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PRINCIPLED MINIMALISM: RESTRIKING THE BALANCE BETWEEN JUDICIAL MINIMALISM AND NEUTRAL PRINCIPLES

*Jonathan T. Molot**

ABSTRACT

Scholars who grapple with the Rehnquist Court's activism understandably have built upon the work of Alexander Bickel, who grappled with the Warren Court's activism several decades ago. They respond to the countermajoritarian difficulty by emphasizing just how much courts may leave unresolved. In so doing, these contemporary minimalists overlook half of an important tradition. From the time of the Founding right up until Bickel, judicial power was defended based not only on its narrowness, but also on the expectation that judges would base their decisions on law. The other half of this tradition, embraced in large part by Bickel himself and captured by Herbert Wechsler in his famous Neutral Principles article, has been largely overlooked. The goal of this Article is to correct the current imbalance between the neutral-principles and minimalist traditions. The Article employs institutional and historical analysis to cast doubt on the recent shift toward minimalism and to support a jurisprudence of "principled minimalism" in its place.

*Associate Professor, George Washington University Law School. My thanks to Lisa Bressman, Brad Clark, Michael Dorf, Richard Fallon, Barry Friedman, Chip Lupu, Henry Monaghan, Marty Redish, Richard Schragger, Jonathan Siegel, Peter Strauss, Mark Tushnet, Bob Tuttle, Carlos Vázquez, and participants in a faculty workshop at George Washington University and in the 2004 May Gathering at Georgetown University Law Center.

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*“Those of us to whom it is not given to ‘live greatly in the law’ are surely called upon to fail in the attempt.”*¹

INTRODUCTION

THE countermajoritarian difficulty is back, and back with a vengeance. The Rehnquist Court’s activism has led scholars to ask once again why courts should play such a major role in our political life. The problem manifests itself most prominently in constitutional matters, when the Court strikes down laws enacted by Congress or state legislatures. But it also arises in statutory matters when the Court interferes with policymaking by political officials. In both contexts, the Court’s activism over the last decade or so has

¹ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 35 (1959) (quoting Justice Oliver Wendell Holmes).

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led scholars to ask again why unelected judges, rather than elected officials, should call the shots.

Much of the recent work on the countermajoritarian difficulty is appropriately derivative of past scholarship on the subject. Rather than reinvent the wheel, scholars have built upon the work of those who grappled with the Warren Court's activism several decades ago, especially the work of Alexander Bickel.² Cass Sunstein's recent work on "judicial minimalism," for example, openly embraces and expands upon Bickel's notion of "passive virtues."³ Michael Seidman's recent exploration of the way that courts may "unsettle," rather than settle, constitutional disputes likewise has much in common with Bickel, although it does not borrow from him quite as openly or directly.⁴ Michael Dorf works in a similar (albeit distinct)⁵ vein, embracing "experimentalist courts" that "give deliberately incomplete answers" and "deliberately include ambiguity in their pronouncements."⁶ Although these authors vary in their prescriptions—quite vehemently, in fact—Sunstein, Seidman, Dorf, and many other scholars explain judicial power in a democracy in

² Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962) [hereinafter Bickel, *Least Dangerous Branch*].

³ Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 39 (1999) [hereinafter Sunstein, *One Case at a Time*]; see also Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 *Harv. L. Rev.* 1733 (1995) [hereinafter Sunstein, *Agreements*]; Cass R. Sunstein, *On Analogical Reasoning*, 106 *Harv. L. Rev.* 741 (1993) [hereinafter Sunstein, *Reasoning*]; Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 *Harv. L. Rev.* 4 (1996) [hereinafter Sunstein, *Foreword*].

⁴ See Louis Michael Seidman, *Our Unsettled Constitution: A New Defense of Constitutionalism and Judicial Review* 8–9 (2001) [hereinafter Seidman, *Unsettled Constitution*].

⁵ See Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 *N.Y.U. L. Rev.* 875, 887 n.36 (2003) [hereinafter Dorf, *Legal Indeterminacy*] (citing Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 *Colum. L. Rev.* 1454, 1468–69 (2000), and arguing that "C.J. Peters misclassifies me as a minimalist").

⁶ Dorf, *Legal Indeterminacy*, *supra* note 5, at 886; see also Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267, 314–22 (1998) [hereinafter Dorf & Sabel, *Democratic Experimentalism*] (developing model of democratic experimentalism); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 *Vand. L. Rev.* 831, 837–38 (2000) [hereinafter Dorf & Sabel, *Drug Treatment*] (supporting experimentalism); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 *N.Y.U. Rev. L. & Soc. Change* 182, 183 (2003).

much the same way Bickel did: by emphasizing just how much judges may leave unresolved.⁷

But, if the Rehnquist Court's activism has led scholars today to revisit scholarly responses to the Warren Court's activism, they seem to have overlooked the fact that Bickel was not the only scholar in the 1950s and 1960s to offer a justification of, and prescription for, judicial power (and that Bickel himself emphasized other judicial attributes beyond restraint).⁸ In their zeal for negative defenses of judicial power that focus on what judges do *not* decide, scholars have overlooked Herbert Wechsler's affirmative defense of what judges *do* decide.⁹ In his *Neutral Principles* article, Wechsler relied on judges not to avoid or postpone resolution of disputes, but instead to engage disputes and resolve them based on generally applicable legal principles.¹⁰ In so doing, Wechsler joined a long line of legal thinkers (most of them pre-Realist) who believed that judicial decisions are a product of law rather than politics and for this reason did not worry about the judiciary's failure to reflect majoritarian preferences.

Indeed, contemporary scholarship has overlooked not only Wechsler, but half of a rich tradition that influenced Wechsler and Bickel alike. From the time of the Founding right up until Wechsler and Bickel, judicial restraint had always been part of the standard defense of judicial power, but only part. As important as it was to prevent courts from unnecessarily deciding issues best left unresolved, it was equally important to ensure that when judges did review the decisions of political actors they would exercise judgment based on law rather than asserting their political will. Judges were expected not only to limit themselves to the "cases"

⁷ But cf. *infra* note 63 and accompanying text (noting that Bickel embraced legal principle as well as judicial restraint). For ease of reference, this Article occasionally will use the shorthand expression "minimalism" to refer collectively to these theories. This should not be taken as an effort to trivialize their very important differences. Nor do I mean to suggest that Sunstein, Seidman, and Dorf are the only contemporary scholars who defend judicial power based on what judges may leave unresolved. See *infra* notes 91–97 and accompanying text (discussing range of scholarship that has been labeled "minimalist").

⁸ See *infra* notes 62–65 and accompanying text.

⁹ To be fair, Dorf does pay significant attention to Wechsler's argument, and acknowledges that Wechsler's views have been misrepresented in the literature. See Dorf, *Legal Indeterminacy*, *supra* note 5, at 952–53.

¹⁰ Wechsler, *supra* note 1, at 15–16.

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and “controversies” before them but also to decide those cases based on law. In this manner, the system was thought to cabin *both* judicial power *and* judicial leeway. The contemporary emphasis on leaving matters unresolved does a good job developing half of this important historical tradition, but it ignores the other half.

It is not entirely surprising that in the aftermath of legal realism and critical legal studies (“CLS”) one half of this tradition would have thrived while the other half receded. Even at the time he was writing, Wechsler recognized that his arguments might sound naive to many post-Realist thinkers and that his faith in “neutral principles” would be dismissed by many as a throwback to nineteenth-century formalism.¹¹ In a post-Realist age, law came to be viewed as less constraining and scholars therefore shifted their focus from cabining judicial leeway to cabining judicial power. No longer confident in the constraining force of legal principle, scholars saw judicial restraint as the best way to prevent judicial intrusions into the political realm. If judges could no longer be counted on to decide cases based on law, at least they could be asked to tread lightly and decide as little as possible.

But if faith in the power of legal principle has declined, this need not lead us to elevate judicial minimalism over principled analysis. Contemporary minimalism has voiced valid concerns regarding the risk of judicial overreaching. I suggest, however, that minimalists have overstated this risk and overlooked two core attributes of our legal system that check judicial power and limit judicial leeway. Whether judges consciously follow Wechsler’s advice, the advice of Bickel and his successors, or no particular jurisprudence at all, a certain amount of minimalism and constraint are inherent in the judiciary’s institutional and historical setting.

First, there are a host of institutional forces that lead judges in pending cases to tread lightly and feel constrained by existing legal materials. A judge’s place in the constitutional structure and judi-

¹¹ Wechsler, *supra* note 1, at 11 (“Those who perceive in law only the element of fiat, in whose conception of the legal cosmos reason has no meaning or no place, will not join gladly in the search for standards of the kind I have in mind.”). Given that Wechsler was considered outdated when he wrote (and that he used his “neutral principles” theory to criticize the Supreme Court’s treasured decision *Brown v. Board of Education*, 347 U.S. 483 (1954), see Wechsler, *supra* note 1, at 31–35), it is no surprise that four decades later scholars searching for a way to defend judicial power have overlooked his account of “neutral principles.”

cial hierarchy, a judge's relationship with litigants and lawyers, and a judge's stature in the legal community and broader polity help to explain both why judges tend to limit themselves to the cases before them and why judges are constrained by existing legal materials in the course of deciding those cases. Whether the legal constraints that judges experience are best described using Wechsler's "neutral principles" label or another label more in keeping with post-Realist sensibilities, the constraints nonetheless remain effective and important. Institutional analysis can help to explain what most judges and lawyers firmly believe, but what post-Realist scholars often deem naive: the power of law in judicial decision-making.¹²

Second, when one looks beyond the institutional setting in which judges approach pending cases and considers the evolution of legal doctrine over time, one finds a system that minimizes the harm that any single judge, or generation of judges, may do. To the extent that the current generation of judges is free to alter law created by prior generations—and may not be as constrained by law as scholars once believed—so too will the next generation retain freedom to alter law created by this one. Conversely, to the extent that judges have the power to bind their successors, then this means that judicial leeway is considerably limited by existing legal materials. Historical analysis thus reveals an inevitable balance between judicial freedom and power. Individual judges may seem unconstrained by law and bent on asserting their will—as evidenced by

¹² See Dorf, *Legal Indeterminacy*, supra note 5, at 929 ("Even in the aftermath of legal realism and critical legal studies, relatively few practicing lawyers think that law in general or constitutional law in particular is so indeterminate as to call into question every judicial exercise of power in the law's name."); cf. Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 *Nw. U. L. Rev.* 1239, 1298 (2002) [hereinafter Molot, *Reexamining Marbury*] (noting "strong consensus . . . that judicial reasoning is qualitatively different from political deliberation and that judges are motivated by much more than political consequences"); Lawrence G. Sager, *Constitutional Justice*, 6 *N.Y.U. J. Legis. & Pub. Pol'y* 11, 14–15 (2002–03) [hereinafter Sager, *Constitutional Justice*] ("Judges are constrained to abide by principles that, by their temporal, geographic, or substantive reach, sprawl across areas of disinterest and interest on the judges' part."); David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 *Va. L. Rev.* 519, 556 (1988) [hereinafter Shapiro, *Paternalism*] ("Despite all the palaver that" judges "reach outcomes on the basis of their personal (and possibly idiosyncratic) values", "the truth is that they really do not.").

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the many activist or unprincipled decisions one finds in the reporters—but the judicial process over time tends to compensate for these excesses, leading judicial doctrine on a course that reflects both the minimalist and neutral-principle traditions. When one considers these historical forces together with the institutional forces that operate on judges today, one finds that constraint and minimalism are in important respects built into our legal system.

In the end I suggest that the recent move from neutral principles toward judicial minimalism has overshot its mark. Although judicial restraint has always been and should always remain part of our account of judicial power, it should not be permitted to crowd out other judicial attributes. Ultimately, I embrace a balance between the two traditions—what I call “principled minimalism.” This Article will describe two different variants of principled minimalism—a “forward-looking” version that is ideal and a “backward-looking” version that is actually exhibited by Supreme Court practice. In its ideal form, principled minimalism relies on judges to decide cases in a principled manner but to be consciously minimalist where they lack confidence in their decisions and do not wish to impose sweeping doctrinal pronouncements on their successors. The Article will suggest, however, that even the less-than-ideal version exhibited by the Supreme Court—a version which often relies on later decisions to make sense of earlier ones and to confine their scope—is superior to minimalism alone.

Principled minimalism is more attractive than contemporary minimalism for two core reasons. First, it relies on forces that already are inherent in the judicial process and does not require judges to suppress their natural tendencies. Contemporary minimalism, just like the neutral-principles theory it rejects, rests on unrealistic aspirations, rather than realistic appraisals of judicial conduct. Because judges inevitably fall short of scholarly ideals, a defense of judicial power that rests on description, and not just aspiration, ultimately is more valuable.¹³ Second, principled minimalism offers an affirmative, as well as a negative, defense of judicial

¹³ See Barry Friedman, *The Politics of Judicial Review* (unpublished manuscript, on file with the Virginia Law Review Association) (“In the legal academy, constitutional theory tends to the normative. It says what the law should be, and instructs institutions how to behave The problem for normative constitutional theory is that its prescriptions frequently butt up against reality.”).

power. Minimalists tend to focus on combating the evils of judicial overreaching rather than embracing the virtues of judicial power. Indeed, in showing how judges may tread lightly and exercise power narrowly, minimalists do not really defend judicial power at all; their theory is that limited judicial authority is not quite as bad as unlimited judicial authority and that things could be worse. By correcting the current imbalance between the neutral-principles and minimalist traditions, I hope to resurrect the notion that judicial power is something to be affirmatively embraced, rather than just cabined or minimized.

This Article is organized as follows. Part I will trace the roots of both the minimalist and neutral-principles traditions back to the Founding, demonstrating how the contemporary emphasis on minimalism alone is a historical aberration. Part II will then use institutional analysis to suggest that the contemporary emphasis on leaving matters unresolved has gone too far. Regardless of whether judges affirmatively embrace minimalism or neutral principles, their institutional setting works to ensure that they tread lightly and feel constrained by law. Part III will use historical analysis to reinforce the institutional analysis in Part II and highlight important limits on judicial power and leeway. Part III will offer doctrinal examples in three areas of constitutional law—federalism, separation of powers, and individual rights—to demonstrate that even where individual judicial decisions are activist or unprincipled, minimalism and constraint nonetheless find their way into judicial doctrine over time. Finally, Part IV will consider the normative implications of this Article's institutional and historical observations, defending principled minimalism in its ideal and less-than-ideal forms and tentatively sketching out what a principled-minimalist jurisprudence would entail.

I. THE DECLINE OF NEUTRAL-PRINCIPLES THEORY AND ASCENDANCY OF MINIMALISM

Recent scholarly responses to the countermajoritarian difficulty focus on the judiciary's ability to leave matters unresolved or undecided. In so doing, they overlook half of an important legal tradition. From the time of the Founding right up until Bickel and Wechsler wrote in the 1950s and 1960s, judicial restraint and adherence to law were viewed as cooperative counterparts, rather

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than as alternative or competing models of judicial power.¹⁴ It was relatively recently that these two counterparts turned into competitors, and more recently still that the competition has given way to a rout, with all the emphasis being placed on leaving matters unresolved and little or no attention being given to the importance of judicial adherence to legal principle. One need only examine the history of judicial minimalism and neutral principles to see just what is lacking from contemporary scholarship.

A. Two Traditional Justifications for Judicial Power

The project of defending judicial power is at least as old as the federal judiciary itself. When the Founders included a new federal judiciary in the Constitution, they were repeatedly warned by Anti-Federalists (who opposed ratification) that judges might substitute their own will for that of the people expressed through the states.¹⁵ Having inherited a tradition in which most law was made by judges, rather than by legislatures,¹⁶ and having seen judges in England take a rather aggressive approach to interpreting and even striking down legislative enactments,¹⁷ the Anti-Federalists worried

¹⁴ Bickel himself suggested that although the Supreme Court should exercise discretion to avoid deciding some issues, it nonetheless should resolve those issues it does decide based on principle. Bickel, *Least Dangerous Branch*, supra note 2, at 69–70.

¹⁵ See, e.g., Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 148 (1996); *Essays of Brutus No. XI*, N.Y.J., Jan. 31, 1788, reprinted in 2 *The Complete Anti-Federalist* 358, 420 (Herbert J. Storing ed., 1981) [hereinafter Storing] (“The judicial power will operate to effect, in most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution:—I mean, an entire subversion of the legislative, executive and judicial powers of the individual states.”). I discuss the Founders’ debates on judicial interpretation more thoroughly in Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 *Stan. L. Rev.* 1, 27–41 (2000) [hereinafter Molot, *Judicial Perspective*].

¹⁶ See William N. Eskridge, Jr., *All About Words: Early Understandings Of The “Judicial Power”* In *Statutory Interpretation, 1776–1806*, 101 *Colum. L. Rev.* 990, 995–96 (2001); John F. Manning, *Textualism and the Equity of the Statute*, 101 *Colum. L. Rev.* 1, 8 (2001); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 *Yale L.J.* 27, 71 (2003) [hereinafter Molot, *Old Judicial Role*]; Molot, *Judicial Perspective*, supra note 15, at 20–27; Molot, *Reexamining Marbury*, supra note 12, at 153–54.

¹⁷ See Eskridge, supra note 16, at 996; Molot, *Judicial Perspective*, supra note 15, at 13–14.

that federal judges would abuse their power of law declaration.¹⁸ The Anti-Federalists expected that judges would create law, rather than obey it,¹⁹ and in so doing would act on a strong institutional incentive to favor federal over state interests.²⁰

The Constitution's defenders responded to these concerns on two fronts, establishing the two traditions that later would be picked up by Bickel and Wechsler. First, laying the groundwork for contemporary adherents of judicial minimalism, the Founders limited judges to hearing only specified categories of "cases" and "controversies."²¹ Unlike Congress, which decides how best to exercise its legislative authority, and the President, who decides how best to "take Care that the Laws be faithfully executed,"²² courts would only get to exercise power when other actors—public officials and private citizens—created justiciable cases and controversies for them. Indeed, the Founders embraced this "case and controversy" restriction on judicial power not only by including the "case and controversy" language in Article III, but also by repeatedly rejecting proposals for a "Council of Revision," which would have empowered select judges, working with the executive, to review pending legislation at will without waiting for injured parties to file a lawsuit upon being subjected to the new law.²³ By rejecting the Council of Revision and by including the "case and controversy" restriction, the Founders helped to ensure that judicial intrusions into the political realm would be limited. Given the judiciary's "comparative weakness" and lack of "force,"²⁴ Alexander

¹⁸ See Rakove, *supra* note 15, at 148; Essays of Brutus No. XI, *supra* note 15, at 417–22; Eskridge, *supra* note 16, at 1042; Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 Mich. L. Rev. 239, 308 (1989); Molot, *Judicial Perspective*, *supra* note 15, at 27–29.

¹⁹ See, e.g., Essays of Brutus No. XI, *supra* note 15, at 417–20 (arguing that judges "will not confine themselves to any fixed or established rules").

²⁰ See Rakove, *supra* note 15, at 148.

²¹ U.S. Const. art. III, § 2, cl. 1.

²² U.S. Const. art. II, § 3.

²³ See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1356–57, 1417 n.597 (2001); James Madison, *Notes on the Constitutional Convention* (May 29, 1787), *reprinted in* 1 *The Records of the Federal Convention of 1787*, at 21 (Max Farrand ed., 1937); James Madison, *Notes on the Constitutional Convention* (July 21, 1787), *reprinted in* 2 *The Records of the Federal Convention of 1787*, *supra*, at 73.

²⁴ *The Federalist* No. 81, at 526 (Alexander Hamilton) (The Modern Library ed., Random House 1947). Hamilton presumably was referring not only to the judiciary's

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Hamilton explained, “liberty can have nothing to fear from the judiciary alone.”²⁵

This argument was persuasive enough to convince even the Anti-Federalists that judges would not usurp legislative or executive power from the political branches of the new federal government. To be sure, the Anti-Federalists feared the judiciary’s lack of political accountability and even went so far as to call the judiciary the most dangerous branch of the new federal government.²⁶ But their core concern was *not* that the judiciary would usurp power from the political branches of the new government; rather, they feared the judiciary would cooperate with federal political officials in the expansion of federal power at the expense of the states.²⁷ Neither the Anti-Federalists nor the Federalists saw how judges empowered to resolve only specified cases could use their limited power over these cases “to affect the order of the political system.”²⁸

limited power to resolve cases but also to the fact that the judiciary would have to rely on the executive to enforce its judgments and on Congress to decide which “cases” and “controversies” it could hear. See *infra* note 282.

²⁵ The Federalist No. 78, at 504 (Alexander Hamilton) (The Modern Library ed., Random House 1947); see also *id.* at 504 n.* (“Montesquieu speaking of them says ‘of the three powers above mentioned, the judiciary is next to nothing.’” (quoting Montesquieu, 1 Spirit of Laws 169 (3d ed. Edinburgh 1762))).

²⁶ See Hamburger, *supra* note 18, at 308 (citing Letters from the Federal Farmer (Jan. 18, 1788), *reprinted in* 2 Storing, *supra* note 15, at 214, 316); see also Todd D. Peterson, Restoring Structural Checks on Judicial Power in the Era of Managerial Judging, 29 U.C. Davis L. Rev. 41, 49–51 (1995).

²⁷ Brutus wrote:

The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution:—I mean, an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge, the exercise of their powers, will that of the latter be restricted.

Essays of Brutus No. XI, *supra* note 15, at 420. As Jack Rakove explains, Brutus moved from treating “judicial review as an aspect of separation of powers” to “indicat[ing] that its real force would lie along the axis of federalism, where it would” subvert the powers of the states. Rakove, *supra* note 15, at 186.

²⁸ See, e.g., The Federalist No. 81, *supra* note 24, at 526. Some scholars have suggested that the Founders were comfortable with judicial power not only because they understood judicial power to be constrained, but also because they viewed the judiciary as an effective agent of the people. See Gordon S. Wood, *The Creation of the American Republic: 1776–1787*, at 599 (1969); Cynthia R. Farina, *The Consent of the*

In defending judicial power, the Founders emphasized not only that judges would be confined to deciding discrete cases, but also that they would be constrained by law in the course of deciding those cases. Laying the groundwork not only for contemporary minimalism but also for the neutral-principles tradition, the judiciary's defenders (Alexander Hamilton in particular) highlighted that judges would exercise "JUDGMENT" based on legal principles and would not substitute their "WILL" for that of political officials.²⁹ The most important constraint on judicial decisionmaking in the Founders' view was *stare decisis*, which all the Founders, Federalists and Anti-Federalists alike,³⁰ viewed as a significant limit on judicial power.³¹ James Madison explained that although "*new laws*" are inherently "equivocal," they remain so only "until their meaning be liquidated and ascertained by a series of particular . . . adjudications."³² The Founders were confident that ambiguities would not be everlasting, that interpretation would settle uncertainties over time, and that in most cases judges would be guided by the prior decisions of their peers and superiors.³³

Stare decisis was not the only source available to guide judicial decisions. Judges would be guided not only by prior cases but also by canons of construction that demanded consistency in interpretation across different statutes and constitutional provisions and thus

Governed: Against Simple Rules for a Complex World, 72 Chi.-Kent L. Rev. 987, 1018 (1997). At a more basic level, though, controversy remains over the extent to which the Founders were concerned with democratic theory and majoritarian rule and how much they were concerned instead with preventing tyranny, whether majoritarian or countermajoritarian. Compare Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 Harv. L. Rev. 4, 15, 162 (2001) [hereinafter Kramer, *We the Court*] (highlighting notion of "popular constitutionalism" that was at odds with notions of judicial sovereignty), with G. Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 Va. L. Rev. 1463, 1548–54 (2003) (arguing that democratic theory did not play a role in controversies regarding judicial power until after legal realism and the New Deal).

²⁹ The Federalist No. 78, *supra* note 25, at 508.

³⁰ Indeed, Anti-Federalists like Brutus agreed that "principles" can "become fixed, by a course of decisions." *Essays of Brutus* No. XII, N.Y.J., Feb. 7, 1788, *reprinted in* 2 Storing, *supra* note 15, at 42; see Hamburger, *supra* note 18, at 310; Molot, *Judicial Perspective*, *supra* note 15, at 34.

³¹ See, e.g., Peterson, *supra* note 26, at 52.

³² The Federalist No. 37, at 229 (James Madison) (The Modern Library ed., Random House 1947) (emphasis added).

³³ See Hamburger, *supra* note 18, at 310; Molot, *Judicial Perspective*, *supra* note 15, at 34.

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constrained judges even in cases of first impression.³⁴ “Most of the Americans influential in the framing, ratification, and early interpretation of the federal Constitution were intimately familiar with the common law, and they gleaned from it not only a general approach to . . . interpretation . . . but also a variety of specific interpretive techniques.”³⁵ In light of the history of judicial adherence to interpretive guidelines, it is not surprising that the Founders generally viewed judicial power as a limited force that would not unduly threaten legislative supremacy. The Founders recognized that judges had some leeway, and thus had to concede that when judges exercised that leeway, “[p]articular misconstructions and contraventions of the will of the legislature may now and then happen.”³⁶ But the Founding generation ultimately rejected Anti-Federalist fears that interpretive leeway would be exercised in a way that usurped popular authority. In defense of the judiciary, Hamilton argued that it was not only its “comparative weakness” and lack of “force” that would prevent the judiciary from usurping legislative authority.³⁷ In addition, Hamilton argued that the judiciary would be limited “[by] the general nature of the judicial power, [by] the objects to which it relates, [and by] the manner in which it is exercised.”³⁸ Judicial leeway, Hamilton reassured, “can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system.”³⁹

B. From Counterparts to Competitors

At the time of the Founding, any tension between deciding cases one at a time and deciding them based on generally applicable principles was sufficiently minor as to go virtually unnoticed. It was

³⁴ See Molot, *Judicial Perspective*, supra note 15, at 35–40.

³⁵ H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *Harv. L. Rev.* 885, 901–02 (1985) (footnote omitted); see Eskridge, supra note 16, at 1036–37 (noting that the Founders “both assumed and accepted the traditional rules and canons of statutory interpretation and did not see the ‘judicial Power’ to interpret statutes as deviating from the general methodology laid out in traditional cases and treatises that were considered authoritative by the state judiciaries and that would have been known by most of the thirty-four delegates who had legal training”).

³⁶ *The Federalist* No. 81, supra note 24, at 526.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

not until much later—really not until the mid-twentieth century—that the tension between these two conceptions of judicial power grew into a full-blown jurisprudential conflict.⁴⁰

The extent to which judicial restraint and principled analysis conflict depends in large part upon one's view of law and the judicial process. To the positivist who believes that judges create law rather than discover it, a judge who elaborates generally applicable legal principles in the course of deciding one case cannot avoid making choices that will affect future cases as well.⁴¹ To the natural law theorist who believes that judges find law rather than create it, in contrast, the same judge who decides a case based on legal principles would not resolve future cases.⁴² The judge would simply articulate principles that a subsequent judge inevitably would find on his own in the course of deciding a subsequent case.⁴³

At the time of the Founding, neither natural law theory nor positivism completely dominated. On one hand, natural law theory was quite powerful, and judges could draw upon natural law principles as sources of decision in both common law cases and in the course of interpreting legislative enactments.⁴⁴ On the other hand, the Founders also understood that law was ambiguous and that law interpretation was an active, creative endeavor.⁴⁵ As Philip Ham-

⁴⁰ The tensions inherent in judicial review have been described by Richard Fallon as a three-way conflict inherent in *Marbury* between (1) a "private-rights" model that relies on the Court to resolve disputes between individuals, (2) a "special-functions" model that relies on the Court "to say what the law is," and (3) a "political or prudential" model under which the Court must vary its conduct for "prudential reasons." Richard H. Fallon, Jr., *Marbury* and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension, 91 Cal. L. Rev. 1, 12–20 (2003) [hereinafter Fallon, *Marbury* and the Constitutional Mind].

⁴¹ See generally Anthony J. Sebok, Legal Positivism in American Jurisprudence (1998); Brian Bix, Positively Positivism, 85 Va. L. Rev. 889 (1999) (book review).

⁴² See, e.g., Hadley Arkes, Beyond the Constitution 23 (1990) (noting influence of natural law theory at the time of the Founding).

⁴³ See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842) (describing judicial decisions as "at most, only evidence of what the laws are, and . . . not of themselves laws").

⁴⁴ See, e.g., Arkes, *supra* note 42, at 23; Wood, *supra* note 28, at 291–305; Peter L. Strauss, Courts or Tribunals? Federal Courts and the Common Law, 53 Ala. L. Rev. 891, 909 (2002) [hereinafter Strauss, Courts or Tribunals?]; cf. The Federalist No. 78, *supra* note 25, at 507 (noting that canons of construction are "not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law").

⁴⁵ See Molot, Judicial Perspective, *supra* note 15, at 20–27; cf. William D. Popkin, Statutes in Court: The History and Theory of Statutory Interpretation 41 (1999) (not-

burger has observed, the Founding generation recognized that natural law principles were often “so vague and general as to leave . . . much discretion” and “hardly claimed . . . that natural law dictated the details.”⁴⁶ The Founders thus conceded that even if judges do not impose their “will” on the people they at least exercised “judgment.”⁴⁷

In subsequent centuries, legal thinkers were not content simply to accept this tenuous balance between law creation and law discovery. If some balance between the two has always been acknowledged, intellectual trends and institutional developments have led legal thinkers to emphasize one or the other at different points in history.⁴⁸ In the century or so after the Founding, faith in interpretive constraints grew stronger. Indeed, as formalism came into vogue in the late nineteenth century, scholars tended to downplay the leeway inherent in interpretation and even to portray law as a science.⁴⁹ Several decades later, however, the pendulum swung the other way, as intellectual shifts and institutional changes called greater attention to the leeway inherent in judicial decisionmaking. Legal realists attacked the excesses of formalism, casting doubt on the determinacy of law⁵⁰ and the constraining force of canons of construction.⁵¹ They pointed out that for every canon a judge relies

ing “different traditions” of judging on opposite sides of the Atlantic); Wood, *supra* note 28, at 295 (noting “ambiguity in the American mind about the nature of law”).

⁴⁶ Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *Yale L.J.* 907, 954–55 (1993).

⁴⁷ See Molot, *Judicial Perspective*, *supra* note 15, at 30–34; see, e.g., *The Federalist* No. 78, *supra* note 25, at 504.

⁴⁸ Bix, *supra* note 41, at 898 (observing that one may “view the history of American jurisprudence as an evolving series of responses to the problem of judicial discretion”).

⁴⁹ See, e.g., Brian Bix, *Jurisprudence: Theory and Context* 168 (2d ed. 1999) (noting Christopher Columbus Langdell’s treatment of law as “science, whose principles and doctrines could be ‘discovered’ in cases”).

⁵⁰ See, e.g., Grant Gilmore, *The Ages of American Law* (1977) (noting legal realism’s criticism of the formalist approach of the late nineteenth century); Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* 39–41, 62–72 (1960) (tracing the history of the formalist style); Dorf, *Legal Indeterminacy*, *supra* note 5, at 878–79 (noting that “legal realism rendered untenable the formalist notion that judges mechanically apply a disembodied entity called ‘The Law’”); Daniel A. Farber, *Judicial Review and Its Alternatives: An American Tale*, 38 *Wake Forest L. Rev.* 415, 536 (2003).

⁵¹ See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 *Vand. L. Rev.* 395,

on to support his interpretation in a particular case there is likely to be another canon that cuts the other way.⁵² Moreover, the rise of the administrative state in the late nineteenth century and growth of government regulation during the New Deal called ever greater attention to the political consequences of judicial decisions.⁵³ As the political branches of the federal government tested the historical boundaries of their power, parties subject to new federal statutes and regulations sought relief in the federal courts, thrusting the courts into the midst of heated political debates. Indeed, Supreme Court decisions striking down popular New Deal programs prompted President Roosevelt to consider packing the Court so as to secure a majority sympathetic to his policies.⁵⁴

In the aftermath of legal realism and the New Deal, the inherent tensions in the judicial role that had been considered unproblematic in the late nineteenth century emerged as a source of jurisprudential debate. In earlier centuries, one could believe *both* that a judge would resolve only the case before him *and* that a decision in one case could determine the outcome of another, or at least accept this inherent contradiction without too much fuss.⁵⁵ But by the

401–06 (1950) (juxtaposing contradictory, but equally accepted, canons of construction). As Anthony Kronman has pointed out, however, Realists also attempted to offer affirmative responses to the problems they identified. Anthony T. Kronman, *Jurisprudential Responses to Legal Realism*, 73 *Cornell L. Rev.* 335, 336–37 (1988) (describing “scientific” and “conventionalist” responses to the problems of “intelligibility” and “justification” that Realists raised).

⁵² Llewellyn, *supra* note 51, at 401–06. For a discussion of how evolving views of law and democracy interplayed with views of judicial review during this period, see White, *supra* note 28, at 1531–53.

⁵³ See Molot, *Reexamining Marbury*, *supra* note 12, at 1254–58, 1297–98.

⁵⁴ See, e.g., Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law’s Politics*, 148 *U. Pa. L. Rev.* 971, 988–1046 (2000) [hereinafter Friedman, Part Four] (analyzing shifting perceptions of government and of judicial review during the New Deal period); White, *supra* note 28, at 1544 (noting participation of Edward Corwin, a leading proponent of a “living Constitution,” in the Court-packing plan).

⁵⁵ This is not to say that questions regarding the legitimacy of judicial power did not arise prior to the New Deal. To the contrary, they did. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129, 144 (1893) (laying out problem in late nineteenth century); See *supra* Section I.A. (describing controversies in the Founding era). See generally Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 *N.Y.U. L. Rev.* 333 (1998) (describing early federal period); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction’s Political Court*, 91 *Geo. L.J.* 1 (2002) [hereinafter Friedman, Part II] (describing Reconstruction period); Barry Friedman, *The History of the Countermajoritarian*

mid-twentieth century, it became hard to see how a judge who decides a case based on broadly applicable principles ever could limit himself to deciding only the case at hand.⁵⁶ In the course of elaborating broadly applicable principles, the judge would constrain future judges nominated by future Presidents and confirmed by future Senates, as well as political officials and private citizens who structure their conduct to comply with judicial decisions. To articulate broad principles in the aftermath of legal realism and the New Deal was to be a judicial activist, a judge who took issues away from the political process.

As often is the case with evolutions in legal thought, it took a decade or two for scholars to explore the consequences of this shift from compatibility to competition. In part because the Supreme Court retreated from its aggressive review of New Deal programs—allowing Congress new leeway to exercise its constitutional authority and administrators new leeway to implement new regulatory regimes⁵⁷—the countermajoritarian difficulty with judicial power receded into the background for some time.⁵⁸ The Court's restraint in the aftermath of the New Deal—what some have called the “switch in time that saved nine”⁵⁹—contributed to a postpone-

Difficulty, Part Three: The Lesson of *Lochner*, 76 N.Y.U. L. Rev. 1383 (2001) (describing *Lochner* period); Kramer, We the Court, *supra* note 28 (describing changes over time in attitudes toward judicial review); Larry D. Kramer, *Marbury* and the Retreat from Judicial Supremacy, 20 Const. Comment. 205, 206–26 (2003) [hereinafter Kramer, Retreat from Judicial Supremacy] (same); White, *supra* note 28 (tracing judicial power from the Founding to the late twentieth century).

⁵⁶ Cf. Mark Tushnet, The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration, 113 Harv. L. Rev. 29, 83 (1999) (noting that with “formalism and originalism rejected” after the New Deal “the justification for judicial review was called into question” and that one option available was Justice Frankfurter’s “generalized theory of judicial deference to . . . democratic majorities”).

⁵⁷ See, e.g., Reuel E. Schiller, Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970, 53 Vand. L. Rev. 1389, 1417–28 (2000); Peter L. Strauss, On Resegregating the Worlds of Statute and Common Law, 1994 Sup. Ct. Rev. 429, 431.

⁵⁸ See Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 Yale L.J. 153, 176 (2002) (referring to this period as “the lull”).

⁵⁹ Scholars have debated the influence that President Roosevelt’s Court-packing plan and public sentiment against the Court may have exerted over its constitutional jurisprudence. See, e.g., Barry Cushman, Rethinking the New Deal Court 18–32 (1998); William E. Leuchtenburg, The Supreme Court Reborn 142–162 (1995); Rich-

ment of the debate over the competing virtues of judicial minimalism and neutral principles.

As the Warren Court thrust the judiciary back into the limelight, however, the tension between these competing justifications for judicial power gained in prominence. Alexander Bickel's classic book, *The Least Dangerous Branch*, and Herbert Wechsler's controversial article, *Toward Neutral Principles of Constitutional Law*, helped to frame the debate.

Bickel, who coined the term "countermajoritarian difficulty"⁶⁰ and framed the problem of constitutional judicial review,⁶¹ made valuable contributions to our understanding of both judicial minimalism and neutral principles.⁶² Though more often associated with judicial restraint, Bickel emphasized that the Supreme Court should be principled as well as restrained.⁶³ He emphasized "that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring

ard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. Pa. L. Rev. 1891, 1895-96 (1994).

⁶⁰ Bickel, *Least Dangerous Branch*, supra note 2, at 16 ("The root difficulty is that judicial review is a counter-majoritarian force in our system.").

⁶¹ Bickel explained that "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it." *Id.* at 16-17.

⁶² Cf. Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 Yale L.J. 1567, 1573 (1985) [hereinafter Kronman, *Bickel's Philosophy*] ("What does in fact distinguish Bickel's theory of judicial review from the many competing theories that have been offered both before and since is its emphasis on the political function of the Supreme Court, understanding politics in the sense defined above, as an ensemble of prudential techniques 'that allow leeway to expediency without abandoning principle' and thus 'make possible a principled government.'" (quoting Bickel, *Least Dangerous Branch*, supra note 2, at 71)).

⁶³ See Neil Duxbury, *Patterns of American Jurisprudence* 284 (1995) ("Bickel, like Wechsler, demonstrates a faith in rational consensus. Neutral principles, he insists, are a prerequisite to the 'elaboration of any general justification of judicial review as a process for the injection into representative government of a system of enduring basic values.'" (footnote omitted) (quoting Bickel, *Least Dangerous Branch*, supra note 2, at 51)); Kronman, *Bickel's Philosophy*, supra note 62, at 1569 ("One should not infer from this that Bickel believed either law or politics to be unprincipled. On the contrary, it was Bickel's emphatic view that 'we cannot live, much less govern, without some 'uniform rule and scheme of life,' without principles, however provisionally and skeptically held.'" (quoting Alexander Bickel, *Constitutionalism and the Political Process*, in *The Morality of Consent* 1, 25 (1975))); White, supra note 28, at 1565-66.

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values. This in part is what is meant by government under law.”⁶⁴ Bickel saw the Supreme Court as the “institution of our government” best positioned to “be the pronouncer and guardian of such values.”⁶⁵

But if Bickel defended judicial power based on the Court’s ability to protect enduring legal values, he emphasized that the Court’s role was not simply to announce or impose its values but rather to introduce them into public discourse: “The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed.”⁶⁶ To undertake the leadership role Bickel envisioned, the Court would need to approach cases in a way that induced the political branches and broader polity to consider enduring values.⁶⁷ By embracing the “passive virtues”—employing prudential justiciability doctrines, the discretionary certiorari power, and other tools to postpone or avoid resolving disputes that are not ready for resolution—the Supreme Court could avoid displacing political decisionmaking and instead exert a valuable influence over democratic deliberation and debate.⁶⁸ Bickel believed his

⁶⁴ Bickel, *Least Dangerous Branch*, supra note 2, at 24.

⁶⁵ *Id.* See Kronman, *Bickel’s Philosophy*, supra note 62, at 1577 (“There is, therefore, a sense in which our social ideals, the ‘enduring values’ we aspire to attain despite their occasional conflict with our existing needs, are in the special, though not exclusive, custody of the Court—the ‘pronouncer and guardian of such values.’” (quoting Bickel, *Least Dangerous Branch*, supra note 2, at 24)).

⁶⁶ Bickel, *Least Dangerous Branch*, supra note 2, at 239. For a discussion of others who have emphasized “the educational function of the Supreme Court in its capacity as constitutional interpreter,” see Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 *Nw. U. L. Rev.* 145, 175–77 (1998) [hereinafter Klarman, *Constitutionalism*] (citing, and largely disagreeing with, Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 *N.Y.U. L. Rev.* 961 (1992); Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 *Sup. Ct. Rev.* 127; Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 *Harv. L. Rev.* 193, 208 (1952) (noting that Supreme Court Justices “are inevitably teachers in a vital national seminar”)).

⁶⁷ See Molot, *Reexamining Marbury*, supra note 12, at 1313.

⁶⁸ Bickel, *Least Dangerous Branch*, supra note 2, at 111–98; see Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 *Harv. L. Rev.* 40, 67 (1961) (defending use of justiciability doctrines to avoid overruling political process); cf. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 *N.Y.U. L. Rev.* 962, 1001–37 (2002) [hereinafter Ferejohn & Kramer, *Independent Judges*] (including similar limitations on the exercise of judicial power in a broader institutional analysis of judicial freedom and constraint).

model of judicial review would induce the polity to pause and take into account overlooked constitutional values.⁶⁹

While Bickel thus recognized *both* the judiciary's ability to embrace enduring legal values *and* its ability to avoid displacing the political process, his legacy lies in the latter observation. To be sure, some scholars have focused on Bickel's ideas regarding the long-term values that judges are supposed to protect.⁷⁰ But if Bickel has triggered debate over the judiciary's ability to promote enduring values, it is the other half of his theory that triggered greater controversy and that ultimately has had a lasting influence. Bickel's model of judicial restraint generated criticism at the outset and, in subsequent decades, invited a significant following.

Bickel's model of restraint was initially criticized for being unprincipled.⁷¹ Indeed, one of Bickel's harshest critics, Herbert Wechsler, laid out a counterargument even before Bickel's famous

⁶⁹ See Bickel, *Least Dangerous Branch*, *supra* note 2, at 111–98. Bickel's ideas echo those of Alexander Hamilton, who argued that the

firmness of the judicial magistracy . . . not only serves to moderate the immediate mischiefs of those [laws] which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.

The Federalist No. 78, *supra* note 25, at 509.

⁷⁰ For example, Bruce Ackerman has built upon Bickel's ideas by calling attention to the judiciary's fidelity to bargains struck in our nation's past, not just its foresight regarding values that the public may come to embrace in the future. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *Yale L.J.* 1013, 1050 (1984); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 *U. Chi. L. Rev.* 689, 767 (1995). John Ely has challenged Bickel's assertion that judges have any special insight into enduring constitutional values and has emphasized instead the judiciary's ability to monitor the procedures by which political officials govern, thereby ensuring that the government operates consistently with our constitutional commitment to popular self-government. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 103 (1980); see Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *Constitutionalism and Democracy* 195, 230–38 (Jon Elster & Rune Slagstad eds., 1988); Croley, *supra*, at 769–72; White, *supra* note 28, at 1566–68.

⁷¹ See Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 *Colum. L. Rev.* 1, 5–9 (1964); cf. Martin H. Redish, *The Passive Virtues, The Counter-Majoritarian Principle, and the "Judicial-Political" Model of Constitutional Adjudication*, 22 *Conn. L. Rev.* 647, 656, 662–63 (1990) (criticizing Bickel's "passive virtues" and highlighting the judiciary's role as "enforcer of the counter-majoritarian Constitution").

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book was published. In his *Neutral Principles* article, Wechsler took aim at a more extreme argument for judicial restraint advanced by Judge Learned Hand.⁷² Like Bickel, Hand urged courts sometimes to refrain from reaching constitutional questions, suggesting that “[i]t is always a preliminary question how importunately the occasion demands an answer,” and that sometimes “[i]t may be better to leave the issue to be worked out without authoritative solution.”⁷³ Wechsler responded:

If this means that a court, in a case properly before it, is free—or should be free on any fresh view of its duty—either to adjudicate a constitutional objection . . . or to decline to do so, depending on “how importunately” it considers the occasion to demand an answer, could anything have more enormous import for the theory and practice of review? What showing would be needed to elicit a decision? . . . For me, as for anyone who finds the judicial power anchored in the Constitution, there is no such escape from the judicial obligation; the duty cannot be attenuated in this way.⁷⁴

To Wechsler, a court’s decision either to accept jurisdiction or to dismiss a case, just like the court’s resolution of a case once accepted, must be based on legal principle and not left to judicial discretion. Wechsler placed an “emphasis upon the role of reason and of principle in the judicial, as distinguished from the legislative or executive, appraisal of conflicting values.”⁷⁵

Wechsler understood that in a post-Realist age his emphasis on principle might ring hollow to some: “Those who perceive in law only the element of fiat, in whose conception of the legal cosmos reason has no meaning or no place, will not join gladly in the search for standards of the kind I have in mind.”⁷⁶ But Wechsler had faith that such skepticism toward law was unwarranted and, ultimately, shared by only a small minority of legal thinkers.⁷⁷ “The

⁷² Wechsler, *supra* note 1, at 2–10 (citing Learned Hand, *The Bill of Rights* (1958)).

⁷³ Hand, *supra* note 72, at 15.

⁷⁴ Wechsler, *supra* note 1, at 6.

⁷⁵ *Id.* at 16.

⁷⁶ *Id.* at 11.

⁷⁷ *Id.* (noting that the “more numerous among us” do not share this extreme skepticism but do worry about judges being influenced by a desired “result in the immediate decision”).

man who simply lets his judgment turn on the immediate result may not . . . realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them . . . as courts of law.”⁷⁸ Wechsler reminded post-Realist skeptics, much as Hamilton had reminded Anti-Federalists at the Founding, that to be a “court of law” was to exercise “reason” or “judgment” based on legal principles rather than to act by “fiat” or assert one’s “will.”⁷⁹ It is not that Wechsler thought legal principles were pre-ordained; he did not use a capital “N” in “neutral” or ground his ideas in natural law theory.⁸⁰ Wechsler understood that courts would have to choose among available principles and work out their implications for pending cases. But he expected that they would do so by exercising reason or judgment rather than by asserting their political will.⁸¹ As I read Wechsler, his focus was on the judicial reasoning process—on the need for judges to articulate principles applicable beyond the case at hand. That reasoning process itself may be a source of constraint—as I will explore

⁷⁸ Id. at 12.

⁷⁹ See discussion *supra* Section I.A.

⁸⁰ See Dorf, *Legal Indeterminacy*, *supra* note 5, at 952–53 (“[N]eutral principles’ was always something of a misnomer. Wechsler did not argue that principles themselves are neutral, but that a responsible judge applies principles evenhandedly . . . ‘Neutral application of principles’ is a fairer rendition of what Wechsler had in mind.”) (footnotes omitted); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 *Colum. L. Rev.* 982, 987–88 (1978); Henry Paul Monaghan, *A Legal Giant is Dead*, 100 *Colum. L. Rev.* 1370, 1373 (2000) [hereinafter Monaghan, *Legal Giant*] (“What Herb insisted was not so much that the governing principle should be neutral, but that the applicable principle should be neutrally and generally applied.”). Indeed, Judge Robert Bork later faulted Wechsler for focusing only on the neutral *application* of principles, and never insisting on their neutral *derivation*. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 7–8, 35 (1971).

⁸¹ See Dorf, *Legal Indeterminacy*, *supra* note 5, at 953 (“Judges, [Wechsler] said, should mean what they say when they explain their decisions by principles.”); Monaghan, *Legal Giant*, *supra* note 80, at 1373; David L. Shapiro, *Herbert Wechsler—A Remembrance*, 100 *Colum. L. Rev.* 1377, 1379 (2000) [hereinafter Shapiro, *A Remembrance*] (“The essence of the argument, I believe, is that a principle approaches neutrality—in the Wechslerian sense—to the extent the judge is willing and able to articulate it as the true basis of decision, and to apply it in future cases that are not fairly distinguishable. Recognizing that this effort can never be fully successful, and that principles must of necessity evolve as times and circumstances change, I cannot conceive of a better canon for a judge to live by.” (citing Greenawalt, *supra* note 80, at 991)).

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later—but Wechsler did not make any grander jurisprudential claims about the constraining force of legal principle.

Wechsler’s argument was noteworthy not only because he was willing to emphasize principled reasoning in a post-Realist age, but also because he highlighted the tension between judicial restraint and judicial adherence to principle—a tension that until then had been largely overlooked. “To be sure,” Wechsler conceded, “the courts decide, or should decide, only the case they have before them.”⁸² But in Wechsler’s view, the need to decide cases based on principle trumped the notion that judges should tread lightly:

But must they not decide on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed?⁸³

The debate between Bickel and Wechsler thus captured how two historically compatible justifications for judicial power had emerged as rivals. If for centuries legal thinkers had been able to defend judicial power as both principled and minimally intrusive, this no longer seemed possible. To favor Bickel’s model of restraint was to subject oneself to Wechsler’s criticism of being unprincipled. To favor Wechsler’s neutral-principles model, following broad principles without regard to their intrusion upon politics, was to subject oneself to Bickelian criticism for overreaching and activism.

C. The Disappearance of Half of the Tradition

In Bickel and Wechsler’s day both of the traditional justifications for judicial power were at least represented in constitutional law scholarship, even if they seemed at odds. Today, in contrast, scholars tend to focus on one at the expense of the other. Whether because Wechsler used his neutral-principles model to criticize the most significant Supreme Court decision of his day, *Brown v.*

⁸² Wechsler, *supra* note 1, at 15.

⁸³ *Id.*

Board of Education,⁸⁴ or because it seemed like a throwback to the formalist views that legal realism had so soundly rejected decades earlier,⁸⁵ Wechsler's article was first criticized and then subsequently ignored as a basis for judicial power.⁸⁶ Wechsler's article remains a frequently cited work,⁸⁷ but typically by those who disagree with it. With few exceptions,⁸⁸ it has not had a lasting impact on those who seek to defend judicial power.

Bickel's advocacy of restraint, in contrast, has had lasting influence in the ongoing quest to overcome the countermajoritarian difficulty.⁸⁹ Indeed, as scholars in recent years have turned their attention to the Rehnquist Court's activism, they have borrowed a great deal from Alexander Bickel, so much so that "minimalism" has become a dominant school of thought in constitutional law (albeit a school that lumps together a variety of scholars whose views di-

⁸⁴ 347 U.S. 483 (1954); see Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale L.J.* 421, 421 n.3 (1960); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 *U. Pa. L. Rev.* 1, 1-2 (1959); Wechsler, *supra* note 1, at 22-24; see also Ely, *supra* note 70, at 55 ("Neutral principles' has often served as a code term for judicial conservatism, probably because Wechsler himself originally used the concept in criticizing *Brown v. Board of Education* as wrongly decided.").

⁸⁵ See, e.g., Dorf, *Legal Indeterminacy*, *supra* note 5, at 953 ("[A] skilled judge can purport to be applying principles neutrally even while deciding cases based on political preferences."); Barry Friedman, *Neutral Principles: A Retrospective*, 50 *Vand. L. Rev.* 503, 519 (1997) [hereinafter Friedman, *A Retrospective*] ("Wechsler's approach, to those critical of it, bore too much similarity to the now bad old days of arid legal formalism.").

⁸⁶ See, e.g., Ely, *supra* note 70, at 54-55 (describing its reception); Dorf, *Legal Indeterminacy*, *supra* note 5, at 952-53 (same). Scholars also criticized neutral principles because they believed "it was the consequences of legal decisions that mattered, not the formal neutrality of the decisional rules employed." Friedman, *A Retrospective*, *supra* note 85, at 520 (discussing the work of Alexander Bickel, Martin Shapiro, Jan Deutsch, Arthur Miller, M.P. Golding, and Eugene Rostow).

⁸⁷ Upon Herbert Wechsler's death, David Shapiro observed that *Neutral Principles* had been cited 1036 times in law reviews. Shapiro, *A Remembrance*, *supra* note 81, at 1378 n.6; see also Monaghan, *Legal Giant*, *supra* note 80, at 1372 (describing it as Wechsler's "most famous article").

⁸⁸ See Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 *Stan. L. Rev.* 169, 187-97 (1968); Greenawalt, *supra* note 80, at 982; cf. Dorf, *Legal Indeterminacy*, *supra* note 5, at 952-53 (noting how Wechsler has been misunderstood).

⁸⁹ See Peters, *supra* note 5, at 1457 ("This new judicial minimalism hearkens, self-consciously and often somewhat defensively, back to the original minimalist manifesto, Bickel's *The Least Dangerous Branch*.").

verge as often as they converge).⁹⁰ So-called “minimalist” scholars may disagree over the extent of the problem and may vary in their prescriptions, but they seem almost uniformly to focus on the risk of judicial overreaching and the need to prevent, or at least reduce, judicial intrusions upon the political process. I explore three prominent examples of what I call minimalism below—the work of Cass Sunstein, Michael Seidman, and Michael Dorf—but they are by no means the only examples that could fit the definition. When Larry Kramer laments that the Court has claimed sole authority to interpret the Constitution—and has confused “judicial supremacy and judicial sovereignty”—he is making an argument that is fairly characterized as minimalist.⁹¹ When Reva Siegel and Robert Post criticize the Court for “seek[ing] to exclude Congress from the process of constitutional lawmaking” and “regard[ing] the integrity of our system of constitutional rights as dependent upon its complete insulation from the contamination of politics,” they too are making a minimalist argument.⁹² When Rachel Barkow criticizes the erosion of both judicial deference to Congress and of the political question doctrine,⁹³ or Neal Katyal calls for judges to heed Senators’ views of the Constitution,⁹⁴ they too are embracing variants of minimalism.⁹⁵ And, of course, scholars like Mark Tushnet,

⁹⁰ See *id.*

⁹¹ See Kramer, *We the Court*, *supra* note 28, at 13 (“There is . . . a world of difference between having the *last* word and having the *only* word.”); Kramer, *Retreat from Judicial Supremacy*, *supra* note 55, at 206–26 (criticizing “new mythology in which judicial supremacy is treated as the logical and inexorable endpoint of a beneficent progress”).

⁹² Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *Yale L.J.* 1943, 1946 (2003).

⁹³ Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 *Colum. L. Rev.* 237, 242 (2002).

⁹⁴ Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 *Duke L.J.* 1335, 1339–46 (2001) [hereinafter Katyal, *Interpretation*] (arguing that judges are not sufficiently influenced by political views, that Senators during Supreme Court confirmation hearings should offer their views on constitutional interpretation, and that all nine Justices should pay attention to the Senate’s interpretations).

⁹⁵ Minimalism has been employed by both liberal and conservative judges, and liberal and conservative scholars. See Louis Michael Seidman, *Romer’s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 *Sup. Ct. Rev.* 67, 87–88 (“Both liberals and conservatives can regularly be found arguing for activism and for restraint in various contexts.”). Someone seeking to defend affirmative action, for example, might employ minimalist arguments against “heightened scrutiny in equal protection

who have long argued for the abolition of constitutional judicial review, are minimalist.⁹⁶ Indeed, they are the forerunners of contemporary minimalism.⁹⁷

But to understand minimalism at its core, and to understand its influence over a broad range of constitutional theory today, I find it most useful to examine the work of Sunstein, Seidman, and Dorf. These three scholars advance very different models of judging, but their work demonstrates just how large Bickel's ideas on postponing resolution loom in contemporary constitutional theory. Contemporary scholarship has embraced and expanded upon half of Bickel's legacy, largely ignoring the other half, and certainly ignoring Wechsler's neutral-principles alternative.

Cass Sunstein, who coined the phrase "judicial minimalism," is the scholar most famous for expanding Bickel's notion of the "passive virtues" into a full-blown jurisprudential approach.⁹⁸ Whereas Bickel's "passive virtues" are "exercised when a court refuses to assume jurisdiction," Sunstein describes a minimalist approach that tends to "increase the scope for continuing democratic deliberation on the problem at hand" even in those cases courts *do* review.⁹⁹ He defends a judicial practice of "saying no more than necessary to justify an outcome, and leaving as much as possible undecided" as

jurisprudence." Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. Pa. J. Const. L. 281, 281 (2002). Or, as Suzanna Sherry has pointed out, conservatives may employ "majoritarian defense[s] of minimalism" to rally "against the Supreme Court's relatively aggressive protection of individual rights." Suzanna Sherry, *An Originalist Understanding of Minimalism*, 88 Nw. U. L. Rev. 175, 175 (1993) (commenting on Michael J. Perry, *The Constitution, the Courts, and the Question of Minimalism*, 88 Nw. U. L. Rev. 84 (1993)).

⁹⁶ See Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

⁹⁷ As Christopher Peters points out, there are many other scholars who can be classified as "minimalist" in the sense that they seek to promote interbranch dialogue instead of judicial supremacy on constitutional issues. See Peters, *supra* note 5, at 1466–76 (discussing Robert A. Burt, *The Constitution in Conflict* (1992); Neal Devins, *The Democracy-Forcing Constitution*, 97 Mich. L. Rev. 1971 (1999); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54 (1997) [hereinafter Fallon, *Implementing the Constitution*]; Neal Kumar Katyal, *Judges as Advicegivers*, 50 Stan. L. Rev. 1709 (1998) [hereinafter Katyal, *Advicegivers*]).

⁹⁸ See Cass R. Sunstein, *Legal Reasoning and Political Conflict* (1996); Sunstein, *One Case at a Time*, *supra* note 3, at 39–40; Sunstein, *Foreword*, *supra* note 3; see also Katyal, *Advicegivers*, *supra* note 97, at 1713–15 (examining the relationship between Bickel and Sunstein's ideas and building upon them).

⁹⁹ Sunstein, *One Case at a Time*, *supra* note 3, at 39–40.

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a way to “promote more democracy and more deliberation.”¹⁰⁰ True, Sunstein contends that judges must still justify outcomes; he does not take minimalism to such an extreme as to eliminate principle from the judicial process altogether (a state of affairs that he would call “reasonlessness”).¹⁰¹ But in his zeal for minimalism, Sunstein is willing to relegate principle to as minor a role as possible. Principle may have a place in judicial decisionmaking, but for Sunstein the key to reconciling judicial power with democratic values lies in minimalism rather than adherence to principle. Sunstein seems to accept principle grudgingly, rather than to embrace it as part of the solution to the countermajoritarian difficulty. Too much principle would foreclose too many options in his view,¹⁰² and so principle should be kept to a minimum.

A very different approach, but one which shares the project of leaving matters unresolved, is found in Michael Seidman’s book, *Our Unsettled Constitution*. Seidman rejects Sunstein’s brand of minimalism, suggesting that it “overstate[s] the extent to which we can do without constitutional law.”¹⁰³ Where Sunstein urges judges to be “shallow” rather than “deep,” and to reach “incompletely theorized agreements” that settle pending disputes but avoid linking the settlements to deeper constitutional principles,¹⁰⁴ Seidman embraces the traditional notion that judges should trace their decisions to deeper legal values.¹⁰⁵ But if Seidman does not share Sunstein’s emphasis on being “shallow,” he does share Sunstein’s project of confining the force of judicial decisions (so that, in Sunstein’s terms, judicial decisions are “narrow” rather than “broad”).¹⁰⁶ Seidman suggests that when judges decide cases they should settle only the disputes before them, leaving open deeper, more enduring disagreements about the political values that under-

¹⁰⁰ Id. at 3–4.

¹⁰¹ See id. at 9–10 (distinguishing between “reasonlessness” and “minimalism”).

¹⁰² See id. at 26. Sunstein defends minimalism not only as democracy promoting, but also as a way to minimize error and decision costs in most instances. See id. at 46–60.

¹⁰³ Seidman, *Unsettled Constitution*, supra note 4, at 31.

¹⁰⁴ See Sunstein, *Foreword*, supra note 3, at 20–21.

¹⁰⁵ Seidman, *Unsettled Constitution*, supra note 4, at 31–32 (citing Sunstein, *One Case at a Time*, supra note 3; Sunstein, *Agreements*, supra note 3, at 1739–42).

¹⁰⁶ Sunstein, *One Case at a Time*, supra note 3, at 209; Sunstein, *Foreword*, supra note 3, at 15–20.

lie those disputes.¹⁰⁷ In Seidman's view, judges should *unsettle*, rather than settle, those underlying political disagreements, advancing one set of political values over another in the case at hand, but only temporarily and always with the possibility that the values will be reshuffled in future cases.¹⁰⁸ Seidman points out that while "[a]ny constitutional settlement is bound to produce losers who will continue to nurse deep-seated grievances . . . a constitution that unsettles creates no permanent losers."¹⁰⁹ "By destabilizing whatever outcomes are produced by the political process," Seidman hopes to "provide[] citizens with a forum and a vocabulary that they can use to continue the argument" and to help "entic[e] losers into a continuing conversation."¹¹⁰

Whereas Sunstein's "shallow," "narrow" model of judging squarely rejects the neutral-principles tradition that had been so important from the time of the Founding right up until Wechsler, Seidman seeks to manipulate, rather than discard, that tradition. Seidman allows a role for principle in judicial decisionmaking; he just believes that principle is not really principle, but rather political ideology. Like Sunstein, however, Seidman is squarely in the camp of contemporary scholars who have rejected principle as a basis for judicial power. The crucial distinction between "judgment" and "will" that thinkers from Alexander Hamilton to Herbert Wechsler relied upon to distinguish judicial from political deliberation, and to defend judicial power, is completely absent from Seidman's theory. Seidman defends judicial power based entirely on what judges avoid resolving.

Another contemporary scholar who offers a good example of minimalism's current dominance is Michael Dorf.¹¹¹ Dorf differs

¹⁰⁷ Seidman challenges "the two central assumptions upon which most prior theory has been based: that principles of constitutional law should be independent of our political commitments and that the role of constitutional law is to settle political disagreements." Seidman, *Unsettled Constitution*, supra note 4, at 7.

¹⁰⁸ See Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 *Yale L.J.* 1006, 1008 (1987) ("The work of judges can be understood as an effort to manipulate decisionmaking contexts . . . so as to preserve continuing, unresolved tensions between our universalist and particularist urges.").

¹⁰⁹ Seidman, *Unsettled Constitution*, supra note 4, at 8.

¹¹⁰ *Id.* at 8-9.

¹¹¹ Cf. Dorf, *Legal Indeterminacy*, supra note 5, at 887 & n.36 (arguing that "C.J. Peters misclassifies me as a minimalist" (citing Peters, supra note 5, at 1468-69)); Mark

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from other so-called minimalists by building on a Hart and Sacks legal process paradigm that affirmatively embraces courts “as a means of coordinating activity across professional and institutional boundaries.”¹¹² Yet Dorf “break[s] with that [legal process] tradition—by assuming neither that government institutions are static nor that the courts that interact with them must operate by reference to necessarily tacit principles.”¹¹³ Dorf’s “experimentalist” courts would avoid establishing binding legal principles and would “rarely resolve contested questions of law in the sense of choosing one rather than another meaning of authoritative text.”¹¹⁴ Courts would “interpret ambiguous but authoritative commands by calling into existence a system of experimentation, rather than by—or at least in addition to—laying down specific rules.”¹¹⁵ He explains how “courts that call into existence experimentalist regimes by crafting their judgments as provisional performance standards rather than as once-and-for-all resolutions of contested meaning can overcome the bounded rationality generally thought to limit institutions like courts in their ability to address complex social problems.”¹¹⁶

Despite their differences, Sunstein, Seidman, and Dorf all share Bickel’s emphasis on postponing resolution, or leaving matters unresolved, rather than on resolving disputes based on principle in the manner that Wechsler envisioned.¹¹⁷ They may mention Wechsler in passing, but these contemporary scholars clearly are working in the other half of the tradition. Indeed, in reading these contemporary scholars and many others, one gets the impression that Wechsler’s response to Bickel represented the last gasp of a dying tradition.

Tushnet, *A New Constitutionalism for Liberals?*, 28 N.Y.U. Rev. L. & Soc. Change 357, 358 (2003) (observing, and lamenting, that “experimentalist constitutionalism is something that has not yet reached much beyond the confines of Columbia University” (referring to Liebman & Sabel, *supra* note 6, Dorf & Sabel, *Democratic Experimentalism*, *supra* note 6, and Dorf & Sabel, *Drug Treatment*, *supra* note 6)).

¹¹² Dorf, *Legal Indeterminacy*, *supra* note 5, at 936.

¹¹³ *Id.*

¹¹⁴ *Id.* at 959–60.

¹¹⁵ *Id.* at 961.

¹¹⁶ *Id.* at 970.

¹¹⁷ As already noted, these three are by no means the only scholars with such an emphasis. See *supra* notes 91–97 and accompanying text.

II. INSTITUTIONAL SETTING AND LIMITED JUDICIAL POWER

The recent ascendancy of judicial minimalism is noteworthy for two reasons. First, contemporary scholars have transformed descriptive theories into normative ones. At the time of the Founding, the neutral-principles and minimalist traditions were largely descriptive. The Founders did not encourage judges to be more or less principled, or more or less minimalist. The Founders expected that judges would be both principled and minimalist because these were features inherent in the judicial process. Today, in contrast, scholars are not content to rely on descriptions of judicial behavior. They affirmatively embrace some aspect of judicial behavior and develop jurisprudential theories that accentuate their chosen characteristic.

Second, in moving from descriptive theories about how judges *do* behave to normative theories about how judges *should* behave, scholars have elevated one traditional characteristic of judicial power over another. Lacking faith in the constraining force of legal principle, scholars have abandoned the neutral-principles tradition and sought to curtail judicial power by emphasizing its other defining characteristic—its limited role in our system of government. The idea is that if judges cannot be counted on to base their decisions on legal principle, at least they can be encouraged to decide as little as possible.

These two transitions—from descriptive to normative and from balance to imbalance—are of course related. Neutral principles and judicial minimalism had once been part of the same traditional justification for judicial power, but as scholars lost faith in legal principle they understandably looked to the other half of the tradition to justify judicial power in a post-Realist, post-CLS age. Concerned about giving judges too much power to substitute their judgments for those of the representative branches of government, and skeptical about law's constraining force, these scholars logically looked to minimalism as a solution.

In their zeal to cabin judicial authority, however, contemporary scholars have overlooked institutional and historical constraints on judicial behavior that address the very same ills that drive the minimalist project. One need not embrace judicial minimalism to protect against judicial overreaching. There are a host of institutional and historical forces at work that constrain judges and nar-

row the scope of their influence. The recent move from descriptive to normative analysis has led contemporary scholars to lose sight of the forces that actually influence judicial behavior, forces that support both the neutral-principles and minimalist traditions. The discussion that follows seeks to reverse recent trends, turning from the normative back to the descriptive and from one-sided advocacy back toward an emphasis on balance.

The discussion immediately below explores the impact of the institutional setting in which judges operate¹¹⁸—a move invited by Cass Sunstein and Adrian Vermeule in a recent article,¹¹⁹ and one reminiscent of the legal process movement.¹²⁰ It considers a variety of institutional forces that lead judges both to tread lightly and to feel constrained by existing legal materials, whether they affirmatively embrace minimalism, neutral-principles theory, or neither. Part III then turns to the historical setting in which judges operate, a setting which cabins judicial leeway and power, and minimizes the influence that any judge or generation of judges can have over the course of legal doctrine. Finally, Part IV considers the normative implications of the descriptive project in Parts II and III.

A. The Minimalism Built into the System

Whether judges affirmatively embrace contemporary minimalism and try to decide as little as possible, embrace neutral-

¹¹⁸ Cf. Lee Epstein & Jack Night, *The Choices Justices Make* 17 (1998) (“[W]e cannot fully understand the choices justices make unless we also consider the institutional context in which they operate.”). But cf. Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, 50 *Duke L.J.* 1395, 1396 (2001) (“[I]ncentives and institutional characteristics only conduce to behavior; they do not determine it.”).

¹¹⁹ See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 *Mich. L. Rev.* 885, 886 (2003). For an argument that Sunstein and Vermeule’s emphasis on institutional analysis is not really all that novel, see Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 *Mich. L. Rev.* 952, 954–55 (2003) (citing Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 *Harv. J.L. & Tech.* 569, 573 (2001); Molot, *Reexamining Marbury*, *supra* note 12, at 1292–1320).

¹²⁰ See Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Dorf, *Legal Indeterminacy*, *supra* note 5, at 879 (noting how Hart and Sacks “aimed to show how the legal process—including constitutional as well as sub-constitutional elements, public law and private law—domesticated judicial and other forms of official discretion”).

principles theory and try to explain their decisions with broad principles, or ignore these jurisprudential debates and simply decide cases as they have been trained to do as lawyers and law students, judges inevitably operate in an institutional setting that narrows the scope of their power. A judge's place in the constitutional structure and judicial hierarchy, a judge's relationship with litigants and lawyers, and a judge's stature in the legal community and broader polity help to explain why judges tend to limit themselves to agendas that have been set for them by somebody else.

What is it that renders the judiciary the least dangerous branch, as Hamilton long ago observed and Bickel used as the title of his famous book? Part of the explanation lies in the Constitution itself, which restricts courts to deciding only the cases and controversies that come before them,¹²¹ and deprives them of anything like Congress's broad legislative power¹²² or the President's broad power to "take Care that the Laws be faithfully executed."¹²³ But constitutional text is not the only mechanism that inhibits judges from setting broad agendas; the judiciary's institutional attributes act against agenda-setting as well.¹²⁴ By institutional design, the legislative and executive branches are equipped to investigate and address social problems as they deem fit.¹²⁵ While Article I of the Constitution vests "All legislative Powers" with the Congress,¹²⁶

¹²¹ U.S. Const. art. III, § 2.

¹²² Id. art. I, § 8.

¹²³ Id. art. II, § 3; see, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992).

¹²⁴ See *The Federalist* No. 81, supra note 24, at 526; Shapiro, *Paternalism*, supra note 12, at 551–55.

¹²⁵ See Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 *Harv. L. Rev.* 1, 28–29 (1975) [hereinafter Monaghan, *Foreword*]; Bradford Russell Clark, Note, *Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation*, 84 *Colum. L. Rev.* 1969, 1987–88 (1984) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819)); cf. Shapiro, *Paternalism*, supra note 12, at 551–55 (observing that "courts are limited in their ability to investigate issues on the periphery of those brought to them by the litigants" and that "courts find it more difficult than do legislatures to experiment, to monitor the results, and to revise the experiment in the light of those results"). But see Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 *Duke L.J.* 1169, 1170 (2001) (challenging assumption "that as a matter of comparative institutional competence, the Court is better at sorting out the law and legislators are better equipped to get the facts right" and observing that "while Congress has superior factfinding capacities, it often lacks the institutional incentives to take factfinding seriously").

¹²⁶ U.S. Const. art. I, § 1.

Congress's ability to exercise legislative authority on a wide variety of subjects of its choosing depends just as much on congressional staffs and budgets as on the text of the Constitution. The same is true of executive power. While the Constitution empowers the President to "take Care that the Laws be faithfully executed" and to appoint "Officers of the United States" who can help him carry out this function, the President's ability to set a policy agenda is just as much a product of the financial and human resources available to him to investigate and address social problems—resources that have outpaced Congress's over the last half-century.¹²⁷

In contrast, the judiciary is unable to set a broad policy agenda because it lacks the constitutional authority and institutional resources that the political branches possess. As important as the constitutional "case and controversy" limitation on judicial authority¹²⁸ is the institutional reality that a district judge with two law clerks, an appeals court judge with three, or even a Supreme Court Justice with four, simply does not have the staff or finances to seek out and resolve social issues he deems important.¹²⁹ The Supreme Court's discretionary certiorari authority does allow it more power than lower federal courts to shape its own agenda because it grants only a small minority of the thousands of petitions it receives each Term.¹³⁰ Indeed, the certiorari authority is the one institutional

¹²⁷ See, e.g., Guido Calabresi, *A Common Law For the Age of Statutes* 1 (1982); Molot, *Reexamining Marbury*, supra note 12, at 1254–56; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1671 (1975) [hereinafter Stewart, *Reformation*]; Richard B. Stewart, *Madison's Nightmare*, 57 U. Chi. L. Rev. 335, 337 (1990) [hereinafter Stewart, *Madison's Nightmare*]; Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 408–09 (1989) [hereinafter Sunstein, *Interpreting Statutes*].

¹²⁸ U.S. Const. art. III, § 2; see Molot, *Reexamining Marbury*, supra note 12, at 1283–84, 1308–09; Shapiro, *Paternalism*, supra note 12, at 551 (observing that "courts act on cases brought to them by litigants, and thus have a very limited control over their agenda").

¹²⁹ Cf. Sunstein, *One Case at a Time*, supra note 3, at 47 ("A clue to understanding minimalism is to recognize that in deciding constitutional cases, judges often lack relevant information, and their rulings might well have unintended consequences. Their interest in shallow and narrow rulings is a product of their understanding of their own cognitive (and motivational) limitations.").

¹³⁰ See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 Colum. L. Rev. 1643, 1718 (2000) (noting how the certiorari policy gives the Court "the power to set its own agenda"); Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. Pa. L. Rev. 1067, 1072 (1988) ("[T]he criteria that the Court is expected to apply in decid-

characteristic that most risks turning the judiciary into yet another agenda-setting branch,¹³¹ as Wechsler himself seemed to recognize.¹³² Moreover, given that some extraordinary judges (Judge Posner, for example) seem able to overcome their resource limitations and become knowledgeable on a host of complex sociological and economic issues beyond those they see in court, one could imagine a group of extraordinary Justices using the discretionary certiorari authority to try to address social or economic problems that the political branches have failed to resolve and that they deem to be pressing.¹³³ It is no surprise that Bickel focused on the certiorari authority as the place where the Court had the most flexibility to be activist or minimalist and the place where he urged restraint so emphatically.¹³⁴

But we must not exaggerate the importance of the certiorari authority. For one thing, the certiorari power is available only to the Supreme Court, and even that Court must wait for a litigant to file a lawsuit, litigate it in the lower courts, and file a petition for certiorari before the Court can decide the policy question raised by that case. In addition, when one considers the obligation the Court

ing whether to grant certiorari are . . . opaque. Neither the Judiciary Act of 1925 nor any other statutory enactment define such criteria.”); Strauss, *Courts or Tribunals?*, supra note 44, at 896–97 (“A court with certiorari authority is not merely able, but is expected, to choose its targets with reference to what law seems most important to enunciate. Having thousands of petitions from which to select, say, one hundred controversies for decision enables judges to have agendas.”); see also *The Supreme Court, 2000 Term: The Statistics*, 115 *Harv. L. Rev.* 539, 545–47 (2001) [hereinafter *The Statistics*] (providing numbers of petitions for and grants of certiorari).

¹³¹ This generally is true of the highest state courts as well as the Supreme Court of the United States. See, e.g., *Goldberg v. Kollsman Instrument Corp.*, 191 N.E.2d 81, 81 (N.Y. 1963) (“We granted leave to appeal in order to take another step toward a complete solution of the problem partially cleared up in [earlier cases regarding privity of contract in products liability cases].”).

¹³² See Wechsler, supra note 1, at 9–10. Whereas Wechsler lamented the Court’s refusal to apply criteria and curtail its discretion, others have lamented the opposite, citing political question doctrine as an area of doctrine where the Court has relinquished its discretion in favor of principle. See Barkow, supra note 93, at 242; Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 *N.C. L. Rev.* 1203, 1203–06 (2002).

¹³³ That the Warren Court heard more cases than the current Supreme Court may be attributable in part to the broad social agenda that some of its members sought to advance. Other factors certainly influence the size of the Court’s docket as well, such as the relative homogeneity or heterogeneity on the courts of appeals and whether Congress in a given period passes many or few statutes requiring judicial interpretation.

¹³⁴ See supra note 68 and accompanying text.

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feels to resolve conflicts of authority among circuit courts of appeal and to review lower court decisions striking down state or federal legislation,¹³⁵ less room remains on the Court's docket to pick cases simply because they would advance a particular Justice's chosen policy agenda.¹³⁶ Indeed, the very fact that the Court can address only a small fraction of the petitions it receives reveals just how limited it is in setting its agenda.¹³⁷ It may have discretion to pick one case over another, and even to expand or contract its docket considerably as it has done in recent decades, but the Court inevitably must leave unheard the vast majority of disputes that are filed.¹³⁸

Moreover, when one considers that a judge or Justice's institutional role is informed not only by the judiciary's relationship with the political branches, but also by relationships among judges, it becomes far less likely that an activist judge will succeed in pursuing a political agenda.¹³⁹ District judges sit alone, but they typically

¹³⁵ Sup. Ct. R. 10.

¹³⁶ Cf. Strauss, *Courts or Tribunals?*, supra note 44, at 925 ("In the unspoken battle between agenda-setting and judging, we should all hope judging wins."). But see Hartnett, supra note 130, at 1723 (noting that "from Taft on down, the Justices have steadfastly refused to promulgate rules that might constrain their discretion"). That the Court's docket is so small today does, however, leave it ample room to take more cases should it wish to do so.

¹³⁷ See The Statistics, supra note 130, at 545–46 (providing numbers of petitions for and grants of certiorari).

¹³⁸ Cf. Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 Harv. L. Rev. 4, 4–5 (1998):

[The] flurry of activity [in June 1998] gave the impression of a Court at the center of the nation's most pressing controversies. This impression is largely false For most of the 1997 Term, fundamental questions of liberty and equality were almost invisible. Even matters of federalism, so prominent in recent Terms, receded from view. Instead, the docket was crammed with technical questions of "lawyer's law." Such issues are an essential ingredient of every Term's caseload, but this year they were especially dominant, as the Court turned its attention to filling relatively small gaps in acts of Congress and the Court's own precedents.) (footnote omitted).

¹³⁹ See Molot, *Reexamining Marbury*, supra note 12, at 1283–84, 1308–09; Shapiro, *Paternalism*, supra note 12, at 551–55; see also Lewis A. Kornhauser and Lawrence G. Sager, *Unpacking the Court*, 96 Yale L.J. 82, 82 (1986) ("Only at the trial level do judges normally decide cases alone. Intermediate courts of appeal and courts of last resort are organized so that judges almost always sit and act together with colleagues on adjudicatory panels."); cf. Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. Cal. L. Rev. 535, 548 (1999) (noting that "the [judicial] process itself constrains judges in a variety of ways").

are more pressed for time than their superiors and are subject to appellate review, both of which render them less likely on a regular basis to reach out and resolve disputes beyond those squarely presented by the parties.¹⁴⁰ Appellate judges typically are less pressed for time than district judges, but they sit in panels of three (or more in en banc proceedings) and thus cannot reach out and decide more than is necessary to dispose of a pending case without first convincing at least one of their colleagues to go along.¹⁴¹ Supreme Court Justices sit as a Court of nine, four of which are needed to grant certiorari and five of which typically are needed to issue a decision on the merits. Although the certiorari power certainly allows the Supreme Court broad leeway in setting its agenda—and is the single factor most threatening to the Founders’ original “case-and-controversy” based distinction between the courts and the political branches—the fact that the Court is a multimember body helps offset the certiorari authority and makes it more difficult for the Supreme Court to pursue an active policy agenda.¹⁴² Even if outlier judges or Justices are able to overcome the resource constraints that lead most of their colleagues to resolve disputes and avoid broader social inquiries, the nature of the judicial hierarchy ensures that the actions of the judiciary as a whole will generally reflect its limited resources. There may be an activist judge or Justice bent on advancing a social agenda, but overall the judiciary can be relied on to perform the more limited role of resolving cases brought to them by others.

¹⁴⁰ See Ferejohn & Kramer, *Independent Judges*, supra note 68, at 997–98.

¹⁴¹ Although the prospect of Supreme Court review also is a check on the power of appellate court judges, the Supreme Court reviews only a small fraction of their decisions. Moreover, many appellate judges escape any scrutiny at all (beyond that of other panel members) by refusing to publish their decisions. See Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 *L. & Contemp. Probs.* 157, 162 (1998) (noting that between 1989 and 1996 “the Third Circuit not only used the JO [Judgment Order] in approximately sixty percent of its cases, but it also may have used the JO in some of its hardest cases”).

¹⁴² See Sunstein, *One Case at a Time*, supra note 3, at 47 (highlighting “the pressures imposed on a multimember court consisting of people who are unsure or in disagreement about a range of subjects”). Of course, Congress is a multimember body as well (or really two multimember bodies). For a discussion of group decisionmaking by multimember courts that draws a distinction between preference aggregation by courts and other decisionmaking bodies, see Kornhauser & Sager, supra note 139, at 82.

The judiciary's limited ability to set its own agenda is a product not only of the judiciary's place in government and its own internal dynamics, but also of courtroom dynamics and a judge's relationship with lawyers and litigants. Lacking the resources to investigate cases entirely on their own, judges rely on litigants to develop a factual record and make legal arguments.¹⁴³ Of course, judges and their clerks can conduct research on their own—particularly on legal matters where they are institutionally strongest—and can reframe the issues framed by the parties.¹⁴⁴ But judicial resource constraints mean that the issues that judges will resolve depend largely upon how litigants and lawyers present their cases.¹⁴⁵ Moreover, litigants and lawyers themselves face resource constraints that ordinarily lead them to frame policy issues narrowly rather than broadly. While public interest litigants and lawyers might look to judges to address social issues in much the same way they would look to legislators or administrators,¹⁴⁶ most litigants and lawyers are concerned with winning lawsuits. No doubt lawyers like to be thorough in discovery and to investigate broadly, particularly when they are paid

¹⁴³ See Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 *Geo. L.J.* 2011–15 (1999); James S. Kakalik et al., *Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data*, 39 *B.C. L. Rev.* 613, 632 (1998) (“Shifting the conduct of discovery to judges in the United States would require a radical rethinking of the virtues of the adversarial process.”); Molot, *Reexamining Marbury*, *supra* note 12, at 1284, 1308–09; Shapiro, *Paternalism*, *supra* note 12, at 551–55; cf. Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 *Duke L.J.* 1265, 1304 (“[D]espite the willingness of courts to innovate in handling [new] litigation, they are still very much courts, bound for the most part by a process devised for the adjudication of individual disputes and not especially apt for coping with large questions of policy and administration.”).

¹⁴⁴ See Erichson, *supra* note 143, at 1986–94 (describing how some judges have employed court-appointed experts in mass tort cases); Molot, *Old Judicial Role*, *supra* note 16, at 60–61.

¹⁴⁵ See Molot, *Old Judicial Role*, *supra* note 16, at 60–61.

¹⁴⁶ For discussions of structural reform litigation see generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *Harv. L. Rev.* 1281 (1976); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 *Va. L. Rev.* 43, 45 (1979); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 *Harv. L. Rev.* 1, 39–44 (1979); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 *Yale L.J.* 635, 637 (1982) [hereinafter Fletcher, *Discretionary Constitution*]; Horowitz, *supra* note 143; Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 *Geo. L.J.* 1355, 1385–87 (1991).

by the hour,¹⁴⁷ but practicing lawyers and bill-paying clients do not approach policy questions in the same open-ended way that an academic, a think tank, or even a policy staffer in the executive or legislative branches does. They investigate with an eye toward bringing and winning lawsuits, rather than with an open-ended mandate to address social problems.¹⁴⁸

Finally, a judge's reputation in the legal community, and indeed in the broader polity, depends in large part upon whether the judge respects the boundaries of his or her role.¹⁴⁹ Even if a judge could find a way to set an agenda, doing so would subject the judge to criticism in a legal culture that emphasizes the difference between judges who decide cases brought by others and political officials who initiate inquiries themselves. Among the incentives that drive judges, prestige¹⁵⁰ and power¹⁵¹ loom large.¹⁵² Judges who wish to enhance their "reputation within the legal community"¹⁵³ and to "create precedents in new ar-

¹⁴⁷ See Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 *Ind. L.J.* 59, 74–75 (1997).

¹⁴⁸ Cf. Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 *Va. L. Rev.* 955, 971 (1998) [hereinafter Molot, *Changes*] (noting litigators' incentive to internalize the "judicial perspective" in order to win lawsuits); Note, *Sympathy as a Legal Structure*, 105 *Harv. L. Rev.* 1961, 1978–79 (1992) [hereinafter *Sympathy*] (same).

¹⁴⁹ See Molot, *Reexamining Marbury*, *supra* note 12, at 1301–08.

¹⁵⁰ See, e.g., Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 *Pub. Choice* 107, 129 (1983) (positing that "self-interested judges seek prestige"); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 *J. Legal Stud.* 627, 631 (1994). But see Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 *Sup. Ct. Econ. Rev.* 1, 2, 31–39 (1993) (arguing that judges maximize income and leisure); but cf. Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-making*, 75 *B.U. L. Rev.* 941, 982–84 (1995) (contrasting Posner's earlier and later work); Richard L. Hasen, "High Court Wrongly Elected": A Public Choice Model of Judging and its Implications for the Voting Rights Act, 75 *N.C. L. Rev.* 1305, 1311 n.22 (1997) (same).

¹⁵¹ See Richard A. Posner, *Economic Analysis of Law* 534 (4th ed. 1992) (positing that "judges seek to impose their personal preferences and values on society"); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 *J.L. Econ. & Org.* 263, 267 (1990); Hasen, *supra* note 150, at 1311; Macey, *supra* note 150, at 631 (noting incentive to exercise "increased influence"); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 *S. Cal. L. Rev.* 1631, 1646 (1995) (positing that a court acts to "maximize its own legal preferences or ideology"); Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 *Seton Hall L. Rev.* 736, 738 (1993).

¹⁵² Molot, *Reexamining Marbury*, *supra* note 12, at 1302–03 & nn.294–96.

¹⁵³ Macey, *supra* note 150, at 631.

eas of law that will be obeyed by other judges”¹⁵⁴ have strong incentives to follow the traditional model of case-by-case adjudication that will earn the respect of their colleagues and the legal community generally.¹⁵⁵

B. The Legal Constraints Built into the System

The various institutional forces that tend to limit judicial agendas also influence the way in which judges go about deciding cases on those agendas. A judge’s place in the government structure and the judicial hierarchy, a judge’s reliance on lawyers and litigants for input, and a judge’s standing in the legal community and broader polity all exert powerful influences on the manner in which judges reach decisions and issue opinions.¹⁵⁶ Whether or not these institutional constraints on judges are best described using Wechsler’s “neutral principles” label, they are every bit as real as the forces that inhibit judges from setting their own agendas. The judiciary’s institutional setting continues to support the notion that judicial leeway—not just judicial power—is limited.

Wechsler believed that judges should decide cases based not only on what seems wise or just in the case at hand, but also on some broader rationale that would apply to other cases with different parties and particulars.¹⁵⁷ It was this reasoning process, and not any particular set of underlying substantive principles, that occupied Wechsler. And, as the discussion below demonstrates, it is this reasoning process that continues to enjoy support in the judiciary’s institutional setting today. Indeed, the judiciary’s institutional setting offers support for expanding upon Wechsler’s description of the judicial process in one important respect. Institutional forces tend to lead judges not only to ground their decisions in generally applicable legal principles, but also to look to existing legal materi-

¹⁵⁴ Eric Rasmusen, *Judicial Legitimacy as a Repeated Game*, 10 *J.L. Econ. & Org.* 63, 67 (1994).

¹⁵⁵ See Molot, *Reexamining Marbury*, *supra* note 12, at 1302–03.

¹⁵⁶ John Ferejohn and Larry Kramer draw a distinction between the external institutional constraints imposed on the judiciary as a whole (which they view as significant) and those imposed on individual judges (which they suggest are relatively less intrusive and allow for great judicial independence). See Ferejohn & Kramer, *Independent Judges*, *supra* note 68, at 976–77.

¹⁵⁷ See *supra* notes 10, 75–83 and accompanying text.

als as the source of those legal principles.¹⁵⁸ The judiciary's institutional setting (together with its historical setting described in Part III) leads judges to reconcile their decisions not only with hypothetical future cases, but also with actual cases decided in the past.

It is not surprising that the institutional forces that confine judges in setting their agendas would also affect the manner in which judges resolve items on those agendas. After all, the resources required to identify and investigate agenda items are often the very same resources needed to develop solutions. Consider the tools that legislators and administrators use to identify and investigate social problems, whether formal investigations, hearings, and reports, or informal exchanges with industry experts, constituents, and lobbyists. These tools help the political branches not only to identify the social problems they wish to address, but also to craft solutions to those problems. A congressional committee or agency head will draw upon these formal and informal sources both in deciding whether to make law on a subject and in drafting the relevant bill or regulation.

In contrast, judges who are deprived of this broad array of inputs¹⁵⁹ are hampered not only in setting their agendas, but also in resolving the questions on their agendas. Unable to engage in freewheeling investigations, judges both confine themselves to cases brought by others and tend to resolve cases based on the limited information available to them.¹⁶⁰ Unable to pick up the phone

¹⁵⁸ Cf. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *Harv. L. Rev.* 781, 814 (1983) [hereinafter Tushnet, *Following the Rules*] ("Although Wechsler framed the neutral principles theory in prospective terms, it might be saved by recasting it in retrospective terms. The theory would then impose as a necessary condition for justification the requirement that a decision be consistent with the relevant precedents."). But cf. *id.* at 815 (criticizing this variation as well as Wechsler's original version).

¹⁵⁹ Judges lack these inputs in part because of their limited resources and in part because of the prohibition against *ex parte* communications with those who might have knowledge on a subject.

¹⁶⁰ See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) ("Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on . . . an issue."); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 *U. Pa. L. Rev.* 1033, 1037-38 (1968) ("The court, not being a representative institution, not having initiating powers and not having a staff for the gathering of information, must rely on the parties and their advocates to frame the problem and to present the opposing considerations relevant to its solution."); Molot, *Old Judicial Role*, *supra* note 16, at 60 & n.134;

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and call industry experts the way a legislator or administrator might, and unable to initiate the open-ended investigations or hearings with broad public input that characterize the legislative and administrative processes, judges look to the factual record developed by the parties and the legal materials with which they are familiar.¹⁶¹

Of course, judges do not live under a rock, and just as legislators and administrators approach policy questions informed by their own personal background knowledge and political beliefs, so too will judges be influenced by their background knowledge and political views.¹⁶² But when one considers a second institutional underpinning of minimalism noted above—the judiciary’s internal structure—one finds that this too reinforces the tendency among judges to base decisions on law rather than on their personal politi-

Monaghan, Foreword, *supra* note 125, at 28–29 (“Congress has . . . a special ability to develop and consider the factual basis of a problem.”); Shapiro, Paternalism, *supra* note 12, at 551–55 (observing that “courts are limited in their ability to investigate issues on the periphery of those brought to them by the litigants”); Clark, *supra* note 125, at 1987–88. But see Devins, *supra* note 125, at 1170 (challenging traditional assumptions regarding comparative institutional competence of courts and legislatures).

¹⁶¹ See Molot, Old Judicial Role, *supra* note 16, at 61, 110; cf. Katyal, Interpretation, *supra* note 94, at 1339–40 (“The Justices mingle with a tiny number of people and have little incentive to understand life beyond the cloister where they work.”). But cf. Ilya Somin, Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory, 89 *Iowa L. Rev.* 1287, 1324–25 (2004) (describing and noting criticisms of “judicial use of empirical evidence” in *Brown* and other cases); Peter L. Strauss, Changing Times: The APA at Fifty, 63 *U. Chi. L. Rev.* 1389, 1416 (1996) (exploring instances in which the Supreme Court engaged in independent legal research and pursued a line of reasoning not found “in the case’s development below or in the briefs”).

In important respects the judiciary’s limited institutional competence reinforces its limited constitutional role. In our constitutional structure, judges arguably should not make the legislative-type policy judgments that their institutional position renders them ill-equipped to make. See, e.g., Frank H. Easterbrook, The Supreme Court, 1983 Term—Foreword: The Court and the Economic System, 98 *Harv. L. Rev.* 4, 60 (1984) (“Judges must be honest agents of the political branches. They carry out decisions they do not make.”); Manning, *supra* note 16, at 5 (“In our constitutional system, it is widely assumed that federal judges must act as Congress’s faithful agents.”).

¹⁶² See Molot, Reexamining *Marbury*, *supra* note 12, at 1307 (“[W]henever we trust to enforce legislative enactments inevitably will have some leeway and will be influenced by politics in at least some instances.”); cf. Robert C. Post, The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law, 117 *Harv. L. Rev.* 4, 8 (2003) (arguing that the “boundary between culture and constitutional culture is quite indistinct”).

cal views.¹⁶³ Just as the prospect of review by superiors and peers leads judges to refrain from reaching out and deciding questions that are not presented, so too does the judiciary's internal structure lead judges to resolve presented questions based on law. District judges subject to appellate review, appellate judges who sit in panels of three, and Supreme Court Justices who sit on a court of nine all have incentives to look to the materials that their colleagues and/or superiors will look to as well.¹⁶⁴ Some judges may be more inclined than others to draw upon personal experiences and political views in making judicial decisions. But whereas these experiences and views vary from one judge to the next, *all* judges are able to look to the same body of legal materials in the course of deciding cases on their dockets.¹⁶⁵ Indeed, the judge who wishes to be a leader, rather than a follower, of judicial opinion has a strong incentive to ground his decisions in existing legal materials, not only to convince his peers and superiors that he is right, but also to give his opinion more weight with future generations of judges who will be less likely to overturn a judicial doctrine with a deep historical pedigree.¹⁶⁶

¹⁶³ See Shapiro, *Paternalism*, supra note 12, at 556.

¹⁶⁴ See Ferejohn & Kramer, *Independent Judges*, supra note 68, at 997–1001; Kornhauser & Sager, supra note 139, at 102–15; Molot, *Reexamining Marbury*, supra note 12, at 1307–09; *Sympathy*, supra note 148, at 1978–79. As noted above, appellate judges may sometimes escape scrutiny beyond that of their fellow-panel members by issuing unpublished decisions. See supra note 141. “[T]he failure to provide reasons [for decisions] undermines the foundations of our precedent-based system, which assumes that judges follow precedent by a process of reasoning and deliberation.” Gulati & McCauliff, supra note 141, at 194.

¹⁶⁵ See Fallon, *Implementing the Constitution*, supra note 97, at 109–51 (“Once established, doctrine frequently serves as a focal point for reasonable agreement among the Justices, despite their divergent views about how the Constitution would best be interpreted or implemented.”); Ferejohn & Kramer, *Independent Judges*, supra note 68, at 1037 (“So, while some judges or some lower courts might, at times, undertake a venturesome jurisprudence, the Supreme Court retains and employs its authority to limit or stop these experiments if they threaten to provoke a political retaliation that would affect the federal court system generally.”); *Sympathy*, supra note 148, at 1978 (“A judge must reconcile his perspective with those of other judges; he therefore tends to characterize social interactions according to their legally relevant meanings and to twist social life to fit legal paradigms. Rather than bend his legal notions to meet a party’s unique perspective, a judge expects parties to modify their perspectives to fit the law.”).

¹⁶⁶ See Molot, *Reexamining Marbury*, supra note 12, at 1303.

Moreover, a judge's relationship with litigants and lawyers reinforces his place in the judicial hierarchy and the government structure, likewise leading judges to feel constrained by law. To the extent that judges rely on lawyers and litigants for input, this leads judges to resolve cases based on the materials those entities rely upon.¹⁶⁷ Certainly, judges are free to look to sources of law not cited by the parties and to take judicial notice of some facts. But given limited judicial resources, a judge bent on going beyond the materials relied upon by the parties generally will look to legal, as opposed to nonlegal, sources. And, given their own resources and incentives, lawyers and litigants likewise will tend to rely on law as the basis for their arguments. No doubt, lawyers will undertake an extensive factual inquiry into matters relevant to their particular disputes. They are unlikely, however, to undertake the broader sociological inquiries that might inform legislative or administrative, as opposed to judicial, decisionmaking. Indeed, the incentive among lawyers and judges to frame and resolve disputes based on existing legal materials is a product not only of the resource constraints both face, but also of the legal culture in which they are educated and trained. The lawyer-judge relationship in any given case is at the centerpiece of a legal culture that for centuries has relied on lawyers to frame legal arguments for judges and on judges to evaluate the lawyers' positions by reference to existing legal materials.¹⁶⁸ For a judge to base a decision on something other than law is to buck that legal tradition. For a party to frame a dispute in such a manner is to risk losing the judge's sympathies and the case.¹⁶⁹

¹⁶⁷ See Christopher J. Peters, *Adjudication As Representation*, 97 *Colum. L. Rev.* 312, 347–56 (1997); Peters, *supra* note 5, at 1481–86. But see Robert W. Bennett, *Counter Conversationalism and the Sense of Difficulty*, 95 *Nw. U. L. Rev.* 845, 883 (2001) (“It is not true that the courts will hear only from parties to litigation The last half century . . . has seen a steady and dramatic increase in *amicus* submissions, and the contemporary practice in the United States Supreme Court is freely to allow them.”).

¹⁶⁸ See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *Harv. L. Rev.* 353, 363–84 (1978); Molot, *Old Judicial Role*, *supra* note 16, at 34–35, 63–73. See generally Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 315–52 (1993) (noting importance of judicial model for legal profession).

¹⁶⁹ See Molot, *Changes*, *supra* note 148, at 971; *Sympathy*, *supra* note 148, at 1978 (“Parties must hire lawyers who translate the parties’ stories into legal language and provide access to the judges’ interpretive community.”).

Finally, a judge's standing among lawyers and citizens generally tends to confine judges not only to narrow agendas, but also to a range of results ordained by existing legal materials. To the extent that judges care about their prestige and power—and truly want to earn the respect of their colleagues and the legal community generally—it is crucial that they be perceived to base their decisions on the law. The prospect of public exposure, criticism, and reputational harm are among the most powerful forces that lead judges to ground their decisions in existing legal materials.¹⁷⁰

C. Evaluating The Inherent Constraints on Judicial Power and Leeway

The institutional forces that prevent judges from setting their own agendas and that require judges to ground their decisions in law are of course only moderately constraining. Although institutional setting allows judges less flexibility than political officials in setting their agendas, judges can decide cases narrowly or broadly, issuing opinions with sparse explanations or sweeping dicta. The minimalism inherent in the judiciary's institutional setting is incomplete and that is precisely why scholars feel compelled to embrace minimalism affirmatively.

So too are the inherent constraints on judicial leeway incomplete. Institutional analysis helps to explain why, even in the aftermath of legal realism and CLS, judges tend to engage in something akin to the reasoning process that Wechsler described. Rather than simply announce conclusions in the cases before them, judges tend to explain their decisions in terms that would apply to future hypothetical cases and that are consistent with past cases. Institutional analysis cannot tell us, however, precisely how constraining this reasoning process is.¹⁷¹ Someone skeptical of using institutional

¹⁷⁰ Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. Colo. L. Rev. 923, 924–25, 942 (2001); see Friedman, Part II, *supra* note 55, at 3 (“Although seldom studied, it ultimately is popular approval or disapproval—both of court decisions and actions threatened against courts—that determines the freedom with which any institution may act.”).

¹⁷¹ Nor can institutional analysis tell us with great specificity what sort of reasoning process judges will use—whether, for example, judges will tend toward the sort of “analogical reasoning” that Sunstein embraces or instead seek to achieve “reflective equilibrium.” See Sunstein, *Reasoning*, *supra* note 3, at 751–52.

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analysis to fill the gap left by the decline of neutral-principles theory might concede that the same institutional forces that prevent judges from setting their own agendas also lead judges to ground their decisions in law, but might question whether “law” is really all that constraining.¹⁷² After all, law consists of a host of potential sources. Faced with a constitutional question, a judge may look to the Constitution’s text, structure, and history, as well as to decisional law interpreting the relevant constitutional provisions and a host of canons of construction. These sources of law often conflict with one another and often are ambiguous in their own right.¹⁷³ In the aftermath of legal realism and CLS, it is hard to tell whether a judge who relies on existing legal materials in explaining a decision has chosen those materials over other, conflicting authorities because they are inherently more powerful or rather because he or she feels compelled to marshal legal arguments in favor of a position that he or she is drawn to for extra-legal motivations.¹⁷⁴ Is the judge really driven by a “principle” found in existing legal materials, or is the judge announcing a principle to justify his or her preferred outcome?¹⁷⁵

Although institutional analysis may provide some comfort to those concerned about judicial overreaching—and fill some of the gap left by the decline of the neutral-principles tradition—institutional analysis may not be so reassuring as to obviate the need to place additional limits on judicial power. Judges always will retain some leeway in setting agendas and making decisions, and we are all keenly aware that judges sometimes issue decisions that seem activist, unprincipled, or both. To the institutional arguments

¹⁷² As Michael Dorf explains, it is the “indeterminacy problem” that drives virtually all efforts to overcome the countermajoritarian difficulty. Dorf, *Legal Indeterminacy*, supra note 5, at 889.

¹⁷³ Indeed, Wechsler himself understood the limited force of principle in determining the outcomes of cases and the possibility that principles would conflict. See Wechsler, supra note 1, at 34; Duxbury, supra note 63, at 277–78.

¹⁷⁴ See supra notes 50–52 and accompanying text (citing sources on legal realism).

¹⁷⁵ Cf. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv. L. Rev.* 1189, 1253–63 (1987) (exploring ways in which interpreters may utilize, and try to reconcile, different varieties of constitutional argument); Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 *Va. L. Rev.* 1141, 1148 (1988) [hereinafter Fallon, *Ideologies*] (“In the face of reasonable uncertainty about historical understandings, legal interpreters tend to prefer conclusions that accord with their conceptions of good social policy.”).

offered thus far, a minimalist might thus respond: “Yes, judges are constrained by institutional setting, but not so constrained as to prevent them from unduly interfering with the political process.”

The strongest response to this concern—pursued at length in Part III below—is to examine how the judiciary’s historical setting reinforces the limits imposed by its institutional setting. Even where institutional forces fail adequately to curtail judicial power or leeway, and where courts issue activist or unprincipled decisions, the judicial process over time tends to assuage this problem and minimize the long-term intrusion upon the political process. Before shifting from an institutional to an historical argument, however, two brief observations are in order.

First, it is worth noting that simply because the institutional constraints on judicial power and leeway are partial or incomplete is not a reason to ignore them, or to emphasize one at the expense of the other. Minimalist scholars may view restrictions on judicial power as more promising than restrictions on judicial leeway, but this does not justify overlooking the judicial reasoning process as a source of constraint as well. Some amount of legal constraint is inherent in the system, and this will affect judicial decisions whether minimalist scholars acknowledge it or not. But the effectiveness of this constraint may vary widely, as judges may sometimes hew closely to past decisions and other times exercise leeway to stray significantly from those decisions. By emphasizing minimalism alone, and ignoring the constraining force of law, contemporary scholars may inadvertently relieve judges of some of their traditional obligation to reconcile their decisions with past ones. Overzealous advocacy of minimalism risks ignoring the legal constraints on judges, and inadvertently weakening a potentially significant constraint on judicial leeway. The legal constraints inherent in the judiciary’s institutional setting can be strengthened or weakened, depending upon the judicial philosophy that judges are induced to embrace.¹⁷⁶

Second, although judges today may be only moderately constrained in setting agendas and deciding cases, institutional analysis suggests that they are probably just as constrained today as they ever were. Indeed, institutional analysis provides substantial reas-

¹⁷⁶ See *infra* Part IV.

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surance that, despite the dismantling efforts of legal realism and CLS, the limits on judicial power and leeway are not nearly as weak as many contemporary scholars would have us believe. When one examines institutional evolutions over the past century, one finds that the institutional disparities between the judicial and political processes remain strong.

The judicial role evolved considerably over the course of the twentieth century,¹⁷⁷ but it arguably changed more modestly than the respective roles of legislators and administrators. The rise of the administrative state and its New Deal expansion transformed our government from a reactive to a proactive institution, one that routinely regulates our lives in ways that the founding generation could not have imagined.¹⁷⁸ Political officials today, and executive officials in particular, have much more discretion to set policy agendas and many more resources to carry out those agendas. To be sure, the expanded role of government in the twentieth century altered the role of judges as well. Judges called upon to review agency regulations, for example, had to consider administrative records containing a much broader range of information than the trial records they had relied upon in presiding over traditional bipolar lawsuits.¹⁷⁹ The judiciary's new responsibility for reviewing agency regulations also required judges to make decisions with much broader societal ramifications than judicial decisions in traditional civil lawsuits.¹⁸⁰ Moreover, this expansion of the judicial role was not confined to administrative matters. The evolution of the class action mechanism in the second half of the twentieth century also expanded the range of issues judges address and the range of information they draw upon in resolving cases.¹⁸¹ The creation of

¹⁷⁷ See, e.g., Strauss, *Courts or Tribunals?*, supra note 44, at 895 ("There are many important differences between today's courts and those the Framers might have imagined . . .").

¹⁷⁸ See Calabresi, supra note 127, at 1; Molot, *Reexamining Marbury*, supra note 12, at 1254–56; Stewart, *Reformation*, supra note 127, at 1671–72; Stewart, *Madison's Nightmare*, supra note 127, at 337; Sunstein, *Interpreting Statutes*, supra note 127, at 408–09.

¹⁷⁹ See Molot, *Judicial Perspective*, supra note 15, at 53–68; Molot, *Old Judicial Role*, supra note 16, at 97–100.

¹⁸⁰ See Molot, *Judicial Perspective*, supra note 15, at 66–68; Molot, *Old Judicial Role*, supra note 16, at 100.

¹⁸¹ See Molot, *Old Judicial Role*, supra note 16, at 110; supra note 146 (citing sources on structural reform litigation).

the Supreme Court's discretionary certiorari authority in 1925 also altered the role of that Court.¹⁸²

But when we compare the magnitude of change in the political branches (and particularly the executive branch) to these changes in the judicial role, the judiciary looks much more like it did a century ago than do the political branches of government.¹⁸³ Indeed, as I have argued elsewhere,¹⁸⁴ judges called upon to review administrative decisions and to preside over class action lawsuits generally have responded by structuring their new responsibilities to resemble their old ones. Judges have structured their new tasks so that they continue to rely on litigants to frame disputes and continue to rely on an identifiable body of law in resolving those disputes.¹⁸⁵

In administrative matters, judges have come to rely on winners and losers in the administrative process to frame disputes in a traditional bipolar manner and have developed new procedural and substantive doctrines that help structure their resolution of these disputes.¹⁸⁶ Instead of engaging in a wide-ranging inquiry into the broad social effects of administrative regulations, judges evaluate opposing arguments on (1) whether an agency has followed proper procedure and (2) whether its regulation (a) is within the bounds of its legal authority and (b) is supported by the evidentiary record. Judicial review of agency action has thus evolved to look very

¹⁸² See Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System 1552–56* (5th ed. 2003) [hereinafter *Fallon, Federal Courts*] (providing historical background of the growth of discretionary certiorari authority); Felix Frankfurter & James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (1927); Strauss, *Courts or Tribunals?*, supra note 44, at 896–97.

¹⁸³ Cf. Wechsler, supra note 1, at 7 (“As a legal system grows, the remedies that it affords substantially proliferate, a development to which the courts contribute but in which the legislature has an even larger hand. There has been major growth of this kind in our system and I dare say there will be more . . . Am I not right, however, in believing that the underlying theory of the courts’ participation has not changed and that, indeed, the very multiplicity of remedies and grievances makes it increasingly important that the theory and its implications be maintained?”) (footnotes omitted); see also Fletcher, *Discretionary Constitution*, supra note 146, at 649 (“Federal courts in constitutional institutional suits have tried in several ways to control or influence the manner in which remedial discretion is exercised, and thereby to reduce its threat to the legitimacy of the judicial process.”).

¹⁸⁴ Molot, *Old Judicial Role*, supra note 16, at 33–34.

¹⁸⁵ See id.

¹⁸⁶ See id. at 101–09.

much like appellate review of trial court decisions in traditional bipolar lawsuits (where judges likewise ask (1) whether proper procedure was followed and (2) whether judgments are (a) consistent with law and (b) supported by the evidentiary record).¹⁸⁷ In class action practice as well, judges have used the class certification mechanism and other related doctrines to make multi-party lawsuits with broad social consequences resemble traditional bipolar disputes governed by law.¹⁸⁸ And, although the Supreme Court's certiorari policy allows that particular court a great deal of leeway, it is afforded to that court only, and, as noted above, one should not exaggerate its significance in comparing judicial and political power.¹⁸⁹

In short, when one examines the institutional forces that continue to lead judges to rely on parties to frame disputes and on existing legal materials as their principal source for decisions, one finds that ample support remains for the Founders' original observations regarding the judiciary's limited power and discretion. Judges may have some flexibility in setting agendas and deciding cases on those agendas, but the institutional context in which they operate constrains and confines them, whether or not they affirmatively embrace judicial minimalism or neutral-principles theory. To the extent that institutional setting continues to cabin judicial power in a post-Realist, post-CLS age, this significantly reduces the risk of judicial overreaching that drives minimalist scholarship. Indeed, institutional analysis teaches us that minimalism and constraint are both inherent in our system, regardless of whether judges actively embrace them.

III. HISTORICAL SETTING AND LIMITED JUDICIAL POWER

Although minimalism and constraint are both inherent in the judicial system—and arguably as powerful today as they were in the past—these forces nonetheless have never been potent enough to

¹⁸⁷ Id. at 95 (“[T]he law governing judicial review of government action evolved over the course of the twentieth century so as to supply judges with the litigant input and legal criteria they needed to perform their assigned functions and to make the judicial role in the administrative state resemble the judicial role in conventional adjudication.”).

¹⁸⁸ Id. at 48–49.

¹⁸⁹ See *supra* notes 130–38 and accompanying text.

prevent judges from issuing activist or unprincipled decisions. To contemporary scholars concerned about judicial intrusions into the political sphere, institutional analysis may offer some reassurance, but not enough to prevent them from taking affirmative measures against judicial overreaching. Wary of relying on the minimalism or constraint inherent in the system, scholars may want to urge further restraint.

Before minimalism can make its case about the need to minimize judicial intrusions upon the political process, however, it must consider historical as well as institutional limits on judicial power. To understand judicial power one cannot take a mere snapshot of the judiciary today, but instead must consider the role of the judiciary over time. To the extent that the current generation of judges is free to alter law created by prior generations—and may not be as constrained by law as scholars once believed—so too will the next generation retain freedom to alter law created by this one. Conversely, to the extent that current judges can bind future judges, then this means that judicial leeway is considerably constrained by existing legal materials. Historical analysis reveals an inevitable balance between judicial freedom and power. The evolution of legal doctrine over time works to ensure that no single generation of judges enjoys unhealthy portions of both.¹⁹⁰ Moreover, as the discussion below demonstrates, the system over time gravitates toward moderation, tending to ensure that judges are somewhat constrained by law, and that they possess only limited power to take issues away from political actors and from future judges appointed by future political administrations.¹⁹¹ If institutional setting is only

¹⁹⁰ Cf. Robert A. Dahl, *Democracy and its Critics* 190 (1989) (“[T]he views of a majority of the justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country.”); Robert G. McCloskey, *The American Supreme Court* 224 (Daniel J. Boorstin ed., 1960) (“[I]t is hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand.”).

¹⁹¹ Although one would expect to find more opportunities for dialogue between the judiciary and political branches on common law and statutory matters—where the political branches are empowered to overrule judicial decisions through new legislation—dialogue nonetheless is found in constitutional matters as well. See Barry Friedman, *Dialogue and Judicial Review*, 91 *Mich. L. Rev.* 577, 647–48 (1993) [hereinafter Friedman, *Dialogue*]; see also Molot, *Reexamining Marbury*, *supra* note 12, at 1313 (offering a “brief comparison of judicial review of administrative decisions on

partially constraining, and scholars today are appropriately concerned about judges abusing their leeway or power, historical setting helps to ensure that the problem will have little long-term impact. If we take the long view, we see that judicial leeway and power both are inherently quite limited.

In the discussion below, I explore three areas of constitutional doctrine—involving federalism, separation of powers, and the Bill of Rights—which reveal this long-term balance between judicial leeway and judicial power, even where decisions in the short term seem neither minimalist nor principled. In exploring doctrinal evolutions in these three areas, I focus on Supreme Court decisions, in part because this offers the best vantage point from which to evaluate the ebb and flow of doctrine over time,¹⁹² and in part because Supreme Court Justices appear to have the most discretion to depart from minimalist or neutral-principles ideals.¹⁹³

In these three doctrinal areas, the Court has neither tread lightly nor adhered consistently to principle. Instead, the Court has tacked back and forth, boldly announcing a new direction in one case only to change course abruptly in subsequent cases.¹⁹⁴ The cases thus of-

statutory grounds with judicial review of government action on constitutional grounds”).

¹⁹² It is much more complicated to trace doctrinal evolutions across lower courts who are not bound by one another's decisions and must await Supreme Court review to resolve conflicts. For an empirical study tracing the influence of law and political ideology on courts of appeals decisions, see Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts Of Appeals*, 91 *Cal. L. Rev.* 1457, 1462–79 (2003). For studies of courts of appeals decisions reviewing agency action specifically, see Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *Yale L.J.* 2155, 2166–72 (1998); Richard J. Pierce, Jr., *Two Problems in Administrative Law: Political Polarity on the District of Columbia Circuit and Judicial Deterrence of Agency Rulemaking*, 1988 *Duke L.J.* 300, 303–07; Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 *Va. L. Rev.* 1717, 1717, 1729, 1750 (1997); Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 *Duke L.J.* 1051, 1066–68 (1995).

¹⁹³ The Supreme Court's position at the top of the judicial hierarchy and its discretionary certiorari power, see *supra* notes 130–38 and accompanying text, allow it more discretion than lower courts both in setting its agenda and in resolving questions on that agenda. Then again, as noted earlier, appellate courts generally can escape Supreme Court review, and often can escape any scrutiny by deciding cases in unpublished opinions. See *supra* note 141.

¹⁹⁴ When I describe how the Court tacks back and forth, my description has much in common with Michael Seidman's description of the manner in which courts may “unsettle” rather than settle disputes. See *supra* notes 103–10 and accompanying text.

fer support for those who would question the force of the institutional limits explored above in Part II. The doctrinal examples below highlight the incompleteness, and even weakness, of institutional limits and reveal the freedom that judges retain to issue decisions that seem activist or unprincipled. But if the Court's individual decisions in each area may be far from perfect from the perspective of an adherent of minimalism or neutral principles, the Court's overall course in each area may be defended as more principled, more restrained, and ultimately more faithful to the original constitutional bargain¹⁹⁵ than appears at first glance.¹⁹⁶ Whether or not the Justices so intend, the Court over time has struck a balance between the two traditional bases for judicial power.

Before proceeding with the discussion below, a caveat is in order. The three areas of law examined happen to be areas in which the Court starts out boldly in one direction, subsequently tacks in another direction, and attempts in hindsight to explain its shift by distinguishing and reconciling earlier cases. Each exhibits a kind of revisionism that I label "backward-looking principled minimalism," for want of a better term. I am not claiming that this pattern is the

¹⁹⁵ Principled minimalism as actually practiced by the courts is appropriately faithful to the Founding debate, rather than to the position of any single group of Founders within that debate. Cf. Rakove, *supra* note 15, at 10 (warning that scholars and judges interpreting the Constitution should "never forget that it is a debate they are interpreting"); Hamburger, *supra* note 18, at 325 (noting balance between a Constitution that would not change over time but would be sufficiently open-ended to accommodate social change).

¹⁹⁶ The descriptive project in this Part III has much in common with David Strauss's description of "common law constitutional interpretation." See David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877, 935 (1996) [hereinafter Strauss, *Constitutional Interpretation*] ("[P]roperly understood the common law method does not immunize the past from sharp, critical challenges. Gradual innovation, in the hope of improvement, has always been a part of the common law tradition, as it has been a part of American constitutionalism."). Both projects try to account for continuity and change during ordinary moments, not just during the extraordinary moments of change that are the focus of Bruce Ackerman's description of "dualist democracy." Bruce Ackerman, 1 *We the People: Foundations* 3–33 (1991); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 *Yale L.J.* 453, 456 (1989) [hereinafter Ackerman, *Constitutional Politics*]; cf. Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 *Stan. L. Rev.* 759, 769 (1992) (noting that Ackerman "explicitly acknowledges the existence of other, 'lesser' constitutional moments").

only one that the Court can follow.¹⁹⁷ Certainly, the Court sometimes has begun by treading lightly, indeed almost so lightly as to look unprincipled, only later to supply the missing principle.¹⁹⁸ Either way, however, the Court need not live up to any ideal version of neutral principles or judicial minimalism in earlier cases in order to navigate a course in later cases that is both principled and minimalist in important respects. Whether a decision is principled or minimalist ultimately is determined not only by the rendering court but also by later decisions that can either narrow its rationale and scale it back or else supply a missing rationale and beef it up. It is the evolution of judicial doctrine over time that makes the balance between principle and minimalism possible and, in most instances, virtually inevitable.

The backward-looking principled minimalism I describe below certainly has its drawbacks. The Court's sweeping pronouncements in earlier cases make it look activist, and its later backtracking makes it look unprincipled. But to those who would attack judicial review as countermajoritarian, the Court's backward-looking brand of principled minimalism nonetheless highlights why the judiciary is not nearly as dangerous as one might fear. If the Court were indifferent to political change, this would give credence to those who worry about judicial review standing in the way of democratic change over a prolonged period of time. Conversely, if judicial review were entirely political, one might argue for its abolition on the theory that the Court will never match the political accountability of the representative branches of government. But the Court is neither immune from politics¹⁹⁹ nor entirely susceptible to

¹⁹⁷ Cf. Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. Rev. 893, 896 (1990) [hereinafter Sager, *Incurable Constitution*] ("Judicial interpretation of the Constitution at times has preceded and been an active catalyst of widespread changes in social practice and commitment; at times it has lagged rather badly behind such changes; and at times, while simply never achieving general rapport with popular perspectives, it has still clung tenaciously to its conclusions.").

¹⁹⁸ This is the pattern that Cass Sunstein associates with the current Supreme Court and embraces as normatively attractive. See Sunstein, *One Case at a Time*, supra note 3, at 75–205. Of course, there also have been extraordinary moments at which the Court has radically moved the buoys. For an influential account of such constitutional moments, see Bruce Ackerman, *2 We the People: Transformations* (1998).

¹⁹⁹ See, e.g., Fallon, *Marbury* and the Constitutional Mind, supra note 40, at 31 ("[T]he Justices' immersion in the prevailing sentiments of their times will often make anything other than a politically prudent decision 'virtually unthinkable' despite oth-

politics.²⁰⁰ The Court's behavior in all three areas described below demonstrates both its willingness to change with political times and its refusal to acquiesce in the face of strong principles to the contrary.²⁰¹ Albeit far from perfect, these doctrinal examples exhibit a form of backward-looking principled minimalism that helps us to defend judicial review and overcome the countermajoritarian difficulty with its exercise.

A. A Federalism Example: State Sovereign Immunity Doctrine

To most contemporary scholars, the Court's Eleventh Amendment jurisprudence is far from any ideal of judicial minimalism or neutral principles.²⁰² The Court has been activist rather than minimalist: It has invalidated federal statutes that subject states to fed-

erwise formidable legal arguments supporting a claim of constitutional right." (citing Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 *Va. L. Rev.* 1, 26–30 (1996) [hereinafter Klarman, *Rethinking*]); Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 *St. Louis U. L.J.* 569, 575–76, 620–38 (2003) (examining extent to which "public opinion played an important role" in the Rehnquist Court's evolution).

²⁰⁰ See, e.g., Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 *U. Chi. L. Rev.* 429, 435–36 (2002) [hereinafter Fallon, "Conservative" Paths] (describing notion of "path dependence" that "links the *legal* force of precedent with an implication that the Court feels constrained by surrounding attitudes in the public and political culture" and that leads the Court to refrain from "simultaneously . . . revers[ing] its own precedent and . . . dramatically alter[ing] settled schemes of rights and responsibilities"); Ferejohn & Kramer, *Independent Judges*, supra note 68, at 1038–39 ("It is, of course, possible to see in this picture a judicial system that is *too* vulnerable to external political pressures [But] the way courts define their role through doctrinal development is crucial in finding and defining a workable counterbalance to the pressures of popular politics.").

²⁰¹ Cf. Strauss, *Constitutional Interpretation*, supra note 196, at 929 ("[C]ommon law constitutionalism is democratic in an important sense: the principles developed through the common law method are not likely to stay out of line for long with views that are widely and durably held in the society.").

²⁰² See, e.g., David L. Shapiro, *The 1999 Trilogy: What Is Good Federalism?*, 31 *Rutgers L.J.* 753, 759–60 (2000) ("For me, . . . the 1999 trilogy is neither good federalism nor a sign of moderation. For the Court to take a concept that has little justification in itself, to constitutionalize it, to use it as a vehicle for a possible assault on several fundamental Fourteenth Amendment doctrines, including a direct attack on the recognition of statutory entitlements as property, and to strike down three acts of Congress in one day on three different grounds (when only two acts of Congress were invalidated before the Civil War) is the opposite of either moderation or good federalism. I can only hope that this arrogation of authority will sooner, rather than later, meet the fate of some of its notorious predecessors.") (footnote omitted).

eral court jurisdiction and has done so with sweeping pronouncements about state sovereign immunity.²⁰³ Yet the Court has taken this activist stance without a clear, compelling principle that requires it to do so. When the Court in its famous decision in *Seminole Tribe of Florida v. Florida*²⁰⁴ held that Congress may not subject states to federal court lawsuits for federal law violations, the Court found no support either in the constitutional text or in existing case law. The text of the Eleventh Amendment says nothing about a state's immunity from suits by its own citizens²⁰⁵ and is ambiguous as to whether it covers federal question cases or only cases brought under Article III's citizen-state diversity clause.²⁰⁶ Moreover, the Court's prior decisions had permitted Congress to subject states to federal lawsuits for violations of federal obligations.²⁰⁷ To reach the result that it did, the *Seminole Tribe* majority had to ignore the text of the Eleventh Amendment and to ignore or overrule several of its prior decisions.²⁰⁸

²⁰³ See, e.g., Laura S. Fitzgerald, *Beyond Marbury: Jurisdictional Self-Dealing in Seminole Tribe*, 52 Vand. L. Rev. 407, 409–10 (1999); Vicki C. Jackson, *Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. Rev. 495, 496 (1997) [hereinafter Jackson, *The Eleventh Amendment*] (describing the Court's "unforced errors" in *Seminole Tribe*).

²⁰⁴ 517 U.S. 44 (1996).

²⁰⁵ *Id.* at 54; see Fallon, *Ideologies*, supra note 175, at 1189; Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 Harv. L. Rev. 102, 104, 113 (1996) [hereinafter Monaghan, *Sovereign Immunity*]; William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 Notre Dame L. Rev. 843, 857 (2000); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 Cornell L. Rev. 1269, 1369–70 (1998) [hereinafter Pfander, *State Suability*]; James E. Pfander, *Once More Unto the Breach: Eleventh Amendment Scholarship and the Court*, 75 Notre Dame L. Rev. 817, 821 (2000).

²⁰⁶ *Seminole Tribe*, 517 U.S. at 69–70; see, e.g., Pfander, *State Suability*, supra note 205, at 1277–78. For an argument that the Eleventh Amendment was intended only to reverse the interpretation in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), of the citizen-state diversity clause, see William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033, 1033–35 (1983) [hereinafter Fletcher, *Historical Interpretation*].

²⁰⁷ *Seminole Tribe*, 517 U.S. at 76–77 (Stevens, J., dissenting). Prior to *Seminole Tribe*, the Court had held that Congress may regulate states pursuant to its commerce power, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), and subject them to federal court jurisdiction for violations of federal obligations, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

²⁰⁸ See Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 Stan. L. Rev. 1311, 1315–16 (2001); Daniel J.

But if, at first glance, the Court's Eleventh Amendment doctrine seems neither principled nor minimalist²⁰⁹—and tends to confirm that the institutional limits outlined in Part II above are incomplete, and often weak—the picture is quite different when one examines the evolution of that doctrine over time. When one charts the development of state sovereign immunity doctrine as I do below, one sees a Court that has shifted with the political winds, but generally has stayed within earlier-established boundaries.²¹⁰ On one hand, it is hard to accuse the Court of being *too* countermajoritarian.²¹¹ In the twentieth century, at least, it favored federal supremacy when it was fashionable to do so (whether in the name of property interests early in the century or civil rights later) and fa-

Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 Sup. Ct. Rev. 1, 2; Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 Notre Dame L. Rev. 1011, 1012 (2000). *Seminole Tribe* expressly overruled *Union Gas*. 517 U.S. at 65–66. See, e.g., Fallon, “Conservative” Paths, *supra* note 200, at 459; Carlos Manuel Vázquez, *What is Eleventh Amendment Immunity?* 106 Yale L.J. 1683, 1699, 1714 (1997) [hereinafter Vázquez, *Eleventh Amendment Immunity*].

²⁰⁹ The internal contradictions in the Court's federalism doctrine should be troubling not only to a contemporary scholar enamored with principled minimalism, but also to an originalist scholar who cares about the Founders' intent. Given the Founders' firmly held belief that where there is a right there must be a remedy and their well-considered decision to rely on the courts (via the Supremacy Clause), rather than on Congress or the military, to enforce federal over state law, it is rather odd that contemporary federalism doctrine empowers Congress to impose federal obligations on states but not to subject states to lawsuits for violating those obligations. See Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 3–4 (1988) [hereinafter Jackson, *Supreme Court*]; Vázquez, *Eleventh Amendment Immunity*, *supra* note 208, at 1685–86; cf. Monaghan, *Sovereign Immunity*, *supra* note 205, at 122 (“[A]ny doctrine of state sovereign immunity strains both the traditional conception of the rule of law, which emphasizes governmental accountability to courts of law, and national supremacy, which generally presumes that Congress can entrust enforcement of whatever rights it can validly create to the national courts.”).

²¹⁰ Cf. Fallon, “Conservative” Paths, *supra* note 200, at 459 (noting both the “boldness of the sovereign immunity decisions, as signified by the Court's brash willingness to overrule prior cases and reformulate doctrinal tests” and the Court's adherence to major “loopholes” established in prior cases); Fallon, *Ideologies*, *supra* note 175, at 1188–1202 (describing the Court's swings over time between Nationalist and Federalist positions); Vázquez, *Eleventh Amendment Immunity*, *supra* note 208, at 860–61, 916 (describing two “strains” in the Court's opinions—the “supremacy” strain and “state sovereignty” strain—the former of which has much stronger support in the Constitution).

²¹¹ Cf. Klarman, *Rethinking*, *supra* note 199, at 6 (describing the “myth of the heroically countermajoritarian Court [that] has persisted in the face of consistently contravening evidence”).

vored state sovereignty when that became fashionable in the aftermath of the Reagan revolution. On the other hand, the Court has not been entirely susceptible to political pressure either. A pro-supremacy swing during the first three quarters of the twentieth century was cabined by earlier pro-sovereignty decisions and a recent pro-sovereignty swing has been cabined by earlier pro-supremacy decisions. The Court's tendency to tack within boundaries can be criticized on a variety of grounds, but it at least offers a reasonable response to the countermajoritarian difficulty with judicial power. The Court's tacking helps to insulate it from the charge of being too countermajoritarian, and its adherence to certain core principles protects it from the charge that it is just another political branch, albeit one that is a poor reflector of majoritarian preferences.²¹²

From its inception, the Constitution empowered Congress to make federal law and create federal court jurisdiction over cases arising under federal law. The courts, however, did not have to consider the consequences of this power for federal-state relations until much later, as Congress neither passed legislation regulating the states nor established federal question jurisdiction until much later.²¹³ In the First Judiciary Act,²¹⁴ Congress limited the federal courts to diversity cases, and it was a controversy over diversity jurisdiction—and specifically the citizen-state diversity clause in Article III and the First Judiciary Act—that led the Court to take its first look at the federalism issues surrounding federal court jurisdiction. In the 1793 *Chisholm* case, in which an out-of-state bond holder sued Georgia to recover on a bond, the Court decided that Congress could (under Article III) and indeed did (in the First Judiciary Act) establish federal court jurisdiction over a controversy between a state and a citizen of another state.²¹⁵ *Chisholm* was

²¹² Cf. Richard H. Fallon, Jr., *Common Law Court or Council of Revision?*, 101 *Yale L.J.* 949 (1992) (book review) (noting hybrid nature of Supreme Court as both a political institution and a common law court); Post, *supra* note 162, at 8 (“I shall argue that constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture . . . [C]ulture is inevitably (and properly) incorporated into the warp and woof of constitutional law.”).

²¹³ See Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470; Fallon, *Federal Courts*, *supra* note 182, at 320.

²¹⁴ Judiciary Act of 1789, ch. 20, Pub. L. No. 96-486, 1 Stat. 73.

²¹⁵ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474–79 (1793).

short lived, however, as the Eleventh Amendment immediately overturned that decision, making clear that the citizen-state diversity clause in the Constitution could no longer be read to confer jurisdiction over unconsenting states.²¹⁶

It was not until a century later, after a Reconstruction Congress had established federal question jurisdiction,²¹⁷ that the Court had to decide what the Eleventh Amendment, Article III, and the broader Constitution had to say about federal district court jurisdiction over cases against states that arose under federal laws. In *Hans v. Louisiana*, a bond case that raised a *constitutional* challenge to a state's non-payment, the Court held that federal courts could not assert jurisdiction over non-consenting states, whether in federal question cases or diversity suits.²¹⁸

But *Hans* was not the last word on the subject. Although *Hans* in the late nineteenth century established a principle of state sovereign immunity that the Court would adhere to over the century that followed, the twentieth century witnessed major shifts in the Court's approach to state sovereignty and federal supremacy. Whereas in 1890 in *Hans* the Court had faced "the pressing political likelihood that the executive branch would not enforce judgments against the southern states,"²¹⁹ in the early twentieth century, and again in the aftermath of the civil rights movement in the 1960s, the Court responded to countervailing forces in favor of federal supremacy by finding new ways for the federal courts to serve as instruments of federal supremacy, even within the restrictions imposed by *Hans*.²²⁰

In 1908, the Court opened the federal courts to businesses seeking to protect their federal constitutional property rights against

²¹⁶ U.S. Const. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.").

²¹⁷ Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470; see Fletcher, *Historical Interpretation*, supra note 206, at 1039.

²¹⁸ 134 U.S. 1, 10–11 (1890).

²¹⁹ Jackson, *Supreme Court*, supra note 209, at 9 (citing John V. Orth, *The Judicial Power of the United States: The Eleventh Amendment in American History* 77–80 (1987)).

²²⁰ See *id.* at 4; Fallon, *Ideologies*, supra note 175, at 1195–1202 (1988) (noting the importance of *Ex Parte Young*, 209 U.S. 123 (1908), and *Fitzpatrick v. Bitzer*, 437 U.S. 445 (1976), as ways around *Hans*).

state intrusions. In *Ex parte Young*, railroads enlisted the federal courts in their battle with state officials over railroad rates they deemed to be confiscatory.²²¹ The Supreme Court held that although *Hans* prohibited federal courts from hearing private suits against states seeking damages from state treasuries, federal courts nonetheless could hear suits that sought injunctive relief against state officers.²²² Proceeding on the fiction that a state officer acting contrary to federal law is not acting as an arm of the state, the Court in *Ex parte Young* found a way to play a role in ensuring that states respected their federal obligations.²²³

Nearly three-quarters of a century later, the Court again found a way around *Hans*, this time on behalf of individuals seeking to protect civil rights, rather than business interests seeking to protect property rights. Under *Fitzpatrick v. Bitzer*,²²⁴ individuals seeking to enforce new civil rights statutes against states no longer had to comply with *Ex parte Young*'s restriction and confine themselves to suing state officers for injunctive relief. The *Fitzpatrick* Court held that individuals could sue states directly for money damages so long as Congress had expressly *abrogated* state sovereign immunity.²²⁵ In upholding a state employee's ability to sue a state under Title VII of the Civil Rights Act of 1964, the Court relied on Congress's power under Section 5 of the Fourteenth Amendment to enforce the Fourteenth Amendment via "appropriate legislation."²²⁶ Moreover, in subsequent years the Court suggested that Congress could abrogate state immunity under Article I, as well as Section 5, and thereby authorize suits against states for violations of virtually any federal statute.²²⁷ In dicta in *Edelman v. Jordan*²²⁸

²²¹ 209 U.S. 123, 130 (1908).

²²² *Id.* at 155–56. Actually, in many respects, the officer suit form predates *Young*. See, e.g., *Virginia Coupon Cases*, 114 U.S. 269 (1885); Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 *Colum. L. Rev.* 1612, 1622–44 (1997) (describing history of officer suits and significance of *Young*).

²²³ See Vázquez, *Eleventh Amendment Immunity*, *supra* note 208, at 1686.

²²⁴ 427 U.S. 445 (1976).

²²⁵ *Id.* at 452; see Jackson, *Supreme Court*, *supra* note 209, at 12.

²²⁶ *Fitzpatrick*, 427 U.S. at 456; see Monaghan, *Sovereign Immunity*, *supra* note 205, at 106–07.

²²⁷ See Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 *Duke L.J.* 1167, 1182 (2003).

²²⁸ 415 U.S. 651, 672–74 (1974); see Jackson, *Supreme Court*, *supra* note 209, at 11–12.

and *Atascadero State Hospital v. Scanlon*,²²⁹ and in the holding of *Pennsylvania v. Union Gas*,²³⁰ the Court treated state sovereign immunity as a mere default rule, subject to overruling by a clear statement of Congress.²³¹

But if the federal courts in the twentieth century opened their doors to businesses and individuals seeking to enforce federal rights against states, this pro-supremacy swing always was cabined by the earlier pro-sovereignty position laid down in *Hans*. Although four Justices may have been willing to overrule *Hans* at times,²³² *Hans* remained good law throughout. Indeed, *Hans*'s core pro-sovereignty principle remained potent enough to gain prominence again at the end of the twentieth century, when the Reagan Revolution was far enough along to have influenced the views of many federal judges regarding the appropriate balance between state sovereignty and federal supremacy.²³³ In a string of cases beginning with *Seminole Tribe*, the Court halted its century-long swing in favor of federal supremacy, turning state sovereign immunity back from a rebuttable presumption into a hard-and-fast rule. The Court held that Congress may abrogate state sovereign immunity *only* pursuant to Section 5 of the Fourteenth Amendment, and

²²⁹ 473 U.S. 234, 255 (1985); see Jackson, Supreme Court, *supra* note 209, at 112.

²³⁰ 491 U.S. 1, 14–17 (1989); see Vickie C. Jackson, One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term, 64 S. Cal. L. Rev. 51, 52 (1990) [hereinafter Jackson, One Hundred Years]; Monaghan, Sovereign Immunity, *supra* note 205, at 107–08; Jonathan R. Siegel, Congress's Power to Authorize Suits Against States, 68 Geo. Wash. L. Rev. 44, 50–52 (1999); Siegel, *supra* note 227, at 1182; Vázquez, Eleventh Amendment Immunity, *supra* note 208, at 1687.

²³¹ See Jackson, One Hundred Years, *supra* note 230, at 57; Jackson, Supreme Court, *supra* note 209, at 40–44; Monaghan, Sovereign Immunity, *supra* note 205, at 106; Laurence H. Tribe, Intergovernmental Immunities in Litigation, Taxation and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 695 (1976); cf. Vázquez, Eleventh Amendment Immunity, *supra* note 208, at 1689.

²³² In *Union Gas*, Justices Brennan, Marshall, Blackmun, and Stevens would have cemented the Court's shift toward federal supremacy by overruling *Hans* and subjecting states to private suits in federal court for violations of their obligations under federal law. See Jackson, Supreme Court, *supra* note 209, at 59. In *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468 (1987), the Court also divided evenly, 4-4, on whether to overrule *Hans*.

²³³ See Pfander, State Suability, *supra* note 205, at 1271–72 (“Although the Court has countenanced a variety of exceptions to *Hans*, it has continued to view its rule of sweeping immunity, rather than the text of the Eleventh Amendment, as the starting point for any analysis of state suability.”).

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not pursuant to its general Article I powers.²³⁴ Moreover, in *Seminole Tribe* and its progeny, the Court threatened to confine *Ex parte Young*'s exception for suits against officers to constitutional (as opposed to statutory) claims,²³⁵ and to curtail severely Congress's power to abrogate state sovereign immunity even under Section 5 of the Fourteenth Amendment.²³⁶

But just as *Hans* prevented pro-supremacy courts like the Warren Court from shifting too far with the political winds, so too have the major twentieth-century cases on federal supremacy tempered the Rehnquist Court's shift toward state supremacy.²³⁷ Although the Court in *Seminole Tribe* threatened to narrow *Ex parte Young* to constitutional actions, and to prevent *Young*-type relief in statutory actions, so far this aspect of *Seminole Tribe* has been confined to its facts.²³⁸ *Seminole Tribe* seems to exclude equitable remedies

²³⁴ *Seminole Tribe*, 517 U.S. at 65–66.

²³⁵ The Court explained that where Congress provides for a damages remedy directly against states, courts should not permit equitable actions against state officers under *Young*, even if the express damages remedy is struck down as unconstitutional. *Seminole Tribe*, 517 U.S. at 74; see Jackson, The Eleventh Amendment, supra note 203, at 496, 530; Siegel, supra note 227, at 1183; Vázquez, Eleventh Amendment Immunity, supra note 208, at 1717.

²³⁶ See *Bd. of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that § 5 cannot support the Americans with Disabilities Act); *United States v. Morrison*, 529 U.S. 598 (2000) (holding same for the Violence Against Women Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that § 5 cannot support the Age Discrimination in Employment Act); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (embracing narrow interpretation of Congress's powers under § 5 of the Fourteenth Amendment).

²³⁷ See Daniel J. Meltzer, The Seminole Decision and State Sovereign Immunity 1996 Sup. Ct. Rev. 1, 21; John C. Jeffries, Jr., In Praise of the Eleventh Amendment and Section 1983, 84 Va. L. Rev. 47, 49–50 (1998); Carlos Manuel Vázquez, Eleventh Amendment Schizophrenia, 75 Notre Dame L. Rev. 859, 860 (2000); cf. Tushnet, supra note 56, at 74 (“The Eleventh Amendment decisions . . . make it more difficult to enforce national law, particularly to the extent that they leave it to the national government—itsself committed to a less interventionist stance—to enforce federal law on its own. But they do not either in principle or in practice make it impossible to do so.”); Robert C. Post & Reva B. Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation after *Morrison* and *Kimel*, 110 Yale L.J. 441, 443–44 (2000) (“Depending upon how *Kimel* and *Morrison* are interpreted in subsequent decisions, the Court's Section 5 jurisprudence could develop in quite different directions.”).

²³⁸ See Fallon, “Conservative” Paths, supra note 200, at 457 (“Significantly, a 1997 decision reaffirmed the vitality of *Young*.” (citing *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 287–88 (1997))); Jeffries, supra note 237, at 47–49 (“The Eleventh Amendment almost never matters. More precisely, it matters in ways more indirect and attenuated than is usually acknowledged.”); Karlan, supra note 208, at 1313

against state officers only where Congress itself has expressly provided a damages remedy against the state directly²³⁹—a mistake Congress presumably can avoid in the aftermath of *Seminole Tribe*. *Fitzpatrick* likewise has shown a resilience even as interpreted by the Rehnquist Court. After a string of decisions rejecting congressional abrogations under Section 5 of the Fourteenth Amendment, the Court in 2003 upheld the Family and Medical Leave Act as a proper exercise of Congress's Section 5 power in *Nevada Department of Human Resources v. Hibbs*.²⁴⁰ Just last Term in *Tennessee v. Lane*, moreover, the Court upheld another congressional abrogation under Section 5, affirming the ability of a disabled person denied access to a public courthouse to sue a state under Title II of the Americans with Disabilities Act.²⁴¹

The Court's decisions at each point in time may seem less than ideal from the perspective of judicial minimalism or neutral-

(“[A]s Henry Monaghan and John Jeffries have pointed out in a series of insightful articles, the main effect of the Court's Eleventh Amendment decisions has not been to preclude litigation against the states altogether, but rather to force such claims into lawsuits against state officials either under the *Ex parte Young* fiction (if the plaintiffs seek injunctive relief) or under 42 U.S.C. § 1983.”); Meltzer, *supra* note 237, at 49–60 (exploring options available to Congress in the aftermath of *Seminole Tribe*); Monaghan, *Sovereign Immunity*, *supra* note 205, at 103 (“[L]ittle has changed after the *Seminole Tribe* decision because the rule of *Ex parte Young* remains in full force.”). But cf. Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 *Stan. L. Rev.* 1331, 1332 (2001) (“[T]he Court's state sovereign immunity doctrine, although viewed by some as being of secondary importance (because it does not preclude federal regulation of the states altogether but merely restricts the available remedies), is in fact a matter of considerable constitutional and practical importance.”).

²³⁹ See Monaghan, *Sovereign Immunity*, *supra* note 205, at 114; cf. *id.* at 130 (“At first blush, the *Seminole Tribe* Court's analysis of *Young* is unconvincing. Surely Congress would prefer some federal court remedy to no remedy. And why should *Young* necessarily entail a remedial scheme different from [that provided in the statute]?”).

²⁴⁰ 538 U.S. 721, 735 (2003). After a “searching inquiry” into whether the Act was sufficiently remedial to be justified under § 5 of the Fourteenth Amendment, the Court held that “the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.” *Id.* at 735; see Henry P. Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 *Colum. L. Rev.* 1919, 1944 n.105 (2003).

²⁴¹ 124 S. Ct. 1978 (2004). The Court noted “the sheer volume of evidence demonstrating the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services,” *id.* at 1991, and described Congress's requirement of reasonable accommodations as a “reasonable prophylactic measure, reasonably targeted to a legitimate end,” *id.* at 1994.

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principles theory. The contortions that the Court resorted to in *Ex parte Young* to open a door that *Hans* seemed to have shut are by no means a shining example of principled reasoning. Is suing a state officer to prevent state action really so distinct from suing a state?²⁴² Nor is the *Seminole Tribe* opinion a shining example of principled deliberation. The Court's stated rationale for state sovereign immunity in *Seminole Tribe*—that the federal government was created to regulate the people directly, and not to regulate the states as states—is hard to reconcile with the Court's holding in *Garcia v. San Antonio Metropolitan Transit Authority* that Congress can regulate the states as states, for example, by requiring states to pay federally mandated wages to their employees.²⁴³ And, as noted at the outset, the Court engaged in these seemingly unprincipled manipulations to announce broad, rather than narrow, decisions. The hole that *Ex parte Young* carved in *Hans* was sufficiently large to enable streams of plaintiffs to flood through in the ensuing decades.²⁴⁴ Conversely, the prohibition announced in *Seminole Tribe* was very broad and very intrusive upon congressional authority.²⁴⁵

But if some of the Court's decisions have been activist or unprincipled, their shortcomings fade when we take the longer view. The Court has neither allowed one generation of judges to freeze judicial doctrine for all time nor has it entirely abandoned legal principle in the face of political change. Rather, the Court has struck a balance between susceptibility and insulation, perhaps not the ideal balance we would like to see between the minimalist and neutral-principled traditions, but a reasonable substitute nonetheless.

The evolution of Eleventh Amendment doctrine over time may offer some reassurance to those who worry that the judiciary's institutional setting is not sufficiently constraining. Whether a particular decision seems activist or minimalist, the judicial process over time inevitably permits later courts to adjust the decision and

²⁴² See Jackson, *One Hundred Years*, supra note 230, at 58–59.

²⁴³ Compare *Seminole Tribe*, 517 U.S. at 54, with *Garcia*, 469 U.S. at 554–57.

²⁴⁴ See Monaghan, *Sovereign Immunity*, supra note 205, at 127 (“To characterize *Young* as an exception . . . gets matters nearly backward: the Eleventh Amendment is an exception to *Young*.”).

²⁴⁵ See Jackson, *The Eleventh Amendment*, supra note 203, at 496.

minimize its impact. Some amount of minimalism is thus inherent in the judicial process, even if only in retrospect. Yet, so too is some amount of legal constraint built into the system. Later decisions may adjust the meaning of earlier ones, but the earlier decisions inevitably influence the course that later courts may travel.²⁴⁶ Minimalism and constraint are both present, whether the Court affirmatively embraces them or not.

B. A Separation-of-Powers Example: Congressional Control of Executive Action

A second doctrinal area that reveals the power of principle and minimalism over the long term is the law governing legislative efforts to control executive action. Here too, the Court has strayed from any principled-minimalist ideal. It has invalidated legislative enactments based on sweeping legal principles that it later revised or discarded. But when one examines the evolution of the doctrine over time, one sees both an adherence to core principles and a willingness to shift with the political times within the confines of those principles. Balance emerges here just as it does in the federalism cases.

The Constitution directly addresses the appointment of executive officials—providing that all but “inferior” officers must be nominated by the President and confirmed by the Senate²⁴⁷—but it says virtually nothing about the power to remove those officers (other than through impeachment) or to control them while in office.²⁴⁸ In 1926, in *Myers v. United States*, the Supreme Court nonetheless struck down a statute that required the President to obtain Senate approval for the removal of postal officials.²⁴⁹ Chief Justice Taft (formerly President Taft) wrote a decision that flatly prohib-

²⁴⁶ Cf. Strauss, *Constitutional Interpretation*, supra note 196, at 927 (“[T]he common law method has a centuries-long record of restraining judges.”).

²⁴⁷ U.S. Const. art. II, § 2, cl. 2.

²⁴⁸ See Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 *Duke L.J.* 963, 965 (2001); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573, 597–99 (1984) [hereinafter Strauss, *Place of Agencies*]. But cf. U.S. Const. art. II, § 2, cl. 1 (empowering President to “require the Opinion, in writing, of the principal Officers in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices”).

²⁴⁹ 272 U.S. 52 (1926).

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ited congressional encroachments on presidential power.²⁵⁰ For Congress to share in the President's exclusive removal power, Taft wrote, would "make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed."²⁵¹ The *Myers* opinion explained that even where there are "duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance," nonetheless the President "may consider the decision after its rendition as a reason for removing the officer."²⁵²

Just nine years later in *Humphrey's Executor v. United States*, however, the Court *did* permit Congress to encroach on the President's control over law execution.²⁵³ The statute at issue in *Humphrey's Executor* prohibited the President from removing a Federal Trade Commission ("FTC") commissioner except "for inefficiency, neglect of duty, or malfeasance in office."²⁵⁴ By upholding this restriction on presidential control over the FTC, the Supreme Court sanctioned the creation of "independent agencies" and empowered Congress to weaken the President's historical control over law administration. *Humphrey's Executor* thus represented a significant retreat from the strong "unitary executive" position taken by the Court in *Myers* less than a decade earlier.²⁵⁵

²⁵⁰ Strauss, Place of Agencies, *supra* note 248, at 609–10. Although he could not find direct support in the constitutional text for the holding, Taft reasoned that (1) the Constitution vests executive power exclusively in the President, (2) the President must rely on subordinates to carry out his constitutional duties, and (3) to control these subordinates the President must have exclusive power to remove them from office. *Myers*, 272 U.S. at 163–64.

²⁵¹ *Id.* at 164.

²⁵² *Id.* at 135.

²⁵³ 295 U.S. 602 (1935).

²⁵⁴ *Id.* at 620.

²⁵⁵ For discussions of "unitary executive" theory see, for example, Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541 (1994) (advancing originalist argument for a unitary executive); Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2319 (2001) (noting reality of presidential control over law administration as an institutional matter even where not required by the Constitution); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 2 (1994) (advancing structural argument for a unitary executive).

From a political standpoint, the Court's shift is not difficult to explain. Although the dynamics surrounding the Court's reaction to the New Deal are quite complicated,²⁵⁶ one theme that pervaded the Court's decisions at the time of *Humphrey's Executor* was a suspicion of the power that New Deal legislation had transferred from the Congress to President Roosevelt. Indeed, *Humphrey's Executor* was decided the very same year as *A.L.A. Schechter Poultry Corp. v. United States*²⁵⁷ and *Panama Refining v. Ryan*,²⁵⁸ two cases famous for striking down New Deal delegations of power from Congress to the President. Although the "independent agency" was itself a novelty that might have aroused the suspicions of Justices hostile to New Deal innovations, this particular innovation tended to assuage another perceived problem with the New Deal: namely, the threat that unchecked executive authority posed to the constitutional structure.²⁵⁹

But if the Court in the early years of the New Deal was willing to tolerate legislative innovations that offset the New Deal's transfer of power to the President, later on, as the administrative state became more firmly entrenched, the Court seemed to return to its earlier skepticism toward legislative overreaching. The Court's hostility to executive power may have led it to accept constitutional innovations in favor of the legislative power in 1935, but half a century later in *INS v. Chadha*²⁶⁰ and *Bowsher v. Synar*²⁶¹ the Court rejected these sorts of innovations.

Just as the independent agency at issue in *Humphrey's Executor* was designed to accommodate both the need for legislative delegations and the need for legislative checks on executive power, so too

²⁵⁶ See, e.g., Friedman, Part Four, *supra* note 54, at 988–1046; Schiller, *supra* note 57, at 1417–28.

²⁵⁷ 295 U.S. 495 (1935).

²⁵⁸ 293 U.S. 388 (1935).

²⁵⁹ The Court justified its decision on the ground that the Federal Trade Commission ("FTC"), unlike the postal officers at issue in *Myers*, "acts in part quasi-legislatively and in part quasi-judicially." *Humphrey's Executor*, 295 U.S. at 628. Although the FTC certainly was empowered to perform executive functions like enforcement, the Court explained that "[t]o the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government." *Id.*

²⁶⁰ 462 U.S. 919 (1983).

²⁶¹ 478 U.S. 714 (1986).

was the legislative veto at stake in *INS v. Chadha*.²⁶² By the time *Chadha* was decided in the 1980s, however, the Court had long abandoned its resistance to New Deal delegations. If it once had been possible for Congress to make most major policy decisions itself, and if the Court in the mid-1930s still clung to that idea, that possibility faded in the decades that followed. The rise of the administrative state in the late nineteenth century and its expansion during the New Deal had rendered the delegation of some lawmaking authority a simple fact of life for all three branches of government.²⁶³ Although the legislative veto in *Chadha*, much like the independent agency structure in *Humphrey's Executor*, offered a way for Congress to retain some control over the officials to whom it delegated power,²⁶⁴ the Court struck down the legislative veto on separation-of-powers grounds.²⁶⁵ *Chadha* explained that for one House of Congress—or indeed both Houses—to retain power to overrule executive decisions was to take legislative action without complying with the constitutionally prescribed lawmaking procedures.²⁶⁶ For Congress to alter executive decisions through any procedural mechanism other than bicameralism and presentment would not be permitted under the Constitution.²⁶⁷

Three years later, in *Bowsher v. Synar*,²⁶⁸ the Court again struck down a law that would have permitted legislative officials to oversee executive action by means other than the constitutionally pre-

²⁶² 462 U.S. at 944.

²⁶³ See, e.g., Dorf & Sabel, *Democratic Experimentalism*, supra note 6, at 267; cf. Strauss, *Place of Agencies*, supra note 248, at 596 (noting the importance of both “the realities of the administrative state” and “the existing bodies of textual and decisional prescription of the Constitution”).

²⁶⁴ See Seidman, *Unsettled Constitution*, supra note 4, at 162. For a broader discussion of legislative vetoes before *Chadha* was decided, see Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 Harv. L. Rev. 1369 (1977); Jacob K. Javits & Gary J. Klien, *Congressional Oversight and the Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. Rev. 455 (1977); Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, Reg., Nov.–Dec. 1979, at 19.

²⁶⁵ See Strauss, *Place of Agencies*, supra note 248, at 633–35.

²⁶⁶ 462 U.S. at 955–59. For a discussion of how legislative oversight has survived in the aftermath of *Chadha*, see, for example, Jessica Korn, *The Power of Separation* 47 (1996) (arguing that “informal interbranch contacts and negotiations . . . serve as the real workhorse of congressional oversight power”).

²⁶⁷ *Chadha*, 462 U.S. at 958.

²⁶⁸ 478 U.S. 714 (1986).

scribed lawmaking procedures. The Balanced Budget and Emergency Deficit Control Act of 1985 (or “Graham-Rudman-Hollings”) gave the Comptroller General power to make budget cuts pursuant to a statutorily prescribed formula.²⁶⁹ The Court in *Bowsher* reasoned that because the Comptroller General was an officer of the legislative branch, subject to removal only by Congress, he could not be empowered to carry out budget cuts that the Court deemed to constitute “execution of the law.”²⁷⁰ Whereas *Humphrey’s Executor* a half-century earlier had permitted the FTC to exercise “executive function[s]” “as an agency of the legislative or judicial departments,”²⁷¹ *Bowsher* squarely rejected any arrangement that permitted an agent of Congress to engage in law execution.²⁷²

Yet, just two years later, in *Morrison v. Olson*,²⁷³ the Court acquiesced in a legislative innovation that removed a traditional executive function from presidential control. In the aftermath of Watergate, Congress had passed the Ethics in Government Act,²⁷⁴ which provided a mechanism whereby an independent counsel could be appointed to conduct criminal investigations targeting the President or other executive officials.²⁷⁵ Whereas the investigation and prosecution of crimes was traditionally an executive function performed by executive officials subject to presidential control, the Act provided for an independent counsel appointed by a three-judge panel at the instigation of the Attorney General and subject to her removal only for “good cause.”²⁷⁶

²⁶⁹ Id. at 717–18.

²⁷⁰ Id. at 732–33. Justices Stevens and Marshall, in concurrence, characterized the budget functions as legislative, rather than executive, but voted to strike down the law anyway because it empowered legislative officials to make law without following the constitutionally prescribed lawmaking procedures. Id. at 737 (Stevens, J., concurring).

²⁷¹ 295 U.S. at 628.

²⁷² 478 U.S. at 733.

²⁷³ 487 U.S. 654 (1988).

²⁷⁴ Ethics in Government Act of 1978, Pub. L. No. 95–521, 92 Stat. 1824 (codified as amended in scattered sections of 2, 5, 18, 28, and 39 U.S.C. (2000)).

²⁷⁵ Id. at 92 Stat. at 1867–73 (codified as amended at 28 U.S.C. §§ 591–599 (2000)). See Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 *Geo. L.J.* 2267, 2271 (1998) [hereinafter Sunstein, *Bad Incentives*] (“The original goal of the Independent Counsel Act was simple, laudable, and entirely appealing: to ensure that the decision whether to prosecute high-level government officials would not be made by high-level government officials.”).

²⁷⁶ *Morrison*, 487 U.S. at 660–63.

As a political matter, the *Morrison* Court's willingness to acquiesce in the new institutional arrangement resembled that of the *Humphrey's Executor* Court a half-century earlier. Just as executive overreaching during the New Deal had led the Court in the mid-1930s to support restrictions on executive power, so too did an era of presidential scandals highlight the need for new institutional arrangements.²⁷⁷ But, as a legal matter, *Morrison* conflicted not only with *Myers*, *Chadha*, and *Bowsher*, which struck down legislative innovations that impinged upon executive power, but also with *Humphrey's Executor*, which had sanctioned such innovations only on the theory that the power being asserted was more "legislative" or "judicial" than "executive."²⁷⁸ To sanction the independent counsel statute, the *Morrison* Court had to reject squarely the emphasis in *Humphrey's Executor* (and indeed in *Chadha* and *Bowsher*) on whether an official was performing an executive, judicial, or legislative function. After all, the prosecution of crimes has traditionally been an executive function. The Court explained:

We undoubtedly did rely on the terms "quasi-legislative" and "quasi-judicial" to distinguish the officials involved in *Humphrey's Executor* . . . from those in *Myers*, but our present considered view is that the determination of whether the Constitution allows Congress to impose a "good cause"-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as "purely executive."²⁷⁹

When one examines the holdings and rationales of *Myers*, *Humphrey's Executor*, *Chadha*, and *Bowsher*, it is very difficult to characterize any of these decisions as either minimalist or principled.²⁸⁰ In *Myers*, the Court struck down a legislative impingement on executive power based on a sweeping unitary executive principle that it seemed to abandon just nine years later in *Humphrey's Executor*.

²⁷⁷ See Sunstein, *Bad Incentives*, supra note 275, at 2271 ("In the aftermath of the Watergate scandal, a genuine constitutional crisis, the Act seemed indispensable as a way of promoting public trust in government, by giving an assurance that high-level officials would be investigated by people who were not controllable by their hierarchical superiors.").

²⁷⁸ *Morrison*, 487 U.S. at 688–89.

²⁷⁹ *Id.* at 689.

²⁸⁰ See Strauss, *Place of Agencies*, supra note 248, at 611–12.

In *Humphrey's Executor*, the Court sanctioned independent agencies on the ground that they perform quasi-legislative functions and are agents of Congress or the courts, rather than the President. The Court later abandoned this reasoning too—first in *Chadha* and *Bowsher*, which prohibited agents of the legislature from acting without adherence to the constitutionally prescribed lawmaking procedures, and then in *Morrison*, which permitted an independent agency or official to perform what clearly are “executive” functions.

But if none of the Court's decisions seems particularly minimalist or principled standing alone, the evolution of the Court's doctrine over time reflects the influence of both forces and ultimately offers a reasonable response to the countermajoritarian difficulty. The Court has tacked back and forth between formal adherence to separation of powers and flexible acceptance of new arrangements²⁸¹ while adhering to certain core principles (albeit clumsily derived, sometimes after the fact). The Court's position in each case may be partly a product of the political times, but this is to be expected, and indeed embraced, in a constitutional system that relies on the political branches of government to appoint federal judges.²⁸² The susceptibility of judges to political changes over time is part of what renders the countermajoritarian difficulty not quite as intense as one might fear. But the Court's separation-of-powers

²⁸¹ See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. Pa. L. Rev. 603, 604 (2001); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 Cornell L. Rev. 488, 488–89 (1987) [hereinafter Strauss, *Formal and Functional*].

²⁸² For discussions of the judicial appointments process as an avenue for political influence over the court see, e.g., William Mishler & Reginal Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 Am. Pol. Sci. Rev. 87 (1993); Jeffrey Segal & Helmut Norpoth, *Popular Influence on Supreme Court Decisions*, 88 Am. Pol. Sci. Rev. 711, 716 (1994). The Constitution of course also gives Congress extensive power over the jurisdiction of Article III courts. U.S. Const. art. III, §§ 1–2; see, e.g., Akhil Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985); Friedman, Part II, *supra* note 55, at 16; Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. Pa. L. Rev. 1569 (1990); Martin Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 Nw. U. L. Rev. 143 (1982); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981).

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cases, just like its Eleventh Amendment cases, highlight the Court's insulation from political pressure as well as its susceptibility. The Court was willing to strike down a statute in *Bowsher* even though it responded to a political problem as pressing and important as those at issue in *Humphrey's Executor* and *Morrison*.²⁸³ In *Bowsher*, after all, Congress strayed from conventional institutional arrangements for a very good reason: the conventional arrangements were leading the government to overspend. But the Court in *Bowsher* elevated principle over political expediency and struck down a law that was politically attractive. If the need for an institutional change was just as great in *Bowsher* as in *Humphrey's Executor* or *Morrison*, the Court nonetheless refused to acquiesce because of a key legal difference. The statute struck down in *Bowsher* (like those struck down in *Myers* and *Chadha*) did not just curtail executive power, as did the statutes upheld in *Humphrey's Executor* and *Morrison*, but also aggrandized the power of legislative officials.²⁸⁴

The legal principle that has emerged from the Court's tacking, and presumably will bind it in future cases, is this important distinction between "encroachment" and "aggrandizement."²⁸⁵ When Congress merely "encroaches" on the President's power—restricting the President's power without claiming that power for itself—the Court has been willing to acquiesce in new arrangements. Faced with congressional efforts to limit ever-expanding executive power in the New Deal and to prosecute crimes by executive officers after Watergate, the Court has been flexible in its approach to separation of powers. Despite its strong "unitary executive" language in *Myers*²⁸⁶—language that seemed to prohibit

²⁸³ See Thomas O. Sargentich, *The Contemporary Debate about Legislative-Executive Separation of Powers*, 72 *Cornell L. Rev.* 430, 431 (1987) [hereinafter Sargentich, *Contemporary Debate*] ("The 1986 decision by the Supreme Court invalidating the core of major legislation designed to reduce the national budget deficit—the so-called Gramm-Rudman-Hollings Act—offers a striking example of the enduring prominence of the separation of powers.").

²⁸⁴ See, e.g., Strauss, *Formal and Functional*, *supra* note 281, at 519–20 (noting that in *Bowsher* "one could fairly describe Congress as having appropriated to itself the President's characteristic functions").

²⁸⁵ See, e.g., *id.* But cf. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 *N.Y.U. L. Rev.* 461, 519–23 (2003) (explaining *Chadha* and *Bowsher* as reflecting an anti-arbitrariness principle).

²⁸⁶ 272 U.S. at 163–64.

any encroachment at all on presidential power—the Court signed off on independent agencies in *Humphrey's Executor*²⁸⁷ and on independent prosecutors in *Morrison*.²⁸⁸ But when Congress has sought not only to limit the President's power but to aggrandize its own power—as it did in *Myers*, *Chadha*, and *Bowsher*—the Court has adhered to the formal separation of powers and invalidated these new arrangements. The Court's decisions thus can be reconciled based on principle, even if each appears to be a product of its political times.

This is not to say that the distinction between encroachment and aggrandizement explains entirely the Court's shifts over the course of the twentieth century. The Court may be consistent in distinguishing between mere encroachments on executive power and more dangerous aggrandizements of legislative power, but within the subset of encroachments the Court has been very hazy about what makes an encroachment acceptable. Although *Myers*, in hindsight, can be classified as an aggrandizement case (because Congress retained part of the President's removal power for itself), the Court suggested in dicta in *Myers* that any encroachment at all on the President's power of law execution was unconstitutional.²⁸⁹ In *Humphrey's Executor* the Court sanctioned encroachments where the function to be performed is “quasi-legislative” or “quasi-judicial.”²⁹⁰ And in *Morrison* the Court allowed encroachments so long as the executive function performed by an official insulated from presidential removal is not so important as to “impede the President's ability to perform his constitutional duty.”²⁹¹ The Court may be willing to abide by a principled distinction between aggrandizement and encroachment—always striking down the former while typically permitting the latter—but the Court has left itself quite free to shift with the political winds when it comes to reviewing encroachments in future cases.

The Court's separation-of-powers jurisprudence thus reveals the same sort of backward-looking principled minimalism exhibited by its Eleventh Amendment cases. What drives the Court in cases of

²⁸⁷ 295 U.S. at 628.

²⁸⁸ 487 U.S. at 691.

²⁸⁹ *Myers*, 272 U.S. at 135.

²⁹⁰ 295 U.S. at 628.

²⁹¹ 487 U.S. at 691.

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first impression—like *Myers* or *Hans*—often is some broadly announced principle unaccompanied by any minimalist restraint. Much to the dismay of a minimalist like Cass Sunstein,²⁹² the Court may announce these broad principles—for example, states are immune from suit in federal court, or the President’s power over law execution is immune from legislative interference—without considering that unforeseen events may require doctrinal evolution. Minimalism tends to come into play only later, in hindsight, as changed circumstances and political shifts lead the Court to try to distinguish later cases from the earlier ones in which the broad principles were announced. But if backward-looking principled minimalism yields some decisions that are activist or unprincipled—as many of the Court’s separation-of-powers decisions undoubtedly are—it also ensures that over time the Court is neither impervious to political change nor entirely susceptible to political influence. A sweeping decision like *Myers* could not prevent a later Court, whose members were appointed by subsequent political administrations, from adjusting legal doctrine to reflect new political realities. Yet, the Justices deciding those subsequent cases also were somewhat constrained by the decisions of their predecessors. The Court’s respect for existing legal doctrine counterbalances its tendency to change with the political times and prevents the Court from deciding cases based entirely on the political preferences of its current members. The end result is a balance between judicial power and judicial leeway, one that prevents any single generation of Justices from possessing too much control over the decisions of their successors or too much freedom to alter the decisions of their predecessors. To borrow (and adjust) language from Alexander Hamilton, neither judicial leeway nor judicial power “can [l]ever be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system.”²⁹³

C. An Individual Rights Example: Due Process

A third example of the Court’s backward-looking principled minimalism can be found in its decisions on due process, where a liberal expansion of procedural rights for both “new” and “old”

²⁹² See supra notes 98–102 and accompanying text.

²⁹³ The Federalist No. 81, supra note 24, at 526.

property in the early 1970s was followed in quick succession by a retrenchment.²⁹⁴ Here too, one can trace the Court's shift to political changes, and specifically to President Nixon's replacement of several Warren Court Justices to form a new Burger Court majority.²⁹⁵ But, as in the federalism and separation-of-power examples noted above, legal principles set boundaries for this political shift. The Court was neither entirely political nor entirely principled; rather it struck a balance between the two.

After decades of adhering to a "right/privilege" distinction that required "trial-type" hearings only where conventional property was at stake,²⁹⁶ the Court in *Goldberg v. Kelly* required the government to afford precisely such a hearing before terminating benefits to welfare recipients.²⁹⁷ *Goldberg* was significant for two reasons. First, by regarding welfare entitlements as more like "property" than a "gratuity,"²⁹⁸ *Goldberg* extended due process

²⁹⁴ Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 Colum. L. Rev. 1973, 1973 (1996) [hereinafter *Pierce, Counterrevolution*] ("It took only two years for the Supreme Court to stage the due process revolution. . . . A retreat of sorts began even before the revolution was complete.").

²⁹⁵ Jack Balkin and Sandy Levinson explain:

When enough members of a particular party are appointed to the federal judiciary, they start to change the understandings of the Constitution that appear in positive law. If more people are appointed in a relatively short period of time, the changes will occur more quickly. Constitutional revolutions are the cumulative result of successful partisan entrenchment when the entrenching party has a relatively coherent political ideology or can pick up sufficient ideological allies from the appointees of other parties.

Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1067–68 (2001); see *supra* note 282 and accompanying text (discussing political influence via the judicial appointments process).

²⁹⁶ Compare *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 894 (1961) (finding due process not violated by government's refusal to permit cafeteria employee into Naval Gun Factory), and *Bailey v. Richardson*, 182 F.2d 46, 57 (D.C. Cir. 1950), *aff'd per curiam* by an equally divided Court, 341 U.S. 918 (1951) ("It has been held repeatedly and consistently that Government employ is not 'property.'"), with *Londoner v. Denver*, 210 U.S. 373 (1908) (requiring hearing for assessment of a tax on those benefited by paving of a street). See *Pierce, Counterrevolution*, *supra* note 294, at 1974.

²⁹⁷ 397 U.S. 254 (1970). In focusing on a property holder's right to fair process, I am only capturing one aspect of the Court's due process jurisprudence. See Richard H. Fallon, Jr., *Some Confusion About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 329–44 (1993) (distinguishing between rights to process, to judicial review, and to remedies, and further discussing overlap and confusion between procedural and substantive due process).

²⁹⁸ 397 U.S. at 262 n.8.

rights to “new” forms of property, such as government benefits and government jobs that were not protected under prior doctrine.²⁹⁹ Second, by affording welfare recipients a *pre-termination* hearing with trial-type procedures,³⁰⁰ *Goldberg* set the stage for a shift in approach even with respect to deprivations of “old” property.

From the face of the *Goldberg* opinion, the first of these consequences was more obvious than the second.³⁰¹ Although it was clear that *Goldberg* extended due process protection to “new,” as well as “old,” property, it was not immediately clear just how *Goldberg*’s pre-deprivation procedures would apply in cases involving the sequestration, attachment, or replevin of traditional property.³⁰² In *Goldberg*, the Court justified its requirement of a pre-deprivation hearing based on the importance of the property interest at stake and the risk that an erroneous deprivation would be devastating to the recipient:

[T]he crucial factor in this context—a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose government entitlements are ended—is that the termination of aid pending resolution of a controversy over

²⁹⁹ See Jerry L. Mashaw, *Due Process in the Administrative State* 33–34 (1985); Charles A. Reich, *The New Property*, 73 *Yale L.J.* 733, 733 (1964). For a pair of subsequent cases dealing with government employment (reaching different conclusions based on their facts), see *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

³⁰⁰ *Goldberg* afforded recipients an opportunity to present witnesses and cross-examine opposing witnesses, to retain an attorney, and to have their cases decided by neutral arbiters based on the “legal rules and evidence adduced at the hearing.” 397 U.S. at 267–71.

³⁰¹ See Pierce, *Counterrevolution*, *supra* note 294, at 1977–78 (“In a single opinion the Court transformed welfare, and potentially all other forms of government benefits, from a mere privilege completely unprotected by due process to a property right subject to the most stringent procedural safeguards available in the United States legal system.”).

³⁰² In one prior case, *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340–42 (1969), the Court had struck down a procedure for prejudgment garnishment of wages without notice or hearing. That case, however, like *Goldberg*, may have been based on the dire consequences associated with the erroneous termination of a stream of payments upon which to live. Cf. William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 *Brook. L. Rev.* 777, 787 (1990) (noting ambiguity as to whether *Goldberg* was concerned solely with accuracy or also with the dignity of welfare beneficiaries).

eligibility may deprive an *eligible* recipient of the very means by which to live while he waits.³⁰³

Two years after *Goldberg*, however, the Court confirmed in *Fuentes v. Shevin* that its requirement of a pre-termination exchange extended not only to property for which there was a dire need (such as welfare benefits or wages), but also to conventional property items, without regard to their importance.³⁰⁴ Mrs. Fuentes was deprived of a stove and a stereo, important household items, but by no means bare necessities of life.³⁰⁵ The Court nonetheless struck down state laws that had permitted creditors to enlist state government assistance in repossessing her goods without prior notice and an opportunity to be heard. The Court in *Fuentes* thus seemed to extend the due process requirement of pre-deprivation notice and a hearing to traditional property.

This dramatic expansion in the Court's due process jurisprudence in *Goldberg* and *Fuentes* was followed by a quick retreat and retrenchment, attributable in large part to President Nixon's replacement of several Warren Court Justices. *Fuentes* was a 4-3 decision, with Nixon's first two appointees, Chief Justice Burger and Justice Blackmun, joining Justice White's dissent, and Nixon's next two appointees, Justices Powell and Rehnquist, not on the Court in time to participate in the decision. Just two years later in *Mitchell v. W.T. Grant Co.*, however, Justices Powell and Rehnquist joined the *Fuentes* dissenters to form a 5-4 majority that upheld a Louisiana sequestration statute very similar to the laws struck down in *Fuentes*.³⁰⁶ The reasoning of the five-Justice majority in *Mitchell*—that creditor-debtor disputes involve *two* opposing sets of property interests in the item being repossessed—was the same employed by the three-Justice dissent in *Fuentes* two years earlier.³⁰⁷

³⁰³ 397 U.S. at 264.

³⁰⁴ 407 U.S. 67, 88–89 (1972).

³⁰⁵ *Fuentes* held that even where legal title remains with the creditor until the final payment is made, the debtor nonetheless has a property interest warranting due process protection. 407 U.S. at 86–87.

³⁰⁶ 416 U.S. 600, 601–03 (1974).

³⁰⁷ Compare *Mitchell*, 416 U.S. at 604–05 (per White, J.) (emphasizing creditor's property interest), with *Fuentes*, 407 U.S. at 100 (White, J., dissenting) (same).

Moreover, this 1974 retreat from *Fuentes* was followed by a retreat in 1976 from *Goldberg*. In *Mathews v. Eldridge*³⁰⁸ the Court held that although pre-termination hearings were required for *welfare* recipients, they were not required for *disability* benefit recipients.³⁰⁹ The Court explained that “the disabled worker’s need is likely to be less than that of a welfare recipient,” as disabled workers removed from disability benefit rolls could always resort to welfare.³¹⁰ By holding that *Goldberg* did not apply to those just one rung up on the social ladder from welfare recipients, the Court in *Mathews* sharply limited the significance of *Goldberg*’s pre-termination hearing requirement. Indeed, where *Goldberg* and *Fuentes* had taken revolutionary steps toward requiring pre-termination trial-type proceedings for both “new” and “old” property, *Mathews* and *Mitchell* put an end to the revolution, confining the earlier cases to their facts.

The Court’s rapid shift in direction must be attributed in large part to politics. If President Nixon had not had the opportunity to replace retiring Warren Court Justices, it is hard to believe that *Goldberg* and *Fuentes* would have been followed by *Mitchell* and *Mathews*.³¹¹ This was not just a gradual evolution in the Court’s thinking of the sort that Barry Friedman might appropriately attribute to the long-term influence of political discourse upon judicial deliberation.³¹² This was a sharp change in direction that can be

³⁰⁸ 424 U.S. 319 (1976).

³⁰⁹ See, e.g., Jerry L. Mashaw, The Supreme Court’s Due Process Calculus for Administrative Adjudication in *Mathews v. Eldridge*: Three Factors in Search of a Theory of Value, 44 U. Chi. L. Rev. 28 (1977); Pierce, Counterrevolution, supra note 294, at 1981–82.

³¹⁰ *Mathews*, 424 U.S. at 342.

³¹¹ Changes in Court personnel help to explain the shift from *Goldberg* to *Mathews*, just as they help to explain the shift from *Fuentes* to *Mitchell* outlined in the text above, see supra notes 306–07 and accompanying text. Only three members of the original 1970 *Goldberg* majority remained on the Court in 1976, two of whom dissented in *Mathews* (Justices Brennan and Marshall) and one of whom (Justice White) joined the majority. The rest of the *Mathews* majority was made up of two dissenters from *Goldberg* (Chief Justice Burger and Justice Stewart) and three new Nixon appointees (Justices Powell, Blackmun, and Rehnquist). Justice Stevens, whom President Ford had appointed, did not participate.

³¹² See Friedman, Dialogue, supra note 191, at 580 (“The theory of this article . . . is that the process of constitutional interpretation that actually occurs does not set electorally accountable (and thus legitimate) government against unaccountable (and thus illegitimate) courts. Rather, the everyday process of constitutional interpretation in-

fairly traced to a change in political administration and Court personnel.

Upon closer examination, however, the due process cases reveal not only the vulnerability of constitutional law doctrine to political influence, but also how the judicial process tends to resist undue political influence and to promote continuity as well as change. The Court never overruled *Goldberg* or *Fuentes*, but rather confined them. Moreover, in the course of trying to reconcile its later decisions with its earlier ones, the Court offered principled explanations that served not only to rationalize, but also to bind the court in future cases and limit the course that it could travel.

Consider Justice White's majority opinion in *Mitchell*, and its impact on subsequent decisions dealing with the constitutionality of replevin, sequestration, and attachment statutes.³¹³ As the author of a sharp dissent in *Fuentes*, Justice White might have been tempted in *Mitchell* to enlist two new Nixon appointees to reverse *Fuentes*. Instead, he sought to distinguish and reconcile the cases. He explained that although the Louisiana statute upheld in *Mitchell* resembled the Florida and Pennsylvania statutes struck down in *Fuentes*—insofar as they all permitted *ex parte* confiscation of property—the Louisiana statute nonetheless contained important safeguards designed to prevent erroneous deprivations. Louisiana required an affidavit from the creditor, rather than the unsworn assertion of entitlement involved in *Fuentes*, and Louisiana subjected the creditor's case to review by a judge, rather than just a clerk.³¹⁴ Though not as effective as hearing from the other side of the dispute, these features of the Louisiana procedure at least provided some protection against erroneous deprivations of property.³¹⁵ In *Mathews v. Eldridge* as well, the Court sought to

tegrates all three branches of government: executive, legislative, and judicial.”). But cf. Mark Tushnet, “Shut Up He Explained,” 95 *Nw. U. L. Rev.* 907, 907 (2001) [hereinafter Tushnet, “Shut Up He Explained”] (“The contemporary Supreme Court is not simply counter-conversational. Rather, the Court's self-understanding leads it to authoritarian efforts to shut off conversation by disparaging those who refuse to shut up after the Court has spoken.”).

³¹³ *Connecticut v. Doehr*, 501 U.S. 1 (1991); *N. Ga. Finishing v. Di-Chem*, 419 U.S. 601 (1975).

³¹⁴ *Mitchell*, 416 U.S. at 616.

³¹⁵ Moreover, unlike the broadly applicable statutes in *Fuentes*—which covered any goods alleged to be “wrongfully detained” and permitted a husband in a companion case to confiscate his children's clothing from his wife in a marital dispute, *Fuentes*,

limit, rather than reject, *Goldberg. Mathews* established a three-part balancing test that included (1) the degree of harm associated with an erroneous deprivation, (2) the risk of error under current procedures and the likelihood of reducing errors with additional or substitute procedures, and (3) the costs to the public fisc of those additional or substitute procedures.³¹⁶ Using these three factors the *Mathews* Court was able to justify *Goldberg* and distinguish *Mathews*.³¹⁷

The distinctions that the Court drew in *Mitchell* and *Mathews* are questionable. Upon reading *Mitchell*, one may ask whether a judge examining a creditor's one-sided affidavit really is likely to provide all that much accuracy.³¹⁸ Upon reading *Mathews*, one is left wondering: Are disabled workers really all that likely to have other means of support? Is a written exchange likely to assess accurately not only whether a worker is physically disabled, but also whether he is capable of performing a variety of job-related tasks?

But, by choosing to distinguish rather than overrule its prior decisions, the Court established principles that not only gave them cover to change course, but also would bind them in future cases. Indeed, applying the distinctions that *Mitchell* drew between the facts of that case and those in *Fuentes*, the Supreme Court followed *Fuentes* and struck down garnishment and attachment statutes in

407 U.S. at 72—the statute at issue in *Mitchell* only applied to creditor-debtor relations where one-sided presentations were more likely to yield accurate outcomes. See *Mitchell*, 416 U.S. at 616.

³¹⁶ *Mathews*, 424 U.S. at 335.

³¹⁷ The *Mathews* Court made the following observations about *Goldberg*: (1) an erroneous deprivation of welfare benefits would have deprived deserving recipients of the very means of survival, *id.* at 340; (2) a written exchange was likely to result in errors and an oral hearing likely to avoid them given the literacy levels of welfare recipients and the nature of the inquiry involved, *id.* at 344–45; and (3) society itself would not have wanted deserving welfare recipients to go without means of subsistence, *id.* at 348–49. In contrast, the Court suggested in *Mathews* that (1) the harm of erroneous deprivation is not quite so egregious for disability benefit recipients who might have other means of support, *id.* at 340–41; (2) written exchanges are likely to be more accurate where medical evidence regarding disability is at issue, *id.* at 344–45; and (3) the cost of additional hearings and payments to undeserving recipients during the pendency of those proceedings may mean fewer funds available for deserving recipients, *id.* at 348–49.

³¹⁸ Indeed, if Mrs. Fuentes had lived in Louisiana, her stove and stereo likely would have been taken from her without the judge ever knowing that she had refused to make payments because of a dispute with the creditor over the creditor's alleged failure to service her stove. See *Fuentes*, 407 U.S. at 70.

two subsequent creditor-debtor repossession cases. In *North Georgia Finishing v. Di-Chem*, decided just a year after *Mitchell*, Justice White, writing for a unanimous Court, struck down a Georgia statute that enabled creditors to garnish a bank account without prior notice or hearing. He explained that the Georgia statute at issue was more like the Florida and Pennsylvania statutes struck down in *Fuentes* than the Louisiana statute upheld in *Mitchell*.³¹⁹ Moreover, more than a decade later in *Connecticut v. Doehr*, the Court again found for a debtor and, in so doing, tried to rationalize all of its cases—whether for “new” or old “property”—by adjusting and applying the three-part balancing test of *Mathews*.³²⁰

In short, the Court’s due process cases reveal a backward-looking principled minimalism very similar to that found in the federalism and separation-of-powers examples explored above, albeit over a much shorter time frame. To the observer who fears that a countermajoritarian judiciary may assert its will over that of the political branches—and thwart the majority for a prolonged period—the due process cases stand as yet another example to the contrary. Like the Court’s federalism and separation-of-powers decisions, the due process cases reveal a Court that is susceptible to political influence over time, and indeed over a relatively short period of time. Yet, the cases also offer some reassurance to those who worry that the Court is *too* susceptible to political influence and, thus, unconstrained by legal principle. To be sure, the cases confirm that where principle might get in the way of politics, the Court has been willing to strain and revise its principles to reach the results it wants. But the cases also reveal the power of principle even in the face of politics. Rather than overrule prior decisions issued by majorities appointed by prior political administrations, the Court is likely to try to reconcile those earlier cases and abide by the principles that emerge from their reconciliation.

³¹⁹ 419 U.S. 601, 606–08 (1975). Even though the creditor in *Di-Chem* was required to submit an affidavit, the affidavit did not call for personal knowledge in the way that the statute at issue in *Mitchell* had, and the Court for this reason treated *Di-Chem* like *Fuentes*. *Id.* at 607.

³²⁰ 501 U.S. 1, 9–17 (1991). In *Doehr*, the debtor was the defendant in a tort suit whose home had been attached at the instigation of his alleged tort victim in order to secure a potential judgment. *Id.* at 5.

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The big difference between the principled minimalism one might embrace as ideal and the brand of principled minimalism actually practiced by the Court is that the Court's version often has been backward looking rather than forward looking. Rather than confine itself to pending cases and follow law in each of those cases, the Court tends to announce broad principles in earlier cases only to revise and narrow them in later ones. But if the Court's brand of principled minimalism is achieved in retrospect, it nonetheless offers a sound response to the countermajoritarian difficulty. Because the Court always remains free to revise and recast the principles it has announced in earlier decisions, no single decision can unduly interfere with the decisions of future courts, appointed by future administrations. The Court's ability to tack back and forth within the space left open by its prior decisions renders judicial power substantially less countermajoritarian. Yet, precisely because the Court feels obligated to grapple with legal principles rather than to reject them, the Court implements the other half of the traditional justification for judicial power. Both in the course of announcing broad principles in cases of first impression and in the course of revising and following those principles in later cases, the Court distinguishes judicial deliberation from political discourse. Though never immune from political influence, the judiciary nonetheless remains an independent branch of government that respects longstanding legal principles even in the face of political resistance. The Court may tack with the political winds, but only within the boundaries that principled analysis can sustain.

In this manner, minimalism and principle both continue to play a role in judicial practice, just as the Founders hoped they would. It may seem from the academic literature that minimalism has won and the neutral-principles tradition has lost. But judicial practice confirms what the Founders themselves knew two centuries ago: The judiciary's institutional and historical setting cabins judicial power and leeway and renders the judiciary less dangerous than eighteenth-century Anti-Federalists or contemporary minimalists would have us believe.

IV. FROM THE DESCRIPTIVE BACK TO THE NORMATIVE

This Article thus far has been largely descriptive. Rather than engage in normative debates over whether judges should announce

broad legal principles or leave matters undecided, Parts II and III argued as a descriptive matter that the judiciary's institutional and historical setting leads it over time to do a bit of both. Just as the Founders expected judicial power to be limited and judicial leeway to be constrained, and did not urge judges to elevate one judicial characteristic over the other, so too have I.

But it was the contemporary normative debate over how judges *should* behave—described in Part I—that prompted me to undertake this descriptive enterprise in the first place. It was my skepticism over the recent trend toward minimalism and away from neutral principles that led me to examine institutional and historical forces that may obviate the need for judges to embrace minimalism. To the extent that contemporary minimalism's popularity stems from a declining faith in the legal constraints on judges, and a corresponding fear of judicial overreaching, then the institutional and historical limits described above tend to assuage these concerns and undermine this basis for contemporary minimalism. If institutional setting discourages judges from deciding too much or straying too far from precedent, and if historical setting reinforces these institutional limits and prevents any single generation of judges from obtaining too much power or leeway, then perhaps judges need not be avowed minimalists to avoid treading on political power. The descriptive arguments in Parts II and III suggest that the swing in favor of judicial minimalism (described in Part I) has gone too far and that some readjustment is in order.

What does this mean in practical terms? To the extent that we can rely on institutional and historical forces to cabin judicial leeway and curb judicial power, then judges today may not need to shy away from resolving disputes and articulating legal principles. Perhaps judges can approach cases in the first instance much in the way Wechsler wanted them to—by articulating and applying generally applicable legal principles—safe in the knowledge that their errors will be subject to correction by later judges. Although minimalist scholars would object that such an approach may end up resolving more than necessary, the institutional and historical analysis above teaches us that the system over time can compensate for this problem. Because minimalism and constraint both are inherent in the system, judges need not affirmatively embrace minimalism to avoid impinging on political power.

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Moreover, the institutional and historical analysis above suggests that if the goal is to limit judicial intrusions into politics, then the contemporary emphasis on leaving matters unresolved may be not only unnecessary, but also harmful. Parts II and III demonstrated that judges may be somewhat constrained simply by virtue of the fact that they must ground their decisions in law. Parts II and III conceded, however, that the extent of this constraint may vary. Although judges today continue to feel compelled to follow the reasoning process described by Wechsler a half-century ago, institutional and historical analysis cannot tell us precisely how constraining this reasoning process is. Judges may hew closely to past decisions or else exercise their leeway to stray significantly from those decisions.

By emphasizing minimalism alone, and ignoring the other half of the tradition, we may inadvertently relieve judges of some of their traditional obligation to reconcile their decisions with past ones. Minimalism sends a message to judges that they can reach their preferred outcomes in pending cases so long as they confine their holdings to those cases. If we instead tell judges that they cannot reach those desired outcomes if they do not first justify their decisions based on existing legal materials, we end up with an additional check on judicial power.³²¹ The legal constraints on judges may not seem as powerful today as they did in a pre-Realist age, but the institutional and historical analyses above suggest that they retain some force. We can emphasize these constraints on judicial leeway or else ignore them. Overzealous advocacy of minimalism risks ignoring them and inadvertently removing what historically has been a significant constraint on judicial leeway.³²²

In advocating a retreat from judicial minimalism, I do not mean to substitute the neutral-principles tradition in its place, but rather

³²¹ See Wechsler, *supra* note 1, at 19:

A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. *When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive.*

(emphasis added); see also Duxbury, *supra* note 63, at 274 (“The appeal for neutral principles of constitutional law was . . . an appeal for institutional competence and judicial restraint.”).

³²² See Duxbury, *supra* note 63, at 274 (associating “neutral principles” with “judicial restraint”); *supra* text accompanying note 176.

to return to a balance between the two. Although judges may rely on their successors to correct their errors—and the Court often seems to have done just that—this does not mean that judges should entirely ignore the risk of error or overreaching. Judges who ignore the discretion inherent in the judicial enterprise, and who purport merely to apply legal principles without altering their meaning, run the risk of aggrandizing their own power at the expense of future judges and aggrandizing the power of past judges over present ones.³²³ In contrast, judges who tend to acknowledge the creativity inherent in the judicial enterprise—and to recognize that legal principles are largely a product of past, present, and future judges who articulate them in the course of deciding cases—are less likely to let any single activist judge decide too much.³²⁴ Where judges lack confidence in a principle, it would be irresponsible for them to embrace it in broad terms.³²⁵ And, where judges feel drawn to a particular outcome in a case but lack a legal rationale for that outcome, it would be disingenuous and downright dis-

³²³ Cf. Sunstein, *One Case at a Time*, *supra* note 3, at 19 (linking breadth of a decision's impact to "the applicable theory of *stare decisis*"); Michael C. Dorf, *Dicta and Article III*, 142 *U. Pa. L. Rev.* 1997, 1998 (1994) (exploring uncertainty over "how federal courts ought to distinguish between the holdings and dicta of past cases").

³²⁴ Cf. Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 *Sup. Ct. Rev.* 61, 63 ("[T]here is, and ought to be, considerable opportunity for shared constitutional interpretation; and . . . this cooperative process can work only if all constitutional actors are sufficiently humble about their own conclusions and respectful of the pronouncements of the others."); Strauss, *Constitutional Interpretation*, *supra* note 196, at 89 ("[T]raditionalism is counsel of humility: no single individual or group of individuals should think that they are so much more able than previous generations.").

³²⁵ See *Rodriguez v. Chicago*, 156 F.3d 771, 778 (7th Cir. 1998) (Posner, C.J., concurring) ("It is a matter of judgment whether to base the decision of an appeal on a broad ground, on a narrow ground, or on both, when both types of ground are available. If the judges are dubious about the broad ground, then they will do well to decide only on the narrow ground; but if they are confident of the broad ground, they should base decision on that ground (as well as on the narrow ground, if equally confident of it) in order to maximize the value of the decision in guiding the behavior of persons seeking to comply with the law."); Linda Greenhouse, *Between Certainty & Doubt*, 6 *Green Bag 2d* 241, 251 (2003) (quoting Posner); cf. Jan G. Deutsch, *Precedent and Adjudication*, 83 *Yale L.J.* 1553, 1570–71 (1974) (noting how important the likely future treatment of a decision should be to the Court rendering it). A familiar manifestation of the dilemma of whether to decide a case broadly or narrowly manifests itself in the question of whether in the course of applying law to fact a court should undertake "a further effort at norm elaboration." Henry P. Monaghan, *Constitutional Fact Review*, 85 *Colum. L. Rev.* 229, 236–37 (1985).

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honest for them to embrace a principle simply in order to justify their desired outcome. Accordingly, in cases of doubt or hesitation, judges should consciously avoid doing harm by treading lightly, deciding cases narrowly, and refusing to set aside government action where they cannot justify doing so. Judges should embrace minimalism affirmatively in these cases, rather than simply relying on their successors to minimize the impact of their decisions. The principled minimalism I envision would emphasize principle or minimalism depending on a judge's level of confidence.³²⁶ In place of the sharp swings, stops and starts, and post-hoc rationalizations so often exhibited by the Supreme Court, forward-looking principled minimalism would favor a moderate path that balances conflicting impulses.³²⁷

It seems uncontroversial that this sort of forward-looking principled minimalism would be more attractive than the backward-looking principled minimalism found in the three doctrinal examples in Part III. If judges *can* balance their conflicting impulses—both confining themselves to cases brought by others and following law in the course of deciding those cases—it is hard to see why judges should not do so. Although later judges will always have leeway to narrow or expand the principles articulated by current judges, current judges should at least try to balance principle and minimalism themselves, rather than abdicate this responsibility to their successors.

But if forward-looking principled minimalism is superior to backward-looking principled minimalism, each offers a reasonable response to the countermajoritarian difficulty. This is important because it distinguishes principled minimalism from other contemporary accounts of judicial power that tend to rest on unrealistic aspirations for judicial behavior, rather than realistic appraisals of judicial conduct.³²⁸ A coherent defense of judicial power should

³²⁶ Cf. Sunstein, *One Case at a Time*, supra note 3, at 46–60 (defending minimalism not only as democracy-promoting, but also as a way to minimize error and decision costs). Of course, the confidence exhibited by judges and Justices depends not only on the merits of cases, but also on their personalities and judicial philosophies.

³²⁷ Cf. Fallon, *Ideologies*, supra note 175, at 1224 (“Affirmatively, the prescribed approach celebrates tension, rather than attempting to resolve it, but eschews rhetorical excess and its attendant contradictions.”).

³²⁸ Cf. White, supra note 28, at 1565–66 (“But even though many constitutional commentators in the 1960s and early 1970s agreed with Wechsler and Bickel . . . neither the Warren nor the Burger Courts seemed particularly devoted to deriving ‘neutral princi-

take into account what judges actually do, in addition to discussing what we wish they would do.³²⁹ Principled minimalism offers a sound basis for judicial power, whether it is exercised in its ideal forward-looking form or less-than-ideal backward-looking form. Indeed, both versions of principled minimalism supply both a negative account of why judicial power should not be feared and an affirmative account of why judicial power should be embraced.

The negative defense of judicial power is relatively straightforward, and already evident from the discussion in Part III. Principled minimalism renders judicial power less dangerous and less intrusive on the political process, and it thereby alleviates the countermajoritarian difficulty. The “principled” component of principled minimalism cabins judicial leeway while the “minimalist” component cabins judicial power.

Moreover, unlike the minimalist theories that are so popular today, principled minimalism—in both its forward- and backward-looking forms—also offers an *affirmative* defense of judicial power.³³⁰ A core value of the neutral-principles tradition that has been lacking from minimalist theory is its affirmative, as opposed to just negative, defense of judicial power. Rather than just defending judicial power on the ground that it is not so bad, the neutral-principles tradition affirmatively embraced judicial power as a mechanism to enforce the rule of law.³³¹ In a post-Realist, post-CLS

ples’ of constitutional law or to perfecting the use of passive techniques to avoid decision.”).

³²⁹ See Friedman, *Judicial Review*, supra note 13.

³³⁰ Cf. Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 *Sup. Ct. Rev.* 343, 345 (“The approach of judicial passivity, articulated forcefully though followed only inconsistently [by the Court], would deprive the polity of an immeasurably important source of lawmaking authority, would impose unrealistic demands on the federal legislative process, and would give rise to needless injustices in routine disputes.”); Sager, *Incorrigible Constitution*, supra note 197, at 955 (“Are there reasons for supposing that a society committed to the ongoing project of constitutional justice is well-served by a robust judiciary which sees its role as that of an active participant in that project?”).

³³¹ But cf. Duxbury, supra note 63, at 274 (associating “neutral principles” with “judicial restraint”); Tushnet, *Following the Rules*, supra note 158, at 805 (suggesting that the role of neutral principles is to place “sufficient bounds on judges to reduce the risk of arbitrariness to an acceptable level”). Of course, the “rule of law” is a rather complex concept. See, e.g., Richard H. Fallon, Jr., “The Rule of Law” As a Concept in Constitutional Discourse, 97 *Colum. L. Rev.* 1, 42 (1997) (“[A]ny plausible theory [of the Rule of Law] must include multiple strands . . . and must explain how

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age, this affirmative defense is somewhat more difficult to advance. Although Parts II and III suggested that judges are constrained by law, the discussion grounded these constraints in the judiciary's institutional and historical setting, without making grander jurisprudential claims about the power or value of legal principle. If "law" amounts to nothing more than institutional or historical constraint,³³² then one may question whether principled minimalism is all that different from minimalism alone. Although principled minimalism seeks to narrow the range of decisional options available to judges, and not just the scope of judicial authority, it resembles contemporary minimalism insofar as it relies on the fact that judicial power is constrained, and thus not as dangerous as unlimited judicial power.³³³

But one does not need a full-blown jurisprudential defense of legal principle in order to see the affirmative benefits of judicial re-

those diverse and sometimes competitive strands relate to each other."); Laurence Tribe, *Revisiting the Rule of Law*, 64 N.Y.U. L. Rev. 726, 729–30 (1989) ("In fact, we make a grievous mistake when we equate the Rule of Law with the narrowest, most ahistorical, most unfeeling and unseeing versions of the Ideal of Law.").

³³²The institutional and historical accounts I offer above do nothing to undermine traditional neutral-principles theory. I have grounded neutral-principles theory in institutional and historical analysis because I believe this is the best way to convince skeptics—scholars working in a Realist or CLS tradition—that judges continue to be constrained. But the vast majority of lawyers, judges, and even scholars, do not share that skepticism. They believe in legal principle and believe that judicial decisions are at least partly a product of legal principle. See Dorf, *Legal Indeterminacy*, supra note 5, at 929–30; Molot, *Reexamining Marbury*, supra note 12, at 1298. Simply because institutional and historical analysis helps to explain the power of the neutral-principles tradition does not mean that lawyers' faith in neutral principles is misguided. Most legal thinkers can continue to defend judicial power based on their faith in law and, ultimately, it may not matter whether one explains this phenomenon from the internal perspective of a duty-bound lawyer or judge who believes in legal principle or from the external perspective of a scholar who explains this faith using institutional and historical analysis. See Molot, *Reexamining Marbury*, supra note 12, at 1303.

³³³Moreover, if principle is no more than the product of the judiciary's institutional setting, then at some points in history institutional forces may align in such a way as to free judges not only to tack within buoys, but actually to move those buoys. See, e.g., Ackerman, *Constitutional Politics*, supra note 196, at 456–58; Bruce Ackerman & Neal Katyal, *Our Unconventional Founding*, 62 U. Chi. L. Rev. 475, 572 (1995). The "switch in time that saved nine" offers one such example of a Court not just shifting with the political winds, but arguably picking up buoys and changing course completely. See supra note 59 and accompanying text. *Brown v. Board of Education*, 347 U.S. 483 (1954), offers another example.

view in a principled minimalist fashion.³³⁴ To be sure, judicial power is *easier* to defend if we assume that judges enforce *constitutionally* established limits on political power, rather than simply imposing limits of their own creation.³³⁵ But one need not believe that judges are any better than political officials at getting to the “true” or “best” meaning of the Constitution, or even believe that there is such a thing, in order to see the value of judicial review within the institutional and historical setting described above. Even when we substitute institutional and historical constraints for faith in neutral principles, we can support an affirmative defense of judicial power in our constitutional structure.³³⁶ The same institutional and historical forces that constrain judges and render the judiciary the least dangerous branch of government also equip the judiciary to perform an affirmative constitutional role minimizing the dangers posed by the other branches.³³⁷ When one considers the institutional and historical analysis outlined above against the backdrop

³³⁴ I have chosen to employ institutional and historical analysis, rather than to attempt such a jurisprudential feat, in part because I recognize that others, like Ronald Dworkin, have done a much better job explaining the force of principle in judicial reasoning than I ever could hope to accomplish through jurisprudential analysis. See Ronald Dworkin, *Law's Empire* (1986). But my choice is also a reflection of the fact that Dworkin has failed to convince skeptics, and even sympathetic scholars, of the soundness of his argument. See, e.g., Larry Alexander & Ken Kress, *Against Legal Principles*, 82 *Iowa L. Rev.* 739, 740 (1997); Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law*, 67 *Notre Dame L. Rev.* 553, 555 (1992); Sunstein, *Reasoning*, *supra* note 3, at 784; cf. Dorf, *Legal Indeterminacy*, *supra* note 5, at 877 (denying “that much progress can be made by further theorizing about the nature of law and constitutions as they are”); Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 *Colum. L. Rev.* 133, 137 (1997) (book review). No judge can measure up to Dworkin's Hercules, and if the neutral-principles tradition is ever again going to be taken seriously alongside the minimalist tradition, it should be grounded in a realistic, rather than aspirational, account of the role of legal principle in judicial decisionmaking.

³³⁵ Indeed, if judges did nothing more or less than accurately enforce the Constitution, one would not need the checks on judicial power we associate with minimalist theory.

³³⁶ See Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 *Duke L.J.* 1335, 1336 (2001) (“The institutional differences between the branches can be a source of richness, rather than a constitutional weakness.”).

³³⁷ Cf. Farber, *supra* note 50, at 449 (“Essentially, judicial review is an attempt to solve a practical problem: how to keep politicians from violating individual rights or undermining the overall system of government for short-term gains.”).

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of our constitutional structure,³³⁸ several affirmative defenses of judicial review emerge.³³⁹

First, whether or not the judicial process is any *better* than the legislative or administrative process at enforcing the Constitution, the judicial process at least is *different* from the political process and this is a reason to embrace judicial power rather than simply to minimize it. As the discussion above demonstrated, courts go about deciding constitutional questions in a very different institutional and historical setting from legislators or administrators. The unique institutional and historical constraints on judges not only protect against judicial overreaching, but also position the judiciary to play an affirmative role that protects against overreaching by other constitutional actors.³⁴⁰

The Constitution establishes three separate processes for legislative, executive, and judicial action, and it further divides legislative power among three distinct entities.³⁴¹ Before the federal government can take action against an individual, a statute authorizing the action must be enacted by the House, the Senate, and the President. Next, the President or his subordinates must decide to enforce that law against the relevant individual. And, finally, the judiciary must agree that the legislative and executive branches have constitutional authority to take the relevant action. The institutional differences between the courts and the political branches, just like the institutional differences within the political branches,

³³⁸ One may also, of course, rely on the constitutional structure itself to constrain judges. See Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 12–32 (1985) (describing how norms of federalism, separation of powers, and electoral accountability constrain federal courts in making new law); Thomas W. Merrill, *The Judicial Prerogative*, 12 Pace L. Rev. 327, 331 (1992) (same). Indeed, I point out above how constitutional and institutional constraints on judges often are mutually reinforcing. See *supra* notes 121–29 and accompanying text.

³³⁹ These are by no means the exclusive justifications for an affirmative judicial role. See Klarman, *Constitutionalism*, *supra* note 66, at 145 (1998) (describing and critiquing “ten leading accounts of constitutionalism”).

³⁴⁰ The Founders were sufficiently suspicious of political bodies that they believed such a check was necessary. See Molot, *Judicial Perspective*, *supra* note 15, at 44–45.

³⁴¹ U.S. Const. art I, §§ 1–3, amend. XVII; see Friedman, *Dialogue*, *supra* note 191, at 642–43; Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. Cal. L. Rev. 673, 673 (1999) (“To be sure, those who framed our Constitution never contemplated either a direct or unlimited form of democracy. To the contrary, they inserted numerous republican-like speed bumps to democratic rule.”).

reinforce the importance of this multi-stage process.³⁴² Indeed, the greater the difference between the judicial process and the legislative and administrative processes, the stronger the check imposed by the judiciary on the political branches of government.³⁴³ Just as the constitutionally prescribed lawmaking procedures give affected parties more than one body in which to advance their concerns and obstruct legislation, so too does the constitutional separation of powers give those parties additional fora in which to fight.³⁴⁴

Second, the judicial process is not only different from the legislative and executive processes, but is different in a way that may give voice to constituencies who would not otherwise be heard.³⁴⁵ The

³⁴² Cf. Bennett, *supra* note 167, at 880 (“There is a dramatic difference in the conversational behavior of the courts, on the one hand, and of the political branches of government, on the other. The former engage in highly stylized interactions concentrated on limited private parties, while the latter have freely formed and diverse exchanges with all manner of constituencies.”); Sager, *Incorrigible Constitution*, *supra* note 197, at 958 (noting how judicial review introduces “a special kind of redundancy”). Lisa Bressman makes an analogous, albeit distinct, argument in the administrative law context. See Bressman, *supra* note 285, 462–63 (2003) (“I argue that we have become so fixated on the concern for political accountability lately that we have overlooked an important obstacle to agency legitimacy: the concern for administrative arbitrariness.”).

³⁴³ See *The Federalist* No. 78, *supra* note 25, at 506 (explaining that “the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority”). But cf. Klarman, *Constitutionalism*, *supra* note 66, at 156 (“Descriptively, the checks-and-balances version of constitutionalism fails to account for the most fundamental shifts in governmental powers over the course of our constitutional history. The Court occasionally intervenes at the margin, but rarely resists fundamental changes that reflect an altered material reality.”). Part III of this Article, by describing how the Court can accommodate as well as resist political change, offers a partial response to Klarman’s argument.

³⁴⁴ As my colleague Brad Clark has pointed out, however, the constitutionally prescribed lawmaking procedures have another attribute that is not reinforced by the judiciary’s role in the separation of powers: namely, the manner in which those lawmaking procedures reinforce federalism, and not just separation of powers. See Clark, *supra* note 23, at 1403.

³⁴⁵ See, e.g., Sager, *Constitutional Justice*, *supra* note 12, at 17–18 (“Any member of the community is entitled . . . to have each deliberator assess her claims on its merits, notwithstanding the number of votes that stand behind her, notwithstanding how many dollars she is able to deploy on her behalf, and notwithstanding what influence she has in the community.”); cf. Rebecca L. Brown, *Accountability, Liberty, and Constitution*, 98 *Colum. L. Rev.* 531, 535 (1998) (“[A]ccountability is best understood, not as a utilitarian means to achieve maximum satisfaction of popular preferences, but as a structural feature of the constitutional architecture, the goal of which is to protect liberty.”); Bressman, *supra* note 285, at 462–63; Farina, *supra* note 28, at 1017–18 (de-

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Constitution requires the consensus not just of a multitude of government officials, but of different categories of government officials who are accountable to different constituencies. Representatives answer to geographic areas within states, Senators to entire states, and the President to the entire nation. Moreover, the administrative officials who execute law are accountable to the President,³⁴⁶ to members of Congress via legislative oversight,³⁴⁷ and to the interest groups and constituents who participate in the administrative process and often bring administrative matters to the attention of the White House and members of Congress. But if the legislative and administrative processes give voice to a variety of political interests, the judicial process supplements this diversity of perspectives by giving voice to additional constituencies who might otherwise be excluded from the debate.³⁴⁸ In the recent pledge of allegiance case before the Supreme Court, *Elk Grove Unified School District v. Newdow*, an avowed atheist was given the same amount of time at oral argument and the same number of pages in briefs as the Solicitor General of the United States (even though he ultimately was denied standing as a non-custodial parent to assert the rights of the student in question).³⁴⁹ One would not find that sort of evenhandedness in the political process. Senators, Congressmen, and

scribing “polyphonic” conception of representation under which “multiple voices speak[] of and for the people”). But cf. Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 Yale L.J. 31, 71, 79 (1991) (noting “mechanisms by which interest groups are likely to exert their ‘disproportionate’ influence over the litigation process”); Klarman, Constitutionalism, supra note 66, at 161 (suggesting that the Court “has . . . generally declined to protect minority rights against dominant majoritarian norms”); Klarman, Rethinking, supra note 199, at 6 (describing the “myth of the heroically countermajoritarian Court [that] has persisted in the face of consistently contravening evidence”); Peter L. Strauss, Revisiting *Overton Park*: Political and Judicial Controls Over Administrative Actions Affecting the Community, 39 UCLA L. Rev. 1251, 1322 (1992) (noting dangers of judicial interference with political decisions in the administrative context, particularly where “individual rights [are] not at issue”).

³⁴⁶ This is true, scholars have observed, even for independent agencies. See, e.g., Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 Colum. L. Rev. 452, 510 (1989); Richard Pierce, Institutional Aspects of Tort Reform, 73 Cal. L. Rev. 917, 936–37 (1985).

³⁴⁷ See, e.g., Korn, supra note 266, at 47 (1996) (arguing that “informal interbranch contacts and negotiations . . . serve as the real workhorse of congressional oversight power”).

³⁴⁸ See Sager, Constitutional Justice, supra note 12, at 16–18.

³⁴⁹ 124 S. Ct. 2301 (2004).

agency heads would almost uniformly return a call from a senior administration official but would almost uniformly decline to speak to an individual like Mr. Newdow.³⁵⁰ By giving voice to underrepresented interests, judicial review reinforces the rights of those with less political power.³⁵¹

A third judicial attribute with constitutional significance is the judicial tendency to emphasize long-term continuity. Whether one is a believer or a skeptic in legal principle, the emphasis within the judiciary on the long term provides yet another affirmative reason to embrace judicial review in the institutional and historical setting I have described. A believer in legal principle might argue, as Alexander Bickel and Bruce Ackerman have, that judicial review is valuable because the “enduring values” that judges embrace tend to be substantively attractive.³⁵² But even a skeptic who does not believe that enduring values or principles underlie constitutional law must admit that the institutional dynamics that surround judicial review tend to favor long-term continuity more than the institutional dynamics found in a legislative or administrative setting.³⁵³

³⁵⁰ Indeed, when Chief Justice Rehnquist pointed out that Congress unanimously supported the inclusion of the words “under God” in the Pledge, Mr. Newdow responded: “[T]hat’s only because no atheist can get elected to public office.” Transcript at 44–45, *Newdow* (No. 02-1624) (describing the handicaps placed on atheists in the political process).

³⁵¹ In making this argument, I do not mean to draw the distinction that Jesse Choper draws between constitutional challenges under the Bill of Rights, on one hand, and separation-of-powers and federalism challenges on the other. See Jesse Choper, *Judicial Review and the National Political Process* 260–379 (1980); Sargentich, *Contemporary Debate*, supra note 283, at 441 (summarizing Choper’s argument). I am embracing instead the value of hearing from underrepresented individuals in the judicial process, whether they are objecting to government action on structural grounds or are asserting an individual right. Cf. Rebecca L. Brown, *Liberty, The New Equality*, 77 *N.Y.U. L. Rev.* 1491, 1499 (2002) (emphasizing role of courts “in ensuring that the very features of the democratic process that make it an appropriate primary decisionmaking locus in a free society do not give way to the pitfalls of we/they legislation”); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 *U. Pa. L. Rev.* 1513, 1513–14 (1991) (exploring overlapping aims of separation of powers and Bill of Rights).

³⁵² See supra notes 64–65, 70 and accompanying text.

³⁵³ See Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 *N.Y.U. L. Rev.* 570, 585 (2001) (arguing “that a good legal system requires reasonable stability; that while decisions that are severely misguided or dysfunctional surely should be overruled, continuity is presumptively desirable with respect to the rest; and, again, that it would overwhelm the Court and country alike to require the Justices to rethink every constitutional question in every

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Given the institutional and historical forces noted above that combine to lead judges to base decisions on past legal precedents,³⁵⁴ and the fact that judges are appointed for life,³⁵⁵ the judicial process not only gives voice to different constituencies, but also places an emphasis on different values—longer-term values—that might otherwise be overlooked by the day-to-day political process. When one considers the two-year terms for Representatives, four-year term for the President, six-year terms for Senators, and life-time appointments for judges,³⁵⁶ one sees a variety of institutional settings that not only answer to different constituencies but also consider constitutional questions over a range of time horizons.

The fact that the judicial process is different, that it gives voice to those who are underrepresented in the political process, and that it emphasizes long-term continuity, all contribute to the normative value of judicial review. Although it is easier to embrace judicial review if one believes that judges generally get the law “right,” one need not adhere to such a belief in order to see how judicial review adds value. So long as one believes in a system of checks and balances that promotes careful consideration across different deliberative bodies, one can affirmatively embrace judicial power.

This is not to say that the institutional and historical account of judicial review offered by this Article has the same normative force as the traditional neutral-principles justification for judicial power. There is a vast difference between observing, on one hand, that judges enforce “the law” or “the Constitution” and, on the other, that judges merely interpret constitutional law in a different institutional and historical setting from actors in the political branches. To the extent that the value of judicial review lies in the extra de-

case on the bare, unmediated authority of constitutional text, structure, and original history”); Fallon, *Implementing the Constitution*, supra note 97, at 109–10; cf. Anthony T. Kronman, *Precedent and Tradition*, 99 *Yale L.J.* 1029, 1034 (1990) (seeking to develop a philosophical defense of the law’s emphasis on tradition). But see Klarman, *Constitutionalism*, supra note 66, at 163–64 (“Descriptively, it seems plain that *judicial review* makes little contribution to preserving continuity with the past.”).

³⁵⁴ See supra Parts II and III.

³⁵⁵ For a historical explanation of the Constitution’s provision of life tenure for judges see Molot, *Judicial Perspective*, supra note 15, at 16–17.

³⁵⁶ But cf. Mark Tushnet et al., *Judicial Review and Congressional Tenure: An Observation*, 66 *Tex. L. Rev.* 967, 968 (1988) (observing, with “slight overstatement . . . that members of the House of Representatives hold their seats during good behavior—that is, for as long as they wish to remain in the House”).

liberation and diversity of viewpoints and values that it offers, then it is important not only that judicial review be available to check political action but also that judicial review itself be checked. If deliberation in diverse settings is the goal, then it is important that the judiciary add to that diversity rather than detract from it.³⁵⁷ It is important, in the words of Larry Kramer, not to confuse “judicial supremacy and judicial sovereignty.”³⁵⁸ Permitting judicial views of the Constitution simply to trump those of the political branches would not be a problem if we truly believed that judges did nothing more than accurately enforce constitutional commands. But, to the extent that the value of judicial review lies in its differences from political deliberation rather than in any inherent superiority over political deliberation, it is important that judicial deliberation not overshadow political discourse.

This is where affirmative and negative defenses of judicial power dovetail. The institutional and historical differences between the judicial and political branches not only position the judiciary to check political power, but also impose limits on the judiciary itself. As this Article has demonstrated, the judiciary’s institutional and historical setting confines the judiciary in setting its agenda and in resolving items on that agenda. The principled minimalism inherent in the system thus protects the political system against excessive judicial intrusion while at the same time positioning the judiciary to perform its constitutionally prescribed role. Principled minimalism—both in its ideal, forward-looking form and in the

³⁵⁷ Cf. Fallon, *Implementing the Constitution*, supra note 97, at 151 (“[B]ecause the Court must speak for a diverse and sometimes reasonably divided constitutional community, not just for the Justices themselves, deference and accommodation are sometimes appropriate.”); Lawrence G. Sager, *Thin Constitutions and the Good Society*, 69 *Fordham L. Rev.* 1989, 1989 (2001) (“On this view, our constitutional tradition is best understood as reflecting a division of labor between the judiciary and other governmental actors, most notably, but not exclusively, Congress.”).

³⁵⁸ Kramer, *We the Court*, supra note 28, at 13 (“There is . . . a world of difference between having the last word and having the only word”); Kramer, *Retreat from Judicial Supremacy*, supra note 55, at 206–26 (criticizing “new mythology in which judicial supremacy is treated as the logical and inexorable endpoint of a beneficent progress”); see Post & Siegel, supra note 92, at 1946; Thomas O. Sargentich, *The Rehnquist Court and State Sovereignty: Limitations of the New Federalism*, 12 *Widener L.J.* 459, 462 (2003); Tushnet, “Shut Up He Explained,” supra note 312, at 907–08; cf. Farber, supra note 50, at 416–17 (distinguishing judicial “competency,” “potency,” and “supremacy”); Mark Tushnet, *Non-Judicial Review*, 40 *Harv. J. on Legis.* 453, 455 (2003) (examining “constitutional review by non-judicial officials”).

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backward-looking form exhibited by the Court—gives us a reason to embrace judicial power rather than to fear it.

CONCLUSION

This Article has pointed out that the contemporary emphasis on treading lightly and leaving matters unresolved misses half of a rich tradition. From the time of the Founding right up until the Bickel-Wechsler debate, judicial power was defended based not only on the narrowness of judicial authority, but also on the belief that those who exercise it follow the law. My goal has been to restore this tradition and correct the current imbalance between its two essential components.

In pursuit of this goal, I relied on institutional and historical analysis. First, I explored the way in which the judiciary's institutional setting leads judges to tread lightly and ground their decisions in existing legal materials. Next, I explored the way in which the judiciary's historical setting limits judicial power and judicial leeway. The balance that judges strike between principle and minimalism may not be ideal, but even the less-than-ideal approach reflected in Supreme Court decisions offers a sound response to the countermajoritarian difficulty. Rather than elevating one half of the tradition over the other, as contemporary minimalism has sought to do, this Article urged courts to restrike a lost balance between the minimalist and neutral-principles traditions. Instead of minimalism or neutral-principles theory alone, this Article defended a blended jurisprudence of principled minimalism.