

**WHAT'S WRONG WITH JUDICIAL SUPREMACY?  
WHAT'S RIGHT ABOUT JUDICIAL REVIEW?**

ROBERT JUSTIN LIPKIN\*

I. INTRODUCTION .....2

II. THE PROBLEM OF JUDICIAL SUPREMACY IN A REPUBLICAN DEMOCRACY.....6

III. NORMATIVE DEFENSES OF JUDICIAL SUPREMACY ..... 10

*A. General Rationale Justifying Judicial Supremacy: The Court as Guardian of the  
    Constitution* ..... 10

*B. The Policing Function of the Courts*..... 11

*C. The Individual Rights Defense*..... 18

*D. The Judicial Independence Defense* ..... 26

*E. The Settlement Function Defense*..... 34

*F. The Second-Order Rule Defense* ..... 41

IV. THE VALUE OF JUDICIAL REVIEW ..... 46

V. CONCLUSION ..... 50

---

\* Professor, Widener University School of Law (Delaware); Ph.D. (Philosophy), 1974  
Princeton University; J.D., UCLA, 1984.

## I. INTRODUCTION

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.<sup>1</sup>

A stealth aristocracy dominates the American nation. Through the guise of constitutional interpretation,<sup>2</sup> a cadre of unelected, unaccountable, life-tenured, judges rides roughshod over American lawmaking.<sup>3</sup> This judicial aristocracy, unknown to most Americans as such, considers its reflective judgments about constitutional meaning (and thereby public policy) to be superior to the reflective judgments of the elected branches and even to those of the electorate. Indeed, judicial aristocrats conspire to transform the benefits of self-government into government by elites. This conspiracy—known as “judicial supremacy”—has hijacked American constitutionalism by leading the populace to believe that *judicial* constitutionalism is all the constitutionalism there is or all the constitutionalism there should be. When this conspiracy is exposed, apologists for judicial aristocracy unleash a hidden arsenal designed to show, often by denigration, how ridiculous objections to judicial supremacy are. Typically, these apologists insist that the critics misunderstand the nature of American self-government, or that the critics in essence advocate the

---

1. Lino A. Graglia, Opinion, *Rule of Law: Our Constitution Faces Death by 'Due Process'*, WALL ST. J., May 24, 2005, at A12.

2. The wars over constitutional interpretation continue unabated. Is textualism, originalism, representation-reinforcement, structuralism, precedent, historicism, or pragmatism the correct interpretative methodology? See PHILIP BOBBITT, *CONSTITUTIONAL FATE* (1982). If not, is some lexical ranking of some or all of these methodologies the correct one? I do not sneer at the importance of these questions, but just because they are important does not mean they are likely to be resolved. Although there are reasonable arguments in favor of each of these methodologies, the chances are slim that the Court will ever permanently decide which methodology (or methodologies) is correct. It is even more unlikely that a lexical ordering of these methodologies will ever be successfully formulated. But see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1192 (1987).

3. Ran Hirschl calls this aristocracy a “juristocracy.” RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* *passim* (2004). In contemporary political culture, the term “juristocracy” does not convey the appropriate condemnation of judicial supremacy. By contrast, “a stealth judicial aristocracy” conveys, in my view, the scorn some of the Founding generation held for privilege, wealth, and the power of the few over the many. Thus, I call this “a stealth judicial aristocracy” not because Americans are unaware of the power held by federal judges or even because they are unfamiliar with the operations of the judiciary. What makes this a stealth judicial aristocracy is the insidious and disproportionate influence the courts exhibit in American self-government. Although it could be argued that courts have a rather marginal role in American government, their role in deciding the constitutional controversies that form the basis of the culture wars is difficult to deny.

elimination of constitutional government entirely, or that judicial supremacy is indispensable to republican democracy, or a host of other creative rationalizations.<sup>4</sup>

This objection to judicial supremacy transcends party lines.<sup>5</sup> History reveals it is neither exclusively a conservative nor a liberal complaint. Throughout American constitutional history, notable Americans have complained that an unconstrained judiciary threatens republican democracy. As Thomas Jefferson, our third President, insisted, “the judiciary perversions of the constitution will forever be protected under the pretext of errors of judgment, which by principle are exempt from punishment. Impeachment therefore is a bugbear which they fear not at all. . . . *It is a misnomer to call a government republican, in which a branch of the supreme power is independant of the nation.*”<sup>6</sup> This defect derives directly from John Marshall’s triumphant declaration, “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>7</sup> For Jefferson, the Court “was at first considered as the most harmless and helpless of its organs. But it has proved that the power of declaring what the law is, *ad libitum*, by sapping and mining, slyly, and without alarm, the foundations of the Constitution, can do what open force would not dare to attempt.”<sup>8</sup>

The great emancipator, Abraham Lincoln, another President skeptical of judicial supremacy, rejected the idea that the Court’s decision in *Dred Scott v. Sandford*<sup>9</sup> could fix constitutional meaning for all branches of government or for the people. For Lincoln, “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.”<sup>10</sup> In a similar fashion, progressives railed against the

4. For a more detailed elaboration of these rationalizations, see Robert Justin Lipkin, *Which Constitution? Who Decides? The Problem of Judicial Supremacy and the Interbranch Solution*, 28 CARDOZO L. REV. 1055 (2006) [hereinafter Lipkin, *Which Constitution?*].

5. Perhaps the most notable example of a scholar rejecting judicial supremacy is Raoul Berger, a self-described “deep-dyed liberal and lifelong Democrat.” Raoul Berger, *Robert Bork’s Contribution to Original Intention*, 84 NW. U. L. REV. 1167, 1167 (1990) (book review). Neither conservative politics nor majoritarian jurisprudence is required to challenge the legitimacy of judicial supremacy. A progressive, republican democrat is (or should be) just as skeptical. The table around which those opposing judicial supremacy sit is capacious and welcomes anyone who recognizes the incompatibility of judicial supremacy and republican democracy irrespective of whether the opponent is substantively committed to conservative or liberal values.

6. Letter from Thomas Jefferson to James Pleasants (Dec. 26, 1821), in 10 THE WRITINGS OF THOMAS JEFFERSON, 1816-1826, at 199 (Paul Leicester Ford ed., New York, G. P. Putnam’s Sons 1899) (emphasis added).

7. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

8. Letter from Thomas Jefferson to Edward Livingston (Mar. 25, 1825), in 16 THE WRITINGS OF THOMAS JEFFERSON, 1816-1826, at 114 (Andrew A. Lipscomb ed., 1904).

9. 60 U.S. (19 How.) 393 (1857).

10. Abraham Lincoln, First Inaugural Address, in 2 COMPLETE WORKS OF ABRAHAM LINCOLN 5 (John G. Nicolay & John Hay eds., New York, Century Co. 1894).

*Lochner* Court<sup>11</sup> for preventing the political process from solving the nation's economic problems. And conservatives rejected the Warren Court's mysterious capacity to find unenumerated rights in the Constitution that, surprisingly, no one had ever recognized before.

The question, then, of whether judicial supremacy comports with republican democracy is an old but unresolved issue that the mainstream constitutional community has so far successfully suppressed. Why reopen an issue that most Americans—including judges, attorneys, legal scholars, and governmental officials—believe to be settled? There are several reasons for reexamining this question now.

First, many nations emerging from the oppressive grasp of the Soviet Union seem committed to democratizing for the first time in their histories. This birth of democratic aspirations in other nations provides us with an opportunity to re-examine our own democratic aspirations in a comparative context. Are other newly liberated nations following our lead in designing democratic institutions? If not, what implications, if any, do their different choices of democratic constitutionalism have for possible reforms in American constitutional design?

Second and more importantly, we have been perennially mired in wars about correct constitutional interpretation. Any moderately informed American citizen is aware that, painting with broad strokes, some jurists interpret the Constitution narrowly, as it is said the Founders intended, while others believe the Constitution is a living document to be adapted to the particular crises that arise in contemporary society.<sup>12</sup> On the basis of two hundred years of American constitutional history, it is safe to say that no one will win these interpretation wars. If there never will be a consensus on the correct constitutional methodology, we must ask ourselves why Supreme Court Justices should have the final word on the Constitution's meaning. The Court might have a contribution to make in a conversation about constitutional meaning, but why should this contribution qualify as the final word? On the hopeful assumption that the American republic will endure, it is never too late to resolve the question of the judiciary's role in republican democracy, and whether it should or should not be the primary constitutional interpreter.

Third, the interpretation wars suggest a broader problem in a diverse, pluralist society. One need not be a skeptic to acknowledge the probability that consensus over controversial questions in constitutional law, politics, and

---

11. *See* *Lochner v. New York*, 198 U.S. 45 (1905).

12. The distinction between narrow and broad interpretation oversimplifies the interpretation wars. Greater complexity exists in discussions of the correct methodology. Nevertheless, this complexity does not change the fact that the interpretation wars are unwinnable.

morality is unlikely.<sup>13</sup> Indeed, the burdens of judgment,<sup>14</sup> the inevitable difficulties of reaching consensus in a pluralist society, should prompt us to refocus our attention away from quarrels over the correct constitutional methodology and concentrate on the institutional question of which constitutional actor has the greater democratic pedigree in deciding questions of constitutional meaning.<sup>15</sup>

Fourth, the doctrine of judicial supremacy presents a paradox. In a republican democracy, governmental institutions either need to be externally constrained or they do not. If, as mainstream constitutionalism insists, electoral institutions need to be externally constrained, some institution must constrain them.<sup>16</sup> If the Court constrains electoral politics, who or what constrains the Court? Any answer to this question results in an unchecked checker.<sup>17</sup> Yet, this conclusion is at odds with the presupposition that governmental institutions must be externally constrained.<sup>18</sup> By contrast, if governmental institutions need not be externally constrained, then the reason for judicial supremacy evaporates. In either case, judicial supremacy is extremely problematic.

---

13. To say that consensus is elusive is not based on any naïve claim that everything is relative or that all political claims are just a matter of opinion. Rather, it derives from the fact that in a pluralist democracy truth cannot be compelled. Hence, even if there is one true constitutional methodology, we are not likely to divine methods for convincing or even predictably persuading other reasonable citizens to accept it as canonical.

14. The burdens of judgment are the reasons for the persistence of reasonable disagreement: (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 generating different judgments; and (6) the difficulty in selecting the appropriate subset of values from society's actual set of "cherished values" and the difficulty in determining the priority of the values finally chosen. JOHN RAWLS, *POLITICAL LIBERALISM* 56-57 (1993).

15. We can, of course, persist in perseverating over finding the correct interpretive methodology. If history is our guide, however, we are unlikely to ever agree on the correct interpretive methodology, not because no such methodology exists, but rather because in a free, complex, diverse society, consensus, like truth, cannot be compelled. Moreover, most candidates for such a methodology are reasonable. Or, to put the point differently, reason does not compel accepting one methodology over the others. Not only does reason not compel such acceptance, it does not even make it unreasonable to reject any of the leading interpretive methodologies. Hence, from a practical perspective, we cannot reasonably expect consensus on the question of which interpretive methodology is correct.

16. Of course, it does not follow that this institution must be the Court.

17. If not, the doctrine faces an infinite regress. Any institution posited as a check on another institution itself needs to be checked *ad infinitum*.

18. This prompts an inquiry into which constitutional actor has the best democratic pedigree to constrain governmental institutions. The choices are: the President, Congress, the courts, the states, the people, or some combination of these. Which choice best reflects our commitment to republican democracy championing the consent of the governed? Is there a constitutional actor who satisfies accountability requirements while preserving the integrity of the Constitution? Choosing the courts, for instance, obscures the role of the people as sovereign in a republican democracy.

This essay examines some of the leading normative defenses of judicial supremacy.<sup>19</sup> Part I of the essay states the problem of judicial supremacy. The essay then turns to an explanation of the role of judicial review in republican democracy. Part II examines arguments designed to show why judicial supremacy is an attractive, necessary, or useful feature of republican democracy. In Part III, the essay explains why dismissing judicial supremacy should not mean rejecting judicial review. In its most elemental form, judicial review contributes to a necessary deliberative conversation among citizens in a republican democracy.<sup>20</sup> Judicial review encourages deliberative conversation, but retaining judicial supremacy confuses the utility of judicial review with a wholesale reassignment of sovereignty from the people to the courts.

## II. WHAT'S WRONG WITH JUDICIAL SUPREMACY?

Judicial review becomes judicial supremacy when the Court's opinion is taken to be final. The complaint against judicial supremacy consists of the irony in a practice whereby appointed, life-tenured judges are permitted to overturn the hard fought compromises in lawmaking. This so-called "counter-majoritarian difficulty" drove Alexander Bickel, the originator of contemporary attempts to challenge the Court's democratic credentials, to insist that because judicial supremacy was counter-majoritarian, the Court represented a "deviant institution" in American democracy.<sup>21</sup> Although Bickel did not follow this route, underlying this charge is the presupposition that in a republican democracy, the voice of the people as sovereign should prevail through some institutional mechanism such as a congressional override, referenda, or term limits.<sup>22</sup>

This counter-majoritarian difficulty is illustrated whenever the Supreme Court hands down a decision overturning a controversial congressional or

---

19. Empirical inquiries about how the judiciary operates are critical, but they do not obviate the need of *normative* justifications of judicial supremacy. Normative theories are *not* falsified—or in some important sense rendered defective—if they do not explain how government actually operates. Normative theory must have empirical support, but its goal is to determine which institutions ought to be constructed.

20. See generally Robert W. Bennett, *Counter-Conversationalism and the Sense of Difficulty*, 95 NW. U. L. REV. 845 (2001); Robert Justin Lipkin, *Pragmatism—The Unfinished Revolution: Doctrinaire and Reflective Pragmatism in Rorty's Social Thought*, 67 TUL. L. REV. 1561 (1993); Robert Justin Lipkin, *Kibitzers, Fuzzies, and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 TUL. L. REV. 69 (1992) [hereinafter Lipkin, *Kibitzers, Fuzzies, and Apes Without Tails*]; Maimon Schwarzschild, *Pluralism, Conversation, and Judicial Restraint*, 95 NW. U. L. REV. 961 (2001).

21. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-18 (2d ed., Yale Univ. Press 1986) (1962).

22. Even according to contemporary constitutional theory, the electorate has the last word, at least in principle, in determining constitutional meaning. Any Supreme Court decision, in theory, can be overturned through Article V. The question becomes whether this elaborate supermajoritarian obstacle course comports with either efficiency or justice in constitutional change.

state law or some other government conduct. In this situation, the losing side invariably cries “Foul!” Protesting judicial decisions is a ritualistic part of our constitutional culture. The opposing chorus demands to know, “How in a democratic nation can an unelected branch of government overturn democratically created laws? Democracy simply disallows such heresy.” Yet, this same loser will lavish praise on the Court when his or her side wins. This is remarkably ironic because the same underlying cause exists whenever you win or lose—namely, judicial supremacy.

The ritual continues. One response reminds the critic that the United States government was designed to be a republic, not a democracy. Therefore, while counter-majoritarian institutions might be disqualified in a democracy, they are not disqualified in a republic. Democracy prizes the consent of the governed. Republicanism prizes the consent of the governed while protecting individual rights.

There is some merit to this response. The fundamental distinction between republican democracy and majoritarian democracy is simply this: the former seeks a process for generating the reflective judgment of the people, at least as far as this is possible, while the latter is concerned with ascertaining the will of the people, however unreflective or transient the result. The Founders were wary of democracy because, in their view, the unconstrained counting of heads quickly transforms democracy into mobocracy.<sup>23</sup> As the Federalist Fisher Ames remarked, republicanism is more different “from a democracy than a democracy [is] from a despotism.”<sup>24</sup> The implicit commitment here is that when self-government lacks the comprehensive constraints of republicanism—a government carefully constrained to combine the benefits of counting heads with the protection of minorities—the inevitable result is tyranny. Without significant constraints, the tyranny of the majority is potentially just as cruel as any other form of tyranny. If American constitutionalism creates a majoritarian democracy, explaining and justifying judicial supremacy would be impossible.<sup>25</sup> Indeed, the notion that infallible courts can contribute to majoritarian democracy borders on the unintelligible. Few serious commentators, however, embrace majoritarian democracy.<sup>26</sup>

---

23. Laurence H. Tribe, *On Judicial Review*, DISSENT, Summer 2005, <http://www.dissentmagazine.org/article/?article=219> (arguing that eliminating judicial review confuses “constitutional democracy under the rule of law with mob rule”).

24. Fisher Ames, *The Mire of a Democracy*, in 2 MONTHLY ANALOGY OF THE BOSTON ATHENAEUM 563-66 (1805), reprinted in the 1 WORKS OF FISHER AMES 7 (W.B. Allen ed., 1983).

25. Each generation of constitutional scholars seems compelled to engage in an exercise of Sisyphean futility. Their scholarly efforts involve elaborate attempts to push the rock of judicial supremacy to the top of the mountain of republican democracy only to see it roll back down to earth again.

26. John Hart Ely’s *Democracy and Distrust* is the clearest example of majoritarianism. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). While Robert Bork’s originalism is often regarded as majoritarianism—and indeed Bork often uses it as such—it cannot count as pure majoritarian democracy. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990). Bork emphasizes the role of the majority when no explicit or reasonably inferential right is involved. In a Madisonian democracy, according to Bork, there are “two opposing principles that must be continually

Is this distinction between democracy and republicanism helpful in resolving the problem of judicial supremacy? Two reasons suggest it is not. First, today the distinction between democracy and republicanism is simply not as stark as it was during the founding. Few observers believe in a direct, unconstrained, majoritarian democracy. If that is tantamount to a rejection of democracy, then almost everyone rejects democracy. There is no need, however, to regard democracy in that light. Democracy may be viewed as a more nuanced, complex system of self-government, which includes representationalism, rights, and vertical and horizontal rules for organizing government. Understood in this light, democracy is closer to republicanism than it is to mobocracy.

Second, and far more relevant, a republic can have a counter-democratic (even if not a counter-majoritarian democratic) difficulty. Any form of self-government presumably has a problem when the consent of the governed is rendered virtually ineffective in determining constitutional norms and public policy. Even if republicanism is distinguished from democracy,<sup>27</sup> the Court remains a deviant institution, not because it is counter-*majoritarian*, but rather because it runs counter to self-government of any kind. Any government boasting of judicial supremacy must block the sovereign will of the governed in some circumstances.

The controversy over judicial supremacy goes to the heart of the kind of self-government American constitutionalism creates. Republicanism has a dual purpose: dispersing power and achieving deliberative consensus. The very same governmental filters—checks and balances, federalism, bicameralism, and judicial review—designed to curb political power also provide government filters through which the transient, ordinary beliefs of the populace are refined into the reflective judgments of the community. By dispersing power between and among different constitutional actors, each of whom must solicit the support of other constitutional actors, deliberative conversation becomes a prized value. Because power is dispersed, it is necessary to deliberate with other constitutional actors to determine constitutional norms and public policy. In a republican democracy, the systematic operation of these filters is designed to express the community's

---

reconciled. The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities." *Id.* at 139. This principle qualifies Bork as a majoritarian. However, Bork continues, "[t]he second [principle] is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule." *Id.* This second principle qualifies Bork as a republican democrat. The fact that Bork gives minimal and often *ad hoc* content to the second principle means, as many commentators assert, that in the final analysis Bork's majoritarianism clearly overwhelms his republicanism.

27. The standard distinction between republicanism and democracy depicts republicanism as self-government, committed to checks and balances and to protection of minority rights. By contrast, democracy is committed to majority rule. However, today this distinction is far from obvious.



reflective judgment as far as that is possible. As Publius puts it, “The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs.”<sup>28</sup> The deliberate sense of the community—or more specifically the deliberative sense of the community—is contrasted with “an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests.”<sup>29</sup>

The incompatibility of judicial supremacy and republican democracy is not that the former is a filter through which the community’s reflective judgments are formed. In republican democracy, filters are necessary to afford the polity a second look at a piece of legislation that may upon reflection—that is, as a result of the second look—be inconsistent with the Constitution. This process contributes to the integrity of a constitutional democracy. As merely a filter, judicial review (without supremacy) serves a legitimate and helpful purpose. The incompatibility arises when judicial review turns into judicial supremacy. When this occurs, the judgment of the Court replaces the community’s reflective judgment, as developed through the elected branches, with the reflective judgment of unelected, unaccountable Justices. Providing filters for genuine deliberative debate destined to generate the electorate’s reflective judgments about constitutional norms and public policy is one thing. Regarding the filter of judicial review to be more important than the electorate’s reflective judgment is another. Consequently, the problem of judicial supremacy is not a problem of judicial review. The problem arises when the Court’s constitutional judgment trumps the judgment of the electorate and its representatives.

In the final analysis, filters designed to help formulate the community’s reflective judgment must remain filters and not masquerade as final judgments. Formulating final judgments should be the people’s role, or that of their representatives. These filters should serve as informing or enlightening the electorate’s choice. But the elected branches as well as the electorate, though institutionally encouraged to consider the results of filtering, should have the last word in deciding whether to adopt the judgments these filters produce. This imperative reflects both the Constitution’s actual structure as well as the most attractive theory of self-government.

Notice the republican element in “republican democracy” refers to the processes—or filters—for generating the community’s reflective judgment through deliberative dialogue. Judicial review is one of these filters and attempts to derive what it takes as the appropriate reflective judgment of the community. The democratic—or self-government—element requires that when the judiciary’s reflective judgment conflicts with the community’s, the former prevails. In a nutshell, what is wrong with judicial supremacy is that it represents an artificial cessation, even if not absolute, of the deliberative

---

28. THE FEDERALIST No. 71, at 458 (Alexander Hamilton) (Robert Scigliano ed., 2000).

29. *Id.*

process. Judicial supremacy mistakes important filters in deliberation with the end result of that deliberation. As such, it confuses the important role of advising the king with the king's decree itself. What is right about judicial review is that it advises the electorate on constitutional meaning and public policy without confusing its advice with the community's final reflective judgment.

We have just reviewed the case against judicial supremacy. The next part of this essay examines attempts to defend judicial supremacy as a critical element in republican democratic government.

### III. NORMATIVE DEFENSES OF JUDICIAL SUPREMACY

#### *A. General Rationale Justifying Judicial Supremacy: The Court as Guardian of the Constitution*

The general rationale for judicial supremacy, following Hamilton, portrays judges as the "faithful guardians of the Constitution."<sup>30</sup> While the preeminence of judicial supremacy may not have reached fruition until the twentieth century, the founding generation laid the groundwork for the Court becoming "the all-encompassing guardian of the Constitution."<sup>31</sup> According to this rationale, constitutionalism rests upon the distinction between ordinary laws and higher laws, or, as Frank Michelman puts it, between making laws and the law of lawmaking.<sup>32</sup> The elected branches are responsible for making laws about public policy. But they must make such laws according to the constraints set down in the Constitution. Consequently, some branch or institutional practice is required to ensure that the elected branches are faithful to the laws of lawmaking contained in the Constitution. The Court—an unelected, independent branch of government—is designed to play this guardianship role.

The guardianship rationale is the core of judicial supremacy. It depicts the Court at the center of American constitutionalism, protecting the document from various attempts to obliterate the distinction between ordinary and higher law. Inextricably involved with being the guardian of the Constitution is the Court's policing function. The following section examines whether the policing function succeeds as a defense of judicial supremacy.

---

30. THE FEDERALIST No. 78, at 501 (Alexander Hamilton) (Robert Scigliano ed., 2000).

31. Gordon S. Wood, *Judicial Review in the Era of the Founding*, in IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION? 153, 153 (Robert A. Licht ed., 1993).

32. FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 6-7 (1999).

*B. The Policing Function of the Courts*

To serve this guardianship role, courts police federal and state laws with an eye to enforcing constitutional limits on the elected branches. Such an enforcement mechanism is the price we pay for our constitutional democracy and was a constituent element in the original constitutional design. As Justice Frankfurter explained in his *United States v. United Mine Workers* concurrence, “[F]rom their own experience and their deep reading in history, the Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. ‘Civilization involves subjection of force to reason, and the agency of this subjection is law.’”<sup>33</sup> The idea of government based on the rule of law “dominated the thoughts of those who founded this Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men.”<sup>34</sup> But how do we protect the law from the transient desires of mortals? The Founders’ answer was to “set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be ‘as free, impartial, and independent as the lot of humanity will admit.’”<sup>35</sup> These virtues became the hallmark of the rule of law. But the Founders realized that this system must be protected from the intrusions of self-interest:

So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for.<sup>36</sup>

Because the lawmaker has a vested institutional interest in whether a particular law passes constitutional review, she cannot be a significant player in the reviewing process. The mechanism of constitutional review must be placed outside of the elected branches. Without such a constraint, constitutional review is meaningless, or so the argument goes, because if lawmakers possessed the responsibility for constitutional review, they would naturally interpret the Constitution to legitimize the laws they pass. The claim here is that the elected branches have extra-constitutional incentives that even the most righteous legislator or executive cannot escape.<sup>37</sup>

---

33. *United States v. United Mine Workers*, 330 U.S. 258, 308 (1947) (Frankfurter, J., concurring) (quoting Roscoe Pound, *The Future of Law*, 47 *YALE L.J.* 1, 13 (1937)).

34. *Cooper v. Aaron*, 358 U.S. 1, 23-24 (1958) (Frankfurter, J., concurring) (quoting *United Mine Workers*, 330 U.S. at 308 (Frankfurter, J., concurring)).

35. *Id.* at 24. (quoting *United Mine Workers*, 330 U.S. at 308 (Frankfurter, J., concurring)).

36. *Id.* (quoting *United Mine Workers*, 330 U.S. at 308-09 (Frankfurter, J., concurring)).

37. This point overlooks the Madisonian design of American constitutional institutional structures, which is based on the recognition that extra-constitutional incentives will

Laws are the result of negotiation, compromise, and sometimes even bullying, all undertaken without necessarily considering the law's constitutional propriety. Since the executive and legislative branches are not naturally concerned about constitutionality, the Constitution designates the courts to guarantee that the elected branches respect the constitutional limits of their power. This judicial function is vital to the survival of the nation and the federal structure which supports it. It is so essential that "[o]ur kind of society cannot endure if the controlling authority of the Law as derived from the Constitution is not to be the tribunal specially charged with the duty of ascertaining and declaring what is 'the supreme Law of the Land.'"<sup>38</sup>

When enacting laws, the elected branches—both federal and state—may choose whatever public policy they wish as long as the law satisfies constitutional parameters. If challenged, some constitutional actor must evaluate whether the challenge succeeds. The electoral branches are interested parties in these challenges. It is hornbook law that they cannot be the ones to answer the challenge, because then they would be the judge in their own cases. Just as the plaintiff or defendant in a trial cannot decide whether her own conduct was lawful, the elected branches cannot decide whether their laws satisfy the laws of lawmaking. If the defendant moves for summary judgment, he or she cannot be the one responsible for granting it. Judges play the role of referees and, as referees, judges must be objective, impartial, disinterested, and fair. Just as in an ordinary trial, when a law's constitutionality is challenged, the Court must assess its constitutionality, not the parties to the dispute or the parties responsible for enacting the law in the first place.

The conventional wisdom provides a powerful defense of judicial supremacy. However, it seems to elide the question of whether constitutionalism requires constraints—and therefore whether it requires constitutional review—for the question of which institution(s) should be assigned responsibility for engaging in such a review. Constitutionalism certainly requires some type of review, but it is a *non sequitur* to infer that this kind of constitutional review must be judicial review. Moreover, even if it requires judicial review, it is just as much a *non sequitur* to insist that judicial review must be supreme. Additional reasons for identifying constitutional review with judicial review are necessary. Such reasons are rarely produced because this defense of judicial supremacy takes for granted the picture

---

always be present. Of course, it is possible that the Madisonian design was doomed to failure as a safeguard for preventing the elected branches from exceeding their constitutional authority, and that the courts have assumed the job originally assigned to the republican character of self-government. But if the original constitutional design has failed, we should face the question of remedying this failure straightforwardly rather than just acquiesce to a judicial substitute.

38. See *Cooper*, 358 U.S. at 24 (Frankfurter, J., concurring) (citing President Andrew Jackson's Message to Congress of January 16, 1833, at 623, in 2 MESSAGES AND PAPERS OF THE PRESIDENTS (James D. Richardson ed., 1896)). Jefferson, Lincoln, and Jackson, among others, would turn over in their graves if they could hear these words. But with these words judicial supremacy was born, or if not born, certainly confirmed.

Frankfurter draws. He equates the legislature reviewing its own laws with a person acting as judge in his or her own case. This view further assumes that anyone acting in such a fashion will be partial to his her own interests.

It is fair to say that most people will be swayed in their own favor, even when trying to be free, impartial, and independent. Even so, a legislature reviewing its own laws is conspicuously different from an individual making the final decision in his or her own case. One difference is that the reviewing legislature's identity is often different from the legislature that enacted the law. Another difference is that the legislators must answer to the electorate. Especially in hot button controversies, legislators might depart from their own opinions to serve the people. This departure, of course, is a double-edged sword. Legislators might capitulate and review legislation in a manner they believe unconstitutional to please the electorate. But in such circumstances, the electorate might be right about the correct constitutional decision, and so their representatives should vote accordingly. Of course, if you believe that the electorate is driven by the whims of the moment, then you will not be sanguine about its role in constitutional interpretation. In that case, your commitment to democracy is constrained by distrust. No republican democracy can survive with this sort of distrust.

A greater problem is not the unreliability of ordinary citizens, but the alleged reliability of judges. What justification is there for believing, as Frankfurter does, in the priestly roles of judges? Self-interest and bias exist both in the electorate and in the judiciary. Is there any empirical evidence to suggest these vices are always greater and more damaging in the former? People are pulled by their own material interests. This is an issue that any theory of American constitutionalism must accommodate. Much less recognized is a person's interest in his spiritual or secular beliefs. Judges want recognition, fame, and admiration; they want to go down in history as great judges. More importantly, judges are driven by conviction. We should heed Nietzsche's admonition that "[c]onvictions are more dangerous enemies of truth than lies."<sup>39</sup> Whatever else judges have, they have convictions, especially their convictions about what the Framers intended or what occurred during some critical phase of constitutional history. When a polity sets aside a privileged place for a group of individuals whose job it is to resolve terribly important constitutional conflicts, intellectual humility is not often the primary virtue developed.

Justices are driven by their conception of American constitutionalism and want to see this conception expressed in judicial decisions. Frankfurter's priestly Justices are just as dangerous; they are just as likely to privilege their own judicial preferences as legislators are to privilege their legislative preferences. Self-interest—one of judgment, the other of will—is present in both institutions. Justices, as members of the so-called least dangerous branch,<sup>40</sup> recognize that their power and authority is limited to judgment only,

---

39. FREDERICH NIETZSCHE, *HUMAN, ALL TOO HUMAN* 179 (R. J. Hollingdale trans., Cambridge Univ. Press 2d ed. 1996).

40. BICKEL, *supra* note 21, at 1.

and this often predisposes some Justices to become frozen in their judgments. Many of the five-to-four decisions illustrate how the same Justices align in the same way over a range of constitutional controversies. Of course, this does not mean that all constitutional cases line up in this manner. Nevertheless, the existence of such constitutional controversies and the frozen judgments of Justices on both sides of the conflict are present in just those controversies that matter most.<sup>41</sup>

Finally, this defense of judicial supremacy founders, as any defense of judicial supremacy must, because if legislators cannot be trusted to judge in their own cases—when making laws—how can Justices be trusted to judge in their own case when their conception of American constitutionalism is at stake? Justices become as committed to their judicial judgments, even if for different reasons, as legislators are committed to their legislative judgments. How often do Supreme Court Justices change their positions as a result of criticism? If external checks are necessary to protect the abuse of decision-makers, how are we protected from the abuse of an external checker? Here is where the priestly conception of the Court earns its pay. Only by invoking an unrealistically sanguine view of Justices can we be duped into believing that legislators cannot be trusted but Justices can. Although, admittedly, the temptations legislators cannot resist might be different from those Justices cannot resist, it hardly follows that the former is any more dangerous than the latter. Indeed, unfettered review by unelected, life-tenured Justices seems prone to much greater, more dangerous temptations than the temptations legislators face.<sup>42</sup>

The policing defense oversimplifies the possibility of legislatures engaging in constitutional review. Legislators may be interested parties, but the compositions of legislatures change. Different people are typically members of different Congresses. Thus, if constitutional review were placed in the legislature, constitutional review could be designed to minimize the chances that the same legislators who enacted the legislation would be reviewing it. Indeed, legislative review might require that more than one Congress engage in the reviewing process. In that case, legislative review would not violate the imperative proscribing judging in one's own case. Nevertheless, the bulk of the legislators are likely to be the same, and even if they were not, legislative interests often create the same institutional motivation on the part of different legislators to uphold the constitutionality of federal laws.<sup>43</sup> But if Congress

---

41. One argument favoring term limits is that they will unfreeze the conceptual culture that arises from the same group of Justices arguing with one another for such long periods of time.

42. Legislators are tempted to please their constituents, which might have good consequences or bad consequences, depending on the constituents. However, this is the price one pays for republican democracy. Moreover, undesirable legislation can be overturned after the next election. By contrast, Justices are tempted to alter constitutional meaning, which is far more dangerous conduct.

43. *See* THE FEDERALIST No. 51 (James Madison).

shared constitutional review with the Court, the institutional interests of legislators would increase. In addition to running for office on their record of enacting legislation, they would now also be evaluated by how well they engage in constitutional review. Thus, the electorate would function, as it should, as the external check on legislative constitutional review. Arguably, no similar function exists for the electorate regarding judicial review.

This is not quite accurate. Even in our regime of judicial supremacy, the electorate remains the ultimate constitutional check. Since Article V permits the electorate to overturn any Supreme Court decision, the courts, in principle, do not have the final word. The citizenry armed with Article V is the final policeman. The problem, in our regime of judicial supremacy, is that Article V is not effective, except on rare occasions. In fact, Article V has been used rarely to overturn judicial decisions.<sup>44</sup>

In a republican democracy—where the people are sovereign—external review always rests with the electorate. Consequently, the policing defense does not entail judicial supremacy, only that some review in addition to legislative constitutional review is required. Recognizing the existence of alternatives enables us to begin to imagine replacing judicial constitutionalism with legislative and electoral constitutionalism. Alternatively stated, while constitutional review requires policing the elected branches, it simply does not follow that the judiciary is the only branch capable of policing the elected branches, or that the judicial supremacy is the best way to enforce constitutional requirements while also satisfying the demands of accountability.

It is critical here to reveal a stealth assumption underlying the defense of judicial supremacy. The policing defense presumes that we cannot expect ordinary people to appreciate the complexity of such ideas as federalism, separation of powers, incorporation, or fundamental rights, let alone the different levels of judicial scrutiny. To fully comprehend these ideas, a person must study constitutional law and theory for many years. Ordinary people simply do not have the time, inclination, or talent to appreciate the different features of constitutional review.

Sometimes this stealth assumption is dressed in fancy clothes. Currently, it is chic to insist that rational choice requires information ordinary citizens do not possess, and that they would not know what to do with it if they did

---

44. The Eleventh Amendment overruled *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The Fourteenth Amendment overturned *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), on the citizenship of slaves. The Sixteenth Amendment overruled *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, *aff'd on reh'g*, 158 U.S. 601 (1895). This rarity suggests either that Americans have been generally satisfied with the judicial supremacy or that the method of amending the Constitution is simply too difficult. Given the degree of constitutional controversy and criticism of the Court's role in American constitutionalism, it would be naïve to suppose that Americans have been satisfied with the Court's role. It is a safer bet that Article V's severe super-majoritarian requirements prevent the people from exercising an effective voice in constitutional change.

possess it.<sup>45</sup> Moreover, the effect of one's vote in a polity that consists of three hundred million people is less than negligible. Therefore, no matter how dangerous it is for citizens in a republican democracy to fail to acquire sufficient information about public policy,<sup>46</sup> few people are inclined to take the time and energy necessary to do so, or to acquire the expertise to know how to use the information if they did acquire it.<sup>47</sup>

This unstated assumption needs to be evaluated. First, it might be true that ordinary—even highly intelligent—citizens do not readily understand the body of constitutional doctrine and analysis. Perhaps the culprit is the egregiously legalized conception of constitutional law.<sup>48</sup> Consider constitutional theorist Mark Tushnet's distinction between the thin and thick Constitutions. The thin Constitution consists of equality, liberty, and the rights of republican democratic government. It contains principles of political morality that underlie American constitutionalism reality. The content of these principles—"liberty," "equality," "power," and "rights"—creates the American constitutional character and, in turn, the American constitutional character helps revivify the content of these principles.<sup>49</sup> The thin Constitution permits anyone, especially informed non-lawyers, to interpret the fundamental conceptions in republican democracy.

In short, the unstated assumption is reinforced by, and in turn reinforces, the idea that constitutional law must be legal—doctrinal and analytic—rather than political.<sup>50</sup> One can almost hear an imaginary interlocutor saying,

45. *E.g.*, ALAN WOLFE, DOES AMERICAN DEMOCRACY STILL WORK? 24-49 (2006) (describing the problems associated with a citizenry that is short on information, logic, and interest).

46. *Id.*

47. A variant of this assumption contends that our constitutional tradition involves a set of myths about the role of the Founders, the ratifiers, and the people. The idea of the people as sovereign is perhaps the founding myth. Just who are "the people"? There are, to be sure, democrats, republicans, truck drivers, lawyers, baseball players, and so forth. But the idea of "the people" is just a convenient myth. EDMUND S. MORGAN, INVENTING THE PEOPLE 153 (1988) (arguing that the idea of "the people" is a fiction). Moreover, the idea of "the Founders" fares no better. How do we combine the convictions of different Founders so as to arrive at the group's collective intent? It could be argued that the sovereignty of the people, consent, and democracy itself are just convenient myths that we retain if they prove useful.

48. STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 18 (1996).

49. *See generally* Robert Justin Lipkin, *Deliberativism As the Moral Personality of American Citizens*, 100 S. ATLANTIC Q. 1029 (2002) [hereinafter Lipkin, *Deliberativism*].

50. *See* GRIFFIN, *supra* note 48, at 18. The contrast between the legal and the political in constitutionalism emphasizes the purported neutrality and objectivity of law with the value commitments of politics. Consider Franklin D. Roosevelt's statement of the distinction: "[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 [(the political)] and those who would shrivel the Constitution into a lawyer's contract [(the legal)]." Franklin D. Roosevelt, Address on Constitution Day: The Constitution of the United States Was a Layman's Document, Not a Lawyer's Contract (Sept. 17, 1937), in 6 THE PUBLIC PAPERS



“C’mon, as any first year law student knows constitutional law is extremely complex and it is simply quixotic to think that it is within the ken of ordinary citizens to make such a citizen’s Constitution work. In constitutional law, we need specialists to explain the Constitution to the masses.” Alternatively stated, democracy is a good thing, but too much democracy is not.

How can such a view represent the conventional wisdom of a republican democracy? What has become of the idea of self-government? Just what kind of polity does the Constitution create? If constitutional review must be limited to specialists independently of ordinary citizens and constitutional law constitutes higher law, then whatever else higher law creates, it does not create a republican democracy. If the electorate should be responsible for constitutional law only through Article V, then the constitutional operations of government virtually excludes the people. Let me put this point in the following manner: since the United States has *de facto* created a system where unelected Justices are given the ultimate or penultimate authority to interpret the Constitution, ordinary citizens can only have a rather attenuated role in this process, if they have any role at all.

Underlying this claim about constitutional expertise lies a darker conviction about the ordinary citizen’s role in republican democracy. The conviction is that ordinary citizens are simply unable to govern in complex contemporary political society.<sup>51</sup> Specifically, ordinary citizens have little capacity to distinguish between their own individual short-term and long-term interests. Ordinary citizens are typically unsophisticated, with little understanding of the distinction between self-interest and the common good. Yet, when they do understand the distinction, their loyalty lies with their self-interest, not with the common good. Ordinary citizens are easily manipulated by power-seeking politicians, special interest groups, and especially the media. In effect, ordinary citizens are stupid, greedy, and the source of evil, or more gingerly stated, the source of mismanagement in government. And even when none of these qualities apply to an individual, he or she has little ability or inclination to try to appreciate an opponent’s point of view, let alone attempt to struggle to reach consensus or compromise. Consequently, republican democracy should be re-conceptualized so that its public face glorifies self-government. But in reality, government officials, special interest groups, religious activists—in short, different types of governing elites—do the heavy lifting concerning the actual operations of “self-government.”

This chilling conception of the realities of self-government is in one obvious respect curious, even bewildering. If governmental elites rule, describing the American government as “self-government” is misleading at best. Why does this notion of an array of governing elites ring true at least to

---

AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359, 363 (Samuel I. Rosenman ed., Russell & Russell 1969).

51. This darker conviction drove John Adams to reveal his fear of democracy in a letter to Thomas Jefferson. Adams wrote: “Elections . . . I look at with terror.” SUSAN DUNN, JEFFERSON’S SECOND REVOLUTION: THE ELECTION CRISIS OF 1800 AND THE TRIUMPH OF REPUBLICANISM 29 (2004).

a certain degree? The answer, I suppose, is that on the surface, Americans are committed to the *myth* of popular sovereignty and would not tolerate being told that they are incapable of self-government. Ordinary Americans want to simultaneously believe they are sovereign yet avoid *being* sovereign. In other words, they want the charade of self-government without its responsibilities. So let's retain the appearance (and discourse) of self-government, but be careful not to mistake the appearance of self-government for the reality of self-governing. The reality is much more complex and is not easily described as "self-government." Instead, it is government by an oligarchy of eclectic governing elites vying with one another for dominance. Nothing permanently links any of these groups to one another except the realization turned conviction that the people's leadership role is a fiction, but the people must never know this.

If anything close to the above depiction is true, republican democracy is a fraud. The question, then, is what should sincere advocates of republican democracy do? One answer is to expose the myth and attempt to rebuild a political culture where citizens seek and find the requisite knowledge of politics, develop sensitivity to the importance of the common good, and, most importantly, educate their children about the process of civic responsibility. The irony here is that the only way to form a movement to revitalize republican democracy is to join the eclectic array of elites competing for control of the electorate. In other words, if political reality, as it's presently constructed, betrays self-government, one must join the pretense and compete with the elites for the electorate's allegiance. This means that the only way to remedy the problem of "pretend self-government" is to become part of the problem. Some remedy indeed.

While elements of this chilling conception are no doubt true and do present problems any republican democracy must face, the entire picture of an oligarchy of eclectic governing elites is more hyperbole than reality. Republican democracy is necessarily messy. Freedom and equality, in the real world, demand nothing less. Advocates of republican democracy can take some comfort in the realization that the spirit of American democracy is reformation and improvement, not perfection. To the extent that the chilling conception is true, we need to bring it to the light of deliberation and examination. To insist that it is an intractable, permanent, or necessary feature of American democracy confuses contemporary contingency with future necessity.

### *C. The Individual Rights Defense*

One of the most powerful defenses of judicial supremacy anoints the Court as the ultimate protector of individual rights. According to this defense, rights

are designed specifically to be trumps<sup>52</sup> or shields against the majority excesses. The Court serves as a forum of principle in which *ad hoc* compromises, for which legislatures are notorious, can be scrutinized to determine whether they violate individual rights.<sup>53</sup> Only an institution external to the political branches can be the protector of rights so central to republican democracy.

If the elected branches were responsible for the final interpretation of the Constitution, so the argument goes, rights could not serve as trumps against majoritarian excess. If the very purpose of a right is to guard against majority excess, then granting the majority the authority to define rights is like putting the fox in charge of the henhouse. Because judges are more likely to see their role as enforcing the Constitution, not imposing partisan political agendas upon the electorate, their dedication to protecting individual rights is absolutely necessary for the rights to exist in the first place. Consequently, judicial supremacy is required if courts are to protect individual rights. Since everyone has reason to support these rights, everyone has reason to endorse judicial supremacy.

More than any other justification, the individual rights justification resonates with the culture of American constitutionalism.<sup>54</sup> The Warren Court's decisions, especially *Brown v. Board of Education*,<sup>55</sup> were examples of the Court overturning legislative decisions that enforced American apartheid. For decades, legislative majorities sustained segregation. In 1954, the Court, as a knight in glistening, constitutional armor, struck down the immoral dragon of American apartheid. Subsequently, the courts supervised the dismantling of school segregation throughout the South.

The picture of the Court as a dragon-slayer is familiar, but not entirely accurate.<sup>56</sup> Indeed, taking a candid look at Supreme Court history will reveal

52. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184-205 (1977).

53. Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

54. A variant of this view is that judicial supremacy is vital in a democracy. In this view, the Court must inspect the elected branches to determine whether the processes of representative democracy are unencumbered. This "representation-reinforcing" role for the Court was first articulated by John Hart Ely in *Democracy and Distrust*. Ely sees the Court's role as making sure the representative electoral process functions as it should. See ELY, *supra* note 26, at 7.

It is an empirical matter whether courts vigorously inspect the political process to determine whether the marginalized are represented. And the answer might very well indicate judicial and constitutional instability. In some eras, the Court might succeed in policing the political process; in other eras, it might not. Just what counts as a decision made for the purpose of representation-reinforcement is not, and will never be, settled. The right to vote surely is. But is school desegregation? Abortion? A narrow reading of representation-reinforcement will support certain cases, while a broader reading will support additional cases. Is there a noncircular argument in favor of one reading over the other?

55. 347 U.S. 483 (1954).

56. Louis Fisher clearly rejects the conventional wisdom:

The judiciary is supposedly better structured than legislative bodies to protect minority rights. While it may seem logical that a majoritarian institution like Congress cannot be trusted to protect isolated and politically weak minorities, history does not follow logic. The record shows that for the past two centuries

that the Warren Court was an anomaly—a desirable anomaly perhaps, but an anomaly nonetheless. For over 150 years,<sup>57</sup> the Court decided cases almost entirely bereft of any concern with individual rights. Consider *Dred Scott v. Sandford*, the infamous 1857 Supreme Court decision that buttressed a vicious system of slavery and is credited with being one of the precipitating causes of the Civil War. Here, Congress attempted—through *ad hoc* compromises to be sure—to prevent a final conflict over slavery until slavery withered and died for economic reasons. Congress and several Presidents deliberated over and finally endorsed these compromises. Yet nine members of the Court rejected the constitutionality of these compromises and helped bring about the slaughter of over 500,000 Americans. This is certainly a severe price to pay for judicial supremacy, an institutional practice found nowhere in the constitutional text. More importantly, it does not bode well for the idea of the Court as the protector of individual rights.

Even after the Civil War and the abolition of slavery, the decision in the *Slaughterhouse Cases*<sup>58</sup> eviscerated the Fourteenth Amendment's Privileges or Immunities Clause, which the American people had just recently created through Article V. Although controversy exists over just what this clause means, if its principal architect in the House of Representatives, John Bingham, is any guide, the Clause was designed to apply the first eight provisions of the Bill of Rights to the states.<sup>59</sup> Bingham expected the Privileges or Immunities Clause to protect freedmen from the injustice of state governments. Consider Bingham's words:

[M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, "cruel and unusual punishments" have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none. . . .

. . . It was an opprobrium to the Republic that for fidelity to the United States they could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law. That great want of the

---

American legislatures have performed quite well in protecting minority rights, while courts during that period have been generally insensitive and unreliable.

Louis Fisher, *Nonjudicial Safeguards for Religious Liberty*, 70 U. CIN. L. REV. 31, 31 (2001).

57. The Court only began to protect the right to free speech in the twentieth century. See *infra* note 70 and accompanying text.

58. 83 U.S. 36 (1873).

59. See generally CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM* (1997).

citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment.<sup>60</sup>

One can, of course, question whether Representative Bingham's understanding of the Fourteenth Amendment should stand for the Amendment's canonical interpretation. Even if Bingham's understanding is not dispositive, the *Slaughterhouse Cases* virtually removed the Clause from the Constitution. Thus, this example cannot serve as evidence of the Court's role in protecting individual rights.

Next on the Supreme Court's wall of horrors was a decision that has never received its proper share of ignominy: the *Civil Rights Cases*.<sup>61</sup> This decision prevented Congress from using its powers—expressed in the Civil Rights Act of 1877—to protect African Americans against deeply embedded social customs of racial apartheid. As a result, the Court still wreaks havoc by requiring state or governmental action—not private conduct alone—to trigger the protections of the Fourteenth Amendment. This completely overlooked that state *inaction* can be just as heinous as state *action* when racially discriminatory attitudes customarily prompt violent or otherwise oppressive conduct against racial minorities,<sup>62</sup> while also ignoring the fact that intimidation often prevents those minorities from seeking the protections of local laws.

This questionable constitutional distinction between state action and private action continues to be applied today, apparently without regard to the reality that governmental indifference in the face of discrimination against minorities can be more reprehensible than state action.<sup>63</sup> The state action doctrine permitted terrorism against African-Americans to continue unabated. The decision in the *Civil Rights Cases* was one of the pillars of American apartheid and is still good law.<sup>64</sup> Hence, this decision and its reaffirmation in case law throughout American constitutional history cannot make supporters of the individual rights defense sanguine.

The *Slaughterhouse Cases* are not the only example of the Court's failure to protect individual rights. *Plessy v. Ferguson*—licensing the extension of apartheid—followed twenty years later.<sup>65</sup> More than any other single case, *Plessy* became the lynchpin for enforcing the existence of two Americas in the

60. CONG. GLOBE, 39th Cong., 1st Sess. 2542-43 (1866).

61. 109 U.S. 3 (1883).

62. See ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994).

63. Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 70 (1967); see Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985).

64. Francisco M. Ugarte, *Reconstruction Redux: Rehnquist, Morrison, and the Civil Rights Cases*, 41 HARV. C.R.-C.L. L. REV. 481, 481 (2006).

65. *Plessy v. Ferguson*, 163 U.S. 537 (1896). It is terribly important to avoid the mistake of blaming state legislatures and not the Court when the Court upholds reprehensible states laws. The legislatures should be condemned, but so should the Court.

United States.<sup>66</sup> Courts repeatedly relied on *Plessy* for perpetuating segregation. Of course, *Brown v. Board of Education* gallantly overturned *Plessy*, at least in effect. But how many scarred lives were required to bring about this result? More important, there is even doubt that *Brown*, rather than the Civil Rights Acts of 1964-1965, deserves the credit for ending racial apartheid in America.<sup>67</sup> If this doubt can be substantiated, not even *Brown* illustrates the judiciary's superiority over the legislature in protecting individual rights.

Discrimination against other racial minorities also reveals the absence of historical substantiation for the individual rights defense. While articulating the importance of strict judicial scrutiny in cases of racial discrimination, the Court nevertheless deferred again in *Korematsu v. United States*.<sup>68</sup> The Justices upheld President Roosevelt's military order incarcerating 110,000 individuals of Japanese descent, 70,000 of them American citizens, none of whom was ever convicted of treason, espionage, sabotage, or any other wartime crime. Hence, constitutional history shows that we cannot rely on the Court to protect equal protection rights of racial minorities.<sup>69</sup>

Equal protection rights are not the only rights the Court failed to protect. Until the third decade of the twentieth century, the Court was indifferent to the free speech rights of pacifists, socialists, and other anti-war groups, instead upholding the government's decision to criminalize speech exhorting men not to serve in the armed forces.<sup>70</sup> In these cases, the Court upheld laws against unpopular minorities. Just when the Court was supposed to be the protector of rights, according to the individual rights defense, it faltered and sustained the fears of a powerful majority against the free speech rights of a weak minority. If ever the individual rights defense should work, these were the cases; yet history conspicuously reveals the failure of the judiciary to act as this defense says it does. It took the Court 182 years before it articulated, in *Brandenburg v. Ohio*, a broad principle protecting an individual's right to freedom of speech.<sup>71</sup>

The failure of the individual rights defense does not in any way depend upon one's political, moral, or constitutional values. Indeed, the failure of this defense can be criticized from both conservative and progressive perspectives.

---

66. See generally GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (Twentieth Anniversary ed., 1962).

67. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39-40 (1991); see MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

68. 323 U.S. 214 (1944).

69. REBECCA ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION AND THE PROTECTION OF INDIVIDUAL RIGHTS (2006).

70. See *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

71. 395 U.S. 444 (1969).

If you believe abortion to be the killing of a person, the Court has conspicuously failed to protect neonatal persons. If you favor abortion rights, women seeking late-term abortions may have their rights restricted.<sup>72</sup> In every case where the Court defends someone's individual rights, it is almost always simultaneously permitting the violation of someone else's individual rights. The point here is that although neither the elected branches nor the courts have splendid records in supporting individual rights, if this job is the Court's responsibility, it conspicuously fails its very *raison d'être*.

One may still insist, despite the historical record, that normatively courts are better than legislatures in defending individual rights. According to this normative argument, judges are better suited than legislators to protect individual rights because the expertise of judges, and the institutional structure of courts, provides judges with sanctuary for examining statutes for constitutional violations above the din of politics.

Constitutional scholar Lawrence Sager maintains that judicial expertise lies in the virtues of impartiality, specialization and redundancy, and reflective equilibration.<sup>73</sup> These "epistemic" virtues, in Sager's view, are also democratic virtues that courts better exemplify than legislatures.<sup>74</sup> Judges, Sager insists, must articulate reasons for their decisions. In short, "when a constitutional claimant stands before a court, the force of her claim does not turn on the number of votes or dollars she can muster for her cause."<sup>75</sup> Judges instead apply "a scheme of articulate propositions of political justice embraced by the court in the name of the Constitution."<sup>76</sup> In principle, judges applying this scheme must formulate reasons for concluding that the claimant should benefit from its application. Judges are then bound by these reasons in future cases, "which is a discipline that not only encourages epistemic impartiality but that also encourages the democratic virtue of a careful response to the merits of the constitutional claim."<sup>77</sup> Sager concludes that these virtues demonstrate that "democracy is not compromised by a nation that includes a robust constitutional judiciary within its portfolio of political institutions."<sup>78</sup> The most one can say about such a democracy is that "this institutional decision [is] a trade-off between modes of participation in the processes by which the fundamentals of political justice are identified and secured within a political community."<sup>79</sup>

Sager's argument is intriguing. Perhaps he is right, if his point is that the best instance of adjudication is superior to the worst instance of legislation. But, even if true, that should not be our criterion for determining whether courts are better than legislatures in protecting individual rights in ordinary

---

72. *See* *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007).

73. Lawrence G. Sager, *Courting Disaster*, 73 *FORDHAM L. REV.* 1361, 1369-70 (2005).

74. *Id.* at 1370.

75. *Id.*

76. *Id.*

77. *Id.* at 1371.

78. *Id.*

79. Sager, *supra* note 73, at 1371.

circumstances.<sup>80</sup> Arguably, Sager's contrast between political justice, on the one hand, and money and votes, on the other, is simply a false comparison. In a republican democracy, money is speech, and it calls attention to principles on which to base votes. The idea that somehow courts are more likely to give reasoned, principled arguments, while legislatures reflect smoke-filled rooms, is overdrawn. Where a constitutional controversy involves reasonable disagreement—as almost all do—it is not at all clear why Sager believes that courts are on the side of reason while legislatures are corrupt. Only if there existed a baseline telling us in advance the correct solutions to constitutional controversies and we saw that courts were more likely than legislatures to reach these solutions would Sager's argument be plausible. However, the persistence of reasonable disagreement over the range of constitutional controversies precludes agreement on such a baseline.

Without an uncontroversial baseline, the question of which branch of government is better suited for constitutional interpretation rests in part on which branch is more likely to achieve resolution. There are two possible kinds of resolutions: (1) one-right-answer resolutions and (2) reasonable compromises. There might be one right answer to every political controversy; but that possibility does not help much in a diverse, pluralistic society. Without a consensus on epistemic procedures for discovering the one right answer, it is unreasonable for citizens to adopt one-right-answer resolutions over reasonable compromises. Yet, courts often, if not invariably, seek one right answer, while legislatures are virtually compelled to compromise. Consequently, the kind of resolution consistent with the burdens of judgment appears clearly to be the second kind.

The persistence of reasonable disagreement means that citizens will need to resort to the reasonable compromises, especially for the most controversial issues. Consequently, politics—where one forges reasonable compromises—seems to be the venue for settling the most pressing controversies. As a corollary, where resolutions of the second kind dominate, the branch that best represents the citizenry will be a more appropriate vehicle for resolving controversies. In the next section, I will take up the issue of representation, but for now we can probably agree about this. However one conceptualizes the issue of representation, courts represent a narrow class of well-educated individuals lacking in the kind of experience which is at the heart of the cases they decide.

We might also want to determine what kinds of solutions various institutions produce when the decision-makers are accountable and when they are not. Although not completely unaccountable, federal judges have fewer formal constraints, and fewer people they have to answer to, than do legislators. This means that they are less likely to feel compelled to decide in a certain expected manner. It also means, however, that they are free to impose

---

80. It is equally true that the best instance of legislation is better than the worst instance of adjudication.



their version of constitutional meaning, consciously or not, on the Constitution. By contrast, when directly accountable, decision-makers may have a greater tendency to seek reasonable solutions to conflicts. Although far from conclusive, this suggests that accountability influences the scope of solutions and the readiness of participants to compromise. Consequently, accountability might encourage decisions more representative of the populace.

By contrast, insulating decision-makers from any significant accountability might encourage them to mistake their own idiosyncratic conceptions of epistemic virtues, correct interpretive methodology, and the importance of precedent for those actually embedded in our constitutional structure. Unaccountable, or relatively unaccountable, judges are more likely to produce less representative decisions than legislators. Without relative accountability or significant discipline, judges are less constrained and freer to decide cases in a manner conforming to what they sincerely think is best, even diverging from precedents and conventional understanding of the law. Indeed, in these circumstances, a judge is freer to act conscientiously and identify the law with his or her cherished values. We might wonder why judges should even try to resist deciding cases conscientiously when no discipline exists to influence them. Of course, there are informal constraints, such as the need to convince other judges on a panel of the propriety of one's decision, as well as public opinion and the opinion of legal scholars. But in a case where a judge's conscience is triggered or where an issue emerges about which the judge has deep conviction, these factors might not constrain his or her judgment. In these cases, accountability is absent.

One critical question remains. If courts are not qualitatively superior at protecting individual rights than legislators, what mechanism exists to remedy judicial transgressions? When legislatures give the wrong answer, the remedy is obvious, at least in theory: replace the wayward legislators with better ones. When courts get a controversy wrong, the route to reversing the decision is circuitous and hardly a function of deliberation. In a diverse, pluralist society, reasonable disagreement about rights suggests that judicial resolution of constitutional controversies brings an unyielding, unaccountable force to support one reasonable position over another reasonable position. This cannot be right in a constitutional democracy, not even if we could know with certainty which side was correct. Democracy is not only a means of resolving conflict, but it is the only means that respects all sides by engaging in deliberative debate and then settling the debate by voting. Any other process compromises self-government, because consent, the *sine qua non* of self-government, can only be expressed democratically.<sup>81</sup>

Once we recognize the persistence of reasonable disagreement, the question then shifts from the interpretive questions of which rights exist and what their content is, to the institutional question of who should decide these issues. Should the forum of principle for determining which rights to protect be

---

81. See generally MICHELMAN, *supra* note 32, for a discussion of the problem of whether electoral minorities can be truly described as part of self-government.

limited to judges or to the people's representatives? Given the persistence of reasonable disagreement over rights, it is difficult to understand how republican democracy can assign this responsibility to judges. If, by contrast, there existed an uncontested method for answering these questions and legislators were unable to deploy this method as well as judges, then judicial supremacy might be warranted.<sup>82</sup> Absent the existence of such a method, and since disagreement about the meaning of rights and the meaning of democracy will persist, "it is important that a *representative* assembly resolve them."<sup>83</sup> Only a deep distrust of the capacity of ordinary citizens to deliberate about these fundamental issues in republican democracy can justify taking these constitutional choices away from the people.<sup>84</sup> Judicial review, in principle, is compatible with this sentiment. Judicial supremacy is not.

#### *D. The Judicial Independence Defense*

Judicial independence has been heralded as a democratic virtue since the Republic's inception.<sup>85</sup> No less a figure than Alexander Hamilton has insisted that "[t]he complete independence of the courts of justice" was nothing short of "peculiarly essential in a limited Constitution."<sup>86</sup> Three overlapping reasons explain the importance of judicial independence. First, the doctrine of separation of powers requires the judiciary to be independent of the elected branches of government except where the Constitution says or implies otherwise. Second, without judicial independence, the commitment to the rule of law is put in jeopardy. Third, in order for judges to pursue justice, they must be impartial and fair in deciding cases. Neither impartiality nor fairness is possible if the judiciary is controlled by another branch.<sup>87</sup> Accordingly, judicial dependence on the elected branches will prevent judges from serving justice, while a commitment to judicial independence helps fulfill the judicial role.

Institutional protections must be in place to enable judges to serve independently. As Christopher Eisgruber contends, "By guaranteeing judges prestige, a good salary, and life tenure, Americans insulate them from forces that often tempt reasonable people to mistake self-interest for moral

---

82. Even then, self-government requires the people to discover the truth themselves, not receive it from some anointed authority.

83. JEREMY WALDRON, *LAW AND DISAGREEMENT* 309 (1999).

84. *See* RICHARD D. PARKER, *HERE THE PEOPLE RULE* (1994).

85. During the Revolutionary Period, judicial independence meant independence from the Crown. It was a later development that independence should also include independence from the legislature. *See* CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE* (2006).

86. *THE FEDERALIST* No. 78, at 497 (Alexander Hamilton) (Robert Scigliano ed., 2000).

87. Judges must also be independent of coercive, non-governmental forces.

principle.”<sup>88</sup> Because judges are insulated in this hallowed refuge in American government, they are left unfettered to examine the Constitution and the facts of particular cases without thought of personal gain or personal protection. The ordinary concern of legislators—political support—is irrelevant to the decisions of judges.

There is both virtue and vice in this familiar story of judicial independence. The same insulation from worldly pressures which permits judicial independence makes judges unreachable. Although judges must typically articulate the reasons for their decisions, they are never compelled to give a complete account of their reasoning. No one ever formally challenges judges to explain themselves.<sup>89</sup> No force exists to discipline judges by either removing them from office or reversing their decisions. The people must simply acquiesce to judicial opinions and accept the reasons judges give in their formal opinions.<sup>90</sup> Indeed, the more insulated the courts are from the elected branches and from the people, the less accountable judges become. It is one thing to be permitted to decide cases independently of threats to one’s life or liberty. It is quite another thing not to have to account for the errors and consequences of one’s decisions. In practice—unlike NFL coaches, CEOs, and elected officials—judges who make mistakes will neither be removed from office nor prevented from repeating the same mistakes indefinitely.<sup>91</sup> Hence, for all practical purposes, judges are never required to effectively account for their decision-making.

The appropriate institutional design of the courts should discourage judges from acting in a partisan or otherwise self-interested way. However, self-interest is not the only vice to guard against. Completely conscientious decision-makers can and do wreak havoc, not because they seek an advantage to their own material good, but rather because their sincere convictions are unreasonable or in some other way incompatible with the Constitution. Indeed, judicial independence without accountability might tempt otherwise reasonable decision-makers to identify their own sincerely held convictions with what they believe to be constitutionally permissible. Democratic government is designed with checks and balances not only because we want to protect ourselves from scoundrels, but also to protect ourselves from well-intentioned individuals who simply have erroneous conceptions of American constitutionalism or who have become intoxicated by their own insight and brilliance. The only mechanism for dealing with this problem in a republican democracy is for there to be checks on all governmental decision-makers. Hence, an uncritical adherence to judicial independence conceals one of the more glaring defects in American judicial practice: the absence of effective accountability. Without effective accountability, the people never have a

---

88. CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 60 (2001).

89. Of course, scholars, media, and ordinary citizens always challenge judicial opinions. But alas, these forces can only complain. Judges can, and do, ignore them.

90. It is a mistake to conflate acquiescence with consent. People acquiesce to many things that they would reject if they had the opportunity to formally do so.

91. Impeachment has never been an effective means of removing judges from office. *See infra* note 95.

chance to consent to individual judicial decisions, let alone to the entire practice of judicial supremacy.<sup>92</sup> This means that the judiciary is never legitimized in such a republican democracy.

The hallmark of a republican democracy, or any democracy for that matter, is consent. Citizens must have effective means of approving or disapproving of the conduct of their representatives or other public officials. Consent cannot serve as a structural feature of government without accountability and certain conceptions of judicial independence make accountability difficult, if not impossible. To put this point hyperbolically, to the extent the judges are independent, they are to that same extent unaccountable. Genuinely complete independence, as Hamilton desired,<sup>93</sup> becomes, perhaps unwittingly, complete unaccountability. Indeed, Jefferson realized that “[a] judiciary independent of a king or executive, alone is a good thing; but independence of the will of the nation is a solecism at least in a republican government.”<sup>94</sup> To avoid this inevitability, there must be some effective mechanism for removing judges or reversing their decisions. Hamilton thought impeachment would be the mechanism for accountability, but in this he has been proven wrong.<sup>95</sup> Thus, judicial independence, in the American context, is at war with democratic accountability.<sup>96</sup>

---

92. Absolute independence requires the absence of accountability, while absolute accountability requires the absence of judicial independence. What is needed is the integration of both values. Only a theory of republican democracy can articulate such integration. This theory must determine how much independence is compatible with the desired degree of accountability. However, because consent and accountability are so central to republican democracy, surely accountability must be lexically prior to specifying the degree of judicial independence.

93. THE FEDERALIST No. 78, at 501 (Alexander Hamilton) (Robert Scigliano ed., 2000).

94. Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), in 10 THE WRITINGS OF THOMAS JEFFERSON, 1816-1826, at 171 (Paul Leicester Ford ed., New York, G. P. Putnam's Sons 1899).

95. THE FEDERALIST No. 81, at 518 (Alexander Hamilton) (Robert Scigliano ed., 2000). Hamilton's confidence in the Court is plausible only if a distinct interpretive methodology exists to which all reasonable people will assent. This ancient confidence has proven illusory, and given the persistence of reasonable disagreement and the burdens of judgment, we now understand why.

The Chase impeachment trial convinced Thomas Jefferson of the ineffectuality of impeachment for disciplining judges. No Supreme Court Justice has been impeached in the two hundred years that followed the Chase trial. Few contemporary scholars advocate impeachment as a means for reigning in the judiciary. *But see* DAVID BARTON, RESTRAINING JUDICIAL ACTIVISM (2003). In my view, impeachment is too blunt a tool and treats the symptoms, not the cause. *See* Lipkin, *Which Constitution?*, *supra* note 4.

96. In contemporary constitutional culture there seems to be a suspicion of those who consider judicial accountability to be at least as important as judicial independence. A certain degree of wariness in this regard is justified. We have just witnessed an episode where Congress decided to interfere in the judicial process by using its legitimate power to modify the appellate jurisdiction of the court. The Terri Schiavo case stands as an important example of how a

A disproportionate emphasis on judicial independence obscures the fact that accountability and judicial independence are two equally important values in a republican democracy.<sup>97</sup> The republican democrat's goal should be to include both these values in a system of constitutional review. Judges should not be directly interfered with, punished, threatened, or bullied while deciding a constitutional controversy. However, this does not mean that alternative methods of accountability are inappropriate.<sup>98</sup> Our constitutional culture seems to suppress the importance of accountability by embracing a sweeping endorsement of some unanalyzed conception of judicial independence.

Eisgruber, for instance, believes that even if judges and elected officials are equally virtuous, “there is a simple reason why we should expect federal judges—and Supreme Court justices in particular—to handle matters of principle relatively well.”<sup>99</sup> The reason is that “[f]ederal judges enjoy a singular advantage: the independence that comes with life tenure.”<sup>100</sup> Independence permits judges to decide issues without regard to such prudential considerations as job security or a reduction in pay. However, this does not make judges better qualified to decide complex issues of morality and constitutional law. Deciding matters of principle is no guarantee of correct decision-making, nor do judges always formulate the correct constitutional principles. Eisgruber overstates the degree to which judges are impartial, intelligent, and reflective and understates the degree to which legislators exhibit these virtues. It is far from obvious why judges should be better able to explicate such critical features of American constitutionalism as liberty, equality, or community than legislators well-versed in the concepts of republican democracy.

Eisgruber seems committed to judicial elites as better constitutional interpreters than elected officials. But even if elites must decide complex questions of constitutional morality and constitutional law, surely Eisgruber has picked the wrong elite. Why would anyone contend that Justices Antonin Scalia or Stephen Breyer are better able to decide constitutional questions

---

constitutionally authorized relationship between the elected branches and the courts can go awry.

97. The idea that there exists “a core to the notion of judicial independence, an irreducible normative essence that must be present in any political system for a court to operate as such” requires that we are able “to identify such a core.” Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS* 21 (Stephen B. Burbank & Barry Friedman eds., 2002). The persistent failure to do so should alert us to the possibility that no such irreducible normative essence exists. Remember, “judicial independence is not an end in itself but a means to an end, which requires that the inquiry focus on the goal(s) to be achieved in determining the quantum and quality of independence (and accountability).” *Id.* Too often assuming the existence of an irreducible normative essence of judicial independence gives short shrift to accountability. Instead, the more perspicacious view would seek to explicate and rank the democratic republican values of judicial independence and accountability. *Id.* at 21-22. For without accountability, republican democracy loses its claim to embrace self-government.

98. Some alternatives include term limits, recalls, electing judges, and congressional overrides.

99. EISGRUBER, *supra* note 88, at 58.

100. *Id.*

involving liberty, equality, or community than John Rawls, Robert Nozick, or Gordon Wood? Is Chief Justice Roberts more likely to appreciate the constitutional, moral, political, and social questions associated with flag desecration, abortion, affirmative action, stem-cell research, or same-sex marriage than Richard Rorty or William F. Buckley, Jr.? Only by insisting that the Constitution must be approached through the arcane writing found in case law is it even minimally plausible to suggest the fundamental concepts of republican democracy require the attention of an intellectually limited and experientially deficient elite.<sup>101</sup>

The point here is that the training of lawyers and judges render them no more able to interpret the Constitution than intellectuals in other fields, or even ordinary informed and thoughtful citizens. Becoming well-versed in the background fabric of constitutional law, including morality, politics, history, and social traditions, is at least as important as knowing when an agreement is a contract, or the proper standard of review for symbolic speech. Constitutional theorists who insist that constitutional reasoning necessarily includes moral reasoning are especially vulnerable to this criticism. They leave themselves open to this attack—that they've backed the wrong elite—in a way other constitutional theorists do not. Judges may be virtuous, but simple virtue does not qualify a judge to explicate the moral content of constitutional provisions.

Eisgruber may be correct that life tenure enables judges to interpret the Constitution free from any influence except what they sincerely and reflectively believe to be the legal, moral, and political content of the relevant constitutional provision. Does this make it more likely that judges will get the right answer, or even that judges will get the right answer more often than legislators or ordinary citizens? All that follows from the freedom life tenure affords is that judges will be more likely to articulate what *they* sincerely believe the Constitution means, not what the Constitution actually means. It is simply a *non sequitur* to insist that life tenure makes it more likely that judges will interpret the Constitution correctly. Eisgruber's argument is plausible only if we assume that all that distinguishes people in deriving right answers is the degree of time and convenience they have in deciding difficult questions of law and morality. This assumption is clearly false; in any event, no argument has been offered to establish its truth. It is just as likely that when people are permitted to articulate their convictions free from the constraint of accountability they are more likely—depending upon the individual, of course—to see their ideological convictions reflected in the Constitution. Freedom from constraints is just as likely to generate idiosyncratic interpretations of the Constitution as it is to generate fidelity to constitutional values, maybe even more so. In fact, Eisgruber fails to consider the possibility

---

101. The Justices are intellectually limited in the sense that legal education and experience do not prepare one to appreciate the values of liberty, equality, and so forth, which prompted the creation of the Constitution.

that accountability produces better constitutional decisions than the freedom to decide as one chooses.<sup>102</sup>

Underlying Eisgruber's commitment to judicial independence is the idea that the Court is a representative institution. Eisgruber argues, "[i]f we deepen our understanding of democracy, it becomes possible to understand the Supreme Court as a sophisticated kind of representative institution. We can thus reconceive judicial review . . . not as a constraint upon the democratic process, but as one institutional mechanism for implementing a complex, non-majoritarian understanding of democracy."<sup>103</sup> This sounds nice, but does it have any cash value? How in the world can the Supreme Court, populated almost its entire history with white, propertied males, constitute "a sophisticated kind of representative institution"? What kind of "representation" is this?

Answering this question requires some explication of the notion of "representation." What follows is only a general schema of what representation means. The general schema is this: X represents Y's true interests, Z, when X pursues Z.<sup>104</sup> However, this schema conceals an important ambiguity. In one sense—call it "the paternalistic sense"—X represents Y's true interests, Z, when X pursues Z *period*. In short, I represent your interests when I try to acquire what you *should* want or what is truly in your best interests, irrespective of whether you believe it is. In this sense, I can represent your interests whether or not you ask me to, or even whether or not you know what your true interests are. In the second sense—call it "the autonomous sense"—X represents Y's true interests, Z, only when X pursues Z because Y instructs X to do so. Here I represent your interests when I try to acquire what you do, in fact, want or what you believe to be in your true interests because you have instructed me to do so. In this sense, Z might not be in Y's true interests, but representing someone's true interests requires accepting what that person believes his or her true interests to be. Which sense of "representation" does republican democracy require?

In a republican democracy representation must be understood in the autonomous sense illustrated by agency theory.<sup>105</sup> Congresspersons act as agents of the people; they do the people's bidding. This means that, when feasible, a representative should pursue a particular course of action because her constituents instructed her to do so.<sup>106</sup> The autonomous sense is primary

---

102. There are many informal constraints on judges. Among the more prominent are one's reputation as a good judge and one's historical legacy. However, these constraints are soft constraints and achieve accountability only if the judge is unwilling to stand alone.

103. See EISGRUBER, *supra* note 88, at 48 (footnotes omitted).

104. A complete theory of representation would include an analysis of when a representative should make a decision which is not in the *perceived* interest of the person being represented.

105. See RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

106. The constituents' instructions are central here. In a direct democracy citizens can vote for a course of action based on nothing more than their desires, even if the action proves not to be in their interest. At the least, in ordinary circumstances representatives should be governed by their constituents' instructions. The exception is when the representative knows with practical certainty that the constituents' wishes will prove catastrophic.

because consent is the hallmark of democracy. Even when a representative is better at ascertaining his or her constituents' true interests than the constituents themselves, democratic representatives must defer, almost always, to their constituents' instructions. It is this autonomous sense of representation that comports with the consent of the governed,<sup>107</sup> while the paternalistic sense is consistent with dictatorship. We must remember that even when a dictator understands his or her constituents' true interests better than the constituents themselves, it is still a dictatorship. Of course, sometimes a dictatorship might understand and satisfy the people's true interests better than a democracy. But the dictatorship does not become a democracy for that reason. This explains why it is difficult, if possible at all, to describe the Court as representing the people in the relevant (democratic)—autonomous—sense of representation.<sup>108</sup> Judges try to interpret and apply the law. The people's interests are secondary if relevant at all.<sup>109</sup>

Eisgruber seems committed to the principle that we can assess the democratic score of a particular institution (in this case, whether it represents the people's will) "on the basis of a pragmatic assessment of its ability to serve democratic values."<sup>110</sup> Whether one contends that the legislature or the courts represent the people depends on "the incentives that structure the behavior" of legislatures or voters, not "on the basis of any intrinsic connection between direct elections and democracy."<sup>111</sup>

Eisgruber's contention needs to be carefully scrutinized. First, does this pragmatic assessment mean that it is the Court's job to determine which democratic values should be served, even when the people disagree? Here again exists a form of paternalism that is in tension with consent. Given the persistence of reasonable disagreement, no canonical sense of democratic values seems forthcoming, at least not in the present circumstances. Hence, how does the pragmatic assessment operate when courts and the people differ over the content of these democratic values?

Second, how are we to decide which incentives structure judicial behavior? Are the people to decide this? The courts? Again, given the persistence of reasonable disagreement, paternalistic imposition by the Court of the "correct"

---

107. Consent, through accountability, must be obtained at some point in the law-making process for self-government to be possible in the first place.

108. It might be possible to constrain the first sense of representation so as to break its conceptual slide into a dictatorship. For example, one might argue that representatives should pursue their constituents' true interests when the constituents are not able to discern them, but the constituents would agree about what their true interests were if they were able to consider them. Counterfactuals of this type are, of course, difficult to confirm.

109. Eisgruber may contend that courts bring about democratic values, which are always part of a person's true interests in a democracy. However, it is unclear whether there is empirical evidence that this is so. Additionally, this would mean judicial decisions represent the people's interests, whether the people think so or not.

110. EISGRUBER, *supra* note 88, at 51.

111. *Id.* at 52.



incentives will never achieve a consensus. More importantly, a paternalistic judiciary denigrates the people and implicitly rejects their autonomy and capacity for republican virtue.

Third, there *is*, of course, an intrinsic relationship between elections and democracy. It would be extremely perverse to design a “democracy” without elections. Indeed, to propose doing so would be unintelligible from the start. The question is not whether there is such an intrinsic relationship, but rather whether every form of democratic design must be tied directly to elections. The answer is, certainly not. However, there is also an intrinsic relationship between *accountability* and democracy, even if not every democratic institution must be directly accountable to the people. Without effective accountability, the agent represents her principal only in a paternalistic sense if at all. This would commit us to the conviction that paternalistic courts are better at discerning the people’s true interests than the people themselves. This cannot be what democracy means. If it does, the principal will cease to be sovereign, despite the many benefits she may derive from her agent’s paternalism.

What kind of representation does judicial independence involve? Life-tenured judges whose decisions are provisionally final do not represent the electorate in the autonomous sense. While some degree of paternalism might be acceptable in republican democracies, the paternalistic sense as a general conception of representation takes the “self” out of “self-government.” Representing the electorate paternalistically means that the electorate has no effective control over its “representatives” decisions.

If we accept the paternalistic sense of representation, judges are no longer accountable to the electorate in any interesting sense of the term.<sup>112</sup> They are not effectively removable from office, and their decisions are generally not overruled, at least at the Supreme Court level. Consequently, neither the electorate nor its elected representatives have any significant influence over judicial decisions. It is true, of course, that Supreme Court decisions can be overruled by a supermajoritarian effort through Article V or by transformative judicial appointments. And, of course, the elected branches nominate and confirm federal judges. No one, however, would take seriously these examples as instances of accountability without first being convinced of judicial supremacy’s normative sanctity.<sup>113</sup> Perhaps judicial supremacy is so important that an exception to the accountability requirement is appropriate. But if that is the case, let us say so instead of mangling the idea of accountability to fit judicial supremacy when its fit is not obvious at all. Keep in mind, a

---

112. I distinguish between three forms of accountability, each of which arguably needs to apply to constitutional institutions: (1) input-accountability, (2) process accountability, and (3) output-accountability. Lipkin, *Which Constitution?*, *supra* note 4, at 1067-68.

113. To effect change through Article V is extremely difficult, and transformative appointments can take decades. Satisfaction with authorizing judicial power as a necessary and sufficient condition for accountability is scary. Imagine being required to stick with your choice of auto mechanic, attorney, physician, or house cleaner for the rest of their lives or until they quit. No one would accept such a requirement in these cases. What makes such a choice of federal judges any more palatable? Pick your judge and then cross your fingers.

benevolent dictatorship might bring about some democratic values without being accountable. Yet, no one, for this reason, would call it a “democracy.”

Judicial independence is a salient democratic virtue. Judges must not fear for their lives, liberty, or material possessions when deciding great constitutional controversies. Nevertheless, external checks on the judiciary are just as necessary as those on the elected branches, and are even more vital because the electorate is the ultimate check on the legislature and the executive branches. The appropriate conception of judicial independence need not be compromised for judges to be held accountable for their judicial decisions.<sup>114</sup>

#### *E. The Settlement Function Defense*

In order for legal actors to live autonomously and productively, law needs to be settled. Individuals base their decisions *inter alia* on the reigning body of law. Accordingly, their expectations and reliance interests must be relatively stable. If the content or meaning of constitutional law changed every time a different governmental body or different governmental official applied the law, anarchy would reign. Settled law permits one to know what to expect in choosing to engage in various forms of conduct. Without settled law, practical decisions based on unsettled law become radically uncertain. Consequently, it is safe to say that the settlement function of law is one of the virtues of any adequate legal system.

Larry Alexander and Frederick Schauer embrace the doctrine of judicial supremacy because, in their view, it is essential to settling law. For these authors, *Cooper v. Aaron*<sup>115</sup> is the paradigmatic statement of this doctrine. Consider Chief Justice Warren’s words from that decision:

Article VI of the Constitution makes the Constitution the “supreme Law of the Land.” In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as “the fundamental and paramount law of the nation,” declared in the notable case of *Marbury v. Madison* that “It is emphatically the province and duty of the judicial department to say what the law is.” This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3 “to support this Constitution.”

---

114. This would, however, require introducing some novel institutional checks, such as the congressional override. Lipkin, *Which Constitution?*, *supra* note 4, at 1058-60, 1121-29.

115. 358 U.S. 1 (1958).

. . . Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery."<sup>116</sup>

Chief Justice Warren's immediate target was the notorious doctrine of nullification, which permits a state to reject or nullify Supreme Court decisions.<sup>117</sup> However, his argument has wider implications.

For Alexander and Schauer, *Cooper* makes clear that governmental officials should consider judicial interpretations as weighty as the Constitution itself. Despite taking an oath to defend the Constitution, non-judicial officials cannot choose their constitutional interpretations over the Court's, because their interpretations cannot satisfy the settlement requirement. Alexander and Schauer, praise *Cooper* and *City of Boerne v. Flores*,<sup>118</sup> two decisions through which the Court trumpets its role, at least relative to the states, as the exclusive and final arbiter of constitutional meaning.<sup>119</sup> However, the authors do not

---

116. *Cooper*, 358 U.S. at 18 (citations omitted). The concern over everything being up for grabs is, of course,

a panic about self-government in the political realm . . . [P]olitics does leave things up for grabs in a way that is bound to be disconcerting from each individual's point of view. Respect for the opinions and consciences of others means that a single individual does not have the sort of control over political outcomes that his conscience or his own principles appear to dictate. That bullet, I think, simply has to be bitten.

WALDRON, *supra* note 83, at 304.

117. In response to the Alien and Seditions Acts, despised by the Jeffersonians, Kentucky and Virginia attempted to nullify the federal law. THE KENTUCKY-VIRGINIA RESOLUTIONS AND MR. MADISON'S REPORT OF 1799 (Va. Comm'n on Constitutional Gov't 1960).

118. 521 U.S. 507 (1997). In this case, the Court asserted, When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. . . .

It is for Congress in the first instance to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and its conclusions are entitled too much deference. Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison* to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.

*Id.* at 536 (alteration in the original) (internal citations omitted) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

119. Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 456-458 (2000).

endorse judicial supremacy merely because the Court claims this power,<sup>120</sup> but rather because there exist good moral reasons to do so:

[A] central moral function of law is to settle what ought to be done. A constitution, because of the difficulty of altering it, attempts to effect a more permanent settlement of what ought to be done than do statutes and common law decisions. Where the meaning of a legal settlement, including a constitutional one, is itself controverted, it is a central moral function of judicial interpretation to settle the meaning of that (attempted) settlement.<sup>121</sup>

According to this view, legal virtues—such as consistency, coherence, predictability, stability, and so forth—are imperatives because the moral basis of law requires them. Consequently, in order for the law to be authoritative, these virtues must apply. Similarly, law’s settlement requirement is also a judicial virtue, and perhaps the pre-eminent one.

Law’s authority, according to this argument, does not depend upon the truth of a judicial interpretation. Instead, “a judicial interpretation of an attempted legal settlement may be incorrect,” but this “does not and should not call into question its authority.”<sup>122</sup> When the meaning of a constitutional provision is settled, it retains its authority “even if those subject to them believe the settlements to be morally and legally mistaken.”<sup>123</sup> The authority of even a mistaken interpretation rests in the acknowledgement by officials and citizens that the erroneously interpreted law should be obeyed as interpreted until its interpretation is authoritatively revised.<sup>124</sup> Consequently, judicial supremacy and its capacity to achieve settlement are necessary for constitutional law’s authority.

For Alexander and Schauer, text and history are relevant to the question of judicial supremacy, but hardly dispositive. Even if a hypothetical constitution included text stating that “Congress is the final arbiter of constitutional meaning,” the institutional question—who is responsible for interpreting *this* provision?—remains. The answer to this question cannot, short of circularity, be answered by referring to the provision itself.

Nor would historical evidence establishing that the Founders intended the courts to be the supreme constitutional interpreter dispositively answer the institutional question. Evidence of past intent cannot itself tell us how that evidence should factor into our present interpretations. The institutional question of who should be the arbiter of constitutional meaning is independent of text and history; instead, normative reasons—jurisprudential

---

120. Of course, this reason for judicial supremacy would be as circular as it would be empty.

121. Alexander & Schauer, *supra* note 119 at 457.

122. *Id.*

123. *Id.*

124. This argument runs counter to Marshall’s argument in *Marbury*, rejecting the proposition that the Courts should enforce unconstitutional bills until Congress reforms them.

and moral—must be articulated for assigning the interpretive authority to one institution over another.<sup>125</sup>

Alexander and Schauer's position does not depend upon denigrating the significance of deliberation; nor does it depend on constitutional provisions being fixed and not subject to creative revision. In their view, emphasizing the settlement function "is premised on the special functions that *law* serves, . . . and the peculiar and special province of constitutions that have been written down and understood in substantially law-like ways."<sup>126</sup> Settlement takes a certain controversy off the table, giving citizens notice that the controversy has been settled. The authority of legal settlements permits coordination and "provides, for those who disagree with the terms of the settlement, content-independent reason for obeying the terms of the settlement even when they disagree with their substance."<sup>127</sup> In effect, for Alexander and Schauer, "settlement *qua* settlement serves important social functions" and is "more valuable than the value that comes from greater flexibility in the face of changing facts about the world, and changing views about how we wish to confront those facts."<sup>128</sup>

The authors are clearly right about the importance of settled law. Certainly, laws must provide dispositive reasons for acting irrespective of their content. If obedience depended upon content, obeying the law would depend upon whether the populace agreed with the law's content. Surely in a diverse society where reasonable disagreement persists, no such consensus is likely or even desirable. Hence, if a law's content was the determining factor of whether it should be obeyed, people would obey only those laws whose content they favored. Any intelligible conception of the rule of law must reject this possibility. Hence, the authority of law depends on its derivation, not its content.

Although the authors recognize that settlement is not the only virtue of law, they privilege it over other legal virtues. This clearly overstates its significance. Especially when addressing the question of constitutional morality, the flexibility of reform must also be taken into account. If the Court denies disabled citizens equal protection, for example, then the flexibility of future judicial interpretations—or interpretations of other governmental actors disputing the settled meaning of the law—should override the settlement function of the law. Unless Alexander and Schauer can establish some

---

125. This argument is correct, but overstated. Ultimately, the institutional question, as Alexander and Schauer insist, must be resolved by moral reasons for deciding which institution—the courts or the legislature—should have the final word in constitutional interpretation. One could argue that if constitutional text or history clearly assigned the institutional role to the courts, a presumption would be created in favor of the courts. This presumption, however, could be overcome by the appropriate normative reasons. That said, in the American experience, neither text nor history comes close to assigning the courts the role of constitutional arbiter. Further, the moral reasons for choosing the courts are arguably incompatible with the idea of republican democracy.

126. Alexander & Schauer, *supra* note 119, at 469.

127. *Id.* at 469-70.

128. *Id.* at 470.

canonical ranking of the settlement function and the flexibility function, this possibility cannot be ruled out, and it should not be ruled out. Even if settlement is primary, it must accommodate other values, such as reform. The question then is whether judicial supremacy helps or inhibits the operation of these other values. American history shows that judicial supremacy inhibits more than it enhances.<sup>129</sup>

This aspect of judicial supremacy is clearly illustrated by our current regime of constitutional adjudication, where settlement interacts with the flexibility of reform. Reinterpreting or ignoring precedents is testimony to the regime's flexibility.<sup>130</sup> The Supreme Court's constitutional adjudication adheres to precedent when it finds it convenient and ignores precedent when it chooses. Those who believe that constitutional adjudication is revolutionary<sup>131</sup> and those who insist the Supreme Court reflects public opinion will agree that the Court adjusts prevailing constitutional norms when it deems it necessary. Of course, flexibility within judicial interpretation is not tantamount to flexibility between and among the different government branches. Though not the same, the flexibility of reform in judicial interpretations is nonetheless a constitutional imperative. If so, why reject the possibility of interbranch settlement?

Alexander and Schauer fail to appreciate that settled law is more important in some areas than in others. In property and contracts, for instance, where reliance interests are critical, settled law might be crucial. However, constitutional law is replete with powers, rights, and liberties. One would think that getting constitutional law right would be far more important than settling the law. Indeed, the great controversies in constitutional adjudication typically involved cases—including *Dred Scott v. Sandford*, *Plesy v. Fergusson*, *Lochner v. New York*, and *Bowers v. Hardwick*<sup>132</sup> just to name a few—where the interpretation of a law was well-settled, even virtually entrenched. Judicial settlement, which almost always becomes judicial entrenchment, prevents required constitutional change. Surely, judicial settlement is one of the primary villains in those cases denying individual rights and liberties or rejecting the federal government's primacy in settling national economic problems. The crux of Alexander and Schauer's problem is their failure to distinguish between strong and weak settlement. No doubt, assigning

---

129. Consider the tortuous journey from *Plesy v. Ferguson* to *Brown v. Board of Education*. This period represents fifty-eight years during which judicial supremacy entrenched racial apartheid within America's legal, political, and social culture.

130. The United States Supreme Court has overruled itself more than 200 times. GPO Access, Supreme Court Decisions Overruled by Subsequent Decision (Nov. 1, 1996), <http://www.gpoaccess.gov/constitution/html/scourt.html>. These decisions, together with federal circuit courts overruling precedent in their circuits, testify to a healthy respect for flexibility.

131. See generally ROBERT JUSTIN LIPKIN, CONSTITUTION REVOLUTIONS: PRAGMATISM AND THE ROLE OF JUDICIAL REVIEW IN AMERICAN CONSTITUTIONALISM (2000).

132. 478 U.S. 1039 (1986).

constitutional authority to one governmental body will settle the law. This is precisely what occurred in *Dred Scott*, *Plessy*, and *Roe v. Wade*.<sup>133</sup> Indeed, the law can be further settled by granting the Supreme Court the authority to examine proposed amendments to the Constitution. Granting this power will clearly settle the law as much as anything can settle the law, but is it desirable? The authors never ask this question. In short, they never consider the desirability of weaker forms of settlement, or the catastrophe of stronger forms of judicial supremacy.

Consider an example from Indian constitutional law. The Indian Supreme Court has assumed the authority to determine when an amendment compromises the Indian Constitution's basic structure. In *Minerva Mills*,<sup>134</sup> extending "the basic structure doctrine" first formulated in *Kesavananda Bharati v. the State of Kerala*,<sup>135</sup> the Court held that Parliament's authority to amend the Constitution does not extend to amendments designed to change (damage, destroy) the Constitution's "basic or essential features."<sup>136</sup> Accordingly, Parliament's power to amend the Constitution "was limited and [Parliament] was not competent to alter the basic structure of the Constitution."<sup>137</sup> Accordingly, "the Supreme Court ensured that [the Indian Court] would remain the foundation of the country's constitutionalism."<sup>138</sup> Hence, the Indian Court's settlement function and its judicial supremacy are much stronger than the settlement function and judicial supremacy in the United States. However, nothing like the Indian Court's supremacy is compatible with republican democracy. It is one thing to make the Supreme Court the final arbiter of constitutional meaning under the present constitution, but it is quite another to require the Court's approval of constitutional amendments. The moral of this story is this: judicial supremacy is at best a mixed blessing, and at worst a monumental failure of democratic accountability, leading to the undermining of republican democracy.

Alexander and Schauer also fail to recognize that there are different degrees of settlement. The authors favor only one kind of settlement, one that must be external to the legislature, and only the Court can achieve this strong settlement. Yet suppose a congressional override of judicial decisions—by two-thirds of Congress—were instituted. Such a mechanism provides a strong settlement, just not a judicial one. I have argued for a congressional override elsewhere,<sup>139</sup> and I will not repeat the argument here. Suffice to say, the possibility of a congressional override would satisfy both the settlement requirement *and* an accountability requirement. In this case, the Court's decisions would, for the most part, prevail. However, it would provide the elected branches and the people an opportunity to reverse judicial decisions

---

133. 410 U.S. 113 (1973).

134. *Minerva Mills Ltd. v. Union of India*, (1981) 1 S.C.R. 206.

135. *Kesavananda Bharati v. Kerala*, (1973) Supp. S.C.R. 1.

136. GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: A HISTORY OF THE INDIAN EXPERIENCE* 502 (2003).

137. *Id.* at 504.

138. *Id.* at 506.

139. See generally Lipkin, *Which Constitution?*, *supra* note 4.

when necessary.<sup>140</sup> In addition, depending upon the precise design of the override, it would provide interbranch communication on constitutional controversies.<sup>141</sup> The bottom line here is not to argue for unorthodox alternatives outright, but only to suggest the extreme nature of the authors' commitment to judicial supremacy.

The extremity of their position seems to be based on their fear of "interpretive equality," which gives competing constitutional actors the authority to interpret the Constitution.<sup>142</sup> The authors fear that in this case there will be no final decision regarding the meaning of a constitutional provision. This overlooks the role of the electorate in electing or re-electing those political officials whose views reflect the choice of the people. The authors seem to believe that such a practice would result in chaos, but is there any empirical substantiation for their fears? Why would giving the electorate the final word in determining constitutional meaning be chaotic in a republican democracy? The authors are fixated on American-style judicial supremacy and, as a result, fail to take seriously alternative conceptions of judicial review. For example, Canada and Belgium both permit the legislature to have the final word in certain circumstances. How might their different conceptions of constitutional review compare with ours?

Giving the electorate a greater role in deciding upon constitutional meaning has certain benefits. It would engage more citizens and conceivably make a deeper settlement more likely. In a pervasive media age, the reasons for and against proposed interpretations of constitutional provisions could be comprehensively discussed. Even in periods where provisional closure seems illusive, the deliberation occurring can contribute much to the public's

---

140. This might diminish the distorting collateral effects of judicial supremacy on American politics. The role *Roe* played in contributing to polarization and in creating the culture wars derives, in part, from the understandable resentment in having electoral victories prohibiting abortion snatched from the electorate by an unelected Court. Consider further the role overturning a Supreme Court decision plays in American politics. To overturn a decision, short of a constitutional amendment, requires that voters elect a President who supports this change. Further, it requires that this President make the right transformative appointment(s) to the Court. In the case of abortion, that prospect has proved elusive. American politics and culture have suffered greatly from the abortion wars. Congressional change, perhaps, is more likely to provide a weaker settlement in theory, but a stronger one in fact, because losing in the legislature is something any republican or democrat must accept as legitimate.

141. One need not be a crude pragmatist or an advocate of unbridled flexibility to deny that the courts should have the final role in settling constitutional law in every case. Indeed, as indicated earlier, the elected branches serve the settlement function now in dormant commerce clause cases and political question cases, and when exercising traditional rational basis review. Thus, judicial supremacy even now permits the settlement function to be served by the elected branches. Moreover, the Court's role in cases of statutory interpretation suggests an interbranch relationship that has relevance to the question of judicial supremacy.

142. In "departmentalism"—the view that each federal branch or department is equally authoritative in interpreting the Constitution—presumably there is no way to come to a final resolution if two or more departments, as is likely, disagree. See Lipkin, *Which Constitution?*, *supra* note 4, at 1092-93.



understanding and appreciation of constitutional values. Only if these dynamic periods permanently prevented provisional closure—resulting in continual reinterpretations of the Constitution and changes to federal law—would they be inconsistent with the settlement function of law. Such a prospect is unlikely, not only because the electorate is likely to tire of perennial changes, but also because democracy generally encourages respect for a perpetually winning position, at least regarding all but the most controversial issues. This is even more likely when the need for provisional closure itself becomes an electoral issue. Indeed, such periods of dynamic revision might very well assist the nation in finally coming to a prolonged provisional closure concerning constitutional meaning.<sup>143</sup>

It is critical to point out that the authors' argument occurs in the conceptual space of *status quo* constitutionalism. They assume that settlement and stability are more important than accountability and reform. They further assume that external constraints on the elected branches and on the electorate are absolutely required for constitutional review. Not only are these assumptions unsubstantiated by empirical investigation, but more importantly, this commitment to external constraints is paradoxical. If external constraints are required generally to satisfy some unexplained principle of "checks and balances," why aren't such external constraints for the judiciary equally necessary? And if this principle is not a general one, the authors must explain why an exception is made in the case of the courts. The standard arguments from within the conceptual space of *status quo* constitutionalism are not persuasive, or at least that is the charge.

#### *F. The Second-Order Rule Defense*

If constitutional law is the law of law-making, what is the relationship between ordinary laws and constitutional law? Frederick Schauer argues, "the constitution incorporates a series of rules that impose second-order constraints on the first-order policy preferences of the people and of their elected representatives and executive officials."<sup>144</sup> Since these second-order constraints are designed to restrict the first-order preferences of elected officials to bring about "longer-term or deeper values,"<sup>145</sup> it would be self-defeating to give the job of constitutional review to these officials. Restricting

---

143. Flexibility is also related to the constitutional imperative to deal with injustice, or what one might call the law's ameliorative function. Given too prominent a place in constitutional importance, constancy of interpretation tends to derogate the ameliorative function of constitutional interpretation. The strength of law's settlement function needs to be balanced against other significant legal values such as flexibility and amelioration. Legal positivists have, perhaps, a natural commitment to stability and flexibility. However, this commitment seriously underestimates the equally important values of flexibility and amelioration. By contrast, legal pragmatists might be more inclined toward flexibility and amelioration.

144. Frederick Schauer, *Judicial Supremacy and the Modest Constitution*, 92 CAL. L. REV. 1045, 1046 (2004).

145. *Id.*

these officials is precisely the role of constitutional limits. Thus, it would be anomalous to give the job of restricting those who need to be restricted to the restrictees themselves. Judicial supremacy, in this view, “is the natural partner of *constitutionalism itself*.”<sup>146</sup>

We have encountered some form of this argument before. However, Schauer joins some of the standard defenses or parts of the standard defenses with the distinction between first- and second-order rules. Consequently, we should determine whether the distinction between first- and second-order rules provides a stronger defense of judicial supremacy than the standard defenses alone.

According to Schauer, the question of judicial supremacy is a question of judicial authority. Supreme Court decisions should be followed because of their source, not because of their merit. Judicial authority is not absolute; rather it is a presumption that can be overridden in some circumstances.<sup>147</sup> Although not absolute, from a practical perspective in those constitutional controversies that captivate the public, judicial supremacy is virtually absolute. The presumption in favor of the Court’s role as the ultimate constitutional decision-maker is strong enough to require other governmental branches and the people to defer to Supreme Court decisions.

Schauer’s statement of judicial supremacy as a general presumptive deferral to the Courts is an overstatement. In political question doctrine cases, dormant commerce clause cases, and most applications of rational basis scrutiny, the Court already defers to the legislature. However, this does not really affect Schauer’s point. These areas of judicial review require deference because the Court says they do. In other words, these are judicially created instances of deference. In principle, the Court can reverse itself and adopt less deferential forms of judicial review. Thus, aside from changes in the composition of the Court and absent Article V modifications, whatever deference the Court owes other constitutional actors is derived from the Court’s authority, not those actors’.

Unlike other defenders of judicial supremacy, Schauer does not rest his argument on the proposition that public officials making first-order judgments are often dishonest or in some other manner not well-meaning. Rather, “constitutional rights exist not to keep bad people from doing bad things, but rather to keep good people from enacting sound first-order policies” that have harmful second-order effects.<sup>148</sup> Perfectly decent first-order governmental decisions often need to be reversed to protect “important long-term second-order values from erosion by good people making reasonable short-term

---

146. Schauer, *supra* note 144, at 1046. (emphasis added).

147. Article V permits the citizenry to reverse Supreme Court decisions by amending the Constitution. Additionally, Article III gives Congress the authority to regulate the Court’s appellate jurisdiction. Congress also controls funding for the operations of the Court.

148. Schauer, *supra* note 144, at 1055.

decisions.”<sup>149</sup> These second-order constraints constitute what Schauer calls the “negative Constitution.”<sup>150</sup> Such constraints “entrench[] those long-term values . . . that are especially likely to be vulnerable in the short term.”<sup>151</sup> Second-order constraints are “externally-enforced rules [that] may be necessary in order to protect a majority’s own long-term interests from [the] majority’s short-term desires.”<sup>152</sup> The importance of external constraints is a familiar feature of life. It explains why a smoker attempting to quit smoking votes for a law prohibiting smoking in the work place or in restaurants. While she can simply decide not to smoke in these venues, the rule prohibiting smoking guards against weakness of the will; it helps discipline the smoker when self-discipline is difficult or impossible. Second-order constitutional constraints provide the discipline necessary to make sure that majorities do not simply make law without any concern for political or ethnic minorities.

The strongest argument for judicial supremacy, in Schauer’s view, is not one committed to “an unrealistically rosy view of the judiciary nor . . . an unrealistically dim view of the electorate.”<sup>153</sup> Rather, judicial supremacy rests on the idea that “checks on self-interest” are important when designing institutions for people to engage in practical reasoning about the public good. People in general need assistance in reflecting upon their first-order decisions to see if they comport with second-order values to which they are also committed. Articulating a need for external checks representing the public’s long-term values is not to denigrate the public; rather, it simply recognizes that such external constraints are necessary for anyone who engages in practical reasoning about policy preferences while at the same time keeping faith with constitutional traditions.

Schauer indicates that his “modest” Constitution does not render every controversy a constitutional controversy. Thus, the modest Constitution is not “at the center of all or even most debates of either policy or principle.”<sup>154</sup> However, “there is good reason” to eschew “a regime of unlimited legislative or popular sovereignty.”<sup>155</sup> The reason to reject such a practice is that “[n]either legislatures nor the people are best suited to recognize and enforce the necessary limits on their own power, nor are they well suited to implement and, if necessary, create . . . side-constraints on policy optimization.”<sup>156</sup> In the end, well-intentioned and competent people are “in need of an external check to ensure the aggregate common good.”<sup>157</sup> The modest Constitution simply reflects a principle common in other areas of life, namely, that self-interest is good and that constraints on self-interest are better.<sup>158</sup>

---

149. Schauer, *supra* note 144, at 1055 (footnote omitted).

150. *Id.*

151. *Id.*

152. *Id.* at 1057.

153. *Id.* at 1060.

154. *Id.* at 1065.

155. Schauer, *supra* note 144, at 1065.

156. *Id.*

157. *Id.*

158. *Id.* at 1066.

Schauer is correct about the existence and salience of the distinction between first-order and second-order judgments in practical reasoning. We would be a remarkably different species if we could only formulate first-order judgments. That we can and do formulate both kinds of judgment is at the heart of self-reflective consciousness and, therefore, at the heart of civilization. Yet, however important this distinction is, it fails to support judicial supremacy for the following reasons.

First, the burdens of judgment pertain to both first-order judgments and second-order judgments. Second-order judgments are just as contentious as first-order judgments. While there exists intractable disagreement over the propriety of abortion—a first-order judgment—such intractability also arises regarding the second-judgment of whether prohibiting abortion is constitutional. Both first- and second-order judgments, in this case, involve essentially contested concepts, principles, and reasoning. Given the persistence and desirability of reasonable disagreement, the difficulty in resolving both orders of judgment in a republican democracy will be the same. This explains why so many controversial Supreme Court decisions are split five to four among the members of the Court. Both majority and minority opinions represent coherent, plausible, and reasonable positions that resist consensus. If reasonable disagreement persists with second-order judgments, what special expertise do unelected, life-tenured judges possess to resolve them? This inability to achieve consensus over second-order judgments permits Justices to disguise their own first-order judgments as second-order judgments.<sup>159</sup> That was the point of Professor Graglia's passage quoted at the beginning of this essay.<sup>160</sup>

Second, why do we believe that Justices make better second-order reasoners than legislators? Both can be disingenuous, duplicitous, or revisionist. Just as legislators might choose to satisfy short-term desires at the expense of long-term interests, Supreme Court Justices might do the same.<sup>161</sup> Third, institutionally segregating first-order reasoners from second-order reasoners tends to impoverish both forms of reasoning. Indeed, this institutional segregation creates what constitutional scholar Mark Tushnet calls "the judicial overhang."<sup>162</sup> The existence of judicial supremacy itself causes legislators to

---

159. Rather than candidly asserting that abortion is wrong, some Justices hide their first-order distaste for abortion by camouflaging it in second-order judgments about constitutionality.

160. See Graglia, *supra* note 1, at A12.

161. Whenever the Court splits five to four over a hot-button issue, political considerations may have played a significant role in the Court's decision. On the assumption that *Bush v. Gore* derives, at least in part, from a preference for a Republican victory, the case illustrates the Justices deciding to satisfy their short-term interests—a Republican victory—over the long-term interests of the Court and the nation. See generally *Bush v. Gore*, 531 U.S. 98 (2000).

162. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 57-65 (1999).

avoid thinking explicitly about second-order constitutional reasons for and against their first-order policy judgments. Many legislators believe that because the Court has the final say in constitutional decisions anyway, they should confine themselves strictly to policy preferences, not constitutional judgments. This also enables legislators to escape accountability. Fourth, Schauer doesn't satisfactorily establish that second-order decision-making must be external to the legislature. Surely, one can imagine a legislative committee devoted to constitutional review. No doubt the majority in Congress would exert pressure on this Committee to rubberstamp legislation through second-order arguments. But the electorate can serve as a final check on the Court by removing those members of the Committee who are not candid about second-order problems with legislation they wish enacted. Fifth, even if the Court is more likely than Congress to formulate good second-order judgments, that fact itself does not conclusively prove that the Court's role must be exclusive. If the Court is more likely to formulate good second-order judgments, why not nevertheless establish an interbranch process whereby the Court seeks the legislature's considered judgment about a bill's constitutionality? This demonstrates the proper interbranch comity, even if the Court, once consulted, decides the case according to its own interpretations.

Sixth, although rights are "more than an interest pounding its fist on the table,"<sup>163</sup> it is not clear why courts are better arbiters of constitutional rights than legislatures. In the short term, when a particular majority has passed legislation that burdens the rights of a minority, that same majority is unlikely to vindicate the minority right. But if majorities violate rights, so too can different—future—majorities vindicate rights. Further, vindicating rights through political engagement is unlikely to cause the sort of resentment citizens feel towards unelected judges carving non-textual rights out of opaque constitutional provisions. Moreover, vindicating rights in a regime of judicial supremacy distorts politics by placing the vindication of such rights in the hands of a stealth aristocracy divorced from the electorate.

Seventh, Schauer's approach has more force as a rationalization for the existing practice of judicial power, and relatively little force concerning the question of institutional design in a democracy. If both democratic pedigree and the articulation of second-order judgments are equally important, there may be an alternative mechanism enabling us satisfy both values. For example, if federal judges were elected, their role as an external check would be much more democratic.

Put differently, according to Schauer, second-order judgments are necessary to constrain first-order decision-makers. As with the standard defenses, however, this fails to explain how second-order decision-makers are constrained. The very assumption that practical reasoning requires constraint damns the entire project of second-order judgments constraining first-order judgments. Because if that assumption is true, we are bereft of any procedure explaining how second-order judgments are constrained.

---

163. Schauer, *supra* note 144, at 1062.

This essay has examined some important defenses of judicial supremacy and found them to be insufficient. A republican democracy—however constrained by filters to encourage the community to derive its reflective judgments—needs accountability. A practice in which judicial decisions can only be reversed by constitutional amendment or transformative appointments falls short of this accountability requirement.

#### IV. WHAT'S RIGHT ABOUT JUDICIAL REVIEW

The value of judicial review lies in its utility in establishing a practice for reflection and deliberative conversation designed to translate the constitutional values of the past into the constitutional reality of the present. Judicial review provides the government and the people with a chance to take a second look at or have a second thought about their conduct—as expressed through laws and other official action—in order to ascertain whether this conduct comports with prevailing constitutional meanings and traditions. Individual practical reasoning includes both (first-order) decisions and judgments about what to value and what to do, and it also includes (second-order) critical reflection upon whether our first-order judgments were properly generated. The Court, through judicial review, helps us achieve this critical reflection. However, we simply sacrifice the *raison d'être* of republican democracy when we regard the Court's second-order judgments as binding all other governmental branches and the entire body politic. Judicial review is designed to encourage us to reflect upon the conduct of the elected branches, not to short-circuit the legislative process by anointing the Court as perennial monitor checking the elected branches' homework. The overriding imperative here is to welcome what courts say in our deliberative conversations about constitutional meaning, not to identify their words as final.<sup>164</sup>

Does judicial review *sans* judicial supremacy retain value in a republican democracy? The standard justification of the judiciary emphasizes its role in protecting the Constitution from electoral alteration. In a regime of judicial supremacy, the Court's judgment concerning what counts as electoral alteration is final.<sup>165</sup> Eliminating judicial supremacy leaves a vacuum

---

164. Of course, it could be argued that the Court's judgment is not final, and in the sense of absolute finality this is clearly right. However, relative or provisional finality requires constitutional change to either embrace the onerous task of amending the Constitution through Article V or the equally, if not more, difficult task of refocusing political debate, not on the substantive merits of a particular controversy, but rather on electing Presidents and Senators who will facilitate repopulating the Court in a conservative or liberal direction. Rather than representing a plausible example of electoral efficacy in constitutional change, this process arguably refocuses and distorts proper political debate.

165. Article V, which incorporates a process for overturning a judicial decision, renders any finality associated with such decisions only provisional. Still, this provisional finality reduces the possibility of the electorate directing the community's future. In effect, although strictly speaking the Court's finality is only provisional finality, it warrants special notice.

concerning whose job it is to highlight a possible constitutional violation. Yet, at the same time, it might open up the possibility of an interbranch process whereby the Court, Congress, and the electorate each contribute to a final judgment concerning constitutional meaning.<sup>166</sup> Shorn of judicial supremacy, judicial review still has a formidable role to play in a republican democracy. Let's explore this role by further elaborating the idea of republican democracy.

Republican democracy encourages members to reciprocally acknowledge the equal moral value of one's fellow citizens through the process of deliberative conversation. This commitment to deliberative conversation derives from the early foundations of American republican democracy.<sup>167</sup> Because the American republic is the formation of a community of individuals committed to the mutual recognition of one another's good, the idea of dialogue becomes indispensable. One's good must be defined, redefined, and integrated with the good of others. From a group of diverse democrats each committed to conflicting conceptions of the good life arose a communitarian republic made up of individuals each acknowledging that individuality, diversity, and sociality in part define their identities. The American quest is to explore the possibility that such individuals can create a community that ultimately permits self-government and a commitment to the equal freedom of everyone.

Republican democracy seeks to integrate two values central to self-government: consent and deliberation. First, republican *democracy*, as a system of self-government, requires the consent of the people and the accountability of the government. Consent and accountability are interrelated democratic values. Without consent there is no accountability, and without accountability, consent is hollow. Second, as a system of *republican* democracy, governmental decision-making requires deliberative structures to encourage the formulation of reflective judgments that every member can recognize as reasonable, or at least more reasonable than alternatives. These structures are designed to filter out transitory judgments that cannot withstand reflective scrutiny. Put differently, consent is more than a momentary, heated, or transient commitment to a fashionable course of action. Republican consent involves a reflective commitment to what, after all the evidence is examined, is in the community's best interest.<sup>168</sup>

Republican democracy requires an institutional structure that enables the electorate to have a second thought and the government to take a second look at legislation and other official conduct. Just as it is important to seek the advice or counsel of others when making practical decisions, so too governmental practical reasoning benefits when it has a built-in structure to provide a second look at its conduct. Judicial review serves this purpose.

---

166. See generally Lipkin, *Which Constitution?*, *supra* note 4.

167. Lipkin, *Deliberativism*, *supra* note 49, at 1050 n.19.

168. Republican consent is not a mechanical procedure, nor a procedure that will always yield one right answer for every constitutional conflict. The burdens of judgment preclude this procedure from being anything but political. One's experiences, initial values, the ranking of these values, and the generality with which one holds these values cannot be determined in advance.

What is the character of such an institution? A political institution for evaluating governmental conduct needs a forum for dialogue about constitutional meaning. This forum contributes to the overall deliberative dialogue that structures republican deliberation. Deliberative dialogue should include constitutional inquiries, political discussions, social investigations, and cultural explorations. Judicial review assists in constitutional inquiries and therefore enriches the overall deliberative dialogue necessary for the citizenry to articulate its reflective judgments about the future.

Can this notion of a deliberative dialogue be made more precise? In the past twenty-odd years, philosophy and social theory have formulated various conceptions of deliberative dialogue or conversation.<sup>169</sup> Understood properly, judicial review can be the center of a conversational dialogue between and among government bodies, the electorate, citizens, and others. To understand the role of judicial review, it is helpful to appeal to the distinction between first- and second-order judgments introduced earlier. First-order judgments are practical judgments about which policy is *desirable*.<sup>170</sup> Second-order reasoning yields practical judgments about whether what is desirable is also faithful to the Constitution and the traditions it generates. Judicial review provides a forum permitting the elected branches and the electorate to re-examine their first-order preferences about desirable public policy. Judicial review encourages this re-examination of first-order judgments (about desirability) by expressing second-order judgments (about fidelity). However, fidelity must *ultimately* be decided, with the help of such constitutional filters as judicial review, by the people.

Consider, for example, the question of whether federal law may prohibit the possession of a gun within a school zone. Two different levels of queries arise. First, is such a law desirable? In contemporary American society, such a law is clearly desirable. However, in a constitutional government, that answer does not end the inquiry. A second-order question—is this law constitutional?—asks us to wait and reflect. While prohibiting the possession of guns within a school zone is desirable, this second-order question asks whether our federalist constitutional traditions designate federal law—as opposed to a state, county, or city law—as the appropriate level of government to restrict this conduct. In *United States v. Lopez*,<sup>171</sup> the Court

---

169. See JAMES S. FISHKIN, *THE DIALOGUE OF JUSTICE* (1992); Jürgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in *THE COMMUNICATIVE ETHICS CONTROVERSY* 60 (Seyla Benhabib & Fred Dallmayr eds., 1990); Bruce Ackerman, *Why Dialogue?* 86 *J. PHIL.* 5 (1989); Lipkin, *Kibitzers, Fuzzies, and Apes Without Tails*, *supra* note 20; Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 *HARV. L. REV.* 4 (1986); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 *HARV. L. REV.* 10 (1987); Robert Post, *Managing Deliberation: The Quandary of Democratic Dialogue*, 103 *ETHICS* 654 (1993); see generally CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993).

170. Most legislation involves first-order reasoning and judgment. Legislators do not often engage in second-ordering reasoning about a law's constitutional fidelity.

171. 514 U.S. 549 (1995).



answered no to this second-order question. The Court in effect said that while it is desirable to prohibit the possession of guns in school zones, a constitutional democracy must be concerned with *how* this is done. Especially when alternative means exist, it is better, upon reflection, to assign the regulation of this conduct to the local authorities, not to the federal government.<sup>172</sup> The relevant sense of “better” in this context is explained as follows: By prohibiting federal law to regulate the possession of guns in a school zone, we simultaneously satisfy the first-order value of prohibiting the possession of guns in school zones and the second-order value of requiring the appropriate level of government—local government—to be responsible for this regulation. The second-order judgment permits what is desirable to be brought about in a manner consistent with our constitutional traditions. This practical inquiry concerning desirability and fidelity is an essential feature of *constitutional* reasoning. In a government without a constitution, political reasoning would issue only first-order judgments about what is desirable. Constitutionalism adds this level of reasoning about fidelity and therefore requires the formulation of second-order judgments.

Although constitutional government requires first- and second-order judgments, nothing in the distinction between these two different kinds of judgments requires assigning them to different decision-makers. Since *Marbury v. Madison*,<sup>173</sup> the American constitutionalism scheme has assigned second-order judgments to the courts. A problem arises here. How do we resolve conflicts over second-order judgments between Congress and the Court or between the Court and the electorate? The conventional answer is that the Court’s second-order judgment must prevail. Why? Because Congress’ job is to make first-order judgments, while the Court’s is to make second-order judgments. This response is transparently circular. As I have argued earlier, answers favoring the Court are predicated on the supposition that Congress, for an assortment of reasons, will get the second-order question wrong. This certainly does happen. However, all arguments favoring the Court founder because the Court also gets second-order questions wrong, sometimes even tragically wrong.<sup>174</sup> Indeed, it is not obvious that the record of the Court is as good as Congress’ in answering second-order questions.<sup>175</sup>

One argument favoring the courts warrants special mention. Why should judges take the time to answer second-order questions if other institutions or mechanisms can overrule their answers? The deliberative exercises of the Court in answering second-order questions are difficult and costly. If the Court is not the final arbiter of constitutional meaning, there is little reason for Justices to undertake the arduous task of answering second-order questions.

---

172. Of course, the dissents in *Lopez* reject the Court’s second-order judgment about the law’s fidelity. 514 U.S. at 602-03 (Stevens, J., dissenting).

173. 5 U.S. (1 Cranch) 137, 177 (1803).

174. *Dred Scott* is often portrayed as one of the precursors to the Civil War, a war which caused the deaths of over 500,000 Americans. See *supra* Part III.C.

175. See generally REBECCA E. ZIETLOW, *ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION AND THE PROTECTION OF INDIVIDUAL RIGHTS* (2006).

This answer proves too much. Judges sitting on the United States appellate courts are not demoralized because their decisions can be overruled by their own court sitting *en banc* or the Supreme Court reversing their decisions. Nor do legislators recoil from enacting legislation because the Court can strike it down. If a Justice's ego cannot survive a mechanism for overruling his or her decision, then we are better off keeping such a Justice from sitting on the Court.

One way of regarding the role of a robust, but not final, Supreme Court is as a constitutional advisor to the elected branches and to the electorate. As a constitutional advisor, the Court scrutinizes, at the behest of a citizen or group of citizens, whether a particular piece of legislation or other governmental conduct comports with constitutional self-government and then issues a second-order judgment expressing its answer. Just as in any system of advice, a constitutional advisor does his or her best to determine whether some course of action is constitutional. However, the advisor ceases being an advisor when the principal is compelled to accept the advice or compelled to accept the advice short of engaging in onerous, circuitous action. In these circumstances, the advisor is king. If the advisor can compel the principal to accept his or her advice, the advisee is no longer autonomous. Indeed, in order for the electorate to retain its autonomy, the Court's advice must remain *advice*. Here we have a perfectly useful example of the value of judicial review outside a regime of judicial supremacy. The Court acts as it does now and its judgment usually prevails. However, when the elected branches and the people question the propriety of the Court's second-order decision, there is a direct vehicle for them to protest and to refuse to take the advice of the Court.

## V. CONCLUSION

In this essay, I have argued that the strongest normative arguments in favor of judicial supremacy are inadequate. While judicial review makes an important contribution to republican democracy, these normative arguments do not establish that it should be final. In a republican democracy, judicial review contributes to a deliberative dialogue that encourages citizens to take one another seriously.

This type of deliberative conversation has an epistemic dimension. Since the persistence of reasonable disagreement cannot be permanently dispelled, deliberative debate is needed. The goal is a reflective consensus between and among various participants. Such a consensus is as close to political truth as possible.<sup>176</sup> Here, "political truth" is understood as justified or warranted

---

176. The best way to understand the role of deliberative conversationalism is as a form of political epistemology; it is a procedure for deriving knowledge of the community's judgments regarding various controversies. Rather than insisting upon rationalism, empiricism, or some other epistemology, deliberative conversationalism is the unstructured political epistemology of republican democracy. Contrary to those who insist that democracy is the

assertability. When a debate ensues over social security, for example, the appropriate deliberative dialogue is the means for deriving warranted assertability. At this point, one is warranted, as a member of the nation, to assert the solution that the deliberative structures generated. Provisional closure emerges, until that time when controversy breaks out again.

When consensus is illusory—because of citizen obduracy or the incommensurability of different perspectives—deliberative debate seeks to sharpen the contours of the conflict, to identify it in its most perspicuous form. Hence, when conflict cannot be resolved, deliberative debate seeks to encourage the conflict either in the hope that future discoveries or investigation might bring resolution, or simply to make it clear throughout the polity that equally authentic and valuable citizens cannot agree on a particular matter.

After deliberative debate, the final judgment concerning constitutional and political values should be the electorate's. Any alternative system gives a government branch the power to check the other branches without an appropriate check on *it*. If there are to be unchecked checkers in American democracy, they should be—after extensive deliberative debate—the people themselves.

---

result of moral skepticism, deliberative conversationalism contends that democracy is based on the moral conviction that each individual has inherent moral value. In addition, the way to acknowledge this equal, inherent moral value is by adopting a decision procedure—majority rule—to express moral equality in voting. The equal worth of individuals encourages the view that political truth should represent the considered views of the community or some subset of the community.