A half-century ago the prominent legal theorist Alexander Bickel posed a normative dilemma to students of American constitutionalism. “The root difficulty,” Bickel claimed, “is that judicial review is a counter-majoritarian force in our system” (Bickel 1986, 16). For the last fifty years, Bickel’s difficulty has served as a focal point—some say an obsession—(Friedman 2002, Keck 2007, 513)—of American constitutional theory as scholars search for a principled justification for the legitimacy of judicial review.

While legal theorists have been working to solve Bickel’s normative dilemma, political scientists have been challenging his empirical foundation. A rich empirical literature now argues that the U.S. Supreme Court tends to follow public opinion (Casillas, Enns and Wohlfarth 2011), yield to congressional pressure (Segal, Westerland and Lindquist 2011), and promote the interests of the dominant governing coalition (Clayton and May 1999). In short, most political scientists argue the Court is generally majoritarian; therefore, Bickel’s difficulty is moot. But these findings raise new normative concerns. Some scholars now worry that the Court suffers from a “majoritarian difficulty” because it fails to check majority excess (Dorf 2010).

The result is a literature mired in paradox. The Court is thought to be both majoritarian and countermajoritarian, and both possibilities potentially undermine its legitimacy. The problem is that both the countermajoritarian and majoritarian difficulties rely on simplistic

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empirical accounts of the judiciary’s role in American politics. Consequently, arguments based on these accounts tend to be dissatisfying. We are left searching for an account of judicial review that is both empirically accurate and normatively appealing.

I argue that a more nuanced understanding of judicial independence and power suggests a more accurate and defensible account of the judiciary’s role in American politics. In short, I argue that the Supreme Court exercises countermajoritarian power only by releasing individuals from criminal and civil liability. In all other cases, the Court is generally majoritarian. This structural dynamic enables the Court to actively protect minority interests to the greatest extent possible without empowering the Court to potentially violate individual rights.

The (Counter?)Majoritarian Difficulty

Bickel built his countermajoritarian difficulty on two simple propositions, the first normative and the second empirical. First, Bickel assumed “that coherent, stable—and morally supportable—government is possible only on the basis of consent, and that the secret of consent is the sense of common venture fostered by institutions that reflect and represent us and that we can call to account” (20). Second, Bickel assumed, without providing specific evidence, “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” (16-17). Consequently, Bickel concluded that “judicial review is a deviant institution in the American democracy” (18). Thus, Bickel’s countermajoritarian difficulty amounts to a simple, logical argument: majoritarianism is the basis for political legitimacy; judicial review is countermajoritarian; therefore, judicial review is illegitimate. Rather than accept this argument, most scholars attempt to resolve Bickel’s difficulty by challenging one of the assumptions underlying his logic.
The first strategy, commonly employed by constitutional theorists, is to challenge the assumption that majoritarianism is the basis for political legitimacy. Instead, these scholars suggest that political legitimacy is rooted in some alternative political value, such as promoting equal moral status (Dworkin 1996), minimizing tyranny (Brown 1998), or encouraging broad political participation (Ely 1980). Others suggest that political legitimacy is grounded in super-majoritarianism. The Court promotes super-majoritarian values by enforcing the dictates of formal constitutional enactments (Bork 1990; Whittington 1999) or unconventional constitutional transformations (Ackerman 1991, 2000) against current majorities. These accounts elaborate on Bickel’s notion that “government should serve not only what we conceive from time to time as our immediate material needs but also certain enduring values” (1986 24). If courts tend to promote these enduring values more reliably than electoral institutions, then judicial review may be a legitimate practice. By advancing alternative conceptions of legitimacy that support judicial review, these theorists reject Bickel’s normative assumption and render the difficulty moot.

The second strategy is to challenge Bickel’s empirical assumption that judicial review undermines majority interests. Even before Bickel posed his difficulty, Robert Dahl argued that “[e]xcept for short-lived transitional periods... the Supreme Court is inevitably a part of the dominant national alliance... [and] of course supports the major policies of the alliance” (291-293). Modern “regime politics” scholars generally support this assertion, arguing that “[r]ather than a check on majority power, the federal courts often function as arenas for extending, legitimizing, harmonizing, or protecting the policy agenda of political elites or groups within the dominant governing coalition” (Clayton and Pickerill 2006 1391; see also Gillman 2003; McMahon 2004; Whittington 2005; Whittington (2007)). Due to the judicial appointment process, the various sanctioning tools available to Congress, and the judiciary’s lack of implementation powers, the Court tends to follow public opinion (Casillas, Enns and Wohlfarth 2011; McGuire and Stimson 2004; Mishler and Sheehan 1993), evade congressional rebukes (Clark 2009; Owens, Wedeking and Wohlfarth 2013; Segal, Wester-
land and Lindquist (2011), and invalidate federal statutes with little congressional support (Hall 2013; Harvey and Friedman 2006). Recently, several legal scholars have joined political scientists in insisting that the Supreme Court tends to follow popular will (Friedman 2009; Klarman 2004; Rosen 2006; Tushnet 2005). Even if the Court does break this trend and issue countermajoritarian decisions, those rulings tend to have little practical effect on social change because courts lack implementation powers (Horowitz 1977; Rosenberg 2008; Scheingold 2004). Of course, if judicial review is truly majoritarian, it poses no countermajoritarian difficulty and is, therefore, legitimate.

Somewhat ironically, the two-fold assault on Bickel’s argument raises a new legitimacy problem for the Court. If our core political values require the Court to sometimes act in a countermajoritarian manner, yet the Court rarely, if ever, acts in this manner, our system may pose a “majoritarian difficulty.” As Michael Dorf frames the problem, “Are courts that roughly follow public opinion capable of performing what is generally understood as their core counter-majoritarian function—protecting minority rights against majoritarian excesses?” (2010). If the Court is majoritarian, it cannot reliably reinforce participational democracy, hold us to originalist principles, or promote moral values. Consequently, accepting either challenge to Bickel resolves his difficulty, but accepting both raises a new legitimacy concern.

Thus, both the normative and empirical nature of judicial review remain hotly contested. Judicial review may be majoritarian or countermajoritarian, and both possibilities may prove troubling for the institution’s legitimacy. This tension in constitutional thought is not new; in fact, both perspectives can be found in Federalist 78. At some points, Hamilton seems to presume and defend countermajoritarian judicial behavior. Independent courts, he claims, “guard the Constitution and the rights of individuals from the effects of those ill humors, which... have a tendency... to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.” Without these independent courts armed with judicial review, “all the reservations of particular rights or privileges would amount to nothing.” Yet, at other points, Hamilton assuages concerns about the Court by suggesting
the unlikelihood of countermajoritarian behavior. “[I]t is easy to see, that it would require
an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the
Constitution, where legislative invasions of it had been instigated by the major voice of the
community.” Indeed, due to “the natural feebleness of the judiciary, it is in continual jeopardy
of being overpowered, awed, or influenced by its co-ordinate branches.” Two centuries later,
we are still grappling with this tension. Is judicial review countermajoritarian and, whether
it is or not, is the practice legitimate?

The Majoritarian Resolution

The tensions in empirical and normative accounts of judicial review might be resolved
by adopting one of two relatively straightforward approaches. First, one might accept ma-
joritarianism as the basis of all political legitimacy and concede Dahl’s argument that the
Court is majoritarian. This strategy incorporates social science findings and eases norma-
tive concerns, but it leaves the justification for judicial review on uncertain ground. Even if
judicial review poses no legitimacy concern, what purpose does it serve? Surely we should
not preserve and maintain an institution that runs fundamentally counter to our core po-
litical value (for the purposes of this argument, majoritarianism) simply for the purpose of
conferring legitimacy on popular policies.

Kieth Whittington suggests that judicial review by a friendly judiciary may help current
elected officials overcome obstructions and disrupt the status quo [2005, 2007]. As examples,
Whittington highlights cases in which the Court has helped elected officials overcome ob-
structions associated with federalism, entrenched interests, and fractious and cross-pressured
political coalitions. His account is a convincing explanation of why current power holders
might support the active exercise of constitutional review. However, Whittington’s argu-
ment does little to justify the existence of judicial review in a democratic system; indeed,
providing such a justification was not his goal. Constitutional structures such as federal-
ism, the separation of powers, and the filibuster undoubtedly hinder majority interests, and judicial review may well assist governing coalitions in overcoming these obstructions. But surely the democratic solution to these problems is to excise the anti-democratic features from our constitutional system, rather than create another anti-democratic system in the hopes that two democratic wrongs will tend to make a normative right. As Whittington and others have pointed out, assisting elected officials sometimes undermines democratic accountability. For example, elected officials may support judicial review in part because it allows them to “shift[] blame for controversial decisions to the Court and obscur[e] their own relationship to those decisions” (Whittington 2005, 592; see also Graber 1993).

Even if we believe the Court promotes popular will more reliably than the elected branches (Rosen 2006), the existence of a non-democratic process imposes costs on a democratic society (2006). Therefore, accepting majoritarianism as our core political value may require us to follow Jeremy Waldron and completely abandon judicial review. But embracing Waldron’s approach does little to alleviate our normative headaches. Accepting majoritarianism as the *sine qui non* of political legitimacy invites a wide range of similar problems. Must we also abandon the numerous countermajoritarian structures of our constitution? Must bicameralism, the Electoral College, the system of representation in the Senate, and single member districts also be jettisoned from our political system? And if the practical likelihood of achieving these reforms is effectively zero (as I suspect it is), must we simply accept that our constitutional structure is irredeemably illegitimate?

In sum, accepting majoritarianism and a majoritarian Court leaves judicial review unexplained and undermines the legitimacy of our entire constitutional system. Even more troubling, most main-stream political theorists would balk at a theory of legitimacy that abandons all rights in favor of pure majority rule. As a result, the first strategy for resolving the (counter)majoritarian paradox offers little solace.
The Enduring Values Resolution

Alternatively, one might reject evidence that the Court is majoritarian and adopt a philosophical approach that embraces its countermajoritarian character as a mechanism to promote alternative political values. Such is the approach of many constitutional theorists who suggest that political legitimacy is rooted in originalist principles, equal moral concern, or some other nonmajoritarian value. This strategy has great appeal; it promises to save the narrative of a heroic, countermajoritarian Court, boldly defending our enduring values (whatever those values may be) against an intemperate and tyrannical majority. Thus, the political legitimacy of judicial review can be saved if the practice promotes our enduring values.

The majoritarian literature casts serious doubt on the heroic Court narrative, but it does not necessarily disprove it. The Court may generally follow majority will and deviate from that pattern only when the majority runs afoul of its own values. We might readily admit that courts and legislatures tend to agree on the application of fundamental values (which should not be surprising considering that these values are supposedly fundamental in our society). It is only on rare occasions when the judgments of courts and legislatures diverge, and on these occasions we might believe that courts tend to more accurately and faithfully adhere to these values.

The critical step in this argument is demonstrating that courts possess the capacity to produce outcomes consistent with our enduring values more reliably than do representative legislative institutions. As Bickel wisely advised, “[t]he search must be for a function... which is peculiarly suited to the capabilities of the courts...[and] which will be effective when needed” (1986, 24). Do courts of justice possess a capacity, unique in their institutional setting, that enables them to promote a particular value with greater reliability than representative legislatures?
Bickel suggested several potential advantages that judges may possess, such as “the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government” (1986, 25-6). These features, Bickel argued, “give courts the capacity to appeal to men’s better natures, to call forth their aspirations, which may have been forgotten in the moment’s hue cry” (26). Michael Moore offers another possibility: “judges are better positioned for... moral insight than are legislatures because judges have moral thought experiments presented to them everyday [sic] with the kind of detail and concrete personal involvement needed for moral insight” (Moore 2001, 188). Each of these arguments has an initial appeal, but they do not withstand scrutiny.

First, some of these claims apply to legislators as well as judges. Many legislators have very similar legal training to that of judges. In fact, the training argument may lean in favor of legislatures. In a large legislative body, members often possess a wide variety of educational and professional backgrounds. This diversity of perspectives and combined body of knowledge may well yield better outcomes than a small group with a single educational and professional background. Similarly, legislators can and often do look at specific cases to inform debates (Waldron 2006, 1346). They can also consider statistical evidence, moral arguments, and pragmatic policy considerations often thought inappropriate in a judicial context.

Second, though insulation from public opinion will undoubtedly yield different outcomes, it is not clear why insulation should necessarily yield better outcomes. To adopt such a position, one would have to go well beyond rejecting majoritarianism as the basis for political legitimacy. Instead, one would have to adopt a philosophy that assumes popular decision making tends to violate enduring values, thus any other decision would be preferable (even a random draw). Absent this anti-democratic assumption, it is unclear why decisions by insulated actors should tend to more reliably protect enduring values. A brief canvas of history suggests the Court often fails to protect individual rights (Plessy v. Ferguson, Korematsu v.
Third, this perspective smacks of elitism. The notion that judges possess special wisdom by virtue of their leisure and training tends to evoke Catherine MacKinnon’s image of Ronald Dworkin as he “floats above social life, transcending it. . ., decides what is good and bad. . ., [and] pronounces what is faithful to the constitution and what is not” (MacKinnon 1997, 1775). Surely our theory of political legitimacy in a democratic society must rely on arguments with more egalitarian intuitions and persuasive force.

An alternative approach is to adopt Richard Fallon’s notion of the Court as a “third legislative chamber” (2010, 299). Fallon argues that judicial review might promote enduring values even if courts possess no unique capabilities. Fallon argues “that legislatures and courts should both be enlisted in protecting fundamental rights, and that both should have veto powers over legislation that might reasonably be thought to violate such rights” (2008, 1695). This approach admits that Courts are generally majoritarian, yet defends judicial review without abandoning countermajoritarian values. Fallon suggests that “Legislative action is more likely to violate fundamental rights than legislative inaction” (1700). Consequently, any limitation on legislative productivity potentially promotes individual rights. Adopting judicial review adds a veto point to the system (just like bicameralism and a presidential veto) and simply makes it harder to enact laws. Therefore, judicial review may indeed promote rights at the margins by limiting legislative enactments, even if the Court possesses no special characteristics and generally tends to promote majority interests.

Unfortunately, Fallon describes his argument as “an uneasy” case for judicial review because it hinges on the assertion that “over-enforcing” rights is preferable to “under-enforcing” those rights. The argument assumes it is better to invalidate too many statutes rather than too few because legislative action is more likely to violate fundamental rights than legislative inaction. But, as Fallon readily acknowledges, this assumption is open to challenge (2008, 1711). Rulings such as Dred Scott v. Sandford and Lochner v. New York may evidence the potential for invalidation of legislative action to severely curtail fundamental rights. At
worst, the flaws in this assumption undermine the theory; at best, they suggest serious limitations in the proper use of judicial review. For example, Fallon concedes that his argument does not apply to “ordinary” *Lochner*-style liberty rights, cases in which the legislature creates protections for individual rights, structural constitutional norms such as federalism or the separation of powers, or cases in which fundamental rights claims are plausibly asserted on both sides (2008, 1728-30). Accordingly, Fallon’s approach leaves a great deal of judicial review as it has been practiced in the United States without a normative defense. At most, Fallon’s theory might defend judicial legitimacy under a very different system than our own.

However, Fallon’s approach suggests a promising avenue for establishing the legitimacy of judicial review. Rather than suggesting that judges possess superior moral judgment with regard to fundamental rights, Fallon simply points out a feature of judicial review that may promote these rights. Judicial review, he claims, leads to less legislative action, and less legislative action may promote rights. The difficulty in his reasoning lies in the claim that less legislative action always promotes rights. Reducing legislative action may not be a function that legitimizes judicial review, but another function may yet exist. Has the social scientific study of the judiciary identified a function that is “peculiarly suited to the capabilities of the courts” and might legitimize judicial review?

**The Acquittal Theory**

In this section, I attempt to develop an account of judicial review that is both empirically grounded and normatively defensible. I argue that a more nuanced understanding of judicial independence can reconcile conflicting accounts of the judiciary and suggest a compelling normative defense of judicial legitimacy. The key to my approach is to understand that the judiciary plays two distinct roles in American democracy. The Court is sometimes countermajoritarian, but only in cases that involve criminal or civil liability. In all other cases, the Court tends to follow majority will, and when it does not, its decisions have little
effect. Thus, the Court can undermine the majority, but only by acquitting individuals from criminal prosecution or civil damages. Accordingly, the empirical reality of judicial review is congruent with theories of political legitimacy that value freedom from government restraint over majority rule.

The acquittal theory hinges on the distinction between two categories of cases the Supreme Court might hear: “vertical” cases and “lateral” cases (Hall 2011). Vertical cases involve potential judicial punishment via criminal prosecution or civil damages. As an example, consider the Court’s ruling in *Roe v. Wade*, which involved potential criminal penalties for abortionists. The critical feature of a vertical issue is that the Supreme Court’s ruling can be effectively implemented by lower-court judges. In *Roe*, the successful implementation of the Court’s ruling simply required lower-court judges to acquit individuals charged under an abortion statute. As a wealth of literature has demonstrated, lower-court judges generally adhere to Supreme Court precedent (Brent 1999; Gruhl 1980; Hoekstra 2005; Songer, Segal and Cameron 1994; Songer and Sheehan 1990), and the Court’s “hierarchical control appears strong and effective” (Westerland et al. 2010, 891). Consequently, when the Court issues a ruling like *Roe*, it can generally rely on lower-court judges to implement its decision. Consistent with this expectation, *Roe* had a significant impact on the practice of abortion in the U.S (Hall 2011 38-44), and the decision had far-reaching societal effects (e.g., Bitler and Zavodny 2002; Donohue and Levitt 2001). As a result of this institutional dynamic, the Supreme Court enjoys substantial implementation power in vertical cases. The Court’s rulings have had significant effects on behavior across a range of vertical issues, including criminal justice, gun control, and free speech (Hall 2011 38-96).

Furthermore, the Court’s power in these cases does not depend on the popularity of its rulings. *Roe* was effective, despite some strong public opposition, because the case involved a vertical issue. Lower courts could directly implement the decision, and did so without regard to popular opinion. Because implementation does not depend on public opinion in these cases, the Supreme Court can disregard the preferences of the public and elected officials.
In fact, a closer look at external pressures on the Court reveals that public opinion and congressional preferences have little or no influence on the Court’s decisions in vertical cases (Hall 2012). In other words, the pattern of external influence on the Court documented by dozens of scholars is primarily driven by a subset of the Court’s cases. In vertical cases, the Court makes truly independent decisions and those decisions have real-world consequences irrespective of public opinion. Taken together, these findings have important implications for judicial legitimacy. By setting the standards under which individuals can be punished in lower courts, the Court can insulate minority groups from criminal and civil penalties, even in the face of majority opposition.

The nature of the Court’s role in vertical cases is sharply contrasted against its role in lateral cases. Lateral cases involve situations in which lower-court judges cannot directly implement a Supreme Court ruling. In these situations, the justices must rely on nonjudicial actors for the efficacy of their decisions. Consider, as an example, Brown v. Board of Education. Lower-court judges obviously play no inherent role in the administration of public schools. Accordingly, the actual desegregation of schools ultimately depended on the actions of local school boards and other nonjudicial actors. Not surprisingly, these nonjudicial actors (who generally must stand for reelection or answer to those who do) tend to ignore or undermine unpopular rulings (Hall 2011). These actors tend to follow judicial orders only when the public supports the order; therefore, only popular lateral rulings tend to be implemented. Consequently, most public schools in the Deep South remained segregated for a decade after Brown due to intense public opposition (Klarman 2004). Only in the Border States, where public opposition was weaker, did the Court’s ruling have any effect (Hall 2011, 127-30; Rosenberg 2008, 72-107). Similar patterns appear in unpopular lateral rulings related to school prayer, censorship in school libraries, and minority set-aside programs (Hall 2011, 130-47).

As many scholars have emphasized, the Court’s lack of implementation power is a compelling reason for the justices to heed external pressures (2011, 75; Cross and Nelson 2001).
But these scholars have overlooked the fact that the Court only lacks implementation power in lateral cases. Accordingly, external pressures should only influence the justices in lateral cases. Empirical investigation confirms this expectation: the justices generally tend to follow public and congressional preferences only in lateral cases (Hall 2012). Accordingly, the Court rarely, if ever, plays a countermajoritarian role in these lateral cases. In these issue areas, the justices generally issue majoritarian rulings and their decisions have little impact when they deviate from this trend.

**Acquittal as a Peculiar Capability**

This nuanced empirical account resolves some of the tensions in the legitimacy of judicial review. The Court can and does act in a countermajoritarian manner in some circumstances. Thus, the Court can sometimes perform its “core counter-majoritarian function—protecting minority rights against majoritarian excesses” (Dorf 2010). The Court can protect minorities by acquitting individuals from criminal and civil liability. The Court can free individuals from direct government interference; it can protect the life, liberty, and property of individuals, even in the face of majority opposition.

We might then say that the Court can promote liberty over majoritarianism, but only liberty in a narrow sense. The Court cannot provide positive rights, supervise electoral institutions, or guarantee that nonjudicial government actors accord equal treatment to similarly situated individuals. As a result, the Court may be incapable of ensuring a robust fulfillment of fundamental rights under many normative theories. If the acquittal theory required adopting this narrow conception of fundamental rights, it would likely prove unpalatable to many rights theorists.

Fortunately, the acquittal theory is compatible with a variety of rights-based theories, including theories that demand the protection of a substantially broader array of rights. The acquittal theory does not imply that this narrow sense of liberty as acquittal encapsulates all
fundamental rights. Instead, the acquittal theory suggests only that acquittal from government penalties can promote some fundamental rights. Almost every theory of fundamental rights includes insulation from government interference, such as free speech and freedom of religion. Therefore, acquittal can promote at least some enduring values.

Of course, acquittal will prove insufficient to promote some values, including some that are undoubtedly fundamental (e.g., equal protection). However, empowering the judiciary to protect a broader array of rights would give judges the power to potentially infringe on fundamental rights. Enabling the judiciary to promote only acquittal places a one way ratchet into our political system. It allows judges to release people from government interference without allowing it to instigate government interference. It allows judges unilaterally promote some fundamental values without allowing them to unilaterally infringe on those values.

Conclusion

In this essay, I have argued that recent empirical studies on judicial power and independence provide valuable insight for the on-going debate over the legitimacy of judicial review. Simplistic understandings of the judiciary’s function in American politics yield dissatisfying normative conclusions; however, a more nuanced account opens the door to an appealing normative argument. The Court is sometimes countermajoritarian, but it can use this power only to acquit individuals from criminal or civil punishment. In this manner, the judiciary can promote some fundamental values without potentially threatening those values.
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