

CONCLUSION: WHAT HISTORY TEACHES

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

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

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

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

THE ONCE AND FUTURE COURT

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

Roberts's confirmation hearings as Chief Justice were a cakewalk. Though some viewed this as a "defeat for liberal advocacy groups," it was not clear their hearts were really in it.⁵ Roberts, who had clerked for Chief Justice Rehnquist, was generally seen as an ideological swap. "It's hard to imagine a choice more similar to Chief Justice Rehnquist than John Roberts," observed former Solicitor General Walter Dellinger.⁶ Add to that the fact that Roberts's performance during the hearings was "almost flawless," leaving everyone wowed.⁷ No sense going to war over Superman, especially if it might not matter to the long-term direction of the Court. The Senate approved Roberts 78–22.⁸

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

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

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

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

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

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

THE WILL OF THE PEOPLE

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

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

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

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

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

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

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

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

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

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

THE POLITICAL COURT

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

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

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

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

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

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

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

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

THE ALIGNMENT OF THE JUSTICES WITH POPULAR OPINION

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

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

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

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

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

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

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

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

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

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

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

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

THE INDEPENDENCE OF THE JUSTICES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE DEMOCRATIC CONSTITUTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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