

# CONSTITUTIONALISM AND JUDICIAL REVIEW OUTLINE

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Spring 2015

## CONSTITUTIONALISM: DEFINITIONAL PRELIMINARIES

**Giovanni Sartori, “Constitutionalism: A Preliminary Discussion” (1962)**

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### 1. The 19<sup>th</sup> century consensus on the definition of “constitution”

- a. A common *telos* (purpose): what matters for constitutionalism is the *telos*, or purpose, of constitutional understandings, and for English, American, and French constitutionalism the *telos* was identical: “a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a “limited government”
- b. British constitutionalism is not so different from this tradition:
  - i. the doctrine of Parliamentary sovereignty historically meant nothing more than the “sovereignty of the State”
  - ii. the British constitution is not really “unwritten,” but merely uncodified: While its fundamental or “supreme laws” (such as the Habeas Corpus Act of 1679 or the Act of Settlement) “are not collected in a single document,” these documents are written
  - iii. “During the 1848 revolutions, it was very clear on both sides of the Channel what the people were asking for when they claimed a constitution. If, in England, “constitution” meant the system of British liberties, *mutatis mutandis* the Europeans wanted exactly the same thing”

### 2. Ancient notions of constitutionalism were fundamentally different

- a. The classical Greek understanding: many have “mistranslated” Aristotle and his concept of *politeia* to mean the equivalent to “constitution.” Yet “*politeia* only conveys the idea of the way in which a polity is patterned. To us constitution means a frame of political society organized through and by the law for the purpose of restraining arbitrary power. And surely nothing resembling this concept was in the mind of Aristotle”
- b. The republican Roman understanding: “the Latin term *constitutio* meant the very opposite of what is now understood by “constitution.” A *constitutio* was an enactment; later, after the 2nd century, the plural form *constitutiones* came to mean a collection of laws enacted by the Sovereign; and subsequently the Church, too, adopted the term for canonical law”

### 3. The 20<sup>th</sup>-century collapse of the 19<sup>th</sup> century consensus

- a. Three types of 20<sup>th</sup>-century constitutions: In essence, post-WWII the term “constitution” has come to mean both something strictly substantive as well as something formal and cosmetic:
  - i. Garantiste constitutions: These are constitutions proper, congruent with the 19th century consensus, which limit arbitrary government power and ensure limited government
  - ii. Nominal constitutions: These constitutions are “fully applied and activated,” but they perform no limiting function vis-a-vis the government because they merely formalize “the existing location of political power for the exclusive benefit of the actual power holders”
  - iii. Facade constitutions: These take on the appearance of a true constitution, but “what makes them untrue is that they are disregarded”

### Charles McIlwain, *Constitutionalism: Ancient and Modern* (1940)

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#### 1. The modern, Montesquieuan concept of “constitution”

- a. The emergent consensus post-French/American revolutions: the constitution comprises the “conscious formulation by a people of its fundamental law,” as opposed to the much more ancient notion of the constitution as the “substantive principles to be deduced from a nation’s actual institutions and their development.” Modern conceptions, like Thomas Paine’s, see the constitution as “antecedent,” in the sense of being both fundamental and a “definitive historical compact” temporally prior to the operation of the state
- b. Critique of the Montsequeiuian constitution: Few are worse than the extreme doctrine of separation of powers.
  - i. The separation of powers doctrine weakens government, whereas the legal limitation of powers need not do so - it may actually empower it in the administrative law - all the while an independent judiciary can be charged with protecting individual rights

#### 2. McIlwain’s favored, British conception of “constitution”

- a. Unconstrained state action vis-à-vis administrative law, constraint state action vis-à-vis individual rights:
  - i. By replacing the functional separation between judiciary, executive, and legislature with the administrative-individual rights distinction, the modern world is ensured “the negative limitation of the sphere of government already mentioned,” but also “the full political responsibility...to the whole people for all positive acts of government within its proper sphere, [for] without adequate power there can be no such responsibility, and if the power is not concentrated and obvious

to all, there can be neither the fixing nor the enforcement of this responsibility.”

- ii. These should be the fundamental principles of modern constitutionalism: “the legal limits to arbitrary power and a complete political responsibility of the government to the governed”

## CONSTITUTIONAL INTERPRETATION I: THE FEDERALIST PAPERS

### **James Madison, *Federalist* #45**

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#### **1. In defense of the federal power**

- a. Federal institutions will continue to channel state interests: all the federal institutions- the Senate, elected by State legislatures – the House of Representatives, though elected by the people, will be influenced by state interests, the President cannot be elected without the intervention of State legislatures via the electoral college – are dependent on the states.
  - i. “The principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them.”
- b. The federal government is one of limited powers: “the federal government will be one of limited powers, “few and defined,” whereas all other powers, “numerous and indefinite,” will fall to the states.
- c. Day-to-day governing will mostly fall to the states: Most federal powers will be exercised “on external objects, as war, peace, negotiation, and foreign commerce; with which the last power of taxation will, for the most part, be connected.” Most state powers will be exercised “in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.” Since times of peace are likely to be more common than times of war, “the State governments will here enjoy another advantage over the federal government.”
- d. The constitution does not add many more powers vis. the Articles of Confederation: the Constitution, compared to the Articles of Confederation, “consists much less in the addition of new powers to the Union, than in the invigoration of its original powers,” with the exception of the power to regulate commerce, a power which, Madison notes, is one few oppose. Thus, “the proposed change does not enlarge these powers; it only substitutes a more effectual mode of administering them.”

1. In defense of the judicial power

- a. Judges will only hold office during good behavior: “(“the standard of good behavior ...is certainly one of the most important modern improvements in the practice of government.”
- b. Judges will be the weakest of the three branches: “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse ...and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”
- c. An independent judiciary is necessary to protect constitutional rights: the protection of liberties “can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.”
- d. The courts will channel the sovereignty of the people’s will captured by the constitution: “the power of the people is superior to both [the legislature and the judiciary]; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.” It is the constitution that is supreme: “whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.”
- e. Judges will be constrained by precedent: “which serve to define and point out their duty in every particular case that comes before them...” Because the number of precedents will be large, adhering to them will be hard, and thus Hamilton argues that judges must be educated, possessing the “sufficient skill in the laws to qualify them for the stations of judges.”
- f. Life tenure will attract trustworthy, educated men: “Life tenure, rather than temporary office, according to Hamilton, will attract learned men to the judiciary: “the temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench.”

## James Madison, *Federalist #10*

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### 1. In defense of large-scale federalism

- a. Since factional interests cannot be eliminated, they must be mediated: there are two ways to try to resolve the problem of factions: “the one, by removing its causes; the other, by controlling its effects.” He argues strongly in favor of the latter, for to remove the liberty that allows factions to develop would “be worse than the disease.” Indeed, “as long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed.” Indeed, it is the duty of government to protect such diversity of interests. In other words, “the causes of faction cannot be removed, and that relief is only to be sought in the means of controlling its effects.”
- b. A large federal republic best protects and mediates diverse interests
  - i. “As each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried...”
  - ii. Indeed, “Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.”
  - iii. Federalism is the great protector: “The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States.”

## James Madison, *Federalist #39*

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### 1. In defense of republicanism

- a. The definition of republicanism: “a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior...It is sufficient...that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified...”
  - i. “it is essential to such a government that it be derived from the great body of society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might,,claim for their government the honorable title of republic.”

- b. The constitution institutes a federal republic: “Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a federal, and not a national Constitution...” But, in the end, the Constitution, once enacted, will be a mix of federal and national.”

## CONSTITUTIONAL INTERPRETATION II: INTERPRETIVE THEORIES

### **Antonin Scalia, “Common Law Courts in a Civil-Law System” in *A Matter of Interpretation* (1997)**

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#### **1. Against the common law attitude**

- a. The glorification of the judge in law school: “The case-law method, pioneered by Harvard, emphasizes the judicial creation of the law. “The first year law school is exhilarating because it consists in playing common law judge, in being king!”
- b. The common law attitude: “the one that asks “What is the most desirable solution of this case, and how can any impediments to the achievement of that result be evaded?”
- c. It is not for the courts to rewrite foolish statutes: “Congress enacts foolish and wise statutes- it is not for the courts to decide to uphold the latter and rewrite the former.”
- d. Living constitutionalism embodies the worst of the common law: “Living constitutionalism is the common law risen from the dead, more powerful than ever before... Constitutional evolution often brings less flexibility to government, not more. Living constitutionalists also are in no agreement upon what is to be the guiding principle of the evolution.”

#### **2. Against legislative intent**

- a. Legislative intent is a handy cover for judicial intent: “legislative history provides a uniquely broad playing field. In any major piece of legislation, the legislative history is extensive, and there is something for everybody.”
  - i. Using legislative history is objectionable on principle, since intent of the legislature is not the proper criterion for discerning the law.
  - ii. Plus, legislative history seeking is exceptionally time consuming- a waste of time that should be abandoned.

#### **3. In favor of textual originalism**

- a. Textualism promotes the rule of law: “Textualism is, of course, formalism. It is what makes a government one of laws and not of men.”

- b. It requires uncovering the textual meaning as originally understood: “What one must look to is the original meaning of the text as it was understood, not what the original draftsmen intended.”
- c. The originalist does not have all the answers, but knows where to look: Contra living constitutionalism, “at least agree on what to look for- the original meaning of the text. The originalist, if he does not have most of the answers, has many of them.”

### **Laurence Tribe, “Comment” in *A Matter of Interpretation* (1997)**

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#### **1. Interpretation implies construction**

- a. Against passive, mechanical interpretation: “We cannot reduce constitutional interpretation to a passive process of discovering rather than constructing an interpretation. There are no rules to interpretation.”
- b. Interpreting the constitution requires an extraconstitutional theory: “Even if we sought to prove a straightforward proposition that a text should be understood this way, we could never hope to do so by quoting from the text itself. In choosing among the views of what counts as “the Constitution” and as binding constitutional law, one must of necessity look outside the Constitution itself.”
- c. Rights-provisions in particular require construction: Thus the interpretation of structural/architectural features of the constitution should be a fairly literal- But the rest are principles, and those should be elaborated with time.
  - i. The constitution is an aspirational document, and its rights provisions should be interpreted as such

#### **2. A Constitution has an evolving transtemporal dimension**

- a. A constitution evolves over time, and should be interpreted as such: “A text, like the Constitution, that has a strong transtemporal extension cannot be read the same way as a statute/regulation enacted at a given point in time.”
- b. Constitutional provisions acquire new meanings “by the process of formal amendment to other parts of it, even when the words contained remain unchanged and only the surrounding text has been altered. The Constitution is a whole, not just a collection of unconnected parts.”

### **Ronald Dworkin, “Comment” in *A Matter of Interpretation* (1997)**

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#### **1. Against Scalia’s “semantic originalism”**

- a. Scalia embraces a “semantic originalism” which “insists that the rights-granting clauses be read to say what those who made them intended to say.”

- b. Dworkin prefers an “expectation originalism” whereby : these clauses should be understood to have the consequences that those who made them expected them to have.”
- c. Scalia is himself an inconsistent semantic originalist
  - i. “Scalia’s arguments in favor of reading abstract clauses as concrete and dated ignore the natural semantic meaning of a text in favor of speculations about the expectations of its authors.”
  - ii. “Why is Scalia so sure that the Equal protection clause did not always forbid discrimination on grounds of age, property, or sex (or sexual orientation)? Certainly when adopted, few people thought that it had this consequence, but the semantic-originalist would dismiss this as intent, not of what they actually said.”

## 2. **The founders did not expect to have the last word**

- a. Enlightenment statesmen were unlikely to think that their own views represented the last word in moral progress.
- b. Concepts vs. conceptions: “The founders knew how to be concrete and specific when they needed to be. Judges need to keep faith with past decisions, but the Constitution insists that our judges do their best collectively to construct, reinspect, and revise, generation by generation, the skeleton of freedom and equality of concern that its great clauses, in their majestic abstraction command. The key constitutional provisions, as a matter of their original meaning, set out abstract principles rather than concrete or dated rules. If so, then the application of these principles to particular cases must be continually reviewed, not in an attempt to find substitutes for what the Constitution says, but out of respect for what it says.”

## 3. **Majority rule, yes, but which majority?**

- a. Scalia believes in a democratic theory of majority rule: “it is undemocratic when a statute is interpreted other than in accordance with the public text that was before legislators when they voted.” (Landes and Posner make a similar assumption)
- b. Yet Scalia’s rejection of living constitutionalism disavows majoritarianism: “he later makes an argument for rejecting textualism in constitutional interpretation- namely that he has reservations about majority rule (his main concern with living constitutionalism is found in this reservation).”

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## **Ronald Dworkin, *A Matter of Principle* (1985)**

### 1. **Courts as fora of principle**

- a. Judicial review is so entrenched that it should be accepted and justified. Indeed, “abdication would be more destructive of consensus, more a defeat for cultivated expectation, than simply going on as before.”



- b. Judicial review is justified by privileging principle over policy: “In hard cases, normatively it would be wrong for judges to decide civil suits on grounds of policy. Descriptively... judges adjudicate civil claims through arguments of principle rather than policy, even in very hard cases.”
  - i. “We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophecy. I call it law.”

## 2. **Originalism is an inadequate interpretive theory**

- a. Judges cannot interpret the framers’ intent without substantive judgments: “Judges cannot decide what the pertinent intention of the Framers was, or which political process is really fair or democratic, unless they make substantive political decisions of just the sort the proponents of intention or process think judges should not make.”
- b. Originalism is at best the mid-part of an interpretive theory: “At best it can be the middle of such a theory, and the part that has gone before ... is substantive-and controversial-political morality.”

## 3. **Interpreting Legislative Intent**

- a. We should distinguish between concepts and conceptions: “When phrases like “due process” or “equal protection” are in play, we may describe a legislator’s or delegate’s intention either abstractly, as intending the enactment of the “concept” of justice or equality, or concretely, as intending the enactment of his particular “conception” of those concepts.”
  - i. “If the abstract statement is chosen as the appropriate mode or level of investigation into the original intention, then judges must make substantive decisions of political morality not in place of judgments made by the “Framers” but rather in service of those judgments.”
- b. We should not be faithful to legislative intent via reference to said intent: “Some part of any constitutional theory must be independent of the intentions or beliefs or indeed acts of the people the theory designates as Framers. Some part must stand on its own in political or moral theory; otherwise the theory would be wholly circular in the way just described.”

## **Keith Whittington, *Constitutional Interpretation* (1999)**

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### 1. **The significance of a written constitution**

- a. Historically, as a break with British constitutionalism: Britain’s common laws constitution created lack of clarity, over-malleability (which meant susceptibility to change based on political passions “of the moment”, which is especially likely without clear, written fundamental principles to which to

- appeal), and a lack of differentiation between acts of Parliament and basic principles that ought to guide government conduct.
- b. Institutionally, it is necessary for judicial review: A written text is needed if the constitution is to be judicially enforceable, especially against the legislature.
  - c. Interpretationally, it necessitates originalism: Writing— especially legal writing— is an act of communication bound up with the intentions of the author. America’s adoption of a written constitution also indicates an adoption of an originalist interpretive paradigm— in which the text is seen as binding as it was written, necessarily bound up with the framers’ intentions such that judges ought not to act contrary to them.
2. **Judicial review should limit itself to interpretation rather than construction**
- a. Courts should interpret relatively clear conceptions: Judicial review should be about interpreting relatively clear constitutional provisions.”
  - b. Courts should not construct vague concepts: The open-ended parts of the Constitution, its “gaps”, should be filled in by electoral institutions partaking in constitutional construction.

### **Keith Whittington, *Constitutional Construction* (1999)**

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#### **1. The constitution outside the text**

- a. Constitutional meaning cannot be derived from the text alone: It is also constructed from the political melding of the document with external interests/principles. This essentially creative task represents a working constitutional system. The constitution is a synthesis of legal doctrines, institutional practices, and political norms.
- b. Constitutional construction is a method of elaborating constitutional meaning in the realm of politics. Constitutional construction focuses on how the constitution operates through/with elected representatives and their actions. All branches of government share in the practice of constitutional construction. Broadly:
  - i. It is creative: “it elucidates the text when the text is so broad or so undetermined as to be incapable of faithful but exhaustive reduction to legal rules.”
  - ii. It considers fundamental political principles
  - iii. It structures future political practice
  - iv. It occurs at moments of unsettled understandings
  - v. It develops in the lacunae of discoverable textual meaning
  - vi. It provides standards for political conduct
- c. Construction outside the courts: Constitutional construction does not necessitate judicial enforcement. It occurs via political practice outside the

- courts, and alters said practice outside the courts. Indeed, constructions never leave the realm of politics: They do not become a higher law to be recognized and judicially enforced from above.
- d. Examples:
- i. The impeachment of Associate Justice Samuel Chase: helped establish our understanding of the purpose/limits of federal impeachment power, and shaped our conception of the appropriate use of Judicial power in American politics. (Chase was a Federalist... was impeached by the Jeffersonian House in 1804, but was acquitted by the Senate)
  - ii. The nullification crisis of 1832-1833: Highlights the interaction of policy interests and constitutional principles in constructions. Although the specific mechanism of nullification was rejected, the crisis promoted more decentralizing conceptions of federalism, and the protective tariffs that instigated the crisis were abandoned for the remainder of the antebellum period (South Carolina argued that the recently imposed Federal Tariffs were unconstitutional, and thus null and void)
  - iii. The impeachment of Andrew Johnson (1868). Highlights the unintended consequences of constructive activity. Here, Congress reaffirmed earlier understandings of impeachment power, crushed Johnson's efforts to strengthen the postbellum presidency, and put the spoils system on the defensive. (House impeached Johnson in 1868, and was acquitted by Senate)
  - iv. Richard Nixon and Watergate: Highlights the interrelationship between institutional struggles and substantive political goals. In such areas as budgeting, war powers, and intelligence, Congress sought greater presidential responsiveness in policymaking rather than to displace/weaken the presidency or the modern state that he led.

## **Lawrence Solum, “The Interpretation-Construction Distinction” (2010)**

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### **1. Constitutional interpretation**

- a. “the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text”
- b. ambiguity can be resolved by relying on publicly available context of the constitutional provision at issue to select among the possible senses of the words and phrases of the text
- c. Interpretation is not normative: Because interpretation aims at the recovery of linguistic meaning, it is guided by linguistic facts—facts about patterns of usage. “The correctness of an interpretation does not depend on our normative theories about what the law should be.”

- d. Canons of interpretation “are rules of thumb—they point judges and other legal actors to facts about the way language works and to reliable procedures for making inferences about linguistic meaning.”
- e. Originalism is primarily a theory of interpretation: “Originalists claim that the linguistic meaning of the constitution is fixed by linguistic facts at the time that each constitutional provision is framed and ratified.”

## 2. **Constitutional construction**

- a. “the process that gives a text legal effect (either by translating the linguistic meaning into legal doctrine or by applying or implementing the text)”
- b. vague provisions always require construction
- c. Construction is normative: “the production of legal rules cannot be “value neutral” because we cannot tell whether a construction is correct or incorrect without resort to legal norms.”
- d. Canons of construction “guide the process by which linguistic meaning is translated into legal effect. The so-called “substantive” canons are clear examples of canons of construction. For example, the avoidance canon tells judges to construe statutory language so as to avoid constitutional issues.”
- e. Living constitutionalism is primarily a theory of construction: “Living constitutionalists believe that the legal content of constitutional doctrine must change with changing circumstances and values.”

## Larry Kramer, *The People Themselves* (2004)

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### 1. **Popular constitutionalism is the American constitutional tradition**

- a. Popular constitutionalism defined: the predominant constitutional tradition (i.e. set of beliefs and practices) established the “customary constitution” as a set of moral principles for the regulation of the government, to be interpreted and enforced (via, for example, popular vote, petition, assembly, popular mobilization) by the people (who retained final interpretive authority), and compatible only with a limited use of judicial review to subordinate state to federal laws
- b. Popular constitutionalism has declined recently: Popular constitutionalism took a decisive downward turn after *Cooper v. Aaron* (1958), and was basically defunct by the time of the Rehnquist Court in the 1980s. This marks a turn away from representative government, with citizens now aloof about having been taken out of the process of interpreting the constitution—and away from the people’s superior ability to protect liberty.

### 2. **Against judicial supremacy, in favor of departmentalism**

- a. In favor of departmentalism: Kramer sees the roots of the “departmental” theory of constitutional interpretation (in America) in Jefferson’s claim that each branch may decide for itself how to interpret the constitution. He

conceives of the theory as compatible with popular constitutionalism. On the departmental theory, no branch of government has final authority on constitutional interpretation, because the branches are meant to be regulated (by each other and the people), not the regulators. Rather, the final interpretive authority lies with the people, who “supervise” the branches and whose refusal to accept a branches’ interpretation can render it illegitimate.

### **Tom Donnelly, “Making Popular Constitutionalism Work” (2004)**

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#### **1. Putting the constitution back in the people’s hands**

- a. The time has come for a civic renewal in which presently inert citizens reawaken to their ability to engage in and make judgments about constitutional controversies. Citizens should cease to passively accept the Supreme Court’s judgments as to what the constitution says/means, and should be motivated to interpose their own considered views into constitutional deliberation (and to consider their previously underdeveloped or instinctual views).
- b. Implementing a “people’s veto:” After a 5-4 SCOTUS decisions on a constitutional question, the decision should go to Congress for an up-down vote on reconsideration; if a super-majority in Congress votes for reconsideration, the decision should be passed on to the People, to be voted on in a national referendum (to take place a sufficiently long time after the original Court decision to allow for thoughtful deliberation).

### **Todd E. Pettys, “Popular Constitutionalism and Relaxing the Dead Hand” (2009)**

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#### **1. Americans can be trusted to interpret the Constitution for themselves**

- a. We have reason to trust Americans and relax the “dead hand” of the past: We can, in fact, trust ordinary American citizens with the job of interpreting the Constitution— and in particular of not sacrificing basic constitutional principles for ephemeral political gain. There are five reasons for this:
  - i. Americans have an affective attachment to the Constitution: They identify strongly with the Constitution and its framers, and would thus be extremely cautious not to “break faith” with the document or the historical figures.
  - ii. Americans see the constitution as valuable, and all would be reluctant to abandon its basic principles.
  - iii. The inter-generational composition of American people promotes long-term judgment: At any given time, the American citizenry is comprised of people from several different generations. Their political

deliberations will thus converge not (for example) on the short-term expediency, which would only benefit older generations, but on constitutional principles valuable in the long-term

- iv. Americans recognize their own fallibility, as evidenced by their consistent desire for politicians who answer to their own convictions and principles, rather than only to public opinion polls. They would thus, when devising the ways in which popular constitutional interpretations were to be translated into law, be careful to design a system that would check and compensate for pure majoritarianism.
- v. Constitutional development has historically occurred in the political rather than the judicial arena. Since there is no bright-line between the institutions that supervise everyday politics and those that supervise constitutional politics, so there is little reason to think that more explicitly assigning constitutional questions to quotidian public-opinion-driven institutions would lead to disaster.

## LEGAL REALISM

### Oliver Wendell Holmes, “The Path of the Law” (1897)

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#### 1. What is law?

- a. A prediction of what courts will do: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law
  - i. Hence, a legal duty “is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court”
  - ii. Hence, the object of jurisprudence is “the prediction of the incidence of the public force through the instrumentality of the courts”

#### 2. How do we know what the law is?

- a. We look at it as a bad man: “If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reason for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”
- b. Look at external actions, not internal intent: For example, to understand the law of contracts, we must realize that “the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs- not on the parties’ having meant the same thing but on their having said the same thing.”

#### 3. What the law isn’t

- a. It isn't logical: "The danger of which I speak is... the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct."
  - i. In fact, "Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, and yet the very root and nerve of the whole proceeding."
- b. It isn't a set of moral rights: "Nothing but confusion can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law."
- c. It isn't always rational: Tradition- or the historical evolution of the law- often overrides rational policy.
- d. It isn't only a historical relic: "We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws upon the present," and indeed Holmes looks "forward to a time when the part played by history in the explanation of dogma shall be very small, and instead...we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them."

## **Karl Llewellyn, "A Realistic Jurisprudence – The Next Step" (1930)**

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### **1. How we should study the law**

- a. By focusing on "behavior-contacts": "we should focus instead on the area of contact between judicial behavior and the behavior of laymen, and rights should be studied with reference to behavior-contacts."
  - i. This also allows us to consider the actions of actors other than judges: "The focus, the center of law, is not merely what the judge does, in the impact of that doing on the interested layman, but what any state official does, officially."
- b. By focusing on "real rules," not "paper laws:" The proposed approach is to leverage a "comparison of facts with facts, not of words with words."
  - i. Real rules: are conceived in terms of behavior, they are names for the remedies, the actions of courts. They are descriptive, not prescriptive. They are more so practices than they are rules. They are what the law is, rather than what it ought to be
  - ii. Paper rules: are rules of law- the accepted doctrine of the time and place, what the books say the law is. And they are often prescriptive

### **2. How we should not study the law**

- a. By avoiding rights-talk: "the term 'rights and rules' has persistent tendency to misfocus attention, and we would gain clarity by avoiding it." This is because rights-talk has a tendency to conflate a non-legal 'right' ("a reason

- for claiming or striving toward awarding a legal right”) with a legal right (“recognizing that some kind of remedy could be had”)
- b. By avoiding legalism: This is because legalism assumes that all paper rules are real rules: “The traditional focus is on words, the letter of the law; from this we mindlessly jump to assume that the prescriptions of the law are accepted in the legal system under discussion; from this without discussion or inquiry we assume that the practice of the relevant actors conforms to these accepted prescriptions.”

### **H.L.A. Hart, Critique of Legal Realism in *The Concept of Law* (1961)**

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1. Rules need not be enacted by a court to be laws: “There is a difference, crucial for understanding of law, between the truth that if a statute is to be law, the courts must accept the rule that certain legislative operations make law, and the misleading theory that nothing is law till it is applied in a particular case by the court.”
2. Legal realists ignore the “internal aspect” of laws: “The [legal realist] will miss out a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop; they look upon it as a signal for them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behavior and an obligation.”
3. Legal realists cannot explain judicial behavior: “For the judge, in punishing, takes the rule as his guide and the breach of the rule as his reason and justification for punishing the offender. The predictive aspect of the rule (though real enough) is irrelevant to his purposes, whereas its status as a guide and justification is essential.”

## **THE COUNTERMAJORITARIAN DIFFICULTY I: NORMATIVE THEORIES**

### **James B. Thayer, “The Origin and Scope of the American Doctrine of Constitutional Law” (1962)**

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1. **The historical context of constitutional review in the US**
  - a. It was implied in revolutionary state constitutions: “It is a singular fact that the State constitutions did not give this power to the judges in express terms; it was inferential. It was only in Article 7 of the 1792 Kentucky constitution that the explicit language of judicial review was first found.”
  - b. Marbury v. Madison was the climax of a longstanding debate: “Marbury v. Madison was the climax of a series of arguments that had already borne themselves out in state litigation. The people, it was said, have established written limitations upon the legislature; these control all repugnant



legislative acts; such acts are not law; this theory is essentially attached to a written constitution.”

## 2. **The scope of judicial review: the “clear mistake” rule**

- a. The clear mistake rule: Yet a limiting rule of administration developed, as elaborated by Chief Justice Tilghman of Pennsylvania: “an Act of the legislature is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt.”
  - i. Hence the clear mistake rule is not new: “I am not stating a new doctrine, but attempting to restate more exactly and truly an admitted one.”
- b. Judicial review fixes the boundaries of legislative action, and no more: “The courts are revising the work of a co-ordinate department, and must not, even negatively, undertake to legislate. And, again, they must not act unless the case is so very clear, because the consequences of setting aside legislation may be so serious.”
- c. Judicial minimalism is the best means to remind the people of their responsibilities: “The safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power.”

## Alexander Bickel, *The Least Dangerous Branch* (1962)

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### 1. **The countermajoritarian difficulty**

- a. Post-New Deal, democracy rules. Bickel was Frankfurter’s law clerk, and like Frankfurter he believed that the *Lochner*-era court had been too eager to strike down popularly-supported statutes. The court’s “switch in time” symbolized the triumph of majoritarian democracy, and the SCOTUS should not get in its way.
- b. Judicial review is a counter-majoritarian force. When courts strike down statutes, they are striking down the will of the majority. This is a threat to democracy, understood not as a direct democracy via constant plebiscite, but as the condition “that a representative majority has the power to accomplish a reversal.” The constitutional jurisprudence of the court, in the context of judicial supremacy, makes this impossible.
  - i. Judges, at least federal judges, are unelected, unlike other popularly elected representatives
  - ii. Other unelected officials (for example, bureaucrats in executive agencies) are directly accountable to elected representatives. Not so for SCOTUS justices.

- iii. Channeling Thayer: Over time, judicial review can reduce the incentive for the legislature to be mindful of the constitution, by assuming that the court will be there to rescue it
- iv. Judicial review weakens the American democratic ideal of popular self-government

## 2. In defense of principled judicial review

- a. Judicial review's function is to articulate long-term principled goals, even absent their immediate realization
  - i. This counters the momentary passions of the legislature: Occasionally, a mob mentality may overspread public opinion, and it is up to Judges to remind the American people of their long-term principled commitments and allow cooler heads to prevail.
  - ii. However, the principles need to be adopted by the American people in relatively short order; otherwise, it is an indication that the court has overstepped its bounds. *Brown v. Board of Education* was a good example of the court articulating a principle that was quickly endorsed.

## 3. The passive virtues

- a. The court should be selective in handling its discretionary docket: It is not a duty of the Court to take up all cases over which it possesses jurisdiction. In particular, the court should avoid:
  - i. Politicized questions that may damage the institution's reputation in the long-run
  - ii. Cases for which you cannot derive a set of reasoned principles (for example, legislative reapportionment cases)
- b. This is in contrast to Wechsler, who emphasizes that courts have an obligation to hear all cases lodged before them and to resolve them.

## Learned Hand, *The Bill of Rights* (1958)

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### 1. An instrumental justification for judicial review

- a. To settle disputes between departments and the states: "The authority of courts to annul statutes may, and indeed must, be inferred, although it is nowhere expressed, for without it we should have to refer all disputes between the departments and states to popular decision, patently an impractical means of relief, whatever Thomas Jefferson may have thought."
- b. It should be limited to *ultra vires* acts: "this power should be confined to occasions when the statute or order was outside the grant of power to the grantee, and should not include a review of how the power has been exercised."

### 2. Against alternative justifications for judicial review

- a. Judges are not necessarily better able to take a long-term, principled view: “Judges are perhaps more apt than legislators to take a long view, but that varies so much with the individual that generalization is hazardous.”
- b. Even if judges were better able to take the long-term principled view, it would remain objectionable: “Each of us must in the end choose for himself how far he would like to leave our collective fate to the wayward vagaries of popular assemblies... For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.”

## Herbert Wechsler, “Toward Neutral Principles of Constitutional Law” (1959)

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### 1. Main points

- a. Courts should decide all constitutional cases before them: courts have the power and duty to decide all constitutional cases in which the jurisdictional and procedural requirements are met.
- b. Courts should articulate neutral principles of constitutional law:

### 2. Against Bickelian “passive virtues”

- a. It is the duty of courts to settle cases raised before them: “For me, as for anyone who finds the judicial power anchored in the Constitution, there is no such escape from the judicial obligation; the duty cannot be attenuated in this way.”
- b. Abstaining is only permissible when jurisdiction is lacking: “Abstaining from adjudicating a case is only proper if it is decided that the Constitution has committed the determination of the issue to another agency of government than the courts.”

### 3. Neutral principles of constitutional law

- a. Principled decisions require generality and neutrality: “I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.” Here, a “principled decision...is one that rests in their generality and their neutrality transcend any immediate result that is involved.”
- b. Application to *Brown v. Board of Education*:
  - i. The problem: “The problem with *Brown* inheres strictly in the reasoning of the opinion... the Court did not declare, as many wish it had, that the 14th amendment forbids all racial lines in legislation.”
  - ii. The solution: “For me, assuming equal facilities the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the

denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved.”

## **J. Skelly Wright, “The Role of the Supreme Court in Democratic Society” (1969)**

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### **1. Refuting arguments against judicial review**

- a. The court will be unable to effectively behave like the legislature. Response: “If the legislature simply cannot or does not act to correct an unconstitutional status quo, the Court, despite all its incapacities, must finally act to do so.”
- b. Judicial review weakens the democratic process. Answer: “These considerations again simply require that the Court not act precipitately. If substantial rights are at stake which the legislative process cannot or will not vindicate, the task of doing so unfortunately, but inevitably, passes to the courts. It is this task which the Warren Court has reluctantly, but properly, assumed with respect to the implementation of our constitutional ideal of equality.”
- c. The SCOTUS’s structure is inherently undemocratic:
  - i. Answer 1: “it is equally clear that many of our other governmental institutions are also undemocratic...the internal rules of the legislatures make popular- that is to say majority-control even less likely.”
  - ii. Answer 2: “This argument for judicial restraint not only overplays the Court's deviancy but also overstresses its immunity from democratic processes. To begin with, the Justices are appointed by the President, the one elected official whose constituency is the nation as a whole... Even more important, however, is the fact that the legitimacy of a particular institution in our society depends not on its intrinsic representational structure, but rather on its institutional authorization from, and acceptance.”

### **2. In defense of judicial activism**

- a. The modern social-democratic era necessitates it. “The political and social realities of the twentieth century, however, have required government to essay an affirmative role in its service to its citizens. The Court, as part of government, must participate in that affirmative role.”
- b. Unpopular minorities must be protected: “In the era of positive government, it is incumbent on the Court to protect unpopular minorities not simply from governmental persecution, but from governmental neglect as well.”

## Thomas Grey, “Do We Have an Unwritten Constitution?” (1975)

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### 1. **Judges should apply extraconstitutional values**

- a. Courts should apply values not articulated in the constitutional text, “and appropriately apply them in determining the constitutionality of legislation. This doctrine, however, has not been clearly stated and articulately defended, as basic constitutional doctrine should be.”
  - i. “I do not think that the view of constitutional commentators [such as Bork, Black, Ely)] is sufficiently broad to capture the full scope of legitimate judicial review.”
- b. Courts are expounders of basic national ideals even when not expressed in a written constitution: this view “accepts the courts' additional role as the expounders of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution.”
- c. Judges should interpret the constitution as a living constitution, or “a constitution with provisions suggesting restraints on government in the name of basic rights, yet sufficiently unspecific to permit the judiciary to elucidate the development and change the content of those rights over time.”
- d. The founders understood that the higher law could not be completely codified: “For the founders, who believed in a rich repertoire of natural law protecting individual rights, it was generally recognized that written constitutions, while essential, could not completely codify the higher law.”
- e. The framers of the 14<sup>th</sup> amendment understood that there are rights outside the text: “The framers of the 14th amendment reconfirmed the original understanding that there exist natural rights outside the constitutional text through the majestic generalities of its section 1.”

### 2. **Against the “pure interpretive model”**

- a. It cannot be reconciled with Warren-court jurisprudence: for it “cannot be reconciled with constitutional doctrines protecting unspecified essential or fundamental liberties, or fair procedure or decency- leaving it to the judiciary to give moral content to those conceptions either once and for all or from age to age.”
- b. It cannot be reconciled with due process jurisprudence: for “virtually all the doctrines developed under the due process clauses of the 5th and 14th amendments would be [deemed] usurpations of judicial power.”
  - i. “Much of the application of the 14th amendment to the states could not stand under the pure interpretive model, and the large body of doctrine that has grown up around the interests in the franchise and in participation in the electoral process could not stand.”

## John Hart Ely, *Democracy and Distrust* (1980)

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### 1. **Judicial review is justified when it reinforces the democratic process**

- a. The SCOTUS should stay clear of substantive policy/moral issues, as this responsibility belongs to the people's representatives via the majoritarian legislature
- b. The SCOTUS' responsibility is to ensure the ability for all to participate in the democratic process:
  - i. The Court's only job is to make sure the polity insiders are not manipulating electoral or other rules such that they will remain insiders indefinitely, while the polity outsiders will not have access to channels for political change.
  - ii. This also implies that courts should ensure that legislators are not "beholden" to some majority to the point that they systematically disadvantage a minority in a way that denies them the protections owed all groups in a representative system.

### 2. **The Origins and Implications of Ely's process-reinforcing judicial review**

- a. This theory is derived from Justice Stone's footnote no. 4 in *US vs. Carolene Products co.* (1938): "There may be narrower scope for operation of the presumption of constitutionality" in the case of "statutes directed at particular religious, or national, or racial minorities," and "prejudice against discrete and insular minorities...tends seriously to curtail the operation of those political processes ordinarily thought to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."
- b. This perspective legitimates the Warren Court's activism: Its decisions regarding criminal procedure, legislative apportionment, voter qualification, and political expression, were process-oriented decisions rather than decisions meant to establish substantive values.
- c. This perspective delegitimizes the Burger Court's *Roe v. Wade* decision: The decision is an indication of SCOTUS adjudication on the basis of substantive values that are deeply controversial, and in doing so the SCOTUS trumped the democratic process by pre-empting legislative action.

## Bruce Ackerman, *We The People: Foundations* (1991)

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### 1. **The dualist constitution**

- a. Dualist democracy distinguishes between decisions made by the people (the sovereign) and decisions made by their government (the sovereign's representatives)

- i. Decisions by people are difficult to implement, they require deliberation, persuasion, and time. This justifies a republic over a direct democracy.
- ii. Decisions by government are made daily, by officials accountable at the ballot box

## 2. **The preservationist justification for judicial review**

- a. Courts should protect the hard-won principles of a mobilized citizenry “against erosion by political elites who have failed to gain broad and deep popular support for their innovations.”
- b. The higher lawmaking track/constitutional moment: Judicial protection of rights depends upon prior democratic affirmation via a “higher lawmaking track”:
  - i. Signaling (the movement earns the constitutional authority to claim that its reform agenda should be placed at the center of public scrutiny)
  - ii. Proposal (the movement is encouraged to operationalize their rhetoric)
  - iii. Mobilized popular deliberation (which may lead to backlash and a failed constitutional moment, or not)
  - iv. If successful, the last phase is legal codification (the SCOTUS begins the task of translating the constitutional politics into constitutional law)
- c. Old vs. new constitutional moments:
  - i. The traditional constitutional moment (ex. The American Revolution): culminates in a decisive moment of truth (either Convention/Congress propose a constitutional amendment, or they don't)
  - ii. The modern constitutional moment (ex. The New Deal): is more gradual. Does the constitutional movement have enough strength to persuade the SCOTUS that the constitutional identity of the country has changed?
- d. The synthesis problem: In light of a new constitutional moment that changes the identity of the US constitution, how should the SCOTUS synthesize the change with the old constitution?
  - i. By downplaying the change: It can treat the change as a superstatute and thus as an amendment which doesn't revise the deeper principles in the higher law
  - ii. By exaggerating the change: It can exaggerate what was decided in more modern times. This exaggerates how much the people self-consciously considered the synthetic problem and opted for a complete overhaul
  - iii. Usually, synthesis is achieved incrementally: through legal precedent building on precedent, and a continuing conversation to reconcile the tension between the old order and the newer order

- e. From the founding to reconstruction to the new deal:
  - i. Synthesis of founding and reconstruction: If the founding gave limited fundamental rights protections to white men to exercise freedom via property and contract, shouldn't reconstruction be interpreted as requiring equal fundamental rights protections for all Americans via property and contract?
    - 1. *Lochner* was correctly decided: The *Lochner* court was providing a reasonable constitutional interpretation to the problem of intergenerational synthesis: on the one hand, the national government emerged from reconstruction as the guarantor of rights of citizens to own their labor and property; on the other hand, the national government remained one with limited powers, without authority to oust the states as regulators of economic life
  - ii. Synthesis of founding/reconstruction and New Deal: *Brown* tries to achieve a Time 2-Time 3 synthesis: the implications of the 14th amendment for the public school (a symbol of the New Deal's activist use of state power for general welfare); *Griswold* confronts a Time 1-Time 3 synthesis, by squaring the founding's concerns with personal liberty in a way that endures in a post-New Deal world of economic and social regulation.

## **Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006)**

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### **1. Moral disagreement is best settled in legislatures**

- a. Each individual is an autonomous moral agent, capable of forming good-faith opinions on substantive issues of rights, values, and justice.
- b. Yet we lack agreed-upon methods to resolve moral questions, which means moral disagreement is to be expected, especially in liberal societies.
- c. The best process to mediate this disagreement is legislatures, which allows for all people's opinions to be considered and taken into account equally, and it gives even those on the losing side an opportunity to try to bring the law in line with their preferences via persuasion and compromise.
- d. Courts should not bind people to the dead hand of the past: is unacceptable because it doesn't allow for the changes that inevitably develop in public opinion to make their way into law.
- e. Moral debate will be more open in legislatures: Courtroom debates force citizens to cash out their arguments in terms of pre-determined "constitutional values" rather than allowing for the full range of debate, synthesis, and compromise of the full range of everyone's opinions.

### **2. Four Necessary Conditions for Judicial Review to be Unjustified**



- a. Democratic institutions operate effectively, and include a popularly elected legislature and universal suffrage
- b. Non-representative judicial institutions are in working order, able to hear individual cases and uphold the rule of law and the legislative will
- c. Most social actors are committed to individual and minority rights
- d. There exists moral disagreement amongst social actors committed to individual and minority rights

**Christopher Eisgruber, *Constitutional Self-Government* (2001)**

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**1. Against simplistic understandings of constitutional democracy**

- a. Elected officials are not the only plausibly democratic institutions: conventional justifications (like Ely and Bickel) “run into trouble because they unwisely accept that elected officials are the only institutions which can plausibly claim to speak on behalf of a democratic people. Yet the presumption in favor of legislative supremacy or majority rule rests upon an over-simplified conception of democracy.”
  - i. Legislatures can be captured by powerful minorities
- b. The SCOTUS is a representative institution viewable “not as a constraint upon the democratic process, but as one institutional mechanism for implementing a complex, non-majoritarian understanding of democracy.”
  - i. In some circumstances, judicial review is a reasonably good way “to promote democratic flourishing”

**2. Justifying judicial review**

- a. There may be a shared moral understanding underneath moral disagreement: Contra Waldron, beneath moral disagreement is a shared sense “that (1) morality is something different from mere preferences; (2) that moral positions should be backed up by moral reasons; (3) that moral positions benefit from good faith discussion and argument.”
  - i. On the basis of this moral understanding, government must sustain public deliberation and help “moral opinion to converge upon new and better positions.”
- b. Government must resolve moral issues on the basis of principle rather than self-interest.
- c. Judges are institutionally better positioned to advance impartial, principled moral arguments because:
  - i. Judges have life tenure: “Unlike politicians, judges need not worry that they will lose their jobs if they take an unpopular position. [SCOTUS] justices are especially free to exercise their judgment untainted by avarice or personal ambition.”

- ii. Judges are disinterested: “We insist that judges should recuse themselves if they have a personal stake in the outcome of a case, but we permit, and often expect, citizens to vote their pocket books.”
- iii. Judges take moral responsibility for their decisions: Judges are publicly accountable for their decision, and must give a public account for their reasoning.
- iv. Judges are more likely to be mainstream due to the appointment process: “Judges are appointed on the basis of their political views and connections, and they are thus likely not to be at odds with the American mainstream.”

## **Corey Brettschneider, “Balancing Procedures and Outcomes within Democratic Theory” (2001)**

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### **1. Democracy requires balancing process and substance**

- a. Outcomes theorists emphasize the instrumental nature of...procedures and argue that they are valuable only because they produce good outcomes
- b. Proceduralists “emphasize the intrinsic value of democratic procedures, for instance, on the grounds that they are fair.”
- c. Balancing procedure and outcomes: “In instances in which there is a conflict between these two commitments, I suggest they must be balanced.”
  - i. “Contra pure outcomes theorists, I suggest that decisions made through democratic procedures have intrinsic value because they allow persons to exercise their own autonomy in a way consistent with their status as equal citizens.” This is the “right to participate.”
  - ii. “Contra pure proceduralists, however...procedures can produce outcomes that undermine persons’ autonomy and equal status. In such cases, the very democratic rationale for fair procedures has been undermined.” For example, “outcomes of majoritarian procedure that undermine speech are thus rightly regarded as losses to democracy.”

### **2. Implications for Judicial Review**

- a. Congress is a fallible representative institution: “Congress, for instance, is not equivalent to a plebiscite, ... Congress is a representative institution that sometimes reflects and sometimes does not reflect the actual views of persons within the polity.”
- b. The court is sometimes a democratic, representative institution: “the Court can act democratically in two senses. At times it strikes the balance between procedural and substantive values in favor of individual rights, and at times it protects majoritarian decision-making in the name of democracy.”
- c. The court fosters democratic dialogue: “the process of judicial review involves striking down legislation that can then be debated once again and

reformulated by majoritarian institutions. This process is better understood as a conversation or dialogue between the Court and legislative majorities.”

## **THE COUNTERMAJORITARIAN DIFFICULTY II: EMPIRICAL THEORIES**

### **Robert Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-maker” (1957)**

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#### **1. The SCOTUS will align with the preferences of the lawmaking majority**

- a. The argument: “the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.” Indeed, “the [Court] is inevitably a part of the dominant national alliance. As an element in the political leadership of the dominant alliance, [it] supports the major policies of the alliance. By itself, the Court is almost powerless to affect the course of national policy.”
- b. The mechanism is the presidential appointment process:
  - i. Frequency of appointment: “Over the whole history of the Court, on the average one new justice has been appointed every twenty-two months. Thus a president can expect to appoint about two new justices during one term of office.”
  - ii. Evidence that presidents consider justices’ policy views: “if justices were appointed primarily for their “judicial” qualities without regard to their basic attitudes on fundamental questions of public policy, the Court could not play the influential role in the American political system that it does in reality play.”
- c. The New Deal was an exception: “New Deal measures comprise nearly a third of all the legislation that has ever been declared unconstitutional within four years after enactment.”
- d. The counter-majoritarian difficulty is empirically irrelevant: “the elaborate “democratic” rationalizations of the Court's defenders and the hostility of its “democratic” critics are largely irrelevant, for law-making majorities generally have had their way.”

### **Robert McCloskey, *The American Supreme Court* (1960)**

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#### **1. The SCOTUS must align the constitution to shifting national needs**

- a. The Constitution must flexibly align with national needs: “The Constitution became a symbol of American patriotic devolution, but a symbol whose

- continued force depended on its continued flexibility in the face of shifting national needs.”
- b. The court heeds public expectations: “The Supreme Court became a venerated institution, half judicial tribunal and half political preceptor, sensitive but not subservient to popular expectations, obliged by its tradition to share the duties of statesmanship.”
    - i. “Throughout the nation’s ...history this lesson can be read again and again: paradoxical though it may seem, the Supreme Court often gains rather than loses power by adopting a policy of forbearance.”
    - ii. By the early 19<sup>th</sup> century, SCOTUS judges had learned: “the necessity to avoid, if possible, head-on collisions with the dominant political forces of the moment; the undesirability of claiming too much too soon; the great advantage of taking the long view.”
  - c. Empirical application: History of SCOTUS’ judicial decisions
    - i. Antebellum US: national need is to preserve the Union, and that is what Chief Justices Marshall and Taney try to do by promoting a nationalist jurisprudence, and particularly the protection of property rights from state action.
    - ii. Postbellum *Lochner* era: With northern victory in the civil war, centrifugal forces threatening the nation were diffused. On the national agenda was now government regulation of business. The court’s historic respect for property rights and businessmen, and composed of elite judges, was pre-destined to throw its weight against the regulatory movement. Thus the Court sought to project business interests against state governments.
    - iii. Post-New Deal era: With the popular rejection of the Court’s jurisprudence during the New Deal, the court turned to the next pressing issue on the national agenda: the issue of civil rights, and the value of “the free play of the human spirit.” It was WWII, in large part, that engendered a newfound emphasis on civil rights.

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**Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991)**

**1. The contingent court**

- a. The SCOTUS will usually be unable to produce autonomous, large-scale social reform. Here, social reform means “policy change with nationwide impact” affecting national-scale groups as well as changes in bureaucratic and institutional practice nationwide.”
- b. Three constraints that must be jointly overcome for SCOTUS to produce significant social reform:

- i. Constitutional rights are limited (to overcome this constraint, there must be significant precedent to support social change)
    - ii. Judicial dependence is often an impediment (to overcome this constraint, the Court needs the support of powerful Congressional actors and the President)
    - iii. The judiciary's inability to implement and enforce its judgments (to overcome this constraint, the Court needs support from some, or non-opposition from all, citizens)
  - c. And at least one of four conditions must obtain for the SCOTUS to produce social change:
    - i. There are incentives for political elites to comply with the court
    - ii. There are costs facing political elites for not complying
    - iii. The court's decision can be implemented via private market forces
    - iv. Officials key to administering the decision are already willing to act and see the Court's decision as a tool to further their existing reform agenda
  - d. This means the court will seldom stray from majoritarian political currents: many of the conditions for effective Court action depend on the support of majoritarian elements of the government— citizens, legislators, presidents, politically appointed bureaucrats, etc. Thus, even if the Court wants to oppose popular opinion, it generally can't effectively do so.
- 2. **Key empirical case study: *Brown v. Board of Education***
  - a. The case showcases the court's inability to promote autonomous social change:
    - i. 1954 unanimous ruling by the Warren Court to desegregate schools
    - ii. Fewer than 2% of all public schools are desegregated over the next several years
    - iii. Desegregation only occurs when President Johnson and the Democratically-controlled Congress pass the 1964 Civil Rights Act and begin to place substantial pressure on southern states to comply with *Brown*.

## **Caldeira and McCrone, "Of Time and Judicial Activism: a Study of the US Supreme Court, 1800-1973" (1982)**

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### **1. The SCOTUS's Activism Began after the Civil War**

- a. Measure of activism: The number yearly assertions of the Court's power to declare laws invalid (from 1800-1973)
- b. The civil war as a watershed: "The Civil War is indeed the watershed in the growth of judicial activism, at least toward Congress"
- c. Partisan realignment is sufficient but not necessary for activism

- d. The court is more likely to strike down state laws than Congressional statutes: “We observe considerable growth over time in the incidence of judicial activism toward the states. And just as clearly, the Court has declared many, many more state than federal statutes unconstitutional.”
  - i. Yet there is little evidence that the striking down of state laws has grown over time
- e. Two periods of incredible judicial activism surface:
  - i. In the mid-1920s: “During the first cycle, under the leadership of chief justices White and Taft, a very conservative Court struck down statute after state from state legislatures on matters such as labor relations and the regulation of business enterprise.”
  - ii. In the 1950s-1970s: “During the second cycle, under Chief Justice Warren and later Burger, the Court invalidated state enactments that discriminated on the basis of ‘suspect’ classifications, that infringed on freedom of expression, association, or religion; and that violated minimum standards of proper criminal procedure.”

**Keith Whittington, “The Least Activist Supreme Court in History? The Roberts Court and the Exercise of Judicial Review.” (2014)**

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**1. The Roberts Court is the least activist SCOTUS in history**

- a. A decline in the propensity to strike down laws: “a rarely observed but important feature of the Roberts Court is its unusual restraint in the exercise of judicial review. By some measures, in fact, the Roberts Court can thus far be called the least activist Supreme Court in history...The Court has become less likely to strike down federal laws, but importantly it has become far less likely to invalidate state laws.”
  - i. The Roberts Court has struck down state laws in fewer cases per year than any Court since the Civil War, by a significant margin.
- b. This is due to the declining ability of liberals to form majorities: “Although the willingness of modern conservative jurists to strike down statutes is notable, the declining ability of the liberals on the Court to form majorities willing to strike down state laws has been particularly important to the creation of a restrained Court. The return of judicial activism on the Supreme Court is likely to depend on the appointment of more liberal Justices to the Court who could press the constitutional views that are now most often expressed in dissent.”
- c. Vignettes from the Burger, and Rehnquist Courts (1981-1999)
  - i. The Burger Court in 1981–1982 was not as activist as Brennan and Marshall would have preferred, but they rarely thought that the Court had struck down an undeserving law. By contrast, the most

- conservative members of the Court at that time were the most likely to vote to uphold statutes and the least likely to vote to strike them down.
- ii. The Rehnquist Court of 1989-1990: Though Rehnquist was still unlikely to vote to strike down laws, Antonin Scalia joined nearly as many coalitions to nullify legislation as William Brennan did, and the Court rarely struck down a law without Anthony Kennedy in the majority.
  - iii. The Rehnquist Court of 1998-1999: In 1998 and 1999, there were no Warren-era Justices still on the bench. The first President Bush had replaced Brennan and Marshall with Souter and Thomas, while Clinton had replaced White and Blackmun with Breyer and Ginsburg. The net result was, in some ways, a wash.

### **William Landes and Richard Posner, “The Independent Judiciary in an Interest-Group Perspective” (1975)**

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#### **1. Legislators will support judicial review to make credible commitments**

- a. Transaction costs necessitate institutions to make credible commitments:
  - i. If one adopts an interest-group perspective and conceives of legislation as “sold” by political parties and “bought” by the prospective statutory beneficiaries, it becomes clear that both the parties and the beneficiaries have much to gain by ensuring the durability of the resulting legislation.
  - ii. both actors “may have incurred substantial costs that would not prove worthwhile if the legislation were to be altered unfavorably or repealed within a few months or years.” If the political waters turn sour on a given legislative majority, the danger is that the subsequent political coalition will repeal the costly statutory edifice constructed by said majority.
- b. Partisan actors have an incentive to establish an independent judiciary
  - i. to enforce legislative commitments in accordance with the intentions of the parties to the statutory bargain against the potentially recalcitrant preferences of subsequent political forces
- c. Courts have an incentive to adopt an originalist jurisprudence
  - i. the fact that courts stand little chance of resisting purse- or sword-driven court-curbing if they “are not valued highly” provides judicial actors with an incentive to adopt an originalist interpretive stance, since only if they “entrench the original understanding of the “contract”” will they serve as a politically valuable institution for the enforcement of credible commitments

## **J. Mark Ramseyer, “The Puzzling (In)dependence of Courts” (1994)**

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### **1. Legislators will support judicial review to hedge against electoral uncertainty**

- a. Electoral conditions for the support of judicial review:
  - i. “Only where [partisan actors] rate (i) the likelihood of continued electoral government high and (ii) the likelihood of their continued victory low might they provide independent courts.” In this view, stable partisan competition emerges as an important necessary condition for the political construction of judicial independence.
- b. Empirical application: Japan vs. the US:
  - i. Ramseyer highlights the negligible role that the constitutional text plays in explicating variation in judicial independence between the United States and Japan. While post-war Japan possesses a constitutional architecture that substantively mirrors that of the US (as the text was partially imposed upon the Japanese by American occupying forces), the Liberal Democratic Party (LDP)’s four-decade hegemonic rule endowed it with minimal incentives to support judicial independence when compared to the mercurial electoral prospects of its partisan American counterparts.

## **Tom Ginsburg, *Judicial Review in New Democracies* (2003)**

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### **1. Constitution-makers will provide for judicial review as a form of insurance**

- a. The insurance logic of judicial review:
  - i. If, during the constitution-writing process, a political party emerges as hegemonic and expects to be able to maintain control of the constitutional apparatus of the fledgling democratic regime, its incentive to support judicial review is minimized.
  - ii. Conversely, when political power is more fragmented and long-term electoral prospects are uncertain, the empowerment of a counter-majoritarian force within the political system becomes more lucrative.
  - iii. Hence, to explicate why freshly democratized states entrench judicial review within their newly-drafted constitutional texts, we need to conceive judicial review as a form of political insurance: “By serving as an alternative forum in which to challenge government action, judicial review provides a form of insurance to prospective electoral losers during the constitutional bargain”
- b. Empirical application: Countries following a regime transition to democracy and a constitution-writing process that subsequently had multi-party electoral systems were more likely to provide for a strong, independent



judiciary than countries in a similar situation that subsequently had two-party electoral systems.

- i. Ginsburg's measurement strategy falls back on the notion that "the political configuration in the first election after the adoption of the court is a reflection, albeit an imperfect one, of the true extent of diffusion before adoption of the constitution."

### **Matthew Stephenson, "When the Devil Turns" (2003)**

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#### **1. Adding nuance to Ginsburg's insurance theory**

- a. Conditions necessary for legislators to support judicial review as a focal point resolution to the problem of institutional design:
  - i. Sufficient partisan competition
  - ii. Judicial moderation
  - iii. Long-term risk aversion on the part of political elites
- b. Empirical application: Stephenson subsequently conducts an ordered probit regression using 1995 data from 153 countries and finds a strong correlation between partisan competition and judicial independence

### **Ran Hirschl, "The Political Origins of Judicial Empowerment through Constitutionalization" (2002)**

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#### **1. Judicial review entrenches the interests of hegemonic elites**

- a. The hegemonic preservation thesis: "conscious judicial empowerment is likely to occur (a) when the judiciary's public reputation for political impartiality and rectitude is relatively high and (b) when the courts are likely to rule, by and large, in accordance with the cultural propensities and policy preferences of the traditionally hegemonic elites."
  - i. "Influential coalitions of domestic neoliberal economic forces (e.g., powerful industrialists and economic conglomerates given added impetus by global economic trends) may view constitutionalization of rights (especially property, mobility, and occupational rights) as a means to promote economic deregulation and to fight what its members often understand to be harmful "large government" policies of the encroaching state."
- b. Empirical application: Judicial empowerment in Israel in the 1990s
  - i. "Well aware of the backlash eroding its hegemony, representatives of the Ashkenazi secular bourgeoisie in the Knesset, in cooperation with economic and legal elites, initiated and promoted Israel's 1992 constitutional revolution in order to transfer the main locus of political

- struggle from parliament, local government, and other majoritarian decision-making arenas to the Supreme court, where their ideological hegemony is under less of a challenge.”
- c. Empirical application: Canada’s Charter of Rights and Freedoms of 1982
    - i. Enacting the Charter “stemmed primarily from political pressure to preserve the institutional and political status quo and to fight the growing threats to the Anglophone establishment and its dominant Protestant, business-oriented culture by the Quebec separatist movement and by other emerging demands for provincial, linguistic, and cultural autonomy that stem from, among other things, the dramatic changes in Canada's sociodemographic composition over the last five decades.”
  - d. Empirical application: New Zealand’s Bill of Rights Act of 1990
    - i. “The driving force behind the 1990 constitutionalization of rights in New Zealand was a coalition of the disparate sections of a threatened elite seeking to preserve its power and economic actors who were pushing for neoliberal economic reforms.”

### **James Rogers, “Information and Judicial Review” (2007)**

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1. **Legislatures support judicial review because it transmits important information**
  - a. Why legislatures want information: Legislatures want to make sure that the laws they pass are appropriate to achieving the legislature’s purpose. In other words, legislatures have an interest in making sure that the legislation they pass is achieving the desired ends in practice
  - b. Judicial review transmits information to the legislature: There are three reasons why courts have an informational advantage when considering the empirical consequences of a statute:
    - i. The Court reviews legislation chronologically after the legislature has acted
    - ii. The role of the Court’s “standing” and “ripeness” doctrines implies that courts will acquire a different type of information in judicial proceedings relative to that acquired in legislative proceedings.
    - iii. It is easier for the Court to strike down an enacted law when it is empirically inappropriate than for the legislature to repeal the law
  - c. Game-theoretic model findings:

- i. The Legislature tolerates judicial policy making because it cannot deny independence to the Court when it has divergent policy preferences without also eliminating informative judicial review when the Court has convergent preferences
- ii. As long as the Court is not too political, when the Legislature loses to judicial policy-making it more than makes up from the informational service that the court provides in helping the legislature to secure its own policy goals
- iii. When the Legislature is very uncertain about the appropriateness of its enactment, the court is entirely unconstrained by strategic considerations

### **Gordon Wood, “Comment” in *A Matter of Interpretation* (1997)**

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#### **1. The quick turn to judicial review in revolutionary America**

- a. Inefficient/dangerous legislatures and the turn to the judiciary: “Annually elected, unstable, and logrolling democratic legislatures broke apart plans for comprehensive legal codes and enacted statutes in a confused manner.” Hence by the 1780s, “many Americans now concluded that state legislatures were not only incapable of simplifying and codifying law but had become the main source of tyranny in society - they turned to the judiciary to restrain these popular legislatures.”
- b. Hamilton’s Federalist #78 captures this perspective: “[Hamilton] argued the legislatures weren’t the people- they were their servants. So he reduced the “democratic” sense of the legislature. The courts would help keep the legislatures within the sphere of their authority. Judges were also servants of the people. Thus courts came to be seen as nearly equal in authority with the legislatures in the creation of law. The transformation was monumental.”

#### **2. Problematizing the “Democratic” Pedigree of the US Government**

- a. The US government has never been purely democratic: “We have never had a purely democratic system of government. The problem to which Scalia is alluding is a deeply rooted one in our history, and thus it is probably not as susceptible to solutions as he implies.”

Against easy turns to “textualism:” “Textualism is as permissive and open to arbitrary judicial discretion and expansion as the use of legislative intent or other interpretative methods, if the text-minded judge is so inclined.” The real source of the judicial problem that troubles Justice Scalia lies in our demystification of the law, contributed to by the legal realists - we should remystify some of

what lawyers and judges do.

## **Mark Graber, “The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary” (1993)**

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### **1. Legislators support judicial review to manage a fractal national coalition**

- a. The argument: “Judicial review presents the nonmajoritarian difficulty when the real controversy is between different members of the dominant national coalition.” Specifically, “when disputes arise that most elected officials would rather not address publicly, Supreme Court justices may serve the interests of the political status quo by making policy taking public reasonability for making policy, and making policy favored by political elites. Judicial policymaking in these circumstances cannot be described as either majoritarian or countermajoritarian; it takes place when and because no legislative majority has formed.”
- b. Courts may be countermajoritarian only when a new coalition is emerging: “Justices engage in countermajoritarian behavior in those brief periods when members of a newly formed dominant national coalition have not yet had the time necessary to install their adherents on the bench.”
- c. Empirical application: The Sherman Antitrust Act of 1890
  - i. “Unable to agree on the extent of regulation of powerful monopolies, party moderates drafted a bill with exceptionally vague language for the purpose of forcing the SCOTUS in the guise of statutory interpretation to determine the scope of federal commerce power.”

## **Howard Gillman, *The Constitution Besieged* (2002)**

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### **1. In Defense of *Lochner* Era Jurisprudence**

- a. *Lochner*-era judges merely channeled predominant political principles at the time: “the standards used by these judges to evaluate exercises of legislative power were not illegitimate creations of unrestrained free-market ideologues, but rather had their roots in principles of political legitimacy that were forged at the time of the creation of the Constitution and were later elaborated by state court judges as they first addressed the nature and scope of legislative power in the era of Jacksonian democracy.”
- b. *Lochner*-era judges sought to uphold the well being of the

community: “These principles encouraged nineteenth-century judges to uphold legislation that (from their perspective) advanced the well-being of the community as a whole or promoted a true “public purpose” and to strike down legislation that (from their perspective) was designed to advance the special or partial interests of particular groups or classes.”

- i. When a regulation was considered a valid promotion of the general welfare and not an invalid attempt at unfair class legislation, 19th century judges tended to uphold the law
- c. Lochner-era judges channeled founding-era beliefs about the free market: The original founding vision treated the market as “harmonious and liberty loving, and the access to the freehold on the American frontier ensured that those who might find themselves in pockets of dependency would always be able to escape; thus there was little justification for allowing the government to intervene in the conflicts” between competing groups in the market.
  - i. “The Constitution set up a structure...to nurture and protect the social relations produced by capitalism by preventing the state from taking sides in the disputes arising among or between competing classes.”
- d. Lochner-era judges channeled Jacksonian-era beliefs about government impartiality: “Like the Jeffersonians before them, the Jacksonian coalition was bonded by the belief that it could hold its own in a political and economic system purged of special privilege.” Their desire was to “remove restrictions and privileges that had their origin in acts of government.”

## **Howard Gillman, “How Political Parties Can Use the Courts to Advance Their Agendas” (2002)**

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### **1. *Lochner*-era judicial review was supported to entrench economic nationalism**

- a. Argument: “I demonstrate that the increased power, jurisdiction, and conservatism of federal courts during [1875-1891] was a by-product of Republican Party efforts to promote and entrench a policy of economic nationalism during a time when that agenda was vulnerable to electoral politics.”
  - i. This is not unlike entrenchment via delegation to executive agencies: “the expansion of federal judicial power in the late-nineteenth century is best understood as the sort of familiar partisan or programmatic entrenchment that we frequently

associate with legislative delegations to executive or quasi-executive agencies.”

b. The empirical application: Judicial empowerment in the late 19<sup>th</sup> century

- i. “The expansion of power resulted from the passage of two key pieces of legislation—the Judiciary and Removal Act of 1875 and the Evarts Act of 1891—that were part of the Republican Party’s efforts to restructure national institutions better to facilitate national economic development...The more familiar parts of this political agenda involved currency policy, tariff policy, and...national bureaucratic expansion.”
- ii. “The expansion of federal administrative capacity became necessary only after economic nationalists were successful at promoting large- scale enterprise by extending more reliable legal institutions to investors and producers who operated within a national market. Federal judges became the principal agents of this agenda after Republicans in the national government retooled the federal judiciary by changing its jurisdiction, reforming its structure, and staffing courts with judges who were reliable caretakers of this new mission.”
  1. “The construction of this market required sympathetic supervision of individual transactions rather than general regulative or administrative capacity.”
  2. Judges were “a remarkably similar, if not insular, social group” that was closely tied to “powerful political and economic actors, ... trained and experienced at the bar, steeped in the revered common law, and coming largely from the ranks of the corporate elite.”

**Keith Whittington, ““Interpose Your Friendly Hand:” Political Supports for the Exercise of Judicial Review by the United States Supreme Court” (2005)**

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1. **The “overcoming obstructions” theory of judicial review**

- a. The argument: “When current elected officials are obstructed from fully implementing their own policy agenda, they may favor the active exercise of constitutional review by a sympathetic judiciary to overcome those obstructions and disrupt the status quo.”
  - i. The source of fragmentation is American federalism: “The American political system is fragmented horizon- tally within governments as well as vertically between layers of government. This fragmentation- across branches, across

- legislative chambers, and within legislative chambers-frequently obstructs those seeking to alter the status quo.”
- ii. The logic: “For individual legislators, their constituents may be sharply divided on a given issue or overwhelmingly hostile to a policy that the legislator would nonetheless like to see adopted. Party leaders, including presidents and legislative leaders, must similarly sometimes manage deeply divided or cross-pressured coalitions...When faced with such issues, elected officials may actively seek to turn over controversial political questions to the courts so as to circumvent a paralyzed legislature and avoid the political fallout that would come with taking direct action themselves.”
- b. The conditions necessary for the argument to hold:
    - i. The first is that courts often be ideologically friendly to the governing coalition.
    - ii. The second precondition is that judicial review is actually useful to current political majorities.
  - c. The observable implications of the theory:
    - i. Judges should be selected on the basis of being “activist” insofar as they embrace national policy preferences
    - ii. The encouragement of specific judicial action consistent with the political needs of coalition leaders
    - iii. The congenial reception of judicial action after it has been taken
    - iv. The public expression of generalized support for judicial supremacy in the articulation of constitutional commitments
  - d. Empirical application: The Kennedy Administration and civil rights
    - i. The Kennedy administration embraced the Warren court’s progressive civil rights jurisprudence because of an “overcoming constraints” logic:
      1. “In 1960, the Kennedy brothers likewise feared that becoming entangled in the civil rights issues would cost the party more votes than it would gain...Though approving the inclusion of a civil rights plank in the party platform, the Kennedy administration was determined not to “endorse a frontal assault against the segregation system.”

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**Keith Whittington, *Political Foundations of Judicial Supremacy* (2007)**

**1. Affiliated Presidents actively support judicial authority**

- a. The affiliated president’s logic in support of judicial review: “The affiliated leader supports judicial activism because he does not expect it

to be used against himself... The Supreme Court has often used the power of judicial review to bring states into line with the nationally dominant constitutional vision.” By being free of the “jumble of legislative and electoral politics,” the Court is often better able to move the coalition’s constitutional agenda forward.

- b. The necessary conditions for the politics of affiliation: (1) Appointments, (2) Political supports (in defense of friendly courts from attack), (3) Contextual supports (the fact that federal judges are drawn from a sociologically similar pool as elected officials), (4) a coherent constitutional component to the regime.
- c. Affiliated regimes protect courts from attack: “elected officials can protect friendly courts from court-curbing legislation, allowing the Court to be activist with little fear of political reprisal... In the early 20<sup>th</sup> century, Progressives responded to the *Lochner* Court by frequently proposing a variety of court-curbing measures that were promptly buried in conservative congressional committees.”
- d. Examples: Harry Truman, John F. Kennedy

## 2. **Preemptive Presidents defer to judicial authority**

- a. The preemptive president will rarely openly oppose the court: “The preemptive president is likely to be in opposition to the Court and its understandings of the Constitution as well as to other elected officials and the dominant ideology... Unable to pursue the politics of reconstruction, however, the preemptive leader will see little benefit and much danger in the path of maximal resistance and will refrain from issuing a direct challenge to the judicial authority.”
- b. The preemptive president may sometimes align itself with the court: “In their political weakness, preemptive presidents may seek alliances with the courts. Despite their particular disagreements with judicial doctrine, preemptive presidents may find themselves attempting to bolster judicial authority...to the extent that the courts take the law seriously. The relative insulation of the judiciary from normal political pressures... prevents it from being a mere instrument of the dominant regime.” Hence preemptive presidents may find themselves “attempting to borrow from the authority of the courts in order to hold off their political adversaries.”
- c. Examples: Andrew Johnson, Richard Nixon, Jimmy Carter

## 3. **Reconstructive Presidents actively challenge judicial authority**

- a. Reconstructive presidents emerge during realigning elections: “at every turn in national policy where the cleavage between the old order and the new was sharp, the new President has faced a judiciary almost wholly held over from the preceding regime...[which has] been an estranging influence between the Court and the great Presidents.”



- b. Reconstructive presidents challenge inherited constitutional understandings, and in so doing they “find the judiciary to be an intrinsic challenge to their authority... the heightened constitutional sensitivity of these presidents is likely to make contemporary judicial actions unusually salient.”
- c. Reconstructive presidents supplant judicial authority: “The president and the judiciary compete over the same constitutional space, with the authority of presidents to reconstruct the inherited order supplanting judicial authority to settle disputed constitutional meaning.”
  - i. In the politics of reconstruction, the judiciary is portrayed as itself highly politicized.
- d. Examples: Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt