

THE D'OH! OF POPULAR CONSTITUTIONALISM

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THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA. By Jeffrey Rosen. Oxford and New York: Oxford University Press. 2006. Pp. xi, 238. \$25.

INTRODUCTION

With the 1980 election of Ronald Reagan, law professors readied themselves for the coming Armageddon. Reagan preached judicial restraint and, with it, the belief that the people and their elected representatives should make policy. The embodiment of that philosophy was Robert Bork, Reagan's choice to replace judicial moderate Lewis Powell on the Supreme Court and a man whose appearance and judicial inclinations conjured images of the devil.¹

Legal academics cringed at Bork's claim that the founders banked a good deal upon the good sense of the people and their elected representatives.² The academy had banked a good deal on the good sense of courts to protect interests that the people and their elected representatives could not or would not safeguard. In *Democracy and Distrust*,³ the most influential book of this period, John Hart Ely tackled the same problem that Bork addressed and came up with a very different solution. For Bork, the Warren Court perpetrated a "limited coups d'état" by recognizing rights that are not in the Constitution.⁴ For Ely, the Warren Court acted legitimately and heroically when it protected the rights of individuals systematically disadvantaged by the political process.⁵

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1. Law professor opposition to Bork took many forms. Most notably, law professors signed onto a letter opposing the Bork nomination. *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 3349–412 (1987) [hereinafter *Bork Hearings*] (statement of Sen. Biden) (incorporating letters sent to the Committee in opposition to Robert Bork's nomination to the Supreme Court signed by law professors).

2. *See id.* at 114–19 (statement of Robert H. Bork).

3. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

4. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 6 (1971).

5. *See ELY*, supra note 3, at 73–75 (1980) (citing the Warren Court as an exemplar of Ely's approach to constitutional interpretation for its decisions protecting racial minorities, aliens, illegitimates, and poor people).

In 1987, the legal academy carried the day; the Senate Judiciary Committee formally concluded that courts must check democratic excess and that the Constitution “is not simply a grant of rights by the majority.”⁶ Twenty years later, ironically, the defining works of today’s law professors seek to limit the power of courts, rather than look to them for salvation.⁷ Cass Sunstein has called for courts to issue “minimalist” opinions so that elected officials will play the dominant role in shaping constitutional values;⁸ Mark Tushnet has argued that judicial review is counterproductive and should be taken away from the courts;⁹ Larry Kramer has called for the people to exercise control over the Constitution.¹⁰

Jeffrey Rosen’s¹¹ *The Most Democratic Branch* takes matters one step further. Rosen sees the Supreme Court’s role as validating the people’s constitutional preferences. For the most part, that means the Court should defer to the preferences of Congress and state lawmakers. Appearing to turn *Democracy and Distrust* on its head, Rosen contends that the Court should invalidate laws that do not reflect popular constitutional preferences. Rosen argues in part that courts have no power to put in place a “constitutional vision that a majority of the country rejects” and, correspondingly, that the best way to avoid “political backlashes that can thwart the effectiveness of judicial decisions is for courts to defer to Congress or the states in the face of uncertainty” (p. 14). Furthermore, claiming that judges can only maintain their “democratic legitimacy” by “deferr[ing] to the constitutional views of the country as a whole,” Rosen argues that courts should only invalidate those laws that run afoul of “values that national majorities are willing to recognize as fundamental.”¹² In other words, rather than feeling limited by real-world constraints, the Court should embrace those constraints.¹³ That,

6. S. REP. NO. 100-7, at 8 (1987).

7. To explain this shift in law professor attitudes, Barry Friedman argues that the recent wave of scholarship calling for limited judicial review is tied to academics’ belief that elected-government decision-making is likely to be more progressive than the judicial decision-making of Republican-appointed judges and justices. See Barry Friedman, *The Cycles of Constitutional Theory*, LAW & CONTEMP. PROBS., Summer 2004, at 149, 150–56.

8. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

9. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

10. LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004). I should note that I too (along with Lou Fisher) have written about the profoundly important and very useful role that elected officials have played in defining the Constitution’s meaning. NEAL DEVINS & LOUIS FISHER, *THE DEMOCRATIC CONSTITUTION* (2004).

11. Professor of Law, The George Washington University School of Law, and Legal Affairs Editor, *The New Republic*.

12. Pp. 8, 14. In this way, Rosen sees his brand of popular constitutionalism as fundamentally different than that embraced in KRAMER, *supra* note 10. For Rosen, constitutional principles should not be created in the streets; instead, they should be established by a political and electoral process that validates the informed constitutional views of the electorate and lawmakers.

13. P. 210 (“The [Court] can best serve the country . . . by reflecting and enforcing the constitutional views of the American people.”).

for Rosen, is how the Supreme Court can make the Constitution more relevant and enduring.

There is great ostensible appeal to Rosen's theory. It is soothing to learn that one's limits are one's strengths. The problem, however, is that Rosen's theory is premised on two questionable propositions. First, Rosen assumes that the people have "constitutional views." Second, Rosen assumes that the Supreme Court will be slapped down for rendering decisions that do not resonate with the people and their elected representatives.

In the pages that follow, I will argue that the people are uninterested in the Constitution and the Supreme Court, leaving the Court substantial leeway to put into place its vision of the Constitution. This is not to say that the Court operates without constraint; it is to say that the risks of backlash are not nearly as significant as Rosen suggests. Correspondently, it makes no sense for the Court to sort out the Constitution's meaning by looking to the American people, who do not care about constitutional principles: while only one in four Americans can name more than one of the five freedoms guaranteed by the First Amendment, more than half can name at least two members of the Simpsons cartoon family.¹⁴

This Review will be divided into three parts. Part I will both summarize *The Most Democratic Branch* and highlight some of the difficulties that the Supreme Court would face in implementing Rosen's decision-making model. In particular, by allowing the Court to invalidate laws for a host of "antidemocratic" reasons, Rosen's matrix does not constrain the Court in a predictable way. Part II will examine some of the empirical evidence about public attitudes toward the Supreme Court, including public awareness of Supreme Court decisions. I will contend that the Court cannot look to the people to sort out the Constitution's meaning or otherwise constrain the Court. Finally, this Review will return to *The Most Democratic Branch*, considering why it is that Court decisions typically reflect majoritarian preferences. Specifically, through an abbreviated case study of the Rehnquist Court, I will argue that the Court is at once majoritarian and independent—able to do what it wants but usually not wanting to do more than is politically popular.

I. ROSEN'S MOST DEMOCRATIC BRANCH: JUDICIAL DEFERENCE WITH AN ASTERISK

The Most Democratic Branch makes two claims about judicial power to invalidate state and federal law.¹⁵ First, Rosen argues that Supreme Court decisions will, over time, reflect "the public's views about constitutional questions" (p. 185), and that "on the rare occasions that [the Court] has been

14. *Aye, carumba! U.S. fails History*, NEWSDAY, Mar. 2, 2006, at A15. For reasons I will detail *infra*, the American people have their priorities straight—at least when it comes to *The Simpsons*.

15. Rosen does not meaningfully grapple with the power of the executive both to interpret law and to pursue policy initiatives of its own choosing.

even modestly out of line with popular majorities, it has gotten into trouble” (p. 185). For this very reason, Rosen counsels the Supreme Court not to engage in “judicial unilateralism”—striking “down federal or state laws in the name of a constitutional principle that is being actively and intensely contested by a majority of the American people” (p. 8).

Rosen’s second claim concerns whether, when, and how the Court should invalidate federal or state laws. His answer is easily stated but hard to apply: Whenever the Supreme Court invalidates a law, it must promote democracy in some way. “[J]udges should identify the constitutional views of the people by using whatever combination of the usual methodologies they find most reliable and then enforce those views as consistently as possible” (p. 13). Throughout *The Most Democratic Branch*, Rosen fleshes out the circumstances in which the Supreme Court promotes democracy by invalidating state or federal law.

Recognizing that lawmaker action does not always reflect the constitutional views of the American people, Rosen identifies categories of cases in which the Court can, and should, intervene (pp. 9, 59, 63, 200–01). One category concerns instances in which Congress is hampered by party polarization, seniority systems that protect antiquated views, interest group politics, the malapportionment of the Senate, logrolling, the disproportionate power of party leadership, and computer-driven redistricting. The Court can also intervene in cases, like flag burning, in which legislation is at odds with a preexisting constitutional consensus forged by the people and the elected branches (pp. 14–15, 201). Because “national majorities” had embraced a libertarian interpretation of the First Amendment, the Court could sustain its legitimacy by invalidating this politically popular measure. Matters where the Court can promote democracy through “gentle nudges” are also ripe for judicial intervention.¹⁶ In this way, the Court can return an issue to Congress and the White House to encourage a dialogue between the branches that will yield a “democratic” resolution of the dispute. The Court encouraged such a dialogue in *Ex Parte Mitsuye Endo*.¹⁷ Holding that congressional action approving curfews and evacuations for West Coast Japanese did not extend to detentions, the “Court encouraged both branches carefully to weigh the consequences of abridging liberty in the name of security”¹⁸

16. Rosen’s “gentle nudges” sound a lot like the “judicial minimalism” embraced by Cass Sunstein in *One Case at a Time*, *supra* note 8. For my assessment of Sunstein’s book, see Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971 (1999) (book review).

17. 323 U.S. 283 (1944).

18. P. 177. “Gentle nudges” are not limited to situations, like *Endo*, in which the Court returns an issue to the elected branches. The Court may also anticipate the direction that a given constitutional debate will take, issuing a substantive decision that is a “gentle nudge” and not a “dramatic shove.” P. 200. At the same time, recognizing that a gentle nudge may short-circuit the political process, Rosen posits that “judges often serve a more constructive role when they try to preserve a constitutional consensus that has become contested but has not yet been repudiated by a majority of the country.” *Id.*

To understand the line separating a unilateralist decision from a democracy-enhancing exercise of judicial review, Rosen draws a contrast between *Brown* and *Roe*. With public opinion “divided” and “without fear of congressional backlash,” *Brown* is applauded. The decision helped to “crystallize” a “constitutional consensus,” especially since the Court followed the White House’s “gradualist” approach of declaring segregation unconstitutional without issuing a meaningful remedy (pp. 62–63). “In the face of constitutional ambiguity,” as Rosen puts it, “the Court had the political support necessary to bring the twenty-one states that still endorsed segregation into line with a growing national consensus about the unconstitutionality of American apartheid” (p. 59). *Roe*, on the other hand, he deems unilateralist, “impos[ing] a complicated reform not yet acceptable to a majority of the public” (p. 90). Even though opinion polls showed a narrow majority of Americans supporting the opinion, there was “no constitutional consensus in Congress or the states” that backed the Court’s reasoning. Also, *Roe* was anything but a gentle nudge; the Court mandated immediate reform, invalidated forty-six state laws, and endorsed an expansive right that far exceeded anything that pro-choice interests could have attained through the political process.¹⁹

Roe and *Brown* are not so easily distinguishable. Rosen claims that the Court should avoid politically costly backlashes and should only invalidate state laws when a “clear national consensus, represented by a strong majority of the states, has, in fact, materialized.”²⁰ At the time of *Brown*, however, twenty-one southern and border states strongly backed segregation. Each of these states subsequently challenged *Brown* through one or more bills designed to preserve segregation.²¹ The Court also risked a backlash from Congress. One hundred of the 128 southern lawmakers signed a “Manifesto” protesting the decision and these lawmakers worked in tandem with anticommunist lawmakers to challenge Court authority on other issues.²² Against this backdrop, it is hard to see how *Brown* can be tweaked to fit his model.²³

While *Roe*’s aggressive remedy stands in sharp contrast to *Brown*’s gradualist approach, the Court’s recognition of abortion rights in 1973 mirrors the Court’s repudiation of segregation in 1954. Opinion polls backed limited abortion rights and a majority of Americans supported the

19. See DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF Roe v. Wade* (1994).

20. P. 15. That Rosen does not blink when applauding the Court’s invalidation of the laws of twenty-one states also highlights his weak commitment to federalism.

21. For a chart, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 350–51 (1991); see also MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004) (detailing the intensity of southern hostility toward *Brown*).

22. See DONALD G. MORGAN, *CONGRESS AND THE CONSTITUTION* 269–92 (1966); WALTER F. MURPHY, *CONGRESS AND THE COURT* 80 (1962); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 61–62 (2000).

23. Rosen admits that his case for *Brown* is “arguable” and that there was not a strong national consensus backing the decision. P. 63.

invalidation of the Texas statute in *Roe*. Public support for abortion rights was on the rise and several states enacted modest reforms in the 1960s (p. 92). No doubt, the Court recognized that *Roe* would be controversial—but the Justices anticipated that their decision would settle, rather than inflame, the abortion issue.²⁴ The recognition of abortion rights, in other words, parallels the dismantling of segregation. Indeed, if the nation had accepted *Roe*, Rosen may have praised the Court for recognizing—as it did with *Brown*—an emerging national consensus.

The task of sorting out the divide between a unilateralist decision and a democracy-enhancing exercise of judicial review is certainly vexing. Rosen also asks the Court to perform the comparable feat of assessing whether legislatures reflect the constitutional views of the American people. In so doing, the Court must sort out whether the Congress or state lawmakers are impeded in their ability to reflect popular constitutional preferences. The congruence between public policy and public opinion is roughly sixty percent.²⁵ And while these data do not speak to popular attitudes toward constitutional questions, they do suggest that lawmakers will often deviate from the constitutional preferences of the American people. Rosen, however, does not consider these studies nor does he take into account many of the pervasive limits on Congress's ability to speak the people's voice.²⁶

By leaving it to judges to sort out whether Congress, in fact, is reliable, Rosen ultimately places few limits on judicial power. Should today's Court, for example, look skeptically at everything that Congress does, pointing to partisan redistricting and the accompanying polarization of Congress?²⁷ Alternatively, the fact that Congress may or may not reflect the views of the American people tells us precious little about whether a specific piece of legislation is representative of popular attitudes. The most representative Congress may nonetheless push through special interest measures that lack

24. Justice Harry Blackmun put forth a trimester test both to make clear what the Court intended and to limit future efforts to sidestep the Court's decision. See GARROW, *supra* note 19, at 585–87 (discussing Blackmun's efforts to ensure state compliance with *Roe* by, among other things, issuing a press release to accompany the decision).

25. Terri Peretti, *An Empirical Analysis of Alexander Bickel's The Least Dangerous Branch*, in THE JUDICIARY AND AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY 123, 127–28 (Kenneth D. Ward & Cecilia Castillo eds., 2005) (discussing these studies).

26. Even though Rosen thinks Congress is the most “reliable representative of the constitutional views of the American people,” he recognizes that Congress may not reflect the people's constitutional views when “Congress's own prerogatives are under constitutional assault (in cases involving legislative apportionment or free speech, for example) . . .” P. 9. Rosen also discusses other examples of congressional action being inconsistent with the constitutional views of the American people. See Rosen's account of the Terri Schiavo case, pp. 1–3, judicial nominations, p. 3, and segregation, p. 59. Rosen also notes more generally that gerrymandering and interest group politics may make modern Congresses unrepresentative of popular opinion some of the time. P. 4.

27. Justice Scalia, for example, issued the following warning to Congress: “[I]f Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution . . . then perhaps th[e] presumption [of Congress acting constitutionally] is unwarranted.” Stuart Taylor, Jr., *The Tipping Point*, 32 NAT'L J. 1810, 1811 (2000).

popular support. Should the Court then examine each piece of legislation to see if it is representative of popular constitutional attitudes?

Judicial review of congressional action is further complicated by the fact that the American people may embrace conflicting views of what the Constitution means. In sorting out how the Supreme Court should sift through these conflicts, Rosen claims that democracy-enhancing judicial review should take into account that there are some constitutional norms that are sufficiently entrenched to warrant judicial invalidation of politically popular measures. In defending 1989 and 1990 Supreme Court decisions turning down state and federal efforts to prohibit flag burning, Rosen does not consider the possibility that the people could simultaneously embrace flag-burning prohibitions and a libertarian view of the First Amendment. The four justices who dissented in the flag cases and a majority of the American public, however, clearly backed this view.²⁸ At the time of the Court's ruling, forty-eight states and the federal government had enacted flag-desecration legislation.²⁹ Following the Court's decision, Congress sought to nullify the ruling through legislation and (at the urging of every state except Vermont) a constitutional amendment. The legislation was invalidated in 1990; the flag-burning amendment has come within one vote of approval. Against this backdrop, there is reason to question Rosen's assessment that the Court's decisions reflected popular sentiment because "the country could accept the importance, in the abstract, of protecting free speech" (p. 15). Under this view, any decision that is not overturned by a constitutional amendment can be defended as reflecting the nation's views. Congress, after all, rejected a constitutional amendment overturning *Roe*, voted down the nomination of anti-abortion Supreme Court nominee Robert Bork, and turned down human life legislation that would overturn *Roe*. Does that mean that there is a national commitment to privacy rights, one that would override state laws regulating abortion?³⁰

28. A *Los Angeles Times* poll taken after the Court's decision in *Texas v. Johnson*, 491 U.S. 397 (1989), found that seventy percent of people disapproved of the decision. Bill Boyarsky, *The Times Poll; Public is Deeply Divided over Ruling on Abortion*, L.A. TIMES, July 24, 1989, at 1. More recent polls indicate that support for the flag-burning amendment remains high—a CNN poll taken before the Senate voted on the amendment in June 2006 found fifty-six percent of the public supported the amendment. Johanna Neuman & Faye Fiore, *Flag Measure Fails by 1 Vote*, L.A. TIMES, June 28, 2006, at A1.

29. Carl Hulse, *Senate Debates Flag Bill; Backers Seem Near Success*, N.Y. TIMES, June 27, 2006, at A15. The prevalence of these bills casts doubt on Rosen's claim that "[b]y the 1980s, national support for free speech as an abstract value had become so widespread that the Court had broad leeway to reach particular results that the public and Congress may have questioned . . ." Pp. 169–70. In 1968, for example, Congress responded to Vietnam War protests by making it a crime to "knowingly cast contempt" on the flag. See DEVINS & FISHER, *supra* note 10, at 182. That bill was passed by a voice vote in the Senate and a vote of 387 to 16 in the House. *Id.*; see also Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1334 (2004) (noting that the Court's decisions striking down flag-burning legislation were "a clear example of true countermajoritarian judicial review").

30. Rosen, to his credit, recognizes some of the difficulties that the Court would face in implementing his model. He understands that his assessment of *Brown* is debatable. He also

So what is a democratically minded Justice to do? Judicial overreaching is bad, even if you can get away with it; democratic exercises of judicial independence are part and parcel of the judicial function. It is not enough to say, as Rosen does, that “judges should identify the constitutional views of the people by using whatever combination of the usual methodologies they find most reliable” (p. 13). That standard does not tell us what makes a decision unilateralist, what “abstract values” are backed by national majorities, and whether Congress is reflecting the views of the American people.

II. THE D’OH! OF POPULAR CONSTITUTIONALISM

In calling for the Supreme Court to reflect and enforce “the constitutional views of the American people,” (p. 210) Rosen assumes that the people and their elected officials have “constitutional views.” Opinion polls are considered irrelevant because “polls seldom ask people what they think about constitutional issues, as opposed to policy issues” (p. 9). Correspondingly, even though the “constitutional views of the people” are usually “channeled and represented” by elected officials (p. 9), Rosen emphatically rejects judicial deference to the “political views” of lawmakers. Instead, the Court should only “defer to the national majority’s constitutional views” and, as such, “Congress must debate issues in constitutional (rather than political) terms” (p. 10).

Like other theorists who look to political actors and the American people to engage in informed constitutional debates,³¹ Rosen ignores critical facts about the American people and Congress. The American people do not care much about politics, let alone constitutional reasoning. And to the extent that the American people care about the Constitution, they care about judicial independence. For their part, lawmakers have little incentive to take the Constitution seriously. And finally, even if Congress and the American people paid attention to the Constitution, social science evidence suggests that it would be very difficult to rank order the people’s constitutional preferences.

How Much Does the Public Know about the Constitution? Next-to-nothing. Fewer than one in four Americans can name more than one First Amendment provision.³² Nor do voters pay much attention to the Supreme Court. The Court’s decisions go unnoticed by nearly all Americans.³³ Only

struggles with the Court’s approval of segregated rail cars in *Plessy v. Ferguson*, 163 U.S. 537 (1896). See pp. 57, 200.

31. Bruce Ackerman, Larry Kramer, and Mark Tushnet head this list. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (arguing that the people and their representatives can amend the Constitution by engaging in “higher lawmaking”); KRAMER, *supra* note 10 (arguing that the American people have supreme interpretive power over the Constitution); TUSHNET, *supra* note 9 (contending that judicial review is counterproductive because it discourages Congress from engaging in thoughtful, constructive constitutional deliberations).

32. See *supra* note 14.

33. For a summary of the data, see Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2620–23 (2003). See also David Adamay & Joel B. Grossman, *Support for the Supreme Court as a National Policymaker*, 5 LAW & POL’Y Q. 405, 407 (1983) (citing studies);

three percent of Americans knew that William Rehnquist was Chief Justice of the United States.³⁴ And just one percent of voters ranked the Supreme Court as the most important factor in making their selection during the 2004 presidential election.³⁵

In fact, voters are ignorant about all things political. Instead, people know the things that are important to them—family, work, popular culture.³⁶ Even well-informed Americans know very little about specific policy questions (so much so that general knowledge about politics is not especially useful in sorting out one's views on specific policy questions).³⁷ For most Americans, the costs of becoming fluent in policy issues far outweigh the benefits of acquiring political knowledge. After all, a single vote is not likely to shape policy outcomes. Put another way: Most Americans are “rationally ignorant” about politics.³⁸ Polls showing that Americans know much more about *The Simpsons* than the First Amendment reflect this phenomenon.

Nothing in the social science data suggests that increasing judicial deference to decision-making by elected officials will result in more engaged constitutional discourse by the American people.³⁹ Furthermore, there is no reason to think that voters are signaling their views about constitutional questions by voting for a particular candidate or party. Voters—if they think about politics at all—think about policy preferences, not theories of constitutional interpretation. They understand, for example, that the Republican Party opposes abortion rights and is generally supportive of the social conservative agenda.⁴⁰ But they neither understand nor care about the jurisprudential underpinnings of these policy debates.⁴¹

Walter F. Murphy & Joseph Tannenhaus, *Publicity, Public Opinion, and the Court*, 84 NW. U. L. REV. 985 (1990).

34. Martin Gilens, *Political Ignorance and Collective Policy Preferences*, 95 AM. POL. SCI. REV. 379, 393 (2001).

35. Press Release, Pew Ctr. for the People and the Press, Moral Values: How Important? Voters Liked Campaign 2004, but Too Much “Mud Slinging” (Nov. 11, 2004), available at <http://people-press.org/reports/pdf/233.pdf>.

36. Somin, *supra* note 29, at 1371 (“[The] low level of political knowledge among American citizens is one of the best-established findings in all social science.”).

37. See Gilens, *supra* note 34 (demonstrating that general political knowledge is of little use to voters in sorting out preferences on policy-specific questions).

38. See Somin, *supra* note 29.

39. Even though opinion polls reveal that most Americans think that the Supreme Court has the final say on constitutional questions, there is no reason to attribute that belief to Supreme Court decision-making. If anything, the belief in judicial supremacy is fueled by cultural norms. Most notably, the media and public schools typically treat Supreme Court decisions as definitive. See, e.g., Ruth Marcus, *Constitution Confuses Most Americans; Public Ill-Informed On U.S. Blueprint*, WASH. POST., Feb. 15, 1987, at A13 (discussing poll on Americans' knowledge of the Constitution and noting that sixty percent of Americans “correctly” thought the Supreme Court spoke the last word on the Constitution's meaning).

40. See H.W. Perry, Jr. & L.A. Powe, Jr., *The Political Battle for the Constitution*, 21 CONST. COMMENT. 641 (2004) (highlighting ways in which the Democratic and Republican parties have come to symbolize different conceptions of the Constitution).

41. In arguing that Larry Kramer's version of popular constitutionalism is barely intelligible, Judge Richard Posner made this very point. According to Posner, even if there were a federal town meeting “at which 200 million adult Americans could deliberate and then take a vote [on matters of

Do Americans Value Judicial Independence? Apparently. Voter ignorance about the Constitution does not mean that voters do not support our system of checks and balances. The American people have long backed the power of the Court to interpret the Constitution independently, even though individual Supreme Court decisions can be upsetting.⁴² Most Americans, for example, resisted FDR's efforts to pack the Court with justices sympathetic to his New Deal agenda.⁴³ Reflecting popular opposition to the plan, the Senate Judiciary Committee Report chastised the proposal "as a needless, futile, and utterly dangerous abandonment of constitutional principle[s]."⁴⁴ More than that, Court-packing severely limited Roosevelt's ability to pursue his policy agenda. Court-packing opponents successfully cast Roosevelt as a man of power rather than a man of law and, as such, the Court-packing backlash made impossible any further expansion of the administrative presidency.⁴⁵

Popular support for judicial independence continued through the Warren Court era and continues today. Notwithstanding vigorous congressional attacks of some Warren Court rulings, there was also an "uninterrupted expansion of federal court jurisdiction," suggesting "a high degree of congressional respect for and reliance on the federal courts that a few unpopular decisions simply could not erode."⁴⁶ Opinion polls during the Rehnquist era also revealed public confidence in the Court and public support for independent judicial review.⁴⁷ "On balance then, what seems to be the case, is

constitutional law, their vote would not be] based on their ideas about constitutional law. It would be based on their visceral approval or disapproval of the [underlying policy]." Richard A. Posner, *The People's Court*, NEW REPUBLIC, July 19, 2004, at 35.

42. For extensive treatments of this issue, see CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* (2006); Gregory A. Calderia & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992); Friedman, *supra* note 33.

43. Gregory A. Calderia, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139 (1987); see also Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 597, 659-62 (2003) (highlighting voter ignorance during the Court-packing episode and, in so doing, questioning reliability of opinion poll data).

44. S. REP. NO. 75-711, at 23 (1937); see also WILLIAM E. LEUCHTENBERG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 146 (1995) (linking the Senate's rejection of the plan with popular opposition to it).

45. For a detailed treatment of this issue, see Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 256-65 (1996).

46. Charles G. Geyh, *Judicial Independence, Judicial Accountability and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 209 (2003).

47. Rosen notes that, in 2005, opinion polls showed the country to be "relatively happy with the Supreme Court," especially as compared to Congress. P. 3. Correspondingly, a study of public opinion after *Bush v. Gore*, 531 U.S. 98 (2000), found that support for the Court remained high, despite significant opposition to the decision. See James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 555 (2003).

that over time the Court somehow builds up a store of diffuse support, which is not easily eliminated by negative reaction to individual decisions.”⁴⁸

Popular and elected government support for an independent judiciary is telling for two reasons. First, if “national majorities” think that judicial independence is a “fundamental” attribute of our system of checks and balances, a “democratically” minded Court may feel that it ought to look to its own understanding of the Constitution (not that of the American people or Congress) (p. 14). Second, irrespective of whether it has a responsibility to pursue its vision of constitutional truth independently, pragmatic constraints on judicial independence may be less severe than Rosen imagines.⁴⁹

Does Congress Represent the American People on Constitutional Questions? No way. Ideological polarization in Congress, as Rosen recognizes, has made today’s Congress more likely to reflect political extremes—not the interests of the median voter.⁵⁰

The disconnect between voter and lawmaker preferences has little, if anything, to do with assertions of judicial supremacy by the Supreme Court. Instead, the political parties have strong incentives to discount centrist voters.⁵¹ With only one-half of eligible voters actually voting, there is greater emphasis on mobilizing the partisan base. More than that, candidates are under great pressure to appeal to the partisans who vote in party primaries.⁵²

48. Friedman, *supra* note 33, at 2627 (summarizing numerous studies on judicial independence).

49. As I have argued elsewhere, Congress did not challenge the Supreme Court’s power to set constitutional policy when it took up proposals to strip federal court jurisdiction on social issues (Ten Commandments, Pledge of Allegiance, same-sex marriage). See Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337 (2006) [hereinafter Devins, *Should the Supreme Court Fear Congress?*]. Likewise, Congress backed judicial independence when enacting legislation limiting court jurisdiction over enemy combatants (both in anticipation of and in response to the Supreme Court’s decision in *Hamdan v. Rumsfeld*). See Neal Devins, *Congress, the Supreme Court, and Enemy Combatants: How Lawmakers Buoyed Judicial Supremacy by Placing Limits on Federal Court Jurisdiction*, 91 MINN. L. REV. (forthcoming 2007).

50. The November 2006 elections may result in Congress moving away from the extremes and toward the center. Most significant, a key component of the Democratic takeover of the House was the success of moderate “blue dog Democrats” in Republican-leaning districts. See Jackie Calmes & David Rogers, *Rumsfeld’s Ouster Transforms Iraq Debate—Bush, Pelosi Face Challenge: How Much Compromising Can Each Stand to Do?*, WALL ST. J., Nov. 9, 2006, at A-1; Peter Wallsten & Janet Hook, *Liberal Groups Insist on Results; Activists who helped Democrats secure Congress make clear they intend to get their reward*, L.A. TIMES, Nov. 12, 2006, at A-1. In order to maintain a Democratic majority in Congress, House speaker Nancy Pelosi and other party leaders have committed themselves to govern from the center. At the same time, left-leaning interests are placing significant pressure on Democratic leadership, and established left-leaning Democrats are in charge of key committees. See *id.*; see Calmes & Rogers, *supra*.

51. Support for the claims made in this paragraph can be found in Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV. 415 (2004).

52. For example, Senator Joseph Lieberman’s reelection campaign almost derailed in the 2006 Democratic primary (when Lieberman lost to anti-war candidate Ned Lamont) because of partisan activists’ anger with Lieberman’s moderate stands on a number of issues. See Anne E. Kornblut & Jennifer Medina, *Dealt Setback, Lieberman Calls for Round 2, Despite Obstacles in Party*, N.Y. TIMES, Aug. 9, 2006, at B5. Political scientists have also detailed the effect that partisan activists can have in so-called “toss-up” districts where, despite a more evenly split general electorate, parties nominate highly partisan candidates for the House of Representatives. See Justin

This is especially true in the House of Representatives, where computer-generated redistricting has created mostly safe Democratic and Republican seats, leaving as the defining electoral battle the party primary (which determines who will run for a safe Democratic or Republican seat).

With lawmakers and political parties often looking for ways to reach out to their respective partisan bases, lawmakers increasingly see constitutional questions as unnecessary distractions.⁵³ Lawmakers, for example, are less interested in what happens to legislation after it is enacted—including a court decision striking down legislation.⁵⁴ Today's lawmakers do not place a high value on their power to independently interpret the Constitution.⁵⁵ Fewer congressional committees hold hearings on constitutional questions.⁵⁶ And when they do hold such hearings, lawmakers steer clear of nonpartisan witnesses, preferring, instead, to hear from partisan ones.⁵⁷

Congress cannot be expected to represent the American people on constitutional questions. Congress does not care much about the Constitution and its commitment to the median voter is suspect. More than ever before, lawmakers are apt to seek partisan advantage by strengthening their ties to interest groups. In so doing, lawmakers may well engage in strategies that are deceptive and misleading. A now twenty-year-old but still relevant example exemplifies this practice: the Bork confirmation battle.⁵⁸ Pro-choice interest groups and Democratic Senators thought it politically risky to make

Buchler, *Competition, Representation and Redistricting: The Case Against Competitive Congressional Districts*, 17 J. THEORETICAL POL. 431 (2005); David D. King, *Congress, Polarization, and Fidelity to the Median Voter* (Mar. 10, 2003) (unpublished manuscript, available at http://ksghome.harvard.edu/~dking/Extreme_Politics.pdf).

53. Neal Devins, *The Academic Expert Before Congress: Observations and Lessons from Bill Van Alstyne's Testimony*, 54 DUKE L.J. 1525 (2005). The 2006 elections, even if they push Congress towards the center, are unlikely to change this phenomenon. In the House, for example, Democratic committee chairs reflect long standing ideological polarization in Congress and are unlikely to run bipartisan hearings. See Calmes & Rogers, *supra* note 50 (discussing committee leadership and noting that interest groups are pressuring Democrats to embrace left-leaning causes that committee chairs support); Wallsten & Hook, *supra* note 50 (same).

54. The electoral requirement for today's lawmaker is to "make pleasing judgmental statements," not to "make pleasing things happen." DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 62 (2d ed. 2004). For a discussion of the rise of so-called "position taking" legislation in today's Congress, see Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 512–18 (2001).

55. See Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959–2001*, 29 LAW & SOC. INQUIRY 127 (2004). Correspondingly, it is not surprising that today's lawmakers would turn to the courts to settle constitutional disputes. See Neal Devins, *Congress as Culprit*, 51 DUKE L.J. 435 (2001) (linking Rehnquist Court decisions invalidating federal statutes to congressional support for judicial supremacy). Rosen picks up on this phenomenon, calling for the Court to resist such congressional entreaties.

56. Keith E. Whittington et al., *The Constitution and Congressional Committees: 1971–2000*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 396–97 (Richard Bauman & Tsvi Kahana eds., 2000).

57. Devins, *supra* note 53, at 1542–43.

58. Another relevant, if somewhat dated, example of this phenomenon is the New Deal. At that time, political leaders also sought to misrepresent issues to voters—fearing that the American people did not, in fact, support their favored policies. See Somin, *supra* note 43.

the Bork confirmation a referendum on abortion rights. Instead, they chose to “pluck the heartstrings of [the] middle class” by having abortion subsumed into the larger issue of privacy.⁵⁹ In full page newspaper ads, anti-Bork interests claimed that “[y]our personal privacy . . . has never been in greater danger,” including “your freedom to make your own decisions about marriage and family, childrearing and parenting.”⁶⁰ The fact that lawmakers were unlikely to enact politically unpopular restrictions on marriage, parenting, and the like did not matter. What mattered was that the abortion issue would not play.⁶¹

Even if Lawmakers and the American People Gave Serious Thought to Constitutional Questions, Could the Preferences of the American People Be Identified? No. Consider the battle over Bork. Americans support privacy rights, but, as Bork put it: “Privacy to do what . . . to use cocaine in private? Privacy for businessmen to fix prices in a hotel room?”⁶² Earlier in this review, I suggested that it is very difficult to identify “values that national majorities are willing to recognize as fundamental” (p. 14). Indeed, social science research suggests that people do not have fixed, constant, and transitive preferences.⁶³ Public opinion polls, for example, are extremely unreliable.⁶⁴ The context in which a choice between preferences is given can matter greatly to how people rank their preferences. That is why opinion poll results are often tied to a range of contextual factors—including the types of options to choose among and the wording of questions.⁶⁵ Beyond inconsistent or indeterminate preferences, there is the problem of “exclusion bias”—the exclusion of preferences of those who refuse to express an opinion due either to a lack of “resources that would allow them to form a

59. MICHAEL PERTSCHUCK & WENDY SCHAEZEL, *THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION* 257 (1989).

60. Planned Parenthood Fed'n of Am., Advertisement, *Robert Bork's Position on Reproductive Rights: You Don't Have Any*, WASH. POST, Sept. 14, 1987, at A9.

61. Focus groups run by Judiciary Committee Chair Joseph Biden's staff revealed that the broader attacks on privacy tested well. MARK GITTENSTEIN, *A MATTER OF PRINCIPLE* 112–17 (1992). Ann Lewis, an anti-Bork political consultant, put it this way: “[I]t was the strongest way to make the case, because when you talk about privacy, everyone has their own private ideas for private behavior.” Pertschuk & Schaezel, *supra* note 59, at 258.

62. *Bork Hearings*, *supra* note 1, at 150–51.

63. See Mark Kelman et al., *Context-Dependence in Legal Decision Making*, in *BEHAVIORAL LAW AND ECONOMICS* 61 (Cass R. Sunstein ed., 2000); see also Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175, 1176 (1997); Amos Tversky & Itamar Simonson, *Context-Dependent Preferences*, 39 MGMT. SCI. 1179 (1993).

64. Rosen, on the one hand, seems to recognize this—cautioning against the use of opinion polls to sort out what people think about constitutional issues. P. 9. On the other hand, *The Most Democratic Branch* often cites opinion polls to sort out popular attitudes. See, e.g., p. 59 (school desegregation), p. 68 (busing), p. 90 (abortion).

65. One well known example of conflicting voter preferences is affirmative action. Voters support affirmative action designed to help minorities get better jobs and education but oppose programs that give special preferences to minorities. See News Release, Pew Research Ctr. Conflicted Views of Affirmative Action (May 14, 2003), available at <http://people-press.org/reports/display.php3?ReportID=184>.

coherent opinion or to a fear of expressing sentiments that might paint them in an unfavorable light.”⁶⁶

To summarize: Proposals, like Rosen’s, that look to Congress and the American people to have informed opinions on constitutional questions do not take into account the real-world preferences of Americans and their elected officials. Aside from a general commitment to our system of checks and balances, the American people do not think about the Court’s institutional prerogatives. More telling, Americans, like yours truly, who own *Simpsons* tee shirts, underwear, beer openers, bobble heads, and DVDs, are not embarrassed by how little we know about the Constitution or our constitutional preferences. We do not lose sleep over the fact that our elected representatives do not care about constitutional interpretation or our non-existent views about constitutional interpretation. And we do not even mind living in a world where pollsters would have a devil of a time sorting out our preferences. We are, in fact, content to live in a country where public awareness of *The Simpsons* far exceeds public knowledge about the First Amendment. Hand me a Duff.

III. CONCLUSION: THE MAJORITARIAN REHNQUIST COURT

Rosen concludes *The Most Democratic Branch* with a warning: The courts must steer clear of the “combative” extremism that dominates the “right and the left”; if not, “they risk a backlash that could imperil their effectiveness and legitimacy in ways that will make the current attacks on judges look like shadowboxing” (p. 210). Pragmatics, in other words, compels the Court to “reflect[] and enforc[e] the constitutional views of the American people” (p. 210). For reasons already detailed in this review, Rosen’s warning is overstated. Popular support for judicial independence and the uninterest of Congress and the American people in questions of constitutional interpretation provide the justices with significant opportunities to advance their own constitutional agendas.

This is not to say that the Court is not dependent on lawmakers and the American people. The Court is susceptible to political control and must act in ways that encourage elected officials and the American people to implement its decisions. But so long as lawmakers, interest groups, and the American people can pursue first-order policy preferences, the Court can be opportunistic.⁶⁷ In critical respects, *The Most Democratic Branch* makes this point without admitting it. Rosen’s case studies show that when Court decisions foreclose meaningful responses by Congress and the American people (e.g., *Dred Scott*, *Lochner*), the Court puts itself at risk. When decisions

66. ADAM J. BERINSKY, SILENT VOICES: PUBLIC OPINION AND POLITICAL PARTICIPATION IN AMERICA 2 (2004).

67. See J. MITCHELL PICKERELL, CONSTITUTIONAL DELIBERATION IN CONGRESS (2004). In particular, Pickerell argues that judicial review does not impinge on important congressional interests—so long as there are outlets for Congress to advance its favored policies.

don't do that, there is ample room for elected officials to advance their preferred agenda (e.g., the right to die, affirmative action) through legislation.

Rosen's project, ultimately, is an admirable failure. Rosen deserves credit for advancing a theory of judicial review that links what is practically necessary with what is normatively desirable. *The Most Democratic Branch* fails because Rosen cannot back up his central factual premises—that Congress and the American people have informed, identifiable preferences on constitutional questions, and that political actors will force the Court to validate those constitutional preferences. Equally troubling, Rosen's criteria are too indeterminate. Contrary to his call for judicial humility, Rosen's criteria do not meaningfully limit judicial review.

Rosen nevertheless is correct in arguing that the Supreme Court, especially the Rehnquist Court, may be more reflective of public opinion than Congress. The reason, however, has little to do with exogenous pressures that impel the Court to follow majoritarian preferences.⁶⁸ The reason, instead, is tied to a complex mix of factors—some of which make Congress less responsive to public opinion and some of which make the Court somewhat more responsive to public opinion. These factors, always present, were particularly pronounced during the Rehnquist era. The rest of this review will explain why the Rehnquist Court was more likely than Congress to take the median voter into account.

To start, Rosen's assessment of Supreme Court responsiveness to public opinion pays too much attention to the risks of political backlash. While Rosen is correct to note that the Court must protect itself from destabilizing attacks by elected officials, he wrongly depicts constitutional dialogues between the Court and elected officials as adversarial. Elected officials are not seeking to beat the Court into shape. Rather, as suggested above, elected officials are simply looking for some democratic outlet to express their policy preferences. On constitutional questions, the principal mechanism through which elected officials express their policy preferences is the appointments and confirmation process. It is through this process (one that Rosen largely ignores) that the Court keeps up with majoritarian preferences. Specifically, "[b]ecause presidents usually nominate Justices with philosophies similar to their own and the Senate generally confirms only nominees who have views consistent with the contemporary political mainstream, regular turnover results in a Court majority rarely holding significantly divergent political preferences from those held by the president and Congress."⁶⁹

The Rehnquist Court exemplifies how the appointments and confirmation process can produce a Court whose preferences generally track the

68. On occasion, the Court has good reason to calibrate its decision-making to match lawmaker preferences. For example, the Warren Court had good reason to fear a congressional backlash in the mid-1950s. Consequently, by backing away (in 1957) from earlier decisions providing civil liberties protections to Communists, the Court sensibly protected itself from political retaliation. See Devins, *Should the Supreme Court Fear Congress?*, *supra* note 49, at 1342–44.

69. Lee Epstein et al., *The Supreme Court As a Strategic National Policymaker*, 50 EMORY L.J. 583, 586 (2001).

median voter. Unlike the Congress of that period (in which each political party embraced a constitutional agenda that appealed to ideological extremes), the Rehnquist Court embraced a “split the difference” jurisprudence, offering a “bipartisanship that the public purportedly want[ed] but [was] otherwise lacking in Washington.”⁷⁰ On divisive social issues, for example, Court decision-making was decidedly middle-of-the-road.⁷¹ Rather than overrule any landmark ruling establishing “new and controversial constitutional rights,”⁷² the Court reaffirmed *Miranda v. Arizona*,⁷³ *Roe v. Wade*,⁷⁴ and *Engel v. Vitale*.⁷⁵ The Court also approved diversity-based affirmative action, upheld soft-money limits on campaign contributions, and, most notably, overturned the Burger Court’s *Bowers v. Hardwick*⁷⁶ in establishing a right to same-sex sodomy. At the same time, the Court helped put an end to busing, approved school vouchers, rejected efforts to establish a right to die, cast doubt on race-conscious redistricting, and handed the 2000 election to George W. Bush.⁷⁷

Appointments and confirmation politics, more than anything else, explains Rehnquist Court decision-making. By rejecting Bork, for example, the Senate frustrated the social-conservative agenda on abortion, affirmative action, gay rights, and school prayer. Not only did the Senate keep a staunch conservative off the Court, it set into motion the appointment of both Anthony Kennedy (who took the seat that Bork was nominated to fill) and David Souter (whose nomination was made to avoid Bork-like fights over nominees with extensive paper trails). Assuming that Kennedy and Souter reflected median voter preferences in ways that Bork did not, the defeat of Bork moved the ideological composition of the Court toward the political middle.

70. Perry & Powe, *supra* note 40, at 643. For an insightful essay on the Rehnquist Court’s tendency to “split the difference,” see J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969 (2006).

71. The balance of this paragraph is drawn from (and citations to the accompanying list of cases can be found in) Neal Devins, *The Majoritarian Rehnquist Court?*, LAW & CONTEMP. PROBS, Summer 2004, at 63, 78–79 (2004). Rosen reaches a similar conclusion about the Rehnquist Court, although the appointments and confirmation process does not play a lead role in his accounting. Pp. 3–4. At the same time, Rosen also accuses the Rehnquist Court of “routinely adopt[ing] an imperious tone” and of “act[ing] unilaterally.” Pp. 16, 202.

72. Robert F. Nagel, *The High (and Mighty) Court*, WALL ST. J., June 30, 2000, at A14.

73. 384 U.S. 436 (1966).

74. 410 U.S. 113 (1973).

75. 370 U.S. 421 (1962) (school prayer).

76. 478 U.S. 186 (1986).

77. The Court’s tendency to adhere to majoritarian preferences included decisions in which the Court invalidated federal statutes. See Devins, *supra* note 55; Devins, *supra* note 71; see also Barry Friedman & Anna Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123 (2003) (suggesting that Congress did not support laws that the Court invalidated on federalism grounds); Keith E. Whittington, “Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583 (2005) (explaining how active judicial review can assist lawmakers in advancing their favored policy agenda).

More than that, the Senate signaled to the Court that the pursuit of the social-conservative agenda would be politically divisive (prompting, at a minimum, bitter confirmation battles and public denunciations). For justices with weak policy preferences, political imbroglios came at a cost and were to be avoided. Even though these justices may not have feared political retaliation, these “no win” cases placed them in the middle of a political firestorm. Perhaps for this reason, the Court’s two swing justices (Sandra Day O’Connor and Anthony Kennedy) sought to keep divisive social issues off the Court’s agenda by voting to deny certiorari⁷⁸ or (more tellingly) backing middle ground solutions.⁷⁹ That O’Connor and Kennedy would embrace fact-specific, indeterminate standards was to be expected. Swing justices do not have fixed preferences and are more likely to pay attention to the views of elected officials, elites, and the American people.

To the extent that confirmation politics has shaped Court decision-making, the Rehnquist Court was hardly unique. What set the Rehnquist Court apart is that it, more than any other Supreme Court in history, divided 5–4 on those contentious issues that shaped the Court’s identity.⁸⁰ Moreover, as mentioned above, the dominion of swing justices on the Rehnquist Court made the Court more reflective of popular opinion than Congress was. Unlike the ideological extremes that dominate party politics, the Rehnquist Court favored neither Republican nor Democratic interests. By seeking middle ground solutions, the Court tried to placate both sides while keeping its options open in subsequent cases.

This is not to say that the Rehnquist Court sought to protect itself from political backlash by issuing indeterminate, fact-specific decisions. The members of the Court knew they had little reason to fear Congress. So long as there were democratic outlets for lawmakers and interest groups to pursue favored policy initiatives, the Court had substantial slack to advance its vision of constitutional truth. Indeed, from 1995–2002, the Court invalidated all or parts of thirty-one federal laws and, along the way, revived federalism limits on Congress.⁸¹ This federalism revival, however, did not foreclose democratic outlets and largely conformed to populist anti-Congress

78. See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003).

79. These “finely spun” splitting-the-difference decisions allowed for the public display of the Ten Commandments outside the Texas state capitol but not in a Kentucky courtroom. *McCreary County v. ACLU*, 544 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005). Also, university officials cannot add a fixed number of “race diversity” points in an admissions index but can make race a plus factor (but only for twenty-five years) in admissions. *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003). See generally Wilkinson, *supra* note 70.

80. Charles Fried, Comment, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163 (2002).

81. These decisions were of little interest to Congress and of no interest to the American people. See Neal Devins, *The Federalism-Rights Nexus: Explaining Why Senate Democrats Can Tolerate Rehnquist Court Decision Making But Not the Rehnquist Court*, 73 U. COLO. L. REV. 1307 (2002).

rhetoric.⁸² In other words, the Rehnquist Court was at once independent and majoritarian. It pursued its agenda, but its agenda was largely defined by swing justices who took social and political forces into account.⁸³

* * *

What then of the Roberts Court? Will the Rehnquist Court's split-the-difference approach be a harbinger of things to come? For the time being, yes. The Court remains closely divided and the Court's swing justice (Anthony Kennedy) will likely reinforce Rehnquist Court practices. Over time, however, the Court's direction may well be a byproduct of whether the president and Senate come from the same or different political parties. When the president and the Senate are from the same party, ideological polarization may well push the Court to one or the other extreme. A Republican-controlled Senate, for example, confirmed ninety-three percent of Ronald Reagan's first-year judicial nominees; a Democratic Senate confirmed just forty-four percent of George W. Bush's first year nominees.⁸⁴ More to the point: Bork would not have been rejected by a Republican Senate and George W. Bush Supreme Court nominee Samuel Alito would not have been confirmed by a Democratic Senate.⁸⁵

The rejection of Bork is instructive for another reason. Ronald Reagan and George Bush over-responded to the Bork defeat, for they could have successfully nominated justices more conservative than Justices Kennedy and Souter. In this way, the Rehnquist Court's status as *The Most Democratic Branch* was hardly predetermined. The Court, after all, was a fluke—the unpredictable byproduct of divided government and the predilections of the Court's swing justices to “split the difference.” Rosen therefore is quite correct to sense that the Court may run afoul of median voter preferences. His book, in part, is a call for the Roberts Court to steer clear of the ideological extremes associated with Congress and, instead, to “serve the country . . . by reflecting and enforcing the constitutional views of the American people” (p. 210). Rosen, however, missteps by warning that the failure to follow the people's will “risk[s] a backlash that could imperil [the Court's] effectiveness and legiti-

82. The American people thought Congress irresponsible and self-serving; Congress too signaled its support of states' rights decision-making. See Devins, *supra* note 53; Devins, *supra* note 71.

83. For a somewhat different accounting of O'Connor and Kennedy, see Dahlia Lithwick, *A High Court of One: The Role of the “Swing Voter” in the 2002 Term*, in *A YEAR AT THE SUPREME COURT 11* (Neal Devins & Davison Douglas eds., 2004) (arguing that swing justices do not disproportionately pay attention to extrajudicial forces). See also LAURENCE BAUM, *JUDGES AND THEIR AUDIENCES* (2006) (arguing that Supreme Court justices seek to impress different audiences, including elected officials and the news media).

84. David S. Law, *Appointing Federal Judges: The President, The Senate, and the Prisoner's Dilemma*, 26 *CARDOZO L. REV.* 479, 499 (2005).

85. Six out of forty-six Republicans voted against Bork. Linda Greenhouse, *Bork's Nomination Is Rejected*, 58–42, *N.Y. TIMES*, Oct. 24, 1987, at A1. Forty of the Senate's forty-four Democrats voted against Alito, as did the Senate's sole independent member. David D. Kirkpatrick, *Alito Sworn In as Justice After Senate Gives Approval*, *N.Y. TIMES*, Feb. 1, 2006, at A1.

macy” (p. 210). The people do not have constitutional views, and the Court has great discretion to pursue its constitutional agenda without significant fear of political retaliation. Ironically, the best way for the Court to advance a centrist agenda may be for justices (like the Rehnquist Court’s swing justices) to put their personal preferences for a split-the-difference jurisprudence ahead of the desires of the president who appointed them. For this to happen, however, voters—as they did in 2006— might need to cast their ballot in favor of divided government.

