recently, for example, Republican presidents have searched for judges of a strong conservative ideology, so much so that they may well be out of the center of public opinion.”); Lain, *supra* note 20, at 159 (noting that when the same party controls the presidency and Senate, “party polarization may lead to off-center judicial appointments as presidents and senators increasingly look to appease their party base”).

the opportunity to put their mark on the bench at all.<sup>22</sup> There are a host of reasons why the judicial appointments process may fail to produce a Supreme Court that reflects the people's views—including the possibility that prior judicial appointments were all too successful in doing just that.<sup>23</sup>

But this is not to say, as some have, that the judicial appointments process provides a mere “scintilla of democratic respectability in the constitution of judicial power.”<sup>24</sup> To the contrary, the American people recognize the appointments process for what it is—a way to influence the Supreme Court's constitutional decision-making. That is why judicial appointments have become part of electoral politics; the people understand this channel of influence and the ability it gives them, through their representatives, to influence the Court's constitutional views.

Consider the role that the judicial appointments process played in the 2016 presidential election. At the Democratic National Convention (DNC), Hillary Clinton accepted her party's nomination with a promise to “appoint Supreme Court justices who will get money out of politics and expand voting rights, not restrict them.”<sup>25</sup> Bernie Sanders's speech at the DNC put the issue in broader, starker terms, telling supporters, “If you don't believe that this election is important, if you think you can sit it out, take a moment to think about the Supreme Court justices that Donald Trump would nominate and what that would mean to civil liberties, equal

---

22. The average tenure for Supreme Court Justices is now just over twenty-six years, creating the possibility of long periods of time—as was the case between 1994 and mid-2005—without a new Supreme Court appointment. See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 770-73 (2006) (discussing the phenomenon of the Justices' increasingly long tenures and making the case for term limits as a response).

23. See Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066-67 (2001) (considering the appointment of Supreme Court Justices as a means of “partisan entrenchment” allowing current political majorities to prevent future political majorities from fully implementing adverse policy objectives); Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 512, 521-22 (2002) (discussing judiciary entrenchment as a means of enforcing the constitutional commitments of a prior governing regime against new political majorities).

24. Waldron, *supra* note 1, at 43.

25. *Transcript: Hillary Clinton's Speech at the Democratic Convention*, N.Y. TIMES (July 28, 2016), <http://www.nytimes.com/2016/07/29/us/politics/hillary-clinton-dnc-transcript.html> [<https://perma.cc/5CR5-EAKK>].

rights and the future of our country.”<sup>26</sup> For their part, delegates at the Republican National Convention cited the importance of ensuring a conservative majority on the Supreme Court as the “best reason” to support Trump,<sup>27</sup> while conservative commentators dubbed the appointment of Supreme Court Justices as the most important issue of the 2016 presidential election.<sup>28</sup> In 2016, voters were asked to choose not just a President, but also a constitutional worldview, and the results of that election will undoubtedly influence the Supreme Court’s constitutional decision-making for years to come.

In fairness, the importance of the judicial appointments process in the 2016 election was likely exaggerated by Justice Scalia’s open seat and its potential to alter the ideological balance of the Supreme Court.<sup>29</sup> But the role of judicial appointments in presidential elections is not particularly anomalous. Witness Richard Nixon campaigning in 1968 on a promise to appoint conservative, “law and order” Justices to the Supreme Court,<sup>30</sup> and Ronald Reagan

---

26. *Transcript: Bernie Sanders’s Full Speech at the 2016 DNC*, WASH. POST (July 26, 2016), <http://www.washingtonpost.com/news/post-politics/wp/2016/07/26/transcript-bernie-sanders-full-speech-at-the-2016-dnc/> [https://perma.cc/WC59-32XP].

27. See Chad Livengood & Jonathan Oosting, *Supreme Court Pick a Rallying Cry at GOP Convention*, DETROIT NEWS (July 20, 2016, 9:48 AM), <http://www.detroitnews.com/story/news/politics/2016/07/20/gop-leaders-trump-support/87320632/> [https://perma.cc/6ZFZ-6EG5].

28. See Hugh Hewitt, *Most Important Issue of 2016: The Judiciary*, HUGH HEWITT SHOW (Jan. 25, 2016), <http://www.hughhewitt.com/important-issue-2016-judiciary/> [https://perma.cc/HBQ8-GVFZ]; see also Alvin Rabushka, *Opinion, If Hillary Clinton Gets Her Way with the Supreme Court*, NEWSWEEK (May 24, 2016, 12:33 PM), <http://www.newsweek.com/if-hillary-clinton-gets-way-supreme-court-463140> [https://perma.cc/3AH9-E2R6] (discussing the damage Hillary Clinton could inflict if she wins the presidential election and has the power to appoint Justices to the Supreme Court). For a biting commentary on the Republican Party’s treatment of its “most important” issue, see Dahlia Lithwick, *Justices Ignored*, SLATE (July 21, 2016, 4:19 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/07/the\\_gop\\_refuses\\_to\\_talk\\_about\\_the\\_supreme\\_court\\_at\\_the\\_rnc.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/07/the_gop_refuses_to_talk_about_the_supreme_court_at_the_rnc.html) [https://perma.cc/TBG3-YE5G] (“The Supreme Court is the most important issue of the election for Republicans. So they’re not talking about it.”).

29. Even *Rolling Stone* was talking about it. See David S. Cohen, *The Biggest Thing at Stake in the 2016 Election*, ROLLING STONE (Oct. 9, 2015), <http://www.rollingstone.com/politics/news/the-biggest-thing-at-stake-in-the-2016-election-20151009> [https://perma.cc/ZH64-5XTY].

30. See DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 97-98* (1999) (noting that Nixon “increased the stakes for all subsequent Supreme Court nominations by making the Supreme Court a central issue in his 1968 presidential campaign” and discussing his campaign promise to appoint “only conservative ‘law and order’ judges”).

campaigning in 1980 on a promise to appoint Supreme Court Justices who would overturn (or at least undermine) *Roe v. Wade*.<sup>31</sup> It does not happen all the time, but it does happen from time to time—the power of the people to shape constitutional law through the judicial appointments process becomes an explicit part of the electoral process itself.

In the wake of the 2016 election, one might reasonably conclude that this sort of politicization of the judicial appointments process is a bad thing, illustrating the danger of judicial supremacy. Presidential elections should be about Presidents, not the Supreme Court, the argument goes, but in a world where the Court gets the last word, voters may well decide that the stakes of constitutional decision-making are too high not to vote the party line. As one of my readers put the point, “Judicial supremacy just helped elect a man widely viewed as unfit to be President, and that should give us pause about being a judicial supremacist.”<sup>32</sup>

This strikes me as a fair point (albeit a debatable one)<sup>33</sup>—but note the essence of the claim. The claim is that the Supreme Court is so powerful that the people are doing *too much* to influence its decision-making, rather than not enough (or, as the standard script would have it, nothing at all). As Miguel Schor notes, judicial

---

31. See Lynn D. Wardle, *Judicial Appointments to the Lower Federal Courts: The Ultimate Arbiters of the Abortion Doctrine*, in *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS* 215, 228-29 (Dennis J. Horan et al. eds., 1987) (“President Reagan took office committed to appointing federal judges who recognize the basic worth of all human life and who believe in the constitutional allocation of decision-making power to elected state representatives. The 1980 Republican Party platform emphasized these very points .... Again, in 1984, the Republican Party platform reiterated this position.”); see also Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 *YALE L.J.* 2028, 2067 (2011) (noting the irony of Ronald Reagan running on a promise to appoint judges who would “respect human life and traditional family values” in his 1980 presidential campaign in light of the fact that, as governor of California, he had signed into law a statute liberalizing access to abortion).

32. Larry Kramer has made a similar point. See Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 *CALIF. L. REV.* 959, 1009 (2004) (“[The Founders] would have been incredulous if told (as we are often told today) that the main reason to worry about who becomes President is that the winner will control judicial appointments. Something would have gone terribly wrong ... if an unelected judiciary were being given that kind of importance and deference.”).

33. See Pozen, *supra* note 8, at 2072 (noting that engagement of an energized public in the judicial appointments process helps sustain the democratic legitimacy of constitutional law); see also *infra* note 184 and accompanying text (applying the same reasoning to the departmentalist view).

supremacy has not disempowered the people; to the contrary, it has mobilized them to ensure that their constitutional commitments are represented on the bench.<sup>34</sup> This may at times distort the electoral process (although it is hard to view the elections of Nixon and Reagan that way, or for that matter, anyone other than Trump). But look how far we have come—from a claim that the judicial appointments process offers but a scintilla of democratic accountability to a claim that it invites too much.

In the end, the judicial appointments process is one way the people have a hand in shaping the content of constitutional law, but it is not a foolproof way. It is not an uncomplicated way. And most importantly, it is not the only way. When it comes to the role of the people in constitutional decision-making, we are just getting started.

### *B. Constitutional Doctrine*

The content of constitutional law turns on the application of constitutional doctrine, and the Supreme Court's constitutional doctrine works to ratify democratic outcomes in numerous ways. Here I illustrate the point with three examples: rational basis review, constitutional decision-making that relies on state legislative consensus, and the Court's justiciability doctrines.

#### *1. Rational Basis Review*

The most obvious way in which constitutional doctrine works to ratify democratic outcomes is the Supreme Court's use of the rational basis standard to judge legislation challenged under the Due Process and Equal Protection Clauses.<sup>35</sup> In both constitutional

---

34. See Miguel Schor, *Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty*, 16 MINN. J. INT'L L. 61, 91 (2007) ("The Supreme Court's assertion of supremacy did not debilitate the people, but rather mobilized them to seek to place their partisans on the Court.").

35. Although my focus is use of the rational basis standard in the due process and equal protection contexts, where it is deeply entrenched and well known, it is worth noting that rational basis review can be found in a number of other constitutional contexts as well. See John Ferejohn & Larry D. Kramer, *Judicial Independence in a Democracy: Institutionalizing Judicial Restraint*, in NORMS AND THE LAW, *supra* note 18, at 161, 205 ("Indeed, the use of rational basis scrutiny is ubiquitous in constitutional law, liberating most of what government

contexts, the rational basis standard is the default standard of scrutiny for legislation that does not impinge upon a fundamental right or protected class of individuals.<sup>36</sup> As others have recognized, the practice of judicial review largely entails application of the rational basis standard, which governs the vast majority of challenges to government action.<sup>37</sup>

Under the rational basis standard, legislation need only be rationally related to a legitimate government interest to withstand constitutional scrutiny.<sup>38</sup> In practice, this standard is more deferential yet. Legislation subject to rational basis review enjoys “a strong presumption of validity” and will be upheld if there is any conceivable basis to sustain it<sup>39</sup>—even if not supported by the legislative history or facts of the case, and even if regarded as “stupid.”<sup>40</sup> Given this deferential standard, it should come as no surprise that rational basis review results in the vast majority of what the representative branches do being left to the the representative branches.

---

does from serious judicial oversight whether it be under the Due Process Clause, the Takings Clause, the Contract Clause, or the Necessary and Proper Clause.”).

36. See *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld ... if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

37. See Gerhardt, *supra* note 4, at 746-47 (“[I]n most constitutional cases, the Court uses extremely deferential review. Judicial review primarily involves the application of the rational basis test.”); see also SAGER, *supra* note 3, at 90 (“Outside the comparatively narrow areas where the Court has adopted a stance of active constitutional oversight, a tradition of judicial restraint reigns.”); Ferejohn & Kramer, *supra* note 35, at 205 (noting the ubiquity of rational basis scrutiny in constitutional law).

38. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”).

39. *Beach Commc'ns, Inc.*, 508 U.S. at 313-15; see also *id.* at 313-14 (noting that “equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices” and assuming that “even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted” (quoting *Vance v. Bradley*, 440 U.S. 43, 97 (1979))); *id.* at 314 (“This standard of review is a paradigm of judicial restraint.”).

40. See *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008) (Stevens, J., concurring) (“[A]s I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: ‘The Constitution does not prohibit legislatures from enacting stupid laws.’”); *Beach Commc'ns, Inc.*, 508 U.S. at 315 (“[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.... In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.”).

Particularly relevant in the context of the current discussion is *why*—why a Supreme Court with the power to override the will of the people instead employs a default standard that almost always lets them have their way. The reason, as the Court itself has made clear, is respect for the representative branches.<sup>41</sup> The extreme permissibility of the rational basis standard reflects a conscious recognition of the primacy of democratic decision-making, *even within the Court’s constitutional decision-making domain*.

## 2. *Constitutional Decision-Making Based on State Legislative Consensus*

My second example of how the Supreme Court’s constitutional doctrine works to ratify democratic outcomes is the Court’s use of state legislative consensus to identify and apply constitutional rights.<sup>42</sup> The phenomenon of state counting—tallying state legislative positions and then using the majority position of the states to determine what the Constitution requires—is well known in the death penalty context. This is the Court’s “evolving standards of decency” doctrine,<sup>43</sup> and as a few scholars have noted, the Court’s more recent substantive due process cases employ state counting

---

41. See *City of Cleburne*, 473 U.S. at 441-42 (“[T]he courts have been very reluctant, as they should be in our federal system and with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued.”); see also *United States v. Lopez*, 514 U.S. 549, 604 (1995) (Souter, J., dissenting) (noting that the Court’s rational basis review of congressional statutes under the Commerce Clause “reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes from Congress’s political accountability in dealing with matters open to a wide range of possible choices”).

42. For an extended discussion of this phenomenon, see generally Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 *UCLA L. REV.* 365 (2009).

43. See *Roper v. Simmons*, 543 U.S. 551, 562-64 (2005) (discussing the importance of determining whether a “national consensus” exists under the Eighth Amendment’s “evolving standards of decency” doctrine and noting that “[t]he beginning point [of analysis under the doctrine] is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question”); see also Lain, *supra* note 42, at 366 (“Under the [evolving standards of decency] doctrine, a punishment violates the Cruel and Unusual Punishments Clause when a ‘national consensus’ has formed against it, prohibiting a punishment only after a majority of states have already done so on their own.” (footnote omitted)).



as well.<sup>44</sup> But by and large, scholars have missed the vast extent to which the Court relies on state legislative consensus to decide questions of constitutional law.

In the due process context, for example, the Supreme Court has used state legislative consensus to identify fundamental rights that trigger heightened scrutiny,<sup>45</sup> to determine whether punitive damage awards are excessive,<sup>46</sup> to identify which constitutional provisions in the Bill of Rights are incorporated to the states,<sup>47</sup>

---

44. See, e.g., Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 124-33 (2006) (recognizing an implicit doctrine of “evolving national values” in the Supreme Court’s most recent substantive due process cases, and pointing to the Eighth Amendment “evolving standards of decency” doctrine as precedent and guidance for developing the doctrine); Michael W. McConnell, Lecture, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173, 174 (noting that although constitutional theory has been dominated by originalist and moral reasoning approaches, in practice a third approach has appeared—one grounded on “the gradually evolving moral principles of the nation” and exemplified by the Court’s substantive due process decisions); Benjamin J. Roesch, *Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine*, 39 SUFFOLK U. L. REV. 379, 382 (2006) (noting “striking similarities” between substantive due process analysis in recent cases and Eighth Amendment evolving standards analysis, and the absence of similar doctrinal developments elsewhere).

45. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (invalidating the criminalization of same sex sodomy based on a fundamental right to engage in such conduct in private, and basing analysis on state legislative landscape and legislative trends); *Washington v. Glucksberg*, 521 U.S. 702, 710-21 (1997) (denying the right to physician-assisted suicide for terminally ill, competent adults based on the state legislative landscape and noting that only those liberties “deeply rooted in this Nation’s history and tradition” qualify as fundamental, with “[t]he primary and most reliable indication” being “the pattern of enacted laws” (first quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); and then quoting *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005))); *Michael H. v. Gerald D.*, 491 U.S. 110, 126-27 (1989) (denying fundamental right status to paternity claim based on examination of state legislative landscape).

46. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583-84 (1996) (considering statutory penalties authorized for comparable conduct in other jurisdictions to determine whether punitive damages award was excessive and thus prohibited by the Due Process Clause).

47. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968) (incorporating the Sixth Amendment right to a jury based on majority position of the states); *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (incorporating the Sixth Amendment’s Confrontation Clause based on majority position of the states); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (incorporating the Sixth Amendment right to counsel based on majority position of the states); *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (incorporating the Fourth Amendment exclusionary rule against the states based on majority position of the states); see also *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937) (noting in context of incorporation of the right to a jury that “[d]oubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments”).

to identify what procedural due process requires,<sup>48</sup> to determine whether a defendant has had notice and the opportunity to be heard,<sup>49</sup> and to answer constitutional questions relating to burdens of proof.<sup>50</sup>

In the equal protection context, the Supreme Court has likewise used state legislative consensus to identify fundamental rights that trigger heightened scrutiny,<sup>51</sup> but more common here is the Court's use of state legislative consensus to determine whether a challenged classification survives the application of heightened review. How do we know whether the challenged classification is supported by a compelling state interest? Just ask whether other states have also recognized the importance of that issue.<sup>52</sup> How do we know whether

---

48. *See, e.g.*, *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 64-65 (2009) (rejecting procedural due process challenge based on survey of similar state practices); *Clark v. Arizona*, 548 U.S. 735, 748-52 (2006) (same); *Montana v. Egelhoff*, 518 U.S. 37, 46-49, 51 (1996) (plurality opinion) (same); *see also* *Schad v. Arizona*, 501 U.S. 624, 640 (1991) (rejecting a procedural due process challenge based on the rationale that if the procedure was truly inconsistent with due process, most states would not be using it); *Schall v. Martin*, 467 U.S. 253, 266-68 (1984) (same).

49. *See, e.g.*, *Connecticut v. Doebr*, 501 U.S. 1, 17-18 (1991) (counting states to invalidate statutory scheme that allowed for prejudgment attachment of real estate without notice); *Ake v. Oklahoma*, 470 U.S. 68, 78-80 (1985) (counting states to support holding that a trial court's refusal to appoint psychiatrist to support an indigent defendant's mental health claim deprived the defendant of the opportunity to present a fair defense); *Parham v. J.R.*, 442 U.S. 584, 612-13, 612 n.20 (1979) (counting states to validate state's truncated procedure for committing juveniles to state mental hospital).

50. *See, e.g.*, *Rivera v. Minnich*, 483 U.S. 574, 578-79 (1987) (relying on "[t]he collective judgment of the many state legislatures" in determining what due process requires and noting that "a principal reason for any constitutionally mandated departure from the preponderance standard has been the adoption of a more exacting burden of proof by the majority of jurisdictions"); *Santosky v. Kramer*, 455 U.S. 745, 747, 749 n.3 (1982) (counting states to hold that due process is not satisfied by the preponderance of evidence standard in termination of parental rights proceedings); *Addington v. Texas*, 441 U.S. 418, 426-27 (1979) (counting states to hold that due process is not satisfied by the preponderance of evidence standard in involuntary civil commitment proceedings); *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) (relying on "the nearly complete ... acceptance of the reasonable-doubt standard by the states" to hold that due process is not satisfied by the preponderance of evidence standard in criminal proceedings).

51. *See, e.g.*, *Vacco v. Quill*, 521 U.S. 793, 797, 804-06 (1997) (relying on the majority position of the states to find that there is no fundamental right to assisted suicide under the Equal Protection Clause).

52. *See, e.g., id.* at 804-05 (rejecting an equal protection challenge to state's ban on assisted suicide and relying on the fact that "the overwhelming majority of state legislatures" have done the same thing); *Romer v. Evans*, 517 U.S. 620, 623, 633 (1996) (invalidating a state constitutional amendment that prohibited protection on the basis of sexual orientation

a challenged classification is narrowly tailored, or substantially related, to a given state interest? Just look to see what other states have done.<sup>53</sup>

The Supreme Court's constitutional decision-making in the First, Fourth, and Sixth Amendment contexts likewise illustrates the point. In the First Amendment context, the Court has used state legislative consensus to judge the importance of the government interest supporting a regulation and the legitimacy of the state's chosen means to serve it.<sup>54</sup> Here the Court has also used state legislative consensus to make threshold determinations as to whether certain categories of speech are outside the ambit of First

---

and noting that "[d]iscriminations of an unusual character" require careful consideration, even under rational basis review (alteration in original) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)); *Heller v. Doe*, 509 U.S. 312, 326-28 (1993) (relying on the majority position of the states to uphold a classification that treated mentally retarded and mentally ill patients differently for the purposes of involuntary commitment, and noting the fact "[t]hat the law has long treated the classes as distinct, ... suggests that there is a commonsense distinction" along the lines that the classification has drawn); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 47-48 (1973) (relying on the majority position of the states to uphold a state's unequal allocation of funding among school districts, and noting that there must be a rational basis for a system that results in different levels of per-pupil expenditure because this is the system "employed in virtually every other State").

53. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 208-09, 209 n.22 (1976) (invalidating gender distinctions in state regulation of sale of alcohol, noting that "[t]he repeal of most of these laws signals society's perception of the unfairness and questionable constitutionality of singling out groups to bear the brunt of alcohol regulation"); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 n.4, 670 (1966) (invalidating a poll tax under Equal Protection Clause analysis and considering the fact that "only a handful of States today condition the franchise on the payment of a poll tax").

54. *See, e.g.*, *Bd. of Educ. v. Grumet*, 512 U.S. 687, 701-02 (1994) (invalidating a school district that tracked denominational lines, noting that it was "exceptional to the point of singularity"); *Marsh v. Chambers*, 463 U.S. 783, 788-89, 794 (1983) (upholding the state practice of opening a legislative session with a prayer by a chaplain paid from public funds, noting that the practice has "been followed consistently in most of the states" and that "many state legislatures and the United States Congress provide compensation for their chaplains"); *McDaniel v. Paty*, 435 U.S. 618, 625 (1978) (plurality opinion) (invalidating a state provision barring ministers from serving as delegates, noting that "[t]oday Tennessee remains the only State excluding ministers from certain public offices"); *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 676 (1970) (upholding a state tax exemption for realty owned for religious purposes, stating, "[a]ll of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees.... Few concepts are more deeply embedded in the fabric of our national life"); *McGowan v. Maryland*, 366 U.S. 420, 435 (1961) (upholding Sunday closing laws, stating, "[a]lmost every State in our country presently has some type of Sunday regulation and over forty possess a relatively comprehensive system").

Amendment protection altogether.<sup>55</sup> In the Fourth Amendment context, the Court has used state legislative consensus to determine whether certain police conduct constitutes an unreasonable search or seizure.<sup>56</sup> And in the Sixth Amendment context, the Court has used the same doctrinal approach to determine the contours of the right to trial by jury.<sup>57</sup>

This is not to say that the Supreme Court always polls the states in its constitutional decision-making, or even that it does so most of the time.<sup>58</sup> And this is not to say that the Court always uses state legislative consensus in the same way; sometimes it counts states to identify constitutional rights, other times just to apply them. But the basic point remains: across vast swaths of constitutional law, the Court relies on the majority position of state legislatures to determine what the Constitution requires.

That does not necessarily mean that the Supreme Court's decision-making in these cases is majoritarian.<sup>59</sup> As discussed below,

---

55. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 758 (1982) (excluding child pornography from First Amendment protection based on legislation criminalizing it in virtually every state); *Roth v. United States*, 354 U.S. 476, 484-85 (1957) (excluding obscenity from First Amendment protection based on “the [nearly] universal judgment that obscenity should be restrained” as reflected by obscenity laws in forty-eight states); *Beauharnais v. Illinois*, 343 U.S. 250, 255 (1952) (excluding libel from First Amendment protection based on recognition that libel is punished in every state).

56. *See, e.g.*, *Atwater v. City of Lago Vista*, 532 U.S. 318, 346 n.14 (2001) (upholding arrest for a nonjailable offense under Fourth Amendment challenge, and noting a reluctance to invalidate a practice that “has continued to receive the support of many state legislatures”); *Tennessee v. Garner*, 471 U.S. 1, 15-16 (1985) (finding Fourth Amendment violation when the police used deadly force against a nonviolent felon, and noting that “[i]n evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions”); *Payton v. New York*, 445 U.S. 573, 590, 600 (1980) (holding that the Fourth Amendment prohibits warrantless entry into the home and relying, in part, on “the clear consensus among the States,” noting that “custom and contemporary norms necessarily play ... a large role in the constitutional analysis”).

57. *See, e.g.*, *Burch v. Louisiana*, 441 U.S. 130, 134, 138 (1979) (invalidating nonunanimous six-member juries because the “near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not”); *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968) (stressing the importance of “objective criteria, chiefly the existing laws and practices in the Nation” in jury trial analysis); *District of Columbia v. Clawans*, 300 U.S. 617, 627-28 (1937) (noting that jury trial analysis must be governed by “objective standards such as may be observed in the laws and practices of the community”).

58. *See* *Lain*, *supra* note 42, at 406-08 (discussing differences in the frequency and formality of state-counting across doctrinal contexts).

59. By majoritarian, I mean consistent with the will of the people *at the national level*.

there is reason to doubt legislation as a proxy for the will of the people (although there is also reason to think state legislation may do a better job than federal legislation in that regard, particularly when a majority of state legislatures come to the same conclusion).<sup>60</sup> But again, the point of the discussion is not outputs; it is inputs. And on that score, the point is this: when the Supreme Court uses state legislative consensus to decide contested questions of constitutional law, it is expressly relying on the people's considered judgments, as reflected in the results of their own democratic processes, to interpret the Constitution—and that is about as representative as nonrepresentative decision-making can get.

Granted, the Supreme Court is still the one doing the deciding. It can ignore state legislative consensus at will. But it is difficult to claim that the Supreme Court has taken away the people's say in constitutional decision-making when across vast swaths of doctrine the Court is literally taking what the people have said to make its decisions.

### 3. *Justiciability Doctrines*

Thus far, I have discussed constitutional doctrines that defer to the will of the people (rational basis review) and adopt the will of the people (state legislative consensus), but there is a third category that leaves the actual decision-making to the people: the justiciability doctrines. The justiciability doctrines are a collection of “techniques and allied devices for staying the Court's hand,”<sup>61</sup> an

---

Clearly, when the Supreme Court counts states and constitutionalizes the majority position, its ruling is countermajoritarian for the minority of states whose position is being suppressed. That poses serious federalism concerns, but it does not pose a countermajoritarian problem, at least as the term has been conventionally understood. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153, 174-75 (2002) (“For almost all academic commentators ... the relevant question was whether a national majority supported a Court decision.... Among the broader public it also was the national majority that mattered.”).

60. See *Bute v. Illinois*, 333 U.S. 640, 652 (1948) (“No national authority, however benevolent, ... can be as closely in touch with those who are governed as can the local authorities in the several states and their subdivisions.”); see also Chemerinsky, *supra* note 12, at 1019 (“Many have defended federalism on the ground that state and local governments are closer to the people and thus more responsive to public needs and concerns.”). For a discussion of the reasons to doubt legislation as a proxy for the will of the people, see *infra* Part III.B.

61. Alexander M. Bickel, *The Supreme Court, 1960 Term, Foreword—The Passive Virtues*,

assortment of self-imposed restraints designed to take the judiciary out of the decision-making process altogether. Although generally justified as a matter of institutional competency and separation of powers, the justiciability doctrines have clear implications for the point I aim to make, for they leave the resolution of a number of constitutional questions in the hands of the people themselves.

The political question doctrine is perhaps the best example. Constitutional questions relating to foreign policy, the political process, impeachment, and the like—“[q]uestions[] in their nature political”<sup>62</sup>—have been deemed by the Supreme Court to be ill-suited for judicial resolution, leaving the representative branches to decide for themselves what the Constitution requires.<sup>63</sup> Granted, the Court still decides whether the political question doctrine applies in the first instance,<sup>64</sup> and the doctrine is more erratic and less theorized than a number of scholars would like.<sup>65</sup> But it has resulted in entire categories of constitutional decision-making being removed from the judiciary’s purview and given to the representative branches.<sup>66</sup>

---

75 HARV. L. REV. 40, 51 (1961).

62. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (“Questions, in their nature political, ... can never be made in this court.”). For sample cases, see *Nixon v. United States*, 506 U.S. 224, 226 (1993) (holding that whether the Senate had properly conducted an impeachment trial is a political question not subject to judicial resolution); *O’Brien v. Brown*, 409 U.S. 1, 5 (1972) (per curiam) (holding that whether delegates were properly seated at the 1972 Democratic National Convention is a nonjusticiable political question); *United States v. Belmont*, 301 U.S. 324, 330-32 (1937) (holding that whether a foreign government can be recognized is a nonjusticiable political question); and *Commercial Tr. Co. v. Miller*, 262 U.S. 51, 57 (1923) (holding that whether war has begun or ended is a nonjusticiable political question); see also *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion) (holding that partisan gerrymandering claims are political questions and thus nonjusticiable).

63. See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 83 (2008) (“The political questions doctrine does not mean that Congress is totally unconstrained by the Constitution in the areas it identifies. Rather, it means that Congress conclusively determines what the Constitution means in those areas.”).

64. See Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 244 (2002) (“To be sure, the courts still determine which branch decides the question, so there is an initial evaluation by the judiciary even when the political question doctrine applies.”).

65. See, e.g., *id.* at 275 (lamenting the Supreme Court’s failure to even consider the political question doctrine in its 2000 decision in *Bush v. Gore*, 531 U.S. 98 (2000)); Ferejohn & Kramer, *supra* note 35, at 191 (noting that the Supreme Court has “steer[ed] an erratic and inconsistent course in how it has used and explained the political question doctrine over time”).

66. See, e.g., *supra* notes 62-63 and accompanying text.

These categories are narrow to be sure, but what is important is what they show: the Court's explicit recognition that some constitutional conflicts are too politically charged to be decided by anyone other than politically accountable actors.<sup>67</sup>

Other justiciability doctrines—standing, ripeness, mootness, the federal question requirement, and the like—also illustrate the point, providing ample opportunity for the Supreme Court to steer clear of deciding politically hazardous cases. Indeed, the history of these doctrines suggests that this was their purpose from the start.<sup>68</sup> These are what Alexander Bickel famously referred to as “the passive virtues,”<sup>69</sup> and the Court has invoked them on a number of occasions to take itself out of constitutional decision-making fraught with sensitivity to judicial intervention.<sup>70</sup> As Neal Devins and Louis Fisher explain, “This deliberate withholding of judicial power reflects the fact that courts lack ballot box legitimacy and need to avoid costly collisions with the general public and other branches of government.”<sup>71</sup> What the justiciability doctrines reflect is the recognition of a simple truth: sometimes the best the Supreme Court can do in a constitutional controversy is to stay out of it.

---

67. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 184 (2d ed. 1986) (1962) (describing the political question doctrine as reflecting “the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from”).

68. See Ferejohn & Kramer, *supra* note 35, at 184-93 (discussing the history of various justiciability doctrines and noting that “[w]hat they share in common is the aim and effect of curbing judicial responsibility in potentially sensitive areas of law and policy”); see also *id.* at 167 (“Federal judges have concocted an impressive body of doctrinal limitations, creating a buffer zone that minimizes their chances of stepping heedlessly into political thickets.”).

69. See generally Bickel, *supra* note 61 (defending prudential use of justiciability doctrines to avoid deciding cases that are politically volatile and may cause the Supreme Court to sacrifice principle if decided on the merits); see also BICKEL, *supra* note 67, at 111-98 (chapter discussion of “the passive virtues”).

70. See DEVINS & FISHER, *supra* note 18, at 310 (“On many occasions the Court has invoked the so-called passive virtues: procedural and jurisdictional mechanisms that allow the Court to steer clear of politically explosive issues.”). A prominent example of this is *Naim v. Naim*, an appeal that challenged Virginia’s antimiscegenation law in 1955 and was dismissed by the Supreme Court for failing to present a federal question in the proper manner. See 350 U.S. 891 (1955) (per curiam); see also MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 117-18 (2003) (discussing *Naim v. Naim* as a paradigmatic example of the Supreme Court invoking Bickel’s “passive virtues” to avoid deciding a case that came to the Court through the appeal, rather than certiorari, process).

71. DEVINS & FISHER, *supra* note 18, at 311.

Taken together, the doctrines I have discussed paint a radically different picture of Supreme Court decision-making than what one typically sees in judicial supremacy debates. On the surface, the Court is supreme. But the way it uses that supremacy is nothing like the conventional script. The Court defers to the will of the people, adopts the will of the people, and even bows out to the will of the people. And when it comes to constitutional decision-making, the role of the people and their representatives is not done yet.

### *C. Constitutional Dialogue with the Representative Branches*

Both avenues of influence that I have discussed thus far—the judicial appointments process and constitutional doctrine—involve the representative branches. The representative branches decide who to appoint, what laws to pass, and how to resolve nonjusticiable disputes. But sometimes—indeed, many times—the executive and legislative branches express their constitutional views in even more direct ways. Consider the role of the Solicitor General in Supreme Court litigation and congressional legislation that reflects a particular constitutional understanding.

#### *1. The Solicitor General*

The Solicitor General is the nation's most successful litigator before the Supreme Court, wielding tremendous influence on the Court's constitutional decision-making.<sup>72</sup> The Supreme Court grants a whopping 70 percent of the Solicitor General's certiorari requests—as opposed to 5 percent generally, and 21 percent for the specialty Supreme Court bar<sup>73</sup>—and it rules in favor of the Solicitor General's position on the merits around 60 to 70 percent of the

---

72. See Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1324 (2010) ("The U.S. Solicitor General, as the U.S. Supreme Court's premier advocate, has long exerted significant influence over both the Court's case selection decisions and its substantive decisions on the merits."); *id.* at 1333-35 (discussing the Solicitor General's success rate at the petition and merits stages compared to other litigants).

73. See John Shiffman et al., *Elite Law Firms Spin Gold from a Rarified Niche: Getting Cases Before the Supreme Court*, REUTERS (Dec. 8, 2014, 10:30 AM), <http://www.reuters.com/investigates/special-report/scotus/> [<https://perma.cc/67VH-KX7T>].



time.<sup>74</sup> When the Solicitor General enters a case as amicus, as opposed to as a party, its success rate is even higher—70 to 80 percent.<sup>75</sup> Surveying the data, Brianne Gorod has it right: “It may be the ‘province and duty of the judicial department to say what the law is,’ but the Executive Branch often plays a significant role in helping the judiciary make that determination.”<sup>76</sup>

Granted, the Solicitor General’s positions are not a perfect proxy for those of the executive branch. In theory, the Solicitor General represents the United States, not the President, and in practice the Solicitor General enjoys a substantial amount of independence in determining what positions to take.<sup>77</sup> That said, the Solicitor General is appointed by the President and serves at the President’s pleasure<sup>78</sup>—and just as one might expect, empirical evidence has shown that the positions that the Solicitor General takes tend to reflect the ideological commitments of the administration in which he or she serves.<sup>79</sup> This is particularly true when it comes to highly

---

74. See Cordray & Cordray, *supra* note 72, at 1335. When the Solicitor General is petitioner, its success rate is 70 to 80 percent, as opposed to other petitioners, who win around 60 percent of the time. See *id.* at 1334. When the Solicitor General is respondent, its success rate is 50 to 60 percent, as opposed to other respondents, who win around 40 percent of the time. See *id.* at 1335.

75. This figure holds true regardless of whether the Solicitor General is supporting the petitioner or respondent. See *id.* at 1335.

76. Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1212 (2012) (footnote omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

77. See 28 U.S.C. § 517 (2012) (“The Solicitor General ... may be sent ... to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.”); *id.* § 518 (“[T]he Solicitor General shall conduct and argue suits and appeals in the Supreme Court ... in which the United States is interested.”); Cordray & Cordray, *supra* note 72, at 1365 (noting the Solicitor General’s “significant functional autonomy”); Kristen A. Norman-Major, *The Solicitor General: Executive Policy Agendas and the Court*, 57 ALB. L. REV. 1081, 1084-87 (1994) (discussing the autonomy of the Solicitor General and the relationship between the Solicitor General and the executive branch).

78. See 28 U.S.C. § 505 (“The President shall appoint in the Department of Justice, by and with the advice and consent of the Senate, a Solicitor General, learned in the law, to assist the Attorney General in the performance of his duties.”); Cordray & Cordray, *supra* note 72, at 1363 (“The Solicitor General is appointed by the President, and serves at the President’s pleasure in the same manner that the Attorney General does.”).

79. See Cordray & Cordray, *supra* note 72, at 1330 (“[Solicitors General] are advocates for the policies and priorities of the administrations in which they serve, and ideology thus inevitably plays a role as they set the government’s litigation agenda, select cases, and frame arguments.”); *id.* at 1333 (noting empirical evidence demonstrating a “pattern of amicus

publicized cases that implicate the President's social policy agenda, although the pressure on the Solicitor General to toe the party line in such cases is more intense in some presidential administrations than others.<sup>80</sup>

Of course, the executive branch has other ways to express its views about the meaning of the Constitution as well. Presidential signing statements, executive orders, and vetoes are a few that come to mind.<sup>81</sup> But it is difficult to match the influence of the Solicitor General on the Supreme Court's constitutional decision-making, and so, to the extent that departmentalism is (as some have claimed) mainly about the executive branch wanting to exert its influence on the development of constitutional law,<sup>82</sup> one response is to point out the tremendous extent to which it already does.

---

filings under different administrations: solicitors general in Democratic administrations have submitted substantially more amicus briefs in civil rights cases (and have primarily advocated pro-rights positions), whereas solicitors general in Republican administrations have submitted substantially more amicus briefs in criminal cases (and have generally advocated tighter restrictions on defendants' rights)"); Norman-Major, *supra* note 77, at 1085-86 ("Studies show that in some ways the Solicitor General has responded to the political inclinations of the administration(s) under which he served.... The political influence on the Solicitor General by the President or Attorney General need not be overt to be effective." (footnote omitted)).

80. The Reagan Administration's politicization of the Solicitor General to pursue its social policy agenda is a well-known, and well-documented, example of this phenomenon. See Norman-Major, *supra* note 77, at 1099-101 (discussing Solicitor General Rex Lee's resignation from his post in response to intense pressure from the Reagan Administration to pursue conservative policies); see also *id.* at 1086 ("The fact is that the Solicitor General is a political position, although the extent to which the work is politicized is largely controlled by the administration under which the Solicitor General serves. Political pressure on the Solicitor General can be direct, as in the *Pentagon Papers* and *Bakke* cases, or discreet." (footnote omitted)).

81. Devins and Fisher write:

When the President concludes that an act of Congress is unconstitutional, the last word on that dispute typically rests with the executive .... President George H. W. Bush helped maintain strict abortion funding restrictions by successfully vetoing five bills that allowed some federal funding of abortion....

...[T]he President sometimes signals constitutional objections to legislation through *signing* statements. When Bush I signed flag protection legislation in 1989, he expressed "serious doubts that it can withstand Supreme Court review."

DEVINS & FISHER, *supra* note 18, at 55-56 (emphasis added) (quoting George H.W. Bush, Statement on the Flag Protection Act of 1989, 2 PUB. PAPERS 1403, 1403 (Oct. 26, 1989)).

82. See WHITTINGTON, *supra* note 3, at 16-17 (discussing why departmentalist claims are predominantly claims of independent interpretive authority by the President).

## 2. Congressional Legislation

Sometimes Congress has its own advocate in cases before the Supreme Court, but this does not happen often, and when it does, it is usually because the executive and legislative branches are divided.<sup>83</sup> More often, Congress communicates its constitutional views by passing legislation that reflects a particular constitutional understanding. As others have recognized, congressional legislation of this sort serves a legitimating function, validating contested constitutional understandings by transmitting them into the formal law.<sup>84</sup> Here again, the impact on the Court's constitutional decision-making is substantial.

Consider, for example, the role of congressional legislation in the Supreme Court's modern understanding of the Equal Protection Clause. As Reva Siegel and Robert Post have persuasively shown, the Court's changed understanding of equal protection in the 1970s did not just fall from the sky like manna from heaven; it was the constitutional codification of a changed understanding of what the dictates of equality required, an understanding that had found

---

83. See Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 916 (2012) ("Although not unprecedented, it is ... unusual for either chamber of the U.S. Congress to join in litigation."); *id.* at 917 ("The executive is least likely to represent Congress's interests during periods of divided government.... Particularly during such periods, Congress cannot rely on the president's lawyers to represent its interests in court."). The litigation in *United States v. Windsor* is a prime example of this phenomenon. See Reply Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the United States House of Representatives, at i, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) ("The Bipartisan Legal Advisory Group of the United States House of Representatives intervened as a defendant in the district court and was an appellant and appellee in the court of appeals.").

84. See, e.g., Theodore Ruger, *Social Movements Everywhere*, 155 U. PA. L. REV. PENNUMBRA 18, 23 (2006) ("Justices are more likely to adopt a transformative new idea that has been legitimated by transmission into concrete 'law,' not necessarily by a clear majority of the entire American public, but at least by some parts of the American polity.").

expression in a slew of federal statutes passed in the prior decade.<sup>85</sup> Siegel and Post explain:

Congress responded to the [women's movement] with the legislative enactment of the [Equal Rights Amendment], Section 5 legislation, and a variety of other statutes. It was only after Congress used its lawmaking powers to validate the movement's understanding of equality that the Court proved willing to modify its own Section 1 doctrine to protect citizens against state action that discriminates on the basis of sex. The Court altered its jurisprudence to reflect the evolving constitutional culture of the country, as that culture was evidenced by congressional lawmaking.<sup>86</sup>

Indeed, the Supreme Court explicitly recognized the point in its 1973 decision of *Frontiero v. Richardson*, explaining that "Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration."<sup>87</sup> The country had come to understand its commitment to equality in a new way, and congressional legislation reflecting that fact provided strong support for the Court to incorporate this new understanding into the content of constitutional law.

*What about the Defense of Marriage Act (DOMA)*, inquiring minds want to know; how does the above account explain the Supreme

---

85. See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1995-96 (2003) (discussing statutes); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1368 n.115 (2006) ("In a decade the [women's] movement sought enactment of the Equal Pay Act and the sex discrimination provisions of the 1964 Civil Rights Act, and then during the 92nd Congress when the Equal Rights Amendment was enacted, the movement secured enactment of a vast array of civil rights statutes, covering education, employment, childcare, and more.").

86. Post & Siegel, *supra* note 85, at 1951.

87. 411 U.S. 677, 687-88 (1973) (plurality opinion) (invalidating a benefit program for families of military service members that provided automatic benefits to married servicemen but required servicewomen to show that their husbands were dependent); *accord* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part) ("It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality.").

Court's invalidation of DOMA?<sup>88</sup> The answer, I submit, is that DOMA did not reflect “the evolving constitutional culture of the country,” to borrow again from Siegel and Post.<sup>89</sup> To the contrary, DOMA was designed to suppress it.<sup>90</sup> In the context of the current discussion, the lesson of DOMA is clear—congressional expressions of constitutional meaning will have more weight as indicators of the country's understanding of its constitutional commitments to the extent that they actually are.

Nearly three decades ago, Louis Fisher observed that “[i]n our political system the executive and legislative branches necessarily share with the judiciary a major role in interpreting the Constitution.”<sup>91</sup> The world he was describing—the one that still exists—is the world of soft supremacy. It should come as no surprise that the people have their say in the interpretive process through the representative branches; ours is a representative democracy. What is more remarkable yet is that the so-called “constitutional dialogues”<sup>92</sup> that the Supreme Court has with the representative branches are but a part of a larger constitutional dialogue that the Court has with the people themselves.

#### *D. Constitutional Dialogue with the People Themselves*

Perhaps the most powerful way in which the people have their say in constitutional decision-making is the one that is least structured and most difficult to define: the ongoing dialogue between the Supreme Court and the people themselves. As Alexander Bickel recognized in 1962, the Supreme Court engages in a “continuing colloquy with the political institutions and with society

---

88. *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013) (invalidating section 2 of DOMA, which restricted the definition of marriage to unions between a man and woman).

89. Post & Siegel, *supra* note 85, at 1951.

90. For an excellent discussion of the country's evolving understanding of its constitutional commitment to equality in the gay rights context, see generally MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* (2013).

91. LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 231 (1988). For other important statements of this interbranch dialogue, see, for example, William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Forward: Law as Equilibrium*, 108 HARV. L. REV. 26, 28-29 (1994); Robert Nagel, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 380, 382 (1988).

92. See FISHER, *supra* note 91, at 275-76.

at large,” a dialogue in which constitutional meaning “evolve[s] conversationally,” rather than through unilateral declarations.<sup>93</sup> In short, the depiction of the Supreme Court’s constitutional decision-making as separate, apart, and even at odds with the will of the people is an inaccurate portrayal of how that decision-making actually works. As political scientists have recognized, the Supreme Court’s “institutional insularity” belies a fascinating relationship between the Court and the American people—one that shows the Supreme Court responding to, and reflecting, the nation’s constitutional views, *even in the absence of a formal mechanism for doing so*.<sup>94</sup>

Americans take a decidedly “protestant” approach to constitutional interpretation, assuming the legitimacy of individuals expressing their constitutional views.<sup>95</sup> As a result, our political discourse is chock-full of ordinary citizens making claims about the meaning of the Constitution.<sup>96</sup> From gun control to abortion, and from affirmative action and healthcare to the death penalty and LGBT rights, Americans have an opinion on what the Constitution says and

---

93. BICKEL, *supra* note 67, at 240, 244. For other key contributions on judicial review as a dialogue between the Supreme Court and the people, see DEVINS & FISHER, *supra* note 18, at 4; FISHER, *supra* note 91, at 5; Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 581 (1993).

94. See Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POLITICS 1018, 1019-20 (2004).

95. See Jack M. Balkin, *Protestant Constitutionalism: A Series of Footnotes to Sanford Levinson*, BALKINIZATION (Sept. 17, 2010), <http://balkin.blogspot.com/2010/09/protestant-constitutionalism-series-of.html> [<https://perma.cc/Y7Y4-D82W>] (“One of Sandy [Levinson’s] most fruitful ideas is constitutional protestantism, the idea that each citizen has the right to decide for him or herself what the Constitution means.... Constitutional catholicism stands for the view that a certain group of professional or learned authorities has the last word on interpretation, while protestantism, as we have seen, invites all believers to offer their views on the meaning of scripture. Sandy gives both positions their due, but he is essentially a constitutional protestant.”). For the seminal work on this concept, see generally SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

96. See Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 781 (2002) (“[P]rivate citizens offer their own interpretations of the Constitution all of the time. Some academics make a living at it. Private interpreters at the bar and in the press rush into constitutional battles before the Court and evaluate and criticize the Court after it has rendered its opinion.”); see also Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 322-23 (2001) (“Ordinary citizens believe that they are entitled to make claims about the meaning of the Constitution” and that they view it as “having meaning that can be ascertained apart from the pronouncements of those authorized to interpret it.”).

means, and they are not shy about sharing it.<sup>97</sup> All day, every day—just read the paper, browse the Internet, watch the news. To borrow from Barry Friedman, “it is impossible to ... miss the fact that we live in a *constitutional* democracy, that the terms of our Constitution are constantly being debated and discussed.”<sup>98</sup> People of all political persuasions make claims about the meaning of the Constitution, and those claims vie for influence among the larger body politic.<sup>99</sup> This is just the sort of constitutional contestation one would expect from a polity that views its voice as important in determining what the Constitution means.<sup>100</sup>

What happens next depends on the course of history, but my focus is on what happens when the public discourse leads to momentum in favor of a particular constitutional understanding and the emergence of a dominant view. Sometimes, but not always, the dominant view is part and parcel of a larger social movement.<sup>101</sup> And sometimes, but not always, the dominant view finds expression in state or federal legislation as well.<sup>102</sup> What matters is that as this

---

97. For an illustration of the point, consider the decal on a truck I happened to see on the day I wrote this paragraph. See *The Second Amendment Is My Gun Permit*, [http://law2.richmond.edu/images/faculty/lain/IMG\\_0329.jpg](http://law2.richmond.edu/images/faculty/lain/IMG_0329.jpg) [<https://perma.cc/6RHH-XW4D>].

98. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 385 (2009).

99. See Post & Siegel, *supra* note 85, at 1981-82 (“Constitutional issues frequently involve questions of profound political moment and controversy.... [E]lected officials and ordinary citizens, as well as judges and courtroom lawyers, regularly make claims about constitutional law.”).

100. See *id.* at 1982 (“While Americans revere the Court and respect its authority to pronounce constitutional law, they also expect their own constitutional beliefs to matter, and will, in extraordinary circumstances, mobilize to secure recognition of their views.”); *id.* at 2029 (“Precisely because the Constitution has political as well as legal dimensions, we expect it to be a site of contestation and disagreement.”).

101. For excellent discussions of this phenomenon, see, for example, Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 28-30 (2005); Post & Siegel, *supra* note 85, at 1950-51; Siegel, *supra* note 85, at 1329-31; Siegel, *supra* note 96, at 299-300, 345. For a qualification of the point, see Larry Kramer, *Generating Constitutional Meaning*, 94 CALIF. L. REV. 1439, 1449 (2006) (“By no means do I wish to suggest that social movements are unimportant. But neither is it clear just how big a role they play in actually changing people’s minds, for they are themselves a product of the *zeitgeist*.”).

102. See *supra* Part I.B.2 (discussing state legislative consensus); *supra* Part I.C.2 (discussing congressional legislation). Note that this is not the story of the Supreme Court’s school desegregation ruling in *Brown v. Board of Education (Brown I)*, 347 U.S. 483 (1954), nor is it the story of the Court’s recognition of the right to gay marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In neither of these cases did the Court’s ruling have state or

happens—as the many voices in our public discourse converge into the voice of dominant public opinion, and as that voice becomes increasingly loud and clear—we can start to see the Supreme Court respond.

Empirical research confirms this phenomenon, showing time and again the Supreme Court’s responsiveness to changes in dominant public opinion even in the absence of changes in the Court’s composition.<sup>103</sup> Indeed, recent work has found that the influence of public opinion is “far greater than previously documented,” leading one team of researchers to conclude that “a system of popular representation is alive and well in the Supreme Court.”<sup>104</sup> None of this is news to the Justices, who on numerous occasions have recognized the influence of public opinion on their constitutional decision-making.<sup>105</sup> When the people coalesce around a particular

---

federal legislation on its side.

103. McGuire & Stimson, *supra* note 94, at 1019, 1033 (summarizing empirical results as showing “a substantial degree of sensitivity to public opinion, even when the ideological composition of the Court is held constant”); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 96-97 (1993) (“[T]he evidence suggests that public opinion exercises important influence on the decisions of the Court even in the absence of changes in the composition of the Court or in the partisan and ideological make up of Congress and the presidency.... Our analyses indicate that for most of the period since 1956, the Court has been highly responsive to majority opinion.”); *see also* Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We’re Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 279 (2010) (“What is surprising is that even after taking into account ideology, *Public Mood* continues to be a statistically significant and seemingly non-trivial predictor of outcomes.”).

104. McGuire & Stimson, *supra* note 94, at 1033.

105. *See, e.g.*, DEVINS & FISHER, *supra* note 18, at 40 (quoting Justice Jackson as saying, “[l]et us not deceive ourselves; long-sustained public opinion does influence the process of constitutional interpretation” (quoting Robert H. Jackson, *Maintaining Our Freedoms: The Role of the Judiciary* (Aug. 24, 1953), in 19 VITAL SPEECHES OF THE DAY 759, 761 (1953))); FRIEDMAN, *supra* note 98, at 384 (quoting Justice Ginsburg as stating that the Justices “do not alone shape legal doctrine,” but rather “they participate in a dialogue with other organs of government, and with the people as well” (quoting Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992))); JEFF YATES, *POPULAR JUSTICE: PRESIDENTIAL PRESTIGE AND EXECUTIVE SUCCESS IN THE SUPREME COURT* 12 (2002) (quoting Justice Frankfurter as explaining that, in large part, the Court’s decisions reflect “that impalpable but controlling thing, the general drift of public opinion” (quoting CONGRESSIONAL QUARTERLY’S GUIDE TO THE PRESIDENCY 1155 (Michael Nelson ed., 1989))); William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 768 (1986) (“Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs.”); *see also id.* at 768-69 (“[I]f a judge on coming to the bench were to decide to seal himself off



constitutional understanding, the Supreme Court tends to ratify that view. As Mike Klarman notes, “That is simply how constitutional law works.”<sup>106</sup>

One might understand the Supreme Court’s responsiveness to dominant public opinion in its constitutional decision-making in a number of ways. Maybe it reflects nothing more than the fact that the Justices are a part of society and thus are likely to take the view that most members of society do.<sup>107</sup> Maybe it reflects some sense that the majority view is the constitutionally correct one too.<sup>108</sup> Maybe it reflects the Justices’ natural inclination toward rulings that will earn them acclaim, either now or in the future.<sup>109</sup> Or maybe it reflects the Justices’ awareness of, and strategic response to, what happens when they ignore the people’s widely held constitutional views.<sup>110</sup> Whatever the reason, what matters is this: the Supreme Court has its own relationship with the American people, a direct dial that allows the Court to respond to, and reflect, the nation’s constitutional views even without a formal mechanism for doing so.

Indeed, it is difficult to understand the evolution of constitutional law over time—at least when it comes to the highly salient cases,

---

hermetically from all manifestations of public opinion, he would accomplish very little; he would not be influenced by current public opinion, but instead would be influenced by the state of public opinion at the time he came to the bench.”).

106. KLARMAN, *supra* note 90, at 207.

107. See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 53 (“Judges do not interpret the Constitution to please majorities. But widespread social convictions are likely to influence anyone who lives in society. Judges live in society.”); see also BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921) (“The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.”).

108. See Cass R. Sunstein, *The Supreme Court, 2007 Term—Comment: Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 265 (2008) (noting that “at least in some domains, widespread social convictions convey information about the proper content of rights”); Steven L. Winter, *Tennessee v. Garner and the Democratic Practice of Judicial Review*, 14 N.Y.U. REV. L. & SOC. CHANGE 679, 684-85 (1986) (“For if the Court is engaged in the explication of values, it makes very good sense to refer to and be guided by the value judgments of other societal decision makers.”).

109. See, e.g., FRIEDMAN, *supra* note 98, at 374-75 (“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.... Some justices appear to play to immediate public opinion.”); see also KLARMAN, *supra* note 90, at 206-07 (discussing the Justices’ attentiveness to their legacy and predicting that the Supreme Court will eventually recognize a constitutional right to gay marriage, noting, “What justice would not be tempted to author the opinion that within a few short years likely would become known as the *Brown v. Board* of the gay rights movement?”).

110. See *infra* note 159 and accompanying text.

the ones that the people care most about—in any other way. “[S]ocial understandings of law shape legal understandings,” Larry Kramer explains.<sup>111</sup> As societal norms evolve, constitutional commands like due process and equal protection (and other, seemingly less capacious ones as well) take on new meaning.<sup>112</sup> “The obvious becomes dubious, the dubious obvious,” writes Lawrence Friedman.<sup>113</sup> This is why what was so evidently right in 1896 when the Court decided *Plessy v. Ferguson*<sup>114</sup> was so evidently wrong in 1954 when the Court decided *Brown v. Board of Education*.<sup>115</sup> And this is why the people’s views are—again, borrowing from Kramer—“more than a source of ideas for the Supreme Court to consider as it goes about making law for the rest of us.”<sup>116</sup> The people are an integral part of the interpretive process, the key to understanding how the evolution of constitutional law actually works.

None of this is to say that the Supreme Court always reflects the country’s views. Most cases fly so far below the radar that it would be impossible to make that sort of claim; the American people do not know about the vast majority of cases and likely would not have an

---

111. Kramer, *supra* note 32, at 983.

112. Even decisions like *District of Columbia v. Heller*, 554 U.S. 570 (2008), holding that the Second Amendment protects an individual’s right to bear arms and decided on originalist grounds, make most sense when understood in this manner. As Cass Sunstein observes:

Notwithstanding the Court’s preoccupation with constitutional text and history, *Heller* cannot be adequately understood as an effort to channel the document’s original public meaning. The Court may have been wrong on that issue, and even if it was right, a further question remains: why was the robust individual right to possess guns recognized in 2008, rather than 1958, 1968, 1978, 1988, or 1998?...

...This point has general implications for constitutional change in the United States, even when the Court contends, in good faith, that it is merely channeling the original meaning or other established sources of constitutional meaning. Sunstein, *supra* note 108, at 247-48.

113. Friedman, *supra* note 18, at 154; *see also id.* at 153 (“Legal arguments that were persuasive in the past seem ridiculous today; arguments made today are taken seriously that would have been laughed off the boards in the past, or rejected in shock.”).

114. 163 U.S. 537, 550-51 (1896) (upholding “separate but equal” racial classifications), *overruled by Brown I*, 347 U.S. 483 (1954). For a discussion of how cultural context can constrain the Supreme Court’s inclination and ability to recognize rights claims using *Plessy* as one of three case studies of the phenomenon, see Corinna Barrett Lain, *Three Supreme Court “Failures” and a Story of Supreme Court Success*, 69 VAND. L. REV. 1019, 1025-31 (2016).

115. 347 U.S. 483, 492-95 (1954).

116. Kramer, *supra* note 32, at 983.

opinion on them even if they did.<sup>117</sup> Moreover, even in highly salient cases, the Court sometimes goes its own way—although the number of times it has done so is quite small,<sup>118</sup> and even the Court’s most famous cases in that regard were strikingly less countermajoritarian than commonly supposed.<sup>119</sup> As to those cases—and to preview my claim in Part II—what we see is that the American people either accept the Court’s decision, recognizing that the Constitution sometimes requires protecting an unpopular view, or they do not accept the decision, and the law changes.<sup>120</sup> But that point is yet to come; my point here is simply to concede that the Supreme Court does not always track the people’s views. Moreover, it is sometimes in the business of starting conversations too.<sup>121</sup>

---

117. See Friedman, *supra* note 21, at 2623 (“[O]nly a small fraction of the Supreme Court’s work is likely to be salient with the public, absent some other influence to hold the decisions in the public light.”); Nathaniel Persily, *Introduction to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 3, 9 (Nathaniel Persily et al. eds., 2008) (“For the most part, the decisions of the Supreme Court and other courts go unnoticed by the American public.... Most issues courts deal with, whether they revolve around torts, antitrust, federal statutes, or even important questions of constitutional law, are overly complex and/or below the radar of both the mainstream media and public attention.”); see also FRIEDMAN, *supra* note 98, at 377 (“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.”).

118. See Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1750 (2001) (“On only a relative handful of occasions has the Court interpreted the Constitution in ways opposed by a clear majority of the nation.... The number of times that an overwhelming majority of Americans has opposed the Court’s constitutional interpretations probably can be counted on one hand.”).

119. Understanding these cases has been an interest of mine for a number of years. See generally Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004) (historically contextualizing the landmarks of the criminal procedure revolution) [hereinafter Lain, *Countermajoritarian Hero or Zero?*]; Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1 (2007) (historically contextualizing *Furman v. Georgia*, 408 U.S. 238 (1972), which invalidated the death penalty as it then existed) [hereinafter Lain, *Furman Fundamentals*]; Corinna Barrett Lain, *God, Civic Virtue, and the American Way: Reconstructing Engel*, 67 STAN. L. REV. 479 (2015) (historically contextualizing *Engel v. Vitale*, 370 U.S. 421 (1962), which invalidated school prayer) [hereinafter Lain, *God, Civic Virtue, and the American Way*].

120. See *infra* Part II.

121. See KLARMAN, *supra* note 90, at 165 (“Prominent Court decisions can direct public attention to previously ignored issues. Americans were not preoccupied with flag burning until the Supreme Court issued two controversial rulings on the subject in 1989 and 1990.”). For a more recent example, consider Justice Kennedy’s separate concurrence in *Davis v. Ayala*, 135 S. Ct. 2187, 2208-10 (2015) (Kennedy, J., concurring). *Ayala* was a capital case challenging an all-white jury, and Kennedy wrote his concurrence solely to bring attention to the exceedingly harsh conditions of solitary confinement on death row. See *id.* at 2208 (“This

But none of these nuances change the basic truth: the Supreme Court is by and large a *responsive* institution, and what it responds to are the people's views. As Justice O'Connor has observed, "[R]eal change, when it comes, 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. Courts, in particular, are mainly reactive institutions."<sup>122</sup> My own sense is that this is true not because the Justices are actually trying to decide cases consistent with dominant public opinion (although their state-counting doctrine suggests that sometimes they are) but rather because of everything I have discussed thus far. Because conscious or not, this is just what the Justices do.

Some say that the Supreme Court's tendency to take on the nation's constitutional understandings as its own is a good thing because (ironically, in light of the current discussion) it adds a decidedly democratic component to the construction of constitutional law,<sup>123</sup> and because the Constitution is hard to formally amend.<sup>124</sup> Others say this is a bad thing because it ignores the constraint of a written Constitution,<sup>125</sup> because the Court is institutionally

---

separate writing responds only to one factual circumstance, mentioned at oral argument but with no direct bearing on the precise legal questions presented by this case.").

122. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 166 (Craig Joyce ed., 2003). For other articulations of the point, see Michael C. Dorf, *The Paths to Legal Equality: A Reply to Dean Sullivan*, 90 CALIF. L. REV. 791, 807 (2002) ("Before an argument or emotional appeal succeeds in changing the minds of lawmakers (including judges), it must first change the minds of a mass of the public."); Kramer, *supra* note 32, at 980 ("[W]hat courts say is itself only the end product of a larger, societal process of generating legal meaning.").

123. See DEVINS & FISHER, *supra* note 18, at 325 ("By participating in this [interpretive] process, the public has an opportunity to add legitimacy, vitality, and meaning to what might otherwise be an alien and short-lived document."); Robert Post & Reva Siegel, Essay, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L.L. REV. 373, 383 (2007) ("The democratic legitimacy of our constitutional law in part depends on its responsiveness to popular opinion."); Winter, *supra* note 108, at 685 ("One would not want it any other way in a democracy.... Those at the top of the political organization may have the power to declare and require adherence to societal norms—that is, to 'the law.' But the process requires dialogue because the viability of those norms and the legitimacy of their enforcement depends to a very large extent on the existence of a consensus—whether emerging or preexisting—amongst society.").

124. See Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1239 (2010) ("Is this process of constitutional change a good thing?... [I]t is awfully hard, in light of the difficulty of the Article V amendment process, to see how it could be any different.").

125. *But see supra* note 112 (noting that even decisions justified on originalist grounds in

incompetent to be tracking the majority view,<sup>126</sup> and because it means the Court is unlikely to play the heroic, countermajoritarian role for which it is famous.<sup>127</sup> But my interest is not an extended discussion of whether the reality is good or bad; my interest is in making sure that we understand the reality. Reva Siegel sums up the point nicely: “A look at our constitutional history suggests that judicial supremacy is, in important respects, a collaborative practice, involving the Court in partnerships with the representative branches and the People themselves.”<sup>128</sup> The constitutional history she describes is the history of soft supremacy.

For those who oppose judicial supremacy in favor of democratic rule, one more point merits mention: democratic rule supports the practice of judicial supremacy. As a purely descriptive matter, the public not only assumes judicial supremacy, but also endorses it, preferring that the judiciary resolve constitutional disputes regardless of the substantive outcome.<sup>129</sup> As Frank Michelman explains, “what Americans want above all else out of the Supreme Court is assurance that someone is there to bring the country to heel when

---

good faith may be best understood as reflecting larger social understandings, using *District of Columbia v. Heller*, 554 U.S. 570 (2008), as a prime example).

126. It is such a common critique that I feel duty-bound to mention it, although one would think that the empirical evidence on this issue provides a sufficient answer. See *supra* note 14 and accompanying text (noting empirical evidence showing that the Supreme Court’s decision-making is roughly as majoritarian as that of the representative branches).

127. This is the so-called “majoritarian difficulty.” See Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 284-85 (2010) (“Are courts that roughly follow public opinion capable of ... protecting minority rights against majoritarian excesses? Do American courts, in other words, have a ‘majoritarian difficulty?’” (footnote omitted)). For my answer—which is yes—and an account of the Supreme Court’s role in creating this heroic, countermajoritarian image in the first place, see Lain, *supra* note 114, at 1067-74.

128. Siegel, *supra* note 96, at 351.

129. See KRAMER, *supra* note 1, at 232 (“In several recent surveys, more than 60 percent of respondents answered that the Supreme Court has the ‘last say’ on constitutional questions.”); James L. Gibson, *Public Images and Understandings of Courts*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 828, 840-41 (Peter Cane & Herbert M. Kritzer eds., 2010) (discussing the results of six surveys conducted between 1987 and 2008 indicating diffuse support for the Supreme Court); see also Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 6-7 (2001) (“[A]s a descriptive matter, judges, lawyers, politicians, and the general public today accept the principle of judicial supremacy—indeed, they assume it as a matter of course.”); Kevin L. Yingling, Note, *Justifying the Judiciary: A Majoritarian Response to the Countermajoritarian Problem*, 15 J.L. & POL. 81, 94 (1999) (“Significant evidence indicates that people prefer that the courts decide such constitutional disputes regardless of the substantive outcome.”).

chaos looms or politics threaten to get out of hand.”<sup>130</sup> When craziness ensues, the people want to know there is a responsible adult in the room. Of course, one might counter that the people simply do not appreciate the dangers of judicial supremacy; they know too little and are too busy living their lives to take the time to understand.<sup>131</sup> But as Dale Carpenter notes, the idea that a bunch of constitutional theorists would step in and decide the issue for them is a mighty odd position to take for those who put all their chips on the primacy of democratic rule.<sup>132</sup> In the end, it is hard to say that judicial supremacy takes the Constitution away from the people when the people are quite content for the Supreme Court to have it.

All of this is to say that the depiction of judicial supremacy as being in deep tension with democratic self-governance is itself in deep tension with reality. In theory the Supreme Court might be insulated from the will of the people, but in reality the Court’s constitutional decision-making is inextricably intertwined with the will of the people, channeling the views of political and popular majorities in a myriad of ways. To the extent, then, that opposition to judicial supremacy is driven by a desire to give power to the people in determining what the Constitution says, my answer is that they already have it, in spades. Critics are getting *what* they want, just not in the *way* they want. The nub of the problem is that if the people are unhappy, they cannot just “vote the bastards out.”<sup>133</sup> *What control do the people have if the Supreme Court goes astray?*, critics ask. To that question the discussion turns next.

---

130. Frank I. Michelman, *Machiavelli in Robes? The Court in the Election, in THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000*, at 256, 266 (Arthur J. Jacobson & Michel Rosenfeld eds., 2002).

131. See Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT. 405, 412 (2003) (“Perhaps the people are too uninformed about the danger. Perhaps the issues are just too complicated for them to understand. Perhaps they are preoccupied by other issues, prosaic ones, they regard as more central to their lives. If so, constitutional theorists may have to save their Constitution for them.”).

132. See *id.* (“[T]his would be an uncomfortably elitist response from commentators who celebrate self-government.”).

133. It is a saying. For illustrations of the expression, see AMMOLAND, <http://www.ammoland.com/wp-content/uploads/2015/10/Vote-the-Bastards-Out-600x375.jpg> [<https://perma.cc/YGM6-Y9SC>]; KEEP-CALM-O-MATIC, <http://www.keepcalm-o-matic.co.uk/p/keep-calm-and-vote-the-bastards-out-4/> [<https://perma.cc/B7EE-UGRX>].

## II. “WE THE PEOPLE” AFTER CONSTITUTIONAL DECISION-MAKING

Critics claim that the problem with judicial supremacy is that it gives the Supreme Court the last word on constitutional controversies—that is what judicial supremacy *is*, and that is how the usurpation of the people’s right to self-governance occurs.<sup>134</sup> The Court decides the issue, and it gets the last word. In the discussion below, I challenge this formalistic conception, using the reality of judicial supremacy to show that the Supreme Court’s pronouncements are final in only the thinnest of ways. Granted, the Supreme Court has the final say in the case it is deciding. But the fight over judicial supremacy is about whether the Court’s ruling settles the matter for future constitutional claims,<sup>135</sup> and the answer to that question ultimately depends on the people themselves. As it turns out, the people and their representatives have a number of ways to control the staying power of a Supreme Court decision—some directed at the decision, others directed at the Supreme Court itself.

### A. *The Judicial Appointments Process*

I start with the judicial appointments process because it so clearly illustrates an important point: the front side of one decision is often just the back side of another, and so the people’s influence on constitutional decision-making yet to happen may take the form of their reaction to constitutional decision-making that has already occurred. What do the people and their representatives do when they fundamentally disagree with the Supreme Court’s understanding of the Constitution? They appoint Justices to the bench who also fundamentally disagree with it. Warren Burger, for example, was almost certainly appointed for his outspoken criticism of *Miranda*

---

134. See *supra* notes 1-9 and accompanying text (presenting the critique of judicial supremacy on democratic grounds).

135. See Whittington, *supra* note 96, at 797-98 (“The judiciary does, of course, resolve individual cases, but that limited settlement function of the courts is not in dispute.... The question is how effectively the courts can broadly settle contested matters of constitutional interpretation.”); see also Daniel A. Farber, *The Importance of Being Final*, 20 CONST. COMMENT. 359, 364 (2003) (“[W]ith the single prominent exception of Michael Paulsen, no one seriously argues against decisional supremacy.”).

*v. Arizona*,<sup>136</sup> the chief target of Richard Nixon's 1968 "law and order" campaign.<sup>137</sup> And Antonin Scalia, as Jack Balkin notes, may have complained bitterly about popular mobilization on the abortion issue to change the Court's constitutional views, but his place on the bench was in large part a function of that mobilization, and the electoral votes that followed, and the appointment power that followed that.<sup>138</sup>

Granted, it takes time for the appointments process to work constitutional change—time to appoint the Justices hostile to a particular decision, and time for them to decide cases that limit the decision so that it no longer much matters and is ripe to be overruled. And granted, all the provisos previously discussed regarding the ability of the appointments process to accurately channel the will of the people apply here too. But the basic point remains: the people and their representatives control the Supreme Court's composition, so the Court's constitutional rulings can withstand the people's determined opposition for only so long.<sup>139</sup> Over time, the people *will* have their way with the meaning of the Constitution.

---

136. 384 U.S. 436 (1966).

137. See YALOF, *supra* note 30, at 101 (discussing Warren Burger's nomination and noting that "[e]ven more important [to Nixon], Burger had cultivated a reputation as an outspoken critic of the Warren Court's decisions favoring the accused, including the controversial 1966 *Miranda* decision").

138. See Balkin, *supra* note 101, at 28 ("Justice Scalia may well dismiss the claims of the abortion protesters outside his window, but he sits on the Supreme Court in large part because of the success of the conservative social movements of the 1970's and 1980's which helped put the Republican Party in power."); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 999-1000 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) ("We are offended by these marchers who descend upon us, every year on the anniversary of *Roe*, to protest our saying that the Constitution requires what our society has never thought the Constitution requires.... How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus.").

139. See Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1030-31 (2004) ("Because Article III lodges the composition of the federal judiciary in the political control of the President and the Senate, no judicial interpretation of the Constitution can withstand the mobilized, enduring, and determined opposition of the people.... In view of these features of our constitutional order, it is unhelpful to define judicial supremacy as giving to courts the last word or ultimate authority to determine constitutional meaning.").



Article III guarantees it,<sup>140</sup> and in the meantime there are other controls that the people and their representatives can use.

### *B. Constitutional Amendment*

Any discussion of how the people and their representatives control the finality of the Supreme Court's constitutional decisions must at least mention the constitutional amendment process. After all, Article V provides a structural mechanism for the people to override the Court's pronouncements of what the Constitution means, if only by amending the Constitution to change the meaning that the Court has given it.<sup>141</sup> But I will not be spending much time on this particular control mechanism, as the formal amendment process is exceedingly difficult and rarely used. Indeed, it has been successfully deployed to overturn a Supreme Court ruling only four times in our constitutional history.<sup>142</sup>

That said, it merits mention that the formal amendment process need not be successful in order to successfully change the Supreme Court's constitutional views. The failed Equal Rights Amendment (ERA) is a prime example. As David Strauss observes, "Today, it is difficult to identify any respect in which constitutional law is different from what it would have been if the ERA had been adopted. For the last quarter-century, the Supreme Court has acted as if the Constitution contains a provision forbidding discrimination on the basis of gender."<sup>143</sup> What explains the Supreme Court's changed constitutional understanding? As previously discussed, congressional legislation is part of the story,<sup>144</sup> but just as important, if not more so, was the ERA. The ERA mattered, Reva Siegel explains, because congressional expressions of constitutional understanding matter,

---

140. See generally U.S. CONST. art. III.

141. See *id.* art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified.")

142. See DEVINS & FISHER, *supra* note 18, at 25-27 (discussing the difficulty of amending the Constitution and the few occasions when the amendment process was successful in overturning a Supreme Court decision).

143. David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1476-77 (2001) (footnote omitted).

144. See *supra* Part I.C.2.

and Congress's landslide votes passing the ERA provided the Court with a strong indication of the nation's widely held constitutional views.<sup>145</sup> In short, the ERA mattered not because it changed the text of the Constitution, but because it helped change the Supreme Court's understanding of what the text required, *even though the amendment process failed*. In the end, this sort of constitutional change may be the most realistic way that the Article V process actually works.

### C. Court-Curbing Measures

Yet another way for the people and their representatives to control the finality of constitutional rulings is by adopting court-curbing measures to control the Supreme Court. The Constitution gives Congress the power to strip the Court of its jurisdiction, alter its size, impeach its members, and control its budget, among other things.<sup>146</sup> Here again, I pass by most all of these control mechanisms because over the last half-century they have rarely been used.

Jurisdiction-stripping is a modest exception in that regard; it has been an oft-cited threat over the years, and to the extent that court-curbing measures are a realistic possibility, that possibility plays out here. Article III gives Congress the power to make "exceptions" to the Supreme Court's appellate jurisdiction, so Congress controls the types of cases that the Court hears as a matter of constitutional design.<sup>147</sup> In theory, then, a hostile Congress could strip the Supreme Court of jurisdiction over a class of cases, leaving a pocket of statutes that the Court would be powerless to consider in its exercise of judicial review.<sup>148</sup> From 2003 through 2006, Congress threatened to do exactly that, considering proposals to strip the

---

145. For a full account of the argument, see generally Siegel, *supra* note 85. The House of Representatives passed the ERA in October 1971 by a vote of 354-24. *See* 117 CONG. REC. 35,815 (1971) (recording the House vote). The Senate passed the ERA in March 1972 by a vote of 84-8. *See* 118 CONG. REC. 9598 (1972) (recording the Senate vote).

146. *See* DEVINS & FISHER, *supra* note 18, at 24-25 (discussing various court-curbing techniques); Ferejohn & Kramer, *supra* note 35, at 171-75 (same).

147. *See* U.S. CONST. art. III, § 2 ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

148. *See id.*; *see also* Colo. Cent. Consol. Mining Co. v. Turck, 150 U.S. 138, 141 (1893) ("[I]t has been held in an uninterrupted series of decisions that this court exercises appellate jurisdiction only in accordance with the acts of Congress upon that subject.").

Supreme Court's jurisdiction over cases involving same-sex marriage, the pledge of allegiance, enemy combatants, and state-sponsored acknowledgments of God, among others.<sup>149</sup> Although Congress did manage to pass limited jurisdiction-stripping measures in the enemy-combatant context,<sup>150</sup> by and large, its consideration of such proposals was more talk than action. Jurisdiction-stripping may be the most commonly threatened court-curbing measure, but it is still not one that the people actually use.

It may be that Congress's failure to follow through on threats to strip the Supreme Court's jurisdiction reflects the serious constitutional and pragmatic concerns that mark this particular court-curbing measure.<sup>151</sup> Or maybe it reflects the sheer difficulty of passing any court-curbing measure in a world of divided government and strong public support for the Supreme Court.<sup>152</sup> Or maybe, as Neal Devins has argued, controlling the Supreme Court was never the point of the 2003-2006 jurisdiction-stripping proposals in the first place.<sup>153</sup> As Devins explains, "it did not matter

---

149. See Neal Devins, *Congress and Judicial Supremacy*, in *THE POLITICS OF JUDICIAL INDEPENDENCE* 45, 54-55 (Bruce Peabody ed., 2011) (discussing various jurisdiction-stripping proposals and noting that "the specter of lawmakers expressing their disapproval of court decision-making through retaliatory legislation seemed more real during 2005 and 2006 than at any time since the Warren Court").

150. Ultimately, the Court rebuffed Congress's attempt to restrict the Supreme Court's jurisdiction in this area, first in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and then in *Boumediene v. Bush*, 553 U.S. 723 (2008). But as Devins explains, neither case was particularly problematic vis-à-vis Congress because both jurisdiction-stripping measures at issue were "the exceptions that prove[d] the rule—statutes that explicitly limit[ed] judicial review but [did] so in ways that signal[ed] congressional support of judicial authority." Devins, *supra* note 149, at 61.

151. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 54 (1980) (noting that if Congress were to divest the Supreme Court of appellate jurisdiction in an area, then it would leave the final resolution of issues in that area with the various courts of appeals, creating the potential for inconsistency without a way to resolve it and potentially freezing into place the doctrine that inspired the jurisdiction-stripping measure in the first instance); Mark A. Graber, *supra* note 6, at 1589 ("The precise power Congress holds over federal jurisdiction has been the subject of a running constitutional debate for more than two hundred years.").

152. See Lain, *supra* note 20, at 162 ("Divided government and political polarization make it unlikely that the Court's foes will unite behind a court-curbing agenda—assuming that actually curbing the Court (as opposed to galvanizing the party base) is the point of such proposals in the first place." (footnote omitted)); see also WHITTINGTON, *supra* note 3, at 98 ("Progressives responded to the *Lochner* Court by frequently proposing a variety of court-curbing measures that were promptly buried in conservative congressional committees.").

153. See Devins, *supra* note 149, at 64 ("The rhetorical attacks on the Court were addressed

whether jurisdiction-stripping proposals were enacted, let alone found constitutional.”<sup>154</sup> What mattered was that Republicans reaffirmed their commitment to the religious right, particularly with strategists predicting that their success in upcoming elections might turn on the propensity of religious conservatives to vote.<sup>155</sup>

Of course, the mere threat of jurisdiction-stripping or other retaliatory court-curbing measures may be enough to make the Supreme Court step back from constitutional rulings that the people find intolerable. The so-called “switch-in-time that saved nine” is perhaps history’s most famous example of this phenomenon,<sup>156</sup> but it is not the only one.<sup>157</sup> Indeed, empirical evidence shows that court-curbing efforts “have generally proven successful in forcing judicial accommodation to political pressure, even without the actual restriction

---

not to the Court but to social conservatives.”); *id.* at 60 (noting that “Republican leaders had little to gain by pushing for the enactment of these bills” and surmising that this may explain why several jurisdiction-stripping proposals never made it out of committee, whereas others were voted on too late for consideration in the Senate, although the timing was opportune by way of upcoming elections).

154. *Id.* at 60.

155. *See id.* at 59-60 (discussing the use of jurisdiction-stripping measures to signal strong commitment to a social conservative agenda and noting that “[a]t that time, Republican strategists thought that President Bush’s reelection might hinge on the willingness of religious conservatives to vote in the 2004 elections”).

156. *See* WALTER F. MURPHY ET AL., *COURTS, JUDGES, & POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 53 (5th ed. 2002) (“This ‘switch-in-time that saved nine’ is the most dramatic American example of judicial retreat, but it is certainly not the only one.”). I concede that some evidence suggests that Justice Owen Roberts may have changed his mind on the constitutionality of Roosevelt’s New Deal legislation before the court-packing plan was announced, which complicates this narrative, although it remains perhaps the most famous example of the point. *See* MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937*, at 419 (2002) (discussing the relevant historical record).

157. *See* Friedman, *supra* note 59, at 194 n.169, 196-97 (discussing the Supreme Court’s retreat from its “Red Monday” decisions protecting communists in 1957 when faced with the threat of court-curbing measures and noting that its move “might be called a second ‘switch in time’”). For a theory of constitutional change built on the Supreme Court’s submission to threats of populist reprises on particularly momentous occasions, with special attention to the “switch in time” that followed Roosevelt’s court-packing proposal, see BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 23-26 (1998) (discussing the “switch in time”).

of judicial power.”<sup>158</sup> In short, court-curbing proposals are largely successful even when they fail.

This brings me to one last point: it is entirely possible that the reason we rarely see efforts to curb the Supreme Court is that we rarely see the Court act in a way that would give such efforts much traction. Political scientists have shown that the Justices respond not only to threats of retaliation, but also to the *anticipation* of threats of retaliation, adjusting their decision-making to the response of the representative branches even before it occurs.<sup>159</sup> To the extent that this happens, the fact that court-curbing measures are rarely used does not mean they are ineffective. To the contrary, it suggests that just the opposite is true.

That said, my own sense is that the possibility of court-curbing measures is not the response that the Justices worry most about, or the control mechanism that most keeps them in line. Rather, it is the possibility that the people will not abide by their decisions, and the representative branches will not force them to do so.

#### *D. Nonenforcement*

Supreme Court decisions are not self-executing. What the Court has—indeed, *all* the Court has—is the power of “*Because I said so.*” In the words of Alexander Hamilton, the judiciary has “neither

---

158. WHITTINGTON, *supra* note 3, at 75; *see also* Terri Peretti, *An Empirical Analysis of Alexander Bickel's The Least Dangerous Branch*, in *THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY* 123, 134 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005) (noting results of one empirical study showing that “[c]ourt-curbing bills, even when not enacted, produced decisional reactions by the Court in six of the nine periods of ‘intense Congressional hostility’” (quoting Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 *REV. POLITICS* 369, 369 (1992))).

159. *See* Lee Epstein et al., Essay, *The Supreme Court as a Strategic National Policymaker*, 50 *EMORY L.J.* 583, 610 (2001) (“Tests at both the individual and the aggregate levels support the proposition that the Justices adjust their decisions in anticipation of the potential responses of the other branches of government.”); Friedman, *supra* note 124, at 1245 (“The effect that political scientists call ‘anticipated reaction’ or ‘anticipated response’ means that if the system is in equilibrium, little will be observed in the way of overt struggle. The Justices know their bounds; they stay away from trouble.”); *see also* POSNER, *supra* note 20, at 375 (“What reins in the Justices ... is an awareness, conscious or unconscious, that they cannot go ‘too far’ without inviting reprisals by the other branches of government spurred on by an indignant public.”).

Force nor Will, but merely judgment.”<sup>160</sup> This is the reason it is the “least dangerous” branch<sup>161</sup>—even the mighty United States Supreme Court is largely powerless to effectuate change on its own.<sup>162</sup> The Supreme Court needs the support of the executive or legislative branches to make its rulings count, but those branches may choose to override, undermine, or even ignore the Court’s rulings instead. Indeed, the more the Court strays from the will of the people, the more help it will need to enforce its decisions and the less help it can expect to get.<sup>163</sup> In short, yet another reason that the Supreme Court’s constitutional decisions so often go the people’s way is the difficulty of enforcing those decisions that do not.<sup>164</sup>

This is the lesson of Gerald Rosenberg’s classic, *The Hollow Hope*,<sup>165</sup> and it is amply illustrated by *Brown v. Board of Education*.<sup>166</sup> In the wake of the Supreme Court’s 1954 ruling, the South turned to massive resistance,<sup>167</sup> and the representative branches

---

160. THE FEDERALIST NO. 78, at 378 (Alexander Hamilton) (Terence Ball ed., 2003). The full text of the passage is instructive. It reads: “It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” *Id.*

161. *Id.*

162. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 420 (2d ed. 2008) (“The structural constraints ... built into the American judicial system[] make courts virtually powerless to produce change. They must depend on the actions of others for their decisions to be implemented.”).

163. See Lain, *supra* note 20, at 161 (“The more popular the ruling, the riskier it will be for public officials to oppose or subvert it (at least openly); conversely, the more unpopular the ruling, the more difficult it will be to enforce and the less likely that elected officials will commit to enforcement.”); McGuire & Stimson, *supra* note 94, at 1022 (hypothesizing that the Supreme Court’s responsiveness to public opinion is “a classic case of rational anticipation by policy makers” and explaining that “[t]he Court requires the cooperation of legislative and executive officials, many of whom are themselves careful auditors of mass opinion”); *id.* at 1019 (“[W]hile the Court is certainly not electorally accountable, those responsible for putting its rulings into effect frequently are. For that reason, strategic justices must gauge the prevailing winds that drive reelection-minded politicians and make decisions accordingly.” (citation omitted)).

164. For a political science model of Supreme Court decision-making that explains this phenomenon as a matter of “rational choice institutionalism”—strategic choices in light of the Court’s forced dependency on other institutional actors—see LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 11-17 (1998).

165. See ROSENBERG, *supra* note 162, at 16 (“If the separation of powers, and the placing of the power to enforce court decisions in the executive branch, leaves courts practically powerless to insure that their decisions are supported by elected and administrative officials, then they are heavily dependent on popular support to implement their decisions.”).

166. 347 U.S. 483, 495 (1954).

167. See ROSENBERG, *supra* note 162, at 78-80 (discussing massive resistance and noting

offered little by way of support.<sup>168</sup> President Eisenhower steadfastly refused to endorse the Court's ruling and on several occasions quietly declined federal enforcement.<sup>169</sup> Meanwhile, Congress considered and rejected an enforcement provision for *Brown* in its 1957 Civil Rights Act.<sup>170</sup> Ten years later, the ruling that the Supreme Court had declared "the supreme law of the land"<sup>171</sup> had changed next to nothing. Just 1.2 percent of black children in the South attended school with whites.<sup>172</sup>

Lest one think that *Brown* was an aberration in this regard, it is worth pausing to consider the ability of the representative branches to undermine enforcement of Supreme Court decisions more generally. Some say this is overstated—that enforcement is routinely forthcoming if only because the executive would have to expend tremendous political capital to refuse.<sup>173</sup> But that misses the reality

---

that "[b]y 1957, only three years after *Brown*, at least 136 new laws and state constitutional amendments designed to preserve segregation had been enacted.... As the Southern saying went, 'as long as we can legislate, we can segregate'" (quoting HARRELL R. RODGERS & CHARLES S. BULLOCK III, *LAW AND SOCIAL CHANGE: CIVIL RIGHTS LAWS AND THEIR CONSEQUENCES* 72 (1972)).

168. This may seem puzzling given that *Brown* was itself a largely majoritarian ruling. For a discussion of the many reasons why the Supreme Court may, on occasion, be more majoritarian than the ostensibly majoritarian branches, with *Brown* as one example, see generally Lain, *supra* note 20. See also *infra* Part III.B (discussing the phenomenon as one of three implications of soft supremacy).

169. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 324-25 (2004) ("The [Eisenhower] administration[] fail[ed] in 1956 to enforce desegregation orders against local resistance in Clinton, Tennessee; Tuscaloosa, Alabama; and Mansfield and Texarkana, Texas."); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 131 (1994) ("After the Court issued its ruling, Eisenhower repeatedly refused to publicly endorse it, observing that the president's role extended only to enforcing, not to approving or disapproving, Supreme Court decisions.... Moreover, in 1956 Eisenhower on more than one occasion refused to involve the federal government when mob protests and state obstructionism blocked the implementation of school desegregation orders.").

170. See KLARMAN, *supra* note 169, at 366 (noting that the 1957 Civil Rights Act originally had an enforcement provision that would have allowed the Attorney General to sue for injunctions to enforce *Brown* but that it was stricken in response to charges that it would result in enforcement of *Brown* with "federal bayonets").

171. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[T]he interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land.").

172. See *THE SUPREME COURT IN CONFERENCE (1940-1985)*, at 671 (Del Dickson ed., 2001).

173. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 301 (1994) ("The moral force of persuasive, independent judgment on matters of constitutional and statutory law by the least dangerous branch makes it, politically, extremely difficult for the executive to act in a manner inconsistent with that

of how the implementation process actually works. It is true that Presidents rarely outright refuse to enforce a Supreme Court ruling, but they can engage in a number of passive-aggressive responses that result in “willfully lackluster” enforcement.<sup>174</sup> As Alexander Bickel put the point, “there are degrees of enthusiasm in rendering executive support.”<sup>175</sup> Consider the efforts of the executive branch during the Reagan and both Bush Administrations to underenforce and undermine *Roe v. Wade*.<sup>176</sup> And consider the efforts of Congress to underenforce Supreme Court rulings in the bussing context, abortion context, and criminal procedure context by simply denying the federal funding needed to enforce them.<sup>177</sup> There are a multitude of ways for the executive and legislative branches to wage a “lower-level war of attrition” against Supreme Court rulings they do not like—ways that are not easily challenged or even readily noticed.<sup>178</sup> As Judge Richard Posner explains, the Supreme Court “cannot put

---

judgment.”).

174. Ferejohn & Kramer, *supra* note 35, at 169. For a discussion of five passive-aggressive responses to the duty to enforce, see generally Corinna Barrett Lain, *Passive-Aggressive Executive Power*, 73 MD. L. REV. 227 (2013).

175. BICKEL, *supra* note 67, at 252.

176. See DEVINS & FISHER, *supra* note 18, at 177-78 (“The Reagan—and later the George H.W. Bush—administration invoked its regulatory authority to advance a pro-life agenda. Policies on fetal tissue research, USAID grant recipients, the importation of the abortifacient RU-486, and restrictions on abortions in military hospitals were all promulgated pursuant to the executive’s authority to implement the laws.”); Gerhardt, *supra* note 4, at 780 (“Similarly, Presidents Ronald Reagan, George H.W. Bush, and George W. Bush did not just underenforce *Roe v. Wade*; they tried to undermine it. They used all their prerogatives, including issuing executive orders withdrawing abortion services for military personnel, vetoing bills, supporting bills withdrawing financial support for abortion services, and appointing anti-*Roe* judges and Justices, to implement *their* judgment that *Roe* was a mistake.”).

177. See MURPHY ET AL., *supra* note 156, at 318 (discussing Congress’s attempt to prevent implementation of Supreme Court rulings in the bussing context by adding a provision to its 1980 appropriations bill that forbid the Department of Justice from spending money to enforce them); POSNER, *supra* note 20, at 156 (“And without directly challenging the courts Congress often can use its legislative authority to pull the sting of constitutional rulings that it does not like, as by defunding abortion clinics, [and] starving legal aid clinics and criminal defenders of funds.”).

178. Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court’s Constitutional Rulings, 1987-2000*, 31 LEGIS. STUD. Q. 533, 536 (2006) (“Many of the other weapons possessed by Congress are quite blunt, and their use can attract public attention and debate. But Congress can wage a lower-level war of attrition with regard to some constitutional decisions simply by failing to take heed of them.”); Scott E. Lemieux & David J. Watkins, *Beyond the “Counter-majoritarian Difficulty”: Lessons from Contemporary Democratic Theory*, 41 POLITY 30, 35 (2009) (“Governments can use a wide array of passive and active strategies to resist implementation in ways that leave the courts little recourse.”).



its hands on most of the levers of governmental power, [so] Congress or the President, without visibly retaliating, is often able to pull the sting from a constitutional decision.”<sup>179</sup> In short, resistance need not be explicit; indeed, it may be more effective when it is not.

Granted, in one class of cases—criminal prosecutions—the Supreme Court can largely rely on lower courts and the power of *stare decisis* to enforce its constitutional commands. As Matt Hall notes in his study of the impact of Supreme Court rulings, “the Court may not hold the sword or the purse of our society, but it does hold the keys to our jail.”<sup>180</sup> Yet even here, the efficacy of the Court’s rulings—particularly when they are unpopular—is far from guaranteed. Lower courts have substantial room to thwart the impact of Supreme Court rulings they do not like by reading them narrowly and limiting their application,<sup>181</sup> and given the volume of cases that these courts are deciding, there is little that the Supreme Court can do about it.<sup>182</sup>

All this is to say that supreme judgements are coupled with supreme weakness. As Justice Jackson observed, the Supreme Court is “in vital respects a *dependent* body.”<sup>183</sup> This recognition has its own implications for the departmentalist position—if the

---

179. POSNER, *supra* note 20, at 273.

180. MATTHEW E.K. HALL, *THE NATURE OF SUPREME COURT POWER* 164 (2011); *see also id.* at 163 (noting that the Supreme Court can sometimes use lower court judges to implement significant change and that such cases “almost always involve the Court designating a particular class of citizens as immune from criminal prosecution or civil action”).

181. *See* MURPHY ET AL., *supra* note 156, at 313 (“Lower-court judges can hamper the commands of higher courts by avoiding, limiting or even defying them—as many lower courts did with the U.S. Supreme Court’s desegregation decisions.”); *id.* at 694 (noting that lower courts must follow Supreme Court decisions but in doing so they can limit or facilitate implementation).

182. As Judge Posner notes, the federal courts of appeals decided over 56,000 cases in 2003, compared to around 3700 in 1960, while state courts of last resort decided over 25,000 in 2002. *See* POSNER, *supra* note 20, at 269; *see also id.* at 374 (noting that “the Court decides such a small percentage of cases and thus has only limited control over the lower federal courts (which tend therefore to go their own way, generating conflicts that the Court may take many years to get around to resolving”); *id.* at 143 (“[S]o few court of appeals decisions are reviewed by the Supreme Court (currently less than 1 percent) that the threat of reversal cannot be much of a constraint on court of appeals decision making.”).

183. DEVINS & FISHER, *supra* note 18, at 67 (emphasis added) (quoting ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 10 (1955)). In the end, the Supreme Court’s dependence on the people and their representatives was, for Alexander Bickel, “how and why judicial review is consistent with the theory and practice of political democracy.” BICKEL, *supra* note 67, at 258.

representative branches have equal authority to interpret the Constitution, then they actually have *more* interpretive power than the Supreme Court, because their interpretive authority is bolstered by the ability to enforce those interpretations too.<sup>184</sup> But my primary interest here is the implications of the point for the Court's constitutional decision-making. On this score, Justice O'Connor's comments are instructive. She writes:

We don't have standing armies to enforce opinions, 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.<sup>185</sup>

The Justices understand their institutional vulnerability and the limits it places on what the Supreme Court can realistically do.

Few cases illustrate the point better than *Brown*, so I return here briefly to provide a glimpse of the internal view. Going into *Brown II*, the Justices knew that their desegregation decree would be met with fierce resistance.<sup>186</sup> “[N]othing could injure the court more than to issue orders that cannot be enforced,” Justice Black told his colleagues in conference, concluding, “[T]he less we say the better off

---

184. As to the normative implications of this point, I paraphrase a comment from one of my readers noted earlier: departmentalism would give a man widely viewed as unfit to be President more power over our Constitution than the Supreme Court, and this should give us pause about being a departmentalist. For the original comment, see *supra* note 32 and accompanying text; see also THE FEDERALIST NO. 78, *supra* note 160, at 380 (Alexander Hamilton) (noting that “there is no liberty, if the power of judging be not separated from the legislative and executive powers and that “liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments” (quoting 1 CHARLES DE MONTESQUIEU, SPIRIT OF LAWS 173 (Thomas Nugent trans., Baroche Books) (1748)).

185. Sandra Day O'Connor, *Public Trust as a Dimension of Equal Justice: Some Suggestions to Increase Public Trust*, CT. REV., Fall 1999, at 10, 13.

186. States in the deep South had dismissed the Justices' invitation to submit briefs on how enforcement should proceed, signaling their intent to ignore the decision entirely. See KLARMAN, *supra* note 169, at 314. And in a moment of brutal honesty, the lead lawyer for the South told the Justices at oral argument that there would be no attempt to comply. See FRIEDMAN, *supra* note 98, at 246-47 (quoting the lead lawyer for the South as stating at oral argument, “Mr. Chief Justice, to say we will conform depends on the decree handed down.... I would have to tell you that right now we would not conform—we would not send our white children to the Negro schools”).

we are.”<sup>187</sup> Justice Minton agreed, stating that the Supreme Court would “reveal its own weakness” if it issued a “futile” decree.<sup>188</sup> Deadlines and timetables just invited defiance, the Justices reasoned.<sup>189</sup> The result was an order requiring “all deliberate speed.”<sup>190</sup>

One last point merits mention: what is at issue when Supreme Court rulings go unenforced is greater than the stakes of any given case. Disobedience of Supreme Court rulings reveals the Court’s weakness; it shows that the emperor has no clothes and that the Supreme Court cannot, without help, make anyone do much of anything. That, in turn, renders the Court vulnerable to future disregard of its rulings.<sup>191</sup> In short, nonenforcement undermines the Supreme Court’s legitimacy—its ability to say what the law means and have the people respect and follow its pronouncements even when they disagree.<sup>192</sup> And that is a problem because legitimacy is all the Court has.<sup>193</sup> So when Justice Black said that “nothing could injure the court more than to issue orders that

---

187. KLARMAN, *supra* note 169, at 314, 317 (second alteration in original) (quoting Justice Black).

188. *Id.* at 314 (quoting Justice Minton).

189. *See id.* at 314-18 (discussing the Justices’ desire in *Brown II* to avoid issuing orders that the South could easily defy).

190. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

191. *See* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 781 (2009) (“Just as a traffic light ceases to coordinate behavior if it becomes known that everyone ignores the traffic light, the court’s ability to coordinate behavior collapses if people learn that their beliefs about how others react to judicial decisions are wrong. Once the belief spreads that there are no consequences to disobeying the court, the court will find it difficult to command obedience again.”); *see also* ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 95 (1978) (“A court unmindful of [its] limits will find that more and more of its pronouncements are unfulfilled promises, which will ultimately discredit and denude the function of constitutional adjudication.”).

192. *See* James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 204-05 (2014) (discussing what some call legitimacy and political scientists call “diffuse support” but in both cases refers to the public’s willingness to abide by decisions even when they disagree).

193. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) (“[T]he Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court’s power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”).

cannot be enforced,”<sup>194</sup> he spoke a truth that is ever present on the Justices’ minds.<sup>195</sup> At issue in every case is not just the Court’s ruling, but the power and prestige of the Supreme Court itself.

### *E. Statutory Pushback*

The last major means by which the people and their representatives control the finality of the Supreme Court’s constitutional decisions is their ability to pass statutes that push back against the Court’s rulings and, in so doing, test and retest the Court’s commitment to its prior pronouncements. On occasion, these statutes purport to actually reverse a constitutional ruling, and are either ignored as obviously unconstitutional, or invoked as binding authority and ultimately struck down.<sup>196</sup> But most often, these statutes skirt the boundaries of established constitutional rules.<sup>197</sup> By necessity, Supreme Court decisions take place within the context of a particular factual setting. As such, there is always room for legislative action that is inconsistent with the spirit of a constitutional decision but not obviously within the four corners of its rule.<sup>198</sup> Statutory pushback is one way—perhaps even the most common way—that the people and their representatives express

---

194. See *supra* note 187 and accompanying text.

195. See *supra* note 185. For a candid recognition of the point by a federal court of appeals judge, see Harry T. Edwards, *Judicial Norms: A Judge’s Perspective*, in *NORMS AND THE LAW*, *supra* note 18, at 230, 231-32 (discussing the various ways that the representative branches can obstruct courts and noting that “only one of these threats looms large to judges ... and that is the possibility that our mandates might not be carried out by the executive or legislative branches.... [T]he awareness that we can do little to compel enforcement of our judgments is a real, recurring element in judicial thinking”).

196. An example is 18 U.S.C. § 3501, originally passed in 1968, which purported to make the lack of *Miranda* warnings one of several “factors to be taken into consideration by the judge,” while noting that the lack of *Miranda* warnings “need not be conclusive on the issue of voluntariness of the confession.” 18 U.S.C. § 3501(b) (2012). The provision was ignored for decades, and then invoked and ultimately struck down in *Dickerson v. United States*. See 530 U.S. 428, 437 (2000) (“Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”); see also R. Ted Cruz, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 10, 14 (2005) (“[F]or three decades, § 3501 lay dormant on the statute books, all but ignored.”).

197. See WHITTINGTON, *supra* note 3, at 800 (“Direct challenges to judicial supremacy are rare. More common are efforts to evade the logic of the Court’s reasoning and to influence subsequent judicial opinions.”).

198. See Kramer, *supra* note 32, at 970 (“Congress, the President, the states, and other relevant players find room to act in, around, and between judicial decisions.”).

disagreement with the Court's constitutional pronouncements. And experience shows that the Supreme Court is remarkably responsive to this sort of pushback, presumably for the same reasons it considers state and federal legislation in its constitutional decision-making in the first instance.<sup>199</sup>

Statutory pushback against the Supreme Court's decisions in both *Roe v. Wade*<sup>200</sup> and *Furman v. Georgia*<sup>201</sup> illustrates the point nicely. In the first fifteen years following *Roe*, forty-eight states passed 306 anti-abortion restrictions, almost all of which presented issues that the Supreme Court had not specifically addressed in *Roe* but which clearly resisted its logic.<sup>202</sup> Shortly thereafter, the Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which watered down *Roe*'s holding and accommodated the country's strongly expressed legislative views.<sup>203</sup> *Furman* is a similar story. In the wake of the Court's 1972 decision striking down the death penalty as it was then administered,<sup>204</sup> thirty-five states reinstated the death penalty with statutes that were widely viewed as suffering from the same infirmities identified in *Furman*.<sup>205</sup> Four years

---

199. See *supra* Part I.B.2 (discussing constitutional decision-making based on state legislative consensus); *supra* Part I.C (discussing constitutional decision-making as a dialogue with the legislative and executive branches). For a discussion of whether the Supreme Court *should* take such statutes into consideration in its constitutional decision-making, while recognizing that it does so, see generally Robert F. Nagel, *Disagreement and Interpretation*, LAW & CONTEMP. PROBS., Autumn 1993, at 11, 24-33.

200. 410 U.S. 113 (1973).

201. 408 U.S. 238 (1972) (per curiam).

202. See DEVINS & FISHER, *supra* note 18, at 62, 322 (discussing statutes imposing spousal consent, parental notification and consent, informed consent, and waiting period requirements, and discussing the opportunities those statutes provided for the Supreme Court to soften its *Roe* ruling).

203. 505 U.S. 833, 876, 882, 886-87, 899 (1992) (adopting an "undue burden" test and upholding state-imposed waiting periods, informed consent, and parental notification requirements); see also FRIEDMAN, *supra* note 98, at 382 (noting that *Casey* "watered down *Roe* in important ways and which—all polls and pundits agreed—was remarkably in line with popular opinion"); Post & Siegel, *supra* note 123, at 429 ("*Casey* authorizes the Court to respond to both sides of the abortion dispute by fashioning a constitutional law in which each side can find recognition. *Casey* famously concludes both that 'the essential holding of *Roe v. Wade* should be retained and once again reaffirmed' and that 'the rigid trimester framework of *Roe*' should be overturned, thus authorizing for the first time fetal protective regulations throughout pregnancy." (footnotes omitted) (quoting *Casey*, 505 U.S. at 846, 878)).

204. See *Furman*, 408 U.S. at 239-40.

205. See Lain, *Furman Fundamentals*, *supra* note 119, at 47-48 (discussing legislative backlash to the *Furman* ruling); *id.* at 57-60 (discussing widespread knowledge that the new death penalty statutes did nothing to fix the problems that plagued the old ones, including

later, the Court upheld these new statutes, explicitly recognizing their relevance to its constitutional analysis.<sup>206</sup>

All told—and this is the point of the entire preceding discussion—the people and their representatives have a number of ways to control the staying power of Supreme Court decisions with which they disagree. Some are more effective than others. Some take more time than others. And some are more confrontational than others. But they all provide outlets for the people and their representatives to influence, if not control, the Supreme Court’s constitutional decision-making. And they all have been successful in actually changing the Court’s constitutional views, *even when the control mechanism at issue technically failed*. These mechanisms are not only levers of power, but also opportunities for expression, and that matters in light of the Supreme Court’s proclivity to respond to the people’s clearly expressed constitutional views.<sup>207</sup>

If the notion of the people and their representatives expressing their views to the Supreme Court, and the Court responding, sounds familiar, it should—this is the back side of the dialogue between the Court and American people discussed in Part I. When the Supreme Court issues a constitutional ruling, that dialogue is not over; to the contrary, it has formally just begun. The Court’s voice in this dialogue is weighted, to be sure. It purports to reign supreme. But what happens next will decide the validity of that declaration; it depends on what the people do. The Court rules, the people react, and the Court responds to that.<sup>208</sup> Constitutional contestation—this time between the Court and the people and their representatives—

---

statements by state governors as they signed new legislation that it was probably unconstitutional).

206. See *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976) (plurality opinion) (“[I]t is now evident that a large proportion of American society continues to regard [the death penalty] as an appropriate and necessary criminal sanction. The most marked indication of society’s endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 states have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person.” (footnote omitted)).

207. See Graber, *supra* note 16, at 72 (“[T]he record indicates that the justices are fairly responsive to public demands that the Court retreat from earlier decisions.... The Supreme Court is simply not structured to impede a determined majority for any length of time.”).

208. For prominent statements of this phenomenon, see BICKEL, *supra* note 191, at 91-95; DEVINS & FISHER, *supra* note 18, at 299-325; FRIEDMAN, *supra* note 98, at 381-85; Friedman, *supra* note 93, at 653-58.

continues until the nation finally settles in on an understanding of the Constitution that everyone can live with.

Granted, sometimes it takes a while to work all that out. And granted, the public may still disagree with a decision in the end. But a brief look at the two most oft-cited examples of this happening—the Supreme Court’s protection of flag burning and invalidation of school prayer—is instructive. The Court’s protection of flag burning in 1989 and 1990 was incredibly unpopular, but efforts to amend the Constitution stalled on the notion that perhaps robust free speech protections were a good thing after all,<sup>209</sup> and the public quickly turned its attention to other things.<sup>210</sup> By way of comparison, the Court’s invalidation of state-sponsored school prayer in 1962<sup>211</sup> and bible reading in 1963<sup>212</sup> produced an even greater firestorm and for a longer period of time, but here it is not clear how much the people actually disagreed with the Court’s rulings. In both cases, the proposed constitutional amendment to overturn the decisions, which ultimately became a plank in the 1964 Republican Party Platform, took a position no different from what the Supreme Court had held.<sup>213</sup>

---

209. See DEVINS & FISHER, *supra* note 18, at 247 (noting that Congress’s repeated refusal to amend the Constitution to limit the First Amendment’s reach is due in part to “ever growing lawmaker acquiescence to the flag-burning decision”); *id.* at 252 (quoting Walter Dellinger in a Senate Judiciary Committee hearing as saying: “We love the flag because it symbolizes the United States; but we must love the Constitution even more, because the Constitution is not a symbol. It is the thing itself.”).

210. See Tom Donnelly, Essay, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159, 176 (“Congress failed to pass a constitutional amendment and the American people quickly turned their attention to other matters.”).

211. See *Engel v. Vitale*, 370 U.S. 421 (1962).

212. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

213. In both cases, the Supreme Court’s problem with the religious exercise was that the state was leading it—the state wrote the prayer in one case, and chose the Bible verses (and the version of the Bible to read them from) in the other. See *Schempp*, 374 U.S. at 223-27 (invalidating state-sponsored Bible reading under the Establishment Clause); *Engel*, 370 U.S. at 422-25 (invalidating state-sponsored school prayer under the Establishment Clause). Here is what the 1964 Republican Party Plank supported: “a Constitutional amendment permitting those individuals and groups who choose to do so to exercise their religion freely in public places, provided religious exercises are not prepared or prescribed by the state or political subdivision thereof and no person’s participation therein is coerced.” REPUBLICAN PLATFORM 1964, in NATIONAL PARTY PLATFORMS 1840-1972, at 677, 683 (Donald Bruce Johnson & Kirk H. Porter eds., 5th ed. 1973). For a discussion of the confusion that marked the public’s response to *Engel*, and the factors that caused it, see Lain, *God, Civic Virtue, and the American Way*, *supra* note 119, at 507-25.

The point of mentioning these cases, as notoriously unpopular as they are, is to give some idea of how the process actually works. The Supreme Court's decisions will not always reflect the people's views, even at the end of the dialogic process. Sometimes the Court will issue an unpopular decision and stick to its guns. But the people either come to accept those decisions, understanding them better, or at least understanding that the Constitution sometimes requires protecting an unpopular view,<sup>214</sup> or they do not accept those decisions, and the law evolves until they do.

And what that means in the context of the current discussion is that the Supreme Court's constitutional pronouncements are final in only the most limited of ways. The Court decides the case, and for a time its understanding of the Constitution is final. But in the wake of the Court's decision, the people and their representatives respond, and the dynamic process of determining what the Constitution means—not to settle the case, but to settle the larger constitutional controversy, the rules that the nation must live by—begins.<sup>215</sup> What Alexander Bickel recognized as true nearly forty years ago remains true today:

The Supreme Court's judgments may be put forth as universally prescriptive; but they actually become so only when they gain widespread assent. They bind of their own force no one but the parties to a litigation. To realize the promise that all others similarly situated will be similarly bound, the Court's judgments need the assent and the cooperation first of the political institutions, and ultimately of the people.<sup>216</sup>

In other words—this time, those of Larry Kramer—“It ain't over 'till it's over, and the final arbiter of whether a given action is

---

214. See Larry D. Kramer, *Undercover Anti-Populism*, 73 *FORDHAM L. REV.* 1343, 1358 (2005) (“[P]oliticians and ordinary citizens alike can and do appreciate that there are advantages in giving the Court some leeway to act as a check on politics. This includes understanding that many benefits of judicial involvement are systemic and long term, and so may require accepting individual decisions with which one disagrees.”).

215. Put another way, the Supreme Court settles controversies, but with the flexibility to rethink that settlement should the people and their representatives convince it to do so.

216. BICKEL, *supra* note 191, at 90; see also *id.* at 181 (“[The Court’s] authority, although asserted in absolute terms, is in practice limited and ambivalent, and with respect to any given enterprise or field of policy, temporary.”).



constitutional is the public itself.”<sup>217</sup> We will know when it is over because there will be no traction in the system to undo what the Court has done.<sup>218</sup>

This is the reality of judicial supremacy. The Supreme Court’s pronouncements are final in only the thinnest of ways and supreme only to the extent that the people and their representatives are willing to accept them. Maybe that is why the people like it as much as they do.<sup>219</sup>

### III. THREE IMPLICATIONS OF SOFT SUPREMACY

Thus far, I have endeavored to provide an accurate account of the reality of judicial supremacy, one that recognizes the role of the people and their representatives in the Supreme Court’s constitutional decision-making process. Here I turn to three implications of this account—first considering what judicial supremacy does for our democratic discourse, then considering what judicial supremacy does for the people, and finally considering what judicial supremacy does for the representative branches. In light of the numerous and important ways that judicial supremacy serves the representative branches, I ultimately ask whether departmentalism is good for even departmentalists, and conclude that the answer is no. What departmentalists appear to want is what they already have, and that is supremacy *sometimes*—the essence of soft supremacy.

#### A. *What Soft Supremacy Does for Our Democratic Discourse*

Critics claim that judicial supremacy not only takes the people’s voice in determining the meaning of the Constitution, but also shuts it down. Larry Kramer has been particularly forceful in making this claim, arguing that “[s]upremacy is an ideological tenet whose whole purpose is to persuade ordinary citizens that, whatever they may think about the Justices’ constitutional rulings, it is not their place

---

217. Kramer, *supra* note 101, at 1452.

218. *See id.* (noting that public acceptance is “measured by the inability of proponents or opponents to gain political traction anywhere in the system to undo what has been done”).

219. *See supra* notes 129-32 and accompanying text (noting public support for judicial supremacy).

to gainsay the Court.”<sup>220</sup> Supremacy tells the people that “the meaning of their Constitution is something beyond their compass, something that should be left to others,” he writes.<sup>221</sup> But this is not what we see in practice; indeed, just the opposite is true. Ordinary citizens make claims about the Constitution all the time,<sup>222</sup> and my argument here is that this sort of democratic discourse occurs not in spite of judicial supremacy, but in good measure *because* of it.

The Supreme Court’s constitutional decision-making can generate any number of reactions, but one of the most prominent is backlash.<sup>223</sup> Backlash can occur even if a constitutional ruling has the balance of public opinion on its side because those who agree with the ruling just nod along, while those who disagree on the merits mobilize.<sup>224</sup> Defeat, to borrow from Jesse Choper, is the “great[] energizer.”<sup>225</sup> And Supreme Court rulings energize the opposition in spades. They unite critics, inspire action, and, perhaps most importantly, provide a clear target for directing resistance.

Judicial supremacy plays an important role in this process, for it is the purported finality of the Supreme Court’s decisions that makes those decisions so important to the larger polity and so outrageous to those who disagree. To be sure, backlash is primarily a response to the merits of a decision, and it can happen in the wake of democratic decision-making as well.<sup>226</sup> But Supreme Court decisions are special in this regard—not because they give rise to laments of an unelected judiciary deciding an issue that should have been decided by the people themselves (although they do), but

---

220. KRAMER, *supra* note 1, at 233.

221. *Id.* at 229.

222. *See supra* notes 95-100 and accompanying text.

223. *See* Friedman, *supra* note 21, at 2624-25 (discussing the backlash thesis and suggesting that the most significant impact of Supreme Court decisions is to embolden those who oppose the Court’s decision on the merits).

224. *See* Lain, *supra* note 20, at 182.

225. CHOPER, *supra* note 151, at 134.

226. Consider, for example, the backlash that followed Congress’s passage of the Affordable Care Act. *See* Jason Millman, *Democrats Are Bracing for Another Obamacare Backlash*, WASH. POST: WONKBLOG (Feb. 17, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/02/17/democrats-are-bracing-for-another-obamacare-backlash> [<https://perma.cc/2U4P-2KR9>]; Jayne O’Donnell et al., *As Obamacare Choices Dwindle, Feds Face Consumer, Political Backlash*, USA TODAY (Aug. 30, 2016, 9:59 AM), <http://www.usatoday.com/story/news/politics/2016/08/29/obamacare-choices-dwindle-feds-face-consumer-political-backlash/89403698/> [<https://perma.cc/XLL4-DKBH>].

rather because they give rise to outrage among those who disagree with a decision that they are now stuck with it. If the Supreme Court's constitutional rulings did not purport to be final, it would not matter so terribly much how the Court rules.<sup>227</sup>

Yet judicial supremacy's contribution to the democratic discourse is not just about its ability to galvanize debate like only the Supreme Court can. It is also (and perhaps more importantly) about what happens to the democratic discourse as a result. Judicial supremacy leads to constitutional decisions that are what Barry Friedman calls "sticky"—they *can* be overturned, but it takes substantial mobilization, often over a sustained period of time, to induce that sort of reconsideration.<sup>228</sup> In short, they are final unless the Court becomes convinced that they should not be. This stickiness, Friedman explains, creates the need for a deeper, and broader, consensus than what ordinarily inures in the political process, and attempts to forge that consensus, in turn, lead to extensive public engagement on the question of what the Constitution means and why.<sup>229</sup> Friedman claims that the chief virtue of this process is its result—a sifting out of immediate preferences from the "deeper, more enduring values" that mark the nature of constitutional commitments.<sup>230</sup> But others have argued that the process is equally

---

227. See Friedman, *supra* note 59, at 169 ("Without this form of [judicial] supremacy, there is not much in the way of a countermajoritarian problem. Judicial decisions can simply be ignored or modified by the other branches."); see also Pozen, *supra* note 8, at 2050 ("If amendments were readily achievable, one would not find such anguish about judicial supremacy.")

228. See FRIEDMAN, *supra* note 98, at 383 ("[I]t 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.")

229. See Barry Friedman, *Discipline and Method: The Making of The Will of the People*, 2010 MICH. ST. L. REV. 877, 916 ("[P]recisely because of the stickiness of judicial review, we are forced to seek and ultimately forge broader consensus on the most difficult constitutional issues of our day."); Friedman, *supra* note 124, at 1239-40 ("[T]he very 'stickiness' of constitutional decisions forces a public debate that is different from what occurs in ordinary politics over nonconstitutional matters. It is precisely because it is difficult to change or get around Supreme Court constitutional rulings that a longer-term and deeper mobilization occurs." (footnote omitted)).

230. Friedman, *supra* note 229, at 916; see also FRIEDMAN, *supra* note 98, at 383 ("[I]t 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."); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1297 (2004) ("The benefit of the process of constitutional change is that

important for its deliberative quality and ability to engage actors beyond the political and social elite, concluding that to the extent we have a deliberative democracy, we owe it in part (ironically) to the power of an unelected Supreme Court.<sup>231</sup>

One can see the same sort of galvanizing effect on the formal political process, with *Roe v. Wade*<sup>232</sup> being one of the clearest illustrations of the point. By conventional wisdom, *Roe* shut down the political process,<sup>233</sup> but experience shows that just the opposite is true. *Roe* utterly transformed American politics, mobilizing the political process to resist the ruling in every possible way. From presidential elections to Supreme Court nominations to ordinary legislation and more, *Roe* energized electoral politics on the abortion issue because, as several scholars have noted, it raised the stakes.<sup>234</sup> What Lawrence Sager writes about *Roe* and other cases is right: no “sensible observer of our political life [could] conclude that those matters which do get taken up by the judiciary in the name of the Constitution are thereby swept off the popular political agenda.”<sup>235</sup> If anything, the Court’s pronouncements have a galvanizing effect on the political process instead.

---

it serves the separating function, of helping to determine and distinguish between immediate political preference and deeper commitments.”).

231. See John Ferejohn & Pasquale Pasquino, *The Countermajoritarian Opportunity*, 13 U. PA. J. CONST. L. 353, 354, 360, 374-75 (2010).

232. 410 U.S. 113 (1973).

233. See William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 519 (2001) (“[A] standard critique of *Roe v. Wade* is that it was not only countermajoritarian, but that it preempted the normal operation of politics, which was in the process of reforming or repealing abortion laws state by state.”). *But see* Lain, *supra* note 20, at 143 (examining the historical record and concluding that “it is not the case, as conventional wisdom would have it, that *Roe* short-circuited legislative efforts moving in the same direction. *Roe* did not kill legislative reform—by 1973, it was already dead.” (footnote omitted)).

234. See Post & Siegel, *supra* note 123, at 403 (recognizing the point and quoting William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1310 (2005); and Friedman, *supra* note 230, at 1310 as noting the same). For an excellent discussion of “*Roe* rage” as an important illustration of how backlash can invigorate popular and political discourse, thereby enhancing the democratic legitimacy of the larger constitutional order, see generally Post & Siegel, *supra* note 123. For a discussion of how even the Supreme Court’s denial of rights claims can energize the political process for change using *Bowers v. Hardwick*’s refusal to invalidate criminal prohibitions on same-sex sodomy as an example, see DEVINS & FISHER, *supra* note 18, at 186-89.

235. SAGER, *supra* note 3, at 220; see also *id.* at 221 (“It would have been silly in prospect to think that these cases could lay the social controversies with which they contended to rest, and utterly wrong in retrospect to think that they have done so.”).

For the formalists out there who think the people have no business trying to influence the development of constitutional law—the law is what the text, or original meaning, or whatever other source of guidance one ascribes to says it is, and nothing more—the process I have described is a bad thing. Those who lament the fate of certain decisions that were softened, or even abandoned, as a result of the success of this process might reasonably conclude it is a bad thing too.<sup>236</sup> But in light of the current discussion and attacks on judicial supremacy on democratic grounds, one might consider the views of Justice Blackmun, who once stated, “It may prove to be well in the long run that people do get disturbed and concerned and interested in what the Court does. I think on balance that this is a good thing for the country, because the Supreme Court of the United States belongs to the country.”<sup>237</sup> By and large, this symposium contribution has been an extended discussion of why Justice Blackmun’s words are true—why the Court belongs to the country, and the Constitution too.

### *B. What Soft Supremacy Does for the People*

To understand what soft supremacy does for the people, one must first understand the dissonance that sometimes occurs between the people and the representative branches. It is widely assumed that the representative branches represent the people—if not well, then at least better than unelected judges do.<sup>238</sup> But sometimes just the opposite is true. Sometimes the representative branches are not so representative, leaving an unelected (but highly responsive)

---

236. For my own proclivities in this regard, compare *Furman v. Georgia*, 408 U.S. 238, 240 (1972) (invalidating the death penalty as then administered), with *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (reinstating the death penalty under circumstances similar to those found problematic in *Furman*).

237. DEVINS & FISHER, *supra* note 18, at 308 (quoting *A Justice Speaks Out: A Conversation with Harry A. Blackmun* (CNN television broadcast Dec. 4, 1982)).

238. See Kramer, *supra* note 32, at 999 (“Legislatures do not perfectly mirror or translate popular will, and courts are to some extent responsive to democratic pressures. But it would be ludicrous to treat the two as comparable in this respect.”); Waldron, *supra* note 1, at 44 (“Both in theory and in political practice, the legislature is thought of as the main embodiment of popular government: it is where responsible representatives of the people engage in what they would proudly describe as the self-government of the society. Now there are lots of dignified ways of describing the judiciary, but ‘locus of representative authority’ is unlikely to be one of them.”).

Supreme Court to give voice to the people's views instead. This, then, is what soft supremacy does for the people: it gives force of law to their widely held views even when the representative branches do not.

To see the point as a real, reoccurring phenomenon rather than a rare fluke requires some understanding of the impediments to effective representation by the representative branches. Some are structural impediments, obstacles to effectuating the will of the people that are built into the system as a matter of constitutional design.<sup>239</sup> The states' equal representation in the Senate, which results in a minority of the population having a majority of the votes, is perhaps the best example.<sup>240</sup> Other impediments are more operational in nature, consisting of the various "institutional habits and characteristics"<sup>241</sup> of the representative branches that make effectuating change difficult, even when backed by majority will. The congressional committee system is one example; the Senate filibuster is another.<sup>242</sup>

But neither of these sorts of impediments is responsible for the democratic dysfunction that has marked the representative branches over the last several decades, and neither is growing more acute. That distinction goes to politics, and, on this score, gerrymandering is as good a place as any to start. Now more than ever, sophisticated computer algorithms allow for the creation of voting districts with equal population and just about any political configuration.<sup>243</sup> As a

---

239. For an excellent discussion of the antimajoritarian features of our structure of government, see SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 25-78 (2006); see also CHOPER, *supra* note 151, at 12-25 (summarizing structural impediments to majoritarian change); LAIN, *supra* note 20, at 146-48 (same).

240. See CHOPER, *supra* note 151, at 16 ("The Senate is composed of two legislators from each state who have equal voting power irrespective of their state's population. Mathematically, this permits senators who represent about 15 percent of the national citizenry—and who were elected by just more than half of that number—to constitute a voting majority, able to overrule the preferences of senators representing 85 percent of the population."); see also LEVINSON, *supra* note 239, at 53 ("Majority rule' within the Senate may have only a random relationship to majority rule within the country as a whole.").

241. BICKEL, *supra* note 67, at 18.

242. See CHOPER, *supra* note 151, at 17-18 (discussing the use of the filibuster and committee system to thwart majority rule).

243. See Michael Kent Curtis, *Judicial Review and Populism*, 38 WAKE FOREST L. REV. 313, 324 (2003) ("New computer technology has moved the gerrymander from an art to a science, making it far easier to create districts of equal population with any desired political configuration. Where voters once chose among politicians, now politicians select voters.").

result, the party that controls congressional redistricting can “pack” like-minded voters into districts to ensure that a particular party wins, and “crack” the voting strength of the opposing party’s constituents across districts to ensure that it loses.<sup>244</sup> Gerrymandering is all about wasting votes—“diluting” them, in election law speak—and it is wildly effective, routinely resulting in one party winning the most seats in a state despite the other party winning the most votes.<sup>245</sup> Indeed, that is the very point.

Because gerrymandering creates one-party “safe seats,”<sup>246</sup> it distorts not only electoral results, but also the electoral process as a mechanism by which representatives are held accountable to the people they represent.<sup>247</sup> Almost 90 percent of the House of Representatives seats are safe seats today.<sup>248</sup> As such, the race that matters most is not the general election, but the party primary that precedes it—and the constituency that matters most is not the general public, but the committed partisans who comprise the party base.<sup>249</sup> This phenomenon, in turn, pushes candidates to the

---

244. See Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 561, 567 (2011) (discussing packing and cracking strategy in gerrymandering).

245. See *id.* at 577 (discussing schemes that “dilute” the vote of minority voters). The Princeton Election Consortium concluded that at least twenty-six seats of the thirty-one-seat advantage Republicans had in the House after the 2012 election were gerrymandered seats, largely a result of redistricting done in the wake of the 2010 census. See Sam Wang, *Gerrymanders, Part I: Busting the Both-Sides-Do-It Myth*, PRINCETON ELECTION CONSORTIUM (Dec. 30, 2012, 12:29 PM), <http://election.princeton.edu/2012/12/30/gerrymanders-part-1-busting-the-both-sides-do-it-myth/> [<https://perma.cc/KS5M-QGLV>].

246. *2015 Report Cards: Safe House Seats*, GOVTRACK, <https://www.govtrack.us/congress/members/report-cards/2015/house-safe-seat> [<https://perma.cc/G62U-GSEX>] (categorizing 385 of 440 House seats—87.5 percent—as “safe seats”). This is not to say that gerrymandering is the only cause of safe seats. For an explanation grounded in people’s tendency to reside in homogeneous communities, see generally BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* (2009).

247. See Patrick Basham & Dennis Polhill, *Uncompetitive Elections and the American Political System*, POL’Y ANALYSIS, June 30, 2005, at 2 (noting that the House of Representatives was designed to reflect “shifting popular will” and that “[t]he decline in congressional political competitiveness is grossly inhibiting the extent to which the contemporary House serves this function of democratic responsiveness”).

248. See *id.* at 6 (“Almost 90 percent of Americans live in congressional districts where the outcome is so certain that their votes are irrelevant.”); see also *supra* note 246 (noting that 385 of 440 House seats are considered to be safe seats—87.5 percent).

249. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 298 (2011) (“[P]rimaries tend to be dominated by the most committed and active party members, who tend to be more ideologically extreme

ideological extremes, pandering for partisan votes to avoid “getting primaried.”<sup>250</sup> The upshot is an electoral process that produces decidedly off-center results. As a practical matter, representatives today do not represent the people; they represent the hardliners that form their party base.

The impact on Congress is palpable. Although gerrymandering is not the only corrosive force in politics today, it is one of the most powerful.<sup>251</sup> Today’s Congress is marked by acute party polarization along ideological lines and the demise of party moderates. As Rick Pildes writes, “In 1976, moderates constituted 30% of the House; by 2002, this proportion had shrunk to 8%. Similarly, in 1970, moderates constituted 41% of the Senate; today, that proportion is 5%.”<sup>252</sup> If it seems as though Congress has lost touch with moderate, mainstream views, that is because it has.

And this development, in turn, has had ill effects of its own. Party loyalists have little reason to reach across the aisle; indeed, the incentives all run the other way, leading to what one veteran Congress-watcher describes as “the middle-finger approach to governing, driven by a mind-set that has brought us the most rancorous and partisan atmosphere ... in nearly 35 years.”<sup>253</sup> As one might expect, congressional lawmaking has suffered too, resulting in what political scientists Jacob Hacker and Paul Pierson describe as “policymaking that starkly and repeatedly departs from the

---

than the average party member. As a result, primaries tend to be controlled by the extremes of each party, which can affect which kinds of candidates prevail.” (footnote omitted).

250. See generally ROBERT G. BOATRIGHT, *GETTING PRIMARIED: THE CHANGING POLITICS OF CONGRESSIONAL PRIMARY CHALLENGES* (2013); Robert Draper, *The League of Dangerous Mapmakers*, ATLANTIC (Oct. 2012), <http://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/> [<https://perma.cc/KW79-Y64X>] (quoting a Congressman as saying that there are some Republicans “who would be inclined to be more moderate, if they didn’t have to fear a primary challenge”).

251. For insightful discussions of the connection between gerrymandering and party polarization, see generally Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POLITICS 75 (2006); Jamie L. Carson et al., *Redistricting and Party Polarization in the U.S. House of Representatives*, 35 AM. POL. RES. 878 (2007); J. Gerald Hebert & Marina K. Jenkins, *The Need for State Redistricting Reform to Rein in Partisan Gerrymandering*, 29 YALE L. & POL’Y REV. 543 (2011).

252. Pildes, *supra* note 249, at 277 (footnote omitted).

253. Norman Ornstein, *GOP’s Approach to Continuity: Not Just Unfortunate. Stupid*, ECONOMIST (June 9, 2004), <http://www.economist.com/node/2745245> [<https://perma.cc/JFA8-QZV6>].



center of public opinion.”<sup>254</sup> We tend to assume that the people’s representatives represent the people’s views, but in serious and substantial ways, they do not.

Compounding the problem is the incumbency rate in Congress, which ranges between 90 and 99 percent—largely due to incumbency advantages that elected representatives themselves put in place.<sup>255</sup> Political scientists are right in concluding that when it comes to Congress, “many voters lack any real say in who represents them.”<sup>256</sup> If the virtue of having elected representatives is the ability to vote them out, then it is worth noting that this is not an ability that the people realistically have.

None of this includes the dysfunction that arises from *inputs* into the democratic decision-making process, which have a corrosive effect of their own. Scholars have long lamented the influence of special interest groups, which, as Rebecca Brown has observed, “widely undermine[ ] ... any confidence that the system of representative government is doing the work that we count on it to do.”<sup>257</sup> Today, however, that influence is exacerbated by a world of super PACs able to accept unlimited political contributions and make unlimited political expenditures.<sup>258</sup> Money talks. And when money

---

254. JACOB S. HACKER & PAUL PIERSON, *OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY* 16 (2005); *see also* GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY* 22 (2003) (“[T]he idea that legislative outcomes should serve as a paragon of democracy or a proxy for the will of ‘majorities’ seems almost bizarre.”).

255. *See* Basham & Polhill, *supra* note 247, at 2 (reporting that “99.3 percent of unindicted congressional and state legislative incumbents won reelection” in the 1980s and recommending that elected officials be disconnected from campaign and election rule making and regulation); Chris Cillizza, *People Hate Congress. But Most Incumbents Get Re-Elected. What Gives?*, WASH. POST (May 9, 2013), <https://washingtonpost.com/news/the-fix/wp/2013/05/09/people-hate-congress-but-most-incumbents-get-re-elected-what-gives/> [<https://perma.cc/2D79-WXTF>] (noting an incumbency rate of 90 to 91 percent in the 2012 election); *see also* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 498 (1997) (discussing various entrenchment measures adopted by policymakers and concluding that “[i]n neither of these [entrenchment] contexts is legislative decisionmaking likely to be majoritarian; judicial review quite plausibly would be more so” (footnote omitted)).

256. Basham & Polhill, *supra* note 247, at 2 (quoting Ross K. Baker, *Why Your Vote Often Means So Little*, L.A. TIMES (Mar. 18, 2002), <http://articles.latimes.com/2002/mar/18/opinion/oe-baker18> [<https://perma.cc/DY7V-ZYFB>]).

257. Rebecca L. Brown, *The Logic of Majority Rule*, 9 U. PA. J. CONST. L. 23, 23-24 (2006).

258. *See* *Citizens United v. FEC*, 558 U.S. 310, 371 (2010) (recognizing First Amendment right of interest groups to make unlimited expenditures in support or opposition of a candidate so long as they are independent of the campaign and candidate).

talks to politicians, politicians are prone to listen. In the wake of *Citizens United v. Federal Election Commission*,<sup>259</sup> they do not have much choice; monied special interests could spend unlimited sums advertising for, or against, them in their next campaign.<sup>260</sup> This is a concern in and of itself, but coupled with our distressingly low voter turnout rates—49 to 57 percent in presidential elections and 33 to 37 percent in off-term congressional elections<sup>261</sup>—the problem is particularly acute. Monied special interests are wielding influence well beyond the number of voters they represent,<sup>262</sup> and their influence is even greater when the voters who could offset that influence do not show up to vote.

All this is to say that the current “fetishism of representation”<sup>263</sup> that drives much of the judicial supremacy debate could use a serious reality check. Attacks on judicial supremacy as anti-democratic tout the virtues of self-governance and assume a

---

259. See *id.* at 372.

260. See David D. Kirkpatrick, *Lobbyists Get Potent Weapon in Campaign Ruling*, N.Y. TIMES (Jan. 21, 2010), <http://www.nytimes.com/2010/01/22/us/politics/22donate.html> [<https://perma.cc/6YJV-S2UX>] (“The Supreme Court has handed lobbyists a new weapon. A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election.”); see also *Citizens United*, 558 U.S. at 396 (Stevens, J., concurring in part and dissenting in part) (“The Court’s ruling threatens to undermine the integrity of elected institutions across the Nation.”); Barack Obama, Statement on the United States Supreme Court Ruling on Campaign Finance, 1 PUB. PAPERS 54, 54 (Jan. 21, 2010), <https://www.whitehouse.gov/the-press-office/statement-president-todays-supreme-court-decision-0> [<https://perma.cc/DJB4-FKVD>] (“With its ruling today, the Supreme Court has given a green light to a new stampede of special interest money in our politics. It is a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans.”).

261. See U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 244 (2012); see also Lain, *supra* note 20, at 154 (discussing low voter turnout and noting that “[e]qually problematic, those who vote are not representative of the country at large; they are (among other things) older, wealthier, and whiter”).

262. See CHOPER, *supra* note 151, at 23 (“[I]t is generally agreed that by transmitting pertinent information to key lawmakers, by skillfully and selectively applying pressure at critical points in the system, and by expending massive sums of money—not infrequently in an abusive, and occasionally criminal manner—[special interest groups] are able to exercise power well beyond the force of the numbers of people they represent.”).

263. Nimer Sultany, *The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification*, 47 HARV. C.R.-C.L. REV. 371, 400 (2012); see also *id.* at 400 n.154 (“I use fetishism here to denote the act of giving something power that it does not inherently possess. In this context, the representative system is arguably fetishized, because some scholars venerate it as if it had the power to stand for the People when in fact it does not.”).

reasonably well-functioning representative democracy.<sup>264</sup> But that is not the democracy we have.

The point has rather obvious implications for the departmentalist position, and so I pause for a moment to recognize those. As previously noted, departmentalists claim that the representative branches have equal authority to say what the Constitution means and are therefore not bound by what the Supreme Court says.<sup>265</sup> To the extent that this claim rests on democratic grounds—the notion that the Constitution belongs to the people, and that the representative branches speak for them—the foregoing discussion suggests that skepticism is in order. The representative branches today are not even plausibly good at speaking for the people, offering a weak rationale for diluting the Supreme Court’s interpretive power.

In light of the fact that the representative branches do not even represent the people well, it is also unclear why one would think they would do any better at expressing equally authoritative constitutional views. Indeed, the available evidence suggests that they may not be even interested in the enterprise. “[T]oday’s lawmakers are less engaged in constitutional matters and less interested in asserting their prerogative to interpret the Constitution independently,” Neal Devins writes, noting that “Congress seems more interested in scoring rhetorical points than in engaging the Court on constitutional questions.”<sup>266</sup> The people’s representatives may care about many things, but the thing they care about most is reelection, and in a world of safe seats and polarized politics, that requires

---

264. See Josh Benson, *The Past Does Not Repeat Itself, but It Rhymes: The Second Coming of the Liberal Anti-Court Movement*, 33 LAW & SOC. INQUIRY 1071, 1083 (2008) (book review) (“Perhaps most importantly, the Anti-Court scholars share a strong belief that the political branches function reasonably well.... [T]he Court is the problem, not the solution—and the solution is the other branches.”). Those who oppose judicial review rest their argument on the same assumptions. See, e.g., Jeremy Waldron, Essay, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1360 (2006) (explicitly resting the case against judicial review on an assumption of “democratic institutions in reasonably good working order”); *id.* at 1362 (“I belabor these points about a democratic culture and electoral and legislative institutions in reasonably good working order because they will be key to the argument that follows.”).

265. See *supra* note 7 and accompanying text.

266. Devins, *supra* note 149, at 66-67; see also *id.* at 55 (describing the theme of the essay as showing “Congress’s interest in making symbolic statements on divisive social issues and its lack of interest in challenging judicial authority by independently interpreting the Constitution”); *id.* at 67 (“Indeed, today’s Congress ... seems quite accepting of judicial control of constitutional questions.”).

appeasing the party base.<sup>267</sup> “Message politics” is the name of the game, raising serious doubts about whether the representative branches have the ability or inclination to assume the role that departmentalists would have them play.<sup>268</sup> Perhaps all of this would change in a world without judicial supremacy, as some have claimed.<sup>269</sup> But our electoral system is not structured to resist the off-center pull of partisan politics, so it is hard to imagine departmentalism playing out in any other than a hyperpartisan way.<sup>270</sup>

And that brings me back to judicial supremacy. In theory, the fact that Supreme Court Justices are not elected renders them less responsive to the will of the people.<sup>271</sup> This is the problem with

---

267. See TUSHNET, *supra* note 63, at 87 (“The main concern about legislators’ incentives is simple: They are *elected*. Their primary incentive is to retain their jobs.”); WHITTINGTON, *supra* note 3, at 134 (“Legislators are driven by a desire to win reelection.... Legislators do have other goals and desires ... but reelection is often a prerequisite to the pursuit of other goals and it looms large in the calculations of members of legislatures.”); *supra* notes 246-50 and accompanying text (discussing importance of appeasing party base in safe-seat districts, which is around 90 percent of all districts).

268. See Devins, *supra* note 149, at 56-58 (discussing a shift to “message politics” and the “profound” consequences of political actors making statements not to make things happen, but because the statements themselves have political payoffs); see also Neal Devins, *The D’oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1343-44 (2007) (book review) (“*Does Congress Represent the American People on Constitutional Questions?* No way.... With lawmakers and political parties often looking for ways to reach out to their respective partisan bases, lawmakers increasingly see constitutional questions as unnecessary distractions.”). For an early empirical study demonstrating Congress’s “abdication of its role as a constitutional guardian” and explaining why electoral and political pressures make Congress a particularly challenging venue for deliberating constitutional issues, see Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 610 (1983).

269. See TUSHNET, *supra* note 63, at 82 (noting that judicial supremacy encourages position-taking because “legislators may say to themselves, ‘I can get political mileage out of taking a position on this question, without worrying that anything actually will happen, because the courts will find the statute unconstitutional anyway” and that this sort of position-taking does not show that legislators actually want those statutes to go into effect, or that they would be “incompetent constitutional interpreters” in a world without judicial supremacy); *id.* at 101 (“The fact that legislators behave badly when they know that someone is around to bail them out tells us little about how they would behave were they to have full responsibility for their actions.”).

270. See Whittington, *supra* note 96, at 825 (noting that elected officials exercising independent interpretive authority are likely to be influenced by “the electoral pressure of constituents or intermediate actors such as parties and interest groups” because “[t]hey are, after all, representatives, and we would normally expect them to be responsive to the opinions of their constituents”).

271. See MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* 170 n.4

judicial supremacy, at least for those who oppose it on democratic grounds—the Justices are not elected, so we cannot just “vote the bastards out.”<sup>272</sup> Indeed, this is what drives the claim that judicial supremacy affords the people no say in constitutional decision-making on the front side, and no control over what has been decided on the back side.<sup>273</sup> The entire case against judicial supremacy on democratic grounds is built on the fact that the Justices are unelected, and the assumed implications of that fact for their decision-making.

For those who care only about the *fact* of electoral accountability (or the lack thereof), judicial supremacy is hopelessly undemocratic and nothing I can say here will change that view.<sup>274</sup> But for those who care about the *point* of electoral accountability—its purpose as a mechanism for giving voice to the people’s views—it is worth noting that in practice, electoral politics are a huge part of the reason that the representative branches are not so representative. And the Justices are not subject to any of those electoral distortions. As Amanda Frost observes:

[F]ederal judges’ insulation from electoral politics allows them to bypass special interests, party activists, and campaign donors, and listen instead to what the majority of the general public prefers. Perhaps the Court’s value lies in the *purity* of its majoritarianism[,] ... the luxury of listening to the general public without the din of elections that so distracts the political branches of government.<sup>275</sup>

---

(1982) (“[O]ne important reason we value electorally accountable policymaking is that we think it more sensitive to the sentiments of majorities than is policymaking that is not electorally accountable.”); *see also supra* note 238 and accompanying text (noting the widespread assumption that, because they are elected, the representative branches represent the people, if not well then at least better than the judicial branch).

272. *See supra* note 133 and accompanying text.

273. *See supra* notes 1-4 and accompanying text.

274. *See* Waldron, *supra* note 1, at 50 (“But if the process is non-democratic, it inherently and necessarily does an injustice, in its operation, to the participatory aspirations of the ordinary citizen. And it does *this* injustice, tyrannizes in *this* way, whether it comes up with the correct result or not.”); *see also* CHOPER, *supra* note 151, at 10 (“But irrespective of the *content* of its decisions, the *process* of judicial review is not democratic because the Court is not a politically responsible institution.”).

275. Amanda Frost, *Defending the Majoritarian Court*, 2010 MICH. ST. L. REV. 757, 768; *see also id.* at 765 (“The fact that federal judges are insulated from electoral pressures while remaining attentive to mainstream public opinion enables them to listen to and be influenced

None of this is to say that the Supreme Court is immune to ideological distortions (although its roughly balanced ideological composition has tended to minimize them).<sup>276</sup> But it is to say that electoral accountability is not doing the work we think, and that the Court's deficit in this regard is also its advantage. Elected representatives respond to power—the voice of those who can make themselves strategically valuable.<sup>277</sup> The Supreme Court responds to the people *en masse*, more so as the cacophony of voices converge into a message that is loud and clear.<sup>278</sup> Free of the electoral politics that distort the representative branches and moved by a dialogic process of its own, the Court is able to respond to, and reflect, the people's widely held views even when the representative branches do not.

This ability gives rise to what I have called “upside-down judicial review,”<sup>279</sup> and it is what judicial supremacy does for the people in a world of democratic dysfunction. Upside-down judicial review is about the Supreme Court's ability, at times, to represent the people's views better than the people's own representatives. Its premise is that our representative branches are so dysfunctional that the Supreme Court (ironically) is sometimes a better conduit for the will of the people than the institutions ostensibly designed for that very purpose. The Court's recent recognition of same-sex marriage in

---

by the majority in a way that elected officials are not.”).

276. See Lain, *supra* note 20, at 165 (“On this ideologically balanced Supreme Court, it is the moderate, swing Justices who matter most in the Court's decision making, and empirical evidence has shown these Justices to be highly responsive to changes in public opinion.” (footnote omitted)); see also James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162, 173 (2015) (noting that “a court closely divided on ideology cannot produce the consistent decisional fuel needed to ignite a threat to the institution's legitimacy”).

277. See SAGER, *supra* note 3, at 205 (“No one can demand to be heard or to have their interests taken into account unless they can make themselves strategically valuable. In the real world of popular politics, power, not truth, speaks to power.”).

278. See *supra* Part I.D. As one reader noted, this comparison suggests that departmentalists are not only mistaken in concluding that the Supreme Court is antidemocratic, but also that departmentalists are deeply invested in current power structures, counting only those voices that have electoral power as legitimate and leaving everyone else out.

279. See Lain, *supra* note 20, at 116 (“Instead of a countermajoritarian Court checking the majoritarian branches, we see a majoritarian Court checking the not-so-majoritarian branches, enforcing prevailing norms when the representative branches do not. Here marks the start of a distinctly majoritarian, upside-down understanding of judicial review.”).

*Obergefell v. Hodges*<sup>280</sup> is one example of this phenomenon; *Brown v. Board of Education*<sup>281</sup> is another. Both showcase the representative branches refusing to give force of law to the transformation of attitudes occurring in larger society, leaving the Court to do it instead.<sup>282</sup>

Simply put, soft supremacy offers a safety net for expressing the people's evolving constitutional understandings, an assurance that their constitutional commitments will find expression in the law no matter what the representative branches do. And in the truest, most literal sense, it showcases the Supreme Court serving as guardian of the people's Constitution against the acts of ordinary government, just as it was intended to do.<sup>283</sup> Again, for those who do not want the people in the Constitution, this is a bad thing. But I am speaking to those who do. Soft supremacy is one way, among many, of giving voice to the people's views. Democratic expression never looked so undemocratic, nor has it worked so well.

### *C. What Soft Supremacy Does for the Representative Branches*

Thus far, I have noted the implications of soft supremacy for departmentalism in discrete places where it has made sense to do so.<sup>284</sup> In this Section, I turn more directly to the departmentalist position, starting with a discussion of what soft supremacy does for the representative branches. I begin with a move from the departmentalist playbook—the recognition that judicial supremacy is not

---

280. 135 S. Ct. 2584, 2608 (2015).

281. 347 U.S. 483, 485 (1954).

282. See Lain, *supra* note 20, at 119-25 (discussing *Brown* as an example of upside-down judicial review); *id.* at 177-78 (discussing gay marriage as an issue ripe for upside-down judicial review).

283. See THE FEDERALIST NO. 78, *supra* note 160, at 380 (Alexander Hamilton) (“[T]he constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.... [W]here the will of the legislature declared in its statutes, stands in opposition to that of the people, declared in the constitution, the judges ought to be governed by the latter, rather than the former.”).

284. See *supra* text accompanying note 184 (noting that departmentalism would result in the representative branches having more interpretive power than the Supreme Court because those branches would have the power to enforce their interpretive positions as well as render them); *supra* notes 264-70 and accompanying text (noting that the dysfunction that marks the representative branches undermines the justification for departmentalism and raises serious doubts about the representative branches' ability and inclination to independently interpret the Constitution).

a constitutional given.<sup>285</sup> The Founders may have contemplated judicial review, but the same cannot be said of judicial supremacy.<sup>286</sup> Why, then, do we have it? To answer this question is to know what soft supremacy does for the representative branches: we have judicial supremacy because the representative branches have viewed it as being in their best interest to do so.

Within the world of political science, the point is well established—judicial supremacy is a political construct built over time by the representative branches to further ends that they would find difficult, if not impossible, to accomplish on their own.<sup>287</sup> As Justin Crowe concludes in his work on the subject, “to the extent that the courts and judges have become central to American politics, it is because elected politicians have *actively, repeatedly, and strategically* assisted them in becoming so.”<sup>288</sup> The Supreme Court did not start out powerful, and it certainly did not start out supreme in matters of constitutional interpretation.<sup>289</sup> It became both because political actors recognized the usefulness of being able to say that the Supreme Court has spoken and the nation is bound. Of the

---

285. See Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1292 (1996) (“[N]o one ... has even attempted to put forth a plausible originalist case for a generalized judicial supremacy in constitutional interpretation. Instead, those who defend judicial supremacy ... have done so on grounds unrelated to the Constitution’s original public meaning.”).

286. See *id.* For the most famous statement of the Founders contemplating judicial review, see THE FEDERALIST NO. 78, *supra* note 160, at 379 (Alexander Hamilton) (“The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.”).

287. See JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 11 (2012) (noting that over the course of history, the ways in which political actors have empowered the Supreme Court and the precise reasons have varied, “but the overriding purpose has remained constant: to use the judiciary to further some end that would otherwise be difficult or even impossible to realize”). For prominent discussions of the point, see generally *id.*; WHITTINGTON, *supra* note 3; Gillman, *supra* note 23; Keith E. Whittington, “Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583 (2005); see also Stephen M. Engel, *Constructing Courts: Judicial Institutional Change Embedded in Larger Political Dynamics, or the Importance of No Longer Considering the Judiciary an Institution Apart*, 49 TULSA L. REV. 291 (2013) (book review).

288. CROWE, *supra* note 287, at 272.

289. See William H. Rehnquist, Address, *The Supreme Court: “The First Hundred Years Were the Hardest,”* 42 U. MIAMI L. REV. 475, 476-78 (1988).



numerous reasons this is so,<sup>290</sup> I focus here on the three I see as most prominent.

First and foremost, judicial supremacy serves the coordinate branches by legitimating what they do. The public discourse tends to focus on cases in which the Supreme Court invalidates a government action, but that overlooks the vast majority of cases in which the Court validates, and indeed entrenches, the government's actions instead. As Charles Black put the point, "the prime and most necessary function of the Court has been that of *validation*, not that of *invalidation*."<sup>291</sup> This is the reason why Congress rarely wants to actually curb the Supreme Court's power; the Court's power is mostly used to bolster the power Congress claims on its own.<sup>292</sup> As Keith Whittington explains, "politicians recognize the authority of judges so that the judges can in turn recognize the authority of the politicians."<sup>293</sup> Put another way, the representative branches support judicial supremacy because judicial supremacy supports the vast majority of what they do.

Second, and perhaps most consequentially, judicial supremacy serves the representative branches by suppressing pockets of political opposition that are beyond the reach of national legislative control. Our federal system allows political losers at the national level to consolidate and exercise power at the state and local levels, and places limits on the ability of the representative branches to

---

290. For a plenary discussion, see generally WHITTINGTON, *supra* note 3; see also HALL, *supra* note 180, at 14-15 (listing numerous ways in which judicial power serves the elected branches and noting the scholars who have written in each of those areas).

291. WHITTINGTON, *supra* note 3, at 153 (quoting CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* 52 (1960)). Given the political nature of the judicial appointments process, and the ubiquity of the rational basis standard of review, the fact that the Court would generally validate legislation, rather than invalidate it, should come as no surprise. See *supra* Parts I.A, I.B.1 (discussing the judicial appointments process and the rational basis standard).

292. See HALL, *supra* note 180, at 11 (noting that instead of curbing the Supreme Court's power, "[i]t seems much more likely that the elected branches would use the Court as an instrument of their own power by staffing it with political allies, reaping the benefits of enhanced legitimacy when the Court is in agreement, and simply ignoring or subverting the Court when it is not"); see also CROWE, *supra* note 287, at 275 ("By emphasizing concepts such as Court-curbing and strategic retreats, then, scholars of judicial politics (and related fields) have perpetuated a fundamental misconception about the nature of the relationship between Congress and the Court. That relationship, as the history of judicial institution building demonstrates, is markedly more supportive than combative.").

293. WHITTINGTON, *supra* note 3, at 155.

subdue those enclaves of resistance.<sup>294</sup> Judicial supremacy offers a solution to this “regime enforcement” problem, bringing recalcitrant states into line with the nation’s dominant understanding of what the Constitution requires.<sup>295</sup> The Warren Court is famous for serving this outlier-suppressing function; indeed, the dominant theme of its constitutional jurisprudence was enforcing the constitutional order of 1960s liberalism against the recalcitrant South.<sup>296</sup>

Third and finally, judicial supremacy provides an alternative forum for the resolution of conflicts that are too salient and divisive for the political process to resolve. Some political controversies concern crosscutting issues that threaten to dismantle the political coalitions that define party lines.<sup>297</sup> When confronted with such issues, party leaders do all that they can to remove them from the political agenda.<sup>298</sup> In short, they duck. “Rarely have so many public

---

294. See Whittington, *supra* note 287, at 585 (“In a federal system, for example, ideological and partisan opponents may control policymaking jurisdictions that are insulated from direct national legislative control.”); see also *id.* at 586 (“The fragmented American political system provides ample opportunities for national electoral minorities to nonetheless exercise political power. Particularly notable is the American federal structure, which allows ideological outliers and members of the out-party to consolidate and exercise governmental power over limited geographic jurisdictions.”).

295. As Keith Whittington notes, the use of judicial supremacy to suppress constitutional outliers is perhaps the Supreme Court’s most impactful contribution. See WHITTINGTON, *supra* note 3, at 105 (“[P]erhaps the most important [judicial role] is one of regime enforcement against constitutional outliers.”); *id.* at 106 (“Over the course of its history, the Court has invalidated state and local laws in nearly 1,100 cases, while voiding congressional statutes in just over 150 cases.”). Indeed, the vital service that judicial supremacy provided to the representative branches by suppressing pockets of local opposition—what Barry Friedman and Erin Delaney call “vertical supremacy”—is what provided the foundation for the Court to then use judicial supremacy against the representative branches in “horizontal” fashion. See Barry Friedman & Erin F. Delaney, *Becoming Supreme: The Federal Foundation of Judicial Supremacy*, 111 COLUM. L. REV. 1137, 1140-41 (2011) (providing a legal history account of this phenomenon).

296. See LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 490 (2000) (“[T]he dominant motif of the Warren Court is an assault on the South as a unique legal and cultural region.”). For a discussion of this phenomenon in the criminal procedure context, see Lain, *Countermajoritarian Hero or Zero?*, *supra* note 119.

297. For an excellent discussion of “crosscutting issues that threaten to disrupt the existing bases of partisan cleavage” and prominent examples of the phenomenon, see Graber, *supra* note 16, at 38; see also Whittington, *supra* note 287, at 591-93 (discussing the Supreme Court’s role in overcoming “cross-pressured political coalitions”).

298. See Graber, *supra* note 16, at 45 (discussing what political scientists call “displacement of conflicts” theory); see also *id.* at 40 (“When events demonstrate that a potentially disruptive controversy is not going to vanish, politicians attempt to depoliticize that dispute by developing or making use of various means of conflict resolution that seem far removed

officials worked so hard to say so little about an issue on the minds of so many citizens,” wrote Amy Gutmann about abortion politics in 1990,<sup>299</sup> and the same could be said of the context in which the Supreme Court decided *Roe v. Wade* in 1973.<sup>300</sup> At the time, a majority of Americans—64 percent—supported the availability of abortion as a matter of personal choice,<sup>301</sup> but an intense anti-abortion lobby made repealing existing abortion prohibitions (which dated back to the 1880s) exceedingly difficult.<sup>302</sup> Legislators could not afford to vote against the majority position, nor could they afford to vote for it.<sup>303</sup> On the eve of *Roe*, one *New York Times* headline said it all: “Opponents of the Abortion Law Gather Strength in Legislature: But Many Lawmakers Would Prefer to Let the Courts Settle Controversy.”<sup>304</sup> When politicians face crosscutting pressures that make it too costly to take a stand one way or the other, the best stand they can take is no stand at all.

---

from national electoral politics.”). For an in-depth account of legislative deferrals, see generally LOVELL, *supra* note 254.

299. Amy Gutmann, *No Common Ground*, NEW REPUBLIC, Oct. 22, 1990, at 43, 43 (reviewing LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* (1990)).

300. 410 U.S. 113 (1973); see Lain, *supra* note 20, at 133-44 (historically contextualizing *Roe v. Wade*).

301. See GEORGE H. GALLUP, *THE GALLUP POLL: PUBLIC OPINION 1972-1977*, at 54 (1978) (reporting 64 percent of respondents in an August 1972 poll agreeing with the statement, “The decision to have an abortion should be made solely by a woman and her physician”); see also Lain, *supra* note 20, at 135 (“Polling data from the 1960s confirms a decade-long, strong majoritarian trend. From the early 1960s to January 1973, when *Roe* was decided, public support for the prochoice position rose thirty points.”).

302. See Lain, *supra* note 20, at 140 (“Legislators recounted stories of being confronted with grisly pictures and aborted fetuses in jars, picketed wherever they went, denounced in their churches, lobbied in their homes, and threatened with excommunication, political payback, or both. The problem, as one state legislator explained, was not opposition to the repeal of abortion restrictions on the merits—It’s the political repercussions they fear from the Catholic opposition.” (footnotes omitted) (quoting DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 369 (1994))).

303. See *supra* notes 301-02 and accompanying text.

304. William E. Farrell, *Opponents of the Abortion Law Gather Strength in Legislature: But Many Lawmakers Would Prefer to Let the Courts Settle Controversy*, N.Y. TIMES, Jan. 26, 1970, at 19; see also GORDON SILVERSTEIN, *LAW’S ALLURE: HOW LAW SHAPES, CONSTRAINS, SAVES, AND KILLS POLITICS* 114 (2009) (quoting Republican Senator Bob Packwood in 1971 as saying, “[M]ost of the legislators in the nation I have met and certainly many members of Congress would prefer the Supreme Court to legalize abortion, thereby taking them off the hook and relieving them of the responsibility for decision-making” (quoting Bob Packwood, *The Role of the Federal Government*, 14 CLINICAL OBSTETRICS & GYNECOLOGY 4, 1213 (1971))).

In such circumstances, judicial supremacy serves the representative branches by resolving the issue (at least in the short term) and allowing party leaders to further remove it from the political arena by pointing to the binding power of the courts.<sup>305</sup> As one observer notes, “a court order is useful in that it leaves the official no choice and a perfect excuse.”<sup>306</sup> President Eisenhower used judicial supremacy this way in the wake of *Brown*.<sup>307</sup> President Kennedy used it this way in the wake of *Engel v. Vitale*.<sup>308</sup> And President Carter used it this way in the wake of *Roe*.<sup>309</sup> In all three

---

305. See Graber, *supra* note 16, at 44 (“Federal justices help maintain the national party system by removing from the political agenda issues that are disruptive to existing partisan alignments.”); see also WHITTINGTON, *supra* note 3, at 66 (noting in the context of abortion that “the optimal political strategy was to maximize the judicial authority to resolve the issue and remove abortion from the political arena”); *id.* at 143 (“Elected officials have an incentive to bolster the authority of the courts precisely in order to distance themselves from any responsibility for any of its actions.”).

306. ROSENBERG, *supra* note 162, at 34 (quoting Note, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 361 (1967)).

307. See WHITTINGTON, *supra* note 3, at 146 (“After the *Brown* decision was issued, the president determined only to say, ‘The Supreme Court has spoken and I am sworn to uphold the constitutional processes in this country; and I will obey.’”). When a reporter at a press conference pointed out that *Brown* had been decided “under the Republican administration,” Eisenhower distanced himself from the connection, stating, “The Supreme Court, as I understand it, is not under any administration.” *Id.* (quoting Dwight D. Eisenhower, The President’s News Conference of May 19, 1954, 1954 PUB. PAPERS 489, 491-92 (1960)); see also Friedman, *supra* note 59, at 170-71 (quoting Eisenhower at a press conference after *Brown* as stating, “The courts must be sustained or it’s not America” (quoting Anthony Lewis, *Eisenhower Calls Courts’ Sanctity Little Rock Issue*, N.Y. TIMES, Oct. 4, 1957, at 1)); *Eisenhower Address on Little Rock Crisis*, N.Y. TIMES, Sept. 25, 1957, at 14 (“Our personal opinions about the decision have no bearing on the matter of enforcement; the responsibility and authority of the Supreme Court to interpret the Constitution are very clear.”).

308. 370 U.S. 421 (1962) (invalidating state-sponsored school prayer); see Lain, *God, Civic Virtue, and the American Way*, *supra* note 119, at 526 (“At a press conference shortly after *Engel* was decided, Kennedy stated: ‘I think that it is important for us if we are going to maintain our constitutional principle that we support the Supreme Court decisions even when we may not agree with them.’” (quoting John F. Kennedy, The President’s News Conference, 1962 PUB. PAPERS 509, 510-11 (June 27, 1962))). This is particularly interesting because Kennedy *did* agree with *Engel* on the merits—he had campaigned on the strict separation of church and state in the 1960 election; it just was not a good time to say so. See *id.* at 493.

309. See WHITTINGTON, *supra* note 3, at 66-67 (“[I]n a 1980 press conference, [President] Carter deferred to the Court.... [H]e insisted that ‘I’m personally against abortion,’ but he noted, ‘[A]s President I have taken an oath to uphold the laws of the United States as interpreted by the Supreme Court of the United States. So, if the Supreme Court should rule, as they have, on abortion and other sensitive issues contrary to my own personal beliefs, I have to carry out, in accordance with my solemn oath and my duties as President, the ruling of the Supreme Court.’” (fourth alteration in original) (quoting Jimmy Carter, Remarks and a Question-and-Answer Session During a Live Television Broadcast, 3 PUB. PAPERS 2348,

of these cases, judicial supremacy was indeed the perfect excuse, allowing party leaders to distance themselves from the decision on the merits—and distance the decision from the political process itself—by pointing to the binding authority of the Supreme Court.

None of this is to say that the representative branches' use of judicial supremacy in these ways is necessarily a good thing. One might reasonably conclude that the Supreme Court should not be in the business of legitimating most of what the representative branches do, or that the Court's outlier-suppressing function is at odds with the principles that underlie our federalist system, or perhaps most obviously, that the representative branches should not be using the courts as a conflict avoidance mechanism. They should be resolving those conflicts instead.<sup>310</sup>

But it *is* to say that the narrative of a power-grabbing Supreme Court that so often dominates the discourse—what Justin Crowe describes as “a paranoid skepticism that judicial power was ‘stolen’ from the people and their representatives, that the Court somehow rose to prominence through manipulative action taken when citizens and politicians were not looking”<sup>311</sup>—is simply not true. As Keith Whittington puts the point, “Judicial supremacy is established by political invitation, not by judicial putsch.”<sup>312</sup> It exists because political actors seeking to advance their own interests have

---

2354 (Oct. 20, 1980))).

310. This is particularly true to the extent that judicial supremacy actually exacerbates political leaders' use of the Supreme Court as a release valve, although the phenomenon is deeply contested. See WHITTINGTON, *supra* note 3, at 295 (“Judicial supremacy facilitates distortions in representation and accountability. It lets politicians off the hook and encourages a political sensibility of avoiding constitutional responsibilities. It is not obvious, however, that our democratic politics would be better absent the temptation of judicial supremacy. Devices designed to shelter politicians and political decisions from the electorate are commonplace, and it is not at all clear that such devices should be universally condemned.”). For opposing views on this debate, see SAGER, *supra* note 3, at 220 (“If our political life has slighted these issues or their moral dimension, that is our fault, not the fault of the constitutional judiciary. If our moral muscle has atrophied, that is because we are political couch potatoes; there is more than enough room for exercise.”); and TUSHNET, *supra* note 63, at 80-82 (discussing “judicial overhang” that distorts the legislative process and undermines political accountability).

311. CROWE, *supra* note 287, at 271.

312. WHITTINGTON, *supra* note 3, at 294; see also Keith E. Whittington, *Give “The People” What They Want?*, 81 CHI.-KENT L. REV. 911, 922 (2006) (“The justices have not hoodwinked the people and its representatives into accepting judicial supremacy. Judicial supremacy is a construction of the people's representatives and has more often than not been embraced by the people themselves.”).

time and again viewed it as useful in solving a variety of political problems.<sup>313</sup> In short, judicial supremacy exists because it serves departmental *needs*.

And so to departmentalists, I say, you are going to want that supreme Supreme Court back someday. Not even the representative branches want a world of departmentalism all the time. They might want it sometimes, but what they want most of the time is judicial supremacy that is weak enough to be ignored on occasion but strong enough to suit their needs. In short, what they want is what they already have, and that is supremacy *sometimes*—the essence of soft supremacy.

Before concluding, one more point merits mention for those inclined to take a departmentalist view: soft supremacy just might serve departmentalist aims *better*. As previously discussed, the representative branches have a number of ways to control the efficacy of Supreme Court rulings with which they disagree.<sup>314</sup> When the people's representatives choose to take a departmentalist stance instead—when they choose to take stands in sharp contrast to the Supreme Court's constitutional pronouncements under a claim of equally authoritative interpretive power—they are directly challenging the Court's authority and directly attacking its decision on the merits. That leads to lawsuits, which get resolved in courts, which equates to handing the judiciary an opportunity to reassert its supremacy on a silver platter. Given the representative branches' ability to have their way with the Court's rulings through a variety of passive-aggressive responses—responses that leave the courts with little recourse<sup>315</sup>—it is not clear why even those who want to limit the Supreme Court's control over the Constitution would favor the departmentalist position. The beauty of soft supremacy, at least for those sympathetic to the departmentalist view, is that the Court cannot hit back.

---

313. See CROWE, *supra* note 287, at 274 (“[J]udicial power has not increased because of clueless or feckless behavior but because of strategic and deliberate action. In other words, politicians have engaged in institution building consciously and tactically, empowering the judiciary because they saw it in their—and often their constituents’—interests to do so.”).

314. See *supra* Part II; see also WHITTINGTON, *supra* note 3, at 11 (noting “the evident power of elected government officials to intimidate, co-opt, ignore, or dismantle the judiciary”).

315. See *supra* notes 178-79 and accompanying text.

Keith Whittington has noted just how difficult it is for Congress to take a departmentalist stance without “enacting a lawsuit” that invites the reassertion of judicial supremacy,<sup>316</sup> and several prominent decisions illustrate the point. The Supreme Court’s decision in *Dickerson v. United States*,<sup>317</sup> which invalidated Congress’s attempt to legislatively overrule *Miranda v. Arizona*<sup>318</sup> and asserted that “Congress may not legislatively supersede our decisions interpreting and applying the Constitution,” is one example.<sup>319</sup> The Court’s decision in *City of Boerne v. Flores*, which invalidated Congress’s attempt in the Religious Freedom Restoration Act (RFRA) to legislatively overrule one of its decisions under the Free Exercise Clause, is another.<sup>320</sup> There the Supreme Court explained:

When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.... [I]t is this Court’s precedent, not RFRA, which must control.<sup>321</sup>

In short, legislating constitutional conflict is a futile move. The Supreme Court is the institution that resolves such conflicts, so departmentalists are picking a fight they are going to lose.

That said, the quintessential case for comparing the virtues of soft supremacy versus the departmentalist position is 1958’s *Cooper v. Aaron*, decided in the wake of Southern resistance to *Brown*.<sup>322</sup> Recall first the passive-aggressive responses to *Brown*

---

316. WHITTINGTON, *supra* note 3, at 16; *see also* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1609-15 (2005) (book review) (arguing that however one might envision departmentalism playing out, it would inevitably suffer from boundary problems, which would get resolved in the courts, which would “collapse into judicial supremacy”).

317. 530 U.S. 428 (2000).

318. 384 U.S. 436 (1966).

319. *Dickerson*, 530 U.S. at 437. For a synopsis of *Dickerson* and the statute it invalidated, *see supra* note 196.

320. *See* 521 U.S. 507, 515 (1997).

321. *Id.* at 536.

322. *See* 358 U.S. 1, 26 (1958) (holding that the Supreme Court’s decision in *Brown I*, 347 U.S. 483 (1954), was the law of the land and thus binding on the states).

by the representative branches. As previously discussed, Congress considered, and rejected, an enforcement provision for *Brown* in its 1957 Civil Rights Act, and President Eisenhower quietly declined several opportunities for federal enforcement.<sup>323</sup> The Court could do nothing but tap its foot and wait for “all deliberate speed.”<sup>324</sup>

Now consider Arkansas Governor Orval Faubus’s claim in 1957 that the Supreme Court’s decision in *Brown* was “the law of the case’ [but] not ‘the law of the land.’”<sup>325</sup> Governor Faubus’s departmentalist challenge to judicial supremacy resulted in Eisenhower sending troops to Little Rock (much to Eisenhower’s chagrin) and the litigation in *Cooper v. Aaron*, which the Justices used as an opportunity to “answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case.”<sup>326</sup> The result was one of history’s most famous declarations of judicial supremacy—the Court’s assertion that “the federal judiciary is supreme in the exposition of the law of the Constitution” and that judicial supremacy is “a permanent and indispensable feature of our constitutional system.”<sup>327</sup> This is what happens when those looking to curb the Court’s power over the Constitution choose to do so in a way that so obviously invites the further aggrandizement of that power.

In the end, what soft supremacy does for the representative branches is more than just serve their political needs. Soft

---

323. See *supra* notes 168-70 and accompanying text.

324. See *Brown II*, 349 U.S. 294, 301 (1955). For a discussion of the enforcement concerns behind the Court’s decision to order desegregation in this manner, see *supra* notes 186-90 and accompanying text.

325. ELIZABETH JACOWAY, *TURN AWAY THY SON: LITTLE ROCK, THE CRISIS THAT SHOCKED THE NATION* 154 (2007) (quoting Governor Orval Faubus).

326. *Cooper*, 358 U.S. at 17. For those tempted to think that *Cooper* shows the virtues of departmentalism by inviting the executive branch to weigh in on the controversy rather than blithely enforcing the Court’s edict, my answer is that the executive branch was not blithely enforcing the Court’s edict either before Governor Faubus’s stand at Little Rock or after it. The only time the executive branch enforced the Court’s ruling in the first decade after it was issued was when a departmentalist forced its hand. And again, it is hard to see how that is a good thing for departmentalists—particularly in light of the fact that it came with a reaffirmation of the Court’s supremacy.

327. See *id.* at 18 (“[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land.”).



supremacy is also a way for the representative branches to control the Supreme Court's constitutional decision-making without provoking the sort of confrontation that will land them in court. Here again, judicial supremacy exists not despite the representative branches' interests but because of them. And that should make even departmentalists think twice about departmentalism. Soft supremacy—weak when the representative branches want it to be, strong when it serves their needs—is what judicial supremacy offers to the representative branches. Supremacy *sometimes* is what they really want, and that is what they have in soft supremacy.

#### CONCLUSION

The practice of judicial supremacy bears little resemblance to the depiction of rigidity and strength that dominates the discourse in judicial supremacy debates. It is weak, malleable, and decidedly democratic in its operation, channeling the will of the people and contributing to the democratic enterprise in numerous ways. Those who oppose judicial supremacy on democratic grounds want to put the people back into the Constitution, but what they fail to realize is that the people are already there. The people are what puts the soft in soft supremacy.