



2002

Taking Its Toll: Partisan Judging and Judicial Review

Jeff Broadwater

Follow this and additional works at: <https://lawrepository.ualr.edu/appellatepracticeprocess>



Part of the Courts Commons, Judges Commons, Jurisprudence Commons, Law and Politics Commons, and the Law and Society Commons

Recommended Citation

Jeff Broadwater, *Taking Its Toll: Partisan Judging and Judicial Review*, 4 J. APP. PRAC. & PROCESS 41 (2002).

Available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol4/iss1/4>

This document is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in The Journal of Appellate Practice and Process by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

TAKING ITS TOLL: PARTISAN JUDGING AND JUDICIAL REVIEW

Jeff Broadwater*

I. INTRODUCTION

Most Americans would surely like to believe that the text of the Constitution, the intent of the Founders, the decisions of Marshall and Story, and of Holmes and Cardozo would substantially constrain the discretion of the modern Supreme Court. Presumably, the Court's very legitimacy rests largely on the belief that the Court operates within such constraints. Yet many serious students of the Court would challenge those assumptions as embarrassingly out-dated. As early as the 1920s, Legal Realists argued that judges did not discover objective legal truths when they decided cases; their decisions reflected a myriad of economic and social forces, including the prejudices of their time and class. In the field of constitutional law, history, text, and precedent are so malleable, some would argue, as to impose no meaningful limits, or at least no limits the strong-willed justice is bound to respect. Many share the view of Sanford Levinson of the University of Texas School of Law: "...[t]here are as many plausible readings of the United States Constitution as there are versions of Hamlet."¹

This article attempts to provide a representative overview of recent scholarship on the modern Supreme Court, an institution which, for our purposes, dates from the appointment

* J. D., University of Arkansas at Fayetteville, 1979; Ph.D., American History, Vanderbilt University, 1989. Mr. Broadwater is also the author of *Adlai Stevenson and American Politics: The Odyssey of a Cold War Liberal* (Twayne 1994), *Eisenhower and the Anti-Communist Crusade* (U.N.C. Press 1992), and numerous articles and reviews. He practices law in Little Rock, Arkansas.

1. Sanford Levinson, *Law As Literature*, 60 Tex. L. Rev. 373, 391 (1982).

of California Governor Earl Warren as Chief Justice in 1954.² The focus is on a few simple questions: How does the Court decide cases, what should its role be in a democratic system, and what impact do its decisions have, either in promoting social change or maintaining the Court's influence and prestige? More precisely, Section II surveys the debate over how the Court should exercise its power of judicial review. Section III reviews critiques, from left and right, of the Court under Warren and under his successor, Warren Burger. Section IV examines some ominous trends on the Court that have accelerated since the ascension of William Rehnquist to the Chief Justiceship. Section V considers both the nature of the Court's public support and its status among the scholars and intellectuals who watch it most closely.

The literature hardly supports the popular view of a powerful and majestic tribunal impartially dispensing equal justice under law. In this cynical age, that is not news. But the contemporary scholarship does not depict a merely fallible Court occasionally reaching a disagreeable result; it questions the Court's competence, its effectiveness in achieving its own objectives, and its view of its role in the American political system. Most striking is the corrosive effect of the decline of the concept of the Court as a judicial institution administering some identifiable body of constitutional law. The liberal activism of the Warren Court still has its defenders, but support for the modern Court is otherwise surprisingly thin, thin enough to raise questions about the Court's ability to play as dramatic a role in the history of the next half century as it seems to have played in the last. This more modest view of the Court highlights, as we shall see, the value of the traditional ideals of the judicial craft: impartiality, scholarship, and moderation.

One caveat is in order. If modern scholarship is not particularly friendly to the Court, one wonders how much help the scholars have been to the justices. Besides being increasingly arcane and inaccessible to anyone but the specialist, the literature offers nothing approaching a consensus on what the

2. For a succinct but useful bibliography of Supreme Court scholarship from the Court's earliest days to the late 1990s, see the bibliographical essay in Robert G. McCloskey, *The American Supreme Court* (Sanford Levinson ed., 3d rev. ed. U. Chi. Press 2000).

Court ought to do, or even how the Court ought to go about doing it. The most active field of constitutional inquiry in the era of the modern Court has been a debate not over the merits of what the Court has done in particular cases, but over how the Court should approach the question of judicial review. If then for no other reason than the topic looms so large in the literature, we must begin with a review of the debate over an appropriate theory of constitutional decision-making.

II. *BROWN, ROE, AND JUDICIAL REVIEW*

The Warren Court's decision in *Brown v. Board of Education*,³ declaring public school segregation to be a violation of the equal protection clause of the Fourteenth Amendment, created a dilemma for legal scholars. As an exercise in legal draftsmanship, Warren's opinion for the Court did not win high marks. Warren could find no support for his opinion in the origins of the amendment, and accordingly, in the words of the historian Alfred Kelly, the new chief justice "rejected history in favor of sociology."⁴ Warren's sociology consisted of a few, primitive studies that suggested the self-esteem of black children could be harmed by segregation. It seemed a flimsy ground on which to reverse the precedent, *Plessey v. Ferguson*,⁵ establishing the "separate but equal" doctrine, especially in the face of overwhelming white opposition from the area most directly affected by the decision, the American South.

Yet any other result was inconceivable. Less than a decade earlier, the Third Reich had demonstrated where unchecked prejudice could lead. Since the end of World War II, President Harry Truman had ordered the desegregation of the armed services. Jackie Robinson had integrated major league baseball. *Brown* was decided at the height of the Cold War, when the United States was competing with the Soviet Union for the hearts and minds of non-white populations around the world. The Supreme Court itself had already begun to attack Jim Crow

3. 347 U.S. 483 (1954).

4. Alfred Kelley, *Clio and the Court: An Illicit Love Affair*, 1965 S. Ct. Rev. 119, 144.

5. 163 U.S. 537 (1896) (upholding Louisiana law mandating segregated railcars). On the weakness of Warren's sociology, see Lucas A. Powe, Jr., *The Warren Court and American Politics* 41-44 (Harv. U. Press 2000).

in graduate and professional education,⁶ in housing,⁷ and in interstate transportation.⁸ The Court could not, in 1954, have given its sanction to apartheid in the public schools.⁹ But whatever the moral imperative behind *Brown*, how could the Court, as a judicial institution, justify overturning the considered opinions of popularly elected Southern legislatures and school boards in the face of its own precedent and with scant support in the historical record? Liberals, then and since, saw both a messy intellectual problem and an admirable example of the law's ability to promote social justice.¹⁰ For conservatives, the result was a disaster, especially because the result in *Brown* was so generally seen as morally correct. In his widely read book *The Tempting of America*, Robert Bork decried *Brown*'s "calamitous effect upon the law."¹¹ Bork did not challenge the result in *Brown*, but he lamented the lesson it taught: the justices could ignore the original intent behind a constitutional provision, issue a badly reasoned opinion, override massive local resistance to their decision, and still emerge from the fray as moral heroes. To Bork, *Brown* sounded the death knell for judicial restraint.¹²

Brown might have been read to teach that the Court could act boldly, and with little regard for traditional notions of legal craftsmanship, when its decisions reflected a consensus of

6. *McLaurin v. Okla. St. Regents*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948); *Missouri ex rel Gaines v. Canada* 305 U.S. 337 (1938).

7. *Hurd v. Hodge*, 334 U.S. 24 (1949); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

8. *Henderson v. U.S.*, 339 U.S. 816 (1950); *Morgan v. Va.*, 328 U.S. 373 (1946); *Mitchell v. U.S.*, 313 U.S. 80 (1941).

9. For a nuanced defense of *Brown* by a veteran historian, see James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (Oxford U. Press 2001).

10. Laura Kalman, *The Strange Career of Legal Liberalism* 2 (Yale U. Press 1996). See also Stephen L. Feldman, *From Modernism To Postmodernism in American Legal Thought: The Significance of the Warren Court*, in *The Warren Court: A Retrospective* 324 (Bernard Schwartz ed., Oxford U. Press, 1996).

11. Robert Bork, *The Tempting of America: The Political Seduction of the Law* 76 (Free Press 1990).

12. Bork would have justified *Brown* on the theory that the separate but equal rule had failed to produce equality and that although the Framers had not specifically intended to outlaw segregated schools, they had generally intended to ensure equality in public facilities. Bork, *supra* n. 11, at 77-82. Despite earlier conservative criticism, some modern conservatives have embraced *Brown* as a symbol of a colorblind Constitution and, therefore, a useful weapon against affirmative action. See e.g. Patterson, *supra* n. 9, at 206.

national, if not local, opinion. Then came *Roe v. Wade*,¹³ striking down anti-abortion statutes in most of the states. Upholding a right not readily inferable from the Constitution and protecting it with a regulatory scheme of the kind usually devised by legislators, Harry Blackman's opinion for the *Roe* majority suffered from *Brown*-like technical deficiencies. Even prominent liberal scholars seemed bewildered. Stanford's John Hart Ely said *Roe* was not "bad constitutional law" only because it was "*not* constitutional law and gives almost no sense of an obligation to try to be."¹⁴ In the five years after *Roe*, Harvard's Lawrence Tribe, the dean of mainstream constitutional liberals, felt compelled to offer three different rationales to support the result reached by the majority, none of which were based on the majority's reasoning.¹⁵

Roe was seen, in a sense, as *Brown* without the clear moral underpinnings. Although most legal intellectuals were pro-choice, the pro-life forces could hardly be stigmatized as the moral outcasts the Southern segregationists had become. Law professor and historian Laura Kalman, in *The Strange Career of Legal Liberalism*, an important study of modern trends in legal thought, describes *Roe v. Wade* as the defining event of the post-*Brown* generation. "Roe," she writes "plunged constitutional theory into 'epistemological crisis', rekindling interest in judicial review and in the alleged conflict between judicial review and democracy."¹⁶

13. 410 U.S. 113 (1973).

14. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920, 947 (1973).

15. See Kalman, *supra* n. 10, at 58. Kalman notes Tribe's inconsistencies: In *The Supreme Court, 1972 Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1 (1973), Tribe argued that, as a matter of substantive due process, the decision-making role in abortion cases should be reserved to the woman and her doctor. In *Structural Due Process*, 10 Harv. Civ. Rights-Civ. Lib. L. Rev. 269, 317-318 (1975), Tribe expressed concern that the abortion debate pitted a feminist minority against a pro-life minority and was ill-suited for resolution through the political process, and that, therefore, abortion should remain generally unregulated. In *American Constitutional Law* 928-32 (Foundation Press 1978), Tribe questioned the extent to which pre-*Roe* abortion laws, because of lax enforcement, represented a meaningful attempt to protect the fetus. In fairness to Tribe, he has consistently argued that the right-to-life position, because of its sectarian, religious overtones, makes the legal prohibition of abortion problematic. Perhaps more striking than the inconsistencies in Tribe's writings is the extent to which he is willing to base the right to an abortion on judicially defined notions of public policy.

16. Kalman, *supra* n. 10, at 59.

That conflict would be debated on the new, unfamiliar terrain of post-modernism, a vague phrase that was difficult to avoid and impossible to define. Kalman concluded that “the very effort to say what post-modernism was indicated one did not understand it.”¹⁷ Whatever it was, post-modernist jargon came to permeate serious legal scholarship, and despite Kalman’s warning, some writers have offered definitions. Robert Justin Lipkin’s is as good as any:

Postmodernism typically rejects totalizing grand schemes of discourse. It challenges any intellectual or practical domain to reconstruct itself without the assistance of formalistic or rationalistic metaphysics and epistemology. Constitutional theory, traditionally understood as championing reason, objectivity, legitimacy, and truth, is now confronted with the possibility that such notions are illusory.¹⁸

Kalman herself may have captured the essence of the movement, but how could anyone know for sure? “In the deconstructionist moment of poststructuralist thought, the opposition of subjectivity and objectivity . . . stood exposed as artificial constructs that proved more deceptive than revealing.”¹⁹

It is difficult to explain post-modernism, post-structuralism, and deconstructionism without lapsing into caricature, but theorists like Michel Foucault cast as long a shadow over contemporary constitutional scholarship as do Oliver Wendell Holmes and Learned Hand. At a minimum, post-modernism rejects the notion that common sense and empirical research are likely to identify anything we can all accept as objective reality. The best we can do perhaps is to be as precise as possible in describing what we think we see. In any event, post-modernism is obsessed with language and linguistic theory, and one of its distinctive features is its rhetoric. Provisional. Contingent. Indeterminate. The post-modernist has an infinite number of ways to say, “this may be the answer, but only for now.”

17. *Id.* at 97.

18. Robert Justin Lipkin, *Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism* 5 (Duke U. Press 2000).

19. Kalman, *supra* n. 10, at 67.

Post-modernist theory virtually ensured that there would be no scholarly agreement on how to reconcile judicial review and democracy and, pardon the caricature, if the experts were to reach a consensus, their jargon ensured that the rest of us would never know it. Post-modernism satisfied the modern intellectual's desire to look undogmatic, reflected new insights in science and cultural anthropology, and offered the social scientist the legitimacy associated with a set of methodological tools beyond the comprehension of the uninitiated. But it did little to resolve the issues facing legal scholars.

And there were issues. Robert Bork warned readers of *The Tempting of America* that they would "be amazed at how political, how simultaneously sophisticated and anti-intellectual, is much of what passes for constitutional scholarship today." Much of it, Bork said, was not scholarship, but "the advocacy of political results addressed to the courts."²⁰ A more temperate, liberal scholar, Michael J. Perry of Wake Forest University, echoed Bork's criticisms and complained that "contemporary constitutional studies . . . too often consists of depressingly predictable polemical exertions masquerading as scholarship."²¹ The volleys had little effect. Lipkin, a law professor at Widener University, complains that opposing sides have stopped listening to each other because differences over issues such as abortion and gay rights have become insoluble. "The current crisis is the most critical since the Civil War, because our differences, even after being refined through cautious reflection, critical confrontation, and rational argument, remain intractable. . . ." ²²

The inability of legal scholars to formulate a generally accepted theory of judicial review that balanced a responsible deference to the decisions of elected officials with a meaningful respect for the rights of individual litigants may not have been a crisis on a par with the Great Depression or World War II. But it was part of a broader crisis in the law schools. Harvard's Mary Ann Glendon decried the rise of what she called "a law school without law," where activist, usually liberal, law professors taught to the whims of students who had little interest in

20. Bork, *supra* n. 11, at 7.

21. Michael J. Perry, *We The People: The Fourteenth Amendment and the Supreme Court* viii (Oxford U. Press 1999).

22. Lipkin, *supra* n. 18, at 4.

practicing law. The result in constitutional law has been a focus on rights, however esoteric they may be, at the expense of less glamorous topics like federalism and the separation of powers.²³ By the 1990's, legal scholarship—at its worst overtly partisan, painfully pedantic, and highly theoretical—seemed to have little relevance to practicing lawyers and little influence on judges. The wooden prose and interminable footnotes of the law reviews, the most common symptom of legal scholarship, had become easy targets for ridicule. If the judges did pay attention to the law review articles it was likely to lift passages out of context to support results unintended by their academic authors. Occasionally the judges counterattacked. Warren Burger's complaint that graduates were leaving law school without the skills to practice law was widely understood to rest on the assumption that elite law schools were spending too much instructional time on theories about how law could be used to benefit society. One commentator suggested that traditional legal scholarship was being undermined by nothing less than "the collapse of any internal consensus as to the purposes and functions of law."²⁴

Conservatives like Robert Bork continued to insist that, in the field of constitutional adjudication, the way out of the muddle was for the Supreme Court to interpret the Constitution as the Framers had understood it. "Original intent" became virtually the official constitutional theory of the Reagan administration.²⁵ Within the academic community generally, literal adherence to original intent was the legal equivalent of creation science, and received a similar reception. Few liberals were willing to jettison original intent completely and few conservatives were willing to wholly abandon precedent or other interpretative aids, such as the "plain meaning" of the Constitution's words. But the relative importance that original

23. Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (Farrar, Straus & Giroux 1994).

24. Quoted in Kalman, *supra* n. 10, at 62. See also *id.* at 240-46; see generally Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992); Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 Harv. L. Rev. 926 (1990); Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 Yale L. J. 1205 (1981). Legal scholarship may also have been dying of exhaustion. By 1990, 800 legal periodicals were in print. Lasson, *supra* this note, at 926.

25. McCloskey, *supra* n. 2, at 277.

intent should enjoy largely defined the difference between liberals and conservatives. Both sides seemed to assume that original intent, standing alone and rigorously applied, would produce conservative results.²⁶ Liberal scholars raised various objections. The historical record was too fragmentary to produce conclusive evidence of intent. The Framers were not of one mind, and even if they were, why, as Thomas Jefferson asked, should the dead hand of the past rule the present? But mainly liberals were haunted by the spectre of an outdated reactionary regime: a Constitution that would permit state-supported churches, racially-segregated schools, and grossly malaportioned legislative and congressional districts. Michael Perry, in a recent book, quotes James Joyce's *Ulysses*: "History, Stephen said, is a nightmare from which I am trying to awake."²⁷

Ironically, Exhibit A in the case for the horrible results original intent would produce was Raoul Berger's *Government by Judiciary*, published in 1977. Ostensibly a respectably liberal Harvard law professor, Berger took the Warren Court to task, arguing that the Court's tendency to minimize original intent was inconsistent with the notion of a written Constitution itself. If, Berger argued, the power of judicial review was based on the text and history of the Constitution, text and history should logically define the scope of review. Focusing on the original intent of the Framers of the Fourteenth Amendment, Berger concluded that the amendment had never been intended to reach segregation in the public schools or to establish the one-person, one-vote rule for legislative apportionment. Its objectives had been far more modest: to protect the individual's physical security, mobility, and property.²⁸

Berger moved deftly through as impressive an array of historical materials as any law professor ever tackled, and his advocacy of original intent implicated certain issues of legal

26. See Bork, *supra* n. 11, at 7. See also *id.* at 172. Cf. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980).

27. Quoted in Perry, *supra* n. 21, at 117. See Kalman, *supra* n. 10, at 134; see also Akhil Reed Amar, *The Document and the Doctrine*, 114 Harv. L. Rev. 26-134 (2000).

28. Raoul Berger, *Government By Judiciary: The Transformation of the Fourteenth Amendment* 314, 362 (Harv. U. Press 1977).

craft that rarely surfaced in the literature.²⁹ Lawyers are trained to apply and distinguish precedent, not to research primary historical sources. For many lawyers, such materials are not even readily available. Most law schools have been grossly negligent in failing to train students to use primary sources outside of the reporters. Ignorance of the relevant secondary literature makes use of the primary sources even more problematical. Historians, and lawyers themselves, have long ridiculed “law office history,” the fractured, one-sided pseudo-history that finds its way into briefs and, on occasion, opinions.³⁰ Advocates of original intent suffered under the burden of calling on the legal profession to undertake a task for which its members—except presumably the professors at the elite law schools—were unprepared by temperament or training to undertake.

For various reasons then, most law professors believed that another theory of judicial review was needed. One of the earliest, most influential, and most eloquent efforts to define the proper scope of the judicial role apart from the doctrine of original intent was Alexander Bickel’s *The Least Dangerous Branch*. Bickel believed that the Supreme Court had a duty to enforce certain general and fundamental values “that the people themselves, by direct action at the ballot box, are surely incapable of sustaining . . .”³¹ Bickel, however, seemed as troubled by the “countermajoritarian” difficulty—the apparent conflict between democratic theory and judicial review—as he was the proper scope of review. He found historical and legal support for the practice in the intent of the Framers and in *Marbury v. Madison*, but he thought the moral and philosophical justification was less apparent.³²

In reality, Bickel may have been more concerned about majoritarianism than about countermajoritarianism. The obvious solution to the countermajoritarian difficulty was the popular

29. Berger may have moved too deftly. He had his critics, including those who attacked him for practicing “bad history.” See Bruce Ackerman, *We The People* vol. 1, *Foundations* 334, n. 21. (Harv. U. Press 1991).

30. See Kalman, *supra* n. 10, at 70-71. See also McCloskey, *supra* n. 2, at 277.

31. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 27 (Bobbs-Merrill 1962).

32. 1 Cranch (5 U.S.) 137 (1803). See Bickel, *supra* n. 31, at 15-21.

election of federal judges, but although state judges were commonly selected by popular vote, no prominent scholar seriously suggested that federal judges should be elected. Intellectuals of Berger's generation had seen majorities of Germans rally around Adolf Hitler. They had seen majorities of white Southerners support Jim Crow. And they had seen the supposedly enlightened electorate of Wisconsin send Joseph R. McCarthy to the United States Senate.³³ Yet, despite repeated examples of the moral failure of majority rule, Berger and other legal intellectuals, and most Americans, continued to see the rule of the people as the paramount feature of American politics.³⁴

The obsession with justifying judicial review was not inevitable. Although Bickel, many of his contemporaries, and a subsequent generation of scholars could not fully trust the people, they could not shake the conviction that majority rule represented the essence of the American system of government. A still younger generation of scholars would question that premise as well as Bickel's assumptions that judicial review was in reality anti-democratic and that legislators better represented the people's interests than did judges. The Framers themselves had suggested the way of the dilemma, as when Alexander Hamilton wrote in *Federalist No. 78*, "where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former."³⁵ Was it really undemocratic for the Court to strike down a law that violated a Constitution the people had adopted? Bickel did not argue for a particularly expansive reading of the Constitution, but the more any theory minimized original intent, the more scholars seemed to feel a need to elaborate on the justification for judicial review.

33. See Berger, *supra* n. 28, at 312. Suspicion of popular sentiment was not limited to liberal legal scholars. Many contemporary historians shared their concerns. See, for example, Richard Hofstadter's *The Age of Reform: From Bryan to F. D. R.* (Alfred A. Knopf 1955) and the first two chapters of his *The Paranoid Style in American Politics* (Alfred A. Knopf 1965).

34. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 7 (Harv. U. Press 1980).

35. Alexander Hamilton, James Madison, & John Jay, *The Federalist No. 78* 492 (Benjamin F. Wright ed., Harv. U. Press 1996).

Jesse Choper, of the University of California at Berkeley Law School, believed the Court should attempt to preserve its limited political capital by using its power of judicial review to protect individual rights, but abstaining in cases involving federalism or the separation of powers.³⁶ The prominent legal philosopher Ronald Dworkin attempted to resolve the problem by redefining democracy to mean “that collective decisions [should] be made by political institutions whose structure, composition, and practices treat all members of the community with equal concern and respect.”³⁷ Dworkin, and others who were influenced by the contemporary philosopher John Rawls, believed the Court had an obligation to defend individual rights that were rooted in basic notions of political morality. John Hart Ely in *Democracy and Distrust*, perhaps the most important book on judicial review to appear since *The Least Dangerous Branch*, proposed a slightly more modest role for the Court: judicial review should be limited to “clearing the channels of political change” and “facilitating the representation of minorities.”³⁸ In one of the most famous passages in *Democracy and Distrust*, Ely questioned the reliance of others on contemporary moral philosophy in determining what rights the Court ought to protect: “The Constitution may follow the flag, but is it really supposed to keep up with the *New York Review of Books*?”³⁹ Ely’s theory of judicial review, however, was broader than it might appear at first blush. It included the power to strike down legislation stemming from a legislative tendency to systematically disadvantage some minority out of “simple hostility.”⁴⁰ To Ely an unreasonable animus toward a particular group could distort the democratic process as readily as a rotten borough or a poll tax.

36. Jesse H. Choper, *Judicial Review and the National Political Process* (U. Chi. Press 1980).

37. Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 17 (Harv. U. Press 1996). See also Ronald Dworkin, *Taking Rights Seriously* (Harv. U. Press 1978).

38. Ely, *supra* n. 34. *Clearing the Channels of Political Change* is the title of his Chapter 5, which addresses free speech, voting rights, and the legislative process, while *Facilitating the Representation of Minorities* is the title of his Chapter 6.

39. *Id.* at 58.

40. *Id.* at 103.

Michael Perry, by contrast, has argued in a recent study of the Fourteenth Amendment that the Supreme Court could legitimately exercise its power of judicial review to strike down legislation inconsistent with principles that over time had become part of the nation's "constitutional bedrock." In the context of the Fourteenth Amendment that bedrock consists of "the fundamental norm of antidiscrimination." For example, Perry concedes, as do virtually all commentators, that nothing in the history of the Fifth Amendment's Due Process Clause supported the decision in *Bolling v. Sharpe*⁴¹ that the clause prohibited the federal government from maintaining segregated schools in the District of Columbia. Nevertheless, the principle that the federal government should not discriminate against individuals based on their race has become such a part of America's "constitutional bedrock" that even though it lacks support in the history and text of the Fifth Amendment, Perry would not reverse *Bolling v. Sharpe*.⁴²

Perry's "constitutional bedrock" echoes to some extent Yale law professor Bruce Ackerman's "dualists' democracy." Ackerman distinguishes between writers like Bickel and Ely, whom he calls "monists," and "rights foundationalists" like Dworkin. The monists see the American system as basically democratic, equate legislation with the will of the people, and are less willing, therefore, than are rights foundationalists to overturn a statute for infringing on individual rights. Ackerman proposes a third approach. He argues that in "normal

41. 347 U.S. 497 (1954). Ely has described the opinion as "gibberish." Ely, *supra* n. 34, at 32. Powe suggests that due process had a strong equal protection component before the Civil War, but that it had been forgotten by the 1950s, and Warren, "disdainful of history, . . . did not rediscover it." Powe, *supra* n. 5, at 32.

42. Perry, *supra* n. 21, at 27-28. Perry has articulated his own formula for applying the bedrock anti-discrimination principle:

No state may make or enforce any law that denies to some of its citizens, or otherwise lessens or diminishes their enjoyment of, any protected privilege or immunity enjoyed by other of its citizens, if the differential treatment:

- (1) is based on a view to the effect that the disfavored citizens are not truly or fully human—that they are, at best, defective, even debased or degraded, human beings; or
- (2) is based on hostility to one or more constitutionally protected choices; or, finally,
- (3) is otherwise not reasonably designed to accomplish a legitimate governmental purpose.

Id. at 76.

politics”—in the typical election—voters are not really engaged. Legislation arising out of “normal politics” does not represent a popular mandate for constitutional change, and the courts should feel free to strike it down when it violates the Constitution. But on occasion—during the New Deal for example—the people rise up and demand change unequivocally. In those instances, the courts should ratify the legislation that results, even though it requires an alteration of existing constitutional doctrine.⁴³

Ackerman’s work was widely influential, in part, no doubt, because many scholars believed that his description of how constitutional change occurs was more or less accurate. A few highly publicized, controversial cases may distort perceptions of the Court’s role. In most cases the Court is not too far ahead, or too far behind, public opinion.⁴⁴ But Ackerman left the Court in an essentially preservationist mode, incorporating into constitutional law fairly dramatic shifts in public opinion that had already occurred. Other scholars saw a more activist role for the Court. In *Constitutional Revolutions*, Robert Justin Lipkin argued that, historically, fundamental legal change has been brought about by the Court itself. Lipkin easily and effectively surmounted the countermajoritarian difficulty by pointing out the obvious. “Strict or complete majority control has never been the primary goal of American democracy.”⁴⁵ The Electoral College, a Senate in which all states are represented equally, the separation of powers, and the principle of federalism were all designed to check majority rule. Judicial review was one more check in an elaborate system of checks and balances. Lipkin called on the Court to exercise its power to promote what he called “communitarian democracy,” a commitment to emphasizing the individual as an active participant in the process of democratic self-government.⁴⁶

43. See generally Ackerman, *supra* n. 29. See also Ackerman, *We The People* vol. 2 *Transformations* (Harv. U. Press 1998).

44. See McCloskey, *supra* n. 2, at 230-31.

45. Lipkin, *supra* n. 18, at 10.

46. *Id.* at 24. Lipkin’s “communitarian democracy” has its roots in the “republican revival” which began to sweep history departments in the late 1960s and reached the law schools a decade or so later. Republican theorists see two primary intellectual trends in American political history. The first is republicanism, which stresses the individual’s role as a citizen and sees democracy as a vehicle to allow citizens to work together to promote the common good. The alternative is liberalism, in which individual autonomy is

Whether the putative goal of judicial review was protecting fundamental values or individual rights, enhancing representation, preventing discrimination, legitimizing apparent shifts in popular opinion, or promoting communitarian democracy, liberal scholars could not quite convince skeptics that their theories of review would not let them read their political preferences into the Constitution.⁴⁷ Most of their theories presumed the existence of certain values that the people held but had never clearly expressed at the ballot box. As difficult as determining original intent might be, identifying those values presented comparable problems.

More recently, however, Yale's Akhil Reed Amar has called into question the conventional wisdom that original intent would produce judicial opinions a modern democracy could not tolerate. Central to Amar's thesis is the argument that, whatever deficiencies the Constitution has, the Court itself has been worse. If the Constitution permitted slavery, it did not, as the Court did in *Dred Scott*,⁴⁸ deny citizenship to free blacks. In some instances, the Court's botched interpretation of specific provisions aggravated the deficiencies of the document. While many scholars, for example, have struggled with the Court's extraction of the one-person, one-vote rule from the Fourteenth Amendment, Amar, a former clerk to then-First Circuit Judge Stephen Breyer, suggests comparable results could have been reached through the Republican Government Clause,⁴⁹ had not earlier decisions eviscerated that provision through the invention of the political question doctrine.⁵⁰ Amar also suggests that the legal community's focus on the Court, as opposed to the Constitution, tends to glorify the Court, minimize its mistakes, and overlook the continuing relevance of the Constitution

emphasized, political participation is relatively less important, and government power is curbed to allow individuals to seek their own economic self-interest. Republican theory holds that republicanism was the dominant political philosophy in early American history, but that sometime after the American Revolution—when is hotly debated—it was supplanted by liberalism. See *id.* at 243, n. 10; Richard H. Fallon, Jr., *What is Republicanism, and Is It Worth Reviving?* 102 Harv. L. Rev. 1695-1735 (1989); Gordon N. Wood, *Republicanism, The Readers' Companion to American History* 930-31 (Eric Foner & John A. Garraty eds., Houghton Mifflin 1991).

47. See Kalman, *supra* n. 10, at 137-38.

48. 60 U.S. (19 How.) 393 (1857).

49. U.S. Const., art. IV, § 4.

50. See *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

itself.⁵¹ Amar's call for a re-evaluation of the consequences of original intent is compelling, and the fear that a greater reliance on original intent might produce an occasional conservative result is hardly a principled argument against it. But, as we shall see, the scholarly preoccupation with the Court has not, Amar's theories to the contrary notwithstanding, exactly resulted in the deification of the institution.

III. THE WARREN AND BURGER COURTS

In evaluating the activism of the modern Court, the point of reference is invariably the Supreme Court under Earl Warren. For years the prevailing academic view held that, when Warren became Chief Justice, American society was riddled with injustices ranging from Victorian-style censorship to the arbitrary imposition of the death penalty. The Court, under Warren, ushered in a new age of egalitarianism.⁵² Morton Horowitz's *The Warren Court and the Pursuit of Justice* recapitulates the traditional view, and in defending the Warren Court, does not hesitate to resolve the countermajoritarian difficulty by redefining democracy. "[A] simplistic definition of democracy is inadequate to understand the constitutional theory of the Warren Court."⁵³ To Horowitz, democracy could not be understood to sanction discrimination or injustice, and by that definition the Warren Court advanced democracy.⁵⁴ Others would agree. To this day, polls of scholars, judges, lawyers, and students invariably place Earl Warren among the ten greatest Supreme Court justices of all time.⁵⁵

51. Amar, *supra* n. 27, at 133.

52. For a very traditional view of the Warren Court, see Owen Fiss, *A Life Twice Lived*, 100 Yale L. J. 1117 (1991). For a measured—by today's standards—conservative critique of the Warren Court, see Philip B. Kurland, *Politics, The Constitution, and the Warren Court* (U. Chi. Press 1970).

53. Morton Horowitz, *The Warren Court and the Pursuit of Justice* 81 (Hill & Wang 1998).

54. *Id.* at 80-82.

55. Henry Abrams, *Justices and Presidents: A History of the U.S. Supreme Court Appointments From Washington To Clinton* 6-7 (rev. ed., Rowman & Littlefield 1999). At least three of the associate justices most closely identified with Warren Court—William O. Douglas, Hugo L. Black, and William J. Brennan—also appear regularly on the top ten lists. *Id.*

The scholarly view of the Warren Court is changing. Kermit L. Hall has identified three revisionist strands in the Warren Court historiography.⁵⁶ Critics like Robert Bork and Raoul Berger argue that the Court's result-oriented jurisprudence often reached the wrong result and ultimately undermined the rule of law.⁵⁷ Judge Alex Kozinski of the Ninth Circuit has echoed this view: "the Warren Court contributed to the now widespread perception that there really *is* no such thing as constitutional law, that it's all a matter of the philosophy of the particular judges who are making the decision."⁵⁸ A second group, termed "civic republicans" by Hall, argues that the Warren Court tried to do too much and emphasized individual rights at the expense of the common good. He puts Mark Tushnet and Sanford Levinson in this category.⁵⁹ Finally, a third group of scholars suggests that the Court was not as liberal as it was perceived to be and that most of its decisions were modest adjustments of existing legal principles.⁶⁰ Hall, himself a distinguished constitutional historian, has criticized the Court on more technical grounds, specifically its misuse of history.

The Justices were wildly bad historians, so misreading the historical record on such matters of freedom of conscience and race relations as to call into question the very soundness of their approach to these matters. Even worse, the Justices frequently ended up arguing the fine points of history with one another and, in the process, adding to the sense of illegitimacy that accompanied several of their

56. Kermit L. Hall, *The Warren Court in Historical Perspective*, in *The Warren Court: A Retrospective*, *supra* n. 10, at 293-312.

57. See generally Bork, *supra* n. 11, at 1-2; Berger, *supra* n. 28, at 407-410.

58. Alex Kozinski, *Spook of Earl: The Spirit and Spectre of the Warren Court*, in *The Warren Court: A Retrospective*, *supra* n. 10, at 384; see generally *id.* at 377-89.

59. Hall, *supra* n. 56, at 294.

60. By the late 1960s, for example, an attorney for the NAACP was publicly criticizing the Warren Court for refusing to address de facto segregation in northern schools and discrimination in the use of urban renewal funds and for acquiescing in a crackdown on civil rights demonstrations. Powe, *supra* n. 5, at 301-302. Even Morton Horwitz criticized the Court's "all deliberate speed" approach to school desegregation in *Brown II*: "Gradualism probably encouraged violence by allowing enough time for opposition to desegregation to build while holding out hope that the decision could be reversed." Horwitz, *supra* n. 53, at 30. Devotees of a more radical school, Critical Legal Studies, would argue that the Warren Court actually helped preserve an oppressive capitalist system by ameliorating some of its worst abuses without fundamentally changing the system. See Kalman, *supra* n. 10, at 86.

boldest pronouncements. They were no worse than their predecessors in using history, just more persistently bad at doing so.⁶¹

Lucas Powe's impressive new book, *The Warren Court and American Politics*, is likely to represent the dominant view of the Warren Court for years to come. Powe, who teaches law and political science at the University of Texas, attempts to revive the scholarly tradition of explaining the Court in a broad historical and political context. That tradition has been in decline among political scientists since the 1960s and among historians for even longer.⁶² Among lawyers themselves it was never well established. Powe sees the Warren Court as a product of history, especially the Kennedy-Johnson liberalism of the 1960s. What Powe calls "history's Warren Court," the Warren Court of popular imagination, did not take shape until the appointment of Byron White in 1962. Except for *Brown*, the defining cases of the Warren era did not come until the 1960s. Most of those decisions reflected a consensus of national opinion and in fact represented an attempt to impose national values on cultural outliers, the South in civil rights cases, and areas with large Catholic populations in cases involving censorship, contraceptive rights, and church-state relations.⁶³ Much of the Warren Court's jurisprudence has endured, but Powe argues its

61. Hall, *supra* n. 56, at 303.

62. As Powe notes, beginning in the 1950s, political scientists started to turn away from historical analysis to quantitative studies and then to questions of political theory. By the 1970s, public law had been abandoned by senior faculty in many of the most prestigious political science departments. Powe, *supra* n. 5, at xi-xiii. See Melvin I. Urofsky, *Reviving Political Science: Lucas A. Powe, Jr., on the Warren Court*, 26 J. S. Ct. Hist. 89-94 (2001). The status of constitutional law was even more bleak in the history departments; some departments dropped the subject entirely or taught it irregularly. We can only speculate as to what killed constitutional law as an academic discipline outside the law schools, but two suspects are obvious, the field's apparent elitism and the growing reluctance of non-lawyers to take the Court's opinions seriously. Constitutional history might have transformed itself into a subfield of intellectual history, which has been a growth industry, but there is little evidence that the Court's opinions hold any intrinsic interest for scholars outside the law schools. As Mark Tushnet has written, "I cannot imagine. . . an intellectual history of contemporary America in which legal thought would play an important part." Tushnet, *supra* n. 24, at 1205. John Higham touches briefly on the decline of constitutional studies among historians in *History: Professional Scholarship in America 183-84*, 189 (Johns Hopkins 1983).

63. Powe, *supra* n. 5, at 489-92. For a similar view of the Court generally, see Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1 (1996).

impact has been less lasting in areas, such as criminal procedure, in which the Court challenged practices common throughout the nation.⁶⁴

Powe, a former law clerk to William Douglas, is undoubtedly sympathetic to much of what the Warren Court was trying to do. But even Powe finds fault with the Court in its abuse of history, its tendency to decide cases based on the identity of the litigants, and its failure to anticipate the consequences of some of its most far reaching decisions. Nevertheless, whatever his shortcomings as a technician, Earl Warren himself emerges as a dominant figure, one who possessed, in the words of the journalist Eric Sevareid, “gravitas.”⁶⁵

Earl Warren’s successor, Warren Burger, lacked Warren’s commanding presence, and Burger’s Court suffered by comparison. As Judge Robert Henry of the Tenth Circuit has said of judicial temperament, “I . . . know it when I see it and Burger did not have it.”⁶⁶ Conventional wisdom portrays Burger as vain, ineffective, and intellectually overmatched by his job. Appointed by President Richard Nixon to lead the Court to the right, Burger largely failed. The Court remained as activist as ever. One Republican appointee, the moderate Lewis Powell, came under the influence of William Brennan, and another, Harry Blackman, drifted farther to the left, apparently of his own accord, the longer he stayed on the Court.⁶⁷

Although less sweeping than Powe’s *The Warren Court and American Politics*, the best-one volume study of the Burger Court is Earl Maltz’s *The Chief Justiceship of Warren Burger*.⁶⁸ In addition to serving as a solid introduction to the history of the Court from the late sixties until the mid-eighties, Maltz’s book is noteworthy for two points.

64. Powe, *supra* n. 5, at 497.

65. Quoted in *id.* at 500.

66. Robert Henry, *The Players and the Play*, in *The Burger Court: Counter-Revolution or Confirmation* 26 (Bernard Schwartz ed., Oxford U. Press 1998); see generally *id.* at 13-54

67. See generally Mark Tushnet, *The Burger Court in Historical Perspective: The Triumph of Country-Club Republicanism*, in *The Burger Court: Counter-Revolution or Confirmation*, *supra* n. 66, at 203-15; Earl M. Maltz, *The Chief Justiceship of Warren Burger, 1969-1986* 1-13 (U.S.C. Press 2000).

68. See Maltz, *supra* n. 67.

First, Maltz stresses the activism and liberalism of the Burger Court. *Roe* was no anomaly. In addition to the landmark abortion decision, the Burger Court upheld the widespread use of school busing to achieve racial balance in the public schools,⁶⁹ expanded the reach of federal civil rights legislation by adopting the disparate impact test,⁷⁰ attacked the exclusion of aliens from the civil service,⁷¹ attempted to limit the use of political patronage,⁷² expanded procedural due process to include cases involving the denial of welfare benefits,⁷³ and struck down the one-house legislative veto.⁷⁴ The Burger Court overturned all the existing state death penalty statutes in a single case,⁷⁵ and in *Buckley v. Valeo*,⁷⁶ it wrote the modern constitutional law of campaign finance regulation.

Second, Maltz, a Rutgers law professor, levels a charge against the Burger Court that was often made against the Warren Court: many of its major decisions had little basis in existing law.

Indeed, the experience of the Burger Court clearly supports the view that, in the absence of strong, widely accepted formal constraints on the discretion of the justices, constitutional law becomes little more than the aggregate of the idiosyncratic value judgments of the justices who happen to be serving on the Court at a particular time. This is perhaps the most important lesson that can be drawn from the chief justiceship of Warren Burger.⁷⁷

Perhaps the most surprising theme to emerge in contemporary writing about the Court—from standard textbooks to specialized monographs—is a new appreciation of the limits of the Court's power to bring about fundamental social change. For some litigants, victory at the Court may be counterproductive. Women's rights groups prevailed in *Roe*, but Earl Maltz and others have suggested that the backlash against

69. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

70. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

71. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

72. *Elrod v. Burns*, 427 U.S. 347 (1976).

73. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

74. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

75. *Furman v. Ga.*, 408 U.S. 238 (1972).

76. 424 U.S. 1 (1976).

77. Maltz, *supra* n. 67, at 269.

Roe helped defeat the Equal Rights Amendment.⁷⁸ The political scientist Lawrence Baum has questioned the effectiveness of *Roe* in making abortions readily available to women, especially low-income women, and he singled out political dissent as one area in which the Court has had little real impact.⁷⁹ Despite the legal protection the Court has given to extreme forms of protest, social sanctions and extra-legal discipline still operate to stifle dissent: Baum points to the case of the National Basketball Association player who was suspended by the league when he refused, on religious grounds, to stand for the national anthem.⁸⁰ Judge Richard Posner's *The Federal Courts*, an impressive study of the federal judiciary, contains a laundry list of failed efforts by the Supreme Court and the lower federal courts to bring about social changes.⁸¹ "Maybe a lot of their most celebrated interventions," he suggests, "are so much wheel-spinning, costly but largely ineffectual."⁸²

By far the most important study to question the Court's ability to produce reform was Gerald Rosenberg's *The Hollow Hope: Can Courts Bring About Social Change?* Drawing on his own research and a host of earlier studies that had not received wide attention, Rosenberg looked at the Court's activities in a half a dozen areas and concluded that "U.S. Courts can *almost never* be effective producers of significant social change."⁸³ In the area of school desegregation, "the numbers," Rosenberg writes, "show that the Supreme Court contributed virtually *nothing* to ending segregation"⁸⁴ in the South. Ten years after *Brown*, only a little more than one percent of black school children in the South attended integrated schools; if Texas and Tennessee are excluded from the statistics, the figure falls to less

78. *Id.* at 227. Among those who seem to agree with Maltz on this point would be Bork, Berger, Powe, and, perhaps, Hall.

79. Lawrence Baum, *The Supreme Court* 264-73 (6th ed., Cong. Q. Press 1998). Baum concedes, as do others, that the *Brown* decision helped to sustain the civil rights movement and put pressure on Congress to address civil rights issues. See Glendon, *supra* n. 23, at 155-56.

80. Baum, *supra* n. 79, at 267.

81. Richard A. Posner, *Federal Courts: Challenge and Reform* 325-28, 241-42 (Harv. U. Press 1996).

82. *Id.* at 325.

83. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 338 (U. Chi. Press 1991) (emphasis in original).

84. *Id.* at 52 (emphasis in original).

than half of one percent. Not until the late 1960s, when the federal government threatened to withhold federal funds from segregated schools, did meaningful integration occur. Once progress began, it came quickly. The percentage of Southern black children attending school with whites jumped from thirty-two percent in the 1968-1969 school year to almost eighty-six percent in the 1970-1971 term. The threat of the loss of federal funds had done what Court orders could not.⁸⁵

In the area of abortion, the picture is more complex, but Rosenberg comes to similar conclusions. *Roe* was not, as its defenders may argue, the Magna Carta of reproductive freedom, but neither did it open the floodgates to a tidal wave of abortions, as its critics would claim. Between 1966 and 1985, the period Rosenberg studied, the largest increase in the number of legal abortions occurred between 1970 and 1971, two years before *Roe*. Legal abortions were dramatically increasing before *Roe* because four states, most importantly New York, effectively legalized abortion in 1970. Indeed, there had been growing support among legal, medical, and religious groups and among the general public to liberalize, but not repeal, existing state restrictions on abortion throughout the 1960s. The number of legal abortions continued to increase after *Roe*, but the absence of federal funding for abortion and the reluctance of many hospitals and doctors to perform abortions made them difficult for many women to obtain.⁸⁶

Rosenberg seems to recognize that assessing the true impact of *Roe* is highly speculative. Would other states have liberalized their abortion laws if the Supreme Court had not intervened? What would the abortion statistics look like if change had proceeded on a state-by-state basis? Rosenberg's sources agree that roughly two-thirds of the post-*Roe*, legal abortions would have otherwise occurred illegally,⁸⁷ although attempting to count illegal abortions is a notoriously suspect enterprise. In any event, *Roe* itself did less to increase the total number of abortions in the United States than one might assume.

Rosenberg may be open to criticism for underestimating the social significance of transforming an illegal abortion into a

85. *Id.* at 49-54.

86. *Id.* at 178-201.

87. *Id.* at 355.

legal one, but otherwise *Roe* fits well into the second prong of Rosenberg's argument: not only can Court action be ineffective, judicial victories can ultimately be counterproductive. Litigation can siphon off resources that advocacy groups might better use elsewhere. Victories in court, especially at the Supreme Court, can lull litigants into accepting symbolic triumphs instead of continuing to work for grassroots change. By contrast, while a favorable Court decision can give the winning party a false sense of complacency, it can galvanize the losing side into finding ways outside the judicial system to circumvent the Court's ruling. Much of the decades-old scholarly debate about how and if the Supreme Court should promote reform, Rosenberg concludes, is, in reality, moot. Without the support of the public and the other branches of government, the Court can rarely serve as an effective instrument of change.⁸⁸

IV. THE REHNQUIST COURT

Chief Justice Rehnquist has written that Louis Brandeis was once asked why people respected the Supreme Court. Brandeis gave a short answer, "Because we do our own work."⁸⁹

They do less of it today, and the Court's reputation has suffered accordingly. Recent studies of the Court repeatedly note an increasing tendency for the justices to rely more and more on law clerks to draft their opinions. Of the current justices, only Stevens, and perhaps Scalia, regularly prepare the first drafts of their opinions.⁹⁰ Hardly anyone believes that the growing influence of the clerks is a positive development, but as Judge Posner has observed in *The Federal Courts*, the clerks are a fact of modern judicial life that we might as well accept. At

88. *Id.* at 343.

89. William A. Rehnquist, *The Supreme Court: How It Was, How It Is* 261 (William Morrow & Co. 1987).

90. David O'Brien, *Storm Center: The Supreme Court in American Politics* 283-85 (5th ed. W. W. Norton & Co. 2000); Bernard Schwartz, *Decision: How the Supreme Court Decides Cases* 52 (Oxford U. Press 1996); Tinsley E. Yarbrough, *The Rehnquist Court and The Constitution* 51 (Oxford U. Press 2000).

least clerks, Posner points out, are selected, unlike judges, on the basis of merit.⁹¹

But even judges like Posner—and perhaps especially thoughtful judges like Posner—recognize that the increased reliance on clerks has affected the quality of the Court's work. Posner himself has described the principal features of the clerk-written opinion. It is long and heavily footnoted, "colorless and plethoric" in the law-review style.⁹² The clerks' opinions "make an ostentatious display of the apparatus of legal scholarship,"⁹³ but they lack the candor to explain what they are trying to do. Inexperienced lawyers unsure of themselves, the clerks try to conceal new departures in the law and "disguise imagination as deduction."⁹⁴ Posner also believes the opinions lack credibility because lawyers and lower court judges may wonder whether the opinion fairly represents the actual views of the justice to whom it is attributed.⁹⁵ Posner's objections are not about mere matters of style. Longer and less forthright opinions invite uncertainty about the Court's rulings and offer less guidance to lawyers and judges as to what the Court is likely to do in similar cases in the future.⁹⁶

David O'Brien, the University of Virginia political scientist, has identified the shrinking of the Court's docket as one of the most significant changes of the Rehnquist years.⁹⁷ Lawrence Baum has criticized the Court for leaving important questions of federal law unanswered.⁹⁸ Today the Court decides about one percent of the cases brought to it, down from about three percent twenty-five years ago.⁹⁹ The percentage is smaller in part because more litigants seek Supreme Court review, but it is also smaller because the Court is hearing far fewer cases. The Court today may decide fewer than a hundred cases a term on

91. Posner, *supra* n. 81, at 157-58. Ironically, even Rehnquist himself, after clerking for Justice Robert Jackson, questioned the role of the clerks. William H. Rehnquist, *Who Writes Decisions of the Supreme Court?* U.S. News & World Rep. 74-75 (Dec. 13, 1957).

92. Posner, *supra* n. 81, at 146.

93. *Id.* at 148.

94. *Id.* at 147.

95. *Id.* at 148-49.

96. *Id.* at 147-48; O'Brien, *supra* n. 90, at 316-17.

97. O'Brien, *supra* n. 90, at 234-36.

98. Baum, *supra* n. 79, at 126.

99. O'Brien, *supra*, n. 90, at 234.

the merits, as opposed to 150 to 180 in the pre-Rehnquist era.¹⁰⁰ All the justices, except Justice Stevens, participate in the “cert pool” in which the other justices’ clerks divide up the job of reviewing certiorari petitions. The petitions are essentially decided by the clerks, and the clerks, Stevens says, are less likely to grant certiorari than are the justices.¹⁰¹ The Court’s productivity might crudely be measured by the number of opinions produced by each justice each term. By that measurement, with the advent of word processing machines, computerized legal research, and additional law clerks, the Court has, in the space of a century, managed to reduce its productivity. In 1895, the average justice wrote twenty-three opinions a term. In 1995, he or she wrote twenty-two.¹⁰²

Even Rehnquist has acknowledged the phenomenon: the more help the justices have, the less work they get done. The Chief Justice expressed a willingness “to treat this as being pure coincidence, rather than any reflection on law clerks.”¹⁰³ The Court’s stagnant productivity is most likely a commentary on the inefficiency of bureaucratic work routines and the modern tendency of seasoned professionals to delegate—if not abdicate—their responsibilities to inexperienced subordinates. But many observers see it as a reflection on the justices themselves. They spend an inordinate amount of time supervising their clerks, but Judge Posner and Professor Schwartz, at least, doubt whether they work any harder than the average lawyer.¹⁰⁴ Some writers wonder about the skills today’s justices bring to the bench. Sanford Levinson, in a coda to a new edition of Robert McCloskey’s classic, *The American Supreme Court*, writes that Thurgood Marshall, because of his work as a

100. *Id.* at 234-35.

101. *Id.* at 235-36. *See also id.* at 139.

102. Posner, *supra* n. 81, at 154. Presumably the modern justice was writing more concurring and dissenting opinions and fewer opinions for the Court. The slowdown in the number of cases decided continues; it went from eighty-four in the 1998 term to seventy-nine in 1999. *2000 Year-End Report of the Federal Judiciary* 5 (available at <http://www.supremecourtus.gov/publicinfo/year-end/2000year-endreport.html> (accessed June 3, 2002; copy on file with Journal of Appellate Practice and Process)). Former Solicitor General Kenneth Starr also sees a tendency to take cases that would appeal to a 25-year-old, such as the claim that 2 Live Crew’s raunchy parody of “Pretty Woman” infringed the copyright in Roy Orbison’s lyrics. Glendon, *supra* n. 23, at 147.

103. Quoted in Schwartz, *supra* n. 90, at 260.

104. *Id.* at 260-61.

civil rights lawyer, “would have merited a full-scale biography had he been run over by a truck before joining the Court.”¹⁰⁵ So would several of his colleagues. “No one appointed since Marshall,” Levinson goes on, “could conceivably pass the ‘biography test.’”¹⁰⁶ The deeply polarized and evenly balanced nature of contemporary politics puts a premium on the right balance of ideological dependability and confirmability, not merit, in selecting Supreme Court nominees. The Reagan Administration put in place a rigorous screening process to ensure the conservatism of its nominees with the intent, in the words of former Attorney General Edwin Meese, “to institutionalize the Reagan revolution” in the courts. The defeat of the Bork nomination demonstrated the limits of the administration’s approach.¹⁰⁷

If today’s justices are for the most part competent jurists, and every justice appointed to the Supreme Court since 1975 had previously served as an appellate judge, none of them are likely to ever be rated by legal scholars among the Court’s greats. The late Bernard Schwartz, one of the most prolific writers about the Court, concluded his study of decision-making on the Rehnquist Court with a chapter entitled “Apotheosis of Mediocrity.” Schwartz believed that the Rehnquist Court was the least impressive court since before the Civil War. “Not only has the caliber of the Justices declined; it is most unlikely that with the recent politicization of the appointing and confirmation process, a nominee with the potential for greatness could be approved.”¹⁰⁸

The length of the average opinion dropped slightly in the mid-1990s, which most observers would mark as progress, but the persistently high number of individual opinions presents another concern. Important cases are often decided on a five-to-four vote of two almost unchanging blocs, and no single rationale for the Court’s result may command a majority. Barbara Perry has complained that “the increased willingness to display personal and ideological differences before the public in published opinions and speeches is a worrisome phenomenon

105. McCloskey, *supra* n. 2, at 219.

106. *Id.*

107. O’Brien, *supra* n. 90, at 33, 69-70.

108. Schwartz, *supra* n. 90, at 256.

for the image of the institution.”¹⁰⁹ In 1995, fifty-seven percent of Supreme Court opinions were concurring or dissenting opinions, as opposed to ten percent in 1935. Even concurring opinions can undermine the Court’s holding, which in a five-to-four case is already suspect, and create confusion in the law. They also betray, Judge Posner suggests, “a deficient spirit of institutional responsibility.”¹¹⁰ That deficiency of spirit is further manifested in an increasing tendency, common now to most of the federal appellate courts but especially acute at the Supreme Court, to abuse one’s colleagues in print. “Maybe the justices speak in such tones of apodictic certainty because,” Posner has written, “at some unconscious level they are afraid if they lowered the temperature of the debate the public would realize that many Supreme Court opinions are at bottom merely expressions of personal predilection on debatable questions of social policy.”¹¹¹

Edward Lazarus, who clerked for Justice Blackman from 1988 to 1989, captured both the divisions within the Court and the growing activism of the clerks in *Closed Chambers*. Lazarus’s book, part memoir and part history, is an insider’s account written in a fast-paced, richly detailed style reminiscent of *The Brethren*, Bob Woodward and Scott Armstrong’s 1979 bestseller. But at the end of *The Brethren*, which followed the Court through its 1975 term, Woodward and Armstrong had concluded that the “center was in control.”¹¹² In *Closed Chambers*, the center has disappeared to be replaced by two implacable, hostile blocs, which make no effort to compromise their differences and little effort to offer consistent and coherent rationales for their positions. The Court, Lazarus writes, is “so badly splintered, yet so intent on lawmaking, that shifting five-to-four majorities, or even mere pluralities, rewrite whole swaths of constitutional law on the authority of a single, often

109. Barbara A. Perry, *The Priestly Tribe: The Supreme Court in the American Mind* 63 (Praeger 1999).

110. Posner, *supra* n. 81, at 357, 363.

111. *Id.* at 355. For examples of overheated judicial rhetoric, see *id.* at 353, n. 31, 354 n. 32.

112. Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* 444 (Simon & Schuster 1979).

idiosyncratic vote.”¹¹³ By 1988, even the clerks were polarized. Often members of the then-new Federalist Society, clerks for the conservative justices formed what they self-consciously called the Cabal. Stung by being shunted aside at elite law schools where anyone to the right of Che Guevara ran the risk of being labeled a fascist, the conservative clerks, often proteges of Robert Bork and other Reagan-era judges, came to the Court bent on revenge. As one allegedly said in an e-mail at the start of the 1988 term, “Everytime I draw blood I’ll think of what they did to Robert H. Bork.”¹¹⁴ Both sides tried to influence the Court, through, for example, manipulating requests for certiorari to advance their ideological agendas. Assessing the influence of the clerks is difficult, but they surely did their part to poison the atmosphere at the Court.¹¹⁵

Other writers see a lack of collegiality in the perfunctory nature of the Court’s internal conferences and in oral arguments. Although Chief Justice Rehnquist is known, in the words of Barbara Perry, for “his perceived ideological rigidity,”¹¹⁶ she suggests that Rehnquist does not make an inordinate effort to bring other justices around to his views. Rehnquist has defended the Court’s truncated discussions; extended debate, he has written, is unlikely to change a justice’s mind.¹¹⁷ Bernard Schwartz, in his study of the Court’s decisionmaking process, attributes the decline of the conference to more prosaic factors: the introduction of copying machines at the Court during the tenure of Warren Burger. The machines made it easier for the justices to circulate memorandums and draft opinions than to talk issues out in conference. David O’Brien estimates that

113. Edward Lazarus, *Closed Chambers: Rise, Fall, and Future of the Modern Supreme Court* 6 (Penguin Books 1999).

114. *Id.* at 265.

115. See e.g. *id.* at 263. Lazarus’s facts are not always accurate. See David M. O’Brien, *A Dissenting Portrait*, 81 *Judicature* 214 (April 1998). But even allowing for a number of discrepancies, his description of the Court in the late 1980s is compelling. For a view stressing the conservatism of the 1988-89 term, in which the Court limited affirmative action and the scope of civil rights statutes, but upheld the execution of minors and the mentally retarded and allowed the states to prevent the use of state facilities or funds for abortions, see Erwin Chemerinsky, *The Vanishing Constitution*, 103 *Harv. L. Rev.* 43 (1989). Lazarus focused especially on death penalty and abortion cases. Lazarus, *supra* n. 113, at 77, 329.

116. Perry, *supra* n. 109, at 109-10.

117. *Id.*; Rehnquist, *supra* n. 89, at 294.

eighty percent of petitions for certiorari are denied without discussion and that the Court may spend no more than thirty minutes discussing a case it decides on the merits.¹¹⁸ Schwartz argues that oral arguments are as perfunctory as the Court's conferences, which is ironic given that the justices of the Rehnquist Court are among the most active in history in terms of asking questions of lawyers. Nevertheless, Schwartz's research convinced him that the purpose of oral arguments "is a public-relations one—to communicate to the country that the Court had given each side an opportunity to be heard."¹¹⁹

More than partisan politics may be to blame for the Court's apparent decline. Harvard's Mark Tushnet, a former clerk to Thurgood Marshall, puts the emerging view of a new, more modest Court in a broader context in his foreword to the *Harvard Law Review's* summary of the Court's 1998 term. The shrinking of the Court is part, Tushnet suggests, of a "scaling-back of the national government's aspirations to secure justice,"¹²⁰ or what the British political scientist R.A.W. Rhodes has called "the hollowing out of the state."¹²¹ Not only does divided government make it more difficult for national politicians to act, but the rise of the global economy puts more problems beyond the reach of the state. The result has been a weakening, but not the elimination, of the New Deal/Great Society welfare and regulatory system.¹²² The Court has reflected these trends, and a moderate conservatism, or perhaps moderate libertarianism, has replaced the egalitarian liberalism of the Warren years. Tushnet sees in the current Court the triumph of "country club Republicanism," an ideology that protects the interests of the well to do but prompts them to maintain a sense of noblesse oblige. The Court, for example, has preserved the

118. O'Brien, *supra* n. 90, at 262-64; Schwartz, *supra* n. 90, at 7-8, 41-42.

119. Schwartz, *supra* n. 90, at 14, 16.

120. Mark Tushnet, *The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 Harv. L. Rev. 29, 107 (1999); *see generally id.* at 107-09.

121. *Id.* at 33 n.20 (1999) (citing R.W.A. Rhodes, *The Hollowing Out of the State: The Changing Nature of the Public Service in Britain*, 65 Pol. Q. 138 (1994)).

122. Tushnet suggests that *Baker v. Carr*, 369 U.S. 186 (1962), and the Court's other reapportionment decisions may have abetted greater partisanship and stalemate. By forcing politicians to abandon traditional political boundaries, the Court created new opportunities to gerrymander districts for political purposes. As a result, more districts have become bastions of extreme, one-party politics. Tushnet, *supra* n. 120, at 43.

right to an abortion, but mainly for women who are able to pay for one and who have the skills to negotiate their way through a few regulations. Tushnet's Court, in sum, follows a course least likely to generate serious opposition, generally confines itself to narrow, fact-specific holdings, and goes about its business quietly and seriously.¹²³ One of the hallmarks of the contemporary Court is an obvious, careful attention to the detail of particular cases. If the outspoken Antonin Scalia, Tushnet writes, "is the Fox Network of the judicial system, the rest of the Court may see itself as National Public Radio, committed to a thoroughly serious self-presentation."¹²⁴

V. THE QUESTION OF LEGITIMACY

Scholars have so challenged the competence and intellectual integrity of the justices, the very concept of constitutional law, and the ability of the Court to grant meaningful relief to the parties before it as to raise hard questions about the Court's value and legitimacy. Drawing on the early work of political scientist Robert Dahl, law professor Michael Klarman has argued that history does not support great confidence in the Court's ability to do what it is presumed to do best, protect individual rights from abusive majorities.¹²⁵ In a truly revisionist study of four states over two centuries, *Keeping the People's Liberties*, the political scientist John Drinan concluded that state legislatures have proved to be about as

123. Tushnet's notion of a chastened Court has some statistical support, although most commentators will argue that the conservative commitment to judicial restraint is a myth and that the Rehnquist Court has been as activist as the Warren Court. See Terri Jennings Peretti, *In Defense of a Political Court* 140 (Princeton U. Press 1999). If activism is defined as a willingness to overturn precedent and strike down federal and state legislation, the Warren and Burger Courts were unusually active, but in purely statistical terms, the Rehnquist Court has been less assertive. The Rehnquist Court has been, for example, roughly half as likely to strike down a state law as was the Burger Court, partly because the Rehnquist Court was less apt to overturn state laws restricting civil liberties. For tabular displays of the relevant statistics, see either O'Brien, *supra* n. 90, at 30, or Baum, *supra* n. 79, at 201, 203, and 213. Of course, the Rehnquist Court's practice of accepting fewer cases is also a form of judicial restraint.

124. Tushnet, *supra* n. 120, at 91.

125. Klarman, *supra* n. 63, at 4-6; Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279 (1957).

sensitive to individual civil liberties as have the courts.¹²⁶ Mark Tushnet echoed these arguments and those of Gerald Rosenberg in a recent book tellingly entitled, *Taking the Constitution Away from the Courts*. Tushnet pointed, for example, to the Supreme Court's invalidation of the Religious Freedom Restoration Act as evidence that constitutional rights may be safer with Congress than with the Court.¹²⁷ "Adopting a metaphor from electrical engineering, we can say that judicial review basically amounts to noise around ground zero," Tushnet writes. "It offers essentially random changes, sometimes good and sometimes bad, to what the political system produces."¹²⁸

If many liberals have had second thoughts about the Warren Court, they have never warmed to Warren's successors. In 1991, then Yale Law School Dean Guido Calabresi, now a federal appellate judge, wrote in the *New York Times*, "I despise the current Supreme Court and find its aggressive, willful, statist behavior disgusting."¹²⁹ Only his tone was unusual. In a major study of the Rehnquist Court, Tinsley Yarbrough, author of biographies of Hugo Black and both Harlans, uses more subtle language when describing the Court's most conservative members, but dwells at some length on the Court's aversion to publicity and its passion to maintain the confidentiality of its internal deliberations.¹³⁰ Yarbrough does not explain the source of the Court's penchant for secrecy, but one explanation seems obvious: the Court wants to keep its dirty laundry private because its public performance is embarrassing enough.

Ironically, as the Court has drifted toward the right, however haphazardly, under Warren Burger and William Rehnquist, conservatives like Robert Bork have not been appeased. The November 1996 edition of the conservative periodical *First Things* was devoted to a critique of the Court entitled "The End of Democracy? The Judicial Usurpation of Politics." Excoriating the Court for its decisions on abortion,

126. John J. Drinan, *Keeping the People's Liberties: Legislators, Citizens, and Judges As Guardians of Rights* (U. Press Kan. 1998).

127. The Religious Freedom Restoration Act was struck down in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

128. Mark Tushnet, *Taking the Constitution Away From the Courts* 153 (Princeton U. Press 1999).

129. Quoted in Kalman, *supra* n. 10, at 8.

130. See generally Yarbrough, *supra* n. 90.

sexual discrimination, homosexuality, and other issues, some of the commentators came close to advocating open defiance of the Court's orders.¹³¹

A case can be made for the Court on a couple of grounds. The political scientists Lee Epstein and Joseph Kobylka, in their study of abortion and the death penalty, conclude that how a legal argument is framed when the Court first addresses an issue can shape the subsequent development of the law and that the Court really does function like a judicial body. They conclude, in what seems to be a minority opinion, that precedent cannot be completely ignored.¹³² Terri Jennings Peretti, on the other hand, takes the Court at its worst and makes the best of it in her recent book, *In Defense of a Political Court*. Peretti concedes that justices vote their personal prejudices, but she argues that this is perfectly legitimate. A justice is the product of the political system, is as representative of the voters as is any other public official, and has as much right to make political decisions as anybody. The Supreme Court is one more mechanism in a pluralistic political system designed to accommodate a variety of interests and to ensure that government policy represents a broad consensus among the interested parties. Peretti would presumably tell the *First Things* conservatives that the Court has not betrayed them; they simply lost out in a political process in which they failed to secure the appointment of enough sufficiently conservative justices to form a consistent conservative majority.¹³³

Peretti deals with the problem of a political court maintaining its legitimacy and popular support in an unsentimental fashion. She surveys the public opinion research and concludes that most Americans do not know much about the Court, do not expect it to abide by objective, established rules of law, and do not hold the Court in particularly high esteem. The Court maintains what legitimacy it has by making popular decisions more often than it challenges majority sentiment. To

131. For a commentary on the *First Things* symposium, see Perry, *supra* n. 21, at 4-9. For more criticism in a similar vein, see Christopher C. Faille, *The Decline and Fall of the Supreme Court* (Praeger 1995).

132. Lee Epstein & Joseph F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* (U.N.C. Press 1992).

133. See generally Peretti, *supra* n. 123.

Peretti the real mystery is not how the Court maintains a modicum of respectability, but why legal scholars worry about it so much. Peretti offers two explanations. First, lawyers have a vested interest in exaggerating the Court's legitimacy—Peretti herself is a political scientist. Second, the argument that the Court weakens itself when it departs from neutral, objective legal principles is a useful weapon for any partisan who wants to criticize an unpalatable decision.¹³⁴

With defenders like Peretti, the Court hardly needs critics. Fortunately, perhaps, the work of two other political scientists, John Scheb and William Lyons, sheds a slightly different light on public perceptions of the Supreme Court.¹³⁵ Beyond question, most Americans pay little attention to the Court. At the height of the debate over Robert Bork's nomination to the Supreme Court, one of the major news stories of the 1980s, public opinion research showed that fifty-five percent of Americans were unaware of the controversy. In a 1989 *Washington Post* poll, only nine percent of the respondents could identify Chief Justice William Rehnquist; fifty-four percent knew Judge Wapner of the television show *The People's Court*. As the first woman on the Court and as a critical swing vote, Sandra Day O'Connor has become something of a cultural icon and is the best known member of the Court. But according to a 1995 poll, only thirty-one percent of the individuals surveyed could identify her.¹³⁶ According to Scheb and Lyons's 1997 survey, however, forty-seven percent of the respondents rated the Court's job performance as good or excellent, as opposed to a twenty-five percent favorable rating for Congress. In recent years, the Court has consistently out-performed Congress and the President in terms of popular approval, although the Court's ratings have declined along with a general decline in confidence in government.

Scheb and Lyons also found that the Court's overall job approval rating was higher than its rating in any of the specific

134. Peretti, *supra* n. 123, at ch. 6.

135. John M. Scheb II & William Lyons, *Public Perception of the Supreme Court in the 1990s*, 82 *Judicature* 66 (Sept./Oct. 1988).

136. Peretti, *supra* n. 123, at 167; Baum, *supra* n. 79, at 19. See also Perry, *supra* n. 109, at 122-24. On O'Connor's emergence as the pivotal figure on the Court, see Jeffrey Rosen, *A Majority of One*, N. Y. Times Mag. 32 (June 3, 2001).

areas they surveyed, such as criminal law or church-state relations. That gap would suggest the existence of a certain residual respect for the Court that is independent of its decisions in specific cases. Another finding was perhaps more significant. Of all the questions poised by Scheb and Lyons, the clearest consensus emerged when they asked whether a justice's personal ideology should influence his or her decisions. Clear majorities of self-described liberals and conservatives, and two-thirds of self-described moderates, said no.¹³⁷ If, as the data suggests, Americans know little about the Court, give it relatively high ratings compared to Congress and the White House, and believe justices should not base decisions on their personal preferences, traditional notions of judicial legitimacy may not be too far off the mark, Peretti to the contrary notwithstanding. But if Scheb and Lyons have a more sanguine view of the Court than does Peretti, their research is not entirely reassuring. If the public knew what the experts seem to know, the Court would be far less popular than it is.

VI. CONCLUSION

Barring a constitutional revolution, the Supreme Court will endure. Someone must referee disputes between Congress and the White House and between the states and the elected branches of the federal government. Despite all the scholarly handwringing about the countermajoritarian difficulty, the Court undoubtedly derives considerable prestige from the fact that, in an age of sound bites, attack ads, and runaway fund-raising, it is not an elective body. The power of judicial review is a fact of life in a political system that was never intended to be wholly democratic, and the Court need not be defensive about it. In fairness to the Court, many of its most controversial cases, especially those involving race, gender, and reproductive rights, raise issues that so deeply divide Americans that no decision the Court could craft would win general approval.

But questions about the Court's legitimacy and the prestige and influence it will enjoy in the years to come seem as relevant today as ever. The Warren Court raised the stakes and lowered

137. See Scheb & Lyons, *supra* n. 135, at 66-69.

the bar. Its activism pointed later Courts toward new fields of judicial law-making, and its sloppy craftsmanship told them it did not matter how they got there. Abe Fortas, during his brief tenure on the Warren Court, reportedly wrote opinions without reference to the law, and then told his clerks to “decorate” his drafts with legal citations.¹³⁸ Yet the Warren Court usually decided major cases by substantial majorities, which normally reflected elite opinion and, to a considerable degree, the sentiments of the general public. Today the nation is more polarized, and the Court makes law by five-to-four votes, with few advocates among constitutional scholars and no popular consensus.¹³⁹ If the Court is not more political today than at earlier times in its history, we seem to have settled into a pattern of judicial partisanship unprecedented for its duration, bitterness, and near equilibrium.

Results-oriented jurisprudence is risky enough when it produces popular decisions. When it does not reflect what Michael Perry would call “constitutional bedrock,” it can be toxic. Most scholars today see judging at the Supreme Court as an act of political will. The Court’s intervention in the 2000 presidential election, in which all nine justices voted in a politically-charged case along predictable ideological lines, should have eliminated any illusions the general public still held.¹⁴⁰ President George W. Bush’s surge of popularity in response to the war on terrorism, and reports that Bush would have carried Florida even if the Supreme Court had not blocked

138. Laura Kalman, *Abe Fortas: A Biography* 271-72 (Yale U. Press 1990). For more on decorating judicial opinions, see Mortimer Levitan’s *Confidential Chat on the Craft of Briefing*, reprinted at 4 J. App. Prac. & Process, 305, 313 (2002).

139. The most recent such attempt is the Court’s effort to expand state sovereign immunity at the expense of federal authority. Ernest A. Young, *State Immunity and the Future of Federalism*, 1999 S. Ct. Rev. 1; Mark R. Killenbeck, *Pursuing the Great Experiment: Reserved Powers in a Post-Ratification, Compound Republic*, 1999 S. Ct. Rev. 81.

140. See David G. Savage, *The Vote Case Fallout*, 87 ABA J. 32 (Feb. 2001); Garry Wills, *The Making of the President*, 2000 N. Y. Times Book Rev. 8 (Apr. 1, 2001); Alan M. Dershowitz, *Supreme Injustice: How The High Court Hijacked Election 2000* (Oxford U. Press 2001); Vincent Bugliosi, *The Betrayal of America: How the Supreme Court Undermined the Constitution and Chose Our President* (Thunder’s Mouth Press 2001). Evan Tsen Lee, in *The Politics of Bush v. Gore*, 3 J. App. Prac. & Process 461, 473 (2001), attempts to salvage the justices’ “integrity as judges” from what he sees as the constitutional wreckage, but it remains to be seen how successful that effort will ultimately be.

the statewide recount ordered by the Florida Supreme Court, may have muffled criticism of the Court's role.¹⁴¹ But surely a residue of mistrust remains.

If the Court literally has the last word on matters of life and death, and on everything in between, it is understandable that, in a partisan society, people would not want neutral judges. They want judges who share their prejudices. Mary Ann Glendon has lamented the decline of the "classical judicial virtues" of impartiality, prudence, self-restraint, and mastery of the law. Inspired by Earl Warren, more and more judges have felt free since the 1970s to ignore rules and precedent in order to do justice. At the same time, paradoxically, as the courts began to feel liberated from the law, any popular consensus as to what constituted justice seemed more and more elusive. For some judges, doing justice came to mean voting the party line.¹⁴² At the same time, Gerald Rosenberg and scholars who question the effectiveness of judicial intervention may have given partisans an opportunity to begin to think about the merits of a less political Court.

If judicially inspired reform is often ineffective and sometimes counterproductive, perhaps even ideologues can begin to see the value in the "classical judicial virtues." If winning before an activist Court often means losing in real life, partisans may ultimately see the worth of judicial traditionalists who, like doctors, seek above all, to "do no harm." Thus far, there is little evidence of a revival of those values. Political battle lines began to form in anticipation of the next vacancy on the Court shortly after President Bush's election.¹⁴³

Yet, it is the classical judicial virtues, not a fundamentalistic approach to original intent, on which the Court's continued legitimacy may rest. A wholesale rejection of stare decisis, and substantial bodies of existing case law, in the quest for some dispositive original intent, is unlikely to send a

141. For the results of a media review of the Florida election, see Ford Fessenden & John M. Broder, *Examining the Vote*, N. Y. Times A-1 (Nov. 12, 2001). Although the evidence remains inconclusive as to the actual intent of Florida voters, it now appears that the legal strategy pursued by Democratic nominee Al Gore, even if successful, would not have changed the initial election results, and in that sense, the Supreme Court did not deliver the White House to Bush.

142. Glendon, *supra* n. 23, at 118; see generally *id.* at 130-71.

143. Viveca Novak, *Off the Bench?* Time 54 (Feb. 26, 2001).

reassuring message to litigants or the general public.¹⁴⁴ Fortunately, the future is not entirely bleak. The current Court should not be criticized too harshly for taking seriously claims based on state authority within a federal system, the limits of congressional power under the Commerce Clause, or the Fifth Amendment's Takings Clause, areas of the law that the Court had virtually abandoned during the New Deal.¹⁴⁵ We can only hope that the current trends reflect the seeds of something more than another round of partisan warfare.

144. On the importance of respecting precedent, see the opinion of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

145. Yarbrough discusses the Rehnquist Court's rediscovery of state sovereignty and property rights in chapter four of *The Rehnquist Court and the Constitution*. See *supra* n. 90.

