



Winter 2007

The Constitutional Imbalance

Richard Albert

Recommended Citation

Richard Albert, *The Constitutional Imbalance*, 37 N.M. L. Rev. 1 (2007).
Available at: <https://digitalrepository.unm.edu/nmlr/vol37/iss1/3>

This Article is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: www.lawschool.unm.edu/nmlr

THE CONSTITUTIONAL IMBALANCE

RICHARD ALBERT*

I. INTRODUCTION

The modern American judiciary bears little resemblance to the institution created by the Founding Fathers at the Constitutional Convention of 1787. Alexander Hamilton—a leading spokesperson for the Federalist forces that emerged victorious from the founding debates—famously predicted that the judiciary would be the *least* dangerous of the three branches of government. We know now that Hamilton and the Federalists were wrong on this forecast. We also know that the Anti-Federalists were right. Indeed, the Anti-Federalists—an influential group of American founding statesmen who withheld their assent from the Constitution for various reasons¹—correctly presaged the future path of the American judiciary.

Contemporary thinkers have echoed the cautionary words of the Anti-Federalists, arguing that the modern American judiciary has upset the constitutional balance that sustains the American project of democracy. According to one scholar, the judiciary has freely inserted itself into the political thicket, eroding the political question doctrine that once ensured that the voice of the people would be heard.² According to another scholar, the judiciary has mooted popular discourse on important issues of conscience before those deliberations have even begun to bud.³ Still another argues that the judiciary has commandeered public institutions to substitute the people's judgment with its own.⁴ These and other increasingly frequent detours

* J.D., B.A., Yale University. I have benefited from discussions with several friends on the role and function of the American judiciary, several of whom have commented on previous drafts of this Article, including Bruce Ackerman, Akhil Amar, John Baker, Jack Balkin, Rachel Barkow, Mijha Butcher, Dennis Coyle, Drew Days, Steve Gold, Lino Graglia, Shelby Guilbert, Paul Horwitz, Bob Kokta, Ethan Leib, Ryan McLeod, Peter Meyers, Alex Nguyen, Larry Obhof, Brandon Paradise, Stephen Presser, Jay Readey, Ronald Rotunda, Michael Soules, Elizabeth Stauderman, Elisabeth Steele, Joe Tadros, Seth Tillman, Mark Tushnet, John Tuskey, Daniel Walfish, and Russell Weaver. I am also grateful to the terrific team of editors at the New Mexico Law Review, particularly to Barry Berenberg, Seth McMillan, Deana Bennett, and Jennifer Settle for shepherding this Article through the editorial process.

1. See, e.g., Carl A. Auerbach, *Is Government the Problem or the Solution?*, 33 SAN DIEGO L. REV. 495, 497 (1996) (“[T]he Anti-Federalists, who opposed ratification, argued for a state-centered federalism.”); Frederick Mark Gedicks, *The “Embarrassing” Section 134*, 2003 BYUL. REV. 959, 966–67 (“The anti-Federalists opposed the Constitution because it left natural rights without explicit textual protection, and there are strong historical arguments that various clauses of the Constitution and the Bill of Rights were understood at the time they were enacted to recognize or refer to unenumerated rights, including natural rights.”); Robert G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 KY. L.J. 353, 388 (2002) (“Anti-Federalists opposed the new Constitution in part because they believed it would foster dependence.”); Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 16 (1992) (“Indeed, the anti-federalists opposed the Constitution partly because they feared the power of the federal courts to interpret it.”); William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of “Unconstitutional” Statutes*, 93 COLUM. L. REV. 1902, 1942 (1993) (“Anti-Federalists, for example, opposed the Constitution in part on the grounds that its flexibility and purported ability to adapt to the future was a weakness, not a strength. They claimed that the dead hand control that the Constitution represented would unfairly burden future generations; better to have a time-bound constitution that would be repealed, rather than one that sought to constrain governmental decision-making for all time.”); Sol Wachtler, *Judging the Ninth Amendment*, 59 FORDHAM L. REV. 597, 600 (1991) (“The anti-federalists seized upon the omission of a bill of rights as a reason to oppose the ratification of the Constitution.”).

2. Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002).

3. LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 7 (1990) (stating that abortion was “snatched from the political dueling ground by the Court’s 1973 *Roe* decision”).

4. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4–5 (1980); see also MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING*

from the proper judicial course have raised a fundamental question in the separation and distribution of constitutional powers: are judicial encroachments into the public square consistent with American popular sovereignty? As a matter of American political theory, the answer is no.⁵

In these pages, I do not call for an end to judicial review, as Mark Tushnet does in his compelling work that merits an audience from those committed to the integrity of the judicial boundary.⁶ Instead I propose mechanisms to restore balance to the American Constitution—a balance that scholars agree has been disturbed by the American judiciary. These mechanisms are to be read alongside other suggestions for limiting the ever-expanding judicial sphere of influence on issues of policy.⁷ The ultimate objective of this Article is to reclaim for the legislature—as the American Founders had envisioned—its central role in shaping matters of public policy and reflecting the will of the American people.⁸

Judicial lawmaking is vulnerable to the broad criticism that it is fundamentally undemocratic insofar as it does not trace its source to the people themselves, to their will as expressed through the legislature. But this criticism is itself subject to a three-fold rebuttal: (1) legislative lawmaking is not the archetype of popular government; (2) courts enhance the democratic process; and (3) courts reflect and respond to public opinion.⁹ Maybe so. But even if courts *were* able to accurately gauge the pulse of the people, they should refrain from doing so precisely because courts were designed to be shielded from the pressures of politics.¹⁰ Activist judicial lawmaking amplifies the power of the judiciary, weakens the voice of the people, and frustrates the promise of popular sovereignty.¹¹

AMERICAN SOCIETY 120 (1994) (“[T]he Supreme Court must not sit as a super-legislature and...unelected justices must not substitute their views for the judgments of the people’s elected representatives.”).

5. Let me be eminently clear that the views in these pages are limited to the American context. My observations should in no way be understood or extrapolated as a prescription for reworking the institutional relationships among the people, judiciary, and legislature in other countries and jurisdictions.

6. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

7. E.g., STEPHEN B. PRESSER, *RECAPTURING THE CONSTITUTION* (1994) (concluding with suggested constitutional amendments to return the Constitution to the people); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 (2001) (proposing legislative constitutional interpretation as an attractive alternative to judicial supremacy); Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753 (2004) (advancing the theory of principled minimalism on the judiciary); Mark Tushnet, *Non-Judicial Review*, 40 HARV. J. ON LEGIS. 453 (2003) (suggesting three models of non-judicial institutions performing constitutional review); see also Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265, 1368 (2005) (offering evidence in support of the proposition that the judiciary should not enjoy “near tyrannical monopoly of constitutional interpretation”).

8. It is exceedingly important to note that theories of popular will—in particular those arguing that an act of the legislature is the best reflection of popular will—often fail to account for what one scholar calls “knowledge burdens on the electorate.” Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1297 (2004). This refers to the degree of familiarity with the issues that citizens must possess in order to competently express their will to their elected representatives. *Id.*

9. Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057, 1093–94 (2004). But see Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL’Y 569, 595 (2004) (“There is little reason to believe that courts are either more in touch with voters’ views or more capable of formulating sound public policy decisions than the other branches of government.”).

10. Marc A. Fajer, *With All Deliberate Speed? A Reply to Professor Sunstein*, 70 IND. L.J. 39, 42 (1994).

11. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 208–11 (1985).

This is not an argument for majoritarianism.¹² Quite the contrary, this view is entirely in keeping with the first conceptions of the judiciary, which was envisioned as an agent of the people.¹³ Nor do I wish to compromise the elemental doctrine of judicial independence, which is primordial in a liberal democracy.¹⁴ But judicial independence from popular will should not descend into judicial supremacy *over* popular will.¹⁵ Democratic legitimacy can come only from freely given popular consent expressed through an elected legislature. To believe that political judgments should be clothed in that legitimacy is quite different from arguing that a majority of an elected legislature is sufficient to legitimize all political judgments. My claim on this point is simple: the action of a democratically elected legislature is the best reflection of popular will.¹⁶

The unifying theme of this piece—the promise of the American project of democracy is popular participation in public discourse—is echoed in a rich literature.¹⁷ My approach differs, though, in the remedy. I suggest expanding the range of the legislative function in order to moderate the disproportionate force of the judiciary in the American polity. In addition to this legislative expansion, moving concurrently toward a more judicious practice of judicial review that kindles and nurtures—rather than obstructs and ultimately extinguishes—will make real the prospect of popular engagement in the public discourse. The focus of this Article is to explore the use of several constitutional devices in the service of popular democracy so as to reassert the paramount role of the legislature in reflecting the public will. I will begin, in Part II, by reviewing the judicial function, specifically the duties that steer the work of the American judiciary. In Part III, I will survey the existing imbalance in the American constitutional process, underscoring the inequitable influence of the judiciary in the American republic, something the Federalists—but not the Anti-Federalists—had utterly not foreseen at the founding.

In Part IV, I will explore three strategies for restoring balance to the American constitutional order: (1) reinstating the Council of Censors, an artifact of the British colonial era through which the people could articulate their views on important matters of the day; (2) restoring the Council of Revision, an analogue of the Council of Censors that sanitized legislation before the bill was given force and effect; and

12. Indeed, the American Constitution is anchored in principles of republican—not majoritarian—government. See U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government....”); see also James Morton Smith, *Liberty and Learning*, 29 WM. & MARY L. REV. 53, 55 (1987) (“Moreover, the members of the Convention were interested not only in establishing a republican government at the federal level, but also in finding ‘a republican remedy for the diseases most incident to republican government,’ as Madison phrased it.” (footnote omitted)).

13. Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 415 (2003).

14. Robert M. Howard & Henry F. Carey, *Is an Independent Judiciary Necessary for Democracy?*, 87 JUDICATURE 284 (2004).

15. Steven H. Goldberg, *Putting the Supreme Court Back in Place: Ideology, Yes; Agenda, No*, 17 GEO. J. LEGAL ETHICS 175, 192–93 (2004).

16. Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 594 (1995).

17. See, e.g., ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* (2004); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); Frank I. Michelman, *The Supreme Court, 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

(3) importing a Canadian mechanism known as a non-obstante clause, which authorizes the legislature to suspend the application of a judicial decision. Part V will conclude, arguing that although the three options canvassed in Part IV are appealing insofar as they confer upon the people final decision-making authority on the meaning of the Constitution when it takes the shape of public policy, each of the three strategies would disrupt the tripartite balance envisioned in the Constitution. On the other hand, a fourth option—judicial minimalism—could conceivably offer an effective resolution to the current imbalance in the American polity. But it, too, is unequal to the task. Judicial minimalism holds great promise for the American project of democracy, but it demands uncommon restraint from the American judiciary, an optimistic vision that history has exposed as no more than whimsy.

II. THE JUDICIAL FUNCTION

The judiciary occupies a well-settled function in the continuing constitutional discourse among the three branches of government—the executive, the judiciary, the legislature—and the people—from whom each branch of government derives its authority to govern. “To decide cases” is how the late Justice Byron White described the task of the court.¹⁸ More specifically, the role of the judiciary is to resolve private and public disputes as the final arbiter of questions of federal statutory and constitutional law.¹⁹ Two duties fall under this expansive umbrella: (1) to protect the Constitution and the principles of democracy; and (2) to create law, both through the common law approach and the construction of duly enacted statutes.²⁰

A. Judicial Duties

These two duties are at once complementary and contradictory. They are complementary to the extent that defending the Constitution and the very fabric of democracy demands the license to craft and command rules that govern civil society. They are contradictory insofar as the former duty requires the judiciary to adopt a reactive posture—defending the rights and liberties preserved in the constitutional text from public or private infringement—while the latter invites the court to assume an active role in the engineering of the state.

In order to fulfill the first of its duties—namely to protect the Constitution and the principles of democracy—the judiciary leans on its power of judicial review, long enshrined since *Marbury v. Madison*.²¹ Despite potent criticism to the contrary,²² judicial review falls squarely within the delegated power of judges.²³

18. Dennis J. Hutchinson, *Two Cheers for Judicial Restraint: Justice White and the Role of the Supreme Court*, 74 U. COLO. L. REV. 1409, 1415 (2003) (quoting DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 331 (1998)).

19. William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 14 (1986).

20. Aharon Barak, *The Supreme Court, 2001 Term: Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 27–29, 36 (2002).

21. 5 U.S. (1 Cranch) 137 (1803).

22. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

23. Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 915–16 (2003) (“[T]he government can exercise only that power which the people have delegated to it. A written

Insisting otherwise misconstrues the text, structure, and history of the Constitution, not to mention the original intent of its drafters and ratifiers.²⁴ In discharging the second of its duties—to create law—the judiciary will typically issue a decision whose effect is to expand or curb rights and liberties as the court believes is dictated by the circumstances of the particular legal dispute. This is the inevitable result of the marriage uniting the common law tradition with an enthusiastic embrace of judicial review.

B. Judicial Review

Judicial review—the practice of invalidating statutes and administrative acts as violative of the Constitution²⁵—has worked a significant harm on the democratic soul of the American citizenry. Each time the American judiciary has rendered a judgment that fails to promote popular engagement in the public discourse or has decided a case in a way that short circuits public deliberation, the court has in the same breath cast yet another stone against the founding hope for participatory democracy. The fateful consequence of this escalating habit of injudicious review is to keep the people from occupying a formative role in the constitutional process and to risk descending American democracy into juristocracy.²⁶ Though it remains the acknowledged province of the judiciary to elaborate the meaning of the United States Constitution,²⁷ the deed to the text belongs neither to the Supreme Court nor to the Congress but instead to the people.

Let me be clear. Judicial review is an accepted practice securely moored in the embryonic years of the American constitutional tradition.²⁸ Indeed, the power of judicial review was not new to the Founders: the English Privy Council had occasionally exercised similar license.²⁹ Even the Anti-Federalists understood that the Constitution bestowed upon the judiciary the power to invalidate legislative enactments.³⁰ Moreover, one of the contemporary justifications for judicial

constitution serves to codify these powers. Any exercise of authority beyond the grant of power in the written constitution therefore is illegal, because it goes beyond the delegation from the people and undermines popular sovereignty....Nothing in the Constitution directs judges to treat nullities—unconstitutional statutes—as if they were valid laws. Hence vindicating the people's choice of a limited Constitution requires judges to refuse to enforce unconstitutional statutes.”).

24. See generally *id.* (arguing that judicial review does not find its origin in the rule of *Marbury*, but instead in the text and structure of the Constitution, as understood by its drafters and ratifiers).

25. Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 U. RICH. L. REV. 415, 420–21 (2000) (reviewing TUSHNET, *supra* note 6).

26. See generally RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004) (describing the increasing prominence of courts in democratic constitutionalism).

27. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“In considering this question, then, we must never forget, that it is a constitution we are expounding.”).

28. See Robert Justin Lipkin, *Constitutional Revolutions: A New Look at Lower Appellate Review in American Constitutionalism*, 3 J. APP. PRAC. & PROCESS 1, 11–12 (2001).

29. Kenneth Einar Himma, *Making Sense of Constitutional Disagreement: Legal Positivism, the Bill of Rights, and the Conventional Rule of Recognition in the United States*, 4 J.L. SOC'Y 149, 204 (2003) (quoting David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 655–56 (1982)). The Privy Council—specifically its Judicial Committee—had final appellate authority over legal disputes originating from the British colonies. See L. Kinvin Wroth, *Notes for a Comparative Study of the Origins of Federalism in the United States and Canada*, 15 ARIZ. J. INT'L & COMP. L. 93, 114 (1998).

30. Whitman H. Ridgway, *Introduction of Archibald Cox, The Role of the Supreme Court: Judicial*

review—the protection of discrete and insular minorities³¹—remains as powerful as ever. But the goal for the growth of American popular democracy should be to move the court toward a more limited practice of *judicious* review, not unlike what was envisioned at the founding. The framers of the Constitution expected the judiciary to operate within narrow confines in which judges would be freed from the vagaries of politics and the constraints of legislative prescriptions.³² Thus, the power of judicial review was originally intended to be deployed in the service of federalism.³³ But as I illustrate below, the judiciary has exceeded the bounds set by the Founders, in large part because the judiciary has evolved in a manner that the Founders had not envisioned.

III. FEDERALISTS, ANTI-FEDERALISTS, AND CONSTITUTIONAL STATECRAFT

As the nascent American republic emerged from the Revolution to debate the merits and demerits of the proposed Constitution, two groups led the fight for its ratification and rejection. Federalists advocated ratification, often under the pen name *Publius* in the *Federalist* papers.³⁴ Anti-Federalists insisted on rejection, signing their public appeals under such soubriquets as *Cato*, *Brutus*, and the *Federal Farmer*.³⁵ Federalists and Anti-Federalists disagreed about the advisability of several constitutional provisions, including whether it would be possible, as a matter of efficient jurisdiction, to manage concurrent federal and state powers of taxation³⁶ and whether it would be wise, as a matter of statecraft, to devolve such extensive powers onto the central government.³⁷ The distribution of powers between federal and state institutions was another principal point of contention. The Anti-Federalists feared that the Constitution would reduce the several states to the diminutive status of municipal corporations,³⁸ thereby consolidating all real authority in the central government.³⁹

The judiciary likewise featured prominently in the debate between the Federalists and Anti-Federalists. Each side advanced a different conception of the judiciary, along with a distinct forecast for the evolution of the modern American judiciary. With the expedient benefit of hindsight, one could not be faulted for succumbing to the temptation to name a winner based on a careful appraisal of the relative

Activism or Self-Restraint?, 47 MD. L. REV. 115, 115 (1987).

31. *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938).

32. Wendy R. Weiser, *Regulating Judges' Political Activity After White*, 68 ALB. L. REV. 651, 681 (2005).

33. Jack N. Rakove, *Once More into the Judicial Breach*, 72 GEO. WASH. L. REV. 381, 382 (2003).

34. But one constitutional scholar has argued that the *Federalist Papers* may not be a reliable source to interpret the United States Constitution. See Seth Barrett Tillman, *The Federalist Papers as Reliable Historical Source Material for Constitutional Interpretation*, 105 W. VA. L. REV. 601 (2003).

35. Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 405, 406 (2003); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 n.6 (1995); Eric M. Axler, Note, *The Power of the Preamble and the Ninth Amendment: The Restoration of the People's Unenumerated Rights*, 24 SETON HALL LEGIS. J. 431, 457 n.87 (2000).

36. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 543 (2003).

37. Jennifer Nedelsky, Book Review, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340, 345-46 (1982).

38. H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 658 (1993).

39. Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 142 (2000).

foresight of both the Federalists and the Anti-Federalists. Though historians should perhaps resist the urge to do so,⁴⁰ I remain free to surrender to the lure of the siren song. I therefore plead indulgence as I raise a query: in 1787, which of these two bodies of public constitutionalists—the Federalists or Anti-Federalists—more accurately presaged the American judiciary in its present incarnation as a public institution that preempts rather than promotes popular democracy? On this question, the answer could not be clearer: the Anti-Federalists were right and the Federalists were wrong. What is significant, though, is not the shell of this hollow scorecard tally but rather the analysis that underpinned the respective visions of the Federalists and the Anti-Federalists about the role of the American judiciary in the new republic.

A. Federalist Failures

There are perhaps few greater misfires in the annals of American founding history than the Federalists' prediction that, of the three branches of government, the judiciary would be the "least dangerous to the political rights of the constitution"⁴¹ and "incontestably...beyond comparison the weakest of the three departments of power."⁴² For if the evolution of the American federation has revealed anything about the judiciary, it is precisely the opposite. The pages of the United States Reports are filled—some might say littered⁴³—with bold strokes of the staggering dominance of the Supreme Court in the social engineering of the state.⁴⁴ This stands in distinct contrast with the myopic projections of the Federalists on the role of the judiciary in American government. Indeed, the Federalists incorrectly predicted that the judiciary would have no discernible influence on the nation apart from resolving discrete legal disputes.⁴⁵ History has, in no uncertain terms, rebutted the Federalists' expectation.⁴⁶

40. See Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 WM. & MARY Q. 628, 632–33 (1987).

41. THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, 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.")

42. *Id.* ("It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power....").

43. See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA 264 (1990) ("[Judicial review] always denies the freedom of the people who voted for the representatives who enacted the law."); Editorial, THE STATE (Columbia, S.C.), June 19, 1957 ("The Court has usurped the power of the Congress, the State appellate courts and the juries of the States. In the exercise of dictatorial powers the difference between the Kremlin and the Supreme Court is that the Kremlin is composed of 11 men and the Supreme Court only 9."), quoted in David Riesman, *New Critics of the Court*, NEW REPUBLIC, July 29, 1957, at 9, 11.

44. See Lino A. Graglia, "Interpreting" the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1028–29 (1992) (stating that judicial activism "has usurped decisionmaking power over so many issues—abortion, capital punishment, criminal procedure, busing, prayer in the schools, government aid to church-run schools, pornography, libel, street demonstrations, vagrancy control, discrimination on the basis of sex, alienage and illegitimacy, and so on").

45. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 41, at 437 ("The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.")

46. See James L. Buckley, *The Constitution and the Courts: A Question of Legitimacy*, 24 HARV. J.L. &

In *The Federalist*, Alexander Hamilton expressed what we know now to have been a misplaced fear that the other branches of government would overpower the judiciary. Americans, he argued, ought not worry about the judiciary dominating either or both the legislature and the executive because the judiciary is a harmless institution, designed only to safeguard the Constitution and never to assert its own will over the electorate and its chosen representatives.⁴⁷ “[T]he 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,”⁴⁸ insisted Hamilton, adding that “the judiciary is beyond comparison the weakest of the three departments of power.”⁴⁹ Therefore, “liberty,” concluded Hamilton with conviction that can only be disquieting to contemporary observers, “can have nothing to fear from the judiciary alone.”⁵⁰

In Madison’s view, the judiciary is the *least* dangerous branch and the legislature is indisputably the *most* dangerous one. Unlike the judiciary, whose authority is bordered within four clearly delimited corners, the legislature’s authority, according to Madison, is potentially plenary because the legislature is liable to exert a surreptitious superiority over the other department—a supremacy derived subtly and indirectly, yet irreversibly, from its power of the purse.⁵¹ The legislature’s control over dispensations to public officials only exacerbates the wide gulf of prominence between the legislature and the judiciary, whose members, argued Federalists, would be left powerless opposite legislative action constraining the role and function of the judiciary.⁵²

Therefore, as Madison cautioned, “it is against the enterprising ambition of [the legislature], that the people ought to indulge all their jealousy and exhaust all their precautions.”⁵³ Madison wrote that this is inexorably true because “we have seen that the tendency of republican governments is to an aggrandizement of the

PUB. POL’Y 189, 194–201 (2000) (cataloguing several cases in which the judiciary has breached the boundary separating questions of law from those of policy).

47. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 41.

48. *Id.* at 437.

49. *Id.*

50. *Id.*

51. THE FEDERALIST NO. 48 (James Madison), *supra* note 41, at 310 (“The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not unfrequently a question of real nicety in legislative bodies, whether the operation of a particular measure, will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.”).

52. *Id.*

53. *Id.* at 309–10 (“But in a representative republic where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.”).

legislative, at the expense of the other departments.”⁵⁴ This aggrandizement results from the failure of the legislature to differentiate between, on the one hand, the popular election of its members by the people—which renders that deliberative body a representative reflection of the people—and, on the other, the acquiescence of the people to any action taken by the legislature on the strength of its popular legitimacy—which improperly extrapolates from the previous election a mandate to act without regard to the role and jurisdiction of the executive or judiciary.⁵⁵

The Federalists defended their understanding of this legislative inclination with what they regarded as a simple truth: there are fewer members in the executive and judicial branches than there are in the legislature, which also claims for itself a public trust on the strength of its closer connection to the people—particularly those people who travel in the most influential circles.⁵⁶ Armed with this insurmountable advantage in popular legitimacy over both the judiciary and the executive, the legislature will necessarily succumb to the lure of legislative overreaching, whose consequence, concluded Madison, is to “extend[] the sphere of its activity and draw[] all power into its impetuous vortex.”⁵⁷ Thus Madison suggested that parity among the branches would be no more than a fiction if Americans did not remain attentive to the legislature’s predisposition to subjugate the other two branches of government.⁵⁸

The Federalists were wrong. Though the people should always guard with uncompromising jealousy their popular sovereignty wherever threats emerge, their watchful gaze should be fixed on the judiciary, not on the legislature. Under the

54. THE FEDERALIST NO. 49 (James Madison), *supra* note 41, at 314.

55. THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 41, at 410–11 (“The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution.”).

56. THE FEDERALIST NO. 49 (James Madison), *supra* note 41, at 314–15 (“But whether made by one side or the other, would each side enjoy equal advantages on the trial? Let us view their different situations. The members of the executive and judiciary departments are few in number, and can be personally known to a small part only of the people. The latter by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions. The former are generally the objects of jealousy and their administration is always liable to be discolored and rendered unpopular. The members of the legislative department, on the other hand, are numerous. They are distributed and dwell among the people at large. Their connections of blood, of friendship, and of acquaintance embrace a great proportion of the most influential part of the society. The nature of their public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people. With these advantages it can hardly be supposed that the adverse party would have an equal chance for a favorable issue.”).

57. THE FEDERALIST NO. 48 (James Madison), *supra* note 41, at 309. Madison found one example of legislative overreaching in Virginia:

[J]udiciary and executive members were left dependent on the legislative for their subsistence in office, and some of them for their continuance in it. If, therefore, the Legislature assumes executive and judiciary powers, no opposition is likely to be made; nor if made, can it be effectual; because in that case they may put their proceedings into the form of acts of Assembly, which will render them obligatory on the other branches.

Id. at 311 (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 195 (1785)).

58. *Id.* at 309 (cautioning readers about “legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations”).

Constitution, there are several potent limits on the power of the legislature.⁵⁹ Foremost among these, the legislature must be reconstituted at regular intervals in contested elections.⁶⁰ These elections are the quintessential act of popular engagement and public deliberation.⁶¹ The members of the legislature must be approved by—and once elected are answerable to—the people themselves, who retain the right to remove them from their seats.⁶² In contrast, federal judges are encumbered by no similar limits. They are sheltered from removal (except through the extraordinary act of impeachment)⁶³ by the gift of life tenure,⁶⁴ buoyed in their words and actions by an indulgent theory of judicial independence,⁶⁵ and freed from the solemn commitment to popular accountability.⁶⁶ When coupled with these emoluments, the mighty pen that judges wield without popular review becomes perhaps the most powerful instrument controlled by any public body in civil society. The Federalists, at the founding, did not appreciate the consequences of imposing such weak constitutional constraints on the judiciary. But the Anti-Federalists did.

B. Anti-Federalist Prophecies

The new American republic emerged from its colonial years with a profound distrust of the judicial branch, largely because courts had been dutifully submissive agents of the Crown.⁶⁷ For this reason, the Anti-Federalists fully endorsed three features as indispensable to an independent and effective judiciary: (1) promptness and impartiality in the administration of justice; (2) fairness and transparency in

59. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 41, at 438–39 (enumerating specific limits on legislative power and stating that the legislature must be kept “within the limits assigned to [its] authority”); Perry Dane, “*Omalous*” *Autonomy*, 2004 BYU L. REV. 1715, 1724–25 (“The Constitution establishes limits on the normative authority of legislatures and other relevant actors. To say that an act is unconstitutional is to say that those limits have been transgressed. To put it another way, a finding that a law is unconstitutional typically assumes that the legislature could have, in principle, altered the law in some meaningful way so as to render it constitutional.” (footnotes omitted)); *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”).

60. U.S. CONST. art. I, § 2, cl. 1 (providing for House elections); *id.* amend. XVII (providing for Senate elections).

61. *See* Derek Shaffer, Note, *Answering Justice Thomas in Saenz: Granting the Privileges and Immunities Clause Full Citizenship Within the Fourteenth Amendment*, 52 STAN. L. REV. 709, 742 (2000) (recognizing a fundamental right to vote in state elections).

62. *See supra* note 60.

63. U.S. CONST. art. II, § 4.

64. *Id.* art. III, § 1.

65. *See* *Hayburn’s Case*, 2 U.S. (2 Dall.) 408, 411 (1792) (“It is a principle important to freedom, that in government, the *judicial* should be distinct from, and independent of, the legislative department. To this important principle, the people of the United States, in forming their constitution, have manifested the highest regard.”) (quoting Letter from the circuit court for the district of Pennsylvania to the President of the United States); *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1990) (“An independent and honorable judiciary is indispensable to justice in our society.”).

66. David R. Keyser, *State Constitutions and Theories of Judicial Review: Some Variations on a Theme*, 63 TEX. L. REV. 1051, 1075 (1985) (“The whole debate about what ‘theory’ of judicial review is appropriate arises on the federal level because the power of judicial review in the federal system is exercised by judges who, alone of all political decision makers in that system, are free from direct political accountability.”).

67. F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in the State Courts*, 33 J. LEGAL STUD. 431, 444 (2004).

court proceedings; and (3) neutrality and wisdom in the interpretation of laws.⁶⁸ These criteria—particularly judicial independence—remain reflective of what contemporary thinkers regard as essential features for a judiciary in a liberal democracy.⁶⁹

Yet, in sharp contrast to faulty Federalist forecasts about the American judiciary, the Anti-Federalists accurately foretold the powerful role that courts would ultimately exercise in the new nation.⁷⁰ In condemning the unprecedented independence and power of the judiciary as envisioned in the proposed Constitution, the Anti-Federalists warned the people of the new nation that the Constitution, once passed and ratified, would bar the people from exercising any power of correction or meaningful oversight of the judiciary.⁷¹ Indeed, Brutus questioned whether the world had ever seen such an immensely powerful and unchecked court of justice as the one fashioned by the constitutional drafters gathered at the historic convention of 1787.⁷² The proposed Constitution provided no appeal from a Supreme Court judgment—a decision that immediately assumed the force of law—nor did it permit any governmental body to rehabilitate erroneous judicial determinations of either law or fact.⁷³ The Constitution therefore granted the judiciary what the Anti-Federalists accurately observed was an irreversible and absolute supremacy⁷⁴ in interpreting the constitutional text and elaborating the rights and restrictions pertinent to the government⁷⁵—powers said at the time to

68. FEDERAL FARMER XV (Jan. 18, 1788), reprinted in *THE COMPLETE ANTI-FEDERALIST* 315 (Herbert J. Storing ed., 1981) (“In forming this branch, our objects are—a fair and open, a wise and impartial interpretation of the laws—a prompt and impartial administration of justice, between the public and individuals, and between man and man. I believe, there is no feature in a free government more difficult to be well formed than this, especially in an extensive country, where the courts must be numerous, or the citizens travel to obtain justice.”).

69. See William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT’L L.J. 129, 170 (2000); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 12 (2005); Paul B. Stephan, *Redistributive Litigation: Judicial Innovation, Private Expectations, and the Shadow of International Law*, 88 VA. L. REV. 789, 791 (2002).

70. The Federalists did not take the Anti-Federalist predictions seriously. See Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 67–69 (2003).

71. BRUTUS XI (Jan. 31, 1788), *supra* note 68, at 418 (“It is, moreover, of great importance, to examine with care the nature and extent of the judicial power, because those who are to be vested with it, are to be placed in a situation altogether unprecedented in a free country. They are to be rendered totally independent, both of the people and the legislature, both with respect to their offices and salaries. No errors they may commit can be corrected by any power above them, if any such power there be, nor can they be removed from office for making ever so many erroneous adjudications.”).

72. BRUTUS XV (Mar. 20, 1788), *supra* note 68, at 438 (“I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible.”).

73. BRUTUS XI (Jan. 31, 1788), *supra* note 68, at 420 (“The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorised by the constitution to decide in the last resort.”).

74. BRUTUS XV (Mar. 20, 1788), *supra* note 68, at 438 (“But the judges under this constitution will controul the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to set aside their judgment.” (footnotes omitted)).

75. BRUTUS XII (Feb. 7, 1788), *supra* note 68, at 423 (“And the courts are vested with the supreme and uncontrollable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution, unless we can suppose they can make

transcend any power before given to a judicial body by any free government under heaven.⁷⁶

In the eyes of the Anti-Federalists, this extraordinary devolution of powers to the judiciary would result in but one outcome: the judiciary would have the authority to mold the government into any shape that it pleased.⁷⁷ Though the Anti-Federalists could not predict the principles that would inspire the federal courts to act in this regard, they accurately foresaw that “very liberal” decisions⁷⁸ would result from the constitutionally enshrined power of judges to reach beyond the letter of the Constitution in order to summon its amorphous spirit and reason.⁷⁹ The Anti-Federalists therefore foresaw with astonishing precision that the right of the judiciary to invalidate any act of the legislature deemed inconsistent with the Constitution by judges⁸⁰—a judicial prerogative that violates a cardinal principle of representative government⁸¹—would catapult the judiciary into a station “exalted above all other power in the government, and subject to no controul.”⁸² In addition to these broad thoughts about the design of the judiciary, the Anti-Federalists pointed to three specific—and prophetic—concerns about the role of the judiciary in the American polity: (1) the expansive authority of the judiciary as final arbiter of the meaning of the proposed Constitution; (2) the merger of law, equity, and fact in one court, at the time something as yet unseen; and (3) the propensity of judges as political actors to widen the scope of their own powers.

First, the Anti-Federalists were troubled by the elasticity of several passages in the proposed Constitution, which would permit federal courts to stretch the bounds of reasonable constitutional interpretation toward the end of amplifying their powers at the expense of the several states.⁸³ In particular, Brutus believed that federal courts would bleed the states of their already limited authority.⁸⁴ The

a superior law give way to an inferior.”).

76. BRUTUS XV (Mar. 20, 1788), *supra* note 68, at 438 (“[T]he judicial under this system have a power which is above the legislative, and which indeed transcends any power before given to a judicial by any free government under heaven.”).

77. BRUTUS XI (Jan. 31, 1788), *supra* note 68, at 422 (“This power in the judicial, will enable them to mould the government, into almost any shape they please.”).

78. BRUTUS XII (Feb. 7, 1788), *supra* note 68, at 424 (“What the principles are, which the courts will adopt, it is impossible for us to say; but taking up the powers as I have explained them in my last number, which they will possess under this clause, it is not difficult to see, that they may, and probably will, be *very liberal* ones.” (emphasis added)).

79. *Id.* (“We have seen, that they will be authorized to give the constitution a construction according to its spirit and reason, and not to confine themselves to its letter.”).

80. BRUTUS XV (Mar. 20, 1788), *supra* note 68, at 440 (“If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature.”).

81. BRUTUS XVI (Apr. 10, 1788), *supra* note 68, at 442 (“Perhaps no restraints are more forcible, than such as arise from responsibility to some superior power.—Hence it is that the true policy of a republican government is, to frame it in such manner, that all persons who are concerned in the government, are made accountable to some superior for their conduct in office.”).

82. BRUTUS XV (Mar. 20, 1788), *supra* note 68, at 437 (“I said in my last number, that the supreme court under this constitution would be exalted above all other power in the government, and subject to no controul.”).

83. Aaron J. O’Brien, Note, *States’ Repeal: A Proposed Constitutional Amendment to Reinvigorate Federalism*, 44 CLEV. ST. L. REV. 547, 553–56 (1996).

84. BRUTUS I (Oct. 18, 1787), *supra* note 68, at 367 (“It is easy to see, that in the common course of things, these courts will eclipse the dignity, and take away from the respectability, of the state courts. These courts will be, in themselves, totally independent of the states, deriving their authority from the United States, and receiving

perimeter of state jurisdiction, Brutus feared, would be eroded along each of its axes—legislative, executive, and judicial—as a result of Supreme Court decisions on the issue of federal jurisdiction.⁸⁵ It could be no other way, thought Brutus, because where the Constitution establishes concurrent jurisdiction between federal and state organs, the judiciary—as a federal institution—would likely shrink the range of state sovereignty.⁸⁶ And so it has come to pass today.⁸⁷

Although the proposed Constitution authorized the legislature to craft the laws of the Union, it also ensured that judges, “in their interpretations, and in directing the execution of them, have a very extensive influence for preserving or destroying liberty, and for changing the nature of government.”⁸⁸ The judiciary, as the ultimate umpire of constitutional meaning,⁸⁹ poses a greater danger of sowing the seeds of arbitrary government than either the legislature or the executive⁹⁰ precisely because the Constitution endows judges with vast discretion to interpret laws and the Constitution itself according to their own wisdom and inclinations.⁹¹

This risk to American democracy would not be immediately discernible but would instead manifest itself slowly over time, noted the Anti-Federalists. Unlike the immediate effect of an executive seizure or an unjust law duly passed by the legislature—which the people would discover very soon thereafter—the intricacy

from them fixed salaries; and in the course of human events it is to be expected, that they will swallow up all the powers of the courts in the respective states.”).

85. BRUTUS XI (Jan. 31, 1788), *supra* note 68, at 420 (“The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution:—I mean, an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted.”).

86. BRUTUS XII (Feb. 14, 1788), *supra* note 68, at 427 (“It is obvious that these courts will have authority to decide upon the validity of the laws of any of the states, in all cases where they come in question before them. Where the constitution gives the general government exclusive jurisdiction, they will adjudge all laws made by the states, in such cases, void *ab initio*. Where the constitution gives them concurrent jurisdiction, the laws of the United States must prevail, because they are the supreme law. In such cases, therefore, the laws of the state legislatures must be repealed, restricted, or so construed, as to give full effect to the laws of the union on the same subject. From these remarks it is easy to see, that in proportion as the general government acquires power and jurisdiction, by the liberal construction which the judges may give the constitution, will those of the states lose its rights, until they become so trifling and unimportant, as not to be worth having.”).

87. See, e.g., Robert G. Natelson, *The Enumerated Powers of States*, 3 NEV. L.J. 469 (2003) (arguing that federal judicial judgments have improperly expanded the sphere of federal institutions at the expense of state sovereignty); see also Larry J. Obhof, *Federalism, I Presume? A Look at the Enforcement of Federalism Principles Through Presumptions and Clear Statement Rules*, 2004 MICH. ST. L. REV. 123, 162 (“The twentieth century was marked by a significant increase in federal authority vis-à-vis that of the states. In the judicial sphere this expansion was marked by broad constitutional interpretations that gave the federal government the power to regulate a large expanse of activity. Much of the increased federal power came at the expense of the states, which traditionally enjoyed substantial responsibilities in a number of areas of law.”).

88. FEDERAL FARMER XV (Jan. 18, 1788), *supra* note 68, at 315 (“It is true, the laws are made by the legislature; but the judges and juries, in their interpretations, and in directing the execution of them, have a very extensive influence for preserving or destroying liberty, and for changing the nature of the government.”).

89. BRUTUS XI (Jan. 31, 1788), *supra* note 68, at 419 (“They are authorised to determine all questions that may arise upon the meaning of the constitution in law.”).

90. FEDERAL FARMER XV (Jan. 18, 1788), *supra* note 68, at 316 (“[W]e may fairly conclude, we are more in danger of sowing the seeds of arbitrary government in this department than in any other.”).

91. *Id.* at 315 (“It is an observation of an approved writer, that judicial power is of such a nature, that when we have ascertained and fixed its limits, with all the caution and precision we can, it will yet be formidable, somewhat arbitrary and despotic—that is, after all our cares, we must leave a vast deal of discretion and interpretation—to the wisdom, integrity, and politics of the judges....”).

and obscurity of a court decision that imposed its will upon the people under the guise of interpreting the Constitution or a law would not be discovered or understood until much later.⁹² The result, thought the Anti-Federalists, was a kind of stealthy deployment of constitutional authority—the very opposite of what the people demand and expect in a liberal democracy.⁹³

Second, Anti-Federalists criticized the proposed Constitution for “improperly blend[ing]” the powers of law, equity, and fact in the hands of judges, contrary to the practice in “well balanced governments” of keeping these powers distinct.⁹⁴ For the Federal Farmer, the British judiciary was a model worthy of embracing in America because Great Britain possessed a judiciary where questions of law resided with a judge, those of equity with a chancellor, and those of fact with a jury.⁹⁵ The proposed American Constitution, however, granted the judiciary the authority to determine law and fact as well as the expedient maneuverability to draw on its reserve power of equity.⁹⁶

According to Anti-Federalists, the fusion of these powers within a judge in the new republic exploded the most noble and important principle of the common law.⁹⁷ This merger of functions proposed by the Federalists in the American Constitution—in which there was no evidence of “a spark of freedom”—was “a very dangerous thing” because,

if the law restrain [a judge], he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate; we have no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion.⁹⁸

92. *Id.* at 316 (“When the legislature makes a bad law, or the first executive magistrates usurp upon the rights of the people, they discover the evil much sooner, than the abuses of power in the judicial department; the proceedings of which are far more intricate, complex, and out of their immediate view. A bad law immediately excites a general alarm; a bad judicial determination, though not less pernicious in its consequences, is immediately felt, probably, by a single individual only, and noticed only by his neighbours, and a few spectators in the court.”).

93. *Id.* (“[P]articular circumstances exist at this time to increase our inattention to limiting properly the judicial powers.... We are not sufficiently attentive to the circumstances, that the measures of popular legislatures naturally settle down in time, and gradually approach a mild and just medium; while the rigid systems of the law courts naturally become more severe and arbitrary, if not carefully tempered and guarded by the constitution, and by laws, from time to time.”).

94. FEDERAL FARMER III (Oct. 10, 1788), *supra* note 68, at 237 (“In the judicial department, powers ever kept distinct in well balanced governments, are no less improperly blended in the hands of the same men—in the judges of the supreme court is lodged, the law, the equity and the fact.”).

95. *Id.* at 244 (“[W]e have no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain....”).

96. *Id.* (“The judicial powers of the federal courts extends in law and equity to certain cases: and, therefore, the powers to determine on the law, in equity, and as to the fact, all will centre in the supreme court....”).

97. FEDERAL FARMER XV (Jan. 18, 1788), *supra* note 68, at 319 (“The supreme court, in cases of appeals, shall have jurisdiction both as to law and fact: that is, in all civil causes carried up to the supreme court by appeals, the court, or judges, shall try the fact and decide the law. Here an essential principle of the civil law is established, and the most noble and important principle of the common law exploded.”).

98. FEDERAL FARMER III (Oct. 10, 1788), *supra* note 68, at 244 (“These powers [of law and equity], which by this constitution are blended in the same hands, the same judges, are in Great-Britain [sic] deposited in different hands—to wit, the decision of the law in the law judges, the decision in equity in the chancellor, and the trial of the fact in the jury. It is a very dangerous thing to vest in the same judge power to decide on the law, and also general powers in equity; for if the law restrain him, he is only to step into his shoes of equity, and give what judgment his reason or opinion may dictate; we have no precedents in this country, as yet, to regulate the divisions in equity as in Great Britain; equity, therefore, in the supreme court for many years will be mere discretion. I confess in the constitution of this supreme court, as left by the constitution, I do not see a spark of freedom or a

The theory of judicial discretion, in the view of the Anti-Federalists, was a mere smokescreen that emboldened judges and conferred upon them the arbitrary power to rely on conscience, opinion, caprice, or politics in deciding cases.⁹⁹ On this point, too, the Anti-Federalists appear to have been correct.¹⁰⁰

Third, quite apart from the institutional features of the judiciary that make it susceptible to self-aggrandizement, thought the Anti-Federalists, the individuals that occupy the bench are likewise subject to similarly strong temptations.¹⁰¹ The least of these is certainly not the thirst for—and, once acquired, obsession with—power, something the Anti-Federalists saw as a source of great concern.¹⁰² When faced with the choice to either limit or extend their own powers, judges, Brutus believed, would of course hesitate to restrict them and would instead “enlarge the sphere of their own authority.”¹⁰³ Judges have no inducement to do otherwise, argued Brutus, particularly because “there is no power above them, . . . no authority that can remove them, and they cannot be controuled by the laws of the legislature.”¹⁰⁴ The Anti-Federalists perceived this disincentive¹⁰⁵ to acting responsibly and respectfully of popular will as having the disastrous effect of elevating judges to a unique status in the American polity: “they are independent of the people, of the legislature, and of every power under heaven.”¹⁰⁶ Women and men discharging their public duty under

shadow of our own or the British common law.”).

99. FEDERAL FARMER XV (Jan. 18, 1788), *supra* note 68, at 322–23 (“Therefore, it would seem, that if [the words ‘in law and equity’] mean any thing, they must have a further meaning: yet I will not suppose it intended to lodge an arbitrary power or discretion in the judges, to decide as their conscience, their opinions, their caprice, or their politics might dictate.”).

100. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (“When the political branches of the government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.”); *Powell v. McCormack*, 395 U.S. 486, 549 (1969) (“[I]t is the responsibility of this Court to act as the ultimate interpreter of the Constitution.” (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803))); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (proclaiming that the Court possesses the final word on constitutional matters) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

101. BRUTUS XI (Jan. 31, 1788), *supra* note 68, at 421 (“[E]very body of men invested with office are tenacious of power. . .”).

102. *Id.* at 422 (“[J]udges will be interested to extend the powers of the courts. . .”).

103. *Id.* at 421 (“Every body of men invested with office are tenacious of power; they feel interested, and hence it has become a kind of maxim, to hand down their offices, with all its rights and privileges, unimpaired to their successors; the same principle will influence them to extend their power, and increase their rights; this of itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority. Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise.”).

104. BRUTUS XV (Mar. 20, 1788), *supra* note 68, at 322 (“[T]hey have made the judges *independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.”).

105. FEDERAL FARMER XV (Jan. 18, 1788), *supra* note 68, at 316 (“In this country, we have been always jealous of the legislature, and especially the executive; but not always of the judiciary: but very few men attentively consider the essential parts of it, and its proceedings, as they tend to support or destroy free government: only a few professional men are in a situation properly to do this; and it is often alleged, that instances have not frequently occurred, in which they have been found very alert watchmen in the cause of liberty, or in the cause of democratic republics.”).

106. See *supra* note 104.

these illusory parameters could not resist the urge to "soon feel themselves independent of heaven itself."¹⁰⁷ Again, much as the Anti-Federalists were correct in their prophecies on the first two points of contention, the third marks yet another score in the Anti-Federalist column.¹⁰⁸

IV. POPULAR SOVEREIGNTY AND THE JUDICIAL BOUNDARY

With the benefit of nearly two centuries of American jurisprudence, the great constitutional scholar Alexander Bickel drew attention to the Federalists' mistaken assessment of the constitutional balance of power in the American polity.¹⁰⁹ Though Bickel agreed with the Federalist proposition that inequity would inevitably result in the distribution and exercise of power among the three branches of government,¹¹⁰ Bickel and the Federalists disagreed on which branch warranted the most suspicion. For Bickel, it was not the legislature, as it had been for Federalists. It was the judiciary. According to Bickel, the judiciary's practice of judicial review concealed a "counter-majoritarian force" insofar as judicial review allowed an unelected and unrepresentative branch to thwart the will of the people.¹¹¹ Contrary to the founding myth of three co-equal branches—and contrary to Federalist forecasts of a *least* dangerous judicial branch—Bickel argued that the judiciary had appropriated to itself determinative authority in constitutional interpretation, in so doing subordinating the people's judgment to its own.¹¹²

To rectify this imbalance, Bickel turned to the legislature to remedy what he regarded as a "deviant" state of affairs.¹¹³ Bickel stopped short of insisting on enlarged legislative powers but demanded a recalibration of constitutional powers, which he anchored in three principles: (1) representative government; (2) democratic legitimacy; and (3) popular will.¹¹⁴ First, explained Bickel in his discussion of the rightful role of Congress, democracy does not require legislators to endorse the theory of government-by-referenda, or "the making of decisions in town meeting by a show of hands,"¹¹⁵ but it must allow for a representative majority to effect change when the people so desire.¹¹⁶ Second, statutes possess a degree of democratic legitimacy that is superior to judicial decisions because "statutes are the product of the legislature and the executive acting in concert, and [because] the executive represents a very different constituency [than the legislature, this] tends to cure inequities of over- and underrepresentation."¹¹⁷ And third, Bickel regarded

107. BRUTUS XV (Mar. 20, 1788), *supra* note 68, at 438.

108. See, e.g., Jesse H. Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 811 (1974) (stating that judicial invalidation of an executive or legislative act usurps popular will); Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1538 (1990) ("Accountability to the electorate is the touchstone of legitimacy.").

109. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2d ed. 1986).

110. *Id.* at 18.

111. *Id.* at 16.

112. *Id.* at 16–17.

113. *Id.* at 18.

114. *Id.* at 16–33.

115. *Id.* at 17.

116. *Id.*

117. *Id.* at 18.

the legislative branch as best positioned and most suitably equipped to express the will of the people.¹¹⁸

These three Bickellian principles may serve as useful signposts in brainstorming promising strategies to temper the overwhelming influence of the judiciary on American civic and political culture. This is a problem that Mark Tushnet calls “democratic debilitation”—a crisis of popular constitutional legitimacy that occurs “when the public and their democratically elected representatives cease to formulate and discuss constitutional norms, instead relying on the courts to address constitutional problems.”¹¹⁹ Three particular reforms—each enlarging the powers of the people—could return the American polity to participatory and popular government: (1) reinstating the Council of Censors, an artifact of the British colonial era through which the people could articulate their views on important matters of the day;¹²⁰ (2) restoring the Council of Revision, an analogue of the Council of Censors that sanitized legislation before the bill was given effect;¹²¹ and (3) importing a Canadian mechanism known as a non-obstante clause, which authorizes the legislature to suspend the application of a judicial decision.¹²²

A. *The Council of Censors*

The first Bickellian mechanism that could help to remedy the existing constitutional imbalance is drawn from colonial America, specifically from Pennsylvania. The Pennsylvania Constitution of the pre-revolutionary era was widely regarded as more democratic than all others.¹²³ The document left no doubt that the state government was subordinate to the people and that public officials held their posts and discharged their respective functions only at the pleasure of the people.¹²⁴ Indeed, the stated objective of the constitution was to transform Pennsylvania into a majoritocracy, thus removing all obstructions separating the people from the sacred liberty of self-governance.¹²⁵ This populism imbued early American legislatures like Pennsylvania’s and manifested itself in frequent legislative corrections of judicial missteps.¹²⁶

The Pennsylvania Constitution of 1776 created an elected body known as the Council of Censors.¹²⁷ The Council consisted of regular citizens¹²⁸—two from each

118. *See id.* at 16–17.

119. Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 275 (1995).

120. *See infra* Part IV.A.

121. *See infra* Part IV.B.

122. *See infra* Part IV.C.

123. JACKSON TURNER MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781–1788*, at 42 (3d ed. 2004).

124. Christian G. Fritz, *Recovering the Lost Worlds of America's Written Constitutions*, 68 ALB. L. REV. 261, 288 (2005) (“Moreover, the constitution repeatedly suggested that government and its officials were subordinate to the people, subject to the people’s vigilant scrutiny.”).

125. James A. Gardner, *Forcing States to Be Free: The Emerging Constitutional Guarantee of Radical Democracy*, 35 CONN. L. REV. 1467, 1489 (2003).

126. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995).

127. Donald Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401, 472 n.369 (1986).

128. Nash E. Long, *The “Constitutional Remand”: Judicial Review of Constitutionally Dubious Statutes*, 14 J.L. & POL. 667, 695 n.107 (1998).

county,¹²⁹ twenty-six in total¹³⁰—upon whom the people conferred the authority to call a convention to amend the state constitution if two thirds of its members agreed.¹³¹ The Council was a hybrid entity that stood hierarchically above the unicameral legislature, meaning that the Council's powers and authority trumped those of the single-chamber legislative branch.¹³² Though the Council of Censors merged both executive and judicial functions into a single station,¹³³ there were no judges or judicial officers on the Council.¹³⁴

Every seven years, the people of Pennsylvania would elect the membership of the Council of Censors, which would subsequently gather to consider the state of the Pennsylvania Constitution.¹³⁵ The Council's role was to inquire, as a general matter, whether any of the three branches of government had improperly enlarged the scope of its powers at the expense of the others,¹³⁶ for instance, whether the legislature had deviated in any material way from the commands of the constitution.¹³⁷ Its specific function was to assess, sometimes through investigations,¹³⁸ whether the constitution had been violated in any respect.¹³⁹ In short, its duty was to interpret the constitution.¹⁴⁰ This quasi-judicial body was not authorized to declare laws unconstitutional but was entitled to censure, impeach, recommend the repeal of laws, convene a constitutional convention,¹⁴¹ denounce the state assembly,¹⁴² and declare statutes "repugnant" to the constitution.¹⁴³ The Council sought to uphold the original purity of the text, emphasizing preservation over alteration.¹⁴⁴

The Council of Censors was an august body of Pennsylvanians, "as distinguished for virtue and talents as any body of men ever representing the people of

129. HARRY M. WARD, *THE WAR FOR INDEPENDENCE AND THE TRANSFORMATION OF AMERICAN SOCIETY* 24 (2000).

130. JOHN HOWE, *LANGUAGE AND POLITICAL MEANING IN REVOLUTIONARY AMERICA* 61 (2003).

131. PA. CONST. § 47 (1776).

132. See David E. Kyvig, *Arranging for Amendment: Unintended Outcomes of Constitutional Design*, in *UNINTENDED CONSEQUENCES OF CONSTITUTIONAL AMENDMENT* 9, 15 (David E. Kyvig ed., 2000).

133. Anthony V. Baker, "So Extraordinary, So Unprecedented an Authority": A Conceptual Reconsideration of the Singular Doctrine of Judicial Review, 39 DUQ. L. REV. 729, 741 n.55 (2001).

134. Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421, 447 (1991).

135. Price Marshall, "A Careless Written Letter"—Situating Amendments to the Federal Constitution, 51 ARK. L. REV. 95, 103 (1998).

136. James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 924 n.423 (2004).

137. *Respublica v. M'Clean*, 4 Yeates 399, 404 (Pa. 1807).

138. See Charles H. Sturdy, Note, *Section 27A Confronts Lampf and the Constitution*, 74 B.U. L. REV. 645, 652 n.41 (1994).

139. See Randall T. Shepard, *The Renaissance in State Constitutional Law: There Are a Few Dangers, but What's the Alternative?*, 61 ALB. L. REV. 1529, 1550 n.100 (1998).

140. *Commonwealth ex rel. Reynolds v. Bussier*, 5 Serge. & Rawle 451, 460 (Pa. 1820).

141. Jeremy Elkins, *Declarations of Rights*, 3 U. CHI. L. SCH. ROUNDTABLE 243, 307 n.214 (1996).

142. See James E. Castello, Comment, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 CAL. L. REV. 491, 549 n.307 (1986) (citing *Powell v. McCormack*, 395 U.S. 486, 529–30 (1969)).

143. Cf. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1528 (2004) (referring to the Vermont Council of Censors' finding that an act was "'repugnant' to Vermont's Declaration of Rights").

144. MARC W. KRUMAN, *BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA* 55 (1999).

Pennsylvania, urg[ing] the justice and equity of the claims upon the legislature.”¹⁴⁵ Its constitutional interpretations and judgments were considered binding upon the Supreme Court of Pennsylvania.¹⁴⁶ Among the several official acts that the Council performed in the interest of the democratic integrity of Pennsylvania, the Council issued criticisms aimed at Pennsylvania legislators for having circumvented customary legislative procedures by adopting illusory “resolves” instead of more properly proposing and passing bills.¹⁴⁷ The Council also issued a now-famous report that chronicled instance after instance of illegitimate legislative intervention into the judicial process at the behest of private and special interests.¹⁴⁸ In addition, the Council denounced the expulsion of a legislator for failing to conform to the procedures set forth in the state constitution.¹⁴⁹

But the Council was maligned by observers of the day for its exclusivity, malapportionment, and supermajority—as opposed to simple majority—requirement.¹⁵⁰ These perceived shortcomings were only exacerbated by the Council’s inability to insulate itself from public opinion and the pressure that only a vacillating electorate can bring to bear on elected officials.¹⁵¹ Madison—who for his part was most interested in seeing each branch of government respect its own constitutional boundary¹⁵²—did not approve of the Council largely because he thought it relied more on passion than on reason in exercising its function.¹⁵³ This criticism resonated with Pennsylvania Republicans, who viewed the Council as a threat to the rule of law.¹⁵⁴ The Council was ultimately abandoned in the Pennsylvania Constitution of 1790.¹⁵⁵

The Vermont Constitution authorized a similar Council of Censors, elected every seven years,¹⁵⁶ composed of “men of the first respectability for intelligence, having great experience in legislation, and a thorough knowledge of the principles of [the

145. *Barney v. Sutton*, 2 Watts 31, 36 (Pa. 1833).

146. *Johns v. Nichols*, 2 U.S. (2 Dall.) 184, 186 (Pa. 1792) (conceding that “exposition given to this subject by the Council of Censors, is binding on the present decision”).

147. *INS v. Chadha*, 462 U.S. 919, 982 & n.17 (1983).

148. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 220–21 (1995) (quoting REPORT OF THE COMMITTEE OF THE COUNCIL OF CENSORS 6 (Bailey ed. 1784)).

149. *Powell v. McCormack*, 395 U.S. 486, 529 (1969).

150. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 483–84 (1994) (“Thus, as early as 1777 we find Pennsylvanians expressly attacking the exclusivity of the Council of Censors. Though specially elected by the people for the express purpose of effecting constitutional change—and thus in some respects like a convention—the Council was malapportioned and operated under a two-thirds rule.”).

151. See James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 944 n.156 (1997) (noting the impact of public opinion on the work of the Council).

152. See James A. Gardner, *Democracy Without a Net? Separation of Powers and the Idea of Self-Sustaining Constitutional Constraints on Undemocratic Behavior*, 79 ST. JOHN’S L. REV. 293, 300–01 (2005).

153. Emery G. Lee III, *The Federalist in an Age of Faction: Rethinking Federalist No. 76 on the Senate’s Role in the Judicial Confirmations Process*, 30 OHIO N.U. L. REV. 235, 249 (2004) (quoting THE FEDERALIST NO. 50 (James Madison)).

154. MORTIMER N.S. SELLERS, *AMERICAN REPUBLICANISM: ROMAN IDEOLOGY IN THE UNITED STATES* 41 (1994).

155. Stephen B. Presser, *Constitutional Amendments: Dangerous Threat or Democracy in Action?*, 5 TEX. REV. L. & POL. 209, 222 (2000).

156. *Hartness v. Black*, 114 A. 44, 45 (Vt. 1921).

Vermont] government.”¹⁵⁷ The mission of the Vermont Council resembled its Pennsylvanian analogue: “to enquire whether the constitution has been preserved inviolate, in every part; and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves, or exercised, other or greater powers, than they are entitled to by the constitution.”¹⁵⁸ The judgments of the Vermont Council were viewed with great respect.¹⁵⁹ But they were merely advisory in nature and were given force and effect only through adoption by the state legislature.¹⁶⁰ Vermont abolished its Council in 1870.¹⁶¹

The Pennsylvania and Vermont Councils may offer the building blocks for a federal mechanism to give voice to the people and to authorize them to shape the society in which they live. Imagine a federal incarnation of the Council of Censors. Every twelve years—or a preferable interval—the American people would head to the polls in order to elect a national Council of Censors. Each state would place one member on the Council, thus creating a fifty-member body. Candidates for the post would likely be women and men of great learning whose experience, education, and endorsements would presumably be the foremost indicators against which voters would gauge their respective candidacies. It would be naïve to believe that partisanship would not infuse these elections. But partisanship would not necessarily be harmful to the collective exercise of electing a state representative to serve as a sentinel for the sanctity of the Constitution.

This fifty-member group would convene periodically to assess whether the federal judiciary had properly interpreted the U.S. Constitution and to ensure that the judiciary had not exceeded its constitutional function. One example of judicial excess might be an opinion that sets public policy in the guise of simply resolving a private dispute or interpreting the Constitution or a law.¹⁶² Another example of judicial action that could warrant the attention of the Council could be an opinion that inappropriately or too hastily invalidates a duly enacted congressional statute.¹⁶³ In the face of such judicial excess, the Council would have the power to annul the judicial action where the Council determined that the judiciary had erred in some way.

The universe of reviewable decisions would include only final U.S. Supreme Court judgments and appellate or other federal decisions for which an appeal had not been sought or for which the Supreme Court had denied certiorari. This would effectively be an additional layer of judicial review, the principal difference being that popularly elected representatives would be charged with the sole function of performing the review. Admittedly, it would be an extraordinary act to reverse a Supreme Court decision. For this reason, it may not be defensible to allow a simple majority of a Federal Council of Censors to trump a Supreme Court or other federal

157. *Lyman v. Mower*, 2 Vt. 517, 519 (1830).

158. VT. CONST. of 1777, ch. 2, § 44.

159. *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 738 A.2d 539, 553 (Vt. 1999).

160. *State v. Saari*, 568 A.2d 344, 348–49 (Vt. 1989).

161. *State v. Wood*, 536 A.2d 902, 907 n.6 (Vt. 1987).

162. *See, e.g., Kelo v. City of New London*, 545 U.S. 469 (2005) (authorizing urban renewal programs).

163. *See, e.g., United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act, which prohibited the possession of a firearm in and around a school).

judicial opinion. Therefore, suppose the requirement to void a judicial decision were a supermajority—requiring thirty-three of the fifty votes on the Council, or sixty-six percent of a quorum. Such a threshold would have at least two laudable features. First, it would ensure that only an extraordinary expression of popular will could displace the decision of a judge, who may assert some measure of popular consent buttressing her official acts as a result of her presidential appointment and Senate confirmation by majority vote. Second, requiring a supermajority threshold from the fifty American states would give due regard to the diversity that distinguishes the several states from each other. To be more specific, if a supermajority of the fifty dissimilar and distinct states found agreement on an issue of national importance, that would be in and of itself a declaration that merited notice and whose popular legitimacy would be difficult to question.

Let us imagine how the Council would operate in practice. Think back to the controversial decision of *Roe v. Wade*¹⁶⁴—the fabled precedent upholding the right to a medical abortion—which was issued in 1973 to mixed reactions from Americans.¹⁶⁵ The Federal Council of Censors could have chosen to review the Supreme Court's decision after the release of the judgment. If a supermajority of the members of the Council—representing at least thirty-three of the fifty states of the Union—determined that the Supreme Court had rendered an incorrect or imprudent interpretation of the Constitution, the decision would have been invalidated. The result would have been to return the United States to the status quo existing before the case had been decided. On the other hand, if at least eighteen of the fifty states believed that *Roe* had been correctly decided, this block of councilors would have been sufficient to thwart any reversal of the Supreme Court. What is more, this eighteen-state declaration of popular support for the Supreme Court's decision in *Roe* could have perhaps helped to quell or at least placate the vocal dissenters of that era who, still today, have yet to accept *Roe* as the law of the United States.¹⁶⁶ The Council could therefore also play a unifying role in a divided country. And it would do so while adhering to the three principles against which Bickel measured the advisability of a recalibration of constitutional power—representative government, democratic legitimacy, and popular will.

B. The Council of Revision

For a second Bickellian mechanism to restore balance to the American Constitution, we may look to post-revolutionary New York. The 1777 Constitution of the state of New York established a Council of Revision, composed of the state Governor, the Chancellor of the court of equity, and members of the state supreme

164. 410 U.S. 113 (1973).

165. See, e.g., Michael D. Daneker, *Moral Reasoning and the Quest for Legitimacy*, 43 AM. U. L. REV. 49, 70 n.150 (1993) (citing newspaper articles for the proposition that Americans were divided on abortion when the Court decided *Roe*); Michel Rosenfeld, *Law and the Postmodern Mind: The Identity of the Constitutional Subject*, 16 CARDOZO L. REV. 1049, 1066 (1995) (stating that "bitter controversy" followed *Roe*).

166. See, e.g., Joan Biskupic, *Abortion Foes Gain on New Front*, USA TODAY, Feb. 8, 2006, at A1 (tracking the progress of bills on "fetal pain"); Suzannah Gonzales, *Roe v. Wade Foes Rally*, AUSTIN-AM. STATESMAN, Jan. 29, 2006, at B1 (describing march organized to protest holding of *Roe*); Stephanie Simon, *Abortion Ban Foes Petition for a Choice*, L.A. TIMES, Apr. 9, 2006, at A1 (outlining effort in South Dakota to challenge holding of *Roe*).

court.¹⁶⁷ The function of the Council was to review legislation for defects before it was enacted into law.¹⁶⁸ In this role, the Council of Revision would review a bill enacted by the New York legislature and could subsequently reject it on the basis of unconstitutionality or, more generally, on the basis of inconsistency with the public good.¹⁶⁹ This was a very broad power of review, permitting the Council to veto bills that simply seemed improper in their eyes.¹⁷⁰ In vetoing a proposed bill, the Council of Revision could either invalidate it outright or return it to the legislature for reconsideration with suggested amendments.¹⁷¹ When the Council invalidated a bill, one of the judges sitting on the panel would normally write an opinion explaining the Council's grounds for rejection.¹⁷² A supermajority of both houses of the bicameral legislature could override the Council's veto or return of bills.¹⁷³

During the Council's lifetime, it returned 169 bills to the legislature with its objections; and the legislature overrode fifty-one of those returns.¹⁷⁴ The Council exercised its veto power on three principal bases, in descending order of frequency: (1) policy reasons; (2) unconstitutionality; and (3) inconsistency with the spirit of the constitution.¹⁷⁵ As evidence of the broad acceptance of the fusion of powers exhibited by the Council of Revision, consider that the Chancellor of Equity of the day—a member of the Council of Revision—did not object to the role of the Council.¹⁷⁶ The Chancellor was the head of the New York Chancery Court, which was a trial court whose jurisdiction, in the British legal tradition, did not extend beyond matters of equity.¹⁷⁷

The impetus for the Council was a "post-colonial distrust for the executive and a widespread consensus that legislative supremacy was the surest guarantee of the Revolution."¹⁷⁸ Once launched into service, the Council safeguarded minority rights and interests, mitigated the abuse of legislative police powers, fostered private enterprise, and eliminated punitive tax bills.¹⁷⁹ It also protected private rights from

167. William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1016 (2001).

168. Jonathan I. Blake, Note, *State ex rel. Ohio Academy of Trial Lawyers v. Sheward: The Extraordinary Application of Extraordinary Writs and Other Issues; The Case That Never Should Have Been*, 29 CAP. U. L. REV. 433, 451 (2001).

169. John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 563 (1993).

170. N.Y. CONST. OF 1777, art. III.

171. J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 444 (1990).

172. Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 736, 782 n.188 (1992).

173. N.Y. CONST. OF 1777, art. III.

174. James T. Barry III, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 245 (1989).

175. Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 35 n.116 (1996).

176. Harold J. Krent, *Foreword: The Legacy of Chancellor Kent*, 74 CHI.-KENT. L. REV. 3, 5 n.12 (1998).

177. G. Edward White, *The Chancellor's Ghost*, 74 CHI.-KENT. L. REV. 229, 234 (1998).

178. John T. Buckley, *The Governor—From Figurehead to Prime Minister: A Historical Study of the New York State Constitution and the Shift of Basic Power to the Chief Executive*, 68 ALB. L. REV. 865, 871 (2005).

179. 1 FRANK W. PRESCOTT & JOSEPH F. ZIMMERMAN, *THE POLITICS OF THE VETO OF LEGISLATION IN NEW YORK STATE* 52 (1980).

arbitrary and ill-advised state bills.¹⁸⁰ Indeed, “[f]ar from being an impassable barrier to good legislation, the element of compromise was omnipresent as testified by passage of laws satisfactory to both sides after vetoes.”¹⁸¹ The Council of Revision’s review of legislation before its enactment effectively eliminated the need for judicial review in New York.¹⁸² The Council of Revision was abolished by unanimous vote¹⁸³ at the New York Constitutional Convention of 1821.¹⁸⁴ Nevertheless, it was not until the New York Constitutional Convention of 1846 that final judicial appeals were heard by judges instead of a body consisting of, among others, elected legislators.¹⁸⁵

The New York Constitution was something of a model against which the delegates assembled to design the constitutional framework for the new republic measured their own creation.¹⁸⁶ At the Constitutional Convention of 1787 in Philadelphia, the framers proposed a national equivalent of the Council of Revision—modeled on the New York Council¹⁸⁷—on which members of the executive and judiciary would sit in order to endorse or reject legislation before its enactment.¹⁸⁸ The Council, it was proposed, would operate according to the following rules: (1) it would be composed of the President of the United States and the U.S. Supreme Court justices; (2) proposed bills could be vetoed by either the President or the U.S. Supreme Court justices; (3) two thirds of both houses of Congress were required to override either a presidential or judicial veto of the proposed bill; and (4) three quarters of both houses of Congress were required to override a joint presidential-judicial veto of the proposed bill.¹⁸⁹

James Madison championed this proposal as an apparatus that would prevent judicial invalidation of congressional legislation.¹⁹⁰ The founders viewed the Council as an instrument to preserve constitutional limits.¹⁹¹ The intent underlying the Council was to make the judiciary politically accountable for its judgments insofar as the judiciary would be bound, in its judgments, to respect the

180. John F. Hart, *Fish, Dams, and James Madison: Eighteenth-Century Species Protection and the Original Understanding of the Takings Clause*, 63 MD. L. REV. 287, 305 n.129 (2004) (quoting Letter from James Madison to Caleb Wallace (Aug. 23, 1785), in 8 PAPERS OF JAMES MADISON 351 (Robert A. Rutland & William M.E. Rachal eds., 1973)).

181. PRESCOTT & ZIMMERMAN, *supra* note 179, at 52.

182. Walter E. Swearingen, Note, *Wachtler v. Cuomo: Does New York’s Judiciary Have an Inherent Right of Self-Preservation?*, 14 PACE L. REV. 153, 162 n.38 (1994).

183. 1 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK, 1609–1822*, at 175–76 (1994).

184. Steven Wilf, *The First Republican Revival: Virtue, Judging, and Rhetoric in the Early Republic*, 32 CONN. L. REV. 1675, 1696 (2000).

185. Robert Stevens, *The Independence of the Judiciary: The Case of England*, 72 S. CAL. L. REV. 597, 609 (1999).

186. J. Richard Broughton, *Rethinking the Presidential Veto*, 42 HARV. J. ON LEGIS. 91, 99 (2005).

187. Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 759 n.42 (1984); Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL’Y REV. 261, 271 n.30 (2004).

188. Lynn D. Wardle, *Goodridge and “the Justiciary” of Massachusetts*, 14 B.U. PUB. INT. L.J. 57, 63 (2004).

189. Kory A. Atkinson, Comment, *In Defense of Federalism: The Need for a Federal Institutional Defender of State Interests*, 24 N. ILL. U. L. REV. 93, 113 n.155 (2003).

190. Ralph E. Avery, *Article III and Title 11: A Constitutional Collision*, 12 BANKR. DEV. J. 397, 401 n.13 (1996).

191. Larry D. Kramer, *Marbury and the Retreat from Judicial Supremacy*, 20 CONST. COMMENT. 205, 209 (2003).

interpretations of the Council of Revision.¹⁹² Madison also envisioned another purpose for the Council: to remain abreast of state legislation and to advise Congress of any state bills or laws that ran afoul of the federal government's vision for the Union.¹⁹³ The Council would stand guard over the nation as a dispassionate umpire and defender of minority rights, vetoing state legislation before it could awaken factionalism in the several states.¹⁹⁴

Madison was troubled by the practice of judicial review because it stifled the voice of the people.¹⁹⁵ He therefore urged the idea of the Council of Revision upon his fellow delegates as a way to prevent the judiciary from being "paramount in fact to the legislature, which was never intended, and can never be proper."¹⁹⁶ Indeed, as Federalist James Wilson maintained, the Council was necessary because "[l]aws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect."¹⁹⁷ Madison also recommended that a law that had been invalidated by the Council of Revision could still survive—provided that it was repassed by a legislative supermajority after a subsequent election.¹⁹⁸

The idea was ultimately rejected¹⁹⁹—not once but four times²⁰⁰—each time proposed by Madison,²⁰¹ despite the strong backing of Madison²⁰² and Wilson as well as other influential statesmen like Gouverneur Morris and Charles Pinckney,²⁰³ Roger Sherman,²⁰⁴ Luther Martin, and George Mason.²⁰⁵ The proposal was denied repeatedly in large part because delegates to the Convention feared that the Council would bring judges too close to the realm of policy making.²⁰⁶ Although Anti-Federalist Elbridge Gerry viewed the Council as a way to keep judges within their proper sphere—addressing matters of law and not public policy²⁰⁷—he nevertheless

192. Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 ARK. L. REV. 729, 822–23 (2005).

193. Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 498 (1988).

194. Kenneth W. Hartman, *Lochner's Cousin: Demonstrating Originalism's Failure and its Disingenuous Nature*, 34 CREIGHTON L. REV. 517, 544 (2001).

195. See Thomas W. Merrill, *Chief Justice Rehnquist, Pluralist Theory, and the Interpretation of Statutes*, 25 RUTGERS L.J. 621, 631 n.29 (1994).

196. James Madison, *Observations on the "Draught of a Constitution for Virginia,"* in 11 THE PAPERS OF JAMES MADISON 285, 292–93 (Robert A. Rutland & Charles F. Hobson eds., 1977).

197. Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1159 (1987) (citations omitted).

198. David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 332 n.180 (1992).

199. Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1009 n.38 (1994).

200. Senator Orrin G. Hatch, *Modern Marbury Myths* (Nov. 23, 1987), in 57 U. CIN. L. REV. 891, 895 (1989).

201. Suzanna Sherry, *An Essay Concerning Toleration*, 71 MINN. L. REV. 963, 974 n.54 (1987).

202. Gerard N. Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 NEB. L. REV. 205, 214 n.42 (1999).

203. Baker, *supra* note 133, at 741.

204. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 599 (1984).

205. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 244–45 (2000).

206. Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 88 (2000).

207. Raoul Berger, *Reflections on Constitutional Interpretation*, 1997 BYU L. REV. 517, 526–27 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 97–98 (Max Farrand ed., 1911)); Paul E. McGreal, *Ambition's Playground*, 68 FORDHAM L. REV. 1107, 1176 (2000).

worried that seating judges on such a Council would make them feel and act like statesmen rather than jurists.²⁰⁸ Nathaniel Gorham agreed, concurring with the principle that judges cannot “be presumed to possess any peculiar knowledge of the mere policy of public measures.”²⁰⁹

Delegates registered six general objections to the adoption of a national Council of Revision: (1) the power of judges to assess the constitutionality of laws was an adequate safeguard against possible legislative aggrandizement; (2) having reviewed the constitutionality of legislation before it becomes law, judges would be conflicted should the law later appear before them in a case or controversy; (3) the power of the executive would be diminished; (4) the people, not the judiciary, would stand watch over their own rights; (5) judges would have no expertise in matters of policy; and (6) the Council would violate the separation of powers doctrine.²¹⁰ On this final point—the separation of powers—Madison and Wilson appreciated the danger of fusing the executive and judicial powers into a Council of Revision but nonetheless determined that the virtues of the proposed Council outweighed the concerns occasioned by blending governmental functions.²¹¹

The Founders’ solicitude for the doctrine of separation of powers is evident in their similar rejection of a Privy Council, which would have been comprised of the executive department leaders and the Chief Justice of the U.S. Supreme Court and whose function would have been to advise the President.²¹² The delegates agreed at least on this: the judiciary should act only in matters that were “judiciary” in nature.²¹³ Delegates were also attuned to the value of judicial independence, which they feared might be compromised were judges to occupy a formal role in the legislative process.²¹⁴ All options having been dutifully considered, the Convention crafted and adopted the executive veto in place of the proposed Council.²¹⁵

It is exceedingly important to underscore that the Convention’s rejection—and New York’s abolition—of the Council is not effective ammunition for an argument against judicial review.²¹⁶ Quite the contrary, these choices—to turn away from the Council—are testimony to the decision in early America to embrace devices that

208. Douglas W. Kmiec, *Natural-Law Originalism—Or Why Justice Scalia (Almost) Gets It Right*, 20 HARV. J.L. & PUB. POL’Y 627, 647 (1997).

209. Rex E. Lee & Richard G. Wilkins, *On Greatness and Constitutional Vision: Justice Byron R. White*, 1994 BYU L. REV. 291, 309 n.99 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73 (Max Farrand ed., rev. ed. 1966)).

210. Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1058 (1997).

211. John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 644 n.159 (1996).

212. Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 432 (1996).

213. Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 26–27 (1998).

214. Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 46 (1998); Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 STAN. L. REV. 1, 49 (2000).

215. Wendy E. Ackerman, Comment, *Separation of Powers and Judicial Service on Presidential Commissions*, 53 U. CHI. L. REV. 993, 1003 n.53 (1986).

216. Gene R. Nichol, Jr., *Rethinking Standing*, 72 CAL. L. REV. 68, 94 (1984).

would rein in the legislative branch.²¹⁷ It is equally noteworthy that both proponents and opponents of the Council understood that the judiciary would possess the power of judicial review.²¹⁸ But this authority was, and remains, bound by discernible rules. For instance, federal courts must adhere to exacting standing requirements,²¹⁹ as well as the constitutional rule prohibiting advisory opinions.²²⁰ Courts are also subject to jurisdictional limits without which they would effectively operate as the Council of Revision that was rejected long ago—a body that would have had the power to review all legislation.²²¹ Moreover, the judiciary may not invalidate a congressional law within its jurisdiction on a whim—it may do so only when it can articulate a reason why the law is unconstitutional.²²² To be sure, the debates over the Council of Revision suggest that judges were not intended to possess any authority to invalidate an unwise, unpopular, or ill-conceived law so long as that law did not contravene the Constitution.²²³ The judicial perimeter is therefore unmistakable.

It is true that at least some of the Founders believed that judges should discharge some extrajudicial function, unbound by the exacting separation of powers doctrine.²²⁴ But the founding debates effectively foreclosed that avenue insofar as they made clear the stakes involved in weighing the merits of the Council of Revision: a vote in favor of the Council was a vote for judges to have the power to invalidate laws on policy grounds.²²⁵ Walter Berns concurs and argues that the Convention's decision not to adopt a Council of Revision for the new republic demonstrates the intent of framers to deny the judiciary any role in matters of policy and to limit judges to the constitutional text and its animating history.²²⁶ What we learn from the debates of the Constitutional Convention is that the Founders confined the judiciary to a reactive role, invalidating statutes only on grounds of

217. Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 829 n.68 (1969).

218. David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 655–56 (1982).

219. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (outlining standing rules guarding access to courts).

220. See *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945) (“This Court is without power to give advisory opinions.”); see also *Muskraat v. United States*, 219 U.S. 346, 357 (1911) (“By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.”).

221. Jules B. Gerard, Commentary, *A Restrained Perspective on Activism*, 64 CHI.-KENT L. REV. 605, 609–10 (1988).

222. Randy E. Barnett, Foreword: *The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37, 49 (1988).

223. John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1667 n.90 (2001).

224. Jon C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 GEO. J. LEGAL ETHICS 1, 36 (2004).

225. John C. Eastman, *Judicial Review of Unenumerated Rights: Does Marbury's Holding Apply in a Post-Warren Court World?*, 28 HARV. J.L. & PUB. POL'Y 713, 718 (2005).

226. WALTER BERNS, *TAKING THE CONSTITUTION SERIOUSLY* 201–04 (1987).

unconstitutionality.²²⁷ The rejection of the Council of Revision was an express act to deny judges a roving commission to shape the public policy of the new republic.²²⁸ Most framers discarded the notion that judges should have a hand in policy matters.²²⁹ Broadly stated, then, the Council of Revision failed because the Founders did not wish to impose external controls over the people and their representatives.²³⁰

Having reviewed the essential features of the colonial-era Council of Revision, let us ask how such a Council might operate today to restore balance to the U.S. Constitution. The evolution of the American judiciary into a dominant actor in constitutional politics is a significant difference from the founding era, a difference that may warrant establishing something similar in principle to the Council of Revision. As Mark Tushnet has argued, the Fourteenth Amendment has made the adoption of a Council of Revision more compatible with the modern contours of federalism than would have been the case at the Constitutional Convention.²³¹ Another scholar argues that the failure to adopt the Council of Revision at the Constitutional Convention of 1787 is directly traceable to “the development of a kind of judiciary that is problematic in a representative democracy.”²³² The principal institutional concern with a modern incarnation of the Council of Revision is that it would duplicate—and therefore dilute—the presidential veto power.²³³ But that assumes that the composition of a modern Council of Revision would also include the President, who would have been a member of the Madisonian Council of Revision. Moreover, several modern-day Western liberal democracies—France, Germany, Italy, and Spain—possess a constitutional analogue to the Council of Revision.²³⁴

The late William Rehnquist, former Chief Justice of the U.S. Supreme Court, once proposed that a modern Council of Revision should reflect some measure of popular will insofar as its members should be elected or appointed by the President and confirmed by the Senate.²³⁵ The function of the modern Council would be to review congressional legislation before its enactment into law by presidential signature pursuant to the Constitution.²³⁶ The Council would possess the power to either invalidate the bill—on grounds of unconstitutionality—or return it to the Congress with suggested amendments. A supermajority of both houses of the Congress could trump the Council’s decision to invalidate a bill. The effect of the

227. Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 585 (2002).

228. Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 702 (2000).

229. Arthur E. Wilmarth, Jr., *Elusive Foundation: John Marshall, James Wilson, and the Problem of Reconciling Popular Sovereignty and Natural Law Jurisprudence in the New Federal Republic*, 72 GEO. WASH. L. REV. 113, 168–69 (2003).

230. Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1726–27 (1998).

231. Mark Tushnet, *Politics, National Identity, and the Thin Constitution*, 34 U. RICH. L. REV. 545, 556 n.45 (2000).

232. Ann Stuart Anderson, *A 1787 Perspective on Separation of Powers*, in *SEPARATION OF POWERS—DOES IT STILL WORK?* 138, 149 (Robert A. Goldwin & Art Kaufman eds., 1986).

233. Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1363–64 (1988).

234. Leslie Friedman Goldstein, *From Democracy to Juristocracy*, 38 LAW & SOC’Y REV. 611, 619 (2004).

235. William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976).

236. U.S. CONST. art. I, § 7, cl. 2.

Council's blessing of legislation would be to shield the law from invalidation at the hands of the judiciary. Such legislation would effectively be judicial review-proof. The judiciary would still retain its authority to interpret the Constitution, construe legislation, and resolve disputes, but it would lose its power to invalidate duly passed laws. This proposal, like the Council of Censors, would be consistent with the three Bickellian principles of representative government, democratic legitimacy, and popular will.²³⁷

C. *The Legislative Override*

Consider two additional options in the search for balance in the constitutional process: (1) conferring upon the legislature an unqualified power to override judicial invalidations of its statutes; or (2) conferring upon the legislature a qualified power to override judicial invalidations of its statutes. The first option represents a parliamentary supremacy in which the people, through the legislature, retain determinative authority over the constitutionality of statutes. Let us call it legislative sovereignty. Recognizing that the people—through their elected representatives—should have the power to craft the laws that bind them, a parliamentary supremacy holds that unelected and unaccountable judges cannot defensibly be given the authority to nullify a duly passed statute infused with democratic legitimacy that only a legislature acting properly can confer. This option would restore democratic legitimacy to the American polity, as it would leave matters of popular sovereignty to elected representatives and remove them from the purview of what some observers regard as Platonic “philosopher kings”²³⁸ sometimes detached from the practical realities of managing the affairs of the state.

It is unclear whether Bickel would look favorably upon such a change. In his discussion on the role of Congress, Bickel refers to British parliamentary supremacy but does not give readers his assessment of its relative merits and demerits.²³⁹ As for the *Federalist*, its authors plainly disapprove of anything resembling an unqualified legislative override: It is the judiciary's duty, writes the *Federalist*, “[t]o declare all acts contrary to the manifest tenor of the Constitution void.”²⁴⁰ Hamilton concedes that judicial review is a controversial practice inasmuch as it appears to place the judiciary above the legislature in the governmental hierarchy: “some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power.”²⁴¹ But, declares Hamilton, “[i]t can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature.”²⁴² Indeed, “[t]he courts must declare the sense of the law; and if they

237. See *supra* notes 109–118 and accompanying text.

238. See, e.g., Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 833 (1999); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 699; Anthony A. Peacock, Response, *Law, Courts, and American Culture*, 29 VT. B.J. & L. DIG., Summer 2003, at 6, 8.

239. BICKEL, *supra* note 109, at 22.

240. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 41, at 438.

241. *Id.*

242. *Id.* at 440.

should be disposed to exercise WILL *instead of* JUDGMENT, the consequence would equally be the substitution of their pleasure for that of the legislative body.”²⁴³ On this point, Hamilton is correct. The judiciary must not exercise its will instead of judgment, meaning that it must not supplant the will of the people with its own. But Hamilton steers clear of squarely confronting the very real risk that has materialized in the present day—that the judiciary would ever exercise its will instead of judgment.

The second option—a qualified legislative override—is a Canadian innovation. The Canadian qualified legislative override is known as the “Notwithstanding Clause” and is enshrined in the *Canadian Charter of Rights and Freedoms*²⁴⁴—the Canadian equivalent to the American Bill of Rights. Pursuant to the Notwithstanding Clause, either the Federal Parliament or a provincial legislature may adopt legislation to override fundamental civil and political freedoms guaranteed in the *Charter*.²⁴⁵ The adopted legislation remains in place for up to five years, at which time the enacting legislature may re-enact it indefinitely for successive periods lasting up to five years.²⁴⁶ The legislative body may use the Clause in two ways. First, the body may use the Clause preemptively in anticipation of objectionable legislation—for instance, in the case of a provincial legislature invoking the Clause to neutralize legislation about to be passed by the Federal Parliament.²⁴⁷ Second, the Clause may be used retrospectively to negate a judicial decision.²⁴⁸ Perhaps the best way to conceptualize this qualified legislative override is as an opt-out provision by which Parliament or any of the provincial equivalents may opt-out of or suspend the application of a judicial decree in their respective jurisdictions for renewable periods of up to five years.²⁴⁹ The purpose of this override clause, as expressed by the Minister of Justice of the day, “is to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy.”²⁵⁰

The Notwithstanding Clause derives from the theory of parliamentary supremacy, which Canada inherited from its British forefathers.²⁵¹ Canadian parliamentary supremacy has always been qualified by constitutional or conventional limitations,

243. *Id.* (emphasis added).

244. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) § 33.

245. For instance, such fundamental freedoms include freedom of expression, conscience, association, and assembly; freedom from unreasonable search and seizure; and the right to equality. But some rights are unassailable under the Canadian Constitution, including democratic, education, and mobility rights. *See id.*

246. *Id.* § 33(3) (providing that an override “shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration”).

247. *See* Jason Murphy, Note, *Dialogic Responses to M. v. H.: From Compliance to Defiance*, 59 U. TORONTO FAC. L. REV. 299, 309–12 (2001) (discussing preemptive use of the Clause by the Alberta legislature).

248. Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1267.

249. *See* Nadia Ahmad, *The Canadian Charter of Rights and Freedoms: An Example of Canadian Dependence on the United States or Commitment to International Law*, 7 J. INT’L L. & PRAC. 89, 91–92 (1998); Jeffrey L. Friesen, Note, *The Distribution of Treaty-Implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models*, 94 COLUM. L. REV. 1415, 1445 (1994).

250. DAVID JOHANSEN & PHILIP ROSEN, PARLIAMENTARY RESEARCH BRANCH, LIBRARY OF PARLIAMENT, *THE NOTWITHSTANDING CLAUSE OF THE CHARTER 7–8* (Library of Parliament) (rev. ed. May 2005).

251. Robert A. Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV. 1191, 1233–34 (1984).

namely federalism and the distribution of discrete functions between Parliament and the several provincial equivalents.²⁵² But the Clause adds a novel twist to the theory of parliamentary supremacy. It embodies a political compromise between traditional principles of parliamentary supremacy and the model of constitutionalism reflected in the United States,²⁵³ between legislative sovereignty and judicial review,²⁵⁴ thus situating Canada in an intermediate position between its British ancestor and American neighbor.²⁵⁵ Specifically, the Notwithstanding Clause reconciles parliamentary supremacy with the modern vanguard of entrenched rights.²⁵⁶ Importantly, Parliament's authority to invalidate judicial decisions pursuant to the Clause does not operate in the same way as it did under the prior Canadian rule of parliamentary supremacy.²⁵⁷

Instead, this unique marriage has created what Canadian scholars have described as a dialogue or a continuing exchange of thoughts and theories on constitutional interpretation between the court and the legislature.²⁵⁸ Yet the dialogue extends beyond these two parties. By upholding Canada's traditional respect for the principle of parliamentary supremacy—while concurrently embracing a culture of judicial review intended to safeguard basic rights and liberties retained by Canadians, subject only to an extraordinary action on the part of the people through the legislature—the Notwithstanding Clause not only cultivates dialogue between both the legislature and the judiciary but also between the legislature and the people.²⁵⁹ The result is the promotion of the important principle of democratic inclusion,²⁶⁰ which ensures that the court can neither chill nor preempt public discourse on matters that have yet to find resolution, or even yet to face substantive deliberation and debate, among the people. This is the very essence of participatory democracy.

Yet the Notwithstanding Clause has been all but abandoned by politicians.²⁶¹ Legislatures have invoked the Notwithstanding Clause only seventeen times since its inception.²⁶² According to one scholar, the Clause has been consigned to

252. Yoav Dotan, *The Spillover Effect of Bills of Rights: A Comparative Assessment of the Impact of Bills of Rights in Canada and Israel*, 53 AM. J. COMP. L. 293, 297 (2005).

253. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707, 722 (2001).

254. Terrence Meyerhoff, *Multiculturalism and Language Rights in Canada: Problems and Prospects for Equality and Unity*, 9 AM. U. J. INT'L L. & POL'Y 913, 914 (1994).

255. PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 915 (4th ed. 1997).

256. Tushnet, *supra* note 119, at 279.

257. A. Wayne MacKay, *The Legislature, the Executive and the Courts: The Delicate Balance of Power or Who Is Running This Country Anyway?*, 24 DALHOUSIE L.J., Fall 2001, at 37, 57.

258. See generally Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)*, 35 OSGOODE HALL L.J. 75 (1997) (discussing the theory of institutional dialogue).

259. See Tsvi Kahana, *Understanding the Notwithstanding Mechanism*, 52 U. TORONTO L.J., Spring 2002, at 221, 260 n.108 (stating that dialogue occurs not only between the legislature and the judiciary, but also between the legislature and the people).

260. Julie Debeljak, *Rights Protection Without Judicial Supremacy: A Review of the Canadian and British Models of Bills of Rights*, 26 MELB. U. L. REV. 285, 322 (2002).

261. Jeffrey Goldsworthy, *Judicial Review, Legislative Override, and Democracy*, 38 WAKEFOREST L. REV. 451, 466–69 (2003).

262. Canadian legislatures have summoned the Notwithstanding Clause in such contexts as language, labor, marriage, education, pension, and agriculture. See Barbara Billingsley, *Section 33: The Charter's Sleeping Giant*,

permanent illegitimacy and is unlikely to resurrect into a viable constitutional instrument of popular choice.²⁶³ Comparative constitutionalist Mark Tushnet suggests two reasons why the Notwithstanding Clause remains on the shelf, unused by political actors. First, the Canadian legislative process contains a number of “veto points,” or discrete sites along the lawmaking timeline, at which an engaged minority can cripple legislative efforts before they even become matters of public discourse.²⁶⁴ Second, using the Clause in a retrospective fashion comes at a great political cost to the enacting legislature, which must effectively say to the public that it will violate a right that the court has said that they possess as a matter of constitutional law.²⁶⁵ This latter point is echoed by Kent Roach, who argues that the reluctance of legislatures to invoke the Clause is a failure of governmental and public will.²⁶⁶ But it may more accurately represent the degeneration of the Canadian political process into what one observer has called “judicial trumping”—courts arrogating to themselves the last word in the inter-branch institutional dialogue—and *not* the failure of legislatures to revise, reverse, or override judicial decisions.²⁶⁷ Whatever the reason for its disfavor in Canada, the Notwithstanding Clause may reflect an antiquated notion of Canadian parliamentary supremacy that has been supplanted by a model better described as constitutional supremacy.²⁶⁸

It may be helpful to understand precisely what is at stake in the Notwithstanding Clause by exploring the first and only circumstance under which it was invoked in direct response to a judicial decision. Subsequent to a Canadian Supreme Court decision invalidating a ban on non-French language on commercial signs,²⁶⁹ the Quebec provincial government responded by invoking the Notwithstanding Clause to override the decision.²⁷⁰ Under Quebec’s countering legislation, the provincial legislature suspended the application of the Canadian Supreme Court’s decision in the province of Quebec.²⁷¹ The provincial government announced that it would reverse the judgment of the supreme court, thereby making it lawful to do in Quebec just what the supreme court had forbidden: to ban the use of non-French languages on commercial signs.²⁷² I define this option as a “qualified” legislative override because the legislative effect is not indefinite, as it would be under the first option of legislative sovereignty. Once it is invoked by a legislature, the qualified override

21 WINDSOR Y.B. ACCESS JUST. 331, 339–41 (2002).

263. F.L. Morton, *Can Judicial Supremacy Be Stopped?*, POL’Y OPTIONS, Oct. 2003, at 25, 28–29 (arguing that the Clause cannot be resurrected at the federal level but proposing a plan to resurrect it at the provincial level).

264. Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 833–34 (2003).

265. *Id.* at 819, 825.

266. KENT ROACH, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* 175 (2001).

267. Mary Liston, Willis, ‘Theology,’ and the Rule of Law, 55 U. TORONTO L.J. 767, 785–86 (2005).

268. See GERALD L. GALL, *THE CANADIAN LEGAL SYSTEM* 95 (1995); see also Frank Iacobucci, *The Supreme Court of Canada: Its History, Powers and Responsibilities*, 4 J. APP. PRAC. & PROCESS 27, 31 (2002) (“As such, constitutional supremacy, rather than parliamentary supremacy, now characterized the Canadian legal and constitutional landscape.”).

269. *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

270. JOHANSEN & ROSEN, *supra* note 250, at 10.

271. *Id.*

272. *Id.*

would remain in place for up to only five years, after which it would expire unless the enacting legislature deemed it necessary, as a matter of popular sovereignty, to extend the law.

Although the Notwithstanding Clause in Canada “provides a cushion, a comfort zone to which there can be a retreat when the balance in the partnership seems to lean too far towards the courts,”²⁷³ it is unlikely to help resettlement of the constitutional balance in the United States. The qualified legislative override is perhaps much less palatable in the United States than it is in Canada. Consider the consequences of a qualified legislative override. A number of southern states may have invoked this override to suspend the application of the U.S. Supreme Court’s judgment in *Brown v. Board of Education*,²⁷⁴ as may have been the case for northern states in *Dred Scott v. Sandford*,²⁷⁵ thus leading to a troubling fragmentation of the American polity.

Bickel and the *Federalist* would come to divergent conclusions on the use of such a qualified override. Bickel would find virtue in the qualified override. True, Bickel’s *Least Dangerous Branch* embraces a role for the Court in advancing social change. For instance, Bickel viewed *Brown* as a celebration of the role of the Court.²⁷⁶ Nevertheless, Bickel questioned the propriety of judicial policymaking and judicial review. This is precisely what the Notwithstanding Clause aims to temper. Indeed, as Guido Calabresi has observed, the Canadian Constitution is “a wonderful example of an essentially Bickellian constitution.”²⁷⁷ Thus, Bickel is likely to have looked favorably upon the qualified override as a solution to the counter-majoritarian difficulty that he observed in the American polity.

On the other hand, the *Federalist* suggests that the qualified override would not have been well received. Hamilton brandished as his lynchpin the “necessity” of uniformity in national law. Consider his words: “The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.”²⁷⁸ Madison further suggested the imprudence of adopting a qualified legislative override in his discussion of the Lycian confederacy and the Achaean league: “[W]e know that the ruin of one of them proceeding from the incapacity of the federal authority to prevent the dissensions, and finally the disunion, of the subordinate authorities.”²⁷⁹

Nonetheless, the theory underpinning the Notwithstanding Clause is promising. As political theorist Michael Perry has observed, the Clause offers “an opportunity for a deliberative judicial consideration of a difficult and perhaps divisive human rights issue *and* an opportunity for electorally accountable officials to respond, in

273. Patricia Hughes, *Section 33 of the Charter: What’s the Problem, Anyway? (Or, Why a Feminist Thinks Section 33 Does Matter)*, 49 U.N.B. L.J. 169, 174 (2000).

274. 347 U.S. 483 (1954).

275. 60 U.S. (19 How.) 393 (1856).

276. See BICKEL, *supra* note 109, at 244–72.

277. Guido Calabresi, *The Supreme Court 1990 Term: Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 124 (1991).

278. THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 41, at 446.

279. THE FEDERALIST NO. 45 (James Madison), *supra* note 41, at 294.

the course of ordinary politics, in an effective way.”²⁸⁰ The process of dialogue between the legislature and the people raises the possibility of initiating “some process, more reasoned than court-packing and more accessible than constitutional amendment, through which the justice and wisdom of [extremely questionable judicial] decisions can be publicly discussed and possibly rejected.”²⁸¹ The dialogue fostered between the popularly elected branch and the people is more than mere window dressing—the possibility of a legislative override of judicial decision brings with it the prospect of “rich democratic debate,”²⁸² characterized by focused and informed public political discussion.²⁸³ In this respect, the qualified legislative override permits the popularly elected branch to do what it does best, which is to consider, weigh, and implement polymorphic matters of policy that are beyond the institutional aptitudes of the judiciary.²⁸⁴

V. CONCLUSION

As Alexis de Tocqueville once observed, “There is hardly a political question in the United States which does not sooner or later turn into a judicial one.”²⁸⁵ The story of the American judiciary’s increasing power has been a tale about the corresponding decline of the theory of legislative supremacy.²⁸⁶ The first state governments in the United States believed deeply in legislative sovereignty and the notion that the legislature was “the chief organ of the popular will.”²⁸⁷ The gavel of the court was subordinate to the voice of the people, as expressed through the legislature.²⁸⁸ At the Constitutional Convention, delegates agreed that the power to make the law should be distinct from the power to expound on it.²⁸⁹ Thus, Charles Black reasoned that, at the founding, “[t]he function of the judges was thus placed in sharpest antithesis to that of the legislator,” who, in contrast to the judge, should reflect on “what the law ought to be.”²⁹⁰

How far the judiciary has come. Although the U.S. Supreme Court has itself acknowledged that it is not a “super-legislature”²⁹¹ and has accepted that it should

280. Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 691 (2003).

281. Peter H. Russell, *Standing Up for Notwithstanding*, 29 ALTA. L. REV. 293, 295 (1991).

282. Lorraine Weinrib, *Learning to Live with the Override*, 35 MCGILL L.J. 541, 549 (1990).

283. Gal Dor, *Constitutional Dialogues in Action: Canadian and Israeli Experiences in Comparative Perspective*, 11 IND. INT’L & COMP. L. REV. 1, 23 (2000).

284. John D. Whyte, *On Not Standing for Notwithstanding*, 28 ALTA. L. REV. 347, 354 (1990) (describing the Clause as a tool that “preserve[s] social arrangements that have been carefully worked out by legislators through a process in which competing interests have been fully explored and understood and compromises have been thoughtfully constructed”).

285. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

286. Matthew P. Harrington, *Judicial Review Before John Marshall*, 72 GEO. WASH. L. REV. 51, 94 (2003).

287. FRANCIS R. AUMANN, *THE CHANGING AMERICAN LEGAL SYSTEM: SOME SELECTED PHASES* 159–60 (1940).

288. WALTER F. DODD, *STATE GOVERNMENT* 81 (1928).

289. EDWARD CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 43–44 (1963).

290. CHARLES BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN DEMOCRACY* 160 (1960).

291. *Heller v. Doe*, 509 U.S. 312, 319 (1993); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952).

not discharge a policymaking role,²⁹² its modern history proves otherwise. It may be necessary to remind the American people that “[t]he supreme power is in the people, and rulers possess only that portion which is expressly given them.”²⁹³ That is precisely why “a general presumption that rulers will govern well is not a sufficient security.”²⁹⁴ The constitutional balance between the people and the respective branches of the government requires that the people assert themselves when they see choices about their lives made by those who are immune from any consequence. The American people must remember that “[t]he body of the people, principally, bear the burdens of the community; they of right ought to have a controul in its important concerns, both in making and executing the laws, otherwise they may, in a short time, be ruined.”²⁹⁵ As Kermit Roosevelt wrote in compelling fashion to his fellow Americans, “We must not lose sight of the fact that it is not just *a* Constitution the Court is expounding. It is *our* Constitution, and judges can no more sever its application from popular understanding than they can tell us who we are.”²⁹⁶

The options surveyed in the previous Part—the Councils of Censors and Revision, and the legislative override—appear to offer unsatisfactory solutions to the problem of judicial ingress into the public square. In theory, each may be a constructive solution to the existing American constitutional imbalance. Each device canvassed above—particularly the Councils of Censors and Revision—holds great promise for popular engagement in the American judicial and political processes. Moreover, these devices may help defuse or dampen national tensions that appear on the heels of controversial judicial decisions. But in practice, these devices would likely fail. As a practical matter, entrenched political interests are likely to intervene to prevent such a substantial political restructuring of the judicial process. Although the three mechanisms above generally adhere to the three principles against which Bickel measured the advisability of a recalibration of constitutional power—representative government, democratic legitimacy, and popular will²⁹⁷—several problems are likely to stand in the way of such reforms. First, these new judicial controls in the American polity would require a constitutional amendment, and any constitutional amendment is of course difficult to pass.²⁹⁸ Yet, even assuming a sponsor of these reforms could muster the requisite

292. See, e.g., *United States v. Rutherford*, 442 U.S. 544, 555 (1979) (“Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy.”); *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) (“It is up to legislatures, not courts, to decide on the wisdom and utility of legislation.”); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (“Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.”).

293. *FEDERAL FARMER VI* (Dec. 25, 1787), *supra* note 68, at 260.

294. *CATO V* (Nov. 22, 1787), *supra* note 68, at 117.

295. *FEDERAL FARMER XV* (Jan. 18, 1788), *supra* note 68, at 320.

296. Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1719 (2005).

297. See *supra* notes 109–118 and accompanying text.

298. Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121, 144 (1996) (alteration in original) (“Nothing is ‘easy’ about the processes prescribed by Article V.”); Mario J. Rizzo & Douglas Glen Whitman, *The Camel’s Nose Is in the Tent: Rules, Theories, and Slippery Slopes*, 51 UCLA L. REV. 539, 590 (2003) (stating that “amendments are notoriously difficult to pass”); Jennifer Cotner, Note, *How the Spending Clause Can Solve the Dilemma of State Sovereign Immunity from*

popular support to pass an amendment, legislators are likely to view both the Councils of Censors and Revision as intrusions upon their own powers and preeminence in Washington.²⁹⁹ More fundamentally, these mechanisms would require rethinking the American Constitution on a large scale. Even if one *could* conceive of a constitutional amendment that would find support from all necessary constituencies, an amendment instituting any of the tools described above would trigger other domino-effect amendments to the Constitution.³⁰⁰ This is not an appetizing prospect.

Therefore, in brainstorming how to properly superintend the Court's mounting disproportionate influence, perhaps the answer lies not in expanding the powers of the people through popular or legislative institutions—as the three models described above propose—but instead in limiting the reach of the judiciary. Any such strategy would have to address the two principal ways in which courts normally exceed their prudent role: (1) federal judicial invalidations of statutes in a manner that reflects Bickel's countermajoritarian difficulty; and (2) judicial excursions like *Roe* and *Bush v. Gore*,³⁰¹ the latter effectively reducing the Electoral College from a body of designated state electors to an arbitrary nine-person electorate. Neither *Roe* nor *Bush* invalidated congressional statutes, yet they nevertheless strike observers as improper entries into the political process.³⁰² These two cases induce discomfort in Americans concerned with participatory democracy and the integrity of the political process, the first because the Court cast itself as a super-legislature in issuing an opinion that reads like a statute,³⁰³ and the second because the Court blocked the Congress from discharging its constitutionally—and statutorily—delegated function as referee in mediating disputes in electoral contests.³⁰⁴

Intellectual Property Suits, 51 DUKE L.J. 713, 742 (2001) ("Constitutional amendments are extremely difficult to pass in the United States."); Melissa A. Glidden, Recent Development, *Federal Marriage Amendment*, 41 HARV. J. ON LEGIS. 483, 486 (2004) ("As intended by the framers, constitutional amendments are extremely difficult to pass, and only seventeen have succeeded since passage of the Bill of Rights in 1791, although more than 10,000 attempts have been made." (footnotes omitted)).

299. For instance, United States Senators would have to contend with members of the Council of Censors for the status of the state's main representative in Washington. However, this power struggle would unlikely emerge between councilors and members of the United States House of Representatives, who represent only small districts within states. But seven states currently have only one state-wide member of the House of Representatives. See Henry L. Chambers, Jr., *Enclave Districting*, 8 WM. & MARY BILL RTS. J. 135, 181 n.184 (1999). Each state is entitled to at least one member of the House of Representatives. U.S. CONST. art. I, § 2, cl. 3.

300. See, e.g., U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); *id.* art. III, § 1 (stating that "[t]he judicial Power of the United States, shall be vested in one supreme Court"); *id.* art. VI, cl. 2 (providing that the Constitution "shall be the supreme Law of the Land").

301. 531 U.S. 98 (2000).

302. See, e.g., Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1049–50 (2001); Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679, 687 (2001); Kevin Phillips, *His Fraudulency the Second? The Illegitimacy of George W. Bush*, AM. PROSPECT, Jan. 29, 2001, at 22. But see John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775, 776 (2001) (supporting the U.S. Supreme Court's decision in *Bush*).

303. See Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792, 800 (1991) (describing *Roe* as a "judicial statute").

304. See Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335, 341–42 (2001). But see Ronald D. Rotunda, *Yet Another Article on Bush v. Gore*, 64 OHIO ST. L.J. 283 (2003) (defending the *Bush* Court).

For an instructive look at what more closely resembles the proper judicial role in an American participatory democracy, we may turn to political theorist Cass Sunstein, who has articulated in persuasive fashion his apprehension of the judiciary's swelling silhouette over the American political process at the expense of the people through the legislature.³⁰⁵ Sunstein urges the judiciary to "proceed[] in a way that is catalytic rather than preclusive, and that is closely attuned to the fact that courts are participants in an elaborate system of democratic deliberation."³⁰⁶ Sunstein unveils his theory of judicial minimalism, which holds that "sometimes the best decision is [for judges] to leave things undecided"³⁰⁷ with a few cautionary words for the judiciary: "When a democracy is in a state of ethical or political uncertainty, courts may not have the best or the final answers."³⁰⁸ Indeed, declares Sunstein, "[j]udicial answers may be wrong" or "[t]hey may be counterproductive even if they are right."³⁰⁹

In the context of these pages, the relevance of judicial minimalism is its promise to "promote democratic goals, not simply by leaving things undecided but also by allowing opinion to coalesce over time and by spurring processes of democratic deliberation."³¹⁰ Sunstein describes his theory of judicial minimalism in the following passage:

A minimalist court settles the case before it, but it leaves many things undecided. It is alert to the existence of reasonable disagreement in a heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. It avoids clear rules and final resolutions. Alert to the problem of unanticipated consequences, it sees itself as part of a system of democratic deliberation; it attempts to promote the democratic ideals of participation, deliberation, and responsiveness. It allows continued space for democratic reflection from Congress and the states.³¹¹

Sunstein's laudatory objective is to revive and sustain a culture of deliberative democracy. The practice of judging, according to Sunstein, should reflect a philosophy of "democracy-promoting minimalism," an ambitious model that "require[s] deliberative judgments by democratically accountable bodies"³¹² and "trigger[s] or improve[s] processes of democratic deliberation [by] provid[ing] spurs and prods to promote democratic deliberation itself."³¹³ This measured approach to discharging the solemn judicial function furthers the liberal democratic values of democratic accountability and judicial reason-giving and prevents "excessive judicial intervention into political domains."³¹⁴

305. The description of Sunstein's theory is adapted from Richard Albert, *Popular Will and the Establishment Clause: Rethinking Public Funding to Religious Schools*, 35 U. MEM. L. REV. 199, 232–34 (2005).

306. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 263 (1999).

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at 259.

311. *Id.* at ix–x.

312. *Id.* at 26.

313. *Id.* at 27.

314. *Id.* at 28.

To illuminate his conception of judicial minimalism, Sunstein calls upon the seminal case *Roe v. Wade*. He argues that the Court ventured beyond its modest judicial role in advancing an elaborate trimester system and a complex body of rules and standards.³¹⁵ Sunstein argues that a minimalist judge would have issued one of two moderate and democracy-promoting judgments: “the state may not forbid a woman from having an abortion in a rape case” or “a state may not ban all abortions in all circumstances.”³¹⁶ These two options for a minimalist ruling in *Roe*—which “would have left the details undecided, to be filled in, at least in the first instance, by lower courts and democratic judgments”³¹⁷—would have reflected the best intentions of democracy-promoting minimalism and, as a consequence, would have contributed to restoring popular participation and deliberation in the United States. It is terribly important to stress that Sunstein makes no claim about whether *Roe* was rightly or wrongly decided as a matter of constitutional law. His concern lies with the process. As he writes, “at least it seems reasonable to think that the democratic process would have done much better with the abortion issue if the Court had proceeded more cautiously and in a humbler and more interactive way.”³¹⁸ Thus, according to Sunstein, the popular function of the judiciary in the American polity is to play a catalytic role in resolving important socio-legal issues of the day. Answers to the great questions of political morality must not come from the judiciary but rather from the dialogue and interchange in democratic politics.³¹⁹

Sunstein’s theory of judicial minimalism straddles the delicate median separating an aggressive policy of judicial review and a pervasive rule of legislative sovereignty. Bickel would very likely look favorably upon Sunstein’s judicial minimalism as it appears to map very comfortably onto Bickel’s vision for the Court, which is to adopt a posture that “might help to set in motion the process of political decision.”³²⁰ Indeed, judicial minimalism offers an appealing resolution to Bickel’s counter-majoritarian difficulty insofar as judicial minimalism does not propose to palliate the existing constitutional imbalance in the United States—in which the judiciary rules—by impulsively shifting governmental powers from one branch to another, only to create another equally irrational imbalance—in which, for example, the legislature would predominate.

Recognizing that America is neither a congressional supremacy nor a judicial supremacy but more precisely a constitutional supremacy, judicial minimalism places the burden to restore balance to the American polity squarely upon the judiciary. This responsibility calls on the judiciary to exercise self-restraint in conceding that certain matters are better left for resolution by the people through the elected branches of government. This, in turn, triggers a didactic process of democratically accountable deliberation in the public square by and among the people. Judicial minimalism negates the prospect of judges inappropriately

315. *Id.* at 37.

316. *Id.*

317. *Id.*

318. *Id.*

319. Cass R. Sunstein, *The Supreme Court 1995 Term: Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 101 (1996).

320. BICKEL, *supra* note 109, at 147.

interjecting themselves in the public discourse or imposing their unrepresentative and unaccountable views on the people by invalidating duly passed congressional statutes on anything other than narrow grounds. This resonates with the sentiment that “the Court that writes broadly usurps the basically legislative function of proscribing law.”³²¹

Nevertheless, as appealing as judicial minimalism may be to those who wish to return the Constitution to the people themselves, history has abidingly demonstrated that the American judiciary may not be willing to embrace a culture of minimalism. One need not look any further than *Roe* and *Bush* to confirm that the judiciary considers itself the peerless keeper of the constitutional score. These two now mythical decisions are noteworthy. Unlike liberals and conservatives who generally view these cases through conflicting lenses—liberals typically applaud and conservatives usually decry *Roe*, while the reverse is generally true of *Bush*—I stand not on political ideology but instead on political theory to regard each as equally objectionable as the other. If such judicial decisions have taught Americans anything it is that the American judiciary—unabashed by continuing criticisms of its role among the three branches of government—has often displaced popular will and declined to exercise restraint in the service of participatory democracy and civic engagement. Even in its modern conservative incarnation. Just ask Al Gore.

321. Marcia Gelpe, *Constraints on Supreme Court Authority in Israel and the United States: Phenomenal Cosmic Powers; Itty Bitty Living Space*, 13 EMORY INT'L L. REV. 493, 536 (1999).