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## BOOK REVIEW

### THE SUPREME COURT AND JUDICIAL REVIEW: TWO VIEWS

PACKING THE COURT: THE RISE OF JUDICIAL REVIEW AND THE COMING CRISIS OF THE SUPREME COURT. By James MacGregor Burns. New York: Penguin Press. 2009. Pp. 326. \$27.95.

THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION. By Barry Friedman. New York: Farrar, Straus & Giroux. 2009. Pp. 614. \$35.00.

*Reviewed by Thomas A. Schweitzer\**

President Obama caused a stir during his second State of the Union Address in January 2010, when he said the following:

With all due deference to separation of powers, last week, the Supreme Court reversed a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections. I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. They should be decided by the American people. And I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems.<sup>1</sup>

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He was obviously referring to *Citizens United v. Federal Election Commission*,<sup>2</sup> decided only a week earlier, in which the Supreme Court's conservative majority had struck down the McCain-Feingold campaign finance law as unconstitutional. At these remarks, Supreme Court Justice Samuel Alito was observed frowning, shaking his head, and disagreeing with the President under his breath.<sup>3</sup>

Some observers thought it unfair for the President to chastise Justices who were members of a captive audience and precluded by their office from responding in kind.<sup>4</sup> Afterward, Chief Justice Roberts, who was also in attendance and targeted by the President's remarks, suggested that he might absent himself from future State of the Union addresses.<sup>5</sup>

While President Obama's condemnation of a recent Supreme Court decision in his State of the Union speech may have been unprecedented, at least in recent times, this confrontation was only the latest manifestation of a centuries-old conflict between the unelected Judicial Branch and the two other branches of the federal government, the Executive and Legislative branches.<sup>6</sup> The focus of this conflict is the Supreme Court's exercise of its greatest power, the power to strike down a law because it is deemed inconsistent with the Federal Constitution.<sup>7</sup>

Two recent books regarding the history of the Supreme Court have discussed this conflict. *Packing the Court*,<sup>8</sup> by distinguished

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<sup>1</sup> President Barack H. Obama, Address Before a Joint Session of the Congress on the State of the Union (Jan. 27, 2010).

<sup>2</sup> 130 S. Ct. 876 (2010).

<sup>3</sup> Jeff Shesol, *Justices Will Prevail*, N.Y. TIMES, Mar. 14, 2010, at WK10.

<sup>4</sup> *Id.*

<sup>5</sup> Six weeks later, Chief Justice Roberts described the scene at the State of the Union Speech as "very troubling." *Id.* He painted a harrowing picture of "one branch of government standing up, literally surrounding the Supreme Court, cheering and hollering while the Court—according to the requirements of protocol—has to sit there expressionless." *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> As the renowned Constitutional scholar Alexander Bickel pointed out, since judicial review is "counter-majoritarian," it constitutes "a deviant institution in American democracy." BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 259 (2009) [hereinafter FRIEDMAN] (citations omitted). Friedman comments that Bickel's concern is overstated for various reasons, one of which is that the majority will does not necessarily prevail in the modern legislative branch of government. *Id.* at 259-62.

<sup>8</sup> JAMES MACGREGOR BURNS, *PACKING THE COURT: THE RISE OF JUDICIAL REVIEW*

Williams College Professor Emeritus James MacGregor Burns, denounces judicial review and asserts that it has been used more often than not to thwart progress and the will of the majority while protecting the interests of the powerful and the wealthy rather than the interests of the poor and weak in society. In contrast, New York University Professor Barry Friedman, in *The Will of the People*,<sup>9</sup> takes the view that Supreme Court decisions, over time, have tended to mirror the sentiments of the American people.<sup>10</sup> This article assesses the two books and evaluates which account is more persuasive.

### ***PACKING THE COURT BY JAMES MACGREGOR BURNS***

Burns, a ninety-two year-old Political Scientist who has published more than twenty books, has been a critic of the Supreme Court's power for more than seventy years. As a Williams College scholarship student who had welcomed President Franklin Roosevelt's landslide reelection the year before, Burns supported the President's "Court-packing plan" in 1937 and was disappointed when it was rejected.<sup>11</sup> This was one of the major missteps of the Roosevelt Administration, which aroused the opposition of not only Republicans, but also many Democrats because it seemed like a blatant interference with a coordinate branch of the federal government. The plan would have authorized the President to increase the number of Supreme Court Justices gradually.<sup>12</sup> Eventually, this plan would have overcome the conservative majority which had struck down many new federal statutes during Roosevelt's first term.<sup>13</sup>

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AND THE COMING CRISIS OF THE SUPREME COURT (2009) [hereinafter BURNS].

<sup>9</sup> FRIEDMAN, *supra* note 7.

<sup>10</sup> The book's subtitle indicates Friedman's thesis.

<sup>11</sup> BURNS, *supra* note 8, at 1.

<sup>12</sup> The United States Constitution, Article III, Section 1 states, "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST., art. III, § 1. Over time, Congress has changed the number of Justices from as few as four to as many as eleven. The number of Justices has been fixed at nine since 1869. FDR's proposal would have entitled him to add an additional Justice to the Court when a Justice reached the age of 70 without retiring. Just such a plan had been proposed in the 1920s by constitutional scholar Edward Corwin. See FRIEDMAN, *supra* note 7, at 217.

<sup>13</sup> Roosevelt's plan was met with widespread opposition. See BURNS, *supra* note 8, at 145-49, 151. In the end, he withdrew it, but not before changes on the Court (the retirement of Willis Van Devanter and the "switch in time" of Justices Owen Roberts and Charles Evans Hughes) produced a Court more congenial to New Deal legislation. See *id.* at 151-52.

The impetus for FDR's "Court-packing plan," of course, was the long series of New Deal reform measures which had been struck down by the Supreme Court from 1933 to 1937.<sup>14</sup> While the American electorate plainly voted for change in 1932, and emphatically approved FDR's programs in his landslide reelection in 1936, many of the most important reforms were blocked by a phalanx of elderly Justices who had been appointed by FDR's predecessors.<sup>15</sup> Similar frustration at the Supreme Court's resistance to legislative change had motivated earlier efforts in American history to enlarge the Court so as to change its judicial course.<sup>16</sup>

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Both Hughes and Roberts denied that they had yielded to FDR's pressure in what seemed like a major jurisprudential change on their part. *Id.* at 148. Perhaps the most blatant instance of presidential pressure on the Supreme Court to reverse itself occurred in the Legal Tender Cases. In 1869 the Court, with two vacancies, invalidated by a 4-3 vote a federal statute that provided that paper money could be used to pay debts incurred before passage of the act. *See Hepburn v. Griswold*, 75 U.S. 603 (1869). This set off a furor, and President Grant promptly nominated two new Justices, William Strong and Joseph Bradley, whom he had reason to believe would vote differently. After they were confirmed, the Court overruled *Hepburn* a year later in *Knox v. Lee*, 79 U.S. 457 (1870). *See BURNS, supra* note 8, at 93-96.

<sup>14</sup> BURNS, *supra* note 8, at 141-45.

<sup>15</sup> The majority included the elderly "Four Horsemen," Willis Van Devanter, Pierce Butler, Joseph McReynolds, and George Sutherland. *See* Elizabeth C. Price, *Constitutional Fidelity and the Commerce Clause: A Reply to Professor Ackerman*, 48 SYRACUSE L. REV. 139, 161 (1998). They were usually joined by Chief Justice Charles Evans Hughes and Justice Owen Roberts. *See id.*

<sup>16</sup> Congress changed the number of Supreme Court Justices three times during the Civil War and its aftermath. *See* FRIEDMAN, *supra* note 7, at 11. This was part of its conflict with President Andrew Johnson, who was impeached. The Nineteenth Century is full of examples of Congress manipulating the Supreme Court by changing the number of Justices. In the 1801 Judiciary Act, which became law three weeks before Thomas Jefferson became president, the lame-duck Federalist Congress not only created sixteen new circuit judgeships (authorizing the "midnight judges," whom outgoing President John Adams hastily appointed), but also prospectively reduced the number of Supreme Court Justices from six to five to deprive Jefferson of the next appointment. *See* BURNS, *supra* note 8, at 22. Congress created two new Supreme Court seats in 1837 to cement Democratic Party control of the Court. *See* FRIEDMAN, *supra* note 7, at 103-04. In 1863, Congress increased the number of Justices to ten in order to ensure a pro-union majority. *See id.* at 134. After the assassination of President Lincoln in 1865, the Republican Congress reduced the number of Justices from ten to seven in order to deprive his hated successor, Andrew Johnson, of the ability to make appointments. As soon as President Grant took office in 1869, Congress restored the number of Justices to nine. *Id.* FDR, in 1937, evoked this history in order to justify his own plan to authorize additional Justices (although he did not call it a "court-packing" plan). *See* BURNS, *supra* note 8, at 145. The new Republican Congress took a more radical step in 1802 to forestall what it anticipated might be a negative Supreme Court decision on its recently-enacted Repeal Act (which nullified the Circuit Judges Act): it simply cancelled the next term of the Supreme Court and delayed the beginning of the subsequent Term. *See*

Burns states plainly at the outset of his book that the reason that the Supreme Court's power of judicial review is not mentioned in the Constitution is that the Framers did not want a judicial veto in the hands of unelected judges.<sup>17</sup> He concludes that it "is alien to the constitutional design"<sup>18</sup> and has allowed the Supreme Court to "checkmat[e] the popular will[,]"<sup>19</sup> turning the Justices into "lawgivers"<sup>20</sup> and "politicians in robes."<sup>21</sup> Moreover, the fortuitous and anomalous consequences of "America's biggest wheel of fortune" have increased over time.<sup>22</sup> The average tenure of Supreme Court Justices since 1789 has been approximately fifteen years, but it has increased to 26 years since 1970.<sup>23</sup> Thus, the "dead hands" of past presidents can influence government and cases through their long-lived appointees decades after they have been replaced (and perhaps repudiated) by the electorate.<sup>24</sup>

Burns's freewheeling chronological history identifies several periods during which a conservative Court has stymied presidents' programs.<sup>25</sup> President Washington set the Supreme Court on a strong Federalist course when he appointed the original six Justices and later named an additional five to succeed those who retired or died.<sup>26</sup> His successor, one-term President John Adams, appointed three Justices

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FRIEDMAN, *supra* note 7, at 58.

<sup>17</sup> BURNS, *supra* note 8, at 2.

<sup>18</sup> *Id.* at 255.

<sup>19</sup> *Id.* at 257.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.*

<sup>22</sup> BURNS, *supra* note 8, at 4.

<sup>23</sup> *Id.* at 3-4. *See id.* app. at 261-67 (listing Justices and their years of service); RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE & PROCEDURE* § 2.9(c) (4th ed. 2010).

<sup>24</sup> BURNS, *supra* note 8, at 4. *See id.* at 144 (citing FDR's opinion that a constitutional amendment should be used to "lift the Dead Hand"). In the author's opinion, President George W. Bush's appointments of John Roberts and Samuel Alito were master strokes in the decades-long effort by Republican presidents to make the Supreme Court more conservative. *See id.* at 239; Adam Liptak, *The Roberts Court; The Most Conservative in Decades*, N.Y. TIMES, July 25, 2010, at A1. Because of the nominees' intellectual brilliance, legal acumen, and outstanding credentials, liberal Democrats were unable to challenge their qualifications to join the Court. *See id.* Furthermore, they satisfied two essential attributes for Republican nominees: They were both extremely conservative and relatively young. *See* David D. Kirkpatrick, *In Alito, G.O.P. Reaps Harvest Planted in '82*, N.Y. TIMES, Jan. 30, 2006, at A1.

<sup>25</sup> *See* BURNS, *supra* note 8, *Contents* (organizing its analysis chronologically).

<sup>26</sup> *Id.* app. at 261.

of similar views.<sup>27</sup> Thus, the first two presidents got to appoint a total of fourteen Justices in twelve years while the following three Republican presidents, the Virginians Jefferson, Madison, and Monroe, only got to appoint half as many (seven) during a period more than twice as long (1801-1825).<sup>28</sup> Setting a pattern which persists today, the Washington and Adams appointees felt no need to retire from the Court just because their preferred presidential candidate had been defeated.<sup>29</sup> Instead, they clung to power and charted an independent course, frequently differing from the preferences of the new administration.<sup>30</sup>

John Adams's rush to appoint "midnight judges" at the end of his administration led to the momentous tenure of John Marshall, whose brilliant decision in *Marbury v. Madison*<sup>31</sup> affirmed judicial review and set the stage for the more than two-century-long controversy which it engendered.<sup>32</sup> In important decisions like *Fletcher v. Peck*,<sup>33</sup> *Martin v. Hunter's Lessee*,<sup>34</sup> and *M'Culloch v. Maryland*,<sup>35</sup> Marshall promoted the sanctity of contracts and affirmed the primacy of the national government over the state governments and state courts.<sup>36</sup>

As the Nineteenth Century progressed, the controversy over slavery increasingly came to dominate U.S. politics.<sup>37</sup> The abolitionist movement grew in strength, Northern states abolished slavery, and the South feared for the survival of the institution.<sup>38</sup> The political conflict focused on whether slavery would be preserved in the western territories as they entered the Union as states, and both the 1820 Compromise and the 1854 Kansas-Nebraska Act were attempts to

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 34.

<sup>29</sup> *Id.* (noting that "Justices [appointed by Washington and Adams] clung to their seats, even as health or finances failed," preventing the succeeding presidents from appointing new Justices).

<sup>30</sup> See BURNS, *supra* note 8, at 34-37 (discussing Chief Justice Marshall's dominant influence over even Republican appointees).

<sup>31</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>32</sup> *Id.* at 177-78.

<sup>33</sup> 10 U.S. (6 Cranch) 87 (1810).

<sup>34</sup> 14 U.S. (1 Wheat.) 304 (1816).

<sup>35</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>36</sup> See *Fletcher*, 10 U.S. at 136; *Martin*, 14 U.S. at 341; *M'Culloch*, 17 U.S. at 420-21.

<sup>37</sup> BURNS, *supra* note 8, at 50-51.

<sup>38</sup> *Id.*

smooth over a national conflict over the issue.<sup>39</sup>

In what was perhaps the Court's most disastrous decision in history, Chief Justice Roger Taney's Supreme Court evidently thought it was putting the issue of slavery to rest when it issued the *Dred Scott* decision in 1857.<sup>40</sup> The result, instead, was to exacerbate regional conflict and to hasten the onset of the Civil War.<sup>41</sup> Abraham Lincoln's election led to the breaking point with the secession of the Confederate States and the outbreak of armed conflict in 1861.<sup>42</sup> During the conflict, President Lincoln suspended the writ of habeas corpus and authorized the roundup of tens of thousands of suspected Confederate sympathizers—steps which were not authorized by the Constitution.<sup>43</sup> When Chief Justice Taney ordered the release from prison of Maryland secessionist John Merryman, Lincoln ignored the order and the Court was left powerless to enforce its will.<sup>44</sup>

After the Union victory in 1865, passage of the Thirteenth, Fourteenth and Fifteenth Amendments promised to protect the rights and interests of the freedmen.<sup>45</sup> However, in the succeeding decades, a conservative Court disappointed supporters of civil rights by giving a crabbed interpretation of the Privileges or Immunities Clause in the *Slaughter-House Cases*.<sup>46</sup> As part of the deal which was made to settle the disputed presidential election of 1876, the Republican Party agreed to withdraw federal troops from the states of the former Confederacy.<sup>47</sup> A sea change occurred as the federal government gradually turned its back on Reconstruction, "Jim Crow" laws were passed, and the former slaveholders consolidated their control over southern state governments.<sup>48</sup> A decade later, the Court minimized the scope of the Fourteenth Amendment when it struck down the 1875 Civil Rights Act, which had outlawed discrimination in public accommo-

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<sup>39</sup> *Id.* at 50, 56.

<sup>40</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. See BURNS, *supra* note 8, at 56.

<sup>41</sup> BURNS, *supra* note 8, at 56, 61-62.

<sup>42</sup> *Id.* at 64.

<sup>43</sup> *Id.* at 65.

<sup>44</sup> *Id.* (noting that Justice Taney had "only the Constitution in his arsenal" and that any order to "haul the commander into court . . . would have been repelled by the army").

<sup>45</sup> *Id.* at 81-83.

<sup>46</sup> 83 U.S. (16 Wall.) 36, 77 (1872). See BURNS, *supra* note 8, at 86-87.

<sup>47</sup> BURNS, *supra* note 8, at 91.

<sup>48</sup> *Id.*

dations like inns, coaches, and theaters.<sup>49</sup> The gravamen of Justice Bradley's decision, which ignored Congress's clear intent to protect the freedmen against white-dominated southern governments, was that only actions by states were forbidden by the Fourteenth Amendment and not the acts of private businessmen.<sup>50</sup>

For the next six decades, the Court tended to protect property rights and big business while showing little concern for the interests of the poor and underprivileged in society.<sup>51</sup> The Court supported federal power and the interests of interstate railroads by striking down state governments' attempts to regulate freight rates as violations of the Interstate Commerce Clause.<sup>52</sup> Under the banner of "substantive due process," the Court also struck down various legislative efforts by state governments to protect workers.<sup>53</sup>

During the next three decades, state legislatures chafed when their legislative efforts to protect the welfare of workers were invalidated by the Court.<sup>54</sup> Matters came to a head in the Franklin Roosevelt Administration, when from 1933 to 1937, the Court struck down numerous New Deal laws on substantive due process grounds and li-

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<sup>49</sup> An Act to Protect All Citizens in Their Civil and Legal Rights, ch. 114, 18 Stat. 335 (1875), reviewed by *The Civil Rights Cases*, 109 U.S. 3, 8, 25 (1883). See BURNS, *supra* note 8, at 89-90.

<sup>50</sup> *The Civil Rights Cases*, 109 U.S. at 25. See BURNS, *supra* note 8, at 89-90. The Court administered its third major rebuff to black civil rights plaintiffs in *Plessy v. Ferguson*, which upheld the constitutionality of racial segregation in railroad cars and was used to justify racially segregated schools until it was overruled by *Brown v. Board of Education*. 163 U.S. 537 (1896); 347 U.S. 483 (1954). See BURNS, *supra* note 8, at 112, 183-84.

<sup>51</sup> BURNS, *supra* note 8, at 99. In 1886, the Court handed a major gift to corporations when it held that a corporation was a "person" within the meaning of the Fourteenth Amendment which could sue to protect due process and equal protection rights. *Cnty. of Santa Clara v. S. Pac. R. Co.*, 118 U.S. 394 (1886). See FRIEDMAN, *supra* note 7, at 163. Remarkably, the Court brought about this great expansion of corporations' constitutional rights without hearing any argument on the question: "The Chief Justice waved off counsel, telling them the [J]ustices were already decided on the issue. 'The Court does not wish to hear argument on the question' of whether the Fourteenth Amendment covers corporations, he said. 'We are all of opinion that it does.'" *Id.* (citation omitted). Perhaps this should not have been surprising, coming from a Court comprised principally of former corporate lawyers. See BURNS, *supra* note 8, at 107.

<sup>52</sup> See, e.g., *Wabash St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 563 (1886) (citing U.S. CONST. art. I, § 8, cl. 3); see also BURNS, *supra* note 8, at 107.

<sup>53</sup> The classic case was *Lochner v. New York*, in which the Court held unconstitutional a New York law limiting the work week of employees in the hazardous baking business to sixty hours, on the grounds that this violated their freedom of contract protected by the Due Process Clause. 198 U.S. 45, 61 (1905).

<sup>54</sup> BURNS, *supra* note 8, at 133.



mitted federal powers.<sup>55</sup> When the conservative majority continued in this course after FDR's blockbuster reelection in 1936,<sup>56</sup> the exasperated President reacted with his "Court-packing plan."<sup>57</sup> While the "Court-packing plan" ultimately failed, it was largely rendered unnecessary by a dramatic shift in the Court in 1937 which led to more New Deal statutes being upheld.<sup>58</sup> During the 1940s and 1950s, the Supreme Court was no longer much of a brake on Congress in large part because FDR eventually was able to appoint nine Justices, thus transforming the Court.<sup>59</sup>

The one period in Supreme Court history which receives Professor Burns's unqualified approval is the Warren Court. Burns gives Chief Justice Warren credit for the Court's success in stating, "By making the Supreme Court a center of progressive reform, Warren would forge a luminous exception to the [C]ourt's historic role as the bulwark of anti-democratic, anti-egalitarian conservatism."<sup>60</sup> Under Warren's leadership, the Court ventured into such controversial areas as racial equality, civil liberties, criminal defendants' rights, and voting power.<sup>61</sup> For once, the Supreme Court, rather than acting as a drag on progressive forces, was actually taking a leadership role in protecting individual rights and liberties. "For the first time, the Supreme Court was in the vanguard of change . . . ."<sup>62</sup>

Conservatives, however, were angered rather than enthusiastic

<sup>55</sup> *Id.* at 139-45.

<sup>56</sup> President Roosevelt was reelected with over 60% of the popular vote, carrying all the states except for Maine and Vermont. See H.W. Brands, *Obama Could Take a History Lesson from FDR's 1936 Re-Election*, WASH. POST, Nov. 4, 2010.

<sup>57</sup> BURNS, *supra* note 8, at 145.

<sup>58</sup> Chief Justice Hughes and Justice Roberts voted to uphold federal statutes which were quite similar to others they had recently voted to invalidate. See David N. Mayer, *The Myth of "Laissez-Faire Constitutionalism": Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L.Q. 217, 280 (2009) (citing *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (upholding a minimum wage law)); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act); *NLRB v. Friedman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937) (upholding the National Labor Relations Act in regard to a small manufacturer); *Associated Press v. NLRB*, 301 U.S. 103 (1937) (upholding the National Labor Relations Act in regard to newspapers and press associations); *Chas. C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (upholding the Social Security Act's unemployment excise tax for employers); *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding provisions in the Social Security Act for taxes and benefits for the elderly).

<sup>59</sup> BURNS, *supra* note 8, at 157.

<sup>60</sup> *Id.* at 180.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 194.

about many of the Warren Court's progressive and sometimes radical decisions.<sup>63</sup> The Court was the target of furious criticism and "Impeach Earl Warren" signs sprouted on highways in conservative parts of the country.<sup>64</sup> Other than Samuel Chase, no Supreme Court Justice has ever been impeached, and the campaign to impeach Warren did not succeed.<sup>65</sup> It did, however, produce a determination on the part of Republicans and conservatives to move the Court to the right.<sup>66</sup>

In the last few decades, the campaign to make the Court more conservative by Republican presidents from Nixon to George W. Bush has borne fruit. As Justice Stevens observed as he left the Court in 2010, every new Justice appointed since 1974, the date of Stevens's appointment, had been at least as conservative, if not more so, than his or her predecessor.<sup>67</sup> This is largely due to the fact that the presidency was held by Republicans for twenty-eight of the forty years following 1968, and no Justice was appointed by a Democratic president from 1968 to 1993.<sup>68</sup>

Conservatives were frustrated and disappointed when the Burger Supreme Court did not overturn precedents established by the previous Warren Court, but merely stopped the movement to the left.<sup>69</sup> This was due in part to the effective rearguard action of liberal Justices like William Brennan and John Paul Stevens, and in part to Republican presidents' nominees like Sandra Day O'Connor, David Souter, and Anthony Kennedy manifesting unwelcome moderation.<sup>70</sup> The conservative makeover of the Court finally reached real traction with the appointment of Samuel Alito in 2006 to succeed Sandra Day

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<sup>63</sup> *Id.* at 193.

<sup>64</sup> BURNS, *supra* note 8, at 193.

<sup>65</sup> The impeachment trial of the "rabidly partisan" Federalist Justice Samuel Chase, in 1805, was mishandled by Senate Republicans, and he was not convicted of any of the charges against him. BURNS, *supra* note 8, at 33-34.

<sup>66</sup> *Id.* at 201-02.

<sup>67</sup> Adam Liptak, *From Age of Independence to Age of Ideology*, N.Y. TIMES, Apr. 10, 2010, at A1.

<sup>68</sup> Jimmy Carter was the only president to serve a full term without the opportunity to appoint a single Supreme Court Justice. BURNS, *supra* note 8, at 211.

<sup>69</sup> *Id.* at 207.

<sup>70</sup> The paramount objective of most conservatives was the overruling of *Roe v. Wade*, which held that abortion was a constitutional right. 410 U.S. 113 (1973). These three Justices, appointed by Republican presidents Reagan and George H. W. Bush, dashed the hopes of the pro-life movement when they concurred in reaffirming the central holding of *Roe*, albeit with modifications, in *Planned Parenthood v. Casey*. 505 U.S. 833 (1992).

O'Connor.<sup>71</sup> The resulting Roberts Court has been aggressive in striking down federal statutes as unconstitutional, mimicking the Court during FDR's first term.<sup>72</sup> According to Professor Burns, during the last two decades the Court has quietly brought about a counter-revolution in the law.<sup>73</sup> He states:

Over the previous two decades, the [J]ustices had undertaken a remarkable but little-noticed transformation in their rulings on economic issues, a slow reversal of the "constitutional revolution" of 1937, when the [C]ourt had abruptly and at long last acknowledged the authority of the elected branches of government to regulate the economy. Through a widening stream of pro-business decisions in such areas as environmental regulation, equal pay and union rights, health care and retirement benefits, and a host of others, the Supreme Court stripped power from the political branches and from consumers and workers and shareholders to hold corporations and their executives to account. The [C]ourt joined the elite, turn-of-century consensus that trumpeted the virtues of the free market and dog-eat-dog competition whose benefits supposedly would trickle down to hard-pressed working men and women

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<sup>71</sup> The appointment of Chief Justice John Roberts, his former clerk, to succeed Chief Justice William Rehnquist, did not alter the conservative-liberal balance, since both were quite conservative. BURNS, *supra* note 8, at 235.

<sup>72</sup> A new constitutional crisis could eventuate if, as now seems certain, the Supreme Court agrees to decide the constitutionality of the health insurance law enacted by Congress in March 2010 without a single Republican vote. As this journal went to press, four federal district courts had ruled on the statute, whose constitutionality has been challenged in court by more than twenty states. Two of them have upheld its constitutionality. *See* Liberty Univ., Inc. v. Geithner, No. 6:10-cv-00015-nkm, 2010 WL 4860299, at \*14 (W.D. Va. Nov. 30, 2010) (holding that the bill was within Congress's Commerce Clause power); Thomas More Law Ctr. v. Obama, 720 F. Supp. 2d 882, 894-95 (E.D. Mich. 2010) (upholding the law). Two have held it unconstitutional. *See* Florida v. U.S. Dep't of Health and Human Servs., No. 3:10-cv-91-RV/EMT, 2011 WL 285683, at \*22 (N.D. Fla. Jan. 31, 2011) (holding the entire statute unconstitutional) ("It would be a radical departure from existing law to hold that Congress can regulate inactivity under the Commerce Clause."); Virginia *ex rel.* Cuccinelli v. Sebelius, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010) (holding the mandate that everyone purchase medical insurance unconstitutional but severable from the rest of the statute). There is a real possibility that the five-vote conservative majority on the Supreme Court will strike down the health insurance law. *See* Shesol, *supra* note 3.

<sup>73</sup> BURNS, *supra* note 8, at 249.

and impoverished families.<sup>74</sup>

To summarize Professor Burns's view, throughout history, the Supreme Court majority has often acted as a brake on progress. Numerous Justices have regarded their principal role to be to check the excesses of the people's elected representatives. Others originally deemed progressive have become increasingly conservative after being appointed to the Court. This situation becomes all the more anomalous when Justices cling to their seats for two or three decades, imposing their will on the nation's laws long after the end of the administration of the president who appointed them.

Burns acknowledges that "Americans have also regarded the Supreme Court as the ultimate guardian of their civil rights and liberties, and the defender of individuals against government oppression, of powerless minorities against majorities. That image . . . owes much to the leadership of . . . Earl Warren."<sup>75</sup> Yet, while "[t]he idea of the [C]ourt as friend to the weak and the powerless lingers[,]"<sup>76</sup> Burns contends that the historical reality has often been quite different:

Yet, as we have seen, for much of its history, the Supreme Court has more often been indifferent to the wants and needs of the great majority of Americans. It has wielded its supremacy over the Constitution to deny them economic and political power. Too often, the [C]ourt has been fighting history.<sup>77</sup>

And given the current right-wing majority and Burns's bleak view of the Supreme Court's historical record of blocking progress, with the notable exception of the Warren Court, this pattern is likely to continue in the future.<sup>78</sup>

What, if anything, can be done about this anti-democratic state of affairs? Burns notes that Roosevelt's "Court-packing plan" was only the latest of numerous attempts by earlier presidents to curb

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<sup>74</sup> *Id.* at 249-50.

<sup>75</sup> *Id.* at 251.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> "Americans cannot look to the judicial branch for leadership. They cannot expect leadership from unelected and unaccountable politicians in robes." BURNS, *supra* note 8, at 252.

the Court's power.<sup>79</sup> All failed, because they never mobilized a large number of Americans, and amending the Constitution is a daunting task. Burns makes a radical proposal—that the president simply defy the Court. He states:

Confronted by a hostile [C]ourt repeatedly striking down vital progressive legislation, a president could declare that there is no place in a modern democracy for unelected judges to veto twenty-first-century laws. The president would announce flatly that he or she would not accept the Supreme Court's verdicts because the power of judicial emasculation of legislation was not—and never had been—in the Constitution. The president would invite the partisans of judicial supremacy to try to write that authority into the Constitution by proposing a constitutional amendment. Through their representatives in Congress and the state legislatures, the American people would be given the choice denied them in 1803; *to establish in the Constitution the power of judicial supremacy, or to reject that power*. Only by this route could judicial rule be legitimated, 'constitutionalized.' In the meantime, until the matter was settled, the president would faithfully execute the laws the Supreme Court had unconstitutionally vetoed.<sup>80</sup>

As Burns recognizes, such a bold move by a president would no doubt provoke a severe constitutional crisis.<sup>81</sup> It seems certain that no president would dare risk such defiance of the Court. Nevertheless, Burns believes that a determined president could ultimately carry this off, so that as in Britain,<sup>82</sup> elected government officials

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<sup>79</sup> *Id.* at 252.

<sup>80</sup> *Id.* at 253.

<sup>81</sup> *Id.*

<sup>82</sup> In the past, Britain had no entity comparable to the United States Supreme Court. *Id.* at 256. It does have an "unwritten constitution," which imposes limits Parliament is obliged to observe. BURNS, *supra* note 8, at 256. However, when Parliament passes a law, it is deemed constitutional. *Id.* The British government recently created a "supreme court" for the first time. See Dominic Casciani, *Inside the UK Supreme Court*, BBC NEWS, July 15, 2009, available at [http://news.bbc.co.uk/2/hi/uk\\_news/8152427.stm](http://news.bbc.co.uk/2/hi/uk_news/8152427.stm) (last visited Feb. 1, 2011).

would have to define and protect the people's interests.<sup>83</sup> He postulates that if supporters of judicial review were unable to get a constitutional amendment authorizing its ratification, "the Supreme Court's exclusive grip on constitutional interpretation would be broken[;]"<sup>84</sup> the Court would be "[s]horn of its supremacy."<sup>85</sup> Burns's support for such a radical course is undergirded by "the fact that the Constitution never granted the judiciary a supremacy over the government, nor had the Framers ever conceived it."<sup>86</sup>

### ***THE WILL OF THE PEOPLE* BY BARRY FRIEDMAN**

*The Will of the People*, by New York University Law Professor Barry Friedman, is an in-depth and magisterial history of the Supreme Court armored with 202 pages of endnotes.<sup>87</sup> Like Burns, Friedman introduces the subject by describing the conflict between FDR and the Hughes Supreme Court leading up to the 1937 crisis.<sup>88</sup> The book covers in exhaustive detail the Court's exercise of judicial review over its lifetime, beginning with what he regards as its antecedents in the colonial period.<sup>89</sup>

Friedman takes a much more favorable view of the Supreme Court and its decisions than Burns. While he sometimes is critical of its decisions,<sup>90</sup> his views on both the theory and practice of judicial

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<sup>83</sup> BURNS, *supra* note 8, at 254-55.

<sup>84</sup> *Id.* at 254.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 253. Burns quotes the sardonic observation of the noted constitutional scholar, Edward S. Corwin, during "FDR's battle with the Hughes Court," about the "miracle" that "supposes a kind of transubstantiation whereby the Court's opinion of the Constitution . . . becomes the very body and blood of the Constitution." See *id.* at 255 (quoting EDWARD S. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT 68 (1938) (internal quotation marks omitted). More recent Supreme Courts, of course, have been no less outspoken in proclaiming their continued prerogative and power of judicial review. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 516, 535-36 (1997); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

<sup>87</sup> See FRIEDMAN, *supra* note 7. The voluminous quantity of references probably explains why the publishers did not put them at the foot of each page, where they might overwhelm the text. However, this makes the book less user-friendly, as does the small print used throughout the book.

<sup>88</sup> *Id.* at 3-4.

<sup>89</sup> *Id.* at 20-22 (discussing English influences during the colonial and early Revolutionary periods).

<sup>90</sup> He is especially caustic about the Court during Reconstruction, charging it with "abandoning blacks and embracing corporations," although he assumes that many whites probably

review are quite positive. He appears to regard the Supreme Court as engaged in a kind of dialogue with the American people in which over time, the Court's decisions tend to respond to, and reflect, the views of the public. While acknowledging that the Court in the modern era exercises more power than in the past, he states:

The Court has this power only because, over time, the American people have decided to cede it to the [J]ustices. The grant of power is conditional and could be withdrawn at any time. . . . The [J]ustices recognize the fragility of their position, occasionally they allude to it, and for the most part (though, of course, not entirely) their decisions hew rather closely to the mainstream of popular judgment about the meaning of the Constitution. It is hardly the case that every Supreme Court decision mirrors the popular will—and even less so that it should. Rather, over time, as Americans have the opportunity to think through constitutional issues, Supreme Court decisions tend to converge with the considered judgment of the American people.<sup>91</sup>

Thus, in the rejection of FDR's "Court-packing plan," Friedman believes the American people struck a bargain with the Court which has come to define the modern era:

They would support the exercise of judicial review so that the Court could do precisely what its New Deal defenders said it would—specify and enforce constitutional liberties—but they would offer this support only so long as the Court's decisions did not stray far, and for long, from the heart of what the public understood

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welcomed what he calls the "dismantling" of Reconstruction. *Id.* at 138. In contrast, he asserts, "The decisions in favor of business and property rights, on the other hand, were the product of a deliberate effort by the country's rulers to pander to the captains of industry." *Id.* This pro-business bias continued, moreover, in the 1880s: "For all of the Supreme Court's Reconstruction Era rhetoric about the importance of preserving the federal-state balance, in the years following Garfield's ascension to the presidency the [J]ustices went on a binge of striking down state laws to protect corporate interests and property rights." FRIEDMAN, *supra* note 7, at 160 (citing 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 347 (1922)).

<sup>91</sup> *Id.* at 14.

the Constitution to mean. And this, to a remarkable extent, is what has happened. On issue after contentious issue—abortion, affirmative action, gay rights, and the death penalty, to name a few—the Supreme Court has rendered decisions that meet with popular approval and find support in the latest Gallup Poll.<sup>92</sup>

Friedman traces the antecedents of judicial review back to Seventeenth Century England.<sup>93</sup> While William Blackstone<sup>94</sup> asserted that Parliament possessed virtually unlimited power to make laws,<sup>95</sup> Lord Chief Justice Sir Edward Coke had exercised a power closely resembling judicial review in *Dr. Bonham's Case* in 1610.<sup>96</sup> The Royal College of Physicians, acting pursuant to power conferred on it by Parliament, fined and imprisoned Dr. Thomas Bonham for practicing medicine without a license.<sup>97</sup> Since the College received the fine, Lord Coke ruled in favor of Dr. Bonham on the grounds that the law violated the basic principle that no one should be a judge in his own case.<sup>98</sup> Coke asserted, “When an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul<sup>99</sup> it, and adjudge such Act to be void.”<sup>100</sup>

Judicial review, however, is a homegrown American product. According to Friedman, “This extraordinary power was a rather uni-

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 20-22.

<sup>94</sup> Blackstone published his four volumes of *Commentaries on the Laws of England (1765-1769)* (“*Commentaries*”). It was the law book which American lawyers were most likely to possess at the time of the Revolution, and it greatly influenced their understanding of English common law. DANIEL BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 3 (1941); DAVID A. LOCKMILLER, *SIR WILLIAM BLACKSTONE* 170 (1938).

<sup>95</sup> Describing Parliament’s vast power, Blackstone asserted that it “can . . . do everything that is not naturally impossible.” FRIEDMAN, *supra* note 7, at 21 (quoting *Commentaries*, *supra* note 94, at 156 (internal quotation marks omitted)).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> (Thus in the original.)

<sup>100</sup> FRIEDMAN, *supra* note 7, at 21 (quoting *Dr. Bonham's Case*, [1610] 77 Eng. Rep. 646, 652 (K.B.)). Britain, of course, did not have a written constitution then, nor does it have one now. *Does Britain Have a Written Constitution?*, BRIT. EMBASSY WASH., <http://ukinusa.fco.gov.uk/en/about-us/faqs/uk-government/written-constitution/> (last visited Jan. 13, 2011). Apparently, Lord Coke regarded the common law as a source of similar limits on government power and actions. See FRIEDMAN, *supra* note 7, at 21.



quely American innovation, emerging without plan or design in the period prior to the Constitutional Convention as a means of checking the excesses of democracy.”<sup>101</sup> Friedman persuasively demonstrates that the power of the courts to strike down laws as unconstitutional was widely recognized in America long before *Marbury*.<sup>102</sup> One source of the concept was widespread disgust at legislation enacted by the states during and after the Revolution.<sup>103</sup> Noah Webster decried “[s]o many legal infractions of sacred right—so many public invasions of private property—so many wanton abuses of legislative powers!”<sup>104</sup> Leading New Hampshire politician William Plumer lamented in 1787 that “[o]ur liberties, our rights & property have become the sport of ignorant unprincipled State legislators!”<sup>105</sup> Further, North Carolina Attorney General James Iredell, later to become a Supreme Court Justice, labeled his state legislature’s work product “the vilest collection of trash ever formed by a legislative body.”<sup>106</sup> James Madison’s notes on the “Vices of the Political System of the United States,” which he wrote on the eve of the Constitutional Convention, listed as “evils” “the multiplicity of laws, from which no State is exempt.”<sup>107</sup>

<sup>101</sup> FRIEDMAN, *supra* note 7, at 5.

<sup>102</sup> *See id.* at 27-31; *see also* BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 3-4 (1993) (discussing judicial review proclaimed by Chief Justice Coke in 1608). This thesis is shared by Lawrence Joseph Perrone. *See* Lawrence Joseph Perrone, *The Fundamental and Natural Law ‘Repugnant Review’ Origins of Judicial Review: A Synergy of Early English Corporate Law with Notions of Fundamental and Natural Law*, 23 BYU J. PUB. L. 61, 70 (2008).

<sup>103</sup> FRIEDMAN, *supra* note 7, at 20.

<sup>104</sup> *Id.* at 23 (emphasis omitted) (internal quotation marks omitted) (citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 411 (1969)).

<sup>105</sup> FRIEDMAN, *supra* note 7, at 24 (internal quotation marks omitted) (citing Letter from William Plumer to Daniel Tilton (Dec. 16, 1787)) (quoted in Timothy A. Lawrie, *Interpretation and Authority: Separation of Powers and the Judiciary’s Battle for Independence in New Hampshire, 1786-1818*, 39 AM. J. LEGAL HIST. 310, 318 (1995)).

<sup>106</sup> FRIEDMAN, *supra* note 7, at 24 (internal quotation marks omitted) (citing Letter from James Iredell to Hannah Iredell (May 18, 1780), in 1 GRIFFITH J. MCREE, LIFE AND CORRESPONDENCE OF JAMES IREDELL 446 (1857)).

<sup>107</sup> FRIEDMAN, *supra* note 7, at 23. Many of the Framers, of course, far from being democrats, feared that rule by the majority would threaten property rights. For instance, Virginia Governor Edmund Randolph told delegates to the Constitutional Convention in Philadelphia in 1787 that “[o]ur chief danger arises from the democratic parts of our Constitutions. . . . None of the Constitutions have provided sufficient checks against the democracy.” *Id.* at 24 (alteration in original) (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 26-27 (1911)) (internal quotation marks omitted). Property-owning qualifications for voting remained universal in the early United States.

What these leaders regarded as democratic excesses, however, was often enthusiastically supported by the electorate.<sup>108</sup> Thus, the only realistic means of challenging legislative actions was not in subsequent elections, but rather in the courts. Friedman claims that in twenty state cases in the fifteen years following ratification of the Constitution, “at least one judge wrote a decision relying on the power to strike down legislation as unconstitutional.”<sup>109</sup> Blackstone recognized two sources of court powers to impose checks on legislatures, which resembled judicial review: the duty to resolve conflicts between two statutes or between two rules of law and the necessity that inferior courts conform to the holdings of higher courts.<sup>110</sup>

Another reason why Americans might have found judicial review congenial was their resentment at what they regarded as tyrannical measures by Parliament,<sup>111</sup> which had led to the Revolution. The colonists justified resistance to these measures by claiming that they violated the constitution or higher law,<sup>112</sup> and these were obviously questions for the courts to decide. Thus, while state supreme court decisions in the 1780s invalidating state laws on constitutional grounds naturally provoked howls of protest from legislatures and sometimes from the citizens, Friedman observes that the latter generally acquiesced in the results.<sup>113</sup>

At the Constitutional Convention in Philadelphia in 1787, another rationale for judicial review surfaced: a coherent and workable national government could not be formed unless its laws ultimately would take precedence over the laws of the states in cases of conflict.<sup>114</sup> The Framers met this need by including the Supremacy Clause<sup>115</sup> in the Constitution. Since conflicts between state and federal laws would inevitably arise, it was obviously necessary under the Supremacy Clause for the Supreme Court, and other federal courts, to

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<sup>108</sup> See FRIEDMAN, *supra* note 7, at 24-25.

<sup>109</sup> *Id.* at 41 (citing William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 497 (2005)).

<sup>110</sup> FRIEDMAN, *supra* note 7, at 25.

<sup>111</sup> For example, the use of writs of assistance by British soldiers searching for customs law violations, the Stamp Act of 1765, and the tax on tea. *Id.* at 27-28.

<sup>112</sup> For instance, the Preamble of The Declaration of Independence invokes “the Laws of Nature and of Nature’s God.” THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

<sup>113</sup> See FRIEDMAN, *supra* note 7, at 31-33.

<sup>114</sup> *Id.* at 34.

<sup>115</sup> U.S. CONST. art. VI, cl. 2.

have the power to resolve them.<sup>116</sup> The power to declare an act of Congress unconstitutional was not as clearly authorized by the Constitution, but in 1800, three years before *Marbury*, Justice Samuel Chase asserted that the existence of this power was generally accepted by the bar and judges.<sup>117</sup> Friedman also argues that the First Congress anticipated judicial review when it enacted the Judiciary Act of 1789, which gave the Supreme Court the power to review both state and federal statutes.<sup>118</sup>

Thus, it appears that Professor Friedman has conclusively demonstrated the existence of a strong body of opinion endorsing judicial review in America during the last three decades of the Eighteenth Century. Friedman concedes that this opinion was not un-animously held, and he describes the hostile reaction of some state legislatures to its exercise.<sup>119</sup> Nevertheless, the prevalent opinion among the legal community, even before *Marbury*, appears to have been that judicial review was necessary as a check on abuses by state legislatures.

As noted above,<sup>120</sup> James MacGregor Burns raised the question of whether the Framers wanted the Supreme Court to have the power of judicial review and answered it in the negative, asserting that they were “meticulous men” who would not have omitted the subject from the Constitution through inadvertence.<sup>121</sup> He concludes, “The Framers did not include a judicial veto in the Constitution because they did not want it. They would not grant that supremacy over the elected branches to a nonelected judiciary.”<sup>122</sup> He clearly implies that judicial review would not have existed except for John Mar-

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<sup>116</sup> FRIEDMAN, *supra* note 7, at 35.

<sup>117</sup> *Id.* at 43.

<sup>118</sup> *Id.* at 42.

<sup>119</sup> For example, the Rhode Island Supreme Court in *Trevett v. Weeden* struck down a state law requiring businessmen to accept paper money. *Id.* at 32-33. While many merchants applauded this result, the angry legislature demanded that the judges appear before it and explain their decision. *Id.* After a two-month delay, the Justices finally appeared but refused to comment on the case, asserting that “they were accountable only to God and their consciences.” FRIEDMAN, *supra* note 7, at 32. After the Attorney General supported the judges’ position, the assembly relented and released them. *Id.* at 32. There was no written opinion in the case, which is described in James M. Varnum, *The Case, Trevett Against Weeden* (Providence, John Carter 1787).

<sup>120</sup> See *supra* text accompanying notes 17-21.

<sup>121</sup> BURNS, *supra* note 8, at 2.

<sup>122</sup> *Id.*

shall's "brilliant political coup" in the *Marbury* decision.<sup>123</sup> However, even if Burns is correct about the Framers, his account seems to ignore the origins of judicial review prior to *Marbury* and thus presents an incomplete historical picture.<sup>124</sup>

Friedman divides the history of the United States Supreme Court into four main periods.<sup>125</sup> During the first period, which he dates from the time of independence through the first decade of the Nineteenth Century, judicial review was widely accepted, but the Court was directly involved in the bitter warfare between the new Federalist and Republican political parties.<sup>126</sup> During the 1790s, Federalist judges engaged in open political partisanship when prosecuting Republicans under the Alien and Sedition Acts.<sup>127</sup>

After John Adams's defeat for reelection in 1800, the lame-duck Federalist Congress angered the Republicans by passing the Circuit Judges Act.<sup>128</sup> The statute established sixteen new federal judgeships, which outgoing President John Adams filled with Federalist nominees before Thomas Jefferson took office.<sup>129</sup> A second statute established forty-two Justice of the Peace positions for the District of Columbia, and Federalist William Marbury received one of these appointments.<sup>130</sup>

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<sup>123</sup> *Id.* Friedman, on the other hand, states: "Despite the fame Marshall's opinion in *Marbury* later achieved, nothing he said on the subject of judicial review was new." FRIEDMAN, *supra* note 7, at 62-63. Friedman acknowledges that *Marbury* represented the first instance in which the entire Supreme Court had declared outright that it could fail to follow an act of Congress, but he maintains that others like Iredell and Hamilton had said the same thing years earlier. *Id.*

<sup>124</sup> See SCHWARTZ, *supra* note 102, at 3-4.

<sup>125</sup> FRIEDMAN, *supra* note 7, at 12.

<sup>126</sup> The Constitution makes no mention of political parties, and evidently the Framers believed that the new federal government could function without them. After President George Washington left office in 1797, however, the opposing political factions in the country coalesced into the Federalists and the Republicans. *Id.* at 46.

<sup>127</sup> *Id.* at 46-50. Justice Samuel Chase was an intensely partisan Federalist. After he delivered what Friedman calls "a highly incendiary political grand jury charge" in Baltimore, the House of Representatives voted articles of impeachment against him in March 1804. *Id.* at 64-65. After a trial in February 1805, he was acquitted, and no other United States Supreme Court Justice has ever been impeached. *Id.* at 66-71.

<sup>128</sup> FRIEDMAN, *supra* note 7, at 49.

<sup>129</sup> *Id.*

<sup>130</sup> See *id.* at 48-50. The second statute also created a new court for the District of Columbia with three judgeships: one went to John Adams's nephew and a second went to John Marshall's brother, James. BURNS, *supra* note 8, at 22. James Marshall later served as a key witness for Marbury at the trial of *Marbury*; thus, it could be argued that Chief Justice Marshall should have recused himself in the case. Curiously, the federal reporter, Cranch, was

On March 4, 1801, Thomas Jefferson's distant cousin and political adversary, newly-confirmed Chief Justice John Marshall,<sup>131</sup> administered the oath of office to him in an awkward ceremony followed by Jefferson's conciliatory inaugural address.<sup>132</sup> The conciliatory mood quickly evaporated, however, as the Republicans tried to repeal the Circuit Judges Act and the Supreme Court issued an order to Secretary of State James Madison to show cause as to why he should not deliver a commission to newly-appointed Federalist Justice of the Peace William Marbury.<sup>133</sup>

Two years later, the Supreme Court decided *Marbury*, undoubtedly its most important decision ever because it proclaimed the Court's power of judicial review.<sup>134</sup> Those interested in the outcome might not have appreciated the importance of this power, which would not be used to strike down Congressional statutes for many years. Instead, President Jefferson's principal reaction was a bitter resentment at John Marshall for lecturing and scolding him for refusing to perform his duty to order the delivery of Marbury's commission, although the Court concluded that it had no power to order the commission delivered because it held that the statute conferring jurisdiction on the Court was unconstitutional.<sup>135</sup> Throughout the end of his long term as Chief Justice, John Marshall continued to promote federal government power at the expense of the states.<sup>136</sup> Presidents Jefferson, Madison, and Monroe were frustrated by the tendency of Federalist Justices to linger in office, limiting their chance to appoint new Justices, and even more exasperating was the fact that some of their own Republican appointees became more sympathetic to Fede-

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another nephew of John Adams (the son of Abigail Adams's sister), and Supreme Court Justice Bushrod Washington was a nephew of George Washington, but no one seems to have argued that nepotism was involved. *Id.* at 19.

<sup>131</sup> Both Jefferson and Marshall were descended from the wealthy Randolph family. William Michael Treanor, Address at Touro Law Center (Apr. 2010). While Jefferson grew up in a mansion, Marshall, whose Randolph grandmother had been ostracized by the family after she eloped with a plantation overseer of whom her family disapproved, grew up on the Virginia frontier. *Id.* He despised Jefferson for not serving in the military during the Revolution, and Jefferson evidently feared Marshall. *Id.*

<sup>132</sup> "We are all republicans. We are all federalists . . ." FRIEDMAN, *supra* note 7, at 52.

<sup>133</sup> President Adams had signed the commission before leaving office March 4, but through an oversight it had not been delivered to Marbury. *Id.* at 50.

<sup>134</sup> FRIEDMAN, *supra* note 7, at 44.

<sup>135</sup> *Id.* at 61.

<sup>136</sup> *Id.* at 80.

ralist views after joining the Court.<sup>137</sup>

Friedman dates the second period of the Supreme Court from the War of 1812 to the Nullification Crisis of 1832-33.<sup>138</sup> During this period, state governments often openly defied Supreme Court decisions aimed at them.<sup>139</sup> Georgia went ahead with its removal of Cherokee Indians to Western areas despite Supreme Court decisions favorable to the Cherokees' claims.<sup>140</sup> In contrast, when South Carolina asserted the power to nullify federal laws with which it disagreed, it was forced to comply with a federal tariff which it opposed when President Andrew Jackson threatened to send federal troops to the state to enforce the law.<sup>141</sup>

Friedman's third period of Supreme Court history dates from the *Dred Scott* decision<sup>142</sup> until 1937.<sup>143</sup> During this period, he states that the Supreme Court allied itself with the interests of powerful corporate and commercial interests.<sup>144</sup> In the late 1800s, the Court favored the interstate railroads by curbing state laws setting maximum freight-carrying charges.<sup>145</sup> After 1900, it overturned state laws which protected workers.<sup>146</sup>

The fourth and final period in Friedman's Supreme Court history is the period from 1937 to the present.<sup>147</sup> At the outset of this period, the Supreme Court forestalled FDR's "Court-packing plan" by making a sharp turn in its jurisprudence and subsequently upholding federal laws similar to those it had hitherto struck down.<sup>148</sup> While FDR's "Court-packing plan" failed because of lack of popular support, he ultimately prevailed in reshaping the Court as a quite liberal body by the appointment of nine Justices.<sup>149</sup> After 1953, the

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<sup>137</sup> *Id.* (recognizing that the Court enhanced the power of the federal government "with the bench comprised mainly of judges who were appointed by Jefferson and Madison").

<sup>138</sup> *Id.* at 12.

<sup>139</sup> FRIEDMAN, *supra* note 7, at 12.

<sup>140</sup> *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); FRIEDMAN, *supra* note 7, at 88-93.

<sup>141</sup> FRIEDMAN, *supra* note 7, at 95-104.

<sup>142</sup> *Dred Scott*, 60 U.S. (19 How.) 393.

<sup>143</sup> FRIEDMAN, *supra* note 7, at 13.

<sup>144</sup> *Id.*

<sup>145</sup> *See, e.g., Wabash St. Louis & Pac. Ry. Co.*, 118 U.S. 557.

<sup>146</sup> FRIEDMAN, *supra* note 7, at 13.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 225-29 ("The Switch in Time that Saved Nine").

<sup>149</sup> BURNS, *supra* note 8, at 157.

Warren Court greatly expanded the individual rights of criminal defendants and promoted civil rights for blacks starting with its epochal decision in *Brown v. Board of Education*.<sup>150</sup>

Following tactical missteps by Earl Warren, Abe Fortas, and President Lyndon Johnson, the new President Nixon had the opportunity to appoint Chief Justice Warren Burger and Justice Harry Blackmun shortly after taking office.<sup>151</sup> His announced intent was to make the Court more conservative and every subsequent Republican presidential candidate followed suit.<sup>152</sup> However, the results have been slow despite the lack of Democratic appointees.<sup>153</sup> A Court with six Republican appointees issued the least conservative and most controversial decision of the Burger Court, *Roe v. Wade*,<sup>154</sup> which legalized abortion.<sup>155</sup>

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<sup>150</sup> 347 U.S. 483.

<sup>151</sup> FRIEDMAN, *supra* note 7, at 277-78. Earl Warren, a longtime political adversary of Richard Nixon from their days as California politicians, offered his resignation in the summer of 1968, to take effect upon the appointment of a successor. President Johnson decided to elevate Justice Abe Fortas, his friend from Texas, to succeed him as Chief Justice. *Id.* at 277. The Senate was not receptive to the nomination of a liberal adviser to Johnson, and the nomination was withdrawn; subsequently, Fortas was forced to resign because of a financial scandal. *Id.* As a result, new President Nixon, to Warren's dismay, had the opportunity to appoint successors to both Warren and Fortas. *Id.* at 278.

<sup>152</sup> *See generally id.* at 276. During Nixon's 1968 presidential campaign, he advocated scaling back the criminal protections afforded by the Warren Court. He famously derided the Court for making the public less safe when he stated, "A cab driver has been brutally murdered and the man that confessed the crime was let off because of a Supreme Court decision." FRIEDMAN, *supra* note 7, at 276. *See also id.* at 314 (taking note of Reagan's appointment of Justices O'Connor and Scalia, and his promotion of conservative Justice William Rehnquist to Chief Justice, a position formerly occupied by the more moderate Warren Burger).

<sup>153</sup> *See id.* at 284 (observing that the Burger Court was quite liberal despite the expectation that it would be more conservative than the Warren Court). President Jimmy Carter (1977-81) was the only president to serve a full term without the opportunity to appoint a Supreme Court Justice. BURNS, *supra* note 8, at 211. Between President Johnson's appointment of Thurgood Marshall in 1967 and President Bill Clinton's appointment of Ruth Bader Ginsburg in 1993, Republican presidents got to make ten appointments (plus the elevation of Justice William Rehnquist to the post of Chief Justice). Justice Ginsburg replaced Justice Byron White, the sole remaining appointee of a Democratic president on the Court, in 1993.

<sup>154</sup> 410 U.S. 113.

<sup>155</sup> The decision, undoubtedly the most controversial one by the Burger Court, overturned the statutes of forty-six states and engendered a bitter conflict in society which has not ended. Friedman cites polls from that period finding that a majority of Americans favored legalization of abortion in most cases, but he does not attempt to explain why only four states out of fifty had legalized it. Professor John Hart Ely, who supported legislative legalization of abortion rights, commented that the *Roe* decision "is not constitutional law and gives almost no sense of an obligation to try to be." FRIEDMAN, *supra* note 7, at 301, 354. In

The Supreme Court, Friedman maintains, has become one of the most popular government institutions in the United States largely because it has closely mirrored public opinion on a series of controversial subjects.<sup>156</sup> Critics on both the left and right criticized what they regarded as the Court's tendency to "split the difference"<sup>157</sup> on controversial issues like abortion, with Justice Sandra Day O'Connor often finding a middle ground between the contending sides.<sup>158</sup> The result was that "the Court ran in the range of popular opinion, sometimes ahead, sometimes behind, but never far from the mainstream. When the Court deviated substantially, it was quickly brought into line."<sup>159</sup>

Friedman believes that such deviations, however, are merely temporary. "Over time," he concludes, "the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values."<sup>160</sup> "American politics has been a constant, unrelenting process of constitutional contestation and dispute."<sup>161</sup> This is a positive thing because this is how constitutional issues are debated and decided:

Judicial review is our invention; we created it and have chosen to retain it. Judicial review has served as a means of forcing us to think about, and interpret, our Constitution ourselves. In the final analysis, when it

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subsequent years, *Roe* proved difficult to restrict, let alone overturn, but it provided an effective campaign issue, mostly for Republican candidates.

<sup>156</sup> *Id.* at 14-16. Friedman comments, "But to judge by opinion polls, the Rehnquist Court was an extremely popular institution of government, and the public seemed well content with the role it was playing." *Id.* at 362. Friedman does not believe that this had always been the case in earlier eras; he comments that the Court during the Civil War "was constantly in jeopardy during this period, apparently because the [J]ustices were unable to read the public mood or unwilling to temper their actions in the face of it." *Id.* at 136.

<sup>157</sup> *Id.* at 365. This was how conservative Judge J. Harvie Wilkinson of the United States Court of Appeals for the Fourth Circuit characterized the Court's jurisprudence.

<sup>158</sup> FRIEDMAN, *supra* note 7, at 365. Friedman, referring to the early Rehnquist Court, comments that "Justice O'Connor's equivocation on many issues over many years proved very much to be a mirror of American public opinion." *Id.* at 354.

<sup>159</sup> *Id.* at 364. Friedman "[i]magine[s] the Court as tethered to public opinion by a bungee cord." *Id.* at 373. His implication is that if it moves too far out from the public, it will be "snapped back into line." *Id.*

<sup>160</sup> FRIEDMAN, *supra* note 7, at 367-68. On "big ticket issues . . . the Court seemed to be following cultural trends with remarkable steadfastness." *Id.* at 359. Perhaps as a result, its constitutional decisions "met with broad approval from the American people." *Id.* at 322.

<sup>161</sup> *Id.* at 385.



comes to the Constitution, *we* are the highest court in the land.<sup>162</sup>

### THE SUPREME COURT IN PERSPECTIVE

As the foregoing account makes clear, the economic conservatism of the entrenched Supreme Court majority, which so frustrated FDR and led him to try to “pack the Court,” was not an exceptional phenomenon. Rather, support for powerful property interests has marked the Court’s jurisprudence throughout its history with minor exceptions.<sup>163</sup> Moreover, the institution of judicial review has played a critical role in promoting and protecting these interests for most of the Court’s history.

As Friedman demonstrates, opposition to the democratic excesses of state legislatures during the time of the Articles of Confederation led conservative supporters of property rights to support the idea of a judicial check on these excesses two decades before *Marbury*.<sup>164</sup> During his remarkable tenure as Chief Justice, John Marshall enshrined the rights of contract and the economic leadership role of the federal government in United States constitutional law.<sup>165</sup> Federal power eventually triumphed over the opposing supporters of states’ rights in the controversies over the Bank of the United States, tariffs, and nullification.<sup>166</sup>

After the Civil War, the Supreme Court betrayed the promise of equality to blacks contained in the Reconstruction Amendments<sup>167</sup> while it fostered the power of national economic forces like the railroads over states’ attempts to regulate them.<sup>168</sup> In 1886, the Court, without even hearing argument, bestowed an enormous boon on corporations, greatly expanding their rights by holding that they were

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<sup>162</sup> *Id.* at 385 (emphasis added).

<sup>163</sup> Influential economic historian Charles Beard, moreover, popularized the controversial thesis that the Constitution itself was written by the propertied classes to protect their interests. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913); FRIEDMAN, *supra* note 7, at 179.

<sup>164</sup> *See generally* FRIEDMAN, *supra* note 7, at 23-25.

<sup>165</sup> *See* *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

<sup>166</sup> FRIEDMAN, *supra* note 7, at 79-104.

<sup>167</sup> U.S. CONST. amend. XIII, XIV, and XV.

<sup>168</sup> FRIEDMAN, *supra* note 7, at 161. Congress cooperated by greatly expanding federal jurisdiction through the 1875 Judiciary and Removal Act, thereby affording corporations a preferred forum for challenging unwelcome state regulatory legislation. *Id.* at 162-63.

“persons” with rights under the Fourteenth Amendment.<sup>169</sup> Such pro-business results were made more likely by the remarkable fact that no fewer than ten former railroad attorneys were appointed to the Supreme Court.<sup>170</sup> Under the guise of freedom of contract, meanwhile, the Court struck down early attempts at social welfare legislation such as laws banning child labor and limiting workers’ hours.<sup>171</sup>

While the substantive due process approach has been discredited by posterity, Supreme Court decisions, such as treating corporations as “persons” enjoying the full panoply of rights of persons under the Fourteenth Amendment, are still taken for granted and not seriously questioned. It is as if one axiom of our constitutional framework is a commitment to the idea that protecting business interests is generally a national interest or, as former General Motors chief executive Charles Wilson was reported to have stated in the 1950s, “What’s good for General Motors is good for the country.”<sup>172</sup> And while commercial free speech rights have been treated more restrictively by the Supreme Court than the free speech rights of individuals, powerful and often anonymous economic interests took full advantage of the opportunity afforded them by the *Citizens United* decision to contribute generously to the campaigns of congenial Congressional candidates in 2010.<sup>173</sup>

No Supreme Court in history, moreover, has been less restrained than the Rehnquist and Roberts Courts in using the power of judicial review to strike down federal statutes as unconstitutional.<sup>174</sup>

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<sup>169</sup> *Cnty. of Santa Clara*, 118 U.S. 394. See also *supra* note 51.

<sup>170</sup> President Ulysses Grant set the pattern; each of his appointees was a railroad attorney: William Strong, Joseph P. Bradley, Ward Hunt and Morrison Waite. See generally BURNS, *supra* note 8, at 84-132. Rutherford Hayes appointed Stanley Matthews, who was rejected by the Senate and re-nominated by James A. Garfield and confirmed. *Id.* Grover Cleveland appointed Melville Fuller. *Id.* Theodore Roosevelt appointed William Day. *Id.* William Howard Taft appointed Willis Van Devanter, Joseph Rucker Lamar, and Mahlon Pitney. *Id.* Warren Harding appointed Pierce Butler. See generally BURNS, *supra* note 8, at 84-132. Herbert Hoover appointed Owen Roberts, who had strong ties to the railroads. *Id.* FDR, who got to nominate nine Justices, changed this pattern: none of his nominees were railroad lawyers. *Id.*

<sup>171</sup> The paradigmatic case of “substantive due process” was *Lochner v. New York*. 198 U.S. 45.

<sup>172</sup> Wilson was misquoted: he actually had said, “for years I’ve thought what was good for our country was good for General Motors, and vice versa.” *Armed Forces: Engine Charlie*, TIME, Oct. 6, 1961.

<sup>173</sup> See generally Bill Toland, *Group Aims to Limit Flow of Cash from Companies into Politics*, PITTSBURGH POST GAZETTE, Oct. 5, 2010, at A-10.

<sup>174</sup> See FRIEDMAN, *supra* note 7, at 323 (“Rehnquist’s Court struck down an unprecedented-

Certainly, the dividing line between what is constitutionally permissible and what is beyond the pale is not a bright line on which all can agree. It is striking, however, that an unelected Supreme Court dominated by conservatives should feel so uninhibited in rejecting legislation enacted by the people's elected representatives. Yet as noted above, Supreme Court Justices of both conservative and liberal hue have been quick to reassert and reaffirm their power of judicial review and their exclusive right to determine what the Constitution means whenever the Justices feel these institutions are challenged.<sup>175</sup>

In the contemporary period, more than two centuries after *Marbury* was decided, the institution of judicial review seems impregnable. Most Americans of varying political views appear to take it for granted and the Supreme Court consistently fares better than Congress and the President in nation-wide popularity polls.<sup>176</sup> Yet it is sobering, in light of these facts, to consider the Court's rather rocky jurisprudential history.

Not all Supreme Court decisions have stood the test of time. Two important Supreme Court decisions in moments of national crisis have been met with universal condemnation by posterity.<sup>177</sup> Most observers would add *Plessy v. Ferguson*<sup>178</sup> to this group. More recently, in *Bush v. Gore*,<sup>179</sup> the Court, in deciding the outcome of a presidential election, came up with an equal protection theory which no constitutional scholar could have anticipated while simultaneously insisting that its decision would have no precedential value.<sup>180</sup>

The Supreme Court has often been at loggerheads with the Executive Branch. A number of presidents have condemned Supreme Court decisions issued while they were in office.<sup>181</sup> This list includes Thomas Jefferson and *Marbury*,<sup>182</sup> Andrew Jackson and Georgia's removal of the Cherokees,<sup>183</sup> Abraham Lincoln and *Dred*

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ed number of congressional laws." For an example of the Roberts Court defiantly striking down a federal statute, see *Citizens United*, 130 S. Ct. 876.

<sup>175</sup> See, e.g., *Flores*, 521 U.S. 507; *Cooper*, 358 U.S. 1.

<sup>176</sup> FRIEDMAN, *supra* note 7, at 14-15.

<sup>177</sup> *Dred Scott*, 60 U.S. (19 How.) 393; *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>178</sup> 163 U.S. 537.

<sup>179</sup> 531 U.S. 98 (2000).

<sup>180</sup> FRIEDMAN, *supra* note 7, at 334-37.

<sup>181</sup> See *infra* notes 182-184 and accompanying text.

<sup>182</sup> FRIEDMAN, *supra* note 7, at 60.

<sup>183</sup> *Worcester*, 31 U.S. (6 Pet.) 515. Jackson was apocryphally reported to have said in response to *Worcester*, "John Marshall has made his decision; now let him enforce it."

*Scott*,<sup>184</sup> and Theodore Roosevelt in a number of cases.<sup>185</sup> James Madison, who as Secretary of State was the defendant in *Marbury*, was initially skeptical of the power of judicial review<sup>186</sup> although he later came to support it.<sup>187</sup> Reacting to New York Court of Appeals decisions invalidating worker protection laws on federal constitutional grounds, Theodore Roosevelt asserted, “It is the people, and not the judges, who are entitled to say what their constitution means, for the constitution is theirs.”<sup>188</sup>

Presidents, moreover, have been able to bring about sharp reversals of *stare decisis* by the pressure they exert. The two most dramatic instances of abrupt changes in the law under presidential pressure are probably the *Legal Tender Cases*<sup>189</sup> and the 1937 “switch that saved nine.”<sup>190</sup> President George W. Bush’s brilliant move in appointing Justices Roberts and Alito pushed the Court to the right, leading to radical new constitutional holdings,<sup>191</sup> and the overturning of long-standing precedents.<sup>192</sup> With the current sharp political polarization in Washington, and with the Court currently be-

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BURNS, *supra* note 8, at 44.

<sup>184</sup> Lincoln’s reaction to *Dred Scott* was that “[i]f the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by the decisions of the Supreme Court . . . the people will have ceased, to be their own rulers.” FRIEDMAN, *supra* note 7, at 6.

<sup>185</sup> *Id.* at 167.

<sup>186</sup> In 1800, he “denied that ‘the judicial authority is to be regarded as the sole expositor of the constitution.’ ” BURNS, *supra* note 8, at 23. According to Burns, Thomas Jefferson held a “departmentalist view of constitutional interpretation—that each branch of the government had an equal right to determine for itself the constitutionality of measures and actions affecting its own sphere.” *Id.* at 29 (internal quotation marks omitted).

<sup>187</sup> FRIEDMAN, *supra* note 7, at 101. Madison noted that without “the supremacy of the judicial power of the U.S.,” the Constitution’s Supremacy Clause would be meaningless, although he contended that “ ‘the power has not always been rightly exercised.’ ” *Id.* (citation omitted).

<sup>188</sup> *Id.* at 179 (internal quotation marks omitted). See also *Ives v. S. Buffalo Ry. Co.*, 94 N.E. 431 (N.Y. 1911); *In re Jacobs*, 98 N.Y. 98 (1885).

<sup>189</sup> See *Knox*, 79 U.S. 457.

<sup>190</sup> See *W. Coast Hotel*, 300 U.S. 379.

<sup>191</sup> See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 639 n.3 (2008) (Stevens, J., dissenting) (criticizing the majority opinion for failing to recognize the precedent set by *United States v. Miller*, 307 U.S. 174 (1939), which held that unless restrictions on firearms “ha[ve] some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument”).

<sup>192</sup> See, e.g., *Leegin Creative Leather Prods. v. PKS, Inc.*, 551 U.S. 877, 882 (2007) (overruling the precedent set in *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 373 (1911)).

ing divided almost evenly between five conservatives and four liberals, important decisions are likely to turn on fortuitous factors like the Justices' health and the outcome of future presidential elections.

As both authors observe, of course, Justices have been known to change their judicial philosophy while on the Court, sometimes in reaction to a public outcry against their decisions. In 1957, during the height of the Cold War and the ascendancy of Senator Joseph McCarthy of Wisconsin, the Supreme Court decided twelve civil liberties cases in favor of Communist defendants.<sup>193</sup> Following the vehement criticism of these decisions, Justices Felix Frankfurter and John Marshall Harlan switched their positions and voted to uphold convictions in subsequent cases.<sup>194</sup>

In another example, Justices Byron White and Potter Stewart joined the Supreme Court majority in declaring the death penalty unconstitutional as applied in *Furman v. Georgia*,<sup>195</sup> which was harshly criticized by many.<sup>196</sup> After thirty-five state legislatures enacted new death penalty statutes that avoided the defects of prior laws, White and Stewart switched sides and upheld the new Georgia statute.<sup>197</sup>

The most famous "switch" by Justices in response to public pressure was undoubtedly that of Chief Justice Charles Evans Hughes and Justice Owen Roberts in 1937 during the controversy over FDR's "Court-packing plan."<sup>198</sup> In *West Coast Hotel v. Parrish*,<sup>199</sup> the Court upheld a minimum wage law for women similar to one that it had held unconstitutional in *Adkins v. Children's Hospital*.<sup>200</sup> A series of cases followed which rejected challenges to the constitutionality of New Deal legislation.<sup>201</sup> The defeat of FDR's "Court-packing plan" is commonly ascribed to the changed votes on the Supreme Court, which appeared to achieve the same objective and make the

<sup>193</sup> FRIEDMAN, *supra* note 7, at 250.

<sup>194</sup> *Id.* at 255.

<sup>195</sup> 408 U.S. 238, 314 (1972) (Stewart, J., concurring) ("In my judgment [authorizing the death penalty] in these cases violated the Eighth Amendment.").

<sup>196</sup> *Id.* at 287.

<sup>197</sup> FRIEDMAN, *supra* note 7, at 285-88. ("Justices Stewart and White had plainly bowed to intervening events."). Although their opinions in *Furman* clearly stated that they had not excluded the possibility that a properly drafted death penalty statute might be constitutional. *Furman*, 408 U.S. at 257.

<sup>198</sup> FRIEDMAN, *supra* note 7, at 225-29.

<sup>199</sup> 300 U.S. 379.

<sup>200</sup> *Id.* (overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923)).

<sup>201</sup> FRIEDMAN, *supra* note 7, at 226.

plan unnecessary.<sup>202</sup>

For Justices to change their votes in response to public pressure is, however, the exception rather than the rule. Indeed, Supreme Court Justices tend to regard yielding to such pressure as impropriety. For example, Justices O'Connor and Kennedy had expressed skepticism about the validity of *Roe*, and they were widely expected to vote to overrule it when the Court decided *Planned Parenthood v. Casey*.<sup>203</sup> Instead, they voted to uphold *Roe*'s core holding, resisting the intense public pressure of anti-abortion groups.<sup>204</sup>

As noted previously, the outcome of controversial Supreme Court cases sometimes depends on fortuitous circumstances such as the retirement or death of Justices and the victors in recent presidential elections. Burns states, "Over the years, this judicial roulette has produced a jagged line of personal and political selections and made what might have been the most stable of branches the most unstable—as well as the most unrepresentative of all the people."<sup>205</sup> Per-

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<sup>202</sup> *Id.* at 4.

<sup>203</sup> 505 U.S. 833.

<sup>204</sup> *See id.* According to one student of the Court, Justice O'Connor persuaded Justices Souter and Kennedy to join her in claiming that stare decisis required *Roe*'s survival. *See* LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE*, 308-09 (2009). Professor Powe comments:

The Republican troika (as they soon came to be labeled) . . . wrote a joint opinion that stood for judicial courage. Taking the high ground, the troika stated that a decision "without principled justification would be no judicial act at all." Yet this was precisely the charge that had been leveled at *Roe*. The troika made no attempt to demonstrate that *Roe* was principled, and if it wasn't principled, then by their reasoning it was "no judicial act at all" and presumably void. They didn't even claim that *Roe* had been rightly decided. They just refused to overrule it "under fire" as though opposition to *Roe* was sufficient reason to keep the decision alive.

*Id.* at 309 (citations omitted). The three Justices suggested that *Roe* was one of the cases where "the Court's interpretation calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Planned Parenthood*, 505 U.S. at 867. Both they and Justice Scalia, who dissented, insisted that the Court should not be swayed by the emotional demonstrators on both sides of the controversy. *See id.* Powe comments, "But the troika said that if a decision is controversial because so many Americans refuse to accept it, then the Court may not overrule it. . . . The troika essentially presented the nation with a [c]atch-22 scenario: if the people protest the Court will remain steadfast in adhering to its controversial positions; and if there is no protest, there would be no need to reconsider the decision." POWE, *supra*, at 312-13. While popular opposition to a Supreme Court holding is not a valid reason to overturn it, neither is it a valid reason why it must be reaffirmed.

<sup>205</sup> BURNS, *supra* note 8, at 4.

haps as a result, respected legal authorities have questioned the validity of judicial review over the years. In the aftermath of the controversial decision in *Lochner v. New York*,<sup>206</sup> judicial review was criticized by North Carolina Supreme Court Justice Walter Clark, Dickinson School of Law Dean William Trickett, and future Harvard Law School Dean Roscoe Pound.<sup>207</sup> More recently, Professor Mark Tushnet proposed doing away with judicial review altogether<sup>208</sup> and other liberal law professors have reconsidered their support for judicial review after the Supreme Court's recent turn to the right.<sup>209</sup>

As previously noted, Professor Friedman maintains that in the ongoing dialogue between the Supreme Court and American public opinion, the Court will eventually approximate the public's prevailing views on controversial subjects.<sup>210</sup> Given the tendency of most Supreme Court Justices to dig in their heels and resist public pressure in such instances, however, there is reason to doubt the likelihood of this kind of rapprochement. Many Supreme Court decisions, like other cases, have quite technical holdings that the public would not understand even if, as is unlikely, laymen actually took time to read them. Even when substantive legal issues are squarely presented by a case's fact pattern, the public, lacking a legal education, cannot be expected to have an intelligent legal opinion about such issues. As Friedman himself acknowledges, it seems that pluralism usually benefits only powerful organized interests.<sup>211</sup> The record of Congress and regulatory agencies demonstrates that powerful vested interests "with an ax to grind" often prevail over the diffuse public interest because the general population lacks the time and ability to focus on a myriad of policy questions and to organize and lobby for particular results.

Plainly, an ultimate authority is needed in our system to render dispositive decisions on the constitutionality of state and federal

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<sup>206</sup> 198 U.S. at 64 (striking down a New York statute intended to protect the health and welfare of workers in the hazardous bakery industry by limiting their work week to sixty hours, based on the premise that it violated their due process right to enter into contracts).

<sup>207</sup> FRIEDMAN, *supra* note 7, at 178.

<sup>208</sup> *Id.* at 345 (citing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999)).

<sup>209</sup> FRIEDMAN, *supra* note 7, at 345. Friedman asserts, for instance, that Cass Sunstein evolved from support for an active role for judges in correcting legislative dysfunction towards advocacy of a more minimalist judicial role.

<sup>210</sup> *Id.* at 16.

<sup>211</sup> *Id.* at 261 (citing THEODORE LOWI, *THE END OF LIBERALISM* (2d ed. 1979)).

laws, as the Supremacy Clause makes clear. In light of the great power which is embodied in the institution of judicial review, its anti-democratic character and the aggressive manner in which it is wielded by the current Supreme Court, it is perhaps surprising that it is merely an assumed prerogative without explicit Constitutional warrant. Given the fervor with which individual Justices support positions diametrically opposed to the positions of their brethren, and given the record of such fatally wrong past decisions as *Dred Scott*, it seems that the Justices would be wise to manifest greater humility in reaching their decisions and greater awareness that they might be wrong. Along with this increased recognition of their fallibility, they should exercise the great power of judicial review with restraint and with greater hesitancy to set aside laws enacted by the elected representatives of the people.