The Countermajoritarian Myth

Countermajoritarianism, depending on who you ask, is either the justification for judical supremacy or its disease. Detractors of the Supreme Court can hardly comprehend how a body with such apparently little democratic legitimacy can wield such power in the American political system. Granting coequal status to the electorally unaccountable judicial branch, these critics argue, most certainly runs afoul of the principles of a government President Lincoln famously summarized as being "of the people, by the people, for the people." Yet to its supporters, the Judiciary's independence from elective politics is exactly what necessitates its existence. Without a powerful Court, proponents argue, the rights of minorities will be sacrificed at the altar of popular sovreignty. To them it is the words of another former president that define our government, "to the end it may be a government of laws and not of men."[1]

Not surprisingly, the authority of the Court becomes interposed between what Michael Klarman calls the "heroic countermajoritarian function," that is, the "common wisdom that a fundamental purpose of judicial review is to protect minority rights from majoritarian overreach" and a "countermajoritarian dilemma," which he defines as "the notion that invalidation of statutes by an unelected, remotely accountable federal judiciary is inconsistent with basic premises of democratic government."[2] These two contravening principles seem to dead end us at a choice between tyranny of the majority or reign of the robe. Thankfully this is not the case. Countermajoritarian arguments on both sides of the issue, intuitively, presuppose that the Court is an obstacle to the popular will. Klarman and his forerunner Robert Dahl, however, undertake studies that expose the myth of a Court disengaged from national sentiment. And while both pieces were

largely intended as oppositional works to the substantive claims of the "heroic countermajoritarian function," taken together with the political studies of Keith Whittington and Lawrence Baum they construct an entirely new insight into the Court's value. What emerges is a picture that should please those who honor both majoritarian principles *and* a commitment to basic liberties. The Supreme Court, contrary to ideologically fueled perceptions, is an agent of the People and is legitimized as such through a variety of institutional and political constraints. In this capacity it respects the popular will and best serves it by universalizing National Ideals when other political actors cannot or will not.

The first part of this paper intends to establish the legitimacy of the Court's ability to represent the People by highlighting its democratic foundations. It assumes acceptance of the fundamental concept that in a democracy elected representatives do, by and large, represent the prevailing attitudes of the electorate.

Certain institutional and political constraints exist that prevent the Court from pursuing a course radically out of step with general preference. One such constraint is the Judiciary's dependence on other political actors for legitimacy. As the American concept of judicial review is not enshrined in the text of the Constitution but rather justified by the Court's own pronouncements in *Marbury v. Madison*, "it is the purest bootstrapping," explains Keith Whittington, "to imagine [*Marbury*] establishes judicial supremacy as a political practice."[3] For the Court's adverse possession of Constitutional review to persist, it must rely on the continued abidance of the executive and legislature. At historical junctures when the Court has been seen to veer off course from acceptable adjuication, it has encountered resistance—notably in the forms of powerful Presidents

like Jackson, Lincoln and Roosevelt who have tried to undermine the Court's monopoly on Constitutional authority. Additionally constraining is the Court's inability to enforce its own decisions. The judicial branch, after all, possesses neither the power of the purse nor of the sword. The Court itself acknowledges its dependency, conceding in *Cooper v. Aaron* (unanimously) that "Compliance with decisions of this Court, as the constitutional organ of the supreme Law of the Land, has often, throughout our history, depended on active support by [other] authoritites." Withholding that support, the Court confesses, "precludes the maintenance of our federal system" of legitimized Judicial supremacy.[4] Thus, lest it bite the hand that feeds it, the Court's ability to adjudicate independently of the popular will is severely constrained by the relative fragility of its authoritative mandate.

Desires to advance strong countermajoritarian programs are largely checked by institutional constraints. Yet, the Constitutional appointment process, and particularly its usage of late, makes it unlikely that a majority of the Court's membership would hold views demonstrably out of step with popular will in the first place. Justices are, after all, nominated by the democratically elected President before they are subjected to a confirmation hearing by the electorally accountable Senate. Robert Dahl's experience monitoring the selection procedure led him to point out the obvious reality that "Presidents are not famous for appointing justices hostile to their own views on public policy nor could they expect to secure confirmation of a man whose stance on key questions was flagrantly at odds with that of the dominant majority in the Senate."[5]

In the intervening fifty years since Dahl observed the democratic demands of the confirmation process, political scrutiny of would be Justices has only increased.

Lawrence Baum argues that, in fact, we have entered an entirely new era of intensified examination of judicial nominees, focused on strict expectations of ideological congruence and ajudicative qualifications. Indeed, while the half-century preceding Dahl's article saw three of thirty-six Presidential Supreme Court nominations fail to obtain Senate confirmation, seven out of twenty-seven nominations have fallen short since.[*6] The hearings have evolved to meet the Senate's own assumption of greater investigative responsibility. They continue to increase in length and now presuppose the relatively recent practice of interrogating an appointee on his or her jurisprudence. Consequently, "in the current era," Braun concludes, "the eagerness of many senators to oppose nominees whose views they dislike give presidents an incentive to choose people who seem ideologically moderate and who have avoided controversial positions on policy issues."[7] Thus, it is unlikely an individual whose policy preferences are out of touch with the majority would ever be appointed, not to mention confirmed. Ultimately, challenges to the majoritarian foundations of the Court must consider this dynamic role that the recognizably democratic branches play in determining its membership.

Political constraints upon the Court's composition and jurisdictional latitude have translated into a judicial renderings that accord with national sentiment. While the High Court commands the authority of Congressional review, it reserves its exercise for extreme circumstances. In one hundred and sixty-seven years of Supreme Court existence leading up to Dahl's case study only twenty-four pieces of federal legislation were deemed by the Court impermissible within the first two years of enactment. The Court's caution in striking down legislative agendas immediately means the presumable

[*] John Marshall Harlan's first nomination in 1954 resulted in a no vote, but was confirmed upon renomination the next year.

legal manifestations of the People's will remain safeguarded. Similarly, withholding invalidation with the two-year election cycle reflects a deference to constituents and their opportunity to react at the polls. Just as the Court has shown itself to be largely unwilling to defy Congressional action in the short term, it has even more rarely impeded sustained legislative efforts throughout the long term. Only six times, in Dahl's history, has the Court remained recalcitrant to continued Congressional attempts at passing specific reform. These figures lead Dahl to the conclusion that "The elaborate 'democratic' rationalizations of the Court's defenders and the hostility of its 'democratic' critics are largely irrelevant, for lawmaking majorities generally have had their way."[8]

Up to this point an effort has been made to establish the Supreme Court as rooted within a sufficient democratic framework upon which, assuming fundamental principles of democratic representation are accepted, the Court may act as a proxy for the general public. Now that the Court's democratic credentials have been propounded, it is appropriate to show the judiciary's utility to the body politic whose interests it seeks to defend. The primary benefit the Supreme Court provides in its fiduciary duty to the People is the universalization of communal principles. This paper makes the normative claim that protection of national doctrine, and not deference to state and local autonomy, offers the most utility to the People. The Civil War marked the high point of debates over federalism and ultimately settled the question in favor of preservation of national principle. The Reconstruction Amendments, particularly the Fourteenth, established that state sovereignty is and should be constrained by a binding conception of American liberty.

When other governing authorities fail to ensure that nationally recognized substantive protections are extended throughout the land, the Supreme Court is in the unique position to act on behalf of the principled majority. If the Court rarely challenges federal legislation, which is after all presumptively usually in accord with that principled majority, it has shown an exceeding willingness to intervene in State action. Michael Klarman highlights the landmark case and *cause celebre* of rights foundationalists *Griswold v. Connecticut* as evidence of what he perceives as an overblown perception of the Court as a gallant defender of minority rights. Klarman reminds readers that when Justice Douglas issued his famous opinion invalidating a Connecticut statute banning the use of birth control by married couples, only two states still had such laws on the books. "This is hardly the heroic countermajoritarian role claimed for judicial review by proponents," he argues. Furthermore, *Griswold*, Klarman charges, evidences the broader truth that "the court identifies and protects minority rights only when a majority or near majority of the community has come to deem those rights worthy of protection."[9]

To the countermajoritarian ideologues who Klarman is addressing this might be a sad reality, yet the Court's flair for enshrining commonly acknowledged liberty has intrinsic value to those Americans who share a faith in democratic principles and a commitment to rights protection. If one abandons positive or negative expectations of countermajoritarianism and instead accepts Thomas Grey's definition of the Court as "the expounder of basic national ideals…even when the content of these ideals is not expressed as a matter of positive law," than *Griswold* was a remarkable success.[10] The 1965 ruling was a famous example of a common Court practice in which, in Klarman's words, it "takes a strong national consensus and imposes it on…outliers."[11] Impelling

obstinate authorities to abandon their out of touch ways is an important means of protecting popular aspirations and the Court has embraced this function with considerable success. Indeed it is in this capacity that Dahl, who was unimpressed by the Court's fitness to stand up to Congress, appreciates the judiciary's mandate. The Court, he writes, is "most effective when it sets the bounds of policy for officials, agencies, state governments or even regions."[12]

The Court is particularly effective in isolating and smoking out forces of reaction largely because other political actors neglect to do so. *Gideon v. Wainright*, like *Griswold*, is another celebrated instance when the Court formalized a right, which the nation had considered a norm. Had Clarence Earl Gideon been tried in one of forty-five other states, he would have been provided a lawyer.[13] Yet Florida remained a Constitutional holdout until the Court's intercession. Because Florida's failure to protect Gideon's right to counsel was so anomalous, Klarman remains unmoved by the Court's intervention. "Congress," rationalizes Klarman, "can force local outliers to abide by national norms as well as the Court can."[14] Klarman is absolutely correct that Congress possesses the same legitimate authority as the Court to change the law. Yet the distinctiveness of Florida's statute, or lack thereof, is both an indicator of its egregiousness and of the unlikelihood of Congress to act. Congress, whose activities are largely strategic because of its highly political nature, would find little incentive to mobilize in an effort to change a local law. Even if Congress did overcome initial reluctance to intervene in State matters, the cause of indigent criminals would surely not generate the requisite political capital Congress to come to their aid. In Congress, "the need for prioritization is felt in the area of constitutional disputes as much as it is in

routine policy disputes,' Whittingotn explains, "debates over abortion euthanasia, and religious liberty may readily rise to the top of the political agenda and demand attention from political leaders, whereas the requirements of a criminal defendant's right to counsel or police interrogation techniques will never receive full political consideration."[15]

Of course the ultimate evidence of the Court's powerful ability to enshrine national principles in the face of inactive political actors is *Brown v. Board of Education*. Polls have shown that before the Court's decision a majority of the American public favored integration and after the decision a majority of the American public supported the Court's rendering.[16] And, indeed, Topkea, Kansas was no outlier. Yet as Ronald Dworkin points out, even if "the only people who wanted *de jure* segregation were white Southerners…the fact remains that the national Congress had not in fact checked segregation, either because it believed it did not have the legal power to do so or because it not want to."[17] The likely explanation is that the white Southen faction, despite it being a minority, was so powerful in the government that it prevented the subject from ever being broached. Indeed, while the elected legislature most often represents the majoritarian will, legislative leaders, explains Whittington, "must cope with fractious coalitions and crowded agendas" that often paralyze Congress from acting in that will.[18] Judicial independence from electoral politics frees the Court to act in exactly these situations.

Klarman charges that a decision of *Brown*'s physical scope is the exception, rather than the rule and that Country was on its way to destroying Jim Crow organically anyway. The Court's modesty in wielding this judicial power in expanse, reveals a

deference to the elected bodies that is admirable. Indeed, the Court is only willing to interpose itself when it is necessary and this should provide comfort to those who remain fearful of a judicial tyranny. That national trends were setting wheels in motion against segregation only highlights the urgency of the Congressional paralysis and the Court's agency of the populace. Furthermore, acknowledging the relative infrequency of cases of Brown's expanse, which also include the likes of *Roe v. Wade* and *Lawrence v. Texas*, ought not undermine their importance. They remain evidentiary of flaws in traditional democratic institutions that can, at times, leave them too self-constrained to advance majoritarian demands and reveal the ability of the Court to fill the void. That the Court has shown a readiness but not an overzeal to issue these decisions is a reminder both of its commitment to the People and their principles as well as the judicary's ability to serve them within a democratic framework.

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[1] Mass. Const. pt. 1, art. XXX. (Drafted by John Adams and quoted as national ideal by Supreme Court).
[2] Michael Klarman, "Rethinking the Civil Rights and Civil Liberties Revolution," *Virginia Law Review* 82 (1996): 1,5.
[3] Keith Whittington, *Political Foundations of Judicial Supremacy* (Princeton University Press, 2007), 9.
[4] Cooper v. Aaron, 358 U.S. 1 (1958).
[5] Dahl, 284.
[6] Staff Writers, "Miers joins 34 on list of failed Supreme Court nominees," *USA Today*, October 28, 2005, http://www.usatoday.com/news/washington/judicial/2005-10-27-scotusflops_x.htm.; "Appointees Chart," Supreme Court Historical Society, http://www.supremecourthistory.org/myweb/fp/courtlist2.htm.
[7] "The Selection and Confirmation of Justices: Criteria and Process." CQ Electronic Library, CQ Supreme Court Collection, tsupct-0007067738. Originally published in Lawrence Baum, The Supreme Court, 7th edition (Washington: CQ Press, 2001). http://library.cqpress.com/scc/tsupct-0007067738 (accessed December 16, 2007).
[8] Dahl, 286 (Table 3), 291.
[9] Klarman, 10, 17-18.
[10] Thomas C. Grey, "Do We Have an Unwritten Constitution?" *Stanford Law Review* 27 (1975): 706.
[11] Klarman, 6.

[12] Dahl, 294.
[13] Klarman, 17 n. 75.
[14] *Ibid*, 10.
[15] Whittington, 20.
[16] Klarman, 8, 10.
[17] Ronald Dowrkin, *Taking Rights Seriously*, 143.
[18] Whittington, 24.