

## The Maryland/Georgetown Constitutional Law Schmooze - Foreword: from the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power

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## Symposium

### THE MARYLAND/GEORGETOWN CONSTITUTIONAL LAW SCHMOOZE

FOREWORD: FROM THE COUNTERMAJORITARIAN DIFFICULTY TO  
JURISTOCRACY AND THE POLITICAL CONSTRUCTION OF JUDICIAL POWER

MARK A. GRABER\*

Constitutional theory in the legal academy during the late twentieth century was “obsessed” by the countermajoritarian difficulty.<sup>1</sup> Alexander Bickel informed law professors in 1962 that judicial review was “a deviant institution in the American democracy.”<sup>2</sup> “[W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive,” he famously asserted, “it thwarts the will of representatives of the actual people of the here and now.”<sup>3</sup> Passionately devoted to both popular sovereignty and the Warren Court’s decision in *Brown v. Board of Education*,<sup>4</sup> legal scholars filled the law reviews with essays attempting to reconcile democracy and judicial review. “Grand theory in constitutional law”<sup>5</sup> became a heroic quest

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1. See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998) (“The ‘countermajoritarian difficulty’ has been the central obsession of modern constitutional scholarship.”); Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1290 (2004).

2. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 18 (1962).

3. *Id.* at 16-17.

4. 347 U.S. 483 (1954).

5. This phrase was first coined by Mark Tushnet. MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 1 (1988).

“for a function . . . which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it.”<sup>6</sup>

This legal mission did not engage the most prominent political scientists of the late twentieth century who studied the Supreme Court of the United States. Robert Dahl in 1957 informed students of American politics that judicial review rarely presented significant counter-majoritarian problems. “[I]t would appear . . . somewhat unrealistic” he declared, “to suppose that a Court whose members are recruited in the fashion of Supreme Court justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite.”<sup>7</sup> A second line of public law research detailed how judicial decisions declaring laws unconstitutional were often ignored by local officials and did not have nearly the social impact commonly attributed to them. *Engel v. Vitale*<sup>8</sup> did little to reduce official prayer in schools,<sup>9</sup> the due process revolution often bypassed police officers on the beat,<sup>10</sup> *Brown v. Board of Education* did not reduce segregation in the Jim Crow South,<sup>11</sup> and *Roe v. Wade*<sup>12</sup> made only a minor contribution to expanded access to legal abortion.<sup>13</sup> Yet another line of social science research concluded that grand constitutional theory was politically sterile. Justices based decisions primarily on their policy preferences, employing modes of legal discourse only instrumentally as means to reach politically congenial results. Jeffrey Segal and Harold Spaeth, the leading proponents of the attitudinal model of judicial behavior, declared, “Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.”<sup>14</sup>

Committed to different and conflicting research agendas, law professors and political scientists largely went their separate ways dur-

6. BICKEL, *supra* note 2, at 24.

7. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 291 (1957).

8. 370 U.S. 421 (1962).

9. KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, *THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE* (1971).

10. See GERALD N. ROSENBERG, *THE HOLLOW HOPE* 334-35 (1991) (discussing the Court's extension of increased procedural rights to criminal defendants and the limited effect it had on police conduct). *But see* DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 224-37 (1977) (documenting the difficulty in determining the effect of Court decisions on police conduct).

11. ROSENBERG, *supra* note 10, at 52.

12. 410 U.S. 113 (1973).

13. ROSENBERG, *supra* note 10, at 226-27.

14. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002).

ing the 1960s, 1970s, and 1980s. Law professors concentrated on solving a countermajoritarian problem that political scientists proclaimed did not exist. Political scientists elaborated on behavioral models of judicial behavior that law professors proclaimed demonstrated little familiarity with the legal experience. Leading political science professors cited law professors only to demonstrate the latter were simpletons.<sup>15</sup> Leading law professors did not bother citing political scientists at all.<sup>16</sup>

During the mid-1990s a rapprochement began. A growing school of historical institutionalists in public law proposed models of judicial behavior that incorporated how ideas, including ideas about law and legal institutions, influenced legal decisions. Rogers Smith insisted that only through careful study of legal opinions could scholars identify what kind of liberal Justice Thurgood Marshall was and the debt such conservatives as Chief Justice William Rehnquist owed to the American liberal tradition.<sup>17</sup> Howard Gillman insisted that Justices understood themselves as committed to legal forms and reasoning and that those commitments both shaped and constrained the influence of their policy preferences on judicial decisions.<sup>18</sup> Many prominent law professors acknowledged that the Supreme Court was not the sole oracle of constitutional principle. Sanford Levinson pointed to prominent strands in the American constitutional tradition which highlighted constitutional reasoning outside of courts.<sup>19</sup> Barry Friedman suggested that constitutional decisions were typically consequences of dialogues between courts and elected officials.<sup>20</sup> Whether judicial decisions were perceived as countermajoritarian, his magisterial history of the countermajoritarian difficulty demonstrated, de-

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15. See *id.* at 48-53 (arguing that legal scholars merely “cloak the reality of the Court’s decision-making process”).

16. Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 *LAW & SOC. INQ.* 309, 314-16 (2002) (book review).

17. See ROGERS M. SMITH, *LIBERALISM AND AMERICAN CONSTITUTIONAL LAW* 65 (1985) (analyzing the Court’s treatment of constitutional issues and noting the ease with which liberals and conservatives can use the same analytic paradigm to serve their distinct ends); Rogers M. Smith, *Political Jurisprudence, the “New Institutionalism,” and the Future of Public Law*, 82 *AM. POL. SCI. REV.* 89, 100-01 (1988) (arguing that judicial decisionmaking allows room for judges to exercise personal choice through their opinions, although those choices are constrained by the choices made in the past).

18. HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* 11 (1993); Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in *SUPREME COURT DECISION-MAKING* 65, 67-68 (Cornell W. Clayton & Howard Gillman eds., 1999).

19. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 7-8 (1988).

20. Barry Friedman, *Dialogue and Judicial Review*, 91 *MICH. L. REV.* 577, 653-55 (1993).

pended more on the political and intellectual climate of the times than on pure matters of jurisprudence.<sup>21</sup>

The *Maryland/Georgetown Constitutional Law Schmooze*,<sup>22</sup> presently held annually at the University of Maryland School of Law, builds on these increasing connections between important research agendas in the legal academy and political science. Every year, twenty or so of the leading thinkers in academic and public law, representing older and younger generations, descend upon Baltimore to discuss a topic of mutual professional interest. Rather than write and present lengthy formal papers, participants are asked to prepare a short ticket of admission that either suggests promising lines of inquiry or offers tentative hypotheses on a common subject. Conversation then goes round the table informally. One purpose is simply to inform members of one discipline what members of the other are thinking. Another is to highlight different disciplinary assumptions, points of convergence, and particular problems where insights of one discipline might inform research in the other.

Juristocracy provides a particularly good basis for an interdisciplinary conversation. The past decades have witnessed local and global explosions of judicial power.<sup>23</sup> Lisa Hilbink's essay observes how "the 'judicial turn' that began in Europe in the wake of World War II has spread to almost all corners of the globe."<sup>24</sup> An increasing number of countries have adopted written constitutions, constitutional courts, and judicial review. These new constitutional courts are intruding into more and more areas traditionally reserved for other political decisionmakers.<sup>25</sup> Noga Morag-Levine's essay notes the enormous influence of such transnational institutions as the European Court of

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21. See Friedman, *supra* note 1, at 342; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 5 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1387 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 980-81 (2000); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 159-60 (2002).

22. Mark Tushnet, the founder of the *Georgetown Schmooze*, deserves credit for the appellation, the concept, and, most important, his exceptional support of what is presently the *Maryland/Georgetown Schmooze*.

23. See, e.g., TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000); THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995).

24. Lisa Hilbink, *Beyond Manicheanism: Assessing the New Constitutionalism*, 65 MD. L. REV. 15, 15 (2006).

25. HIRSCHL, *supra* note 23, at 169-210.

Human Rights on “adjudicative bodies well beyond Europe.”<sup>26</sup> “Judicial review is suddenly everywhere,” Gordon Silverstein concludes.<sup>27</sup>

Americans are witnessing similar expansions of judicial power. The Rehnquist Court, many of whose members were appointed ostensibly to stymie liberal activism, became the most activist court in history<sup>28</sup> and was the first to play an official role in determining the winner of a presidential election.<sup>29</sup> State courts are playing at least as great a role fashioning local policies. Robert Williams observes how “[i]n the last quarter of the twentieth century, American state courts emerged as major policymakers,”<sup>30</sup> some promoting same-sex marriage and others handing down decisions requiring that “billions of dollars” be “redirected to poor school districts as a result of school finance litigation.”<sup>31</sup> Even family and drug courts are playing more substantial policy roles. Richard Boldt and Jana Singer detail how such institutions “have largely repudiated the classical virtues of restraint, disinterest and modesty, replacing these features of the traditional judicial role with bold, engaged, action oriented norms.”<sup>32</sup>

Scholars in law, political science, and other disciplines are concentrating on two dimensions of the increased empowerment of courts throughout the world and the United States. The first set of questions concerns the causes of juristocracy. Grand constitutional theory treated unelected justices as seizing power from elected officials, creating the tension between democracy and judicial review that animated the countermajoritarian difficulty. More recent scholarship suggests that judicial review is often politically constructed, that elected officials have numerous political and policy reasons for empowering constitutional courts.<sup>33</sup> The second set of questions con-

26. Noga Morag-Levine, *Judges, Legislators, and Europe's Law: Common-Law Constitutionalism, and Foreign Precedents*, 65 MD. L. REV. 34, 34 (2006).

27. Gordon Silverstein, *Sequencing the DNA of Comparative Constitutionalism: A Thought Experiment*, 65 MD. L. REV. 48, 48 (2006).

28. THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* (2004).

29. See generally HOWARD GILLMAN, *THE VOTES THAT COUNTED: HOW THE COURT DECIDED THE 2000 PRESIDENTIAL ELECTION* (2001).

30. Robert F. Williams, *Juristocracy in the American States?*, 65 MD. L. REV. 68, 68 (2006).

31. *Id.* at 72.

32. Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 83 (2006).

33. E.g., HIRSCHL, *supra* note 23, at 11; GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS* 8-9 (2003); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 494 (2000); KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (forthcoming 2007); Paul Frymer, *Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85*, 97 AM. POL. SCI. REV. 483, 484 (2003); Howard Gillman, *How*

cerns the consequences of juristocracy. Grand constitutional theory treated the Supreme Court as the “forum of principle” in American life,<sup>34</sup> insisting that Justices had special capacities to “listen[ ] for voices from the margins.”<sup>35</sup> More recent scholarship suggests that justices are more likely to promote elite agendas, handing down decisions that favor the powerless only when doing so is consistent with elite values and interests.<sup>36</sup>

## I. CAUSES

The essays for this Symposium articulate the emerging consensus in law and political science that judicial review is politically constructed. Justices gain and increase their power to declare laws unconstitutional and make public policy when and only when at least some members of the existing governing coalition wish justices to exercise such power. George Lovell and Scott Lemieux observe that the “interaction between judges and other officials cannot be understood as a zero-sum competition in which each branch uses fixed institutional powers.”<sup>37</sup> Their essay asserts that the capacity of judges to exercise power is “often dependent on contingent, politically motivated decisions by elected officials in other branches of government.”<sup>38</sup> Elected officials empower courts for the same reasons that members of governing coalitions have historically empowered such institutions as administrative agencies. Karol Soltan’s contribution recognizes that “the recent global popularity of the delegation of decision-making authority and de facto lawmaking powers to constitutional courts” cannot be understood “in isolation from all other forms of delegation.”<sup>39</sup> Some elected officials hope courts will help them overcome problems associated with fragmented governing coalitions. Other government officials simply wish to foist responsibility on to the judiciary for making

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*Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 AM. POL. SCI. REV. 511, 511 (2002); Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425, 446 (2005) [hereinafter Graber, *Constructing Judicial Review*]; Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36 (1993) [hereinafter Graber, *The Nonmajoritarian Difficulty*].

34. RONALD DWORKIN, *A MATTER OF PRINCIPLE* 33 (1985).

35. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1537 (1988).

36. HIRSCHL, *supra* note 23, at 11-12; Graber, *Constructing Judicial Review*, *supra* note 33, at 431-38.

37. George I. Lovell & Scott E. Lemieux, *Assessing Juristocracy: Are Judges Rulers or Agents?*, 65 MD. L. REV. 100, 100 (2006).

38. *Id.* at 101.

39. Karol Soltan, *Delegation to Courts and Legitimacy*, 65 MD. L. REV. 115, 115 (2006).

politically difficult choices.<sup>40</sup> Silverstein notes the “powerful incentives for those who fear political control is slipping from their grasp to vest extraordinary power in courts and judges”<sup>41</sup> and points out that empowering independent courts may be “among the most effective signals one nation can send to others that it is a reliable investment and trading partner.”<sup>42</sup> That courts “may well bite the wrong person from time to time,” Silverstein states, will not threaten their independence or powers as long as crucial elected officials believe they are better off with a powerful judiciary than without.<sup>43</sup>

Elected officials have numerous devices for empowering courts. Common means include creating constitutions, authorizing judicial review, appointing justices to the bench known to be committed to exercising the power of judicial review, and supporting litigation aimed at having various state and federal laws declared unconstitutional. Promoting constitutional adjudication has been a particularly favored means for elected officials interested in removing issues from congresses to courts. “[O]ne of the most common ways legislators represent their voters,” Paul Frymer states, “is by increasing voters’ ability to gain access to the courts.”<sup>44</sup> Lovell and Lemieux highlight how representatives often employ “deliberate statutory ambiguity” when seeking to empower justices to make hard policy choices.<sup>45</sup> Courts remain distinctive institutions, employing legal logic even as they make political choices foisted upon them by other governing institutions. Carol Nackenoff’s contribution notes, the “Court has its own norms, dynamics, and institutional history; it has doctrine, rules, precedents, metaphors, and language peculiar to it.”<sup>46</sup> That justices bring legal perspectives to public policy questions, however, hardly places constitutional matters and questions of statutory interpretation above the political fray. Academic lawyers and social scientists now recognize that all governing agencies play a role “in the shaping of the Constitution’s meaning,”<sup>47</sup> that “various institutions are deeply linked

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40. See Keith E. Whittington, “Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583, 584-86 (2005).

41. Silverstein, *supra* note 27, at 51.

42. *Id.* at 54.

43. *Id.* at 50.

44. Paul Frymer, *Distinguishing Formal from Institutional Democracy*, 65 MD. L. REV. 125, 128 (2006).

45. Lovell & Lemieux, *supra* note 37, at 104.

46. Carol Nackenoff, *Is There a Political Tilt to “Juristocracy”?*, 65 MD. L. REV. 139, 149 (2006).

47. *Id.* at 150.

in the policymaking process.”<sup>48</sup> Constitutional politics in a world in which judicial power is politically constructed consists of struggles inside and outside of official governmental settings to empower those political actors and institutions thought sympathetic to particular political interests and constitutional visions.

The increased powers of state and local courts are as rooted in electoral politics as the increased power of federal courts. Williams details various factors that “decrease the propensity of [state appellate courts] . . . to act in a countermajoritarian fashion.”<sup>49</sup> These factors include frequent judicial elections,<sup>50</sup> constitutional texts that clearly justify judicial interventions,<sup>51</sup> and state political cultures that more clearly require courts to engage in dialogues with elected officials and politically active citizens in order to bring about policy and legal change.<sup>52</sup> Dialogues are facilitated by state constitutional amendment practices that are far more majoritarian than the procedures set out in Article V. To the extent state court decisions declaring state laws unconstitutional can be reversed by a fairly majoritarian process, judicial review in state courts does not present a countermajoritarian problem in classical form.<sup>53</sup> “Changes in judicial behavior” exhibited in local drug and family courts, Boldt and Singer similarly note, “have less to do with role modeling within the judicial branch and more to do with political pressures and institutional relationships among legislatures, courts, and administrative agencies.”<sup>54</sup> The rapid growth in the number of drug courts was largely the result of “federal funding effort[s] that pumped more than \$80 million” into those institutions.<sup>55</sup>

Constitutional courts outside the United States are, if anything, more “deeply and explicitly embedded in and contained by the democratic political process.”<sup>56</sup> Peter Quint’s essay points out that constitutional majorities in West Germany “explicit[ly]” endorsed “judicial review” and have authorized the Constitutional Court of Germany to hear constitutional disputes that do not satisfy standing requirements

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48. Frymer, *supra* note 44, at 127.

49. Williams, *supra* note 30, at 78 (quoting James P. Wenzel et al., *Legislating from the State Bench: A Comparative Analysis of Judicial Activism*, AM. POL. Q., July 1997, at 363, 376).

50. *Id.*

51. *Id.*

52. *Id.* at 78-79.

53. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION 237, 246-65 (Sanford Levinson ed., 1995) (documenting the various methods states use to amend their constitutions).

54. Boldt & Singer, *supra* note 32, at 84.

55. *Id.* at 89.

56. Hilbink, *supra* note 24, at 17.

in the United States.<sup>57</sup> The Constitutional Court of Germany exercises “moral control” over legislation, Quint explains, in part because this function “is now thoroughly endorsed by the German population and electorate.”<sup>58</sup> Many new constitutions, when sanctioning broad judicial power, provide for greater judicial accountability. Hilbink details how European and South American nations “have established institutional mechanisms and/or informal norms to ensure that judges who decide constitutional cases have a (much) higher level of representative legitimacy than do ordinary judges.”<sup>59</sup> Many nations select justices in ways that “provide rough proportionality in partisan, religious, and geographic representation”<sup>60</sup> and reject a life-tenured judiciary.<sup>61</sup> Many constitutions permit electoral majorities to override unpopular judicial decisions.<sup>62</sup> That such devices are rarely employed provides more evidence that judicial review is rarely as countermajoritarian as much literature suggests.<sup>63</sup> Lovell and Lemieux note in the American context that “[t]he availability of numerous means for challenging or reversing the effects of judicial rulings means that the finality of judicial rulings is sometimes the result of choices made by elected officials rather than the result of judges having any fixed power to have the final word.”<sup>64</sup>

Politically constructed judicial review presents accountability problems, but not the accountability problems that animate the countermajoritarian difficulty. The conflict between democracy and judicial review is not as stark as Bickel proclaimed to the extent justices declare laws unconstitutional or make public policy only when invited to do so by crucial members of a governing coalition. Richard Primus asserts that citizens are not ruled by the dead hand of the past when popular majorities choose which strands of constitutional history shall be central to the national narrative.<sup>65</sup> Rather than worry about politically unaccountable justices, Lovell and Lemieux suggest constitutional theorists worry about the problems of democratic governance

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57. Peter E. Quint, “*The Most Extraordinarily Powerful Court of Law the World Has Ever Known?*”—*Judicial Review in the United States and Germany*, 65 MD. L. REV. 150, 154-56 (2006).

58. *Id.* at 169.

59. Hilbink, *supra* note 24, at 22.

60. *Id.* at 23.

61. *Id.* at 25.

62. *Id.* at 26-27.

63. See HIRSCHL, *supra* note 23, at 18 (noting that Canada’s override clause, while not a “dead letter,” has failed to block the trend toward juristocracy).

64. Lovell & Lemieux, *supra* note 37, at 110.

65. Richard A. Primus, *Judicial Power and Mobilizable History*, 65 MD. L. REV. 171, 177-81 (2006).

that arise when representatives claim credit for legislation while surreptitiously empowering courts to make the actual policy choice. "When legislators shift divisive social issues to the judicial branch because they want to avoid electoral accountability for making hard choices," they assert, "their actions raise significant concerns about democratic accountability."<sup>66</sup> These and other ways in which elected officials promote judicial power suggest that the justification of judicial review is likely to depend on the democratic theory being employed. Popular sovereignty, standing alone, does not provide a sufficient basis for assessing whether democratic values are best served by having abortion policy made by elected state officials, many of whom have no desire to take any position on that matter,<sup>67</sup> or by justices appointed and confirmed by elected national officials. "Before abandoning court activism," Frymer reminds us, "we first need to ask what type of democracy and representation we want."<sup>68</sup>

## II. CONSEQUENCES

The participants in the Symposium on juristocracy are more divided on the consequences of increased judicial power. Hilbink is cautiously optimistic. Justices who do not "have to cater to constituents with particular demands," she writes, "are freer to decide cases on principle than are legislators who must keep one eye always on the polls."<sup>69</sup> Frymer is a similarly qualified champion of judicial power. He observes how critics of judicial review "end up creating too much of a dichotomy between courts and popular politics that ignores both the inter-webs between the two and the complicated ways in which representation is promoted within each."<sup>70</sup> Nackenoff is more pessimistic. She endorses Jack Balkin's claim that "the major beneficiaries of the emerging conservative judicial activism appeared to be whites, state governments, advertisers, opponents of environmental and land use regulation, and wealthy contributors to political campaigns."<sup>71</sup>

Quint takes a more nuanced position. On the one hand, he notes that the Constitutional Court of Germany has handed down important decisions suggesting constitutional limits on government power to legalize abortion, take military action in concert with NATO,

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66. Lovell & Lemieux, *supra* note 37, at 114.

67. MARK A. GRABER, *RETHINKING ABORTION* 148 (1996).

68. Frymer, *supra* note 44, at 129.

69. Hilbink, *supra* note 24, at 25.

70. Frymer, *supra* note 44, at 127.

71. Nackenoff, *supra* note 46, at 139 (quoting Jack M. Balkin, *Brown as Icon*, in *WHAT BROWN v. Board of Education Should Have Said* 3, 18 (Jack M. Balkin ed., 2001)).

and tax poor families.<sup>72</sup> On the other hand, Quint observes that despite the broad language in judicial opinions, the Constitutional Court of Germany rarely orders elected officials to alter previous policies significantly.<sup>73</sup> When the justices insisted on “parliamentary approval for the executive’s stationing of troops abroad,” he points out, that demand was relatively painless given that “any chancellor possessing the parliamentary support to remain in office would ordinarily also have majority parliamentary support for his desired stationing of troops.”<sup>74</sup>

Several contributors claim that expanding judicial power reduces political polarization. When political parties become dominated by their more extremist wings, courts often become more centrist institutions.<sup>75</sup> The Rehnquist Court on issues as diverse as abortion, religion, and affirmative action consistently reached compromises rejected by both the national Democratic and Republican parties.<sup>76</sup> This capacity to find the political center helps explain the relative popularity of the contemporary federal judiciary. Nackenoff points out that the Supreme Court “appears to retain broader public confidence than is enjoyed by other branches of the federal government” because “it remains sufficiently consistent and sufficiently moderate.”<sup>77</sup> Neal Devins suggests “the disjunction between lawmaker complaints about the Court and the Court’s apparent irrelevance to the electorate”<sup>78</sup> is the consequence of symbolic politics in a polarized polity. American politicians must presently gain financial support from powerful extremists on the left and right who vehemently detest judicial decisions that either limit affirmative action or legalize abortion, and appeal for votes from centrist voters who are often aware, indifferent, or reasonably approving of the relatively moderate course chartered by the Rehnquist Court. Many legislators respond to these conflicting campaign imperatives by loudly condemning “judicial activism” whenever courts hand down decisions that antagonize their political base,<sup>79</sup> while quietly supporting procedural maneuvers which prevent them

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72. Quint, *supra* note 57, at 156, 159, 161.

73. *Id.* at 164-65.

74. *Id.* at 166.

75. Mark A. Graber, *Dred Scott as a Centrist Decision*, 83 N.C. L. REV. 1229, 1268 (2005).

76. H.W. Perry, Jr. & L.A. Powe, Jr., *The Political Battle for the Constitution*, 23 CONST. COMMENT. (forthcoming 2006).

77. Nackenoff, *supra* note 46, at 144.

78. Neal Devins, *Smoke, Not Fire*, 65 MD. L. REV. 197, 197-98 (2006).

79. *Id.* at 201.

from having “a chance to vote on legislation that would restrict court power” to issue such decisions.<sup>80</sup>

Soltan suggests that the judicial moderation characteristic of the new constitutionalism is part of broader regime “efforts to enhance legitimacy.”<sup>81</sup> Relying on Arend Lijphart’s influential analysis of democratic forms,<sup>82</sup> Soltan notes that the simple majoritarian model favored by proponents of legislative supremacy solves legitimacy problems only in “small homogeneous settings.”<sup>83</sup> As societies become more heterogenous, political stability may be achieved only when constitutions establish consensual practices that enable all social groups to influence public policy. Delegation to courts is consistent with “a moderate style of politics, committed to balancing principles and ideals.”<sup>84</sup> Soltan sees “emerging . . . a new form of the balanced constitution” structured by “different legitimacy producing systems.” In this new mixed regime, government policy is legitimated partly by the influence of the people’s elected representatives, partly by the influence of particular experts in government bureaucracy, and partly by the “distinctive procedures and forms of reasoning of a court” that may be structured to ensure that prominent minorities have a say in government decisionmaking.<sup>85</sup>

This moderation, Primus suggests, is often purchased by truncating the constitutional histories available to those who wish to challenge governing majorities. His essay details how Justices both make constitutional law and tell constitutional stories that privilege particular accounts of the national narrative. The judicial power over the constitutional past, Primus explains, is “cliopathic” as well as jurispathic.<sup>86</sup> “When the Supreme Court articulates a view of constitutional history that foregrounds some elements of that history and not others,” he writes, “there is a risk that the elements of history it neglects will disappear from the view of the legal community.”<sup>87</sup> The Supreme Court’s decision in *United States v. Morrison*<sup>88</sup> holding that Congress had no power under the Fourteenth Amendment to pass the Violence Against Women Act, for example, promoted the conservative

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80. *Id.* at 202.

81. Soltan, *supra* note 39, at 116.

82. AREND LIJPHART, PATTERNS OF DEMOCRACY (1999).

83. Soltan, *supra* note 39, at 121.

84. *Id.*

85. *Id.* at 123.

86. The canonical study of the jurispathic aspects of judicial decisions is Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

87. Primus, *supra* note 65, at 196.

88. 529 U.S. 598 (2000).

Republican interpretation of Reconstruction while rendering invisible the more radical interpretations championed by other post-Civil War Republicans.<sup>89</sup> The more constitutional law delegated to courts, the less history may be available to mobilize against the legal status quo. Primus concludes that political movements advancing alternative constitutional visions must not only challenge the law as determined by national judiciaries, but not “let courts drive their choices about what materials should be added to our collective constitutional memory.”<sup>90</sup>

The expansion of judicial power within nations has generated an expansion of judicial conversations between nations. Morag-Levine notes “a marked increase in the prevalence of citation to foreign court opinions on the part of a growing number of national supreme courts and international adjudicative bodies.”<sup>91</sup> The vigorous American debate over this practice<sup>92</sup> is anomalous. Only in the United States has significant opposition emerged to the judicial practice of citing foreign sources.<sup>93</sup> Moreover, while American justices historically sought to prevent American legislatures from importing civil law reforms, “the roles have reversed with some judges serving as agents of transplantation and some legislators guarding the gates.”<sup>94</sup> At the heart of this debate, Morag-Levine declares, are issues concerning whether the Constitution of the United States is so distinctive that, while citations from any state or lower federal court at any time in history might inform present constitutional policy, citations from any foreign source do not. “To the extent that the protection of American exceptionalism is understood to be part of the original American constitutional project,” Morag-Levine notes without approving, “all manner of legal borrowing from Europe becomes constitutionally suspect.”<sup>95</sup>

Whatever the merits of borrowing for interpreting constitutional texts, this Symposium highlights the merits of borrowing for explaining constitutional development. Models developed to explain the increasing empowerment of American courts<sup>96</sup> are being successfully

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89. Primus, *supra* note 65, at 188-89. See generally PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* (1999).

90. Primus, *supra* note 65, at 192.

91. Morag-Levine, *supra* note 26, at 32.

92. See Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345 (2005), and Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003) for a sample of this ongoing debate.

93. Morag-Levine, *supra* note 26, at 33.

94. *Id.* at 35.

95. *Id.* at 43.

96. Graber, *The Nonmajoritarian Difficulty*, *supra* note 33, at 70-73.

exported abroad to explain the increasing empowerment of foreign courts<sup>97</sup> and that foreign experience has successfully been imported to explain American practice.<sup>98</sup> Judicial practice in the United States and abroad, while typically advertised as a means for protecting the less fortunate, has quite frequently benefited the upper-middle class. Students of courts across the world are recognizing that justices are far more supportive of elite gender roles than the rights of labor unions.<sup>99</sup> At the very least, gone are the days when Americans blithely asserted that judicial review was necessary to protect fundamental freedoms, oblivious to the actual role the judiciary has played in the United States and the complex ways in which fundamental freedoms have and have not been protected in other countries. Perhaps the United States is different, but discovering the relevant differences requires far more comparative study than engaged in by the scholars who obsessed over the countermajoritarian difficulty.

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97. HIRSCHL, *supra* note 23, at 39-40.

98. Graber, *Constructing Judicial Review*, *supra* note 33, at 432.

99. *See id.* at 438; Linda C. McClain & James E. Fleming, *Constitutionalism, Judicial Review, and Progressive Change*, 84 TEX. L. REV. 433 (2005) (book review).