

WHICH CONSTITUTION? WHO DECIDES?

THE PROBLEM OF JUDICIAL SUPREMACY AND THE INTERBRANCH SOLUTION

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INTRODUCTION

“The Senate hearings on Supreme Court nominations are designed to give the American public an opportunity—its *last* opportunity—to pass judgment on *an official who for the rest of his [or her] life will have enormous and unchecked power to define their most fundamental political rights.*”¹

Does any institution exercising such *enormous unchecked* power and authority comport with republican self-government? If the answer is no, what is the remedy? This Article first explains why such unchecked power and authority are incompatible with republican democracy. In a nutshell, republican democracy is a form of self-government where complex deliberation is designed to articulate the community’s real interests or what the community reflectively judges its real interests to be. Republican democracy rejects both direct and representative *majoritarian* democracy.² Instead, it embraces the

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¹ Ronald Dworkin, *The Strange Case of Judge Alito*, N.Y. REV. BOOKS, Feb. 23, 2006, at 14 (emphasis added).

² Jared Sparks, editor of *North American Review* and future president of Harvard College, told Alexis de Tocqueville, “[the political dogma of this country is that the] majority is always right.” H.W. BRANDS, *ANDREW JACKSON: HIS LIFE AND TIMES* 456 (2005) (quoting Jared Sparks). But that surely is dogma or, if not dogma, a caricature of democracy. Republican democracy categorically rejects this radically oversimplified role of majority rule. The majority may be enabled to prevail in various circumstances, but that hardly means its perspective is either constitutionally, politically, or morally right simply because it is the majority. *But see* ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 139 (1990) (stating that “in wide areas of life majorities are entitled to rule [] . . . simply because they are majorities”). Not even Bork, however, believes this to be the exclusive principle of republican democracy. *Id.*

distinction between the community's reflective judgment and the everyday attitudes of the populace.³ Republican democracy fortifies this distinction by constructing deliberative governmental filters to transform the electorate's raw, unrefined, and possibly transient beliefs into the reflective judgment of the community. Judicial review may be one of these filters by providing a chance for the lawmaking community to express second-thoughts—or critical reflection—concerning legislation and other governmental conduct.⁴ Ultimately, however, republican democracy is committed to the proposition that the electorate—after refining its judgment deliberatively through its representatives and other institutional procedures—is the final arbiter of constitutional meaning. Republican democracy founders when any governmental branch has final unchecked authority and uses it to short-circuit this process.

In the American republic, no other political institution has anything like the judiciary's unchecked authority to invalidate or sustain⁵ federal and state legislation simply because the Court views such legislation to

³ Interest-group democracy, public choice theory, and other forms of collective decision making reject the coherence or intelligibility of any muscular conception of the community itself having a reflective judgment. These views might be right, but I do not think so; consequently, my argument in this paper assumes the intelligibility of notions such as "the reflective judgment of the community."

There is nothing metaphysical in the transition from our initial intuitive beliefs to the reflective judgment of the community. Rather, it is simply a more extended version of the process of wide reflective equilibrium. One starts out with one's initial intuitive beliefs and then determines which principles best explain and justify them. Sometimes the principles are adjusted to fit the beliefs and sometimes the beliefs are refined—some even jettisoned—to fit the principles. One adjusts one's untested intuitive beliefs in this manner until one reaches a provisional balance or equilibrium. The modified beliefs one holds in equilibrium are one's reflective judgments. Similarly, applying this process across persons in principle yields the community's reflective judgments. Admittedly, this process does not guarantee deriving uncontested judgments, but the process promises at least to delimit the possible candidates.

The process of wide reflective equilibrium is also usefully deployed in this Article. The ultimate task is to provide an illuminating account of "republican democracy" as it applies to the role of the courts. We start out with a rough definition. We then assess how this definition might fare when tested against our reflective intuitions. Then we adjust the principle and our intuitions accordingly until a rough balance is achieved. This Article intends to initiate this process in the context of republican democracy, accountability, and the courts. For an initial account of wide reflective equilibrium's role in legal theory, see Robert Justin Lipkin, *Beyond Skepticism, Foundationalism, and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811 (1990).

⁴ ROBERT JUSTIN LIPKIN, CONSTITUTIONAL REVOLUTIONS: PRAGMATISM AND THE ROLE OF JUDICIAL REVIEW IN AMERICAN CONSTITUTIONALISM xii, 237 (2000).

⁵ When the Court sustains unconstitutional legislation, it provides license for both state and federal governments to enact laws—such as segregation in *Plessy v. Ferguson*—that are incompatible with constitutional values. Additionally, it creates or reinforces undesirable cultural values, which ground the dubious legislation. True, the Court does not require such laws. Without the Court's imprimatur, however, legislators might think twice before passing constitutionally dubious legislation. When the Court talks, legislators listen. Consequently, upholding constitutionally dubious legislation can be as constitutionally pernicious as striking down constitutional ones.

be unconstitutional.⁶ This power—known as judicial supremacy—is essentially a failure of *accountability*,⁷ not, as many jurists and commentators contend, a countermajoritarian difficulty.⁸ Even if a super-majority or a mere plurality were required to pass ordinary legislation, the problem of judicial supremacy would persist—not because it is countermajoritarian—but rather because no constitutional actor can *effectively* check the Court when it chooses to speak.⁹

This point requires emphasis. Accountability need not be majoritarian to its core. Even in such undemocratic governments as monarchies, aristocracies, or theocracies, a failure of accountability may exist when the institution primarily designated to create law is checked by another institution whose role as authoritative reviewer has been garnered informally. In other words, even when the primary designated decision-maker is *unaccountable* to the people, the problem of accountability is present if a formally undesigned decision-maker can overturn or significantly modify the primary *designated* decision maker's decisions even if only on special occasions. Hence, one salient form of unaccountability is unchecked power by an undesigned decision maker.¹⁰

Defending the practice of judicial supremacy requires too great a tolerance for almost complete unaccountability in deciding constitutional meaning.¹¹ This creates a republic where the

⁶ The problem of judicial supremacy does not, of course, compare to the problem of war and peace, and other problems in contemporary American society such as health care, economic justice, and dealing with natural disasters. However, it is nonetheless a failure in the constitutional design of our political institutions, and the consequences of such a failure are often unclear. If the Court lacked the authority to go unchecked in its decisions, arguably the United States would have been a decidedly different society. Indeed, perhaps there would not have been a Civil War or an invasion of Iraq.

⁷ To describe the problem of judicial supremacy as an accountability problem does not mean that judges are never accountable in any sense at all. Rather, it means “[j]udges are only accountable to the public under the most rare and extreme circumstances.” STEPHEN P. POWERS & STANLEY ROTHMAN, *THE LEAST DANGEROUS BRANCH?: CONSEQUENCES OF JUDICIAL ACTIVISM* 179 (2002).

⁸ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 18 (2nd ed. 1986). Bickel's work initiated, virtually by itself, a legion of attempts by contemporary constitutional theorists to try to explain away the countermajoritarian role of the courts.

⁹ The Court does not always choose to speak. But when it does, its word is virtually final. This usurps a fundamental principle of republican government so well captured by Madison: “The ultimate authority, wherever the derivative may be found, resides in the people alone” *THE FEDERALIST* NO. 49, at 300 (James Madison) (Robert Scigliano ed., 2001).

¹⁰ Notwithstanding the source of the designated decision maker—the people, history, tradition, war, or religion—the problem of accountability is a problem not only for republican democracies but for any ordered society. Of course, the problem of accountability is more urgent in a society purporting to be committed to self-government.

¹¹ I am concerned with explicating the idea of a “republican democracy,” at least as it pertains to the role of the judiciary. Which conditions are necessary—even if not sufficient—for republican democracy? What kind of delegation does republican democracy permit? Is the institution of life-tenured judges, with the capacity to veto legislation without any cost-effective

constitutional choices of the people are often blocked or come to a virtual dead-end. Such a dead-end republic can, of course, survive; ours has for over 200 years. But it prevents citizens nevertheless from engaging in the joint enterprise of integrating and reconstructing their reflective judgments into a conception of the common good as the only authentic fount of sovereign authority over the society's future.¹²

Rather than offering an *internal* remedy of judicial self-regulation—requiring judges to adopt judicial restraint¹³ or to adhere to the “correct” judicial methodology—I offer instead an *external* solution to be imposed on judges through a congressional override of Supreme Court decisions. My suggested remedy does *not* eliminate judicial review, but rather augments this important constitutional practice by fashioning an institutional safety net that permits the best reflective judgment of the people to prevail over the best reflective judgment of the courts.¹⁴ Article V makes it clear that the Constitution is committed

and timely response by the elected branches or the electorate, compatible with such a democracy? Although I offer the solution of a congressional override, its precise institutional design is beyond the present inquiry.

¹² For Madison, “the people are the only legitimate fountain of power.” THE FEDERALIST NO. 49 (James Madison), *supra* note 9, at 322. Lincoln was more specific. For Lincoln, “[a] majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people.” Abraham Lincoln, *First Inaugural Address—Final Text (Mar. 4 1861)*, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953).

¹³ The doctrine of judicial restraint has been most recently expressed in JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (2006). However, the problem of judicial accountability has never been successfully addressed by urging judicial restraint. For example, the following admonition seems delusive:

The claim that the Court's rulings of unconstitutionality are mandates of the Constitution, or anything more than policy preferences of a majority of the justices, is false. Rule by judges is in violation, not enforcement, of the Constitution. *Ending it requires nothing more complex than insistence that the Court's rulings of unconstitutionality should be based on the Constitution—which assigns “All legislative Power” to Congress—in fact as well as name.*

Lino Gralia, *Rule of Law: Our Constitution Faces Death by ‘Due Process,’* WALL ST. J., May 24, 2005, at A12 (emphasis added). Professor Gralia's remarks are illustrative of forceful conservative voices diagnosing the problem of judicial supremacy accurately, but then providing a remedy that merely insists on judicial self-discipline. Leaving the remedy to judicial discretion has been tried and failed throughout American constitutional history. And constitutional failure of this sort is perfectly understandable. Each time a Justice or the Court embraces internal constraints as a boundary separating legitimate from illegitimate judicial interventions such as judicial restraint or originalism, the boundary created never lasts. LOUIS LUSKY, BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 349 (1975) (indicating that internal “boundaries tend to disappear” when the Court is re-populated). What will work is not the self-discipline of judges, but instead an external institutional check on their problematic role in American constitutionalism. Unlike most critics of excessive judicial power, I offer a solution to the problem of judicial supremacy that does not rely on the good faith of judges.

¹⁴ A sanitized version of judicial supremacy might consider “[t]he only justification for permitting judges to invalidate a policy choice made in the ordinary political process is that the choice is clearly prohibited by the Constitution—‘clearly,’ because in a democracy the judgment of elected legislators should prevail in cases of doubt.” Gralia, *supra* note 13. Presumably,

to the proposition that the best reflective judgment of the electorate should prevail over other constitutional actors.¹⁵ However, while recognizing the promise of the electorate's ultimate role in constitutional change, Article V fails to fulfill this promise.¹⁶ This Article proposes a congressional override as a more effective way for the electorate to fulfill its role as the ultimate constitutional arbiter.

The idea of a congressional override has a grand legacy.¹⁷ But it is not the only possible solution to the problem of judicial supremacy. Among the more prominent solutions are: councils of revision; impeaching Justices; recalling Justices; electing Justices; a periodic re-appointment procedure; referenda; random and temporary selection of appellate judges to serve as Justices on the Court; formal term limits or informal incentives such as attractive retirement packages; and most recently and controversially, congressional standing to challenge any attempt to strike down a congressional statute. Each of these remedies warrants examination, and each has costs and benefits. However, a congressional override of Supreme Court decisions as the solution to the

Professor Galia would retain judicial supremacy for clear cases. Unfortunately, permitting judicial supremacy only in clear cases is unlikely to succeed for two reasons. First, nobody knows the parameters of the "clear case." Professor James Thayer defined a "clear" mistake as one that is "so clear that it is not open to rational question." James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). Relying on the notion of what is "open to rational question" to explicate the idea of a clear mistake is unlikely to get us very far. Just what is open to rational question is not any more obvious than the meaning of "a clear mistake." Second, give the Court an inch and it will quite understandably take a mile.

¹⁵ Article V makes clear that here the people rule. And that includes who has the final word on constitutional meaning. As Thomas Jefferson put it: "The ultimate arbiter is the people of the Union assembled by their deputies in convention, at the call of Congress, or of two-thirds of the States." 15 WRITINGS OF THOMAS JEFFERSON 451 (Andrew A. Lipscomb ed., 1903) (Letter, June 12, 1823). Of course, a single amendment is possible through Article V as well.

¹⁶ Formal constitutional change can be either too difficult, forcing informal mechanisms of constitutional change to evolve, or too easy, rendering constitutional change virtually indistinguishable from ordinary legislative change. Article V clearly falls into the former category. One cannot seriously argue that formally altering the constitution of a republican democracy a mere twenty-seven times over the course of two hundred years constitutes sufficient constitutional change, especially when some of the changes are rather insignificant. In rapidly changing circumstances, anything but a perfect constitution is likely to require more than twenty-seven changes.

¹⁷ Shaken by the impeachment of Justice Samuel Chase, Chief Justice Marshall seriously proposed that "the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the judge who has rendered them unknowingly of his fault." Letter from John Marshall to Samuel Chase (Jan. 23, 1805), in 6 THE PAPERS OF JOHN MARSHALL 347, 347 (Charles F. Hobson ed., 1990). More recently, this issue was addressed in BORK, *supra* note 2, and Mark Tushnet, *Democracy Versus Judicial Review*, DISSENT MAGAZINE, Spring 2005, available at <http://www.dissentmagazine.org/article/?article=248>; see also MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). I tentatively added to this chorus in Robert Justin Lipkin, *The New Majoritarianism*, 69 U. CIN. L. REV. 107 (2000). In the present Article, I am no longer tentative.

problem of judicial supremacy has the advantage of resting the authority for constitutional decision-making in the governmental body representative of the electorate and one that can be held accountable by it.¹⁸

One obstacle to giving the idea of a congressional override a fair hearing is the deeply entrenched distrust of Congress becoming the penultimate constitutional reviewer because that would be enlisting a fox to guard the henhouse. Metaphors are vivid, but not always, or even for the most part, helpful. It is difficult to appreciate how even justified distrust of Congress could have convinced us to select the Court as our constitutional arbiter. If Congress errs, elections can correct its mistakes. Of course, American elections, as they currently operate, are no panacea of democratic accountability. Yet, there is no comparable remedy when the Court errs.¹⁹ Keep in mind “Supreme Court Justices are appointed for life. Legislators are electorally accountable. How can one fail to be apprehensive when the former declare the work of the latter invalid by appealing to an eighteenth century document that is, to put it euphemistically, open textured?”²⁰ Thus, simply as a matter of institutional design, judicial supremacy clearly seems to be democratically deficient because the Court’s accountability is suspect. In order to assess whether judicial supremacy has a place in a constitutional democracy, it is necessary to understand the broader tension between constitutionalism and democracy.

¹⁸ The Court, a mostly white, mostly male, and mostly middle-class body, seems conspicuously unrepresentative. *But see* CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 48 (2001) (“If we deepen our understanding of democracy, it becomes possible to understand the Supreme Court as a sophisticated kind of representative institution.”). Eisgruber contends that viewing the Court as representative is possible once we extricate ourselves from the myopic view that democracy must be majoritarian. A thicker conception of democracy as non-majoritarian enables us to see that the Court represents the people if it brings about democratic values. But this curious view does not explain why even a thick conception of democracy should not be brought about and operated by the people. Benevolent dictators may be the most efficient means to bring about democratic values, but that hardly means that this process is democratic even in a thick non-majoritarian sense.

¹⁹ No one should doubt that the Court errs. Consider Justice Jackson’s recognition of judicial error: “There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would . . . be reversed.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result). Why place what effectively is the final decision about constitutional meaning in such unreliable hands?

²⁰ Harry H. Wellington, *Foreword to BICKEL*, *supra* note 8, at x-xi.

I. CONSTITUTIONALISM AND DEMOCRACY

Constitutional democracy is a tricky achievement. Each notion alone—“constitutionalism” or “democracy”—is unstable. Together they can be explosive. Constitutionalism is, roughly speaking, seeking the political good, which includes defending individual rights, through principles and rules. But which good and whose rules? Democracy is government by the people, but how are the people to decide? Can the constraints imposed by constitutionalism ever sit well with the democratic authority of the people to choose their own futures? Do the people have the normative authority and political and constitutional competence to govern themselves? And if they do, why are constitutional constraints on their choices necessary or desirable at all? These are general and sometimes intractable questions about the legitimacy of democratic constitutionalism.²¹

Judicial supremacy exacerbates these problems. Indeed, the role of the Court in American democracy has been a thorn in the side of constitutional democrats since the Republic’s inception.²² For the past sixty years, if not longer, the so-called “countermajoritarian difficulty” (or problem) has dominated constitutional culture²³ and American constitutional scholarship has been pre-occupied, even “obsessed,”²⁴ with its implications. This “problem” charges Justices with replacing *bona fide* constitutional values with their own idiosyncratic preferences,

²¹ FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* (1999).

²² Several important presidents have protested the Court having too powerful a role. The first, Thomas Jefferson, insisted: “[N]othing in the Constitution has given [the Court] a right to decide for the Executive” whether the law is unconstitutional. THOMAS JEFFERSON, *Letter to Abigail Adams (Sept. 11, 1804)*, in 8 THE WRITINGS OF THOMAS JEFFERSON 311 (Paul Leicester Ford ed., 1897). Abraham Lincoln provided clear instructions regarding the decision in *Dred Scott*, which some contend was one of the precipitating causes of the Civil War. Lincoln proposed:

[resisting *Dred Scott* and to have it reversed if we can, and a new judicial rule established upon this subject. I]f the policy of the Government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers.

Abraham Lincoln, *supra* note 12, at 268. And finally, when Andrew Jackson learned of the Court’s decision in *Worcester v. Georgia*, he is reputed to have said: “John Marshall has made his decision; now let him enforce it.” BRANDS, *supra* note 2, at 493. While Horace Greeley may have falsely reported this quote, “the words captured Jackson’s attitude. The chief justice would have to enforce the decision, because no one else would.” *Id.* Jackson’s and Lincoln’s disdain for judicial supremacy—which was directed at particular cases—had little effect on the subsequent development of the doctrine. CHARLES G. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 429 (1959).

²³ BICKEL, *supra* note 8, at 16.

²⁴ Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

even if these preferences are reflective, sincere, and defensible.²⁵ In this manner, the Court functions as a permanent, if unreliable, constitutional convention amending the Constitution by, in effect, rewriting its provisions according to the discretion of nine unelected, life-tenured Justices.²⁶ Can this be anything but heresy in a constitutional democracy? Amending the Constitution should be the people's job.

The countermajoritarian obsession afflicts the popular culture as well as the legal academy. It is used as both a sword and a shield. Whenever a controversial decision is handed down, its opponents will invariably use it as a sword, insisting that the Court exceeded its authority. The opponents complain that the Court has engaged in lawmaking when its job is to interpret the law. Similarly, when a Supreme Court Justice steps down, those who oppose the trend of the current Court's decisions will use the complaint as a shield to insist that the president appoint a Justice who is a strict constructionist, or one who opposes judicial activism.²⁷

The thrust of the countermajoritarian complaint is that in a democracy, the elected branches, disciplined by the Constitution, should drive policy change. The Court's role is to protect the Constitution from electoral alteration, not to read its own constitutional values into the document to achieve a particular policy result. The Court is only justified in overturning the product of the elected branches when the

²⁵ One should be wary of describing contemporary political process as sufficiently majoritarian or democratic. Many factors suggest otherwise. For example, the role of wealth in the media and elections, wealth advantages generally, the seniority system, the Senate, one-state-one-vote when no presidential candidate garners a majority of the electoral votes, voter ignorance and apathy, and other democratic deficits prevent the presidency or Congress from being genuinely democratic institutions. I ignore these problems in this Article, and instead target the judiciary. If evaluating one branch of government required examining all branches of government, no one would ever successfully evaluate government at all. Moreover, many of the democratic deficits in the elected branches of government differ in principle from those of the courts.

²⁶ LUSKY, *supra* note 13, at 21 (asserting that the Court in effect serves as "a continuing constitutional convention").

²⁷ Analytically, these terms are largely rhetorical. Distinguishing between making law and interpreting law, as an important directive to judges, is a fool's game. Making law is paradigmatically creative. And interpreting law cannot survive by eschewing creativeness altogether. Indeed, understanding a text, any text, is interpretive in nature. Interpreting a text is, for the most part, inferential. The marks on a page are never self-interpretive. Other factors—norms, values, and the standards of the relevant interpretive community—are always involved in inferring the meaning of a text from marks (or even words) on a page. Nothing escapes this requirement, even constitutional text that appears completely determinate. For example, consider the requirement that the president be thirty-five years old. Is this requirement subject to interpretation? Must it apply in all circumstances? Suppose that an epidemic severely incapacitated everyone thirty-five years or older. Would it be necessary to amend the Constitution before a sitting thirty-four-year-old Speaker of the House could assume the presidency? Or would the Court more likely invoke a general norm for interpreting provisions in exceptional or emergency circumstances? When the price is right or the need is imperative, interpretive exceptions—in this case "sufficient maturity"—are always available as part—even if only peripherally—of the meaning of the constitutional text.

latter passes unconstitutional legislation, for example, when Congress tramples on the rights of minorities.²⁸ Because no one knows precisely and conclusively what constitutes “unconstitutional legislation,” a wide breach is left in the walls of a constitutional democracy. If the *sine qua non* of democracy is government by the will of the people, how is it possible for unelected, virtually unaccountable, judges to play this sort of counter-democratic role in lawmaking? The electorate authorizes its representatives to enact legislation, and if the electorate is displeased, it can replace the wayward representatives with more responsive officials. Yet, the judiciary has the power to veto this legislation even though it possesses no *obvious* democratic qualifications.²⁹ Wherein lies the Court’s authority to participate in the lawmaking process as final arbiter of a law’s fidelity to the Constitution? Is judge-made constitutional law not questionable?

Charging any branch of government with anti-democratic deficits requires at least a rough specification of what democracy means. By “democracy” I mean a polity where individuals all have equal constitutional and moral value and where political and constitutional

²⁸ THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 9, at 495, 498 (arguing in favor of a role for the Court in prohibiting unconstitutional legislation). Two replies are essential. First, Hamilton lived in an era where “judicial supremacy” as we understand the term was not yet a central constitutional value. Second, Hamilton’s reliance on the Court “to guard the Constitution and the rights of individuals” does not address the issue of who guards the Constitution and the rights of individuals from the Court.

²⁹ Let me explain my assumptions, none of which can be argued for here. First, no one has ever stated a justified principle that warrants inferring from the Constitution as a whole or from specific provisions the principle of judicial review. Although some members of the founding generation clearly embraced judicial review, others did not. Each argument Marshall and later scholars use to demonstrate how judicial review flows from the Constitution shows, at best, that it *may* be inferred, not that it *must* be. Second, whatever the founding generation believed regarding judicial review, the doctrine was not spelled out clearly in the constitutional text. Had it been, we would have avoided some of the problems afflicting our constitutional culture. Third, even if judicial review is constitutionally authorized, judicial supremacy is not. Fourth, requiring inference to legitimize judicial review leaves an unbounded practice rife with possibilities for judicial imperialism. Fifth, although the Court is almost never alone in ascertaining constitutional meaning, some questions allow the Court to be the ultimate arbiter of constitutional controversies. Hence, there remains at least a small set of controversial issues over which the Court is the ultimate arbiter, short of the onerous processes of transformative appointments or constitutional amendments. Sixth, it is true that some members of the founding generation were fearful of democracy. FISHER AMES, *The Mire of a Democracy*, in 1 WORKS OF FISHER AMES 6-7 (W.B. Allen ed., 1983) (republicanism is more different from “a democracy than a democracy from a despotism”). However, today, the concepts of “republicanism” and “democracy” are not so wildly different and the distinction between them is not terribly helpful in evaluating the Court’s role in American constitutionalism.

Nonetheless, we have learned in our civics classes that the United States is a republic, not a democracy. The historical reasons for this distinction center on an impoverished conception of “democracy” resulting in a fear of democratic excess. Currently, our constitutional culture seems more comfortable, at least on the surface, with the idea that our basic political theory of self-government makes democracy central. For us, the idea of a “democratic republic” is not an oxymoron. Finally, even non-majoritarian forms of democracy may encounter a counter-democracy problem.

meaning must ultimately and effectively rest with the collective participation of the people. In such a polity, every eligible voter and potentially eligible voter should have some voice in political and constitutional change. Besides possessing a critical *instrumental* value in deciding the society's future, democracy has an important *inherent* value through which individuals reciprocally acknowledge the equal worth of their fellow citizens. This reciprocity is the inchoate beginning of a special type of political community in which the beneficiaries of the community's good jointly decide how to achieve that good.³⁰

Because individuals are equally valuable, the procedure for deriving collective judgment should include majority rule.³¹ But majority rule is only one way to express the equal value of individuals.³² Rights such as free speech, equal protection, the right to vote, and so forth are also features that express each individual's equal value. Hence, at the outset, "democracy" can never be synonymous with "majoritarianism." Majority rule is only one central feature of the concept of "democracy," not its exhaustive meaning. More robust conceptions of democracy include the commitment to rights necessary for democracy to flourish and deliberation about the *common* good, not merely the good of particular individuals or special interests. This republican form of democracy embraces the appropriate moral attitudes—including civic virtue—necessary to fulfill these commitments.³³ However, because judicial supremacy creates a problem of accountability, it must be presumed problematic in any self-governing society, across the spectrum from majoritarian democracies to aristocratic republics. The accountability problem goes to the heart of republican democracy because republican democracy is predicated on

³⁰ Robert Justin Lipkin, *Progressivism as Communitarian Democracy*, 4 WIDENER L. SYMP. J. 229 (1999).

³¹ The principle of majority rule is not the consequence of moral skepticism. Rather, as I understand it, it is the product of an objectivist conception of morality. See, e.g., Robert Justin Lipkin, *The Theory of Reciprocal Altruism*, 30 PHIL. STUD. 108 (1983-84) (Ir.). Since all people are moral equals, there should be a strong presumption in favor of each person having an equal say in self-government.

³² As indicate above, any conception of democracy should be committed to the principle of majority rule. However, this commitment does not preclude invoking some supermajority rules in some, well-identified and limited, circumstances. Further, non-majoritarian conceptions of democracy must guarantee those rights, or what I prefer to call "privileged interests," having a conspicuous pertinence to democratic government. Finally, non-majoritarian democracies should periodically revisit the question of who counts as a full member of the political community in order to police the present majority's control of the deliberative forum.

³³ The sort of democracy I advocate implies certain features of a democrat's moral personality. Robert Justin Lipkin, *Deliberativism as the Moral Personality of American Citizenship*, 100 S. ATLANTIC Q. 1029 (2001). Deliberativism is more than a method of organizing society; it is a central feature of decision-making generally and an attitude one embraces toward the opinions of one's fellow citizens.

the consent of the governed³⁴ and, without accountability, consent is illusory.

A. *Accountability and Consent*

A decision-maker is accountable to her superior when she owes the superior an explanation if her conduct is challenged. Accountability typically grants the superior, the prerogative of disciplining the decision-maker for her errant decision. By “discipline” I mean the possibility of reversing the decision, demoting or firing the decision-maker, or making sure the decision is not given effect.

Even in non-majoritarian democracies, there exists a counter-democratic or counter-republican difficulty in that judicial supremacy shields the Justices from any significant accountability.³⁵ In any democracy, the government must answer to the people. Government officials, through some effective institution or practice, must explain and justify their conduct to the people for their consent and approval.³⁶ In republican democracy, some mechanism should exist for the electorate to effectively chasten government officials who fail to implement the electorate’s reflective judgment about the common good, including the appropriate meaning of the Constitution.³⁷

In American government, the executive and legislative branches are at least nominally accountable. But the judiciary is not. It is true, of course, that judges are selected by the elected branches of government, and these branches can be held accountable for errant judicial practices. Also, some judges respond to popular opinion or strident castigation from Congress.³⁸ But is such indirect accountability sufficient? We

³⁴ For Hamilton “[t]he fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.” THE FEDERALIST NO. 22 (Alexander Hamilton), *supra* note 9, at 139.

³⁵ My complaint is best described as the counter-democratic or counter-republican problem. However, because the term “countermajoritarian” is so often used to refer to the anti-democratic deficiencies of the Court, I will retain its use here. It should be carefully noted, however, that if judicial review caused only a *countermajoritarian* difficulty, my complaint would not apply. Republican democracy *is* countermajoritarian if majoritarianism means that constitutional values and policy decisions should directly reflect what a majority of the people or their representatives currently embrace. Rejecting majoritarian democracy, however, does not eliminate accountability as a requirement of self-government.

³⁶ If this is not true, it is unclear how consent is to be measured in a republican democracy.

³⁷ The idea of the “common good” or the “good of the community” is not pellucid. Does this notion refer to some intelligible notion distinct from the good of different individuals or interest-groups? Without providing a comprehensive analysis of this term, let me indicate simply that some such idea is probably essential to the understanding of republican democracy. Even if one accepts this explanatory tease, a fuller explanation is required though not in the present inquiry.

³⁸ Two forms of accountability are relevant here: direct and indirect accountability. As indicated above, direct accountability refers to the process of giving an account of one’s conduct for the purpose of explaining and justifying the conduct, especially conduct that has been

might punish a President and the Senate, or at least their parties, for nominating and confirming a particular Justice, but that does little, if anything, to correct the choices the Justice makes. Sure, we can seek transformative judicial appointments, but this process is extremely slow and promises little guarantee of success. Moreover, cabinet officials and military chiefs are also selected by elected branches of government. However, that fact would do little to diminish the outrage if these officials began declaring laws unconstitutional.³⁹ But military chiefs and cabinet members can be fired, and so their accountability is arguably more secure than the judiciary's.

The point here is that whatever else "constitutional democracy" means, it must include consent and, therefore, accountability. One cannot properly consent, in the democratic sense of that term, if government officials are not accountable to the electorate. In a constitutional democracy, such officials must routinely explain and justify their decisions. And the electorate needs to have the authority and power to approve or reject these decisions or the officials making them. At one time this might have seemed obvious. The historical progression of the Court arrogating more and more power to itself—without correction by Congress, the President, the states, or the people—now renders this perspective suspect.

The first element in democratic accountability is the selection of government officials. At least in theory, political campaigns are work interviews in which the candidate tells her potential employer—the electorate—just how she will represent the people if chosen for the job. Once hired, the electorate exercises an informal influence on its employees—government officials—by communicating its wishes, through letters, the media, lobbying, and so forth—and by commending them or reproaching them for their public statements and governmental conduct. And finally, the tenure of elected employees is limited by the

challenged in some way. Explanation and justification of the conduct is owed to the person or persons superior to the agent. Moreover, failure to adequately explain and justify the conduct can result in disciplining the person whose conduct is challenged. Indirect accountability occurs when the indirectly accountable person is influenced or even pressured by those to whom he or she is indirectly accountable. In this case, it is her choice whether to accede to their demands or requests. An employer might be accountable indirectly to her employees because she is fair or because she simply wants them to be satisfied with their position so that they might be more productive. Direct accountability permits those in the position to judge to remove the directly accountable person from her position or to reverse the challenged decision. Indirect accountability leaves the decision to change entirely up to the person who is indirectly accountable. Thus, indirect accountability may be effective in some circumstances, but generally it is weak and unpredictable, and therefore probably antithetical to a republican democracy.

³⁹ The point of this analogy is not to suggest that Cabinet ministers have just as much authority to engage in constitutional review as the courts. Rather, it is merely to point out that the role of the courts in supervising lawmaking is a historical contingency that appears necessary only in hindsight.

necessity of re-election so that the employer—the electorate—can decide whether to continue to employ them.

Each important constitutional actor must answer to the electorate in a constitutional democracy because the electorate is the only authentically normative source of authoritative power. The process through which the electorate places and removes individuals from the executive and legislative branches of government best exemplifies this accountability. However, it is also revealed in the process of the elected branches appointing and firing inferior officials. If impeachment were an effective means of removing Justices who fail to interpret the Constitution correctly,⁴⁰ the Court might be answerable to the electorate.⁴¹ However, the Chase impeachment convinced Jefferson that impeachment would not serve as an effective means of disciplining the Court,⁴² and no Supreme Court Justice has ever been impeached since.

Republican democratic accountability can be specified by the following three-pronged test: (1) input-accountability, (2) process-accountability, and (3) output-accountability. Input-accountability requires electoral control over the process for selecting governmental officials.⁴³ Process-accountability requires the possibility of communicating with the officials individually or collectively in a variety of ways in order to cause them or require them to vote for a

⁴⁰ I suspect there would be an overwhelming consensus that some Justices have interpreted the Constitution erroneously, although such a consensus would vanish when deciding who those Justices were or in which cases they erred.

⁴¹ DAVID BARTON, *RESTRAINING JUDICIAL ACTIVISM* 31 (2003) (arguing “impeachment simply makes the judiciary an accountable branch by making individual judges responsible for their decisions, thus preventing their usurping, misusing, or abusing power”). This recommendation for impeaching judges seems directed decidedly at liberal judges. However, both liberal and conservative judges are unconstrained. The problem lies in our commitment to judicial constitutionalism, which permits judges to delude themselves into thinking that values they believe *should* be in the Constitution, are actually in the Constitution already. This temptation is too much for any judge and cannot be resisted through self-discipline. That is why an external constraint is necessary. Let us depersonalize this issue and provide an interbranch solution which provides an external check on courts generally, not just individual judges.

⁴² Jefferson did not, however, think that judges had a predominant role in determining constitutional meaning. Indeed, in his view:

To consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is “*boni iudicis est ampliare jurisdictionem*,” [good justice is broad jurisdiction] and their power the more dangerous as they are in once for life The constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots.

THOMAS JEFFERSON, *Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820)*, in 1 *THE WRITINGS OF THOMAS JEFFERSON* 160 (Paul L. Ford ed., 1892).

⁴³ Of course, the electorate or its representatives need not be responsible for selecting every governmental official, only those with central constitutional functions. However, representatives of the people should have some authority to reverse decisions of unelected public officials, especially constitutional interpreters.

particular policy or reverse some disputed decision. Output-accountability requires the process of removing a governmental official if the electorate is unsatisfied with his or her performance. For democratic employees to be accountable to their employer, this three-pronged test should be satisfied.

With important qualifications,⁴⁴ the executive and legislative branches in American government satisfy this test of democratic accountability.⁴⁵ The judiciary does not. Frequently, it is argued that federal judges satisfy input-accountability because the elected branches of government nominate and confirm them. The counter-argument is that the process is too remote for the electorate to have any significant role in the selection process.⁴⁶ One hundred one governmental officials

⁴⁴ Ordinary electoral politics in America do not satisfy a strict application of the accountability test. Disproportionate wealth in electoral campaigns, corporate control of the media, and voter indifference certainly disqualify the executive and legislative branches from satisfying the test, except in their institutional design. However, the judiciary is not even designed to be effectively accountable. And the idea of “judicial independence” should not be invoked to rationalize this design. Nothing inherent in the notions of judicial independence and accountability renders them incompatible. Some external constraints on judicial decision-making are perfectly compatible with “judicial independence.” For example, a congressional override does not encroach upon judicial independence. The Court still has the prerogative to have its independent say and render its decisions in good faith. Judicial independence is compromised only when the Court, through unauthorized, external coercion, is unable to freely decide cases within its jurisdiction. Insisting upon the absence of such coercion does not entail that the Court must be the final constitutional interpreter. The two issues are virtually unrelated. A congressional override compromises judicial independence only if one’s definition of “judicial independence” is ludicrously expansive and without regard to the importance of accountability.

⁴⁵ The scope of democratic accountability is more expansive than the test offered here. In a republican democracy, the electorate delegates authority to representatives who are the electorate’s voice and who commit the electorate to public policy. In republics like ours, delegation of authority to elected officials for short, fixed terms subject to renewal should be the norm. This process is tied closely to consent and accountability. Indeed, “[r]epresentation entails accountability: somehow representatives are held responsible for their actions by those they claim to be entitled to speak for.” Guillermo O’Donnell, *Delegative Democracy*, 5 J. DEM. 55, 61 (1994). In the structure of American republican democracy “accountability runs not only vertically, making elected officials answerable to the ballot box, but also horizontally, across a network of relatively autonomous powers, (i.e. other institutions) that can call into question, and eventually punish [checks and balances] improper ways of discharging the responsibilities of a given official.” *Id.* Indeed, it is fair to say that delegation, representation, and accountability are essential ingredients of republican democracy. “Representation and deliberation constitute the *republican* dimension of republican democracy.” *Id.* Accountability and consent constitute its *democratic* dimension.

⁴⁶ Currently, the amount of money spent and attention paid to judicial nominations rival presidential elections. Rather than trying to persuade 101 Americans, the attempt should be to persuade all American citizens directly. Of course, campaigns for judicial nominees are usually directed at special interest groups whose support is regarded as essential for the Senate to approve a particular candidate. However, this leaves the ordinary, unaffiliated citizen out of the process. The argument for electing Justices is forcefully, if not entirely convincingly, presented in RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* (2005).

participate in the selection of federal judges. Yet, the ultimate employer plays a marginal role in this process at best.⁴⁷

However, even conceding input-accountability, for the sake of argument, it is quite clear that the Court fails to satisfy the other two prongs of the accountability test. It fails the second prong because American constitutional culture inhibits congressional interaction with the Court, and citizens are discouraged from informally communicating with sitting judges. It fails the third prong because short of the highly ineffective method of impeachment, there is little one can do to remove a sitting judge, especially Justices, from the bench.

The failure of the judiciary to satisfy this three-pronged test of democratic accountability gives substance to Alexander Bickel's famous accusation that "judicial [supremacy] is a deviant institution in American democracy."⁴⁸ Judicial [supremacy] is deviant, not because it is the only practice in American government exhibiting counter-democratic features, but because courts are not even designed to satisfy the accountability test. Yet, this deviant, accountability-deficient institution has the power to veto laws enacted by officials who are accountable to the electorate. In order to defeat this charge of deviance, supporters of judicial supremacy must demonstrate how federal judges satisfy the test for democratic accountability. If that cannot be done, they must show why the test is inadequate and replace it with a more attractive test. Though numerous rationalizations attempt to do this, in my view, none have succeeded.

The democratic unaccountability of the courts should not be obscured by glib references to counter-democratic features of other aspects of American government.⁴⁹ It is far from obvious that these other counter-democratic features have the same negative effects of self-government as the counter-democratic effects of judicial supremacy, and if they do, the natural response is to eliminate them also.⁵⁰ This means that the character of our form of self-government

⁴⁷ The electorate selects these 101 or 102 officials when the Vice-President is needed to break a tie vote. If accountability for judicial decisions is taken seriously, the role of the electorate or its representatives needs to be more direct.

⁴⁸ BICKEL, *supra* note 8, at 18.

⁴⁹ Glib rationalizations of the judiciary's deviance are legion. The more common ones include: courts are necessary to ensure that the majoritarian branches remain faithful to the Constitution; minorities—both electoral and racial—need judicial protection; and courts are necessary in general to prevent the abuse of power. These are *rationalizations*, not justifications, because their supporters appear oblivious to the problem of *judicial* constitutional failure. Congress might abuse power in these ways, but so might courts. When Congress abuses power, in principle, there is an effective remedy, not so with the courts.

⁵⁰ This may seem utopian, but keep in mind, the genuinely utopian nature of the American Revolution. The founding generation was, as Gordon Wood exclaims, "expressing nothing less than a utopian hope for a new moral and social order led by enlightened and virtuous men." GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION 189-90* (1992). Our republican revolution was the greatest utopian movement in American history. The

needs to be clarified. Are we committed to self-government with deliberative filters or constraints, but shorn of democratic dead-ends, or are we satisfied with such dead-ends just so long as we believe the substantive results to be acceptable?

This Article is devoted to the question of whether current judicial practice is compatible with republican democracy. One should not assume that a commitment to simple majoritarian democracy drives this complaint. Even if the legislature required a super-majority or a plurality to enact laws, or even if there existed a sophisticated set of obstacles a bill was required to navigate before it could be law, permitting non-majoritarian rule, the complaint against the American judiciary is that there is no way to hold Justices accountable when they strike down these laws. When we resist the Court's power to strike down such legislation, the motive cannot be a commitment to majoritarianism; rather it is the respect for accountability.

Respect for accountability applies to each part of the machine of self-government, which includes the electorate, representatives, appointed government officials, the media, civil society, and so forth. These constitutional and lawmaking actors perform in a cyclical practice where few issues are permanently off the table, even in a society that champions judicial supremacy. This cyclical practice gives a republican democracy life and that life reinforces the cyclical practice. The question judicial supremacists must answer is whether a single branch of government in that cycle should have the capacity to bring the lawmaking process to a halt, even for only a decade or two.⁵¹ Less tendentiously, should one branch of government have its say without the electorate effectively holding its members accountable?⁵² Even if the

revolutionaries aimed at nothing less than a reconstitution of American society. They hoped to destroy the bonds holding together the older monarchical society—kinship, patriarchy, and patronage—and to put in their place new social bonds of love, respect, and consent.

Id. at 229.

⁵¹ In discussing the new Court, Ronald Dworkin laments that “[w]e may be on the edge of a new, long, and much darker era of our constitutional history.” Dworkin, *supra* note 1, at 16. Why would any republican democrat support an institution—removed from republican democratic accountability—that can bring on the Dark Ages? Legislatures cannot do anything comparable. For legislatures to bring on the Dark Ages, the electorate must repeatedly support it. In that case, the electorate chooses the Dark Ages, which any republican democrat must acknowledge is part of the price of republican democracy, and can be challenged as soon as the next election.

⁵² It could be argued that this accountability problem is not a real problem, because, for example, the elected branches nominate and confirm judges and the politics involve guarantees that the appropriate nominees are selected. Also, accountability must be directly to the Constitution, not to a contemporary majority. Further, since the electorate acquiesces to judicial supremacy, no problem of accountability arises. However, input-accountability, even when satisfied, is insufficient to guarantee full accountability. Accountability asks who decides whether the government is accountable to the Constitution. And finally, how does acquiescence satisfy questions about accountability? How can the electorate demonstrate its non-acquiescence

benefits of such an institution were considerable, the institution itself compromises republican democratic legitimacy.

We have now narrowed that question of the compatibility of republican democracy and judicial supremacy to the question of whether the courts are sufficiently accountable. If they are, how so? If they are not, why not? And finally, if the Court's lack of accountability is a problem, how can we fix it? What additional mechanisms will render the Court accountable to the people or the people's representatives? The doctrine of judicial supremacy rejects the accountability problem. Let us explore this doctrine in greater detail.

II. JUDICIAL SUPREMACY

The idea of judicial supremacy is not self-interpretive. Just what it means—and whether it exists at all—is controversial. Roughly, judicial supremacy authorizes the courts to review both state and federal statutes, and other governmental action, in order to ascertain whether they comport with the Constitution. If the statutes fail this test, the Court is authorized, according to this doctrine, to strike them down. This means that the Court generally has the final say in resolving constitutional conflicts. Thus, judicial supremacy includes, but is not limited to, judicial review. Roughly speaking and as a slogan only, judicial review plus finality equals judicial supremacy.⁵³ Hence, this general doctrine of judicial supremacy maintains that the Supreme Court is the final (and often exclusive) arbiter of constitutionality in the American democratic republic.⁵⁴ In the next section, I mention some

by mobilizing to influence input-accountability? That is playing the game, not repudiating it. Ideally, the electorate could seek to change the system through Article V. But given the arduousness of that process, acquiescence cannot be taken seriously as an indication of what the electorate thinks the appropriate role of the courts should be.

⁵³ At the outset, it is important to realize that judicial supremacy does not mean that courts have an absolute final say on constitutional meaning. Because Article V grants the government and the people the permanent authority to overrule the Court, nothing the Court does can be absolutely final.

⁵⁴ Uncritically insisting, it could be argued, that the Court has the final say overlooks important evidence to the contrary. For example, who had the final say to determine whether a national bank was constitutional? Was it Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), or President Jackson when he vetoed the bank's reauthorization for constitutional reasons? This example is perplexing. Given our system of judicial review/supremacy, *McCulloch* established the permissibility of a national bank, not that such a bank is required. Vetoing reauthorization—even for constitutional reasons—does not necessarily say anything authoritative about the bank's constitutionality. The constitutional permissibility established in *McCulloch* persists and the next Congress and president can decide to enact such legislation without a thought to Jackson's veto. Consider Jackson's constitutional reasons for rejecting the bank.

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to

objections to setting up the problem of judicial supremacy in this manner, but for now let us simply point out that judicial supremacy is a law-making process different from ordinary legislative lawmaking.⁵⁵ And while overturning the results of ordinary legislative lawmaking is difficult, reversing Supreme Court decisions is much more onerous. Even if judicial lawmaking contributes to the health of republican democracy in some mysterious manner, judicial supremacy, as a lawmaking process, differs significantly from ordinary lawmaking. It is more permanent, deeper, and more controlling than its legislative counterpart.

A. *Questions of Meaning and Questions of Institutional Responsibility*

Understanding judicial supremacy requires distinguishing between the question of interpretation and the question of institutional authority. The first question asks which interpretive methodology is appropriate for ascertaining the Constitution's meaning.⁵⁶ The familiar interpretive

support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.

BRANDS, *supra* note 2, at 469.

It is true that the dialogic process never really ends. When the Court strikes down a statute, it starts a deliberative conversation, which may lead in turn to judicial appointments that reverse the former decision. But this process of transformative appointments is arduous and does not guarantee success. Moreover, even on its own terms, it is problematic. Because everything seems directed to what the Court says, the process of unfettered deliberative interactions between and among citizens and between citizens and their representatives is distorted. When courts are the ultimate arbiter of constitutional meaning, the conversation typically targets the abuse of power, not the substantive constitutional issues. Deny this role, and substantive arguments on the merits of the controversy are likely to occur.

⁵⁵ At one point in our history, constitutional law was viewed as higher law and perhaps by some not even law at all, in the adjudicative sense. But over the course of our history, the Constitution was transformed into a legal document subject to legal analysis and interpretation. Gordon S. Wood refers to this as "the legalization of fundamental law" which in his view "might equally be called 'the domestication of the Constitution.'" Gordon S. Wood, *Judicial Review in the Era of the Founding*, in *IS THE SUPREME COURT GUARDIAN OF THE CONSTITUTION?* 153, 164 (Robert A. Licht ed., 1993); see also STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 144-45 (1998).

⁵⁶ The interpretive question seeks to ascertain which principles are contained in the Constitution. Answers to this question are not obvious and first require determining how judges should decide which "principles are in the Constitution." Dworkin, *supra* note 1, at 16. Merely barking out that some right is or is not in the Constitution does not make it so. Similarly, when judicial candidates proclaim their intention to follow the rule of law, they tell us nothing. The

theories include constitutional textualism, originalism, structuralism, passivism, historicism, precedent, and pragmatism. An ideal situation would be one in which one of these interpretive theories proved to be most compelling and that a reflective consensus existed about its application to concrete cases.⁵⁷ But we are far from the ideal. An interpretive consensus requires too many conflicting factors, which results in the likelihood of reasonable disagreement.⁵⁸ Hence, the appropriative methodology for construing the Constitution will remain essentially contested.⁵⁹

This point needs to be amplified. The persistence of reasonable disagreement in republican democracy must be acknowledged and understood. Besides bad faith, false consciousness, and logical and factual mistakes, constitutional judgment reflects the complexity of reasoning about constitutional meaning and the political good. One need not be a skeptic to recognize, perhaps even valorize, the fact that each individual occupies his or own perspective. From these different perspectives, individuals derive different values. Moreover, even when they share the same values, they often weigh or rank them differently. In other words, legitimate, non-skeptical, obstacles exist that may preclude consensus at least through any given era. This is not to say that constitutional interpretation can never form a reasonable consensus.

critical issue remains: How do they propose to determine what following the rule of law means in general and in particular cases? Since there is—and never will be—lasting consensus on how to answer these questions independently of political, moral, and jurisprudential commitments, why give unelected officials the final say in this matter?

⁵⁷ Alternately, our circumstances would be virtually ideal if we possessed a well-accepted hierarchy for using various interpretive factors in analyzing any constitutional question.

⁵⁸ This raises more than conflicting factors. It means that reasonable disagreement in constitutional debate is likely to be with us perennially. Consequently, it is highly unlikely that the prospect of reasonable disagreement will permit either an uncontroversial articulation of such a hierarchy or an uncontroversial application of such a hierarchy if one was articulated. These obstacles to agreement are often referred to as “the burdens of judgment,” and they reveal the sources explaining the persistence of reasonable disagreement. These sources include (1) the complexity of empirical factors relevant to a judgment; (2) the difference in weight placed on relevant empirical factors; (3) the indeterminacy associated with concepts and the need for interpretation; (4) the difference in life experiences and the effect this difference has on our judgments; (5) different kinds of normative factors with their concomitant difference in normative force generate different judgments; and (6) the difficulty in selecting the appropriate subset of values from the society’s actual set of “cherished values” and the difficulty in determining the priority of the values finally chosen. JOHN RAWLS, *POLITICAL LIBERALISM* 54-58 (1993).

Recently, Laurence Tribe, the author of an important constitutional treatise as well as a premier constitutional scholar, announced that he would not complete the third volume of his treatise on American constitutional law because he was “afraid that the[] sharp splits on the Court reflect a . . . fundamental and seemingly irreconcilable division within legal and popular culture that is not amenable to the treatment that a treatise might hope to give such cases.” Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2D 291, 302 (2005). Although Tribe contends that this division is a recent factor, the persistence of the burdens of judgment suggests that there will always be irreconcilable differences within any democratic legal culture.

⁵⁹ W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167 (1956); Alasdair MacIntyre, *The Essential Contestability of Some Social Concepts*, 84 ETHICS 1 (1973).

Rather the point is that such a consensus is never guaranteed, especially concerning hot-button constitutional controversies. Acknowledging the persistence of reasonable disagreement in cases of constitutional interpretation suggests that the question of institutional responsibility should be prior to the question of interpretation.⁶⁰

Accordingly, the question of institutional responsibility brackets the interpretive question and simply asks which constitutional actor(s) should be responsible for interpretation regardless of the interpretive theory adopted.⁶¹ Whatever the proper methodology for interpreting the Constitution, the problem of accountability casts doubt on whether the Court's interpretation should prevail.⁶² The institutional question admonishes us to delay asking what the Constitution means until we answer the question of who is authorized to decide its meaning. And once that is done, the question of interpretation is assigned to that authority.⁶³

To put this point differently, the perennial debate over the correct interpretive methodology is the search for which constitution is *our* Constitution. Among the candidates are: the living Constitution, the strictly constructed Constitution, the perfect Constitution, the strategic Constitution, the modest Constitution, the interpretable Constitution, the dynamic Constitution, the settled (or unsettled) Constitution, the sedimentary Constitution, the partial Constitution, the emergency Constitution, and the Constitution in exile. This Article does not enter

⁶⁰ Two approaches to the question of institutional responsibility suggest either: (1) choose the institution most likely to bring about the substantively correct result, or (2) choose the institution closest to the authentic sovereign authority. The first approach is a nonstarter. If reasonable disagreement applies to the question of which interpretive methodology is correct, then it also applies to the question of which institution is most likely to generate the correct interpretation. Indeed, the persistence of reasonable disagreement applies to both applications. The second approach identifies the sovereign authority as the appropriate institution to settle substantive controversies in light of the persistence of reasonable disagreement.

⁶¹ The institutional issue involves two important questions. First, who decides the constitutionality of governmental action? And second, how does the appropriate constitutional actor execute its responsibility? For example, if Congress should have the interpretive authority in federalism cases, it might enforce this authority by regulating the Court's appellate jurisdiction through Article III, Section 2. If the Court has the authority to decide, it might do so by deferring to Congress's override or by applying a heightened standard of review.

⁶² Judicial supremacy, for many, is an entrenched feature of American constitutional practice. Indeed, some cannot imagine eliminating it. The following are some of the more potent defenses of judicial supremacy: (1) the policing function of the courts defense; (2) the individual rights defense; (3) the under-enforcement defense; (4) the settlement function defense; (5) the unsettlement defense; and (6) the defense from second-order constraints. These defenses all point to the dangers of unchecked legislatures, but none considers the dangers of unchecked courts. I critically examine these and other rationalizations in an unpublished article. Robert Justin Lipkin, *What's Wrong with Judicial Supremacy? What's Right About Judicial Review?* (2006) (on file with author).

⁶³ Chief Justice Marshall only partly recognizes that "the question-in-chief" is the institutional question of "who should be empowered to decide that the act is repugnant." BICKEL, *supra* note 8, at 3.

the dispute over which constitution is our Constitution. Instead, it addresses the question of who should decide this issue.⁶⁴

In this light, we can plainly see that the move from the idea of constitutionalism or a written constitution to judicial supremacy is a powerfully dangerous *non sequitur*. The question of whether the constitutional text sets at least some parameters for lawmaking is a question quite distinct from the question of which branch or political entity is assigned the responsibility of interpreting the Constitution. Only when our political consciousness is captured by the cynical assumption that no society, not even a mature republican democracy, can take principles and rules seriously, does the jump from constitutionalism to courts become even remotely plausible.

This Article answers the question of institutional responsibility by designating Congress as the penultimate constitutional interpreter, one step short of the ultimate interpreter: the electorate. Constitutional review then becomes, institutionally, legislative supremacy with the electorate having the final say over constitutional meaning. Before describing the congressional override, some preliminary issues must be examined. The first issue warns against the distorting effects of the entrenched understanding of judicial review and constitutionalism.

B. *The Entrenched Understanding of the Role of the Courts in American Constitutionalism*

Keep in mind that the question of judicial supremacy has been debated so often that it is difficult to find anyone left possessing a genuinely open mind regarding this practice. Let me describe several elements in what I consider to be our “entrenched understanding of the role of the courts in American constitutionalism,” or the “entrenched understanding” for short. By “entrenched understanding,” I refer to a set of reflexive attitudes toward the judiciary so deeply ingrained that challenging them becomes almost impossible.⁶⁵

⁶⁴ In the final analysis, all three branches of government, the states, the citizens, and even broader social factors play a role in choosing which Constitution is ours. My goal here is limited to examining which branch of government should have the final say in constitutional interpretation.

⁶⁵ The entrenched understanding involves a virulent form of constitutional denial. Rather than recognize some of the more ludicrous aspects of our judicial culture we simply ignore or ritualize them. One example of the former is that we brush under the rug the fact that 105 Supreme Court decisions since 1995 have struck down federal laws by a 5-4 vote. How can two almost equally reasonable or plausible points of view be decided by one individual outside of the legislature? An example of the latter is the ceremonious way Senate confirmation hearings occur. How can such a small, remote group of officials—such as federal judges—wield so much power and occupy such a prominent role in our constitutional consciousness?

We all, to be sure, suffer from some sort of constitutional denial. I can be accused, I

The first element of the entrenched understanding is that judicial supremacy is required to protect minority rights. If legislatures were the guardians of constitutional meaning, they could run roughshod over the Constitution, thereby jeopardizing individual and minority rights.⁶⁶ Second, a corollary of this position is that self-government is dangerous or at least suspect. Leaving political decisions to the masses can result in mobocracy, which the U.S. Constitution is specifically designed to prevent.⁶⁷ Third, preventing the adverse effects of mobocracy requires a governmental body insulated from the direct influence of either the electorate or its representatives.⁶⁸ Fourth, because a guarantor of correct constitutional interpretation is required, a governmental body having the final say over constitutional meaning is needed,⁶⁹ and this body must be assured that its decisions will not jeopardize the offices of its members. As political scientist Walter F. Murphy puts it, “[t]here is a magnetic attraction to the notion of an ultimate constitutional interpreter, just as there is a magnetic pull to the idea of some passkey to constitutional interpretation that will, if properly turned, always open the door to truth, justice, and the American way.”⁷⁰ Fifth, without such an independent

suppose, of denying the risks associated with a congressional override. However, I do not *deny* these risks. Rather, I think these risks are worth taking. Risk-aversion is only conceivably justified if one can demonstrate that courts are clearly better—historically and normatively—constitutional interpreters than legislatures. I am unaware of any such demonstration. Judicial supremacy is firmly anchored in our constitutionalism consciousness, not because of demonstration, but rather due to the unsupported attitudes in the entrenched understanding.

⁶⁶ The evidence is to the contrary. In my view, the best, brief attempt to evaluate the judicial role in guarding minority rights is Louis Fisher, *One of the Guardians Some of the Time, in IS THE SUPREME COURT GUARDIAN OF THE CONSTITUTION?*, *supra* note 55, at 82.

⁶⁷ It is a mistake, I would argue, to say, as Laurence Tribe does, that eliminating judicial supremacy confuses “[c]onstitutional democracy under the rule of law with mob rule.” Laurence Tribe, *On Judicial Review*, *DISSENT MAGAZINE*, Summer 2005, available at <http://www.dissentmagazine.org/article/?article=219>. According to Tribe, “[w]hen the Supreme Court enforces what it understands the Constitution to mean, it is enforcing what ‘the People’ solemnly imposed upon themselves and their ‘Posterity’ in the very act of ratifying or amending the Constitution.” *Id.* But who constitutes “the People”? White propertied males? More importantly, this position conflates the question of whether it is the people’s ratified Constitution that should be enforced with the question of who decides what this Constitution means. Tribe continues: “[t]he professional and cultural pressures inevitably shaping judicial thought, coupled with the highly political process that puts the justices in power, ensures that, if anything their reading of [the] Constitution might hew *too* close to that of a contemporary majority.” *Id.* But this perspective then says judicial review protects us against mobocracy but in the end reflects the majority’s political values. Something is radically wrong with such a perspective.

⁶⁸ After Andrew Jackson’s first inauguration, hordes of democrats accompanied the new president to the White House and a virtual riot ensued as a mob broke glass, destroyed furniture and bloodied noses. As Justice Joseph Story characterized it: “The reign of King ‘Mob’ seemed triumphant.” BRANDS, *supra* note 2, at 412-13.

⁶⁹ Recall Justice Robert A. Jackson’s remark: “We are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result).

⁷⁰ Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 *REV. POL.* 401, 417 (1986).

governmental body, the very distinction between constitutional law and ordinary law cannot be sustained. And finally, somehow Justices are better equipped by experience and study to interpret the constitution.

There are alternative and more complete characterizations of this entrenched understanding, but my goal here is simply to present a rough approximation of its content. The more important point is that this entrenched understanding more often than not is subliminal and as such typically functions as a hidden obstacle to impartially evaluating alternative conceptions of constitutionalism. For now, keep in mind that the entrenched understanding takes judicial supremacy to be an unexamined, intuitive given, possessing subliminal power to reject an honest consideration of alternatives. Rejecting such alternatives out of hand, as the entrenched understanding insists, renders significant constitutional change virtually impossible.

Let us imagine being freed from the entrenched understanding's deep and rigid grasp. Suppose instead we play agnostics regarding the proper judicial role in a republican democracy. What sorts of external mechanisms for disciplining the courts are available? As earlier indicated, this Article examines the remedy of a congressional override, but that does not mean that other remedies should not be explored also. The entrenched understanding anchors and camouflages the doctrine of judicial supremacy in the conceptual space of American constitutionalism, and identifies judicial constitutionalism with constitutionalism generally. As agnostics regarding the role of the courts, we must state clearly just what the doctrine of judicial supremacy means.

C. *Four Kinds of Judicial Supremacy*

The general conception of judicial supremacy maintains that the judiciary has final authority in determining constitutional meaning. Four versions of this general conception have special interest: (1) *Complete Judicial Supremacy*: The strongest claim of judicial supremacy contends that the Supreme Court is in fact the final (and exclusive) arbiter of constitutional meaning pertaining to every aspect of government. No change in constitutional meaning ever occurs except through the Court or Article V. (2) *Incomplete Judicial Supremacy*: In this view, the Supreme Court has final (and often exclusive) authority over a rather large range of constitutional questions, but some questions are beyond its reach. The passive virtues and the political question doctrine remove several important constitutional issues from judicial

review.⁷¹ (3) *Question-Relative Judicial Supremacy*: This version of the doctrine picks out one set of issues, for instance, structural issues or individual rights, and contends that the Court has relative or provisional final (and often exclusive) authority over those issues, but not others. The political safeguards argument is a good example of question-relative judicial supremacy. Here the argument would be that Congress has final authority over constitutional meaning regarding federalism but not other constitutional issues such as individual rights. (4) *Limited Judicial Supremacy*: The Supreme Court has final authority over some delimited range of controversies, for instance, controversies in the so-called culture wars, or federalism, or both.⁷²

Complete judicial supremacy maintains that courts are always the final arbiters of constitutional meaning throughout American government, except when Congress, the states, and the people invoke Article V. Because some questions of constitutionality never appear before the Court, this is too strong a conception of judicial supremacy. And while incomplete judicial supremacy and question-relative judicial supremacy are plausible, in this Article, I defend only limited judicial supremacy. However restricted this class of cases is—and I concede for argument sake that it is a narrow class—the issues involved are often just those hot-button controversies that become the focus of national attention when the Supreme Court decides them.⁷³ Since the Court often has a relative or provisional final say over these issues, the question arises whether such a practice is consistent with republican democracy.

To summarize, there seems to be an accountability problem regarding judicial practice, and we need a remedy if the courts are to assume their rightful place in our republican democracy. Therefore, the

⁷¹ Even in this case, however, both the passive virtues and the political question doctrine are judge-made. Conceivably, a future Court might whittle down these limitations or eliminate them entirely. In fact, the political question doctrine has already withered on the judicial vine. 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, 242 (2002) (contending that judicial supremacy is at odds with the political question doctrine).

⁷² Even some writers who are generally critical of judicial supremacy concede that in some cases the Court's decision is final. NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* 232 (2004). Just how to pick these conflicts out conceptually is a difficult task. Abortion, same-sex marriage, and church/state conflicts seem clearly to fall into this category. However, even limited judicial supremacy is unpredictably expansive. We know that judicial supremacy applies to most individual rights, federal action, and state action. But we do not always know in advance the precise parameters of its range. The persistent possibility of the Court entering new constitutional arenas—for example, *Bush v. Gore*—as well as revisiting old ones, precludes specifying judicial supremacy's range with any great precision.

⁷³ I must emphasize the fact that this type of judicial supremacy does not denigrate the contributions of other branches of government in constitutional change. For example, the President and Congress played a significant role in creating the so-called "imperial presidency" and the administrative state, both of which constitute significant constitutional changes.

question of interpretation is less critical than fixing this accountability problem. Before pursuing a remedy, let me discuss a series of objections against framing the question of judicial supremacy in this manner. In general, these objections seek to reject or deflate the purported salience of the countermajoritarian difficulty or any other complaint that judicial practice is riddled with democratic deficiencies. They sometimes even deny the existence of judicial supremacy completely.

III. WHAT COUNTERMAJORITARIAN PROBLEM?

Increasingly, objections have been raised challenging the conceptualization of the *problem* of judicial supremacy as countermajoritarian or counter-democratic. These objections are advanced mainly by constitutional scholars, especially political scientists. Ironically, these objections arise just when our popular constitutional culture seems to suggest that the Court unjustifiably wields enormous power. For example, former Chief Justice Rehnquist repeatedly located the Court as the exclusive forum of constitutional review. We are inundated with the entrenched understanding from the media every time there is a vacancy on the Court. The ordinary informed citizen would be surprised at this split between these scholarly accounts of the role of the judiciary and his or her own view of the Courts' role. The non-legal intellectual elite fortifies this view of the courts as the exclusive means of constitutional change. Perhaps, the best recent example of this split lies in the curious fact that just when constitutional scholars are casting doubt on the importance of *Marbury v. Madison*, Senator Mike DeWine, Republican of Ohio, a member of the judiciary committee, referred to this case as a superprecedent, one that cannot even be questioned. Casting doubt on the importance of *Marbury* and deeming it to be a superprecedent, while not formally contradictory, certainly creates in an uneasy tension. The following section, though hardly exhaustive, examines objections designed to deflate the democratic deficiencies of American judicial supremacy.

A. *American Government Was Designed to Be Countermajoritarian*

One recurrent response to the charge of countermajoritarianism is that it overlooks the other countermajoritarian features of American self-government. Federalism, separation of powers, the Electoral College, the Senate, and a host of informal practices such as the filibuster, the seniority system, the process of redistricting, and so forth,

are all countermajoritarian features of American government. The overall design of American constitutional government was deliberately intended to be countermajoritarian. The goal was to combine democratic self-rule with the protection of individual rights. It is foolhardy, therefore, to conflate democracy with majoritarianism. The Constitution's purpose was specifically designed with countermajoritarian elements to prevent majoritarian democracy from taking route. Thus, pointing out the countermajoritarian nature of judicial supremacy is a non-starter.

Recognizing that American self-government is considerably more complex than majoritarianism does not render democratic objections to the Court moot. Indeed, we can say that the Court's countermajoritarian role is not a problem at all, but its counter-*democratic* or counter-*republicanism* role is. We cannot escape the problem of judicial supremacy by insisting our nation is a republic. Any form of self-government must confront the challenge judicial supremacy poses. To put this point differently, republican democracy might include all sorts of deliberative filters to derive and refine the community's reflective judgment from the people's raw, immediate, and transient beliefs. The question is whether, after all this filtering occurs, the final ratification of the refined judgment is effectively the people's. Judicial review might very well qualify as such a filter. However, for judicial review to avoid dead-end republicanism, the electorate must have some way other than the arduous process of Article V to reject the results of filtering.⁷⁴ In other words, it is clear that republican democratic law-making permits us to hear the voices of the better angels of our nature through countermajoritarian structures, and perhaps judicial review is one of them. However, in the end, the people must be capable of effectively rejecting the result of this process. In a republican democracy, the possibility to create constitutional evil must be preserved because self-government is illusory without it.

The point here is that the problem of accountability remains even after distinguishing between majoritarian democracy and republican democracy. Accountability must be available in any type of democracy worthy of the name, and if a system of unelected, life-tenured, virtually unaccountable judges cannot satisfy the requirements of accountability, then such a system presents a problem for republican democracy as well as for majoritarian democracy. Republican democracy permits

⁷⁴ The objection to Article V is that it is difficult to satisfy; therefore, formal constitutional change must be extremely slow. Of course, constitutional change should not be impetuous. But some balance is required between constitutional change that occurs too quickly, on the one hand, and arduously slow and ineffective constitutional change, on the other. If Article V included a more effective and reasonable process of constitutional change, there might be no need for a congressional override. But that is not the case and probably never will be. In order to amend Article V, it is first necessary to satisfy its requirements, and that is precisely the problem.

deliberative filters for encouraging majority rule to reflect the community's reflective judgment. The question is not whether such filters are permissible, but rather whether the filter of judicial supremacy provides sufficient accountability to be included in republican democratic government.

A variant of this objection distinguishes between the Court as a countermajoritarian institution and the Court as an illegitimate institution.⁷⁵ The Court's legitimacy is secured if it gives a voice to "interests overlooked in other institutions, thereby expanding the bases of consent[.]"⁷⁶ However, this assumes, contrary to fact, that the Court's countermajoritarianism always works in favor of "expanding the bases of consent." If that is tantamount to giving minorities a greater voice by protecting their rights,⁷⁷ then the history of constitutional law is replete with counter-examples.⁷⁸ Just as important, if the marginalized and excluded were given a motive to vote—for example, by public funding of elections, thereby eliminating wealth as a pre-condition of running a successful campaign—they would be more likely to be able to protect themselves.

Even if these counter-examples can be explained away, there exists an important objection to the doctrine that the entire system can cure the effects of one counter-democratic part of that system as a whole. If the parts of a non-unified government need not be accountable in themselves, there is a danger that we can never have a truly accurate assessment of the accountability of the entire system. The reason is that hidden elements of unaccountability may remain concealed and their effects on the operations of the whole system unnoticed.⁷⁹ Indeed, in a

⁷⁵ 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 (Kenneth D. Ward & Cecilia R. Castillo eds., 2005).

⁷⁶ *Id.* at 139.

⁷⁷ Contemporary research suggests that over the course of American constitutional history, Congress has better protected individual rights, especially the rights of minorities than does the Court. See generally REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION AND THE PROTECTION OF INDIVIDUAL RIGHTS* (2006).

⁷⁸ Consider *Dred Scott*, the Civil Rights cases, *Plessy*, the early free speech cases, *Korematsu*, and recent free exercise cases. Even if these cases came out differently, the effects would still restrict someone's rights.

⁷⁹ Mark Tushnet, for example, introduces an intriguing conception of the Court's role. According to Tushnet, the Court engages in collaboration and confrontation with other branches of the government and by doing so sets the stage for a new political order. Mark Tushnet, *The Supreme Court and the National Political Order: Collaboration and Confrontation*, in *THE SUPREME COURT & AMERICAN POLITICAL DEVELOPMENT* 117, 117 (Ronald Kahn & Ken I. Kersch eds., 2006). Consequently, "a collaborative Court also can strengthen the normative case for judicial review, limiting the sting of the charge that judicial review is necessarily countermajoritarian." *Id.* But we should be careful before accepting this conclusion. In a political system containing a collaborative and confrontational Court, the Court's unaccountable confrontational role may be disguised by its collaborative role within the system. What justifies

government where authority and power are deliberately dispersed, without requiring each branch to be accountable, systemic unaccountability can be hidden in ways that betray republican democracy.

More significant, if the touchstone of legitimacy is merely whether a particular branch of the government or a particular type of government represents the people's interests best, then in principle, a monarchy or compassionate dictatorship might in some circumstances achieve this goal better than a republican democracy.⁸⁰ In that case, we must revise our views about the importance of republican democracy as our national creed. If our goal is that the government should reflect the people's interests by whatever means, then perhaps republican democracy is not necessarily the best means to achieve this goal.⁸¹ The point here is that in certain circumstances it might be irrational to choose republican democracy over a dictatorship. Indeed, when people know they are ill-informed about what is truly in their interests, they might vote for a dictatorship. However, as Jeremy Waldron writes, "[w]hen the people vote for dictatorship, maybe dictatorship is what they need, and maybe dictatorship is what they should have, but let us not kid ourselves that dictatorship is therefore a form of [republican] democracy."⁸²

Fortunately, there is no compelling reason to further explore this possibility. That the Court represents excluded interests does not explain why it should have a relatively *final* say in this process. More important, the value of representing excluded interests must be assessed in terms of the countervailing value of the people bringing about the

this? And what implications for the accountability of the system as a whole does the Court's special capacity have? A confrontational Court does not escape the counterdemocratic charge even when it sometimes acts collaboratively. Indeed, the complaint remains that the electorate or its representatives need to consent to the Courts confrontational role—as well as its collaborative role—in order to satisfy constitutional legitimacy.

⁸⁰ A Saudi Arabian woman clearly stated that full democracy is undesirable because the people and policies she disdains might prevail. She preferred instead a "positive dictatorship." Radio Broadcast: WHYY-Public Radio, Philadelphia, Pennsylvania (Feb. 23, 2006) (transcribed by author). Americans need to reconcile their endorsement of democracy with their tolerance of the many anti-democratic features of contemporary American government. Do you want a "positive dictatorship" or not? Do you want a pure republican democracy or is a hybrid government of republican democratic elements and positive dictatorial elements acceptable? Perhaps, in the final analysis, such a hybrid government is what we will settle for. But let us first identify its hybrid character rather than insisting its positive dictatorial elements enrich republican democracy.

⁸¹ One might reply that a balance is needed between the value of self-rule and the value of satisfying the people's interests. Such a balance rejects complete majoritarian responsibility for knowing and implementing the means for achieving these interests. By instituting judicially-enforced constraints on oppressive legislation or legislation controlled by special interests, we effectively strike a balance between two desirable values. However, without specifying the precise criteria for balancing these values, this response remains radically incomplete. Who should get to decide how and when the balance is struck correctly?

⁸² Jeremy Waldron, *Precommitment and Disagreement*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 271, 278 (Larry Alexander ed., 1998).

representation of excluded interests *themselves*. When the elected branches constitute the battlefield for expanding the interests represented, the ultimate victory is more secure than when it comes about judicially. There is less resentment and continued opposition is more transparent. And even if the victory is not achieved at that time, republican democrats must learn to lose in the legislature and continue the battle in that forum. Shopping for forums for victory undermines the legislative process, which must be considered the hallmark of self-government. In short, expanding the range of interests represented without participation, consent, and accountability, tends to cast doubt on the authenticity of a republican democracy.⁸³

Finally, the present study is concerned with the inherent, normative elements of self-government. In short, it seeks to ascertain which institutions and practice republican democracy *should* possess. And while empirical reality is certainly relevant to the normative inquiry, the emphasis is on the most plausible and defensible understanding of “republican democracy” and the role of courts in that conception.⁸⁴ Some might resist this entire enterprise of philosophical analysis, and perhaps they are right to do so. But settling this issue must remain for another occasion.⁸⁵ If the normative claim that judicial practice is a

⁸³ Pointing out that the Constitution itself creates formal mechanisms that are counter-majoritarian or counter-democratic suggests that the government the Constitution creates does not comport with what most Americans take self-government to be. Thus, exploring the counter-majoritarian features of non-judicial institutions only compounds the criticism that American government has too many democratic deficiencies; it does not cure the ones the Court exhibits. By contrast, many, though not all, of the democratic deficiencies of American government can in principle be cured by politics.

It may be argued that the Constitution surely must be the touchstone of the kind of government Americans should prefer. Thus, if the Constitution belies the intent to create a democracy, then counter-democratic deficiencies cannot be regarded as a constitutional failure. But this reply plays havoc with America’s quest for independence. Colonialists did not wage a war of independence to establish the Constitution ratified in 1789. Rather, they spilled their blood for independence, equality, self-government, and the creation of a democratic republic. Thus, the baseline for evaluating American government should be the most plausible and defensible conception of self-rule. If we can agree on such a conception and it conflicts with the Constitution and the traditions arising informally from the Constitution, then we have our work cut out for us to change American constitutional government. Similarly, some might argue that the Constitution is designed to preclude self-government, not to enable it. If so, we have a choice: change these mechanisms or renounce the myth that ours is a democratic republic.

⁸⁴ See LIPKIN, *supra* note 4.

⁸⁵ The difference here might be between constitutional theory as political philosophy and constitutional theory as political science. Political philosophers, at least analytic political philosophers, are inclined to examine constitutional reality through an analysis of the central concepts of “liberty,” “equality,” and to a lesser extent “community,” and the additional terms they spawn. These and other concepts are critical terms in the evolution of constitutional theoretical discourse. Political scientists seem more inclined to examine constitutional reality by investigating how it actually works. There is a noticeable tension here. To shamelessly over-generalize, political scientists tend to resist the kind of philosophical analysis this Article advocates as unreflective of constitutional reality. Their impatience is understandable. Critical normative concepts often appear divorced from the actual workings of government. By contrast,

deviant institution in American constitutionalism because it arguably suffers from an accountability problem,⁸⁶ then this study's ultimate quest is to begin the task of fixing that problem.

B. *Judicial Decisions Are Not Final*

One complaint against judicial supremacy rejects its claim to finality.⁸⁷ According to this objection, judicial decisions are far from final. Rather, they can be reversed by repopulating the Court or by constitutional amendment. Similarly, future Courts can limit the effects of constitutional decisions by giving them a narrow interpretation, ignoring them, or by limiting their relevance in light of subsequent decisions. And the President and Congress can do the same. This objection overlooks the difficulty of ridding the nation of the effects of a judicial decision.⁸⁸ So while it is true that the Court lacks absolute finality, it does possess *relative* or *provisional* final authority over the acts of the other branches of the federal government as well as over state action that conflicts with the Constitution.

It is important to stress that the Court's decisions are relatively or provisionally final. They are never, and were never intended to be, final *tout court*, especially in light of Article V. With limited exceptions perhaps, no democratic institution can ever have absolute finality over its decisions. But the cost—in time, energy, and type of activity—required to overturn a judicial decision counts as evidence that judicial decisions are as final as one can get in a democracy. Legislative decisions can be overturned through politics, but needless to say, judicial decisions generally cannot. Thus, even conceding that judicial decisions are not absolutely final, asking for a justification of relative or

some political philosophers, for a host of conceptual reasons, are suspicious of the methodologies in social science as *bona fide* claims to knowledge. More important perhaps, political philosophers contend that before one can report on the actual operations of self-governance, one needs a pretty clear understanding of what the critical concepts in republican democratic theory mean. In the end, a complete understanding of constitutional reality requires both types of inquiries. The present inquiry attempts to contribute to the first type only.

⁸⁶ That the courts are a deviant institution does not mean we should abandon them. It does mean, however, that their place in a republican democracy needs to be reconsidered.

⁸⁷ Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 643-45 (1993). Even if the Court's pronouncements are never absolutely final, the electorate has only a minor and attenuated role in reversing them.

⁸⁸ This finality permits "the Court . . . for decades [to] stifle . . . reform on which there is widespread agreement." GRIFFIN, *supra* note 55, at 89. The Court possesses other powers not readily understood by the public. Consider: "to a certain extent, the Court's control over its docket gives it the power to act as a roving commission seeking out important constitutional questions. The Court can deliberately avoid cases that are poor vehicles for new constitutional rules and seek out cases that are good vehicles." *Id.* at 129.

provisional finality in terms of democratic accountability is nonetheless imperative.

Contemporary practice reveals many temporary stopping points, obstacles, and filters usefully occurring in the process of lawmaking. These elements often slow down the process through which a bill becomes law. And when these filters improve the final deliberative product, republican democracy is improved. However, whenever judicial process stops this process, the end is more permanent and more difficult to restart. When members of the elected branches slow down or terminate the process of lawmaking there is almost always a relatively effective remedy at least in principle: Throw the scoundrels out! When the Court slows down or terminates the process of lawmaking, the electorate is relatively disabled from remedying the problem.

C. *The Countermajoritarian Complaint is Overly Court-Centered*

A corollary—and popular complaint—amongst political scientists is that the countermajoritarian problem is court-centered, overlooking a host of other non-judicial contributions to constitutional meaning. Emphasizing the Court's salience in this manner conflates judge-made constitutional law with American constitutionalism generally. The latter depends on the operations of the entire government, the states, and the people, not just the courts.

This objection to the court-centered approach is nicely illustrated by the work of political scientist Kevin J. McMahon.⁸⁹ McMahon disputes the conventional depictions of President Franklin Roosevelt's contribution to civil rights, which say essentially that Roosevelt was sympathetic to the need to extirpate American apartheid, but lacked resolve to do so. Perhaps for good reasons, Roosevelt thought that pushing a platform that included civil rights would alienate Southern democratic support for his New Deal reforms. Since the Great Depression and World War II were major continuing problems for Roosevelt, civil rights were slighted. Consequently, *Brown v. Board of Education*⁹⁰ arose through the NAACP's litigation strategy without help from any branch of government other than the courts. Ultimately, the great *Brown* decision derives from a courageous Court acting alone without any interbranch assistance.⁹¹

⁸⁹ KEVIN J. MCMAHON, RECONSIDERING ROOSEVELT ON RACE: HOW THE PRESIDENCY PAVED THE ROAD TO *BROWN* (2004).

⁹⁰ 347 U.S. 483 (1954).

⁹¹ I explore this issue in greater detail in Robert Justin Lipkin, Haunted by *Brown* (2006) (unpublished manuscript, on file with author).

In McMahon's view, this conventional picture distorts the process Roosevelt used to create a Court that would be in a position to even consider desegregating public schools at some future moment. By appointing Justices who were liberal supporters of Roosevelt's economic policies and liberal also about race, the future Court would be in a position to consider striking down American apartheid.⁹² Thus, McMahon argues that *Brown* cannot be credited to the courts alone. Rather, *Brown* results from the interactions of the presidency and the courts.

McMahon is one of a growing cadre of political scientists intent on disputing that constitutional change is court-driven. While McMahon's controversial work is important, it does not appear to address the question of which branch of government had the constitutional authority and the relative or provisional final word in directly attacking racial segregation at the time *Brown* was actually decided. In *Brown*, the Court had the constitutional authority to order public schools to desegregate. Moreover, it seems highly unlikely that any other constitutional actor could do this. And so, *Brown* is a paradigm example of judicial supremacy. The existence of other constitutional actors leading up to *Brown* is important and noteworthy. Their role in the historical desegregation battle does not, however, defeat the historical and normative claim that the Court has and should have the authority to remediate constitutional defects, and that when the Court speaks, its decision should be final. That is true irrespective of what other non-judicial factors might be involved in the etiology of the decision.⁹³ However, whatever antecedent elements were necessary for creating a particular historical Court, if when the Court speaks its voice prevails, then that is a paradigmatic example of judicial supremacy. Requiring anything more stringent to count as judicial supremacy is to deviate from our ordinary understanding of that term. Keep in mind that, in any complex, institutionally inter-related government, there exist temporary stopping points in lawmaking, and the cost of moving on often varies. The problem with judicial supremacy is that it forestalls

⁹² McMahon's thesis is more complex than this. He focuses on Roosevelt's Department of Justice, which aimed at eliminating the white primary system in the South paving the way for African American support for his economic policies.

⁹³ Similarly, I do not dispute the political scientific evidence that the Court tries to avoid confrontation with Congress over issues within the latter's purview, that Congress sometimes deliberately relinquishes a question of constitutional interpretation to the Court or that the Court often acts consistently with popular opinion or with the majority of states. I do not possess evidence to refute any of these claims, but the Rehnquist Court's "New Federalism" ought to put the first claim in question. My interest is in the philosophy of democracy and whether judicial supremacy is compatible with republican democracy. In that regard, even if no actual instances of judicial supremacy existed, my inquiry would still be useful, although perhaps much less so than in the real world where everyone has a list of hot-button cases in which the Court overreached.

this process and brings it to a halt, sometimes for a generation, sometimes longer.

A variant of this objection denies the allegation that Justices have too much power or that the Court can function independently of the elected branches. For the Court to hear a case, a law must be passed, challenged, and litigated. The Supreme Court's ultimate disposition of this case relies on many other governmental and non-governmental factors besides a Supreme Court pronouncement. Thus, constitutional decision-making results from a host of factors rendering the court-centered approach simply erroneous.

Again, this reply misses the point and tends to underestimate the effects of judicial supremacy. The allegation that the Court possesses too much power does not mean that Supreme Court decisions occur in a vacuum without any other influences. Rather, it alleges that when all other factors have had their influence, the process and effect of the Supreme Court's decisions are removed from republican democratic accountability. Indeed, we are only now learning about the influence of Supreme Court clerks and their influence on the actual writing of opinions.⁹⁴ Here we have appointees—almost always recently graduated from law school—who sometimes write judicial opinions and almost always influence the content of the opinions. These clerks are an integral feature in the elite class of constitutional lawyers controlling the development of the Constitution removed from the people. Indeed, anyone who has ever had experience as a federal appellate clerk knows that institutional questions arise only indirectly. Instead, judges and clerks almost exclusively attend to the interpretive question. And even when institutional questions arise, the practice of judicial supremacy gives judges and their clerks the prerogative to settle them.

D. *Judicial Supremacy Is Majoritarian*

Another objection contends that empirical studies fail to support the claim that judicial supremacy has this countermajoritarian role. In this view, the Court often reflects popular opinion even if popular opinion runs counter to a legislative majority.⁹⁵ Assuming, for the sake of argument, that these studies are reliable, it is critical to note that pointing to the democratic deficiency of judicial supremacy is not a

⁹⁴ See ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* (2006) (reporting on a statistical study of the influence of Supreme Court clerks in constructing judicial opinions). The authors contend that "some aspects of the role of the modern law clerk tread perilously close to what many critics see as an unconstitutional abdication of the justices' duties." *Id.* at 246.

⁹⁵ Peretti, *supra* note 75.

descriptive contention, but a normative claim about what the role of the courts should be.⁹⁶

Thus, several points are relevant to this claim. First, assuming that many of the Court's decisions reflect popular opinion more than legislative acts do, what justifies the Court's decision when it *does not* reflect popular opinion? This objection does not seem to have an obvious answer. Second, and more importantly, empirical studies showing a correspondence between judicial decisions and popular opinion do not blunt the accountability problem. The accountability problem is directed toward the mechanism for selecting, influencing, and removing Justices or otherwise reversing their decisions when the electorate conscientiously believes these decisions to be constitutionally erroneous. This normative problem survives empirical studies showing that judicial decisions often reflect popular opinion and that legislative opinions often do not. Third, it is unclear why popular opinion should be taken as the baseline in a republican democracy. The electorate selects representatives to help craft the community's reflective judgments. Thus, the relevant majority should always be the majority of the representatives at the time that they enact legislation, not what various private polling suggests the public might want at some future time.⁹⁷ Fourth, if these studies prove what they claim, then precisely what do the courts contribute to the operations of American government? If, after all is said and done, courts provide no checking functions, but instead reflect the wishes of the legislature or popular opinion, what is the point of the courts at all? These rhetorical questions serve an important purpose. They warn us that it is extremely misleading to insist that courts reflect popular opinion in order to take the steam out of the problem of judicial supremacy. If judicial interpretations of the Constitution were always "mirror images of contemporary values . . . there would be no need for . . . courts to decide constitutional decisions. All constitutional questions could be left with legislative bodies."⁹⁸ Consequently, the role of the courts in policing

⁹⁶ *But see* Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257 (2006) (arguing that normative theorizing about judicial review should take into account empirical inquiries about how judges actually decide cases).

⁹⁷ Empirical studies showing that the Court reflects popular opinion as much as or more than the elected branches seem irrelevant to this issue for two reasons. First, transient popular opinion or polls are hardly the basis for assessing the community's reflective judgments. In republican democracies, the people choose their representatives. When legislators vote, they are responsible for their vote and accountable to the electorate. An individual responding to a pollster is responsible to one. Second, for every counter-democratic act by the elected branches, a relatively obvious remedy is available, namely, an electoral repeal. Is there an effective remedy for counter-majoritarian decisions of the Court?

⁹⁸ LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 2 (1992).

legislative choices counts against the supposition that their decisions reflect popular opinion.

A variant of this objection points out that when the Court strikes down state laws, even state laws that reflect popular opinion within the state, its decisions often reflect national popular opinion. Put differently, when striking down state laws, the Court reflects a national majority over a local majority, and thus still is majoritarian.⁹⁹ One problem with this objection is that sometimes in striking down state laws, the Court rejects both local and national majorities. *Texas v. Johnson*¹⁰⁰ and *Employment Division v. Smith*¹⁰¹ are examples of such Court decisions. I will examine these decisions in greater detail later, but for now let me say that such cases reveal judicial unaccountability to both levels of government. Further, since the United States government is designed to be a federal republic, there is no obvious reason why the Court should support national majorities over local ones. Here, just where the Court is supposed to protect minorities, state governments, and populations in states, it conspicuously fails.

A further variant of this objection contends that judicial supremacy is legitimate because the electorate in fact acquiesces to the practice of judicial supremacy.¹⁰² However, even if it is true that “judicial power rests on popular acquiescence,”¹⁰³ it hardly undermines the necessity of justifying judicial supremacy in a republican democracy. The public’s informal support of “the direction of judicial review and its existence,”¹⁰⁴ even if established, is irrelevant to the problem of judicial accountability. When do the people have a voice in formally embracing judicial supremacy (or not), and when and how do they effectively alter the decisions and the consequences of a branch of government whose members have no formal accountability? Popular opinion, even if constant, is irrelevant to this claim.

Alternatively stated, there is no effective way for the public to object directly to judicial supremacy except the onerous mechanism of Article V. The effect of popular opinion, while real, is insufficient to satisfy the accountability test. Americans do not get to vote on the role of the Court, nor do they have any other effective manner for guaranteeing or even encouraging process-accountability. Consequently, we simply do not know how to read such acquiescence in

⁹⁹ Keith E. Whittington, *An “Indispensable Feature”? Constitutionalism and Judicial Review*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 21 (2002). *But see* Richard H. Fallon, Jr., *Implementing the Constitution*, 111 HARV. L. REV. 56, 136 (1997).

¹⁰⁰ 491 U.S. 397 (1989).

¹⁰¹ 494 U.S. 872 (1990).

¹⁰² *See* Barry Friedman, *The Myths of Marbury*, in *ARGUING MARBURY V. MADISON* 65, 86 (Mark Tushnet ed., 2005).

¹⁰³ *Id.* at 85.

¹⁰⁴ *Id.*

this matter, assuming, of course, it exists at all. The reason for acquiescence might be a fatalistic submission to what the people perceive as an oppressive system sustained by the courts, leaving the people with no way out but to “acquiesce.” In this case, acquiescence disguises resignation and electoral demoralization.

Moreover, even if we knew how to interpret acquiescence, it is not clear why this descriptive fact should answer the normative question of whether judicial supremacy is compatible with republican democracy. If the best explication of “republican democracy” rejects judicial supremacy, then the electorate’s acquiescence is unjustified. Hence, first determining the relevance of acquiescence requires ascertaining why the people acquiesce and whether such acquiescence is sufficient to satisfy the accountability test in a republican democracy.

Finally, some contend that because the Court protects governing elites, legislators are (secretly?) in favor of judicial supremacy.¹⁰⁵ *Dred Scott*, the granddaddy of all pilloried judicial supremacist decisions, is sometimes reconstructed as having considerable majoritarian support. Why? The answer, or so the argument goes, is that Congress was perfectly content with (or would happily tolerate) the Court deciding the question about slavery in the territories. In short, many congresspersons wanted the Court to take the heat for this decision and thereby avoid having to take responsibility themselves.¹⁰⁶ But the presence of a transient majority supporting a Supreme Court decision, whether the majority is a majority of Congress or a majority of popular opinion is insufficient evidence that the people normatively embrace judicial supremacy. Rather only an official practice of electoral politics and representative government should count.

Even if we accept this view, it raises a deeper and more complex question about American democracy. What is the relationship between the electorate and their representatives? Are governing elites transparent about the reasons for their support of judicial supremacy? Do the people ever really get to decide whether they support governing elites in this matter? If not, the relationship between courts and legislatures suggest a more significant democratic deficiency than judicial supremacy alone.

More important, this theory fails to grapple with the character of judicial supremacy and the reasons governing elites are seduced into supporting the courts. Even if governing elites are responsible for supporting judicial supremacy, what is it about the character of the

¹⁰⁵ Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35 (1993).

¹⁰⁶ I am skeptical about the factual claim that governing elites desire judicial supremacy. What are governing *elites*? How are they to be identified? And why would they embrace judicial supremacy when they will no longer be in power in the future?

courts that attract this support? If the answer is that courts are more or less insulated from the electorate, and therefore can do the (tyrannical) dirty work of the governing elites, the counter-democratic character of the Court is not explained away. Rather, a more plausible conclusion is that counter-democratic members of Congress support the courts just because the Court is counter-democratic in nature and can serve the purposes of anti-democratic governing elites. Rather than take the risk of electoral defeat, congresspersons seek cover from the courts. And through the gift of cover, the Court absolves Congress from taking responsibility and permits the policy to become virtually entrenched. Therefore, the countermajoritarian character of the Court is precisely the reason governing elites support judicial supremacy.¹⁰⁷ At least, this possibility should be considered before we explore this objection further.¹⁰⁸

E. *The Court Contributes Only Minimally to Constitutional Change*

Some scholars argue that judicial supremacy contributes little to remedying social or constitutional wrongs,¹⁰⁹ so why the fuss?¹¹⁰ I sympathize with this empirical claim, though I nevertheless think that some cases have significant symbolic force for both good and evil. That aside, it is difficult to credit the view that limited judicial supremacy

¹⁰⁷ It could be argued that the democratic legitimacy of judicial supremacy lies in an accepted practice that governing coalitions have the prerogative to express their constitutional vision through the Court. Hence, rather than leading, the Court merely does yeoman service for the current governing coalition. Two responses are appropriate here. First, what sort of evidence supports this claim? Which governing constitutional vision is expressed in *Marbury? Brown? Roe? Bush v. Gore?* Second, this view depends on a distinction between legislation enacted by governing coalitions and judicial decisions expressing the governing coalition's constitutional vision. Why would a governing coalition not simply enact legislation expressing its constitutional vision instead of bothering with the Court? It is difficult to see how this question can be answered without appealing to a fairly sharp, perhaps untenable, dichotomy between law and politics or legislative reasoning and judicial reasoning. While some modest, distinction exists between these two forms of reasoning, it does not appear to be substantial enough to justify the governing coalitions' explanation of judicial supremacy.

¹⁰⁸ And indeed this is a pervasive and vexatious problem. Just how democratic is American democracy in general? Recently, it was reported that Congress voted on the 2006 budget even before copies were printed. This, of course, means that only a few, if any, congresspersons ever read the complete document before casting their vote. *Syndicated Columnist Mark Shields on News Hour with Jim Lehrer* (PBS radio broadcast Jan. 6, 2006), available at http://www.pbs.org/newshour/bb/political_wrap/jan-june06/sb_1-6.html. Moreover, few people would be surprised to learn that many critical pieces of legislation are written by lobbyists.

¹⁰⁹ GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

¹¹⁰ Similarly, some deny that the Supreme Court plays such a crucial role in American government. *But see* BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 160 (2006) (asserting that the United States is "a country that depends . . . heavily on the Supreme Court in its governing arrangements").

does not have a significant effect on republican democracy. Even if non-judicial actors have the lion's share of directing constitutional change generally, limited judicial supremacy nevertheless has some force. My claim in this Article pertains to whatever force judicial supremacy has. Consequently, the objection that most constitutional change is driven by non-judicial actors, even if true, does not successfully obviate the need to seek a remedy to the problem of limited judicial supremacy.

F. *Departmentalism or Coordinate Construction*

A counterpoint to judicial supremacy, championed by some distinguished political scientists and legal scholars,¹¹¹ can be found in the doctrine of departmentalism or coordinate construction.¹¹² According to this doctrine, each governmental department or branch has the authority to interpret the Constitution. The Court's power of judicial review should not detract from the legitimacy of the other branches—or constitutional actors—to engage in constitutional review also.¹¹³ Two variants of this general doctrine exist: (1) *Departmental Supremacy*: There is always one final constitutional actor who determines constitutional meaning, but it is not necessarily the same actor in every case. Departmental supremacy envisions each branch as constitutionally supreme over issues pertaining to its constitutionally mandated authority.¹¹⁴ (2) *Interpretive Equality*: The various branches of government and government officials are equal in interpreting the Constitution over the entire range of constitutional conflicts. The precise manner of how constitutional meaning becomes settled depends on the interactions of these branches and the electorate in various

¹¹¹ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

¹¹² Keith E. Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning*, 33 *POLITY* 365, 368 (2001).

¹¹³ The contenders for authoritative interpreters of the Constitution are: (1) the electorate; (2) state governments; (3) the entire federal government; (4) one of the existing branches of the federal government; (5) a new governmental entity such as a constitutional court or a council of revision; or (6) all of the above. One should keep in mind the distinction between the question of whether all of the above are legitimate constitutional actors, whose actions contribute to constitutional meaning, and the question of who is the authoritative constitutional interpreter. The former does not entail the latter. That said, my aim is to explore (1) and (4) as the appropriate constitutional actors for interpreting the Constitution.

¹¹⁴ Consider Jefferson's departmentalist view: "The constitution has erected no such single tribunal [as the Supreme Court], knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves." THOMAS JEFFERSON, *Letter to William Charles Jarvis* (Sept. 28, 1820), in 15 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 42, at 27.

contexts. In attending to these interactions, we are likely to find that other constitutional actors play as significant a role in determining constitutional meaning as the courts.¹¹⁵

Departmental supremacy maintains that each branch of government has the sole or primary responsibility to determine the constitutionality of laws within each branch's domain of constitutional authority. However, departmental supremacy seems to be committed to executive, legislative, and judicial supremacy, though not all in the same case. Defensive judicial supremacy is an example of departmental supremacy. *Marbury v. Madison*¹¹⁶ is often interpreted as committed to the principle that the Court has the authority to strike down a law when the law pertains to the Court's own powers. Departmental supremacy arises when the final word in constitutional review is determined by whose authority is under examination.

The obvious problem with departmental supremacy is its failure to explain how conflicts between branches are resolved. For example, suppose Congress rejected Chief Justice Marshall's decision in *Marbury*. According to Congress, Section 13 of the Judiciary Act of 1789 was constitutional. How would a departmentalist resolve this conflict? Perhaps the conflict could be resolved by a continued dialogue between the two branches or perhaps by the electorate at the next election.¹¹⁷ But it is unclear how these possible resolutions would operate.¹¹⁸ Leaving the solution to future interactions between the branches of government and the people seems to invite instability and conflict.

Similarly, interpretive equality—where each branch and each public official has constitutional authority to evaluate *every* constitutional question—exacerbates the risk of conflict even further when two or more branches of government or officials, each entitled to interpret the entire Constitution, disagree on constitutional meaning. Moreover, interpretive equality is often articulated more broadly as the

¹¹⁵ This variant might be plausible, but that is essentially an empirical matter. By contrast, I regard my project to be jurisprudential and normative. Empirical inquiry shows that the Court is *never* the final arbiter of constitutional meaning, the relevance of this empirical data is marginal to my inquiry. Even if constitutional change is generated mostly by non-judicial events, Court decisions nevertheless play a role in such change. Perhaps judicial change pertains to a much narrower field than is usually thought. Pure judicial supremacy may exist only in a narrowly circumscribed set of cases. No matter. The jurisprudential and normative aspects of judicial supremacy are worth examining on their own even if a lot more needs to be said in order to completely understand how constitutional meaning is generated.

¹¹⁶ 5 U.S. (1 Cranch) 137 (1803).

¹¹⁷ LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* (1988).

¹¹⁸ Perhaps an extreme version of departmentalism assigns different constitutional actors to decide different kinds of constitutional questions at different times. Presumably, the appropriate actor to settle a constitutional controversy would be determined by politics. Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002).

view that everyone—citizens, local officials, legislators, executives, and the courts—has a say in determining whether a statute or government act is constitutional. In a sense, this reflects current reality. If a school principal rejects a certain Christian play because she believes it violates the First Amendment, it is clear that she considers herself responsible for evaluating whether decisions about school policies are constitutional. However, the idea that her responsibility and authority to make such decisions is equal to that of the judge who strikes the policy down is perplexing. And it highlights the general problem of interpretive equality.¹¹⁹ In cases of conflict, whose conception of constitutionality prevails?¹²⁰

Departmentalism as interpretive equality depends on a fatally defective argument. This argument begins with an uncontroversial premise that each branch of government has constitutionally prescribed authority and power. The argument then concludes that “the three branches of national government *share* [constitutional interpretive] authority.”¹²¹ However, this is clearly a *non sequitur*. To be sure, constitutional actors must implement or act in accordance with the roles the Constitution prescribes for them. And, of course, to act in good faith, they must at least implicitly believe their conduct conforms to constitutional text. However, this belief does not qualify as a significant kind of *interpretation*. Rather, it is merely following the rules. And even if these constitutional actors must “interpret,” in some attenuated sense of that term, constitutional text in order to implement their constitutional powers and fulfill their constitutional responsibilities, this type of *interpretation-as-implementation* is a far cry from *interpretation-as-judgment*, let alone final judgment. The former corresponds to any conduct performed according to rules, whether constitutional conduct or not. In this sense, baseball players “interpret”

¹¹⁹ The recent Dover, Pennsylvania, “intelligent design” trial might suggest a counter example. In this case, a school board voted to include a disclaimer about the legitimacy of evolutionary theory in biology classes. All but one member of that board was defeated in the next election. Why not retain interpretive equality and supplement it by letting the people choose the winner in cases of inter-governmental conflicts? But what if the school board was retained and the Court struck down the disclaimer? In that situation, what remedy do the people have? Here interpretive equality means judicial supremacy or perennial conflict.

¹²⁰ How would supplementing departmentalism with popular constitutionalism work? If the Court, for example, strikes down a statute on constitutional grounds, what can the people do? Replace members of Congress? Let us assume the law is, contrary to the Court’s position, constitutional. Elections cannot solve this problem, at least not in the present. Congress and the people line up behind the one (right) interpretation and the Court behind another. Neither Congress nor the people can prevail in the short-term.

The people can check the Court when it upholds a statute by also checking Congress. In that event, the people can replace members of Congress with representatives who share their view. Once elected, the new members can repeal the legislation.

¹²¹ WALTER F. MURPHY, JAMES E. FLEMING & SOTIRIOUS A. BARBER, *AMERICAN CONSTITUTIONAL INTERPRETATION* 263 (2d ed. 1995) (emphasis added).

the rules of baseball in order to play the game. Legislators, for example, must use interpretation-as-implementation to argue and vote for legislation regulating commerce. However, this interpretation should not be equated with judicial interpretation used to explicate the meaning of the Commerce Clause. To put this point differently, merely pointing out that legislators have authoritative roles in republican democracy does not establish that they also interpret—in any significant sense of that term—the rules which defines these roles. To establish that acting on rules and interpreting rules are equivalent, one needs an additional argument demonstrating this.

Given the distinction between interpretation-as-implementation and interpretation-as-judgment, the conventional claims of departmentalism must be augmented with additional arguments. The fact that the Constitution authorizes each branch to exercise various powers does not mean that each branch is entitled to engage in full-blown interpretation. Indeed, it is not obvious that executives and congresspersons give much substantial attention to what the Constitution means at all, and yet they are able to implement constitutional rules most of the time without any significant constitutional challenge. Consequently, just because members of the elected branches follow constitutional rules does not mean that they engage in interpretation of the Constitution.

Of course, several important Americans have embraced interpretive equality. Lincoln, for example, seems to embrace interpretive equality as illustrated by his response to the *Dred Scott v. Sandford*¹²² decision in his first inaugural address:

I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to very high respect and considerations, in all parallel cases, by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be over-ruled, and never become precedent for other cases, can better be borne than could the evils of a different practice. At the same time the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers having, to that extent, practically resigned their government, into the hands of that eminent tribunal.¹²³

¹²² 60 U.S. (19 How.) 393 (1857).

¹²³ Abraham Lincoln, *supra* note 12, at 268. In an earlier draft of this speech, Lincoln used

But what follows? Certainly, for consistency sake, the Court must decide a similar case as it decided *Dred Scott*. Further, what in the above remarks demonstrates that Congress or the President need not follow the case unless the Court overrules it? Thus, the institutional supremacy of the Court seems intact. That this supremacy threatens self-government seems obvious, but limiting the decision to the parties does not mitigate the threat.

One contemporary attempt, in support of Lincoln's opposition to judicial supremacy, distinguishes between judgment-supremacy and interpretive-supremacy.¹²⁴ According to this view, the Court's *judgment* resolving a particular conflict binds other branches of government, but the *interpretive* rationale underlying this judgment does not. Presumably, this means that Congress retains its authority to articulate its interpretive rationale, perhaps even pass further legislation based on this rationale. However, if the Court has judgment supremacy and Congress's interpretive rationale yields legislation in conflict with the Court's judgment supremacy, then Congress's interpretive rationale is irrelevant. When Congress's interpretive rationale yields legislation inconsistent with the Court's interpretive rationale that legislation will also conflict with the Court's judgment supremacy, and in the final analysis, the Court's judgment supremacy prevails.

In other words, the distinction between judgment supremacy and interpretive supremacy fails to come to terms with the Court's *institutional* supremacy. Judgment supremacy permits the Court to strike down a congressional bill because that bill conflicts with the Court's judgment in a particular case. Judgment supremacy gives the Court full institutional supremacy to override the results of the constitutional interpretations of other branches of government when these interpretations yield judgments in conflict with the Court's. Institutional supremacy is the bedrock principle of judicial supremacy. Consequently, even if we limit judicial supremacy to judgment supremacy, the Court's power of institutional supremacy remains intact.¹²⁵

"despotism" but then replaced it with "eminent tribunal." Abraham Lincoln, *First Inaugural Address—First Edition and Revisions*, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 12, at 249, 257 n.67. Despotism, for Lincoln, was the absence of majority rule. Consider: "A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people." Abraham Lincoln, *supra* note 12, at 268.

¹²⁴ Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1541-42 (2005).

¹²⁵ Two reasons make this distinction suspect. First, what authorizes other branches of government to distinguish between judicial judgments and their reasons? If Congress must follow the Court's judgment, why not its reasons? Second, why should the Court provide an interpretive rationale if doing so fails to bind other constitutional actors? Perhaps the answer is that the interpretive rationale binds the Court. But why should that be? All *stare decisis* requires

G. *A Different Kind of Objection to Judicial Supremacy*

One objection to setting up the problem of judicial supremacy in the manner I have chosen is conspicuously vexatious. A scholar who thinks that judicial supremacy is bad, might instead of mounting a normative argument against it, argue that it is descriptively false. "You see," such a scholar might intone,

we need not fear judicial supremacy for the simple reason that it does not exist. Empirical investigation may show that the courts are only one mechanism for determining constitutional meaning, not the only one. Indeed the Court is not involved in determining constitutional meaning in a host of areas of constitutional law. Other branches of government may in fact be much more influential.

For example, in the introduction of a recent book entitled *Congress and the Constitution*,¹²⁶ the editors write:

More than anything, this book calls attention to the pivotal role that Congress plays in interpreting the Constitution and the need for additional research in this area. Reflecting that the study of Congress and the Constitution is still nascent, the book is more a wake-up call than a definitive statement. And while it raises more questions than it answers, we anticipate that the subsequent studies will be more definitive. Increasing interest in both the Constitution outside the Courts and the decisions of the Rehnquist Court limiting congressional prerogatives will undoubtedly result in more comprehensive research on the topics addressed here. This is as it should be, for Congress's role in shaping the constitutional values may well be as important as the Supreme Court's.¹²⁷

The problem with this passage *inter alia* is that it begins by suggesting that Congress plays a pivotal role in interpreting the Constitution and ends by saying that this role *may* be as important as the Supreme Court's. Congress, to be sure, plays a role in interpreting the Constitution, but it hardly follows that this role is either pivotal or as important as the Court's.¹²⁸ Furthermore, just how does congressional interpretation operate and how does it fare in conflicts with judicial interpretation?

More importantly, even if Congress's role is critical, this argument says nothing about whether the two institutions interpret the

in a regime committed to judgment supremacy is that the Court follow its own precedential judgments; it does not require the Court to follow its own interpretive rationales.

¹²⁶ Neil Devins & Keith E. Whittington, *Introduction to CONGRESS AND THE CONSTITUTION 1* (Neil Devins & Keith E. Whittington eds., 2005).

¹²⁷ *Id.* at 14-15.

¹²⁸ New discoveries are, of course, possible. However, the scholarly protocol of political scientists and legal scholars might emphasize different aspects of constitutional practice. Consequently, Congress might have a role in determining constitutional meaning; yet the Court nonetheless might be the primary constitutional interpreter.

Constitution in the same manner, whether both branches are as equally accountable in interpreting the Constitution, whether the difficulty in overturning these interpretations is in any way similar, or whether both branches are equally legitimate in interpreting the Constitution. Thus, this kind of scholarly tease leaves most of the important questions about judicial supremacy unaddressed.

My concern is with a certain tenor of mind and type of argument, not so much with the specific argument the editors advance in their book. However, what is so troubling about this passage is that it makes no reference to how one tells whether Congress is “as important as the Supreme Court.” Further, it makes no reference to how conflicts between Congress and the Court over the meaning of a constitutional provision are resolved. If the Court prevails, then whatever else Congress does, it clearly has a decidedly secondary role in constitutional interpretation.¹²⁹

I suspect that there is an unstated normative agenda behind these admonitions, which essentially contends that current American constitutional practice gives the Court an unwarranted role in interpreting the Constitution and that we—American citizens and constitutionalists—should take it back. There is nothing wrong with such an agenda. But, it might be more helpful to say that Congress *should* play a greater role in constitutional interpretation—a role which sometimes even trumps the Court’s—not that “more comprehensive research” will reveal it already *has* such a role. For even if it turns out that Congress has the decisive role in constitutional interpretation in a large number of governmental decisions that establish constitutional meaning, the cases that grip the nation, in all probability, are not included in those decisions.

The above passage suggests that research might reveal Congress has as an important role or even a greater role than the Court. And that claim, though conceivably true in the end, currently is counter-intuitive in the extreme. Everyone—the legislators included—looks to the courts for constitutional guidance.¹³⁰ The authors suggest that law professors

¹²⁹ Similarly, consider the argument that while Supreme Court decisions “do matter[.] . . . equally important, if not more so, are the reactions of elected officials and the people to Supreme Court decisions and the many constitutional issues that never come to the courts or, when they do, are returned by judges to the political branches for resolution.” DEVINS & FISHER, *supra* note 72, at vii. Nothing in this statement precludes the Court’s final role as constitutional interpreter in an array of hot-button constitutional controversies. Thus, even if not all areas of constitutional law are subject to judicial supremacy, some are. The question then is whether judicial supremacy is normatively desirable in those areas of the law in which it exists. Additionally, even when the Court returns issues to the political branches, it is the Court that decides whether to do so, which means judicial supremacy is operative here as well.

¹³⁰ Robert Bork insists “the Constitution is the trump card in American politics, and judges decide what the Constitution means.” BORK, *supra* note 2, at 3. Similarly, Ronald Dworkin insists: “Marshall decided that the courts in general and the Supreme Court in the last analysis

and the media have a vested interest in keeping alive the myth of judicial supremacy. But such an *ad hominen* argument can be turned around. Political scientists have a vested interest in redirecting our attention toward Congress and other constitutional actors and away from the courts. They are, after all, concerned with American government generally and would benefit if everyone—especially law professors and judges—saw constitutional change driven by each branch of government, not merely the Court.

Further, even if Congress has formal authority in deciding certain kinds of conflict, *Bush v. Gore*¹³¹ has revealed that nothing prevents the aggrieved party from seeking redress through the Court, and nothing prevents the Court from entering an arena belonging to Congress. Finally, even if research shows that Congress actually has a greater role in constitutional interpretation than constitutional culture suggests, this will not detract from the fact that judicial decisions, once resolved, cannot be reversed through ordinary politics, except over a long, arduous process involving Article V or transformative appointments. Hence, trying to disabuse us of the idea that the courts are supreme over an important range of issues is, in my view, unhelpful. Rather, whatever the descriptive and explanatory facts are, the more direct approach cites the accountability problem as a reason against embracing judicial supremacy as a central feature of the most *normatively* attractive republican democratic theory, and urges us to attempt to remedy this deficiency.

In conclusion, it should be clear that this Article emphasizes not the role that Congress *does* play in constitutional meaning and adjudication, but what role it *should* play. Because nothing constrains the Court from entering arenas it never before dared to enter, whatever Congress's current role, the real action lies in seeking a mechanism that *guarantees* Congress's place as the relative or provisional final arbiter of constitutional meaning in cases that grip the nation.

have the power to decide for the government as a whole what the Constitution means and to declare acts of the other departments of government invalid if they exceed the powers provided for them by the Constitution, properly understood [by the Court].” RONALD DWORKIN, *LAW'S EMPIRE* 356 (1986). These remarks overstate the power of the Court just as the claims that the Court is merely one among several constitutional actors understates the Court's power. The truth, in my view, is that while the Court is not alone in interpreting the Constitution, its role often dominates the dialogue. The question then is whether this dominance is desirable. This Article's objective is first to show the undesirability of this dominance and then to explain how it should be corrected.

¹³¹ 531 U.S. 98 (2000).

IV. FROM JUDICIAL SUPREMACY TO
DEMOCRATICIZING JUDICIAL CONSTITUTIONALISM

Since judicial supremacy has an accountability problem, what are the conceptual steps and political structures required to move from judicial constitutionalism to republican democracy? The general answer is that republican democracy requires accountability, and accountability requires delegation and revocation. The following section explores this issue in greater detail.

A. *Delegating Authority and the Revocation Condition*

Any system of self-government, whether a direct majoritarian democracy or republican democracy, will require some mechanism for delegating authority. Even town meetings need to be called and meeting halls rented. Failure to delegate authority to citizens acting in official capacity is probably fatal to any society's survival. Consequently, in advocating external checks on the Court, I am not suggesting that delegating authority is inappropriate or that the people cannot delegate authority to judges through elected officials. The central point is that accountability requires that delegation be democratically legitimate and effective.

What does this entail? Can an absolute, or virtually absolute, grant of authority to some branch of government or official be consistent with self-government? If not, just what are the parameters of delegation? Should some form of revocation be included in any delegation of authority? And if so, how strong a mechanism of revocation?

One clear statement of why democrats might choose to delegate authority to the Court is:

By granting to a non-legislative body that is not electorally accountable the power to review democratically enacted legislation, citizens provide themselves with a means for protecting their sovereignty and independence from the unreasonable exercise of their political rights in legislative processes.¹³²

This argument is, of course, a common one. The underlying idea is that legislative decisions can sometimes put in jeopardy the sovereignty, independence, and rights each citizen should possess in a republican democracy. If the right to free speech, for example, were subject to the transient aspirations, fears, and suspicion rampant in legislative bodies, its status as a right would be tenuous. Thus, constitutional democrats

¹³² Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 LAW & PHIL. 327, 353 (1990).

can reasonably assign, or so the argument goes, an unelected branch of government with the responsibility of preventing such legislative excess.

This approach certainly makes sense. The very idea of constitutionalism means that the sovereign voice of the people expressed constitutionally must inform the choices of governmental officials, branches of government, and even a current majority of the electorate. What is troubling is that once we recognize the preeminence of the Constitution and the importance of pre-commitment to its rules, the entrenched understanding takes over. Most people conclude almost automatically that at least in our government the Court must be the constitutional custodian. It is troubling because it overlooks the possibility that the courts themselves can inhibit the sovereign voice of the people. Put differently, what makes us sanguine about the possible risk “from the unreasonable exercise [or elimination] of [our] political rights” by the judicial process?¹³³ Of course, Congress has neither a superlative record in protecting individual rights nor in enacting desirable public policy, but “the Court does not always make good decisions either. Whatever one’s assessment of the legislative process, it is hard to argue that the problem is a thin but rampaging majority regularly disregarding all interests other than its own and forcing major policy change on a large and intense minority.”¹³⁴

Every argument for judicial review—based on the need for checking majorities—founders on the problem of what or who checks the courts. One striking example is Justice Jackson’s powerful remarks concerning the Bill of Rights:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.¹³⁵

What Justice Jackson so obviously overlooks is that withdrawing rights from political controversy and beyond the reach of deliberative democracy, and placing them in the hands of the courts, sacrifices any political or constitutional accountability. What recourse is available when the Court’s interpretation of the Bill of Rights is erroneous? This attempt to protect the Bill of Rights from electoral distortion completely overlooks the question of who protects republican democracy from judicial distortion.

¹³³ *Id.*

¹³⁴ Barbara Sinclair, *Can Congress Be Trusted with the Constitution?*, in CONGRESS AND THE CONSTITUTION, *supra* note 126, at 293, 310.

¹³⁵ *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

This problem has a lineage that dates back at least to Hamilton's insistence "that where the will of the legislature in its statutes, stands in opposition to that of the people, declared in the constitution, the judges . . . ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."¹³⁶ Of course, in one sense, this is uncontroversial. Where it is *known* or at least readily accessible that legislation violates the Constitution, every branch of government and the people themselves ought to reject the legislation. But Hamilton's remarks and almost every argument for judicial supremacy fail to establish how the Constitution's meaning is determined and who rightfully determines it. Only in a world where constitutional meaning is transparent, a world markedly different from ours, and remarkably different from any world we are likely to inhabit, does Hamilton's argument possess any force at all.

Since all three branches of government can and do oppress the people, which branch is more likely to do so as a matter of institutional design and historical fact? From the perspective of institutional design, the people and regular elections are, in principle, an effective means of revoking the authority of legislators who seek to enact oppressive legislation. Accordingly, it stands to reason that some effective means of revoking the authority and power of the courts should be available in the first place. History confirms this by revealing several oppressive judicial decisions, which took civil wars, constitutional amendment, or other expenditures of life and effort to overturn, and some oppressive decisions are still with us today.¹³⁷

What is the Constitution's answer to the question of revocation? Presently, the Constitution contains revocation conditions for each of the three branches of government. Election is the hallmark of revocability for officials in the political branches, as well as impeachment and removal from office, which also is the procedure for revoking the authority delegated to non-elected officials.¹³⁸ We could have a system where public officials could be re-called at virtually any time during their tenure, or a system with relatively easy procedures for impeachment.¹³⁹ However, some constraints must be placed on such discretion, or we could see all political deliberation degenerate into a continual debate about recalling or impeaching officials. The people's business would never get done. What is needed is a mechanism—such as a congressional override—for reflectively deliberating about judicial

¹³⁶ THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 9, at 467-68.

¹³⁷ See *supra* note 78.

¹³⁸ Only federal judges have life tenure; all other appointed officials can be removed by the elected officials responsible for their appointment. Court decisions can be reversed by amending the Constitution through Article V, though resorting to this remedy has been rarely successful.

¹³⁹ Other mechanisms are also possible, such as censure and reprimand.

decisions and then, if necessary, revising them. I discuss such a mechanism later in the Article.

For now consider the legitimacy of institutional practices involving irrevocable conditions. Should the idea of republican democracy preserve the possibility of irrevocably delegating authority? Is such delegation democratic simply because it is a conscious, deliberative choice on the part of the electorate? An affirmative answer to these questions overlooks the accountability requirement. For officials in a republican democracy to be accountable there should be some sort of effective revocation condition. One might argue that a present majority, for whatever reasons, might want to democratically choose to create an irrevocable delegation of authority and power. If the choice is conducted democratically, why is it nonetheless incompatible with republican democracy? Preventing a majority from choosing a revocability requirement restricts the choices it can make. Such an *a priori* position is itself violative of democracy.

This argument overlooks the fact that majority rule does not exhaust the meaning of “republican democracy.” While permitting majorities to create irrevocable delegations does, in fact, limit choice, it is not obvious that doing so is incompatible with republican democracy. Whatever gives majorities a greater number of choices cannot itself be the *sine qua non* of democracy. Some choices are incompatible with democracy even when embraced by a fully informed majority. The problem with insisting on the democratic appropriateness of irrevocable delegations is that while it does provide an option for choice, it is the wrong type of option. Whenever a present majority irrevocably delegates some of its authority, to that extent, it relinquishes its role as the fount of sovereignty. The founding generation understood that to say the people are sovereign is more than an amorphous, vague attribution. The founding generation’s contribution to the political philosophy of republican democracy is not simply that “all governmental powers were derived from the people.”¹⁴⁰ The founding generation’s distinct contribution was to drive home a new conception of sovereignty. These practical men who took self-government seriously believed “sovereignty, the final supreme indivisible lawmaking authority, remained always with the people and that government was only a temporary and limited agency of the people—lent out to the various government officials . . . on a short-term, always recallable loan.”¹⁴¹ In the final analysis, it is this novel conception of sovereignty and self-government that the founding generation ushered

¹⁴⁰ GORDON S. WOOD, REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT 192 (2006).

¹⁴¹ *Id.*

into the modern world.¹⁴² And it is this conception of sovereignty that is incompatible with irrevocable conditions.

Viewing irrevocable conditions as incompatible with republican democracy illustrates just how “republican democracy” should be understood. Certainly, in some circumstances, a society would be better off if there was a non-democratic, external authority. But this concession does not show that irrevocable choices can and sometimes should be made routinely in a republican democracy. Just as it is better in some circumstances for individuals to delegate to others the authority to make certain decisions about their lives, sometimes it is better for citizens to do the same. But this hardly shows that permanently delegating this authority to others is compatible with the individual’s autonomy as a responsible agent. Nor does it show that irrevocably delegating authority to a branch of government is compatible with republican democracy. If we irrevocably delegate such authority, we might indeed be better off in some sense. But that does not mean we have preserved our republican democracy.¹⁴³

To put this point differently, prohibiting the current majority from delegating authority permanently to a king reduces the range of choices available to the community. Yet, it would hardly be anti-democratic to prohibit this choice. There are some choices that are inherently undemocratic because the relation between democracy and accountability, while perhaps not definitional, certainly represents a synthetic *a priori*, or deeply conceptual, truth.¹⁴⁴ In a self-governing republic, the notions of consent, collective choice, and accountability are inextricably interrelated. It seems difficult to imagine how accountability is possible without effective revocation conditions in the process of selecting, influencing, and removing public officials. Proponents of irrevocably delegating authority and power to federal judges must explain wherein the republican democratic authority of such delegations lies. Without procedures for reasonable and effective

¹⁴² *Id.* at 193 (asserting that the founding generation was “creating an entirely new and modern notion of the relation of government to the society”).

¹⁴³ Truly irrevocable conditions deprive future majorities of effectively deciding whether such an institutional arrangement is satisfactory. Hence, they are democratic, if at all, only relative to the generation that creates them.

¹⁴⁴ A synthetic *a priori* proposition contains empirical content but is nonetheless necessarily true, not as a definition is necessarily true, but rather as a proposition about the world whose denial is virtually inconceivable. Put differently, the synthetic *a priori* truth that republican democracy requires accountability is not a definition of republican democracy. Rather, it indicates that these terms are inextricably tied together in our constitutional and political conceptual scheme. Perhaps the statement can turn out to be false. But if so, when we jettison such a statement, we reject not just one proposition in this scheme, but a structural principle defining that scheme. Accepting the compatibility of republican democracy with unaccountability is conceptually, if not logically, to alter the concept of republican democracy.

revocations of authority and power in general or in a particular case, it is difficult to see how federal judges are accountable.

One might argue that judicial independence requires irrevocable delegations. However, the revocability condition is not necessarily incompatible with judicial independence. It depends, of course, on what one means by “judicial independence.” I doubt that any democracy countenances complete or total independence.¹⁴⁵ Rather, the precise type and degree of judicial independence must be articulated. Complete judicial independence means that judges are beyond the law. This possibility follows from “an axiom of eternal truth in politics that whatever power in any government is independent, is absolute also; in theory only, at first, while the spirit of the people is up, but in practice as fast as that relaxes. Independence can be trusted nowhere but with the people in mass.”¹⁴⁶ Independence must strike the appropriate balance with accountability. For example, Canada and Belgium have legislative override procedures that, of course, bear on judicial independence. But it hardly follows that the courts in those countries are in effect appendices of the legislature. Even in the United States, the power of impeachment and Article V’s amending procedure can intrude on complete judicial independence; so even our current Constitution contains a revocability condition.

The problem is that Article V’s revocability condition is weak and ineffective. The republican democratic challenge is to devise a revocability condition that accommodates accountability *and* judicial independence. The question then is *not* whether democracy requires accountability and accountability requires the revocation condition. Rather, the question is just how strong the revocation condition should be, or to put the point differently, how weak may a revocation condition be yet still guarantee accountability. The ultimate point is that judicial independence *and* judicial accountability are two important values, both of which should be accommodated in the proper institutional design of a republican democracy.

B. *Eliminating or Constraining Judicial Review?*

Should the remedy to judicial supremacy be to *constrain* judicial review or *eliminate* it entirely? Eliminators see judicial review as a

¹⁴⁵ Similarly, the claim that a congressional override will defeat the structural principle of separation of powers depends on a certain conception of “the separation of powers.” The appropriate conception of the separation of powers should be one which accommodates both judicial independence and political accountability.

¹⁴⁶ THOMAS JEFFERSON, *Letter to Judge Spencer Roane* (Sept. 16, 1819), in 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 42, at 212, 213-14.

redundant distortion of democratic lawmaking. If no strong dichotomy between law and politics exists, courts will inevitably be super-legislatures imposing on the electorate—quite sincerely and unaware of their own biases—their own conceptions of law and constitutionalism. Further, this intrusion into the law-making process fails to reveal any special expertise on the part of judges to make such a contribution. Additionally, reliance on the Court inevitably distorts the roles of Congress and the President because, in a regime of judicial supremacy, both branches are inclined to ignore constitutional considerations when performing their roles in law-making. What is more troubling is that informed citizens think of constitutional analysis as solely a legal matter where non-lawyers have no expertise. This reverence for—or “priestification” of—federal judges, prompts the question of whether a republican democracy should encourage such a seemingly sacrosanct institution.

By contrast, constrainers believe that judicial review can contribute a unique form of reasoning to the law-making process. As Frank Michelman points out in his book *Brennan and Democracy*,¹⁴⁷ much judicial constitutionalism involves explicating the ideas of democracy—collective self-government and individual rights—in concrete circumstances of an actual, constitutional controversy. This process of explicating critical political philosophical terms central to American constitutional history (in contradistinction to how these terms developed in Great Britain or France, say), is a form of the contextualized (applied or practical) political philosophy of democracy. The self-conscious reconstruction of these concepts through contextual political philosophizing—including both historical and normative inquiries—enables us to apply the Constitution’s meaning to actual cases. What we seek is the best explanatory and justificatory accounts of *American* political and constitutional development. Legislators can also engage in this form of reasoning, but they are often occupied with negotiating the details of a bill. Both judicial and legislative reasoning are political, but not in the same sense.¹⁴⁸ And each form has its place within a republican democracy.

¹⁴⁷ MICHELMAN, *supra* note 21.

¹⁴⁸ Contextual political philosophizing is less abstract than general political philosophizing. Instead, it explicates the critical concepts of a polity as they have developed in a particular historical setting. In the American context, republicanism, democracy, liberty, equality, and some form of community are the primary abstract terms which represent our constitutional foundations. Even less abstract, but equally important, notions such as federalism, separation of powers, freedom of speech, religion, press, and association also constitute the subject matter of contextual political philosophizing in American constitutionalism. It might be a historical accident that constitutional meaning developed in this manner, but constrainers believe that this development defines the meaning of our constitutional values.

Judicial review, as contextual political philosophy, contributes to a deliberative dialogue critical to republican democracy. Of course, if contextual political philosophy is good for the Court, why should it not be good for the other branches of government and the electorate as well? The short answer is that it *is* good for these other constitutional actors. However, at present the Court is the forum in which this discourse is practiced more consistently, though not nearly consistently enough. Should we choose to eliminate judicial review entirely, whatever that precisely means, a prudent course would be incremental. First, we should give Congress the final institutional role as constitutional interpreter and then assess whether the discourse and methodology Congress develops is the kind we wish to embrace. If Congress—in its role as constitutional reviewer—develops the discourse of contextual political philosophy, we may then assess whether there is any need for a Court to interpret the Constitution at all. But for now let us not throw out the baby, contextual political philosophy, with the bath water, judicial supremacy.¹⁴⁹

Rather than embrace the political discourse of judging, Mark Tushnet recommends eliminating judicial review.¹⁵⁰ Tushnet contends that judicial review is democratically suspect because “people ought to be able to govern themselves. Judicial review stands in the way of self-government.”¹⁵¹ For Tushnet, “[c]onstitutionalism can be implemented through politics as people listen to arguments about why some policies they might initially prefer are inconsistent with deeper values they hold, values that find expression in the Constitution.”¹⁵² In Tushnet’s view, deliberative democracy can accommodate both policy and constitutional reasoning. One might be tempted to challenge this powerful proposal as conflating policy-making and constitutional interpretation. This criticism, I think, is misplaced. Tushnet is simply crediting the importance of both in republican democracy.

The deliberative feature of republican democracy generates interpretive deadlock or irresolvable (at least temporarily) reasonable disagreement. If that is so, why should a majority of Justices have a privileged place over a majority of legislators? The remedy, according to Tushnet, is the ratification of the “End Judicial Review Amendment” (EJRA), which asserts that “no court of the United States or of any individual state shall have the power to review the constitutionality of statutes enacted by Congress or by state legislatures.”¹⁵³

¹⁴⁹ My own view is that judicial review, conceived of as contextual political philosophy, benefits republican democracy. The question, for me, is not whether judicial review is beneficial, but rather who should have the final say over constitutional decisions.

¹⁵⁰ Tushnet, *supra* note 17.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

Tushnet carefully distinguishes between reviewing statutes and reviewing governmental action. Those worried about the loss of an independent, impartial monitor of individual rights should be reassured. For Tushnet, “courts would still have an important role in enforcing the Constitution.”¹⁵⁴ Tushnet’s amendment “is directed at statutes, not at the actions, say, of individual guards, police officers, or mayors.”¹⁵⁵ Courts will continue to enforce the Bill of Rights and Civil War Amendments; only their role in reviewing the constitutionality of statutes will be eliminated. And Congress, according to Tushnet, can authorize courts to review statutes in particular areas of the law or even generally if it so chooses.¹⁵⁶

As I understand it, EJRA is designed to replace the absence of judicial accountability with the full-blooded accountability of Congress. What is gained by this proposal? The people’s representatives will have the final say over the constitutionality of statutes and governmental action except in those cases where Congress chooses to return it to the courts.¹⁵⁷ While the Court must still interpret the Constitution to enforce individual rights, Congress can always pass an unreviewable law reversing the Court’s decision. Thus, with Tushnet’s amendment, we have gone a considerable way toward resolving the problem of judicial supremacy. It gives the people’s representatives the final institutional say over the constitutionality of governmental actions.¹⁵⁸

Yet, there remains a difficulty. How can courts review governmental conduct without interpreting constitutional language? Tushnet uses the “hitching post” case—involving an extreme form of punishing prisoners—to illustrate the Court’s continued role in constitutional interpretation.¹⁵⁹ According to Tushnet, the Court could find the use of hitching posts to discipline prisoners “to be a violation of the prisoner’s constitutional right to be free from cruel and unusual punishment.”¹⁶⁰ But if so, the Court must interpret the relevant constitutional provision. And so, the Court as a constitutional

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ It is not clear how this qualification helps. Most constitutionally suspect governmental conduct concerns federal or state laws. In *Texas v. Johnson* the defendant was convicted of violating a state law. According to Tushnet, the EJRA would not apply here.

¹⁵⁷ However, delegating authority to courts and then revoking that delegation might offend an appropriate sense of fairness as expressed in the due process and equal protection provisions of the Constitution.

¹⁵⁸ Any theory granting Congress ultimate power in determining constitutional meaning must consider the role of federalism and separation of powers in this constitutional scheme.

¹⁵⁹ The Alabama Department of Corrections manual, under Regulation 429, describes use of the hitching post as standing an inmate up with his hands shackled to the ends of a suspended horizontal metal bar. The inmate is unable to sit down or lower his arms and stands in that position for hours, sometimes without water, baking in the sun. This practice was struck down in *Hope v. Pelzer*, 536 U.S. 730 (2002), for violating the Eighth Amendment.

¹⁶⁰ See Tushnet, *supra* note 17.

interpreter is hardly eliminated. Moreover, some state laws sanction such barbaric conduct as hitching posts. Hence, the Court is still involved in reviewing state statutes. Perhaps Tushnet understands the EJRA as granting Congress the authority to pass legislation eliminating (or sustaining) state laws authorizing the use of hitching posts. But until Congress acts, nothing in the EJRA seems to deny the Court's temporary interpretive supremacy.¹⁶¹

Hence, if Tushnet contends that eliminating judicial review is the appropriate democratic response to judicial *supremacy*, the Court's continued role in constitutionally reviewing official conduct seems to undermine this response. In order to enforce the prisoner's constitutional rights according to the Eighth Amendment's prohibition against "cruel and unusual punishment," the Court must interpret these words. If the Court is still in the business of interpreting the Constitution, how has Tushnet's proposal eliminated judicial review?

Traditionally, courts interpret constitutional language, federal and state statutes, as well as official governmental conduct that is not statutorily grounded. The EJRA eliminates judicial review of statutes, but not of constitutional text or official governmental action not statutorily grounded. By retaining judicial review of constitutional text and official governmental conduct, Tushnet fails to qualify as an authentic eliminator. He lauds the EJRA as "cleaner" than other solutions to the problem of judicial supremacy, but by retaining judicial review of official conduct, Tushnet's position is no cleaner than other solutions. Instead, Tushnet's position is much closer to the proposal of retaining judicial *review*, but eliminating judicial *supremacy* by permitting congressional constitutional review of judicial decisions. The important difference between Tushnet's proposal and this one is that his precludes the Court from reviewing statutes and therefore limits its reach to constitutional text and governmental action only. The Court should play a role, no doubt, in reviewing governmental action. However, a constitutional amendment prohibiting judicial review of statutes is too strong a remedy to the problem of judicial supremacy. Judicial review, as contextual political philosophy, is a critical element in republican democracy. Judicial *review* is not the problem, judicial *supremacy* is.

There is additional reason to be skeptical about eliminating judicial review of statutes. Depriving courts of the authority to review statutes leaves unexplained what judges are supposed to do if a statute is a critical feature of a particular case involving official conduct. If the Court cannot review statutes, then it cannot review official conduct

¹⁶¹ Further, the EJRA hardly implies a departmentalist position at this penultimate level. In other words, judicial supremacy arguably exists in full force at this stage, binding all other constitutional actors until Congress decides to act.

when authorized by statute or when the statute is relevant to the conduct of a governmental official, even when constitutional rights are implicated. So, in the hitching post case, if such punishment is statutorily permitted, the Court no longer retains the capacity to protect prisoners from Eighth Amendment violations. Consequently, when a statute authorizes official conduct, the Court no longer can enforce the Bill of Rights or the Civil War Amendments. In this event, Tushnet might be making a clean break after all. But without courts, it is difficult to appreciate how individuals can formally protest violations of constitutional rights, especially in trials for criminal violations.

Consequently, several reasons augur in favor of constraining, not eliminating, judicial review. First, constraining judicial review is less radical than eliminating it. Incremental change serves two purposes here: it is politically more feasible and it provides an opportunity to carefully observe how a reduction in the role of the Court as the final arbiter of constitutional meaning plays out. Will it be successful? Will undesirable collateral effects be limited? Constraining judicial supremacy then qualifies as a bridge to more radical change, if that is desirable.

Second, as noted earlier,¹⁶² judicial reasoning—or contextual political philosophy—is valuable in itself. When legislators seek to institute new policies, their action can be seen as writing on a clean slate; they can, in short, begin again. When engaged in policy creation, legislators often do not have the opportunity to simultaneously engage in an evaluation of whether the proposed policy comports with and nourishes such fundamental constitutional values as freedom and equality. If we understand judicial reasoning as contextual political philosophizing, the practice of judicial review helps us retain a form of reasoning vital to a viable republican democracy.¹⁶³ If, in the end, we should eliminate judicial review entirely, it would be better to first engage Congress in interbranch cooperation through the process of using contextual political philosophy as a shared form of constitutional discourse. This will provide a basis for Congress to develop institutional mechanisms—such as special constitutional committees—to articulate Congress's constitutional interpretations.

¹⁶² See *supra* note 116 and accompanying text.

¹⁶³ At the risk of hyperbole, republican democracy rests on a multitude of political philosophical concepts the continuing explication of which is vital to the polity's survival. Recognizing the Court as a primary interpreter of these concepts as they evolved in American constitutionalism serves a valuable purpose. It also might suggest a radical revision in our conception what expertise judges should have. We should still be wary of Platonic guardians. See LEARNED HAND, *THE BILL OF RIGHTS* 70 (1958). Judges need not be Platonists to take seriously American history, especially those critical political philosophical concepts and values which drive constitutional development and which in turn are shaped by it.

If constrainters win out over eliminators, what kinds of constraints are feasible? As indicated earlier,¹⁶⁴ two different types of solutions to the problem of judicial supremacy or constraints on judicial review exist: external constraints and internal constraints. Internal constraints urge judges to adopt the right methodology, to use it consistently,¹⁶⁵ and to exert the appropriate self-discipline in interpreting the Constitution. External constraints consist of some mechanism—such as a congressional override—*imposed* on the Court.

The first solution focuses on the interpretive question.¹⁶⁶ Textualists, originalists, structuralists, historicists, pragmatists, passivists, minimalists, and so forth have all had their hour on the stage, yet have failed to reach a reflective consensus on which is the “correct” methodology.¹⁶⁷ The battle for one or more of these internal solutions has been fought and lost time and time again. Perennial disagreement persists over the correct interpretive methodology. Even the Court has no generally accepted interpretive methodology. Accordingly, the Herculean task of judges to consistently apply the correct methodology—even assuming they make a conscientious attempt to do

¹⁶⁴ See *supra* notes 9-10 and accompanying text.

¹⁶⁵ See Glenn Phelps & John Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567 (1991) (arguing that no such consistency exists in the opinions of Rehnquist and Brennan); SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* (1999) (arguing that Justice Thomas’ opinions are not consistent over the range of issues in constitutional law).

¹⁶⁶ From almost every perspective, internal constraints have historically failed. Internal constraints have been championed in different historical periods both by progressives and conservatives. Why have they failed? Because there is never consensus on when they should be invoked. The progressives in the 1920s and 1930s argued against a conservative Court that eventually capitulated by creating a deferential form of rational basis scrutiny through which to evaluate economic, social, health, and welfare legislation. This deference left a small opening in the form of *Carolene Products*’ remarkable footnote warning that withdrawing economic and social legislation from serious scrutiny should not be interpreted as the Court’s abdication of its responsibility in protecting individual rights. *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). Through this opening, the Warren Court pursued a panoply of rights. Equal protection, due process, and freedom of speech were the main gardens from which these new rights sprung. Conservatives then waged a war against this blossoming of rights admonishing the Court to adopt judicial restraint. Their victory was brought about, to a large degree, by Ronald Reagan’s ascent to the presidency. The Court fashioned by presidents Ronald Reagan and George H.W. Bush—the Court that should have been judicially restrained—was not so restrained, at least not in the area of federalism. Congressional laws were struck down that intruded, in this newly formed Court’s mind, into areas reserved for the states. Indeed, the Rehnquist Court, designed to be restrained by electoral politics, arguably became the most activist Court in American history. See generally THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* (2004).

¹⁶⁷ Randy Barnett describes the conventional hybrid account of judicial methodology as being “basically an emphasis on legal craftsmanship. You take a smidgen of history, a dollop of text, a spoonful of precedent and ladle it all over a very sensitive treatment of the facts and that yields a very high-quality product.” Charles Lane, *A Conservative, Yes, but Not a Scalia*, WASHINGTON POST, Sept. 15, 2005, at A13. According to one interpretation of this recipe, legal craftsmanship turns out to be a disguise for more idiosyncratic perspectives.

so—renders this recommendation quixotic in the extreme, perhaps even insane in the Einsteinian sense of doing the same thing over and over again, expecting different results each time.¹⁶⁸

External constraints, as indicated earlier,¹⁶⁹ are those imposed on the Court by some other constitutional actor. The general purpose of external constraints is to bring the electorate or its representatives back into the picture of constitutional interpretation, or in some other manner to limit the influence of the Court. Consider the fanfare surrounding the appointment and confirmation of Supreme Court Justices. Tens of millions of dollars are spent in an attempt to persuade 101 Americans to nominate and confirm particular types of Justices with only a marginal concern for the views of ordinary citizens unaffiliated with special interest groups. There is an eerie similarity between these campaigns and presidential campaigns. Why not recognize the political nature of the Court¹⁷⁰—in the best sense of that term—and insist on accountability as we do with other political branches? Why not acknowledge as did Jefferson that “our judges are effectually independent of the nation. But this ought not to be I deem it indispensable to the continuance of this government that they should be submitted to some practical and impartial control”?¹⁷¹ Judicial supremacy may not cause the demise of the government, but it may be an obstacle preventing self-government to flourish.

V. FIXING THE DEMOCRATIC DEFICIENCIES OF JUDICIAL SUPREMACY: THE CONGRESSIONAL OVERRIDE

A congressional override provides a safety net while at the same time permitting the benefits of judicial review to continue. Two conceptions of a congressional override exist: a weak version and a strong version. The weak version permits Congress to override a Supreme Court decision by passing the appropriate legislation, which the Court may then strike down. The strong version makes Congress the final arbiter. The weak version provides a cooperative inter-branch relationship within a modified form of judicial supremacy. In essence, the weak override requires the Court to defer to Congress whenever possible, and strike down an override only as a last resort. There is some value to a weak congressional override. Such an override is at

¹⁶⁸ This conception of “insanity” has been attributed to Albert Einstein. The Quotations Page, <http://www.quotationspage.com/quote/26032.html> (last visited Oct. 8, 2006).

¹⁶⁹ See *supra* notes 54-55 and accompanying text.

¹⁷⁰ TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999).

¹⁷¹ THOMAS JEFFERSON, AUTOBIOGRAPHY, in 1 WRITINGS OF THOMAS JEFFERSON 121-22 (1903).

least an improvement over our current form of judicial supremacy for two reasons. First, it makes Congress a partner—albeit a junior partner—in determining constitutional meaning. In short, it explicitly rejects the notion that courts have an *exclusive* role in constitutional interpretation. Second, this partnership may be enhanced by Congress publicly explaining its reasons for overriding the Court’s decision. Then, if the Court strikes down that override, it in turn must explicitly reply to Congress’s rationale and analysis. Accordingly, an explicit, dynamic constitutional dialogue between Congress and the Court is formally created. A Court acknowledging Congress’ authority to weakly override its decisions might decline reviewing a challenge to an override by publicly requesting the electorate to chasten the legislators who enacted the override. If this fails, the Court has a choice to defer to the electorate or to strike down the override in an appropriate case. Though this is an improvement over our present system, in all probability it would be insufficient. The Court remains the final arbiter of constitutional meaning. The benefit, however, would be requiring the Court to respond analytically to serious objections from a co-equal branch of government.¹⁷² In the end, however, congressional overrides should be made of sterner stuff.¹⁷³

The stronger version of the congressional override *is* made of sterner stuff. The reason a congressional override appears to be an attractive external mechanism for constraining the Court without jettisoning its important role as the central forum of contextual, political philosophizing within the government is, in a word, accountability. Recall the three pronged test for democratic accountability: input-accountability, process-accountability, and output-accountability. The legislative override applies directly to process-accountability without significantly affecting the other two forms of accountability. Ideally, republican democrats should want a judiciary that satisfies all three prongs of the accountability test. But short of that goal, process-accountability emerges as the primary vehicle for accountability.

Consider one version of a congressional override:

Any law of the United States, a State, the District of Columbia, or any territory or possession of the United States declared unconstitutional by the Supreme Court, or in a final decision of an

¹⁷² This distinguishes the weak version from actual cases where the Court decided an issue and Congress responds with new legislation which the Court then strikes down. This occurred in cases discussed below such as *United States v. Eichman*, 496 U.S. 310 (1990), and in *City of Boerne v. Flores*, 521 U.S. 507 (1997). In these cases, the Court just struck down the law based on its interpretation of the Constitution. Congress did not provide its own interpretation nor did the Court reply to a congressional interpretive rationale. However, in these cases, the Court could have considered the second piece of legislation a congressional override, but it did not.

¹⁷³ It is important to keep in perspective that there are other possible solutions to the problem of judicial supremacy.

inferior court for which review in a higher court is not sought or not granted, shall be nevertheless constitutional if Congress votes to override that decision.¹⁷⁴

Tricky problems of the proper institutional design of a congressional override ultimately must be resolved: (1) Who has the authority to propose an override? An individual congressperson? A joint House and Senate committee? Should more than a majority vote be required to raise the possibility of overriding a Supreme Court decision?¹⁷⁵ (2) Should Congress articulate its opinion and its reason for overruling the Court? (3) Should enacting an override require a simple majority or a supermajority vote? In both Houses or only in the Senate? (4) Should more than one Congress be required to ratify the override? If so, should a presidential election also be included in this process in order to gain the electorate's attention and consent? Two presidential elections?¹⁷⁶ (5) Can Congress repeal a former Congressional override and thereby reinstate the original Supreme Court's decision? (6) Should congressional hearings be held on whether to override the Court's decision and if so at what point? (7) How will instituting the possibility of a judicial override affect the principles of federalism and separation of powers?¹⁷⁷ And finally, (8) Will Congress retain the power to delegate to the Court institutional supremacy in a class of cases or even in all cases for some period of

¹⁷⁴ A congressional override may be initiated against any Supreme Court decision striking down either federal or state laws. There are differences between Congress overriding federal laws and Congress overriding state laws. The question of whether Congress can uphold or strike down a state law through legislation is best defended when congressional authority exists in that area of law.

¹⁷⁵ The objection that Congress would be inundated with lobbying and crusades for overriding the Court might be true in hot-button cases, but it is extremely improbable that the override would have any impact on routine congressional legislation. Having an effective mechanism of accountability when the electorate wants it, though not used in every conceivable case, is a marked improvement over having it only through Article V or transformative appointments. Nor would the override render the courts superfluous. Their role, even if construed as advisory, still has great weight. The propriety of or need for a congressional override would become a campaign issue, thus bringing the electorate into the process of ascertaining constitutional meaning. American campaigns are already impoverished by demagoguery, to be sure. But this distortion of constitutional and political truth says more about the failure of America's electoral process generally than it does about any inherent weakness of a congressional override.

¹⁷⁶ Requiring two or more congresses to ratify a congressional override or two or more presidential elections to transpire before a congressional override can take effect reflects a commitment to keep this mechanism out of normal politics. Indeed, this commitment locates a congressional override somewhere between the ease of normal politics and the arduous procedure in Article V.

¹⁷⁷ Ironically, some judicial supremacists reject the idea of a congressional override on separation of powers grounds. Yet, judicial supremacy itself is quintessentially a separation of powers problem. When the Court strikes down a law, it intrudes on both Congress's lawmaking powers and the President's power to veto. Indeed, the Supreme Court itself "has made much of its role in preserving and protecting the separation of powers, but is blind to its own aggrandizement at the expense of the other branches." Barkow, *supra* note 71, at 336.

time? If so, Congress still retains its enhanced institutional role because it can revoke this delegation statutorily. Ultimately, any proposal for a congressional override cannot be assessed fully without answering these and other questions of precise institutional design. For now, however, I want to put them aside, and explore how such an override might have worked in cases already a part of the canon of constitutional law. If persuasive, we can then approach these difficult issues on another occasion.

A. *Applying a Congressional Override to Past Cases*

1. *Brown v. Board of Education*

Consider how Congress might have operated if it had the power of a legislative override in *Brown*. In 1954, the North and South were separated by hostility and alienation, a condition exceeded only by the Civil War. The South was committed to its way of life and determined to resist change. Many did not seriously believe that change would come. The North probably agreed that change was unlikely. But the North's moral indignation—some might say self-righteous hypocrisy—painted the South as a quite incomprehensible alien nation.

Some might argue that since a congressional override of *Brown* would have been morally and constitutionally wrong, the possibility that this decision could have been overridden had Congress the power detracts from the plausibility of instituting such a practice now. It is critical to recognize, however, that a congressional override of *Brown* would have represented a huge political target throughout future electoral campaigns. Of course, it is impossible to tell how long it would have taken for organized popular action to reverse the congressional override. But Congress's reversal of *Brown* would have haunted every congressional and presidential campaign until segregation was eliminated.

Consider the Southern Manifesto, conceivably a failed congressional override of *Brown*.¹⁷⁸ In March 1956, seventy-seven members of the House and nineteen Senators signed a document decrying what they considered a “clear abuse of judicial power.”¹⁷⁹ These officials insisted that the desegregation cases “climax[ed] a trend in the Federal Judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people.”¹⁸⁰ Southern congressmen pledged “to use all

¹⁷⁸ 102 CONG. REC. 4515-16 (1956).

¹⁷⁹ *Id.* at 4459-60.

¹⁸⁰ *Id.* at 4460.

lawful means to bring about a reversal of this [unconstitutional] decision.”¹⁸¹ Suppose the Southern Manifesto succeeded in overriding *Brown*. What would have resulted? On the one hand, the success of the Southern Manifesto might have entrenched American apartheid more deeply for another generation. On the other hand, had the Southern Manifesto succeeded, the Civil Rights movement might have intensified and galvanized progressive political action in 1956.

Given the moral propriety—about which we now all agree—that segregation is utterly or inherently wrong, it is inconceivable that overriding *Brown* would have succeeded.¹⁸² If the situation arose today, the “sound-bite” media culture would surely favor reversing any override with electoral challenges. “White supremacist racists should be ousted and thrown out of office for good!” would become the battle cry. Though the technologies used today by the media were not available at that time, radio and print journalism would have sufficed.

Some might complain that a congressional override might have slowed the progress of extirpating American apartheid. The schools might not have been desegregated in 1954. Reaching the promised land might have been delayed for another decade or more.¹⁸³ The problem with this complaint is that segregated schools were not abolished in 1954 in either the South or the North. Had the worst-case scenario occurred—Congress’s overriding *Brown*—the ultimate cure would have been electorally driven, not Court decreed. The electorate, in the end, would have been the prime mover in freeing this nation from the grips of American apartheid.¹⁸⁴ In this case, the character of American politics would have been drastically altered. Electoral constitutional change would have been revived.¹⁸⁵

¹⁸¹ *Id.* I have absolutely no sympathy with the racist motives of many of these officials. My concern is only with what might have happened if a congressional override was available to Congress at that time, not whether their determination to continue racial apartheid was just.

¹⁸² I explore various types of alternatives to *Brown* in *Constitutional Revolutions*, *supra* note 4, and *Haunted by Brown*, *supra* note 91.

¹⁸³ Some scholars contend that desegregating the schools in the South gained momentum only after the Civil Rights Acts of 1964 and 1965. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

¹⁸⁴ At what cost? Decades of continued injustice? Perhaps. But no one seriously contends that *Brown* cured American racial apartheid; nor does anyone seriously suggest that racial injustice is no longer systemic in American society. *But see* DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* (1995). I am sensitive to the fact that some might think it glib for a caucasian male to cavalierly suggest that African-Americans should have been content to wait longer for even the symbolic gesture of liberation that *Brown* represents. I do not mean to be cavalier. I am simply suggesting that the cause of justice might have been better served by extirpating American racial apartheid through the electoral process. Consider Derrick Bell’s thoughtful reflection. “Contending with [the resistance to *Brown*] made it unlikely that any of those trying to implement *Brown*, including myself, would stop to consider that we might be on the wrong road.” DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 19 (2004).

¹⁸⁵ Of course, no one now can say whether a broader, less adjudicative form of constitutional

My point is that, electorally, desegregationists were in a win-win situation. If Congress had rejected a congressional override of *Brown* that too would have become an issue in electoral politics. However, given the circumstances surrounding *Brown*, it is unlikely that subsequent electoral politics would have succeeded in finally overriding *Brown*. However, if that occurred, electoral politics would once again be used to resurrect *Brown*.

Electoral politics will always have losers. But the law resulting from fair political processes should inhibit resentment, the attitude responsible for political backlash. By contrast, resentment is inevitable when an electoral winner loses through the courts. Without significant resentment, the chances for sustained polarization appear to be less likely. Republican democrats, on whatever side of the political divide, must accept the possibility of losing not only as a necessary evil, but more importantly as a positive good. In a community of equals, reasonable disagreement will be a permanent feature of constitutional reality. And no one but the arrogant will insist that they cannot be wrong, even about a pressing constitutional controversy.

By contrast, given the moral correctness of desegregation, not only in terms of general morality, but especially constitutional morality, it is difficult to see how those favoring segregation could have ultimately succeeded in defeating *Brown*. One further benefit of electoral constitutional change is that *Brown* would not have then served as precedent for constitutionally rejecting affirmative action. Instead, Congress's intent in defending *Brown* might have become dispositive. Consequently, congressional approval of affirmative action—even one permitting the remediation of past injustice to count as a compelling interest—might have quieted some of the fractious resentment of using racial preferences. Progressives—some of whom are passionately committed to judicial supremacy—must be happy over the prospect of eliminating cases that arguably preclude affirmative action. In other words, if Congress had the ultimate constitutional authority to supervise the Court's handling of affirmative action, then, at least in the early cases, affirmative action would have been the law of the land.¹⁸⁶ If access to a congressional override would not have been an insurmountable obstacle in extirpating American apartheid, two other cases show how congressional overrides might have operated with a Court that understood its subordinate institutional role.

law would be better than the kind we have now. But it is at least conceivable that constitutional controversies would be decided more on the merits than on elements that arise only because on some level of constitutional consciousness, the Court's legitimacy is deeply suspect.

¹⁸⁶ While it is true that with the nation's shift toward conservatism, legislative support of affirmative action might have waned, Congress and the states are the proper fora for deciding this issue. With certain qualifications such constitutional change invigorates politics and each citizen's recognition of his or her role as a member of the government's sovereign authority.

2. *Texas v. Johnson* and *Eichman v. United States*

In *Texas v. Johnson*,¹⁸⁷ the Court overturned a Texas law prohibiting the desecration of the American flag. In its aftermath, Congress attempted to override the Court's decision by enacting the Flag Protection Act (FPA).¹⁸⁸ Although Congress, on some accounts, is an equally *bona fide* constitutional interpreter of the First Amendment, the Court's response, in *United States v. Eichman*,¹⁸⁹ ignored Congress's co-equal role and invalidated the FPA. In other words, in this actual case, Texas had spoken, the Court had spoken, and then the national legislature spoke. Such a process indicates, at least in principle, a significant degree of deliberation. Why should an unelected body get two bites of the apple when both state and federal elected branches get only one? This is clearly an example of judicial process becoming dominating constitutional review, even tyrannical. But even suggesting that this process is tyrannical may trigger shrieks of astonishment and anger. Why? Because the entrenched understanding has so pervaded our attitude toward and commitment to judicial supremacy, we fail to recognize even a presumptive problem here. Instead, we automatically generate the same rationalizations again such as, the independence of the Court contributes to, rather than detracts from, republican democracy; or it is perfectly reasonable to delegate virtually irrevocable authority to a branch of government designed to protect minority rights, and so forth. We all know the drill. Are these explanations anything more than mere rationalizations?

Imagine an alternative scenario. Instead of striking down the FPA in *Eichman*, the Court might have upheld the FPA on institutional not interpretive grounds. The Court might have said that according to its best attempt at constitutional interpretation, the First Amendment clearly protects burning an American flag. Nevertheless, the Court might have conceded that the institutional question of who decides

¹⁸⁷ 491 U.S. 397 (1989).

¹⁸⁸ Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (codified at 18 U.S.C. § 700) (invalidated by *United States v. Eichman*, 496 U.S. 310 (1990)). Here is another example of a missed opportunity for a congressional override. *Miranda v. Arizona*, 384 U.S. 436 (1966), required law enforcement officers to apprise criminal suspects of their Fifth Amendment rights regarding self-incrimination. The suspect must be given certain warnings if his or her statements made while in custody are to be admitted in evidence. In response, Congress enacted legislation, 18 U.S.C. § 1602 (2000), requiring only that confessions be voluntary. In *Dickerson v. United States*, 530 U.S. 428 (2000), the Court held that *Miranda* was a constitutional decision of the Court, which Congress cannot override. Had the Court in *Dickerson* deferred to Congress, 18 U.S.C. § 1602 would have been a congressional override. All the components of a congressional override were already in place. Hence, the practice could come about informally without Article V assistance. However, this would require the unrealistic prospect of judges exercising self-discipline.

¹⁸⁹ 496 U.S. 310.

which interpretation prevails is more fundamental in a republican democracy than questions of interpretation. Hence, as an institutional matter, the Court should have deferred to Congress's decision to enact the FPA. Such deference would indicate the judicial recognition of the FPA as a congressional override.

Do not confuse this position with skepticism about the meaning or existence of correct constitutional interpretations. Rather, this position merely says that absent some privileged access to such an interpretation, and given the persistence of reasonable disagreement, the electorate or its representatives' interpretation should prevail. To be candid, in my own view, flag burning must be constitutionally protected if free speech is to remain a capacious, vibrant constitutional value. In short, I believe that the decision in *Johnson* is the *objectively* correct interpretation, if any interpretation ever is. However, what I think the objectively correct interpretation is, even what the Court believes the objectively correct interpretation is, should not be dispositive in a republican democracy. Additionally, I do not suggest that the quality of the actual debate over the constitutionality of flag burning was in any way satisfactory from a deliberative perspective. Indeed, demagoguery and distortion were rampant. But that must remain a permanent possibility in any democracy. It is up to the people collectively to improve the quality of the debate. No conception of democracy or institutional design can guarantee a high level deliberative process.

But when Congress weighs in on this issue, and had the Court abstained from further action in recognition of its own subordinate institutional role, the national legislature would have had two bites of the apple, not the Court. Of course, the Court might hope that the electorate would make its opinion known through the next series of congressional elections, and throw the scoundrels who passed the FPA out of office. Here the Court would be deferring to Congress in the spirit of the New Deal Revolution even though this issue involves rights and as such would seem to be covered by footnote four of *United States v. Carolene Products, Co.*¹⁹⁰ The Court might hope that the people as sovereign would elect congresspersons who would repeal the FPA. But, as an institutional matter, the Court would freely acknowledge its secondary role in American republican democracy. In the appropriate constitutional culture, Justices would be content to have their judgments heard, and would be relieved that it was not their responsibility to invalidate legislative enactments. That job ultimately remains with the people or the people's representatives.

In deferring to Congress, the Court is not surrendering its commitment to the correct interpretation of the First Amendment;

¹⁹⁰ U.S. v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938).

rather, it is surrendering its institutional primacy. It is acknowledging that even when the Court's interpretation is right, institutionally the Court must give the relative or provisionally final say to Congress and to the electorate that hires Congress. Of course, getting the interpretation right is imperative, but there is a difference between the question of which interpretation is right and who has the best democratic pedigree to decide the issue.¹⁹¹ The notion of a congressional override is predicated on the conviction that after the appropriate interbranch exchange and consultation with the electorate, the elected branches should prevail.¹⁹²

Even when the Court gets the right interpretation three problems remain: (1) Delegating the ultimate question of constitutionality to the courts discourages the polity from engaging in unfettered conversation about constitutional meaning,¹⁹³ a conversation not directed primarily toward the courts.¹⁹⁴ (2) A related point maintains that judicial

¹⁹¹ The standard argument is that when the Court protects a constitutional right, it does so because we have a pre-commitment to protecting the interest underlying that right. And pre-commitment is impossible without judicial supremacy. However, the question is not whether we are pre-committed to certain rights, but rather the question is who gets to decide the content of those rights. The contention that giving this job to Congress destroys such pre-commitment is circular and unsupported by history. It is circular because it assumes that even in a mature democracy legislators necessarily will be motivated by partisan consideration. It is unsupported by history because the Court has not reliably—except perhaps the Warren Court—protected rights and Congress has not always failed to protect them.

¹⁹² I would like to make one thing clear. I am neither asserting nor denying that there are correct interpretations of the Constitution. My point is simply that no one has ever successfully formulated an uncontroversial approach for identifying correct interpretations. In this situation, what does republican democracy counsel? The Court might have a distinct contribution to make to constitutional self-government, but that hardly entails judicial supremacy. The people can check the legislature. But the courts cannot be checked effectively, and thus the entrenched understanding leaves us with an institution of constitutional review where unchecked checkers have the final word.

¹⁹³ This Thayerian point is captured nicely in the following:

Americans have generally regarded the political system as an arena in which the populace debates and explores public moral issues. In that way they clarify and implement their evolving understanding of the public good. In recent years we seem to have moved increasingly in the direction of expecting such issues to be decided not by the people but by judges. Whatever the positive elements of such a shift, it has certainly reduced the role of the citizens in discussing, debating, and deciding many issues that affect them, weakening . . . the democratic order.

POWERS & ROTHMAN, *supra* note 7, at 187.

¹⁹⁴ In Justice Breyer's view, the Court's role is to facilitate this conversation. He cautions that the "tumult" of American bottom up participatory democracy counsels a special degree of judicial modesty and caution. This is because a premature judicial decision risks short-circuiting, or preempting the "'conversational' lawmaking process—a process that embodies our modern understanding of constitutional democracy." STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 71 (2005). However, Justice Breyer seems unwilling to go the extra mile by creating an external mechanism to enforce "judicial modesty and caution." *Id.* Without such an external mechanism, even a Court of Breyerian Justices will be unable to resist those occasions when their best judgment tells them that the Court must intervene. Once the Court begins to intervene, any chance of returning to modesty and caution, without instituting a congressional override, is permanently lost.

constitutionalism has created a language decidedly more legal than the language of contextual political philosophy. (3) The question of who checks the Court is never institutionally addressed. Keep in mind that no one would argue that the Court *always* produces the correct interpretation. Not even the Court would entertain such an argument. Indeed, everyone believes that the Court has made dreadfully bad decisions in the past and will in all likelihood do so again in the future. We just disagree on which decisions were bad. Where such reasonable disagreement exists, the solution in a republican democracy should be to subject constitutional meaning to a complex interbranch process with the final say in the hands of an elected branch and therefore ultimately in the hands of the people.

American constitutionalism has become the antithesis of its origin in the revolutionary era. Removing constitutional supremacy from the courts forces the electorate to be more involved in deciding constitutional meaning. This might enable constitutional discourse to be revived and transformed from the language of lawyers to the language of sovereign republican democratic citizens.¹⁹⁵ Providing a congressional override is one step in bringing the Constitution back to its roots.

Are there any risks in instituting the possibility of a congressional override? Of course there are. But there are also risks in assigning the final word to the courts. Those extraordinarily risk-averse may prefer the status quo over significant institutional restructuring. And to be sure, in a world of war and terror, judicial supremacy might not pose the greatest problem to republican democracy. Nevertheless, on the assumption that the United States will exist and thrive centuries from now, our job as custodians of the Constitution might be better served if we take some risk now in order to avoid a republican democracy that effectively loses its connection to the electorate.

B. *Section 5 and the Congressional Override*

A more interesting example of a congressional override that might have happened, but did not, is illustrated by the sequence of events in *Employment Division v. Smith*,¹⁹⁶ the Religious Freedom and

¹⁹⁵ As FDR put this point: “[F]or one hundred and fifty years we have had an unending struggle between those who would preserve this original broad concept of the Constitution as a layman’s instrument of government and those who would shrivel the Constitution into a lawyer’s contract.” *The Constitution of the United States Was a Layman’s Document, Not a Lawyer’s Contract* (Sept. 17, 1937), in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359, 367 (Samuel I. Rosenman ed., 1941).

¹⁹⁶ 494 U.S. 872 (1990).

Restoration Act (RFRA),¹⁹⁷ and *City of Boerne v. Flores*.¹⁹⁸ In *Smith*, the Court arguably revised the jurisprudence of the Free Exercise Clause by scrapping the strict scrutiny standard of review used for laws that unintentionally burden religious liberty. In brief, the issue in *Smith* was that if every law burdening religious liberty—even laws that were designed for other reasons without the slightest interest in burdening religious liberty—must be subject to strict scrutiny, then doing so creates two significant problems: the first is the problem of *magnitude*, and the second is the problem *religious fraud*. The problem of magnitude indicates that strictly scrutinizing all laws burdening religious liberty would overwhelm the Court's docket. How many laws have a totally benign effect on religious liberty? The problem of fraud indicates that anyone could conjure up a set of "religious" tenets and practices requiring the strict scrutiny review in the hope of being granted exemptions from a wide array of legal requirements. Viable diverse democracies need to be ever vigilant against deliberately and significantly intruding on religious liberty, but laws of obvious general applicability, if reasonable, should be permitted. By contrast, assuming a cavalier attitude toward religion, reserving only those deliberate and most obvious legislative intrusions into religious liberty radically reduces the protected sphere of religious liberty. Hence, plausible arguments exist on both sides.¹⁹⁹

As in the aftermath of *Texas v. Johnson*, *Smith* created a furor. Religious conservatives and civil libertarians condemned the decision for allegedly reading religious liberty out of the Constitution. The combined force of these groups made it possible to pass RFRA, which effectively restored strict scrutiny as the standard for reviewing laws that burden religious freedom. This illustrates Congress's institutional role in overturning a Supreme Court decision. If the story ended here, RFRA would be a *bona fide* instance of a congressional override. The

¹⁹⁷ Pub. L. No. 103-344, 108 Stat. 3125 (1994) (codified at 42 U.S.C. § 1996a (2000)).

¹⁹⁸ 521 U.S. 507 (1997).

¹⁹⁹ Conceivably, there is a similarity between *Smith* and *Washington v. Davis*, 426 U.S. 229 (1976). Justice Scalia thought so. Consider:

[W]e have held that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause. . . . Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with [this] precedent.

Smith, 494 U.S. at 886. However, potentially significant differences between the two cases exist. For one thing, liberty is the value in *Smith*; equality is the value in *Davis*. However, citing this difference without a persuasive explanation of why it is significant fails to defeat the claim that the two cases should be treated the same. In a diverse democracy, laws designed neither to harm a particular kind of liberty (religion) or a particular kind of equality (racial) should not be suspect just because their effects might burden someone's liberty or equality. Or alternatively stated, whenever a law burdens such values, it should be strictly scrutinized.

State of Oregon had spoken, the Court had spoken, and Congress had spoken. Critical elements of American federalism and separation of powers would have joined to determine constitutional meaning.

What would be the benefits of this process? First, the Supreme Court, a co-equal branch of the federal government, would have done what it should have done. The Court examined a state law denying unemployment benefits to drug counselors discharged from their positions for using drugs. In *Smith*, the Court presented its interpretation of the Free Exercise Clause. According to this interpretation, the Free Exercise Clause does not bar the Oregon law. Do judicial interpretations contribute to the deliberative process of discovering the community's best interpretation of the Free Exercise Clause? For those who construe judicial constitutional decisions as contextual political philosophical explications of constitutional provisions, the answer is "yes." In essence, the Court's opinion presents one account of the relationship between and among generally applicable laws, religious liberty, and religious exemptions. It seems uncontroversial that, as a normative position, Justice Scalia's opinion in *Smith* is cogent, coherent, and plausible, even if one believes that it is ultimately wrong. All the typical arguments—impartiality, objectivity, and judicial independence—pertain to the force and relevance of the Court's institutional role as a primary interpreter of the Constitution regarding a controversial issue of democracy, not its ultimate supremacy or final word in interpreting the Constitution.

It is a *non sequitur*, however, to insist that the primary interpreter must be the final institutional interpreter at least in a republican democracy. Constitutional finality and legitimacy require the final interpreter to be the sovereign. Not to put too fine a point on it, constitutional finality requires the sovereign to ratify constitutional interpretations made by governmental authorities.²⁰⁰ When this normative pedigree of sovereignty resides in the electorate, Congress should be the penultimate interpreter of the Constitution, not the Court.²⁰¹ Only the entrenched understanding creates the impression that this is merely an unsupported assertion or circular or both. The entrenched understanding prevents us from recognizing Congress's role as the final interpreter in a republican democracy.

In other words, if the judiciary makes a unique or distinct contribution to lawmaking, as contended here, then Justice Scalia's

²⁰⁰ Article V clearly recognizes the people to be the sovereign interpreters of the Constitution. The complaint against judicial supremacy is that it insufficiently recognizes the people or the electorate as sovereign in law-making and constitutional interpretation.

²⁰¹ By "final interpreter" I do not mean that every such decision should be submitted to the electorate for ratification. Rather, I mean the representative dimension of American democracy should permit Congress to examine and override, if necessary, the primary interpreter's decision.

opinion in *Smith* effectively contributes to our understanding of religious liberty. But why should it be the final understanding? Consider Justice Kennedy's answer in *City of Boerne*:

If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.' Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detail amendment process contained in Article V.²⁰²

This judicial supremacist response reveals much about the entrenched understanding of the role of the courts. Justice Kennedy worries that if Congress can define its own powers in Section 5, it can alter the meaning of the Fourteenth Amendment. Consequently, if constitutional meaning is to remain constant, some other branch of government must be the arbiter of the Fourteenth Amendment's meaning or Congress goes unchecked and the distinction between constitutional change (higher law) and legislative change (ordinary law) is lost. But something similar is equally true of the courts. If the Court goes unchecked in its constitutional interpretations, then the distinction between what the Constitution says and what the Court says the Constitution says is lost. It is only because of the insidious presence of the entrenched understanding that we reflexively identify constitutional meaning with judicial interpretations of the Constitution.

The agnostic view of the role of the courts in Section 5 cases should be more circumspect. After all, Section 5's constitutional text names Congress as the enforcer of the rights in Section 1. At least within the four corners of the Amendment, Congress is the only branch assigned any authority whatsoever.²⁰³ Arguably, then, at least from a textualist or original meaning perspective, Congress should be the primary agent that enforces the Amendment, and one cannot be an effective enforcer unless one can legitimately identify when

²⁰² *City of Boerne*, 521 U.S. at 529 (citations omitted).

²⁰³ Section 5 has had a revisionist history since its inception. 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 (2003). The Court, soon after the ratification of the Fourteenth Amendment, indicated that it is Congress's responsibility to enforce this Amendment. *Ex Parte Va.*, 100 U.S. 339, 345 (1879) (assigning an enlarged role to Congress, not the courts, to enforcing and protecting the rights in Section 1). This position was reversed by a series of cases over the course of the next century. *Smyth v. Ames*, 169 U.S. 466 (1898); *Ex Parte Young*, 209 U.S. 123 (1908); *General Oil Co. v. Crain*, 209 U.S. 211 (1908); *City of Boerne*, 521 U.S. at 507. However, *City of Boerne* implicitly rejects the more deferential standard articulated in *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

enforcement is necessary.²⁰⁴ This in turn requires that one has the capacity to identify *what* needs to be enforced in the first place. To do this requires *interpreting* constitutional text. It would then seem that Congress deserves an extraordinary degree of deference from any other legitimate interpreter of the Amendment. Inevitably, Congress will “reinterpret” Section 1 contrary to some judicial interpretations. But this does not mean that Congress’s interpretation is *ultra vires*. It is simply impossible to *enforce* Section 1 without *interpreting* it. And when Congress does misinterpret Section 1, the political process enables the electorate to select a Congress whose interpretations mirror the Constitution. The process of accountability is pellucid regarding Congress’s interpretations, not so when the Court insists on its own, often parochial, interpretations of Section 1.²⁰⁵

The entrenched understanding turns this argument on its head. It postulates the Court as the final interpreter of the Constitution; therefore, any argument not conforming to this postulate must fail. Without an independently convincing argument establishing this postulate, the entrenched understanding is entirely circular. The Court must scrutinize Congress’s Section 5 enforcement powers because the Court’s role in interpreting Section 5 is superior to Congress’s. The entrenched understanding makes this response plausible, or even compelling, because it assumes the truth of the very conclusion it purports to demonstrate. What otherwise might seem to be Congress’s obvious role in interpreting Section 5 is rejected because the entrenched understanding will not permit the Court to step back at all.

To put this point differently, if we bracket the entrenched understanding—that is, if we make no assumptions about which branch has the provisional final say over the interpretation of Section 5—then the Fourteenth Amendment itself suggests that Congress has the responsibility of interpreting which rights the Constitution includes in Section 1 and when putative violations of these rights should be enforced. The Fourteenth Amendment grants Congress *some* power regarding Section 1. But the amendment does not mention the Court anywhere. And, of course, the framers could have said that the courts *should* enforce Section 1, but they did not. Thus, without the

²⁰⁴ Of course, on most accounts of the evolution of the Court’s role since *Marbury* support the view that courts have a sacrosanct place as constitutional interpreters. But that’s just giving a name to the entrenched understanding. If we bracket the entrenched understanding and take a closer look at constitutional history, it is far from obvious that the Court should be permitted to intrude into the legislative sphere in the way that Justice Kennedy’s opinion does.

²⁰⁵ One might object that the position articulated in this Article simply ignores the counter-democratic problems in the political process itself. However, if such problems exist, fix them. Do not assign a branch of government, whose unaccountability is created by institutional design, to circumvent the political process.

entrenched understanding, Congress's role in enforcing and interpreting Section 1 seems paramount.

Even if the entrenched understanding were true at the founding and through the Civil War—and this is a controversial historical claim—the Civil War Amendments, including the explicit reference to Congress in Section 5, should modify it. A new constitutional provision has assigned Congress a new interpretive role. Justice Kennedy's remarks are plausible only within a logical space tightly controlled by the entrenched understanding. Without committing the logical fallacy of *petitio principii*—assuming that the Court has the primary role in constitutional interpretation, which in fact should be the argument's conclusion—Justice Kennedy's argument is difficult to sustain.

Nowhere in the Constitution as ratified or as amended by the Civil War amendments is the Court's role as primary interpreter—or the distinction between paramount law and ordinary law—enshrined. Is this distinction included in the entrenched understanding? Yes, of course it is. But that is part of the problem. This principle is used to somehow render it obvious that Section 5 should be understood as a limitation of congressional powers not a grant. Even if it is clear that Section 5 is so limited, it is not obvious apart from our entrenched understanding that the courts must enforce this limited grant of congressional powers.

However, Justice Kennedy, without even a hint of irony, contends that “shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.”²⁰⁶ What is so ironic about this remark is that the practice of American judicial supremacy itself circumvents Article V. Judicial supremacy throughout American constitutional history has rendered the Court a perennial constitutional convention. The question we must answer is this: Assuming one or the other governmental branch will circumvent Article V, which one has a greater democratic pedigree to do so? Which branch is more accountable? Clearly, Congress, textually and structurally, is that branch. Should Congress through Section 5, get it wrong, the electorate can always correct the mistake. Who protects us when the Court gets it wrong?²⁰⁷

Justice Kennedy devised the “congruence and proportionality” test to determine when a congressional statute is authorized by Section 5. But, as Justice Scalia correctly points out in *Tennessee v. Lane*,²⁰⁸ such

²⁰⁶ *City of Boerne*, 521 U.S. at 529.

²⁰⁷ As Kentucky's John Breckenridge put it: “It is said that the different departments of Government are to be checks on each other, and that the courts are to check the Legislature. If this be true, I would ask where they got that power, and who checks the courts when they violate the Constitution?” 11 ANNALS OF CONG. 178-79 (1802).

²⁰⁸ 541 U.S. 509 (2004).

tests “have a way of turning into vehicles for the implementation of individual judges’ policy preferences.”²⁰⁹ According to Justice Scalia, “[t]he ‘congruence and proportionality’ standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decision-making.”²¹⁰ And further, this test requires that “the courts (and ultimately this Court) must regularly check Congress’s homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional.”²¹¹ Inevitably, the Court as a homework monitor will

bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test (“congruence and proportionality”) that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed.²¹²

Justice Scalia’s repudiation of the “congruence and proportionality” test is sensible. But his candidate for replacing it—attending to the obvious meaning of “enforceability”—suffers from an implicit commitment to the entrenched understanding.²¹³ Just what does it mean to distinguish between “enforceability” and “reinterpretation?” And even if there is consensus on what this distinction means, how do we know when and how to draw it? Finally, who gets to decide what the distinction means and when it applies? These are questions that need to be resolved. Yet, the entrenched understanding’s spell is so controlling here that the Court never recognizes the need even to ask them.

Judge Michael McConnell is not blinded by the entrenched understanding.²¹⁴ Instead, he distinguishes three possible senses of Congress’s Section 5 power: (1) the remedial sense, (2) the substantive sense, and (3) the interpretive sense. The remedial sense understands Section 5 power to limit Congress’s legislative authority to enforce

²⁰⁹ *Id.* at 556 (Scalia, J., dissenting)

²¹⁰ *Id.* at 557-58. It is not obvious why this objection is stated in terms of judicial arbitrariness. The test seems no more flabby than “cruel and unusual punishment,” “beyond a reasonable doubt” as well as other tests in constitutional law. Indeed, articulating why some remedy might be congruent and proportional might be thoughtful and insightful. From a democratic perspective, the problem is not the flabbiness of such terms; flabbiness is endemic to all discourse generally. The real problem, for republican democrats, is who should decide when the test is satisfied.

²¹¹ *Id.* at 558.

²¹² *Id.*

²¹³ Curiously, Justice Scalia’s insistence in *Lane* that there is a sharp difference between enforcing Section 1 rights and creating new rights seems to be at odds with his view in *Printz* that the difference between enforcement and making law is extremely difficult to discern. *Printz v. United States*, 521 U.S. 898, 927 (1997).

²¹⁴ Michael W. McConnell, *Comment: Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).

Section 1 rights as those rights are understood by the Court. The substantive sense treats Congress's Section 5 power to be plenary, permitting Congress "to determine, as a legislative matter, what rights it believes the people should have, and could protect those rights against infringement by state and local governments."²¹⁵ And finally, according to the interpretive sense, "the question is not whether Congress is enforcing the Fourteenth Amendment *as construed by the Court*, but whether it is enforcing a reasonable interpretation of the Fourteenth Amendment."²¹⁶ The interpretive sense is designed to navigate successfully between the Scylla of identifying the Constitution with the Court and the Charybdis of giving Congress free reign to interpret Section 1 as it pleases. Reasonable interpretations need not be identical to the Court's interpretation, but the Court still maintains the critical role of reviewing how Congress interprets Section 1.

McConnell's analysis, though thoughtful, is like Justice Kennedy's, limited by the entrenched understanding. First, it is far from obvious whether the Court can perform the function McConnell assigns to it. In a regime of judicial supremacy, the Court would require enormous self-discipline to interpret Section 1 as X, yet uphold Congress's interpretation as not-X. Requiring self-discipline for the purpose of giving Congress its proper role in interpreting Section 1 is quixotic. We have been down this road before. If, by contrast, the Court functioned in a regime with the possibility of a congressional override, the Court would know in advance that its interpretation, though often controlling, is only one step in the process of arriving at constitutional meaning.

Second, the dichotomy between "interpreting the law rather than making the law" dominates McConnell's approach. While McConnell is clearly right that the remedial sense impoverishes the text and history of Section 5, insisting on the Court's authority to distinguish between a substantive and interpretive reading of the provision brings back the specter of the entrenched understanding just when we thought we were beyond its reach. Like McConnell, I would insist that the question of whether a congressional interpretation is substantive or interpretive should remain a fundamentally important inquiry. But Congress and the electorate should provide the answer, not the Court.

Why not instead regard Congress's use of Section 5 to enact RFRA, a congressional override of the Court's decision in *Smith*. Alternatively put, the *City of Boerne* could have stated that although the Court stands behind its interpretive decision in *Smith*, it recognizes that Congress's interpretation institutionally prevails, especially when the

²¹⁵ *Id.* at 171.

²¹⁶ *Id.* (emphasis added).

relevant constitutional text explicitly assigns Congress a role in enforcing the Amendment.

It is far from obvious why Section 5 does not imply judicial deference to Congress since the section explicitly assigns Congress an enforcement role, which necessarily involves an interpretive role as well.²¹⁷ Nonetheless, here is another example of judicial supremacy assigning to itself the responsibility to interpret a constitutional provision that can be read plausibly to assign that role to Congress. It is always possible, and in this case actual, for a Court to decide that its interpretation supersedes the text and caselaw interpreting the text. And then who checks the Court? One can, of course, answer this question by referring to the circuitous practice of transformative appointments and the process in Article V. And perhaps inertia will compel accepting this solution. But even so, inertia does not close the question of what republican democratic theory *should* countenance.

In principle, judicial review serves an important purpose in a republican democracy; however, it serves this purpose when it is one voice among several in deriving constitutional meaning. Judicial supremacy, by contrast, abruptly short-circuits the process wherein the Court and Congress participate jointly in an interbranch attempt at interpreting the Constitution.

Notice congressional overrides already exist in cases of statutory interpretation and judicial review of dormant commerce clause cases. Congress, in these cases, has the power to override a judicial interpretation of a statute by enacting another statute that corrects the Court's interpretation. Similarly, Congress can now override the Court's interpretation of the Commerce Clause when the Court reviews state laws affecting interstate commerce. These are pellucid examples of how congressional overrides actually operate today. In these areas, few critics insist that congressional overrides are incompatible with the ideals of federalism, separation of powers, or checks and balances. Consequently, it is not obvious why a permanent constitutional override cannot be extrapolated from these instances and applied to constitutional review generally.

CONCLUSION

In this essay, I have attempted to cast doubt on the entrenched understanding of the role of the courts in American constitutionalism. Much more needs to be done to deflate this largely unconscious and

²¹⁷ Even if everyone agreed upon the primacy of Congress to override Supreme Court decisions through Section 5, contrary to what is likely, this still leaves federalism the unchecked domain of the courts.

anti-democratic conception. For example, one area only briefly mentioned in this essay is the role of the executive branch in responding to judicial supremacy and how its decisions affect the presidency. One conception, eloquently stated by Justice Jackson, reflects the entrenched understanding:

With all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary decisions. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.²¹⁸

Of course, the Executive branch must be under law. But by what criteria do we to determine how to achieve this? Will the Supreme Court routinely restrain the president from acting lawlessly and unconstitutionally? Keep in mind, no court stopped Lincoln from suspending the writ of habeas corpus during the Civil War, arguably a congressional, not an executive, prerogative.²¹⁹ And the Court failed to extirpate the injustice perpetrated on Fred Korematsu despite Justice Jackson's prescient warning that:

Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.²²⁰

The Court will not save us from present executive lawlessness. Only the people, through the political branches, can succeed. Indeed, "[t]he problem is that the Court's review would likely be a rubber stamp. Historically, the judiciary has been so deferential to the executive in wartime as to provide virtually no meaningful check. . . . And, in blessing dubious executive wartime measures, the Supreme Court might actually make things worse—establishing precedents for even more frightening government actions in ordinary times."²²¹

²¹⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

²¹⁹ The relevant provision is in Article I: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art I, § 9, cl. 2. Thus, this seems to be a quintessential legislative power.

²²⁰ *Korematsu v. United States*, 323 U. S. 214, 244 (1944) (Jackson, J., dissenting).

²²¹ Lawrence Tribe, *Trial by Fury: Why Congress Must Curb Bush's Military Courts*, NEW REPUBLIC, Dec. 10, 2001, at 18.

Realistically, “the odds that judges will second-guess a determination by the nation’s commander in chief that a given measure is truly demanded by military necessity [or national security] are particular slim.”²²² Especially, in times of national emergency and crisis, when it really counts, it clearly is an egregiously “terrible mistake for those who worry about civil rights and liberties to pin too much hope on the judiciary.”²²³

A congressional override should be fashioned to counter the President’s lawlessness, although this does raise potential separation of powers problems.²²⁴ Or will both Congress and the Court surrender to an overreaching President? At present, one cannot be sanguine about keeping the Executive branch from assuming unlawful power without appealing to the people.²²⁵ Hence, while further exploration of the congressional override is needed, the Court’s role in preventing executive transgression does not appear to have much empirical support.

Judge Learned Hand’s admonition applies here with deadly seriousness: “Liberty lies in the hearts of men and women; [if] it dies there, no constitution, no law, no court can save it.”²²⁶ And in the present war on terror hysteria, “it is by no means clear that the present Supreme Court will protect the Bill of Rights.”²²⁷ Nor is it clear that

²²² *Id.* at 19.

²²³ *Id.* This should serve as a warning to David Cole who so admirably and tirelessly fights for retaining the rule of law in the war on terror. Cole pins his hope to reign in a lawless executive by concluding his well-argued article on *Hamdan v. Rumsfeld*, 524 U.S. 507 (2004), in *Why the Court Said No*, N.Y. REV. BOOKS, Aug. 10, 2006, at 41, 43, with this powerful remark:

[B]oth the strength and security of the nation in the struggle with terrorists rest on adherence to the rule of law, . . . because only such adherence provides the legitimacy we need if we are to win back the world’s respect. *Hamdan* suggests that at least one branch of the United States government understands this.

However, Cole seems to think the Court—actually Justice Kennedy—will save us from the follies of the elected branches. One should be wary of placing one’s bet upon one branch of the government on such slender evidence. What is needed is governmental support for civil liberties by governmental officials who are themselves accountable. If protection from tyranny cannot be procured from accountable branches of government, it is madness to think enduring protection will be better achieved by the one unaccountable branch.

²²⁴ Ironically, the proposal for a congressional override is often objected to on separation of powers grounds. Yet, the assumed role of the Court to overturn acts of other branches of government including the states is itself a separation of powers problem.

²²⁵ Keep in mind that the Court in some circumstances might restrain an overreaching President, but the same power the Court has in restraining the president can be used to sanctify the President’s overreaching. For example, “if the Court appeals to that [political question] doctrine and refuses to declare that the president has no right to disregard legislation, then it hands victory to the president[.]” Dworkin, *supra* note 1, at 16. Once again, we find that anywhere the Court can intervene to support principles of republican democracy, it can also intervene to suppress the very same principles.

²²⁶ LEARNED HAND, *The Spirit of Liberty*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 190 (Irving Dilliard ed., 1952).

²²⁷ Bruce Ackerman, Editorial, *Railroading Injustice; Congress Is Racing to Give the President the Power to Lock Up Almost Anyone*, L.A. TIMES, Sept. 28, 2006, at B13.

Congress will protect the people here. In that event, the people must remedy constitutional failure independently of government.

Additionally, this Article has attempted to debunk the myth that judicial supremacy is a problem only in a majoritarian democracy. Judicial supremacy, as it exists in the United States, is incompatible with republican democracy because it does not provide for accountability, which must exist in any sort of democracy whatsoever. Accountability requires delegating and revoking authority and power, and the possibilities for doing so must be reasonable and effective. The answer is to constrain judicial review, not to eliminate it. Judicial reasoning, as a form of contextual political philosophizing, contributes to the essential task in a republican democracy of providing deliberative structures to filter the electorate's transient desires and reconstruct them into the community's considered judgment, not merely to set rules for fractious interest-group warfare. In the end, maybe such warfare is all there is. But republican democracy should attempt to resist this cynicism until the day, if it should ever come, when no other explanation is plausible.

This Article's central position is that when a conflict exists between the Court's version of the community's considered judgment and Congress's version, Congress, the branch constitutionally closer and more responsive to the electorate, should prevail. Accordingly, a congressional override should be available to democratize judicial constitutionalism. Our interpretive debates will continue, though shorn of the unhelpful heat caused by questions of republican democratic legitimacy. The possibility of a legislative override arguably can render all judicial decisions legitimate since the people's representatives will either embrace the decision or use the congressional override to invalidate it. If you do not agree with the Supreme Court's interpretation, call your congressperson or at least vote to revoke his or her authority to speak for you unless he or she calls for a congressional override.

Democratizing judicial constitutionalism should be regarded as instrumental to a grand strategy of democratizing American constitutionalism generally. This strategy should be the goal of each and every one of us if we are to assume our place and responsibility as members of the trans-temporal generation of American constitutional founders.