
Majoritarian Judicial Review: Deference and the Political Construction of Judicial Power

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Abstract. Judicial deference to elected legislatures and executives on questions of constitutionality is motivated, in part, by a belief that unelected judges should not interfere with the application of the people's political authority by their elected representatives. This view assumes that unelected judges are unrepresentative of the people and that elected officials are faithful agents of their constituents. Canonical and contemporary research in political science, though, challenge these assumptions. The "regime politics" perspective proposes judicial majorities are typically partners in a national governing coalition and that judicial decisions—even those that invalidate or narrowly interpret laws created by elected institutions—tend to advance the interests of legislative majorities and the voters who support them. More recent "popular agency" theories of judicial power claim electoral majorities may make common cause with unelected judges in ways that stymie the political goals of elected representatives.

This Essay describes these two perspectives on the relationship between majoritarian politics and judicial power and describes some of their implications for the problem of judicial deference. I argue first the regime politics view of judicial power suggests normative concerns about judicial deference to the political branches of government is misplaced. Meaningful and independent judicial scrutiny of legislative and executive policy making is foreign to a system in which courts, Congress, and president are members of the same team. In contrast, I argue the popular agency view of judicial independence suggests that courts' latitude to independently interrogate policy making by the elected branches of government will vary, in part, as a function of the public's perception of their elected representatives' trustworthiness. I conclude by identifying some political factors that

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may support diminished judicial deference to the choices of elected legislatures and executives in some cases.

Introduction

A pair of nested questions frames this symposium. First, does the “Will of the People” exist and if so, to what extent? And second, what does the answer to that question have to say for judicial deference to the political branches on questions of constitutionality? This Essay focuses on the second question, proceeding from two assumptions: (1) election results are meaningful collective political choices that represent the people’s political will,¹ and (2) individual preferences can be aggregated into sensible, interpretable constructions, like public opinion or public mood, that are consequential for policy making processes.²

The latter question—addressing the problem of judicial deference to the decisions of elected policy makers—points to the apparent tension in the Constitution’s twin commitments to representative government, carried out by a congress and president,³ and limited government, enforced in part by an unelected judiciary.⁴ Alexander Bickel famously names assigning appointed judges to police the people’s elected representatives the “countermajoritarian difficulty,” and condemns judicial review as a “deviant institution in the American democracy.”⁵ For half a century, this formulation has been “the central obsession of constitutional theory,” particularly within the legal academy.⁶

¹ See JOHN W. PATTY & ELIZABETH MAGGIE PENN, SOCIAL CHOICE AND LEGITIMACY: THE POSSIBILITIES OF IMPOSSIBILITY 73–126 (2014); Arthur Lupia & Mathew D. McCubbins, *Lost in Translation: Social Choice Theory Is Misapplied Against Legislative Intent*, 14 J. CONTEMP. LEGAL ISSUES 585, 589–94 (2005); Gordon Tullock, *The General Irrelevance of the General Impossibility Theorem*, 81 Q.J. ECON. 256, 257–61 (1967).

² See generally ROBERT S. ERIKSON, MICHAEL B. MACKUEEN & JAMES A. STIMSON, THE MACRO POLITY 381–448 (2002) (creating a model to evaluate the behavior of the electorate and political actors at the macro-level); ARTHUR LUPA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? 1–93 (1998) (discussing how individuals learn and make meaningful choices even with incomplete information); JOHN R. ZALLER, THE NATURE AND ORIGINS OF MASS OPINION 6–52 (1992) (evaluating “the relationship among information, predispositions, and opinion. . . .”); James A. Stimson, Michael B. MacKuen & Robert S. Erikson, *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 552–59 (1995) (analyzing the influence of public opinion and elections on each branch of the U.S. government and the overall impact on policy).

³ THE FEDERALIST NO. 39, at 193–94 (James Madison) (Ian Shapiro ed., 2009).

⁴ THE FEDERALIST NO. 78 (Alexander Hamilton) (Ian Shapiro ed., 2009).

⁵ ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–18 (2d ed. 1986).

⁶ Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) [hereinafter Friedman, *The Birth of an Academic Obsession*]; see also BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 369–85 (2009) (discussing the

At the same time, though, entirely different paradigms for understanding the role of judicial power in the American political system and the connection between judicial review and majoritarian democracy emerged in political science and related fields. These alternative theoretical perspectives propose that federal courts' application of judicial review—including the invalidation of laws and executive actions—tends to promote majoritarian interests. Robert Dahl, for example, argues the Supreme Court is best understood as “an essential part . . . of the dominant [governing] alliance” rather than as an oppositional or countermajoritarian institution.⁷ Within this regime-politics perspective, constitutional courts, including the United States Supreme Court, are instead agents to which “[p]olitical majorities may effectively delegate a range of tasks . . . [they] may be able to perform more effectively or reliably than the elected officials” themselves.⁸

More recently, a second view of judicial majoritarianism has emerged in political science. A growing number of studies find that popular majorities' support for courts creates electoral incentives for vote-seeking legislatures and executives to avoid court-curbing activity, insulating the judiciary and its decisions from external political influences.⁹ Indeed,

relationship between popular opinion and judicial review throughout different periods of U.S. history); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 93–226 (2004) (same); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 6–32 (1999) (arguing against judicial supremacy in favor of a “populist constitutional law . . .”).

⁷ Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293–94 (1957).

⁸ 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 (2005); see also Matthew E. K. Hall & Joseph Daniel Ura, *Judicial Majoritarianism*, 77 J. POL. 818, 819–20 (2015); James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 AM. J. POL. SCI. 84 (2001) (discussing the informational advantage inherent in judicial review and how this impacts legislative behavior).

⁹ See, e.g., Tom S. Clark, *The Separation of Powers, Court Curbing, and Judicial Legitimacy*, 53 AM. J. POL. SCI. 971 (2009) (analyzing the impact of public opinion on legislative-judicial interactions); Alison Higgins Merrill, Nicholas D. Conway & Joseph Daniel Ura, *Confidence and Constraint: Public Opinion, Judicial Independence, and the Roberts Court*, 54 WASH. U. J.L. & POL'Y 209 (2017) (estimating the Supreme Court's willingness to hold federal laws unconstitutional based, in part, on public opinion of the Court); Michael J. Nelson & Alicia Uribe-McGuire, *Opportunity and Overrides: The Effect of Institutional Public Support on Congressional Overrides of Supreme Court Decisions*, 70 POL. RSCH. Q. 632 (2017) (discussing the effect of public opinion on congressional overrides of Supreme Court decisions); Joseph Daniel Ura & Patrick C. Wohlfarth, “An Appeal to the People”: *Public Opinion and Congressional Support for the Supreme Court*, 72 J. POL. 939 (2010) (discussing the effect of public opinion on the balance of power between the legislative and judicial branches); see also THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 139–40 (1989) (citing polls in which respondents expressed greater confidence in the Supreme Court than in Congress).

When [popular] support for courts is sufficiently high, election-minded politicians—who would otherwise prefer to make policy without the constraint of judicial review—are induced “to respect judicial decisions as well as the institutional integrity of a court . . . [by t]he fear of . . . a public backlash” against [their] court-curbing activity.¹⁰

Together, these studies suggest that courts serve as agents of the people in some way that is (at least sometimes) antagonistic to the ambitions of elected legislators and executives.¹¹

Both claims run counter to Bickel’s notion of judicial countermajoritarianism, agreeing there is no inherent tension between majoritarian democracy and judicial review. The regime politics perspective proposes that judicial decisions—even those that invalidate or narrowly interpret laws created by elected institutions—tend to advance the interests of legislative majorities and the voters who support them.¹² Popular agency theories claim electoral majorities may make common cause with unelected judges in ways that stymie the political goals of elected representatives.¹³ Nevertheless, the two accounts of judicial majoritarianism have different implications for the problem of identifying boundaries for judicial deference to legislative and executive decisions.

This Essay identifies and explains the divergent implications of the regime politics and popular agency theories of judicial power for the practice of “judicial deference to the political branches on questions of constitutionality.”¹⁴ Part I briefly sketches both Dahl’s regime politics perspective of judicial power¹⁵—as well as subsequent studies of the ways that judicial power is used to advance the political goals of lawmaking majorities—and the popular agency theory of judicial review’s creation and maintenance.

Part II describes some things these two theories have to say about the judiciary’s deference to the elected branches of government on questions

¹⁰ Ura & Wohlfarth, *supra* note 9, at 940 (citations omitted); *see also* JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 165–77 (2002); Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291 (2002) (using the Argentine Supreme Court as an example of a court increasing its antigovernment decisions as the country nears a government transition); Georg Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 AM. J. POL. SCI. 346, 347 (2001) (“The fear of such a backlash can be a powerful inducement for legislative majorities to respect judicial decisions as well as the institutional integrity of a court.”).

¹¹ *See generally* James R. Rogers & Joseph Daniel Ura, *A Majoritarian Basis for Judicial Countermajoritarianism*, 32 J. THEORETICAL POL. 435 (2020) (discussing when popular majorities may support judicial review of legislative action).

¹² *See supra* notes 7–8 and accompanying text.

¹³ *See supra* notes 9–11 and accompanying text.

¹⁴ David Bernstein, *Does the “Will of the People” Exist? Conference at the Scalia Law School this Friday*, VOLOKH CONSPIRACY (Aug. 30, 2021, 2:20 PM), <https://perma.cc/W3FM-RVJB>.

¹⁵ *See* Dahl, *supra* note 7, at 283–85.

of constitutionality. I argue first the regime-politics view of judicial power suggests the notion of “deference to the political branches of government” is misplaced.¹⁶ From this theoretical perspective, judicial review is neither a shield to protect minority rights nor a weapon in antagonistic interactions between branches of government. Instead, judicial review is a tool used by judicial actors within the national governing alliance to advance the regime’s collective constitutional and political ambitions. Meaningful and independent judicial scrutiny of legislative and executive policy making is foreign to a system in which courts, Congress, and president are members of the same team.¹⁷ Even when courts and the elected branches of government are temporarily out of step, a large measure of deference or judicial restraint will endure, since courts will avoid conflict with the elected branches of government in order to preserve the judiciary’s institutional integrity.¹⁸

In contrast, I argue the popular agency view of judicial independence suggests that courts’ latitude to independently interrogate and challenge policy making by the elected branches of government will vary as a function of the public’s perception of their elected representatives’ trustworthiness, among other factors.¹⁹ The prospect of legislative and executive corruption creates incentives for voters to support judicial review applied against policies created by elected officials and (conditionally) some space for courts to make decisions contrary to popular preferences.²⁰ This result offers descriptive implications about when courts are best positioned to act on their countermajoritarian impulses and supports some normative guidance about when judicial review should be most aggressively applied to the decisions of the elected branches of government.

Part III identifies two classes of issues or problems that may justify heightened judicial scrutiny of policies that follow from courts’ role as the people’s insurance against faithlessness or corruption in the other branches of government. These are policies involving low-salience, non-ideological issues, and policies made in periods of political excitement or threat.

¹⁶ Bernstein, *supra* note 14.

¹⁷ See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 743–47 (1995); Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 299–304 (2010).

¹⁸ See J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 739 (1994); Matthew C. Stephenson, *Court of Public Opinion: Government Accountability and Judicial Independence*, 20 J.L. ECON. & ORG. 379, 380–81 (2004).

¹⁹ Rogers & Ura, *supra* note 11, at 444–50.

²⁰ *Id.* at 450–53.

I. Courts Against the People?

A half-century ago, Alexander Bickel framed one of the central problems in American constitutional theory. According to Bickel, “[c]oherent, stable—and *morally supportable*—government is possible only on the basis of consent”;²¹ yet “when the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives of the actual people of the here and now.”²² Michael Klarman explains that Bickel’s logic makes it “difficult to escape the conclusion that judicial review is moderately countermajoritarian, and to that extent, in tension with the principle of majority rule.”²³ Since then, many legal scholars have been “obsessed” with resolving the apparent tension between judicial review and representative democracy.²⁴

A. Courts in the Governing Alliance: Judicial Majoritarianism

Yet, even before Bickel proposed the countermajoritarian difficulty, political scientists—led by Robert Dahl—advanced a wholly different take on the judiciary’s place in the American constitutional system. Dahl observed that the Supreme Court only rarely overturned acts of Congress and even less frequently invalidated important laws of recent vintage.²⁵ He concluded that the Supreme Court and the federal judiciary generally “supports the major policies of the [dominant national] alliance.”²⁶

In the intervening decades, a larger literature in political science has expanded and refined “Dahl’s classic discussion . . . by pointing out that the judiciary can serve the regime’s interest.”²⁷ This literature suggests that “the justices almost never engage in policy-making that challenges those power-holders who are in a position to assault their nominal independence.”²⁸ Instead, “federal courts often function as arenas for

²¹ BICKEL, *supra* note 5, at 20.

²² *Id.* at 16–17.

²³ Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 494–95 (1997).

²⁴ See, e.g., Friedman, *The Birth of an Academic Obsession*, *supra* note 6, at 159; Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 L. & SOC. INQUIRY 511, 536 (2007) (book review).

²⁵ Dahl, *supra* note 7, at 283–91.

²⁶ *Id.* at 293.

²⁷ Howard Gillman, *Martin Shapiro and the Movement from “Old” to “New” Institutional Studies in Public Law Scholarship*, 7 ANN. REV. POL. SCI. 363, 377–78 (2004).

²⁸ Howard Gillman, *Judicial Independence Through the Lens of Bush v. Gore: Four Lessons from Political Science*, 64 OHIO ST. L.J. 249, 251 (2003); see also ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 188 (1960).

extending, legitimizing, harmonizing, or protecting the policy agenda of political elites or groups within the dominant governing coalition.”²⁹ Indeed, judicial review by allied courts can promote the interests of national governing coalitions, including congressional majorities, in a variety of ways. Judicial review can legitimize policy choices³⁰ and enforce national policies against recalcitrant states.³¹ Even the act of striking down a federal law—the quintessential act of judicial countermajoritarianism according to Bickel³²—can serve the governing alliance’s majoritarian interests. The judicial veto can eliminate older statutes that are out of step with the governing coalition’s preferences,³³ laws made during intervals of divided government when a dominant coalition was forced to make distasteful compromises,³⁴ laws passed in unusual political circumstances that are out of alignment with the governing regime’s stable persistent objectives,³⁵ and statutes with unintended consequences.³⁶

B. Courts as the People’s Agents

In addition to the governing alliance view of judicial power advanced by Dahl and others, a growing literature in political science and related fields emphasizes the role that public opinion plays in the evolution and expression of judicial power. Despite strong evidence that courts and the elected branches *can* be and *sometimes* have been partners in advancing

²⁹ Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court’s Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1391 (2006); see also THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 284 (2004); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 41–73 (1993); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 894–901 (1975); Whittington, *supra* note 8, at 584.

³⁰ Dahl, *supra* note 7, at 294; Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 808–09 (1975); Joseph Daniel Ura, *Backlash and Legitimation: Macro Political Responses to Supreme Court Decisions*, 58 AM. J. POL. SCI. 110, 113–15 (2014).

³¹ KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 105–07 (2007).

³² BICKEL, *supra* note 5, at 16.

³³ Hall & Ura, *supra* note 8, at 826; Whittington, *supra* note 8, at 584.

³⁴ See generally GEORGE I. LOVELL, *LEGISLATIVE DEFERRALS: STATUTORY AMBIGUITY, JUDICIAL POWER, AND AMERICAN DEMOCRACY* 42–67 (2003); Terri Peretti, *A Normative Appraisal of Social Scientific Knowledge Regarding Judicial Independence*, 64 OHIO ST. L.J. 349, 358–59 (2003).

³⁵ Graber, *supra* note 29, at 40–41, 44–46; Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 L. & SOC. INQUIRY 91, 99 (2000); see also Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?*, 13 INT’L REV. L. & ECON. 349, 366–67 (1993).

³⁶ Rogers, *supra* note 8, at 86–88.

shared constitutional and political ambitions,³⁷ it does not follow that courts, legislature, and executives *must* be or even *often* are coalition partners. In fact, there is clear historical evidence of periods of significant antagonism between courts, legislatures, and executives throughout American history.³⁸ Instead of some steady state judicial power, the institutionalization of courts and the practice of judicial review in the United States (and elsewhere) are dynamic.³⁹

Contrary to the governing alliance view of judicial power, these studies typically proceed from the Madisonian assumption that each branch of government has a “will of its own,” and that legislators would prefer to make policy without the constraint of judicial review.⁴⁰ Although Congress (and legislatures in other systems) is empowered to limit federal courts’ independence and constrain the application of judicial review,⁴¹ public opinion can constrain election-minded legislators to accept or expand judicial power. When support for courts is sufficiently high, legislators are induced “to respect judicial decisions as well as the institutional integrity of a court” by “fear of . . . a public backlash” against court-curbing.⁴²

The theory of judicial independence rooted in public opinion—what Patrick Wohlfarth and I call the “public support hypothesis”⁴³—is substantiated by a growing body of empirical research showing a robust, positive association between public support for the Supreme Court and judicial independence. Americans’ confidence in the Supreme Court predicts Congress’s propensity to acquiesce to judicial decisions striking down federal laws⁴⁴ as well as Congress’s allocation of discretion and resources to the Supreme Court.⁴⁵ Positive views of the Court also predict

³⁷ See Whittington, *supra* note 8, at 584–94.

³⁸ See generally KRAMER, *supra* note 6, at 93–226; TUSHNET, *supra* note 6, at 72–94.

³⁹ See JEFFREY K. STATON, JUDICIAL POWER AND STRATEGIC COMMUNICATION IN MEXICO 22–100 (2010); GEORG VANBERG, THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY 19–137 (2005); Helmke, *supra* note 10, at 291–92, 300; Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. POL. SCI. 345, 354–56, 361 (2009); Kevin T. McGuire, *The Institutionalization of the U.S. Supreme Court*, 12 POL. ANALYSIS 128, 129–40 (2004).

⁴⁰ THE FEDERALIST NO. 51, at 263 (James Madison) (Ian Shapiro ed., 2009).

⁴¹ THE FEDERALIST NO. 80, at 405–06 (Alexander Hamilton) (Ian Shapiro ed., 2009).

⁴² Vanberg, *supra* note 10, at 347; see also SEGAL & SPAETH, *supra* note 10, at 86–177.

⁴³ Ura & Wohlfarth, *supra* note 9, at 942.

⁴⁴ See Nelson & Uribe-McGuire, *supra* note 9.

⁴⁵ Ura & Wohlfarth, *supra* note 9, at 939–44. *But cf.* Joseph Daniel Ura & Patrick C. Wohlfarth, *Greater Public Confidence in the US Supreme Court Predicts More Jurisdiction Stripping*, POL. SCI. RSCH. & METHODS, Apr. 19, 2021, at 1–9 (noting a “positive relationship between Americans’ confidence in the Supreme Court and jurisdiction stripping [of federal courts]”).

Supreme Court decisions invalidating federal laws.⁴⁶ Similar connections between public support for courts and judicial independence are evident in other democratic systems.⁴⁷

Although legislators' electoral incentives to respect public sentiment against court curbing are self-evident, voters' incentives to make common cause with unelected judges in ways that stymie the political ambitions of their elected representatives are less obvious. Extensive literature in behavioral political science ascribes Americans' "diffuse support" for the judiciary to federal courts' principled decision-making, distinguishing them from other political institutions and making them "worthy of more respect, deference, and obedience" than other institutions of national government.⁴⁸

More recently, scholars have also begun to identify instrumental, institutional reasons for voters to support the institution and application of judicial review, even if it is sometimes applied against *popular* majority preferences. Matthew Stephenson, for example, argues that voters prefer to retain judicial review when they expect courts' decisions to provide additional, useful information about whether legislation or executive actions are in the public's interest.⁴⁹ James Rogers and I contend that popular majorities will support judicial review when the risk that the elected branches of government are corrupted against the people's will is sufficiently high.⁵⁰

The latter analysis also shows that the prospect of legislative corruption carves out space for some judicial countermajoritarianism,

⁴⁶ See TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* 62–206 (2011); Clark, *supra* note 9, at 973–85; Merrill et al., *supra* note 9, at 211, 215–16.

⁴⁷ See, e.g., VANBERG, *supra* note 39, at 19–115; James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 356 (1998); Helmke & Rosenbluth, *supra* note 39, at 359; Michelle M. Taylor-Robinson & Joseph Daniel Ura, *Public Opinion and Conflict in the Separation of Powers: Understanding the Honduran Coup of 2009*, 25 J. THEORETICAL POL. 105, 121–22 (2013).

⁴⁸ JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE* 4, 9 (2009); see also JAMES L. GIBSON & MICHAEL J. NELSON, *BLACK AND BLUE: HOW AFRICAN AMERICANS JUDGE THE U.S. LEGAL SYSTEM* 21–49, 129–57 (2018); James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 356, 360 (2003); James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 537, 546–47, 553 (2003). *But see* Brandon L. Bartels & Christopher D. Johnston, *On the Ideological Foundations of Supreme Court Legitimacy in the American Public*, 57 AM. J. POL. SCI. 184, 193–94 (2013); Dino P. Christenson & David M. Glick, *Chief Justice Roberts's Health Care Decision Disrobed: The Microfoundations of the Supreme Court's Legitimacy*, 59 AM. J. POL. SCI. 403, 416 (2015).

⁴⁹ Stephenson, *supra* note 18, at 397.

⁵⁰ Rogers & Ura, *supra* note 11, at 444, 450–51.

when courts return political value to the people. In particular, if the probability of legislative corruption is high enough and the likelihood that a court is generally countermajoritarian is low enough, then voters will likely punish a legislature that undermines judicial independence *even if the court earlier vetoed a preferred policy*.⁵¹ The risk that the people's political authority can be misappropriated by unfaithful agents can generate political support for an independent judiciary, and the dangers of legislative "graft" create space for some (but not too much) judicial countermajoritarianism.⁵² By implication, again, this model shows that courts' pro-majoritarian scrutiny of unfaithful legislative agency can account for the people's support for constitutional structures that can thwart the actions of their elected representatives.

II. Deference and the Regime Politics Perspective on Courts: A Majoritarian Difficulty

Both Dahl's original formulation of courts in the national governing alliance and subsequent elaborations of regime politics theory applied to the judiciary indicate that judicial review in the American constitutional system is neither necessarily countermajoritarian, as Bickel insists, nor even principally used in a countermajoritarian fashion.⁵³ If courts are part of a national governing alliance, many judicial invalidations of laws or executive actions are only superficially countermajoritarian, since the elected "representatives of the actual people of the here and now,"⁵⁴ and unelected judges are playing for the same team. Indeed, it may well be the case that judicial review suffers, instead, from a "majoritarian difficulty" in which "judges are highly unlikely to stand up for the civil rights of truly marginalized groups."⁵⁵ This view is evident, for example, in Derrick Bell's argument that landmark judicial decisions in favor of Black civil rights followed from a (transient) "convergence" of Black Americans' interests with the interests of America's White majority rather than any principled, constitutional commitment to equal protection for racial minorities.⁵⁶

⁵¹ *Id.* at 449–50.

⁵² *Id.* at 448–52.

⁵³ Hall & Ura, *supra* note 8, at 819; *see also* Funston, *supra* note 30, at 805–06, 808–09.

⁵⁴ BICKEL, *supra* note 5, at 17.

⁵⁵ Dorf, *supra* note 17, at 285, 287; *see also* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 39–156 (2d ed. 2008) (arguing that courts cannot bring social change, citing evidence that the Supreme Court's decision in *Brown v. Board of Education* had virtually no effect on the civil rights movement); Croley, *supra* note 17, at 713–14 ("[T]he majoritarian difficulty . . . is implicated whenever judges are influenced by democratic pressures.").

⁵⁶ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523–24 (1980).

Seen from this perspective, the normative difficulty of judicial countermajoritarianism is much less imposing and the question of judicial deference takes on a very different tenor.

As others in this symposium discuss, the problem of judicial deference to decisions made by the elected branches of government is complex. The subtext of the deference question put to this symposium seems to focus on one aspect of the larger problem, though: whether removing the weight of democratic legitimacy behind the actions of elected legislators and executives would (or ought to) make judges more likely to invalidate them on constitutional grounds? If there is no such thing as public opinion, or its meaning cannot be discerned, policies made by the elected branches of government become more vulnerable to constitutional challenges.

The regime politics view of judicial power suggests that reasoning toward more potent judicial review by reasoning against public opinion is beside the point. Without straying too far into the vast political science literature on judicial behavior, it suffices to observe that judges are political actors as well as legal decisionmakers.⁵⁷ James Gibson observes, “[J]udges’ decisions are a function of what they prefer to do, tempered by what they think they ought to do, but constrained by what they perceive is feasible to do.”⁵⁸ If judges are part of the national governing alliance, as Dahl proposes, they will want to do what’s best for the regime’s interests—whether that means upholding or invalidating a law in a particular case—and the “ought to do” and “feasible to do” conditions won’t often bite.⁵⁹

When judges find themselves outside the governing coalition—for example, when an electoral realignment leaves the courts temporarily in the hands of the previous regime until sufficient replacements take place to restore alignment between the judiciary and the elected branches,⁶⁰ or when close partisan competition and polarization create longer-term instability in control of Congress and the presidency⁶¹—“ought to do” and “feasible to do” become more interesting. In those cases, judges may want to be less deferential to the interests of the present governing coalition

⁵⁷ See generally LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013) (providing a statistical analysis of the behavior of federal judges); SEGAL & SPAETH, *supra* note 10, at 87–97 (explaining Supreme Court decision-making using an attitudinal perspective).

⁵⁸ James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 *POL. BEHAV.* 7, 9 (1983).

⁵⁹ See Dahl, *supra* note 7, at 293–94.

⁶⁰ See Funston, *supra* note 30, at 798.

⁶¹ See Barry Friedman & Margaret H. Lemos, *Dysfunction, Deference, and Judicial Review*, 29 *GEO. MASON L. REV.* 487, 493–98 (2022) (explaining the effects that polarization has on judicial appointments, nominations, and confirmations).

and be more sympathetic to legal arguments against its preferred outcomes. However, introducing too much friction into the political process may simply invite the new regime to deconstruct judicial independence altogether.⁶²

In either case, though, the normative problem that follows from the regime politics view of judicial power seems to be that courts—at least federal courts—don't really provide much independent constitutional oversight over their alliance partners. Whether a law or executive action survives judicial scrutiny is a function of the policy's usefulness to the governing coalition and not the weight of the democratic legitimacy it carries having been enacted by an elected policy maker. Thomas Keck, for example, shows how the Rehnquist Court abandoned older, conservative notions of judicial restraint, striking down federal laws at a rate much higher than the Warren Court, to advance various Republican policy making projects in partnership with allies in Congress and the executive branch.⁶³ Against that backdrop, it is not clear that the concept of “judicial deference to the political branches” is useful either as a predictive concept or a normative guide for judicial decision-making.

III. Deference and the Popular Agency View of Courts: Corruption, Excitement, and the Space for Judicial Activism

Contrary to the regime politics view of judicial power, the popular agency perspective on the political construction of judicial review allows for the possibility that courts and the elected branches of government will be at odds with one another.⁶⁴ It also recognizes that Congress and the president have potent constitutional and political tools for undermining judicial independence.⁶⁵ However, popular majorities' support for courts creates electoral incentives for vote-seeking legislatures and executives to avoid court-curbing activity, insulating the judiciary and its decisions from external political influences.⁶⁶ Although extensive literature in behavior political science attributes Americans' loyalty to the Supreme

⁶² See Ramseyer, *supra* note 18 (illustrating situations where elected officials facing opposition restricted judicial independence); Stephenson, *supra* note 18, at 396–97; see also Hall & Ura, *supra* note 8, at 819–20 (“[T]he justices almost never engage in policy-making behavior that challenges those power-holders who are in a position to assault their nominal independence.” (quoting Gillman, *supra* note 28, at 251)).

⁶³ See generally KECK, *supra* note 29, at 40, 199–283 (describing the jurisprudence of the Rehnquist Court).

⁶⁴ Clark, *supra* note 9, at 985.

⁶⁵ See *id.* at 972–74.

⁶⁶ Nelson & Uribe-McGuire, *supra* note 9, at 633–35; Ura & Wohlfarth, *supra* note 9, at 940; Vanberg, *supra* note 10, at 347, 354.

Court to substantive judgments about the character of judicial decision-making supported by powerful symbols of judicial legitimacy,⁶⁷ recent research proposes an instrumental explanation for why voters side with courts against their elected representatives (under some conditions) as a hedge against faithless or corrupt policy making.⁶⁸

This most recent step in the development of a public agency view of judicial power recalls Hamilton's case in Federalist 78 for a pro-majoritarian oversight role for courts. Hamilton writes, "[C]ourts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."⁶⁹ Courts, then, are empowered with judicial review, in part, to police elected representatives and ensure their enactments reflect the will of people. "[W]here the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."⁷⁰ Hamilton recognized that elected officials might pursue impermissible ends either through their own "iniquitous intention[s]" or "a momentary inclination [among the people themselves], incompatible with the provisions in the existing Constitution."⁷¹

Together, recent positive analysis of public support for judicial review and Hamilton's account of courts' function as an "intermediate body" enforcing the people's will—particularly as it is expressed in their Constitution—against legislative overreach, indicate two classes of political circumstances that may justify heightened judicial skepticism of the constitutionality of legislative enactments and executive decisions. The first is anchored in the notion of (conditional) public support judicial review as institutional insurance against corrupt elected officials.⁷² Courts should be particularly attentive to constitutional questions arising from issue domains in which special interests are likely to have undue influence on the policy-making process. The second relates to circumstances in which a crisis or emergency pushes voters to temporarily abandon their enduring policy commitments in favor of impulsive support for a seemingly expedient response offered by elected leaders. In the first case, judicial review can be an antidote to venal legislative and executive actions; in the second case, it helps mitigate the damage the people can do to themselves through their representative institutions.

⁶⁷ See, e.g., GIBSON & CALDEIRA, *supra* note 48, at 7–9.

⁶⁸ Rogers & Ura, *supra* note 11, at 444, 449–50.

⁶⁹ THE FEDERALIST NO. 78, at 393–94 (Alexander Hamilton) (Ian Shapiro ed. 2009).

⁷⁰ *Id.*

⁷¹ *Id.* at 395–96.

⁷² Rogers & Ura, *supra* note 11, at 444, 448–50.

A. *Judicial Review of Policies Addressing Low-Visibility, Non-Ideological Issues*

Corruption, in the sense of graft or the undue influence of factions or special interests, may be especially likely to taint questions of public policy that are not easily visible to the public at large and do not neatly align with prominent ideological or partisan cleavages.⁷³ Issue visibility and ideological cues make it easier for citizens to learn or form reasonable views on questions of public policy. Visibility lowers the cost of obtaining information about policy solutions.⁷⁴ Alignment with ideological cleavages gives people a useful heuristic for matching positions on a specific issue with their basic political orientations.⁷⁵ It is therefore relatively easy for ordinary citizens to observe unfaithful agency by elected officials on ideologically charged issues in the public's focus and punish elected officials for getting out of step with their views.⁷⁶

Delegation of less salient political questions to elected officials creates large savings for ordinary citizens. Many "minor" political problems seem relatively unimportant because the costs and benefits attached to different potential policies are diffuse and generally low.⁷⁷ So, many citizens remain rationally ignorant about them, delegating their resolution to their agents in government.⁷⁸

However, policies with diffuse costs and benefits can be pivotal to the well-being of a particular groups of people.⁷⁹ Rigorous licensure requirements for professional hair braiders or florists, for example, may be of little consequence to most people. They may patronize those services rarely if ever, and the marginal differences in cost and quality (if any) that follow from the licensing regime are likely difficult to discern. The credentialing rules, however, have much more concentrated consequences for the subset of people who provide—or want to provide—these services in commerce and others who regularly pay for them. For

⁷³ Alan Neustadt, *Interest-Group PACsmanship: An Analysis of Campaign Contributions, Issue Visibility, and Legislative Impact*, 69 SOC. FORCES 549, 551, 554–56 (1990); Christopher Witko, *PACs, Issue Context, and Congressional Decisionmaking*, 59 POL. RSCH. Q. 283, 283–84 (2006).

⁷⁴ Witko, *supra* note 73, at 283–84.

⁷⁵ EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* 17, 144 (1989).

⁷⁶ Brandice Canes-Wrone, David W. Brady & John F. Cogan, *Out of Step, Out of Office: Electoral Accountability and House Members' Voting*, 96 AM. POL. SCI. REV. 127, 136–38 (2002); see also DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 16–17, 23–25 (1974).

⁷⁷ See Witko, *supra* note 73, at 288.

⁷⁸ ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 244–46, 266–71 (1957).

⁷⁹ See Theodore Lowi, *Decision Making vs. Policy Making: Toward an Antidote for Technocracy*, 30 PUB. ADMIN. REV. 314, 314 (1970) (book review).

example, licensing can create barriers to entry that limit competition and increase the prices that existing businesses in a field can command.⁸⁰ Licensing is also a classic “hard” issue that has little obvious ideological loading.⁸¹

The combination of a low-salience, non-ideological policy space with distributive policy dynamics creates room for factions or special interest groups to wield influence over elected policy makers against the people’s interests.⁸² The people’s will, however, remains latent and disorganized because the institutional framework they have adopted to delegate authority to governing agents has kept the problem from public consideration.⁸³ Those with heightened interest in its resolution can prevail on legislators and executives to act with their distinctive preferences in mind.⁸⁴

In turn, the visibility and ideological mapping of policy problems can be used by judges to help evaluate whether normal presumptions of constitutionality should be adjusted in particular cases. Private influence against the common good could take many forms, from ordinary lobbying to literal bribery.⁸⁵ The key point is that the nature of the issue leaves related policy proposals in an institutional blind spot: one where the gap between the people and the behavior of their elected legislative and executive agents can be greater than usual. Policies arising in a low-visibility, non-ideological policy spaces should be viewed with an extra measure of skepticism by courts asked to judge their constitutionality. In other words, policies formulated in these political blind spots should be afforded less deference than policies formed amidst robust public debate or in those that could be more easily understood by ordinary voters applying common partisan or ideological heuristics.⁸⁶

⁸⁰ See *How Monopolies Form: Barriers to Entry*, BCCAMPUS OPEN PUBL’G, <https://perma.cc/U484-7P97>.

⁸¹ See Edward G. Carmines & James A. Stimson, *The Two Faces of Issue Voting*, 74 AM. POL. SCI. REV. 78, 78–79 (1980).

⁸² Lowi, *supra* note 79, at 318–19; Witko, *supra* note 73 at 283–84.

⁸³ See Witko, *supra* note 73, at 291–92.

⁸⁴ See *id.* at 284.

⁸⁵ *Id.* at 285–87.

⁸⁶ See generally SAMUEL L. POPKIN, THE REASONING VOTER: COMMUNICATION AND PERSUASION IN PRESIDENTIAL CAMPAIGNS 44–71 (1991) (discussing the shortcuts that voters rely on to acquire relevant information when voting and assessing candidates); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 63–72 (1994) (same).

B. *Judicial Review of Policies Made in Periods of Political Excitement*

A second kind of policy making “corruption” can emerge from dynamic changes in public opinion matched with elected officials’ impulse to satisfy electoral demand for action in the face of extraordinary political circumstances. There is substantial evidence of significant changes in the distribution of Americans’ political attitudes in response to various national emergencies, particularly, but not exclusively, wars and other types of international conflicts.⁸⁷ Following a crisis, many individuals’ political attitudes enter an excited state exemplified by unusual support for national leaders and enthusiasm for intervention and conflict, a phenomenon that John Mueller calls the “rally round the flag effect.”⁸⁸

Depending on the electoral horizon and other factors, election-minded legislators and executives may have incentives to satisfy the public’s demand for prompt action in response to an emergency even if available policy responses contradict the people’s stable commitments. Later, when the crisis abates, the rally effect decays, and public opinion re-equilibrates around the people’s constitutional commitments and enduring political values, the people are left burdened by laws and other policies that would have been much less likely to be enacted in periods of less excited public sentiment. The passage of the Patriot Act in the immediate aftermath of Al-Qaeda’s terrorist attacks on New York and Washington, D.C., on September 11, 2001, springs to mind as an example of law enacted during a period of excited public sentiment that (at least) strained the Constitution’s boundaries on several fronts.

These dynamics can be conceptualized as a kind of corruption of policy-making processes against the people’s sincere constitutional commitments by their own excited behavior rather than by some undue factional influence. Nevertheless, the prospect of legislative corruption from the inter-temporal dynamics of policy enthusiasm creates a similar space for courts to operate as a safeguard against policies contrary to the people’s sober preferences. Judicial review is, in this light, a mechanism of

⁸⁷ See generally JOHN E. MUELLER, WAR, PRESIDENTS AND PUBLIC OPINION 1–65 (1973); Martin Bækgaard, Julian Christensen, Jonas Krogh Madsen & Kim Sass Mikkelsen, *Rallying Around the Flag in Times of COVID-19: Societal Lockdown and Trust in Democratic Institutions*, 3 J. BEHAV. PUB. ADMIN., no. 2, 2020, at 1–10; Marc J. Hetherington & Michael Nelson, *Anatomy of a Rally Effect: George W. Bush and the War on Terrorism*, 36 PS: POL. SCI. & POL. 37 (2003); John E. Mueller, *Presidential Popularity from Truman to Johnson*, 64 AM. POL. SCI. REV. 18 (1970) [hereinafter Mueller, *Presidential Popularity*].

⁸⁸ Mueller, *Presidential Popularity*, *supra* note 87, at 21 (internal quotation marks omitted).

self-control that operationalizes the people's pre-commitments to certain kinds of principled political behavior.⁸⁹

Once again, an inquiry into the policy environment in which particular policies were formulated and passed could be used by judges to adjust their approach to answering constitutional questions. Policies enacted in periods of political excitement or under some kind of public duress may reflect transient "ill humors" rather than the people's principled commitments.⁹⁰ As with policies enacted in low-visibility, non-ideological policy spaces, judges should approach laws and executive actions created in periods of political excitement with less deference and greater constitutional skepticism than those passed amidst more mundane conditions.

Conclusion

Despite important differences between the regime politics and public-agency perspectives of judicial power, one key insight from both theoretical approaches is that consistency or inconsistency between courts' decisions and the preferences of elected politicians or some notion of public opinion more likely follow from political considerations than judges' commitments to abstract notions of deference. (These political factors include the formation of national governing coalitions,⁹¹ justices' political attitudes,⁹² ideological and partisan affinity between the branches of government,⁹³ and public support for courts.⁹⁴) As Keck and others show, principled commitments to judicial deference to legislative and executive decision-making slide off quite easily when a winning coalition

⁸⁹ Cf. Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 39-59 (1980) (discussing instances of irrational human behavior from a consumer choice perspective). It is also possible that courts can remind the people of a disjunction between their preferences "in the heat of the moment" and their "fundamental" "principles or values" by "entreat[ing them] to take a sober second thought" about the course they have set. Funston, *supra* note 30, at 810.

⁹⁰ See THE FEDERALIST NO. 78 (Alexander Hamilton) (Ian Shapiro ed., 2009).

⁹¹ Dahl, *supra* note 7, at 293-95; see also JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES 19-34 (1983); V. O. Key, Jr., *Secular Realignment and the Party System*, 21 J. POL. 198, 198-99, 206-10 (1959).

⁹² See SEGAL & SPAETH *supra* note 10, at 86-114.

⁹³ See Hall & Ura, *supra* note 8, at 820-21; Jeffrey A. Segal, Chad Wasteland & Stefanie A. Lindquist, *Congress, the Supreme Court, and Judicial Review: Testing a Constitutional Separation of Powers Model*, 55 AM. J. POL. SCI. 89, 93 (2011).

⁹⁴ Clark, *supra* note 9, at 972-74; Gibson et al., *supra* note 47, at 343-45, 351-58; Rogers & Ura, *supra* note 11, at 438; Ura & Wohlfarth, *supra* note 9, at 939-40.

of judges can more effectively achieve its preferred policy ambitions through judicial activism than judicial restraint.⁹⁵

This fatalistic take on the question of judicial deference to the elected branches is particularly associated with the regime politics view of judicial decision-making. If courts, legislators, and executives are effectively coalition partners, then the judiciary will strike down or uphold policies as a function of their usefulness to the governing alliance's constitutional and political ambitions, rather than any abstract aversion to invalidating decisions made by the people's elected representatives. Even in cases where courts are out of step with the governing alliance—as shortly after a realigning election—judges' desires to protect the judiciary's institutional integrity against legislative and executive court-curbing will constrain decisions that undermine major policy goals of the new governing alliance whether or not they are couched as principled deference.

The popular agency view of judicial review can support some normative claims about cases where judges ought to be less deferential to policies made by elected officials than they would be otherwise. There are two classes of policies that should be subject to greater judicial scrutiny in this framework: policies involving low-visibility, non-ideological issues and policies made in periods of political excitement. Both of these policy categories involve factors that make legislative and executive decision-making particularly prone to corruption; in the first case by special interests' influence and in the second case by the people's own impulsive enthusiasm for policies at odds with their own constitutional commitments.

The critical factor for both classes of cases is the opportunity for courts to fulfill their function as a hedge against unprincipled decision-making by elected representatives.⁹⁶ It may be that other kinds and classes of issues ought to be subject to heightened judicial scrutiny because of a relatively high risk they suffer from unfaithful or faithless legislative or executive behavior. The identification of these sets of policies should, however, continue to be anchored in cogent accounts of courts' public agency function.

⁹⁵ See Keck, *supra* note 24, at 513–14, 539–41.

⁹⁶ See Rogers & Ura, *supra* note 11, at 436–37.