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MEDIATED POPULAR CONSTITUTIONALISM

Barry Friedman*

I. INTRODUCTION

There are divergent views in the legal academy concerning judicial review, but at their core these views share a common (and possibly flawed) premise. The premise is that the exercise of judicial review is countermajoritarian in nature. There is a regrettable lack of clarity in the relevant scholarship about what “countermajoritarian” actually means.¹ At bottom it often seems to be a claim, and perhaps must be a claim,² that when judges invalidate governmental decisions based upon constitutional requirements, they act contrary to the preferences of the citizenry.³ Some variation on this premise seems to drive most normative scholarship regarding judicial review.⁴

Some scholars laud judicial review precisely because of its countermajoritarian character. Those of this view believe constitutional

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1. See *infra* notes 17-26 and accompanying text.

2. See *infra* notes 17-26 and accompanying text.

3. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962) (“The root difficulty is that judicial review is a countermajoritarian force in our system.”). Numerous citations are provided in Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 U. PA. L. REV. 971, 972-83 (2000) [hereinafter Friedman, *The Countermajoritarian Difficulty, Part Four*]. The lack of clarity includes the question of whether critics object to the substance of judicial decisions (i.e., that they do not comport with outcomes the majority would prefer) or the process of judicial decisionmaking (i.e., that judges are unaccountable in an electoral sense). This question is taken up explicitly in *infra* notes 17-26 and accompanying text.

4. Collaboration of this point can be found in Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334-39 & nn. 1 & 4 (1998) [hereinafter Friedman, *The Countermajoritarian Difficulty, Part One*].

strictures exist to constrain the majority,⁵ that constitutional rights are not to be subject to majority will. For those who hold this view, countermajoritarian judicial review is normatively desirable, although these theorists may diverge when it comes to precisely how judicial power should be exercised.

Other scholars criticize judicial review precisely because it interferes with the popular will.⁶ Under this view, representative government — such as what we enjoy in the United States — is intended to reflect majority preferences. When judges invalidate government acts, they inappropriately interfere with democracy.

Obviously, scholars on both sides of this divide usually are not, and need not be, absolutists. One may applaud the judiciary's role in limiting majority will in some instances, while believing it inappropriate in others. Similarly, one might think the judiciary often should defer to popular preferences, but not always. The divergent approaches express a mood,⁷ a sentiment about how judicial review ought to operate in the main. And as might be expected, one's mood

5. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1380 (1997) (arguing that one of the reasons for a Constitution and for judicial supremacy is “to remove a series of transcendent questions from short-term majoritarian control”); Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 556 (1998):

If one is bothered by the idea that judicial review entails a countermajoritarian or undemocratic type of decisionmaking, if one views this as deviant, troubling, or even “difficult” to reconcile with one’s vision of American government, then one has approached the question with a presumption that majority rule is the starting point of inquiry. That presumption is not justified by the text of the Constitution, nor has it been justified by extrinsic theoretical arguments. Majority rule has a place under the Constitution, but that document does not purport to elevate popular will to a position of even presumptive primacy. Indeed, popular political will is a force to be tempered at every turn.

Erwin Chemerinsky, *The Supreme Court 1988 Term — Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 47 (1989):

Furthermore, decisionmaking by electorally accountable institutions should no longer be presumed to be superior to that by the judiciary; a far more sophisticated institutional analysis is required. Thus, at minimum, the justification offered by the Court that it is avoiding judicial value imposition or that it is deferring to elected officials should not suffice to reject constitutional claims.

6. The classic statement is Bickel’s. See BICKEL, *supra* note 3, at 16 (“The root difficulty is that judicial review is a countermajoritarian force in our system.”); see also Suzanna Sherry, *Issue Manipulation by the Burger Court: Saving the Community from Itself*, 70 MINN. L. REV. 611, 613 (1986) (“[W]hen the Court invalidates a statute, it is overturning the decision of a popularly elected body; in essence it is enforcing its will over that of the electorate.”).

7. Cf. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951) (Frankfurter, J.) (explaining that Congress, in the Administrative Procedures Act, expressed a “mood” about judicial review).

about judicial review often reflects what the judiciary presently is doing.⁸

In the legal academy the view critical of judicial review is ascendant, often flying under the banner of “popular constitutionalism.”⁹ Because the idea of popular constitutionalism is (at least in its recent appearance)¹⁰ a relatively new one, the particulars have not been worked out. Different scholars, whether using the phrase explicitly or not, likely have differing views of what it does or should mean. Most proponents of the idea do not question the legitimacy of judicial review. But what they seem to share is a notion that — at least in specified circumstances — judicial review should mirror popular views about constitutional meaning.¹¹

This Article discusses the relationship between popular opinion and constitutional law. The Article rests heavily on research in the social sciences that suggests there is substantial congruity between popular opinion and the decisions of constitutional judges, as well as other research that indicates popular support for the practice of judicial review. In light of this research, the Article suggests that popular constitutionalists may be getting what they want, albeit not in the

8. See Barry Friedman, *The Cycles of Constitutional Scholarship*, LAW & CONTEMP. PROBS. (forthcoming 2004) [hereinafter Friedman, *The Cycles of Constitutional Scholarship*] (discussing how judicial activity influences academic perspectives).

9. Larry D. Kramer, *The Supreme Court 2000 Term — Foreword: We the Court*, 115 HARV. L. REV. 4, 163 (2001) (“Popular constitutionalism is not some quaint curiosity from the Founders’ world. It is a vital principle that has been part of our constitutional tradition all along.”); see also Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1102 (2001):

According to our theory of partisan entrenchment, each party has the political “right” to entrench its vision of the Constitution in the judiciary if it wins a sufficient number of elections. If others don’t like the constitutional vision that results, they have the equal right to go out and win some elections of their own.

10. Larry Kramer describes the historical roots of the idea in a *Harvard Law Review* Foreword, see Kramer, *supra* note 9, and a forthcoming book. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (forthcoming 2004).

11. See, e.g., MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 194 (1999) (“[T]he public generally should participate in shaping constitutional law more directly . . . [and] reclaim [the Constitution] from the courts.”); Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281, 295 (2002) (“When all three branches of government are in the business of protecting constitutional rights, the vocabulary of the ‘countermajoritarian difficulty,’ with its contrast between majoritarian legislatures and a minoritarian Court, no longer makes sense.”); Kramer, *supra* note 9, at 12 (“[I]t was the people themselves — working through or responding to their agents in the government — who were responsible for seeing that the Constitution was properly interpreted and implemented. The idea of turning this responsibility over to judges was unthinkable.”); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 444 (2000) (“We question the court-centered model of constitutional interpretation that these decisions assume, examining the relationship between Court and Congress that actually shaped the meaning of the Equal Protection Clause in recent decades. We argue that this history justifies a continuing role for democratic vindication of equality values.”).

precise form in which they ask for it. Similarly, it explains that the core premise of much legal scholarship — that judicial review is counter-majoritarian — may well be wrong.

The animating idea of the Article is that our system is one of popular constitutionalism, in that judicial interpretations of the Constitution reflect popular will over time. But the relationship is not direct, and does not involve judges simply deferring to popular will in certain instances, as some popular constitutionalists seem to believe should be the case. Rather, the process is mediated by the ways that the public gets its information about what courts do, the way the public can and does respond to judicial decisions, and the extent to which courts are cognizant of popular opinion and take account of it.

Although the Article takes a firm view that as a descriptive matter there is a relationship between popular opinion and judicial review — that we have a system of mediated popular constitutionalism — the broader point is that there is much we do not understand about this system and how it operates. Social science has a great deal to teach us on this score, in a body of work that has received little notice by the legal academy. But that literature raises as many questions as it answers. In a sense then, this Article maps out a research agenda, directing attention to what we must learn in order to understand better the relationship between popular opinion and constitutional law.

Part II of the Article offers an understanding of constitutionalism and judicial review that rests upon popular acquiescence, and is more strongly tied to democratic electoral processes than most legal scholars acknowledge or believe to be the case. While only a sketch, Part II begins to provide a normative justification for the practice of judicial review. This theory is one of “popular constitutionalism” because if it is operating as posited, judicial outputs should not be greatly out of line with popular preferences, and the public generally should be supportive of the process of constitutional adjudication. On the other hand, this popular constitutionalism necessarily is “mediated” by notable aspects of our system, such as unelected judges, a not-always-well-informed public, and representatives who may or may not do the public’s bidding. The mediated nature of judicial review is a good thing, because the normative role of judicial review requires that constitutional adjudication not be as immediately responsive to popular will as are other aspects of our system.

Part III explores one central part of the concept of mediated popular constitutionalism, the extent to which the public can and does serve as a monitor of judicial activity. Public monitoring of the judiciary, and judicial responsiveness to public opinion over time, are essential to mediated popular constitutionalism. But under almost any normative theory of judicial review, the trick is striking a balance between too little and too much judicial responsiveness to public

opinion. The bulk of the Article explores what we know about the extent to which the public can and does monitor its judicial agents. The focus of Part III is on the social science concept of “diffuse” support: that the public will support the judiciary even if it disagrees with specific decisions. Evaluating how this theory operates in practice requires an examination of how the public receives information about judicial review, and how that information influences public opinion. Among social scientists, evaluating the relationship between public support and judicial review has posed a complicated and difficult set of questions to answer. But what we know suggests that we may indeed have a system of mediated popular constitutionalism, albeit an imperfect one.

Part IV compares the information provided by social scientists about popular attitudes toward judicial review with normative claims about the practice. The information that we possess suggests that the actual practice of judicial review is quite different than normative scholars paint it. This Part discusses in broad brush how theories of judicial review fare in light of what we know. It then takes up what ultimately may be the most interesting question: the extent to which public opinion can be manipulated by various actors, thereby influencing attitudes toward judicial review, and perhaps the outputs of the courts as well.

II. THE JUDICIARY OF POPULAR ACQUIESCENCE

This is a sketch of a theory of constitutionalism that does not rest on the assumption that judicial review is contrary to popular will. The theory is as responsive as it is affirmative, meaning that it is designed to call into question normative theories of judicial review that rest heavily on the countermajoritarian premise. For example, if judicial review is not regularly countermajoritarian, then those who expect constitutional courts to play the role of rights defenders against majority sentiment may have to adjust their theories. They will have to ask what expectations of constitutional judges are reasonable, or under what conditions rights are protected given majority preferences. They may have to seek widespread institutional reform. Similarly, those who complain about the inconsistency between judicial output and popular will may have to revise the basis for their complaints. They may need to consider the possibility that it is their own views (and not those of constitutional judges) that are out of step with popular preferences, or to determine why the public is not getting the right message about what the Supreme Court is doing.

Within this largely responsive theory, however, rests the beginnings of a more affirmative, normative theory of constitutional and judicial review. If the judiciary is not regularly or commonly outside the run of popular opinion, then all existing theories of judicial review

are in a sense problematic. The question becomes, is there a theory of judicial review that rests more firmly on the evidence at hand about how the practice actually operates? And is the theory normatively appealing?

Following recent scholarship, such a theory might be called “mediated popular constitutionalism.” Some scholars are of the view that constitutional meaning should be rooted more deeply in popular understandings.¹² But there necessarily are bounds to such a claim; it cannot help but bump up against notions of constitutionalism and of the practice of judicial review. Surely the Constitution cannot mean whatever the present majority happens to think it should mean, for then constitutionalism would bleed entirely into “normal politics.”¹³ The populace does not typically express its desires in terms of what the Constitution should mean, but what it wants at present. This is not to say the people are incapable of distinguishing between immediate preferences and constitutional limitations, only that the mechanisms of ordinary politics do not often ask them to make this distinction. In addition, when present preferences collide with constitutional limitations, the tension between the two tends to distort the latter. Thus, even popular constitutionalism must be a search for some deeper set of limiting principles with which the population over time is willing to live,¹⁴ constraints that on sober reflection and at a proper level of generality are those that achieve widespread acceptance.¹⁵ Because

12. See Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1336 (2001) (“My conclusion is that because of its unique institutional features, Congress should interpret the text in ways the courts should not. For example, I suggest that Congress should take popular values and beliefs into account when formulating constitutional principles.”); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 302 (discussing “the role of social movements in shaping constitutional meaning in a different framework”); *supra* note 11.

13. This claim is developed at length in Barry Friedman & Scott B. Smith, *The Seditious Constitution*, 147 U. PA. L. REV. 1 (1998). *But see* KRAMER, *supra* note 10, at 73-84 (forthcoming 2004) (arguing this is the way popular constitutionalism has operated throughout history). The phrase “normal politics” or “normal lawmaking” is what Bruce Ackerman uses to distinguish everyday political activity from the special moments of “higher” constitutional lawmaking. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6, 266 (1991).

14. See Rebecca L. Brown, *Tradition and Insight*, 103 YALE L.J. 177, 180 (1993):

I argue that the Constitution should be viewed as part of a body of tradition that can teach present and future generations the principles that will allow society not merely to change, but to mature — to develop a certain degree of autonomy and capacity for independent judgment while still appreciating the value to be gained from the wisdom and experiences of prior generations.

Friedman & Smith, *supra* 13, at 7 (“The role of the constitutional interpreter is to reconcile our deepest constitutional commitments, revealed by all of our constitutional history, with today’s preferences.”). See generally Larry Kramer, *Fidelity to History — and Through It*, 65 FORDHAM L. REV. 1627 (1997).

15. Responding to the countermajoritarian problem, some writers have argued that judicial review might be understood as a technique for remanding a question for reconsideration by the people: an appeal from John drunk to John sober. See Mark V. Tushnet, *Justice Brennan, Equality, and Majority Rule*, 139 U. PA. L. REV. 1357, 1369-70 (1991); see also

popular constitutionalists rarely recommend abolishing judicial review altogether, so it must serve a function other than rubber-stamping immediate popular preferences.

Under a regime of mediated popular constitutionalism, the judiciary plays an important role in identifying those constitutional values that achieve widespread popular support over time.¹⁶ This is not an exclusively judicial role, but given the functions performed by the different branches this task falls largely on the judiciary. After all, the more political branches are assigned to enact and fulfill popular desires. Judges, on the other hand, say no (and yes) to the acts of the popular branches, based on judicial interpretation of constitutional requirements. In exercising the power of judicial review, judges rely (or should rely) upon society's deeply held, longstanding values when they trump the immediate acts of other governmental actors.

But what those who complain about judicial review often miss is that consistent with the concept of popular constitutionalism, the judicial veto necessarily must fall within a range acceptable to popular judgment over time. Judicial decisions need not be instantly popular or accepted; that is just one way in which popular constitutionalism is "mediated." Sorting immediate preferences from longstanding and deeply held constitutional views may take some time. The question is whether on reflection a judicial decision will win popular acceptance.

What follows is a sketch of such a system of judicial review, based not in jurisprudence, but in the theory and empiricism of social science. The sketch has a purpose: to set the stage to address one of mediated popular constitutionalism's more problematic aspects, the question of whether public attention to the work of the judiciary likely will succeed in achieving the underlying premises of the system. In other words, does mediated popular constitutionalism strike an appropriate balance between judicial accountability over the long run and the immediate triumph of popular opinion? The remainder of the paper explores this problem in depth.

Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 678 (1991) [hereinafter Friedman, *Dialogue and Judicial Review*] (referring to "appeal from John drunk to John sober"). In that form, the defense of judicial review is incomplete. Suppose, after the remand, the people decided that they really did want the statute the Court held unconstitutional. The Court might say, "Well, if that's what you really want, we'll let you do it. The statute is no longer unconstitutional, even though it was when we first considered the case." But, the response might also be to frustrate sustained majority will.

As to levels of generality, see *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989) (Scalia & Rehnquist, JJ.) ("We refer to the most specific level [of generality] at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."); Lawrence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future — or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 180 (discussing "Justice Scalia's contention that rights unearthed through an examination of our traditions are to be defined at the greatest level of specificity possible").

16. For an elaboration of this point, see Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. (forthcoming 2004).

A. *The Countermajoritarian Problem Critiqued*

Because this is a responsive theory, it is useful to explain what it is developed against. It writes against a long tradition of claiming that for better or for worse judicial review is countermajoritarian.¹⁷ The “for better or for worse” question is itself problematic — progressives and conservatives tend to switch sides depending on what courts are doing¹⁸ — but both positions implicate the countermajoritarian assertion.

It is extremely important to understand what the countermajoritarian claim actually is. This is because constitutional theorists may say that empirical evidence regarding the relationship between popular opinion and judicial review is irrelevant to their project. They may argue that they are, as a matter of political philosophy, trying to address the legitimacy of judicial review. They may insist that whether the public agrees with judicial decisions, or likes judicial review, has nothing to do with the legitimacy of the practice.

At some point, however, philosophical claims must meet empirical evidence head on. Elusiveness as to what precisely is the countermajoritarian objection makes this difficult. But under any plausible description, the relationship between public opinion and judicial review must have some bearing on the countermajoritarian claim.

Judicial review might be problematic because judges are not electorally accountable, as are the other branches.¹⁹ It seems at times this is the basis for complaint, but if so, it is an exceedingly odd one. After

17. See *supra* notes 1-6 and accompanying text.

18. See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) [hereinafter Friedman, *The Countermajoritarian Difficulty, Part Five*]; Friedman, *The Cycles of Constitutional Scholarship*, *supra* note 8.

19. See ELY, *supra* note 5, at 4-5 (stating what he considers the “central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they’d like”). A related problem with such theories is that they too readily assume that the work of constitutional judging primarily involves striking down laws enacted by elective assemblies, when in fact most constitutional cases deal with the activity of relatively unaccountable administrative officials, such as low-level police officials. See, e.g., Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 762 (1997) (“Judicial review is not the practice of invalidating statutes. Nor is it a practice exemplified by the invalidation of statutes. Rather, judicial review is, at a minimum, the practice of invalidating (state and federal) statutes, rules, orders and official actions on direct constitutional grounds.”); Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427, 427 (1997) (“In fact, the federal courts most often enforce constitutional norms against administrative agencies and street-level bureaucrats, and the norms are enforced not by the Supreme Court but by the federal trial courts.”) Of course, these officials may be accountable (or responsive) to public opinion in ways other than through election. But if this satisfies democratic theory, then election vel non ought not to be the question regarding judges.

all, federal judges never were electorally accountable.²⁰ Thus, one must follow the logic of this complaint to the conclusion that either the system for selecting federal judges must be changed, or the practice of judicial review must be eliminated. Yet one rarely hears either claim in so clear a form. In addition, many state and local judges also possessing the power of judicial review — complete power, in fact, to interpret state constitutions — are elected. Even rarer is the claim that such electoral systems are preferential to the federal system. There may be a better selection system than the federal one, and it might involve electoral elements, but the existing state selection systems are commonly considered objects of woe.²¹ Empirical evidence about popular opinion may be irrelevant to a claim that judicial review is problematic because judges are not elected; but if this is the claim, one must be prepared to attack the problem at its root. And to the extent the claim is that elected representatives are relatively more accountable to popular preferences, that seems once again to be an empirical question.²²

Alternatively, the claim might be that judicial review is problematic because it invalidates laws enacted on behalf of the people by their elected representatives.²³ This sort of claim squares more comfortably with the sorts of remedies proposed to address supposedly

20. U.S. CONST. art III, § 1 (“The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.”).

21. See, e.g., Mark A Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J. LAW & PUB. POL’Y 273 (2002); Charles Gardner Geyh, *Why Judicial Elections Sink*, 64 OHIO ST. L.J. 43 (2003); see also Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995).

22. The claim might be that public officials are relatively more accountable than constitutional judges, or that it is easier to correct errors of other officials than it is to correct judges’ constitutional decisions. If these are the claims, it is worthy of note that they are highly empirical, and most scholarship in the field makes no attempt to resolve them on this basis. This is a fruitful area for further study, but three things might be said at this juncture. First, not all public officials are electorally accountable, and if some other form of accountability is the issue then it would take sensitive study to figure out whether judges are more or less accountable than these other officials. See *supra* note 19 (discussing unelected public officials). Second, unpopular judicial decisions do get overturned; the claim here is specifically that congruence typically is achieved between popular opinion and judicial outcomes. See *infra* notes 28-36 and accompanying text. Whether overturning judicial decisions is more difficult than defeating legislative inertia or interest-group pressure, both of which might defeat popular opinion, is difficult to say absent comparative study. Finally, studies measuring government responsiveness to public opinion tend to show the judiciary is at least as responsive as other governmental entities. See Terri Peretti, *An Empirical Analysis of Alexander Bickel’s The Least Dangerous Branch*, in ALEXANDER BICKEL AND CONTEMPORARY CONSTITUTIONAL THEORY (Kenneth Ward ed., forthcoming 2004) (summarizing the literature on opinion-policy responsiveness).

23. BICKEL, *supra* note 3, at 16-17 (arguing that “when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it”).

close countermajoritarian judicial review, which typically involve theories of constitutional interpretation, not judicial selection. Some commentators suggest that judges defer more to the judgments of elected representatives.²⁴ Others advance interpretive theories that ostensibly would square the practice of judicial review with democratic government.²⁵

But even this claim — that it is problematic when judges trump the decisions of elected officials — has a confusion that requires identification, if not resolution. The confusion is whether the complaint is that judges are striking down duly enacted laws, or are interfering with majority preference. The two are not necessarily the same. Though jurisprudential theory often avoids this messy fact, duly enacted laws do not always carry with them popular support.²⁶ It is thus incumbent upon the complainants to specify which of the two is problematic.²⁷

If judges are striking down unpopular laws, the countermajoritarian objection is at least a little difficult to understand. Relying on a theory of deliberative democracy, one could argue that insulated representatives not mirroring constituent preferences should be favored over judges who do represent popular preference, but this is not an argument that one hears often (if at all). Nor is it easy to see the normative appeal of favoring elected representatives who deviate from popular will over judges who act consistently with popular will.

Ultimately, the claim (and the fear) must be that judges strike down popular laws. And this, as we will see, is a highly dubious claim. Judges who strike down popular laws ultimately will run into trouble. On the other hand, judicial review is unlikely to be threatened when judges act contrary to the will of elected officials, but consistently with popular opinion.

Even if the public does not approve of all judicial decisions, the system of judicial review itself still may find widespread popular

24. This is the view commonly attributed to Thayer, which raises an immediate problem because Thayer himself only would apply his rule of deference to congressional judgments. Yet members of state legislatures are elected officials also. See Edward A. Purcell, Jr., *Learned Hand: The Jurisprudential Trajectory of an Old Progressive*, 43 *BUFF. L. REV.* 873, 886 (1995) (book review). Today arguments in favor of deference are being heard frequently. See *supra* notes 12-15.

25. For examples of such theories, see generally ACKERMAN, *supra* note 13; RONALD DWORKIN, *LAW'S EMPIRE* (1986); CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* (2001); ELY, *supra* note 5.

26. Some of the vast literature on this point is reviewed in Friedman, *Dialogue and Judicial Review*, *supra* note 15, at 638-41.

27. In addition, those who challenge judicial review focus too closely on the work of the Supreme Court, and fail to address the merit of judicial review in many ordinary cases by lower courts. See Erwin Chemerinsky, *Losing Faith: America Without Judicial Review?*, 98 *MICH. L. REV.* 1416, 1424 (2000) [hereinafter Chemerinsky, *Losing Faith*] ("Focusing exclusively on the high Court ignores the huge quantity of lower-court decisions enforcing the Constitution.") (critiquing TUSHNET, *supra* note 11).

support. Stated differently, the public itself might favor a system in which their judges sometimes trump the public's immediate preferences. It is highly unlikely the public would sustain a system in which judges only, or even usually, struck down popular laws. But the public may well support a system that gives it what it wants much of the time, even if not all the time. And the public might applaud a system that sometimes deprives it of immediate preferences, in the name of other deeply held values.

B. *Popular Constitutionalism, Sketched*

The idea of mediated popular constitutionalism rests on three assumptions. The first is that judicial decisions rest within a range of acceptability to a majority of the people. The second assumption is that even when the public disagrees with some decisions, it nonetheless supports the practice of judicial review. The third is that if the people were discontent with judicial review and its outputs, they could take action.

There is plenty of evidence that the first assumption is true. Although the modeling is not perfect, and the empirical tests have their failings, the wealth of existing evidence suggests that most of the time judicial decisions fall within the range of acceptability that one might expect of the agents of popular government.²⁸ Social scientists pursue basically two sorts of studies of the consistency between popular opinion and judicial decisions. One type of research pairs polling results about substantive policy with Supreme Court output.²⁹ Thus, a poll asking popular views of abortion might be compared to Supreme Court decisions in the area.³⁰ These studies suffer from a failure to conduct a sustained project in which polls regularly are devised to mirror the Supreme Court's agenda.³¹ Yet, there are enough data points

28. See *infra* notes 28-36 and accompanying text.

29. See JONATHAN D. CASPER, *THE POLITICS OF CIVIL LIBERTIES* (1972) (comparing the Supreme Court's civil rights, national security, and criminal rights decisions with public opinion polls); THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT 2* (1989) (examining nearly 150 nationwide polls and corresponding Court decisions since the mid-1930s); ROBERT WEISSBERG, *PUBLIC OPINION AND POPULAR GOVERNMENT* (1976) (comparing the Court's rulings and opinion polls in school integration, death penalty, and school prayer cases); David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POL. 652, 654-64 (1985) (focusing on the relationship between the policy preferences of the Supreme Court and those of the American public on selected issues of public policy, such as birth control, interracial marriage, women's role, and abortion, in the post-New Deal period).

30. See Judith Blake, *The Abortion Decisions: Judicial Review and Public Opinion*, in *ABORTION: NEW DIRECTIONS FOR POLICY STUDIES* 51-82 (Edward Manier et al. eds., 1977); John E. Jackson & Maris Vinovskis, *Public Opinion, Elections, and the 'Single Issue' Issue*, in *THE ABORTION DISPUTE AND THE AMERICAN SYSTEM* 64-81 (Gilbert Steiner ed., 1984).

to reach the conclusion that in the main the results of Supreme Court decisionmaking comport with the preferences of a majority or at least a strong plurality, something that many political scientists now take as a given.³² Polls at least test many high-profile cases,³³ which presumably are the ones the public cares most about, although this may be a failing if one cares about public sentiment regarding the full run of judicial decisionmaking. Moreover, as other studies suggest, if there is a divergence, time — and not too long a time — usually serves to ensure that the Court bows to public opinion, or confirms that public opinion was moving in the same direction as the Court's decisions.³⁴

Another set of studies compare the liberalism or conservatism of Supreme Court decisions with a barometer of public liberalism or

31. Moreover, many studies only look at the consistency between public opinion and a single case or issue. See MARSHALL, *supra* note 29, at 71 (“The available studies are also limited because they chiefly report single case studies.”).

32. CASPER, *supra* note 29 (finding that in civil rights, and national security cases the Court's decisions reflected more closely public opinion than criminal rights decisions); MARSHALL, *supra* note 29, at 97 (“The results suggest that since the mid-1930s the Supreme Court has been an essentially majoritarian institution in American Politics. When a clear poll majority or plurality exists, over three fifths of the Court's decisions reflect the polls.”); TERRY J. PERETTI, IN DEFENSE OF A POLITICAL COURT 177 (1999) (“[T]he Court does not always issue unpopular decisions or play an unpopular role. . . . [A]s several studies have proven, the Court does not exclusively or persistently act in opposition to public opinion or the will of representative bodies.”); WEISSBERG, *supra* note 29 (finding the Court agreed more frequently with public opinion in school integration, and death penalty cases than in school prayer cases); Barnum, *supra* note 29, at 662 (“Viewed in the context of nationwide trends in public opinion . . . the judicial activism of the post New-Deal Supreme Court was in fact surprisingly consistent with majoritarian principles.”); see also James Bryce, *Flexible and Rigid Constitutions*, in 1 STUDIES IN HISTORY AND JURISPRUDENCE 197 (1901):

[E]xperience has shown that where public opinion sets strongly in favor of the line of conduct which the Legislature has followed in stretching the Constitution, the Courts are themselves affected by that opinion, and go as far as their legal conscience and the general sense of the legal profession permit — possibly sometimes a little bit farther — in holding valid what the Legislature has done.

33. MARSHALL, *supra* note 29, at 72-74 (“Major polling organizations are usually tied to newspapers or television stations, and the polls focus heavily on timely controversies. As a result, topics of greater public interest — such as civil liberties, civil rights, national security, labor, privacy, or religion cases — are over represented.”).

34. Barnum, *supra* note 29, at 664 (describing the interdependence of the relationship between the Supreme Court's decisions and public opinion through time, highlighting the impact of the Supreme Court's decisions on bridging the gap when national and state public opinion diverge); William Mishler & Reginald Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-Analytic Perspective*, 58 J. POL. 169, 196-98 (1996) [hereinafter Mishler & Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making*] (finding a five-year lag in some Supreme Court justices' response to public opinion); William Mishler & Reginald Sheehan, *The Supreme Court as a Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993) [hereinafter Mishler & Sheehan, *The Supreme Court as a Counter-majoritarian Institution?*] (finding a lag of five to seven years in Supreme Court responsiveness to public opinion); see also Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (“The fact is, then, that the policy views dominant on the Court are never for long out of line with the policy views dominant among lawmaking majorities of the United States.”).

conservatism.³⁵ These studies are extremely complicated methodologically, and reliance on any one of them alone might be a bad idea. But no matter how the problem is tackled, the result is roughly the same: mood swings in the general public are mirrored in the output of the Supreme Court.³⁶

Of course, there is not perfect congruence between public opinion and judicial decisions, which brings to the fore the second assumption. Clearly there are areas — flag burning and school prayer come to mind — in which the public appears to disapprove of constitutional decisions. But even given these areas, there is no hue and cry to eliminate judicial review.

This necessarily brings us to the final assumption — the more difficult one to test — which is the existence of some mechanism of popular control that accounts for the congruence of popular preferences and judicial outcomes. This assumption is important because the idea of mediated popular constitutionalism assumes that should judicial decisions diverge from popular preference in some significant way, or should the public wish to eliminate or modify the practice of judicial review, there is a means to correct the process. It is, however, worth observing that the fact of convergence between popular opinion and judicial outputs on high-salience issues is evidence alone that such a

35. See Roy B. Fleming & Dan B. Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 492-95 (1997); Mishler & Sheehan, *The Supreme Court as a Countermajoritarian Institution?*, *supra* note 34; James A. Stimson et al., *Dynamic Representation*, 89 AM. POL. SCI. REV. 543, 555-56 (1995); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences* (2000) (unpublished manuscript at 13-14, on file with author), available at <http://www.unc.edu/~jstimson/papers.htm>.

See generally JAMES A. STIMSON, *PUBLIC OPINION IN AMERICA: MOODS, CYCLES, AND SWINGS* (2d ed. 1999) (explaining creation of the index of American Public Mood that is the basis for many studies that explore the relation between liberalism in public opinion and liberal decisions by the Supreme Court).

36. See Fleming & Wood, *supra* note 35, at 468 (finding strong support for the direct impact of liberalism in the public mood on the liberal proportion of decisions made by each individual Supreme Court justice); McGuire & Stimson, *supra* note 35 (finding strong support for the direct impact of liberalism in the public mood on the liberal proportion of decisions made by the Supreme Court); Mishler & Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making*, *supra* note 34, at 169 (finding strong support for the direct impact of liberalism in the public mood on the liberal proportion of decisions made by some individual Supreme Court justices at a lag of five years); Stimson et al., *Dynamic Representation*, *supra* note 35, at 543 (finding that Supreme Court decisions reflect the degree of liberalism in public mood but to a lesser degree than the other branches of government); see also William Mishler & Reginald Sheehan, *Popular Influence on Supreme Court Decisions: A Response*, 88 AM. POL. SCI. REV. 711, 716-22 (1994); William Mishler & Reginald Sheehan, *The Supreme Court as a Countermajoritarian Institution?*, *supra* note 34, at 87 (finding support for indirect impact of public opinion on Supreme Court, via the nomination-confirmation process, and for direct impact of public opinion liberalism on Supreme Court decisions but at a lag of five years); Jeffrey Segal & Helmut Norpoth, *Popular Influence on Supreme Court Decisions*, 88 AM. POL. SCI. REV. 711, 716 (1994) (finding support for indirect impact of public opinion on Supreme Court, via the nomination-confirmation process, and not of direct impact of public opinion liberalism on Supreme Court decisions).

mechanism exists. It would be an awfully large and felicitous coincidence to find such convergence in the absence of a coordination mechanism.

Although it may be hard to specify the mechanism precisely, there are several possibilities. One possible mechanism is the appointment process. As scholars in both political science and law have observed, the process of periodic appointments to the judiciary, and particularly to the Supreme Court, ensures some congruity between popular opinion and judicial output.³⁷ Presidents, themselves subject to popular influence, appoint people whose views are congenial, and who can survive the confirmation process. Some studies suggest this is the primary means by which popular influence is felt on the Supreme Court.³⁸

Despite the obviousness of this mechanism it is not without difficulty. Two points make this apparent. First, the mechanism rests on its own assumption that presidents appoint justices (and judges) whose views are in the mainstream of popular opinion. Yet, the evidence on this is hardly overwhelming. Historical study suggests presidential practices have varied.³⁹ Even when politics motivates presidents, judi-

37. MARSHALL, *supra* note 29, at 20 (evaluating the appointment process as a link between public opinion and the Supreme Court); PERETTI, *supra* note 32, at 100:

Supreme Court justices are selected by the president and Senate primarily because of their partisan loyalties and political beliefs. Thus, the values held by the justices and represented on the Court are highly likely to reflect the values currently, or at a minimum recently, dominant in the society and in the government.

Balkin & Levinson, *supra* note 9; Mark Tushnet, *The Supreme Court 1998 Term — Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 65-67 (1999); Charles Cameron, Albert D. Cover, and Jeffrey Segal, *Supreme Court Nominations and the Rational Presidency* (paper presented at the annual Meeting of the American Political Science Association, 1990, on file with author) (showing that one basis for a president to choose a Supreme Court Justice is to maximize popularity). The authors identified in note 36, *supra*, also evaluate the indirect impact of public opinion on Supreme Court decisions through the nomination-confirmation process vis-à-vis the direct impact of public opinion on Supreme Court decisions. Their findings reflect a combination of direct and indirect impacts of public opinion on Supreme Court's decisionmaking.

38. See, e.g., Mishler & Sheehan, *The Supreme Court as a Countermajoritarian Institution?*, *supra* note 34, (finding that Court's decisions followed the public mood, after a brief time lag, from 1956 to 1981; and suggesting the key explanation was the politically motivated use of the appointment process); Segal & Norpoth, *supra* note 36, at 716 ("While justices are not accountable to the populace, presidents and senators, who share the power to choose them, are. Whatever configuration of public opinion elects a president, in particular, could transpire in his or her Court appointments. . . . It is not that the justices pay keen attention to public opinion but that they have been chosen by a president (with the advice and consent of the Senate) who presumably shares the public's views.").

39. PERETTI, *supra* note 32, at 86-87:

Presidents have, of course, varied in the emphasis they place on particular criteria. For example, Truman was especially prone to "crony" appointments, emphasizing personal friendship and political loyalty over ideology per se. President Ford, similarly to Eisenhower, placed a premium on professional considerations. . . . Carter's . . . goal [was described] as 'merit selection among democrats.' Nominees' policy views were critical in the judicial appointment decisions of FDR, Johnson, Nixon, and Reagan.

cial appointments can and are used to appease numerous constituencies, including those that may well fall outside the mainstream. Recently, for example, Republican presidents have searched for judges of a strong conservative ideology, so much so that they may well be out of the center of public opinion.⁴⁰ Second, judges and justices serve a long time. Issues and politics change around them. It is not at all clear why this aggregation of the views of justices appointed over a long period of time necessarily mirrors public opinion. This mechanism might accomplish the task, but no in-depth study has made an airtight case that it does.

Another way to think about the mechanism that assures congruity between judicial decisions and popular opinion is to look at incentives. Do judges have the incentive to see that their decisions retain some consistency with popular opinion? If they have this incentive, then we might expect such outcomes, so long as there is some way the judges could pull this off. As we will see, this question of incentive and how judges accomplish it plays an important role in the ability of the public to monitor judicial behavior.

The question of incentive appears a fairly easy one. For all the talk of a countermajoritarian judiciary, judges need the people. First, popular opinion is the key to surviving any possible attacks by the political branches.⁴¹ Actors in the political branches have challenged,

DAVID A. YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* (1999) (drawing on the papers of seven presidents, from Truman to Reagan, to show that some presidents — Truman, Kennedy, and Johnson — choose candidates with little or no idea of how they might one day vote as justices, while other executives, including Nixon and Reagan, often settled on candidates in the face of considerable evidence that they might vote contrary to their wishes); see also HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* (1985).

40. PERETTI, *supra* note 32, at 87 (“Similar to Reagan’s, President Bush’s appointees were overwhelmingly Republicans possessing a conservative judicial philosophy, a majority of whom had a history of political activism.”).

41. Gregory A. Yaleira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209 (1986) (suggesting that judiciary’s backing force is public support); Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 584-85 (2001); Georg Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 AM. J. POL. SCI. 346, 351-52, (2001) (“The idea is that supportive publics can help enforce judicial decisions via an implicit threat of a political backlash in response to instances of public authority defiance or delay in implementation.”); Jeffrey K. Staton & Mark Strahan, *The Emergence of an Effective Constitutional Court 3* (Sept. 20, 2002) (unpublished manuscript, on file with author) (arguing that public support is a key element that explains the emergence of an effective constitutional court); Andrew D. Martin, *Public Policy, the Supreme Court, and the Separation of Powers* 21 (Aug. 4, 1998) (unpublished manuscript, on file with author) (“[T]he branch that Alexander Hamilton described as the ‘weakest’ has policy making power only because of public respect and support. Just as justices are savvy policy seekers, it is reasonable to assert that the justices are mindful of the legitimacy of the Court when making decisions”); Andrew D. Martin, *Statutory Battles and Constitutional Wars: Congress and the Supreme Court* 12 (Oct. 26, 2001) (unpublished manuscript, on file with author) (“[T]he justice’s ability to achieve their policy goals hinges on their legitimacy.”).

and will continue to challenge, judicial authority or independence when it serves their interests.⁴² Whether those attacks succeed depends on how the public views the attacks. There is historical evidence that popular opinion can protect a judiciary under siege. The most familiar example of this is the failure of Franklin Roosevelt's Court-packing plan,⁴³ but it is not the only example. It is quite likely that public opinion served as a safeguard of judicial independence at critical moments during Reconstruction,⁴⁴ and there are similar stories from other countries with constitutional courts.⁴⁵

Judges also need popular opinion to see that their decisions are enforced. It is a fair assumption that judges care about the judgments

42. Barry Friedman, "Things Forgotten" in the Debate over Judicial Independence, 14 GA. ST. U. L. REV. 737 (1998). We are familiar with examples regarding federal courts, but this is true in states as well. See Kramer, *supra* note 9, at 57-58 (noting that in the Rhode Island case of *Trevett v. Weeden*, "[a]lthough the judges had neither declared the law unconstitutional nor even stated forthrightly that they had the power to do so, the governor convened a special meeting of the legislature, which summoned the court to explain its action," and when the court did not provide a satisfactory explanation, the "assembly . . . entertained a motion to dismiss the entire bench"); Theodore W. Ruger, "A Question Which Convulses a Nation": The Early Republic's Greatest Debate About the Judicial Review Power, 117 HARV. L. REV. 826 (2004); see also Kramer, *supra* note 9, at 56 (describing other "early efforts to exercise judicial review [that] tended to draw stinging rebukes," such as *Rutgers v. Waddington* (New York), and a New Hampshire case where the state court refused to implement a law eliminating trial by jury in cases involving less than ten pounds).

43. This argument is developed in Friedman, *The History of the Countermajoritarian Difficulty, Part Four*, *supra* note 3, at 1057 (noting that there appears to be a "basis for concluding that had the Court not shifted in the eyes of the public, some retributive action would have been possible. Public sentiment against the Court was strong, and Roosevelt's case would have been bolstered by a bad economy and additional unpopular judicial decisions."). See generally JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS (1938); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995). But see BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 12-13, 25 (1998) (noting that the court-packing plan faced early, organized opposition and that reasons to doubt the success of the plan provided the justices with "ample reason to be confident that constitutional capitulation was not necessary to avert the Court-packing threat").

44. This point is made at great length in Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1, 47 (2002) [hereinafter Friedman, *The Countermajoritarian Difficulty, Part II*] ("Events [during Reconstruction] suggest that there was diffuse support for the Court, and that at least up to a certain limit, the public was reluctant to see action taken against it. Although that reluctance obviously did not foreclose some action against the Court, it might have moderated the action that was taken."); see also *id.* at 63 (noting with respect to Court-packing and jurisdiction-stripping measures, there was "initial public acceptance of the idea of political control of the judiciary, followed by apparent exercise of that control at a critical moment, eventually resulting in public shame over the action and its appearance of conflict with notions of rule of law").

45. For an interesting case regarding Konrad Adenauer and the German Constitutional Court, see Georg Vanberg, *Establishing Judicial Independence in Germany: The Impact of Opinion Leadership and the Separation of Powers*, 32 COMP. POL. 333 (2000). See also JENNIFER A. WIDNER, BUILDING THE RULE OF LAW 23-24 (2001) (describing how Zimbabwian citizens "took to the streets" to protest military action in defiance of court order).

they render and prefer those judgments not fall on deaf ears.⁴⁶ Enforcement of judicial decisions typically does not rest on the public so much as upon public officials. But sometimes public sentiment itself matters, as is evident from the widespread defiance engendered by the decision in *Brown v. Board of Education*.⁴⁷ And even when enforcement is up to public officials, the action they choose to take may again be a function of public pressure.

Given the incentive judges face to remain within the range of public opinion, it takes no large step to see that they can ensure their decisions do not stray too far outside the mainstream. There certainly is evidence that in high-profile cases judges have taken such care.⁴⁸ Judges do not live in a cocoon; they are of this world. It is not credible to think that judges lack information about the way their judgments might be received.⁴⁹ Of course, the more divided the polity, the more

46. LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 55 (2000) (“Students of the Court generally assume that justices act to advance their conceptions of good law or good policy, and supporting that assumption are strong theoretical arguments and considerable empirical evidence.”); RICHARD A. POSNER, *OVERCOMING LAW* (1995) (discussing the different sources of motivations for judges, among them the importance of practical consequences of decisions); JEFFREY SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002) (explaining attitudinal model presumes that each member of the Supreme Court has preferences concerning the policy questions faced by the Court: when the Justices make decisions they want the outcomes to approximate as nearly as possible to those policy preferences); see also Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 558 (1989) (finding empirical support for the attitudinal model).

47. See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994) (detailing Southern resistance to the *Brown* decision); see also MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 25 (1998) (“Reaction to the *Brown* decision was swift. As Richard Kluger recounts in his history of *Brown*, while much of the press outside the South greeted it with enthusiasm, many Southerners were shocked and angered.”).

48. See Dennis J. Hutchinson, *Hail to the Chief: Earl Warren and the Supreme Court*, 81 MICH. L. REV. 922, 924 (1983) (discussing notion that Chief Justice Warren’s “achievement, widely praised at the time, was not only in authoring the opinion that found state-imposed segregation in public schools unconstitutional, but also — almost more important — in pulling together a unanimous Court for the result and the opinion”); Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 307 (2000):

Giles v. Harris] perhaps confirms the theory that “conformity of the law to the wishes of the dominant power in the community was the fundamental tenet of [Holmes’s] legal theory.” . . . that a judge must never “forget[] that what seem to him to be first principles are believed by half his fellow men to be wrong.”

See also Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 GEO. L.J. 1 (1979).

49. PERETTI, *supra* note 32, at 182:

Public and elite support is to a large extent conditioned on political agreement with the Court’s policy decisions. Thus, the Court must exercise political caution and be sufficiently responsive or sensitive to public and elite opinion so as not to wake the sleeping lion. . . .

. . . .

[W]hen the justices come from within the ranks of the political elite, the justices are more likely to possess the knowledge to anticipate and the contacts to discover the political reactions to its decisions.

difficult it will be for a judge to be certain, and in some cases judges may miss the mark.⁵⁰

None of this is to claim that judges do, or should, simply follow popular opinion in rendering their decisions. We have already seen that normative theory diverges on what judges should do. As indicated above, if constitutionalism and judicial review have a place in our system of government, then there necessarily are some occasions on which judges should deviate from popular views.

It is only to suggest that what we may have is a system of popular constitutionalism. That is to say, most important decisions by the Supreme Court fall within the mainstream of public opinion, and when they do not the public supports the practice of judicial review nonetheless. The mechanisms are neither perfect nor perfectly understood, but the theory is plausible.

Of course, the relationship between public opinion and judicial review necessarily is mediated. There are at least three ways in which this is the case. First, judges are not elected, so popular control over them is indirect. Second, the public necessarily expresses its views regarding the maintenance of a system of judicial review through elected representatives. Measures to enforce judicial decisions, or to challenge judicial authority, come from those with the power to do so, and it is those actors who are more or less accountable to the people. Third, the public's understanding of what judges do is filtered, not only through these representatives, but through the media and other sources as well.

Understanding how this mediated system of popular constitutionalism works is important, for it bears upon normative arguments about judicial review. If the empirical evidence offered here is correct, then it is possible that frequent claims made by those in the legal academy regarding the divergence of judicial review from popular opinion simply are inapt. Similarly, the affirmative normative claim — that judges strike laws consistent with the deeper held values of the people, and that the people support this system — rests on empirical claims that themselves require probing.

III. THE COURT'S SLACK

As we have seen, the theory of mediated popular constitutionalism rests heavily on at least one central empirical question: How tightly

See also RICHARD DAVIS, DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS (1995) (providing evidence that the Supreme Court justices are attentive to media coverage of the Court and its decisions).

50. Indeed, Mark Graber argues that with regard to some of the most contentious issues of the time, political branches simply foist these controversies off on the judiciary. See Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35 (1993); see also TUSHNET, *supra* note 11, at 149-50.

does public opinion constrain judicial autonomy? This question might be asked in various ways, but basically it is whether public sentiment will demand judicial decisions that mirror popular preferences, or whether the public will tolerate (or prefers) greater judicial autonomy. Will judges, or a judiciary, that strays from public opinion necessarily be brought to book?

This question is central to most normative views about judicial review, because although judicial outcomes often mirror public opinion, this does not mean they always do. The importance to normative theory is in understanding what consequences follow when divergence occurs. Those who applaud the judiciary's countermajoritarian role will hope courts can act independently with impunity. On the other hand, if the judiciary's independence is seen as a threat to democratic values, popular constitutionalists will be reassured if a Court that strays from popular opinion is likely to be brought back into the fold rather quickly.

For all its importance, this is the question regarding the interaction between public opinion and judicial review that is perhaps the most difficult to get at. It requires careful theoretical specification, presents awkward problems of measurement, and ultimately implicates a related and equally troublesome question about how the public even monitors the judiciary. But for all the difficulty, social scientists have provided a framework and at least several steps toward answers.⁵¹

A. *The Theory of Diffuse Support*

For at least the last forty years, social scientists have thought about the relationship between the work product of institutions and popular support for those institutions. The question is of obvious importance to democratic government. In a democracy, the people, individually as well as collectively, will not necessarily be pleased at all times with the work of their institutions. But will support for those institutions persist even during times when institutional output is displeasing? As David Easton, whose work in this area is seminal, explained:

51. It bears stressing that although the work discussed here offers interesting insight into the question of public support for judicial review, the conclusions should not be accepted without an understanding of the work's strengths and weaknesses. There is a wide body of work in the social sciences that bears upon constitutional theory, see Barry Friedman, *The Politics of Judicial Review* (unpublished manuscript, on file with author), which is just beginning to get well-deserved attention. But like any body of scholarship, that work has difficulties, of which legal scholars relying upon it should be aware. Some of the problematic aspects are reviewed in Barry Friedman, *Modeling Judicial Review* (unpublished manuscript, on file with author). The social science project of connecting public opinion and judicial review faces especially thorny obstacles, many of which are alluded to in the discussion that follows. In addition, the project is still at a relatively early stage. With those caveats in mind, that literature still has the potential to enhance the way normative scholars think about judicial review.

Typically, members of a political system may find themselves opposed to the political authorities, disquieted by their policies, dissatisfied with their conditions of life and, where they have the opportunity, prepared to throw the incumbents out of office. At times such conditions may lead to fundamental political or social change. Yet at other times, in spite of widespread discontent, there appears to be little loss of confidence in the regime — the underlying order of political life — or of identification with the political community. Political discontent is not always, or even usually, the signal for basic political change.⁵²

In order to get at this question of whether people will remain loyal to institutions in the face of policy disagreement, Easton developed the concepts of “specific” and “diffuse” support.⁵³ Specific support is driven by agreement with particular policies, it is a measure of whether a person thinks an institution is doing a good job in terms of policy output. Diffuse support, on the other hand, “consists of a ‘reservoir of favorable attitudes of good will that helps members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants.’”⁵⁴

Despite the utility of the distinction, analysis is compounded by numerous definitional and methodological difficulties that play off one another. In order to measure support of these various types, one must be able to define them with clarity, and once defined, identify ways of getting at the two. This is no easy task because as one would expect, at some point the two come together. In other words, intense enough specific disagreement with an institution ultimately will have an impact on diffuse support.⁵⁵

Applying these concepts to the work of constitutional courts is even more difficult. There are at least two reasons for this. First, the concept’s coherence rests on the salience of institutions. “It assumes that people are or can become aware of the political authorities — those who are responsible for the day-to-day actions taken in the name of the political system.”⁵⁶ Second, it assumes the people can hold the institutions accountable. “The relationship between felt wants and articulate demands must be such that the members can lay the blame or praise at the door of authorities, such as given legislators or the legislature.”⁵⁷ Both of these assumptions are problematic with regard

52. David Easton, *A Re-Assessment of the Concept of Popular Support*, 5 BRIT. J. POL. SCI. 435, 436 (1975).

53. *Id.* at 436-37.

54. *Id.* at 444 (quoting DAVID EASTON, *A SYSTEM OF ANALYSIS* 273 (1965)).

55. Easton recognized the possibility, although he felt it could be overcome: “Empirically they may well shade into each other at some point; but, except at the margins, their differences really ought to be visible.” Easton, *supra* note 52, at 448.

56. *Id.* at 437.

57. *Id.* at 438.

to judicial review. As we shall see, the work of courts is not particularly salient. And as we have discussed, unlike elected representatives, no notion of constitutional judging has at its core the idea that if dissatisfied with decisions the people will simply toss the bums out of office.

The difficulties of applying these concepts to constitutional courts may explain why just over a decade ago, Greg Caldeira could say “The truth is, we know virtually nothing systematically about the effect of public opinion on the Supreme Court.”⁵⁸ Yet, the lack of knowledge poses serious problems for theorizing about judicial review.⁵⁹ Jonathan Caspar put the point bluntly: “Many normative assumptions and prescriptive propositions about the role of the Supreme Court in American society rest in part upon implicit and untested empirical assertions about public attitudes toward the Court.”⁶⁰

B. *Diffuse Support and the Supreme Court*

Yet, Caldeira — speaking in 1990 — was too modest, because shortly thereafter he and frequent coauthor James Gibson took what may still be the largest stride toward understanding the relationship between public opinion and the Supreme Court, *The Etiology of Public Support for the Supreme Court*.⁶¹ Beset by problems of methodology and available data, Caldeira and Gibson nonetheless managed to come at the distinction between specific and diffuse support for the Supreme Court in a way that offered some hope of getting a handle on the question whether people would support the Court despite disagreement with individual Court decisions. In particular, they thought to ask questions of people that identify precisely what we should care about when assessing diffuse support, such as whether judicial review should be maintained despite unsatisfactory decisions, and whether punitive measure like jurisdiction stripping should be employed.⁶² Against this they measured specific support as a function

58. Gregory A. Caldeira, *Courts and Public Opinion*, in THE AMERICAN COURTS 303, 313 (John B. Gates & Charles A. Johnson eds., 1990) [hereinafter Caldeira, *Courts and Public Opinion*].

59. It is important to recall that the issues here apply not only to federal courts but to state courts as well, and that unlike the federal judiciary, the selection and retention systems for state court judges are a work in progress. See JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 191-226 (Stephen B. Burbank & Barry Friedman eds., 2002).

60. Jonathan D. Casper, *Public Opinion and the Supreme Court: Introductory Remarks*, 84 NW. U. L. REV. 983 (1983).

61. Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 639-64 (1992).

62. *Id.* at 639-41 (discussing the way in which they measured diffuse support with a set of items that concerns willingness to accept fundamental structural changes in the institution).

of whether respondents felt the Court's decisions were too conservative or too liberal.⁶³

Caldeira and Gibson found — in Easton's apt phrase — a “reservoir of support” for the Court that transcended sentiment about the specific job that the Court was doing.⁶⁴ Indeed, diffuse support held up as an independent measure of public sentiment about the Court, even when they controlled for numerous other variables — including such things as demographic characteristics or policy preferences on topics like abortion or racial segregation — that might be thought to influence it.⁶⁵

Perhaps the most telling finding was the measure that did correlate moderately with diffuse support. Caldeira and Gibson asked respondents a series of questions that juxtaposed order against liberty, and that inquired about respect for what they call democratic values, but more properly may be thought of as respect for minority rights. As one might expect, those who favored liberty over order, and were more tolerant of political rights of minorities, were more likely to show diffuse support for the Supreme Court than those who did not.⁶⁶

C. *Specific Support Shading into Diffuse Support*

Despite the advance of Caldeira and Gibson, the lurking problem with their analysis was the permeable barrier between diffuse and specific support. Because, as Caldeira recognizes, the output of courts is of low salience,⁶⁷ it is possible that to not know about what the courts do is to love them. Indeed, scholars — including Caldeira — have made just this claim: that diffuse support for courts is highest the less people know about what courts are doing.⁶⁸

63. *Id.* at 642 (“We measured specific support by asking the respondents whether the Supreme Court is ‘too liberal or too conservative or about right in its decisions?’”).

64. *Id.* at 658:

[T]he mass public does not seem to condition its basic loyalty toward the Court as an institution upon the satisfaction of demands for particular policies or ideological positions. . . . Diffuse support for the Supreme Court among the mass public is, rather, associated with basic facets of individuals such as political values. . . . Diffuse support truly does consist of a reservoir of goodwill and commitment among the mass public.

65. *Id.* at 651.

66. *Id.* at 653.

67. Caldeira, *Courts and Public Opinion*, *supra* note 58, at 303 (“This bit of political trivia [that more people could identify Judge Wapner than the chief justice] illustrates one facet of the Supreme Court’s and other court’s [sic] ambivalent place in the eyes of the American public: lack of saliency in all but few situations.”); *see also* PERETTI, *supra* note 32, at 167 (“Clearly the Supreme Court lacks salience for most Americans. Its members are quite unfamiliar to them and, especially significant, ‘many . . . Supreme Court decisions pass by virtually unnoticed by most Americans.’”).

68. PERETTI, *supra* note 32, at 181-82 (“The lesson is simply that should the Court persistently issue decisions that are patently and substantially out of sync with dominant public opinion and the dominant political leadership, the Court can and will be brought to heel

There is, both in the work of Caldeira and Gibson and in the many studies that have followed in their wake, plenty of evidence that the barrier between specific and diffuse support is breached in important situations.⁶⁹ Coming to understand when this is so, and for what groups, is of great importance to normative perspectives on judicial review. If diffuse support is nothing but an artifact of ignorance, then sunshine might bring the two together. But if diffuse support endures even when the public is acquainted with the work of courts, then we are in a different normative ballpark altogether.

One telling breach is in the differing views between what might be called “opinion leaders” or elites, and the rest of the public. Caldeira and Gibson found in their early study that for many of what they called “opinion leaders” “diffuse support behaves as if it were *specific* support.”⁷⁰ In other words, “for many of the opinion leaders support for the high bench is contingent upon satisfactory judicial policies.”⁷¹ Caldeira and Gibson’s definition of an “opinion leader” was shaky — it was basically self-defined⁷² — but other studies have demonstrated the same. Numerous studies suggest that among elites, the politically active, whatever one might call them, “[s]upport for the Court . . . [is] also very closely correlated with their approval of specific court decisions.”⁷³

Perhaps the most telling evidence that to know the Court is to assess it realistically is found in a project by Charles Franklin and

[Yet,] given public inattention, divisions, and ambiguities in public and elite opinion, and structural fragmentation, the Court enjoys considerable room in which to maneuver in its policymaking endeavors.”); Caldeira, *Courts and Public Opinion*, *supra* note 58, at 325-26:

So long as the justices maintain a low profile and policies reinforce expectations, basic political values will shape attitudes toward the Supreme Court. Eventually the Supreme Court upsets expectations, creates controversy, and becomes a more salient target. Some members of the public will come to see a disjuncture between expectations and performance. Diffuse support will therefore weaken, and views toward the court will reflect opinions on matters of policy more directly. Accordingly, basic inclinations toward the Court will play a smaller role in the structuring of current views.

69. See *infra* notes 70-81 and accompanying text. As Chief Justice Taft once confided to his brother:

As I see the history of the Court, almost every year something has to be decided that arouses one section or faction or part of the country against the Court, but generally this is neutralized by some decision in the near future in favor of that section or against some other.

Letter from William Howard Taft to Horace Taft (May 7, 1922) (available in THE PAPERS OF WILLIAM HOWARD TAFT, Library of Congress), *quoted in* Walter F. Murphy & Joseph Tannenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985, 993 (1990).

70. Caldeira & Gibson, *supra* note 61, at 656.

71. *Id.* at 656.

72. *Id.* at 655.

73. David Adamany & Joel B. Grossman, *Support for the Supreme Court as a National Policy Maker*, 5 LAW & POL’Y Q. 405, 408 (1983).

Liane Kosaki involving public awareness of the Supreme Court.⁷⁴ At the conclusion of the study, Franklin and Kosaki correlated the sentiment of people toward the Supreme Court with two factors: their conservatism, and their information about what the Court was actually doing. The data were from 1989, a time when those in the know would rate the Rehnquist Court as increasingly conservative. What Franklin and Kosaki found was stunning. Unknowing liberals rated the Court more favorably than unknowing conservatives, whereas as information about the Court increased, responses came much more closely into line with the Court's actual political stance. Thus, unknowing conservatives would rate the Court below 50 on a "feeling thermometer," while unknowing liberals would rate the Court just above it. Yet, among the most fully informed, conservatives rated the Court well over 75, while liberals dropped below 50.⁷⁵ Depending upon what the Court is doing, to know the Court may well be to love or hate it. Diffuse support might evaporate.

Similarly, there is evidence that when members of the public care about what the Court is doing, specific support is more likely to merge into diffuse support. Caldeira and Gibson noticed that positions on abortion rights tended to correlate with diffuse support, suggesting this is a hot-button issue that could affect diffuse support for the Court.⁷⁶ Adamany and Grossman found this as well — liberal political activists that were less likely to support the Court did so perhaps because of the Court's then support for abortion rights.⁷⁷ Valerie Hoekstra conducted a study, the hypothesis of which was that people most likely to be aware of or influenced by Court decisions would have stronger views about the Court.⁷⁸ She tested this by measuring popular reaction to the Court in geographical areas that gave rise to controversies before the Court, and then measured awareness and response to Court decisions as one moved outside those areas. Although she was not measuring diffuse support, her results showed

74. Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in CONTEMPLATING COURTS 352-75 (Lee Epstein ed., 1995).

75. *Id.* at 371 ("Among the quarter of the population least likely to know about the Court decisions, liberals are more approving of the Court, whereas conservatives are more disapproving. . . . As we move up the level of awareness of the Court, this pattern reverses.").

76. Caldeira & Gibson, *supra* note 61, at 644 ("[T]hose who would permit women to have an abortion under any circumstances . . . show significantly more support for the Supreme Court.").

77. Adamany and Grossman, *supra* note 73, at 423-24:

Opinion about abortion has been gradually shifting toward support for the Court. In 1969, prior to the Supreme Court's decision, abortion during the first trimester of pregnancy was opposed by a margin of 50% to 40%. . . . Subsequent surveys showed a growing majority favoring a woman's right to obtain an abortion, at least under certain circumstances.

78. Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 AM. POL. SCI. REV. 89, 97-100 (2000).

that geographical proximity increased awareness, and that those who knew what the Court was doing tended to change their views of the Court on this basis.⁷⁹

One of the most persistent pieces of evidence suggesting that one's views of actual decisions influences actual support for the institution is the longstanding and significant divergence among racial groups in their reaction to the Court. Since their very first study, Caldeira and Gibson have documented a significant disparity, in that African Americans were less supportive of the Supreme Court than non-African Americans.⁸⁰ In some sense this disparity seemed to be one regarding diffuse support, but on examination matters were more complex. It turns out that there is a generational division of opinion among African Americans. Exposure to the work of the Warren Court had a lasting and profound effect on any particular African American's support for the Court. Those who were so exposed tended to support the Court more than those whose consciousness about the Court was formed either before or after that era.⁸¹ In other words, it appears that views about judicial review were formed in response to specific events, but that those views then persisted for a long period of time.

Taken together this evidence suggests we need to know something about how informed the public is regarding the work of the Supreme Court, and how obdurate feelings about the Court are once formed. If feelings are obdurate and salience is low, then diffuse support may be nothing other than an artifact of these elements, albeit an enduring one. Whether this will matter from a normative perspective would then depend upon whether salience could be increased.

D. *Information and the Court*

Scholars are uniform in their assessment that the salience of the output of courts is low. As Caldeira points out: “[T]he Supreme

79. *Id.* at 97 (“In addition to geographic proximity, awareness is affected by education, gender, attention to the media, and the frequency of political discussions Furthermore, there is evidence that satisfaction with those decisions influences subsequent evaluations of the Court.”).

80. Caldeira & Gibson, *supra* note 61, at 640 (“[B]lacks show substantially less support for the Court than do whites.”); James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 543 (2003) [hereinafter Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*] (“Black Americans are considerably less likely than whites to express loyalty toward the Court.”); James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Supreme Court: Models of Diffuse Support*, 54 J. POL. 1120, 1140 (1992) (“[B]lacks are on balance fairly positive toward the Court, but they are decidedly less positive than whites.”).

81. Caldeira & Gibson, *supra* note 61, at 640 n.7 (“We explain a significant portion of the persistent support among blacks for the Court as a residue of positive affect [sic.] created during the era of the Warren Court.”).

Court and other courts [. . .] lack saliency in all but few situations.”⁸² Obviously this holds less true for the Supreme Court, but even here the mill run judicial decision attracts little public attention.

The public is not as unknowing about the Supreme Court as we sometimes are led to believe.⁸³ It was vogue for a while to point out that more Americans could identify Judge Wapner from the People’s Court than the Chief Justice of the United States Supreme Court, William Rehnquist.⁸⁴ Yet, Caldeira, Gibson, and Spence tested public knowledge about the Court and found Americans know more than that factoid would suggest. Most knew the Court contained a woman and an African American, and most could identify who each of those were from a list. They also knew some basic facts such as how justices are chosen. Perhaps most amusing (and telling) for present purposes, the authors scored as a correct answer — and most people got this correct — the fact that the Supreme Court has the final say as to the meaning of the Constitution.⁸⁵

What people know obviously is based upon how they get their information. People learn about decisions of the Supreme Court the same way they learn about most things: from the media, and from the statements of public opinion leaders.⁸⁶ That simple but apparent point explains the bandied factoid. Judge Wapner spends a lot more time on television and in the media than Chief Justice Rehnquist. If the Supreme Court opened its doors to cameras, Rehnquist’s household recognition likely would go up several points.

Just how salient are Supreme Court decisions? How much does the public know about Court decisions, and what does it take to educate them?⁸⁷ Franklin and Kosaki endeavored to determine how much

82. Caldeira, *Courts and Public Opinion*, *supra* note 58, at 303.

83. James L. Gibson et al., *Public Knowledge of the United States Supreme Court 1* (unpublished manuscript, on file with author) [hereinafter Gibson et al., *Public Knowledge of the United States Supreme Court*].

84. See *supra* note 67; see also LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 39 (1998); *The Washington 100*, NAT’L J., June 14, 1997, at 1169 (results of a poll showing that low-level officials were included in Washington’s 100 most important people while Chief Justice Rehnquist was not); WASH. POST (Weekly Edition), June 26-July 2, 1989.

85. Gibson et al., *Public Knowledge of the United States Supreme Court*, *supra* note 83, at 1 (“Nearly 80% of the respondents rightly responded that at least one of the justices is black and that at least one of the justices is female; over 60% say that the Supreme Court has the ultimate ‘say’ on the Constitution.”).

86. Benjamin I. Page et al., *What Moves Public Opinion?*, 81 AM. POL. SCI. REV. 23, (1987) (finding that public opinion is influenced very much by television commentary, next by the President’s views, positive or negative as public views the President); see also JERRY W. SANDERS, *PEDDLERS OF CRISIS: THE COMMITTEE ON THE PRESENT DANGER AND THE POLITICS OF CONTAINMENT* (1983) (analyzing the impact of “experts,” as different from news commentary, on public opinion).

87. These are questions that Charles Franklin and Liane Kosaki set out to answer in their excellent study, *Media, Knowledge, and Public Evaluations of the Supreme Court*.

media attention is necessary in order to capture public awareness of Supreme Court decisions. They chose a limited area — St. Louis — and measured the amount of coverage the Court received, and public awareness, at various points in time. Their time frame was 1989, when the Court handed down 144 decisions, only one-quarter of which received any network coverage, and just over ten percent (sixteen cases) of which were covered on all three networks.⁸⁸

What is immediately telling about the Franklin and Kosaki study is how few decisions of the Supreme Court are likely to make it into the public awareness in any way.⁸⁹ The authors followed public awareness of five cases handed down at the end of the Supreme Court's Term. Those five cases were *Webster v. Reproductive Health Services*,⁹⁰ an abortion case in which the Court might have overruled or significantly restricted *Roe v. Wade*,⁹¹ the flag-burning decision, *Texas v. Johnson*,⁹² a major affirmative action case, *Martin v. Wilks*,⁹³ the dial-a-porn decision, *Sable Communications v. FCC*,⁹⁴ and the case involving the death penalty for minors, *Stanford v. Kentucky*.⁹⁵ The authors measured media coverage for these cases, and interviewed respondents about awareness of the decisions. From this data the authors then estimated a model of likely public awareness of Supreme Court decisions.⁹⁶

The model that Franklin and Kosaki derived from their interviews suggests that only a small fraction of Supreme Court decisions are likely to make it into the public consciousness. According to their

Franklin & Kosaki, *supra* note 74. Further evidence, generally supportive, is found in Hoekstra, *supra* note 78.

88. One unfortunate thing about the Franklin & Kosaki study is that they did not measure local news coverage, particularly because one of their cases — *Webster* — involved a local story. Franklin & Kosaki, *supra* note 74, at 355-56 (“For the media coverage, we collected all stories carried by the local daily newspaper . . . and the national television network news. We did not collect data on local television notes.”). Hoekstra’s study demonstrates that local news covers local cases more, increasing awareness and popular reaction to the Court. See Hoekstra, *supra* note 78, at 99-100.

89. Franklin & Kosaki, *supra* note 74, at 357-58:

[C]onsider the probability that an average citizen goes for a week without seeing any stories about each of the branches of government. For the president and Congress, the probability of not seeing a story in a week is about 1 percent. For the Court, the probability of not seeing a story is 39 percent. Put simply, citizens are virtually guaranteed to see stories about the president and Congress. It is far more likely that a citizen will miss the few stories that appear about the Court.

90. 492 U.S. 490 (1999).

91. 410 U.S. 113 (1973).

92. 491 U.S. 397 (1989).

93. 490 U.S. 755 (1989).

94. 492 U.S. 115 (1989).

95. 492 U.S. 361 (1999).

96. Franklin & Kosaki, *supra* note 74, at 355.

model of public awareness, only *Webster* and *Texas v. Johnson* were likely to be noticed and recalled by respondents.⁹⁷ On the other hand, these two decisions achieved very high probabilities of likely awareness.⁹⁸

Two different characteristics account for awareness: public attention to the cases, and characteristics of individuals who might be following public information or debate.⁹⁹ It is not only media coverage that matters. There are groups of people — for example those interested in politics or newspaper readers — who are likely to have more information. And certain cases have greater interest for certain individuals, like the abortion decisions for women.¹⁰⁰

Even with regard to public coverage there are different patterns, as evidenced by the abortion and flag-burning controversies. The abortion case was covered immediately in a sharp burst of coverage that boosted likely public awareness quite high. The flag-burning decision, on the other hand, lay relatively dormant until President Bush began to make an issue of it about a week later, at which time coverage and the likely probability of awareness shot up.¹⁰¹

What the Franklin and Kosaki study leads us to conclude is that only a small fraction of the Supreme Court's work is likely to be salient with the public, absent some other influence to hold the decisions in the public light. Only a small number of the cases attract the sort of media attention that cause them to stick in the public consciousness. It is important to understand, however, that public officials can bring media light on decisions, raising their visibility.

97. *Id.* at 358 (“The abortion and flag-burning cases received the highest coverage, from three to seven times as much as the other three cases. The three less visible cases, received little coverage, making it much more likely that citizens would fail to hear of these decisions.”).

98. *Id.* at 366 (“[T]he flag-burning and abortion cases show that it is possible for large proportions of the public to be aware of some Court decisions. . . . The median probability for the flag case is 0.75, whereas for the abortion case it is 0.88. . . . This demonstrates that when a case becomes highly visible, as the abortion and flag cases, public awareness can become very high.”). “Likely” refers to the fact that the authors measured both coverage and actual awareness of survey respondents, then estimated awareness across the geographic population.

99. *Id.* at 361.

100. *Id.* at 366 (“The most important conclusion is that there is substantial variation in awareness of Supreme Court decisions, both from case to case and across individuals.”); see Adamany & Grossman, *supra* note 73, at 423 (“In the 1970s, both blacks and whites told pollsters that they favored desegregation, but the highly visible judicial remedy of school busing was opposed by 82% of whites and also by 33% of blacks.”); accord. Caldeira & Gibson, *supra* note 61, at 645 (showing that the same variation exists for residential racial segregation and legalization of marijuana cases).

101. Franklin & Kosaki, *supra* note 74, at 360.

E. *The Nature and Obduracy of Public Reaction*

It matters not only what the public learns about the Court, but how that information affects public opinion about judicial review generally. Answering this question has proven to be extremely difficult. There are basically two axes that require examination. First, how does information affect public opinion? Second, how long-lasting are the views so formed?

One might reasonably assume that Court decisions engender proponents and opponents, and this is generally the case. The “Warren Court” effect among African Americans is a good example of positive reaction engendering long-term support for the Supreme Court.¹⁰² Studies similarly document negative reaction to decisions lowering confidence in the Supreme Court.¹⁰³

In certain ways, however, reaction to Supreme Court decisions is asymmetrical. Exactly how is unclear. Some studies show negative reaction being more intense than positive, or outlasting positive,¹⁰⁴ and some studies suggest the opposite.¹⁰⁵ The question is whether these seemingly conflicting results can be reconciled.

It seems fairly clear that Supreme Court decisions can polarize public opinion, and that the most important reaction may actually be a form of entrenchment on the merits or even backlash. Franklin and Kosaki performed another study to try to get at whether the Supreme Court’s decisions can motivate public opinion in the substantive direction of the Court’s decision.¹⁰⁶ They tested what several legal commentators have speculated is the “educative” function of the Supreme Court, that is, the capacity of the Court to influence public opinion in a positive way on the merits. What they found was quite the opposite. Studying the impact of an abortion decision, Franklin and Kosaki found that the decision tended to reinforce sentiments against abortion, especially among those most likely to be in groups that shared an opposing position.¹⁰⁷ In fact, they found evidence to support

102. Caldeira & Gibson, *supra* note 61, at 640; Gibson & Caldeira, *supra* note 80, at 1134-35.

103. Anke Grosskopf & Jeffery J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of Webster and Texas v. Johnson on Public Confidence in the Supreme Court*, 51 POL. RES. Q. 633 (1998) (showing that disagreement with one or both decisions of the Court, on *Webster* and *Texas v. Johnson* cases, substantially reduced confidence in the Court); Hoekstra, *supra* note 78, at 97 (showing that satisfaction or dissatisfaction with the decisions made by the Court influences subsequent evaluations of the Court).

104. *See infra* notes 110-119.

105. *See infra* notes 110-119.

106. Charles H. Franklin & Liane C. Kosaki, *Republican Schoolmaster: The U.S. Supreme Court, Public Opinion, and Abortion*, 83 AM. POL. SCI. REV. 751, 763-69 (1989).

107. *Id.* at 759 (“[N]onwhites and Catholics became substantially more opposed to discretionary abortion in the aftermath of *Roe*.”); *see id.* at 767:

their speculation that what occurs is that members of these groups reinforce one another's views, casting them more sharply than those without group influence.¹⁰⁸ This evidence of polarization comports with Michael Klarman's well-developed "backlash" thesis about Supreme Court decisions, that is, that their most significant impact is to embolden the forces that oppose the Court on the merits.¹⁰⁹

Of course, opinions on the merits are not the same thing as opinions about the Supreme Court. It is entirely possible to disagree with the Supreme Court in a case or cases, and nonetheless continue to support the institution of judicial review. This, after all, is what the diffuse-support thesis is all about.

Yet, there is also some evidence to suggest that negative reaction to a decision influences views about the Supreme Court more than positive reaction. Quite different studies by Durr, Martin, and Wolbrecht,¹¹⁰ and by Grosskopf and Mondak,¹¹¹ provide some evidence that those whose ideological views depart from the Court's — either over a range of decisions in the case of the first study, or in reaction to specific decisions in the case of the second — translate those feelings more strongly into a reaction to the Court generally than those whose reactions are positive.¹¹²

If the public homogenously favors the Court's position prior to the ruling, support will rise across all groups. Similarly, if the populace was uniformly opposed to the Court's position beforehand, support will actually decrease in the aftermath. In both cases, the mechanism is the same: individuals are moving in the direction of their (homogenous) social context.

108. *Id.* at 765 (showing that interaction among churchgoers support one another's views, hence "high-attendance Catholics were more strongly opposed to abortions for health than lower-attendance Catholics").

109. See Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 85-129 (1994) (describing the *Brown* backlash thesis); see also Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1182 (2001):

Supreme Court rulings often produce unpredictable backlash effects. In the same way that *Brown* mobilized southern whites to resist further changes in the racial status quo, and *Roe v. Wade* inspired right-to-lifers to organize politically against abortion, *McCulloch v. Maryland* may well have mobilized a states' rights opposition to the nationalist principles articulated by the Marshall Court.

Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 96 (2000):

[D]ecisions such as *Powell v. Alabama* produced notable backlashes in southern white opinion. The more the Supreme Court intervened on behalf of the Scottsboro Boys, the more determined white Alabamians seemed to execute them. Similarly, the Mississippi Supreme Court clearly retrogressed in *Brown v. Mississippi*, refusing to reverse a conviction based on a coerced confession that it almost certainly would have excluded from evidence a decade earlier.

110. Robert H. Durr et al., *Ideological Divergence and Public Support for the Supreme Court*, 44 AM. J. POL. SCI. 768 (2000).

111. Grosskopf & Mondak, *supra* note 103.

112. Durr et al., *supra* note 110, at 774 (explaining that "extreme divergence between the ideological positions of the Supreme Court and the public, maintained over time, causes Court support to erode to nearly the all-time observed low, with potential consequences for

On the other hand, Caldeira and Gibson refer repeatedly to a “positivity” bias in reactions to the Supreme Court.¹¹³ By this they mean just the opposite, i.e., that positive reaction to the Supreme Court matters more than negative reaction. One example of this is, again, the longstanding positive feelings that African Americans influenced by the Warren Court held about the Court, feelings that persisted despite strong subsequent evidence that the Court was not particularly friendly toward African Americans.¹¹⁴

If there is resolution to these divergent positions, it probably has to do with the span of time over which public reaction to the Supreme Court is measured. The Durr, Martin, and Wolbrecht study suggests the negative feelings have a fairly short half-life.¹¹⁵ The study attempts to model how ideological divergence will affect public support for the Court over the long haul, with the conclusion that negative reaction is not likely to have a significant effect absent a series of Court decisions over some sustained period of time that diverge from public sentiment.¹¹⁶ The New Deal period comes immediately to mind. Similarly, it is important to distinguish what sort of public reaction is being tested. The Grosskopf and Mondak measure was “confidence” in the Court,¹¹⁷ which really is more a measure of specific than diffuse

the legitimacy of the institution”). Grosskopf and Mondak, *supra* note 103, at 652, argue that “[r]espondents who agreed with both the abortion and the flag-burning decisions gave the Court minimal credit, but people who disagreed with one or both edicts reacted more strongly against the Court in response.” Favorable response to the Court rulings is, in itself, likely to be insufficient to offset the damage inflicted by too many high-salience unpopular decisions. *See id.*

113. *See* James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 352 (1998) [hereinafter Gibson et al., *On the Legitimacy of National High Courts*] (“We can conclude that awareness is correlated with diffuse support but is generally mediated by the effect of satisfaction. . . . People become satisfied with the court’s policy outputs by being aware of its policies. This lends support to the positivity bias hypothesis, which is well known in the political psychology literature.”); Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, *supra* note 80, at 555:

[T]he Supreme Court decision in *Bush v. Gore* did not have a debilitating impact on the legitimacy of the US Supreme Court. Perhaps because the Court enjoyed such a deep reservoir of good will, most Americans were predisposed to view the Court’s involvement as appropriate, and therefore dissatisfaction with the outcome did not poison attitudes toward the institution.

114. Caldeira & Gibson, *supra* note 61, at 645 (explaining the positive attitude among black Americans who experienced the era of the Warren Court); *see also* Gibson & Caldeira, *supra* note 80, at 1134-35.

115. Durr et al. show that the “aggregate Court support responds to public evaluations of Court behavior, but for various reasons, the impact of temporary shocks is relatively short-lived.” Durr et al., *supra* note 110, at 774. “In two years the system returns to its equilibrium.” *Id.*

116. *Id.* at 774.

117. *See* Grosskopf & Mondak, *supra* note 103, at 641 (using the question “As far as the people in charge of running the Supreme Court are concerned, would you say you have a great deal of confidence, only some, or hardly any confidence at all in them?”).

support.¹¹⁸ On the other hand, Caldeira and Gibson and coauthors consistently have tested whether the public would support fundamental change regarding the Court, the best measure of diffuse support.¹¹⁹

On balance then, what seems to be the case, is that over time the Court somehow builds up a store of diffuse support, which is not easily eliminated by negative reaction to individual decisions.¹²⁰ How this is so is not entirely clear. There is another Caldeira and Gibson study (this one with Baird) that tries to answer this question by studying public reaction to a variety of national high courts.¹²¹ This is their clever way to get at the absence of longitudinal data (survey data over time) about the Supreme Court. The data gathered in the national-high-courts study is difficult to interpret; even the authors' speculations about the data runs in numerous directions.¹²² Nonetheless, trying to peer through the clouds, that data suggests the possibility that high courts make friends and enemies with decisions, that over time they build up a store of friends whose positive feelings linger, that this translates into diffuse support, and that it takes a great deal of negative reaction to displace this fundamental support once a court has managed to establish itself.¹²³

F. *But Is There Really Diffuse Support? Bush v. Gore Says Yes!*

All of this begins to provide a coherent, if not full, picture of public support, except with what seems to be one large problem with the

118. James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 355 (2003) (finding that "confidence" is more a measure of "short-term satisfaction or dissatisfaction with the performance of the Court, rather than an enduring loyalty toward the institution itself").

119. *Id.* at 361-63 (discussing better measures of "legitimacy" of the Supreme Court, including loyalty as expressed by willingness to support fundamental change to the institution).

120. Gibson et al., *On the Legitimacy of National High Courts*, *supra* note 113, at 356 ("The acquisition of support is a dynamic process. . . . It appears that satisfaction slowly evolves into institutional legitimacy, and the degree of connection between specific and diffuse support is contingent upon the institution's age.").

121. Gibson et al., *On the Legitimacy of National High Courts*, *supra* note 113.

122. *Id.* at 348. The study also faces some conceptual problems. In some countries it is not clear which institution is the high court. For instance, the French Supreme Court cannot exercise judicial review, while the Conseil Constitutionnel — not a typical court — engages in a priori judicial review. In addition, the courts of different countries also differ in "political age," and on the formal powers they possess.

123. *Id.* at 355:

Older courts, on balance, tend to be more legitimate, and they tend to have more accumulated specific support, which more readily translates into institutional legitimacy. Not much of . . . this relationship is linear; . . . Specifically, there is a remarkable difference in the strength of the correlation between specific support and legitimacy depending on the institution's age. The courts are easily divided into two groups: nine younger than thirty years and eleven older than that. Among the former, the correlation between specific and diffuse support is .29; among the latter it is .72.

diffuse support thesis. That problem is that although in their many studies Gibson and Caldeira ask the right questions about diffuse support, such as whether one would support jurisdiction stripping or the elimination of judicial review, how reliable are those answers? After all, this is not a question people are likely to have thought about, and one might surmise that if such fundamental change were really on the agenda the matter would get a great deal of sober reflection. Indeed, the problem with studying diffuse support is a metaphor for the idea itself: Would people adhere to their answers after being subject to intense public debate on the matter? This problem is compounded by the information about court salience. If the work of courts is not terribly salient in the first place, people are even less likely to have given this matter any thought.

As it happens, however, history provided something in the way of an experiment, or perhaps an improvement in Gibson and Caldeira's own ability to conduct survey testing of the diffuse-support thesis. The presidential election of 2000 went famously awry in Florida, it went on for a long time, it was in and out of courts, it got lots of attention, people had strong feelings, and it got resolved by the Supreme Court.¹²⁴ Salience there was aplenty, as well as much commentary about the proper role of judicial review.

The Gibson, Caldeira, and Spence study of public opinion after *Bush v. Gore*¹²⁵ provides strong evidence for the diffuse-support hypothesis.¹²⁶ As one might have anticipated, partisanship influenced views of the decision, not only its fairness but whether respondents believed it was decided on the basis of law or the judges' political preferences;¹²⁷ the racial effect continued to surface;¹²⁸ and those who

124. The controversial 2000 election spawned countless academic responses. See, e.g., ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000* (2001); HOWARD GILLMAN, *THE VOTES THAT COUNTED* (2001); RICHARD POSNER, *BREAKING THE DEADLOCK* (2001); *THE UNFINISHED ELECTION OF 2000* (Jack N. Rakove ed., 2001); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001).

125. 513 U.S. 98 (2000).

126. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, *supra* note 80. For a review of more immediate response to the *Bush v. Gore* decision, see Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32 (2001).

127. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, *supra* note 80, at 549 (“[P]arty identification is a strong predictor of the perceived fairness of the decision in *Bush v. Gore*.”).

128. *Id.* at 543 (“Substantial racial differences in opinions toward the Court existed in 1987 and persisted in 2001. Black Americans are considerably less likely than whites to express loyalty towards the Court. . . .”).

disagreed with the decision felt more strongly than those who agreed.¹²⁹

Yet, despite huge opposition to the decision, Gibson et al. conclude that diffuse support for the Supreme Court remains high.¹³⁰ Overall, the decision in *Bush v. Gore* had absolutely no negative impact on levels of diffuse support. Indeed, in comparison to similar studies in 1987 and 1995, those levels had increased. This was true despite the fact that probably as a function of *Bush v. Gore*'s salience, the number of "don't knows" had dropped (this was true even among Democrats).¹³¹

IV. THE IMPLICATIONS OF PUBLIC SUPPORT

The question is where all this learning regarding public support for the judiciary leaves normative theories of judicial review. Section IV.A offers some thoughts on that issue. But as Section IV.B goes on to emphasize, public opinion is, and can be, influenced. Ultimately the ways of influencing judicial review may bear heavily on how normative theories hold up.

A. *Normativity and Public Support*

The question of how public support bears upon normative theories of judicial review really needs to be addressed in two stages. First, there is the question of how we should think about public support assuming that the work of the Supreme Court is of sufficient salience to justify thinking anything. Then, we should think about the implications of low salience.

To the extent the public is sufficiently informed, the implications of the diffuse-support hypothesis cut heavily in favor of normative theories resting on judicial independence, and against those who criticize the Court as having strayed from popular views (including as to constitutional meaning). That is to say, the public apparently remains satisfied with the practice of judicial review, even if this means letting judges go their own way, so long as there are bounds to judicial discretion. As the Durr, Martin, and Wolbrecht model suggests, the store of "capital" that the Court possesses is not infinite.¹³² But then, it is also

129. *Id.* at 546 ("Those who disagreed with the decision are more likely to feel strongly about it than those who supported the outcome.").

130. *Id.* at 555 ("[W]e have shown that the Supreme Court decision in *Bush v. Gore* did not have a debilitating impact on the legitimacy of the US Supreme Court.").

131. *Id.* at 554 ("In 2001 46.6 per cent of the Democrats gave two supportive replies to our questions; in 1987, this figure was *insignificantly* lower (43.0 per cent).").

132. See Durr et al., *supra* note 110, at 774 ("[E]xtreme divergence between ideological positions of the Supreme Court and the public, maintained over time, causes Court support

not a matter of direct expenditure.¹³³ The store of capital is not spent with every unpopular opinion. The public seems to understand the Court's independent job, and cuts it a certain amount of slack.

This bodes well for those who envision a countermajoritarian role for the Court. It indicates that the public will tolerate the Court playing this role, within bounds. The Court can act contrary to popular preference — *Bush v. Gore* suggests resoundingly so — and still find a reservoir of public support. Those bounds likely are not unlimited, however, and as we will see, public opinion is subject to some manipulation by those who take an interest in doing so.

Of course, recognizing a certain amount of judicial independence says absolutely nothing about the normative desirability of the Court's agenda. The Supreme Court was viewed as having acted in counter-majoritarian fashion during the *Lochner* era and the Warren Court.¹³⁴ If this is correct, a court can be countermajoritarian from wildly different political perspectives. When you choose to have an independent court, that's what you get.

It is more difficult to know what the slack accorded the Supreme Court means for popular constitutionalists, because their demands are less clear. Critics from the right (think Bork, and the abortion issue)¹³⁵ and the left (think of the wealth of scholarship about the recent federalism decisions) have assailed the Court for acting contrary to popular will. It is not at all clear that these critics are correct empirically, which is to say that perhaps they have gauged public opinion incorrectly.¹³⁶ If

to erode to nearly the all-time observed low, with potential consequences for the legitimacy of the institution.”).

133. See *id.* (“[O]ur results provide empirical support for the premise that aggregate Court support responds to public evaluations of Court behavior, but for various reasons, the impact of temporary shocks is relatively short-lived.”); see also BICKEL, *supra* note 3, ch. 6 (discussing how the decision of the Supreme Court in the segregation cases was simultaneously costly among some constituents and profitable among others).

134. Those events are summarized in Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1438-47 (2001), and Friedman, *The Counter-majoritarian Difficulty, Part Five*, *supra* note 18, at 215 (describing how countermajoritarian criticism was heard at times when this characteristic was apt).

135. See generally ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* (1996); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

136. See Charles H. Cameron, *Judicial Independence: How Can You Tell It When You See It? And, Who Cares*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH*, ch. 6 (Stephen B. Burbank & Barry Friedman eds., 2002) (surveying literature asking whether judicial review contributes over time to liberal democracy and concluding that we simply do not know the answer); Mark Graber, *Constitutional Politics and Constitutional Theory*, 27 LAW & SOC. INQUIRY 209, 320-22 (taking grand constitutional theorists to task for insufficient attention to empirical reality); see also Chemerinsky, *Losing Faith*, *supra* note 27, at 1423-25 (describing how Tushnet ignores matters like lower court decisions that fall below the attention of the Supreme Court); Friedman, *The Cycles of Constitutional Scholarship*, *supra* note 8.

that is so, then there is no shortfall between public sentiment and judicial outcomes.

Even if the Court has diverged from public opinion as to the merits, or constitutional meaning, the implication of the diffuse-support theory is that the public still might prefer to accord interpretive authority to the Supreme Court regarding constitutional meaning. Think again about the large majority in the Gibson, Caldeira, and Spence study of public knowledge who said the Supreme Court has final authority to say what the Constitution means.¹³⁷ If people think this, and if they oppose fundamental change to the system even as they disapprove of individual decisions or the ideological trend of the Court, then a popular — and indeed fairly longstanding — view is that the Court has interpretive authority over constitutional meaning.

B. *Influencing Public Support*

There is a big “if” here, however: public opinion is not exogenous to the system of judicial review and commentary about it. Public opinion can be influenced. Indeed, the Supreme Court likely influences public opinion quite a bit, whether intentionally or unintentionally. Thus, the real question is where public opinion would rest if actors involved in the process of creating public opinion did so more self-consciously.¹³⁸ In order to think about this, it is useful to consider various ways in which — given what we know about salience and how the public gets its information — the Supreme Court’s practices actually influence (or fail to influence) popular opinion.

First, and perhaps foremost, the Court’s scheduling practices keep it off the public radar except in rare bursts. The Court hands down most of its decisions in a fairly compressed period of time, and typically many of the most controversial come down in the last couple of weeks in the term. The Franklin and Kosaki study of media coverage shows how the Court receives basically very low media attention compared with the other branches of government, the exceptions being a large blip in late June (when the high-profile cases typically are decided), and a somewhat smaller one when the Court begins its new term in October.¹³⁹ Recall also that negative opinion has a fairly short

137. Gibson et al., *Public Knowledge of the United States Supreme Court*, *supra* note 83, at 5.

138. See José María Maravall, *Accountability and Manipulation*, in *DEMOCRACY, ACCOUNTABILITY AND REPRESENTATION* 154-96 (Adam Przeworski et al. eds., 1999) (discussing the ways in which politicians seek not only to influence public opinion but also what they do to hide their actions from public scrutiny).

139. Franklin & Kosaki, *supra* note 74, at 356-57 (“The Court’s coverage peaks in June, when major decisions tend to be handed down. There is also a modest upturn in coverage when the Court begins its term in October.”).

half-life.¹⁴⁰ Thus, the practices of opinion release keep the Court out of the news more than it is in it.

Second, the public cannot possibly follow the actual content of opinions, and largely knows about opinions simply what the media or opinion leaders tell them. This means that sometimes the public gets the headline and misses the story. Think, in this regard, about the decision in *Planned Parenthood v. Casey*.¹⁴¹ The headline the public received was that the Supreme Court had not overturned *Roe v. Wade*.¹⁴² The reality is that following *Casey* courts started to uphold laws bearing negatively on the ability of women to obtain abortions.¹⁴³ It could be that the public is content with both halves of this story. But it also is possible that the public only received information the first half.

Third, the public cannot even follow the headlines when the subject matter is obscure enough. Much of what has aroused academic and progressive ire of late are the Court's federalism decisions, particularly those involving congressional power to subject states to remedial suits.¹⁴⁴ This is difficult stuff to teach even law students. So

140. Durr et al., *supra* note 110, at 774.

141. 505 U.S. 833 (1992).

142. *Roe v. Wade*, 410 U.S. 113 (1973); Linda Greenhouse, *High Court, 5-4, Affirms Right to Abortion but Allows Most of Pennsylvania's Limits*, N.Y. TIMES, June 30, 1992, at A1; Ruth Marcus, *5-4 Court Declines to Overrule Roe; But Limits Permitted On Abortion*, WASH. POST, June 30, 1992, at A1; Laurence H. Tribe, *Write Roe Into Law*, N.Y. TIMES, July 27, 1992, at A17.

143. See, e.g., *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (upholding physician-only requirement); *Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783 (9th Cir. 2002) (upholding broad exception to the confidentiality requirement of Arizona provision on judicial bypass of parental consent); *Planned Parenthood of Mid-Missouri & E. Kan., Inc. v. Dempsey*, 167 F.3d 458 (8th Cir. 1999) (upholding Missouri provision preventing abortion service providers from receiving state family-planning funds).

144. See generally Balkin & Levinson, *supra* note 9, at 1054 ("In 1996, however, in *Seminole Tribe v. Florida*, the increasingly confident new conservative majority created a new state immunity, purportedly based on the Eleventh Amendment but in reality made up out of whole cloth."); Laura S. Fitzgerald, *Beyond Marbury: Jurisdictional Self-Dealing In Seminole Tribe*, 52 VAND. L. REV. 407, 487 (1999) ("By asserting a freestanding prerogative to control its own subject-matter jurisdiction over lawsuits against state interests, this Supreme Court has dealt itself a remarkable constitutional power, moving it a step beyond *Marbury*."); Post & Siegel, *supra* note 11, at 455 ("The Court's new interest in constraining Section 5 power, when considered in light of the developments in Commerce Clause and Eleventh Amendment jurisprudence we have just discussed, raises disconcerting questions for the future of federal antidiscrimination law."). The magnitude of the academic response to these decisions is well demonstrated by the proliferation of symposia and conferences on that topic. See, e.g., Symposium, *Federalism after Alden*, 31 RUTGERS L.J. 631 (2000); Symposium, *Shifting The Balance Of Power? The Supreme Court, Federalism, And State Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001); Symposium, *Symposium on New Directions in Federalism*, 33 LOY. L.A. L. REV. 1275 (2000).

long as the stories about the Court are told at a technical level, the public is going to switch to the next channel or turn the page.¹⁴⁵

Closely related, and perhaps most important, is the issue of salient decisions. As we have seen, only a small fraction of what the Court does is likely to register with the public.¹⁴⁶ Thus, a strategic Court easily could accomplish a great deal while hiding behind salient decisions. The ability to do this can be overstated; it is not as though the Court always can determine in advance which stories will be news. Nonetheless, it does not take prescience to figure out that certain cases will be the high-profile ones, and an awful lot can take place behind the scenes, relying on more obscure doctrines.

Take one final example, this time of something the Court has not done. There long has been a call for the Supreme Court to open its doors to cameras for oral arguments.¹⁴⁷ This the Court has opposed.¹⁴⁸ It is possible that the Court's opposition is ill-placed. There are hints in the literature that what creates diffuse support is the "trappings" of

145. Covering the Supreme Court for the *New York Times*, Linda Greenhouse has made a noble effort to explain the Court's Eleventh Amendment decisions in a catchy way. See, e.g., Linda Greenhouse, *5-to-4, Now and Forever; At the Court, Dissent Over States' Rights Is Now War*, N.Y. TIMES, June 9, 2002, § 4, at 3 ("There are dissenting opinions at the Supreme Court, and then there are declarations of war. These days, federalism means war."); Linda Greenhouse, *Legacy of a Term — A Special Report; In Supreme Court's Decisions, A Clear Voice, and a Murmur*, N.Y. TIMES, July 3, 1996, at A1 ("Continuing a searching, and divisive, re-examination of the allocation of Federal and state power that it began the previous year, the Supreme Court sharply curbed the authority of Congress to subject states to lawsuits in Federal courts."); Linda Greenhouse, *States are Given New Legal Shield by Supreme Court*, N.Y. TIMES, June 24, 1999, at A1 ("Thrusting the doctrine of state sovereignty well beyond existing boundaries, the Supreme Court placed sharp new curbs today on the ability of Congress to make Federal law binding on the states.").

146. Franklin & Kosaki, *supra* note 74.

147. See, e.g., *Cameras Belong in U.S. Courts*, SUN-SENTINEL (Fort Lauderdale, Fla.), Mar. 8, 2003, at 18A; *Court's Vigor on Display*, L.A. TIMES, Dec. 3, 2000, at M4 ("Friday's hearing should, however, settle the question of whether cameras and audio recorders belong in the high court."); *Let TV be a Window to Courts*, L.A. TIMES, Feb. 28, 1999, at M4 ("American Bar Assn. President Philip S. Anderson declared last week, 'I cannot think of a better civics lesson for the people of America than to be able to see and hear every argument before the Supreme Court of the United States.' He is right."); *Televising the Highest Court*, N.Y. TIMES, Dec. 5, 2000, at A28 ("The chief justice should embrace the presence of television in the United States Supreme Court as an important tool of democratic empowerment."); *Television and the Court*, HARTFORD COURANT, Dec. 27, 2000, at A16 ("[The Supreme Court] should follow the lead of most state courts and regularly televise its sessions.").

148. *Court's Vigor on Display*, L.A. TIMES, Dec. 3, 2000, at M4 ("With most of the justices harboring deep antipathy toward the idea of cameras or recorders in the courtroom, Chief Justice William H. Rehnquist last Monday summarily rejected a CNN request to broadcast this session."); *Open up the Courts to Cameras, the Public*, SEATTLE TIMES, Mar. 16, 1998, at B6 ("The day you see a camera come into our courtroom it's going to roll over my dead body," Souter snarled."); *Television and the Court*, HARTFORD COURANT, Dec. 27, 2000, at A16 ("C-SPAN and other networks have long sought the court's permission to take their cameras inside. They have been repeatedly rebuffed.").

power.¹⁴⁹ If this is the case, public viewing of oral arguments might enhance diffuse support. On the other hand, the Court may be wise to be wary. If in fact less information is better (for the Court), then televising arguments is a risk. It is no surprise that the Court declines to take the risk, and chooses not to permit televised arguments.

That is the Court's side of things, but there is room on the opinion leader and media side to play the same game. Recall that this entire discussion about the public takes into account the fact that the public is removed from the Court. The public's influence on the Court is mediated, and the reverse is true as well. In between sit political actors who have direct power over the Court, and influence over public opinion.

In some sense the mediated nature of the public's influence on the Court might protect the Court. Even assuming an angry public, it is possible that those in power will seek to protect the Court when the chips are down. Such sentiments need not be widespread. It is a lot more difficult to take action against the Court than to protect it, there are numerous "veto gates" where legislation that might affect the Court could be stopped.¹⁵⁰

But should the Court stray, it is more likely that the possibility of inserting opinion leaders and politicians between the public and the Court presents an opportunity to muster public opinion. First, recall that for opinion leaders, diffuse support acts like specific support. In other words, those in power tend to react much more directly to specific decisions.¹⁵¹ This makes perfect sense; those in power stay there by having their agendas adopted. For those in power, judicial review can pose a real problem. Second, politicians make their names by acting as policy entrepreneurs, by alerting the public to issues that

149. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, *supra* note 80, at 553:

When Courts become salient, people become exposed to the symbolic trappings of judicial power. . . . No matter how one judges the outcome in *Bush v. Gore*, exposure to the legitimizing symbols of law and courts is perhaps the dominant process at play. Thus, the effect of displeasure with a particular decision may be muted by contact with these legitimizing symbols.

See also Gregory Casey, *The Supreme Court and Myth: An Empirical Investigation*, 8 LAW & SOC'Y REV. 385, 409 (1974) (discussing the mythology of neutrality and objectivity in judicial decisionmaking). *But see* Caldeira, *Courts and Public Opinion*, *supra* note 58, at 325 ("So long as the justices maintain a low profile and policies reinforce expectations, basic political values will shape attitudes toward the Supreme Court.").

150. See Friedman, *The Countermajoritarian Difficulty, Part II*, *supra* note 44, at 45 (2002), for an elaboration of this. See generally McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 720-21 (1992) (providing discussion of veto gates).

151. Adamany & Grossman, *supra* note 73, at 408 ("Support for the Court among these [political] elites [political] is . . . very closely correlated with their approval of specific court decisions."); Caldeira & Gibson, *supra* note 61, at 656.

call out for attention.¹⁵² It is difficult to imagine that if there is a problem with the Court, if the Court has strayed, somebody will not step in and fill the gap by making hay about the Court's present direction.

That said, two caveats are in order. One is the lesson learned painfully by Franklin Roosevelt. Diffuse support does exist; one attacks the Court at one's peril. For another — and this is something that progressive academics discontent with the present Court ought to learn from their conservative cousins — how one says things matters. The conservatives have been clever; the progressives in all their frustration have not. Conservatives figured out that it was easier to attack individual judges than the institution of judicial review,¹⁵³ and that successful attacks depended on spinning stories the right way. Progressives spend their time railing at the Court, and doing so in a fairly technical way unlikely to capture public attention.¹⁵⁴

V. CONCLUSION

Public opinion and judicial review are connected. From a normative position they probably should be. But that connection is at a distance, it is mediated. There is a certain amount of slack between public support for the Supreme Court, and its views about what the Court does. That is probably a good and important thing. Even popular constitutionalism is, and must be, something other than the satisfaction of immediate political desires. But the slack is not endless,

152. See generally Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

153. For instance, John Ashcroft held a series of hearings on judicial activism, *Judicial Activism Defining the Problem and Its Impact: Hearings on S.J. Res. 26 Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 105th Cong. 10 (1997), stating:

[W]e . . . heard testimony from individuals who have experienced the impact of judicial activism firsthand. I don't think any of us who were here could forget the testimony of Detective Pat Boyle, who told us how his son was killed by a dangerous criminal who was out on the street because of a Federal court order issued by a judge who, I believe was inappropriately judicially active. Detective Boyle's testimony demonstrates that the problem of judicial activism is not some theoretical concern about the separation of powers alone, but a problem with sometimes tragic, real-world consequences. Today's hearings will help to demonstrate other ways in which activist judges and their decisions have affected all of us.

Stephan O. Kline, *Judicial Independence: Rebuffing Congressional Attacks on the Third Branch*, 87 KY. L.J. 679, 726 (1999) (quoting then-Senator Ashcroft); see also *id.* at 706-08 (presenting remarks of Senator Dole at a speech to the American Society of Newspaper Editors, asking "Do we really want the majority of judges on the Federal bench to think like Judges Barkett, Baer, Brinkema, and Sarokin — an all-star team of liberal leniency — judges who seem intent on dismantling the rule of law from the bench"); *id.* at 709 (presenting statement of Senator Hatch, "Judge Sarokin has repeatedly come down on the side of criminals and prisoners in a series of cases and he recently voted to overturn the death sentences of two Delaware men who, in separate cases, killed several elderly people"); *id.* at 714 (reflecting views of Tom DeLay favoring the impeachment of "activist" judges such as William Justice, Fred Biery, Harold Baer, Thelton Henderson, and John T. Nixon).

154. See *supra* note 5 and accompanying text.

nor is it fixed. It is a function of how informed the public is, and how it is informed. This ensures — for better or for worse — that diffuse support is not static.